

STATE OF MAINE
KENNEBEC, ss

BUSINESS AND CONSUMER
DOCKET NO. BCD-CV-14-11

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STATE OF MAINE,)
)
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 Plaintiff,)
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 v.)
)
 ZEALANDIA HOLDING COMPANY,)
 INC., F/K/A FESTIVA HOSPITALITY,)
 GROUP, INC., PATTON HOSPITALITY)
 MANAGEMENT, LLC, F/K/A FESTIVA)
 MANAGEMENT GROUP, LLC,)
 ZEALANDIA CAPITAL, INC., F/K/A)
 SETI MARKETING, INC., RESORT)
 TRAVEL & XCHANGE, LLC, FESTIVA)
 REAL ESTATE HOLDINGS, LLC,)
 F/K/A FESTIVA RESORTS, LLC,)
 FESTIVA RESORTS ADVENTURE)
 CLUB MEMBERS' ASSOCIATION,)
 INC., DONALD K. CLAYTON, AND)
 HERBERT H. PATRICK, JR.,)
)
 Defendants)

**ORDER ON DEFENDANTS' MOTION
TO DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

I. INTRODUCTION

The Defendants, Zealandia Holding Company, Inc. *et al.* (collectively "Defendants" or "Zealandia"), pursuant to Rules 8(a), 9(b), and 12(e), of the Maine Rules of Civil Procedure, move this court to dismiss Plaintiff's ("State of Maine" or "Plaintiff") Second Amended Complaint, filed on July 11, 2014. Alternatively, the Defendants request that the Plaintiff provide a more definite statement in a manner that would clarify which alleged acts are

applicable to which Defendants. Defendants contend that the Plaintiff continues to use “shot-gun pleadings” and as a result, failed to put Defendants on notice of the claims against each of them.

II. BACKGROUND

On February 13, 2014, the State filed its First Amended Complaint, in which it alleged that the Defendants violated the Maine Unfair Trade Practices Act (“UTPA”) by employing various unfair and deceptive trade practices in the sale and marketing of points-based vacation-club memberships. Following oral argument by the parties, this court issued an Order dated June 16, 2014, denying the Defendants’ motion to dismiss, but granting the Defendants’ alternative motion for a more definite statement pursuant to Maine Rule of Civil Procedure 12(e). The First Amended Complaint failed to allege that any specific defendant committed any specific act. Rather, it simply alleged that certain acts took place and those acts were attributed to all defendants. On July 11, 2014, the State filed its Second Amended Complaint. The Defendants contend that the State made minimal effort to clarify which Defendants committed which acts. (Def.’s Mot 2.). Oral argument on the Motion to Dismiss was held on October 3, 2014.

III. STANDARD OF REVIEW

On a motion to dismiss the court “examine[s] the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Doe v. Graham*, 2009 ME 88, ¶ 2, 977 A.2d 391 (quoting *Saunders*, 2006 ME 94, ¶ 8, 902 A.2d 830); *Everest v. Leviton Mfg. Co.*, No. CV-04-612, 2006 WL 381832 (Me. Super. Jan. 13, 2006).

According to Maine Rule of Civil Procedure 8(a), a pleading which sets forth a claim for relief, “shall contain (1) a short and plain statement of the claim showing that the pleader is

entitled to relief, and (2) a demand for judgment for the relief which the pleader seeks. Relief in the alternative or of several different types may be demanded.” But Rule 9(b) requires that the circumstances constituting fraud or mistake shall be stated with particularity, while malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

Rule 12(e) of the Maine Rules of Civil Procedure allows a party to move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. If the court orders a more definite statement and the order is not obeyed within fourteen (14) days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

IV. DISCUSSION

1. *Plaintiff has Complied with the Rule 8(a) Pleading Requirements as Set Forth in this Court's 6/16/14 Order.*

Maine’s notice pleading standard is forgiving. *Johnston v. Me. Energy Recovery Co. P’ship*, 2010 ME 52, ¶ 16, 997 A.2d 741. “Notice pleading requires that a complaint give fair notice of the cause of action, by providing a short and plain statement of the claim showing that the pleader is entitled to relief.”¹ *Burns v. Architectural Doors & Windows*, 2011 ME 61, ¶ 17, 19 A.3d 823; M.R. Civ. P. 8(a)(1) (*Quotation marks and citations omitted*). The use of “magic” words is not required to state a particular claim. Maine courts construe the “pleadings in favor of the pleader and in the interests of substantial justice.” *Chiappetta v. LeBlond*, 505 A.2d 783, 785 (Me. 1986); M.R. Civ. P. 8(f). It has long been held that “[t]he function of the complaint is to provide fair notice of a claim. . . . It must sufficiently apprise defendants of the nature of the

¹ Maine is a notice pleading state. *Howe v. MMG Ins. Co.*, 2014 ME 78, ¶ 9, 95 A.3d 79 (*citing Johnston v. Me. Energy Recovery Co., Ltd. P’ship*, 2010 ME 52, ¶ 16, 997 A.2d 741).

action against them.” *Bolton v. Caine*, 584 A.2d 615, 617 (Me.1990) (quoting *Rubin v. Josephson*, 478 A.2d 665, 669 n. 4 (Me. 1984)).

A “shotgun” complaint “completely disregards the requirements of pleading rules that the complaint be a short and plain statement, and that discrete claims be plead in separate counts.” *Magluta v. Samples*, 256 F.3d 1282 (11th Cir. 2001). Previously, Plaintiff’s First Amended Complaint referred to each of the eight (8) corporate entities and two (2) individual defendants, collectively as “Defendants” and asserted nine (9) counts against all Defendants, collectively, without describing which Defendants committed which of the alleged acts. In an Order, dated June 16, 2014, this court found that with respect to the two individual plaintiffs, “the State complied with . . . Rule 8’s [bare-bone] requirement and presented a ‘short and plain statement of the claim’ *i.e.* that Patrick and Clayton are “owner[s], officer[s], and principal[s], of the Corporate Defendants.”² (6/16/14 Order 18-9.) However, with respect to the Corporate Defendants, the State asserted a “common enterprise” theory, which the Defendants argued could not justify the State’s failure to make specific allegations as to each Corporate Defendant. *Id.* As this court stated in June, “a decision whether ‘common enterprise’ doctrine applies . . . is premature at the motion to dismiss stage.”

The Second Amended Complaint has been bolstered by the Plaintiff, yet has maintained its original sufficiency. Thus, said Complaint complied with the notice requirement of Rule 8 by identifying a theory on which it intends to hold the Defendants liable at a later stage of this

² The order goes on to explain that the First Complaint averred that the two individual Defendants personally “formulated, directed, controlled, had the authority to control, or participated in, and had knowledge of, the acts and practices set forth in th[e] complaint,” and that they are “an alter ego of the Corporate Defendants.” (6/16/14 Order 18.)

litigation. *Id.* From a plain reading of the Complaint, the Defendants have been provided with sufficient notice as to the claims brought against them.³

2. Defendants' Motion for a More Definite Statement Pursuant to Maine Rule of Civil Procedure 12(e).

Maine Rule of Civil Procedure 12(e) states: "If a pleading . . . is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before filing a responsive pleading. The motion shall point out the defects complained of and the details desired." M.R. Civ. P. 12(e). In this case, the Defendants request, for the second time, that the Plaintiff provide a more definite statement indicating which Defendant is subject to which claim.

As mentioned in this court's previous Order, motions for a more definite statement are not favored. Said motions are designed to "strike at unintelligibility, rather than a lack of detail in the complaint." *Haghkerdar v. Husson Coll.*, 226 F.R.D. 12, 13-14 (D. Me. 2005) (Quoting *Cox v. Me. Mar. Acad.*, 122 F.R.D. 115, 116 (D. Me. 1988)).

In the previous First Amended Complaint, the State did not demonstrate how the entities are inter-related. However, in the Second Amended Complaint, the State indicates that the business model of the Defendants warrants the claims against all Defendants collectively. Given

³ Count I avers Deception against the "Defendants" for the conversion of Rangeley owners' timeshare to club memberships (Compl. ¶ 95); Count II alleges the "Defendants induced consumers to attend sales meetings by promising free gifts (Compl. ¶ 98.); Count III alleges the "Defendants" induced consumers to attend sales meeting by using language tending to persuade customers that they were specially selected (Compl. ¶ 101); Count IV alleges misrepresentation against the "Defendants" (Compl. ¶ 104); Count V alleges material omissions in that the "Defendants" sales representatives omitted information material to a consumer's decision to purchase, such as price (Compl. ¶ 107); Count VI alleges the "Defendants" use high pressure sales tactics (Compl. ¶ 110); Count VII alleges that the "Defendants" fail to disclose the cost of memberships to consumers (Compl. ¶ 113); Count VIII alleges misrepresentation against the "Defendants" (Compl. ¶ 116); Count IX alleges that the "Defendants" make oral representation in contradiction with their printed contract terms (Compl. ¶ 119); Count X alleges that the "Defendants" fail to honor cancellation requests (Compl. ¶ 122.)

the number of Defendants, it would be inefficient to list all individually under each count in the Complaint. The State has provided more detail concerning the Defendants, their relationships, and the conduct of the sales agents. Therefore, this court will not order that the State draft a more definite statement concerning the corporate defendants.

However, in footnote two (2) of Plaintiff's opposition motion, Plaintiff specifically excludes Festiva Resorts Adventure Club Members' Association, Inc. (the "Association"), from the term "Defendants" which is systematically used in every Count throughout the Complaint. Because the Plaintiff specifically sought to keep the Association separate, and because the Plaintiff has failed to aver a claim against the Association in the Complaint, this court finds that Plaintiff must present a more definite statement regarding the Association so as to clarify, which alleged acts and claims are applicable to the Association. If Plaintiff fails to do so within 14 days, their claims against the Association will be dismissed.

3. *The State's Complaint Does not Sound in Fraud and is Therefore not Bound by the Heightened Pleading Requirements of Rule 9(b).*

In the 6/16/14 Order, this court determined that "Maine's [version of the] UTPA goes beyond the scope of common law action for fraud."

To succeed on a claim under the UTPA, the act or practice (1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoidable by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competitors. An act or practice is deceptive if it is (1) a material representation, omission, act or practice that is (2) likely to mislead consumers acting reasonably under the circumstances. An act or practice may be deceptive, within the meaning of Maine's UTPA, regardless of a defendant's good faith or lack of intent to deceive.

(6/16/14 Order at 12.) (*citations omitted*). Further, in Maine, common law fraud is demonstrated by the following elements:

(1) the defendant made a false representation, (2) of material fact, (3) with knowledge of its falsity or in reckless disregard of whether it is true or false, (4) for the purpose of inducing the plaintiff to act in reliance upon it, and, (5) the plaintiff justifiably relied upon the representation as true and acted upon it to the plaintiff's damage.

Rand v. Bath Iron Works Corp., 2003 ME 122, ¶ 9, 832 A.2d 771 (*Citations omitted*).

Claims under the UTPA do not necessarily require pleading specificity because the UTPA provides a remedy for a wider range of business conduct than does common law fraud. (6/16/14 Order at 13.) The Defendants argue that the claims in the Second Amended Complaint sound in fraud, yet fail to satisfy the heightened pleading requirements of M.R. Civ. P 9(b). However, Rule 9(b) does not apply to the claims averred by the State, as the elements of fraud need not be proven under the UTPA. *See generally Fond du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.*, No. 09-CV-00852, 2012 WL 3841397 (E.D. Wis. Sept. 5, 2012) (noting that under the UTPA, “plaintiffs do not need to prove they personally relied on defendants’ deception”). In the previous Order, this court determined that although the State averred that the Defendants’ acts were deceptive, they avoided any allegation of detrimental reliance and, therefore, their claims did not constitute an averment of fraud. (6/16/14 Order at 15.)

In the Second Amended Complaint, the State alleges that the Defendants misrepresented material facts, knowing the statements were false or misleading, with the purpose of inducing consumers to act in a certain way. (Compl. ¶¶ 96, 99, 102, 105, 108, 111, 114, 117, 120, 123) (each alleging that the actions and misrepresentation on behalf of the Defendants were intentional). The Defendants contend, that this language indicates that the Complaint sounds in fraud. The court disagrees.⁴ The same language was present in the previous Complaint under which this court determined the claims fall short of common law fraud. Thus, the State is still

⁴ This court distinguishes *Everest v. Leviton Mfg. Co.*, 2006 WL 381832 (Me. Super. Jan. 13, 2006). In *Everest*, the Superior Court considered a complaint under the UTPA to sound in Fraud. However, as mentioned in the 6/16/14 Order, the Complaint in *Everest* was brought by a private individual pursuant to Section 213 of the UTPA. Further, in *Everest*, the plaintiff alleged that the defendant acted “fraudulently” and did not seek injunctive relief.

not bound to the heightened pleading standard under Rule 9(b) and the Defendant's Motion to Dismiss should be denied as to this claim.

V. CONCLUSION

The entry will be:

Defendant's Motion to dismiss pursuant to 8(a) is DENIED. The Defendant's Motion to Dismiss pursuant to 12(e) is DENIED as to all corporate defendants except Festiva Resorts Association Club Members' Association, Inc.. Plaintiff has 14 days from the date of this Order to provide a more specific and definite statement of the claims against this entity, and failure to do so will result in a dismissal of all claims against it.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this order into the docket by reference.

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Dated


M. Michaela Murphy, Justice
Business & Consumer Docket