UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

TAMARAH C. LOUIS and EMMANUEL G. LOUIS, JR., individually, and on behalf of all others similarly situated, Plaintiffs, v. BLUEGREEN VACATIONS UNLIMITED INC. a Florida corporation and BLUEGREEN VACATIONS CORPORATION, a Florida corporation, Defendants.	**CASE NO. 21-CV-61938-RAR** **CLASS ACTION** **JURY TRIAL DEMANDED**

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Tamarah C. Louis and Emmanuel G. Louis (collectively, the "Plaintiffs"), hereby respond in opposition to Defendants Bluegreen Vacations Unlimited Inc. and Bluegreen Vacations Corporation (collectively, the "Bluegreen Vacations") Motion to Dismiss First Amended Class Action Complaint ("MTD") [ECF No. 27], and in response state:

INTRODUCTION

Congress enacted the Military Lending Act to protect service members from predatory lending practices that had a documented impact on members of the armed forces and our Nation's military readiness. Timeshare plans are among the most predatory agreements that impact our troops financial strength. These plans essentially require a lifetime commitment to escalating fees and dues. Plaintiffs filed this class action on behalf of military borrowers under the Military Lending Act, 10 U.S.C. § 987("MLA"). Plaintiffs and the proposed class entered into Bluegreen Vacations' standard Owner Beneficiary Agreement ("OBA") in order to finance the purchase of a "Bluegreen Vacation Club" membership in to purchase a timeshare. Bluegreen Vacations violated

the MLA because it failed to provide any of the mandated disclosures required by the MLA, failed to provide accurate cost of credit financing and contractually mandated that Plaintiffs submit to arbitration. As a result, any of these violations of the MLA dictate that the transaction is void.

Bluegreen Vacations primarily argues in support of its Motion to Dismiss that Plaintiffs lack standing and that its' vacation timeshare plans fit within the residential mortgage exception to the MLA. The caselaw on Article III standing is more than sufficient to deny the Motion where there was money paid on an illegal contract and where injunctive relief is sought. In contrast, there is very little caselaw developed under the MLA relating to exceptions and this determination will be a matter of first impression. However, the statutory intent and other regulations that control the definitions of residential mortgage dictate that the Amended Complaint should not be summarily dismissed. Further development of the facts and an examination of all of the controlling agreements are necessary to determine this mixed question of fact and law.

ARGUMENT

I. LEGAL STANDARD

"To survive a motion to dismiss, however, a complaint must plead enough facts to state a claim to relief that is plausible on its face." *Cisneros v. Petland, Inc.*¸ 972 F.3d 1204, 1210 (11th Cir. 2020) (internal citations omitted). "A claim has facial plausibility 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.* (internal citations omitted). In determining the sufficiency of a cause of action, the court must accept all non-conclusory allegations as true. *See Ashcroft v. Iqbal*, 556 U.S. 678-79 (2009).

II. THE COURT SHOULD NOT CONSIDER DEFENDANTS' EXTRINSIC DOCUMENTS

Bluegreen Vacations seek to have this Court improperly consider the following proffered documents: a Promissory Note, a Mortgage Deed, and accompanying financial disclosures. (MTD at 6-7). It is improper for Defendants to request that this Court consider these documents at this stage of the proceedings. *See Bruce v. U.S. Bank Nat'l Ass'n,* 770 F. App'x 960, 964 (11th Cir. 2019) ("In ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court is generally limited to the allegations within the four corners of the complaint); *Intel Corp. v. Econintel Treasury Sys., Inc*., No. 06-61352-CIV, 2008 WL 11399616, at *1 (S.D. Fla. Feb. 13, 2008) ("In deciding a motion to dismiss, a court may only examine the four corners of the complaint and not matters outside the complaint without converting the motion to dismiss to a motion for summary judgment.").

Bluegreen Vacations are attempting to use these extrinsic documents to prove a disputed factual issue which is not permitted at the motion to dismiss stage. *See Am. Int'l Specialty Lines Ins. Co. v. Mosaic Fertilizer, LLC,* 8:09-cv-1264-T-26TGW, 2009 WL 10671157, at *2 (M.D. Fla. Oct. 9, 2009) ("A] motion to dismiss should concern only the complaint's legal sufficiency, and is not a procedure for resolving factual questions or addressing the merits of the case."); *Union Asset Mgmt. Holding AG v. Sandisk LLC,* 227 F. Supp. 3d 1098, 1100 (N.D. Cal. 2017) ("[T]he defendants are introducing extrinsic material in an effort to sow doubt at a stage when the plaintiffs' factual allegations are presumed true. That is not appropriate.").

In their Motion, Bluegreen Vacations argue that the Promissory Note (MTD, Ex. A) disputes "Plaintiffs' calculation of the MAPR." (MTD at 8, n.6, 10-11). Whether the MAPR calculation as alleged in the Amended Complaint is factually correct or whether Defendant's interpretation of the MAPR is correct is a determination not proper for a motion to dismiss.

"Calculation of the correct finance charge, and hence the APR, is a question of fact." *In re Williams*, 330 B.R. 534, 539 (Bankr. M.D. La. 2005); *Wepsic v. Josephson*, 231 B.R. 768 (Bankr. S.D. Cal. 1998) (determination of correct finance charge was issue of material fact precluding summary judgment). Defendants' attempt to introduce this extrinsic document for this purpose should be rejected.

Bluegreen Vacations also attempts to introduce the Mortgage Deed (MTD, Ex. B) in order to argue that Plaintiffs' timeshare transaction is not subject to the MLA because it is encumbered by a mortgage. (MTD at 13). Yet, a closer look at the Mortgage Deed shows that Plaintiffs are not even parties to this agreement. The Mortgage Deed is between Vacation Trust, Inc. (mortgagor) and Bluegreen Vacations Corporation (mortgagee) and executed be these parties only. (MTD, Ex. B). Thus, while the consideration of any document other than a contract between the Plaintiff and the Defendant is improper, this document is particularly unsuitable for inclusion beyond the complaint.

III. PLAINTIFFS HAVE ARTICLE III STANDING

The Plaintiffs' Complaint alleges that "they made a substantial down payment" and that they are entitled to statutory and injunctive relief for violation of the MLA. *See* Amd. Compl. at ¶¶ 12, 46, 70, 72, 86. Either of these bases are sufficient to support Article III standing. This should be the end of the inquiry. If there is any doubt, the proper course of action would be to permit jurisdictional discovery, not to dismiss the case.

The Eleventh Circuit held that the "well-settled test for establishing Article III standing includes three basic requirements." *Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1290 (11th Cir. 2017). First, there must be an injury in fact, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not

conjectural or hypothetical." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations, citations, and footnote omitted)). Second, there must be "a causal connection between [a plaintiff's] injury and the defendant's conduct." *Id.* Third, it must be "likely - and not merely speculative - that a favorable decision by the court will redress the injury." *Id.* (citing *Duty Free Americas, Inc. v. Estée Lauder Cos.*, 797 F.3d 1248, 1271 (11th Cir. 2015).

Plaintiffs easily clear these hurdles because (1) they suffered an injury in fact, namely they paid money to Bluegreen Vacations based on a contract which violates the MLA; (2) their injuries are fairly traceable to Bluegreen Vacations' failure to comply with the requirements of the MLA; and, (3) their injuries may be redressed by a favorable decision, namely the recovery of funds paid and recission of the contract. In addition, the Complaint seeks injunctive relief and the harm was "sufficiently imminent and substantial" which the Supreme Court held to be appropriate. TransUnion LLC v. Ramirez, 41 S.Ct. 2190, 2210-11 (2021). Article III requires nothing more.

A. Plaintiffs Articulated Actual Damages Sufficient to Survive a Motion to Dismiss

Plaintiffs have standing due to the tangible injuries suffered which demonstrate a concrete harm: Plaintiffs paid money to Bluegreen Vacations based on an unlawful contract which is enough to create Article III standing.

"Economic harm [is a] well-established injur[y]-in-fact under federal standing jurisprudence." *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1172 (11th Cir. 2014). After all, "economic injury [] is the epitome of 'concrete.'" *MSPA Claims 1, LLC v. Tenet Fla, Inc.*, 918 F.3d 1312, 1318 (11th Cir. 2019). As the Supreme Court has stated: "The most obvious [concrete harms that create standing] are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has

suffered a concrete injury in fact under Article III." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2204 (2021).

While Bluegreen Vacations admits that Plaintiffs paid money, they claim that is not enough. Defendants insist that Plaintiffs have to show they paid more or incurred additional fees and not on whether they received the appropriate MAPR, APR or any other disclosures. (MTD at 10). Bluegreen Vacations' argument that Plaintiffs' payments alone cannot create Article III standing is plain wrong.[1] It is well established that money paid creates an injury in fact in order to satisfy Article III standing. *See Zamber v. American Airlines, Inc*., No. 16-23901-civ-Martinez-Goodman, 2017 WL 4712576 (S.D. Fla. Oct. 16, 2017) (payment of travel insurance premiums retained by the airline alleged to be illegal kickbacks was an "injury in fact."); *Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC*, 198 F.Supp.3d 1332, 1340 (S.D. Fla. 2016) ("Plaintiff clearly alleges an injury in fact: the payment of fees it seeks to recover with its prayer for the repayment of the fees plus interest."); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (holding that consumers who paid more for gas than they should have as a result of discriminatory tax laws had Article III standing).

The Amended Complaint makes clear – and Bluegreen Vacations does not contest the fact – that Plaintiffs paid money in connection with the timeshare transaction as memorialized in the OBA. *See* Amd. Compl. at ¶¶ 46-47, 70, 72, 86. This is sufficient to establish an injury in fact for Article III standing.

Bluegreen Vacations also argue that Plaintiffs do not automatically satisfy the injury-in-

[1] As explained below, whether or not Plaintiffs paid a 1.107% difference between MAPR and APR and whether the $450 Administrative Fee was included in that calculation is a factual determination that has no bearing on whether standing is met because there is no dispute that Plaintiffs paid Defendants causing an injury in fact.

fact requirement whenever a statute grants the plaintiff the right to sue and take the position that there must be more than a bare procedural violation. (MTD at 8-11). While a correct statement of the law generally, this rule applies only when a plaintiff has "fail[ed] to allege any personal detriment" resulting from a statutory violation, *Zinn v. SCI Funeral Servs. of Fla*., Inc., 568 F. App'x 841 (11th Cir. 2014) (per curiam). It is no obstacle when, as here, Plaintiffs allege a statutory violation in connection with the purchase of a product (the timeshare) and the payment of money on terms that that were misleading in the precise manner the MLA statute was designed to prevent.

Plaintiffs also seek injunctive relief. *See* Amd. Compl. at ¶¶ 8, 12, 35, 47, 57, 68-72, 85-88, 100-103. The harm from being contractually obligated on these vacation timeshare contracts without the benefit of congressionally mandated disclosures obligations is the same type of harm found to be "sufficiently imminent and substantial" by the Supreme Court for Article III standing purposes. *See TransUnion LLC v. Ramirez,* 41 S. Ct. 2190, 2210-11 (2021)(Suggesting relief would have been appropriate if the plaintiffs sought injunctive relief). As specifically set forth in the Amended Complaint at paragraph 70, the Supreme Court has held that "when Congress declare[s] in [a statue] that certain contracts are void, it intend[s] that the customary legal incidents of voidness follow, including the availability of a suit for recission or for an injunction against continued operation of the contact, and for restitution." T*ransamerica Mortg., Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, at 19 (1979).

Bluegreen Vacations' reliance on two Eleventh Circuit cases in which the Plaintiffs paid no money is misplaced and easily distinguished. First, *Trichell v. Midland Credit Management, Inc*., 964 F.3d 990 (11th Cir. 2020), held that there was no injury in fact under the FDCPA where the plaintiff only alleged intangible injuries in form of violations of the statute. (MTD at 9). However, in *Trichell*, the plaintiff failed to allege any tangible injury – "neither plaintiff allege[d]

that he made any payments in response to the defendants' letters—or even that he wasted time or money in determining whether to do so. Instead, when confronted with the standing issue during oral argument, Trichell and Cooper asserted only intangible injuries, in the form of alleged violations of the FDCPA." 964 F.3d at 997. Importantly, the FDCPA does not create a statutory right to void contracts like the MLA. Thus, there was no injunctive relief request to supply standing in *Trichell* but the Amended Complaint in this case repeatedly seeks injunctive relief.

Similarly, *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020) addressed an alleged statutory violation of the Fair and Accurate Credit Transaction Act (FACTA) where a retailer printed too many of the customer's account numbers on retail receipts. The plaintiffs only claimed statutory damages under FACTA, and did not allege any monetary or other injury. Nor was there a statutory basis for voiding the contract and concomitant injunctive relief and as a result, the Plaintiff lacked standing. Unlike the plaintiffs in *Trichell* and *Muransky*, Plaintiffs here alleged tangible injuries – the payment of money to Defendants and seek injunctive relief rescinding the void contract. *See* Amd. Compl. at ¶¶ 12, 46-47, 70, 72, 86.

Additionally, Bluegreen Vacations contend that despite paying money on the timeshare contract by way of a down payment, Plaintiffs must show actual damages in order to have standing. (MTD at 10-11). This argument confuses damages under the merits with Article III standing. Because Plaintiffs paid money under a contract that they allege violated the MLA, they have standing. Whether Plaintiffs allegation that the $450 Admin Fee is to be included within the calculation of the MAPR or finance charge is a factual issue going to the merits of this case and cannot be resolved on a motion to dismiss. "Calculation of the correct finance charge, and hence the APR, is a question of fact." *In re Williams*, 330 B.R. 534, 539 (Bankr. M.D. La. 2005); *Wepsic*

v. Josephson, 231 B.R. 768 (Bankr. S.D. Cal. 1998) (determination of correct finance charge was issue of material fact precluding summary judgment).

Bluegreen Vacations also argues that Plaintiffs lack standing to assert Count III under the MLA on behalf of the arbitration clause class because Plaintiffs fail to allege how they are damaged by the arbitration provision. (MTD at 11). First, there is no authority for the proposition that Plaintiffs must demonstrate specific categories of harm for each violation of a single statute in order to show standing. All counts of the Complaint fall under the MLA and because Plaintiffs paid money and seek injunctive relief on the loan at issue, they have standing for all three counts. Plaintiffs also are obligated on contracts which contain a right to void the contract. 10 U.S.C. § 987(e)(3) (unlawful to require the borrower to submit to arbitration). *Transamerica Mortg., Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, at 19 (1979)("when Congress declare[s] in [a statue] that certain contracts are void, it intend[s] that the customary legal incidents of voidness follow, including the availability of a suit for recission or for an injunction against continued operation of the contact, and for restitution."). The separate violation relating to the arbitration clause arises from the inclusion of an arbitration clause in and of itself, and the MLA provides that any such agreement is unenforceable and void. 10 U.S.C. § 987(f)(3) & (4).

B. Plaintiffs' Injuries Satisfy the Traceability and Redressability Elements for Standing

Defendants' claim that Plaintiffs have failed to alleged any facts to show traceability regarding how the nondisclosures affected their decision to finance the timeshare and therefore Plaintiffs cannot show a direct injury. (MTD at 12). Similarly, Defendants' contest redressability by arguing that a decision in Plaintiffs' favor will not redress the injuries suffered by Plaintiffs because the remedies sought have no connection to the harms suffered. (MTD at 12).

These arguments amount to nothing more than a restatement of its other standing arguments (i.e. Defendants' contention that Plaintiffs fail to allege injury-in-fact). The burden to establish traceability is a "relatively modest" burden, *Bennett v. Spear*, 520 U.S. 154, 171 (1997), and "even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Family v. Pinellas Suncoast Transit Auth*., 344 F.3d 1263, 1273 (11th Cir. 2003). In fact, the traceability argument is an attempt to add a reliance requirement to the MLA. The MLA does not require that a plaintiff show more than Defendants failed to provide the required disclosures or included prohibited terms. It is undisputed that Defendants did not provide any MLA disclosures to Plaintiffs. In fact, they allege that the MLA does not apply to timeshares. Thus, Plaintiffs have sufficiently shown traceability for standing purposes. The same is true of the redressability argument as, the Supreme Court has made it clear that "[p]roximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S.Ct. 1377, 1391 n. 6 (2014).

A decision in Plaintiffs' favor will redress their injuries by voiding the OBA and eliminating Plaintiffs' duty to pay for the timeshare.

IV. A TIMESHARE SALE DOES NOT QUALIFY FOR THE RESIDENTIAL MORTGAGE EXCEPTION

This case involves the extension of consumer credit to an active-duty service member. Bluegreen does not dispute that it extended credit to a covered borrower for personal purposes which is subject to a finance charge and is payable by a written agreement in more than four installments. In an attempt to get out from under the MLA, Bluegreen Vacations argues that timeshare interests fall within an exception to the definition of "consumer credit" that exists for residential mortgages under the MLA. (MTD at 13).

While the MLA provides an exception to the definition of consumer credit, this exception is only for "residential mortgages":

> The term "consumer credit" has the meaning provided for such term in regulations prescribed under this section, except that such term does not include (A) a residential mortgage, or
> …

10 U.S.C. § 987 (i)(6). Thus, the issue before the court is whether a timeshare vacation sale is a "residential mortgage." In order to prevail on this issue, Bluegreen Vacations must show that its vacation points system actually constitutes a "residential mortgage" as that term is defined in the MLA.

The DoD attempted to further define the residential mortgage exception to the MLA. However, there is no mention of a timeshare interest within the regulation:

> any credit transaction secured by an interest in a dwelling, including a transaction to finance the purchase or initial construction of the dwelling, any refinance transaction, home equity loan or line of credit, or reverse mortgage.

See 32 C.F.R. § 232.3(2)(i). Obviously, this language indicates that the DoD was addressing loans that pertain to the service member's home. But timeshare sales are not mentioned in either the language of the MLA exception nor within the DoD regulation or guidance.

Importantly, the DoD in implementing and issuing guidance in connection with the MLA expressly stated that "[w]ords that are not defined in this regulation [32 CFR § 232.3] have the same meanings given to them in Regulation Z (12 CFR part 1026) … including any interpretation thereof by the Bureau or an official or employee of the Bureau duly authorized by the Bureau to issue such interpretations. Words that are not defined in this part or Regulation Z, or any interpretation thereof, have the meanings given to them by State or Federal law." 32 CFR § 232.3(s). It is therefore the DoD's intent that the terms used in the MLA be interpreted consistently with Regulation Z.

Regulation Z, 12 CFR § 1026.43, specifically excludes timeshares from the scope of the defined term "dwelling" as follows:

> Minimum standards for transactions secured by a dwelling.
>
> (a) Scope. This section applies to any consumer credit transaction that is secured by a dwelling, as defined in § 1026.2(a)(19), including any real property attached to a dwelling**, other than**:
>
> (1) A home equity line of credit subject to § 1026.40;
>
> (2) A mortgage transaction secured by a consumer's interest in a **timeshare plan**, as defined in 11 U.S.C. 101(53(D)); or

Id. (emphasis added). Thus, Regulation Z says that mortgages for timeshare plans are NOT included withing the definition of residential mortgages.

Additionally, 11 U.S.C. § 101 (53D) of the Bankruptcy code defines the term "timeshare plan" as:

> [T]hat interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives **a right to use accommodations**, facilities, or recreational sites, whether improved or unimproved, **for a specific period of time less than a full year during any given year**, but not necessarily for consecutive years, and which extends for a period of more than three years. A 'timeshare interest' is that interest purchased in a **timeshare plan which grants the purchaser the right to use and occupy accommodations**, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan."

Id. (emphasis added).

Here, Plaintiffs' timeshare purchase falls squarely within the definition of timeshare under the Bankruptcy code which is a federal law. Regulation Z dictates that timeshares are excluded from the definition of residential mortgage which the DoD says controls in the absence of a definition under the MLA. Consistent with these interpretations, the OBA (timeshare agreement

at issue here) provides that Plaintiffs are merely "afforded the opportunity to use the Accommodations of the timeshare Plan on a biennial recurring basis." *See* Amd. Compl., Ex. A. That is a timeshare plan not a residential mortgage.

The MLA itself charges the U.S. Department of Defense with administering the regulatory scheme and authorizes the Secretary of Defense to issue regulations, including those defining consumer credit. 10 U.S.C. § 987(h)(1), (h)(2)(D). However, numerous federal agencies — including the Federal Trade Commission (FTC), Board of Governors of the Federal Reserve System (FRB), Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Consumer Financial Protection Bureau (CFPB), National Credit Union Administration, and U.S. Department of the Treasury—consult on the development of those regulations. *Id.* § 987(h)(3). The MLA confers enforcement authority on several agencies, including the FTC and CFPB. *Id.* § 987(f)(6)(incorporating enforcement provisions of the Truth in Lending Act, 15 U.S.C. § 1607). Not a single federal agency includes timeshare plans within the definition of a residential mortgage under any other federal statute or interpretation. This is why Bluegreen Vacations cites to no federal authority in support of its argument.

Practically, the characteristics of a time share transaction further demonstrate that a timeshare is not considered a residential mortgage. First, the language of the OBA itself demonstrates that Plaintiffs' purchase of a timeshare is not a residential mortgage. Unlike a mortgage on a home, the deed to their timeshare interest is in the name of Bluegreen Vacation Club Trust ("Bluegreen Trust), which is a trust owned by Vacation Trust, Inc. ("Vacation Trust"). *See* Amd. Compl., ¶ 4, Ex A. Because Plaintiffs' timeshare is subject to a Trust ownership it cannot be sold on the open market like other real estate interests. Second, the OBA also

demonstrates that Plaintiffs have actually only purchased "Vacation Points." [2] *See* Amd. Compl., ¶ 4, Ex. A. The OBA specifically states that Plaintiffs are "allocated Vacation Points" which are used to determine the occupancy of the facilities during a year. *Id*. Plaintiffs are merely "afforded the opportunity to use the Accommodations of the timeshare Plan on a biennial recurring basis." *Id.*

Moreover, permitting timeshares to satisfy the MLA's exception for residential mortgages would undermine the statute's basic purpose of protecting service members. *See Henderson ex rel. Henderson v. Shinseki* 562 U.S. 428, 441 (2011) (construing "provisions for benefits to members of the Armed Services … in the beneficiaries' favor"); *see Boone v. Lightner*, 319 U.S. 561, 575 (1943) (statutes benefiting servicemembers should be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *California Pawnbrokers Ass'n cv. Carter*, No. 16-2141, 2016 WL, at *1 (E.D. Cal. Nov.8, 2016) ("The purpose of the MLA is to protect members of the military and their dependents from the financial pitfalls related to consumer credit and ensure military readiness.").

Timeshares inherently have issues that negatively affect consumers. For example, a timeshare purchase agreement creates a "non-cancellable lifetime obligation" that "cannot even be given away" let alone sold. National Association of Attorneys General, Consumer Protection/Timeshare Obligations, Regulations, and Challenges, March 3, 2020 https://www.naag.org/attorney-general-journal/timeshare-obligations-regulations-and-challenges/ (last visited Jan. 15, 2022). "A buyer pays tens of thousands of dollars for an interval (usually one

[2] Defendants claim that while its marketing materials focus on vacation rentals through membership, the timeshare purchases are the conveyance of real property. MTD at 15. However, the OBA belies Defendants' statement because there is no conveyance of real property, Plaintiffs only purchased "Vacation Points" solely for the use of the accommodations.

to two weeks a year) at a resort condominium and agrees to pay maintenance fees and property taxes every year. …Any fees, dues, or maintenance assessments must be paid in perpetuity, until the consumer either passes away or is able to sell the timeshare…" *Id.* These characteristics set timeshares apart from a traditional residential mortgage and reinforce the need for the MLA exception to be interpreted in a manner which protects service members from predatory lending practices. *See U.S. Dep't of Def., Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependent*s 9 (2006), https://go.usa.gov/xtrJH (warning "predatory lending undermines military readiness, harms the morale of troops and their families, and adds to the cost of fielding an all-volunteer fighting force").

Bluegreen Vacations cites to no caselaw, legislative history, DOD interpretation or other source showing any indication that timeshares were intended to be excluded from the protections provided by the MLA. Instead, they rely on *Lennen v. Marriot Ownership Resorts, Inc*., No. 19-13215, 2021 WL 5834264, at *8-9 (11th Cir. Dec. 9, 2021) in support of its claim that beneficial interests in timeshare vacations trusts are real property under the Florida Land Trust Act and the Florida Timeshare Act. (MTD at 15). However, this case is distinguishable because whether or not a timeshare interest is considered real property under a specific state law is not determinative of whether the MLA applies. Pursuant to the language of the MLA and the DoD's regulations, the inquiry is focused on whether the timeshare transaction at issue falls within the MLA exception for residential mortgages that are secured by an interest in a dwelling. 10 U.S.C. § 987 (i)(6). Whether a timeshare interest is related to real property is a red-herring which has no bearing whether the MLA applies to the transaction at issue. Accordingly, Plaintiffs' timeshare purchase falls within the definition of "consumer credit" under the MLA. At the very least, a fact question remains that precludes granting the motion to dismiss.

V. THE MLA PROVIDES FOR ENTITLMENT TO A MINIMUM AMOUNT OF DAMAGES, *I.E.* STATUTORY DAMAGES

Bluegreen Vacations claims that only actual damages are recoverable under the MLA. (MTD at 15-16). The Court should reject this argument for two reasons. First, Bluegreen Vacations ignores that Plaintiffs have plead actual damages. *See* Amd. Compl. at ¶¶ 46-47, 72, 88. Second, the language of the MLA does not require that a plaintiff allege or prove actual damages in order to recover statutory damages. Any person who violates the MLA with respect to any covered consumer is civilly liable to the consumer for: "[a]ny ***actual damages*** sustained as a result, ***but not less than*** $500 for each violation. 32 C.F.R. § 232.9(e)(1)(i) (emphasis added). The Eleventh Circuit has held that a plaintiff need not prove actual damages to recover statutory damages. *See Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209, 1214 (11th Cir. 2005). In that case, the Eleventh Circuit overturned a district court's dismissal and rejected the notion that proving actual damages is a condition precedent to receiving statutory liquidated damages under the Driver's Privacy Protection Act, 18 U.S.C. § 2721, *et seq*. ("DPPA"). In *Kehoe*, the Eleventh Circuit analyzed the plain statutory language of the DPPA: "the court may award— (1) ***actual damages, but not less than*** liquidated damages in the amount of $2,500." *Id.* at 1213 (emphasis added). The Court relied on the phrase "but not less than" and determined that the comma preceding that phrase did not necessarily mean that the second clause was dependent on proof of the first clause. *Id*. Instead, the Court held that the second phrase was not dependent upon proof of actual damages, but rather that the two clauses are to be read in the disjunctive: a plaintiff "may receive the greater of his actual damages or $2,500.00." *Id.* The court concluded that "[h]aving considered the plain text of the DPPA's remedial provision ... a plaintiff need not prove actual damages to recover liquidated damages."

Here, the MLA's similar statutory language should be interpreted consistent with the DPPA as it provides for the recovery of "actual damages . . . , but not less than" a statutory determined amount of damages for each violation. The Eleventh Circuit's analysis in *Kehoe* equally applies to this Court's analysis of the MLA statute and requires that Bluegreen Vacations' arguments be rejected. Thus, the MLA provides for statutory damages, regardless of Plaintiffs' proof or allegations as it related to actual damages.

VI. PLAINTIFFS EQUITABLE CLAIMS SHOULD PROCEED

Contrary to Bluegreen Vacations' assertions, equitable relief is appropriate because its' actions are continuing in nature and can lead to potential future injury. Plaintiffs' OBA is still in effect as are other OBA's entered between Bluegreen Vacations and the class. The fact that the contracts are still valid is harm that is continuing in nature where the MLA requires that "any credit agreement, promissory note, or other contract prohibited under this section is void from the inception of such contract." 10 USC § 987(f)(3). The United States Supreme Court has held that "when Congress declare[s] in [a statute] that certain contracts are void, it intend[s] that the customary legal incidents of voidness follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution." *Transamerica Mortg. Advisors, Inc. (TAMA)*, 444 U.S. at 19. Bluegreen Vacations' failure to comply with the MLA mandates that the contracts be voided, but such contract are still in full force and effect, forcing Plaintiffs and the class to continue to make payments. Equitable relief from this Court is necessary to void Plaintiffs and the class's agreements with Bluegreen Vacations as a result of its' MLA violations.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Bluegreen Vacations' Motion to Dismiss [ECF No. 27] in its entirety.

Dated: January 17, 2022

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Counsel for Plaintiffs, individually and on behalf of all others similarly situated

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Janet R. Varnell
Janet R. Varnell