

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE**

EMILY GEORGE, MICHAEL GEORGE,)	
BENJAMIN FENTRESS, GENELYN BONSA,)	
CHRISTY LEE, JOSEPH LEE, JEFF ANTON,)	
TIFANI ANTON, IDA CARRUTHERS,)	
STEVEN CARRUTHERS, JEANNE BRADLEY,)	
MARITZA REYES, ERICK LAZO,)	
SUSZANNE CAUDELL, JAMES CAUDELL,)	
NICOLE CROSS, BRANDON ROBBINS,)	
KATYA ROGUE, GUIDO DIAZ,)	
LACEY GUILLOTTE, JACOB GUILLOTTE,)	
CATHERINE SIMOES DE ABREAU,)	
LUIZ EDUARDO PEDROSA, RYAN PETRIE,)	
JULIA PETRIE, SHEILA MAITA,)	Case No.: 3:18-cv-00512
JULISSA SANTANA,)	
VANESSA SHEPHERD WILLIAMS,)	
KAREN SOSAK, MICHAEL SOSAK,)	
LESLIE COKER, JUSTIN COKER,)	
SHAKEYSHA J. SHELTON,)	
JACQUELYNE D. SHELTON,)	
JOHN E. SHELTON, STEPHANIE VALLECIO,)	
CARMINDO VALLECIO, LATOYA NETTLES)	
and GREGORY WINN,)	
)	
Plaintiffs,)	
)	
v.)	
)	
WESTGATE RESORTS, LTD., L.P.,)	
)	
Defendant.)	

**MEMORANDUM OF FACTS AND LAW IN SUPPORT OF DEFENDANT’S MOTION
TO DISMISS, MOTION TO SEVER, AND MOTION TO STRIKE JURY DEMAND**

Comes the Defendant, Westgate Resorts, Ltd., L.P. (sometimes referred to as “Defendant”), by and through counsel, and respectfully files this Memorandum of Facts and Law in Support of its Motion to Dismiss, Motion to Sever, and Motion to Strike Jury Demand filed pursuant to Fed. R. Civ. P. 12(b)(6), 12(f), and 21.

I. INTRODUCTION AND FACTS¹

Of the 39 Plaintiffs, 16 purchased timeshare interests from Westgate Resorts, Ltd., L.P. at the resort it developed in Gatlinburg, Tennessee.² The remaining 23 Plaintiffs purchased their timeshare interests from entities other than Westgate Resorts, Ltd., L.P. outside the State of Tennessee.

Plaintiffs, Emily and Michael George (“George”), purchased their timeshare interest from Westgate Resorts, Ltd., L.P. in Gatlinburg, Tennessee on September 29, 2016. (Declaration of Willman, ¶ 7, **Exhibit A**). Plaintiffs, Benjamin Fentress and Genelyn Bonga (“Fentress/Bonga”), purchased their timeshare interest from Westgate Resorts, Ltd., L.P. in Gatlinburg, Tennessee on November 19, 2017. (Declaration of Willman, ¶ 8, **Exhibit B**). Plaintiffs, Steven and Ida Carruthers (“Carruthers”), purchased their timeshare interest from Westgate Resorts, Ltd., L.P. in Gatlinburg, Tennessee on October 29, 2014. (Declaration of Willman, ¶ 9, **Exhibit C**). Plaintiffs, James and Suzsanne Caudell (“Caudell”), purchased their timeshare interest from Westgate Resorts, Ltd., L.P. in Gatlinburg, Tennessee on July 23, 2016. (Declaration of Willman, ¶ 10, **Exhibit D**). Plaintiffs, Jacob and Lacey Guillotte (“Guillotte”), purchased their timeshare interest from Westgate Resorts, Ltd., L.P. in Gatlinburg, Tennessee on February 10, 2016. (Declaration of Willman, ¶ 11, **Exhibit E**). Plaintiffs, Ryan and Julia Petrie (“Petrie”), purchased their timeshare interest from Westgate Resorts, Ltd., L.P. in Gatlinburg, Tennessee on September 28, 2010. (Declaration of Willman, ¶ 12, **Exhibit F**). Plaintiffs, Justin and Leslie Coker (“Coker”), purchased their timeshare interest from Westgate Resorts, Ltd., L.P. in

¹ Other than jurisdictional facts, facts regarding the identities of entities, and the actual contract documents referenced by Plaintiffs in their Complaint, all of which are supplied by Defendant, the facts set forth herein are taken from Plaintiffs’ Complaint. Defendant takes these allegations as true only for purposes of this Motion.

² Westgate Resorts, Ltd., L.P. is also known as Westgate Resorts, Ltd. in filings with the Tennessee Secretary of State, and the entities are the same entities. (Declaration of Willman, ¶ 5). A true and correct copy of the Declaration of John Willman is attached to Defendant’s Motion to Dismiss, Motion to Sever, and Motion to Strike as **Exhibit 1**.

Gatlinburg, Tennessee on October 7, 2016. (Declaration of Willman, ¶ 13, **Exhibit G**). Plaintiffs, Latoya Nettles and Gregory Winn (“Nettles/Winn”), purchased their timeshare interest from Westgate Resorts, Ltd., L.P. in Gatlinburg, Tennessee on July 24, 2016. (Declaration of Willman, ¶ 14, **Exhibit H**). These Plaintiffs are sometimes referred to collectively as the “Gatlinburg Purchasers.”

The remaining Plaintiffs purchased their timeshare interests from entities other than Westgate Resorts, Ltd., L.P. outside the State of Tennessee. Declaration of Willman, ¶ 15). Plaintiffs, Joseph and Christy Lee (“Lee”), purchased their timeshare interest from Westgate Vacation Villas, LLC in Kissimmee, Florida on October 24, 2016. (Declaration of Willman, ¶ 16, **Exhibit I**). Plaintiffs, Jeffrey and Tifani Anton (“Anton”), purchased their timeshare interest from Westgate Flamingo Bay, LLC in Las Vegas, Nevada on July 22, 2012. (Declaration of Willman, ¶ 17, **Exhibit J**). Plaintiff, Jeanne Bradley (“Bradley”), purchased her timeshare interest from Westgate Lakes, LLC in Orlando, Florida on October 30, 2016. (Declaration of Willman, ¶ 18, **Exhibit K**). Plaintiffs, Maritza Reyes and Erick Lazo (“Reyes/Lazo”), purchased their timeshare interest from Westgate Vacation Villas, LLC in Kissimmee, Florida on August 14, 2017. (Declaration of Willman, ¶ 19, **Exhibit L**). Plaintiffs, Nicole Cross and Brandon Robbins (“Cross/Robbins”) purchased their timeshare interest from Westgate Flamingo Bay, LLC in Las Vegas, Nevada on March 22, 2013. (Declaration of Willman, ¶ 20, **Exhibit M**). Plaintiffs, Katya Roque Soto (identified in the Complaint as “Katya Rogue”) and Guido Diaz Morales (identified in the Complaint as “Guido Diaz”) (“Soto/Morales”), purchased their timeshare interest from Westgate Palace, LLC in Orlando, Florida on October 7, 2017. (Declaration of Willman, ¶ 21, **Exhibit N**). Plaintiffs, Catherine Simoes de Abreau and Luiz Eduardo Pedrosa (“de Abreau/Pedrosa”), purchased their timeshare

interest from Westgate Lakes, LLC in Orlando, Florida on May 16, 2012. (Declaration of Willman, ¶ 22, **Exhibit O**). Plaintiffs, Sheila Maita and Julisa Santana (“Maita/Santana”), purchased their timeshare interest from Westgate Lakes, LLC in Orlando, Florida on March 27, 2016. (Declaration of Willman, ¶ 23, **Exhibit P**). Plaintiff, Vanessa Shepherd Williams (“Williams”) purchased her timeshare interest from Westgate Lakes, LLC in Orlando, Florida on October 2, 2012. (Declaration of Willman, ¶ 24, **Exhibit Q**). Plaintiffs, Karen and Michael Sozak (“Sozak”), purchased their timeshare interest from Westgate Flamingo Bay, LLC in Las Vegas, Nevada on August 19, 2013. (Declaration of Willman, ¶ 25, **Exhibit R**). Plaintiffs, Shakeysha, Jacquelyne, and John Shelton (“Shelton”), purchased their timeshare interest from Westgate Vacation Villas, LLC in Kissimmee, Florida on July 17, 2017. (Declaration of Willman, ¶ 26, **Exhibit S**). Plaintiffs, Stephanie Vallecio and Carmindo Vallecio (“Vallecio”), purchased their timeshare interest from Westgate Palace, LLC in Orlando, Florida on February 28, 2014. (Declaration of Willman, ¶ 27, **Exhibit T**).

Westgate Resorts, Ltd., L.P. is a separate entity from Westgate Palace, LLC, Westgate Vacation Villas, LLC, Westgate Flamingo Bay, LLC, and Westgate Lakes, LLC (sometimes collectively referred to as the “Other Developers”). (Declaration of Willman, ¶ 28). Plaintiffs’ Complaint asserts claims against Westgate Resorts, Ltd., L.P. arising from its alleged sale of timeshare interests to Plaintiffs. Because Plaintiffs who purchased their timeshare interests from the Other Developers did not purchase timeshare interests from Westgate Resorts, Ltd., L.P., the Complaint fails to state a claim upon which relief can be granted to them against Westgate Resorts, Ltd., L.P. as a matter of law, and those claims should be dismissed.

In addition, the Contracts for Purchase and Sale executed by Plaintiffs contain the following forum selection clause:

Purchaser (a) hereby irrevocably submits itself to the exclusive process, jurisdiction and venue of the courts of the State of Florida, Orange County, and to the exclusive process, jurisdiction and venue of the United States District Court for the Southern District of Florida, for the purposes of suit, action or other proceedings arising out of, in connection with or in any way relating to this Agreement or the subject matter hereof; (b) agrees that suit, action or other proceedings arising out of, in connection with or in any way relating to this Agreement or the subject matter hereof that Purchaser may bring, file or initiate shall be brought, filed or initiated only and exclusively in such courts and in no other court; (c) if Seller initiates such action, Purchaser irrevocably submits itself to the process, jurisdiction and venue of any court in which Seller shall initiate such action and the choice of such venue shall in all instances be at Seller's election; and (d) without limiting the generality of the foregoing, hereby waives and agrees not to assert by way of motion, defense or otherwise in any such suit, action or proceeding any claim that Purchaser is not personally subject to the jurisdiction of the above-named courts, that such suit, action or proceeding is brought in an inconvenient forum or that the venue of such suit, action or proceeding is improper. Purchaser hereby waives the right to collaterally attack any judgment or action in any other forum.

(Contract for Purchase and Sale, ¶ 23.b.). Accordingly, Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

In the alternative to dismissal of the Gatlinburg Purchasers, Defendant respectfully requests that the Court sever their claims pursuant to Fed. R. Civ. P. 21 and try them individually. As discussed in more detail below, these Plaintiffs' claims arise from completely separate transactions that occurred over a seven year period involving different members of Defendant's sales staff, contain varying allegations of wrongdoing against these different individuals, and will require different witnesses and documentary evidence to litigate. Given these factors, severance of the claims is appropriate if dismissal against the Gatlinburg Purchasers is not granted.

In the alternative to dismissal, Defendant also moves to strike Plaintiffs' jury demand. Each of the Contracts for Purchase and Sale executed by Plaintiffs contain the following waiver of jury trial:

Each party hereto knowingly, voluntarily, and intentionally waives any right it may have to a trial by jury with respect to any litigation (including, but not limited to, any claims, cross-claims, counter-claims, or third party claims) arising out of, under, or in connection with this Agreement or between the parties to this Agreement, their affiliates, subsidiaries, successors, or assigns and irrespective of whether such litigation arises out of this Agreement, by statute, or as a matter of tort law, and the parties hereto expressly consent to a non-jury trial in the event of any of the foregoing.

(Contracts for Purchase and Sale, ¶ 23.c.).

For these reasons, Westgate Resorts, Ltd., L.P. respectfully moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of all of Plaintiffs' claims, or in the alternative, a dismissal of the claims of Plaintiffs who did not purchase timeshare interests from Westgate Resorts, Ltd., L.P. In the alternative to dismissal of the Gatlinburg Purchasers' claims, Defendant respectfully requests that those claims be severed pursuant to Fed. R. Civ. P. 21 and tried separately and that Plaintiffs' jury demand be stricken pursuant to Fed. R. Civ. P. 12(f).

II. LAW AND ARGUMENT

A. Motion to Dismiss.

1. Standard of Review.

To properly state a claim upon which relief can be granted, a plaintiff must meet the pleading requirements of Fed. R. Civ. P. 8(a). *City of Morristown v. AT&T Corp.*, 206 F. Supp. 3d 1321, 1326 (E.D. Tenn. 2016). In order “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In addition, to survive a motion to dismiss for failure to state a claim, a

complaint must contain “either direct or inferential allegations with respect to all the material elements of the claim.” *Feil v. Bank of America, N.A.*, No. 2:12-CV-47, 2013 WL 1619509, *2, (E.D. Tenn. Apr. 11, 2013) (quoting *Wittstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003)). A complaint that suggests the mere possibility of misconduct is insufficient. *Ashcraft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556); *see also Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008) (to survive a motion to dismiss under Rule 12(b)(6), the allegations in the complaint “must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief.”)

When “a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment.” *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007).³ Further, when a written instrument upon which a claim is founded contradicts allegations in the complaint, “the exhibit trumps the allegations.” *Creelgroup, Inc. v. NGS Am., Inc.*, 518 Fed. App'x 343, 347 (6th Cir. 2013) (quoting *Williams v. CitiMortgage, Inc.*, 498 Fed. App'x 532, 536 (6th Cir. 2012)). In the present case, the Contracts for Purchase and Sale upon which Plaintiffs’ claims are founded are attached as exhibits to the Declaration of John Willman, Exhibit 1 to Defendant’s Motion.

2. The claims of Plaintiffs who did not purchase their timeshare interests from Westgate Resorts, Ltd., L.P. should be dismissed for failure to state a claim.

As set forth above, neither Plaintiffs, Lee, Anton, Bradley, Reyes/Lazo, Cross/Robbins, Soto/Morales, de Abreau/Pedrosa, Maita/Santana, Williams, Sozak, nor Shelton, purchased their

³ *See also Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (the court “may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein”); *see also Weiner v. Klais and Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) (citing 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1327, at 762 (2d ed. 1990)) (Where a plaintiff fails to attach an instrument to the complaint, “[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim”), *overruled on other grounds, Swierkiwica v. Sorema, N.A.*, 534 U.S. 506 (2002).

timeshare interests from Westgate Resorts, Ltd., L.P. (Declaration of Willman, ¶¶ 15 - 27). Instead, these Plaintiffs purchased their timeshare interests from Westgate Palace, LLC in Orlando, Florida, from Westgate Vacation Villas, LLC in Kissimmee, Florida, from Westgate Flamingo Bay, LLC in Las Vegas, Nevada, and from Westgate Lakes, LLC in Orlando, Florida. (*Id.*) (as noted above, these entities are sometimes collectively referred to as the “Other Developers”). Westgate Resorts, Ltd., L.P. is a separate entity from the Other Developers. (Declaration of Willman, ¶ 28).

Plaintiff’s Complaint asserts claims against Westgate Resorts, Ltd., L.P. arising from its alleged sale of timeshare interests to Plaintiffs. Because Plaintiffs who purchased their timeshare interests from the Other Developers did not purchase timeshare interests from Westgate Resorts, Ltd., L.P., their allegations in the Complaint fail to state a claim upon which relief can be granted against Westgate, Ltd., L.P. as a matter of law, and those claims should be dismissed. *See Fed. R. Civ. P. 12(b)(6).*

Moreover, even if these Plaintiffs could somehow assert a claim against Westgate Resorts, Ltd., L.P. arising from their purchase of timeshare interests from the Other Developers, which Defendant respectfully submits they cannot, such claims would fail for lack of personal jurisdiction. There are two types of personal jurisdiction, specific and general. Specific jurisdiction exists only ““when a defendant has minimum contacts with the forum state and the cause of action arises out of those contacts.”” *First Community Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 388 (Tenn. 2015) (quoting *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 768 (Tenn. 2013)). General personal jurisdiction may exist ““even if the action is unrelated to the defendant’s contacts with the state,”” *Intera Corp. v. Henderson*, 428 F.3d 605, 615 (6th Cir. 2005) (quoting *Third Nat’l Bank v. WEDGE Group, Inc.*, 882 F.2d 1087,

1089 (6th Cir. 1989)), and it is generally determined by the defendant's place of incorporation and principal place of business. *First Community Bank*, 489 S.W.3d at 384-85 (citation omitted). Alternatively, general jurisdiction may exist in exceptional cases where a defendant's operations in a particular forum "are so "continuous and systematic" as to render [it] essentially home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 138 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). A "corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 571 U.S. at 139, n. 20.

In the present case, specific jurisdiction would not exist for the claims of Plaintiffs who purchased timeshare interests from the Other Developers, because those purchases occurred outside the State of Tennessee. (Declaration of Willman, ¶ 15). In addition, because Westgate Resorts, Ltd., L.P. is a limited partnership whose partners are citizens of the State of Florida and whose principal office is located in the State of Florida, this Court would not have general jurisdiction over Westgate Resorts, Ltd., L.P. for claims arising outside of the State of Tennessee. (*See* Declaration of Willman, ¶ 4).

Finally, Plaintiffs could not bring their purported claims against the Other Developers in this Court, because this Court would lack jurisdiction over those entities and claims. First, there would be no specific jurisdiction, because, as discussed above, those transactions occurred outside the State of Tennessee. Nor would there be general jurisdiction, because the Other Developers are single member limited liability companies with the sole member, Westgate Resorts, Inc., being a citizen of Florida. (Declaration of Willman, ¶ 28). In addition, the Other Defendants have never developed timeshare resorts in the State of Tennessee, have never sold timeshare interests in the State of Tennessee, and have never conducted business in the State of Tennessee. (Declaration of Willman, ¶ 29).

For these reasons, the claims of the Plaintiffs who purchased their timeshare interests from Other Developers should be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

3. Plaintiffs' claims should be dismissed pursuant to the forum selection clauses contained in the Contracts for Purchase and Sale.

In cases based upon diversity jurisdiction, such as the case at bar, “the enforceability of [a] forum selection clause is governed by federal law.” *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 828 (6th Cir. 2009). A “forum selection clause should be upheld absent a strong showing that it should be set aside.” *Id.* (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991)). The following factors are to be considered when evaluating the enforceability of a forum selection clause:” (1) whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust.” *Wong*, 589 F.3d at 828 (citing *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 375 (6th Cir. 1999)). With respect to the first factor, “general claims of fraud will not invalidate a forum selection clause; rather, the challenging party must allege ‘fraud in the inclusion of the clause itself.’” *Mallory v. American Mgmt. Assoc. Int’l, et al.*, No. 3:13-CV-379, 2014 WL 12676180, at *5 (E.D. Tenn. May 19, 2014) (citing *Jenkins v. Marvel*, 683 F. Supp. 2d 626, 634 (E.D. Tenn. 2010)). Further, the “fact that ‘Plaintiff is an individual and [Defendant] is a company with greater economic power does not, by itself, provide a basis for finding abuse.’” *Mallory*, 2014 WL 12676180 at *5 (quoting *Jenkins*, 683 F. Supp. 2d at 634)).

In the present case, Plaintiffs’ Complaint does not allege that the forum selection clauses were included by fraudulent means. Nor does the Complaint allege that the United States

District Court for the Southern District of Florida would ineffectively or unfairly handle the suit. Finally, the Complaint does not allege that the United States District Court for the Southern District of Florida would be more inconvenient than the Eastern District of Tennessee for litigating Plaintiffs' claims. The Complaint alleges that Plaintiffs reside in various states all across the country, with two Plaintiffs residing outside of the country, and only two sets of Plaintiffs are from Tennessee. (Complaint, ¶¶ 1.1 – 1.20).

Plaintiffs' Complaint does not state a valid basis for avoiding the forum selection clause in the contracts they executed and does not contain allegations overcoming the presumption of their enforceability. Accordingly, the Complaint should be dismissed. *See* Fed. R. Civ. P. 12(b)(6).⁴

B. Motion to Sever.

Federal Rule of Civil Procedure 21 states that the “court may also sever any claim against a party.” District courts “have broad discretion to determine whether to sever claims when doing so advances the administration of justice.” *Productive MD, LLC v. Aetna Health, Inc.*, 969 F. Supp. 2d 901, 940 (M.D. Tenn. 2013) (citing *Peterson v. Dean*, No. 3:09-cv-628, 2010 WL 5184794, at *14 (M.D. Tenn. Dec. 14, 2010); *Wright, Miller & Kane*, Fed. Prac. & Proc. § 1689 (3d ed. 2011)). The Middle District of this Court discussed the factors that courts may consider in determining whether to sever claims as follows:

- (1) whether the claims arise out of the same transaction or occurrence;
- (2) whether the claims present some common questions of law or facts;
- (3) whether settlement of the claims or judicial economy would be facilitated;
- (4) whether prejudice would be avoided if severance were granted; and
- (5) whether different witnesses and documentary proof are required for separate claims.

⁴ This Court has found that “arguments regarding the Parties’ alleged exclusive forum selection clause should be addressed either through a motion to dismiss under Fed. R. Civ. P. 12(b)(6) or through a motion to transfer venue under 28 U.S.C. § 1404(a).” *Branch v. Mays*, No. 3:16-cv-249, 2017 WL 3209461, at *1 (E.D. Tenn. Feb. 17, 2017) (citation omitted).

Productive M.D., 969 F. Supp. 2d at 940 (citing *Six L's Packing Co., Inc. v. Beale*, No. 3:10-cv-01132, 2012 WL 928897, at *2 (M.D. Tenn. Mar. 19, 2012)).

In the present case, in the alternative to dismissal, Defendant respectfully requests that this Court sever the claims of the Gatlinburg Purchasers and try them separately. The transactions at issue with respect to these Plaintiffs are individual purchases of timeshare interests that are completely separate from each other. The various transactions occurred over a seven year period and involved different members of Defendants' sales team. Moreover, Plaintiffs allege that these different individuals made different misrepresentations with respect to each transaction. Although the contract documents with respect to each transaction are similar, Plaintiffs claim that they were induced into entering the contracts through misrepresentations that contradict the terms of the contracts. Because the transactions were completely unrelated and involved communications with different personnel, the trial of this case as a single action would require different witnesses and documentary evidence to be presented with respect to each transaction, which would thwart judicial economy, confuse the facts and the issues, and prejudice the parties.

For these reasons, Defendant respectfully requests that this Court sever the claims of the Gatlinburg Purchasers to be tried separately.

C. Motion to Strike Jury Demand.

As noted above, each of the Plaintiffs' Contracts with Westgate include a jury waiver.⁵ A party may contractually waive its Seventh Amendment right to a jury trial, and federal law governs the enforcement of a jury waiver in diversity actions. *Westgate GV at the Woods LLC v. Dickson*, No. 10-03269-CV-S-DGK, 2010 WL 4721245, *2 (W.D. Mo. Nov. 15, 2010) (citing *Simler v. Conner*, 372 U.S. 221, 222 (1963)) (ruling on motion to strike jury demand based on

⁵ See Exhibits to Affidavit of Willman, Contracts for Purchase and Sale, ¶¶ 23.c.

identical contract and identical jury waiver). Waivers must be made “knowingly and voluntarily” to be valid. *Id.* (citing *Popular Leasing USA, Inc. v. Nat’l Restoration Sys., Inc.*, No. 4:04-CV-01629, 2005 WL 2033423, *2 (E.D. Mo. Aug. 23, 2005)). In the Sixth Circuit, the party seeking to avoid waiver bears the burden of proving that the lack of knowing and voluntary consent. *Id.* (citing *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985)).

Courts consider various factors to determine whether a party’s waiver was knowing and voluntary, including whether the waiver is on a standardized form agreement, font size and type, set off in a paragraph of its own, in a take-it-or-leave-it or negotiated contract, and the length of the contract. *Id.* The Eastern District of Missouri has found the execution of a contract containing the same waiver provision to be a knowing and voluntary waiver. *Id.* at *2-3 (preprinted, standardized, take-it-or-leave-it contract with waiver on reverse side did not bar enforceability; provision being separated in its own subparagraph under an unambiguous paragraph heading, and entire contract being two pages long all suggest valid waiver). The Court also considered and rejected arguments that execution of a contract with the same waiver provision was not a knowing and voluntary waiver based on the alleged unsophistication of the purchaser and alleged unequal bargaining power. *Id.*; *See also Advantage Windows, Inc. v. Zacarias*, No. E2014-00122-COA-R3-CV, 2014 WL 4403106, *4 (Tenn. Ct. App. Sept. 8, 2014) (contracting party presumed to have knowledge of contract’s contents).

In the present case, the Complaint makes no allegations with respect to the jury waiver provision in the Contracts for Purchase and Sale executed by Plaintiffs, much less the allegation that Plaintiffs did not knowingly and voluntarily waive a trial by jury. Accordingly, Defendant respectfully requests that this Court strike Plaintiffs’ jury demand pursuant to Fed. R. Civ. P. 12(f).

III. CONCLUSION

For the foregoing reasons, Westgate Resorts, Ltd., L.P. respectfully moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of all of Plaintiffs' claims, or in the alternative, a dismissal of the claims of Plaintiffs who did not purchase timeshare interests from Westgate Resorts, Ltd., L.P. In the alternative to dismissal of the Gatlinburg Purchasers' claims, Defendant respectfully requests that those claims be severed pursuant to Fed. R. Civ. P. 21 and tried separately and that Plaintiffs' jury demand be stricken pursuant to Fed. R. Civ. P. 12(f).

Respectfully submitted this 7th day of December, 2018.

**WOOLF, McCLANE, BRIGHT,
ALLEN & CARPENTER, PLLC**

By: s/Robert L. Vance

Robert L. Vance (BPR #021733)

Gregory C. Logue (BPR #012157)

Post Office Box 900

Knoxville, Tennessee 37901-0900

(865) 215-1000

Attorneys for Westgate Resorts, Ltd., L.P.

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/Robert L. Vance

Robert L. Vance, Esq., BPR #021733

WOOLF, McCLANE, BRIGHT,

ALLEN & CARPENTER, PLLC

Post Office Box 900

Knoxville, Tennessee 37901-0900

(865) 215-1000