UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LEONARD LEON, MELISSA MARLENE SANABIRA RODRIGUEZ AND RAMON SANTIAGO RODRIGUEZ TORRES, MATTHEW PAUL SCHWERI AND DURIA R. RODRIGUEZ SCHWERI, JAMIE HEINDL, AND JEANETTE ROTH, as individuals and on behalf of those similarly situated,

Plaintiffs,

v.

DISNEY DESTINATIONS, LLC, a Florida Limited Liability Company,

Defendant.
_______________________________________/

Civil Action No. 6:20-cv-1780-PGB-LRH

DISNEY'S MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT[1]

Disney Destinations, LLC ("Disney") respectfully moves to dismiss the complaint pursuant to Fed. R. Civ. P 12(b)(1) and 12(b)(6) and submits this memorandum of law in support of its motion.

I. INTRODUCTION

In March 2020, as the COVID-19 pandemic surged across the country, Disney closed its Orlando theme parks in an effort to help protect its guests, cast members, and local community. In the months that followed, Disney worked to develop health and safety-based protocols as part of its reopening plan, which was later approved by state and local officials. These protocols included, among other things, requiring masks be worn, lowering theme park capacity, and

[1] Disney timely filed this Motion to Dismiss in the prior *Leon v. Disney* matter, Case No. 6:20-cv-01227-PGB-DCI, which had been dismissed and closed by the Court. Disney is correcting this filing error by filing the Motion to Dismiss in the current *Leon v. Disney* matter, Case No. 6:20-cv-1780-PGB-LRH.

suspending offerings like fireworks and parades in order to promote social distancing. As part of this plan, Disney created a new reservation system and suspended Park Hopper privileges, which allow some guests to move from one park to another.

Disney proactively addressed the inconvenience and disruption this public health emergency was expected to cause its Annual Passholders by suspending monthly payments due while the parks were closed. Upon reopening, in light of the altered park experience, Disney gave Passholders the benefit of choosing whether to opt in and keep their annual passes with a complimentary one-month extension on top of the prior extension for the length of closure, or to opt out, cancel their passes, and receive refunds for any unused days on their passes.

Notwithstanding the pandemic, and Disney's diligent efforts, Plaintiffs opportunistically seek to capitalize on the altered COVID-19 world. They rushed to the courthouse—within a week of a one-time, inadvertent billing error that Disney promptly corrected—filing the first of their three meritless class action lawsuits against Disney.[2] Plaintiffs' current Complaint, plaintiffs' third and last remaining attempt, alleges that Disney deprived them of what they wrongly characterize as "guaranteed" access to its parks, Compl. ¶¶ 27, 46, 53, 60, 77, that they suffered "extreme financial hardship" from temporary holds on their accounts (due to the one-time, reversed billing error), *id.* ¶ 57, and that logistics associated with Disney's offer to cancel

[2] Their first complaint alleged, among other things, that Disney violated the federal Electronic Fund Transfer Act ("EFTA") on the basis of a one-time, temporary authorization hold placed on Passholder accounts. Compl., *Leon v. Disney Destinations, LLC*, 6:20-cv-1227 (M.D. Fla.), ECF No. 1 (July 10, 2020). Roughly a month later, counsel represented a different plaintiff who sued over concerns attributable to her late payments. Compl., *Heindl v. Disney Destinations, LLC*, 6:20-cv-01384 (M.D. Fla.), ECF No. 1 (Aug. 3, 2020). On the same day that Plaintiffs' counsel non-suited those two actions, they filed this third action, repeating most of the allegations from their prior complaints, but deleting references to EFTA in order to evade its safe harbor provisions. Compl., *Leon v. Disney Destinations, LLC*, 6:20-cv-1780 (M.D. Fla.) (Sept. 24, 2020), ECF No. 1-1.

their passes were "infeasible" and "provid[ed] no meaningful relief at all," *id.* ¶ 43. Their "gotcha" complaint is much ado about nothing. Plaintiffs' Complaint suffers from fatal pleading flaws and should be dismissed for the following reasons:

First, Plaintiffs do not allege injury sufficient for standing under Article III. During the park closure period, Disney suspended payments due from Annual Passholders, including Plaintiffs. Disney also offered every Annual Passholder the option of receiving a refund if they opted not to accept the new reduced-capacity operating conditions. These actions and offers, whether accepted or not by Plaintiffs, show that Plaintiffs have no economic injury. The reductions in park access that Plaintiffs have experienced are a result of social distancing conditions necessitated by the ongoing public health emergency and part of its reopening plans approved by state and local officials. Moreover, while Plaintiffs claim "stress and aggravation" and "mental anguish" resulting from a one-time billing error, no funds were transferred from their accounts, and Disney has already paid or offered to pay any bank fees or other harm caused by that error. Litigation cannot reasonably achieve for them any redress that Disney has not already offered.

Second, Plaintiffs do not plausibly allege any contractual breach. Although Plaintiffs claim their right to "guaranteed" access was taken away, they do not and cannot point to any part of the applicable contracts that actually provides them such "guaranteed" access. Their Passholder contracts say the opposite: they confer a limited license for Passholders to visit Disney theme parks, revocable at Disney's discretion. The applicable terms and conditions state that park access is *not* guaranteed and may be limited due to, among other factors, capacity limitations. These facts are similar to those in a recent decision resolving similar breach of contract claims brought against SeaWorld theme park, which had also curtailed operations due to

COVID-19. *Kouball v. SeaWorld Parks & Ent., Inc.*, No. 20-CV-870, 2020 WL 5408918, at *5 (S.D. Cal. Sept. 9, 2020). There, the court dismissed a complaint by park passholders who asserted they had been deprived of "unlimited access to the parks."

Third, Plaintiffs do not state a claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") because Plaintiffs do not and cannot point to any deceptive statement. Plaintiffs instead complain about "unfairness," yet allege facts that show Disney's conduct was fair, because it offered to cancel their passes and refund the unused value. Disney also responded to any billing errors by offering to reimburse any improper charges, as well as any bank fees, costs, and other harm.

Fourth, Plaintiffs cannot claim unjust enrichment where a contract is at issue; nor can they allege that Disney has been unjustly enriched when it refunded or offered to refund all payments that Plaintiffs could reasonably seek.

Fifth, the parks had to remain closed due to government orders and could not reopen until altered operating plans were approved by state and local officials. Therefore, the fulfillment of any obligation to allow access to Plaintiffs was rendered impracticable. A growing number of courts considering similar COVID-19 class actions have dismissed breach of contract claims on grounds that performance has been rendered impracticable by the COVID-19 pandemic.

Sixth, Plaintiffs' state law claims alleging improper electronic fund transfers are preempted because they directly conflict with the federal EFTA, which precludes liability for bona fide electronic billing errors that, like here, were corrected in compliance with the law.

For all of these reasons, this Court should dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

II. FACTUAL BACKGROUND

A. The Contracts Do Not "Guarantee" Plaintiffs Unfettered Access to Parks

Plaintiffs allege they have Annual Passes to Disney's theme parks, including Walt Disney World. Compl. ¶ 18. They repeatedly claim that their Annual Passes confer "guaranteed" access to Disney's parks. *Id.* ¶¶ 27, 46, 53, 60, 77. However, they do not cite or quote the contracts in which such guaranteed access is purportedly provided. The actual contracts, which are referred to by the Complaint and provided herein, conclusively refute these allegations.

Annual Passholders such as Plaintiffs agree to multiple contracts. Declaration of Sarah Sinoff ("Sinoff Decl.") at ¶ 2.[3] As summarized below, these contracts confer on Passholders only limited and revocable licenses to enter the parks under terms specified in each contract, which Plaintiffs appear to concede. *See, e.g.*, Compl. ¶ 77 ("Ms. Roth's access to Defendant's parks was guaranteed *if the park had not met maximum capacity* as that capacity was determined at the time of entering the contract." (emphasis added)).[4]

1. Annual Pass Terms and Conditions – Website

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[3] The Sinoff Declaration includes as exhibits the contracts entered into by Plaintiffs, which are integral to the Complaint, and written notices sent directly by Disney to Plaintiffs and/or publicly posted on Disney's website, which are referred to in the Complaint. On a motion to dismiss, the Court may consider "relationship-forming contracts" and other terms and conditions. *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010) (finding no error for district court to consider contract where contract was incorporated by reference into the complaint and central to Plaintiff's claim); *Maxcess, Inc. v. Lucent Techs. Inc.*, 433 F.3d 1337, 1340 (11th Cir. 2005) (permitting consideration of contract "central" to plaintiff's claim). A "document need not be physically attached to a pleading to be incorporated by reference into it." *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). The Court may also take notice of "documents central to plaintiff's claim whose authenticity is not challenged, whether the document is physically attached to the complaint or not, without converting the motion into one for summary judgment." *Porcelli v. OneBeacon Ins. Co*., 635 F. Supp. 2d 1312, 1315 (M.D. Fla. 2008) (internal cites omitted).

[4] The language "at the time of entering the contract" does not, in fact, appear in the relevant contracts. The fact that Plaintiffs misleadingly add language that is not there suggests they are aware they cannot prevail on the plain language of the contract.

The Terms and Conditions of Annual Passes on Disney's website, which are part of the purchase process, make clear that park access is not guaranteed. *See* Sinoff Decl., Ex. A ("Passes *do not guarantee* theme park admission, especially during high attendance periods. Admission to theme parks and availability of theme park parking are subject to capacity and other closures. Other restrictions apply." (emphasis added)).

2. Ticket Terms and Conditions

Printed on every ticket for entry provided to the Passholder—indeed on their annual passes themselves—are terms and conditions that summarize the terms of the conditional license granted by that ticket. *See id*., Ex. B (stating "[t]ickets are nonrefundable and revocable . . . Parks, attractions or entertainment may . . . close due to refurbishing, capacity, . . . or other reasons; and may otherwise change or be discontinued without notice and without liability to the owners of the Walt Disney World Resort").

3. Written Debit Authorizations

Annual Passholders who pay for their passes on a monthly basis, as these Plaintiffs do, sign written authorizations that also expressly acknowledge Disney's reservation of rights to revoke any "privileges," including access to the parks, "at any time without notice." *See id.*, Exs. C-G.

B. Disney Proactively Developed Health and Safety Protocols as Part of Its Reopening Plan, Which Was Approved by Florida Officials.

On March 15, 2020, the ongoing global pandemic forced Disney to close its Orlando theme parks. Disney's proactive closures were soon required by government orders, issued by the State of Florida and Orange County, Florida, which closed all non-essential businesses. *See*

id., Exs. K-L.[5] Over a few days in March 2020, COVID-19 did the once unthinkable; it shut down Walt Disney World.

The pandemic took an unprecedented toll on the health and well-being of people around the world. All of Disney's guests and cast members were affected by the closures. This certainly included Disney's Annual Passholders. However, Disney took steps to alleviate the financial impact on them. It suspended monthly payments due from Annual Passholders, including the Plaintiffs, who participated in Disney's automatic monthly payment program (those who paid monthly by debit or credit card rather than paying for the pass in full at the time of purchase). Compl. ¶ 31. Disney also proactively "extended [passholders'] annual passes for the duration of the shutdown." *Id.* ¶ 67.

Disney also worked tirelessly to find a responsible way to reopen, developing health and safety protocols that included requiring masks, reducing theme park and attraction capacity to enable social distancing, suspending offerings like fireworks and parades that attract crowds, enhancing cleaning protocols, and requiring temperature checks prior to entry. To facilitate appropriate physical distancing, Disney also created a new reservation system for park attendance and suspended Park Hopper privileges, whereby some guests move from one theme park to another on the same day. While Plaintiffs complain that these measures have reduced their access and enjoyment of the parks, the steps were undertaken in compliance with government orders that required a plan that "includes a proposed date for resumption of

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[5] The Sinoff Declaration includes publicly available government orders relating to theme park closures and reopening during the COVID-19 pandemic. A Court may take judicial notice of and consider public records that are attached to the motion to dismiss without converting the motion to dismiss into a motion for summary judgment. Such documents are "'not subject to reasonable dispute' because they [are] 'capable of accurate and ready determination by resort to sources whose accuracy [can] not reasonably be questioned." *Horne v. Potter*, 392 F. App'x. 800, 802 (11th Cir. 2010).

operations and proposed guidelines to ensure guest and staff safety."[6] State and local officials approved Disney's reopening plan.[7] Subject to these approvals, Disney reopened Magic Kingdom and Animal Kingdom on July 11, 2020 and Epcot and Hollywood Studios on July 15, 2020.

C. Disney Communicated The Park Changes and Offered Each Passholder the Option to Accept These Changes or Cancel Their Passes.

Because its reopening plan required changes to the park experience and reductions in park capacity, Disney informed its ticketholders and Annual Passholders of the anticipated changes well in advance of reopening. The notice told passholders that, because of the need to limit park capacity, park reservations may be limited or "difficult [] to get." Sinoff Decl., Ex. H. Plaintiffs admit that they received these notices. Compl. ¶ 35 (stating that Disney communicated that "pass benefits and features will not be available" and "park experiences and offering[s] will be modified and subject to limited availability or even closure"). Disney not only informed Passholders about the changes to the park experience, it *gave Annual Passholders the choice to either opt in to the changes or opt out and receive refunds for the unused value of their passes*. If Passholders opted in, they chose to keep their Annual Passes subject to the newly disclosed park changes and received a complimentary one-month pass extension. Sinoff Decl., Ex. H. If Passholders chose to opt out (a benefit not afforded in the contract), Disney would cancel their pass, would not bill them further, and would issue a refund of the unused portion of their pass. These choices provide Passholders all the relief to which they might legitimately be entitled.

Disney asked Annual Passholders to provide Disney with notice of their choice by

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[6] Sinoff Decl., Ex. M (subject to judicial notice under Fed. R. Evid. 201(b)).

[7] On May 29, 2020, the Florida Department of Business & Professional Regulation issued a letter approving the reopening plan for Walt Disney World Resort "based on the Department's review of the proposed safety guidelines." *See* Sinoff Decl., Ex. N (subject to judicial notice under Fed. R. Evid. 201(b)).

August 11, 2020. Compl. ¶ 40 (opt in/opt out period ran from "July 14, 2020 to August 11, 2020"). The one-month period gave Plaintiffs the opportunity to visit the parks at no further obligation to determine firsthand whether the necessarily-different operating conditions were satisfactory to them. Disney's public notice explained these options in detail, and Disney provided a dedicated contact line for Annual Passholders who may have had questions about their options. Sinoff Decl., Ex. H. Disney provided this information both on its website, *id.*, and, as Plaintiffs admit, by e-mail, Compl. ¶ 42.

D. Disney Quickly Corrected a One-Time Technical Billing Error.

Unrelated to the reopening, over the July 4th holiday weekend, there was a one-time technical, electronic billing error that affected Annual Passholders who paid monthly by credit or debit card. *Id.* ¶ 32. The Complaint alleges that this error resulted in the placement of electronic bank "holds" for the amount of monies unpaid by each Passholder during the period of park closure, which in some cases amounted to hundreds of dollars. *Id.* ¶¶ 27-28, 48, 55, 62, 66, 78. While alleging such "holds" were placed, Plaintiffs do not allege that any money was actually transferred from their accounts.

The Complaint does not mention that Disney immediately notified Annual Passholders affected by the billing error by e-mail: "some of our Passholders on the monthly payment program had authorization holds incorrectly applied to their accounts on July 3rd," apologized for the inconvenience, and explained that the "holds have been reversed and you should begin to see this reflected in your bank or credit card account over the next couple of days." *See* Sinoff Decl., Ex. I. Disney later updated Annual Passholders, informing them that any "holds have been reversed and the change should be reflected in your bank or credit card account at this time." *See id.*, Ex. J. Disney also provided Passholders with a dedicated contact line to request redress in the event that they "incurred bank fees or other harm as a result." *Id.*

Nevertheless, Plaintiffs allege that in "the first few days of July," "[A]nnual [P]assholders were shockingly and suddenly charged or had holds placed on their funds" by Disney. Compl. ¶ 32 (emphasis added). They do not allege, however, that any funds were actually transferred out of their accounts, even temporarily, or that they *lost* money that Disney did not already offer to compensate. *See, e.g.*, *id.* ¶ 74 (complaining of "stress and aggravation" due to error, but not actual loss of money). They do not allege Disney received any of the money subject to "holds." The Complaint admits that Disney informed "those customers who were wrongfully billed [that they] are eligible to receive reimbursement of any overdraft fees" or other harm. *Id.* ¶ 43. Plaintiffs fail to even allege that they incurred any bank or other fees or that, if they did, they availed themselves of Disney's offer to reimburse such fees.

III. LEGAL STANDARD

A Rule 12(b)(1) motion challenges subject matter jurisdiction. "Standing to bring and maintain a lawsuit is a fundamental component of a federal court's subject matter jurisdiction." *Torres v. Wendy's Co.*, 195 F. Supp. 3d 1278, 1281 (M.D. Fla. 2016) (Byron, J.) (citations omitted). Plaintiffs "bear[] the burden of proving standing, which requires a three part showing: (1) the plaintiff suffered or will imminently suffer an injury-in-fact; (2) a causal connection exists between this injury and the defendant's conduct; and (3) the plaintiff's injury is likely to be redressed by a favorable decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). In deciding its subject matter jurisdiction, the district court may consider evidence outside the pleading, including testimony and affidavits. *Kuhlman v. United States*, 822 F. Supp. 2d 1255, 1258 (M.D. Fla. 2011) (considering evidence beyond complaint where defendant argued "even if all the allegations in Plaintiff's complaint are true, this Court lacks subject matter jurisdiction to adjudicate Plaintiff's claims ...."); *Dapeer v. Neutrogena*

Corp., 95 F. Supp. 3d 1366, 1371-72 (S.D. Fla. 2015) (same).

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. To survive dismissal, Plaintiffs must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when Plaintiffs allege enough facts to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "When considering a Rule 12(b)(6) motion to dismiss, courts must accept all well pleaded factual allegations—but not legal conclusions—in the complaint as true. . . . [A]fter disregarding allegations that are not entitled to the assumption of truth, the court must determine whether the complaint includes 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Bele v. 21st Century Centennial Ins. Co.*, 126 F. Supp. 3d 1293, 1295 (M.D. Fla. 2015) (Byron, J.) (internal citations omitted) (dismissing in part)).

IV. ARGUMENT

We address the legal bases for dismissing the causes of action under either or both Fed. R. Civ. P. 12(b)(1) or 12(b)(6) below.[8]

A. Plaintiffs Lack Article III Standing.

1. Plaintiffs Have No Injury-in-Fact.

Plaintiffs have failed to allege facts showing that they suffered any concrete injury and therefore cannot satisfy the injury-in-fact requirement for Article III standing. To begin with, Plaintiffs have not alleged any economic losses that "went unreimbursed." *Torres*, 195 F. Supp. 3d at 1282 (dismissing FDUTPA and breach of contract claims for lack of Article III standing). As the Complaint demonstrates, Annual Passholders on the monthly payment plan did not pay

[8] To aid the Court, we attach Appendix A, which shows in tabular form the specific grounds for dismissal for each cause of action, organized by each putative class.

anything for their passes during the closure period. Compl. ¶ 31 (acknowledging that Disney "suspended the monthly auto-payments" for Annual Passholders "until the parks could reopen"). Disney has already offered to all Passholders (whether paid-in-full or paying by the month) refunds for any unused portions of their passes. *Id*. ¶ 40 (admitting that Disney gave Annual Passholders a choice to "cancel their annual passes"); *see also* Sinoff Decl., Ex. H. Thus, even if they have not claimed it, Plaintiffs have been offered refunds for any money they could legitimately claim to be entitled.

By suspending monthly payments and giving refunds for unused portions of passes, Disney mooted Plaintiffs' monetary claims. *Krzykwa v. Phusion Projects, LLC*, 920 F. Supp. 2d 1279, 1281 (S.D. Fla. 2012) (dismissing FDUTPA claims as moot where defendant offered to settle Plaintiffs' claims "in full"); *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 169 (Fla. 1st DCA 2015) (dismissing breach of contract claims as moot because "no further relief could be granted to [plaintiff] individually" based on defendant's waiver and agreement to pay attorneys' fees given relief as pled by plaintiff).

Florida courts have recognized that "[u]ndeniably, if a suit is moot, a plaintiff's claims cannot present an Article III case or controversy." *Krzykwa*, 920 F. Supp. 2d at 1281 ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake."). "Moot cases lie beyond judicial power because the case or controversy ceases to exist once the matter has been resolved." *Labora v. MCI Telecomm.*, No. 98-1073-CIV, 1998 WL 1572719, at *2 (S.D. Fla. July 20, 1998), *aff'd*, 204 F.3d 1121 (11th Cir. 1999) (citations omitted).

Likewise, Plaintiffs cannot show injury based on the temporary authorization holds that

took place over the July 4th weekend because Disney corrected the errors by reversing any holds so quickly that no funds were taken out of accounts, clearly communicated to Passholders that the holds had been reversed, and publicly offered to reimburse any fees or costs incurred as a result of the error.[9] Plaintiffs concede that Disney in fact already "refunded" any allegedly overbilled funds. Compl. ¶ 136. Disney's offer to pay overdraft or other bank fees—and even "other harm" associated with the billing error—similarly moots Plaintiffs' claims arising from this issue. *Whalen v. Michael Stores, Inc.*, 153 F. Supp. 3d 577, 581, 583 (E.D.N.Y. 2015) (holding no actual injury or monetary loss where the plaintiff experienced an attempted fraudulent charge on his credit card that was ultimately not approved), *appeal docketed*, No. 16–352 (2d Cir. Feb. 5, 2016); *Ramon v. Aries Ins. Co.*, 769 So. 2d 1053, 1055 (Fla. 3d DCA 2000) (finding claims were mooted where defendant discovered a billing error and immediately corrected error by prompt payment among other things).

Plaintiffs' Complaint acknowledges that "Disney has stated that those customers who were wrongfully billed are eligible to receive reimbursement of any overdraft fees," Compl. ¶ 43, and further offered to compensate for "other harm," Sinoff Decl., Ex. J. The Complaint does not allege that any class member rejected Disney's offer or even requested compensation for overdraft fees or other harm and was denied such reimbursement. Because Plaintiffs allege that Disney offered to compensate any alleged out of pocket monetary losses or overdraft fees relating to the one-time error, any unreimbursed damages referenced in the Complaint either have already been redressed or are an attempt to "manufacture standing merely by inflicting harm on themselves[.]" *Torres*, 195 F. Supp. 3d at 1284 (dismissing complaint even where

[9] Disney provides copies of relevant correspondence about the incident, which Plaintiffs acknowledge, Compl. ¶ 43, but fail to attach. *See* Sinoff Decl., Exs. I-J.

plaintiff alleged "out-of-pocket expenses" associated with inability to obtain money from account).

2. Plaintiffs' Alleged "Stress and Aggravation" and "Anguish" Are Not Cognizable Injuries.

Plaintiffs' allegations of "extreme financial hardship," "stress and aggravation," and "anguish" arising from temporary holds placed on their bank accounts (*e.g.*, Compl. ¶¶ 57, 120), which were reversed and never resulted in money being taken from them are not cognizable injuries for purposes of Article III standing. *Perret v. Wyndham Vacation Resorts, Inc.*, 846 F. Supp. 2d 1327, 1332 (S.D. Fla. 2012) (holding that "adjectival conclusions" not supported by facts do not set out concrete harm). Plaintiffs' "lack of any factual specificity" on its alleged harm warrants dismissal. *I Tan Tsao v. Captiva MVP Rest. Partners, LLC,* No. 8:18-cv-1606-T-02SPF, 2018 WL 5717479, at *2-3 (M.D. Fla. Nov. 1, 2018). Florida law does not recognize a cause of action for recovery of mental anguish for ordinary breaches of contract, even in cases of willful breach. *Henry Morrison Flagler Museum v. Lee*, 268 So. 2d 434, 436-7 (Fla. 4th DCA 1972); *see also Sheely v. MRI Radiology Network, PA*, 505 F. 3d 1173, 1203 (11th Cir. 2007) (holding that damages might only be available if emotional harm was particularly noteworthy or acute based on the nature of the contract, such as where contract is "personal in nature").

3. Plaintiffs' Alleged Injuries Due to Park Closure and Restrictions in Park Access Are Not Fairly Traceable to Disney.

Plaintiffs fail to allege any injury "'fairly traceable to the challenged action of [Disney], and not the result of the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560. Plaintiffs repeatedly concede that their limited ability to access the parks was "due to" COVID-19, Compl. ¶¶ 30, 67, as well as the resulting governmental actions. Disney's restricted capacity was a part of its reopening plan approved by state and local officials. *See supra* at 7, n.6. This precludes any finding that Disney was the sole or even primary cause of

their harm. *See Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1262 (11th Cir. 2011) (finding Plaintiffs failed to plead causation where they had not alleged Secretary caused Plaintiffs' injury). Because any alleged injuries relating to denial of access are attributable to government-mandated measures taken to respond to the COVID-19 pandemic and not Disney, they are not "fairly traceable" to Disney. *See also 8330 Tokyo Valentino, LLC v. City of Mia., Fla.*, 990 F. Supp. 2d 1327 (S.D. Fla. 2013).

4. Plaintiffs' Alleged Injuries Are Not Redressable by a Favorable Decision.

Plaintiffs also lack standing because their alleged injuries are not "likely to be redressed by a favorable decision." *Lujan,* 504 U.S. at 560. With respect to their monetary claims, Plaintiffs either experienced no harm, or Disney already offered all the monetary relief to which they might be legitimately entitled if they were to prevail. Plaintiffs have not alleged how an order of this Court would redress any already-remedied injury they claim to suffer. Plaintiffs may argue their contracts gave them the right to enter Disney parks at will, in unlimited numbers, and to access all attractions with no restrictions, but they fail to acknowledge that their licenses to enter the parks are expressly revocable, for *any* reason, including capacity limitations. Their passes by no means "guarantee" access, much less during a pandemic. They have failed to satisfy their burden of pleading redressability. *See, e.g.*, *Hollywood Mobile Estates Ltd.*, 641 F.3d at 1259 (finding no standing based on lack of redressability where plaintiff failed to "cite any authority that empowered the Secretary to act for the benefit of plaintiff").

B. Plaintiffs Fail to Plausibly Allege Breach of Contract.

Plaintiffs allege two different contract breaches. First, they allege that Disney breached its contracts with them by "severely restrict[ing]" "broad access" that they claim was "guaranteed" to them. Compl. ¶ 34. Second, they allege that Disney breached their contracts and

violated FDUTPA by virtue of "[d]efective [c]ancellation," claiming that Disney "continue[d] collection of payments from passholders who notified [Disney] they wished to cancel their contract" "*even if the overbilled funds were later refunded*." *Id.* ¶ 136 (emphasis added). Each of these fails to plausibly allege breach of contract.

1. Plaintiffs Were Never "Guaranteed" The Park Access They Claim.

Plaintiffs do not plausibly allege a breach of contract because the contractual language governing their admission to the parks does not "guarantee" them access, and in fact states the opposite. The language in their contracts and as part of the Terms and Conditions on Disney's website repeatedly make clear that "Passes do not guarantee theme park admission" and that parks, attractions or entertainment may close for "other reasons." *See* Sinoff Decl., Exs. A-B. This language put Annual Passholders on notice that the Disney parks may become too crowded and reach capacity, resulting in the inability for guests to visit during peak times.[10] It also warned Passholders that specific attractions may not be available, whether because of repairs, renovation, or other considerations.

Annual Passholders who elect to participate in the monthly payment program, like all of the plaintiffs here, also sign written authorizations that also acknowledge passes provide "pre-specified revocable privileges which may be changed or cancelled by [Disney] at any time without notice," and that Disney reserves the right to revoke any "privileges" for "other reasons." *See* Sinoff Decl., Exs. C-G. Thus, when Disney closed the parks, and then later reopened them in limited fashion with certain access restrictions in light of COVID-19, Disney not only acted as a responsible company, it exercised its clear contractual rights to do so.

[10] Plaintiffs' suggestion in the Complaint that the capacity limits were to be determined as of the time of entry into the contracts is illogical and unfounded, as Passholders are not apprised of park capacity limits prior to purchase. These capacity limits may vary over the year due to many factors.

In a similar case brought against SeaWorld alleging breach of contract for denial of access during the pandemic, another federal court dismissed Plaintiffs' claim that they were entitled to "unlimited access to the parks," holding that the relevant contracts did not support Plaintiffs' theory of breach: the contracts at issue stated that "[r]estrictions may apply. . . hours and services are subject to change or cancellation without prior notice." *Kouball*, 2020 WL 5408918; *see also Trowell v. S. Fin. Grp., Inc.*, 315 F. App'x 163, 165 (11th Cir. 2008) (affirming that plaintiff could not state a claim for breach of contract against defendant for not indemnifying plaintiff where the contract did not explicitly or implicitly contain such a right); *Kwok v. Delta Air Lines Inc.*, 578 F. App'x 898, 902 (11th Cir. 2014) (affirming that plaintiff failed to state a claim for breach of contract where there was no language in the contract to support plaintiff's claim that defendant violated its terms); *Robinson v. SunTrust Mortg., Inc.*, 785 F. App'x 671, 676 (11th Cir. 2019) (same).

2. Plaintiffs Do Not and Cannot Specify Which Contractual Provision Was Purportedly Breached.

In addition, Plaintiffs' breach allegations are implausible because they fail to cite to any contractual provisions that Disney supposedly breached. Instead, Plaintiffs repeatedly assert, without foundation, that the Passholder contracts "guarantee" them access to the parks. *See, e.g.,* Compl. ¶¶ 27, 34, 46, 53, 60, 77. On this basis alone, Plaintiffs' contract claims fail. *See Burgess v. Religious Tech. Ctr., Inc.*, 600 F. App'x 657, 664 (11th Cir. 2015) (affirming dismissal of breach of contract claims in class action that were based on "vague references" and failed to "identif[y] the contract provision that formed the basis of their claims" or attach a copy to the complaint); *Perret*, 846 F. Supp. 2d at 1331 (same). "It is appropriate to dismiss a breach of contract claim if it fails to state which provision of the contract was breached.'" *Timber Pines Plaza, LLC v. Kinsale Ins. Co.,* No. 15-CV-1821-T-17TBM, 2016 WL 8943313, at *2 (M.D. Fla.

Feb. 4, 2016) (citations omitted).

3. Impossibility, Impracticability, and Frustration of Purpose Bar Plaintiffs' Breach of Contract Claim.

Plaintiffs repeatedly concede that Disney "closed its parks *due to the COVID-19 pandemic*." Compl. ¶ 30 (emphasis added); *id.* ¶ 67 ("the Florida Disney theme parks [] shut down due to the COVID-19 pandemic"). In contemplating reopening, consistent with government orders, Disney submitted a proposal with health and safety protocols designed to promote physical distancing that included a reduction in theme park capacity and temporary suspension of certain events and attractions that create crowds. Sinoff Decl., Ex. M. Disney's proposed protocols, which were approved by state and local government officials, included changes to access that have rendered impossible, impracticable, and frustrated the purpose of the annual pass. *Id.*, Ex. N. A growing number of courts considering similar COVID-19 class actions have followed the reasoning articulated by a California federal court, which dismissed breach of contract claims against an airline whose "contractual obligation to provide carriage for plaintiff and other passengers was discharged because performance was rendered impracticable by the [COVID-19] travel ban." *Daversa-Evdyriadis v. Norwegian Air Shuttle ASA,* No. EDCV 20-767, 2020 WL 5625740, at *5 (C.D. Cal. Sept. 17, 2020); *see also Castanares v. Deutsche Lufthansa AG*, No. CV 20-4261-MWF (MRWx), 2020 WL 6018807, at *5 (C.D. Cal. Oct. 9, 2020); *Kouball*, 2020 WL 5408918, at *6.

4. When Plaintiffs Failed to Opt Out, They Ratified Disney's Operating Changes, Precluding Their Breach of Contract Claim.

Disney proactively offered its Passholders two options: opt in to revised (reduced capacity) operating conditions and receive pass extensions, or opt out and receive refunds for the unused values of their passes. *See* Sinoff Decl., Ex. H. Disney gave Passholders about a month in which to make this choice, affording them the opportunity to experience firsthand the revised

park operations. Passholders, who having been informed of these options and conditions, did not choose to opt out and cancel, but instead opted in to the new terms of the contract, are precluded from suing for breach.

Under Florida law, Plaintiffs ratify an amended agreement where they have "full knowledge of all material facts and circumstances relating to the unauthorized act or transaction at the time of the ratification." *Rodriguez v. State Farm Mut. Auto. Ins. Co.,* No. 13-21386-CIV, 2014 WL 11880987, at *2 (S.D. Fla. May 7, 2014) (plaintiff impliedly ratified the changes to insurance policy in the declarations pages sent to plaintiff); *Port Largo Club, Inc. v. Warren*, 476 So. 2d 1330, 1333 (Fla. 3rd DCA 1985) (ratification based on acceptance of consideration, communication with party relating to subject of contract, and setting date for closing).

Plaintiffs' Complaint repeatedly acknowledges that Disney informed them that there will be a "'limited capacity period' where it may be difficult for Annual Passholders to get park reservations . . . ," certain "pass benefits and features will not be available," and "park experiences and offerings will be modified and subject to limited availability or even closure." Compl. ¶ 35. Plaintiffs admit that they knew these additional restrictions were "due to the COVID-19 pandemic." *Id.* ¶ 67. If Plaintiffs objected to these COVID-19 mandated restrictions, they were told of their rights to cancel and could and should have done so. *Id.* ¶ 80. Plaintiffs who had knowledge of the altered conditions but chose to keep their passes, and even to visit the parks, ratified these altered conditions and are estopped from suing for breach of the ratified contract. *Sea-Land Serv., Inc. v. Sellan*, 64 F. Supp. 2d 1255, 1262 (S.D. Fla. 1999) ("Where a party accepts the benefits of a . . . compromise . . . and knows, or in the exercise of due diligence should have known, the facts concerning that settlement, the party ratifies the settlement by accepting the benefits whether the settlement was in the first instance authorized by him, and he

is thereafter estopped from attacking the settlement.”).

5. Plaintiffs’ Allegations of “Defective Cancellation” Do Not Plausibly Allege a Breach of Contract.

A second contract breach is alleged to have harmed one Plaintiff, Ms. Roth, who complains that Disney debited her bank account after she requested cancellation of her pass. Yet, she admits that Disney confessed that this was an error and had already offered her a complete refund. Compl. ¶¶ 80-87. She does not allege that Disney refused to process her cancellation request, that Disney’s cancellation process was designed to prevent cancellation, or that Disney refused to return any money that may have been billed after she expressed her desire to cancel. The cause of action thus fails as a matter of law because it fails to plausibly allege that any accidental “breach” was material or caused damages. *See, e.g.*, *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So.2d 253, 255 (Fla. 2d DCA 1994); *Abruzzo v. Haller*, 603 So.2d 1338 (Fla. 1st DCA 1992).

B. Plaintiffs Fail to Plead a Plausible FDUTPA Violation.

Plaintiffs allege Disney “failed to provide [A]nnual [P]assholders with access to the parks as was promised,” Compl. ¶ 101; that Disney offered Annual Passholders the opportunity to cancel their passes “so that no additional fees would accrue or be charged” but failed to do so, *id.* ¶ 111; and “charged or held” unauthorized amounts, *id.* ¶ 92. None of these allegations describe “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce” as required under FDUTPA. Fla. Stat. § 501.202(2); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006) (requiring causation and “actual damages” in addition to deceptive act or unfair practice); *see Vorst v. TBC Retail Grp., Inc.*, No. 12-CV-80013, 2012 WL 13026643, at *2 (S.D. Fla. Apr. 12, 2012) (defining “unfair practice” as “‘immoral, unethical, oppressive, unscrupulous or substantially

injurious to consumers'" and "decep[tive] [] practice" as one "'likely *to* mislead'" consumers). Plaintiffs have not plausibly alleged either deception or unfairness under the law.

First, Plaintiffs do not point to any deceptive statement. To the contrary, the Complaint admits that Disney provided Plaintiffs with clear notice of the altered park conditions and that they were aware that their Passes came with contractual conditions. The Complaint makes no allegation whatsoever that Disney *communicated* a false or deceptive claim of guaranteed park access. *See Berry v. Budget Rent A Car Sys., Inc.*, 497 F. Supp. 2d 1361, 1367 (S.D. Fla. 2007) (dismissing FDUTPA claim because charge at issue was clearly disclosed so there was nothing unfair or deceptive); *see also Vorst*, 2012 WL 13026643, at *2 (dismissing FDUTPA claims where fee was disclosed to plaintiff at time of purchase).

Second, Plaintiffs do not allege any facts to support the allegation that Disney's handling of these matters was "unfair." The allegations show the opposite. Disney proactively stopped collecting payments from Annual Passholders during the period of park closure. Before reopening the parks, Disney gave Passholders, including Plaintiffs, a choice of either (a) continuing to use their passes (with additional benefits such as pass extensions) or (b) canceling their passes and receiving pro-rated refunds. *See* Compl. ¶ 80 ("When [Disney] re-opened its parks, [Disney] offered to allow [A]nnual [P]assholders to cancel their memberships."). With respect to any billing errors alleged by the Complaint, the Complaint itself acknowledges that Disney has both apologized and offered to reimburse any associated fees, costs or charges. An "unfair" action that violates FDUTPA is one that "offends established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers . . . .." *Betts v. Advance Am.,* 213 F.R.D. 466, 482 (M.D. Fla. 2003). Disney's actions were not unfair. Plaintiffs' Complaint admits they suffered no monetary injuries.

C. Plaintiffs Fail to State an Unjust Enrichment Claim.

Plaintiffs' unjust enrichment claims fail because they "incorporate[] allegations concerning the existence of a contract between the parties." *Local Access, LLC v. Peerless Network, Inc.*, No. cv-236-Orl-40TBS, 2017 WL 7311872, at *3 (M.D. Fla. Dec. 22, 2017) (Byron, J.) (granting motion to dismiss unjust enrichment claims that were essentially duplicative of breach of contract claim); *see also Diamond "S" Dev. Corp. v. Mercantile Bank,* 989 So. 2d 696, 697 (Fla. 1st DCA 2008) (same). Even pled in the alternative, Plaintiffs' unjust enrichment claims are based on the same subject matter and same facts in support of its breach of contract and FDUTPA claims. *Cf.* Compl. ¶ 138 (claiming Plaintiffs conferred benefit on Disney from annual pass fees); *id.* ¶ 128 (claiming Plaintiffs conferred benefit on Disney in the form of "money paid to have access to [Disney's] parks on specific terms"). Thus, they fail for the same reasons discussed above.

In addition, Plaintiffs—not Disney—received benefits conferred upon them that were outside of their contract—namely, the ability to cancel their passes and receive refunds. *Gov't Employees Ins. Co. v. KJ Chiropractic Ctr. LLC*, No. 12-c-1138-Orl-40, 2014 WL 12617573, at *2 (M.D. Fla. Aug. 5, 2014) (Byron, J.) (granting motion to dismiss unjust enrichment claims where plaintiff failed to allege benefit was directly conferred on defendant); *Steven L. Steward & Assocs., P.A. v. Tr. Bank*, No. 20-cv-1083-Orl-40, 2020 WL 5939150, at *3 (M.D. Fla. Oct. 6, 2020) (Byron, J.) (same). Plaintiffs have not identified any funds that they paid to Disney that were unjustly retained by Disney or which Disney has unjustifiably refused to refund.

D. Plaintiffs' Claims for "Unauthorized Billing" Are Preempted.

It is telling that Plaintiffs originally attempted to plead a cause of action under the federal EFTA, but have now reframed that allegation as a state law tort claim arising out of temporary charges or "holds" placed on their accounts by Disney. *See supra* at 2, n.1. However, they

cannot avoid the conflict preemption that their reframed complaint poses with EFTA. 15 U.S.C. §§ 1693q (contemplating preemption of state laws "to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency"); *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (recognizing "federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law").

EFTA facilitates our country's entire electronic funds transfer system. 15 U.S.C. § 1693(a). It includes protections for consumers from "unauthorized electronic fund transfers" by merchants and banks to their bank accounts, *id.* (noting "the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers"). While it penalizes "unauthorized electronic fund transfers," it excludes from those penalties any "unauthorized" transaction that is the product of a "bona fide error." 15 U.S.C. §§ 1693(a)(12). Provided "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error[,]" they are excused from liability. 15 U.S.C. § 1693m(c).

Courts repeatedly have found no liability for "unauthorized transfers" resulting from "bona fide errors." *See, e.g.*, *Singer v. EIntelligence, Inc.*, 55 F. Supp. 3d 1043, 1051 (N.D. Ill. 2014) (EFTA liability precluded by bona fide error defense); *Cohen v. Cap. One, N.A.*, 921 F. Supp. 2d 107, 110 (S.D.N.Y. 2013) (same); *Sherrill v. RaceTrac Petroleum, Inc.*, No. 10-CV-690, 2012 WL 13006049, at *4 (E.D. Tex. Sept. 30, 2012) (same); *Wheeler v. Fitness Formula, Ltd.*, No. 18 CV 582, 2018 WL 5981849, at *3 (N.D. Ill. Nov. 14, 2018) (same).

The Complaints' allegations regarding Disney's one-time billing error demonstrate that this was a "bona fide error." *See* Compl. ¶ 70 (admitting Disney informed Ms. Heindl that the "charge was made in error and that [she] would be reimbursed"); Sinoff Decl., Ex. I (apologizing

for the error that resulted in "authorization holds incorrectly applied to their accounts on July 3rd"); *id.*, Ex. J ("We want to extend our deepest apologies to the Annual Passholders that were affected by the error . . ."). The Complaint does not allege that Disney failed to take immediate action to correct the error. It acknowledges that the error may only have resulted in temporary "holds placed on their funds" and nothing more. Compl. ¶ 32.

While it is clear that Disney would not be liable under the EFTA because it followed EFTA requirements to correct the bona fide error, Plaintiffs attempt to impose state liability for this same conduct. Plaintiffs are apparently well aware of this conflict, having previously pled their first two class actions under the EFTA for this same error. By asserting entitlement to unknown additional remedies, Plaintiffs' Complaint subverts the careful error remediation and compensation scheme set forth in EFTA, a law that is designed to foster interstate electronic commerce, and which benefits consumers such as these who have provided their debit cards to facilitate automated monthly payments.

CONCLUSION

For the reasons outlined above, this Court should grant Disney's motion to dismiss Plaintiffs' Complaint.

Dated: December 7, 2020

Respectfully submitted,

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