IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JASON AND DEBRA OBESTER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 11-3190-CV-S-RED**
	)	
BOUTIQUE HOTEL DEVELOPMENT COMPANY LLC, d/b/a HILTON PROMENADE AT BRANSON LANDING, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is a Motion to Dismiss Plaintiff's Amended Complaint (Doc. 18) filed by counsel for Defendants Boutique Hotel Development Company, L.L.C. d/b/a Hilton Promenade at Branson Landing, Promenade Development Company, L.L.C., Hilton Worldwide, Inc., HCW, L.L.C., BLR Downtown Realty, L.L.C., The Branson Landing Master Association, Inc., HCW Management Consultants, L.L.C., and HCW Development Company, L.L.C. (collectively the "Defendants"). For the reasons below, the Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

INTRODUCTION

Plaintiffs[1] filed this case against Defendants concerning the purchase by Plaintiffs of

[1]The plaintiffs include: Jason and Debra Obester, Greg and Stephanie Smith, Gus and Tracey Skinner, Charles J. Pozimbka, Hunter-Tunnell Branson Investments, LLC and Elaine Bastl, Shirk Living Trust, by Craig and Linda Shirk Trustees, Don and Norma Smith, Allen D. And Patricia L. Millen Family Trust, by Allen D. And Patricia L. Millen, Brandon Landing Condo, LLC, Douglas A. And Dorothy A. Kuehl, LLC, Timothy F. And Beverly A. Grimm Living Trust, by Timothy F. And Beverly Grimm Trustees, Robin and Diane Renner, Roger and Tonah Eberhart, Schlueter Rentals, LLC, Braad and Sherry Foster, David and Deborah Lee Wu, Dana G. Alton Revocable Trust, by Dana G. Alton Trustee, Charles and Teresa Davis, Cynthia Emmert, Dennis and Malia

condominiums at the Branson Landing Hilton Promenade Boutique Hotel, through the Promenade Development Company, L.L.C. Although the parties dispute how the rental program was advertised to Plaintiffs, it is clear that upon purchasing a condominium at the Hilton hotel, the owner, although not mandatory, could participate in a rental program with the Boutique Hotel Development Company, L.L.C., d/b/a Hilton Promenade at Branson Landing, wherein the unit would be rented out and the owner would receive a portion of the rent as profit. Plaintiffs claimed that in marketing the condominiums, Defendants omitted material facts and also represented that the units would "generate a substantial amount of revenue to each purchaser." (First Amended Complaint Doc. 15 ¶ 5). Plaintiffs also claim that Defendants failed to accurately represent that approximately half of the units in the hotel were not being sold and that these un-sold units would be rented to the public at significantly cheaper rates than the owned units. Finally, Plaintiffs argue that the manner in which the rental revenue and costs associated to the units in the rental program would be split between

---

Antonio, Gary and Kathleen Sortino, TMF, LLC, Richard and Nancy Parker, J. Dale and Anita Burnes, Nathan and Janet Courtwright Revocable Trust, by Nathan and Janet Courtwright Trustees, Shirley Christian Revocale Living Trust Agreement, by Shirley Christian Trustee, Garry and Barbara Gordon, John and Patricia Adolf, Be McCarty; CJ McCarty 1991 Family Trust by Billy and Carol McCarty Trustee, Gregory and Suzanne Borganelli, Richard and Dona Gordon, Frost Family Trust by Jon R. Frost Trustee, Warren and Cynthia Chase, LJM Group, LLC, Michael and Cecilia Mahaney, John and Susan Lewallen, L & S Rentals, LLC, Robert and Virginia Ziegler, Donald and Constance Powles, George and Sue Gress, H. Leroy and Marjorie Minatre, Wayne and Dorcas Folmer, Albert and Karin Dalkey, Jeffrey and Lenore Lupa, Fox Investments, LLC, Steadfast Enterprises, Inc., Carole Rosen, Reagan and Angela Cupples, Robin and Georgia Schledorn, Frank and Jacqueline Friedlein, Brad Scott, Martin and Susan Merrick, Phaeton Classic Properties, LLC, KD Properties, LLC, Diane P. Starkey Trust, by Diane P. Starkey Trustee, RK Tremblay Investments, LLC, William and Catherine Wurster, Promenade Properties, LLC, Karen and Franz Rowland, RW Investments, LLC, Adolph M. And Thelma E. Bundrick Joint Revocable Living Trust, by Adolph M. And Thelma E. Bundrick Trustees, Brad Clawson and Judy Mullen-Clawson, Athony Pinner, David and Kelly Thomas, Stan and Sylvia Young, Sherialyn Byrdsond, ImHoff Family, LLC, Perry and Lana Ryburn, Albert Selbee, LLC, Branson Promenade Condominium, LLC, Robert and Yvonne Helstrom, Christina Spengler, Antonios Hoan Seng and Lian K.P. Tan (collectively the "Plaintiffs").

Plaintiffs and Defendants, and the occupancy and rental rates that would be derived from the condominiums pursuant to the rental program, were inaccurately represented to them.

Pursuant to these facts, Plaintiffs filed their First Amended Complaint ("Amended Complaint") against Defendants, which contains 13 counts. In response, Defendants filed their Motion to Dismiss seeking the dismissal of these claims.

STANDARD OF REVIEW

When the Court reviews a motion to dismiss, it must "take[] all allegations in the complaint as true and draw[] all reasonable inferences in favor of the non-moving party". *O'Neal v. State Farm Fire & Cas. Co.*, 630 F.3d 1075, 1077 (8th Cir. 2011).

DISCUSSION

Initially, the Court notes that Defendants have attached several exhibits to their Motion to Dismiss and they argue that consideration of the exhibits does not convert their motion into one for summary judgment. Plaintiffs do not argue otherwise. The rule is that the court may consider " 'materials that are 'necessarily embraced by the pleadings' " even if the materials were not originally attached to the pleadings. *Little Gem Life Scis., LLC v. Orphan Med., Inc.*, 537 F.3d 913, 916 (8th Cir. 2008) (quoting *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)). As it is not in dispute, Defendants exhibits will be considered.[2]

1. Plaintiffs' federal and securities fraud claims should be dismissed (Counts I-V)

---

[2] Plaintiffs filed a motion seeking to exclude Defendants' exhibits 5 and 7 on different grounds, and Defendants filed a motion seeking to exclude all of Plaintiffs' exhibits, which were both denied. The Court will rely on Defendants' Exhibit 5 because it is a useful summary of the dates when Plaintiffs purchased their condominiums and/or entered into the rental program and the Court also took into consideration the exhibits submitted by Plaintiff. Defendants' Exhibit 7 was not considered.

The first issue the Court must address is whether the condominiums sold to Plaintiffs qualify as "investment contracts"[3] as defined in 15 U.S.C. § 77b(a)(1), as both parties have selected this particular term under § 77b(a)(1) as the controlling definition of a security in this case. As both parties also recognize, the United States Supreme Court has established a test in order to determine whether a particular transaction qualifies as an investment contract. *See SEC v. W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946). The Eighth Circuit has recognized, under the test set forth in *Howey*, that an "instrument is a security if (1) there is an investment of money, (2) in a common enterprise, (3) with the reasonable expectation of profits, (4) to be derived from the entrepreneurial or managerial efforts of others." *Great Rivers Co-op of Se. Iowa v. Farmland Indus., Inc.*, 198 F.3d 685, 700 (8th Cir. 1999). Defendants challenge the second, third and fourth elements set forth above.

With respect to whether there is a common enterprise or an expectation of profits from the efforts of others, Defendants argue these elements are not met because Plaintiffs, not defendants, controlled the condominiums after they were purchased, and several documents signed by Plaintiffs advised them that "participation in any rental program is not mandatory and that [Plaintiffs] may choose to enter the rental program of [their] [own] volition now or at a later date ..." (Purchaser's Acknowledgment ¶ 7).

Plaintiffs' main contention is that all of the documents and representations made by Defendants must be viewed together and when viewed together, they argue it is clear that

---

[3] The Court notes that the definition for a security under the Missouri Securities Act of 2003 also uses the language "investment contract" and uses the precise language recognized in *Howey* by the Supreme Court in order to further define an investment contract. Mo. Rev. Stat. § 409.1-102(28)(D). Plaintiffs raise no objection to the use of the same standards in analyzing the federal and state securities fraud claims.

Defendants were not offering merely a sale of condominiums, but rather were offering an investment opportunity through their rental program. Plaintiffs' position is similar to an *amicus* brief filed by the Securities and Exchange Commission ("SEC") in a case currently pending on appeal before the Ninth Circuit.[4] In *Salameh v. Tarsadia Hotels*, No. 09CV2739 DMS, (CAB), 2011 WL 1044129 (S.D. Cal. Mar. 22, 2011), the district court found that the sale of the hotel condominiums were not securities. The SEC took issue with the district court's determination and in the *amicus* brief, argued that the district court relied too heavily on the language contained in the contracts, thereby failing "to appreciate the broader realities underlying the arrangements between the parties." (SEC Amicus Brief p. 11). As the SEC maintains, "in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (citing *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298 (1946)). The SEC argued that the district court erred by relying too heavily on the contractual language between the parties, because it failed to consider the economic reality of the situation. *See Davis v. Metro Prods., Inc.*, 885 F.2d 515, 524-25 (9th Cir. 1989) ("It is well established that courts look beyond contractual language to economic realities in determining whether a transaction is an investment contract."). *See also Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918, 922 n.6 (4th Cir. 1990) (recognizing that "limiting the examination to the contract itself would provide an easy loophole through which sellers could circumvent federal securities laws"). The SEC noted that the Rental Management Agreement between the parties created a "revenue-sharing arrangement for each participating room between [the sellers] and the unit owner," the owners were led to expect profits from the sellers' efforts, because the owners did not have "any

---

[4] Plaintiffs have provided the Court with the SEC's *amicus* brief.

meaningful control over their rooms," which was reserved for the sellers. (SEC Amicus Brief p. 15-16). Finally, the SEC found it significant that the owners could only use their rooms no more than 28 days per years, and the stated purpose for selling the units "was to operate a functioning, economically viable hotel." *Id.* at 13. The SEC determined that the district court placed undue significance on the fact that the Rental Management Agreement and sale of the hotel condominiums occurred on different dates because the hotel was under construction when the units were sold.

Plaintiffs raise these same arguments in this case. They argue that the rental program was a key selling point in purchasing their condominiums and entering into the rental program was not presented as optional. Plaintiffs also point out that Hilton had the exclusive right to provide the hotel and resort services, placed restrictions on Plaintiffs' if they *were* to enter into the rental program (including the length of a rental or lease term), and prohibited them from conducting any maintenance on their units or modifying the interior or exterior of their units. (Declarations Defendants' Ex. 8A ¶¶ 3.3, 3.5, 5.1). Plaintiffs also focus on the manner in which Defendants have advertised the sale of the condominiums. Finally, Plaintiffs argue that they do not have "the interest, background, expertise or willingness to manage their hotel room on their own" and the "sole reason for each Plaintiff's purchase was to enroll their unit or units in the rental program by signing the UMA ..." (Suggestions in Opposition Doc. 26 p. 10).

The Court first notes that with respect to the common enterprise element, the circuits disagree on what is sufficient to satisfy this element. *See Wals v. Fox Hills Dev. Corp.*, 24 F.3d 1016, 1017-18 (7th Cir. 1994) (noting a circuit split on the issue). Some courts require that the enterprise contains vertical commonality, which focuses on the relationship between the purchaser and the seller of the alleged security. *Sias v. Herzog*, No. 04-3832-JNE/JSM, 2006 WL 2418950, at *8 (D. Minn. Aug. 21, 2006). Within the circuits that require vertical commonality, some circuits require strict vertical commonality, whereas other circuits require broad vertical commonality. *Id.* Broad vertical commonality is satisfied where "the fortunes of the investors [are] linked [] to the *efforts* of the promoter," whereas strict vertical commonality "requires that the fortunes of investors be tied to the fortunes of the promoter." *Id.* In contrast, some circuits require horizontal commonality, which focuses on the purchasers of the securities and requires a "pooling of interests among the investors." *Id.* The Eighth Circuit has not addressed whether vertical or horizontal commonality, or both, are required under the common enterprise element. *Id.*

Turning to the issue of vertical commonality, if the Court were to rely solely on vertical commonality, it would be difficult to determine that either strict or broad vertical commonality exists where the company that sold the condominiums was not the same company that entered into the rental agreements with Plaintiffs. If the Court were to overlook that fact, it is clear that the company that entered into the Unit Management Agreements ("UMA"), the Boutique Hotel Development Company, L.L.C. d/b/a Hilton Promenade at Branson Landing, was to share the profits obtained through the program with the individuals participating in the program.

What is more certain is that horizontal commonality clearly does not exist, because it requires a "pooling of interests among the investors." *Id.* (quoting *Top of Iowa Co-op v. Schewe*, 6 F. Supp. 2d 843, 852 (N.D. Iowa 1998)). As Defendants note, the UMA specifically states that there would not be any pooling agreements and Plaintiffs do not allege to the contrary. A lack of horizontal privity weighs against a finding that Plaintiffs were sold securities.

Finally, concerning whether there was a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others, it is clear that these elements are not met because

Plaintiffs were not required to participate in the rental program. Plaintiffs could choose not to rent out their condominiums or could choose to rent out their condominiums on their own without participating in the rental program. Although Plaintiffs try to argue that participation in the rental program was required and have attached a newspaper article wherein the chief executive officer of HCW Development Company was quoted as saying that participation in the rental program was mandatory, Plaintiffs do not cite to any specific representation wherein they were told that they were required to participate in the program. In fact, a review of the advertisements contained on the bransonmissourirealestate.com website and the hcwdevelopment.com website about the condominiums, which Plaintiffs have included as exhibits, do not reveal any representations that participation in the rental program was mandatory. One such representation, attached as Plaintiffs' Exhibit 5 (Doc. 26-5) specifically states that a purchaser could live in his or her condominium or let Hilton Hotels manage it. Moreover, three documents signed by Plaintiffs, consisting of a Promenade Rental Program General Summary and Commonly Asked Questions document (Defendants' Ex. 2) and the Purchaser's Acknowledgement (Defendants' Ex. 3A) and the UMA (Defendants' Ex. 4), all clearly state that participation in the rental program is not mandatory. Thus, these elements strongly weigh against a finding that the sale of the condominiums were securities.

Finally, the Court does not find the brief filed by the SEC to be persuasive in this case, because the facts involved in *Salameh* are distinguishable from the facts in this case. In *Salameh*, the purchasers were restricted to using "a rental program operated or approved by [the seller]" and the hotel rooms, due to a San Diego zoning requirement, were to "be sold for non-residential use and at all times ... be managed as part of the Hotel." (Plaintiffs' Ex. 1 p. 5, 12 (internal quotations and citations omitted)). Notably, the rooms at issue in *Salameh* did not have any kitchens. *Id.* at 5. As

Defendants note in their reply, in contrast to the facts of *Salameh*, there is no limitation on the number of days that an owner of condominium could stay in the unit, it is fit for residential use and importantly, an owner could choose to rent the condominium on his or her own, rather than participating in the rental program.

For the reasons above, the Court finds that the sale of the condominiums were not securities and therefore, Counts I-V should be dismissed.

2. The federal and state law fraud claims are not adequately pled (Counts VI-X)

Defendants' second challenge to certain claims set forth in the Amended Complaint are that the fraud claims, both state and federal claims, are not adequately pled. Because the Court has already found that Counts I-V should be dismissed, the Court will not address whether these claims (Counts I-V) are adequately pled.

Concerning the state law claims, Defendants argue that "all state law claims must be dismissed" by citing to a district court opinion recognizing that "Rule 9(b)'s particularity requirements apply with equal force to state consumer fraud statutes as they do to common law fraud claims." *Khaliki v. Helzberg Diamond Shops, Inc.*, No 4:11-CV-00010-NKL, 2011 WL 1326660, at *2 (W.D. Mo. Apr. 6, 2011). Plaintiffs do not object to the application of Rule 9(b) to their state law claims. Other district courts have agreed with Defendants' position and have applied Rule 9(b) to a majority of Plaintiffs' state law claims. Specifically, Rule 9(b) has been applied to claims under states' Uniform Securities Acts. *See McGraw v. Wachovia Sec., LLC*, No. 08-CV-2064-LRR, 2009 WL 2949290, at *6 (N.D. Iowa Sep. 10, 2009) (citing cases and applying Rule 9(b) to a claim under Iowa's Uniform Securities Act). Furthermore, several district courts in Missouri have applied Rule 9(b) to claims under the Missouri Merchandising Practice Act ("MMPA"). *See Khaliki*, 2011 WL

1326660 at *3 (citing cases). Finally, courts have also applied Rule 9(b) to claims for fraudulent and negligent misrepresentation. *See Trooien v. Mansour*, 608 F.3d 1020, 1028 (8th Cir. 2010) (noting that Rule 9(b) applies to negligent misrepresentation claims); *Akers v. RSC Equip. Rental, Inc.*, No. 4:09CV2022 HEA, 2010 WL 2757284, at *5 (E.D. Mo. July 12, 2010) (applying Rule 9(b) to a fraudulent misrepresentation claim); *Harvey v. CitiMortgage, Inc.*, No. 4:10CV551 TIA, 2011 WL 1226973, at *6 (E.D. Mo. Mar. 29, 2011) (applying Rule 9(b) to a fraud in the inducement claim); *Ariel Preferred Retail Group, LLC v. CWCapital Asset Mgmt.*, No. 4:10CV623SNLJ, 2011 WL 4501049, at *8-9 (E.D. Mo. Sep. 28, 2011) (applying Rule 9(b) to a fraudulent concealment claim). However, Plaintiffs' claims for breach of a fiduciary duty (Count XI), violation of the Missouri Uniform Condominium Act ("MUCA") (Count XII), and breach of contract and unjust enrichment (Count XIII) are not subject to Rule 9(b), in the absence of any authority for holding these non-fraud claims subject to a heightened pleading standard, and should not be dismissed on this basis.

After review, it is clear that these claims are not adequately pled. Rule 9(b) requires that the "who, what, where, when, and how" are identified in the complaint. *United States ex rel. Costner v. URS Consultants, Inc.*, 317 F.3d 883, 888 (8th Cir. 2003). Plaintiffs' Amended Complaint falls well below this requirement for several reasons. First, the claims lump all defendants together rather than identifying the conduct of each defendant. This is insufficient, as Defendants are separate entities. In Plaintiffs' response they argue that Defendants are single use entities under the umbrella organization HCW Development Company, LLC and the defendants are either parties to the documents signed by Plaintiffs or are "tangential" to them. (Suggestions in Opposition Doc. 26 p. 12). However, Plaintiffs could attempt to explain how these entities are related, how the representatives are affiliated with each defendant or otherwise attempt to address this deficiency. Second, ¶ 104 of the Amended Complaint states that all Plaintiffs were subjected to the "same or similar" circumstances as the few Plaintiffs the Amended Complaint seeks to specify in more detail. This is also insufficient, especially in light of the fact that even among the fraud claims that are enumerated, different representatives are mentioned with respect to each plaintiff. Finally, dates are not given with respect to these representations, as Plaintiffs are only able to provide that before they purchased their condominiums, the fraud occurred. At a minimum, Plaintiffs should be required to identify what the fraud was with respect to each plaintiff, who put forth the misrepresentation or who was responsible for the omission and when these acts or omissions occurred.

However, rather than dismiss claims VI-X, the Court will allow those plaintiffs who are within the statute of limitations time to amend their claims, as long as they can allege fraud claims based on past or existing facts as opposed to future predictions.

3. Plaintiffs' claims for fraudulent misrepresentation, negligent misrepresentation, fraud in the inducement and fraudulent concealment (Counts VII-X) cannot be based on representations concerning future predictions

Defendants first argue that Plaintiffs' cannot establish the reliance element for these claims, but in support they misquote a Missouri Court of Appeals decision in support of the notion that "[r]eliance on fraudulent representations is unreasonable as a matter of law where the alleged misrepresentations contradict the express terms of a written agreement." (Supporting Suggestions Doc. 19 p. 15). Defendants cite to *Midwest Energy, Inc. v. Orion Food Sys., Inc.*, 14 S.W.3d 154, 164 (Mo. Ct. App. 2000), however upon review of the case it is clear Defendants are citing the partial concurring and dissenting opinion of Judge Lawrence G. Crahan. Absent any contrary authority or reason to the contrary, the Court elects to follow established law that "[i]n Missouri, in an action for fraud, it is for a jury to decide whether a party is entitled to rely on verbal representations that conflict with a written agreement." *Slone v. Purina Mills, Inc.*, 927 S.W.2d 358, 373 (Mo. Ct. App. 1996).

Defendants also challenge that to the extent Plaintiffs' fraud claims concern what was represented as anticipated occupancy and estimated rental rates, these representations cannot form the basis for their claims. Defendants rely on *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, No. 04-3421-CV-RED, 2006 WL 3825103, at *2 (W.D. Mo. Dec. 21, 2006), wherein this Court recognized that " '[p]redictions and projections regarding the future profitability of a business or investment cannot form a basis for fraud as a matter of law.' " *Id* (quoting *Arnold v. Erkmann*, 934 S.W.2d 621, 627 (Mo. Ct. App. 1996). This is because fraud must be based on "a past or existing fact," not future predictions. *Arnold*, 934 S.W.2d at 626-27. Plaintiffs sole response to this allegation is that *Bath Junkie* dealt with "a franchise store to be run by a franchisee," whereas in this case Plaintiffs do not have any "control over the income potential or success of the enterprise." (Suggestions in Opposition Doc. 26 p. 13).

It is clear that Plaintiffs' distinction is not significant because it is not the type of case, rather the kind of representation that is made, that controls the issue. Defendants allege that Plaintiffs' fraud claims are insufficient because they concern projections related to the rate of occupancy and rent. These are precisely the types of representations that, as a matter of law, cannot support a claim for fraud. Plaintiffs are advised that they cannot rely on these types of representations as supporting their claims if they choose to amend their complaint.

For Defendants' final argument, they argue that Plaintiffs cannot maintain their fraud claims because they signed the CPA after the misrepresentations took place. In support, they once again misrepresent a court's opinion. Defendants refer to *Anselmo v. Mfrs. Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985) for the proposition that a "valid fraud claim is relinquished when the victim of the fraud enters into a subsequent agreement with the alleged perpetrator concerning the same subject matter." (Suggestions in Support Doc. 19 p. 16). What *Anselmo* actually recognizes is that once a plaintiff is made *aware* of a fraud and then subsequently signs an agreement with the alleged perpetrator concerning the same subject matter as the fraud, the plaintiff waives a claim for damages regarding the fraud. *Id.* Therefore, Plaintiffs' state law fraud claims are not improper because Plaintiffs signed their CPAs after the alleged misrepresentations and omissions were made. As noted above, Plaintiffs will be allowed to amend their claims assuming they are within the statute of limitations and can adequately plead their claims.

4. Plaintiffs' claim alleging an unlawful practice under the MMPA (Count VI) should not be dismissed due to a lack of causation

Defendants maintain that Plaintiffs' claim under the MMPA must be dismissed because the causation element is not satisfied. They argue that Plaintiffs cannot show that Defendants' actions caused a loss to them, because the damages arose after Plaintiffs entered into their respective CPAs which acknowledged that the sale of the condominiums were not investment opportunities. Defendants cite to no authority supporting this proposition and only rely on a case establishing that a claim alleging an unlawful practice must be based on a loss that is the "result of the defendant's unlawful practice." *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 714 (Mo. Ct. App. 2009).

Defendants have not met their burden establishing why Count VI should be dismissed on this basis. They cite to no authority establishing that as a matter of law, Plaintiffs cannot show that Defendants' alleged misrepresentations and omissions did not cause a loss to Plaintiffs merely because their CPAs represented that the sale of the condominiums were not investment opportunities. Therefore, dismissal is not appropriate under this basis.

5. Plaintiffs' breach of fiduciary duty claim under Count XI should be dismissed because the agreement between the parties did not create a fiduciary relationship

Defendants argue that no fiduciary duty relationship arises between them and Plaintiffs arising out the UMA because merely entering into a contract does not create a fiduciary relationship between the contracting parties. In response, Plaintiffs note that a real estate agent and the agent's client have a fiduciary relationship. *Lafarge North Am., Inc. v. Discovery Group L.L.C.*, 574 F.3d 973, 983 (8th Cir. 2009). Plaintiffs maintain that a fiduciary relationship exists because the plaintiffs purchased their units from Defendants "either directly or through Defendant's real estate company in which Defendants benefitted from the transaction." (Suggestions in Opposition Doc. 26 p. 15).

Upon consideration, the Court finds that Count XI should be dismissed because Plaintiffs' fiduciary duty claim focuses on the fact that Plaintiffs and Defendant have a fiduciary relationship resulting from the purchase of the condominiums and because of the rental and management of their units as part of the rental program. The facts of this case are akin to *Inauen Packaging Equip. Corp. v. Integrated Indus. Servs, Inc.*, 970 S.W.2d 360 (Mo. Ct. App. 1998), which supports the notion that no fiduciary relationship exists between the parties.

In *Inauen*, plaintiffs, which consisted of Inauen Packaging Equipment Corporation, d/b/a VC999 ("VC999"), Bernard Inauen and Silvio Weder (the owners of VC999) and Inauen Maschinen, AG, sued Integrated Industrial Services, Inc., d/b/a I2S Packaging ("Integrated") and John and Beverly Cremer (owners of Integrated). Originally, Integrated manufactured, repaired and refurbished rollstock packaging machines and VC999 marketed and sold rollstock packaging machines for Inauen Maschinen, AG. In 1994, Integrated began developing a new rollstock packaging machine. *Id.* at 363. The owners from VC999 and Integrated began discussing the possibility of VC999 selling Integrated's new machine and eventually reached an agreement. *Id.* As part of the agreement, Bernard Inauen and Silvio Weder would purchase 70% of the stock in Integrated. Thereafter, VC999 purchased one of the new machines under the agreement. However, early into the agreement, the relationship between the parties deteriorated and ultimately the plaintiffs filed suit against the defendants. *Id.* at 364. The defendants counterclaimed and one of the counterclaims was for a breach of fiduciary duty. The trial court ultimately entered a directed verdict in the plaintiffs' favor on the breach of fiduciary duty claim and the Missouri Court of appeals affirmed, noting that if the parties had entered in a joint venture, a fiduciary relationship would have been created, but "[a]bsent the possibility of a joint venturer relationship, defendants failed to prove their relationship with the plaintiffs was anything more than people who had entered into a contract." *Id.* at 371. The reason the parties did not have a joint venture relationship is due to the fact that John Cremer "clearly had control over Integrated" and "[s]ince the parties did not share control equally ... they cannot be said to have been joint venturers during that time." *Id.*

In this case, based on the Amended Complaint, it is clear that Plaintiffs are relying on Defendants' control over the units under the rental program as the basis for their breach of fiduciary duty claim, but this is precisely why a fiduciary relationship does not exist, as noted in *Inauen.* As such, Count XI should be dismissed.

6. Count XII should be dismissed because Plaintiffs were not sold leasehold condominiums

With respect to Count XII, the issue is whether Plaintiffs' claim for violation of Mo. Rev. Stat. § 448.2-106, which applies to leasehold condominiums, must be dismissed because the sale of the condominiums at issue are not leasehold condominiums. Plaintiffs' argument in response focuses on Defendants' failure to include information in the Declaration that § 448.2-106 requires to be put in declarations that fall under the statute. Notably, Plaintiffs do not address the argument raised by Defendants, which is that since they were sold their units and provided a fee simple interest, there are no leasehold condominiums in this case. Although Defendants do not own the property sold to Plaintiffs, a review of the Declaration shows that Promenade Development Company, L.L.C. and the City of Branson, Missouri, the actual owner, agreed to allow Promenade to sell the condominiums at issue in fee simple, which is exactly what Plaintiffs received. As such, Count XII should be dismissed because § 448.2-106 is not applicable.

7. Plaintiffs' breach of contract claim and unjust enrichment claim (Count XIII) should be dismissed because Count XIII is not asserted against the proper party and a contract governs the dispute between the parties

Count XIII is a claim solely asserted against Hilton Worldwide, Inc. ("Hilton Worldwide"). Defendants first argue that Plaintiffs cannot maintain a breach of contract claim against Hilton Worldwide because it was not a party to either the CPA or the UMA. Plaintiffs do not raise any argument with respect to this issue. Therefore, to the extent Count XIII is a claim for breach of contract, such a claim should be dismissed because it is not asserted against the proper party.

Defendants next argue that any claim for unjust enrichment cannot stand against Hilton Worldwide because an unjust enrichment claim cannot stand where there is "an express contract [that] governs the matters." (Suggestions in Opposition Doc. 19 p. 19). *See Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010) ("If the plaintiff has entered into an express contract for the very subject matter for which he seeks recovery, unjust enrichment does not apply, for the plaintiff's rights are limited to the express terms of the contract."). Again, Plaintiffs do not respond to this argument and merely attempt to demonstrate the alleged harm that Hilton Worldwide has caused to them. The Court finds that Count XIII should be dismissed in its entirety because not only is it asserted against the incorrect party, as noted above, it is also clear that an unjust enrichment claim cannot be maintained where a valid contract governs the dispute between the contracting parties.

8. Plaintiffs' right to a jury trial will be addressed at a later time

Given the fact that most, if not all, claims will be dismissed and the parties have not fully briefed this issue, the Court will take up this issue at a later time.

9. The statute of limitations has run for most of the plaintiffs to assert their claims

The Court will first address Plaintiffs' argument that Defendants waived their statute of limitations defense because the parties entered into a tolling agreement. The plain language of the tolling agreement (Ex. 15 Doc. 26-15) states that it only tolls claims "not otherwise time-barred as of the Effective Date of this Agreement." *Id.* Thus, as of February 28, 2011, the tolling agreement went into effect and any claims barred before that date are not subject to the agreement. Defendants seek the dismissal of claims that were already tolled and therefore, it is clear that there was no waiver.

Defendants first argue that the statute of limitations has run for Plaintiffs to assert Counts I, II and IV, claims which the Court has already found should be dismissed because the sale of the condominiums were not securities. Count I asserts a claim for violation of Section 12(a)(1) of the Securities Act of 1933. *See* 15 U.S.C. § 77*l*(a)(1). Plaintiffs' challenge, under Section 12(a)(1), concerns the sale of what Plaintiffs claim were unregistered securities. Such a claim is subject to a one-year statute of limitations from the date upon which the violation occurred. 15 U.S.C. § 77m. The parties argue over what the trigger date should be, the date the CPA was signed or sometime in February, 2010, when Plaintiffs allege they could have discovered the fraud.

Although Plaintiffs request that the Court apply a date accounting for their alleged discovery of the fraud, it is clear that a claim under Section 12(a)(1) is not subject to the doctrine of discovery because the statute of limitations provision clearly mandates that such a claim must be brought one year after the violation. *See* 15 U.S.C. § 77m (noting that claims under § 77*l*(a)(1) must be "brought within one year after the violation upon which it is based). *See also Teva Pharm. Indus. Ltd. v. Deutsche Bank Sec. Inc.*, No. 09 Civ 6205(AKH), 2010 WL 6864006, at *2 (S.D.N.Y. Dec. 14, 2010) (noting that claims "arising under § 12(a)(1) must be filed within one year of the accrual of the cause of action regardless of whether Plaintiff knew or reasonably could have known of the injury at that time").

The Court also finds that the date the CPAs were entered triggers the statute of limitations because the sale reflects the date the condominiums were sold, which are the alleged securities. As Defendants note, at least one other district court has used the sale of the condominiums as the date beginning the accrual of the statute of limitations because this is when the sale of the securities occurs. *See Salameh*, 2011 WL 1044129 at *8 (utilizing the date the plaintiffs purchased the condominiums and not the date the plaintiffs entered into rental management agreements as the date of sale under § 77m). It is important to remember that Plaintiffs were not required to enter into the UMAs and the sale of the condominiums and entry into the rental program were two separate actions. Finally, based on the language in § 77m setting forth a one-year statute of limitations period from the date of the violation, it would appear that such a claim cannot be equitably tolled, which is consistent with many other district courts that have addressed the issue. *See Hanson v. Johnson*, No. Civ. 02-3709 JRTFLN, 2003 WL 21639194, at *4 (D. Minn. June 30, 2003) (citing cases). Thus, the statute of limitations began to run when each Plaintiff signed their CPA. Upon review of

Defendants' Exhibit 5, it is clear that the statute of limitations has run for every single Plaintiff. Therefore, Count I should be dismissed for this reason as well.

With respect to Count IV (for violation of § 409.3-301 of the MSA), because Plaintiffs' claim concerns Defendants' alleged failure to comply with the registration requirements under Missouri law, this claim is also subject to a one-year statute of limitations pursuant to § 409.5-509(j)(1), which begins to run "after the violation occurred." For the same reasons above, the statute of limitations has run for every single Plaintiff and Count IV should be dismissed for this reason as well.

Along the same lines, Count II (for a violation of 12(a)(2) of the Securities Act of 1933) is subject to a one year statute of limitations and a three-year statute of repose beginning no "more than three years after the sale." § 77m. Again, utilizing the date the CPAs were signed, it appears that the statute of repose has run for every single Plaintiff. Moreover, based on the language contained within § 77m, the three-year statute of repose cannot be equitably tolled. *See also Cohen v. Nw. Growth Corp.*, 385 F. Supp. 2d 935, 942 (D.S.D. 2005) ("The three-year limit in 15 U.S.C. § 77m is a period of repose, which is an outside limit and is not subject to equitable tolling.").

With respect to Count III and Count V, both concern fraud claims related to the sale the alleged securities under federal and state law. Both claims are subject to a two-year statute of limitations after the date of "discovery of the facts constituting the violation," but subject to a five-year statute of repose from the date of the violation. *See* 28 U.S.C. § 1658(b); Mo. Rev. Stat. § 5-509(j)(2). This five year period is also not subject to equitable tolling. *Goldenson v. Steffens*, 802 F. Supp. 2d 240, 257-58 (D.Me. 2011) (citing *Lampf, Pleva, Lipkind, Prupis & Petigro v. Gilbertson*, 501 U.S. 350, 363 (1991)). Initially, the Court notes that the five-year statute of repose period, running from the date the CPAs were signed, bars a majority of the Plaintiffs from asserting Counts III and V.[5]

Concerning whether the two-year statute of limitations bars the remainder of the claims, the cause of action "accrues (1) when the plaintiff did in fact discover, or (2) when a reasonable diligent plaintiff would have discovered, 'the facts constituting the violation' - whichever comes first." *Merck & Co., Inc. v. Reynolds*, 130 S.Ct. 1784, 1789-90 (2010). The " 'facts constituting the violation' include the fact of scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.' " *Id.* at 1790 (internal citation omitted). For the Plaintiffs to fall within the two-year statute of limitations, the cause of action would have to begin to accrue on or before February 27, 2009. It is difficult to determine when Plaintiffs discovered, or should have discovered, the fraud because their claims are inadequately pled. However, it is clear that the representations or omissions occurred before Plaintiffs entered into their CPAs, which was a significant amount of time before the Hotel opened, in February, 2007. Although Plaintiffs argue that February, 2010 is the date that they discovered and when a reasonable person could have discovered Defendants' actions constituting the alleged fraud, there appears to be no rational basis for selecting a date that is approximately three years after the Hotel opened in light of the fact all but two Plaintiffs entered into their UMAs before 2009 and therefore were participating in the rental program for a significant amount of time before the fraud was discovered.

Finally, with respect to Plaintiffs' state law fraud claims, both parties note that they are subject to a five year statute of limitations. Mo. Rev. Stat. § 516.100. However, for the same

---

[6] All of the Plaintiffs that purchased their condominiums on or before February 27, 2006 are barred by the five-year statute of repose.

reasons above, it would be difficult to address the issue of when these claims began to accrue based on the manner in which they are pled. It would seem, however, that most of Plaintiffs' claims would survive.

CONCLUSION

For the Reasons above, the Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**. Counts I-V, XI, XII and XIII are hereby **DISMISSED** in their entirety. Counts VI through X are subject to dismissal, but the Court will allow Plaintiffs 20 days from the date of this Order to amend their Amended Complaint in order to address the deficiencies outlined above. Plaintiffs should plead, with particularity, adequate fraud claims based on past or existing facts, and give sufficient information so that it may be determined whether their claims are within the five-year statute of limitations. Finally, the Court hereby **LIFTS** the stay of discovery previously entered.

IT IS SO ORDERED.

DATE: February 27, 2012

/s/ Richard E. Dorr
RICHARD E. DORR, JUDGE
UNITED STATES DISTRICT COURT