

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IN RE:

**POWER HOME SOLAR, LLC,
Debtor**

Ch. 7

Case No. 22-50228

**CLAUDE MUMPOWER, et al.,
for themselves
and on behalf of others similarly situated,**

Plaintiffs,

v.

Adv. Pro. No: 23-03005

**POWER HOME SOLAR, LLC, et al.,
Defendants.**

**PLAINTIFFS' OPPOSITION MEMORANDUM TO
DEFENDANT DIVIDEND SOLAR FINANCE, LLC'S MOTION TO DISMISS**

Plaintiffs, on behalf of themselves and all others similarly situated, through counsel, state as follows in opposition to the Motion to Dismiss filed by Defendant Dividend Solar Finance ("Dividend") (ECF Nos. 76, 77).

INTRODUCTION

This case concerns a fraudulent scheme through which Defendants induced consumers to purchase underperforming solar panel systems at secretly inflated prices. Not only did Plaintiffs' loans include hidden fees, but Defendants promised Plaintiffs that they would receive significant federal tax *rebates* following their purchases. Plaintiffs, however, could have at best obtained tax *credits* to offset tax liabilities that they may have then had. In other words, no Plaintiffs received—as explicitly promised by Defendants—an automatic payment from the federal government.

This class action seeks to remedy those wrongs. Plaintiffs allege that Dividend, through its active involvement in the scheme, violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the Virginia Consumer Protection Act (VCPA), and the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA); and that Dividend committed common law fraud.

Dividend seeks to dismiss those claims by lodging a laundry list of purported pleading flaws—many of a hyper-technical nature. Most of Dividend’s purported bases for dismissal are devoid of any explanation and, instead, rely on convenient (but out-of-context) “sound bites” from the cases cited. Others simply outright ignore the allegations of the operative complaint. For the reasons set forth more fully below, Plaintiffs plausibly allege claims upon which relief can be granted, and Dividend’s Motion to Dismiss should be denied.

FACTS

The operative Amended Complaint details the misrepresentations and fraud that were systematically carried out by Defendants, including Dividend. (*See* Am. Compl. ¶¶ 28–92, ECF No. 34.) The named Plaintiffs in this action are residents of Virginia or North Carolina who signed separate contracts with Power Home for the installation of a home solar panel system with financing to be arranged with Dividend, among other financial-entity defendants.

“Power Home established contracts with the financial-entity defendants for those entities to work with Power Home to sell and finance residential solar power systems that produced electricity.” (*Id.* ¶ 29.) Defendant Jayson Waller “ensured that the agents who sold the system and arranged the financing did not disclose the hidden fee.” (*Id.* ¶ 38.) Additionally, he “established a standard sales pitch to be used when these systems and the related financing were sold to consumers.” (*Id.* ¶ 40.) That “pitch misled consumers about the efficiency and effectiveness of the system being sold to them, misrepresented the federal solar tax credit as a guaranteed rebate that

would come back to the consumer in one lump sum, and misrepresented the amount of the dollar benefit to the consumer.” (*Id.* ¶ 41.) In fact, agents were not even trained to determine how much of a credit a consumer might receive. (*Id.* ¶¶ 42–46.) Instead, they were trained to misrepresent “the full potentially available tax credit as a rebate that the customer would necessarily receive all at one time, as a cash payment rather than a reduction in tax owed.” (*Id.* ¶ 48.) The agents were also directed to “present this idea even to people who would not receive any tax credit at all, such as people on disability.” (*Id.* ¶ 49.) Finally, the agents “discuss[ed] the monthly payment that would be required to pay the loan as if the full amount of the tax credit would be available to the consumer the following year.” (*Id.* ¶ 50.)

Plaintiffs’ Amended Complaint explains how Power Home increased the cost of the system far higher than if the consumer were to pay cash. (*Id.* ¶ 53.) It details how this was to cover the hidden fee. (*Id.* ¶¶ 55–56.) “No Plaintiffs were aware of the hidden fee in their contract because the Defendants took affirmative steps to conceal its existence from them.” (*Id.* ¶ 81.) Those steps are set forth in Paragraphs 82 through 87. The hidden fee did not become known until the fall of 2022. (*Id.* ¶ 88.) Furthermore, Plaintiffs have alleged that no reasonable borrower diligence or investigation would have uncovered the extent of the hidden fee prior to that time, and that Plaintiffs had no means to access the confidential contracts between Power Home and the financial entity defendants. (*Id.* ¶¶ 89–92.)

The Plaintiffs listed in Paragraph 70 obtained loans from Dividend. By mistake, Logan Schalk was not listed in the paragraph; additionally, Jeffrey Rickard who is listed there was not listed in the caption as a named Plaintiff. If the claims against Dividend are not dismissed, Plaintiffs will seek leave to file these corrections. This Opposition is filed on behalf of all Plaintiffs because the issues raised by Dividend go to the core of much of their claims also.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b) applies in adversary procedures under Federal Bankruptcy Rule 7012(b). When bringing a motion under Bankruptcy Rule 7012(b), the defendant must affirmatively state whether they are consenting to the bankruptcy court issuing a final order or judgment in the case. Dividend has not objected to entry of final judgment by this Court, and instead has asked the Court to enter such final judgment.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. Put simply, it asks whether the plaintiff has stated a claim that is plausible on its face. *Meadows v. Northrop Grumman Innovation Systems*, 436 F. Supp. 3d 879, 889 (W.D. Va. 2020). “In ruling on a 12(b)(6) motion, the court must accept all well-pleaded allegations in the complaint as true and draw all reasonable factual inferences in the light most favorable to the plaintiff.” *Id.* (citing *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997)). A claim is facially plausible when the plaintiff’s allegations ‘allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Lewis v. Davis*, No. 7:22-cv-00023, 2022 WL 16722362, at *1 (W.D. Va. Nov. 4, 2022) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Determining whether a complaint states a plausible claim for relief is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

As the Fourth Circuit has explained, plausibility is not a high bar. “Although it is true that the complaint must contain sufficient facts to state a claim that is plausible on its face, it nevertheless need only give the defendant fair notice of what the claim is and the grounds on which it rests. Thus, we have emphasized that a complaint is to be construed liberally so as to do substantial justice.” *Hall v. DIRECTV, L.L.C.*, 846 F.3d 757, 765 (4th Cir. 2017) (internal quotation marks and citations omitted). A motion to dismiss “does not serve as the means by which

a court will resolve contests surrounding the facts, determine the merits of a claim or address potential defenses.” *Borg v. Warren*, No. 3:21-cv-12, 2021 WL 2657005, at *7 (E.D. Va. June 28, 2021). “The plausibility standard is not akin to a probability requirement” *Iqbal*, at 678. “[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). A court, however, “should hesitate to dismiss a complaint under Rule 9(b) if [it] is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.” *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999).

ARGUMENT

I. Plaintiffs plausibly allege a RICO claim.

The Amended Complaint alleges a RICO enterprise that consists of Waller, Power Home, the financial-entity defendants (including Dividend), Defendants’ sales agents, and one or more third-party financial technology vendors. (Am. Compl. ¶ 113.) “This enterprise had a specific purpose of selling and financing residential solar installations through a hard sales tactic that included misrepresentations.” (*Id.* ¶ 114.) Under 18 U.S.C. § 1962(a),

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

RICO also makes it unlawful “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C. § 1962(c). The predominant elements of a RICO claim consist of “(1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity.” *Salinas v. United States*, 522 U.S. 52, 62 (1997).¹ The RICO remedy for a private cause of action is found in 18 U.S.C. § 1964(c).

Dividend argues that Plaintiffs do not allege a RICO claim upon which relief can be granted for three reasons. *First*, Dividend contends that Plaintiffs have merely alleged “garden variety” fraud. Dividend dismissively argues: “Plaintiffs’ claims to be disappointed with their solar panel systems—in terms of up-front fees and future savings they allegedly were told to expect—hardly constitute the kind of ‘organized, long-term, habitual criminal activity’ appropriate for a RICO claim. (ECF No. 77 at 21.) That argument ignores the very facts set forth in detail in the Amended Complaint about how the Power Home scheme worked and how pervasive it was. Indeed, Plaintiffs’ claims are not rooted in mere disappointment or incidental fraud.

¹ Plaintiffs point out that “[t]he non-fraud elements of a RICO claim are assessed using Rule 8, not Rule 9(b).” *Mao v. Glob. Tr. Mgmt., LLC*, 2022 WL 989012, at *11 (E.D. Va. Mar. 31, 2022); *see also WW, LLC v. Coffee Beanery, Ltd.*, 2012 WL 3728184, at *13 (D. Md. Aug. 27, 2012) (“[I]t is generally accepted, that any non-fraud elements of a RICO claim may be pled pursuant to the less-stringent notice pleading standard of Rule 8.”).

In any event, even where Rule 9(b) applies, “[s]ome relaxation . . . is necessary when plaintiffs are not likely to have access to more specific information until after discovery.” *Pridgen v. Farmer*, 567 F. Supp. 1457, 1460 (E.D.N.C.1983). Specifically regarding RICO claims, at least one circuit court has explained that “that the particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim, and that is most likely to be the case where, as here, the plaintiff alleges a fraud against one or more third parties.” *Corley v. Rosewood Care Center, Inc.* 142 F.3d 1041, 1051 (7th Cir. 1998).

The Amended Complaint makes plain that, as a matter of practice, Defendants intentionally buried a hidden fee in the purported cash price of the solar energy systems. (Am. Compl. ¶¶ 36–39, 60, 81–85, 88–92.) The Amended Complaint even includes representative samples of the pricing sheets that showed how the hidden fee increased as the disclosed interest rate decreased. (See Am. Compl., Exs. 2, 3.) Additionally, the Amended Complaint details how the purported federal tax “rebate” was misrepresented by design so that consumers like Plaintiffs would agree to purchase solar panel systems. (Am. Compl. ¶¶ 41–52, 61.) Those promises were not about *potential* future savings but future savings that Plaintiffs were guaranteed.

This class action is anything but a one-off case involving a disgruntled party in a failed business venture. See *Foster v. Wintergreen Real Est. Co.*, 363 F. App’x 269, 274 (4th Cir. 2010) (rejecting RICO claim involving a few instances of mail and wire fraud between plaintiff and defendant only, noting that “Plaintiffs failed to plead with particularity that any other persons were similarly harmed by Defendants’ alleged fraud”). In fact, Plaintiffs’ allegations involve the experiences of countless consumers, thereby shedding light on “ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.” *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989).

Second, Dividend argues that Plaintiffs have not alleged an enterprise. An “enterprise” is an “individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). Dividend claims—on its own accord and without reference to the Amended Complaint—that there is a single bad actor (Power Home) and that the purported enterprise is merely a “rimless-hub-and-spoke” association. Conversely, Plaintiffs allege that all Defendants had direct and active involvement in the enterprise and that they acted together. (See, e.g., Am. Compl. ¶ 8 (“[T]he financial entity Defendants were directly involved in the sale and credit-granting process, and they therefore have

direct liability for the actions of their agent.”). These specific allegations must be accepted as true in this Motion to Dismiss.

To that end, Plaintiffs allege Defendants’ enterprise is an association-in-fact enterprise—or “a continuing unit that functions with a common purpose.” *Boyle v. United States*, 556 U.S. 938, 948 (2009). An association-in-fact enterprise must have three structural features: (1) purpose; (2) relationships among those associated with the enterprise; and (3) longevity sufficient to permit these associates to pursue the enterprise’s purpose. *Id.* at 946. The structural requirements are not extensive, and the enterprise does not need a hierarchy, fixed roles, or complexity. *Id.* at 948.

Plaintiffs allege that the enterprise had a **purpose** “of selling and financing residential solar installations through a hard sales tactic that included misrepresentations.” (Am. Compl. ¶ 114.)

Plaintiffs allege **relationships** among those associated with the enterprise by averring that the “enterprise was dependent on the network of contractual relationships between the members of the enterprise.” (*Id.* ¶ 115.) The iPad is the “rim” – it connects the finance company defendants to one another through the technology they used to integrate their fraudulent lending scheme with Power Home’s sales process. (*Id.* ¶ 30.) Moreover, we have alleged that each of the finance defendants engaged in the same practice – adding hidden kickbacks to the loan amount – giving them a common course of conduct. When these two allegations are combined – the same practice, which is implemented through the same technology delivered via the same device and software used by Power Home’s salespeople – Plaintiffs have sufficiently alleged that the defendants acted together. Additionally, another way of describing the “rim” of the conspiracy is to conceive of it with Waller as the mastermind (hub) that developed and implemented the fraudulent scheme by connecting it with the finance defendants (the spokes) and then implemented the scheme and interconnected the participants via Power Home’s sales operations (the rim), including through the iPad applications

and sales process, which was a common feature of all of the sales transactions, regardless of which finance entity defendant was providing the financing for a particular sale.

Additionally, we have alleged a “Power Home centered enterprise” involving a series of bilateral association-in-fact RICO enterprises with each of the finance entity defendants. To support this theory, Plaintiffs’ allege that Power Home implemented its fraudulent scheme together with each of the financial entity defendants, who shared a common purpose with Power Home, to defraud Power Home’s consumer solar power system customers by secretly inflating the sales price of these systems. The price inflation occurred by adding undisclosed and fraudulent kickbacks to the finance entity defendants to incentivize the finance defendants to provide financing for the sales of these systems. See *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3rd. Cir. 2010).

As with the antitrust claims, we reach a different conclusion with respect to the claims alleging bid rigging—the bid-rigging allegations in the Commercial complaint suffice to plead a “Marsh-centered enterprise.”⁷⁴ As *Boyle* clarified, a RICO “enterprise” must have a structure, but it need not have any particular structural features beyond “a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.” *Boyle*, 129 S. Ct. at 2244. We think the allegations of bid rigging provide the “rim” to the Marsh-centered enterprise’s hub-and-spoke configuration, satisfying *Boyle*’s requirements. The Commercial complaint alleges that Marsh prepared “broking plans” governing the placement of insurance contracts that came up for renewal. According to plaintiffs, “[t]he broking plans assigned the business to a specific insurer at a target price and outlined the coverage. The broking plans also included instructions as to which preferred Insurers would be asked to provide alternative [i.e., intentionally uncompetitive, or sham] quotes. If the incumbent Insurer hit the ‘target,’ it would get the business and then [Marsh employees] would solicit ‘alternative’ ... quotes from other members of the conspiracy.” Comm. SAC ¶ 117. The complaint also alleges the reasons why the insurers agreed to provide sham bids. For example, it relates a statement by a former employee of a defendant insurer that his employer had agreed to “provide[] losing *376 quotes” to Marsh in exchange for, among other things, Marsh’s “getting ‘quotes from other [insurance] carriers that would support the [employer, at least when it was the incumbent carrier] as being the best price.’ ” Comm. SAC ¶ 109. This statement plausibly evinces an expectation of reciprocity and cooperation among the insurers.

In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 375–76 (3d Cir. 2010).

Plaintiffs further allege that the “enterprise required that Power Home and those financial entity Defendants use the same agent to negotiate the Power Home installation contract and the credit contract.” (*Id.* ¶ 116.) Finally, Plaintiffs allege **longevity** by stating that “[t]he enterprise lasted many years up until Power Home’s bankruptcy filing.” (*Id.* ¶ 117.) To require more at this junction would place a greater pleading burden on Plaintiffs than is required by Rule 8.²

Third, Dividend argues that Plaintiffs have not alleged predicate acts of wire fraud. Plaintiffs, however, allege that, “[t]hrough the enterprise, Defendants conducted or participated directly or indirectly in acts of wire fraud by misrepresenting through the phone, email, and internet two material facts about the credit: the true amount of the principal of the credit being extended; and the benefit that would be provided from the federal tax credit.” (Am. Compl. ¶ 124.) That allegation suffices to establish predicate acts of wire fraud and mail fraud. *See Borg v. Warren*, 545 F. Supp. 3d 291, 311 (E.D. Va. 2021) (“The crimes of wire fraud under 18 U.S.C. § 1343 and mail fraud under 18 U.S.C. § 1341 include two essential elements: (1) the existence of a scheme to defraud and (2) the use of wire communication or the mails in furtherance of that scheme.” (citing *United States v. Curry*, 461 F.3d 452, 457 (4th Cir. 2006))). Dividend’s attachments to its Memorandum confirm electronic documents were sent via DocuSign. (*See e.g.* ECF No. 77-001, pgs 33 and 68).

The two components of the enterprise’s scheme to defraud Plaintiffs and other consumers is set forth in detail in the Amended Complaint. As to the hidden fee, those allegations provide:

² Again, “[t]he non-fraud elements of a RICO claim are assessed using Rule 8, not Rule 9(b).” *Mao*, 2022 WL 989012, at *11.

- Waller ensured that the agents who sold the system and arranged the financing did not disclose the hidden fee.
- The consequence of the hidden fee was that, with Power Home's and Waller's assistance, the financial entity Defendants knowingly made loans to borrowers that were secretly inflated by amounts the financial entity Defendants kept for themselves, even as the financial entity Defendants' loan agreements and other disclosures represented to the consumer that the principal of the loans was to be used exclusively to pay for the design, installation, and solar power generation equipment that the consumer was purchasing from Power Home
- None of Plaintiffs were told that the price of the system had been increased because of the hidden fee being retained by the financial entity defendant that was working with Power Home.
- No Plaintiffs were aware of the hidden fee in their contract because Defendants took affirmative steps to conceal its existence from them.
- These steps included using confidentiality clauses in the contracts between the financial entities and Power Home that required their arrangement to be kept secret.
- These steps also included misrepresenting the price of the system as if no additional fee for the financing was included.
- In addition, these steps included not disclosing the fee anywhere in the contract documents, and not properly itemizing in any Itemization of the Amount Financed the actual components of the disclosed Amount Financed.
- Moreover, these steps included not allowing the sales agents to discuss the fact of the fee with the customers.
- The hidden fee did not become known to any Plaintiffs until the fall of 2022, when the existence of the rate and fee sheets shown in Exhibits 2 and 3 became known.
- No reasonable borrower diligence or investigation would have uncovered the fact and extent of the hidden fee scheme prior to that time.

- No Plaintiffs were on any type of inquiry notice to investigate the existence of the hidden fee before that time.
- Nothing in any individual transactions provides even the slightest clue that a hidden fee increased the price of the system.
- Even if Plaintiffs had been on inquiry notice prior to fall of 2022, none of them had the ability to gain access to the confidential contracts between Power Home and the financial entity Defendants.

(Am. Compl. ¶¶ 38–39, 60, 81–85, 88–92.)

And, as to the tax rebate misrepresentations, Plaintiffs allege:

- The standard sales pitch misled consumers about the efficiency and effectiveness of the system being sold to them, misrepresented the federal solar tax credit as a guaranteed rebate that would come back to the consumer in one lump sum, and misrepresented the amount of the dollar benefit to the consumer.
- Regarding the federal solar tax credit, at the direction of Jayson Waller, Power Home did not train its agents to tell consumers about how to go about determining the availability, amount, and timing of the promised federal tax credit on their own, nor were the agents trained on how to properly determine whether and by how much a potential customer might benefit from the federal tax credit and when that benefit might come in. To determine the amount of the tax credit, an agent would need enough information to complete IRS Form 5695.
- To estimate how much and when any person might benefit from the federal tax credit, an agent could ask to see the person's tax return from the previous year, and then ask whether that person expected any changes in their income or expenses. With that information, a properly trained sales agent could then evaluate whether the person could expect to initially owe federal taxes by using the instructions for the federal tax credit provided by the federal government. For tax year 2021, these are found at www.irs.gov/pub/irs-pdf/i5695.pdf.
- As explained in the “Homeowners’ Guide to the Federal Tax Credit for Solar Photovoltaics” the important aspect is that

this credit is a dollar-for-dollar reduction in the amount of income tax otherwise owed for the calendar year in which the system is placed in service. See <https://www.energy.gov/sites/default/files/2021/02/f82/Guide%20to%20Federal%20Tax%20Credit%20for%20Residential%20Solar%20PV%20-%202021.pdf>. Consequently, the amount of credit available to any person in the next calendar year is a function of the amount of federal income tax that they would be estimated to owe at the end of the tax year.

- Thus, in addition to refraining from misleadingly calling the tax credit a “rebate,” the only truthful ways for Defendants’ sales agents to discuss the solar tax credit to any potential customer would be to either explain and encourage consumers to independently determine the availability and amount of the solar tax credit before signing up or to actually assist the consumer in determining the availability and amount of the solar tax credit by asking sufficient questions and looking at sufficient documents to make a reasonable estimate of the amount of federal income taxes that would be owed by that person at the end of the calendar year.
- At Waller’s direction, Defendants’ sales agents were not trained to make these estimates, nor were they trained to advise consumers about the need to make or obtain estimates of their own before entering into the installation and financing agreements with the Defendants.
- Waller, Power Home, and the financial entity Defendants knew that these estimates were not being made, and they knew their sales agents were telling consumers to evaluate the proposed contractual terms for the installation and finance agreements by taking the amount of the promised federal income tax “rebate” into account.
- Instead of assisting or encouraging consumers to make a reasonable estimate of the available tax credit, at Waller’s direction, Defendants’ sales agents were trained to present the full potentially available tax credit as a rebate that the customer would necessarily receive all at one time, as a cash payment rather than a reduction in tax owed.
- At Waller’s direction, the Defendants’ sales agents would present this idea even to people who would not receive any tax credit at all, such as people on disability.

- At Waller’s direction, and for the benefit of the financial entity Defendants involved in the credit contract, the Power Home agent would also discuss the monthly payment that would be required to pay the loan as if the full amount of the tax credit would be available to the consumer the following year.
- Because the Defendants’ sales agents never made any reasonable estimate of the consumers’ potential tax liability, the Defendants knew that their sales agents could not estimate any consumer’s actual tax credit.
- Consequently, these agents never should have discussed the amount of any tax credit available to any consumer.
- All named Plaintiffs and the class they seek to represent signed a contract with Power Home after hearing Defendants’ agent’s deceptive and misleading sales pitch.
- None of [sic] t Plaintiffs had the federal tax credit program properly explained to them.

(Am. Compl. ¶¶ 41–52, 61.)

II. The Virginia Plaintiffs plausibly allege a VCPA claim.

Dividend likewise asks that the Court dismiss Plaintiffs’ VCPA claim for three primary reasons. *First*, Dividend argues that the Virginia Plaintiffs fail to state a claim for violation of the VCPA because it is not a “supplier” as that term is defined in the statute. Under Virginia Code § 59.1-198, “[s]upplier” means “a seller, lessor, licensor, or professional who advertises, solicits, or engages in consumer transactions, or a manufacturer, distributor, or licensor who advertises and sells, leases, or licenses goods or services to be resold, leased, or sublicensed by other persons in consumer transactions.”

The crux of Dividend’s “supplier” argument is that it is not Power Home and that, as a result, it did not act as the *direct* seller that could qualify as a “supplier.” The Amended Complaint, however, does not allege that Dividend was merely a passive finance entity to which the contracts were subsequently assigned. To the contrary, the Amended Complaint alleges that Dividend

participated directly in the *sales pitch*, through which it made misrepresentations in violation of the VCPA. (Am. Compl. ¶¶ 136–37.) Indeed, Plaintiffs allege that Dividend itself misrepresented the hidden fee that increased the price of the system, and that Plaintiffs would receive federal tax rebates for which they were not eligible. (*Id.* ¶ 136.) Thus, even if Dividend was not identified as a lender who supplied money, it qualifies as a “supplier” given the direct role it played in sales process carried out with Plaintiff. Given its status as the lender, even if it had used its own agents to solicit the loans, it was a “seller” alongside Power Home, with Power Home providing the goods and Dividend providing the financing. These facts distinguish Plaintiffs’ case from those in which the lender was merely an assignee of the loan from which VCPA claims arose. *See, e.g., Harold v. TMC Enterprises, LLC*, 2016 WL 6069023, at *2 (W.D. Va. Oct. 17, 2016) (“Byrider immediately assigned the RISC to CNAC, as it does with all of its RISCs.”).³ Unless exempt from the VCPA, lenders as a supplier of money, are subject to it. *See Valley Acceptance Corp. v. Glasby*, 230 Va. 422, 432-33, 337 S.E.2d 291, 297-98 (1985) (finding a lender liable under the VCPA).

Second, Dividend argues that the VCPA does not apply to it because it is a “small loan company.” Dividend, notably, does not attempt to articulate what qualifies as a “small loan company” under the VCPA and instead pronounces itself as one because it has self-servingly declared that the loans at issue are small—at least when compared with mortgage loans.

³ The Court must reject Dividend’s proposed narrow and technical interpretation of the definition of “supplier” because the VCPA is a remedial statute, which must “be ‘construed liberally, so as to suppress the mischief and advance the remedy,’ as the [Virginia] legislature intended.” *Board of Sup. v. King Land Corp.*, 238 Va. 97, 103, 380 S.E.2d 895, 898-89 (1989) (citing *Shumate’s Case*, 56 Va. (15 Gratt.) 653, 661 (1860)). Indeed, it must be read to “promote the ability of the enactment to remedy the mischief at which it is directed.” *Natrella v. Board of Zoning Appeals*, 345 S.E.2d 295, 301 (Va. 1986) (quoting *Jones v. Conwell*, 314 S.E.2d 61, 64 (Va. 1984)).

Notwithstanding the logical fallacy in Dividend's argument,⁴ the "small loan company" exception applies only to entities regulated by the Virginia State Corporation Commission or a comparable federal regulating body. *See Commonwealth v. NC Fin. Sols. of Utah, LLC*, 100 Va. Cir. 232, 2018 WL 9372461, at *8 (2018) ("The qualifier phrase bestowing exemption from the VCPA applies only to the listed entities specified in § 59.1-199(D), all of which are of a financial 'class,' as long as they are both 'regulated and supervised by the State Corporation Commission or a comparable federal regulating body.'"). Virginia's current codification of its prior Small Loan Act is the Consumer Finance Act, that regulates loans between \$300 and \$35,000. Va. Code § 6.2-1520. Dividend's attachments to its Memorandum show that for Power Home customers it was regularly making loans well in excess of \$35,000.00. (*See e.g.* ECF No. 77-001, pgs 10, 39 and 81, showing "Amount Financed" of \$106,680, \$64,911, and \$71,800 respectively). Because the record before the Court indicates that Dividend makes loans far in excess of the amounts regulated by the Consumer Finance Act, and further nothing shows it substantively regulated by the Virginia State Corporation Commission or a comparable federal regulating body, Dividend cannot invoke the "small loan companies" exception to its benefit.⁵

⁴ Dividend is entitled to prove with evidence, if it can, that it falls under the "small loan company" exception. Plaintiffs had no obligation to predict Dividend's defense and plead that the "small loan companies" exception *does not* apply to Dividend.

⁵ Previewing Plaintiffs' argument, Dividend impermissibly pleads in its filing that "[a]s a wholly owned subsidiary of a nationally chartered bank, Dividend is regulated by the Office of the Comptroller of the Currency and the Federal Trade Commission, which are 'comparable' to the State Corporation Commission." (ECF No. 77 at 15–16 n.10.) Even were that so—a contention the Court cannot consider or accept on a 12(b)(6) motion—the OCC and FTC probably do not qualify as the types of regulatory bodies contemplated by the Virginia legislature. *See NC Fin. Sols. of Utah, LLC*, 2018 WL 9372461, at *9 ("Even if the CFPB were currently subjecting Defendant to regulatory action, this Court finds it is not a 'comparable federal regulating body' to the SCC as required under Virginia Code § 59.1-199(D) for exemption. The SCC has significantly unrestricted power to investigate consumer finance companies under Virginia Code § 6.2-1530, a power not shared by the CFPB.").

Third, Dividend argues that Plaintiffs cannot assert VCPA claims relating to misrepresentations regarding the hidden fee because the TILA regulates failures to disclose. The VCPA, however, does not restrict its reach so much. Indeed, “the statutory exclusion” applies “only to ‘those aspects of a consumer transaction’ regulated by TILA.” *James v. Delta Motors, LLC*, 2023 WL 3306551, at *4 (W.D. Va. May 8, 2023) (quoting *Hodges v. Koons Buick Pontiac GMC, Inc.*, 180 F. Supp. 2d 786, 794 (E.D. Va. 2001)).

Dividend, tellingly, makes no reference to the specific TILA regulation under which Plaintiffs’ VCPA claim is purportedly regulated. The Court should reject Dividend’s argument on that basis alone. *See Nazar v. Balderson*, 104 Va. Cir. 173, 2020 WL 8839569, at *2 (2020) (“Since Defendant has failed to provide a specific, applicable provision of the FCCPA that would preempt the VCPA, Plaintiffs’ claim may properly remain as a cause of action under VCPA.”). In any event, the *fraud* at issue is not governed by TILA because TILA is a disclosure statute. *See Reed v. Litton Loan Servicing LP*, 64 Va. Cir. 447, 2004 WL 1386314, at *1 (2004) (overruling demurrer because “the VCPA is only pre-empted in those specific ‘aspects’ regulated by” the FCCPA and permitting claim that the loan servicer violated the VCPA by charging unauthorized fees).

III. The North Carolina Plaintiffs plausibly allege a UDTPA claim.

The UDTPA states in pertinent part that “unfair or deceptive acts or practices in or affecting commerce[] are declared unlawful.” N.C.G.S. § 75–1.1(a). The “statute is broader and covers more than traditional common law proscriptions on tortious conduct, though fraud and deceit tend to be included within its ambit.” *Bumpers v. Cmty. Bank of N. Virginia*, 747 S.E.2d 220, 226 (N.C. 2013) (citing *Marshall v. Miller*, 276 S.E.2d 397, 400 (N.C. 1981)). To state a claim, “a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.” *Id.* (quoting *Dalton v. Camp*, 548 S.E.2d 704, 711 (N.C. 2001)).

Dividend does not argue that the North Carolina Plaintiffs fail to plausibly allege any of those elements. Instead, Dividend argues that Plaintiffs do not allege “actual and reasonable reliance” (*i.e.*, proximate causation) insofar as Plaintiffs’ claims are rooted in misrepresentations. (ECF No. 77 at 18.) Plaintiffs agree that reasonable reliance on Defendants’ misrepresentations is an element of Plaintiffs’ North Carolina UDTPA claim in this case. *See Caper Corp. v. Wells Fargo Bank, N.A.*, 578 F. App’x 276, 287 (4th Cir. 2014) (applying North Carolina law) (“If the [UDTPA] claim arises from the defendant’s alleged misrepresentation, the plaintiff must also plausibly allege that it ‘reasonabl[y] reli[ed]’ on that misrepresentation.”).

However, Dividend’s restricted framing of the facts Plaintiffs pleaded as including exclusively those facts mentioned in Plaintiffs’ allegations in the separate UDTPA cause of action section of the Amended Complaint asks the Court to disregard the fundamental premises of this lawsuit, which are set forth in detail throughout Plaintiffs’ Amended Complaint. Plaintiffs’ nine allegations included in the UDTPA claim, of course, do not tell Plaintiffs’ entire story. The remainder of the Amended Complaint makes clear that Plaintiffs plausibly allege reliance and myriad facts showing that their reliance was reasonable.

First, Plaintiffs’ actual reliance is expressly spelled out for Dividend. (*See, e.g.*, Am. Compl. ¶ 59 (“All named Plaintiffs and the class they seek to represent signed a contract with Power Home after hearing Defendants’ agent’s deceptive and misleading sales pitch.” (emphasis added)); *id.* ¶ 62 (“All named Plaintiffs and the class they seek to represent were harmed by their agreement to sign the Power Home contract after hearing the sales pitch.” (emphasis added)); *id.* 155 (“All Plaintiffs in the respective subclasses for Defendants Dividend, GoodLeap, Mosaic, Cross River, Tech CU, Digital, Addition, and Sunlight relied on these false statements and signed credit contracts, and suffered damages as a result, including that their initial loan principal was higher than the actual dollar amount provided to Power Home.” (emphasis added)); *id.* ¶ 152

(“All Plaintiffs **relied on** these false statements and signed installation contracts with Power Home, and suffered damages as a result, including that their initial loan principal was higher than the actual dollar amount provided to Power Home.” (emphasis added)).

Second, the reasonableness of Plaintiffs’ reliance is made clear through the context in which the misrepresentations were made, which reveals that Defendants intended to mislead Plaintiffs and that affirmative steps were taken by Defendants to conceal their unfair and deceptive trade practices. As noted above to show predicate fraud in the RICO context, the hidden fee allegations provide:

- Waller ensured that the agents who sold the system and arranged the financing did not disclose the hidden fee.
- The consequence of the hidden fee was that, with Power Home’s and Waller’s assistance, the financial entity Defendants knowingly made loans to borrowers that were secretly inflated by amounts the financial entity Defendants kept for themselves, even as the financial entity Defendants’ loan agreements and other disclosures represented to the consumer that the principal of the loans was to be used exclusively to pay for the design, installation, and solar power generation equipment that the consumer was purchasing from Power Home
- None of Plaintiffs were told that the price of the system had been increased because of the hidden fee being retained by the financial entity defendant that was working with Power Home.
- No Plaintiffs were aware of the hidden fee in their contract because Defendants took affirmative steps to conceal its existence from them.
- These steps included using confidentiality clauses in the contracts between the financial entities and Power Home that required their arrangement to be kept secret.
- These steps also included misrepresenting the price of the system as if no additional fee for the financing was included.

- In addition, these steps included not disclosing the fee anywhere in the contract documents, and not properly itemizing in any Itemization of the Amount Financed the actual components of the disclosed Amount Financed.
- Moreover, these steps included not allowing the sales agents to discuss the fact of the fee with the customers.
- The hidden fee did not become known to any Plaintiffs until the fall of 2022, when the existence of the rate and fee sheets shown in Exhibits 2 and 3 became known.
- No reasonable borrower diligence or investigation would have uncovered the fact and extent of the hidden fee scheme prior to that time.
- No Plaintiffs were on any type of inquiry notice to investigate the existence of the hidden fee before that time.
- Nothing in any individual transactions provides even the slightest clue that a hidden fee increased the price of the system.
- Even if Plaintiffs had been on inquiry notice prior to fall of 2022, none of them had the ability to gain access to the confidential contracts between Power Home and the financial entity Defendants.

(Am. Compl. ¶¶ 38–39, 60, 81–85, 88–92.)

And the tax rebate misrepresentations include:

- The standard sales pitch misled consumers about the efficiency and effectiveness of the system being sold to them, misrepresented the federal solar tax credit as a guaranteed rebate that would come back to the consumer in one lump sum, and misrepresented the amount of the dollar benefit to the consumer.
- Regarding the federal solar tax credit, at the direction of Jayson Waller, Power Home did not train its agents to tell consumers about how to go about determining the availability, amount, and timing of the promised federal tax credit on their own, nor were the agents trained on how to properly determine whether and by how much a potential customer might benefit from the federal tax credit and when that benefit might come in. To determine the amount of the

tax credit, an agent would need enough information to complete IRS Form 5695.

- To estimate how much and when any person might benefit from the federal tax credit, an agent could ask to see the person's tax return from the previous year, and then ask whether that person expected any changes in their income or expenses. With that information, a properly trained sales agent could then evaluate whether the person could expect to initially owe federal taxes by using the instructions for the federal tax credit provided by the federal government. For tax year 2021, these are found at www.irs.gov/pub/irs-pdf/i5695.pdf.
- As explained in the "Homeowners' Guide to the Federal Tax Credit for Solar Photovoltaics" the important aspect is that this credit is a dollar-for-dollar reduction in the amount of income tax otherwise owed for the calendar year in which the system is placed in service. See <https://www.energy.gov/sites/default/files/2021/02/f82/Guide%20to%20Federal%20Tax%20Credit%20for%20Residential%20Solar%20PV%20-%202021.pdf>. Consequently, the amount of credit available to any person in the next calendar year is a function of the amount of federal income tax that they would be estimated to owe at the end of the tax year.
- Thus, in addition to refraining from misleadingly calling the tax credit a "rebate," the only truthful ways for Defendants' sales agents to discuss the solar tax credit to any potential customer would be to either explain and encourage consumers to independently determine the availability and amount of the solar tax credit before signing up or to actually assist the consumer in determining the availability and amount of the solar tax credit by asking sufficient questions and looking at sufficient documents to make a reasonable estimate of the amount of federal income taxes that would be owed by that person at the end of the calendar year.
- At Waller's direction, Defendants' sales agents were not trained to make these estimates, nor were they trained to advise consumers about the need to make or obtain estimates of their own before entering into the installation and financing agreements with the Defendants.
- Waller, Power Home, and the financial entity Defendants knew that these estimates were not being made, and they

knew their sales agents were telling consumers to evaluate the proposed contractual terms for the installation and finance agreements by taking the amount of the promised federal income tax “rebate” into account.

- Instead of assisting or encouraging consumers to make a reasonable estimate of the available tax credit, at Waller’s direction, Defendants’ sales agents were trained to present the full potentially available tax credit as a rebate that the customer would necessarily receive all at one time, as a cash payment rather than a reduction in tax owed.
- At Waller’s direction, the Defendants’ sales agents would present this idea even to people who would not receive any tax credit at all, such as people on disability.
- At Waller’s direction, and for the benefit of the financial entity Defendants involved in the credit contract, the Power Home agent would also discuss the monthly payment that would be required to pay the loan as if the full amount of the tax credit would be available to the consumer the following year.
- Because the Defendants’ sales agents never made any reasonable estimate of the consumers’ potential tax liability, the Defendants knew that their sales agents could not estimate any consumer’s actual tax credit.
- Consequently, these agents never should have discussed the amount of any tax credit available to any consumer.
- All named Plaintiffs and the class they seek to represent signed a contract with Power Home after hearing Defendants’ agent’s deceptive and misleading sales pitch.
- None of [sic] t Plaintiffs had the federal tax credit program properly explained to them.

(Am. Compl. ¶¶ 41–52, 61.)

Dividend’s intimation that consumers somehow should have known better severely downplays the gravity of Defendants’ concealment, their motives driving the scheme, and the bargaining power disparity between the parties. It further is contrary to the purposes of consumer protection statutes. “The fact that a false statement may be obviously false to those who are trained

and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.” *FTC v. Standard Education Society*, 302 U.S. 111, 116 (1937).

IV. Plaintiffs plausibly allege fraud.

Like its argument regarding Plaintiffs’ UDTPA claim, Dividend generally contends that Plaintiffs cannot state fraud claims upon which relief can be granted because Plaintiffs’ reliance was not reasonable. For the reasons stated above, that argument ignores the several allegations relating to the scheme generally and the context in which the misrepresentations were made. (*See* Am. Compl. ¶¶ 38–39, 60, 81–85, 88–92 (allegations relating to the hidden fee fraud); *id.* ¶¶ 41–52, 61 (allegations relating to the tax rebate fraud).) As those allegations make clear, this case is not about a simple business transaction where Plaintiffs failed to ask the right questions. All aspects of the fraud were deliberate and intentional.

Dividend more specifically argues that Plaintiffs’ fraud claims fail because: (i) as to the tax rebate claim, they are premised upon “predictions about future outcomes or events”; (ii) as to the hidden fee, Dividend had no independent duty to disclose the information it was intentionally concealing; and (iii) as to the tax rebate claim, Plaintiffs expressly disclaimed reliance. These arguments each fail for the reasons stated below.

First, Plaintiffs’ tax rebate claim is not based on Plaintiffs’ reliance on “predictions about future outcomes or events.” Indeed, Plaintiffs are not alleging that Defendants were required to predict the specific tax benefits that Plaintiffs would enjoy if they purchased a solar panel system. Instead, Plaintiffs allege that Defendants misrepresented that Plaintiffs would invariably receive

tax *rebates* when, at best, they could receive tax *credits*. This distinction is critical because *no consumers* were eligible for tax rebates as a matter of United States tax policy. To the extent the Amended Complaint discusses how Defendants could have represented the possibility of tax credits to Plaintiffs, that serves to show what Defendants would have needed to do to avoid misrepresenting the existence of tax rebates. That is, if Defendants wished to induce sales based on the purported tax benefits of a solar panel system, they had to individually assess consumer situations. But instead of undertaking that task, Defendants elected to make wholesale misrepresentations about a guaranteed tax rebate, without ever asking the questions to even make an estimate. Those lies—put simply—were not predictions about future outcomes or events.

Second, Dividend claims that it was allowed to intentionally conceal the hidden fee because it had no independent duty to disclose it. Dividend claims that “absent an affirmative duty to disclose such information, such as a fiduciary relationship, there can be no fraud claim.” In support, Dividend cites two cases (one Virginia and one North Carolina) but omits significant portions of the relied-upon law statements. In *Trustees of Columbia Univ. in City of New York v. NortonLifeLock, Inc.*, for example, the Virginia court qualified its statement that “[s]ilence does not constitute concealment in the absence of a duty to disclose” with:

A duty may arise (1) if the fact is material and the one concealing has superior knowledge and knows the other is acting upon the assumption that [t]he fact does not exist, or (2) if one party takes actions which divert the other party from making prudent investigations (e.g., by making a partial disclosure).

580 F. Supp. 3d 236, 270 (E.D. Va. 2022) (citing Virginia Supreme Court cases). Similarly, in *River’s Edge Pharms., LLC v. Gorbec Pharm. Servs., Inc.*, the North Carolina court followed its statement that “[a] duty to disclose may arise from the existence of a fiduciary relationship” with “or where ‘one party has taken affirmative steps to conceal material facts from the other.’” 2012 WL 1439133, at *22 (M.D.N.C. Apr. 25, 2012) (emphasis added). Dividend’s misleading

argument that Plaintiffs needed to plead an independent duty to disclose should be rejected outright.

In any event, Plaintiffs' allegations more than satisfy any requirement that they allege Defendants' affirmative steps to conceal the hidden fee. For example, Plaintiffs allege:

- No Plaintiffs were aware of the hidden fee in their contract because Defendants took affirmative steps to conceal its existence from them.
- These steps included using confidentiality clauses in the contracts between the financial entities and Power Home that required their arrangement to be kept secret.
- These steps also included misrepresenting the price of the system as if no additional fee for the financing was included.
- In addition, these steps included not disclosing the fee anywhere in the contract documents, and not properly itemizing in any Itemization of the Amount Financed the actual components of the disclosed Amount Financed.
- Moreover, these steps included not allowing the sales agents to discuss the fact of the fee with the customers.

(Am. Compl. ¶¶ 81–85.)⁶

Third, Plaintiffs did not expressly disclaim reliance on Defendants' false representations regarding a tax rebate. Dividend's argument turns entirely on its use of brackets to insert the word "tax" into the purported disclaimer: "Plaintiffs acknowledged that they should not make their 'decision to enter into this agreement in reliance on obtaining any such [tax] benefit.'" (ECF No. 77 at 11 (alteration in original).) As a matter of common-sense contract interpretation, if the disclaimer were as clear and obvious as Dividend claims it to be, it would not need to inject

⁶ Dividend's argument that it had no duty to disclose the hidden fee for purposes of defeating Plaintiffs' fraud claims stands in stark contrast to its opposite claim that Plaintiffs' VCPA claim is preempted by Dividend's duty to disclose under TILA. (See ECF No. 77 at 16 ("Plaintiffs clearly rely on TILA as the basis for their assertion that Dividend should have disclosed the allegedly 'hidden fee.'").)

additional terms to convince the Court that the contract says what it wants it to say. Dividend, of course, is not entitled to a broad reading of its insufficiently specific disclaimer to defeat Plaintiff's fraud claims. *See, e.g., Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 631 (4th Cir. 1999) ("By their plain terms, the disclaimers of liability . . . are insufficiently specific to render Signet immune from the alleged fraud that induced the contract."). Dividend's disclaimer is especially unpersuasive here, where the contract is one of adhesion. *See Philyaw v. Platinum Enterprises, Inc.*, 54 Va. Cir. 364, 2001 WL 112107, at *3 (2001) ("A contract of adhesion is a standard form contract, prepared by one party and presented to a weaker party—usually, a consumer—who has no bargaining power and little or no choice about the terms.").

Finally, no businesses can train agents to systematically lie to induce signatures on contracts and then hide behind a disclaimer slipped into those fraudulently induced contracts. Under Virginia law, fraud in the inducement of a contract is grounds for a tort claim. *See Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 362-63, 699 S.E.2d 483, 489-90 (2010). The misrepresentation must be of an existing fact and that fact can include the seller's knowledge that it will not be performing the contract. *Id.* (citing *Boykin v. Hermitage Realty*, 234 Va. 26, 29, 360 S.E.2d 177, 178-79 (1987) and *Lloyd v. Smith*, 150 Va. 132, 145-46, 142 S.E. 363, 365-66 (1928)). North Carolina similarly prohibits fraudulently induced contracts. *See Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C.App. 433, 453, 678 S.E.2d 671, 684 (2009). Parol evidence can be used despite an integration clause in a contract when fraud in the inducement "vitiates the contract." *Laundry Machinery Co.*, 225 N.C. 285, 288-89, 34 S.E.2d 190, 192-93 (1945). Therefore, such fraudulently induced clauses like the one Dividend asserts cannot be enforced.

CONCLUSION

Plaintiffs therefore request that Dividend's Motion to Dismiss be denied. To the extent that the Court considers that Plaintiffs do not sufficiently allege any claim, Plaintiffs respectfully request leave to amend.

Respectfully submitted,

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