UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re: POWER HOME SOLAR, LLC, *Debtor*.	Chapter 7 Case No. 22-50228
Claude Mumpower, *et al.*, *Plaintiffs,* *v.* Power Home Solar LLC, *et al.*, *Defendants*.	Adv. Pro. No. 23-3005

BRIEF IN SUPPORT OF DIVIDEND SOLAR FINANCE, LLC'S MOTION TO DISMISS

THE FIRST AMENDED ADVERSARY CLASS ACTION COMPLAINT

Defendant Dividend Solar Finance, LLC ("Dividend"), by its undersigned counsel, respectfully submits this brief in support of its accompanying motion to dismiss the claims against Dividend in the First Amended Adversary Class Action Complaint (the "Complaint" (Dkt. 34)).[1]

INTRODUCTION

In this putative class action, Plaintiffs are consumers who allege that they are disappointed with their purchase of solar panel systems from defendant (and debtor in the Bankruptcy proceedings) Power Home Solar, LLC ("Power Home"). Plaintiffs financed the systems though certain financial entity defendants (the "Lenders"), including Dividend, the moving defendant here. Plaintiffs' Complaint focuses on allegations that (i) Plaintiffs did not receive the tax credits from their purchases that they expected based on their discussions with Power Home's sales representatives and (ii) Plaintiffs were not told that the loan amounts they agreed to finance were higher than if they had paid in cash, due to a "hidden fee" allegedly arranged between Power Home and the Lenders. (Plaintiffs also state in passing that the "benefits of the [solar panel] system" were generally misrepresented, but they do not develop that assertion as a basis for their claims.)

The Complaint should be dismissed as to Dividend for failure to state a claim under Civil Rule 12(b)(6) because the Complaint fails to allege fraud adequately and because it fails to allege an adequate legal basis for Plaintiffs' other four statutory claims. Fundamentally, the Complaint fails to allege adequately that Plaintiffs reasonably relied on the alleged misstatements about tax credits or that Dividend had a duty to disclose the information allegedly omitted as to each aspect of the pricing for the products Plaintiffs financed.

[1] To the extent the Court does not dismiss all claims pursuant to this Motion to Dismiss, Dividend reserves the right to seek further relief under the Bankruptcy Rules. Plaintiffs' claims are better suited for adjudication through the claims process and/or as a contested matter pursuant to Bankruptcy Rule 9014. Among other reasons, if the claims move forward in this adversary proceeding, the amount of discovery, briefing, and other time and resources expended would detract significantly from the time and resources that could be utilized to resolve the many other issues at stake for the bankruptcy estate. Moreover, to the extent any claims may prove subject to arbitration, Dividend reserves all rights, without waiver.

Specifically, under the heightened standards for fraud claims pursuant to applicable Virginia and North Carolina law, the Complaint fails to allege Plaintiffs' reasonable reliance, including "reasonable diligence," when alleging fraud based on allegedly incorrect statements about future tax benefits. That failure is apparent upon the face of the Complaint itself, but also based on the contracts that Plaintiffs signed with Power Home and Dividend, which are incorporated by reference into the Complaint. In those contracts, Plaintiffs expressly **disclaimed reliance** on any purported representations or promises about tax benefits.

Further, the Complaint fails to state a fraud claim based on the "hidden fee" allegations (which Dividend denies). The Complaint fails to allege any affirmative duty to disclose such pricing information and, again, fails to allege reasonable reliance.

Plaintiffs' statutory claims fail for similar reasons or simply have no application here, as explained below. For example, the Virginia Consumer Protection Act ("VCPA") does not apply because Dividend is not regulated by that statute. The Truth in Lending Act ("TILA") claim is barred by its one-year statute of limitations and to the extent the amounts financed by Dividend borrowers exceeded the statutory maximum threshold. The claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") is based on a criminal statute that the Fourth Circuit held not to apply to "garden variety fraud" disputes such as this one.

Even though Dividend itself had no direct involvement in the alleged misstatements made by Power Home's sales representatives, the Complaint notes that the terms of Plaintiffs' credit contracts with the Lenders "require that any holder of the credit contract be liable for all claims and defenses the consumer has against Power Home." On that basis, Plaintiffs assert that the Lenders have "derivative liability" for Power Home's alleged sales tactics.[2] The Complaint does

[2] These contractual provisions are typically included pursuant to a regulatory requirement by the Federal Trade Commission, commonly called the "Holder Rule." *See* 16 C.F.R. § 433.2 (requiring certain consumer credit

not clearly identify which claims it asserts directly, derivatively, or both, against Dividend, but the distinction does not matter for purposes of this Motion to Dismiss. All claims against Dividend fail, regardless of whether they are asserted directly or "derivatively."

FACTUAL BACKGROUND

Except where noted otherwise, the Complaint alleges the following facts, presumed true only for purposes of this Motion. Plaintiffs are residents of North Carolina or Virginia who purchased solar panel systems from Power Home and financed those purchases through the Lenders. (Compl. ¶ 3.) Dividend is one of those Lenders. (*Id.* ¶ 18.) Of the 89 named Plaintiffs, only nine (9) allegedly borrowed from Dividend. (*Id.* ¶ 70.) Of those nine Dividend borrowers, six submitted declarations containing factual allegations. (*See* Compl. Ex. 1 at 1, 10, 15, 16, 34, 50.) Of those nine, only one is a North Carolina resident, Mr. Michaux. (*See id.* Ex. 1 at 50.)

The Complaint bases its claims on allegations that Plaintiffs were misled in two ways: (i) by statements from Power Home's sales representatives to the effect that Plaintiffs "would receive a substantial federal income tax credit if they purchased solar panels" (Compl. ¶ 1); and (ii) by a lack of disclosure that "the cash price for each financed installation was inflated to include an undisclosed fee charged by the [Lenders], who actually paid less to Power Home for the design, installation, and equipment" (*id.* ¶ 7). Plaintiffs' central claim is that they were "fraudulently induced into purchasing" the solar panel systems. (*See id.* ¶ 1.)

Based on these allegations, the Complaint asserts the following five legal claims: RICO (Count One); VCPA (Count Two); North Carolina Unfair and Deceptive Trade Practices Act

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contracts to include the following notice in bold type: "ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.").

("UDTPA") (Count Three); Fraud (Count Four); and Truth in Lending Act ("TILA") (Count Five).

The Complaint also briefly asserts that Power Home's representatives "would regularly misrepresent the benefits of the system they were selling," citing two local news reports in other states. (*See id.* ¶ 7 (linking to local television reports in Michigan and Georgia).) But the Complaint does not elaborate upon that general assertion as a basis for its legal claims and does not mention it at all as a basis for its central claim of fraud. (*See id.* ¶¶ 149–157.)[3]

Tax Credit Allegations as to Dividend

As to the purported tax credit, Power Home's sales agents allegedly promised five of the nine Dividend borrowers that they "would receive a lump sum credit back from the federal government through [their] taxes, but [they] did not get that." (*See* Compl. Ex. 1 at 1, 10, 15, 16, 34.) One of the Dividend borrowers, Mr. Michaux, alleges that Power Home made the same "promise" regarding the tax credit, but fails to allege that he did not receive the tax credit. (*Id.* Ex. 1 at 50.) There are no allegations about any promise of a tax credit for the remaining three Dividend borrowers, who did not submit declarations (Plaintiffs Atkins, Rickard, and Briggs).

Accordingly, only five of the Dividend borrowers actually allege that they did not receive the specific form of tax credit promised. Of those five, none allege that they failed to receive any tax benefit at all, but only that they did not receive a "lump sum credit." As the Complaint alleges more generally, some Plaintiffs did receive a tax credit "in the form of an income tax reduction that could offset other tax liability," but not in the form of "a tax rebate check from the government." (Compl. ¶ 1.) The Complaint and its exhibits do not specify which, if any, of the Dividend borrowers to whom that scenario applies.

[3] While the Plaintiffs' declarations (signed several months before the complaint was filed) state that they did not realize the savings on energy bills that they expected, it appears that the Complaint effectively abandons that as a basis for its legal claims, mentioning it only in passing.

In sum, the Complaint's allegations are consistent with the notion that each of the nine Plaintiffs asserting claims against Dividend did in fact receive tax credits, but that five of them did not receive credits specifically in the form of a "lump sum credit . . . from the federal government." None of the Dividend borrowers allege anything about the amount of the tax credit they received.

Undisclosed Fee Allegations as to Dividend

The Complaint blurs the line between Lenders, and does not make any allegation specific to Dividend that its loans included an undisclosed fee. While the Complaint cites and attaches "fee sheets" relating to certain of the other Lenders, it does not cite or attach anything related to Dividend. (*See* Compl. ¶¶ 86–87.) Nor do any of the Plaintiffs' declarations say anything at all about an undisclosed fee. Instead, the Complaint alleges as a general matter that "Power Home's contracts with the financial entity Defendants included a hidden fee that the financial entity Defendants included in and retained from each loan to Power Home's consumer customers." (Compl. ¶ 30.)

Plaintiffs Disclaimed Reliance on Representations About Tax Rebates or Energy Savings

Each of the Plaintiffs who borrowed from Dividend signed contracts with Power Home in which Plaintiffs acknowledged that:

> [Power Home] does not (and cannot) guarantee Customer's eligibility for, or the actual dollar amount of, any [tax] Rebates. . . . [Power Home] strongly recommends that Customer contact Customer's financial, tax and legal advisors for details and information on whether Customer qualifies for any Rebates associated with the Project and the amount of any such Rebates, given Customer's individual (or joint, with such Customer's spouse) tax and financial circumstances.

(*E.g.*, Mitchell Decl., Ex. A, at DIVIDEND013 (Michaux Contract § 7(a)).)[4]

[4] Accompanying this brief is the set of the Dividend borrowers' contracts with Power Home. (*See* Mitchell Decl., Ex. A.) Upon a motion to dismiss, a court may consider documents that are "incorporated by reference" or attached to the complaint, in addition to documents that are "integral to the complaint," where there is no dispute about their authenticity. *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). That is the case here, where the Complaint references such contracts repeatedly. (*E.g.*, Compl. ¶¶ 3, 6, 15, 30, 56, 59, 62, 80, 84.)

The contracts further contain the following disclaimers of reliance, in all capital letters, upon any representation about tax rebates or energy savings (*id.* §§ 7(b), 8):

> TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, COMPANY MAKES NO REPRESENTATION, WARRANTY, ASSURANCE OR GUARANTEE THAT CUSTOMER WILL QUALIFY FOR OR RECEIVE, IN WHOLE OR IN PART, ANY REBATE OR SIMILAR FINANCIAL BENEFIT IN CONNECTION WITH THE PROJECT, AND CUSTOMER SHOULD NOT MAKE CUSTOMER'S DECISION TO ENTER INTO THIS AGREEMENT IN RELIANCE ON OBTAINING ANY SUCH BENEFIT. IT IS CUSTOMER'S SOLE RESPONSIBILITY TO INVESTIGATE WHAT REBATES OR OTHER SIMILAR FINANCIAL BENEFITS, IF ANY, MAY BE AVAILABLE TO CUSTOMER AND TO TAKE THE STEPS NECESSARY TO CLAIM ANY SUCH REBATES OR BENEFITS.
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> * * * *
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> CUSTOMER UNDERSTANDS AND AGREES THAT NOTHING IN THIS AGREEMENT (OR OTHERWISE, INCLUDING ANY PRIOR ORAL STATEMENT OR WRITTEN PROPOSAL) SHALL BE CONSTRUED AS A GUARANTEE OF SYSTEM PRODUCTION, MINIMUM POWER OR SAVINGS.

In addition, the Plaintiffs separately initialed a series of additional "Customer Acknowledgements" further disclaiming any guarantees as to projected energy savings or tax rebates. (*See, e.g.*, Mitchell Decl., Ex. A, at DIVIDEND021 (Michaux Contract, Ex. B).)

<u>Allegations as to Dividend's "Derivative" Versus "Direct" Liability</u>

The beginning of the Complaint contains a general assertion that the Lenders are liable derivatively for their borrowers' claims against Power Home based on a provision in the credit contracts, alleging as follows (at ¶ 3):

> All the credit contracts require that any holder of the credit contract be liable for all claims and defenses the consumer has against Power Home, such that any claim the consumer has against Power Home is also a claim that can be raised against the finance entity Defendants, which themselves are creditors of Power Home in its (above captioned) bankruptcy case.[5]

[5] *See supra* note 2 regarding the FTC "Holder Rule" requiring such language in certain contracts.

The Complaint also appears to allege generally at the outset that Plaintiffs' claims against the Lenders are asserted directly as well, on the grounds that the Lenders "were directly involved in the sale and credit-granting process." (*Id.* ¶ 8.) In support, the Complaint alleges summarily that each Power Home sales representative was both "an agent for Power Home and an agent for the [Lender]" because "the same Power Home employee who negotiated the sale of the solar power system also arranged the credit contract." (*Id.* ¶ 6.)

The Complaint does not make clear which aspects of Plaintiffs' claims they assert directly versus derivatively. The only claims that state anything at all about derivative liability are the VCPA and UDTPA claims, which both state that Dividend and certain other Lenders are "derivatively liable pursuant to the terms of the credit contract." (*Id.* ¶¶ 132, 146.) The rest of the claims simply list Dividend as a defendant, without specifying whether the claims are asserted directly or derivatively. Nor does the Complaint make clear which "direct" claims depend on the theory that the Power Home employees acted as the Lenders' agents, much less as Dividend's agents in particular.

In any event, as explained below, all claims against Dividend should be dismissed, regardless of whether Plaintiffs assert them directly or derivatively.

STANDARD OF REVIEW

Under Civil Rule 12(b)(6), a complaint must be dismissed for "failure to state a claim upon which relief can be granted." *See* Fed. R. Bankr. P. 7012 (Civil Rule 12(b) applies in adversary proceedings). A motion to dismiss under this rule "challenges the legal sufficiency of a complaint." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). At minimum, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action,

supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In addition, under Civil Rule 9(b), a party alleging fraud "must state with particularity the circumstances constituting fraud." *See* Fed. R. Bankr. P. 7009 (Civil Rule 9 applies in adversary proceedings). "Courts construe this to mean that plaintiffs must set out the 'time, place, and contents of the alleged fraudulent misrepresentation, as well as the identity of each person making the misrepresentation and what was obtained thereby.'" *TSC Research, LLC v. Bayer Chems. Corp.*, 552 F. Supp. 2d 534, 543 (M.D.N.C. 2007). In other words, a plaintiff must allege "the who, what, when, where, and how of the alleged fraud." *Lambert v. First Horizon Bank*, 2021 U.S. Dist. LEXIS 142635, at *17 (W.D.N.C. June 28, 2021). Plaintiffs failed to meet these standards. Their claims, therefore, should be dismissed.

ARGUMENT

The Complaint's central claim, that Dividend directly or derivatively defrauded Plaintiffs into buying solar panel systems, fails to state a viable legal claim under Rule 12(b)(6). The Complaint fails to allege sufficiently the required elements of fraud, such as reasonable reliance and a duty of disclosure. The fraud claim is also barred to the extent the allegations rely on predictions of future outcomes. The remaining statutory claims fail for similar reasons, in addition to independent flaws under the standards applicable to those statutes. This Brief therefore begins by addressing the fraud claim.

I. THE COMPLAINT FAILS TO STATE A FRAUD CLAIM AGAINST DIVIDEND

The elements of a fraud claim under Virginia and North Carolina law are substantially identical as relevant here: "(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 628 (4th

Cir. 1999) (Virginia law); *accord Sullivan v. Mebane Packaging Grp., Inc.*, 581 S.E.2d 452, 458 (N.C. Ct. App. 2003) (substantially identical elements under North Carolina law).[6]

Importantly, both states have a heightened reliance standard for fraud claims—requiring "reasonable" reliance, not merely "detrimental" reliance. *See Hitachi*, 166 F.3d at 629 ("In order to prove reliance, a plaintiff must demonstrate that its reliance upon the representation was reasonable and justified.") (emphasis added); *Sullivan*, 581 S.E.2d at 458 ("[R]eliance on alleged false representations must be reasonable."); *see also PNC Bank, Nat'l Ass'n v. Dominion Energy Mgmt.*, 2018 U.S. Dist. LEXIS 62577, at *31 (E.D. Va. Apr. 11, 2018) (explaining that "reasonable reliance" is a higher standard than "justifiable reliance"). Moreover, reliance is not reasonable if the plaintiff failed to conduct a "prudent investigation" or exercise "reasonable diligence." *Hitachi*, 166 F.3d at 629; *Sullivan*, 581 S.E.2d at 458.

Regardless of reasonable reliance, fraud claims cannot be premised upon predictions about future outcomes or events. *SuperValu, Inc. v. Johnson*, 666 S.E.2d 335, 342 (Va. 2008) ("Because fraud must involve a misrepresentation of a present or a pre-existing fact, fraud ordinarily cannot be predicated on unfulfilled promises or statements regarding future events."); *accord Potts v. KEL, LLC*, 2018 NCBC 24, at *8 (N.C. Bus. Ct. Mar. 27, 2018); *Synovus Bank v. Okay Props., LLC*, 2012 U.S. Dist. LEXIS 121744, at *25–26 (W.D.N.C. Aug. 27, 2012).

Likewise, a fraud claim cannot be based on an "omission" or "nondisclosure" of information absent an affirmative duty to disclose that information, such as a fiduciary duty. *See, e.g.*, *Doe v. Baker*, 857 S.E.2d 573, 590 (Va. 2021) ("Before nondisclosure may constitute fraud . . . there must be a suppression of facts which one party is under a legal or equitable obligation to

[6] The Complaint appears to assert the fraud claim directly against Dividend (*see* Compl. ¶ 153), but regardless of whether the claim is characterized as direct or derivative, it fails for the reasons below.

communicate to the other, and which the other party is entitled to have communicated to him."); *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 827 (4th Cir. 1999) ("Silence does not constitute concealment in the absence of a duty to disclose."); *Trs. of Colum. Univ. v. NortonLifeLock, Inc.*, 580 F. Supp. 3d 236, 270 (E.D. Va. 2022) ("Under Virginia law, a 'duty to disclose does not normally arise when parties are engaged in an arm's length transaction.'"); *Studco Bldg. Sys. United States LLC v. 1st Advantage Fed. Credit Union*, 2023 U.S. Dist. LEXIS 24818, at *30-31 (E.D. Va. Jan. 12, 2023) ("Virginia courts have consistently held that '[f]raudulent concealment must consist of affirmative acts of misrepresentation, mere silence being insufficient.'"); *River's Edge Pharm., LLC v. Gorbec Pharm. Servs.*, 2012 U.S. Dist. LEXIS 57969, at *73 (M.D.N.C. Apr. 25, 2012) ("[S]ilence is fraudulent only when there is a duty to speak.'").

None of the Complaint's allegations adequately plead fraud under these standards, let alone under Rule 9(b)'s heightened requirement to plead fraud with particularity, as explained below.

As an initial matter, to the extent any claims rely upon the experiences of the three Dividend borrowers who did not submit declarations (Plaintiffs Atkins, Rickard, and Briggs), their claims should be dismissed for failure to allege "the who, what, when, where, and how of the alleged fraud" as required under Rule 9(b). *See Lambert*, 2021 U.S. Dist. LEXIS 142635, at *17. Further, any claim based on Mr. Michaux's expected tax refund fails because he does not allege that he did not receive the credit that the salesperson allegedly "promised." (*See* Compl. Ex. 1 at 50.) The claims as to all borrowers fail for the following additional reasons.

A. The "Tax Rebate" Allegations Do Not Support a Fraud Claim

Plaintiffs do not—and cannot—adequately allege that they reasonably relied on misstatements about the tax rebates they would receive, for three independent reasons, each of which requires dismissal on its own:

First, Plaintiffs fail to allege that they conducted a "prudent investigation" or exercised "reasonable diligence" in verifying their own eligibility for a tax credit. Indeed, as the Complaint itself points out, there is a publicly available IRS Form 5695 that taxpayers can use to calculate residential energy credits (*see* Compl. ¶ 42), with accompanying detailed instructions on how to do so.[7] Plaintiffs do not allege that they even attempted to calculate their own potential tax credits. That failure to conduct a prudent investigation alone precludes their reasonable reliance on alleged representations about tax rebates, and thereby precludes their fraud claim based on such representations.

Second, in their agreements with Power Home, **Plaintiffs expressly disclaimed reliance on any statements about tax credits** that may have been made to them. For example, among other disclaimers set forth above, Plaintiffs acknowledged that they should not make their "decision to enter into this agreement in reliance on obtaining any such [tax] benefit."

Those contracts are both referenced in, and integral to, the Complaint and are therefore appropriately considered on this motion to dismiss. Having contractually disclaimed reliance on any such statements, Plaintiffs cannot turn around and claim the opposite now. *See Anderson v. Fluor Intercontinental, Inc.*, 2021 U.S. Dist. LEXIS 45526, at *27 (E.D. Va. Jan. 4, 2021) (under Virginia law, "reliance is unreasonable . . . where a party specifically disclaims reliance on its counterparty's representation it asserts as fraudulent.") (internal quotation omitted); *Jackson v. Minn. Life Ins. Co.*, 275 F. Supp. 3d 712, 732 (E.D.N.C. 2017) (under North Carolina law, "when a plaintiff alleges misrepresentations that are 'directly contrary' to the express terms of a written contract . . . [,] [r]eliance on such misrepresentations is unreasonable as a matter of law.").

[7] *See* Internal Revenue Service, "About Form 5695, Residential Energy Credits," *available at*: https://www.irs.gov/forms-pubs/about-form-5695 (last accessed June 25, 2023).

Plaintiffs' express disclaimer of reliance is thus an additional, independent reason why their allegations about promises of tax rebates fail to support a fraud claim.

Third, any alleged representations about tax rebates are plainly predictions of a future outcome. Plaintiffs allege that they were told they "would receive" a tax rebate from the federal government in the future. (*See, e.g.*, Compl. ¶ 150.) As a matter of law, such an incorrect prediction of a future event or outcome is not fraud. *See, e.g.*, *SuperValu*, 666 S.E.2d at 342; *Lumbermen's Underwriting All. v. Dave's Cabinet, Inc.*, 258 Va. 377, 382 (1999) (holding that statements regarding expected reductions in premiums were not actionable as "an unfulfilled promise as to a future event").

B. The "Undisclosed Fee" Allegations Do Not Support a Fraud Claim

Nor do the allegations about an "undisclosed fee" support Plaintiffs' fraud claim. Dividend does not have a legal duty to disclose such information. To be clear, Plaintiffs do not allege that they were told a different amount than the amount actually financed. Instead, they complain that they should have received an additional disclosure about <u>how</u> the Defendants arrived at that total amount, including the purported "hidden fee" associated with the financing. But absent an affirmative duty to disclose such information, such as a fiduciary relationship, there can be no fraud claim. *See, e.g.*, *River's Edge*, 2012 U.S. Dist. LEXIS 57969, at *73; *NortonLifeLock,* 580 F. Supp. 3d at 270. Plaintiffs do not allege that Defendants owed them any fiduciary duties or that their contracts constituted anything other than arm's-length transactions.

Furthermore, there is no allegation that Plaintiffs who borrowed from Dividend <u>reasonably and detrimentally relied</u> on the alleged omission of the "hidden fee" as a basis to agree to the loan. Indeed, the Plaintiffs' declarations do not even mention it. This lack of reasonable reliance is an independent basis for dismissal, even as to an omission-based claim. *See Ramos v. AAA of the Carolinas*, 2017 U.S. Dist. LEXIS 196996, at *11 (W.D.N.C. Oct. 31, 2017).

Nor can Plaintiffs base a duty of disclosure on an allegation that the information was "concealed," given their failure to allege an "affirmative act" of concealment. *E.g.*, *Studco*, 2023 U.S. Dist. LEXIS 24818, at *30–31 ("affirmative act," under Virginia law); *River's Edge*, 2012 U.S. Dist. LEXIS 57969, at *73 ("affirmative steps," under North Carolina law). Plaintiffs fail to allege any "affirmative act" of concealment at all relevant to Dividend, much less with the particularity required by Rule 9(b).

At most, the Complaint alleges that Power Home and Dividend remained silent as to which fees they included in the total financing cost they did disclose. In support, the Complaint only cites two of the other Lenders' confidentiality clauses. (Compl. ¶¶ 82–84.) Accordingly, the Complaint does not allege an "affirmative step" to conceal that information. Plaintiffs' vague allegation that Defendants somehow "misrepresent[ed] the price of the system as if no additional fee for the financing was included" (Compl. ¶ 83) does not allege an actionable misrepresentation. The allegation merely recharacterizes the assertion that Defendants were somehow obligated to disclose how they determined what to charge their customers. But there is no support for such an obligation. *See generally Eller v. EquiTrust Life Ins. Co.*, 778 F.3d 1089, 1092–93 (9th Cir. 2015) (observing that it is a "settled premise that a seller generally has no duty to disclose internal pricing policies or its method for valuing what it sells.") (citing cases).[8] The Complaint thus fails to allege a duty to disclose any "hidden" fee.

C. The "Benefits of the System" Allegations Do Not Support a Fraud Claim

Finally, the Complaint's passing reference to alleged misrepresentations about "the benefits of the system" does not support their fraud claim. As noted above, the Complaint does

[8] Plaintiff's separate claim that Defendants were obligated to disclose this information under TILA is also without merit, as discussed below.

virtually nothing to develop that allegation and appears to include it only as background. The fraud claim does not mention those allegations at all, relying only on statements about tax rebates and undisclosed fees. (*See* Compl. ¶¶ 150, 153.) In any event, such an allegation about the benefits of the system would not be actionable because it is a prediction of future outcomes as to energy savings (*see supra* at 9, 12)[9] and because Plaintiffs contractually disclaimed reliance on any such representations (*see supra* at 6, 11).

In sum, none of the allegations in the Complaint support its central claim of fraud. As explained below, Plaintiffs' efforts to repackage the same allegations as statutory claims also fail.

II. THE COMPLAINT FAILS TO STATE A VCPA CLAIM AGAINST DIVIDEND

Plaintiff's VCPA claim also fails as matter of law, whether asserted directly against Dividend, or derivatively based on the conduct of Power Home. "To state a claim under the VCPA, the plaintiff must allege (1) a fraudulent act (2) by a supplier (3) in a consumer transaction." *Curtis v. Propel Prop. Tax Funding, LLC*, 2018 U.S. Dist. LEXIS 19357, at *5 (E.D. Va. Feb. 5, 2018). "The VCPA also requires proof of (1) reliance and (2) damages, with regard to the alleged misrepresentation(s) of fact." *Id.* "As a claim sounding in fraud, Federal Rule of Civil Procedure 9(b) requires plaintiffs to plead VCPA claims with particularity." *Id.* (citation omitted). Claims sounding in fraud "must relate to a present or a pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." *McMillion v. Dryvit Syst.*, 262 Va. 463, 471 (2001).

A. Any Direct Claim Fails Because the VCPA Does Not Apply to Dividend

Dividend is not regulated by the VCPA, and therefore any claim of direct liability fails.

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[9] *See also McMillion v. Dryvit Syst.*, 262 Va. 463, 471 (2001) (insulation manufacturer's representation that "[d]amaging water penetration is avoided" with its product is an inactionable "promise to a future event").

1. Dividend Is Not a "Supplier" Regulated by the VCPA

The VCPA only applies to fraudulent acts or practices by "a supplier in connection with a consumer transaction." Va. Code § 59.1-200(A) (emphasis added); *Branin v. TMC Enters., LLC*, 832 F. Supp. 2d 646, 650 (W.D. Va. 2011). A "supplier" is "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." Va. Code § 59.1-198.

Dividend is not a "supplier" under the Complaint's allegations. Dividend did not sell, lease, license, advertise, or manufacture any of the solar panels. As the Complaint makes clear, Power Home sold the solar panel systems, and Plaintiffs contracted with Power Home to buy them. (*See* Compl. ¶ 3.) Dividend only provided financing. (*See id.*). Dividend did not supply any goods or services and thus is not regulated by the VCPA. *See, e.g.*, *Harold v. TMC Enters., LLC*, 2016 U.S. Dist. LEXIS 142928, at *8 (W.D. Va. Oct. 17, 2016) (company financing plaintiff's car purchase was not a "supplier" subject to the VCPA).

2. Dividend Is Excluded from the VCPA as a "Small Loan Company."

Dividend is separately and independently excluded from the VCPA's coverage because it is a "small loan company." The VCPA expressly provides that it does not apply to certain entities, including "small loan companies." Va. Code § 59.1-199(D).

While "[t]here is no Virginia law defining 'small loan company,'" a recent Virginia court decision reached the commonsense conclusion that a "'small loan company' means companies . . . which issue small loans." *Commonwealth v. Allied Title Lending, LLC*, 98 Va. Cir. 83, 88 (Cir. Ct. 2018).[10] The *Allied* decision held that the company issued "small loans" without further

[10] The court rejected the plaintiff's argument that the last clause of the statute listing excluded entities—which reads ", and insurance companies regulated and supervised by the State Corporation Commission or a comparable

defining what constitutes a "small loan." Here, Dividend indeed issues small loans, based solely on the Complaint's allegations. The Complaint lists the amount of each loan issued by Dividend. (*See* Compl. ¶¶ 70, 80 (reflecting a median loan amount of $68,335.50 by Dividend to Virginia named plaintiffs, and no loan larger than $94,420).) Those amounts, which relate to a solar panel system attached to a house, are much smaller than mortgage loans to purchase such houses.

3. The VCPA Does Not Apply to Dividend if TILA Applies

To the extent TILA is applicable here, the VCPA is not. The VCPA expressly excludes "[t]hose aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq," Va. Code § 59.1-199(C), which includes TILA. *See* 15 U.S.C. § 1601.

Plaintiffs clearly rely on TILA as the basis for their assertion that Dividend should have disclosed the allegedly "hidden fee." (*See* Compl. ¶ 166.) To the extent TILA did require such disclosures, Plaintiffs cannot assert a duplicative VCPA claim due to the statutory exclusion cited above. *See, e.g.*, *Smith v. United States Credit Corp.,* 626 F. Supp. 102, 103 (E.D. Va. 1985), *aff'd* 801 F.2d 661 (4th Cir. 1986). Thus, Plaintiffs cannot proceed under both VCPA and TILA. Plaintiffs' TILA claim is addressed separately below. (*See infra* at Part V.)[11]

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federal regulating body"—should somehow be read to mean that all of the other entities listed also must be so "regulated and supervised" in order to be excluded. *Id.* at 87. The court applied the canon of construction known as "rule of the last antecedent," which "requires that 'all qualifying words and phrases, where no contrary intention appears, apply only to the last antecedent.'" *Id.* (quoting *Scott v. Commonwealth*, 292 Va. 380, 384 (2016)). While one other trial court decision reached a different conclusion, that court failed to apply the "rule of the last antecedent" as required by the Virginia Supreme Court in *Scott*. *See Commonwealth v. NC Fin. Sols. of Utah, LLC*, 100 Va. Cir. 232, 243 (Cir. Ct. 2018). Alternatively, if the Court here disagrees, Dividend is still excluded from the VCPA pursuant to § 59.1-199(D). As 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.

[11] If the Court dismisses the TILA claim as untimely under its statute of limitations (*see infra* Part V), then neither the TILA nor the VCPA claim may proceed. If, however, the Court dismisses the TILA claim on the alternative basis that the loan amounts here exceed TILA's statutory threshold (*see id.*), then it is less clear whether the VCPA would apply in such a scenario—where TILA itself excludes coverage under the circumstances. In the event the Court reaches that particular result, Dividend would be glad to submit additional briefing on that issue.

B. The VCPA Claim Also Fails Even if Asserted Derivatively

Even if Plaintiff's theory is that the VCPA claim applies to Dividend "derivatively" based on Power Home's conduct, the claim still fails for substantially the same reasons as the fraud claim. As with a fraud claim, to state claim under the VCPA, Plaintiffs must adequately allege reliance on the alleged misrepresentations. *See, e.g.*, *Cooper v. GGGR Invs., LLC*, 334 B.R. 179, 188 (E.D. Va. 2005). And again, such reliance must be "reasonable and justified," including a "prudent investigation." *Hitachi*, 166 F.3d at 629. For all the reasons discussed in Part I above, Plaintiffs fail to allege that they reasonably relied on <u>any</u> of the alleged misrepresentations or omissions. Plaintiffs' VCPA claim thus fails in its entirety as to all of Plaintiffs' factual allegations for failure to state a claim.

And again, as a fraud-based claim under the VCPA, the allegations as to the expected tax rebates and "benefits of the system" fail for the additional, independent reason that they are statements or promises of future events or performance. *SuperValu*, 666 S.E.2d at 342; *Lumbermen's Underwriting,* 258 Va. at 382; *McMillion*, 262 Va. at 471. (*See supra* Parts I.A., C.) In sum, Plaintiffs' effort to repackage their fraud claim as a derivative VCPA claim fails.

III. THE COMPLAINT FAILS TO STATE A UDTPA CLAIM AGAINST DIVIDEND

The North Carolina UDTPA claim against Dividend also fails as a matter of law, for largely the same reasons the fraud claim fails.[12] Notably, only one Plaintiff who borrowed from Dividend, Mr. Michaux, is a North Carolina resident. (*See supra* at 3).

The UDTPA prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C.G.S. § 75-1.1(a). To establish a *prima facie* UDTPA claim, a plaintiff must show "(1) [the] defendant committed an unfair or

[12] The Complaint appears to assert the UDTPA claim both directly and derivatively against Dividend (*see* ¶ 146), but regardless of whether it is characterized as direct or derivative, it fails for the reasons below.

deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp,* 548 S.E.2d 704, 711 (N.C. 2001). Whether commercial acts or practices are unfair and/or deceptive is a question of law. *Carpenter v. Nextlevel Ass'n Sols.*, 2022 U.S. Dist. LEXIS 176857 at * 16 (W.D.N.C. Sept. 29, 2022).

Rule 9(b)'s heightened pleading standard "applies to [UDTPA] claims alleging detrimental reliance on false or deceptive representations." *Topshelf Mgmt. v. Campbell-Ewald Co.*, 117 F. Supp. 3d 722, 731 (M.D.N.C. 2015). Thus, where, as here, a plaintiff brings a UDTPA claim "predicated on precisely the same alleged misrepresentations" as their fraud claim, the UDTPA claim must also be pleaded with the requisite particularity under Rule 9(b). *Id.* (dismissing UDTPA claim for the same reasons as the fraud claim).

As with a fraud claim, a misrepresentation-based UDTPA claim must adequately allege plaintiff's actual and reasonable reliance. *Bumpers v. Cmty. Bank of N. Va.*, 747 S.E.2d 220, 227 (N.C. 2013). This requirement is akin to "that of the detrimental reliance requirement under a fraud claim." *Id.* (internal quotation marks omitted). "Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Id.* A UDTPA misrepresentation claim must also allege that plaintiff "affirmatively incorporated the alleged misrepresentation into his or her decision-making process: if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether." *Id.*

Here, once again, the Complaint fails to allege actual and reasonable reliance to support its UDTPA claim. This claim is based on the same allegations as Plaintiffs' fraud claim—the alleged misrepresentations about expected tax rebates, "hidden fees," and efficiency of the solar panel system. (Compl. ¶ 143.) The Complaint fails to allege reasonable reliance on any of them for the same reasons discussed above. (*See supra* Part I.) With respect to the "hidden fee" allegation, if

anything, there is an additional basis for dismissal under the UDTPA. As discussed above, Plaintiffs' declarations say nothing at all about the alleged "hidden fee," much less that they "affirmatively incorporated the alleged misrepresentation into [their] decision-making process." *Bumpers*, 747 S.E.2d at 227.

And again, to the extent this claim relies on a failure to receive a tax credit as promised, it fails because Mr. Michaux—the sole North Carolina resident who borrowed from Dividend—does not allege that he did not receive that tax credit. (*See supra* at 4.)

In sum, Plaintiffs' effort to repackage their failed fraud claim as a UDTPA claim fails, and it should be dismissed just the same. *See, e.g., Topshelf Mgmt.*, 117 F. Supp. 3d at 731.

IV. THE COMPLAINT FAILS TO STATE A RICO CLAIM AGAINST DIVIDEND

Plaintiffs' attempt to pursue a RICO claim is completely inappropriate under these alleged facts. A civil RICO claim is based on the well-known criminal statute designed to prosecute organized crime—enshrined in the statute as covering an "enterprise" engaging in "a pattern of racketeering activity." As explained below, the Fourth Circuit made clear that RICO is <u>not</u> designed to cover "garden-variety fraud" claims or ordinary business disputes, such as those alleged in the Complaint here. And more specifically, the RICO claim fails because (i) it purports to allege a "rimless hub-and-spoke" scheme, which does not constitute an "enterprise" under RICO; and (ii) it fails to allege adequately the predicate offense of wire fraud upon which this claim relies.[13]

Plaintiffs' claim relies on two provisions of RICO: 18 U.S.C. § 1962(a) and 18 U.S.C. § 1962(c). (Compl. ¶ 111.) Section 1962(a) provides, in relevant part:

[13] The Complaint appears to assert the RICO claim directly against Dividend (*see* ¶¶ 113, 125), but regardless of whether it is characterized as direct or derivative, it fails for the reasons below.

> 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.

Section 1962(c), on the other hand, provides:

> It shall be 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.

In order to plead a civil RICO claim under either Section 1962(a) or (c), plaintiffs must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Morley v. Cohen*, 888 F.2d 1006, 1009 (4th Cir. 1989). Both 1962(a) and (c) require plaintiffs to show a pattern of racketeering activity, which includes an assortment of criminal offenses including mail and wire fraud. *Al-Abood v. Elshamari*, 217 F.3d 225, 238 (4th Cir. 2008); *Chisolm v. TranSouth Fin. Corp.,* 95 F.3d 331, 335 (4th Cir. 1996).

A. RICO Does Not Apply to These "Garden Variety Fraud" Allegations

The Fourth Circuit "will not lightly permit ordinary business contract or fraud disputes to be transformed into federal RICO claims." *Flip Mortg. Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988). Rather, the "heightened civil . . . penalties of RICO are reserved for schemes whose scope and persistence set them above the routine." *Id.* (quoting *HMK Corp. v. Walsey*, 828 F.2d 1071, 1074 (4th Cir. 1987)). RICO is designed to address schemes that "resemble the sort of extended, widespread, or particularly dangerous pattern of racketeering which Congress intended to combat with federal penalties." *Id.* Accordingly, RICO "does not cover all instances of wrongdoing. Rather, it is a unique cause of action that is concerned with eradicating organized,

long-term, habitual criminal activity." *U.S. Airline Pilots Ass'n v. AWAPPA, LLC*, 615 F.3d 312, 317 (4th Cir. 2010) (internal citations omitted).

In particular, the Fourth Circuit is "cautious about basing a RICO claim on predicate acts of mail and wire fraud"—as Plaintiffs allege here—"because it will be the unusual fraud that does not enlist the mails and wires in its service at least twice." *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 549 (4th Cir. 2001) (quoting *Al-Abood*, 217 F.3d at 238). "This caution is designed to preserve a distinction between ordinary or garden-variety fraud claims better prosecuted under state law and cases involving a more serious scope of activity." *Al-Abood*, 217 F.3d at 238. Thus, where, as here, Defendants' conduct does not fall "sufficiently outside the heartland of fraud cases" or "involve a scope of unlawful activity that exceeds that found in customary fraud cases," a RICO claim is not viable. *Id.* at 238–39.

Here, not only do Plaintiffs' allegations fail to reflect anything rising above "garden-variety fraud," Plaintiffs fail to state a claim for any fraud at all, as shown above. But even taking Plaintiffs' conclusory claims at face value, they reflect the very type of "ordinary business contract or fraud disputes" that are not the proper subject of a RICO claim under the law of this Circuit. *See, e.g*, *Foster v. Wintergreen Real Est. Co.*, 363 F. App'x 269, 274 (4th Cir. 2010) (per curiam) (concluding that even allegations of "multiple instances of mail and wire fraud over the course of an arguably substantial period of time" were nonetheless "garden-variety fraud" and did not rise to the level of supporting a RICO claim). 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. For that basic deficiency alone, the RICO claim should be dismissed.

B. The Complaint Does Not Adequately Allege an "Enterprise" Under RICO

Plaintiffs' RICO claim should also be dismissed because it fails to allege an "enterprise." As explained below, the Complaint's allegations fail because they indicate a "rimless hub-and-spoke" association that does not constitute a RICO "enterprise" as a matter of law.

Where, as here, a singular alleged bad actor (Power Home) acts as the hub of the purported enterprise, Plaintiffs must also show a relevant relationship between the other spokes—here, the Lenders. *Kadow v. First Fed. Bank*, 2020 U.S. Dist. LEXIS 159848, at *29-32 (D. Md. Sept. 2, 2020); *see generally Dye v. MLD Mortg. Inc.*, 2021 U.S. Dist. LEXIS 132380, at *52 (D. Md. July 16, 2021) (distinguishing "hub-and-spoke" enterprises and "bilateral" enterprises). Specifically, the complaint must allege a relationship between the various spokes separate and apart from each individual spoke's relationship with the principal. *Donaldson v. Primary Residential Mortg., Inc.*, 2020 U.S. Dist. LEXIS, at *26 (D. Md. June 12, 2020) (dismissing complaint that was "devoid of facts connecting the spokes" and "bereft of allegations suggesting that the participating mortgage lenders were working together in furtherance of the scheme or, indeed, that they were even aware of each other's existence"); *see Vuyyuru v. Jadhav*, 2011 U.S. Dist. LEXIS 42254 (E.D. Va. Apr. 19, 2011), *aff'd,* 501 F. App'x 294 (4th Cir. 2012); *Peters v. Aetna, Inc.*, 2016 U.S. Dist. LEXIS 117326, at *22-26 (W.D.N.C. Aug. 16, 2016).

Because the Complaint fails to allege such a relationship between the Lenders, the RICO claim fails as a "'rimless' hub and spoke conspiracy." *Kadow*, 2020 U.S. Dist. LEXIS 159848, at *32. The Complaint lacks any allegations that the Lenders, including Dividend, worked together or were even aware of each other's relationship with Power Home. The Complaint does not allege anything more than the Lenders had separate contracts with Power Home, and therefore does not support the inference that the Lenders associated together for a common purpose of engaging in a

course of conduct. *Peters,* 2016 U.S. Dist. LEXIS 117326 at *25. Thus, the RICO claim should be dismissed for failure to allege an "enterprise." *Id.* at *26.

C. The Complaint Fails to Plead a Sufficient Predicate Wire Fraud Offense

A third and independent basis for dismissal of the RICO claim is that it fails to plead the predicate of wire fraud with the particularity required by Rule 9(b). (*See* Compl. ¶ 124.)

Where, as here, "a RICO claim is based upon predicate acts of wire fraud, the plaintiff "must plead [the] circumstances of the fraudulent acts that form the alleged pattern of racketeering activity with sufficient specificity pursuant to Fed. R. Civ. P. 9(b)." *Ostoyic v. Buchanan*, 2020 U.S. Dist. LEXIS 198971, at *4 (W.D.N.C. Oct. 26, 2020). To meet Rule 9(b)'s heightened pleading requirement, plaintiffs "must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *U.S. ex rel Owens v. First Kuwaiti Gen'l Trading & Contracting Co*., 612 F.3d 724, 731 (4th Cir. 2010) (citation omitted). "It is not enough for a plaintiff to file a RICO claim, chant the statutory mantra, and leave the identification of predicate acts to the time of trial." *Synergy Fin., L.L.C. v. Zarro*, 329 F. Supp. 2d 701, 712 (W.D.N.C. July 12, 2004). In other words, the complaint must "specify the predicate acts . . . upon which the Plaintiffs rely." *Id.*

Here, the Complaint does not specify the circumstances of any predicate acts of wire fraud upon which it purports to rely. Instead, it vaguely asserts that "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," *i.e.*, about the allegedly hidden fee and the expected tax rebate. (Compl. ¶ 24.) Neither the Complaint nor its attached declarations from the Dividend borrowers say anything at all about the circumstances of how interstate wires were used in furtherance of fraud. Thus, the Complaint fails to state the manner in which such alleged wire fraud occurred, much less as it relates to Dividend's conduct in particular. *See Ostoyic*, 2020 U.S.

Dist. LEXIS 198971 at *4 ("[A]bsent some factual enhancement, allegations such as 'defendants agreed, cooperated and conspired with one another to commit the fraudulent transfers' . . . are insufficient . . . ."). Accordingly, Plaintiff's RICO claim is also subject to dismissal for failure to plead any predicate acts of wire fraud with particularity.

V. THE COMPLAINT FAILS TO STATE A TILA CLAIM AGAINST DIVIDEND

Plaintiff's TILA claim is barred by the applicable one-year statute of limitations. In the alternative, TILA does not apply to the loans made to any of the Dividend borrowers who submitted declarations because their loan amounts exceed the maximum statutory threshold for TILA's application. These are two independent bases for dismissal, as explained below.

First, the applicable statute of limitations for TILA is one year, running from the date of the loan agreement. *See* 15 U.S.C. § 1640(e) ("within one year from the date of the occurrence of the violation"); *Moseley v. Countrywide Home Loans, Inc.*, 2010 U.S. Dist. LEXIS 114164, at *5 (E.D.N.C. Oct. 25, 2010) ("The 'date of the occurrence of the violation' is the date on which the borrower accepts the creditor's extension of credit."). Here, each of the nine Plaintiffs who allegedly borrowed from Dividend (Compl. ¶ 70) executed their loan agreements more than one year before this action was filed on March 10, 2023. (*See id.* ¶ 80 (listing the contract dates).) All of the TILA claims against Dividend are therefore barred by the statute of limitations.

There is no merit to Plaintiffs' assertion that this statute of limitations should be tolled "[b]ecause of the fraudulent concealment by Defendants of the hidden fee." (Compl. ¶ 93.) "[S]uch arguments are routinely rejected on the basis 'that fraudulent conduct *beyond the nondisclosure itself* is necessary to equitably toll the running of the statute of limitations.'" *Barnett v. Countrywide Bank, FSB*, 60 F. Supp. 3d 379, 392-93 (E.D.N.Y. 2014) (emphasis in original). "Otherwise, in a context in which nondisclosure is the gravamen of the violation, then just about every failure by defendant to disclose as required by the TILA would seemingly bring about tolling

and would tend to eviscerate the limitations provision set forth in § 1640(e) . . . ." *Wiseman v. First Mariner Bank*, 2013 U.S. Dist. LEXIS 136229, at *86 (D. Md. Sep. 23, 2013) (quoting precedent). To toll the statute of limitations, Plaintiffs would have to allege an "affirmative act" of concealment, typically "some trick or connivance." *Espejo v. George Mason Mortg., LLC*, 2010 U.S. Dist. LEXIS 8190, at *16 (E.D. Va. Feb. 1, 2010) ("Plaintiffs must present evidence of affirmative 'acts of concealment [by Defendants].'"); *see Gregory v. Toler Appraisal Grp., LLC*, 2023 U.S. Dist. LEXIS 46417, at *29 (S.D. W. Va. Mar. 20, 2023) ("some trick or contrivance intended to exclude suspicion and prevent inquiry."). As discussed above, there are no allegations of such "active concealment," much less of any "trick or contrivance." (*See supra* Part I.B.) Accordingly, Plaintiffs cannot evade TILA's statute of limitations, which bars their claim.

Second, TILA does not apply to the Dividend loans for which Plaintiffs submitted declarations in this case because their amounts financed exceeded TILA's statutory maximum threshold. As relevant here, TILA does not apply to credit transactions "in which the total amount financed exceeds $50,000," 15 U.S.C. § 1603(3), subject to periodic increases by regulation, of which the most recent increase relevant to these Plaintiffs was to $61,000.[14] Each of the six Dividend borrowers who submitted declarations borrowed more than that maximum amount, which precludes their TILA claims.[15]

CONCLUSION

All claims against Dividend Solar Finance, LLC should be dismissed under Rule 12(b)(6).

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[14] Those periodic increases are listed on the CFPB's website at https://www.consumerfinance.gov/rules-policy/final-rules/truth-lending-regulation-z-threshold-adjustments/.

[15] The nine alleged Dividend borrowers are listed in Paragraph 70 of the Complaint. The six of them who submitted declarations are Plaintiffs Weaver, Dunford, During, Lee, Abdalla, and Michaux. Each of them borrowed more than $61,000. (Compl. ¶ 80.) Of the remaining three Dividend borrowers—*i.e.*, those who did not submit declarations to support their claims—only one, Mr. Rickard, borrowed under $61,000. (Compl. ¶ 80.) His claim is barred by the statute of limitations, as discussed above, and in any event, there are no allegations in the Complaint to support his TILA claim.

Date: June 30, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on June 30, 2023, electronically in accordance with the method established under this Court's CM/ECF Administrative Procedures upon all parties in the electronic filing system in this case.

/s/ Tyler J. Mitchell
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