

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

SHOSHANA SMITH, individually
and behalf of all others similarly
situated,

Plaintiff,

v.

Case No.: 2:23-cv-849-SPC-KCD

LUMIO HX, INC. and ATLANTIC
KEY ENERGY, LLC,

Defendants.

_____ /

ORDER

Before the Court is Plaintiffs' Opposed Motion for Leave to File Second Amended Complaint (Doc. 42).¹ Defendant Lumio, Hx, Inc. has responded in opposition. (Doc. 52.) For the reasons below, the motion is granted.

I. Background

Plaintiff Shoshana Smith owns a home in Lehigh Acres, Florida. (Doc. 42-1 ¶ 120.) Her husband contracted with Defendant Atlantic Key Energy, LLC for the installation of a "solar energy system consisting of 48 [rooftop] solar panels" after receiving unsolicited calls from their salespersons. (*Id.* ¶¶ 120, 122.) Smith alleges her husband "fell for . . . promises of free solar." (*Id.* ¶ 109.)

¹ Unless otherwise indicated, all internal quotation marks, citations, case history, and alterations have been omitted in this and later citations.

The system cost \$68,912 but worked less than half the time. (*Id.* ¶¶ 121, 151.) And contrary to the representations of Atlantic Key’s salesperson, they never received a cash rebate from the government. (*Id.* ¶¶ 128-29.)

Smith brought this case “individually and on behalf of all others similarly situated.” (Doc. 1 at 1.) The initial complaint alleged claims for breach of contract and unjust enrichment against Atlantic Key. (Doc. 1 ¶¶ 129-52.) Lumio is allegedly a successor corporation to Atlantic Key, so it is also named as a defendant. (*Id.* ¶ 54.) Before the deadline to add parties and amend pleadings, Smith, accompanied by four new plaintiffs, moved to file a Second Amended Complaint. (Doc. 38 at 1, Doc. 42.)

Along with the new plaintiffs, the Second Amended Complaint adds two defendants and five claims against Lumio. (Doc. 42-1.) According to the Second Amended Complaint, Lumio fraudulently induced Plaintiffs to contract for its solar energy systems and violated the Federal Racketeer Influenced and Corrupt Organizations Act, the Florida Deceptive and Unfair Trade Practices Act, and Florida’s Distributed Energy Generation System Sales Act. (*Id.* ¶¶ 250-279, 287-295, 296-299.)

Lumio opposes Plaintiffs’ request to amend. It complains the motion seeks “to revamp [Plaintiffs’] entire case in a shot-gun style 88-page pleading containing 321 paragraphs that confuse the issues, prejudices [Lumio], and is dilatory in nature.” (Doc. 52 at 1-2.)

II. Legal Standard

Federal Rule of Civil Procedure 15 instructs leave to amend “should [be] freely given when justice so requires.” Fed. R. Civ. P. 15(a)(2). This is a liberal standard. *See Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc’ns, Inc.*, 376 F.3d 1065, 1077 (11th Cir. 2004). Permission to amend should be “freely given,” as required by the rule, except in the presence of countervailing factors such as “undue delay, bad faith, . . . undue prejudice . . . [or] futility.” *McKinley v. Kaplan*, 177 F.3d 1253, 1258 (11th Cir. 1999). Denying leave to amend is an abuse of discretion without one or more of these factors. *Fla. Evergreen Foliage v. E.I. DuPont De Nemours & Co.*, 470 F.3d 1036, 1041 (11th Cir. 2006). “The party seeking leave to amend under Rule 15 bears the burden of establishing entitlement to it.” *In re Engle Cases*, 767 F.3d 1082, 1119 n.37 (11th Cir. 2014).

III. Discussion

A. Undue Delay

Starting with undue delay, Lumio argues Plaintiffs waited too long to seek amendment. (Doc. 52 at 16-17.) The new claims, according to Lumio, are based on “the same publicly available information [Plaintiffs] had at the time the lawsuit was originally filed.” (*Id.*)

As an initial matter, Lumio never alleges Plaintiffs’ delay was “undue.” This is significant because “the mere passage of time, without more, is an

insufficient reason to deny leave to amend a complaint[.]” *In re Engle Cases*, 767 F.3d at 1109. Delay must be characterized as undue to overcome Rule 15. *Id.*; *Domke v. McNeil-P.P.C., Inc.*, 939 F. Supp. 849, 851 (M.D. Fla. 1996).

In any event, Plaintiffs’ conduct here is no reason to deny leave to amend. Undue delay can result “when the movant knew of facts supporting the new claim long before the[y] requested leave to amend, and amendment would further delay the proceedings.” *Hesed-El v. Aldridge Pite, LLP*, No. 20-14782, 2021 WL 5504969, at *6 (11th Cir. Nov. 24, 2021). But “[u]ndue delay is not present where, as here, a plaintiff moves to amend within the time period prescribed in a court’s scheduling order.” *Andrews v. Radiancy, Inc.*, No. 6:16-cv-1061-Orl-37GJK, 2017 WL 552873, at *2 n.4 (M.D. Fla. Feb. 10, 2017). Lumio has not shown that Plaintiffs knew of the facts “long before [they] requested leave to amend” or that granting the motion “would further delay the proceedings.” *Hesed-El*, 2021 WL 5504969, at *6.

B. Undue Prejudice

Turning to undue prejudice, Lumio argues that allowing the amended complaint would “significantly broaden[] the issues set forth in this litigation under a case management order entered on much more narrow claims.” (Doc. 52 at 3.) This argument also falls short. “It is true that prejudice can result where a proposed amendment raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party[.]”

Taylor v. Fla. State Fair Auth., 875 F. Supp. 812, 815 (M.D. Fla. 1995). “[B]ut that basis for a finding of prejudice essentially applies where the amendment is offered shortly before or during trial.” *Id.*; see also *Wilson v. Badcock Home Furniture*, No. 8:17-CV-2739-T-33AAS, 2018 WL 11319237, at *2 (M.D. Fla. Mar. 6, 2018). Where the parties are “still in the early stages of litigation,” allowing amendment will not result in undue prejudice. *Taylor*, 875 F. Supp. at 815. Discovery is open through the end of the year, and trial is more than a year off. (*Id.* at 1, 2.) Allowing Plaintiffs to amend at this point may inconvenience Lumio, but it will not cause undue prejudice.

C. Futility

Lumio’s primary argument is futility—“many of the new [claims]. . . do not stand up to the futility framework adopted by the Eleventh Circuit.” (Doc. 52 at 2.) “Futility of amendment warranting denial of leave to amend may be found only when the proposed amendment is clearly insufficient or frivolous on its face.” *Andrews*, 2017 WL 552873, at *3. With this standard in mind, each of the contested claims is addressed below.

i. The Florida Distributed Energy Generation System Act

According to Lumio, Plaintiffs’ claim under the Florida Distributed Energy Generation System Act is futile because the statute does not provide a private cause of action. (Doc. 52 at 2.) The Court disagrees. “Whether a violation of a statute can serve as the basis for a private cause of action is a

question of legislative intent.” *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 23 (Fla. 2004). “Courts must determine legislative intent from the plain meaning of the statute.” *Id.*

Looking at the statute’s text, the Florida legislature intended to create a private right of action:

In the case of a willful and intentional violation of this part, *the owner may recover from the person committing such violation, or may set off or counterclaim in any action* against the owner by such person, an amount equal to any finance charges and fees charged to the owner under the agreement, plus attorney fees and costs incurred by the owner *to assert his or her rights under this part.*

Fla. Stat. § 520.25(2) (emphasis added). This subsection would not serve a purpose unless a claim exists. *See Universal Prop. & Cas. Ins. Co. v. Loftus*, 276 So. 3d 849, 850 (Fla. Dist. Ct. App. 2019) (“A private right of action may be implied from a statutory provision that would serve no useful purpose in the absence of a private right of action.”). Put simply, Florida’s Distributed Energy Generation System Sales Act seemingly allows recovery for “willful and intentional” violations.

Not to be denied, Lumio separately argues that “Count [VI] lacks any allegations of willful and intentional conduct.” (Doc. 52 at 16.) While the words “willful” and “intentional” do not appear in Count VI, the incorporated facts describe willful and intentional non-compliance with the statute. (Doc. 42-1 ¶¶ 10-12, 296-99.) These allegations are enough at this stage.

ii. The Federal Racketeer Influenced and Corrupt Organizations Act

Lumio raises several objections to Plaintiffs' claims under subsections (c) and (d) of 18 U.S.C. § 1962, the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). To prevail under subsection (c), "a plaintiff must plead facts supporting the following elements: (1) conduct; (2) of a RICO enterprise; (3) through a pattern; (4) of racketeering activity." *Craig v. Little Pearls Adoptions Agency, Inc.*, No. 8:10-CV-671-T-30TGW, 2011 WL 2693716, at *2 (M.D. Fla. July 12, 2011). For subsection (d), a plaintiff must plead facts supporting a cause of action under subsection (c) and allege "that each defendant agreed to the overall object of the conspiracy or that each defendant agreed to commit two predicate acts." *Associated Indus. Ins. Co. v. Advanced Mgmt. Servs., Inc.*, No. 12-80393-CIV, 2014 WL 1237685, at *7 (S.D. Fla. Mar. 26, 2014). Plaintiffs fail to state a claim under either subsection, according to Lumio, because they cannot show it was part of a RICO enterprise. (Doc. 52 at 5-6.)

Plaintiffs allege Lumio participated in "an association-in-fact" RICO enterprise. (Doc. 42-1 ¶ 254.) "An association-in-fact enterprise is simply a continuing unit [of individuals associated in fact although not a legal entity] that functions with a common purpose." *Cisneros v. Petland, Inc.*, 972 F.3d 1204, 1211 (11th Cir. 2020). "To plead an association-in-fact enterprise, . . . a

plaintiff must allege that a group of persons shares three structural features: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.* Lumio argues the alleged association-in-fact enterprise lacks the purpose and relationship features. (Doc. 52 at 5-6, 7.)

As for purpose, Lumio notes Plaintiffs have alleged the enterprise's purpose was to make money, which does not support a finding it participated in an association-in-fact enterprise. (*Id.* at 5-6.) While "[a]n abstract common purpose, such as a generally shared interest in making money, will not suffice," an interest in making money can be enough where "the participants shared the purpose of enriching themselves through a particular criminal course of conduct." *Cisneros*, 972 F.3d at 1211. The Second Amended Complaint alleges Lumio participated in an enterprise to make money *through* a fraudulent scheme. (Doc. 42-1 ¶¶ 250-274.) That is enough for now.

To "prove sufficient relationships for an associated-in-fact enterprise, the group must function as a continuing unit, not merely through independent, parallel conduct." *Aim Recycling of Fla., LLC v. Metals USA, Inc.*, No. 18-CV-60292, 2020 WL 209860, at *15 (S.D. Fla. Jan. 13, 2020). Lumio argues the defendants were operating "independently and without coordination." (Doc. 52 at 7.) That may be true, but that's not what has been asserted. Plaintiffs allege several companies, including Atlantic Key, merged to form Lumio in a scheme

to “defraud homeowners into purchasing solar energy systems through false information, undelivered promises, and deceptive business practices.” (Doc. 42-1 ¶¶ 20-21, 24, 40, 134-135.) They also allege these companies “collaborated and colluded” to “deceive Plaintiffs and the Class members into purchasing solar energy systems using false and illicit marketing schemes.” (*Id.* ¶ 253.) For example, Lumio allegedly provided its associates with instructional videos that taught them deceptive tactics. (*Id.* ¶¶ 11, 13, 81-89.) And Atlantic Key employed these deceptive tactics “to deceive Plaintiffs and the Class members into purchasing solar energy systems.” (*Id.*) At this stage, “the Court accepts the proposed amended allegations as true.” *Maguire v. Dish Network LLC*, No. 4:19-CV-216-JPB-WEJ, 2020 WL 13574188, at *3 (N.D. Ga. Jan. 13, 2020). The allegations in the Second Amended Complaint adequately allege the defendants “function[ed] as a continuing unit.” *Aim Recycling of Florida, LLC*, 2020 WL 209860, at *15.

Next, Lumio argues Plaintiffs’ RICO claims are futile because they “failed to show a causal link between the alleged fraud and injury.” (Doc. 52 at 10.) To make this argument, Lumio characterizes Plaintiffs’ injury as “damages for the replacement of a solar panel system that did not function as [they] expected and damage to [their] roof[s].” (*Id.* at 11.) Such damages, however, “are not directly linked to the alleged sales tactics and purported misrepresentations related to the RICO violation.” (*Id.*) While roof damage and

replacement costs are encompassed within Plaintiffs' alleged damages, they are not the entire claim. The Second Amended Complaint also alleges Plaintiffs did not receive the cash rebates promised and must now cover the loan payments for their solar panels in addition to paying electrical bills, despite the contrary representations. (Doc. 42-1 ¶¶ 4, 16, 96-101, 109, 258, 260.) These allegations draw a causal link between the alleged fraud and injury.

Finally, concerning Plaintiffs' claim under 18 U.S.C. § 1962(d), Lumio argues they have not shown Defendants committed two predicate acts with particularity. (Doc. 52 at 8-10.) "[W]hen a RICO claim is premised on predicate acts of mail or wire fraud, the complaint must also satisfy the heightened pleading standard of Rule 9(b), Federal Rules of Civil Procedure." *Lawrie v. Ginn Dev. Co., LLC*, 656 F. App'x 464, 468 (11th Cir. 2016). Rule 9(b) "requires a plaintiff to establish the who, what, when, where, and how of the fraud." *Hicks v. Bombardier Recreational Prod. Inc.*, 684 F. Supp. 3d 1223, 1249 (S.D. Fla. 2023). To meet that standard, "RICO plaintiffs must allege: (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud, and must do so with respect to each defendant's participation in the fraud." *Lawrie*, 656 F. App'x at 468.

As for the first requirement, Plaintiffs allege Defendants “committed thousands of separate acts of mail and wire fraud.” (Doc. 42-1 ¶¶ 262, 272.) These alleged acts include “false, misleading, and fraudulent advertisements, communications, training materials and instructions through the mails and wires (by internet, telephone, and/or fax).” (*Id.* ¶ 17.) Plaintiffs have not identified the “precise statements, documents, or misrepresentations” made in each alleged act of mail or wire fraud. *Lawrie*, 656 F. App’x at 468. But they have provided screenshots of several advertisements and communications they contend are fraudulent. (Doc. 42-1 ¶¶ 112-114, 116, 117.) And Plaintiffs supplement these allegations by describing unsolicited phone calls, filled with misrepresentations, that they received from Atlantic Key. (*Id.* ¶¶ 120-206.) Because Plaintiffs only needed to allege two predicate acts with particularity, they have satisfied the first requirement.

Turning to the second requirement, Plaintiffs provide “the time, place, and person responsible” for the unsolicited phone calls they received from Atlantic Key. *Lawrie*, 656 F. App’x at 468; (Doc. 42-1 ¶¶ 120-206.) But they stumble when asked to provide the same for the screenshots of Defendants’ advertisements and communications. The Second Amended Complaint is silent on when or where such communications were made. (Doc. 42-1 ¶¶ 112-114, 116, 117.) Those deficiencies, however, do not render the Second Amended Complaint futile. *See Burger King Corp. v. Weaver*, 169 F.3d 1310, 1319 (11th

Cir. 1999); *Andrews*, 2017 WL 552873, at *3. Once again, Plaintiffs only needed to allege two predicate acts with particularity. *Diamond Resorts Int'l, Inc. v. Aaronson*, No. 6:17-CV-1394-ORL-37DCI, 2018 WL 735627, at *5 (M.D. Fla. Jan. 26, 2018); *Associated Indus. Ins. Co.*, 2014 WL 1237685, at *7. They have done so by describing the unsolicited phone calls from Atlantic Key.

For the third requirement, Plaintiffs sufficiently allege the content of the alleged fraudulent communications. For example, the screenshots of Lumio and Atlantic Key's advertisements promote their products by promising "average savings of over \$17,878 per household," electricity rates that "never go up," and government tax credits. (Doc. 42-1 ¶¶ 112-114, 116.) And Plaintiffs allege Lumio and Atlantic Key made similar representations in unsolicited phone calls. (*Id.* ¶¶ 120-206.) For example, Plaintiffs were told the system "would pay for itself," (*id.* ¶¶ 124, 163, 191, 200), they would no longer have utility bills, (*id.* ¶¶ 126, 168, 200), their utility companies would pay them for contributing energy to the power grid, (*id.* ¶¶ 125, 163, 191, 204), and they would receive a cash rebate from the government for going solar, (*id.* ¶¶ 128, 165, 202). According to Plaintiffs, these representations were false:

Plaintiffs and all members of the putative class are individuals who fell for Lumio's promises of free solar. However, instead of replacing their utility bills, homeowners are left with paying both their monthly utility bills and their monthly loan payments. Because there was no cash rebate, homeowners were unable to make a lump sum payment toward their loans, causing their monthly loan payments to balloon to unsustainable amounts.

Rather than cost savings, Plaintiffs and the putative Classes are left with significantly increased energy costs.

(*Id.* ¶ 109.)

Plaintiffs claim they bought Defendants’ solar system based on specific misrepresentations about the lower energy costs and government rebates they would obtain. That is enough to allege “the content and manner in which these statements misled the Plaintiffs[.]” *Lawrie*, 656 F. App’x at 468; *State Farm Mut. Auto. Ins. Co. v. Performance Orthopaedics & Neurosurgery, LLC*, 278 F. Supp. 3d 1307, 1322 (S.D. Fla. 2017).

Finally, with respect to the fourth requirement, Plaintiffs have sufficiently alleged Defendants gained money through the alleged fraud. *Lawrie*, 656 F. App’x at 468; *U.S. ex rel. Sanchez v. Abuabara*, No. 10-61673-CIV, 2012 WL 254764, at *10 (S.D. Fla. Jan. 27, 2012); (Doc. 42-1 ¶ 121, 156, 186, 196). Thus, Counts I and II of the Second Amended Complaint allege enough facts to avoid futility.

D. Fraudulent Inducement

Finally, Lumio argues “Plaintiff[s]’ claim for fraudulent inducement is barred by the economic loss rule.” (Doc. 52 at 11, 12-13.) “[U]nder Florida law the economic loss rule applies only in the products liability context.” *Glob. Quest, LLC v. Horizon Yachts, Inc.*, 849 F.3d 1022, 1030 (11th Cir. 2017). It “prohibits tort recovery when a product damages itself, causing economic loss,

but does not cause personal injury or damage to any property other than itself.” *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734, 739 (11th Cir. 1995). “The Florida Supreme Court has defined economic loss as damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profit—without any claim of personal injury or damage to other property.” *In re Takata Airbag Prod. Liab. Litig.*, 193 F. Supp. 3d 1324, 1338 (S.D. Fla. 2016).

According to Lumio, the economic loss rule bars Plaintiffs’ fraudulent inducement claim because their losses are purely economic, resulting from the systems’ alleged failure to work as promised. (Doc. 52 at 11-13.) This argument falls short. Some statements Plaintiffs have identified relate to the performance of the product. (Doc. 42-1 ¶ 276(a).) Perhaps these representations cannot support a fraudulent inducement claim. But the Court need not decide the issue because the false statements related to “the availability and effect of government tax credits” are not covered by the economic loss rule. (*Id.* ¶ 276(b).) These alleged statements do not relate to the solar system at all. Thus, the economic loss rule does not render the fraudulent inducement claim futile.

Lumio seems to have expected this result. It argues that even without the economic loss rule, the fraudulent inducement claim remains barred by express disclaimers in Plaintiffs’ contracts. (Doc. 52 at 13.) To support this

argument, Lumio offers a one-page excerpt from Plaintiff Smith's sales agreement. (Doc. 52-1.) The excerpt includes disclaimers of oral representations related to the availability of tax rebates and government checks. (*Id.*) This evidence is not dispositive. The Eleventh Circuit has held that contractual disclaimers "cannot preclude a fraud claim, unless the contract expressly states that it is incontestable on the ground of fraud." *Global Quest, LLC*, 849 F.3d at 1028. The single-page excerpt does not contain such a waiver. While the contractual clauses Lumio cites "may constitute evidence against [Plaintiffs'] fraud allegations," the Court cannot say they render the fraudulent inducement claim futile. *Id.* at 1028-29.

E. Shotgun Pleading

One last issue concerning the Second Amended Complaint as a whole. Lumio argues it is a shotgun pleading. (Doc. 52 at 3.) There are four types of shotgun pleadings. *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1321-23 (11th Cir. 2015). Complaints "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action" are shotgun pleadings. *Id.* at 1322. So too are those alleging "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Id.* at 1323. But "[t]he key question in deciding whether a pleading is deemed shotgun is not whether a complaint fits into an identified

category, but rather whether it includes enough information to allow a defendant and the court to readily determine if it states a plausible claim for relief.” *Dunn v. Manuel*, No. 2:23-CV-00871-RDP, 2024 WL 790394, at *2 (N.D. Ala. Feb. 26, 2024).

Lumio believes the Second Amended Complaint is a shotgun pleading because it is “replete with legal conclusions and allegations of fact against Defendants collectively without identifying which Defendant is responsible for the conduct in question.” (Doc. 52 at 3, 9.) Not so. It is permissible for Plaintiffs to assert claims against multiple parties, so long as each Defendant is given “adequate notice of the claims against them.” *Cont’l 332 Fund, LLC v. Albertelli*, 317 F. Supp. 3d 1124, 1140 (M.D. Fla. 2018). This standard is satisfied “where the activities undertaken by each defendant [are] alleged.” *Id.* The Second Amended Complaint alleges Atlantic Key joined with several other companies to form Lumio in June 2021, before Plaintiffs’ solar systems were installed. (Doc. 42-1 ¶¶ 35, 120, 155, 185, 195.) It then details how Lumio organized and directed the fraudulent scheme, while Atlantic Key executed it as the door-to-door salesperson. It cannot be said that Defendants have not been provided “with adequate notice of the claims against them.” *Albertelli*, 317 F. Supp. 3d at 1140.

Other factual allegations relate to the alleged conspiracy between Lumio, Atlantic Key, and their financier partners. (Doc. 42-1 ¶¶ 1-249.) And each

allegation is incorporated into Plaintiffs' substantive claims. (*Id.* ¶¶ 250, 267, 275, 280, 287, 296, 300.) So it is not as if factual allegations are unconnected to a particular cause of action. Still, Plaintiffs need to correct paragraph 315 which incorporates and realleges the preceding causes of action. (*Id.* ¶ 315.) That is impermissible, but it does not render the complaint futile. *Weiland*, 792 F.3d at 1323.

Accordingly, it is hereby **ORDERED**:

1. Plaintiffs' Motion for Leave to File Second Amended Complaint (Doc. 42) is **GRANTED**. Plaintiffs are directed to file an amended complaint consistent with the order above as a separate docket entry.

ENTERED in Fort Myers, Florida on May 22, 2024.


Kyle C. Dudek
United States Magistrate Judge

Copies: All Parties of Record