UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-62306-CIV-ALTONAGA/Strauss

CLEAR SPRING PROPERTY AND CAUSALTY COMPANY, *et al.*,

Plaintiffs,

v.

VIKING POWER LLC, *et al.*

Defendants.
_____/

ORDER

THIS CAUSE came before the Court on the Motion to Dismiss Count II of Counterclaim [ECF No. 46], filed on April 15, 2022, by Plaintiffs, Clear Spring Property and Casualty Company and Certain Underwriters at Lloyd's of London Subscribing to Cover Note No. B0507RN2100289 ("Underwriters"). Defendant, Viking Power LLC, filed a Response [ECF No. 47], and Plaintiffs filed a Reply [ECF No. 48]. The Court has carefully considered Defendant's Answer, Affirmative Defenses, and Counterclaim [ECF No. 43] and its attachments, the parties' written submissions, and applicable law. For the following reasons, the Motion is granted.

I. BACKGROUND

Defendant owns the Miss Dunia, a 2007 82-foot Horizon Yacht. (*See* Countercl. ¶ 5). Plaintiffs are foreign insurance companies that do business in Florida. (*See id.* ¶ 3). Plaintiffs issued Defendant an initial and renewed marine insurance Policy that was effective from May 2021 to May 2022. (*See id.* ¶ 6; *see generally id.*, Ex. 1, Policy [ECF No. 43-1]). The Policy provides coverage for damage to the Miss Dunia. (*See* Countercl. ¶ 6).

The Policy states:

> If a sum insured is shown for Section A of the insuring agreement declaration page, we provide coverage for accidental physical loss of or damage to the [Miss Dunia] which occurs during the period of this insuring agreement and within the limits set out in the insuring agreement declarations page, subject to the insuring agreement provisions, conditions, warranties, deductibles and exclusions.

(*Id.* ¶ 10 (alteration added)). The Policy also contains a "Treating Customers Fairly Policy Statement[.]" (*Id.* ¶ 11 (alteration added; quotation marks omitted)). This provision declares that Plaintiffs "are committed to treating customers fairly as a matter of good business and fair dealing." (*Id.* (quotation marks omitted)).

On August 30, 2021, the Miss Dunia caught fire and was destroyed. (*See id.* ¶ 8). Shortly after the fire, Plaintiffs filed this action, seeking a declaration that there is no coverage for the loss based on what Defendant characterizes as "merely technical language" in the Policy. (*Id.* ¶ 12).

Defendant alleges that Plaintiffs' denial of coverage is part of a larger pattern — specifically, that Plaintiffs frequently "deny coverage based on technical 'gotcha's' in their policies unrelated to the causes of loss[.]" (*Id.* ¶ 13 (alteration added)). According to Defendant, Plaintiffs do this by "intentionally" issuing marine insurance policies in Florida that are governed by New York law. (*Id.* ¶ 22). And New York law, unlike Florida law, permits Plaintiffs "to deny coverage based [o]n" what Defendant describes as "mere technicalities . . . unrelated to the loss." (*Id.* (alterations added); *see also id.* ¶¶ 23-24). Defendant claims that Plaintiffs' "practice of issuing policies in Florida governed by New York law, collecting premiums, and subsequently denying coverage based on minor technicalities unrelated to the loss" violates the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201-501.213. (*Id.* ¶ 26).

The Counterclaim asserts two causes of action: breach of contract (Count I) and violation of the FDUTPA (Count II). (*See id.* ¶¶ 14–28). Plaintiffs seek dismissal of Count II. (*See generally* Mot.).

II. LEGAL STANDARD

"A motion to dismiss a counterclaim under [Federal] Rule [of Civil Procedure] 12(b)(6) is treated the same as a motion to dismiss a complaint." *Fabricant v. Sears Roebuck*, 202 F.R.D. 306, 308 (S.D. Fla. 2001) (alterations added; citation omitted). Courts evaluating motions to dismiss under Rule 12(b)(6) must construe the complaint in the light most favorable to the plaintiff and take its factual allegations as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citing *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added; quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Twombly*, 550 U.S. at 555 (alteration added; citation omitted). "A complaint is plausible on its face when it contains sufficient facts to support a reasonable inference that the defendant is liable for the misconduct alleged." *Gates v. Khokhar*, 884 F.3d 1290, 1296 (11th Cir. 2018) (citing *Iqbal*, 556 U.S. at 678).

In addressing a Rule 12(b)(6) motion, a court considers the allegations of the complaint, exhibits attached to or incorporated by reference into the complaint, and exhibits attached to the

motion to dismiss if they are central to the plaintiff's claim and undisputed. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005); *Space Coast Credit Union v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 295 F.R.D. 540, 546 n.4 (S.D. Fla. 2013).

III. DISCUSSION

A. The FDUTPA and Insurance Companies

The Counterclaim alleges that Plaintiffs violated the FDUTPA by intentionally issuing insurance policies in Florida governed by New York law and then denying coverage for reasons permitted by New York law. (*See* Countercl. ¶ 26). Plaintiffs seek dismissal of this claim on the ground that the FDUTPA does not apply to insurance companies. (*See* Mot. 2). They point to the statutory language of section 501.212(4), Florida Statutes, which provides that the FDUTPA "does not apply to . . . [a]ny person or activity regulated under laws administered by: (a) [t]he Office of Insurance Regulation of the Financial Services Commission" or to "(d) [a]ny person or activity regulated under the laws administered by the former Department of Insurance which are now administered by the Department of Financial Services." Fla. Stat. § 501.212(4) (2021) (alterations added); (*see* Mot. 2–3).

Plaintiffs' reading of section 501.212(4) is correct. As other courts have recognized, the statute plainly exempts insurance companies from the FDUTPA's coverage. For example, in *Zarella v. Pacific Life Insurance Company*, 755 F. Supp. 2d 1218 (S.D. Fla. 2010), plaintiffs sued defendants for FDUTPA violations relating to a life insurance policy sold to the plaintiffs. *See id.* at 1221–22. One of the defendants, Pacific Life, was a national life insurance company. *See id.* at 1221. The court dismissed the FDUTPA claim against Pacific Life, concluding the FDUTPA "does not apply to insurance companies." *Id.* at 1226. Scores of other state and federal courts have so held. *See id.* (collecting cases); *see also, e.g.*, *Hotchkiss v. Blue Cross & Blue Shield of*

Fla. Inc., 277 So. 3d 760, 762 (Fla. 1st DCA 2019) (affirming dismissal of FDUTPA claim because the defendant was an insurance company).[1]

Plaintiffs are insurance companies that do business in Florida (*see* Countercl. ¶ 3), so it should surprise no one that their activities are regulated by the Office of Insurance Regulation and the Department of Financial Services. *See generally* Fla. Stat. § 624.307. Thus, the FDUTPA does not apply to Plaintiffs, and Count II cannot withstand the Motion to Dismiss.

B. Unfair Trade Practices

Plaintiffs also argue that Count II should be dismissed on the alternative ground that the Counterclaim fails to allege an unfair trade practice. (*See* Mot. 3). The Court agrees.

To assert a FDUTPA claim, "the plaintiff must establish '(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.'" *Baptist Hosp., Inc. v. Baker*, 84 So. 3d 1200, 1204 (Fla. 1st DCA 2012) (quoting *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1140 (Fla. 3d DCA 2008)). An unfair trade practice is "one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Allstate Ins. Co. v. Auto Glass Am., LLC*, 418 F. Supp. 3d 1009, 1022 (M.D. Fla. 2019) (quotation marks omitted; quoting *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001)).

By contrast, the FDUTPA "does not apply to"— and therefore does not impose liability for — "[a]n act or practice . . . specifically permitted by federal or state law." Fla. Stat. § 501.212(1) (alterations added). Under this "safe harbor" provision, "an act does not need to violate

[1] Defendant states in its Response that it intended to assert a cause of action under Florida's Unfair Insurance Trade Practices Act ("FUITPA") rather than the FDUTPA. (*See* Resp. 2). But Defendant's mistaken pleading does not warrant denial of the Motion. Motions to dismiss test the sufficiency of claims that have been alleged, not of unpleaded, hypothetical claims. *See Eiras v. Florida*, 239 F. Supp. 3d 1331, 1342 (M.D. Fla. 2017) ("[A] plaintiff cannot amend the complaint by arguments of counsel made in opposition to a motion to dismiss." (alterations added; citation and quotation marks omitted)).

a specific rule or regulation in order to be considered [unfair]." *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1358 (S.D. Fla. 2012) (alteration added; citation omitted); *see also Dep't of Legal Affairs v. Father & Son Moving & Storage, Inc.*, 643, So. 2d 22, 24 (Fla. 4th DCA 1994). The relevant question for purposes of the section 512.212(1) safe harbor is whether "a specific federal or state law affirmatively authorized . . . the conduct alleged[.]" *Guerrero*, 889 F. Supp. 2d at 1358 (alterations added; citation omitted).

Defendant admits that New York law allows "marine insurers . . . to deny coverage without consideration of the cause of the loss." (Countercl. ¶ 23 (alteration added; citation omitted)). In fact, that rule is specifically provided by "New York Insurance Law [section] 3106(c)[,]" which "exempts marine insurance contracts from the general rule that a breach of warranty must be material in order for the insurer to disclaim coverage." *Cunningham v. Ins. Co. of N. Am.*, 521 F. Supp. 2d 166, 170 (E.D.N.Y. 2006) (alterations added; citation omitted); *see also* N.Y. Ins. Law § 3106(c) (McKinney 2022). And not only is that the well-settled law of New York: it is also "the federal rule and the law of most states" that "warranties in maritime insurance contracts must be strictly complied with, even if they are collateral to the primary risk that is the subject of the contract[.]" *Safe Harbor Pollution Ins. v. River Marine Enters., LLC*, No. 18 Civ. 5942, 2022 WL 889811, at *7 (S.D.N.Y. Mar. 25, 2022) (alteration added; citation and quotation marks omitted). This well-entrenched rule cannot form the basis of a proper FDUTPA claim because here, "a specific state law" — section 3106(c) — "affirmatively authorized" denials of coverage premised on a failure to comply with a warranty regardless on that failure's causal connection to the loss. *Guerrero*, 889 F. Supp. 2d at 1358 (citation omitted).

What's more, Defendant does not plausibly allege that issuing marine insurance policies with choice-of-law clauses in favor of New York law amounts to a practice that is "immoral,

unethical, oppressive, unscrupulous or substantially injurious to consumers." *Samuels*, 782 So. 2d at 499 (citation and quotation marks omitted). To the contrary, "the general rule in the federal courts is that [a choice-of-law] provision [in a marine insurance policy] will be applied unless the state in question 'has no substantial relationship to the parties or the transaction of the state's law conflicts with the fundamental purpose of maritime law.'" *Great Lakes Reinsurance (UK), PLC v. Rosin*, 757 F. Supp. 2d 1244, 1250–51 (S.D. Fla. 2010) (alterations added; collecting cases).

To the extent Defendant asserts that choice-of-law clauses in marine insurance policies offend the FDUTPA, that argument places the state statute on a collision course with federal law and other states' laws. *See Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1161–62 (11th Cir. 2009) (holding that "federal maritime conflict of laws control" in admiralty cases and enforcing choice-of-law clause in maritime contract (citation omitted)); *see also Rosin*, 757 F. Supp. 2d at 1250–51. It therefore implicates significant Supremacy Clause and comity problems, none of which the FDUTPA's text addresses. *See Collins v. Virginia*, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring) (recognizing admiralty law as one of "several enclaves of federal judge-made law which bind the States" (quotation marks omitted; collecting cases)); *Republic of Ecuador v. Philip Morris Cos., Inc.*, 188 F. Supp. 2d 1359, 1366 (S.D. Fla. 2002) ("[T]he Florida legislature has no authority under the [S]upremacy [C]lause to eradicate a federal common law rule." (alterations added; citation omitted)). To say the least, it is highly dubious that the Florida legislature intended to outlaw the highly common, federally authorized practice of including choice-of-law clauses in marine insurance policies. "Congress does not hide elephants in mouseholes." *Cyan, Inc. v. Beaver Cnty. Emps. Retirement Fund*, 138 S. Ct. 1061, 1071–72 (2018) (citation and quotation marks omitted). The Court will not assume that the Florida legislature does, either.

Perhaps recognizing the validity of choice-of-law clauses in general, Defendant instead takes issue with Plaintiffs' alleged failure to "advis[e] the insured as to the perils of entering into a policy with [Plaintiffs] which is subject to New York law." (Resp. 3 (alterations added)). But the FDUTPA imposes no liability for such an omission. A deceptive act or practice "occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting *reasonably* in the circumstances, to the consumer's detriment." *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) (emphasis added; citation and quotation marks omitted). "An act or practice is 'unfair' if it causes consumer injury that is substantial, not outweighed by any countervailing benefits to consumers or competition, and one that consumers themselves could not have *reasonably* avoided." *Al Amjad Ltd. v. Ocean Marine Engines, LLC*, No. 3:16-cv-234, 2017 WL 1365580, at *4 (M.D. Fla. Apr. 14, 2017) (emphasis added; citation omitted).

Under Florida law, "parties to a contract, in the absence of fraud, accident, or mistake, will be conclusively presumed to know and understand the contents, terms, and conditions of the contract." *Stonebraker v. Reliance Life Ins. Co. of Pittsburgh*, 166 So. 583, 584 (Fla. 1936). The FDUTPA did not eradicate that hornbook principle. "The language of [the choice-of-law clause] is abundantly clear, and [Defendant] had ample time to consider the implications of the provision and cancel the contract if [it] so chose." *Double AA Int'l Inv. Grp., Inc. v. Swire Pac. Holdings, Inc.*, 674 F. Supp. 2d 1344, 1357 (S.D. Fla. 2009) (alterations added). Thus, no reasonable consumer could have been deceived by the Policy's plainly worded choice-of-law clause. *See, e.g.*, *Zlotnick*, 480 F.3d at 1287. Similarly, Defendant "could . . . have reasonably avoided" the harm it complains of by advising itself of the consequences of the choice-of-law clause that it bargained for. *Al Amjad*, 2017 WL 1365580, at *4 (alteration added; citation omitted).

"There is simply nothing unfair" about holding Defendant to the terms of the Policy that it freely entered into and renewed. *Id.* Count II is dismissed.

C. Leave to Amend

In its Response, Defendant requests leave to amend should the Court grant the Motion. (*See* Resp. 4). District courts must liberally grant leave to amend pleadings "when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (holding that Rule 15(a)(2) limits district court's discretion to dismiss pleadings without leave to amend). Only a "substantial reason" for denying leave to amend will justify the denial. *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 85 F.3d 1514, 1520 (11th Cir. 1996) (quoting *Shipner v. E. Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989)). A plaintiff who seeks to amend a complaint under Federal Rule of Civil Procedure 15(a)(2) must request leave by filing a written motion and setting forth the substance of the proposed amendment. *See United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361–62 (11th Cir. 2006) (citations and footnote call number omitted). "[A] plaintiff 'should not be allowed to amend his complaint without showing how the complaint could be amended to save the meritless claim.'" *McInteer*, 470 F.3d at 1362 (alteration added; other alteration adopted; citation omitted).

Here, Defendant's alternative request for leave to amend is both procedurally and substantively flawed. It is procedurally flawed because Defendant has not "set forth the substance of the proposed amendment." *Id.* (citation omitted); *see also Lacy v. BP P.L.C.*, 723 F. App'x 713, 717 (11th Cir. 2018) (affirming dismissal with prejudice because plaintiff "failed to allege or propose any new facts that would have cured the complaint's defects"). Additionally, Defendant improperly requests leave to amend not by motion, but "as an afterthought . . . at the ta[il]-end" of its Response. *Insight Secs., Inc. v. Deutsche Bank Tr. Co. Ams.*, No. 20-23864, 2021 WL 3473763,

at *5 (S.D. Fla. Aug. 6, 2021) (alterations added); *see also Cita Tr. Co. AG v. Fifth Third Bank*, 879 F.3d 1151, 1157 (11th Cir. 2018) ("[W]here a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly." (alteration added; quotation marks omitted; quoting *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009))). And when a party improperly requests leave to amend, "a trial court is not required to *sua sponte* grant leave to amend prior to making its decision." *Burger King Corp. v. Weaver*, 169 F. 3d 1310, 1318 (11th Cir. 1999) (citations omitted).

Defendant's request for leave to amend is substantively flawed because amendment would be futile to the extent Defendant seeks to assert a new claim under the FUITPA. Defendant asserts that it intended to allege a cause of action under either section 626.9541(1)(a)(1) or section 626.9541(1)(i)(3)(b), Florida Statutes. (*See* Resp. 2). Neither provision avails Defendant.

Take section 626.9541(1)(a)(1) first. Section 624.155(1)(a), Florida Statutes, lists specific statutory subsections that permit "[a]ny person" to "bring a civil action against an insurer when such person is damaged[.]" Fla. Stat. § 624.155(1)(a) (alterations added). Section 626.9541(1)(a)(1) appears nowhere on that list. Federal courts must proceed with "reluctance to read private rights of action in state laws where state courts and state legislatures have not done so." *Swerhun v. Guardian Life Ins. Co. of Am.*, 979 F.2d 195, 198 (11th Cir. 1992) (alteration adopted; citation and quotation marks omitted). And because the "plain language" of the FUITPA "does not establish a private right of action" in this circumstance, the Court "will not infer one." *Id.*; *see also Joseph v. Bernstein*, 612 F. App'x 551, 557 (11th Cir. 2015) ("Section 626.9541 (1)(a)(1) is not one of the enumerated sections for which [F]UITPA provides a private cause of action. We will not imply a cause of action under [F]UITPA where the courts and legislature of

the state of Florida have declined to do so." (alterations added; citations omitted)); *Buell v. Direct Gen. Ins. Agency, Inc.*, 488 F. Supp. 2d 1215, 1218 (M.D. Fla. 2007).

A hypothetical claim under section 626.9541(1)(i)(3)(b) would meet a similar fate. Even though Florida law authorizes private suits to enforce that provision, *see* Fla. Stat. § 624.155(1)(a)(1), plaintiffs who bring such suits must send the insurer a civil notice remedy "[a]s a condition precedent" to doing so, *id.* § 624.155(3)(a) (alteration added); *see also Lopez v. Geico Cas. Co.*, 968 F. Supp. 2d 1202, 1208–09 (S.D. Fla. 2013) (dismissing a statutory claim against an insurer for plaintiff's failure to file the required civil remedy notice). Defendant does not allege or suggest that it ever complied with that requirement. Moreover, the entire point of this lawsuit is to determine whether Plaintiffs are liable to Defendant under the Policy for the damage to the Miss Dunia, and bad faith claims under section 624.155 are not ripe until there is a final determination that the insured is entitled to coverage. *See Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 483 F.3d 1265, 1270–71 (11th Cir. 2007); *Fantecchi v. Hartford Ins. Co. of the Midwest*, No. 15-23969-Civ, 2015 WL 12516629, at *2 (S.D. Fla. Nov. 24, 2015).

The "denial of leave to amend is justified by futility when the 'complaint as amended is still subject to dismissal.'" *Burger King Corp.*, 169 F. 3d at 1320 (citation omitted). To the extent Defendant seeks leave to amend to assert a FUITPA claim, that amendment would be futile, so leave to amend is denied.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiffs' Motion to Dismiss Count II of Counterclaim **[ECF No. 46]** is **GRANTED**. Count II of Defendant's Answer, Affirmative Defenses, and Counterclaim **[ECF No. 43]** is **DISMISSED**.

DONE AND ORDERED in Miami, Florida, this 20th day of May, 2022.

CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: counsel of record