IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RHONDA HENDERSON; ROBERTA FAULKS; and RACHEL CHURCH, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

VISION PROPERTY MANAGEMENT, LLC; VPM HOLDINGS, LLC; FTE NETWORKS, INC.; US HOME RENTALS, LLC; KAJA HOLDINGS, LLC; KAJA HOLDINGS 2, LLC; MI SEVEN, LLC; IN SEVEN, LLC; RVFM 4 SERIES, LLC; ACM VISION V, LLC; DSV SPV 1, LLC; DSV SPV 2, LLC; DSV SPV 3, LLC; BOOM SC; ALAN INVESTMENTS III, LLC; ARNOSA GROUP LLC; MOM HAVEN 13, LP; ATALAYA CAPITAL MANAGEMENT LP,

Defendants.

Case No. 20-cv-12649

Hon. Sean F. Cox

Mag. J. R. Steven Whalen

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS ATALAYA CAPITAL MANAGEMENT LP AND ACM VISION V, LLC'S SECOND MOTION TO DISMISS

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ISSUES PRESENTED

1. Whether Plaintiffs are permitted to assert factual allegations in their First Amended Complaint that refer to a settlement agreement in another case when the agreement is a matter of public record and contains facts relevant to Plaintiffs' claims.

2. Whether Plaintiffs properly state claims under the Fair Housing Act against Defendants in their First Amended Complaint when it has been alleged that they participated in a predatory lending scheme by helping design the predatory contract that deprived Plaintiffs of housing (or placed them at risk of losing their homes) and there is a sufficient nexus between Defendants' conduct enabling racially skewed property acquisitions and the harm to Plaintiffs.

3. Whether Plaintiffs properly state a claim under the Equal Credit Opportunity Act against Defendants in their First Amended Complaint where they allege facts showing that the Defendants are creditors who have substantially participated and knowingly took assignment of credit transactions that resulted in both disparate treatment and disparate impact racial discrimination.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Coleman v. Gen. Motors Acceptance Corp., 220 F.R.D. 64 (M.D. Tenn. 2004)

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Plaintiffs file this brief in opposition to Defendants Atalaya Capital Management LP ("Atalaya") and ACM Vision V, LLC's ("ACMV") (collectively, "Defendants") Second Motion to Dismiss ("Motion to Dismiss") and supporting brief, ECF No. 80. The Court should deny Defendants' Motion to Dismiss.

This case involves civil rights and consumer law claims against Vision Property Management, LLC and its affiliates (collectively, "Vision"), its successor entities, and its facilitator Atalaya for a deceptive home purchase scheme that discriminated against Black communities in Southeast Michigan. Atalaya and its real estate investment trust, ACMV, seek to avoid liability for their involvement by mischaracterizing the facts alleged in the First Amended Complaint, ECF No. 77 ("FAC"), and ignoring the body of law that extends liability to substantial participants under the Fair Housing Act, 42 U.S.C. § 3601 *et seq*. ("FHA") and the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq*. ("ECOA").[1]

I. FACTUAL BACKGROUND[2]

In the wake of the foreclosure crisis, when foreclosed homes were abundant and access to mortgage credit was extremely tight, especially in majority Black cities like Detroit, Inkster, and Flint, Vision developed a business model to exploit

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[1] ACMV did not move to dismiss Plaintiffs' claim against it under the Truth in Lending Act, 15 U.S.C. § 1601 ("TILA"), nor has it filed an answer with respect to that claim.
[2] These facts are adapted from the well-pleaded FAC.

inequalities in the housing market for significant financial gain. (ECF No. 77, PageID.324 ¶ 52.) Vision bought dilapidated homes cheaply and sold them at a significant markup, advertising its financial product as a pathway to homeownership for people who had dreamed of owning a home but had been unable to do so. (*Id.*) Despite this marketing pitch, Vision's business model made it virtually impossible for anyone to succeed in becoming a homeowner. (ECF No. 77, PageID.324 ¶ 53.) Atalaya played a key role in the design and implementation of Vision's predatory scheme as discussed below.

Before Atalaya became involved, Vision's business was modest: it purchased a small number of single-family homes from post-foreclosure real estate owned ("REO") sellers and sold them to homeowners, mostly through land contract transactions. (ECF No. 77, PageID.324-325 ¶ 56.) In 2012, Vision was seeking to greatly expand its business by purchasing a large volume of properties in bulk REO acquisitions from the U.S. government and quasi-governmental agencies and selling those properties to homebuyers using a newly developed type of agreement, the "lease with option to purchase" ("LOP") contract. (ECF No. 77, PageID.350-351 ¶¶ 129-133.) In this context, Vision sought to partner with Atalaya as a significant potential funder. Vision sent an email in May 2012 explaining its goal of purchasing bulk REO properties, saying "[b]ased on great relations with Fannie, Freddie, FHA and ResCap, etc., Vision buys pools of foreclosed low-end houses . . . and sells or

leases them long-term." (ECF No. 77, PageID.351 ¶ 134.) Vision explained that it would acquire severely distressed foreclosed homes, "low to mid-tier assets previously thought to be unsellable," homes that "most banks and lending institutions can't give away." (ECF No. 77, PageID.352 ¶ 135.)

Atalaya became an active participant in Vision's program. Atalaya agreed to fund the bulk REO acquisition strategy, and the properties Vision purchased served as collateral to secure the loans from Atalaya. (ECF No. 77, PageID.350, 354 ¶¶ 129, 146.) Prior to investing, Atalaya consulted with Vision regarding the LOP contract and advised Vision on how to structure the terms of the agreement. (ECF No. 77, PageID.352 ¶¶ 136, 137.) The standard form LOP agreement emphasized a seven-year term but obscured the fact that a balance would still be owed at the end of seven years and the agreement would then "automatically" convert to a seller-financed land contract for a longer period of time. (ECF No. 77, PageID.327 ¶ 63.) Vision calculated the LOP monthly payment based on a 20- or 30-year term with a certain interest rate, but the contract did not disclose that interest rate or the duration of the loan to consumers. (ECF No. 77, PageID.327 ¶ 65.) Vision instead told homebuyers that at the end of the seven-year lease-option contract, they would own the home outright. (ECF No. 77, PageID.328 ¶¶ 68-69.) Homebuyers took on the burden of making significant repairs to the dilapidated properties, (ECF No. 77, PageID.333-335 ¶¶ 83-90), and took on the burden of paying the property taxes into escrow

although Vision inflated the amounts and failed to pay the taxes. (ECF No. 77, PageID.330 ¶ 73.)

Atalaya was well versed in how the LOP program functioned. It received financial records that showed that LOP contracts were internally accounted for in a manner similar to a land contract, tracking the interest rate and true duration of the loan, information that Atalaya knew was not disclosed to homebuyers. (ECF No. 77, PageID.352 ¶ 137.) Atalaya knew how the LOP contracts were priced, accounted for and, at a high level, represented to consumers. (ECF No. 77, PageID.352 ¶ 138.) Atalaya received regular reporting from Vision's senior management, reviewed the performance of individual properties, and participated in decisions regarding modifications to contracts that were in default. (ECF No. 77, PageID.353 ¶¶ 139, 140.) Atalaya knew the LOP agreement required consumers to give up any equity they had built up in the property upon default. (ECF No. 77, PageID.354 ¶ 143.)

Vision's predatory scheme did not impact all communities equally. Its property acquisition practices in southeastern Michigan—specifically, its reliance on bulk sales of REO properties—caused Black homebuyers to be disproportionately subject to its abusive and deceptive contracts. (ECF No. 77, PageID.309 ¶ 4.) The practice of buying through bulk REO sales in the Detroit CSA meant Vision's properties were concentrated in Black neighborhoods: Only 29.3% of Vision's properties in the Detroit CSA were in majority white Census tracts, while 63.5%

were in majority Black Census tracts. (ECF No. 77, PageID.339, 343, 344, 345 ¶¶ 107, 113 & Figs. 4-5.) Although the population of the Detroit CSA is 20% Black, in the Census tracts where Vision acquired properties, the median population was 76.78% Black. (ECF No. 77, PageID.339 ¶ 106.) The FAC further explains how buying properties through bulk REO sale results in racial skewed acquisitions and includes maps that show Vision's LOP properties were disproportionately located in majority Black census tracts. (ECF No. 77, PageID.339-343 ¶¶ 108-113 & Figs. 4-5.) This practice, which Atalaya funded, concentrated Vision's business in Black neighborhoods, in which it then marketed and sold LOP contracts. Because Vision's properties were used as collateral for Atalaya's loan, Atalaya was provided with information about Vision's properties, including the addresses or geographic location. (ECF No. 77, PageID.354 ¶ 146.)

Vision also targeted credit-starved Black homebuyers for the unfavorable and predatory terms of its LOP contracts. Vision's acquisition practices indicate a plan to amass a racially skewed portfolio of properties for the purpose of selling LOP contracts to Black homebuyers. (ECF No. 77, PageID.346-347 ¶¶ 115-116.) For example, Vision purchased foreclosed properties from Wayne County, which has a higher Black population than other surrounding counties where Vision did not purchase properties. (*Id.*) Vision then employed a localized marketing scheme that predictably attracted mostly Black homebuyers. (ECF No. 77, PageID.347 ¶¶ 117-

18.) As with other aspects of Vision's business, Atalaya was aware of Vision's marketing and advertising practices. (ECF No. 77, PageID.353 ¶ 139.)

Atalaya became further enmeshed in the LOP program by launching ACMV, a real estate investment trust ("REIT") created to purchase active LOP contracts originated by Vision. (ECF No. 77, PageID.355 ¶ 149.) ACMV is one of the Affiliate Defendants described in the FAC. (ECF No. 77, PageID.312-313 ¶ 15.) Over time, ACMV purchased properties in active LOP contracts from Vision affiliates, including at least 70 properties in the Detroit CSA. (ECF No. 77, PageID.355 ¶ 150.) As the assignee, ACMV became the record owner of the real estate and the party to the contract with homebuyers. (ECF No. 77, PageID.313, 318 ¶¶ 18, 36.) Thus, ACMV knew of the predatory terms of those contracts as well as their locations, many of which were in majority Black communities. (ECF No. 77, PageID.356-357 ¶ 154 & Fig. 6.) At times, ACMV filed evictions against homebuyers who defaulted on their LOP contract. (ECF No. 77, PageID.356 ¶ 153.) ACMV held properties it had acquired from Vision until at least 2020, (ECF No. 77, PageID.356 ¶ 151), and some were still occupied by consumers in active LOP contracts. (ECF No. 77, PageID.356 ¶ 152.)

In its motion, Atalaya emphasizes that the FAC does not allege that it funded the named Plaintiffs' transactions. (ECF No. 80, PageID.464.) Plaintiffs have no way of knowing whether this was the case. However, Atalaya was Vision's dominant

funder during the period of time when it acquired the vast majority of the inventory for its LOP business. (ECF No. 77, PageID.354 ¶ 145.) There is a plausible inference that Atalaya likely funded the purchase of the Plaintiffs' homes.

Atalaya and ACMV financed the bulk REO acquisitions that caused the racial disparity at issue in this case and helped design and operate the LOP scheme. (ECF No. 77, PageID.350 ¶ 128.) They were actively involved in decisions about the business model and activities that gave rise to Plaintiffs' claims.

II. LEGAL STANDARD

In evaluating a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, accept its factual allegations as true, and draw reasonable inferences in favor of the plaintiff. *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). A plaintiff is only required to plead sufficient facts to state a claim to relief that is plausible on its face. *Linkletter v. W. & S. Fin. Grp., Inc.*, 851 F.3d 632, 637 (6th Cir. 2017) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A plausible claim 'pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Defendants bear the burden of proving a complaint fails to state a claim as a matter of law. *Directv*, 487 F.3d at 476.

III. ARGUMENT

A. Plaintiffs' References to a Prior Relevant Settlement Agreement Are Proper.

Defendants contend that Plaintiffs' references to the New York Attorney General's Assurance of Discontinuance Agreement (the "New York Findings") in the FAC are improper and should be disregarded. (ECF No. 80, PageID.461-63.) However, it was appropriate for Plaintiffs to cite this information in the FAC, because the underlying facts are public record, the findings were made by the New York Attorney General and Department of Financial Services after an investigation, and the facts are highly relevant to Atalaya's knowledge and participation in Vision's discriminatory home purchase scheme. Regardless, Plaintiffs' allegations survive independent of reference to the New York Findings because the underlying facts themselves are discoverable.

While a motion to dismiss is not the proper vehicle for Defendants to move to strike parts of the FAC,[3] their request should still be denied pursuant to Rule 12(f). Motions to strike are generally disfavored, *Brown & Williamson Tobacco Corp. v.*

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[3] Defendants' request that the Court "completely disregard[]"parts of the FAC, (ECF No. 80, PageID.462), is tantamount to a motion to strike that must be brought by separate motion. Fed. R. Civ. P. 12(f). "A request for a court order must be made by motion." Fed. R. Civ. P. 7(b)(1). *See also* 5C Charles A. Wright et al., *Federal Practice and Procedure* § 1380 (3d ed. 2004, April 2018 Update) ("A motion to strike must comply with the requirement in Rule 7(b) that motions state with particularity the grounds therefor and set forth the nature of relief or type of order sought").

U.S., 201 F.2d 819, 822 (6th Cir. 1953), and should be granted only if the court "can confidently conclude that . . . the pleading . . . is redundant or is both irrelevant to the subject matter of the litigation and prejudicial to the objecting party." *Rock Holdings, Inc. v. Certain Underwriters at Lloyd's London*, No. 09-11599, 2009 U.S. Dist. LEXIS 69980 at *10 (E.D. Mich. Aug. 11, 2009), *quoting Aqua Bay Concepts, Inc. v. Gross Point Board of Realtors*, No. 91-74819, 1992 U.S. Dist. LEXIS 16038 at *5 (E.D. Mich. May 7, 1992). Atalaya and ACMV point to no authority to support a motion to strike.

It is well settled in this circuit that the use of factual allegations based on settlement agreements or consent judgments is proper. *See United States v. Cohen*, 946 F.2d 430, 435 (6th Cir. 1991) (equating a consent judgment to testimony in a prior proceeding, admissible as probative evidence under Federal Rule of Evidence 801); *Mills v. United Producers, Inc.*, No. 11-13148-BC, 2012 U.S. Dist. LEXIS 66979 at *7 (E.D. Mich. May 14, 2012) (following *Cohen*, held that references to consent judgment in complaint were not prohibited).

Further, cases from outside this circuit demonstrate why Defendants' request should be denied. In *Nimmons v. U.S. Tennis Ass'n*, No. 18-2499, 2019 U.S. Dist. LEXIS 14253 at *13 (E.D.N.Y. Jan. 7, 2019), an employment discrimination and retaliation case, a magistrate judge recommended that the district court deny defendants' motion to strike allegations in the plaintiff's complaint that referred to

the defendants' previous settlement, an "Assurance of Discontinuance" agreement with the state attorney general related to similar issues of discrimination.[4] *Id.* at *3. In moving to strike the plaintiffs' references to the state's investigation and Assurance of Discontinuance, the defendants argued that the allegations were "inadmissible, immaterial and prejudicial" because they were not factual findings, were heavily disputed, and resulted from a settlement agreement. *Id.* at *14. In denying the motion to strike, the court concluded that the prior investigation and Assurance Agreement were not being used to prove that the defendants engaged in discrimination but rather to provide context for the discriminatory treatment experienced by the plaintiff. *Id.* at *17. The defendants also failed to meet their burden to show that the evidence would not be admissible at trial. *Id.* at *17, 21. The court further concluded that because the Attorney General's investigation and Assurance Agreement are public documents, "any prejudice to defendants is purely speculative." *Id.* at *20 n. 9.

Similarly, Plaintiffs' references to the New York Findings in the FAC are proper, material, and relevant to the issues in this case. In addition to providing relevant background information, the New York Findings explain Atalaya's role in designing, funding, and facilitating Vision's LOP agreements and acquisition of bulk

[4] The district court adopted the magistrate's recommendations. *Nimmons v. U.S. Tennis Ass'n*, No. 18-02499, 2019 U.S. Dist. LEXIS 11849 (E.D.N.Y. Jan. 23, 2019).

REO properties. (ECF No. 77, PageID.44-50 ¶¶ 128-154.) And the findings are not the only source for these facts. Plaintiffs' investigation uncovered similar facts from different sources, and discovery is likely to disclose more. Merely "disregarding" these allegations would be premature at this stage. *See Nimmons,* U.S. Dist. LEXIS 14253, at *21 (explaining that striking references is premature because allegations are pertinent to understanding plaintiff's claims and may lead to additional information during discovery). Defendants also make no showing that the references to the New York Findings are irrelevant or prejudicial, nor could they. Consequently, any request to "disregard" or strike the references to the New York Findings should be denied.

Defendants also argue that references to the New York Findings should be disregarded because the Assurance states in paragraph 71 that it is not intended for use by any third party in any other proceeding. (ECF No. 80, PageID.462.) A consent decree is not enforceable by those who are not parties to it, *see Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992), and Plaintiffs, as non-parties to the Assurance Agreement, are also not bound by it. Plaintiffs are not asserting a third-party beneficiary claim. Rather, Plaintiffs cite the Assurance Agreement because facts in the document are relevant to the claims here. Because Plaintiffs do not seek to enforce the Assurance Agreement, paragraph 71 is inapplicable. Further, Defendants ignore other paragraphs in the Assurance that expressly state:

> 70. Nothing in this Assurance shall be construed to deprive any person of or prevent any consumer from pursuing any private right or remedy at law.
>
> 72. Nothing in this Assurance shall relieve Atalaya of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

Clearly, the Assurance is not intended to ban any consumer from pursuing future actions against Defendants that arise from facts contained in part in the document. To the contrary, these provisions are intended to ensure that a litigant's right is not frustrated by the agreement.

Finally, Defendants suggest in a footnote that allowing the use of the Assurance of Discontinuance is against public policy because if private litigants may refer to consent judgments in pleadings, there will be no incentive to settle cases. (ECF No. 80, PageID.468.) But that statement fundamentally contradicts precedent from this circuit. Defendants' purported policy concerns are, like their other arguments, without merit.

B. Plaintiffs Have Adequately Pleaded a Fair Housing Act Violation.

1. Atalaya and ACMV Are Liable Under the FHA.

Plaintiffs Ms. Henderson and Ms. Faulks[5] allege that Defendants discriminated against Black homebuyers in violation of Sections 3604 and 3605 of the FHA through their participation in and facilitation of Vision's predatory home

[5] Plaintiff Ms. Church does not bring claims under the FHA or ECOA. (*See* ECF No. 77, PageID.388-403 ¶¶ 290-351.)

purchase transactions. The Supreme Court and Sixth Circuit have repeatedly found that the language of the FHA is "broad and inclusive" and should be generously construed. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972); *Mich. Prot. & Advoc. Serv., Inc. v. Babin*, 18 F.3d 337, 344 (6th Cir. 1994); *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, a Div. of Gannett Co.*, 943 F.2d 644, 646 (6th Cir. 1991). Under this broad construction, actors beyond the party that directly rents or sells housing can be liable. *See Johnson v. Wachovia Bank of Del., N.A.*, No. 03-2567, 2006 WL 8434813, at *15 (W.D. Tenn. Feb. 16, 2006) (collecting cases applying Section 3604 to racial steering, discriminatory appraisals, insurance redlining, racially motivated firebombing, and sexual harassment); 24 C.F.R. § 100.125 (applying Section 3605 to discriminatory purchasing, pooling, or setting terms of sale of loans on the secondary mortgage market). Applying these principles, Plaintiffs have adequately pleaded their FHA claims.[6]

[6] While Defendants do not specifically contend otherwise, Plaintiffs have adequately alleged that Atalaya and ACMV engaged in both disparate treatment and disparate impact discrimination. For their disparate treatment reverse redlining claim, Plaintiffs have sufficiently pleaded that (1) they are members of a protected class, (2) that they applied for and were qualified for loans, and (3) that Defendants gave them loans on grossly unfavorable terms. *Matthews v. New Century Mortg.*, 185 F. Supp. 2d 874, 886 (S.D. Ohio 2002); *see* ECF No. 77, PageID.346-348, 361-375 ¶¶ 114-121, 171-237. Similarly, for their disparate impact claim, Plaintiffs have alleged facts demonstrating: (1) the specific policy that is being challenged; (2) a disparity on a protected class; and (3) a causal connection between the challenged policy and the disparity. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523-24 (2015); *see* ECF No. 77, PageID.336-345 ¶¶ 95-113.

First, Plaintiffs have properly stated a claim under Section 3604 of the FHA. Section 3604 "reach[es] not only actors who were directly involved in the real estate business, but also actors who directly affect the availability of housing," including "those who, in practical effect, assisted in those transactions of ownership and disposition." *Babin*, 18 F.3d at 344-45. In *Babin*, the Sixth Circuit set forth two factors to determine whether a defendant's conduct is within the scope of Section 3604: (1) whether their actions "directly affect[ed] the availability of housing" for protected groups and (2) whether their actions could be exempted as "normal economic competition." *Id.* at 344, 346; *see also Johnson*, 2006 WL 8434813, at *14.

In examining these factors, it is clear that Section 3604 applies to Defendants' conduct. As alleged in the FAC, Atalaya participated in Vision's predatory lending scheme, primarily by helping design the predatory LOP contract that deprived Vision customers of housing (or placed them at risk of losing their homes) and by enabling Vision's racially skewed property acquisitions, a practice that caused Vision's LOP contract business to disproportionately take place in Black neighborhoods. (ECF No. 77, PageID.350-355 ¶¶ 128-148.) Through these actions, Atalaya directly affected the availability of housing of Black homebuyers. Further, there is little question that ACMV, which became party to LOP contracts and filed evictions against residents, also affected the availability of housing. (ECF No. 77,

PageID.355-356 ¶¶ 149-154.) Plaintiffs allege that these actions were part of a predatory lending scheme, and because "predatory lending is not 'normal economic activity,'" this activity "falls within the provisions of § 3604." *Johnson*, 2006 WL 8434813, at *15.

Section 3605 also applies here because Atalaya helped set the predatory terms of LOP contracts disproportionately sold to Black homebuyers. Section 3605 extends to entities whose business includes "residential real estate-related transactions" which are defined as "[t]he making or purchasing of loans or providing other financial assistance (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (B) secured by residential real estate." 42 U.S.C. § 3605(b). Both definitions apply to Atalaya, which Plaintiffs allege provided financial assistance for Vision to purchase numerous dwellings in Southeastern Michigan and these residences served as collateral to secure the loans Atalaya made to Vision. (ECF No. 77, PageID.354 ¶¶ 145-146.) Although Atalaya did not personally solicit homebuyers or interact with them, it "determine[ed] the manner in which th[e] loan[s] w[ere] to be made," by helping structure the predatory terms of the LOP contract, transactions that Atalaya knew disproportionately took place in and/or were intentionally marketed to Black neighborhoods. *Johnson*, 2006 WL 8434813, at *16; *see also Adkins v. Morgan Stanley*, No. 12-CV-7667 HB, 2013 WL 3835198, at *9-10 (S.D.N.Y. July 25, 2013) (finding that although defendant Morgan Stanley did

not do business directly with the plaintiffs, its "policies set the terms and conditions on which it would purchase loans from New Century" on the secondary market thereby "caus[ing] New Century to issue toxic loans to Plaintiffs"). These facts are sufficient to state a valid claim under Section 3605.

Plaintiffs have also alleged a sufficient nexus between Defendants' conduct and the harm to Plaintiffs as the FAC clearly sets forth "some direct relation" between Atalaya's violation and Ms. Henderson's and Ms. Faulk's injuries. *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1306 (2017). Although Atalaya was not a party to the LOP contract with Ms. Henderson or Ms. Faulks, its actions played a crucial role in bringing about those transactions. As discussed above, Atalaya helped structure the terms of the form LOP contract that was used for each Plaintiff's transaction, terms that caused harm to Plaintiffs and placed them at risk of losing their home. (ECF No. 77, PageID.352, 364, 366, 368, 371-373, 375, 387-388 ¶¶ 136-137, 185, 192, 195, 203-204, 218, 224-225, 227, 236-237, 286-288.) Atalaya knew of Vision's proposed business model—to acquire properties in a way that concentrated predatory LOP contracts in Black communities—and it made loans to Vision with the purpose of facilitating sale of these contracts to homebuyers. (ECF No. 77, PageID.352-354 ¶¶ 138-146.) Although Vision may have had other sources of capital, Atalaya was Vision's primary funder during the period of time it acquired the vast majority of its properties for its LOP business, thereby making Vision's LOP

transactions possible. (ECF No. 77, PageID.354 ¶ 145.) It is likely that this financing went toward purchasing the properties ultimately sold to Ms. Henderson and Ms. Faulks, and Atalaya almost certainly financed Vision's purchase of properties that were concentrated in Black communities and sold to unnamed subclass members. ACMV also owned many occupied properties in majority Black areas within the Detroit CSA, (ECF No. 77, PageID.356-357 ¶ 154 & Fig. 6), raising an inference that it held contracts with subclass members. As such, Plaintiffs have pleaded a direct relation between Atalaya and ACMV's actions and the harm to Plaintiffs and the putative subclass. Accordingly, Defendants are liable under the FHA.

2. Plaintiffs' FHA Claim Is Not Time-Barred.

Defendants improperly raise a statute of limitations argument in a footnote of their brief, contending that Plaintiffs' claims[7] are time-barred because the FHA has a two-year statute of limitations and Atalaya ceased lending to Vision in 2017. (ECF No. 80, PageID.463.) They make no attempt at developing this argument and cite no legal support for dismissal based on this fact. This circuit has long recognized that defenses not properly raised in a party's responsive brief, as well as arguments referenced only in a perfunctory manner, are waived. *See, e.g.*, *Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 624 (6th Cir. 2013); *McPherson v. Kelsey*, 125 F.3d 989, 995-

[7] Defendants' footnote only references the FHA statute of limitations. ECOA has a five-year statute of limitations and there is no question that Plaintiffs' claims under that statute are timely. 15 U.S.C. § 1691e(f).

96 (6th Cir. 1997). As here, "[i]t is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." *McPherson*, 125 F.3d at 995-96.

Defendants' argument is not only waived, it is meritless. Actions under the FHA must be brought within "2 years after the occurrence or the termination of an alleged discriminatory housing practice, . . . whichever occurs last . . . ." 42 U.S.C § 3613(a)(1)(A). The applicable statute of limitation poses no bar to the Plaintiffs' FHA claims, however, because the federal discovery rule, equitable tolling, and the continuing violations doctrine all render Plaintiffs' claims timely. *See Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934, 939 (6th Cir. 1999) ("To the extent that [plaintiffs] claim discrimination . . . their cause of action did not accrue until they knew, or should have known, that ODOT was allocating such resources in an allegedly discriminatory manner."); *Jackson v. Novastar Mortg., Inc.*, 645 F. Supp. 2d 636, 645 (W.D. Tenn. 2007) (recognizing discovery rule for FHA claims in denying defendant's motion to dismiss); *Lewis v. City of Chicago*, 560 U.S. 205, 214 (2010) (holding that Title VII claims brought under a disparate impact theory were not time barred where defendant adopted discriminatory policy outside of limitations window, but continued to apply policy to plaintiffs within limitations window).

Finally, the applicability of these doctrines depends upon factual allegations set out in the FAC, and it would be premature to dispose of Plaintiffs' claims at this

early stage of litigation, before discovery and appropriate findings of fact. *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999). Specifically, the Plaintiffs have alleged that none of them discovered the discrimination underlying their LOP transactions before they consulted with an attorney no earlier than April 2020. (ECF No. 77, PageID.388 ¶ 289.) Plaintiffs could not have reasonably discovered the discrimination independently because the information about Vision's discrimination was not known to them until explained to them by counsel. (*Id*.)

C. Plaintiffs Have Properly Stated a Claim Under the Equal Credit Opportunity Act.

Defendants contend that Plaintiffs state no plausible claim under ECOA because they are not creditors. (ECF No. 80, PageID.470-72.) Defendants are wrong. ECOA clearly covers Defendants' participation in the LOP transactions.[8]

ECOA is a remedial statute and should be broadly construed. *See RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 385 (6th Cir. 2014) (holding that ECOA's definition of "applicant" is broad enough to potentially include spouse-guarantors); *Silverman v. Eastrich Multiple Inv'r Fund, Ltd. P'ship*, 51 F.3d 28, 33 (3d Cir. 1995) (adopting a broad interpretation of ECOA,

[8] While Defendants do not argue otherwise, Plaintiffs have adequately alleged that Atalaya and ACMV engaged in both disparate treatment and disparate impact discrimination. *See supra*, at n.6 (disparate treatment standard); *Coleman v. Gen. Motors Acceptance Corp.,* 196 F.R.D. 315, 325–26 (M.D. Tenn. 2000), *modified on other grounds,* 296 F.3d 443 (6th Cir. 2002) (disparate impact standard); ECF No. 77, PageID.336-348, 396-403 ¶¶ 95-121, 319-351.

in furtherance of its remedial purpose).

The LOP contracts constitute "credit" under ECOA because they provide for the consumer's right to purchase the home and defer payment of the purchase price. *See* 15 U.S.C. § 1691a(d); Reg. B, 12 C.F.R. § 1002.2(j).[9] *See also New York State Dep't of Fin. Servs. v. Vision Prop. Mgmt., L.L.C.*, No. 450562/2018, 2018 WL 3412824, at *4 (N.Y. Sup. Ct. July 12, 2018) (compelling Vision to comply with subpoena by state lending regulator); *FHCCI v. Rainbow Realty Group, Inc.*, No. 1:17-cv-1782, 2020 WL 1493021, at *1, *7 (S.D. Ind. Mar. 27, 2020) (granting class certification on ECOA and TILA claims in scheme involving 24-month rental period followed by 30-year land contract); *James v. Detroit Prop. Exch.*, No. 18-13601, 2020 WL 4583946, at *6-9 (E.D. Mich. Aug. 10, 2020) (allowing TILA claims to proceed in case involving lease-option contracts).

Atalaya and ACMV are "creditors" under ECOA because they participated in the credit transactions and ACMV knowingly took assignment of the loans. The definition of a "creditor" subject to claims under ECOA is intentionally broad. It includes any person who "regularly extends, renews, or continues credit," any

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[9] ECOA's definition of credit is broader than that of TILA. *See* Official Staff Commentary to Reg. B, 12 C.F.R. pt. 1002, supp. I, § 1002.2(j)-1 ("Regulation B covers a wider range of credit transactions than Regulation Z. . . . [A] transaction is credit if there is a right to defer payment. . . ."); *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1209 (6th Cir. 1997) (an applicant for a deferred payment arrangement is covered by ECOA, even if no *debt* has been incurred).

arranger of credit, and "any assignee of an original creditor" who participates in the credit decision. 15 U.S.C. § 1691a(e). An entity "regularly extends" credit if it "regularly participates in a credit decision, including setting the terms of the credit." Regulation B, 12 C.F.R. § 1002.2(l).

ECOA's robust definition of creditor is well established in the context of financing companies that provide capital for car loans processed and approved by dealerships. "Courts have found entities to be creditors for purposes of ECOA even when they did not directly review credit applications, when they regularly participated in determining binding policies for extending credit to customers." *Coleman v. Gen. Motors Acceptance Corp*., 220 F.R.D. 64, 76 n.9 (M.D. Tenn. 2004) (collecting cases involving financers). In *Coleman*, the financer argued it was not a creditor because it did not receive credit information about buyers before the contract was executed. *Id.* at 75. The court disagreed, holding that participation by a financer in setting the "terms and parameters" of the credit transactions was sufficient to make GMAC a creditor under ECOA. *Id*. at 76; *see also Wide v. Union Acceptance Corp*., No. IP 02–0104–C–M/S, 2002 WL 31730920, at *3 (S.D. Ind. Nov. 19, 2002) (UAC was a creditor where it provided financing and participated in setting policies for loans originated by retail car sellers).[10]

[10] *See also Brief of the United States as Amicus Curiae, Cason v. Nissan Motor Acceptance Corp*., No. 3-98-0223 (M.D. Tenn. July 31, 2000) (NMAC was liable

Courts have confirmed that liability under ECOA extends to entities that participate actively in the design or implementation of credit policies without directly approving or denying individual loan applications. In *U.S. v. American Future Systems, Inc*., 571 F. Supp. 551 (E.D. Pa. 1983), the court extended liability to a number of participants in the business of AFS, a china seller that discriminated based on race. The COO was deemed to be a creditor under ECOA because he "regularly participate[d] in determining policy for the extension of credit to all classifications of customers." *Id*. at 561. The court also found First National, a subsidiary of AFS that handled the billing and timing of shipment, was a creditor as a "participant with AFS in carrying out AFS credit policies." *Id*. *See also FTC v. Capital City Mortg. Corp*., No. CIV. A. 98–237, 1998 WL 1469619 (D.D.C. July 13, 1998) (president of mortgage lender could be a creditor where he "directs, supervises, controls, formulates, and participates in the acts and practices" of the company); *Zamudio v. HSBC N. Am. Holdings Inc*., No. 07 C 4315, 2008 WL 517138 (N.D. Ill. Feb. 20, 2008) (parent company HSBC was "involved in setting policies and procedures" applied by Beneficial when Beneficial denied the plaintiff's loan application).

Atalaya provided the capital for the bulk REO acquisition strategy. Atalaya

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under ECOA for disparate impact as a creditor for loans it approved and funded, although dealership applied the credit rules to particular applicants), https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-519.

funded the purchase of the properties that were then sold to homebuyers through Vision's seller-financed loans. As the financer, Atalaya received a stream of payments as homebuyers sent their checks to Vision each month. (ECF No. 77, PageID.355 ¶ 148.) Atalaya actively participated in setting the terms and parameters of the credit transactions, from crafting the LOP contract, to reviewing how contracts were priced, accounted for, and represented to consumers. Atalaya also reviewed the performance of individual properties and participated in decisions regarding modifications to contracts in default. (ECF No. 77, PageID.352-354 ¶¶ 136-146.) Defendants' claim that Plaintiffs failed to allege that Atalaya or ACMV acted as creditors in class members' transactions is baseless. (ECF No. 77, PageID.400-402 ¶¶ 340-349.) Moreover, Atalaya's routine business involves specialty finance and purchasing loans from other lenders. (ECF No. 77, PageID.351 ¶ 131.)

Atalaya is a creditor because of its direct participation in the extension of credit, whereas ACMV falls within the definition as an assignee which "knew or had reasonable notice of the act, policy, or practice that constituted the violation" before becoming involved in the credit transaction. *See* 12 C.F.R. § 1002.2(l). Atalaya created ACMV to purchase a number of Vision's loans. (ECF No. 77, PageID.355-356 ¶¶ 149-154.) ACMV is owned by Atalaya as well as Alex and Antoni Szkaradek, the founders of Vision and owners of the other Vision affiliates. (ECF No. 77, PageID.318 ¶ 36.) ACMV knew of the bulk REO sale acquisition strategy and the

terms and structure of the transactions before purchasing the loans. (ECF No. 77, PageID.402 ¶ 347.) *See Wide*, 2002 WL 31730920, at *3 (for an assignee, "notice of the policy or practice that results in discrimination will be enough, especially where the allegation is of disparate impact").[11]

Discovery will reveal the full nature and extent of Atalaya and ACMV's participation in setting the terms of the credit transactions. At this stage, however, Plaintiffs have alleged sufficient facts regarding both Defendants' substantial involvement to make out a plausible ECOA claim. *See S & G Petroleum*, 1993 WL 22182, at *2 (whether an entity regularly participates in the decision to extend credit "is obviously a factual matter, not usually appropriate for resolution in a motion to dismiss").

D. Defendants Are Not Entitled to Attorney's Fees Should They Prevail on Their Motion.

Finally, Defendants' request for attorney's fees is meritless. (ECF No. 80, PageID.474.) Attorney's fees are available to a prevailing defendant under the Fair Housing Act "only if the plaintiff's case is [] frivolous, unreasonable, or groundless, or . . . the plaintiff continued to litigate after it clearly became so." *Foster v. Barilow*,

[11] Since Plaintiffs are not proceeding on a theory that Defendants "aided and abetted" an ECOA violation, but rather that they directly participated as creditor and knowingly took assignment of class members' loans, *S & G Petroleum Co. v. Brice Capital Corp.*, No. CIV. A. 92-5078, 1993 WL 497859 (E.D. Pa. Dec. 2, 1993), cited by Defendants, is inapposite.

6 F. 3d 405, 408 (6th Cir. 1993). "An award of attorney fees against a losing plaintiff in a civil rights action is an extreme sanction, and must be limited to truly egregious cases of misconduct." *Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001) (internal quotation marks omitted). In no way do Plaintiffs' detailed allegations against Defendants meet this standard, even if the Court ultimately finds them insufficient to state a claim. *Smith v. Smythe-Cramer Co.*, 754 F. 2d 180 (6th Cir. 1985) ("[T]he mere fact that allegations prove legally insufficient to require a trial does not . . . render a complaint groundless.) (ellipsis in original).

CONCLUSION

For the foregoing reasons, Defendants Atalaya and ACMV's motion to dismiss should be denied.

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CERTIFICATE OF SERVICE

I certify that on March 2, 2021, I electronically filed the foregoing Plaintiffs' Brief in Opposition to Defendants Atalaya Capital Management LP and ACM Vision V, LLC's Second Motion to Dismiss with the Clerk of the Court using the ECF system which will send notification to the attorneys of record.

Respectfully submitted,

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