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 DEFENDANT ACM VISION V, LLC'S MOTION TO DISMISS COUNT V OF AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
ISSUES PRESENTED vi
CONTROLLING OR MOST APPROPRIATE AUTHORITY vii
I. FACTUAL AND PROCEDURAL BACKGROUND 1
II. LEGAL STANDARD 4
III. ARGUMENT 5
A. ACMV's Successive Motion to Dismiss Plaintiffs' TILA Claim is Procedurally Improper. 5
B. Plaintiffs Have Adequately Pleaded a TILA Claim Against ACMV. 7
C. ACMV Is Not Entitled to Attorneys' Fees. 14
CONCLUSION 15
CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Page(s)

Cases

Blessing v. Chandrasekhar,
988 F.3d 889 (6th Cir. 2021) 6

Comerica Bank-Detroit v. Dawson-Price,
No. 89 C 2465, 1990 WL 159988 (N.D. Ill. Oct. 17, 1990) 12

Denny v. Garavaglia,
333 Mich. 317 (Mich. 1952) 10

Directv, Inc. v. Treesh,
487 F.3d 471 (6th Cir. 2007) 4, 8

English v. Dyke,
23 F.3d 1086 (6th Cir. 1994) 5, 6

Fair Hous. Ctr. of Cent. Ind., Inc. v. Rainbow Realty Grp., Inc.,
No. 1:17-cv-1782, 2020 WL 1493021 9

James v. Detroit Prop. Exch.,
No. 18-13601, 2020 WL 4583946 (E.D. Mich. Aug. 10, 2020 .... 9, 11

Linkletter v. W. & S. Fin. Grp., Inc.,
851 F.3d 632 (6th Cir. 2017) 4

New York State Dep't of Fin. Servs. v. Vision Prop. Mgmt., L.L.C.,
No. 450562/2018, 2018 WL 3412824 (N.Y. Sup. Ct. July 12, 2018) 10

Oliveira v. Alliance Bankcorp,
No. 07-cv-00050, 2007 WL 9710793 (D. Haw. Apr. 20, 2007) 11

Payne v. Equicredit Corp.,
No. CIV.A. 00-6442, 2002 WL 1018969 (E.D. Pa. May 20, 2002), *aff'd*, 71 F. App'x 131 (3d Cir. 2003) 14

In re Pinder,
83 B.R. 905 (Bankr. E.D. Pa. 1988) 13

Postow v. OBA Fed. Sav. & Loan Assoc.,
627 F.2d 1370 (D.C. Cir. 1980) 14

Rauch v. Day & Night Mfg. Corp.,
576 F.2d 697 (6th Cir. 1978) 6

Schecter v. Assocs. Fin., Inc.,
499 N.E.2d 483 (Ill. App. Ct. 1986) 13

Swart v. Pitcher,
No. 92-2401, 1993 WL 406802 (6th Cir. Oct. 8, 1993) 6

Tolliver v. Edison,
No. G88-51 CA1, 1988 WL 508719 (W.D. Mich. June 24, 1998) 5

Ward v. Shad,
No. 18-cv-01933, 2019 WL 1084219 (D. Minn. Mar. 7, 2019)........................11

Statutes

15 U.S.C. § 1601 et seq. (Truth in Lending Act)..*passim*

15 U.S.C. § 1602(e) 10

15 U.S.C. § 1602(f)...9

15 U.S.C. § 1602(g) 10

15 U.S.C. § 1640(a) 14

15 U.S.C. § 1640(k)(1)..14

15 U.S.C. § 1641(a), (e) 12

15 U.S.C. § 1641(d)(1)..13

15 U.S.C. § 1641(e) 12

Other Authorities

12 C.F.R. § 1026, Supp. I, Official Interpretation § 1026.2(a)(22).........................10

12 C.F.R. § 1026.2(a)(14)...9, 10

5C Wright & Miller, Fed. Prac. & Proc., History and Purpose of Rule 12(g), § 1384 (3d ed. 2008) 6

5C Wright & Miller, Fed. Prac. & Proc., Timing of Rule 12(b) Motions § 1361 (3d ed. 2008)....................5

E.D. Mich. L.R. 7.1(a)(1)....................3

Fed. R. Civ. P. 12(c)....................6, 7

Fed. R. Civ. P. 12(g)(2)....................4

Fed. R. Civ. P. 12(h)(2)....................6, 7

Fed. R. Civ. P. 12(h)(3)....................7

Judge Sean F. Cox, U.S. District Court for the Eastern District of Michigan, *Practice Guidelines: Motion Practice*, A(1), ...5

Stephanie Saul, *Real Estate Shell Companies Scheme to Defraud Owners Out of Their Homes*, N.Y. Times (Nov. 7, 2015) 10

ISSUES PRESENTED

1. Whether Defendant ACM Vision V, LLC's successive motion to dismiss Count V of the Amended Complaint is procedurally improper under Federal Rule of Civil Procedure 12(g).

2. Whether Plaintiffs have properly stated a claim against ACM Vision V, LLC under the Truth in Lending Act as an original creditor through a joint venture or as an assignee.

3. Whether a prevailing defendant may obtain attorneys' fees under the Truth in Lending Act.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

English v. Dyke, 23 F.3d 1086 (6th Cir. 1994)

Rauch v. Day & Night Mfg. Corp., 576 F.2d 697 (6th Cir. 1978)

Postow v. OBA Fed. Sav. And Loan Assoc., 627 F.2d 1370 (D.C. Cir. 1980)

James v. Detroit Prop. Exch., No. 18-13601, 2020 WL 4583946 (E.D. Mich. Aug. 10, 2020)

Ward v. Shad, No. 18-cv-1933, 2019 WL 1084219 (D. Minn. Mar. 7, 2019)

Comerica Bank-Detroit v. Dawson-Price, No. 89-cv-2465, 1990 WL 159988 (N.D. Ill. Oct. 17, 1990)

15 U.S.C. §§ 1640, 1641

Plaintiffs file this brief in opposition to Defendant ACM Vision V, LLC's ("ACMV") Motion to Dismiss Count V of the First Amended Complaint and supporting brief, ECF No. 82. The Court should deny ACMV's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit, which was originally filed on September 29, 2020 (ECF No. 1), brings consumer and civil rights claims to challenge a deceptive home purchase scheme that discriminated against Black communities in Southeastern Michigan. Plaintiffs' claims involve numerous defendants, including Vision Property Management LLC ("VPM"); a number of affiliates that hold (or held) legal title to the properties at issue in the case, including ACMV; and Atalaya Capital Management, LLC ("Atalaya"), VPM's business partner and the dominant funder for the acquisition of the majority of the properties at issue in the case.[1] Plaintiffs allege that Atalaya created ACMV to take title to a number of VPM's properties and become the assignee of the "lease with option to purchase" ("LOP") contracts entered into by residents of those properties. (ECF No. 77, PageID.313, 355-356 ¶¶

---

[1] Although Atalaya claims that as a registered investment advisor, "[i]t does not lend or invest money in any program, and thus could not have provided funds to Vision for the purchase of Plaintiffs' homes," (ECF No. 83, PageID.519), this assertion is inconsistent with its previous admission that it was a "lender of funds to Vision" and served as a "source of capital for Vision." (ECF No. 80, PageID.466, 469.) Plaintiffs have alleged that Atalaya was the dominant funder that provided capital to Vision for the purchase of properties for the LOP program, including in Southeastern Michigan where Plaintiffs' homes were located. (ECF No. 77, PageID.350-351, 354 ¶¶ 129, 145.)

16, 149-150.)

Plaintiffs' original Complaint asserted several causes of action against Atalaya and ACMV, including under the Fair Housing Act ("FHA") and Equal Credit Opportunity Act ("ECOA").[2] (ECF No. 1, PageID.73-84 ¶¶ 255-303.) Plaintiffs also alleged that ACMV violated the Truth in Lending Act ("TILA"). (ECF No. 1, PageID.95-100 ¶¶ 352-369.)

On January 6, 2021, Atalaya and ACMV moved to dismiss the claims against them in Plaintiffs' Complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(6). In response, this Court issued an order stating that Plaintiffs could amend their Complaint within 21 days or file a response to the pending motion. (ECF No. 72.) Plaintiffs filed the First Amended Complaint ("FAC") on January 29. (ECF No. 77.) Like the original Complaint, the FAC alleges claims under the FHA and ECOA against Atalaya and ACMV (ECF No. 77, PageID.388-403 ¶¶ 290-351) and a TILA claim against ACMV (ECF No. 77, PageID.403-08 ¶¶ 352-369). On February 2, this Court denied Atalaya and ACMV's first motion to dismiss as moot. (ECF No. 79.)

Atalaya and ACMV filed a motion to dismiss the FAC on February 9, seeking

[2] Plaintiffs also brought claims against Atalaya and ACMV under the Elliott-Larsen Civil Rights Act and the Michigan Consumer Protection Act, and against ACMV for breach of contract and breach of the duty of good faith and fair dealing. (ECF No. 1, PageID.84-95, 104-106 ¶¶ 304-351, 393-400.) On October 7, 2020, this Court declined to exercise supplemental jurisdiction over these claims. (ECF No. 10, PageID.208-209.)

to dismiss Plaintiffs' FHA and ECOA claims against them under Rule 12(b)(6). (ECF No. 80.) Plaintiffs filed an opposition to that motion on March 2. (ECF No. 81.) In their opposition, Plaintiffs noted that ACMV did not move to dismiss Plaintiffs' TILA claim, nor had it filed an answer to that claim. (ECF No. 81, PageID.484.) On March 3, at 8:30 am, ACMV's counsel sent an email to Plaintiffs' counsel, requesting that Plaintiffs dismiss the TILA claim. *See* Exhibit A (Email from Keefe Brooks to Coty Montag, et al., (Mar. 3, 2021, 8:30 EST)). Less than an hour later, at 9:22 am and without giving Plaintiffs a reasonable opportunity to confer and respond, ACMV filed another motion under Rule 12(b)(6), seeking to dismiss Plaintiffs' TILA claim.[3] (ECF No. 82.) ACMV did not explain why its defense to the TILA claim was not included in the prior motion, other than to note that Plaintiffs' opposition "correctly notes that ACMV did not address [the TILA claim] in that pending motion, so this . . . motion is filed to complete the record." (ECF No. 82, PageID.510.)

[3] ACMV also violated Local Rule 7.1(a). This rule requires a moving party to determine whether a contemplated motion will be opposed prior to filing. E.D. Mich. L.R. 7.1(a)(1). If the motion will be opposed, the rule requires the moving party to state in its motion that a conference was held between the parties in which the movant explained the nature and legal basis for the motion or that a conference was unable to be held despite the moving party's reasonable efforts. *Id.* at (a)(2)(A)-(B). By filing its motion to dismiss the TILA claim less than an hour after contacting Plaintiffs' counsel, *see* Exhibit A, ACMV did not engage in "reasonable efforts" to confer with Plaintiffs regarding the nature and legal basis for its motion.

II. LEGAL STANDARD

Motions to dismiss are governed by Rule 12. In evaluating motions to dismiss for failure to state a claim under Rule 12(b)(6), 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 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)). Defendant bears the burden of proving a complaint fails to state a claim as a matter of law. *Directv*, 487 F.3d at 476.

Further, Rule 12(g) imposes restrictions on the filing of successive motions to dismiss and states that:

> Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule may not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

Fed. R. Civ. P. 12(g)(2). The Sixth Circuit has made clear that Rule 12(g) "does prohibit a party who makes a Rule 12 motion that omits any Rule 12 defense available at the time from making a subsequent motion based on the omitted

defense." *English v. Dyke*, 23 F.3d 1086, 1090 (6th Cir. 1994).

III. ARGUMENT

A. ACMV's Successive Motion to Dismiss Plaintiffs' TILA Claim is Procedurally Improper.

ACMV's successive motion to dismiss Plaintiffs' TILA claim is procedurally improper and should be denied on that basis.[4] ACMV's defense that Plaintiffs have failed to state a TILA claim was available to it at the time it filed its motion to dismiss the FAC and should have been included in that motion.

As noted above, Rule 12(g) limits the circumstances under which successive motions to dismiss for failure to state a claim may be filed. The Sixth Circuit has clearly stated that "a failure to assert the defense in a pre-answer motion to dismiss

[4] ACMV's motion to dismiss Plaintiffs' TILA claim may also be considered untimely. Rule 12(a), which requires a defendant to serve an answer within 21 days after being served with the Complaint (unless a waiver of service applies), "normally controls the time limit" on Rule 12(b) motions. 5C Wright & Miller, Fed. Prac. & Proc., Timing of Rule 12(b) Motions § 1361 (3d ed. 2008). At least one court in the Sixth Court has acknowledged that Rule 12 motions are generally due when a defendant's answer would be due. *See Tolliver v. Edison*, No. G88-51 CA1, 1988 WL 508719 at *2 (W.D. Mich. June 24, 1998), citing *Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons*, 343 F.2d 7, 12 (8th Cir. 1965) (holding that a Rule 12 motion must be filed when the answer would be due). Plaintiffs acknowledge that this Court's Practice Guidelines allow a motion to dismiss to be filed at any time. Judge Sean F. Cox, U.S. District Court for the Eastern District of Michigan, *Practice Guidelines: Motion Practice*, A(1), https://www.mied.uscourts.gov/index.cfm?pageFunction=chambers&judgeid=22 (last visited Mar. 24, 2021). However, ACMV should have included its defense that Plaintiffs failed to state a TILA claim in its motion to dismiss the FAC, which was due by February 19, 2021.

waives the right to raise the issue in a second pre-answer motion to dismiss." *English*, 23 F.3d at 1090. Rule 12(g) was "intended to eliminate unnecessary delays at the pleading stage of a case by avoiding the piecemeal consideration of pretrial motions." *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 701 (6th Cir. 1978); *see also, e.g.*, *Blessing v. Chandrasekhar*, 988 F.3d 889, 899 (6th Cir. 2021) ("Requiring the Rule 12(b) defenses to be presented together created a 'hazard' only for 'motion-minded lawyers who, from force of habit or lack of good faith, cannot close their pleadings or come to issue without attempting to make numerous motions'" (quoting *Rauch*, 576 F.2d at 701 n.3)); *Swart v. Pitcher*, No. 92-2401, 1993 WL 406802, at *3 (6th Cir. Oct. 8, 1993) (holding that, under Rule 12(g), defendants could not raise a qualified immunity defense in a second pre-answer motion to dismiss). Rule 12(g) contemplates "the presentation of an omnibus pre-answer motion" that "advances every available Rule 12 defense and objection." *Rauch*, 576 F.2d at 701 n.3 (quoting 5C Wright & Miller, Fed. Prac. & Proc., History and Purpose of Rule 12(g), § 1384 (3d ed. 2008)).

Rule 12(g) does provide for a few exceptions as set forth in Rules 12(h)(2) and (3). Rule 12(h)(2) permits a successive motion to dismiss for failure to state a claim in three circumstances: "(A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial." Fed. R. Civ. P. 12(h)(2). Rule 12(h)(3) allows a defendant to file a successive motion to dismiss based on the

defense that the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

These exceptions do not apply here. Motions to dismiss are not considered pleadings under Rule 7(a), so that exception under Rule 12(h)(2) is inapplicable. Similarly, a motion for judgment on the pleadings is only available "[a]fter the pleadings are closed." Fed. R. Civ. P. 12(c). Here the pleadings have not yet closed, so this exception does not apply. The parties are also not yet at the trial stage. Finally, ACMV does not raise a subject-matter-jurisdiction defense, so the exception in Rule 12(h)(3) does not apply.

ACMV could have—and chose not to—address its defense that Plaintiffs have failed to state a TILA claim in its motion to dismiss the FAC. Based on Rule 12(g)'s prohibition on successive motions to dismiss, ACMV's motion to dismiss Plaintiffs' TILA claim under Rule 12(b)(6) should be denied as procedurally improper. However, should the Court decline to deny the motion on this basis, Plaintiffs address the merits of the motion below.

B. Plaintiffs Have Adequately Pleaded a TILA Claim Against ACMV.

Plaintiffs have adequately alleged the basis for a TILA claim against ACMV both as an original creditor participating in a joint venture and as an assignee.

ACMV is one of the Affiliate Defendants described in the FAC. (ECF No. 77, PageID.312-313 ¶¶ 15-16.) The FAC alleges that the various Affiliate Defendants were created to hold title to properties and act as the counterparty in LOP contracts

with homebuyers. (*Id.*) As described below, the Affiliate Defendants acted together with VPM as creditors in the transactions. The Affiliate Defendants (including ACMV) held legal title to the properties purchased for the LOP scheme, were named as parties in LOP contracts, and commenced evictions against defaulting homebuyers. (ECF No. 77, PageID.313 ¶ 18.) VPM coordinated the lending process on behalf of the Affiliate Defendants, directly interfaced with the homebuyers, and serviced the transactions. (ECF No. 77, PageID.312 ¶ 13.) The FAC alleges that these entities engaged in a joint venture to extend credit and, for purposes of the TILA count, the conduct alleged against "Vision" is alleged against both VPM and the Affiliate Defendants. (ECF No. 77, PageID.404 ¶ 355.) Plaintiffs further allege that the Vision joint venture, including ACMV, failed to disclose the material terms of credit such as the APR, finance charge, and schedule of payments; failed to verify the consumers' ability to repay; and failed to comply with requirements for "higher priced mortgage loan" and high-cost mortgage loan transactions. (ECF No. 77, PageID.404-407, ¶¶ 355-367.) The transactions constituted credit sales under TILA, and VPM and the Affiliate Defendants, including ACMV, failed to make the required disclosures, including the total sale price of the transaction.[5] (*Id.*)

Plaintiffs also allege that, over time, ACMV purchased properties in active

---

[5] These are the facts alleged in the FAC and must be presumed true for purposes of Rule 12(b)(6). *Directv, Inc.*, 487 F.3d at 476.

LOP contracts from other Affiliate Defendants, including at least 70 properties in the Detroit CSA. (ECF No. 77, PageID.355-356 ¶ 150.) As the assignee of these transactions, ACMV became the record owner of the real estate and the party to the contract with homebuyers. (*Id.*) At times, ACMV filed evictions against homebuyers who defaulted on their LOP contracts. (ECF No. 77, PageID.356 ¶ 153.) ACMV held LOP contracts it had purchased from Vision until at least 2020. (ECF No. 77, PageID.356 ¶ 151.)

Plaintiffs have stated a plausible TILA claim against ACMV because they have alleged that these were consumer credit transactions, that there were multiple violations of the statute, and that ACMV is liable both as an original creditor through its participation in a joint venture, and as an assignee. Each of these issues is discussed below.

The LOP contracts constitute "credit" under TILA because they provide for the consumer's right to purchase the home and defer payment of the purchase price. *See* 15 U.S.C. § 1602(f); 12 C.F.R. § 1026.2(a)(14) ("Reg. Z"); *see also James v. Detroit Prop. Exch.*, No. 18-13601, 2020 WL 4583946, at *6-10 (E.D. Mich. Aug. 10, 2020 (allowing TILA claims to proceed in case involving lease-option contracts); *Fair Hous. Ctr. of Cent. Ind., Inc. v. Rainbow Realty Grp., 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); *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).

A "creditor" under TILA is defined as a "person" who "regularly extends credit. . . subject to a finance charge or . . . payable . . . in more than four installments," and "to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract." Reg. Z. § 1026.2(a)(17)(i); *accord* 15 U.S.C. § 1602(g). A "person" can be a natural person or an organization, including a joint venture. 15 U.S.C. § 1602(e). A joint venture exists when an enterprise is jointly undertaken, for profit. *See Denny v. Garavaglia*, 333 Mich. 317, 323 (Mich. 1952). The Consumer Financial Protection Bureau's official agency interpretations of TILA state that where the elements of a joint venture are met, the group of natural persons and organizations involved in the venture constitute an organization and, therefore, a person under TILA. Reg. Z. §1026, Supp. I, Official Interpretation § 1026.2(a)(22)-1.

In the realm of predatory real estate investment schemes, it has become increasingly common for a company to use multiple small LLCs or trusts to hold title to the real estate and be named as a counterparty in individual transactions.[6]

---

[6] *See, e.g.*, Stephanie Saul, *Real Estate Shell Companies Scheme to Defraud Owners Out of Their Homes*, N.Y. Times (Nov. 7, 2015),

Each member of such a joint venture should be considered a creditor under TILA, even if the name of that member's name did not appear on the face of the loan contract. *See Ward v. Shad*, No. 18-cv-01933, 2019 WL 1084219, at *4 (D. Minn. Mar. 7, 2019) (plaintiff sufficiently pleaded that defendant met the TILA numerical threshold under a joint venture theory); *Oliveira v. Alliance Bankcorp*, No. 07-cv-00050, 2007 WL 9710793 (D. Haw. Apr. 20, 2007) (mortgage broker could be a TILA creditor under joint venture theory); c*f. James*, 2020 WL 4583946, at *9 (declining to rule on the "regularly extends credit" issue on a motion to dismiss, allowing discovery regarding a potential veil piercing or joint venture theory to meet the TILA numerical threshold as a creditor).

Plaintiffs have alleged facts leading to a plausible inference that ACMV engaged in a joint venture along with VPM and the other Affiliate Defendants. VPM used the Affiliate Defendants (including ACMV) to hold title to the real estate and to be named as a counterparty on the face of the documents. (ECF No. 77, PageID.312-313 ¶¶ 15-16.) VPM interfaced with the consumers in all of the transactions on behalf of the various Affiliate Defendant LLCs. (ECF No. 77, PageID.312 ¶ 13.) The joint venture, described collectively as "Vision" in the TILA count, failed to disclose the material terms of credit such as the APR, finance charge,

---

https://www.nytimes.com/2015/11/08/nyregion/real-estate-shell-companies-scheme-to-defraud-owners-out-of-their-homes.html.

and schedule of payments; failed to verify the consumers' ability to repay; and failed to comply with requirements for "higher priced" and high-cost mortgage loan transactions. (ECF No. 77, PageID.404-407 ¶¶ 355-367.) The transactions constituted credit sales under TILA and Vision, including ACMV, failed to make the required disclosures, including the total sale price of the transaction. (ECF No. 77, PageID.407 ¶ 367.) ACMV is a "creditor" under TILA due to its role in the joint venture, as an original counterparty on LOP contracts.

Plaintiffs have also alleged facts stating a TILA claim against ACMV as an assignee. ACMV took assignment of at least 70 LOP contracts in the Detroit CSA. (ECF No. 77, PageID.355-356 ¶ 150.) ACMV is therefore liable as an assignee for all TILA claims that were apparent on the face of the documents. 15 U.S.C. § 1641(a), (e). For real property secured transactions, a violation that is apparent on the face of the documents includes any disclosure that does not use the terms or format required by the Act or that can be determined to be incomplete or inaccurate by comparing the disclosure statement, any itemization of the amount financed, the note, or any other disclosure of disbursement. *See* 15 U.S.C. § 1641(e).

The failure to provide consumers with *any* disclosure of the material terms of credit, including the APR, finance charge, total of payments, or schedule of payments, was apparent on the face of the documents. No assignee could miss the fact that *there was no TILA disclosure* contained in the loan file. *See, e.g.*, *Comerica*

Bank-Detroit v. Dawson-Price, No. 89 C 2465, 1990 WL 159988, at *5 n.6 (N.D. Ill. Oct. 17, 1990) ("Here the parties agree that Ms. Price received no disclosure statement whatsoever—an omission sufficient to give Comerica notice of a violation of TILA."); *In re Pinder*, 83 B.R. 905 (Bankr. E.D. Pa. 1988) (failure to provide any disclosures is apparent on face of disclosure statement, citing FRB Letter No. 538, which directs banks to take appropriate measures to ensure that they do not purchase collateral paper where the consumer has not been provided with TILA disclosures); *Schecter v. Assocs. Fin., Inc.*, 499 N.E.2d 483 (Ill. App. Ct. 1986) (violations "apparent" on face of disclosure statement included omission of APR and security interest, and disclosure of a wrong amount financed).

There are two other independent bases for assignee liability against ACMV. First, assignees are strictly liable for "all claims and defenses" arising out of high-cost loans under the Home Ownership and Equity Protection Act, a subsection of TILA. 15 U.S.C. § 1641(d)(1) (imposing assignee liability against purchasers of high-cost loans as defined by 15 U.S.C. § 1602(aa)). Plaintiffs have alleged that Vision's LOP transactions in the Detroit CSA were high-cost loans because the annual percentage rate for the transactions exceeded the average prime offer rate by more than 6.5%, when factoring in the padded purchase price and padded escrow collection. (ECF No. 77, PageID.406 ¶ 365.) Second, for the violations of the duty to verify ability-to-pay, assignees are always liable, "notwithstanding any other

provision of law," for claims raised defensively after the creditor has initiated a judicial or nonjudicial foreclosure or taken any other action to collect the debt. 15 U.S.C. § 1640(k)(1). Plaintiffs have alleged that ACMV has initiated at least fourteen eviction actions against consumers in LOP contracts. (ECF No. 77, PageID.356 ¶ 153.) Class members that have faced such collection and termination actions would have an additional basis for assignee liability against ACMV.

Plaintiffs have sufficiently alleged TILA violations against ACMV both as an original creditor through the joint venture and as an assignee. Therefore, the motion to dismiss should be denied.

C. ACMV Is Not Entitled to Attorneys' Fees.

Finally, Defendant's request for attorneys' fees is meritless. (ECF No. 82, PageID.515.) TILA provides for a unilateral grant of attorneys' fees to prevailing *consumers* and does not provide for attorneys' fees to creditors. 15 U.S.C. § 1640(a) ("any *creditor* who fails to comply . . . is liable [for] . . . the costs of the action, together with a reasonable attorney's fee as determined by the court") (emphasis added); *see also Postow v. OBA Fed. Sav. & Loan Assoc.*, 627 F.2d 1370, 1387 (D.C. Cir. 1980) (recognizing that "[t]here is no provision for the recovery of attorneys' fees by lenders who successfully defend actions brought under [TILA]"); *Payne v. Equicredit Corp*., No. CIV.A. 00-6442, 2002 WL 1018969, at *7 (E.D. Pa. May 20, 2002) ("TILA does not provide for recovery of attorneys' fees by an alleged creditor

who prevails against a debtor"), *aff'd*, 71 F. App'x 131 (3d Cir. 2003). ACMV's request for attorneys' fees under TILA is impermissible and should be denied.

CONCLUSION

For the foregoing reasons, Defendant ACMV's motion to dismiss Count V of the Amended Complaint should be denied.

Dated: March 24, 2021

/s/Sarah B. Mancini
NATIONAL CONSUMER LAW CENTER
Sarah B. Mancini (G.B. # 319930)
Stuart T. Rossman (B.B.O. #430640)
7 Winthrop Square
Boston, MA 02110
Tel: (617) 542-8010
smancini@nclc.org
srossman@nclc.org

/s/Bonsitu Kitaba-Gaviglio
ACLU FUND OF MICHIGAN
Bonsitu Kitaba-Gaviglio (P78822)
Daniel S. Korobkin (P72842)
2966 Woodward Avenue
Detroit, MI 48201
Tel: (313) 578-6800
bkitaba@aclumich.org
dkorobkin@aclumich.org

/s/Lorray S. C. Brown
MICHIGAN POVERTY LAW PROGRAM
Lorray S. C. Brown (P60753)
15 South Washington Street, Suite 202
Ypsilanti, MI 48197
Tel.: (734) 998-6100 ext. 613
lorrayb@mplp.org

/s/Jennifer A. Holmes
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
Jennifer A. Holmes (D.C. 1018798)
Coty Montag (D.C. 498357)
700 14th Street NW, Suite 600
Washington, DC 20005
Tel.: (202) 682-1300
jholmes@naacpldf.org
cmontag@naacpldf.org

CERTIFICATE OF SERVICE

I certify that on March 24, 2021, I electronically filed the foregoing Plaintiffs' Brief in Opposition to Defendant ACM Vision V, LLC's Motion to Dismiss Count V of the Amended Complaint with the Clerk of the Court using the ECF system which will send notification to the attorneys of record.

Respectfully submitted,

By: /s/Jennifer A. Holmes

Jennifer A. Holmes (D.C. 1018798)
NAACP Legal Defense and Educational Fund, Inc
700 14th Street NW, Suite 600
Washington, DC 20005
Tel.: (202) 682-1300
jholmes@naacpldf.org