

holdings; and improper arguments, none of which support dismissal of any of the causes of action alleged in the Complaint.

Defendant BSRMC inconsistently takes the position that it has standing to raise jurisdictional and substantive arguments requesting dismissal, yet simultaneously admits that at least some of the claims for relief are not properly brought against it. Nowhere has said Defendant alleged that it has not been adequately placed on notice of the claims against it for purposes of being able to answer and defend. Having set forth no sufficient grounds for dismissal of any of the causes of action asserted, BSRMC's Motion to Dismiss should be denied in its entirety.

II. Substantive Arguments

A. The Rooker-Feldman Doctrine

Defendant BSRMC first attacks the Complaint on jurisdictional grounds alleging that the Rooker-Feldman doctrine precludes this Court from taking jurisdiction over the Plaintiffs' request for declaratory relief and to preclude the foreclosure sale of the Plaintiffs' residence. In support of this argument, Defendant BSRMC cites one 6th Circuit case (Blanton v. United States, 94 F.3d 227 (6th Cir. 1996)) which concerned criminal coram nobis proceedings and which, significantly, does not even address the applicability of Rooker-Feldman to post-judgment enforcement proceedings arising out of a mortgage foreclosure.

The non-applicability of the Rooker-Feldman doctrine to the Plaintiffs' claims in the instant case is demonstrated by review of the court's discussion in Fontana Empire Center LLC v. City of Fontana, 307 F.3d 987 (9th Cir. 2002), which primarily bases its holding on the 5th Circuit cases of Davis v. Bayless, 70 F.3d 367 (5th Cir. 1995) and Gauthier v. Cont'l Diving Servs., Inc., 831 F.2d 559, 561 (5th Cir. 1987), and the United States Supreme

Court's decision in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). Defendant BSRMC's Rooker-Feldman argument fails here for the same reasons that it failed in Davis and Gauthier.

The plaintiffs' claims in their complaint in Fontana Empire Center, like the claims of the Plaintiffs herein, sounded in, *inter alia*, fraud, fraudulent concealment, and to set aside a foreclosure sale. Defendants in Fontana, like the Defendants here, filed a motion to dismiss arguing that the district court lacked subject matter jurisdiction over the plaintiffs' claims under Rooker-Feldman.

The Fontana court rejected the defendants' Rooker-Feldman argument on several grounds, first holding that because the plaintiffs' action challenged post-judgment collection and enforcement proceedings that it was an action separable from and collateral to the merits of the state-court foreclosure action, citing Davis and Pennzoil, *supra*. The Court, citing to Davis and Gauthier, held that the Rooker-Feldman doctrine does not bar an action in federal court when that same action, authorized by state law, would be allowed in the state court of the rendering state, and because the plaintiffs could have raised their claims in state courts that the claims were not barred by Rooker-Feldman especially where the claims in the federal case had not been brought before the state court. 307 F.3d at 993-995.

The Court distinguished the cases cited by the defendants on the grounds that "as illustrated by the cases themselves, the issues raised before the [federal] district court had been litigated in state court." 307 F.3d at 995. The plaintiffs in Fontana sought to challenge (as the Plaintiffs herein seek to challenge) irregularities in the foreclosure sale. The Fontana court thus held that the Rooker-Feldman doctrine did not bar the [federal] district court from exercising jurisdiction over the plaintiffs' claims for deprivation of due process, unlawful

taking of property, *set aside foreclosure sale*, promissory estoppel, and cancellation of deed or instrument (emphasis added).

Plaintiffs herein have alleged, within Count XI for violations of the Ohio RICO statute, that the Defendants engaged in a pattern of corrupt activity in order to not only seek the collection of an unlawful debt from the Plaintiffs, but also to acquire an interest in real estate consisting of the Plaintiffs' primary residence (Complaint, paragraph 115). As alleged in the Complaint, the Ohio RICO statute authorizes the institution of a civil action for violations of the Statute, including an action to challenge the collection of an unlawful debt pursuant to a pattern of corrupt activity and the acquisition of an interest in real property acquired through a pattern of corrupt activity (Complaint, paragraph 114).

Plaintiffs have also alleged that the Defendants' actions constituted an enterprise with the aim and objective thereof being to perpetrate a fraud upon the Plaintiffs through the use of intentional nondisclosure, material misrepresentation, and the creation of fraudulent loan documents (Complaint, paragraph 117). The Complaint further alleges, pursuant to sec. 2929.34(B)(1) of the Ohio RICO Statute, that the court may order the Defendants' divestiture in any interest in real property and that the court may also, pursuant to sec. 2929.34(D) of the Statute, order injunctive relief and a temporary injunction (Complaint, paragraphs 120, 121).

It is without dispute or issue that a claim under the Ohio RICO statute was not presented by Plaintiffs or litigated in the state-court foreclosure action, although Plaintiffs could have brought such claim in state court. Plaintiffs have properly brought the claim as part of their Federal action herein pursuant to the doctrine of Pendent or Supplemental jurisdiction, 28 USC sec. 1367(a). The Ohio RICO statute is a state law which authorizes the

specific relief requested by the Plaintiffs. As such, Plaintiffs' claims which attack the foreclosure sale are not barred by the Rooker-Feldman doctrine. Defendant BSRMC's Motion to Dismiss on this issue should thus be denied.

B. Anti-Injunction Act

Defendant BSRMC next alleges that this Court is prohibited from issuing an injunction to preclude the foreclosure sale of the subject property or enjoin further proceedings in connection with the foreclosure citing to the Anti-Injunction Act, 28 USC sec. 2283. The Historical and Revision notes to the Act provide that the Federal courts are without power to enjoin "relitigation of cases and controversies *fully adjudicated* by such courts", citing Toucey v. New York Life Insurance Co., 62 S. Ct. 139, 314 U.S. 118, 86 L. Ed. 100. As set forth above, the Plaintiffs' claims herein, particularly those asserted under the Ohio RICO statute, were never litigated at all and thus were not and could not have been "fully adjudicated" in the state court proceeding. The Anti-Injunction Act does not apply on this threshold issue alone.

A close reading of the one 6th Circuit case cited by Defendant BSRMC, that being Martingdale LLC v. City of Louisville, 361 F.3d 297 (6th Cir. 2004), reveals additional reasons why the Anti-Injunction Act does not preclude this Court's taking jurisdiction of the Plaintiffs' claim for relief under the Ohio RICO Statute. In Martingdale, the state court complaint requested declaratory and injunctive relief challenging a city resolution authorizing the condemnation of a bridge. The relief requested was not brought under a state statute specifically authorizing declaratory or injunctive relief, as the Plaintiffs have alleged in their Complaint in this case.

The Martingdale court also found that the plaintiffs had failed to show a violation of the right to have property taken without just compensation, and that the plaintiffs' "stray request for monetary relief is not accompanied by any alleged claim on which the relief could be based". The court thus held that the Act "concludes the case". 361 F.3d at 304.

Here and in marked contrast to the facts of Martingdale, the Plaintiffs have specifically alleged claims for monetary and equitable relief based on an Ohio state Statute which specifically provides for such relief and authorizes the court to order both injunctive relief and a divestiture of the Defendants' interest in the Plaintiffs' real property. The Plaintiffs have alleged an improper taking of their real property through the Defendants' use of intentional nondisclosure, material misrepresentation, and the creation of fraudulent loan documents in violation of the RICO Statute, and continuing injury and damages including the loss of their home and overpayment of fraudulent charges (Complaint, paragraphs 117, 119, 122). As alleged in the Complaint, the Ohio RICO Statute specifically authorizes the relief requested (Complaint, paragraphs 120, 121).

Defendant BSRMC has cited no decisional law which would support overriding or precluding this Court's express jurisdictional grant to entertain the Plaintiffs' claims under the Ohio RICO statute, including the specific grant of jurisdictional authority pursuant to the Statute and 28 USC sec. 1367(a), to entertain statutorily authorized claims for injunctive relief. The one 6th Circuit case cited by Defendant BSRMC is distinguishable on its facts alone. Defendant BSRMC's Motion to Dismiss as the Anti-Injunction Act should thus be denied.

C. “Abstention” Argument

Defendant BSRMC cites generally to the Pennzoil v. Texaco decision, *supra*, in alleged support of a *Younger* “abstention” argument. As set forth above and as discussed by the court in Fontana Empire Center, *supra*, the Supreme Court held in Pennzoil that an action challenging post-judgment collection or enforcement proceedings is “an action ‘separable from and collateral to’ the merits of the state-court judgment”. Fontana, *supra* at 993, citing Pennzoil, 481 U.S. at 21, 107 S.Ct. 1519 (Brennan, J., concurring)(quoting Nat’l. Socialist Party v. Skokie, 432 U.S. 43, 44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977)). The Pennzoil opinion also states that *Younger’s* purpose is to avoid unwarranted determination of Federal constitutional questions: “The Texas court could have resolved the case on statutory or constitutional grounds without reaching Federal constitutional questions”. 481 U.S. at 2.

As set forth above, the Plaintiffs’ action herein which challenges post-judgment collection and enforcement is a separable action which is not precluded by *Rooker-Feldman*, and there are no “Federal constitutional questions” which are sought to be determined. Abstention is thus unwarranted. Defendant BSRMC’s Motion to Dismiss on this issue should thus be denied.

D. “Issue Preclusion”

Defendant BSRMC next attempts to utilize the doctrine of collateral estoppel, which said Defendant refers to as “issue preclusion”, to request dismissal of certain remedies sought in the Complaint. Defendant BSRMC apparently does not understand the threshold identity requirements in order to even proffer that collateral estoppel is available.

The very decisional law cited by Defendant BSRMC demonstrates that issue preclusion is unavailable as a defense. Pursuant to State ex rel. Stacey v. Batavia Local School Dist. Board of Education, 779 N.E.2d 216 (Ohio 2002), in order for collateral estoppel to apply, the issue or fact has to be “fairly, fully, and necessarily litigated and determined” in the prior action. As also admitted by Defendant BSRMC, collateral estoppel only applies when:

- (a) the fact or issue was actually and directly litigated in the prior action;
- (b) the fact or issue was passed upon and determined by a court of competent jurisdiction; and
- © the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.

Thompson v. Wing, 637 N.E. 2d 917 (Ohio 1994).

Defendant BSRMC first asserts, incredulously, that the “first element of issue preclusion is met” by virtue of the Judgment Entry for Foreclosure and “by Plaintiffs’ own allegation in the Complaint”. Notwithstanding that Defendant BSRMC has failed to cite which paragraph(s) of the Complaint constitute admissions supporting the alleged satisfaction of the first element of issue preclusion, Defendant BSRMC fails to cite any specific facts or issues in any of the causes of action asserted in the Complaint in this action which were “actually and directly litigated” in the prior action. Defendant BSRMC’s assertion of alleged satisfaction of the first element of issue preclusion thus borders on the specious.

Defendant BSRMC next fails to cite any specific facts, relevant to the claims asserted in the Complaint herein for fraud, violations of Federal lending laws, violations of the Ohio Consumer Practices Act, violations of the Ohio RICO act, and conspiracy, which

were “passed upon and determined” by the state court in the foreclosure case which would bar these causes of action on the basis of any “issue preclusion”.

The American Home Products Corporation v. Tracy decision (787 N.E.2d 658 (Ohio 10th App. Dist. 1991)), cited by Defendant BSRMC for the alleged proposition that “a final judgment on the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action”, actually supports Plaintiffs’ position that issue preclusion is not applicable. Also significant is the fact that Defendant BSRMC failed to cite the Tracy court’s recognition of specific exclusions to the general doctrine.

The Tracy case involved an appeal from a decision of the Ohio Board of Tax Appeals (BTA) which sustained a Commissioner’s determination denying part of a corporate franchise tax refund, claimed by one of appellant’s subsidiaries, of a carry-forward net operating loss (NOL) for the last year of business for an entity which was reorganized in a bankruptcy proceeding. The court specifically held, in affirming the BTA’s refusal to apply res judicata effect, that the Ohio Supreme Court had not abandoned all exceptions to the general rule of **issue preclusion**:

Although an issue is actually litigated and determined by a **valid and final judgment**, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(5) **there is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties to the initial action; (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action; or because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did**

not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Tracy, 787 N.E.2d at 662, citing State v. Williams (1996), 76 Ohio St.3d 290, 295, 667 N.E. 2d 932, itself citing to 1 Restatement of the Law 2d, Judgments (1980) 273-274, Section 28.

Significantly as well, subsection (4) of section 28 of the Restatement of the Law 2d Judgments provides that there is no issue preclusion where, in the second action, the burden shifts to the adversary of the party against whom preclusion is sought.

In holding that the BTA did not err in refusing to give res judicata effect to the confirming order of the Bankruptcy court, the Tracy court held that the subject order “did not explicitly define the scope of such an NOL”, and that “On the facts before us, considering applicable Ohio tax statutes, the chronology of proceedings, and the bankruptcy court’s order, we conclude that res judicata does not bar the Ohio Tax Commissioner from making an independent determination off the tax matters raised...”. 787 N.E.2d at 663.

As Defendant BSRMC has admitted, the party who brought the foreclosure proceeding in state court was LaSalle Bank as Trustee for unidentified certificate holders of a series of securities. The Final Judgment of Foreclosure does not explicitly discuss the claims of the Plaintiffs herein, including the claims made under both Federal and state laws, which claims have, in the Complaint in this case, shifted the burden to the Plaintiffs’ adversary.

The Plaintiffs have alleged fraudulent concealment, material omission, and fraud in the Complaint, including within paragraphs 25, 27, 28, 29, 32, 33, 50, 89, 90, and 117. There is thus a clear and convincing need for a new determination of all issues surrounding

the foreclosure because it was both not sufficiently foreseeable at the time of the foreclosure action that the issues the subject of the Complaint herein would arise, in the foreclosure action, in the context of a subsequent action, and as Plaintiffs, as a result of the conduct of their adversary Defendants and the other special circumstances set forth in the Complaint, did not have an adequate opportunity or incentive to obtain a full and fair adjudication of the issues in the Complaint herein within the state court foreclosure action. As such and based on the very decisional law cited by Defendant BSRMC, issue preclusion a/k/a collateral estoppel does not apply to bar any of the causes of action in the Complaint herein. Defendant BSRMC's Motion to Dismiss on this issue must thus be denied.

E. Claims "Are Not Properly Brought against BSRMC"

In support of this argument, Defendant BSRMC alleges that "LaSalle is the holder of the note and mortgage associated with this loan", and as such, Defendant BSRMC is not a proper defendant to certain claims. If this were true, it begs the question of why Defendant BSRMC would even file a Motion to Dismiss, and why Defendant BSRMC did not file an Affidavit setting forth that it has no interest in the subject loan.

Defendant BSRMC has apparently ignored paragraph "3" of the Complaint which specifically alleges that Defendant BSRMC is the successor-in-interest to Defendant ENCORE relative to the mortgage which is part of the subject matter of this action. As this allegation must be taken as true for purposes of a Motion to Dismiss, Defendant BSRMC's argument is without merit and is devoid of any facts which would defeat the allegations of paragraph "3" of the Complaint. Defendant BSRMC's Motion to Dismiss on this issue must thus be denied.

F. Statutes of Limitations Claims

Defendant BSRMC alleges that Plaintiffs' claims asserted under the Home Ownership Equity Protection Act (HOEPA), the Truth-In-Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Fair Credit Reporting Act (FCRA), the Ohio Consumer Practices Act (OCPA), and the common-law claims for Fraudulent Misrepresentation, Breach of Fiduciary Duty, and Civil Conspiracy are all subject to dismissal on statutes of limitations grounds. All such arguments fail in light of applicable decisional law governing equitable tolling.

In cases of fraudulent concealment, the statute of limitations can be tolled when the defendant took affirmative steps to conceal the plaintiff's cause of action and the plaintiff could not have discovered the cause of action despite exercising due diligence. Jarrett v. Kassel, 972 F.2d 1415, 1423 (6th Cir. 1982). Although the 6th Circuit has apparently not decided whether equitable tolling is applicable in a RESPA claim, it has held that the similarly-worded Truth in Lending Act is subject to equitable tolling. Jones v. TransOhio Savings Association, 747 F.2d 1037, 1041 (6th Cir. 1984).

Plaintiffs have alleged, as set forth above, that the Defendants engaged in fraudulent concealment and a pattern and practice, during the life of the mortgage loan, of defrauding Plaintiffs including failing to credit payments made, incorrectly calculating interest on the accounts, and failing to accurately debit fees. Given this continuing pattern and the fact that the mortgage loan was assigned to Defendant OPTION ONE and, at some point unknown to the Plaintiffs, wound up in the alleged possession of LaSalle Bank National Association as the Trustee for certificate holders of Bear Stearns Asset-Backed Securities LLC Asset-Backed Certificate series 2004-HES (which filed the state court foreclosure action), there

was no practicable way for Plaintiffs to know, prior to being sued for foreclosure, of what their available causes of action were as they did not even know who was the true holder and owner of the note and mortgage were (and still do not know).

Further and given the allegations in the Complaint that the mortgage loan transaction was an inter-temporal transaction with multiple assignments as part of an aggregation and the creation of a REMIC tranche itself a part of a collateralized mortgage obligation (Complaint, paragraph 59), none of which was ever disclosed to the Plaintiffs (Complaint, paragraph 28), and as the state court foreclosure action was filed not by the originating lender but by a Trustee for unidentified certificate holders of a series of asset-backed securities (Complaint, paragraph 49), Plaintiffs, who are not engaged in the mortgage securitization business, could not have reasonably known of the filing requirements for the causes of action asserted herein as of the time of the closing and were, under the totality of the circumstances, reasonably ignorant of the subject filing requirements.

Plaintiffs have since been diligent in pursuing their rights, and there is no prejudice to the Defendant BSRMC, who is alleged to be the successor-in-interest to the Defendant ENCORE (Complaint, paragraph 3), but which has affirmatively represented to this Court, in its Motion to Dismiss, that Defendant BSRMC “is not a proper defendant to the claims seeking rescission of the Loan, termination of the Loan documents, or a declaration that the Loan was illegal and void” (Motion to Dismiss, page 8, section “B”). Under the totality of the circumstances where the Defendants have induced or tricked the Plaintiffs by misconduct into allowing the filing deadlines to pass, equitable tolling applies to Plaintiff’s claims under HOEPA, TILA, RESPA, and the FCRA. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990), cited in an Order of the Hon. Michael R. Barrett, United States District Judge

in the matter of Demetrious Smith v. ABN AMRO Mortgage Group, Inc., Case No. 1:06cv45, U.S. District Court, Southern District of Ohio (Western Division).

Ohio adheres to the “discovery rule” as to the statute of limitations in which to bring an action founded in fraud and breach of trust. Investors REIT One v. Jacobs, 46 Ohio St.3d 176, 546 N.E.2d 206 (Ohio 1989). **The discovery rule extends the start date for the running of the statute of limitations to when the consumer discovers or should have discovered the ground for the violation, which rule has also been held to apply to actions for rescission.** Jackson v. Sunnyside Toyota, Inc., 2008 Ohio 687 (Ohio App. 8th Dist. 2008). The time within which the Plaintiffs are required to bring an action based on fraud or nondisclosure in connection with lending violations may be tolled until the Plaintiffs discovered or had reasonable opportunity to discover the fraud or nondisclosures, which have been held to include such matters such as divergent terms of the mortgage, note and disclosure forms. Hamilton v. Ohio Savings Bank, 70 Ohio St.3d 137, 637 N.E.2d 887 (Ohio 1994)(reversing summary judgment on statute of limitations grounds and holding that the issue is one “best left to the finder of fact”)

Defendant BSRMC’s position is grounded solely upon its argumentative position that the fraud and breaches of fiduciary duty arose from the closing date. In view of the allegations of continuing fraud in the assignment and securitization process during the life of the loan (which must be accepted as true for purposes of a Motion to Dismiss), Defendant BSRMC’s position does nothing more than raise issues of fact which are “best left to the finder of fact”, and may be asserted as affirmative defenses in an Answer. Defendant BSRMC’s Motion to Dismiss as to statute of limitations must thus be denied.

G. Alleged “Failure to State a Claim Upon Which Relief Can Be Granted”

Defendant BSRMC first claims that Plaintiffs have “not alleged that BSRMC is a creditor as defined in 15 U.S.C. sec. 1602(h)” (Motion to Dismiss, page 10, part D). Defendant BSRMC has apparently ignored the allegations of paragraphs “3” and “39” of the Complaint where the specific allegation of Defendant BSRMC being a “creditor” within the meaning of 15 U.S.C. sec. 1602(f) has been made.

Defendant BSRMC next makes the specious argument that Plaintiffs have failed to make the requisite allegation as “Plaintiffs’ affirmative allegations show that Encore was the originating lender”. This statement ignores the specific allegations of paragraph “3” of the Complaint which alleges that Defendant BSRMC is the successor-in-interest to Defendant ENCORE relative to the mortgage which is part of the subject matter of this action.

Defendant BSRMC next complains that Plaintiffs did not allege that their loan qualified as a “high cost HOEPA loan”, while simultaneously admitting that Plaintiffs have alleged that they were required to pay excessive fees, expenses, and costs which exceeded more than 10% of the amount financed (which appears in paragraph 54 of the Complaint). The particularized matters raised by Defendant BSRMC as to the definitions of points and fees, etc. are properly the subject of discovery, not pleading. Defendant BSRMC has been placed on adequate notice of the claim and may answer and defend accordingly. Defendant BSRMC’s Motion to Dismiss must thus be denied.

There is no legal authority cited by Defendant BSRMC that Plaintiffs are allegedly required to “attach any documents” to support their HOEPA claim. Further, Defendant BSRMC claims, on the one hand, that it is not a “creditor”, yet defends on the merits of both the TILA and HOPEA claims. Defendant BSRMC must decide which of its inconsistent

positions it seeks to maintain. Having set forth no grounds for dismissal, Defendant BSRMC's Motion to Dismiss must be denied.

Defendant BSRMC next alleges that Plaintiffs' RESPA claim fails in that they have not alleged that Defendant BSRMC gave or received a kickback in violation of 12 U.S.C. sec. 2607 (Motion to Dismiss, page 12). Defendant BSRMC alleges that as to the RESPA claim, "Plaintiffs' Complaint clearly demonstrate [sic] that their RESPA claim is based on the yield spread premium (the "YSP") allegedly received by Defendant Motion Financial ("Motion") from Encore".

The factual allegations relating to the nondisclosure of the YSP are set forth in paragraphs 33 through 35 of the Complaint. Incredibly and in view of the specific factual allegations of the Complaint, Defendant BSRMC has alleged that "Plaintiffs have not alleged that payment of the YSP was in violation of 12 U.S.C. sec. 2607". Perhaps Defendant BSRMC should read paragraphs 33, 34, and 35 of the Complaint.

Paragraph 33 sets forth that as Defendants failed to provide an accurate Good Faith Estimate or Itemization of Amount Financed, the YSP was not disclosed. Paragraph 34 sets forth that as a direct and proximate result of the nondisclosure, Defendant MOTION received a YSP in the amount of \$10,570.00. Paragraph 35 of the Complaint sets forth that the YSP was not disclosed in the MOTION broker contract and as such this is an illegal kickback in violation of 12 USC sec. 2607.

Perhaps even more incredible is the "spin" which Defendant BSRMC has attempted to put on that portion of the transaction relating to the inflated appraisal. While suggesting that Defendant MOTION "helped Plaintiffs complete their loan application" including "coordinated appraisals" and "assisted Plaintiffs at closing", Defendant BSRMC ignores the

facts relating to the inflated appraisal (paragraphs 21, 22); deliberately misrepresents and mischaracterizes the events of the closing (paragraphs 24 and 25 of the Complaint), and then asserts, beyond credulity, that “Motion provided compensable services to Plaintiffs” in an attempt to justify the illegal YSP kickback. This absurd attempt to mischaracterize the actual allegations of the Complaint provides no basis for dismissal, and in fact raises issues as to Defendant BSRMC’s motives, plan, intent, and design which go to the Plaintiffs’ claims for conspiracy and violations of the Ohio RICO statute.

Plaintiffs have alleged sufficient facts to plead the RESPA claim. Defendant BSRMC’s Motion to Dismiss on this issue must thus be denied.

As to the Plaintiffs’ claim for damages for the Defendants’ violations of the Fair Credit Reporting Act, Defendant BSRMC has failed to cite to any infirmity as to the Plaintiffs’ claims for recovery of damages from Defendants for negligent non-compliance with the FCRA pursuant to 15 USC sec. 1681(o) or for punitive damages pursuant to 15 USC sec. 1681(n)(a)(2). Defendant BSRMC’s Motion to Dismiss must thus be denied.

Defendant BSRMC next takes issue with Plaintiffs’ claim under the Ohio Consumer Sales Practices Act, first alleging that Plaintiffs have not alleged that Defendant BSRMC engaged in a consumer transaction with Plaintiffs. In truth and in fact, paragraph “3” of the Complaint alleges that Defendant BSRMC was a “supplier” as defined by ORC sec. 1345.01©, and paragraphs 78 and 79 of the Complaint allege that Defendants are subject to the provisions of the Ohio Consumer Sales Practices Act in connection with the consumer transaction the subject of this action.

Defendant BSRMC next attempts to exempt the transaction the subject of the Complaint from the OCSPA by taking the position that it is a “dealer of intangibles”, which is

one who engages in, *inter alia*, the business of lending money or buying and selling notes and mortgages. However, Defendant BSRMC simultaneously admits, in footnote “1” at the bottom of pages 15 and 16 of its Motion to Dismiss, that “After the loan closed, the legislature amended R.C. sec. 1345.01(A), which now provides that ‘transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers’ are not excluded from the act”, admitting that the act took effect as of January 1, 2007 but arguing that in light thereof that “it does not apply to this case”.

As the final judgment in the state court case was not rendered until January 12, 2007 (Complaint, paragraph 49) and as the Plaintiffs have alleged that the fraudulent conduct of the Defendants was ongoing during the life of the loan (Complaint, paragraph 42), Plaintiffs assert that the change in the act which did not exclude mortgage transactions from the OCSPA is applicable to the instant case. Defendant BSRMC’s Motion to Dismiss must thus be denied.

Defendant BSRMC requests dismissal of Count VI which said Defendant admits “is not asserted against BSRMC”. If the claim is not asserted against BSRMC, there is nothing in the Count to dismiss as to BSRMC. The request for dismissal by Defendant BSRMC of a count admittedly not asserted against said Defendant should be denied as moot.

Defendant BSRMC alleges (in unsworn fashion) that it was not involved in the loan until after the loan closed, and thus could not be directly liable for any alleged misrepresentations or omissions made by any of the parties. The question of to what extent Defendant BSRMC was involved in the overall long-term securitized inter-temporal mortgage transaction (per paragraph 50 of the Complaint) is a question of fact to be

explored in discovery. For all we know at this point, Defendant BSRMC could have succeeded to the interest of Defendant ENCORE while the closing was taking place.

Defendant BSRMC has made no complaint that Plaintiffs have not alleged all requisite elements to plead a cause of action for Fraudulent Misrepresentation. As Plaintiffs have properly alleged all elements to state a cause of action for Fraudulent Misrepresentation, Defendant BSRMC's Motion to Dismiss this claim must thus be denied. The same reasoning applies to the Plaintiffs' claim for Breach of Fiduciary Duty.

As to the complaints regarding Plaintiffs' claim for **Unjust Enrichment** in Count IX, Defendant BSRMC once again intentionally ignores the totality of the factual allegations of the Complaint, and once again misstates the true holding of the one case which it cites in alleged support of its position. Defendant BSRMC claims that "Plaintiffs expressly allege that they had a written contract that would govern the relationship between the parties in this case", citing "e.g. Complaint, paragraph 35". Paragraph 35 of the Complaint discusses only the nondisclosure of the YSP in the broker contract of Defendant MOTION. However, Defendant BSRMC ignores the allegations in paragraphs 32, 33, and 36 which discuss the nondisclosures of all Defendants relating to amounts and rates, the true cost of the consumer transaction, and the understatement of the amount financed.

Defendant BSRMC cites Weiper v. W.A. Hill & Associates, 661 N.E.2d 796 (Ohio 1st App. Dist. 1995) for the alleged proposition that "a party may not prosecute a claim for unjust enrichment where a written contract addresses the matter in dispute" (Motion to Dismiss, page 17, section 8). The actual holding of the Weiper case is: "A party seeking a remedy under a contract cannot also seek equitable relief for unjust enrichment since

absent fraud, illegality, or bad faith, compensation is governed by the parties' contract", citing Ullman v. May (1947), 147 Ohio St. 468, 34 O.O. 384, 72 N.E.2d 63.

It is of record that Plaintiffs herein have not sought any remedy under a contract in any count of the Complaint, and that Plaintiffs have alleged and sought relief under theories involving fraud and illegality. As such and in view of the fact that Defendant BSRMC has not alleged that Plaintiffs have not plead all elements for pleading a cause of action for Unjust Enrichment, Defendant BSRMC's Motion to Dismiss must be denied.

Defendant BSRMC's arguments as to the claim for Civil Conspiracy (Count X) fail for the same reasons that their arguments fail as to the counts for Fraudulent Misrepresentation and Breach of Fiduciary Duty, *supra*. Defendant BSRMC's Motion to Dismiss Count X must thus be denied.

Plaintiffs are at a loss as to how Defendant BSRMC could, in good faith and pursuant to the requirements of Federal Rule of Civil Procedure 11, claim that Plaintiffs have not alleged any facts to support this claim when there are 51 predicate allegations incorporated into Count XI (which Defendant BSRMC conveniently fails to address), which conduct as alleged satisfies the pleading requirements to assert a cause of action under the Ohio RICO statute. Defendant BSRMC's Motion to Dismiss Count XI must thus be denied.

Defendant BSRMC finally advances the argument that it has no tort liability as a successor-in-interest as Plaintiffs have not alleged that Defendant BSRMC "merged or consolidated" with Defendant ENCORE, relying upon a decision relating to the purchaser of a corporation's assets not being liable for the torts of the seller corporation. The problem with this argument is that it makes assumptions not plead in the Complaint.

As set forth above, it is unknown at this point what the full extent of Defendant BSRMC's involvement was in the totality of the inter-temporal securitized mortgage transaction which started with Defendant ENCORE and ended with Bear Stearns Asset Backed Securities LLC Asset Backed Certificate series 2004-HES. It may be that Defendant BSRMC was the successor-in-interest to Defendant ENCORE while the loan was closing, or that Defendant ENCORE was nothing more than a "shell lender" created by Defendant BSRMC in the context of the complicated total transaction which lead to the creation of the specialized investment vehicle known as the Bear Stearns Asset Backed Securities LLC Asset Backed Certificate series 2004-HES, the Trustee for the Certificate Holders thereof having filed the state court foreclosure action. All of these factual issues are the subject of discovery, not pleading. Defendant BSRMC is fully entitled to assert affirmative defenses in an Answer.

III. Conclusion

Defendant BSRMC has failed to demonstrate that any of the causes of action asserted in the Complaint is subject to dismissal. Defendant BSRMC has ignored well-pleaded facts, misrepresented the actual holding of decisional law, "spun" certain facts, taken issue with others, and raised nothing more than questions of fact which are properly the subject of discovery.

Plaintiffs have properly pleaded all causes of action asserted in the Complaint. Defendant BSRMC's Motion to Dismiss must thus be denied and said Defendant should be ordered to serve its Answer to the Complaint.

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CERTIFICATE OF SERVICE

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