UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SKYMARK PROPERTIES CORPORATION, INC., SKYMARK PROPERTIES II, LLC, SKYMARK PROPERTIES III, LLC, SKYMARK SPE, LLC, HAZELTON HOMES, and 2399021 ONTARIO, INC.,

Plaintiffs,

v.

MORTEZA KATEBIAN, a/k/a Benham "Ben" Katebian, a/k/a Morteza Katebian Tabari a/k/a Morteza Katebian Tabary, a/k/a Morteza T. Katebian, PAYAM KATEBIAN, MORROW GA INVESTORS, LLC, 2638168 ONTARIO, INC., FLEMINGTON CAPITAL CORPORATION, JORDAN ASHER SAMUEL, PANTEA SAHEBDIVANI, HOSEINALI SAHEBDIVANI, ALI BEHROUZ, GREEN LAKE REAL ESTATE FUND, LLC, and PETER T. CHANG,

Defendants.
_____/

Case No. 20-12372

Sean F. Cox
United States District Judge

David R. Grand
United States Magistrate Judge

REPORT AND RECOMMENDATION TO (1) DENY GREENLAKE DEFENDANTS' MOTION TO COMPEL ARBITRATION (ECF No. 165), (2) DISMISS WITHOUT PREJUDICE THE ARBITRABLE CLAIMS, AND (3) GRANT IN PART AND DENY AS MOOT IN PART GREENLAKE DEFENDANTS' MOTIONS TO DISMISS (ECF Nos. 98, 100)

Normally, the plaintiff in a RICO case attempts to prove that the *defendants* engaged in "specified unlawful activity," such as, say, bank fraud. The principal plaintiffs in this RICO case, however, take the unorthodox approach of beginning with an admission that

they committed bank fraud against the very bank they now accuse of being a member of the RICO enterprise at the heart of plaintiffs' complaint. Moreover, to commit that fraud – obtaining a loan by false pretenses – they used a shill who they now accuse of being the RICO enterprise's ringleader.

While the principal plaintiffs' conduct may or may not give the bank a valid defense to at least some of the claims in this case, the Court must first decide whether this is the proper forum to resolve those claims. This is because the salient loan documents contain an arbitration clause, and the defendant bank and its co-defendant CEO have filed a motion to compel arbitration of plaintiffs' claims. Although the bank has assigned its rights in the loan documents to another lender, most of plaintiffs' claims against the bank and its CEO are subject to arbitration because those defendants' alleged wrongful conduct took place prior to the assignment, and the loan documents and the parties' relationship thereunder are central to the plaintiffs' claims. However, because the parties agreed to arbitration in Los Angeles, California, the motion to compel arbitration must be denied, and the arbitrable claims must be dismissed without prejudice.

The bank and its CEO have also filed motions to dismiss, and the few claims against them that are not arbitrable are subject to dismissal because the plaintiffs failed to properly plead causation.

The end result is that all of plaintiffs' claims against the bank and its CEO should be dismissed, the arbitrable claims without prejudice.

I. FACTUAL BACKGROUND

A. The Relevant Parties

i. Plaintiffs

The six named plaintiffs ("Plaintiffs") own or owned commercial and other real estate that they claim was stolen from them by some or all of the defendants pursuant to a complex RICO enterprise/conspiracy.

a. Skymark Entities

Plaintiff Skymark Properties Corporation ("Skymark Properties") is a Delaware corporation, with a principal office in the Province of Ontario, Canada. (¶11).[1] Skymark Properties is the sole manager of Skymark Properties II, LLC ("Skymark II"), Skymark Properties SPE, LLC ("Skymark SPE"), and Skymark Properties III, LLC ("Skymark III"). (*Id.*). Skymark II is a Michigan limited liability company incorporated in 2012, with a principal place of business located in the Province of Ontario, Canada. (¶12). Skymark SPE is a Delaware limited liability corporation formed in 2015, with a principal place of business in the Province of Ontario, Canada. (¶13). Skymark III is a Michigan limited liability company incorporated in 2014, with a principal place of business in the Province of Ontario, Canada. (¶14).

b. Hazelton Homes

Plaintiff Hazelton Homes Corporation ("Hazelton Homes") is a Canadian corporation with a principal place of business in the Province of Ontario. (¶15).

c. 2399021 Ontario, Inc.

Plaintiff 2399021 Ontario, Inc. ("'021 Ontario") is a Canadian corporation with its

[1] Standalone citations to "¶__" are all to Plaintiffs' amended complaint, found at ECF No. 68.

principal place of business in the Province of Ontario. (¶16).

ii. Defendants

a. The Katebian Defendants

Defendant Morteza "Ben" Katebian ("Ben") is the alleged ringleader of a conspiracy to steal Plaintiffs' properties. (¶¶2-10). Ben is a dual citizen of Iran and Canada, but maintains permanent resident status with the United States. (¶17). Plaintiffs allege that Ben fraudulently procured his U.S. "green card" "by falsifying his name and lying about his residence." (¶3). Ben's son, Payam Katebian ("Payam"), is also a defendant in this case (jointly, with Ben, "the Katebian Defendants"). (¶1).

iii. The GreenLake Defendants

Defendant GreenLake Real Estate Fund LLC ("GreenLake") is a Delaware limited liability company with its principal place of business located in South Pasadena, California. (¶30). GreenLake is a $270 million pooled mortgage investment company registered with the Securities Exchange Commission, and is a financial institution and/or a loan institution within the meaning of the Bank Secrecy Act, 31 U.S.C. § 5311 et seq. (*Id.*). Defendant Peter T. Chang ("Chang") is GreenLake's CEO. (¶31). The Court will refer collectively to GreenLake and Chang as the "GreenLake Defendants."

iv. Other Individual Defendants

Plaintiffs name as defendants a slew of other individuals who they claim participated in the thefts of Plaintiffs' properties, though only the following two are relevant to the instant motions. Defendant Jordan Asher Samuel ("Samuel") is a Canadian national with a primary residence within the Province of Ontario, Canada. (¶32).

Defendant Ali Behrouz ("Behrouz") is an Iranian national who resides in Toronto. (¶35).

v. The "Shell Corporation" Defendants

a. Morrow GA

Plaintiffs allege that on December 13, 2018, the Katebian Defendants formed a Delaware limited liability company called Morrow GA Investors, LLC, ("Morrow GA"). (¶25). They allege that Morrow GA falsely listed Samuel as its sole owner, but that in reality it was owned by the Katebian Defendants, Behrouz, and others. (PageID.7191, 7196).[2] Plaintiffs further allege that the Katebian Defendants' sole reason for forming Morrow GA was to use it to acquire a note then existing on Skymark III's Adamson Parkway Property to aid in that property's eventual foreclosure. (PageID.7179, 7191).

b. 2638168 Ontario, Inc.

Defendant 2638168 Ontario, Inc., ("'168 Ontario") is a Canadian corporation with a nominal principal place of business in Markham, in the Province of Ontario. (¶27). Plaintiffs allege that '168 Ontario was formed in 2018 by Behrouz, and that '168 Ontario is a shell company, alter ego of Behrouz, and "exists only to effectuate and conceal the fraud and money-laundering of certain Defendants." (*Id.*).

c. Flemington Capital

Defendant Flemington Capital Corporation ("Flemington Capital") is a Delaware corporation with a listed address in Richmond Hill, Province of Ontario. (¶28). Plaintiffs

[2] Standalone citations to "PageID.__" are all to the Plaintiffs' proposed Second Amended Complaint as to the GreenLake Defendants, found at ECF No. 137-2. *See infra* at 22. For ease, the Court will refer to these as Plaintiffs' "Supplemental Allegations."

allege Ben and Behrouz control it, though it is nominally operated by Samuel. (*Id.*).

vi. Relevant Non-Parties

A number of non-parties play significant roles in the facts of this case. Laila Alizadeh ("Alizadeh"), who had been a plaintiff in this case when it was first filed, is the "ultimate owner" of the Skymark entities, presumably through her ownership of Skymark Properties' parent corporation, Liberty & York ("L&Y").[3] (¶64; PageID.7183; ECF No. 166-1, PageID.9158). Alizadeh hired non-party Troy Wilson ("Wilson") to manage numerous properties, and "[a]t all relevant times, Wilson managed and was the legal Manager of the Skymark operating entities." (*Id.*). Skymark III obtained a loan from Extensia Financial, LLC ("Extensia") secured by the "Adamson Parkway Property."

B. Relevant Properties

i. The Southfield Property

At least from an economic perspective, the most significant property at issue in this case, with an appraised value of $38 million, is a four-building commercial property in Southfield, Michigan (the "Southfield Property"). (¶45). The Southfield Property was "operated by Plaintiff Skymark Properties through two special-purpose LLCs, [plaintiffs] Skymark II and Skymark SPE."[4] (¶46).

[3] While Plaintiffs allege that Alizadeh is "Plaintiff's ultimate owner," the context of this averment makes clear they mean to say Alizadeh owns Skymark Properties. (*See* ¶¶61-64).

[4] Plaintiffs allege that the Southfield Property was initially "bought" by Alizadeh (who is now a non-party after having previously been a plaintiff in this case). (¶45). However, the record is not clear as to Alizadeh's actual ownership of the Southfield Property or its apparent transfer to Skymark Properties, and then "assign[ment]" to Skymark II and Skymark SPE. (¶68). Regardless, salient legal documents in this case indicate that plaintiffs Skymark SPE and Skymark II own the Southfield Property. (*See, e.g.*, ECF No. 166-1, PageID.9156) (representing that Skymark SPE

ii. The Adamson Parkway Property

Skymark III owned and managed commercial real estate known at 1590 Adamson Parkway (the "Adamson Parkway Property") outside Atlanta, Georgia. (¶¶14, 47). At some point, Skymark III obtained a $3 million loan from Extensia, secured by the Adamson Parkway Property (the "Extensia Loan"). (¶¶62, 112). The Adamson Parkway Property's appraised value is between $4.8-$5.0 million (¶47).

iii. Properties Owned by Hazelton Homes and '021 Ontario

Hazelton Homes is the so-called "beneficial owner" of properties at 133 Boake Trail, Richmond Hill, Ontario (the "Boake Property"), 11 King High Drive, Thornhill, Ontario (the "King High Property"), and 95 Bridge Street, Picton, Ontario (the "Picton Property"). (¶15). '021 Ontario owned and managed real estate at 1150 Queens Palm Ct., in Hollywood, Florida (the "Queens Palm Property").[5] (¶16).

C. Fraudulent Schemes

i. Fraud by Skymark Properties and Skymark II/SPE in Connection with Obtaining the Southfield Loan

As noted above, Defendants' alleged scheme isn't the only one described in Plaintiffs' amended complaint; Plaintiffs admit that Skymark Properties and Skymark II/SPE obtained a $17 million loan from GreenLake under false pretenses.

Plaintiffs allege that Skymark Properties wanted to refinance then-existing loans on

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and Skymark II are the "sole owner of the fee simple interest in the [Southfield Property]."). Accordingly, where relevant to the Court's discussion of the Southfield Property, the Court will refer to its direct owners as "Skymark II/SPE."

[5] Sometimes the parties refer to this as the "Hollywood Property." (*See*, e.g., PageID.7182-83).

the Southfield Property and the Adamson Parkway Property. (¶61). Skymark Properties negotiated with GreenLake regarding a loan on the Southfield Property, and with Extensia regarding a loan on the Adamson Parkway Property, leading to the consummation of the "Southfield Loan" and the Extensia Loan.

However, Skymark Properties "learned that Greenlake required that the borrower have legal status in the United States," which, given Skymark Properties' and its owners' connections to Canada, apparently was a problem. (¶63). "Plaintiffs' owners" knew defendant Ben Katebian held a green card, and, to circumvent GreenLake's "U.S. legal status" requirement, they enlisted Ben to "become a trustee" of the Southfield Property. (*Id.*). "They made an agreement with 'Ben' that he would serve as a trustee-guarantor until Plaintiffs could replace him with another U.S. individual. 'Ben' agreed to step aside when asked." (*Id.*). Alizadeh then "executed two agreements with 'Ben' on August 1, 2016. The first assigned 'Ben' the voting stock of [Skymark Properties'] parent corporation [Liberty & York]. The second was a trust agreement in which 'Ben' agreed to serve only as a legal owner, with beneficial rights maintained by Alizadeh." (¶64). Ben "never exercised the voting stock, called a shareholder meeting, or performed any corporate function" for Liberty & York. (¶65). The Southfield Property was then "assigned" to Skymark II/SPE, while the Adamson Parkway Property was "assigned" to Skymark III, with Wilson managing both properties. (¶68).

Despite the fact that: (1) Liberty & York owned Skymark Properties; (2) Skymark Properties owned Skymark II/SPE and Skymark III; and (3) Skymark II/SPE owned the Southfield Properties, while Skymark III owned the Adamson Parkway Property, Plaintiffs

allege that "'Ben' was never a legal owner of any entity that owned the properties, and never had legal or actual power to conduct these companies' business." (¶71).

That allegation notwithstanding, Plaintiffs allege that, on December 30, 2016, Ben, ***on behalf of Skymark Properties and Skymark II/SPE***, executed loan documents with GreenLake pursuant to which GreenLake provided a $17,350,000 loan to Skymark II/SPE, in return for a mortgage on the Southfield Property and Ben's (and others') personal guaranty (the "Southfield Loan"). (ECF Nos. 166-1, 166-2). However, far from identifying Ben as merely a "trustee" for Alizadeh, the Promissory Note states that Ben "shall at all times own 100% of [Liberty & York]." (ECF No. 166-1, PageID.9158).[6] The Promissory Note also provides, "All information provide [sic] by or on behalf of Borrower [*i.e.*, Skymark II/SPE] and Guarantors [including Ben] is ***true, complete and accurate in all material respects and contains no omissions that would cause such information to be misleading***." (*Id.*, PageID.9165) (emphasis added). In turn, the Payment and Performance Guaranty, ***signed by Ben as a co-guarantor***, provides, "Guarantors directly or indirectly own Borrower [*i.e.*, Skymark II/SPE] therefore Guarantors will derive material financial benefit from the Loan . . ." (ECF No. 166-2, PageID.9179).

Based on Plaintiffs' own allegations, Ben's "ownership" of Liberty & York was

[6] Whereas in Plaintiffs' original complaint, they allege "Green Lake always knew that [Ben] Katebian's co-guarantee was cosmetic, and existed only so Green Lake could satisfy obligations to its lending source," Plaintiffs soften this allegation in their amended complaint, and allege that the GreenLake Defendants "knew or recklessly ignored that Katebian's claims to ownership of the Skymark Plaintiffs were false." (¶69; ¶281). Regardless, as discussed herein, *infra* at 9-10, numerous representations made by Skymark II/SPE in the Southfield Loan documents were knowingly untrue or contained material omissions.

nothing more than a façade, and the representations in the Southfield Loan documents were false; Ben was not the "100% owner" of Liberty & York because Alizadeh retained at least a "beneficial" interest in the company,[7] did not "directly or indirectly own" Skymark II/SPE, and, perhaps most clearly, did not derive *any* financial benefit from the Southfield Loan, let alone a "material" one.[8] [9] (*Cf.* ECF No. 163, PageID.9039) ("There was no 'fraud' on GreenLake" because Ben "did in fact own the stock of the company, exactly as represented to GreenLake."). At a minimum, by not including in the Southfield Loan documents information about Alizadeh's retained "beneficial interest" in Liberty & York, the representation that there were "no omissions that would cause such information to be misleading" was unquestionably false. *See* fn. 7.

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[7] When it suits them, Plaintiffs very well recognize the distinction between "complete" and/or "true ownership" and the form of "ownership" they allege Ben held. (¶119; PageID.7196 ("a Morrow GA operating agreement [] named Defendant Jordan Samuel as the owner of all of Morrow GA's shares. Samuel did not pay for the shares. His only role was to act as a straw-man owner to hide 'Ben's' true ownership.")). Indeed, the irony runs deep in Plaintiffs' allegations about Samuel's "ownership."

[8] Plaintiffs seem to justify Ben's role as a co-guarantor for the $17 million loan by alleging that the "co-guaranty exposed him to no financial risk . . . [because] the Southfield and Georgia properties were appraised at considerably more than the loan amounts and in the event of a default, there was no chance that 'Ben' would be personally liable." (¶67). But this justification ignores two matters. First, the issue isn't whether Ben might be called to make good on the guaranty, but that Skymark II/SPE misrepresented facts to GreenLake in connection with obtaining the Southfield Loan. Second, myriad circumstances exist where even an extremely valuable commercial property could have that value drastically impaired, such as a major loss not covered by insurance. While Plaintiffs' allegations demonstrate their own fraud, or at least material misrepresentations in the loan documents, the Court recognizes that, at the motion to dismiss stage, it must accept Plaintiffs' allegations as true. *See infra* at 25-26.

[9] The Court also notes that whereas it is represented in the Promissory Note that Ben had never been convicted of a crime, Plaintiffs allege Ben was convicted of criminal counterfeiting in Canada in 2005. (¶18; ECF No. 166-1, PageID.9166). However, Plaintiffs do not allege they were aware of Ben's criminal conviction at the time the Southfield Loan documents were executed.

ii. The Defendants' Alleged Conspiracy against Plaintiffs

In their amended complaint (ECF No. 68) and Supplemental Allegations (ECF No. 137-2), Plaintiffs weave a complicated story about how Ben conspired with GreenLake (among others) to strip Alizadeh and the Skymark entities of their ownership interests in the Southfield Property and the Adamson Parkway Property, while a company Ben created to effectuate the scheme, Morrow GA, ended up owning the latter property. Plaintiffs also allege that the scheme enabled Ben and his cohorts to launder monies they had previously stolen from Plaintiffs and other victims in Canada. Plaintiffs characterize this conduct as part of a civil RICO "enterprise" and "conspiracy." While this summary explains the gist of Plaintiffs' claims, the resolution of GreenLake's motion to compel arbitration turns on the specific and nuanced allegations in Plaintiffs' amended complaint and Supplemental Allegations. Accordingly, the Court will provide additional relevant details below.

a. Initial Canadian Fraud by Ben

Plaintiffs allege a number of frauds by Ben prior to his alleged appointment as a "trustee" "owner" of Liberty & York on August 1, 2016. Plaintiffs allege that Hazelton Homes owns the Boake, King High, and Picton Properties in Canada. (¶15). They allege that in April 2014, Hazelton Homes (for unspecified reasons) "executed a pair of revocable trust agreements appointing 'Ben' to act as trustee to its Boake and King High [P]roperties." (¶49). Hazelton Homes alleges, however, that it "remained the 100% beneficial owner of each property," and that Ben "was required to hold title to the trust properties until they were sold, at which time any proceeds would go to Hazelton Homes." (¶50). However, Ben "impersonated being the 'true' owner [of the Boake and King High

Properties]," "fraudulently encumbered [them] with unauthorized mortgages totaling $1 million (Canadian) and stole the properties' equity" by "pocket[ing] the mortgaged amounts." (*Id.*; ¶74).

This isn't Ben's only alleged seven-figure Canadian fraud. Plaintiffs allege that Ben obtained a Canadian mortgage broker license and became part owner of Toronto-based Money Gate Corporation ("MGC"). (¶57). Ben (along with his son and others) then began operating Money Gate Mortgage Investment Corporation ("MGMIC") in Toronto, which raised about $11 million (CAD) from more than 150 investors. (¶59). On December 19, 2019, the Ontario Securities Commission (the "OSC") found Ben (and Payam and others) "guilty" of defrauding the investors. (¶87). The OSC identified millions of dollars that MGMIC had transferred to other defendants in this case. (¶¶91, 93).

b. Alleged Scheme as to the Southfield Property and Adamson Parkway Property

Summary of the Scheme

Plaintiffs allege that it was not until 2017 that they learned Ben had "placed false mortgages on their Canadian properties." (¶95). They confronted Ben about this and his "response was to extort Plaintiffs with threats that he would injure or destroy their assets unless he was paid off." (*Id.*). More specifically, he "told Plaintiffs that unless he was paid off $1 million (Canadian) and Plaintiffs agree that they would look the other way in their defense of the OSC charges, he would (a) refuse to return the stock rights to the US companies, (b) destroy their American business, and (c) keep the money he misappropriated from the Canadian properties . . ." (¶96). Plaintiffs refer to this as Ben's

attempt to "extort" them.

Ultimately, though, the gist of Plaintiffs' amended complaint and Supplemental Allegations is that Ben "conspired" with the GreenLake Defendants to defraud the Skymark entities out of ***both*** the Southfield Property and the Adamson Parkway Property, with Ben's newly-formed Morrow GA "buying out" the latter property. (PageID.7175).[10] The conspiracy also allegedly enabled Ben to launder monies previously stolen from Plaintiffs and others. (*Id.*). Following are additional details of the alleged scheme.

Ben Publicly Claims Ownership of the Southfield Property and the Adamson Parkway Property

Plaintiffs allege that "[s]tarting on August 8, 2018, [the GreenLake Defendants] began to conspire with [Ben]" to "extort[] the Skymark Plaintiffs" and "defraud[] several Skymark entities from the Southfield [Property], [and the] Adamson Parkway [Property] . . ." (PageID.7175). At that time Ben began publicly asserting that he was the "real" owner of Skymark Properties and its sub-entities, and their commercial properties, the Southfield Property and the Adamson Parkway Property. (¶107). Ben did this by, among other actions, filing two civil actions in which he claimed ownership of the companies and properties and "planting" a story in the Detroit Free Press claiming the same ownership. (¶¶107-08). These actions were allegedly "a sham" designed "to cause the lenders,

[10] Plaintiffs make a slew of allegations that explicitly implicate GreenLake in the alleged scheme to divest the Skymark entities of their interest in ***both*** the Southfield Property and the Adamson Parkway Property. Those allegations are particularly germane to the Court's analysis of why the arbitration clause ***in the Southfield Loan documents*** applies not only to the Skymark entities' claims regarding their loss of ***the Southfield Property***, ***but also*** to their claims regarding their loss of ***the Adamson Parkway Property***. Accordingly, while the Court will touch on these allegations in the ensuring paragraphs, it will provide a fuller discussion of them when it addresses the arbitrability of those claims. *See infra* at 41-44, 47-49.

Greenlake and Extensia, to call the loans and throw the Plaintiffs' properties into disarray," as it would be difficult for them to obtain alternative financing. (¶108).

Ben Causes Skymark III to Default on the Extensia Loan

Next, Plaintiffs allege that Ben intentionally caused Skymark III to default on the Extensia Loan by refusing to provide financial records that Extensia had requested. (¶112). Extensia's requests for information had begun on April 6, 2018, and continued periodically until a "Final Request" on July 12, 2018. (*Id.*). On July 30, 2018, when Ben still had not provided the requested information, Extensia placed the loan into default. (¶114). The Extensia Loan remained in default status until November 26, 2018, when Extensia accelerated the Loan and notified Skymark III of an auction sale. (¶117). As discussed below, Ben engaged in this conduct so that he could buy out the Extensia Loan and acquire the Adamson Parkway Property. (PageID.7191).

Ben "Conspires" with the GreenLake Defendants to Get GreenLake "Out of" the Southfield Loan and Enable Ben to Buy Out the Extensia Loan and Acquire the Adamson Parkway Property

Plaintiffs allege that in August 2018, Ben "began [] telling Green Lake about the [Adamson Parkway Property]," and he and the GreenLake Defendants made a "quid-pro-quo" agreement pursuant to which GreenLake would "finance [Ben's] buying of the soon-to-be-defaulted [Extensia Loan and the Adamson Parkway Property]" if Ben would "help [get] Green Lake out of the Southfield [L]oan." (PageID.7178-79, 7181, 7186, 7191). To get GreenLake off the Southfield Loan, they needed a "friendly assignee" (*i.e.*, a buyer of GreenLake's interest), and they identified local developer Friedman Real Estate Group ("Friedman"). (PageID.7188-89).

Plaintiffs allege that "Friedman assumed foreclosure proceedings against the Skymark companies in place of Green Lake" and that "Friedman and Green Lake had an arrangement that Green Lake would silently assist in the foreclosure" and "that Green Lake would benefit from the transfer" by splitting the profit with Friedman. (PageID.7179, 7189). "The transfer to Friedman solved Chang's problematic loan and hid the agreement with 'Ben' over the [Adamson Parkway Property]." (PageID.7189).

In the midst of all this, using a "sham" owner, Ben formed Morrow GA for the sole purpose of purchasing the Extensia loan and foreclosing on the Adamson Parkway Property. (PageID.7196). Ben then "forced" a default and foreclosure by Extensia by refusing to provide Extensia with required information. (¶¶112-114, 117; PageID.7185). Extensia then began foreclosure proceedings, and Ben offered to, and ultimately did buy, "the loan documents" from Extensia for $2.635 million. (PageID.7177, 7179, 7187, 7191, 7193). Plaintiffs allege that GreenLake, making good on its part of the "quid-pro-quo" agreement, ultimately financed the purchase. (PageID.7179, 7204).

In sum, through the alleged conspiracy and quid-pro-quo agreement between Ben and the GreenLake Defendants, GreenLake profited by getting off the Southfield Loan and assisting Friedman in the foreclosure, Skymark Properties and Skymark II/SPE lost all of their equity in the Southfield Property, Skymark Properties and Skymark III lost all of their equity in the Adamson Parkway Property, and Ben (through Morrow GA) acquired the Adamson Parkway Property.

c. Other Properties

'021 Ontario's Queens Palm Property

Ben allegedly used a similar scheme to allegedly defraud '021 Ontario out of its Queens Palm Property in Hollywood, Florida. (¶¶80-81). Specifically, Plaintiffs allege that, on March 16, 2017, Ben "impersonated himself as 'President' of Plaintiff ['021 Ontario], and secretly executed a warranty deed purporting to convey the property to himself and Payam." (¶81). Ben then allegedly placed "various mortgages on the property, including a $700,000 private mortgage" and eventually caused "a foreclosure on the [Queens Palm Property]." (¶82). Ultimately, Plaintiffs claim that "[t]he ***Katebian Defendants*** caused Plaintiff '021 Ontario Corp. to lose the [Queens Palm Property] in 2017." (PageID.7182-83) (emphasis added). Importantly, this loss was well before the GreenLake Defendants are alleged to have joined the conspiracy. (PageID.7175) ("Starting on August 8, 2018, Green Lake and [] Chang [] began to conspire with the Katebian Defendants" and "on August 28, 2018, Green Lake Defendants joined the RICO enterprise."). (*See also* PageID.7185).

Unlike with the Southfield Property and Adamson Parkway Property, Plaintiffs do not allege that the GreenLake Defendants were involved in their loss of the Queens Palm Property. Rather, Plaintiffs contend that when GreenLake funded Ben's acquisition of the Adamson Parkway Property, it enabled Ben to launder monies he had obtained through the unlawful mortgages on the Queens Palm Property. Specifically, Plaintiffs contend that the GreenLake Defendants "refinanced the Katebian Defendants'[] Atlanta purchase shortly after Skymark III's effort to stop the foreclosure failed" and "fraudulently concealed their knowledge that the Katebian Defendants were laundering illicit money." (*Id.*, PageID.7181-82). Plaintiffs also allege that "Green Lake Defendants' participation in and

conspiracy in money-laundering enabled the Katebians to use a portion of the [July 2019] loan to retire an outstanding $90,000 loan" on the Queens Palm Property, and that as a result, Plaintiffs lost "over $550,000 in lost equity and an unknown amount in rental income." (PageID.7183; *see also* PageID.7207).

Hazelton Homes' Boake, King High, and Picton Properties

Plaintiffs allege that Hazelton Homes owns the Boake, King High, and Picton Properties in Canada. (¶15). For reasons that are unclear, they allege that in April 2014, Hazelton Homes "executed a pair of revocable trust agreements appointing 'Ben' to act as trustee to its Boake and King High [P]roperties." (¶49). Hazelton Homes alleges, however, that it "remained the 100% beneficial owner of each property," and that Ben "was required to hold title to the trust properties until they were sold, at which time any proceeds would go to Hazelton Homes." (¶50). However, as he allegedly did with respect to the Skymark entities' other properties, Ben "impersonated being the 'true' owner [of the Boake and King High Properties]," "fraudulently encumbered [them] with unauthorized mortgages totaling $1 million (Canadian) and stole the properties' equity" by "pocket[ing] the mortgaged amounts." (¶74).

Plaintiffs further allege that, on March 4, 2016, Hazelton Homes similarly "entered into a trust agreement with a third-party, non-party Rakesh Mehta, who was to hold title to the Picton [P]roperty in trust for Hazelton Homes." (¶51). However, on June 27, 2018, Ben, Mehta, and "a number of other accomplices [] unlawfully transferred the [Picton Property] to an Ontario corporation for $1,200,000 (Canadian)." (¶76). This $1.2 million (CAD) is "believed to be among the moneys Plaintiffs allege were laundered and illegally

brought to the U.S. to keep from Plaintiff's reach in Canada," of which about $600,000 (CAD) "is believed to have been moved to the U.S. in the money-laundering arising from the [Queens Palm Property] and Adamson Parkway Property transactions." (¶77). Plaintiffs more specifically allege that about $500,000 of the funds used by Morrow GA to purchase the Extensia note on the Adamson Parkway Property "is believed to have come from funds stolen by 'Ben" from [the Picton Property]" through "an account maintained by a non-party accomplice lawyer, Sandeep Chantal, that had temporarily been ordered frozen by a Canadian court." (PageID.7203).

As with the '021 Ontario properties, Plaintiffs do not allege that the GreenLake Defendants had any involvement in the theft of the Hazelton Homes properties. Rather, they simply allege that GreenLake's financing of Ben's Adamson Parkway purchase enabled the Katebian Defendants "to move money from Canada and Iran and into the US" while "effectively prevent[ing] Plaintiffs from tracing the stolen moneys," *i.e.*, to launder the monies Ben had *already* "stolen from Hazelton Homes and Skymark companies in Canada to the United States and then back to fake companies . . ." (PageID.7181-82).

D. Southfield Loan Document Arbitration Clauses and Assignment

One of the main legal issues before the Court is whether the GreenLake Defendants may compel arbitration with respect to any of Plaintiffs' claims asserted against them. The Southfield Loan Promissory Note provides, in relevant part:

> 31. Arbitration. Without limiting Lender's rights to (a) consummate a power of sale foreclosure, (b) seek judicial appointment of a receiver, (c) file suit for judicial foreclosure, or (d) legally pursue any UCC remedies with respect to Personal property collateral, ***any dispute or controversy under the Loan Documents shall be submitted***

> ***to arbitration under the Rules of the American Arbitration Association.*** Said arbitration shall be heard in the County of Los Angeles in the State of California by a retired judge at ADR Services, Inc. to be mutually agreed upon by the parties. To the extent the parties cannot mutually agreed [sic] upon such retired judge, ADR Services, Inc. shall select the arbitrator from the ADR Services panel.
>
> ***BOTH PARTIES AGREE TO HAVE ANY DISPUTE DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY STATE LAW.*** BOTH PARTIES AGREE TO GIVE UP ANY RIGHTS THEY MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL . . . IF EITHER PARTY REFUSES TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, THE REFUSING PARTY MAY BE JUDICIALLY COMPELLED TO ARBITRATE. THE AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY FOR BOTH PARTIES.[11]

(ECF No. 166-1, PageID.9173) (emphasis added) (the "Arbitration Provision").[12]

Also relevant to the parties' arguments regarding the arbitration issue is the fact that on December 18, 2018, in connection with Friedman's acquisition of the Southfield Loan from GreenLake, GreenLake executed an Assignment of Mortgage Loan Documents in favor of Friedman's related company, Southfield Metro Center Holdings LLC ("SMCH") (the "Assignment"). (ECF No. 181-2, PageID.11855).[13] That Assignment conveyed to

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[11] The parties agree that the Promissory Note was amended on January 25, 2017, increasing the loan amount to $17.7 million. (¶72; ECF No. 165, PageID.9126). The amended Promissory Note does not appear on the docket, but none of the parties has alleged that document amended the salient arbitration provision.

[12] The Payment and Performance Guaranty in which Liberty & York, Skymark Properties, and Ben Katebian guaranteed the Southfield Loan's repayment contains a similar arbitration clause. (ECF No. 166-2, PageID.9187) (providing that "any dispute or controversy under this Guaranty shall be submitted to arbitration under the Rules of the American Arbitration Association. Said arbitration shall be heard in the County of Los Angeles in the State of California . . .").

[13] At various places in their papers, Plaintiffs seem to assert the assignment took place in November 2018. (PageID.7189; ECF No. 181, PageID.11832). However, the Assignment reflects the date

SMCH "all of [GreenLake's] right, title and interest under any and all documents and instruments executed in connection with, or related in any manner whatsoever to, the [Southfield Loan] . . ." (*Id.*).

II. PROCEDURAL BACKGROUND

This case has quite the tortured procedural history, and is only one of many civil actions between these parties throughout the United States and Canada. Here, the Court will provide only the procedural history relevant to the instant motions.

This civil action began on August 31, 2020, when Alizadeh, Liberty & York, the various Skymark entities referenced herein, and '021 Ontario filed a 77-page complaint against the Defendants. (ECF No. 1). Defaults were issued against many of the Defendants, but they were eventually set aside, and all Defendants appeared in the case. (ECF No. 62).

The GreenLake Defendants moved to dismiss Plaintiffs' complaint (ECF No. 58), but that motion was denied without prejudice on February 25, 2021, because Plaintiffs indicated they intended to file an amended complaint. (ECF No. 67). On March 8, 2021, Plaintiffs filed their 105-page amended complaint, removing Alizadeh and Liberty & York as plaintiffs, and adding Hazelton Homes as a plaintiff. (ECF No. 68). The amended

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of December 18, 2018, and Plaintiffs make multiple references in their papers to that as the actual date. (¶136 ("In December, 2018, Friedman bought out Greenlake's [Southfield L]oan . . ."); PageID.11829 ("In December, 2018, GreenLake assigned the [Southfield L]oan together with the arbitration clause to [SMCH] . . .")). Regardless, Plaintiffs admit that "Green Lake Defendants' joinder into the association-in-fact occurred ***no later than August 28, [2018] when Chang decided to*** back 'Ben' over Skymark, ***get rid of the Southfield loan***, and ***help 'Ben' get control of [the Adamson Parkway Property*** in] Atlanta." (PageID.7186) (emphasis added).

complaint asserts three causes of action:

- Count I – Violation of 18 U.S.C. §§ 1961(5), 1962(c), which alleges the Defendants were a "RICO association-in-fact enterprise" engaged in a pattern of racketeering activity the main purposes of which were to perpetuate "an unlawful fraudulent, extortionate scheme in which Plaintiffs' ownership rights in commercial real estate properties in Canada and the U.S. have been stolen . . ." and "to use those properties . . . to launder the source of the money for an illegal purpose";

- Count II – Conspiracy to Violate 18 U.S.C. § 1962(c), which alleges that each of the Defendants "participated in a conspiracy to violate Count I"; and

- Count III – Declaratory Judgment under 28 U.S.C. § 2201, which seeks "a declaration that each of the foreclosure and re-financing transactions that resulted in Plaintiffs' loss of [the Southfield Property and the Adamson Parkway Property] as described in this Complaint are void, voidable, and unenforceable."

(¶¶193-314).

On April 14, 2021, after the Defendants had all appeared in this action, Plaintiffs filed an emergency motion to "freeze" assets and to take "pre-answer discovery" from certain of the Katebian Defendants and unidentified "nonparties," but *not* from the GreenLake Defendants. (ECF No. 80). Indeed, other than in its caption, the Proposed Order that Plaintiffs provided as an exhibit to their motion does not even reference the GreenLake Defendants. (ECF No. 80-10). On June 1, 2021, the Court entered a Report and Recommendation which allowed Plaintiffs to conduct only the limited discovery they requested, and did not authorize them to pursue discovery from the GreenLake Defendants. (ECF No. 105).

On May 17, 2021, the GreenLake Defendants filed separate motions to dismiss Plaintiffs' amended complaint (ECF Nos. 98, 100), and on October 27, 2021, the GreenLake Defendants filed a joint motion to compel arbitration (ECF No. 165), all of

which motions are the subject of this Report and Recommendation. The motions were fully briefed as of July 1, 2021. (ECF Nos. 111, 113, 114). However, on August 31, 2021, the Plaintiffs filed the Supplemental Allegations – 40 more pages worth of amended allegations regarding the GreenLake Defendants' involvement in the alleged conspiracy. (ECF No. 137-2). Plaintiffs contended this filing was appropriate because, "[s]ince the motions were briefed, [they] obtained over 12,000 pages of records by subpoena" which "reveal additional detail concerning the roles played by [the GreenLake Defendants] in the association-in-fact enterprise alleged in the First Amended Complaint." (ECF No. 137, PageID.7169-70). The GreenLake Defendants' moved to strike Plaintiffs' Supplemental Allegations, but the Court (1) denied that motion; (2) allowed the GreenLake Defendants to supplement their own motion to dismiss to address Plaintiffs' Supplemental Allegations; and (3) set a briefing schedule. (ECF No. 140).

The GreenLake Defendants filed their supplemental brief on October 12, 2021. (ECF No. 156). On October 26, 2021, Plaintiffs filed their response. (ECF No. 163). While this response focused on allegations already in the record, it did impermissibly interject some new ones that the Court will not consider, such as SMCH's business dealings with Ben. (*Id.*, PageID.9041). *See Jocham v. Tuscola County*, 239 F. Supp. 2d 714, 732 (E.D. Mich. 2003) (holding that plaintiffs "may not amend their complaint through a response brief"); *Newman v. Encore Cap. Grp.*, No. 16-11395, 2017 WL 3479510, *17 (E.D. Mich. Aug. 14, 2017) ("Plaintiffs cannot cure deficiencies in their Amended Complaint through new allegations in their response to Defendants' motion to dismiss"). Defendants then filed a reply. (ECF No. 176). On December 17, 2021, the Court held oral

argument on the GreenLake Defendants' motions to dismiss and motion to compel arbitration.

III. LEGAL STANDARDS

A. Motion to Compel Arbitration

The Federal Arbitration Act, 9 U.S.C. §§ 1-307 (the "FAA"), governs written arbitration agreements. *See Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 111–12 (2001). Specifically, the FAA provides that a written agreement to arbitrate particular disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Before compelling arbitration, the Court "must engage in a limited review to determine whether the dispute is arbitrable," *Masco Corp. v. Zurich Am. Ins. Co.*, 382 F.3d 624, 627 (6th Cir. 2004) (quoting *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir. 2003)), that is, "whether the parties agreed to arbitrate the dispute at issue." *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000). This review requires the Court to determine (1) whether "a valid agreement to arbitrate exists between the parties," and (2) whether "the specific dispute falls within the substantive scope of the agreement." *Id.* (quoting *Javitch*, 315 F.3d at 624). The "party opposing arbitration must show a genuine issue of material fact as to the validity of the agreement to arbitrate." *Great Earth Companies, Inc. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002) (internal quotation marks and citations omitted). As to the agreement's scope, however, "there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted

dispute." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (internal citations and quotation marks omitted). "In other words, keeping in mind the 'strong federal policy in favor of arbitration ... any ambiguities in the contract or doubts as to the parties' intentions should be resolved in favor of arbitration,' *Stout []*, 228 F.3d [at 714] [], ***especially when the arbitration clause is written broadly to encompass all claims arising under the contract***, *AT&T Techs.*, 475 U.S. at 650." *Kumiko Morioka v. Nissin Travel Servs. (U.S.A.), Inc.*, No. 18-12365, 2018 WL 7048463, at *3 (E.D. Mich. Dec. 28, 2018) (emphasis added), report and recommendation adopted, No. 18-12365, 2019 WL 198986 (E.D. Mich. Jan. 15, 2019). *See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (holding that the FAA reflects "a liberal federal policy favoring arbitration agreements" and "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). The Court recognizes, however, that the "presumption" in favor of arbitration "applies only to the scope of an arbitration agreement, not to its existence." *Southard v. Newcomb Oil Co., LLC*, 7 F.4th 451, 454 (6th Cir. 2021) (citing *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 302–03 (2010)). "[N]o matter how strong the federal policy favors arbitration, 'arbitration is a matter of contract between the parties, and one cannot be required to submit to arbitration a dispute which it has not agreed to submit to arbitration.'" *Simon v. Pfizer Inc.*, 398 F.3d 765, 775 (6th Cir. 2005) (quoting *United Steelworkers, Local No. 1617 v. Gen. Fireproofing Co.*, 464 F.2d 726, 729 (6th Cir. 1972)). Because disputes over arbitrability are usually questions of contract formation and interpretation, federal courts apply state law so long as it is

generally applicable to all contracts. *See Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 972 (6th Cir. 2007); *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 393 (6th Cir. 2003).

B. Motion to Dismiss

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests a complaint's legal sufficiency. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556. Put another way, the complaint's allegations "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Twombly*, 550 U.S. at 555-56).

In deciding whether a plaintiff has set forth a "plausible" claim, the Court must accept the factual allegations in the complaint as true. *Id.*; *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007). That tenet, however, "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," to prevent a complaint from being dismissed on grounds that it fails to comport sufficiently with basic pleading requirements. *Iqbal*, 556 U.S. at 678; *see*

also Twombly, 550 U.S. at 555; *Howard v. City of Girard, Ohio*, 346 F. App'x 49, 51 (6th Cir. 2009). Ultimately, "[d]etermining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

When a court is presented with a motion testing the sufficiency of a complaint, "it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

IV. ANALYSIS

A. Motion to Compel Arbitration

The Court must make "a number of threshold determinations before compelling arbitration." *Fazio*, 340 F.3d at 392. Specifically, the court must determine: (1) whether the parties agreed to arbitration; (2) the scope of the agreement to arbitrate; (3) if federal statutory claims are asserted, whether Congress intended those claims to be nonarbitrable; and (4) whether to stay the remainder of the proceedings pending arbitration if it concludes that some, but not all, of the claims in the action are subject to arbitration. *Id.*; *see also Glazer v. Lehman Bros.*, 394 F.3d 444, 451 (6th Cir. 2005). First, however, the Court will address two potentially dispositive issues: (1) whether GreenLake's assignment of its interest in the Southfield Loan documents to SMCH nullifies any ability the Green Lake Defendants had to compel arbitration; and (2) whether the GreenLake Defendants' other conduct waived the agreement to arbitrate.

i. GreenLake's Assignment of the Southfield Loan to SMCH Does Not Nullify the GreenLake Defendants' Ability to Compel Arbitration

The Assignment provides that GreenLake conveyed to SMCH "all of [GreenLake's] right, title and interest under any and all documents and instruments executed in connection with, or related in any manner whatsoever to, the [Southfield Loan] . . ." (*Id.*). (ECF No. 181-2, PageID.11855). Plaintiffs argue that "[t]he assignment not only gave SMCH exclusive right to enforce the terms of the [Southfield] [L]oan, including the right to compel arbitration if it so chose, it extinguished all of GreenLake's rights, including the arbitration clause." (ECF No. 181, PageID.11835). While Plaintiffs have cited out-of-circuit authority that supports their position, for the reasons explained below, the Court respectfully disagrees with the reasoning underlying those decisions.

Plaintiffs begin with a series of non-controversial black-letter legal propositions regarding assignments:

> Under Michigan law, a written instrument creates an assignment 'if it clearly reflects the intent of the assignor to presently transfer 'the thing' to the assignee.'" *Burkhardt v. Bailey*, 260 Mich. App. 636, 654–55 (2004). . . .
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> An assignment vests all rights previously held by the assignor in the assignee. *Kearns v. Mich. Iron & Coke Co.*, 340 Mich. 577, 582–584 (1954). An assignee thus "stands in the shoes" of the assignor and acquires the same rights as the assignor possessed. *First of Am. Bank v. Thompson*, 217 Mich. App. 581, 587 [] (1996). This is particularly true in the present situation. "A mortgage assignee has the same rights as the assignor." *Burkhardt* [] at 653. "When a mortgage is assigned, the assignee, for all beneficial purposes claimed under it by him, becomes a party to the mortgage, and stands in the place of the mortgagee...." *Coventry Parkhomes Condo. Ass'n v. Fed. Nat. Mortg. Ass'n*, 298 Mich. App. 252, 256–57, (2012). "[T]he assignment, carries with it 'all securities held by the assignor, collateral to the

> claims and all rights incidental thereto, and vests in the assignee the equitable title to such collateral securities and incidental rights.' *DVI Cap. Co. v. Zelch*, No. 232732, 2003 WL 21702516, at *3 (Mich. Ct. App. July 22, 2003).[14]

Plaintiffs also cite a few cases which, the Court recognizes, support their position:

> In *RRCI Constructors, LLC v. Charlie's/Diamond Ready Mix, Inc.,* [No. 2007-147, 2009 WL 799660, at *5 (D.V.I. Mar. 24, 2009)], the court explained:
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> The thrust of RRCI's position is that both the assignor and assignee of an agreement may be compelled to arbitrate a dispute that comes within the scope of a valid arbitration agreement. Such a position is unsupported by law. *See* Restatement (Second) of Contracts § 317(1) (1981) ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which *the assignor's right to performance by the obligor is extinguished* in whole or in part and the assignee acquires a right to such performance.")(emphasis supplied); *see also Affymax, Inc. v. Johnson & Johnson,* 420 F.Supp.2d 876, 879 (N.D.Ill.2006) ("[A]n assignment ordinarily extinguishes the right [of the assignor] to compel arbitration.").

[14] Plaintiffs also argue, "M.C.L. § 211.141(1)(d) accords the 'assignee of an undischarged mortgage on the property' the right to redeem the property. [] Once redeemed, a mortgage cannot be assigned after discharge. [] Once SMHC [sic] foreclosed on the Southfield property, the mortgage was extinguished and the GreenLake financing instruments were terminated. [] Thus, once the foreclosure was complete, SMCH could not 'pass back' the loan to GreenLake. There is no record that it ever did." (ECF No. 181, PagID.11837) (internal citations omitted). In a point the Court will delve into more below, *see infra* at 30-32, the problem with this argument is that the United States Supreme Court has held, "[w]e presume as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision [*e.g.*, "an arbitration provision"] to terminate for all purposes upon the expiration of the agreement" and that "[r]ights which accrued or vested under [an] agreement will ... survive termination of an agreement." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 207-08 (1991). *See also Zucker v. After Six, Inc.*, 174 Fed.Appx. 944, 947–48 (6th Cir. 2006); *PFS Invs., Inc. v. Imhoff*, No. 11-10142, 2011 WL 1135538, at *8 (E.D. Mich. Mar. 25, 2011) ("[c]ontractual provisions relating to remedies and dispute resolution, such as an arbitration provision, often survive the termination of the contract in order to enforce duties arising under the contract."). *See also Dobson v. Counsellors Secs., Inc.*, 94–cv–73942, 1995 U.S. Dist LEXIS 17023, at * 17, 1995 WL 871004 (E.D. Mich. Sept. 13, 1995) (holding that to avoid the federal rule that an arbitration clause survives the agreement containing it, there must be a termination provision that is "plainly specific to the arbitration clause"). Here, because no termination provision specific to the Arbitration Provision exists in the Southfield Loan documents, the foreclosure's consummation does not mean the Arbitration Provision terminated.

> A multitude of cases thus hold that the assignor, like GreenLake, loses the power to compel arbitration of an assigned agreement. Most recently, where antitrust defendant wholesalers had agreed to "convey, assign, transfer and deliver" all of the "right, title, and interest" in underlying supply and arbitration agreements, the Eighth Circuit rejected a multi-pronged argument that the former holder of the underlying contracts can compel arbitration of the antitrust class action. *In re Wholesale Grocery Prod. Antitrust Litig.,* 850 F.3d 344, 349-50 (8th Cir. 2017), amended (May 1, 2017). . . .
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> The same result obtained in *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc.,* 590 F. Supp. 2d 677, 683–85 (D.N.J. 2008), a case followed by the Eighth Circuit. A defendant in a RICO case sought enforcement of an arbitration clause in a contract it had previously assigned. The District Court rejected its motion to compel arbitration on the principle that the assignment extinguished its rights.

(ECF No. 181, PageID.11838-40).

Plaintiffs go so far as to chastise the GreenLake Defendants for seeking to compel arbitration, asserting, "[p]erhaps they can explain why they are wasting the Court's time in light of the known assignment and the easy-to-find law." (*Id.*, PageID.11829). But it's never a "waste of time" for the Court to think critically about important and complicated legal issues, and doing so here leads the Court to respectfully conclude, as the dissent did in *In re Wholesale Grocery,* 850 F.3d at 351-53, that the mere assignment of an agreement containing an arbitration agreement does not necessarily mean the assignor loses all ability to compel arbitration.

This Court's analysis admittedly takes some unpackaging of case law that helps explain why "structural" provisions like arbitration clauses differ from other contractual provisions which relate to performance. The Court begins with *Nolde Bros. v. Loc. No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977), which

explained why arbitration provisions can survive an underlying contract's termination. In that case, Nolde Brothers, Inc. had entered into a collective-bargaining agreement with a local union. Under the parties' contract, "any grievance" arising between them was subject to binding arbitration. The contract also contained a provision which provided for severance pay on termination of employment for all employees having three of more years of active service. Eventually, the contract term expired and was formally "canceled," though the parties kept negotiating the severance issue. Ultimately, the company paid the employees accrued wages, but no severance. The employees sought to arbitrate the severance pay issue, but Nolde declined, and the union then filed suit in federal district court, seeking to compel Nolde to arbitrate that issue.

The district court held that the duty to arbitrate terminated with the underlying contract's termination. The Fourth Circuit reversed, finding that the duty to arbitrate survived the contract's termination. The United States Supreme Court affirmed, holding:

> While the termination of the collective-bargaining agreement works an obvious change in the relationship between employer and union, it would have little impact on many of the considerations behind their decision to resolve their contractual differences through arbitration. The contracting parties' confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract. Nor would their interest in obtaining a prompt and inexpensive resolution of their disputes by an expert tribunal. Hence, there is little reason to construe this contract to mean that the parties intended their contractual duty to submit grievances and claims arising under the contract to terminate immediately on the termination of the contract; the alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid.

Nolde Bros., 430 U.S. at 254.

Years later, in *Litton*, 501 U.S. 190, the Supreme Court considered another labor case in which the National Labor Relations Board was seeking to enforce an order that required an employer to arbitrate a dispute that occurred *after* expiration of the collective bargaining agreement. As relevant here, the Supreme Court held:

> The object of an arbitration clause is to implement a contract, not to transcend it. *Nolde Brothers* does not announce a rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable. . . . The *Nolde Brothers* presumption is limited to disputes arising under the contract. A postexpiration grievance can be said to arise under the contract only ***where it involves facts and occurrences that arose before expiration***, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement. . . .
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> ***Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement***. . . .
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> Finally, as we found in *Nolde Brothers*, ***structural provisions relating to remedies and dispute resolution—for example, an arbitration provision—may in some cases survive in order to enforce duties arising under the contract.*** . . . We presume as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement.

Litton, 501 U.S. at 207–08 (emphasis added).

The *Litton* Court's characterization of arbitration provisions as "vested" "structural provisions relating to remedies and dispute resolution" is key because it distinguishes them from "other contractual obligations" that are dependent on some form of future performance. *Medscript PBM, Inc. v. Procare PBM, Inc.*, No. 4:08CV0293 AGF, 2008 WL 4941002, at *5 (E.D. Mo. Nov. 17, 2008). The cases Plaintiffs rely on appear not to

appreciate this distinction. For example, both *RRCI*, 2009 WL 799660, at *5 and *In re. Wholesale Grocery*, 850 F.3d at 349 (emphasis added) cite the Restatement (Second) of Contracts § 317(1) (1981) for its proposition that "[a]n assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's ***right to performance*** by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." But, "[a]s the Supreme Court has reasoned, an arbitration provision may survive the termination of a contract because it is a 'structural provision' that relates to remedies and dispute resolution, ***and not an obligation concerning performance***." *White v. JRHBW Realty, Inc.*, No. 2:14-CV-01436-RDP, 2014 WL 12607794, at *2 (N.D. Ala. Dec. 9, 2014) (citing *Litton* 501 U.S. at 208 & n.3).

As this Court reads *Nolde* and *Litton*, at least as to claims based on conduct that occurred prior to an assignment, the Supreme Court construes arbitration clauses to be vested "structural provisions" in the contracts of which they are a part. The dissent in the Eighth Circuit case of *In re Wholesale Grocery Prod.,* 850 F.3d at 351-53, agreed with this approach, explaining:

> In this appeal, SuperValu contends that because Village Market alleges an antitrust conspiracy that ***began while the parties were subject to an agreement that required arbitration of such a claim***, Village Market should be compelled to submit the antitrust claim to arbitration. Applying the principles set forth in *Litton* [] and *Koch v. Compucredit Corporation*, 543 F.3d 460 (8th Cir. 2008), I would direct the district court to compel arbitration. ***That Supervalu later assigned the arbitration agreement to C&S does not eliminate Village Market's obligation to arbitrate a dispute that involves facts and occurrences that arose before the assignment.***
>
> *Litton* raised the question whether parties to a collective bargaining agreement with an arbitration clause had a duty to arbitrate grievances

that were brought by a union after the expiration of the agreement. *Litton* applied *Nolde Brothers* [], which found in the context of an expired agreement that there were "strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract." *Id.* at 204 []. *Nolde Brothers* established "a presumption in favor of postexpiration arbitration of matters unless 'negated expressly or by clear implication,'" *id.* at 204 [], as long as the arbitration was "of matters and disputes arising out of the relation governed by contract." *Id.*

Litton clarified that *Nolde Brothers* applies "only where a dispute has its real source in the contract." *Id.* at 205 []. In other words, "[t]he *Nolde Brothers* presumption is limited to disputes arising under the contract." *Id.* "A postexpiration grievance," the Court explained, "can be said to arise under the contract only where [1] it involves facts and occurrences that arose before expiration, [2] where an action taken after expiration infringes a right that accrued or vested under the agreement, or [3] where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Id.* at 206 []. Because the employee layoffs at issue in *Litton* took place almost one year after expiration of the agreement, and the second and third categories were not implicated, the grievance was not arbitrable. *Id.* at 209–10 [].

In *Koch*, this court applied Litton outside the context of collective bargaining. *Koch* involved a credit agreement with an arbitration clause. A credit card obligor alleged violations of the Federal Debt Collection Practices Act by the creditor, and assignees of the original creditor sought to compel arbitration. We concluded that even though the underlying credit agreement arguably was terminated by an earlier settlement, the obligation of the parties to arbitrate disputes arising under the contract survived any termination. Because the dispute at issue there involved facts and occurrences that arose before expiration of the credit agreement, it was a dispute "aris[ing] under the contract." 543 F.3d at 466 (quoting *Litton*, 501 U.S. at 206[]). The dispute also fell within the scope of the arbitration clause, which covered "any claim, dispute, or controversy arising from or related to the Agreement." *Id.* Because the obligor's claim "would have been subject to [arbitration] had it arisen during the contract's term," *id.* (quoting *Nolde Bros.*, 430 U.S. at 252[]), and nothing in the arbitration clause excluded a dispute that was based in part on events occurring after termination of the agreement, we directed the district court to compel arbitration. *Id.* at 466–67.

A similar analysis demonstrates that Village Market should be compelled to arbitrate its antitrust claim against SuperValu. Village Market's ***antitrust claim involves facts and occurrences that arose before SuperValu assigned the arbitration agreement*** in September 2003: ***the claim is that SuperValu formed an antitrust conspiracy while negotiating an asset exchange agreement with C&S between July and September 2003. Although the arbitration agreement was assigned in September 2003, the evidence does not clearly negate a presumption that the parties intended to arbitrate matters that arose under the contract before the assignment.*** If, for example, Village Market and SuperValu found themselves in a mine-run dispute under the supply agreement based on events in July 2003, there is nothing in the various agreements to suggest that the parties wanted that dispute litigated in federal court just because SuperValu assigned the arbitration agreement to C&S in September 2003. The Asset Exchange Agreement did not transfer pre-assignment liabilities. Although the instant claim asserts an antitrust violation rather than a breach of the supply agreement, the broad arbitration agreement covers it: "[a]ny controversy, claim or dispute of whatever nature arising between [Village Market] and SUPERVALU" must be arbitrated.

In rejecting SuperValu's position, the [majority] declines to apply the *Nolde Brothers* presumption of intent to arbitrate when a contract is assigned, apparently because an assignor "generally has control over whether and when they transfer their own rights." []. But of course a contracting party generally has control over the expiration of a contract too: the termination date is a negotiated term of the agreement. ***The point of Nolde Brothers is that even when parties intentionally cause a contractual relationship to end, there are strong reasons to believe that the parties intend to retain arbitration duties for disputes arising under the contract.*** A contrary rule "would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before termination. The same would be true if arbitration processes began but were not completed, during the contract's term." 430 U.S. at 251 []. The Court thought "it could not seriously be contended in either instance that the expiration of the contract would terminate the parties' contractual obligation to resolve such a dispute in an arbitral, rather than a judicial forum," *id.* yet the majority reaches precisely that unlikely conclusion here.

. . . Two other district courts have concluded that an assignor seeking

> to arbitrate a dispute arising before the assignment is still a "party aggrieved" who may compel arbitration under the Federal Arbitration Act. *Vainqueur Corp. v. Lamborn & Co.*, 305 F.Supp. 1007, 1008 (S.D.N.Y. 1969); *Stations West, LLC v. Pinnacle Bank of Oregon*, No. CIV 06-1419-KI, 2007 WL 1219952, at *3 (D. Or. Apr. 23, 2007). Consistent with our circuit precedent in *Koch*, ***the better view is that unless there is persuasive evidence that parties intended to extinguish a duty to arbitrate disputes that are based in part on facts that arose before an assignment, the arbitration agreement continues in effect as to those disputes.*** Accordingly, I would direct the district court to compel arbitration of Village Market's claim against SuperValu.

In re Wholesale Grocery, 850 F.3d at 351–53 (Colloton, Circuit Judge, dissenting).

In light of this Court's interpretation of *Litton*, it finds Judge Colloton's reasoning persuasive. Moreover, the facts here are analogous to the ones before Judge Colloton. The Skymark plaintiffs' claims against the GreenLake Defendants are unequivocally "based in part on facts that arose before an assignment"; whereas GreenLake assigned its interest in the Southfield Loan to SMCH in December 2018, Plaintiffs' claim rests on the assertion that the "Green Lake Defendants' joinder into the association-in-fact occurred no later than August 28, [2018,] when Chang decided to back "Ben" over Skymark, get rid of the Southfield [L]oan, and help 'Ben' get control of [the Adamson Parkway Property] in Atlanta." (PageID.7186). Moreover, Plaintiffs specifically allege that the scheme involved the use of the "judicial foreclosure" remedy referenced in the Promissory Note. (ECF No. 166-1, PageID.9173; PageID.7188-89 ("Chang understood that if Green Lake were to directly foreclose against Skymark, his private involvement with 'Ben' would be exposed and the [Adamson Parkway Property] imperiled. . . . Friedman assumed foreclosure proceedings against the Skymark companies in place of Green Lake. Friedman and Green Lake had an arrangement that Green Lake would silently assist in the foreclosure. They

also arranged that Green Lake would benefit from the transfer.")).

For all of these reasons, the Court finds that although GreenLake assigned its interest in the Southfield Loan to SMCH, it retained the ability to rely on the Promissory Note's Arbitration Provision as to claims that "are based in part on facts that arose before [the] assignment . . ." *In re Wholesale Grocery*, 850 F.3d at 351–53 (Colloton, Circuit Judge, dissenting).

ii. GreenLake Did Not Otherwise Waive the Agreement to Arbitrate

Even when claims are clearly subject to arbitration, a party may, through its own conduct, waive the arbitration agreement. The Sixth Circuit "ha[s] explained that 'a party may waive an agreement to arbitrate by engaging in two courses of conduct: (1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delaying its assertion to such an extent that the opposing party incurs actual prejudice.'" *Johnson Assoc. Corp. v. HL Operating Corp.*, 680 F.3d 713, 717 (6th Cir. 2012) (citations omitted). However, "[b]ecause of the strong presumption in favor of arbitration, waiver of the right to arbitration is not to be lightly inferred." *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 573 (6th Cir. 2003). Here, Plaintiffs' arguments as to why GreenLake supposedly waived the agreement to arbitrate lack merit.

First, Plaintiffs assert that SMCH's "choice to file suit in state court over the terms of the Southfield Loan, and subsequent litigation in circuit court and the Michigan Court of Appeals waive[d] GreenLake's later motion to compel arbitration." (ECF No. 181, PageID.11824). This argument lacks merit. Plaintiffs provide no basis for imputing

SMCH's post-assignment conduct to the GreenLake Defendants, and at any rate, the Arbitration Provision specifically indicates that the arbitrability of disputes exists "[w]ithout limiting [GreenLake's] rights to . . . file suit for judicial foreclosure." (ECF No. 166-1, PageID.9173).

Next, Plaintiffs argue that because GreenLake did not raise the arbitration issue in the Georgia state court action brought against it by Skymark III, it waived the right to assert the Arbitration Provision in this case. (ECF No. 181, PageID.11830). While Plaintiffs assert that Skymark III "alleged that GreenLake conspired with 'Ben' Katebian in return for 'Ben' helping GreenLake get out of the Southfield loan," (*id.*), Plaintiffs have not shown that GreenLake should have understood that particular claim to be arbitrable under the Arbitration Provision in the Promissory Note with Skymark II/SPE, who were non-parties to that action.

Finally, Plaintiffs contend that GreenLake waited too long in this case to move to compel arbitration. (ECF No. 181, PageID.11830-31). The Court disagrees. As explained above, *see supra* at 21, the only discovery in this case has been between Plaintiffs and the Katebian Defendants. The GreenLake Defendants have not filed an answer. And, in its motion to dismiss, GreenLake expressly reserved the right to compel arbitration of any claims not subject to dismissal. (ECF No. 100, PageID.6230).

iii. The Parties Agreed to Arbitration

With these preliminary matters aside, the Court[15] turns to the more substantive

[15] While "parties can agree to arbitrate 'gateway' questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy," *Rent-*

question of which, if any, of Plaintiffs' claims are arbitrable. The first question is whether "a valid agreement to arbitrate exists between the parties." *Stout*, 228 F.3d at 714. Plaintiffs do not argue that the Arbitration Provision itself is in any way invalid, and its plain language shows an unequivocal agreement to arbitrate; the Arbitration Provision provides, "any dispute or controversy under the Loan Documents shall be submitted to arbitration under the Rules of the American Arbitration Association." (ECF No. 166-1, PageID.9173). The parties agreed to the location where the arbitration would be heard (County of Los Angeles, California), who would arbitrate arbitrable claims (a retired ADR Services, Inc. judge), and how the arbitrator would be selected (by mutual agreement, or, if no agreement could be reached, by ADR Services, Inc. selecting one). (*Id.*). This is sufficient for the Court to find a valid agreement to arbitrate between the Skymark entities and the GreenLake Defendants.[16]

iv. The Claims of Skymark Properties, Skymark II/SPE, and Skymark III Against the GreenLake Defendants Fall Within the Arbitration Provision's Scope, But the Claims of '021 Ontario and Hazelton Homes Do Not

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A-Center West, Inc. v. Jackson, 561 U.S. 63, 68-69 (2010), nothing in the instant Arbitration Provision suggests the parties here made such an agreement. Accordingly, the arbitrability questions are clearly for the Court to decide. *Swiger v. Rosette*, 989 F.3d 501, 505 (6th Cir. 2021). ("Generally, when asked to compel arbitration under a contract, a court determines whether the parties agreed to arbitrate their dispute."); *AT&T Techs.*, 475 U.S. at 649 ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

[16] The GreenLake Defendants argue that Chang, a nonsignatory to the Southfield Loan documents, "is entitled to avail himself of the arbitration clause in the Southfield Loan" as an "agent of GreenLake." (ECF No. 165, PageID.9146). Plaintiffs do not dispute that Chang acted as GreenLake's agent, much less that Chang is not entitled to arbitration as an agent of the signatory defendant, GreenLake. Thus, the Court will "follow the well-settled principle affording [nonsignatory] agents the benefits of arbitration agreements made by their principal []." *Arnold v. Arnold Corp.-Printed Commc'ns For Bus.,* 920 F.2d 1269, 1282 (6th Cir. 1990).

Having found a valid agreement to arbitrate, the Court must next consider whether the specific claims at issue fall within the scope of the Arbitration Provision. *Stout*, 228 F.3d at 714. In doing so, the Court bears in mind "[t]he strong federal policy in favor of arbitration requires that the court resolve 'any doubts' concerning the scope of an arbitration clause in favor of arbitration." *Encompass Ins., Inc. v. Hagerty Ins. Agency, Inc.*, No. 1:08-CV-337, 2009 WL 160776, at *12 (W.D. Mich. Jan. 22, 2009) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). It is well-established that "doubts regarding arbitrability must be resolved in favor of arbitration." *Fazio*, 340 F.3d at 386. "If the matter at issue can be construed as within the scope of the arbitration agreement, it should be so construed unless the matter is expressly exempted from arbitration by the contract terms." *Simon v. Pfizer, Inc.*, 398 F.3d 765, 773 n. 12 (6th Cir. 2005) (citations omitted). *See also AT & T Techs.*, 475 U.S. at 650 (doubts about the scope of an arbitration agreement are to be construed in favor of arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.").

The Arbitration Provision here provides for arbitration of "any dispute or controversy under the Loan Documents . . ." (ECF No. 166-1, PageID.9173). While some courts have found that "[c]laims that 'arise under,' 'arise from,' or 'arise out of' an agreement consist only of those causes of action that 'relat[e] to the interpretation and performance of the contract itself,'" *Llevat v. True N. Brands, LLC*, No. 21-CV-656-BAS-AGS, 2021 WL 5449033, at *5–6 (S.D. Cal. Nov. 22, 2021), district courts within the Sixth

Circuit have taken a broader view. For example, in *Braverman Properties, LLC v. Bos. Pizza Restaurants, LP*, No. 1:10-CV-941, 2011 WL 2551189, at *5 (W.D. Mich. June 27, 2011), the court characterized as "broadly worded" an arbitration clause that covered "all disputes arising under an agreement." Indeed, the framework the Sixth Circuit has provided for determining the scope of an arbitration provision compels this broader view:

> District courts have the authority to decide, as a threshold matter, whether an issue is within the scope of an arbitration agreement. [] ***A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue.*** If it could, it is likely outside the scope of the arbitration agreement. [] Torts may often fall into this category, but merely casting a complaint in tort does not mean that the arbitration provision does not apply. [] Even real torts can be covered by arbitration clauses "[i]f the allegations underlying the claims 'touch matters' covered by the [agreement]." []

Fazio, 340 F.3d at 395 (internal citations omitted) (emphasis added).

Moreover, as recently noted in *Kumiko Morioka*, 2018 WL 7048463, at *5, "[c]ourts in this circuit follow the principle that the court must 'focus on the factual allegations in the complaint rather than the legal causes of action asserted.'" (quoting *Corey v. Allergan, Inc.*, 2014 WL 4557616 (S.D. Ohio Sept. 12, 2014)). Another recent district court case within the Sixth Circuit similarly explained:

> To determine whether a claim falls within the scope of an arbitration agreement, the "focus is on the factual underpinnings of the claim rather than the legal theory alleged in the complaint." [] "Focusing on the facts rather than on a choice of legal labels prevents a creative and artful pleader from drafting around an otherwise-applicable arbitration clause."

5th of July, LLC v. Thomas, No. 3:19-CV-00994, 2020 WL 5983111, at *3 (M.D. Tenn. Oct. 8, 2020) (internal citations omitted).

Applying these principles to the facts alleged by Plaintiffs in this case makes clear that the claims asserted by Skymark Properties, Skymark II/SPE, and Skymark III against the GreenLake Defendants fall within the scope of the Arbitration Provisions, but that '021 Ontario's and Hazelton Homes' claims do not.

Claims Brought by Skymark Properties and Skymark II/SPE

As the following allegations (all emphasis added) make clear, not only can Skymark Properties and Skymark II/SPE not maintain their RICO claims[17] against the GreenLake Defendants without *referencing* the Southfield Loan documents and the parties' relationship thereunder, but those matters are at the *very core* of the RICO claims:

- "Starting on August 8, 2018, [the GreenLake Defendants] began to conspire with [Ben]," and "on August 28, 2018, Green Lake Defendants joined the RICO enterprise." (PageID.7175).

- The enterprise, "joined by Green Lake Defendants: (a) extorted the Skymark Plaintiffs; (b) ***defrauded several Skymark entities from the Southfield [Property]***, [and the] Adamson Parkway [Property] . . ." (*Id.*).

- "Between August, 2018 and the present, Green Lake Defendants participated and conspired with the Katebian Defendants to carry out the extortion, scheme to defraud, and money-laundering transactions." (PageID.7176).

- "***Green Lake Defendants agreed that 'Ben' would be replaced as a co-guarantor on the $17.7 million loan on Skymark's Southfield Property***. In August, 2018,

[17] To the extent Plaintiffs' declaratory judgment claim against the GreenLake Defendants is asserted on behalf of Skymark Properties, Skymark II/SPE, and/or Skymark III, the same analysis the Court provides below regarding the RICO claims' arbitrability also applies. The declaratory judgment claim seeks a "declaration that each of the foreclosure and re-financing transactions that resulted in Plaintiffs' loss of [the Adamson Parkway Property and the Queens Palm Property] . . . are void, voidable, and unenforceable." (¶314). The basis of this claim is that the losses were occasioned by the very conduct underpinning the RICO claims against the GreenLake Defendants. (¶312). In other words, both the RICO and declaratory judgment claims grow out of the same alleged wrongful conduct, and the arbitrability question turns on a claim's factual underpinnings, not on its label. *5th of July*, 2020 WL 5983111, at *3.

'Ben' began been telling Green Lake about the Atlanta property. Green Lake Defendants ***ceased cooperating with Plaintiffs to remove 'Ben' from the loan*** and began to use his extortion of the Plaintiffs to their advantage. 'Ben' asked Chang if Green Lake would finance his buying the soon-to-be defaulted note." (PageID.7178).

- "Chang agreed to provide financing if 'Ben' would help ***Green Lake out of the Southfield loan.*** 'Ben' filed a fraudulent 'ownership' suit to prevent Skymark from re-financing. Green Lake Defendants knew 'Ben's' ownership claim was worthless." (*Id.*).

- "***Green Lake Defendants sold its Southfield Property note*** to a friendly buyer. 'Ben' assisted Green Lake's buyer's foreclosure by filing a false affidavit and preventing Plaintiff from re-financing. . . ***Skymark Plaintiffs lost the Southfield Property*** to the buyer in May, 2019. The buyer and Green Lake ***split an unknown profit with Green Lake***." (PageID.7178-79).

- "Green Lake Defendants paid 'Ben' back by financing the [Adamson Parkway Property Extensia Loan] purchase." (PageID.7179).

- "The Katebian Defendants extorted Plaintiffs to pay them off or they would ***use 'Ben's' co-guarantor status to injure the Southfield Property Green Lake Defendants conspired with the Katebians to assist them with the attempted extortion.***" (PageID.7181).

- "The Katebian Defendants used mail and wires to conceal their role ***in the Southfield Property foreclosure***. ***Green Lake Defendants*** participated in and conspired with the Katebians ***to injure Plaintiffs' interest in the Southfield Property***. Plaintiffs could have kept all or some of the $18.1 million in equity from the property had Green Lake Defendants not conspired with 'Ben' to file his fraudulent ownership suit. Plaintiffs would have been able to find alternate financing ***to redeem the loan in default and save their equity in the [Southfield P]roperty***." (*Id.*).

- "Green Lake Defendants' joinder into the association-in-fact occurred no later than August 28, ***when Chang decided to*** back 'Ben' over Skymark, ***get rid of the Southfield loan***, and help 'Ben' get control of [the Adamson Parkway Property]." (PageID.7186).

- "***Chang wanted to get rid of the Southfield loan*** without messy litigation. Chang knew that 'Ben's' false ownership claim could provide Green Lake a way to ***prevent Skymark from re-financing*** with another lender." (PageID.7187).

- "Chang knew that Skymark had over $18 million in equity on the Southfield Property. To assure that ***Green Lake*** or a friendly assignee could ***obtain the property and prevent a redemption***, Chang used 'Ben.' ***Chang understood that if Green Lake were to directly foreclose against Skymark, his private involvement with 'Ben' would be exposed*** and the Atlanta opportunity imperiled." (PageID.7188-89).

- "On November 16, without telling Skymark, ***Chang sold the loan*** o [sic] the acquisition arm of Friedman Real Estate Group. ***Friedman assumed foreclosure proceedings*** against the Skymark companies ***in place of Green Lake***. ***Friedman and Green Lake had an arrangement that Green Lake would silently assist in the foreclosure.*** They also arranged that ***Green Lake would benefit from the transfer***. . . . The transfer to Friedman ***solved Chang's problematic loan*** and hid the agreement with "Ben" over the Atlanta property. (PageID.7189).

- "Chang, Weisberg and 'Ben' met in early December [2018]. Ben' [sic] offered to work with Weisberg in Friedman's foreclosure, and if necessary, ***gum up Skymark's redemption***. In return, Chang let "Ben" know that he was free to line up the money to buy the [Extensia] note." (PageID.7189-90).

- "Weisberg and ***Chang had already told 'Ben'*** he had nothing to worry about [as to the guaranty], because no one would look to him to collect any shortfall ***if he helped see the foreclosure through***." (PageID.7190).

In sum, the gravamen of the claims brought by Skymark Properties and Skymark II/SPE is that the GreenLake Defendants desired to shed their lender interest in the Southfield Loan, and accomplished that goal by participating in a "quid-pro-quo" scheme that used judicial foreclosure proceedings – *a remedy specifically referenced in the Promissory Note* (in its Arbitration Provision, actually) – to strip the Skymark entities of their interest in the Southfield Property. That plan was hatched and put into place *prior* to GreenLake's execution of the Assignment with SMCH. Thus, the Southfield Loan documents and the parties' relationships thereunder are central to the instant claims.[18]

[18] To avoid this conclusion, Plaintiffs attempt to divorce their claims against the GreenLake

Particularly given that "doubts regarding arbitrability must be resolved in favor of arbitration," *Fazio*, 340 F.3d at 386, and that this directive "especially [applies] when the arbitration clause is written broadly to encompass all claims arising under the contract," *Kumiko Morioka*, 2018 WL 7048463, at *3, these claims by Skymark Properties and Skymark II/SPE fall within the scope of the parties' Arbitration Provision and must be arbitrated. *See, e.g., Fazio*, 340 F.3d at 395 (fraud claims were within the scope of the arbitration provision because "the fraudulent activities were a violation of the account agreements and arose out of activities contemplated by those agreements . . ."); *Indigo Ag, Inc. v. Fearless Grain Mktg., LLC*, 2021 WL 6752236, at *19 (W.D. Tenn. Oct. 20, 2021) (fraud claim arbitrable because it required "refer[ence] to the business relationship between the parties").

Claims Brought by Skymark III

Plaintiffs allege that one aim of the RICO conspiracy was to "defraud[]" Skymark III out of its interest in the Adamson Parkway Property. (PageID.7175). Although Skymark III was not a signatory to the Southfield Loan documents, the GreenLake Defendants argue that Skymark III's claims against them are nevertheless subject to arbitration under the Arbitration Provision. The Court agrees.

Defendants from the foreclosure of their interest in the Southfield Property. (*See, e.g.*, ECF No. 181, PageID.11831) ("At no point [] have Plaintiffs claimed that GreenLake wrongfully foreclosed on the Southfield Property. *That* litigation took place in Oakland County. There is no need to interpret the loan documents in this case.") (ECF No. 163, PageID.9027). But again, whether the RICO claims asserted against the GreenLake Defendants are arbitrable turns not on Plaintiffs' characterization of those claims (which they could just as easily label a "breach of contract"), but on the claims' factual underpinnings and the parties' relationship.

"Five theories for binding nonsignatories to arbitration agreements have been recognized: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel." *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003). *See also AFSCME Council 25 v. Cty. of Wayne,* 292 Mich. App. 68, 81 (2011). Courts apply state law principles to determine whether a nonsignatory is bound by an arbitration agreement. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009). In "considering whether to disregard the separate existence of an artificial entity, a court must first examine the totality of the evidence surrounding the owner's use of an artificial entity and, in particular, the manner in which the entity was employed ***in the matter at issue***." *Green v. Ziegelman,* 310 Mich. App. 436, 458 (2015) (emphasis added).

The GreenLake Defendants argue that this is "a compelling case for application of the veil piercing/alter ego doctrines based upon the historic operations of the Skymark entities." (ECF No. 165, PageID.9140). The GreenLake Defendants submit a declaration from their counsel, Maureen A. Harrington, with several attached exhibits. (ECF Nos. 168 through 171). Among other exhibits, the GreenLake Defendants rely on a transcript of the Skymark III bankruptcy hearing on a motion to dismiss by Ben and Morrow GA, in which Troy Wilson attested to the following:

- Skymark Properties controlled the bank account used for Skymark III's operations, including rent deposits from the Adamson Parkway Property. (*See, e.g.*, ECF No. 171-1, PageID.10590-93 ("the monies received by tenants [of the Adamson Parkway Property] from December 28th through at least March 27th were paid into [a Bank of America checking account ending in 2846] controlled by Skymark Properties [Corporation]"; PageID.10612 ("Q: So Skymark III completed tax returns? A: No, it's a pass-through entity. There is a State of Georgia filing that's required, but it's a pass-through entity. All the revenue is collected at the corporate level); *id.*, PageID.10614).

- The "Skymark Properties Corporation account" ending in 2846 was "the collective account that the three Skymark entities fed into." (ECF No. 171-1, PageID.10616; *see also id.*, PageID.10595 (rent overpayment for Adamson Parkway Property went into a "pooled income account" in Canada).

- Alizadeh used one of her corporate accounts to pay for "HVAC repairs for Skymark III" but did not "expect to be paid back." (ECF No. 171-1, PageID.10611).

- Skymark III's "parent company out of Toronto" pays for Skymark III's accounting and tax filing bills. (ECF No. 171-1, PageID.10613).

In addition, the GreenLake Defendants point to several of Plaintiffs' own allegations, which reflect that:

- After "Skymark III bought [the Adamson Parkway Property]" in 2014, it was "operated by Plaintiff [Skymark Properties] through Plaintiff Skymark III." (¶47).

- It was Skymark Properties who negotiated re-financing with both GreenLake on the Southfield Property and Extensia on the Adamson Parkway Property. (¶62).

As a final example, the GreenLake Defendants present a copy of a "Joint Motion by Receiver Nai Farbman and Secured Creditor SMCH" in a bankruptcy case involving Skymark SPE, which states in part:

> The Receiver further learned that Skymark Properties SPE did not maintain a separate bank account, but instead deposited funds into an account held by its members, Skymark Properties Corporation. [] These funds were commingled with rents and funds from other Skymark investments and used to pay operating expenses [] as well as the expenses associated with other Skymark investments. [] By way of example, in June through September of 2018, Skymark used the income to pay debts for property in Georgia [i.e., the Adamson Parkway Property owned by Skymark III] as well as wire tens of thousands of dollars to various bank accounts in Canada, which do not appear to have any relation to [the Southfield Property]."

(ECF No. 171-3, PageID.10761-62).

The Court concurs that the foregoing evidence and admissions amply supports the

GreenLake Defendants' alter-ego argument. Examining the "owner's use" of the entity in question, including "***the manner*** in which the entity was employed ***in the matter at issue***." *Green,* 310 Mich. App. at 458 (emphasis added), further supports this conclusion. Plaintiffs' own allegations establish that Alizadeh "used" the Skymark entities, including Skymark III, to conceal the relevant properties' actual owners through the use of the same individual – Ben Katebian – using the same purported "trustee" relationship, while they did business with various lenders. (*See supra* at 8-10; ¶119). Indeed, one of the most central aspects of the alleged conspiracy is that Ben abused his "trustee" status with respect to both Skymark II/SPE and Skymark III. (¶¶96, 98-99, 105, 107, 112-114, 117, 119).

Based on all of the foregoing, the Court finds that Skymark III is an alter ego of Skymark Properties and its owners. The Arbitration Provision therefore applies to any arbitrable claims asserted by Skymark III against the GreenLake Defendants. As was the case with the other Skymark entities' claims, to determine the arbitrability of Skymark III's claims, the Court must "ask if an action could be maintained without reference to the contract or relationship at issue," *Fazio*, 340 F.3d at 395, keeping its "focus [] on the factual underpinnings of the claim rather than the legal theory alleged in the complaint." *5th of July*, 2020 WL 5983111, at *3. Doing so makes clear that Skymark III's claims against the GreenLake Defendants fall within the Arbitration Provision's scope.

Plaintiffs' allegations and Supplemental Allegations make abundantly clear that the primary (if not sole) basis for *the GreenLake Defendants'* involvement with Skymark III's Adamson Parkway Property is the alleged "quid-pro-quo" agreement to "pay back" Ben for helping GreenLake get off the Southfield Loan through a foreclosure. For example,

Plaintiffs allege (all emphasis added):

- "In August, 2018, 'Ben' began been telling Green Lake about the [Adamson Parkway Property]. Green Lake Defendants ceased cooperating with Plaintiffs to remove 'Ben' from the [Southfield] [L]oan and began to use his extortion of the Plaintiffs to their advantage. 'Ben' asked Chang if Green Lake would finance his buying the soon-to-be defaulted [Extensia] note [on the Adamson Parkway Property]. . . . Chang agreed to provide financing if 'Ben' would help Green Lake out of the Southfield loan." (PageID.7178).

- "Green Lake Defendants sold its Southfield Property note to a friendly buyer. 'Ben' assisted Green Lake's buyer's foreclosure by filing a false affidavit and preventing Plaintiff from re-financing. Skymark Plaintiffs lost the Southfield Property to the buyer in May, 2019. The buyer and Green Lake split an unknown profit with Green Lake. [] ***Green Lake Defendants paid 'Ben' back by financing the [Adamson Parkway Property Extensia Loan] purchase***." (PageID.7178-79)

- "Chang knew that Skymark had over $18 million in equity on the Southfield Property. To assure that Green Lake or a friendly assignee could obtain the property and prevent a redemption, Chang used 'Ben.' Chang understood that if Green Lake were to directly foreclose against Skymark, his private involvement with "Ben" would be exposed and the [Adamson Parkway Property] opportunity imperiled." (PageID.7188-89).

- "The transfer [from GreenLake] to Friedman solved Chang's problematic loan and ***hid the agreement with 'Ben' over the [Adamson Parkway Property]***." (PageID.7189).

- "***When he made the quid-pro-quo agreement with 'Ben,' Chang knew*** that the Katebians were broke, facing well over $15 million in liabilities (between the OSC and other suits), and living off stolen money. He knew they could not legitimately find the $3 million needed ***to buy the Extensia note [on the Adamson Parkway Property]***." (PageID.7191).

As with the other Skymark entities' claims, the foregoing allegations make clear that not only can Skymark III not maintain its claims against the GreenLake Defendants without *referencing* the Southfield Loan documents and the parties' relationship thereunder, but those matters are at the *very core* of Skymark III's claims. Accordingly, Skymark III's claims against the GreenLake Defendants fall within the scope of the

Arbitration Provision.

In sum, the claims brought by Skymark Properties, Skymark II/SPE and Skymark III against the GreenLake Defendants (the "Arbitrable Claims") fall within the scope of the Arbitration Provision.

Claims Brought by '021 Ontario and Hazelton Homes

The claims brought against the GreenLake Defendants by '021 Ontario and Hazelton Homes are substantively different than the ones discussed above by the Skymark entities. Unlike the Skymark entities' claims, '021 Ontario's and Hazelton Homes' claims have no direct connection to the Southfield Property or the Southfield Loan documents which contain the Arbitration Provision. The Court will discuss these claims in greater detail below when it addresses the GreenLake Defendants' motion to dismiss. *See infra* at 55-59. For present purposes, however, it suffices to say that '021 Ontario's and Hazelton Homes' claims relate to the loss of their Canadian properties (the Boake, King High, and Picton Properties) and Queens Palm Property in Florida, which losses they squarely blame on ***the Katebian Defendants***. Indeed, Plaintiffs' own allegations make clear that the GreenLake Defendants had not even become part of the alleged conspiracy or RICO scheme at the time Hazelton Homes and '021 Ontario lost their properties in 2017. *Id*. Thus, '021 Ontario's and Hazelton Homes' claims against the GreenLake Defendants do not fall within the scope of the Arbitration Provision, and as to those claims, the GreenLake Defendants' motion to compel arbitration should be denied.

v. Congress Did Not Intend Plaintiffs' Arbitrable Claims to be Non-arbitrable

Although the Court has found that the Arbitrable Claims – those of the Skymark entities against the GreenLake Defendants – fall within the Arbitration Provision's scope, the Court must also consider whether Congress intended the Arbitrable Claims to be non-arbitrable. *See Stout*, 228 F.3d at 714. The Court finds no evidence that Congress intended RICO claims like the ones the Skymark entities assert against the GreenLake Defendants to be non-arbitrable. Indeed, in *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 240–42 (1987), the United States Supreme Court held that civil RICO claims can be subject to arbitration. *Shearson/American Exp.*, 482 U.S. at 238 ("[T]here is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act."). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *V Cars, LLC v. Chery Auto. Co.*, No. 08-13113, 2013 WL 11308062, at *2 (E.D. Mich. Nov. 27, 2013), aff'd, 603 F. App'x 453 (6th Cir. 2015) ("the United States Supreme Court has definitively held that RICO claims are arbitrable.") (citing *Shearson/American Exp.*, 482 U.S. 220).

vi. Due to the Parties' Selection of Los Angeles County as the Arbitration's Forum, this Court Lacks Jurisdiction to Compel Arbitration of the Arbitrable Claims; Those Claims Must be Dismissed Without Prejudice and the GreenLake Defendants' Motion to Compel Arbitration Must be Denied

There is one final twist to the arbitration analysis. Notwithstanding the Court's finding that the Arbitrable Claims fall within the scope of the Arbitration Provision, it lacks jurisdiction to compel the claims' arbitration. In *Milan Exp. Co. v. Applied Underwriters*

Captive Risk Assur. Co., 590 F. App'x 482, 486 (6th Cir. 2014), the Sixth Circuit held, "[w]here the parties have agreed to arbitrate in a particular forum, only a district court in that forum has jurisdiction to compel arbitration." *Milan Exp.*, 590 F.App'x at 486 (citing *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1018 (6th Cir. 2003) and *Mgmt. Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 854 (6th Cir. 1997)). In that case, the plaintiff had filed a lawsuit in the United States District Court for the Western District of Tennessee, but the contract in question contained an arbitration clause "requiring all disputes arising under the Agreement to be resolved informally without resort to litigation," and providing that "[a]ny dispute not amicably settled is subject to binding arbitration under the provisions of the American Arbitration Association in the British Virgin Islands . . ." The defendant responded to the lawsuit by moving to compel arbitration, but the district court denied that motion, finding the arbitration clause unenforceable.

On appeal, the Sixth Circuit reversed that ruling, finding that the arbitration clause was enforceable. *Id.* at 485. Nevertheless, the Sixth Circuit held that because "the parties expressly provided in the Agreement that arbitration proceedings shall be conducted in the British Virgin Islands . . . [t]he district court thus lacked authority to specifically enforce the arbitration clause." *Id.* at 486.[19] The Sixth Circuit then explained that to the extent the

[19] Since this Court has spent many pages analyzing the arbitration issues, it is worth noting that the "forum" issue is only reached by going through the full analysis and finding at least one arbitrable claim. This is why, notwithstanding its ultimate conclusion that the district court could not compel arbitration, the Sixth Circuit in *Milan* analyzed the arbitrability issues. *Id.* at 485-86. *See also Inland Bulk Transfer Co.*, 332 F.3d at 1009 (holding that the district court erred in finding claims were not subject to arbitration, but did not err in denying the motion to compel arbitration because "district courts only have the power to compel arbitration within their own districts and the arbitration agreement called for arbitration in France . . .").

plaintiff's claims were arbitrable, they were subject to dismissal without prejudice. *Id.*

Here, the parties' Arbitration Provision unequivocally states that "arbitration shall be heard in the County of Los Angeles in the State of California." (ECF No. 166-1, PageID.9173). Accordingly, as it relates to the Arbitrable Claims, the proper course of action is for the Court to dismiss them without prejudice, and deny the GreenLake Defendants' motion to compel arbitration. Moreover, because, for the reasons discussed below, the non-arbitrable claims of '021 Ontario and Hazelton Homes are subject to dismissal, there is no need to stay any aspect of this case. *Fazio*, 340 F.3d at 392.

B. Motion to Dismiss

i. The GreenLake Defendants' Motion to Dismiss Should be Granted as to Claims Asserted by '021 Ontario and Hazelton Homes

Background

In light of the above analysis, the only remaining claims against the GreenLake Defendants are plaintiffs '021 Ontario's and Hazelton Homes' claims based on alleged violations of two RICO provisions: 18 U.S.C. §§ 1962(c) and 1962(d). The federal RICO statute affords a civil remedy for "[a]ny person injured in his business or property by reason of violations of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). Section § 1962 states in relevant part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection … (c) of this section.

Thus, to prove that a defendant violated § 1962(c), a plaintiff must prove that the defendant committed at least two acts of "racketeering activity." *Grange Mut. Cas. Co. v. Mack*, 290 F. App'x 832, 835 (6th Cir. 2008). "But to violate § 1962(d), a defendant need only agree[] that another violate § 1962(c) by committing two acts of racketeering activity." *Id.* (quotation omitted). Still, the law is clear that a plaintiff asserting a § 1962 claim must show that the alleged RICO violation caused his injury. *Gen. Motors LLC v. FCA US LLC*, No. 19-13429, 2020 WL 3833058, at *7 (E.D. Mich. July 8, 2020) (citing *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992)).

In seeking dismissal, the GreenLake Defendants argue mainly that they are not "alleged to have had any dealings or contact with [Hazelton Homes] or ['021 Ontario]," and that is it "unclear on what basis Plaintiffs [Hazelton Homes] and ['021 Ontario] are bringing claims" against them. (ECF No. 100, PageID.6235; *see also* ECF No. 165, PageID.9145 ("The claims of [Hazelton Homes] and ['021 Ontario] seem most likely to be dismissed as to GreenLake and Mr. Chang given the absence of a nexus between the parties or indeed, any knowledge of those entities on the part of the GreenLake defendants.").

In response, Plaintiffs do not meaningfully address specific claims by Hazelton Homes or '021 Ontario against the GreenLake Defendants. Rather, it is apparent from Plaintiffs' pleadings that Hazelton Homes' and '021 Ontario's claims are principally based on the loss of their Canadian properties (the Boake, King High, and Picton Properties) and Queens Palm Property in Florida due to the illicit actions *of the Katebian Defendants*. As discussed below, Plaintiffs' own allegations make clear that the GreenLake Defendants had

not become a part of any alleged conspiracy or RICO scheme at the time Hazelton Homes and '021 Ontario lost their properties. Thus, without regard to whether Plaintiffs sufficiently alleged the existence of a RICO association-in-fact enterprise that includes the GreenLake Defendants, the claims asserted by Hazelton Homes and '021 Ontario against the GreenLake Defendants are subject to dismissal for failure to sufficiently allege causation.

RICO Causation Requirement

To satisfy § 1962's causation requirement, a plaintiff must establish both that the defendant's violation was a "but for" and proximate cause of the plaintiff's injuries. *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 405 (6th Cir. 2012) (citing *Holmes*, 503 U.S. at 268-69). "In other words, a plaintiff must allege facts that support its claim that its injury would not have occurred absent the § 1962 violation ('but for' cause), as well as facts that show a 'direct relation between the injury asserted and the injurious conduct alleged' (proximate cause)." *Gen. Motors LLC*, 2020 WL 3833058, at *7 (quotation omitted). A "direct relation" means that "the injury occurred at the first step in the causal chain." *Id.* (citing *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 10 (2010) (rejecting theory of causation that required moving "well beyond the first step")); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (stating that, for proximate causation, "the central question . . . is whether the alleged violation led directly to the plaintiff's injuries.").

Plaintiffs '021 Ontario and Hazelton Homes Fail to Properly Plead Causation against the GreenLake Defendants

Plaintiffs fail to sufficiently allege that the GreenLake Defendants' own acts or involvement in a conspiracy were a "but for" and proximate cause of any injuries sustained by Hazelton Homes or '021 Ontario. Specifically, as to '021 Ontario's loss of the Queens Palm Property, Plaintiffs allege that it was ***Ben*** who "impersonated himself as 'President' of Plaintiff ['021 Ontario]" to fraudulently convey the Queens Palm Property "***to himself and Payam***" on "***March 16, 2017***," and that "***[t]he Katebian Defendants*** caused Plaintiff '021 Ontario Corp. to lose [the Queens Palm Property] ***in 2017***." (¶81; PageID.7182-83) (emphasis added). Moreover, Plaintiffs clearly allege that the GreenLake Defendants were not involved at all in 2017: "***Starting*** on ***August 8, 2018***, [Green Lake Defendants] began to conspire with the Katebian Defendants. ***Starting*** on ***August 28, 2018***, Green Lake Defendants joined the RICO enterprise." (PageID.7175) (emphasis added).

Plaintiffs similarly fail to establish the causation necessary to state a claim against the GreenLake Defendants for Hazelton Homes' loss of its Canadian properties. Specifically, Plaintiffs allege that (1) "[o]n ***March 29, 2017,*** [] '***Ben***' secretly placed $1 million (Canadian) in fraudulent encumbrances on the Boake and King High properties" by impersonating being the true owner, placing a mortgage on the property, and then pocketing the mortgage amounts (¶74) (emphasis added); and (2) "[o]n ***June 27, 2018, 'Ben,' Rakesh Mehta and a number of other accomplices, including Payam [and] a Canadian lawyer Sandeep Chantal*** . . . unlawfully transferred the Picton property to an Ontario corporation for $1,200,000 (Canadian)," of which the Katebian Defendants

received some significant portion (¶76) (emphasis added). But again, Plaintiffs allege that the GreenLake Defendants' involvement did not begin until August 2018, which was well *after* the loss of the three Canadian properties.

In short, Plaintiffs' allegations make clear that the GreenLake Defendants were neither a "but for" *or* proximate cause of Hazelton Homes' and '021 Ontario's losses of their properties between 2017 and June 27, 2018, where such losses were not caused by any acts of *the GreenLake Defendants* and occurred *before* their alleged involvement in the conspiracy in August 2018. *See Grange*, 290 F. App'x at 835.

Moreover, because Plaintiffs fail to adequately allege causation by the GreenLake Defendants as to Hazelton Homes' and '021 Ontario's loss of their properties, it follows that the GreenLake Defendants could not have been a "but for" or proximate cause of any alleged injuries Hazelton Homes and '021 Ontario subsequently incurred based on a "loss of rental income" that resulted from the lost properties. The loss of a property necessarily entails the loss of an ability to reap and control the profits that would later have flowed to the owner had the loss not occurred. In response, Plaintiffs argue, "[GreenLake Defendants] seem to believe the causation inquiry is limited to the narrow injury only caused by the $2.4 million loan in which they were involved. Not so. So long as Defendants cause *some* injury [] they will be liable for the entire injury caused by the RICO scheme. If Defendants are found to have been either a direct participant in the RICO scheme, or a conspirator of the RICO scheme, their liability will be joint with the other Defendants. Greenlake and Chang are each alleged to be part of the RICO association-in-fact ('AIF'). Regardless when they joined the AIF, as a matter of law they are jointly and

severally liable for *all* injury caused by the enterprise. . . . Plaintiffs have alleged 'but for' cause as to all three properties." (ECF No. 111, PageID.6479-80) (emphasis in original).

Plaintiffs' argument lacks merit. While Plaintiffs cite to a string of cases stating primarily that a defendant can be held jointly and severally liable for damages arising out of a RICO scheme, *see e.g., United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (stating in a RICO criminal forfeiture case that co-conspirators of an enterprise should be held jointly and severally liable "to the forfeiture of proceeds arising out of a RICO conspiracy"), none of these cases excuse a plaintiff from its burden to establish the necessary causation in order to state a valid RICO claim in the first place. *See McNulty v. Home City Ice Co.*, No. 08-13178, 2016 WL 4408826, at *14 (E.D. Mich. Aug. 17, 2016) ("causation must be established as to *each* defendant's alleged predicate acts – it is not sufficient for [plaintiff] to show that the 'scheme' proximately caused his injuries.") (emphasis in original). The bottom line is that because '021 Ontario and Hazelton homes allege they "lost" the properties in question *before* the GreenLake Defendants became part of the alleged conspiracy, the GreenLake Defendants' actions cannot have a "direct relation" to, or have been a "but for" and proximate cause of *these losses*. *Gen. Motors LLC*, 2020 WL 3833058, at *7 (quotation omitted).

To the extent Plaintiffs allege that "[t]he money-laundering described in this Complaint independently caused RICO damages by removing [*i.e.*, laundering] $2.2 million (Canadian) that the Katebian Defendants stole from Plaintiffs from the reach of Canadian courts" (¶287d), this also does not allege an "injury" to their "business or property" that is separate from the Katebians' *prior* theft of this money, much less that *the*

GreenLake Defendants were a "but for" or proximate cause of any such loss. For instance, Plaintiffs allege a "loss [of] over $550,000 in lost equity and unknown amount in rental incomes" from the Queens Palm Property and attempt to connect the GreenLake Defendants by alleging that their "participation in and conspiracy in money-laundering enabled the Katebians to use a portion of the [July 2019] loan to retire an outstanding $90,000 loan on the [Queens Palm Property]." (ECF No. 137-2, PageaID.7182-83). But Plaintiffs already made clear that any loss in equity and rental incomes from the Queens Palm Property was a direct result of "[t]he Katebian Defendants caus[ing] Plaintiff '021 Ontario [] to lose [that property] in 2017," and the fact that the Katebians were otherwise able to pay off an outstanding loan on an already-stolen property using the GreenLake Defendants' financing *in 2019* cannot be said to have caused a new "loss" or "injury" to '021 Ontario necessary to sustain a valid RICO claim *against the GreenLake Defendants.* (*Id.*). Another example is Plaintiffs' allegation that approximately $500,000 of the funds used to purchase the Extensia note "is believed to have come from funds stolen by 'Ben' from Plaintiff Hazelton Homes' Picton property." (¶172c). However, Plaintiffs expressly allege that the "Canadian Funds" involved in this transaction were laundered by the following "Participants: the Katebian Defendants, Behrouz, Samuel, Flemington Capital, Morrow GA" – not the GreenLake Defendants. (¶232e; *see also* ECF No. 137-2, PageID.7210). Even assuming the GreenLake Defendants somehow enabled the Katebians to launder $500,000 of Hazelton Homes' stolen funds to buy the Extensia note on the Adamson Parkway Property, that would at most allege an injury *to Skymark III* as the prior owner of the Adamson Parkway Property. As explained above, though, Skymark III's

claims against the GreenLake Defendants are part of the Arbitrable Claims that are subject to dismissal without prejudice.

For all of the foregoing reasons, '021 Ontario and Hazelton Homes fail to plead facts to establish that the GreenLake Defendants were a "but for" and proximate cause of their claimed losses. Accordingly, to the extent the GreenLake Defendants move to dismiss Hazelton Homes' and '021 Ontario's claims, that motion should be granted.[20] Because the Court has already recommended dismissing the other claims against the GreenLake Defendants without prejudice, their motions to dismiss should be denied as moot as to those claims.

[20] This conclusion applies equally to the Plaintiffs' broad claim for "Declaratory Judgment Under 28 U.S.C. § 2201" based on "an actual controversy between the parties concerning the validity and legality of the following transactions: the March 2017 purchase of the [Queens Palm Property], the December, 25, 2018 $2.6 Million Morrow GA Transaction, the January 8, 2019 Morrow GA Purchase Transaction, and the July 15, 2019 GL Financing Transaction." (ECF No. 68, PageID.4422). In brief, Plaintiffs argue that "[t]he purchases [of] the Adamson Parkway Property and the [Queens Palm Property], and financing of the Adamson Parkway Property by Greenlake were in violation of the IEEPA and the ITSRs," so they "seek a declaration that each of the foreclosure and re-financing transactions that resulted in Plaintiffs' loss of these two properties as described in this Complaint are void, voidable, and unenforceable." (*Id.*; *see also* ECF No. 111, PageID.6494-95 ("…Plaintiffs will seek to render unenforceable any instrument that the Defendants executed to obtain either the [Queens Palm Property] or the Adamson Parkway Property. [] Plaintiffs would be entitled to that relief if they prove that the source of any moneys used to obtain the property came from Iran in violation of the Iran-embargo laws."). However, Plaintiffs also tie this claim to their RICO claims, asserting, "***but for the agreements*** between the various Defendants that resulted and will result in such moneys being returned to Iran, these illegal transactions would not have occurred." (¶312). Again, Plaintiffs failed to properly plead causation as to the GreenLake Defendants. Moreover, while '021 Ontario may have a claim for disputing the validity of the March 2017 purchase of its Queens Palm Property, the GreenLake Defendants were not involved in that transaction, and '021 Ontario has no basis to invalidate transactions involved in the purchase of Skymark III's Adamson Parkway Property. Likewise, Hazelton Homes, who owned the Canadian properties, has no claim to invalidate transactions involved in the purchase of either the Queens Palm Property or the Adamson Parkway Property.

V. CONCLUSION

For all of the foregoing reasons, **IT IS RECOMMENDED** that the GreenLake Defendants' motion to compel arbitration **(ECF No. 165)** be **DENIED**, and the **Arbitrable Claims** – Skymark Properties', Skymark II's, Skymark SPE's, and Skymark III's claims against the GreenLake Defendants – be **DISMISSED WITHOUT PREJUDICE**. **IT IS FURTHER RECOMMENDED** that the GreenLake Defendants' motions to dismiss **(ECF Nos. 98, 100)** be **GRANTED with respect to '021 Ontario's and Hazelton Homes' claims against the GreenLake Defendants**, and **DENIED AS MOOT in all other respects**.

Dated: March 14, 2022
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir.1991); *United States v. Walters*, 638 F.2d 947, 949–50 (6th Cir.1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir.1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370,

1373 (6th Cir.1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge. A party may respond to another party's objections within 14 days after being served with a copy. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §636(b)(1). Any such response should be concise, and should address specifically, and in the same order raised, each issue presented in the objections.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record via email addresses the court has on file.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager

Dated: March 14, 2022