UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

Teresa Lopez *et alia*,

Plaintiffs,

- against -

Delta Funding Corporation *et alia*,

Defendants.

----------X

CV-98-7204 (CPS)

MEMORANDUM AND ORDER

SIFTON, Senior Judge

This is a class action brought by plaintiff Teresa Lopez and plaintiff intervenors James Robinson, Bertha Clinton, Wilfred Loney, Mary Young, Juanita Edwards, Virginia Williams, and Murray Lowe against defendants Delta Funding Corporation ("Delta Funding"); Delta Financial Corporation ("Delta Financial"); All State Consultants, Inc., a/k/a City Mortgage Bankers ("All State"); Doe Corporations 1 through X; Bankers Trust Company of California, N.A. ("Bankers Trust"), as trustees for the Delta Funding Home Equity Loan Trust; and Norwest Bank Minnesota ("Norwest"), also as trustee for the Delta Funding Home Equity Loan Trust. Plaintiffs assert claims, on behalf of themselves and all others similarly situated, for relief for (i) violations of the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639 ("HOEPA"); (ii) violations of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. ("TILA"); (iii) violations of New York State General Business Law § 349 and 3 New York Code of

Rules and Regulations Part 38 ("the Deceptive Practices Act"); and (iv) unconscionability.

Defendants Delta Financial, Delta Funding, and Norwest bring this motion to dismiss the second amended complaint on five separate grounds claiming that (1) the doctrine of res judicata and the Rooker-Feldman doctrine bar plaintiffs Edwards, Robinson, Clinton, and Loney from bringing this suit following a final judgment in their state foreclosure actions; (2) plaintiffs lack standing to bring their claims against defendant Norwest; (3) plaintiffs cannot state a claim of unconscionability as an affirmative cause of action; (4) plaintiffs fail to state a claim against Delta Financial and have not alleged sufficient facts to pierce the corporate veil between Delta Financial and its wholly owned subsidiary Delta Funding; and (5) Federal Rule of Civil Procedure 19 requires joinder of plaintiffs Young's and Loney's spouses as necessary parties.

Plaintiffs move to file a proposed third amended complaint. It is urged by plaintiffs that their proposed third amended complaint adequately addresses two of the arguments raised by defendants in their motion to dismiss. Defendants, on the other hand, oppose plaintiffs' filing of their proposed third amended complaint on the grounds of undue delay, prejudice, and futility.

Proposed intervenor Mary Ward seeks to intervene as a named plaintiff in the action, arguing that there are common

issues of fact and law between her claims and those of the named plaintiffs.

For the reasons set forth below, defendants' motion to dismiss is denied in part and granted in part. Plaintiffs' motion to file their proposed third amended complaint is denied. Mary Ward's motion to intervene in this action is denied.

BACKGROUND

The following facts are taken from the plaintiffs' complaint and, for purposes of defendants' motion to dismiss in part, are taken as true.

Plaintiffs' class action lawsuit against defendants alleges violations of TILA, HOEPA, the Deceptive Practices Act, and unconscionability. Plaintiffs allege that Delta engages in a widespread and systematic practice of enticing low income and largely uneducated homeowners — through fraud, misrepresentation, and other unconscionable conduct — to accept mortgage loans that (a) provide little or no benefit to the borrowers, (b) skim off the equity in borrowers' homes, (c) are padded with excessive and illegal fees to be paid to Delta and other third parties, (d) are priced illegally without regard to the borrowers' abilities to make monthly payments, and (e) place all class members in jeopardy of losing their homes.

Defendant Delta Funding is a consumer finance company engaged in originating, acquiring, selling, and servicing home equity loans. Delta Funding is a wholly owned subsidiary of defendant Delta Financial, a publicly held company traded on the

New York Stock Exchange. Delta Financial's public filings state that, through its subsidiaries, Delta Financial engages in "originating, acquiring, selling and servicing nonconforming home equity loans since 1982." Defendant All State and defendants Doe Corporations 1 through X are corporations that act as mortgage brokers and correspondents and receive mortgage brokerage fees from Delta Funding or Delta Funding's clients. Defendants Bankers Trust and Norwest are trustees for defendant Delta Funding Home Equity Loan Trust (the "Trust"), to which Delta Funding sells virtually all of its loans. The Trust raises the cash payments to purchase loans from Delta Funding through the sale of asset-backed, pass-through securities.

The circumstances surrounding each of the named plaintiffs' mortgage with Delta Funding are similar and set forth below.

Plaintiff Teresa Lopez is a 71-year-old Hispanic widow who has owned and lived at 111-11 142nd Street, Jamaica, New York, for the past 36 years. In approximately January 1996, Lopez was solicited by All State to refinance her existing mortgage in the amount of $85,000. It was represented to her by All State that her monthly payments would not change, and she would receive from $2,000 to $3,000 in cash after closing. After signing numerous documents, which she was told not to read, and receiving no disclosures regarding the loan, Lopez emerged from the transaction with higher monthly payments and no cash. It is alleged by plaintiffs that Delta knew or should have known that

Lopez did not have the money to pay the costs of her Delta Loan. Lopez has since defaulted on this mortgage loan. Delta Funding has not pursued foreclosure proceedings against Lopez in state court.

Plaintiff Wilfred Loney, a 62-year-old African-American man, is the owner of the property located at 882 East New York Avenue, Brooklyn, New York and has lived there as his primary residence for the past 22 years. In late September or early October 1996, Loney responded to an advertisement he received by mail regarding homeowner loans. On November 27, 1996, Loney entered a mortgage loan transaction with Delta for a second mortgage on his property in the amount of $110,000, despite the fact that, as he disclosed in his mortgage application, he was unemployed and had no present source of income. Loney was told nothing about the terms of his loan aside from the fact that he would "walk away" with $7,000 to $8,000 in cash. After closing, Loney learned that he would not receive any money, and he has since defaulted on the mortgage loan.

On October 15, 1997, Delta Funding filed a complaint seeking foreclosure of its mortgage against Loney and his wife in the Supreme Court of the State of New York. The complaint was served upon the Loneys on October 23, 1997. The Loneys failed to appear, and a judgment of foreclosure and sale was entered against the Loneys. The Loneys failed to appeal.

Plaintiff Bertha Clinton, a 67-year-old African-American widow, is the owner of the property located at 4406

Snyder Avenue, Brooklyn, New York and has lived there for approximately 28 years. In the winter of 1995-96, Clinton was solicited by a door-to-door salesman who offered to refinance her existing mortgage in the amount of $116,000. On March 29, 1996, Clinton entered a mortgage loan transaction with Delta for a second mortgage on her property. She was given no time to read any documents relating to the loan, nor was anything disclosed to her in reference to the loan. Clinton has since defaulted on the loan.

On September 22, 1997, Delta Funding filed a complaint seeking foreclosure of its mortgage against Bertha Clinton in the Supreme Court of the State of New York. The complaint was served upon Clinton on October 16, 1997. Clinton failed to appear in Delta Funding's foreclosure action, and a judgment of foreclosure and sale was entered. Clinton did not appeal.

Plaintiff James Robinson, a 30-year-old African-American man, is the owner of the property located at 137-80 Southgate Street, Springfield Gardens, New York. This residence has been in the Robinson family for approximately 30 years. In August 1996, Robinson was solicited by telephone by a salesman who offered to refinance his existing mortgage. On September 26, 1996, Robinson entered a mortgage loan transaction with Delta for a second mortgage on his property in the amount of $156,000. Nothing was disclosed to Robinson concerning the terms of his loan prior to the closing. Upon questioning Delta representatives about the terms of his loan at the closing, Robinson was

discouraged from reading the documents and assured that he had gotten the loan he wanted. Robinson has since defaulted on the mortgage loan.

On June 2, 1997, Delta Funding filed a complaint seeking foreclosure of its mortgage with Robinson in the Supreme Court of the State of New York. The complaint was served upon Robinson on January 21, 1998. Robinson failed to appear in Delta Funding's foreclosure action, and a judgment of foreclosure and sale was entered against him. Robinson did not appeal.

Plaintiff Juanita Edwards, a widowed, 52-year-old African-American, is the owner of the property located at 144-23 Lakewood Avenue, Jamaica, New York. In approximately April 1996, Edwards was solicited by telephone by American Dream Mortgage Company, a bank related to Delta and offered a loan. Edwards stated in this telephone conversation that she could no longer afford the monthly payments of her prior loan. Nonetheless, Edwards closed on a mortgage loan with Delta on May 31, 1996, in the amount of $113,000. Edwards has since defaulted on her mortgage loan.

Delta Funding filed a complaint seeking foreclosure of its mortgage with Edwards on July 14, 1997, in the Supreme Court of the State of New York. The complaint was served upon Edwards on August 2, 1997. As Edwards failed to appear in Delta funding's foreclosure action, a judgment of foreclosure and sale was entered against her. Edwards did not appeal.

Mary Young, a 52-year-old African-American, is the owner of the property located at 584 Hendrix Street, Brooklyn, New York 11207 and has lived there as her primary residence for the past ten years. In the Spring of 1995, Young was contacted by a salesman who offered to refinance her existing loan. Young was told that her new loan would have an interest rate of 9% and that she would receive $10,000 at the closing. On May 19, 1995, without receiving any disclosures concerning the material terms of the loan, Young closed on a loan in the amount of $91,000. Upon learning of the terms of the loan, Young declined to go forward with the loan. On November 11, 1998, Young attended a second closing with Delta, seeking a loan in the amount of $113,600. Young received no disclosures relating to this loan and was told that there was no time to read the documents she was required to sign. At this second closing, false representations were made as to the amount of the loan, its interest rate, and the brokerage fees.

Virginia Williams, a 76-year-old, widowed African-American, owns property located at 89-60 220th Street, Queens Village, New York and has lived there as her primary residence for the past 10 years. After receiving a flyer in the mail concerning low-cost loans in the winter of 1997-98, Williams contacted a mortgage broker who agreed to secure a loan for her. On February 6, 1998, Williams attended a closing on a loan with Delta Funding in the amount of $55,000. She received no disclosures prior to this closing about the material terms of the

loan and repeatedly stated at the closing that she was unable to read the fine print in the documents. Nonetheless, without any knowledge of the material terms of the loan, Williams closed on the loan.

Lowe Murray, a 64-year-old African/Native American, is the owner of property located at 198 Van Buren Street, Brooklyn, New York. He has owned and used the property as his primary residence in excess of 30 years. In approximately March 1996, Murray received a telephone solicitation inquiring whether he would be interested in a loan. On April 25, 1996, Murray entered a loan transaction with Delta Funding in the amount of $35,000.

Mary Ward is a 68-year-old widow. She has lived at 320 Tompkins Avenue in Brooklyn since 1969. Ward needed of $10,000 to pay a lawyer to contest the adoption of her great grandchild. After receiving a letter in the mail from Tarheel Funding which stated that she could "get money from [her] home," Ward called Tarheel and discussed whether or not she could get the $10,000 from her home. Ward was assured that she could get this $10,000 and told that her monthly mortgage payments would be either the same or less than her previous mortgage payments of $890 per month.

Ward arrived at the first closing on July 28, 1995. She was given no documents to read, nor information concerning her loan aside from the fact that she would receive $11,077.66 and pay $906.17 per month. She borrowed $82,500 with an interest rate of 12.9%.

Ward did not receive her check at the closing and was told to return on August 18, 1995. She was told that mistakes had been made and that she would have to return the initial papers and sign new ones, which would provide her $11,388.51. Ward signed the new mortgage papers without receiving any disclosures concerning the loan or having time to read the documents. Ward later discovered that she would have an increased monthly payment of $1,036.57. Ward maintains that she would never have signed such a document had she known of the increased monthly payments, because she "could not handle such a big monthly mortgage payment."

On August 28, 1995, Ward received a check for $1,467.51. She was told that the remainder of the $11,388.51 had been used to pay fees. The next day she attempted unsuccessfully to rescind the mortgage.

On August 21, 1996, Delta Funding commenced a foreclosure action against Ward in the Supreme Court of New York, County of Kings. On October 25, 1996, counsel for Ward filed an answer. Included in the answer was a counterclaim alleging fraud, unconscionable conduct, duress, and forgery concerning the circumstances of the loan. On that same date, counsel for Ward filed a third-party complaint against Ward's mortgage broker, the principal of her mortgage broker, the attorney who represented her at the closing, the attorney who represented Delta Funding at the closing, the abstract company, and Delta Funding's counsel. In her third-party complaint, Ward asserted causes of action for

fraud, misrepresentation and deception, duress, and unconscionable conduct.

Delta Funding moved for summary judgment on March 31, 1998, and the New York Supreme Court heard oral argument on August 6, 1998. On August 31, 1998, the court granted Delta Funding's motion for summary judgment. That court held that Ward did not offer "sufficient proof to raise an issue of fact as to the alleged fraud .... Only bare allegations are proffered by Ward, which are patently insufficient to preclude summary judgment." Memorandum Decision, Index No. 28683/96. On November 20, 1998, Ward filed a Notice of Appeal with the Supreme Court of New York, Appellate Division. On November 23, 1998, Ward filed a motion to stay all proceedings pending the determination of her appeal. By order of May 20, 1999, this motion was denied. The appellate division has not yet ruled upon Ward's appeal. On July 25, 1999, Ward filed a motion to intervene in the Lopez action.

In the instant lawsuit, plaintiffs contend that their mortgage loans with Delta are mortgage loans within the definition of 15 U.S.C. § 1602(aa)(1)(B) and, accordingly, subject to the restrictions of HOEPA and TILA. Plaintiffs request a variety of relief, both individually and for the class, including (1) rescission, (2) voiding any security interest obtained by Delta Funding against plaintiffs' property, (3) actual, statutory, and enhanced damages, attorneys fees, and costs, under HOEPA and TILA, (4) equitable and monetary damages under the Deceptive Trade Practices Act, (5) an order declaring

plaintiffs' mortgage loan transactions void due to unconscionability, and (6) such other relief at law or equity as may be and proper.

Plaintiffs' proposed third amended complaint is identical to their second amended complaint filed in this action on August 6, 1999, with two differences. First, plaintiffs have added an equitable action to redeem. Second, plaintiffs have included additional allegations not present in the second amended complaint with respect to the corporate relationship between Delta Funding and Delta Financial.

DISCUSSION

Defendants' Motion to Dismiss

Defendants argue that plaintiffs Edwards, Robinson, Clinton and Loney are barred by the doctrines of res judicata and Rooker-Feldman from seeking relief from their mortgages. Defendants argue that any claims concerning the mortgage loan were litigated to a conclusion in the state court foreclosure action and may not now be relitigated here — either (1) as an improper appeal of a state court judgment under Rooker-Feldman or (2) in contravention of the doctrine of res judicata as it applies to state court judgments.[1/] Although defendants urge

---

[1/] The application of the res judicata rules in later federal court litigation is not subject to dispute. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Brooks v. Giuliani*, 84 F.3d 1454, 1463 (2d Cir. 1996). That rule has been taken from the full faith and credit statute, which states that "[j]udicial proceedings of any court of any ... State ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State...." 28 U.S.C. § 1738. This statute has existed in essentially the same form since its initial passage in 1790, ch. 11, 1 Stat. 122.

this Court to apply res judicata and Rooker-Feldman as interchangeable doctrines embodying the same legal tests, this view does not comport with the different policy rationales behind these two doctrines. The preclusion doctrines behind res judicata serve the interests of finality of judgment. Rooker-Feldman is a doctrine concerned mainly with the application of principles of federalism in the judicial context. Res judicata is about parties; Rooker-Feldman is about courts. Accordingly, the application of the doctrines to this case will be separately discussed below.

*Rooker-Feldman*

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the Supreme Court held that a federal district court has no jurisdiction to consider collateral attacks to state court judgments, as the exercise of such jurisdiction would be an exercise of appellate jurisdiction, whereas district courts are b and large courts of original jurisdiction.

In *Rooker*, the petitioner sued in district court to have a judgment of an Indiana state court declared null and void because the judgment violated the Contract Clause, Due Process Clause, and Equal Protection Clause of the United States Constitution. *Rooker*, 263 U.S. at 414-15. In affirming the district court's dismissal for lack of subject matter jurisdiction, the Supreme Court held that only the Supreme Court could consider such claims by entertaining an appeal from a state

court judgment. *Id.* at 415-16. The Court stated that, "[i]f the decision [of the state court] was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication." *Id.* at 415. The Supreme Court stated that "[u]nder the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction, [while the] jurisdiction possessed by the District Courts is strictly original." *Id.* at 416 (internal citations omitted). "Moreover, if a litigant in State court fails to file a timely appeal, 'after that period elapses an aggrieved litigant cannot be permitted to do indirectly what he can no longer do directly.'" *Smith v. Winberger*, 994 F. Supp. 418, 423 (E.D.N.Y. 1998) (quoting *Rooker*, 263 U.S. at 416).

Subsequently, in *Feldman*, the Supreme Court extended the Rooker doctrine to bar federal courts from entertaining federal claims that are "inextricably intertwined" with a state court's determinations. *Feldman*, 460 U.S. at 482-84 n.16. As stated in *Feldman*:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's [decision on the merits], then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

*Id.* Accordingly, under Rooker-Feldman, a plaintiff may not institute an action in federal court that either (1) directly challenges the holding or decision of a state court or (2) indirectly challenges the holding or decision of a state court by raising issues in federal court that are "inextricably intertwined" with the state court's decision. As the plaintiffs in this case are not directly challenging the foreclosure judgments of the New York State courts, the sole issue that this Court must resolve is whether plaintiffs' claims are inextricably intertwined with the foreclosure judgments that were entered by New York State courts against plaintiffs Edwards, Robinson, Clinton, and Loney.

In *Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996), the Second Circuit noted that the Supreme Court originally gave little guidance with respect to the meaning of the phrase "inextricably intertwined." Later cases have, however, noted that a "federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco*, 481 U.S. 1, 25 (1987) (Marshal, J., concurring); *see also Simpson v. Putnam County Nat'l Bank of Carmel*, 20 F. Supp. 2d (S.D.N.Y. 1998). It has also been said that "the fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment." *Long v. Shorebank Development Corp.*, 182 F.3d

548, 555 (7th Cir. 1999) (internal quotations and citations omitted). The pivotal inquiry is whether the federal plaintiff seeks to remedy an injury caused by a state court judgment or whether he is, in fact, presenting an independent claim. *See id.* In this regard, a distinction may be made between "a federal claim alleging injury caused by a state court judgment" and "a federal claim alleging a prior injury that a state court failed to remedy." *Centres Inc. v. Town of Brookfield*, 148 F.3d 699, 701-02 (7th Cir. 1998). Under the Rooker-Feldman doctrine, a federal court is precluded from considering the former, but not the latter. *See Long*, 182 F.3d at 555.

In this case, it is clear that the claims are independent of the state foreclosure judgment. The complaint in this action does not require this Court to review the state foreclosure judgment, instead "alleging a prior injury that [the] state court failed to remedy." *Centres*, 148 F.3d at 701-02. To decide in plaintiffs' favor, I need not conclude that the state court's foreclosure judgment was wrongly decided.

Nor did the injury alleged by the plaintiffs come "from the state court judgment itself," but "is distinct from that judgment." *Long*, 182 F.3d at 555. The injuries alleged by the plaintiffs arose out of defendants' loan agreements themselves and the conduct of the defendants before and during each plaintiffs' closing, not from the state court foreclosure judgment. Edwards, Robinson, Clinton, and Loney could have stated the same causes of action they present here even had there

been no foreclosure judgment. The presence of named plaintiffs in this action who have not defaulted on their Delta loans or gone through foreclosure is illustrative; whether or not Edwards, Robinson, Clinton, or Loney had paid their monthly payments would not affect their causes of action or the defendants' liability. Accordingly, the Rooker-Feldman doctrine does not deprive this Court of subject matter jurisdiction.

*Res judicata*

The doctrine of res judicata states that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Further, a federal court must accord the same preclusive effect to a state court decision that a state court would give it. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Accordingly, I must look to New York State law to determine the effect of New York's concluded foreclosure action on the claims of plaintiffs Edwards, Robinson, Clinton, and Loney.

New York courts have adopted a transactional approach to res judicata. *See O'Brien v. Syracuse*, 54 N.Y.2d 353, 357 (1981). Under this analysis, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien*, 54 N.Y.2d at 357. In determining what constitutes a transaction or

series of transactions, a court looks at how "the facts are related in time, space, origin, or motivation." *Smith v. Russell Sage College*, 54 N.Y.2d 185, 186 (1981). Under the test spelled out by the Court of Appeals in *Smith*, there is no doubt that plaintiffs' claims in this action arise from the same transaction or series of transactions as that litigated in the state foreclosure action. However, despite this fact, plaintiffs claims are not entirely barred by New York's res judicata law.

Delta mistakenly suggests that application of New York's transactional approach bars all claims from all parties arising out of the foreclosure action. It does not. New York does not have a compulsory counterclaim rule. *See* N.Y.C.P.L.R. § 3019. As a result, res judicata will not ordinarily bar claims that could have been but were not brought as counterclaims in the prior action. *See Eubanks v. Liberty Mortgage Banking*, 976 F. Supp. 171, 173 (E.D.N.Y. 1997) (holding that the conclusion of a state foreclosure action does not bar, on res judicata grounds, defendant from bringing a TILA claim in federal court where defendant did not impose her TILA claim as a counterclaim in the foreclosure action).[2/] "[T]he fact that a plaintiff may have asserted the subject matter of his present claim as a defense to a former action does not foreclose the maintenance of his present

---

[2] This Court's analysis in *Nembhard v. Citibank*, No. CV-96-3330, 1996 WL 622197 (E.D.N.Y. Oct. 22, 1996), is, on further reflection, mistaken. That case involved claims that were time-barred, leaving any res judicata analysis unnecessary. In all events, that case was decided without consideration of New York's permissive counterclaim rule. I am now persuaded by the reasoning of Judge Trager in *Eubanks*.

action on the grounds of res judicata." *Lukowski v. Shalit*, 110 A.D.2d 563, 566 (N.Y. App. Div. 1985). "New York's res judicata rule thus has a narrower effect on a defendant who then brings her claim in a separate action than it does on the plaintiff who brings successive claims that arise from the same transaction." *Eubanks*, 976 F. Supp. at 173. "[I]f res judicata barred a permissive counterclaim, the 'permissive' counterclaim would, as a practical matter, become compulsory." *Mason Tenders District Council Pension Fund v. Messera*, 1996 WL 351250 at *10 (S.D.N.Y. June 26, 1996).

New York's permissive counterclaim rule allows counterclaims to be raised through separate litigation "as long as a party defendant does not remain silent in one action, then bring a second suit on the basis of a pre-existing claim for relief that would impair the rights or interests established in the first action." *Classic Automobiles, Inc. v. Oxford Resources Corp.*, 204 A.D.2d 209 (N.Y. App. Div. 1994) (citing *Henry Modell and Co., Inc. v. Ministers, Elders and Deacons of the Reformed Protestant Dutch Church*, 68 N.Y.2d 456, 461 (1986)). New York's permissive counterclaim rule would, therefore "save from the bar of res judicata those claims for separate or different relief that could have been but were not interposed in the parties' prior action." *Id.* at 462 n.2. New York thereby ensures that its permissive counterclaim rule will not result in inconsistent verdicts, while at the same time giving greater autonomy to a defendant brought into court against her will.

As applied here, this Court is not able to overturn the New York State court's foreclosure judgment itself but may afford other remedies that do not "impair the rights or interests" of the first action. *See Eubanks*, 976 F. Supp. at 174. Plaintiffs request a variety of different types of relief as a result of defendants' alleged violations of HOEPA, TILA, the Deceptive Practices Act, and unconscionability. The following are not available from this Court as they undermine the rights and interests established by the state foreclosure judgment: voiding of any lien and/or security interest obtained by defendants or rescission. However, this Court does have the power to grant remedies that have no effect on the state court foreclosure judgment, such as statutory and punitive damages under TILA and HOEPA and monetary damages under the Deceptive Practices Act.

*Standing*

Defendant Norwest seeks dismissal of the claims against it for lack of standing. Defendant's motion is premature and fails to analyze precedent properly.

The Supreme Court has developed a three-part test to determine whether a plaintiff has standing to bring a claim under Article III's case or controversy requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). That test is meant to "demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101

(1983) (internal citations omitted). First, "the plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Defender of Wildlife*, 504 U.S. at 560 (internal citations omitted). Second, "there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal citations and quotations omitted). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal citations and quotations omitted). On a motion to dismiss, a court should "presume[] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990).

Defendants claim that plaintiffs' have failed to allege that Norwest purchased any of their loans from Delta Funding. As plaintiffs point out, however, whether Norwest has purchased the relevant loans is a question of fact that cannot be resolved on a motion to dismiss. Since this Court must "presume that general allegations embrace those specific facts that are necessary to support the claim," *see Defenders of Wildlife*, 504 U.S. at 561, plaintiffs' allegations that Norwest, like Banker's Trust, is a trustee of the Delta Funding Home Equity Loan Trust that has

purchased loans from Delta Funding is sufficient to confer standing on plaintiffs against Norwest at least at this stage of the litigation.

Defendants' reliance on the Supreme Court's requirement that plaintiffs' injury must be concrete and particularized, not conjectural or hypothetical, has little apparent bearing on this case. The language has been used by the Supreme Court in cases such as *Defenders of Wildlife* and *National Wildlife Federation* with respect to environmental groups' standing to seek remedy for inchoate harms. In such cases, the connection between plaintiffs and the alleged injury was far from clear. *Id.* at 561-62 (stating that when "as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation ... of someone else," the showing required to confer standing is much greater). In contrast, in the case at bar, should it be found that Norwest has indeed purchased the relevant loans from Delta Funding, the harm to plaintiffs is clear, and "there is ... little question that the action or inaction has caused [them] injury, and that a judgment ... will redress it." *Id.* It is too soon to decide the ultimate factual issue concerning whether plaintiffs' loans were part of Norwest's 1999-1 securities issuance.

The motion to dismiss plaintiffs' claims against Norwest for lack of standing is denied.

*Unconscionability*

Defendants assert that New York law allows a claim of unconscionability only as a defense in an enforcement action, not as an affirmative claim for relief and, accordingly, seek to dismiss plaintiffs' claim of unconscionability.

Plaintiffs rely on three cases to support their position that unconscionability may be used as an affirmative claim for relief. Two of those cases, *Yerkovich v. MCA Inc.*, 11 F. Supp. 2d 1167, 1173 n.5 (C.D. Cal. 1997), and *Tucson Elec. Power Co., Inc. v. Westinghouse Elec. Corp.*, 597 F. Supp. 1102, 1105 (D. Ariz. 1984), do not consider New York law and, therefore, carry little weight. Plaintiffs' third case, *Bevilacque v. Ford Motor Co.*, does, however, apply New York law. 125 A.D.2d 516, 519 (N.Y. App. Div. 1986). Despite defendants' misreading of the case,[3/] *Bevilacque* allows an affirmative claim of unconscionability when the sole relief requested is rescission. As plaintiffs' do not request damages with respect to unconscionability, *Bevilacque's* holding provides a basis for the claim made here.

The cases cited by defendants to the effect that "the doctrine of unconscionability is not available as a basis for an affirmative recovery, but is intended as a means to avoid enforcement of a contract" and "[t]he doctrine of unconscion-

---

[3/] Defendants quote the same language as plaintiffs without apparently reading it. The case states that unconscionability "provides a defense for a party opposing enforcement of a contract or a cause of action for rescission of a contract." *Bevilacque*, 125 A.D.2d at 519 (emphasis added).

ability is to be used as a shield, not a sword" do not squarely address the issue of plaintiffs' ability to use unconscionability affirmatively to rescind their contract. *Poley v. Sony Music Entertainment, Inc.*, 619 N.Y.S.2d 923, 928 (Sup. Ct. 1994); *Avildsen v. Prystay*, 171 A.D.2d 13, 16 (N.Y. App. Div. 1991) (citing *Super Glue v. Avis Rent-A-Car Sys.*, 132 A.D.2d 604, 606 (N.Y. App. Div. 1987)). The same may be said of *Galvin v. First National Monetary Corp.*, which stated that "the doctrine of unconscionability is in the nature of an *affirmative defense*, and does not give rise to a cause of action." 624 F. Supp. 154, 158 (E.D.N.Y. 1985) (emphasis added). Accordingly, plaintiffs' claim of unconscionability will not be dismissed at this stage of the proceeding.

*Piercing the Corporate Veil*

Defendants further assert that, as plaintiffs have not alleged any wrongful conduct by defendant Delta Financial, defendants' motion to dismiss plaintiffs' claims against Delta Financial should be granted. In response, plaintiffs argue that this Court should pierce the corporate veil between Delta Financial and its wholly owned subsidiary Delta Funding, thereby holding Delta Financial liable for Delta Funding's violations.

Plaintiffs seek to pierce the corporate veil between Delta Financial and Delta Funding based on what they assert is Delta Financial's complete domination of Delta Funding. Plaintiffs state that the companies' public filings show that the companies have the same corporate offices, the same phone number,

virtually the same officers and directors, and pay taxes out of consolidated accounts.

Defendants, relying on New York law, argue that, because plaintiffs have failed to allege fraud with respect to Delta Financial and Delta Funding's corporate relationship, this Court should not pierce the corporate veil between the two companies. Under New York law, "it is now clear that ... a plaintiff seeking to pierce the corporate veil must prove *both* complete domination and that the domination was used to commit a fraud with respect to the transaction at issue." *Mars Electronics of N.Y., Inc. v. U.S.A. Direct, Inc.*, 28 F. Supp. 2d 91, 97 (E.D.N.Y. 1998); *American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130 (2d Cir. 1997) (stating that in order to pierce the corporate veil, plaintiff must plead and prove both domination "and that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil").

While both sides look only to New York law on this question, under New York choice of law principles, the law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders. *See Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995). In this case, because defendant Delta Financial is a Delaware corporation, Delaware law determines whether the corporate veil can be pierced. *See id.*

Delaware law permits a court to pierce the corporate veil of a company "where there is fraud or where [the subsidiary]

is in fact a mere instrumentality or alter ego of its owner." *Id.* at 1457 (quoting *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 793 (Del. Ch. 1992)). Under the alter ego theory of liability, no showing of fraud is required. *See id.* While there is no requirement that the plaintiffs show fraud, however, plaintiffs must demonstrate (1) that the parent and the subsidiary "operated as a single economic entity," and (2) that an "overall element of injustice or unfairness ... [is] present." *Id.* (quoting *Harper v. Delaware Valley Broadcasters, Inc.*, 743 F. Supp. 1076, 1085 (D. Del. 1990).

In determining whether a parent and its subsidiary operated as a single economic entity, Delaware district courts have stated that

> an alter ego analysis must start with an examination of factors which reveal how the corporation operates and the particular defendant's relationship to that operation. These factors include whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder.

*United States v. Golden Acres,* Inc., 702 F. Supp. 1097 (D. Del. 1988); *see also Sonnenblick-Goldman Co. v. ITT Corp.*, 912 F. Supp. 85, 89 (S.D.N.Y. 1996) (quoting *Harco Nat'l Ins. Co. v. Green Farms, Inc.*, No. CIV.A. 1331, 1989 WL 110537, at *5 (Del. Ch. Sept. 19, 1989)). No single factor can justify a decision to

disregard the corporate entity, and, therefore, some combination of the elements is required. *Golden Acres*, 702 F. Supp. at 1104.

In this case, the only allegation in the second amended complaint that has any bearing on the issue of piercing the corporate veil states that Delta Funding is the wholly owned subsidiary of Delta Financial and that both companies share the same corporate offices. Plainly, those allegations do not constitute the combination of elements that Delaware law requires to substantiate an alter ego claim. Plaintiffs' proposed third amended complaint adds the additional facts that both entities share the same phone number, same officers, same directors, and same common accounts to pay their tax obligations. This pleading likewise falls short of alleging a combination of elements required under Delaware law to establish prima facie that piercing the corporate veil is appropriate, even considering these allegations in the light most favorable to the plaintiffs. Nor do the complaints allege that injustice or unfairness would exist if the corporate veil were not pierced. *Hallmark Cards, Inc. v. Matthews, Inc. of Del.*, No. CV-99-2129, 1999 WL 1212196, at * 4 & n.4 (E.D. Pa. Dec. 16, 1999); *see also Golden Acres*, 702 F. Supp. at 1104.

As neither the second nor third amended complaint presents sufficient allegations, taken as true and looked at in the light most favorable to the plaintiffs, to support this Court's piercing the corporate veil between Delta Funding and

Delta Financial, the defendants' motion to dismiss the complaint against Delta Financial is granted.

*Joinder of Necessary Parties Under Rule 19*

Defendants also argue that the spouses of plaintiffs Loney and Young must be joined to this action under Rule 19(a) as necessary parties or the claims of Loney and Young should be dismissed. Rule 19 sets forth a two-step inquiry for determining whether an action must be dismissed for failure to join a party. *See Associated Dry Goods Corp. v. Towers Financial Corp.*, 920 F.2d 1121, 1123 (2d Cir. 1990); *see also Jota v. Texaco, Inc.*, 157 F.3d 153, 161-62 (2d Cir. 1998); *Johnson v. The Smithsonian Institution*, 9 F. Supp. 2d 347, 353-54 (S.D.N.Y. 1998). The first prong of the test, found in Rule 19(a), focuses on whether the party should be joined if feasible. Rule 19(a) states in relevant part:

> Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if ... (2) the person claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in the person's absence may ... (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

Fed. R. Civ. P. 19(a). If the Court determines that the party is necessary and, for the reasons denominated in the rule, that

person cannot be joined, then the Court must proceed to the second step, found in Rule 19(b), and "determine whether under the circumstances of the particular case, the court could, in equity and good conscience, proceed in the party's absence." *Global Discount Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 707 (S.D.N.Y. 1997). Accordingly, I will consider each step in turn.

Defendants argue that the language of Rule 19(a)(2)(ii) requires a finding by this Court that the spouses of plaintiffs Loney and Young are necessary parties to this action. As stated above, Rule 19(a)(2)(ii) requires a party to be joined if feasible when disposition in the party's absence would leave existing parties subject to the possibility of "double, multiple, or otherwise inconsistent obligations." This language is further explained in the Advisory Committee Notes ("ACN") to Rule 19, which state that "[w]henever feasible, the persons materially interested in the subject of an action ... should be joined as parties so that they may be heard and a complete disposition made." Fed R. Civ. P. 19(a) Advisory Committee Notes. The ACN additionally advise that "[t]he interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." *Id.*

In this case, there is no dispute that Ms. Loney and Mr. Young are parties to two of the mortgages at issue in the present action. Should wrongful conduct be proven, Mr. Young and

Ms. Loney will have the same rights to recover damages against the defendants as their respective spouses. As stated in *Global Discount*, 960 F. Supp. at 708, "the public's interest in avoiding repeated lawsuits on the same essential subject matter necessitates a finding that [the party] is a necessary party." The policy that requires joinder in such a situation was also clearly enunciated in *Drysdale v. Woerth*, No. CV-98-3090, 1998 WL 966020, at *3 n.6 (E.D. Pa. Nov. 18, 1998) [internal citations and quotations omitted], in which that court stated that the joinder standard found in Rule 19(a) "is designed to protect those who already are parties by requiring the presence of all persons who have an interest in the litigation so that any relief that may be awarded will effectively and completely adjudicate the dispute. In addition it furthers the interest of the public in judicial economy by avoiding repeated lawsuits involving essentially the same subject matter." *See also Troy Towers Tenants Association v. Botti*, 94 F.R.D. 37, 38 (D.N.J. 1981); *Yonofsky v. Wernick*, 362 F. Supp. 1005, 1023 (S.D.N.Y. 1973); *Bixby v. Bixby*, 50 F.R.D. 277, 280 (S.D. Ill. 1970).

Contrary to the defendants' argument, however, before this Court considers whether certain plaintiffs' spouses are indispensable under Rule 19(b), the feasibility of the parties joinder must be considered. "Dismissal under Rule 19(b) is called for only when joinder is not feasible." *Board of Managers of Charles House Condominium v. Infinity Corp.*, 825 F. Supp. 597, 607 (S.D.N.Y. 1993); *see also Dynamic Solutions, Inc. v. Planning*

*& Control, Inc.*, No. CV-86-1886, 1987 WL 6419, at *5 (S.D.N.Y. Feb. 2, 1987) (holding that, despite the party's status as a necessary party, "I need not decide whether Paris is an indispensable party, because it appears his joinder is feasible"); *Kraebel v. New York City Department of Housing Preservation and Development*, No. CV-90-4391, 1994 WL 132239, at *4 (S.D.N.Y. Apr. 14, 1994) (same).

Neither party has provided any information concerning the feasibility of the joinder of the absent parties. It is clear that joinder of plaintiffs Loney's and Young's spouses would not deprive this Court of jurisdiction, as jurisdiction here is based on federal question jurisdiction. "Defendants have made no claim that joinder is not feasible." *Board of Managers*, 825 F. Supp. at 607. Plaintiffs, therefore, are directed to file an amended complaint adding plaintiffs Loney's and Young's spouses as parties, and defendants' motion to dismiss is denied. *See Drysdale*, 1998 WL 9660202 at *3.

The Proposed Third Amended Complaint

The application to file plaintiffs' proposed third amended complaint is governed by the Federal Rules of Civil Procedure. Generally, leave to amend pursuant to Rule 15(a) shall be "freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend will be denied only "when an amendment is offered in bad faith, would cause undue delay or prejudice, or would be futile." *Leonelli v. Pennwalt Corp.*, 887 F.2d 1195 (2d Cir. 1989) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). In

this case, plaintiffs' proposed third amended complaint contains essentially two changes. Plaintiffs seek to include (1) an additional cause of action, an equitable action to redeem, (in addition to a subclass covering this cause of action) and (2) additional allegations concerning Delta Financial's domination of Delta Funding.

In their opposition papers, defendants focus primarily on undue delay and the resulting prejudice that would occur should this Court allow a fourth complaint to be filed in this action asserting, among other things, an entirely new cause of action, an action to redeem. In essence, this argument is based on the fact that defendants claim that they will be prejudiced by the creation of a new subclass at this late date because the return date for plaintiff's motion for class certification is just weeks away.

At this early stage of the litigation, however, where a class has not yet been certified and discovery has not yet been closed, an amended complaint cannot be found to be either untimely or prejudicial. While defendants' main concern appears to be their inability to prepare for plaintiffs' class certification motion, I note that the return date for that motion can be moved to accommodate the parties' consideration of any class certification issues that arise from this new cause of action. Furthermore, a class may be decertified if later events demonstrate that the reasons for granting class certification no longer exist or never existed. *See General Tel. Co. v. Falcon,*

457, U.S. 147, 160 (1982). Defendants' arguments concerning undue delay and prejudice are, therefore, unavailing.

In addition, while defendants also argue that plaintiffs' action to redeem is meritless, "it would be premature to rule on defendant[s'] request and effectively dismiss a complaint" on the record presently before the Court. *Massachusetts Casualty Insurance v. Morgan*, 886 F. Supp. 1002, 1008 (E.D.N.Y. 1995). The Federal Rules of Civil Procedure offer defendant ample opportunity to attack the amended complaint as meritless once it is filed, and thus no prejudice attaches in this respect if leave to amend is granted. Defendants would of course be free to respond to a new pleading as they see fit with either an answer, a Rule 12 motion, or some other device.

The proposed amendments to plaintiffs' complaint setting forth additional allegations concerning the piercing of the corporate veil between Delta Financial and Delta Funding must be denied as futile. Futility exists when the proposed amended complaint fails to state a claim upon which relief could be granted and, thus, would be subject to dismissal. *See Albany Ins. Co. v. Esses*, 831 F.2d 41, 45 (2d Cir. 1987), *overruled on other grounds, United States v. Indelcato*, 865 F.2d 1370 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989).

As already discussed in connection with Delta Funding's motion to dismiss plaintiffs' claims against Delta Financial, *supra*, the facts alleged in plaintiffs' proposed third amended complaint fail to meet Delaware's pleading requirements to pierce

the corporate veil. However, since neither side has yet considered the application of Delaware law to the issue of whether a corporate veil may be pierced, plaintiffs are give leave to file an amended complaint within thirty days of the date of this opinion, attempting to pierce the corporate veil if they can do so in good faith within the strictures of Rule 11 of the Federal Rules of Civil Procedure.

Motion to Intervene

Mary Ward moves pursuant to Rule 23 and Rule 24(b) to intervene as a named plaintiff in this action. While Ward is able to meet the threshold requirements for permissive intervention, other factors require this Court to deny her motion to intervene. While Ward, unlike the other named class members, is unable to state a claim under the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639 ("HOEPA"), because her loan closed on August 18, 1995, before the effective date of HOEPA, she could still participate in the "State Law Sub-Class." That sub-class includes "all individuals ... who entered into mortgage loan transactions after November 18, 1992, wherein Delta engaged in unfair and deceptive trade practices...." Second Amended Complaint at ¶ 221. However, the doctrine of res judicata applies in this case to bar Ward from relitigating the causes of action surrounding her loan before this Court. While Ward argues, borrowing from the plaintiffs' brief, that her redemption action is not barred by res judicata, this Court refuses to exercise jurisdiction over this state law claim, as Ward has no

federal cause of action over which this Court has original jurisdiction.

Delta Funding argues that Ward should be barred from making any argument before this Court concerning the facts surrounding her loan agreement by the doctrines of res judicata and Rooker-Feldman. While, as stated above, this Court is not precluded from considering Ward's claims by Rooker-Feldman, I must separately consider the application of the doctrine of res judicata to Ms. Ward's claim. Defendants argue that any claims concerning the mortgage loan were litigated to a conclusion in the state court foreclosure action and may not now be relitigated in the federal system. While Ward's action is indeed barred by res judicata, it is not barred under the broad rationale put forward by Delta Funding.

As stated in connection with defendants' motion to dismiss the claim of other plaintiffs, *supra*, if the only state court final judgment had been an unopposed foreclosure judgment, New York's permissive counterclaim rule would have preserved Ward's claims to the extent that she did not request relief that would impair the rights and obligations of the prior final judgment. *See Classic Automobiles,* 204 A.D.2d at 209 (citing *Henry Modell,* 68 N.Y.2d at 461). However, unlike plaintiffs Edwards, Robinson, Clinton, and Loney, Ward's actions in state court do act as a bar to Ward's claims on res judicata grounds.

In this case, not only did Ward file counterclaims in her state foreclosure proceeding, she filed an extensive third-

party complaint concerning the very transaction about which she now seeks to intervene. In Ward's counterclaim and third-party complaint before the state courts, she raised all of the arguments that are currently raised in this action.[4/] After summary judgment was entered by the state court in Delta's favor, Ward attempted to intervene in the present action.

Res judicata is meant to "reduce the burden of litigation by precluding multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudication by preventing inconsistent decisions." *Allen v. McCurry*, 449 U.S. at 94. New York's permissive counterclaim rule is unavailing in this case, for, as Ward chose to assert counterclaims, "[h]aving done so, [she] must seek all the relief" to which she claims she is entitled. *Converse, Inc. v. Norwood Venture Corp.*, No. CV-96-3745, 1997 WL 742534, at *5 n.8 (S.D.N.Y. Dec. 1, 1997). Accordingly, the doctrine of res judicata bars Ward from relitigating issues that have already been litigated to a conclusion in prior state court proceedings.

Finally, Ward has adopted by reference the arguments submitted by plaintiffs' counsel with respect to the equity of redemption. Unlike the other named plaintiffs who seek to assert a cause of action to redeem, however, the doctrine of res

---

[4/] Counsel for Ward filed a counterclaim in Delta's state court foreclosure action alleging fraud, unconscionable conduct, duress, and forgery with respect to the mortgage agreement. In addition, Ward filed a third-party complaint in state court asserting four causes of action: fraud, misrepresentation and deception, duress, and unconscionable conduct. Delta filed a motion for summary judgment in that action, which was granted.

judicata bars Ward's federal causes of action. The supplemental jurisdiction that grants this Court jurisdiction over Edwards', Robinson's, Clinton's, and Loney's state law action to redeem is lacking with respect to Ward. As to Ward's redemption action, this Court refuses to exercise supplemental jurisdiction pursuant to 28 U.S.C. 1367(c)(3).[5/]

"It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Following the Second Circuit's decision in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 448 (2d Cir. 1998), the law of this Circuit has required district courts to decline supplemental jurisdiction "only if founded upon an enumerated category of subsection 1367(c)." Subsection 1367(c)(3) "empowers a federal court to dismiss motions seeking supplemental jurisdiction in a case if it has dismissed all claims over which it has original jurisdiction." *Itar-Tass*, 140 F.3d at 448. As all of Ward's federal claims have been dismissed in this case, § 1367(c)(3) is implicated. Taking into consideration the lack of claims remaining in Ward's action over which this Court has original jurisdiction, this Court declines to exercise supplemental jurisdiction over Ward's action to redeem.

---

[5/] 28 U.S.C. § 1367(c)(3) reads: "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if — (3) the district court has dismissed all claims over which it has original jurisdiction...."

## CONCLUSION

For the foregoing reasons, defendants' motion to dismiss in part is granted in part and denied in part. Plaintiffs' motion to file their third amended complaint is granted in part and denied in part as futile. In addition, plaintiffs are given leave to file an amended complaint in accordance with this opinion within 30 days of the date of this order. Further, Mary Ward's motion to intervene is denied.

The within was so ordered by Hon. Charles P. Sifton this 6th day of June, 2000.