IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

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|---|---|---|
| MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff, | ) | |
| -v.- | ) | Civil Action No. 1:08-CV-00062-BEL |
| WELLS FARGO BANK, N.A. and WELLS FARGO FINANCIAL LEASING, INC. Defendants. | ) | |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

Andrew L. Sandler
Benjamin B. Klubes
Michael P. Kelly
Benjamin P. Saul
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000 (Telephone)
(202) 393-5760 (Facsimile)

Attorneys for Wells Fargo Bank, N.A. and
Wells Fargo Financial Leasing, Inc.

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Defendants Wells Fargo Bank, N.A. and Wells Fargo Financial Leasing, Inc. (collectively "Wells Fargo") respectfully submit this Memorandum of Law in support of their Motion to Dismiss the Complaint for Declaratory and Injunctive Relief and Damages filed by the Mayor and City Council of Baltimore ("the City") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

## PRELIMINARY STATEMENT

This is an unprecedented lawsuit in which the City seeks to use a single financial services company as a scapegoat for broad social problems that have plagued Baltimore for decades, including some caused by the City's own actions. The City's Complaint against Wells Fargo alleges that:

- there have been over 33,000 foreclosure filings in Baltimore over the last seven years (Compl. ¶ 17);
- there are currently 16,000 to 30,000 vacant homes in Baltimore (id. at ¶ 18);
- Baltimore's neighborhoods are "highly segregated" between minority and non-minority populations (id. at ¶ 33); and
- many city neighborhoods with high concentration of minority populations suffer from "high vacancy rates, low rates of owner occupancy, substantial housing code violations, and low property values." (Id. at ¶ 65.)

The City's complaint then alleges—in conclusory and illogical fashion—that it was at least 313 foreclosures over seven years by Wells Fargo that caused the City "tens of millions of dollars" in damages. (Id. at ¶¶ 38, 70.)

The City's allegations, however, fail to discuss its own tax lien sales, which have resulted in over 19,000 foreclosure actions being filed against City homeowners during this same seven-year period—particularly harming homeowners in minority neighborhoods that are among the City's poorest. The City places liens on homes for any type of unpaid municipal bill over

$100, and then sells the liens to private investors, knowing the investors will threaten to foreclose on the homes unless the homeowners agree to pay exorbitant fees. As a result of the City's actions, homeowners have lost their homes over unpaid $272 water bills. The City's tax lien sales, moreover, have disproportionately injured minority homeowners in the City's poorest neighborhoods. Over half of the 2006 tax lien sales based only on small unpaid water bills or municipal fees involved properties in census tracts that are more than 80% African-American and over two-thirds involved properties in tracts that are over 60% African-American, but fewer than 11% involved properties in tracts that are 20% or less African-American.

The City's own conduct is directly relevant to several of the reasons why the City's Complaint should be dismissed. First, the Court does not have subject matter jurisdiction over this case. The City lacks standing because:

- The City cannot allege that it has suffered any discrete or palpable injury necessary to bring a case or controversy under Article III. Despite knowing the location of the 313 foreclosures it puts at issue and having all of the tax assessments and other records at its disposal, the City has not made a single specific allegation that it made any expenditure or lost any tax revenue because of any Wells Fargo foreclosure.

- The City cannot allege any injury fairly traceable to the conduct of Wells Fargo. All of the City's injury theories rely on long, speculative causal chains purporting to connect Wells Fargo with the City's alleged injury. The City's injury theories are barred by well-settled Supreme Court precedent that an injury cannot be fairly traceable if it requires the court to speculate on the motives of third parties not before the court. Similarly, the City's causation theories are barred by equally well-settled precedent that a party's self-inflicted injury does not give rise to standing.

Second, even if the Court had jurisdiction, the City cannot state a claim under Rule 12(b)(6) because:

- The Fair Housing Act ("FHA") does not permit disparate impact claims as a matter of law. The Supreme Court's decision in Smith v. City of Jackson, 544 U.S. 228 (2005) makes clear that Congress only authorizes disparate impact liability when it uses certain statutory language that is absent from the FHA.

- Even if the FHA did permit disparate impact claims, the City fails to offer factual allegations that plausibly support its disparate impact claims. In particular, the City fails to plead facts that plausibly show an actual disparate impact on a protected group or demonstrate a causal connection between the specific challenged practices or policies and the alleged disparate impact. The City never compares "similarly-situated" individuals, ignores the role of borrower creditworthiness in loan underwriting and pricing decisions, and offers only unattributed and fatally flawed statistics in its effort to show a disparate impact. The injuries the City alleges, moreover, are far too remote to state a claim, particularly in light of the City's own conduct.

Because the Court does not have jurisdiction over this action and, alternatively, because the City fails to state a claim upon which relief can be granted, the Court should dismiss the City's claims.

## BACKGROUND[1]

### I. A MYRIAD OF SOCIAL PROBLEMS HAVE PLAGUED THE CITY OF BALTIMORE FOR DECADES.

From 1960 through 2000, the City of Baltimore lost over thirty percent of its population. (Ex. A, Editorial, Sprawl, BALT. SUN, Dec. 4, 2002, at 18A.) The City is estimated to have lost another 19,788 citizens from 2000 through 2006. (Ex. B, U.S. Census Estimate for Maryland.) A wide variety of reasons have been offered for why the population of Baltimore has shrunk so dramatically, including crime, schools, urban decay, an exodus to the suburbs, the City's high property tax rates, and the economy. (See, e.g., Ex. C, Jamie Smith Hopkins, Gap Gives City Its Chance, BALT. SUN, Jul. 25, 2006, at 1A ("One of the most violent cities in the nation, [Baltimore] has a chronically underperforming school system, rampant drug addiction and the highest property tax rate in the state.").)

As its population has dwindled, Baltimore has struggled with a large number of vacant or abandoned homes. (Ex. D, Editorial, Still a Blight, BALT. SUN, Sept. 10, 2007, at 6A

[1] This factual background is based on material that can be considered on a Fed. R. Civ. P. 12(b)(1) motion or by judicial notice on a Rule 12(b)(6) motion to dismiss. See Logan v. Denny's, Inc., 259 F.3d 558, 578 & n.9 (6th Cir. 2001) (taking judicial notice of facts stated in newspaper articles); Peters v. Del. River Port Auth., 16 F.3d 1346, 1356 n.12 (3d Cir. 1994) (taking judicial notice of newspaper accounts concerning political rivalries within the Delaware River Port Authority); Fed R. Evid. 201.

("Vacant houses remain one of the city's stubborn, intractable problems . . . .".) The estimated number of vacant homes has stayed relatively constant over the years. (See, e.g., Ex. E, M. Dion Thompson, Weary Homeowners Yearn for Action on City Cleanup, BALT. SUN, Aug. 23, 2000, at 1A; Ex. F, Gerald Shields, City Housing Has a Tough Set of Problems, BALT. SUN, Feb. 28, 2000, at 1B.) The City now alleges that, in 2008, there are between 16,000 and 30,000 abandoned homes in the City of Baltimore. (Compl. ¶ 18.)

## II. THE CITY'S TAX LIEN SALES HAVE A DISPROPORTIONATE IMPACT ON MINORITY HOMEOWNERS.

Meanwhile, throughout this decade, the City has enriched itself through tax lien sales—a process that disproportionately forces African-American homeowners into foreclosures—often because of small unpaid water bills. (See, e.g., Ex. G, Fred Schulte & June Arney, Small Unpaid Bills Put Residents At Risk, BALT. SUN, Mar. 25, 2007, at 1A (video footage associated with article available at http://www.baltimoresun.com/business/realestate/bal-te.bz.waterbills25mar25,0,6802318.story?coll=bal-home-utility).) Specifically, as the BALTIMORE SUN has chronicled at length, the City places liens on properties whenever the homeowner does not pay property taxes, water bills, or other municipal fees. (Id.) The City can place liens on properties for any bill over $100. (Id.) Every year, the City sells its tax liens to private investors, knowing that those investors will then approach the homeowners and demand exorbitant fees from the homeowners in exchange for agreeing not to foreclose on their homes. (Id. (describing how one homeowner lost two properties in Berea because an unpaid water bill of $272.22 had ballooned into a demand by the investor of $6,414.69).)

The homeowners are placed in an untenable situation. Already in a dire financial strait in which they cannot pay a water or other municipal bill, they either have to pay thousands of dollars to satisfy the redemption demand by the investors or risk losing their homes. (See, e.g.,

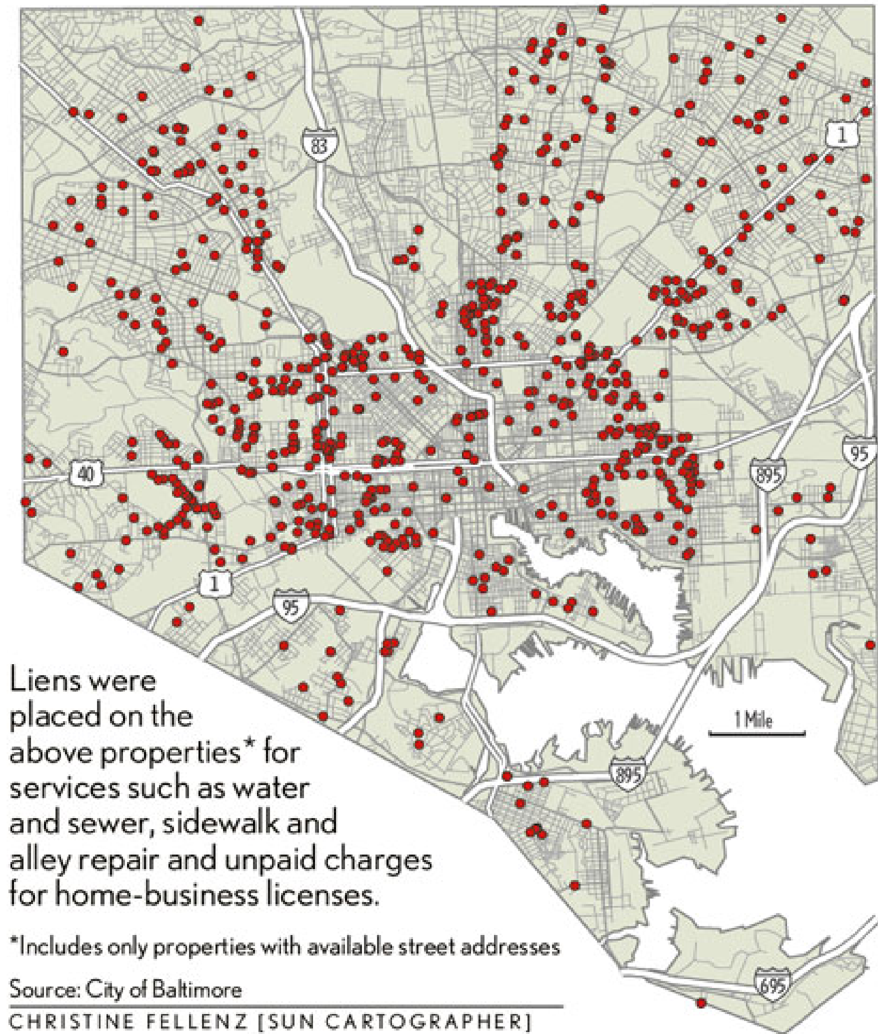
Ex. H, Jean Marbella, As Auctions on Homes Go Up, So Do Concerns, BALT. SUN, Apr. 13, 2007, at 1B (describing testimony of a woman who had to pay $6,000 to prevent her home's foreclosure by a private investor with a lien arising from $1,000 water bill).) According to the analysis by the BALTIMORE SUN, over 400 Baltimore homes were foreclosed upon from 2004 to 2007 simply due to liens on small unpaid water bills or other municipal fees. (Ex. G.)

The City's tax lien sales, however, have encompassed far more than just unpaid water bills. In fact, the City sold 7,435 liens in 2006, and 7,699 liens in 2007, which stemmed from unpaid real estate taxes, water bills, and municipal bills. (Ex. I, Jen DeGregorio, Baltimore City Taxes Become Hot Property, DAILY REC. (BALT.), May 30, 2006, available at 2006 WLNR 9395077, at *1; Ex. J, Tax Sale Proceeds Amid Fairness Concerns, BALT. SUN, May 16, 2007, at B2.) As a result of these sales, Baltimore City Circuit Court has been flooded for years with thousands upon thousands of foreclosure petitions from these tax sales. (Ex. K, CIR. CT. FOR BALT. CITY, TERM OF CT. ANN. REP. 5 (2005), at 5 (new cases involving "[t]ax sale foreclosures totaled four thousand, two hundred sixty-one" in fiscal year 2005); Ex. G (tax sale foreclosures comprised 4,820 cases on the court's docket in March 2007 and occupied at least one judge full time).)

City officials have defended their tax lien sales as having "some unsavory dimensions" but as "an effective way of compelling people to pay the city." (Ex. G (quoting Stanley J. Milesky, chief of the City's Bureau of Treasury Management).) The City's Department of Housing and Community Development has recommended that the City stop its tax lien sales for abandoned homes by 2010 because third party investors are "speculators [who] have financial incentives to displace homeowners and destabilize neighborhoods." (Ex. L, DEP'T OF HOUS. & CMTY. DEV., HOUS. AUTH. OF BALT. CITY, A PLAN TO CREATE THE BALTIMORE CITY

LAND BANK (2007).) State legislators, moreover, who have been sharply critical of the City's tax lien sales (publicly describing the practice as "absolutely obscene" and "dead wrong"), have sought—in the face of City opposition—to place a moratorium on them and recently have introduced various bills to address concerns about the sales. (Ex. M, Laura Smitherman and June Arney, Lawmakers Ponder Halting Foreclosures Over Water Bills, BALT. SUN, Feb. 28, 2008, at 16B; Ex. N, June Arney, Bill Would Protect Houses From Tax Sales, BALT. SUN, Mar. 7, 2008, at 6B.) Nonetheless, despite the controversy and criticism, the City has made a calculated decision to continue the practice and plans to have another tax lien sale concerning potentially as many as 20,000 properties beginning May 12. (Ex. O, Mayor & City Council of Balt., Notice of Tax Lien Sale, BALT. SUN, Mar. 19, 2008, at 1S (list of properties that spans 33 newsprint pages of fine-print).) See also City of Baltimore, Tax Certificate Auction Website, https://www.bidbaltimore.com/main (last visited on March 19, 2008) ("The Tax Sale 2008 Properties Listing includes liens on properties with delinquent real estate taxes, water bills, and other municipal liens.").

In investigating this issue, on March 27, 2006, the BALTIMORE SUN charted where these liens were placed for just one year (2006) and just for unpaid water or other municipal bills. That map is reproduced here.




A review of this map demonstrates that even this small fraction of lien sales had a disproportionate impact on minority neighborhoods. Using the addresses compiled by the BALTIMORE SUN and U.S. Census Tract data, over half (approximately 54.69%) of the City's tax lien sales in 2006 involved properties in census tracts that are more than 80% African-American and over two-thirds (approximately 67.90%) involved properties in tracts that are over 60%

African-American, but only 10.96% involved properties in tracts that are 20% or less African-American. In this very lawsuit, the City has alleged that these types of statistics—but with much smaller numbers of foreclosures—show a disproportionate, discriminatory impact on minority homeowners. (See Compl. ¶ 37.)

## III. THE CITY'S PROPERTY TAX REVENUE INCREASES EVERY YEAR.

Although the destructive effects of the City's tax lien sales have disproportionately harmed minority homeowners least able to afford it, the City of Baltimore's property tax revenue has reached an all-time high, increasing in each fiscal year from 2000 through 2007. (Ex. P, CITY OF BALT., REPORT OF BLUE RIBBON COMMITTEE ON TAXES & FEES (2007), at 19 (describing how property tax revenue has increased from $480.5 million in FY 2000 to $585.5 million in FY 2007).) Moreover, the Maryland State Department of Assessments & Taxation, which sets assessments on all Maryland real estate on a three-year rotating basis, has consistently increased assessments of Baltimore real estate; the State raised the assessments by an average of 25% in the City of Baltimore in 2008, 19.5% in 2007, 15.2% in 2006, and 7.2% in 2005.[2] Pursuant to the Homestead Tax Credit statute, the City has capped the amount up to which residential property assessments can rise in any year at 4%. (Exs. Q-T.) Therefore, even as its property tax revenues rise, the City has not been able to recover the full amount that the assessments would otherwise allow.

[2] EX. Q, MD. DEP'T OF ASSESSMENTS & TAXATION, AVERAGE ANNUAL REASSESSMENTS AND COUNTY-ESTABLISHED ASSESSMENT CAPS (2005); EX. R, MD. DEP'T OF ASSESSMENTS & TAXATION, AVERAGE ANNUAL REASSESSMENTS AND COUNTY-ESTABLISHED ASSESSMENT CAPS (2006); EX. S, MD. DEP'T OF ASSESSMENTS & TAXATION, AVERAGE ANNUAL REASSESSMENTS AND COUNTY-ESTABLISHED ASSESSMENT CAPS (2007); EX. T, MD. DEP'T OF ASSESSMENTS & TAXATION, AVERAGE ANNUAL REASSESSMENTS AND COUNTY-ESTABLISHED ASSESSMENT CAPS (2008).

## IV. THE CITY ATTEMPTS TO BLAME WELLS FARGO.

As the City states in its Complaint, Wells Fargo makes residential loans in both minority and non-minority Baltimore neighborhoods. Even today, Live Baltimore, a non-profit organization funded by the City and designed to entice citizens to move to Baltimore, lists Wells Fargo as one of twelve preferred lenders "that know Baltimore City, and offer competitive products and quality service." (Ex. U, Live Baltimore, Preferred Mortgage Lenders.) The Board of Directors of Live Baltimore includes City Council President Stephanie Rawlings-Blake and, in the past, has included Mayor Shelia Dixon. (Ex. V, Live Baltimore, Board of Directors 2008.)

On January 8, 2008, the City sued Wells Fargo, alleging that the City has suffered "tens of millions of dollars" in damages as a result of a depressed real estate market and attendant consequences that it alleges were caused by Wells Fargo's lending practices. (Docket Entry No. 1; Compl. ¶ 70.) In particular, the City alleges that Wells Fargo has foreclosed upon at least 313 homes in the last seven years during a time period in which there were 33,000 foreclosure filings in the City. (Compl. ¶¶ 17, 38.) The City speculates that the number of Wells Fargo foreclosures "is probably much higher because in many cases the foreclosure records analyzed by Plaintiff do not indicate the original lender." (Compl. ¶ 38.) The City alleges that Wells Fargo loans are particularly injurious because "they are concentrated in distressed and transitional neighborhoods" that "have high vacancy rates, low rates of owner occupancy, substantial housing code violations, and low property values." (Id. at ¶ 65.) Although the City purports to rely on a series of studies in other cities about potential costs of foreclosures, the City never makes any type of concrete allegation concerning the injury it claims to have suffered in this case.

## ARGUMENT

### I. THE CITY'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

"The standing doctrine is an indispensable expression of the Constitution's limitation on Article III courts' power to adjudicate 'cases and controversies.'" Frank Krasner Enters., Ltd. v. Montgomery County, Md., 401 F.3d 230, 234 (4th Cir. 2005). "The burden of establishing standing to sue lies squarely on the party claiming subject-matter jurisdiction." Id. To satisfy the standing requirement of the case-or-controversy limitation on judicial authority found in Article III, Section 2 of the Constitution, the party invoking federal court jurisdiction must show that (1) it has suffered an injury in fact, (2) the injury is fairly traceable to the defendants' actions, and (3) it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 154 (4th Cir. 2000) (en banc) (citations omitted). Constitutional standing concepts are "not susceptible of precise definition" and "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise." Allen v. Wright, 468 U.S. 737, 751 (1984).[3]

On a Rule 12(b)(1) motion, there are two ways that a defendant can challenge the existence of subject matter jurisdiction—by attacking the facial sufficiency of the complaint or by attacking the factual sufficiency of the complaint. See, e.g., Star Scientific, Inc. v. R.J. Reynolds Tobacco Co., 174 F. Supp. 2d 388, 391 (D. Md. 2001); 5B CHARLES A. WRIGHT &

[3] Ordinarily, a court would also have to assess "prudential" considerations of standing. See Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99-100 (1979) (describing various components of prudential standing). However, by extending the right to sue under the FHA to "any aggrieved person," Congress has extended standing as far as the Constitution will permit, and courts lack the authority to dismiss FHA lawsuits based on prudential considerations. Id. at 108-09; see also Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) (same).

ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1350 & n.43 (collecting cases). When a defendant attacks the facial sufficiency of the complaint, the court should dismiss the complaint if the plaintiff does not "assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." Stalley v. Catholic Health Initiatives, 509 F.3d 517, 521 (8th Cir. 2007). When a party attacks the factual sufficiency of the complaint, "a court must apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists." AtlantiGas Corp. v. Columbia Gas Transmission Corp., 210 F.App'x 244, 247 (4th Cir. 2006).

A district court "has considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 449 (D.C. Cir. 1990) (citation omitted); see also Warth v. Seldin, 422 U.S. 490, 501-02 (1975) (trial court has the power to require plaintiff to submit affidavits in support of standing). "The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993) (citation omitted); see also Gladstone Realtors, 441 U.S. at 99-100 (considering evidence outside of the pleadings in determining standing); White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459 (4th Cir. 2005).

In this case, the City essentially tries to allege three basic types of injury: the (1) Property Tax Theory, (2) Crime Theory, and (3) Rehabilitation Theory. All rely on long, speculative and attenuated theories of causation that are legally insufficient:

(1) (i) the Wells Fargo loan alone (and not some other factor such as illness, divorce, the loss of a job, the City's practices with respect to the sale of

tax liens or the City's property tax rate, which is twice the rate of nearly every other neighboring Maryland city or county) caused the homeowner to default; (ii) there was no buyer willing to purchase the foreclosed-upon home at any cost, leaving the house abandoned; (iii) this caused potential real estate buyers to become less interested in the surrounding properties (and not because of any other reason such as a weakening economy or a slumping real estate market or the suitability of those other properties); (iv) this in turn caused "[a] significant decline in the value of nearby homes" (Compl. ¶ 66(a)) (and, again, not because of some other reason such as a weakening economy, slumping real estate market, or disrepair of those other properties); (v) this, as years passed, caused the Maryland State Department of Assessments & Taxation to lower property assessments (and not for any other reason); (vi) which led to "a decrease in property tax revenue" actually collected in subsequent years for the City (id. at ¶ 66(a)) (hereafter, "the City's Property Tax Theory");

(2) (i) the Wells Fargo loan alone (and not some other factor, including, for example, those identified above) caused the buyer to default; (ii) there was no buyer willing to purchase the foreclosed-upon home at any cost, leaving the house abandoned—(iii) which led to an increase in the number of vacant homes—(iv) which prompted gangs or other criminals to decide to increase their level of criminal activity or to initiate new criminal activity because they now had an additional few hundred homes out of 15,000—30,000 abandoned homes in the City in which to operate (id. at ¶ 66(c))—(v) which led the City to increase "police and fire protection" beyond what the City otherwise would have done (id. at ¶ 66(d)) (hereafter, "the City's Crime Theory"); and

(3) (i) the Wells Fargo loan alone (and not some other factor, including, for example, those identified above) caused the buyer to default; (ii) the foreclosure filing actually resulted in foreclosure on the home; (iii) there was no buyer willing to purchase the foreclosed-upon home at any cost—(iv) which led to an increase in the number of vacant homes—(v) which led to the risk of the home being damaged by something or someone—(vi) which led the City to have "[i]ncreased expenditures to secure abandoned and vacant homes" and make "[a]dditional expenditures to acquire and rehabilitate vacant properties" (id. at ¶ 66(e)-(f))—(vii) which led to "[a]dditional expenditures for administrative, legal, and social services." (Id. at ¶ 66(g)) (hereafter, "the City's Rehabilitation Theory").

Whether viewed on the face of the complaint or in the context of the summary judgment standard, none of these causal chains come close to satisfying any of the elements necessary for constitutional standing.

**A. The City Fails to Allege an Injury In Fact.**

In order to have standing, a plaintiff's injury must be "distinct and palpable" and not "abstract" or "conjectural" or "hypothetical." Allen, 468 U.S. at 751. "Such scrutiny is necessary to filter the truly afflicted from the abstractly distressed." Gaston Copper Recycling Corp., 204 F.3d at 154.

As an initial matter, the City fails to make any non-speculative factual allegation that it has actually suffered injury from any of the 313 homes allegedly foreclosed upon by Wells Fargo over the last seven years. Although the City has within its possession (i) the location of the 313 properties, (ii) records of the property assessments surrounding these 313 properties, (iii) police and fire records concerning any visits to those 313 properties, and (iv) records of any expenses the City incurred in rehabilitating any of the 313 properties, the City did not make any non-conclusory allegation that it actually incurred *any* loss of revenue or made *any* expenditure with respect to these 313 properties. The City's inability to allege any concrete harm requires the dismissal of its Complaint. See, e.g., Warth, 422 U.S. at 508 (holding that "a plaintiff who seeks to challenge exclusionary zoning practices must allege *specific, concrete facts* demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention") (emphasis added).

Even if it had made some non-conclusory allegation, however, the City could not allege any injury sufficient for Article III purposes. Courts have found similar claims of vague economic harm to be far too attenuated, speculative, and conjectural to constitute an injury under Article III. For instance, in AtlantiGas Corp., the Fourth Circuit dismissed a claim based on standing when a company, AtlantiGas Corp., alleged that it had a contractual agreement giving it a profit-sharing interest with a natural gas wholesaler that was allegedly damaged by an illegal

scheme of its third party competitors. 210 F.App'x at 251. In rejecting AtlantiGas's argument that it had standing to sue the third party competitors, the Fourth Circuit concluded that the alleged damage was "too conjectural and abstract, not distinct and palpable" because a district court would "be forced to guess what diminution in revenues, if any, is attributable to [the natural gas wholesaler] and what diminution, if any, is attributable to [the third party competitors to the wholesalers]." Id.

Just as in AtlantiGas, the City's causal chain puts the Court in the position of having to "guess what diminution in [City] revenues, if any," is supposedly attributable to Wells Fargo and what diminution is attributable to other sources, including the City's own actions. When the City itself alleges that more than 33,000 Baltimore properties have been subjected to foreclosure filings from 2000 through 2007 (Compl. ¶ 1) and that there are currently 15,000 - 30,000 abandoned properties within Baltimore (id. at ¶ 18), it is pure speculation to argue that 313 foreclosures attributable to Wells Fargo over seven years could have caused any discrete and palpable injury to the City. Likewise, it is pure speculation to argue that Wells Fargo caused the City to make expenditures of money in fire or police costs or "rehabilitation costs" that otherwise it would not have made, particularly given the enormous number of foreclosures by others, including the over 19,000 stemming from the City's own acts.

Indeed, the City's claim of injury is more speculative because the gravamen of the City's complaint is that Baltimore citizens received loans they were not able to repay. (See, e.g., id. at ¶¶ 43-44.) Even if this were true, which Wells Fargo denies, the City essentially alleges that these loans caused the real estate market to have too many prospective buyers, that the market demand for these properties in Baltimore was higher than it should have been, that property tax assessments rose higher than they should have risen, and that the City received more

property tax revenue than it should have received. Similarly, given the reasonable inferences drawn from the City's Complaint, there were buyers for houses that might otherwise have been vacant and otherwise would have imposed costs on the City. See DaimlerChrysler v. Cuno, 547 U.S. 332, 344 (2006) (finding taxpayer claim that tax credit to manufacturer depleted the state treasury to be conjectural in part because "[t]he very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues.") (emphasis in original).

In any event, the City's allegations of injury are conclusively refuted by the City's own property records, which are available online and should have been reviewed as part of any reasonable pre-complaint investigation. Property assessments in the City of Baltimore have only increased since 2005. (Exs. Q-T.) Most recently, in 2008, the City of Baltimore's real estate assessments *increased* by an average of 25%. (Ex. T.) Indeed, the City's proposed budget for the period July 1, 2008 through June 30, 2009 reflects property tax revenue growth of nearly 10%, or roughly $52 million, from 2007—due largely to "higher assessments." (Ex. W, John Fritze, Dixon Budget Avoids Major Cuts, BALT. SUN, Mar. 19, 2008, available at http://www.baltimoresun.com/news/local/baltimore_city/bal-budget0319,0,6218272,print.story.)

Because the City does not and cannot make any concrete allegation that it suffered a "discrete and palpable injury," the City does not have standing to bring its case, and the Court should dismiss the City's action for lack of subject matter jurisdiction.

**B. The City Fails to Allege an Injury Traceable to Wells Fargo's Conduct.**

Even if the City could allege an injury, it cannot allege an injury traceable to conduct of Wells Fargo. First, the City cannot allege traceability because all of its injury theories depend on the unfettered discretion of independent parties not before the Court. Second, the City cannot allege traceability because the City's alleged injuries are self-inflicted.

**1. The City Cannot Allege Traceability Based on the Actions of Independent Third Parties.**

"The traceability requirement ensures that it is likely the plaintiff's injury was caused by the challenged conduct of the defendant, and not by the independent actions of third parties not before the court." Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4th Cir. 2002). Therefore, a party has no standing to bring an action when "[t]he existence of one or more of the essential elements of standing depends on the *unfettered choices made by independent actors not before the courts* and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." Frank Krasner Enters., Ltd., 401 F.3d at 235 (internal quotations and citations omitted) (emphasis in original); see also Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 44 (1976) ("[U]nadorned speculation will not suffice to invoke the federal judicial power.").

Allen, 468 U.S. at 757, is the seminal Supreme Court case addressing this traceability requirement. In Allen, parents of African-American public school children sued the Internal Revenue Service, alleging that the I.R.S. failed to enforce its policy of denying tax-exempt status to racially discriminatory schools and that the I.R.S.'s failures harmed the parents directly and interfered with the ability of their children to receive an education in desegregated public schools. Id. at 739-40. The parents' complaint was not vague; they specifically identified

17 racially discriminatory schools or school systems receiving tax-exempt status from the I.R.S. Id.

In ruling that the parents and students had no standing as a matter of law, however, the Supreme Court concluded that "[t]he line of causation between that conduct [i.e., the granting of tax exempt status by the I.R.S.] and desegregation of respondents' schools is attenuated at best." Id. at 757. The Supreme Court observed that: (1) "it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies[;]" (2) "[i]t is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any such changes in educational or financial policy made by the private school once it was threatened with the loss of tax-exempt status[;]" and (3) "[i]t is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools." Id. at 758.

Courts have consistently applied the Allen analysis, rejecting causation theories alleging that "the actions of an independent third party, who was not a party to the lawsuit, stood between the plaintiff and the challenged actions." Frank Krasner Enters., Ltd., 401 F.3d at 235; see also Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1290 (D.C. Cir. 2007) (finding that tire manufacturers had no standing to challenge government regulation of automakers under the theory that "NHTSA's alleged under-regulation of the automakers will lead to more accidents than otherwise would occur, and the drivers and passengers injured in those accidents will bring warranty claims and suits not just against the automakers but also against the tire industry petitioners").

The City's causation theories rest on the same type of speculative theories about the conduct of third parties that the Supreme Court in Allen and numerous other federal courts have rejected as a basis for standing. For instance, the City's Property Tax Theory relies on a set of entirely speculative assumptions concerning the actions of prospective real estate buyers, including the City's speculation that this collective group of individuals refused to make or lowered offers to buy surrounding properties because they would have been concerned about a Wells Fargo foreclosure in the area—and not because of concerns about a weakening economy, a slumping real estate market, the other 33,000 foreclosure filings in the City since 2000 (including City-instituted foreclosures, the over 19,000 foreclosures stemming from the City's tax lien sales, and numerous other third-party-initiated foreclosures), other neighborhood problems including crime and schools, or the suitability of the other neighborhood properties that the buyers actually contemplated purchasing. It also relies on speculative theories concerning the effect of foreclosures on the State's real estate assessments—which have risen in Baltimore every year since 2000.

The Court can take judicial notice that "in the volatile, modern real estate market, substantial price variations occur with weekly or monthly regularity." Ryan v. Homecomings Fin. Network, 253 F.3d 778, 783 (4th Cir. 2001); see also Shelia Dixon, Balt. City Mayor, State of the City Address, Feb. 4, 2008 (stating that "[r]eal estate is a highly dynamic market"), http://www.sheiladixon.com/node/907. Even Baltimore City officials have consistently warned that the housing market would decline and have stated that the City should plan for a drop in revenue. (See, e.g., Ex. X, Jen DeGregorio, Baltimore City Plans for Real Estate to Slow Ahead, DAILY REC. (BALT.), Mar. 24, 2005, available at 2005 WLNR 4774467, at *1 (quoting Raymond Wacks, Budget Director, City Department of Finance, as saying in 2005 that "[b]ecause there are

a lot of uncertainties out there, especially in real estate, we don't want to be in the position where have to cut back on services halfway through the year because we do not have the funds.").) Just as in Allen, the City's Property Tax Theory cannot allege any traceable injury because it relies on a speculative—and, as shown above, untrue—causal chain that supposedly travels from Wells Fargo's loans to foreclosures, to abandoned homes, to the opinions of prospective real estate purchasers, to the assessment practices of the State of Maryland's Department of Assessments & Taxation, and, finally, to the City's collected revenue.

In the same way, the City's Crime Theory cannot allege traceability because it depends on the independent actions of third party gangs and other criminals. See, e.g., Alston v. Advanced Brands & Importing Co., 494 F.3d 562, 565 (6th Cir. 2007), cert. dismissed, 128 S. Ct. 704 (2007) (holding that parents had no standing to bring lawsuit against manufacturers of alcohol based on the advertising of alcohol to children because "the causal connection between the defendants' advertising and the plaintiffs' alleged injuries is broken by the intervening criminal acts of the third-party sellers and the third-party, underage purchasers."). In emphatically rejecting a standing argument asserting that a defendant's actions invited third parties to break the law, the Sixth Circuit observed, "[a] crime is an independent action" and "[i]ndeed, our entire concept of criminal punishment is predicated on the idea that individuals are accountable for their own actions." Id. Courts, in numerous contexts, moreover, have prohibited municipalities from showing an injury for expenditures on services such as police and fire services because such services are routine governmental functions funded through taxes. See, e.g., Baker v. Smith & Wesson, No. Civ.A. 99C-09-283-FS, 2002 WL31741522, at *4-7 (Del. Super. Ct. Nov. 27, 2007); City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1143-44 (Ill. 2004).

Finally, even if the City had alleged that it made some expenditure to rehabilitate a property foreclosed upon by Wells Fargo (which it did not), the City's Rehabilitation Theory rests on the speculative notion that third parties defaulted on the mortgage loan because of its terms and not because of other extenuating circumstances such as a divorce, illness, or an exorbitant demand from one of the City's tax lien purchasers. (See, e.g., Ex. H, at 1B (describing how a woman's separation from her husband caused her to fall behind on her mortgage).) The City's Rehabilitation Theory also presumes that there was damage done to the property that needed to be rehabilitated—which again depends on the actions of third parties. Because the City's causation theories rely wholly on the actions of third parties, the City cannot allege standing, and the Court does not have subject matter jurisdiction over this case.

### 2. The City Cannot Allege Traceability Because Its Injury Was Self-Inflicted.

Even apart from the involvement of third parties, the City cannot allege traceability under any of its causation theories because the City's alleged injuries were self-inflicted. See Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976) (states had no standing to complain about self-inflicted injury); Public Citizen, Inc., 489 F.3d at 1290 (finding no standing where the claim has "at least some of the hallmarks of a 'self-inflicted' injury not caused by" the defendant's actions).

Over the last two years alone, the City has unleashed tax lien purchasers on up to 15,000 Baltimore homes, many in Baltimore's poorest neighborhoods. By its own admission, the City's

> [e]xisting policies relating to tax liens emphasize revenue collection over neighborhood development. Tax lien purchasers are primarily interested in the liquidated value of abandoned properties and not in the development of the neighborhood. Older residents who miss a single tax payment fall prey to private tax sale purchasers whose aim is to collect high fees and interest.

(Ex. L at 5.) The City further admitted that the third party investors are "speculators [who] have financial incentives to displace homeowners and destabilize neighborhoods." Id. Yet, despite this knowledge, the City has continued to sell these tax liens, even when 80% of these liens involve homes that are occupied. (See, e.g., Ex. G.) Indeed, the City's next tax lien sale, impacting potentially as many as 20,000 properties, will begin on May 12. (Ex. O.)

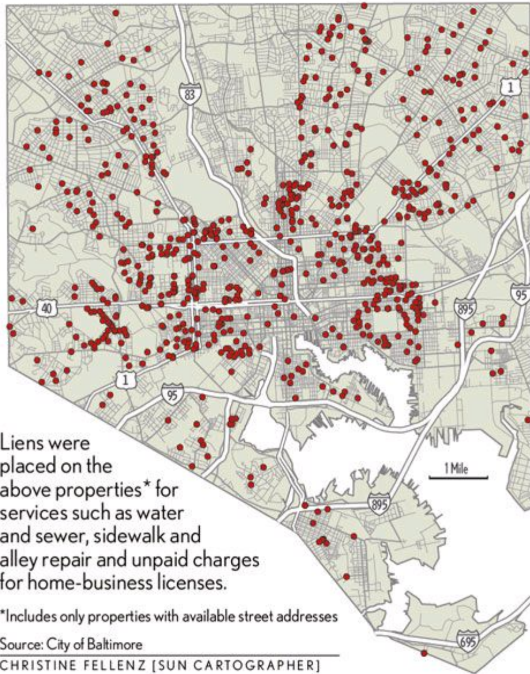
The relative impact of the City's tax lien sales can be seen by comparing the chart compiled by the BALTIMORE SUN (*left*) showing a fragment of the City's tax lien sales for one year (i.e., the tax lien sales for small unpaid water bills and other municipal fees in 2006 alone) with the chart alleged by the City (*right*) purporting to show foreclosures involving Wells Fargo over seven years.[4]

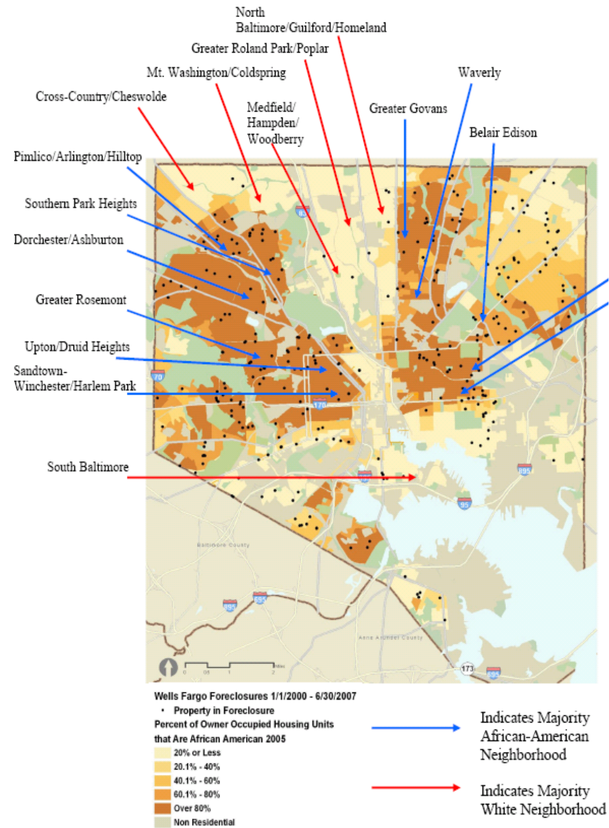
[4] Full scale copies of these maps have been included at Exhibit Y.

**One Year** | **Seven Years**

SMALL DEBTS, BIG CONSEQUENCES

Unpaid water bills or other municipal fees of $500 or less resulted in liens being attached to more than 750 properties last year. The city sold the rights to collect the debts or foreclose on the homes, even though none involved overdue property taxes.




The magnitude of the City's total tax lien sales—and the disproportionate injuries it has inflicted on the City's minority neighborhoods—dwarf any injury the City believes was caused by Wells Fargo. The City alleges that Wells Fargo has foreclosed on <u>313</u> homes over the last <u>seven</u> years. Tax lien purchasers filed 4,261 <u>new</u> foreclosure cases in fiscal year 2005 alone. (Ex. K.) From 2000 through 2007, tax lien purchasers filed over <u>19,000</u> foreclosure cases—nearly 58% of all foreclosures initiated in Baltimore during that period. The City alleges that "[c]oncentrated vacancies driven by foreclosures cause neighborhoods, especially ones already struggling, to decline rapidly." (Compl. ¶ 18.) To the extent that the City believes that it has been injured by police, fire, and rehabilitation costs as a consequence of foreclosures, the injury

has been self-inflicted by the City. Under well-settled case law, the City cannot trace its injury to Wells Fargo and, therefore, lacks standing to bring this action.

Finally, if the City's FHA theory of liability is viable, the claim should be directed against the City. Specifically, the City's tax lien practices have harmed its residents and destabilized its minority neighborhoods by both depressing property values in those neighborhoods and making it more likely that minority borrowers will default on their mortgages. Foreclosures caused by the City's tax lien practices are "particularly injurious because they are concentrated in distressed and transitional neighborhoods," as reflected in the BALTIMORE SUN map, and are characterized by "high vacancy rates, low rates of owner occupancy, substantial housing code violations, and low property values." (See id. at ¶ 65.) The City openly continues its tax lien practices—without regard to their self-destructive and devastating consequences—and is preparing to hold its next tax lien sale of potentially as many as 20,000 properties on May 12. (Ex. O.)

## II. THE FHA DOES NOT PERMIT DISPARATE IMPACT CLAIMS.

Even if the Court has jurisdiction over the Complaint (and Wells Fargo strongly asserts it does not), the City cannot state a claim under Rule 12(b)(6) because, as the Supreme Court's recent decision in City of Jackson, 544 U.S. at 228, demonstrates, the FHA does not recognize the disparate impact liability invoked by the Complaint. The City's claim, therefore, must be dismissed.

The City of Jackson opinion holds that the text of an anti-discrimination statute, not a broad reading of its purpose, determines whether it permits disparate impact claims. In City of Jackson, the Court considered whether the Age Discrimination in Employment Act ("ADEA") permits disparate impact claims. Noting the similarity between the ADEA and Title VII, the Court reviewed its Title VII jurisprudence for guidance—and, in the process, clarified

and emphasized that Title VII disparate impact jurisprudence is firmly rooted in the statutory text. Justice Stevens' plurality opinion clarifies that the Court's holding in Griggs v. Duke Power Co., 401 U.S. 424 (1971) (construing Title VII to permit disparate impact liability), was based on the "interpretation of § 703(a)(2) of Title VII." City of Jackson, 544 U.S. at 234. The Court acknowledged that its opinion in Griggs relied in part on the purposes of Title VII, but explained it has "subsequently noted" that its Title VII disparate impact jurisprudence derives from the text of § 703(a)(2) of Title VII, not an analysis of the Act's overall purpose. Id. at 235. By clarifying that its holding in Griggs was rooted in the text of Title VII rather than being implied by the statute's overall purposes—and by basing its disparate impact analysis under the ADEA on the text of that statute—City of Jackson reaffirms the primacy of the statutory text in construing anti-discrimination statutes.

The Court's analysis in City of Jackson shows that the text of the FHA does not permit disparate impact claims. The Court explained that disparate impact claims under Title VII are permitted by the "effects" language of § 703(a)(2). Section 703(a) provides:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (emphasis added).[5] The Court held that the text of ADEA § 4(a)(2)—which mirrors Title VII § 703(a)(2) and prohibits actions that "otherwise adversely affect" the employee's status—empowered it to conclude that the ADEA permits disparate impact claims. City of Jackson, 544 U.S. at 235-38. Central to its reasoning was that "the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." Id. at 236 (emphasis in original).

In addition to explaining that Title VII § 703(a)(2) and ADEA § 4(a)(2) both permit disparate impact claims, the Court clarified that subsection (a)(1) of each statute—the subsection that the FHA mirrors—does not. The Court noted that there are "key textual differences" between subsections (a)(1) and (a)(2) of both Title VII § 703 and the ADEA § 4. City of Jackson, 544 U.S. at 236 n.6. Whereas Subsection (a)(2) permits disparate impact claims, the Court explained that Subsection (a)(1) encompasses disparate treatment, but "*does not encompass disparate-impact liability*," and requires a showing of intent. Id. at 236-38 & n.6 (emphasis added). This is because "the focus of the paragraph is on the employer's actions with respect to the targeted individual." Id. at 236 n.6. And, although the Justices disagreed as to whether ADEA Section 4(a)(2) permits disparate impact claims, the Court was *unanimous* that Section 4(a)(1) does not. See id. at 236 n.6; id. at 243 (Scalia, J., concurring) ("I agree with all of the Court's reasoning . . . ."); id. at 249 (O'Connor, J., dissenting) ("Neither petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent . . . .").

The Court's clarification of Title VII and the ADEA's disparate treatment and impact provisions shows that the FHA does not permit disparate impact claims. The language of

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[5] Section 4(a) of the ADEA, the statute at issue in City of Jackson, contains comparable language. See 29 U.S.C. § 623(a); City of Jackson, 544 U.S. at 233.

the FHA's § 805 mirrors Title VII § 703(a)(1) and ADEA § 4(a)(1), which permit disparate treatment claims, but not disparate impact claims. Compare Title VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), and ADEA § 4(a)(1), 29 § U.S.C. 623(a)(1), with FHA § 805(a), 42 U.S.C. § 3605(a). Moreover, the FHA lacks language focusing on the effects of actions comparable to the language of Title VII § 703(a)(2) or ADEA § 4(a)(2) that supports disparate impact claims. This is demonstrated in the following table:

| Title VII | ADEA | FHA |
|---|---|---|
| (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to ***discriminate against any individual*** with respect to his compensation, terms, conditions, or privileges of employment, ***because of such individual's*** race, color, religion, sex, or national origin; | (a) It shall be unlawful for an employer: (1) to fail or refuse to hire or to discharge any individual or otherwise ***discriminate against any individual*** with respect to his compensation, terms, conditions, or privileges of employment, ***because of such individual's*** age; | (a) It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to ***discriminate against any person*** in making available such a transaction, or in the terms or conditions of such a transaction, ***because of*** race, color, religion, sex, handicap, familial status, or national origin. |
| (a) It shall be an unlawful employment practice for an employer—<br>(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin. | (a) It shall be unlawful for an employer—. . .<br>(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's age . . . . | **None.** |

These differences are dispositive of Congress's intent in enacting the FHA. As the Court explained, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." City of Jackson,

544 U.S. at 233. On this basis, the Court concluded that an "effects" provision in the ADEA comparable to Title VII's "effects" provision meant Congress intended to permit disparate impact claims. Id. at 235-38. In accordance with this rule of statutory construction, the "discriminate against . . . because of/on the basis of" language in the FHA must have the same meaning as Title VII and the ADEA's identical language. The Justices were *unanimous* that such language permits only disparate treatment claims, not disparate impact claims. See id. at 236 n.6; id. at 243 (Scalia, J., concurring); id. at 249 (O'Connor, J., dissenting).

Just as similar language in similar statutes must be interpreted to have the same meaning, different language in similar statutes must be interpreted as having different meanings: "This use of different language in two statutes so analogous in their form and content, enacted so close in time, suggests that the statutes differ in their meaning . . . ." Acree v. Republic of Iraq, 370 F.3d 41, 61 (D.C. Cir. 2004) (Roberts, J., concurring). In contrast to Title VII and the ADEA, which contain two different anti-discrimination provisions—a "discriminate against . . . because of" provision prohibiting disparate treatment and an "effects" provision prohibiting disparate impact—the FHA lacks an "effects" provision comparable to Title VII § 703(a)(2) and ADEA § 4(a)(2). Given the narrow time period in which the statute was enacted,[6] the omission of "effects" language from the FHA must be viewed as intentional—and shows that it does not permit disparate impact claims.[7]

The Supreme Court's interpretation of other anti-discrimination statutes further demonstrates that the FHA does not permit disparate impact claims. When the statutory text

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[6] Congress enacted the FHA (enacted in 1968) shortly after Title VII (enacted in 1964) and the ADEA (enacted in 1967).

[7] Cf. Garcia v. Johanns, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) ("The Supreme Court has held that this ['effects'] language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. ECOA contains no such language." (citations omitted)).

creates a cause of action based on the "effects" or "results" of actions, the Court has held that the statute permits disparate impact claims. See, e.g., Griggs, 401 U.S. at 429-31 (Title VII); City of Jackson, 544 U.S. at 232-35 (ADEA); Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (Americans with Disabilities Act ("ADA"), which mirrors Title VII); Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Voting Rights Act, which addresses "results"); Alexander v. Choate, 469 U.S. 287, 299 (1985) (Rehabilitation Act, which incorporates the ADA). In contrast, when the statutory text lacks a provision creating a cause of action based on "effects" of actions, the Court has held that the statute does not permit disparate impact claims. See, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 178 (2005) (Title IX); Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001) (Title VI); see also Castaneda v. Pickard, 648 F.2d 989, 1001 (5th Cir. 1981) (Equal Education Opportunities Act); Robinson v. Paragon Foods, Inc., No. 1:04-CV-2940JEC, 2006 WL 2661110, at *6 (N.D. Ga. Sept. 15, 2006) (Title II).

The City, likely, will argue that the purposes of the FHA support the view that disparate impact claims are cognizable under the Act and that the Court should focus on the Act's purposes rather than its text—but such an argument begs the question of what Congress intended to prohibit. The Court has explained that the purpose of a statute includes both what it sets out to change *and* what it resolves to leave alone, with the adopted statutory text being the best evidence of that purpose. Rodriguez v. United States, 480 U.S. 522, 526 (1987) ("Where . . . the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . there is no occasion to examine the additional considerations of policy . . . that may have influenced the lawmakers in their formulation of the statute.") (quotations omitted). The plain language of the Act prohibits only "discriminat[ion]"—not the disparate "effects" of facially neutral actions—which shows that Congress intended it to prohibit only

intentional discrimination.[8] As U.S. Solicitor General Fried has confirmed, "[t]he legislative history [of the FHA] reinforces the understanding [from the text of the statute] that Congress intended to require a showing of intentional discrimination."[9] Thus, any interpretation of the FHA "that would proscribe conduct by the recipient having only a discriminatory *effect* . . . do[es] not simply 'further' the purpose of [the statute]; [it goes] well *beyond* that purpose." Sandoval, 532 U.S. at 286 n.6 (citation omitted and emphasis in original); accord Solicitor General Brief at n.21 ("The argument that the ambitious goals of Title VII require an expansive reading of the statute to include a discriminatory effect standard hardly surmounts the obstacles posed by the statute's plain language and legislative history."). The presence of language supporting only disparate treatment—and not disparate impact—shows that Congress did not intend the FHA to permit disparate impact claims.[10] Because the FHA does not contain the required "effects" language, the Court should dismiss the City's disparate impact claims.

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[8] Several commentators have noted that disparate impact rights of action do not, in fact, punish actions motivated by an intent to discriminate, but rather further notions of distributive justice. See, e.g., James F. Blumstein, Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act, 69 VA. L. REV. 633 (1983). Indeed, the City's own counsel has noted that even actions intended to *prevent* discrimination can lead to disparate impact liability: "A defendant with the best of intentions—indeed, even a defendant who undertakes a particular policy in the express hope of eliminating any possible discrimination—can still be held liable if plaintiff pursues a disparate impact claim. " 1 JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2:24 (2005). It is inconceivable that Congress could have intended the word "discriminate" to reach so far. See, e.g., Birmingham Bd. of Educ., 544 U.S. at 175 ("'Discrimination' is a term that covers a wide range of *intentional* unequal treatment." (emphasis added)). Whether legislation should target only actions motivated by discrimination, or whether the legislation should seek to further notions of distributive justice (as Title VII and the ADEA arguably do), is a decision the courts must leave to Congress. In the FHA, Congress chose to do only the former.

[9] See Brief for United States as Amicus Curiae, Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988) (No. 87-1961) ("Solicitor General Brief") (arguing that the statutory text "strongly suggests a requirement of discriminatory motivation"), available at http://www.usdoj.gov/osg/ briefs/1987/sg870004.txt.

[10] Importantly, all existing FHA disparate impact Fourth Circuit precedent to the contrary borrows the disparate impact theory from Title VII cases. See Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982) (relying on precedent from other courts that incorporated into the FHA the disparate impact theory of Title VII without the required consideration of the FHA's statutory language); Betsey v. Turtle Creek Assocs., 736 F.2d 983 (4th Cir. 1984) (citing Town of Clarkton and using the same flawed analysis). After the Supreme Court's clarification of its Title VII jurisprudence in City of Jackson, which holds that "effects" language must exist within a statute for it to permit disparate impact claims, these holdings and their underpinnings are no longer valid. Accordingly, they and their progeny "must be regarded as retaining no vitality." Limbach v. Hooven & Allison Co., 466 U.S. 353, 360-61 (1984).

## III. THE CITY HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE ITS ALLEGATIONS ARE INSUFFICIENT UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND CONTROLLING SUPREME COURT PRECEDENTS.

Even if the FHA did permit disparate impact claims (although, after City of Jackson, it is clear that it does not), the City has failed to plead factual allegations in the Complaint that plausibly support its disparate impact theory under the FHA. In particular and notwithstanding the Supreme Court's recent and explicit cautions that the federal courts should not be invoked in cases like this unless the plaintiff brings a focused and specific claim, City of Jackson, 544 U.S. at 241, and that a pleader must assert enough facts to show a "plausible" and non-speculative right to relief, Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007), the City has presented a complaint that is vague, speculative, and conclusory. Indeed, the Complaint falls well short of the basic requirement that a complaint set forth a "statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

In pleading that the Defendants' alleged underwriting, pricing, and foreclosure policies and practices, although facially neutral, "have a clear and foreseeable disproportionate adverse impact on African-American borrowers" compared with similarly situated Caucasian applicants (Compl. ¶ 51; see also id. at ¶¶ 36, 39-40, 46, 53-54), the City ignores repeated directions from the Supreme Court that complaints of racial discrimination such as this must be specific, targeted, and plausible. City of Jackson, 544 U.S. at 241; Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989), superseded on other grounds by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991-93 (1988). The Court requires such specificity because, otherwise, it faces an intolerable risk that an advocate can abuse the disparate impact theory of recovery by offering vague allegations or proof where chance, unexplained coincidence, or other factors, rather than the

defendant's alleged conduct, are the real cause of any disparities. City of Jackson, 544 U.S. at 241; Wards Cove, 490 U.S. at 657; Watson, 487 U.S. at 991-93.

To adequately state its "reverse redlining" claim, the City "must show that the defendants' lending practices and loan terms were 'unfair' and 'predatory,' and that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race." Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000). For the City to plead a "plausible," Twombly, 127 S. Ct. at 1966, claim based on disparate impact theory, its Complaint must set forth (1) *a specific and clearly delineated practice or policy* adopted by a defendant, (2) a *disparate impact* on a protected group, and (3) facts demonstrating a *causal connection* between the specific challenged practice or policy and the alleged disparate impact. Wards Cove, 490 U.S. at 657-58; City of Jackson, 544 U.S. at 241; Paige v. California, 291 F.3d 1141, 1144-45 (9th Cir. 2002). The City's Complaint fails to allege both the second and third of these required disparate impact elements in support of its reverse redlining claims. The Court, therefore, must dismiss it.[11]

**A. The City Fails to Allege a Disparate Impact.**

The City's claims for reverse redlining under the FHA are deficient because the complaint fails to specifically allege a disparate impact as to a particular protected class. Watson, 487 U.S. at 994-95; Wards Cove, 490 U.S. at 657. The Complaint seeks to allege that

[11] To the extent the City also alleges that Defendants engaged in intentional discrimination, in violation of the FHA, which it does not or only half-heartedly appears to do (e.g., Compl. ¶ 76(c) (stating that "Defendants' published policies and statements have expressed and continue to express a preference on the basis of race and/or color")), such allegations of intent are conclusory and wholly lacking support. Notably absent from the Complaint is any specific factual assertion, for example, that a single loan officer marked up an interest rate or made additional charges as a result of racial animus, let alone that the Defendants, which are held by one of the nation's largest financial services companies, consciously or deliberately decided to discriminate against African-Americans in Baltimore City. A "formulaic recitation of the elements of a cause of action" is inadequate to state a claim. Twombly, 127 S. Ct. at 1964-65 & n.3. For these reasons, the City's intentional discrimination claims—to the extent they exist—must be dismissed.

the Defendants' underwriting policies and procedures disparately impacted African-American borrowers in Baltimore by placing them in higher-cost loans relative to "similarly-situated" Caucasian borrowers. The Complaint—due to the attenuated injury the City strains to assert—further seeks to allege that the disparate impact of the Defendants' alleged underwriting and pricing policies, in turn, has triggered a "disproportionately high rate of foreclosures" among Baltimore's African-American vis-à-vis "similarly-situated" Caucasian borrowers.

Conspicuously absent from the City's Complaint, however, is any adequate statistical allegation regarding the Defendants' underwriting, pricing, and foreclosure policies or the alleged impact they had on African-American borrowers in Baltimore as opposed to similarly-situated Caucasian borrowers. Wards Cove, 490 U.S. at 651-53; Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983).

To overcome this fundamental defect, the City instead litters the Complaint with simplistic and inaccurate comparisons that, collectively, do not show an entitlement to relief on disparate impact theory. Specifically, the City cites:

- unattributed statistics that allege the Defendants underwrote the same percentage of fixed-rate loans secured by property in "African-American and white neighborhoods," but foreclosed upon more of those loans secured by properties in "African-American neighborhoods" (Compl. ¶¶ 42-44);

- publicly available Home Mortgage Disclosure Act ("HMDA")[12] data, which Federal Reserve economists have concluded *does not show disparate discriminatory impact* (id. at ¶¶ 47-49);

- a facially neutral 2005 pricing sheet it pairs with unattributed data on the number and location of loans secured by properties with low values (id. at ¶¶ 50-52);

- an expert report filed in a separate lawsuit commenced in another federal district court concerning loans secured by Philadelphia—*not Baltimore*—property (id. at ¶¶ 53-54);

[12] Codified at 12 U.S.C. §§ 2801-09.

- its "information and belief" allegation that Defendants' "improperly" underwrote so-called 2/28 and 3/27 adjustable rate mortgage products in a manner calculated to create a disparate impact (id. at ¶¶ 55-57);

- its "information and belief" allegation alongside unattributed statistics that the Defendants set higher interest rate caps on adjustable rate mortgage loans secured by properties in "predominantly African-American neighborhoods" than in "predominantly white neighborhoods, (id. at ¶¶ 58-60); and

- unattributed statistics that purport to show that the time between origination and initiation of foreclosure procedures by the Defendants' is shorter for loans in "African-American neighborhoods" than in "white neighborhoods." (Id. at ¶¶ 61-63.)

The City's allegations share a number of common flaws. First, the City's statistics fail to adequately represent the entire population in Baltimore. The City's self-described "African-American" neighborhoods consist of U.S. Census tracts with African-American populations exceeding 80%, whereas "white neighborhoods" consist of those having less than 20% African-Americans. (Id. at ¶¶ 41-63 & Maps.). This strategy avoids counting not only African-Americans who own property in "white neighborhoods," but also Caucasians who own property in "African-American" neighborhoods. The City's statistics are, at best, speculative allegations of a potential disparate impact, and "[s]peculation as to the potential for disparate impact cannot serve as evidence of such impact itself." Walls v. City of Petersburg, 895 F.2d 188, 191 (4th Cir. 1990) (rejecting assertion that African-Americans "are much more likely statistically" to answer employee background questionnaire in a way that would subject them to negative personnel actions because the plaintiff did not "offer any connection between these statistics and any personnel decisions by the City [nor] did she submit any evidence showing that the City had, in fact, discriminated against blacks because of their answers to these questions."). By segmenting Baltimore into two groups that do not fairly cover the entire population or otherwise constitute the groups the City seeks to compare in this action, the City has failed to allege even a potential effect on African-American homeowners in these

neighborhoods. See, e.g., EEOC v. Datapoint Corp., 570 F.2d 1264, 1269 (5th Cir. 1978) (court must guard against the use of data that has been "segmented and particularized and fashioned to obtain a desired conclusion"); cf. 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 681 (D.C. Cir. 2006) (reversing FHA disparate impact judgment because it was unreasonable to extrapolate the racial composition of an apartment building from the racial composition of the neighborhood in which the building was located).

Second, even if the City's statistics accurately reflect Baltimore's population—which they do not—the City has, nevertheless, failed to compare "similarly-situated" groups of African-American and Caucasian borrowers with loans from Wells Fargo. In particular, the City has failed to plead statistics that account for borrower credit-worthiness factors and pricing information (such as credit scores, debt-to-income ratios, and loan-to-value ratios), information which the Federal Reserve has explained is essential to properly evaluate allegations of discriminatory lending.[13] It is not surprising that the City seeks to avoid citing data that includes credit scores—given the Federal Reserve Board in a report to Congress also has concluded that use of such information is not discriminatory, noting that credit scoring: (1) has increased both the availability and affordability of credit for all populations, (2) is predictive of credit risk, and (3) *is not a proxy for race*.[14] The City's use of HMDA data in the Complaint, therefore, adds nothing to its disparate impact allegations. See Edwards v. Johnston County Health Dep't, 885 F.2d 1215, 1223 (4th Cir. 1989) ("[M]erely demonstrating a statistical imbalance, without more,

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[13] See Robert B. Avery et al., New Information Reported Under HMDA and Its Application in Fair Lending Enforcement, 91 FED. RES. BULL. 393-94 (Summer 2005) at 393-94 (explaining that "reaching convincing conclusions" as to whether specific lenders discriminate "requires institution-specific analysis" that is "not possible with the HMDA data alone," and "improperly analyzed pricing differences" based on "raw data alone can lead to inaccurate conclusions, which in turn may be unfair to particular institutions").

[14] See Bd. of Governors of the Fed. Res. Bd., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT (2007), available at http://www.federalreserve.gov/boarddocs/RptCongress/creditscore/creditscore.pdf.

does not establish a greater discriminatory adverse effect on one race compared to another."); cf. Walther v. Lone Star Gas Co., 977 F.2d 161, 162 (5th Cir. 1992) (noting that even when the statistics cited are meaningful, unlike the HMDA data here, their use "alone" to prove discriminatory intent "would be a challenging endeavor").

Third, the City's suggestion that all "fixed-rate" loans are somehow identical is similarly specious; a "fixed rate" is just one of many features that comprise a loan product, with the "fixed" rate merely the by-product of, as the City concedes, an individualized and automated risk-assessment of race-neutral credit criteria. (Compl. ¶ 43) (emphasis added.) Likewise, the City's suggestion that borrowers with differing loan sizes are somehow "equally creditworthy" or otherwise deserving of equal pricing is inaccurate, conclusory, and, standing alone unsupported as it does, implausible. Twombly, 127 S. Ct. at 1965. Indeed, all loans carry certain fixed, administrative costs that are amortized or priced into them. These fixed and equally applied costs necessarily increase the pricing of loans secured by property with very low values because such costs comprise a higher percentage of those loan amounts.

Finally, the City's use of an expert affidavit concerning loans secured by Philadelphia properties in a separate case brought by an individual Philadelphia borrower in another federal district court (Compl. ¶¶ 53-54) also patently fails to compare, as required, similarly-situated groups. Neither the affidavit (which only compares the loan of a single plaintiff with 14 other Philadelphia loans), nor the case to which it relates, compares—as it must to show an entitlement to relief for disparate impact—the groups the City puts at issue in this case (similarly situated African-American and Caucasian borrowers in *Baltimore*). Courts have widely held that this type of "apples to oranges" comparison runs afoul of basic disparate impact pleading requirements. See, e.g., Donnelly v. R.I. Bd. of Governors for Higher Educ., 929 F.

Supp. 583, 591 (D.R.I. 1996), aff'd, 110 F.3d 2 (1st Cir. 1997) (citation omitted); see also Wards Cove, 490 U.S. at 651-53 (reversing discriminatory impact claim based on alleged statistical disparities where differences were not between similarly-situated employees); Moore, 708 F.2d at 482 (statistical pools should "always be measured against the actual pool of applicants or eligible employees"); Collette v. St. Luke's Roosevelt Hosp., 132 F. Supp. 2d 256, 278 (S.D.N.Y. 2001) (dismissing disparate impact claims); Johnson v. County of Nassau, 480 F. Supp. 2d 581, 598-99 (E.D.N.Y. 2007) (same).

The City seeks to salvage the inadequate comparisons in its Complaint by leveraging "information and belief" pleading. (Compl. ¶¶ 54, 56, 58.) Such invocation of the phrase "information and belief," however, will not satisfy the fact-based pleading and Rule 8 requirements. Twombly, 127 S. Ct. at 1962-63, 1974 (rejecting conclusory allegations and holding that invocation of the phrase "information and belief," without more, will not satisfy pleading requirements). Thus, the City's allegation on "information and belief" that the Defendants' (one of which was not even named in the Philadelphia lawsuit) practices with regard to 15 Philadelphia loans mirror its practices in Baltimore is conclusory, contrary to reason (and reality), and implausible. Id. The same is true of the City's "information and belief" allegations that the Defendants did not properly underwrite their 2/28 or 3/27 loans to African-Americans and that the Defendants exercise discretion to set higher interest rate caps on adjustable rate mortgage loans secured by properties in "predominantly African-American neighborhoods" than in "predominantly white neighborhoods."

The City has taken a scattershot approach to its burden to plead an entitlement to relief under a disparate impact theory. Rather than set forth the required "apples to apples" statistical comparison of similarly-situated groups, it instead lards its Complaint with vague and

conclusory statements, including unattributed and misleading statistics that ignore borrower creditworthiness factors. These types of allegations simply are not enough to "raise a right to relief above the speculative level [assuming] all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 127 S. Ct. at 1965; see also Walls, 895 F.2d at 191; Donnelly, 929 F. Supp. at 591; Collette, 132 F. Supp. 2d at 278; Johnson, 480 F. Supp. 2d at 598-99.

### B. The City Fails to Allege a Causal Connection between the Purported Policies or Practices and the Alleged Disparate Impact.

To meet the final element of a disparate impact claim, the City must allege that the challenged policies and practices actually caused the perceived imbalance. Merely showing a bottom line disparity is not enough:

> Respondents will . . . have to demonstrate that the disparity they complain of is the result of one or more of the [ ] practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on [ ] opportunities for whites and nonwhites.

Wards Cove, 490 U.S. at 657. See also Donnelly, 929 F. Supp. at 591-92; Brown v. Coach Stores, Inc., 163 F.3d 706, 712 (2d Cir. 1998).

Here, the City alleges, at best and certainly insufficiently, only a "bottom line . . . imbalance," with no discernable connection between Defendants' alleged policies and that imbalance. Wards Cove, 490 U.S. at 657. It does not allege in any meaningful way whether, or how, the policies and practices it identifies—rather than some other factors, or chance—caused the City's African-American citizens to obtain more expensive loans than non-minority citizens, or caused more foreclosures to be initiated on loans held by the City's African-Americans than its Caucasians. The City's conclusory assertions of causation are not enough. Twombly, 127 S. Ct. at 1966; Collette, 132 F. Supp. 2d at 278; Syverson v. Int'l Bus. Machs. Corp., No. C-03-04529 RMW, 2007 WL 2904252, at *6 (N.D. Cal. Oct. 3, 2007); Burrell v. State Farm Fire &

Cas. Co., No. CIV 5733, 2001 WL 797461, at *10 (S.D.N.Y. Jul. 12, 2001); Trezza v. Hartford, Inc., No. 98 CIV 2205, 1998 WL 912101, at *8 (S.D.N.Y. Dec. 30, 1998).

The City fails to plead facts that link the Defendants' conduct to the alleged disparate impact—both in terms of underwriting practices and foreclosure rates. The Complaint cites no data whatsoever to refute the simple truth that the Defendants made their loan pricing decisions based on credit risk and that similarly-situated borrowers with the same credit risk received the same rates. Nor can it. The City spends many paragraphs in the Complaint trying to relate the Defendants' alleged practices to higher loan prices and less affordable loans, but fails to do so in large part because it completely ignores the central role that risk-based pricing and creditworthiness factors play in determining loan costs. Cf. Garcia, 444 F.3d at 635 (rejecting as "analytically flawed" appellants' attempt to statistically link a disparate impact to appellee's loan decision-making criteria when the statistics failed to incorporate "key relevant variables," including credit scores). The Complaint's extensive discussion of increased foreclosure rates on loans secured by properties in "African-American neighborhoods" suffers from similar defects, failing ultimately not just to set forth an adequate comparison of similarly-situated groups, but also failing to identify the race of a single borrower on whose property the Defendants allegedly foreclosed.

The Complaint also papers over the myriad and more likely reasons why loans might progress to foreclosure at higher rates or at a faster pace in the City's "predominantly African-American neighborhoods." First, as the City alleges, such neighborhoods are transitional, characterized by "high vacancy rates, low rates of owner occupancy, substantial housing code violations, and low property values." (Compl. ¶ 65.) To the extent that foreclosures occur at a higher rate in neighborhoods having the characteristics described by the

City, each of the allegedly inherent characteristics operates independently to cause foreclosures. Personal circumstances, such as divorce, job loss, or health issues also are significant intervening factors that contribute to foreclosures. Any discrepancy in foreclosure rates that might exist, moreover, is much more likely due to the City's own policies and practices. For example, the City's practice of selling municipal liens to investors who leverage foreclosure as a means to collect such debts and related collection costs. (Ex. G.) Or, as another example, the City's extremely high property tax rate, which pushes many borrowers into default and subjects them to such lien auctions. (See, e.g., Ex. C.) Discrepancies in how fast a loan moves into foreclosure, contrary to the City's allegations, tell the Court nothing concrete about what might have *caused* the foreclosure. In fact, the City itself seeks, in other contexts, to increase and accelerate the pace of its own foreclosures. (Ex. L at 8, 14) (acknowledging, among other findings, the significant and detrimental impact of the City's tax lien auctions and recommending both increasing and accelerating the City's capacity to foreclose on abandoned property.)

Across a range of case types, courts have dismissed claims as improperly pleaded when a plaintiff has alleged, as the City does here, economic injuries too remote from the defendant's alleged conduct to establish a sufficient causal link. See, e.g., Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005) (upholding dismissal when plaintiff alleging an "economic loss" failed to satisfy Rule 8(a)'s pleading requirements by not providing defendant notice of "what the relevant economic loss might be or of what the causal connection might be between that loss and [the alleged conduct]"); Teachers' Ret. Sys. of La. v. Hunter, 477 F.3d 162, 186 (4th Cir. 2007) (upholding dismissal on similar grounds); Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 445 (3d Cir. 2000) (upholding dismissal of antitrust, RICO, and state common law claims by a third-party hospital that sought to recover the unreimbursed costs of

health care it provided to nonpaying patients suffering from tobacco-related disease because of the remoteness of the hospital's injury and many alternate causalities that might have triggered it); City of Phila. v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882, 911 (E.D. Pa. 2000), aff'd, 277 F.3d 415 (3d Cir. 2002) (dismissing case because municipal plaintiff failed to plead a sufficient causal connection between gun manufacturing and harm from gun-related incidents, concluding "this was a theory in search of a case, and the defendants are out of range"). Like these cases, the City's alleged injuries are simply too speculative to show an entitlement to relief. To accept the City's injuries (declining and diverted tax revenue) as pleaded and find that they can be traced to Wells Fargo's foreclosures, the Court must ignore a litany of alternate causalities, including—in addition to those detailed above—a deteriorating housing market, the 33,000 other (including more than 19,000 City-caused, many other City-initiated and other third-party-initiated) foreclosures in Baltimore from 2000 to 2007, the City's struggling school system, pre-existing criminal elements, and many other factors.

The City's numerous conclusory assertions that causation exists (e.g., Compl. ¶ 46), do not salvage its failure to adequately allege a set of facts from which causation can plausibly be inferred. See Twombly, 127 S. Ct. at 1965; Collette, 132 F. Supp. 2d at 278 (rejecting conclusory allegations of causation, when plaintiff failed to state specific facts). Accordingly, the City's allegations of causation are too speculative to state a claim, and its Complaint should be dismissed.

## CONCLUSION

For all the foregoing reasons, the Wells Fargo's motion should be granted and the City's Complaint should be dismissed.

Respectfully submitted,

/s/ Andrew L. Sandler
Andrew L. Sandler (MD Fed. Bar No. 22950)
Benjamin B. Klubes (MD Fed. Bar No. 08085)
Michael P. Kelly (admitted *Pro Hac Vice*)
Benjamin P. Saul (subject to admission to MD Fed. Bar)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000 (Telephone)
(202) 393-5760 (Facsimile)

Attorneys for Defendants Wells Fargo Bank, N.A.
and Wells Fargo Financial Leasing, Inc.

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