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

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

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

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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 Amended 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). In light of the recent decision in *City of Birmingham v. Citigroup Inc., et al.*, CV-09-BE-467-S (N.D. Ala. Aug. 19, 2009), handed down subsequent to the parties' August 6, 2009 Status Hearing before the Court, Wells Fargo's Memorandum in Support of its Motion to Dismiss the Amended Complaint focuses on the City's lack of standing to bring this action.[1]

## PRELIMINARY STATEMENT

The City has amended its original Complaint in two respects. First, in an attempt to bolster its discrimination allegation, it has added inflammatory and inaccurate allegations by disgruntled former employees, Elizabeth Jacobson and Tony Paschal, both of whom have had legal disputes with Wells Fargo in the recent past. (Am. Cmplt. ¶¶ 61-86).[2] Second, in an

[1] Consistent with the parties' discussion with the Court during the August 6, 2009 Status Hearing, Wells Fargo is prepared to proceed with discovery while the Court considers the instant Motion. Plaintiff served discovery on September 17, 2009, and Wells Fargo intends to serve its own in the near term. In this regard, Wells Fargo looks forward to discussing the discovery process further during the next Status Hearing with the Court on October 8, 2009.

[2] In her affidavit, Ms. Jacobson admits to violating long-standing Wells Fargo internal policies and procedures and her own customers' trust over a period spanning nearly a decade, but Plaintiff nonetheless asserts that, in the context of this lawsuit, Ms. Jacobson's statements should be believed. Distancing herself from alleged past conduct, Ms. Jacobson now has recast herself as a consumer rights champion, exploiting her new-found celebrity status while making the rounds on television and radio programs nationwide. Ms. Jacobson's contradictory public statements after the filing of the Amended Complaint revealed her lack of credibility even before discovery commenced. For example, Ms. Jacobson recently told a local radio show that loan officers were being fired for creating false applications by cutting and pasting W-2 forms, while her affidavit asserts that she was not aware of Wells Fargo taking action to address that issue. (Sept. 1, 2009 Marc Steiner Show Interview with Elizabeth Jacobson, *available at* http://www.steinershow.org/radio/the-marc-steiner-show/september-1-2009-hour-1, 40:04-40:11; *compare with* Jacobson Aff., at ¶ 18). Similarly, Mr. Paschal's allegations, the vast majority of which center on alleged racially-motivated employment discrimination, were squarely rejected by the Fairfax County Human Rights Commission. Simply put, neither Ms. Jacobson nor Mr. Paschal is a credible witness.

attempt to support its allegations of injury, the City has added declarations of neighbors of properties once the subject of a Wells Fargo loan who complain of purported disrepair, loitering, rats, crime, and burst pipes. (Am. Cmplt. ¶¶ 114-18). These declarations only highlight what is missing from the Amended Complaint — any plausible allegation that there is, in fact, some fairly traceable connection between any alleged harm and any alleged conduct by Wells Fargo. Indeed, even if there were a constitutionally sufficient connection between a foreclosure and the injuries alleged (and there is not) the homes in which the declarants live are largely situated on blocks with many vacant properties, including a number owned by the City itself. The Jacobson and Paschal allegations and the neighbors' declarations represent a transparent attempt to distract the Court from Plaintiff's obligation to plead facts sufficient under Article III of the Constitution as to causation, and they do not provide any basis to confer standing.

While the City posits several injury theories, each relies on long, speculative causal chains purporting to connect Wells Fargo with the City's alleged injury. Each of these theories is legally insufficient, as well-settled Supreme Court precedent dictates that an injury cannot be fairly traceable if it requires a court to speculate on the motives of third parties not before the court. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984).

Subsequent to this Court's denial of Wells Fargo's Motion to Dismiss the original Complaint (attached as Exhibit 1, with exhibits thereto omitted and available at Docket No. 10), the Northern District of Alabama dismissed the *City of Birmingham* case (attached as Exhibit 2) for lack of standing. The *City of Birmingham* ruling casts this Court's July 2, 2009 denial of Wells Fargo's Motion to Dismiss the original Complaint in a new light. The *City of Birmingham* Complaint (attached as Exhibit 3), filed against several major lenders after this litigation was commenced, advanced word-for-word and line-by-line the very same Fair Housing Act ("FHA")

"reverse redlining" allegations made in the instant case (along with various other state law claims), and thus relied on the same tenuous, and ultimately unsustainable, allegations and legal theories for standing advanced in this case. The court in *City of Birmingham* found that the City's complaint required — just as the Amended Complaint does here — "a series of speculative inferences . . . to connect the injuries asserted with the alleged wrongful conduct by the Defendants" in light of the fact that "the minority borrowers in this case could have defaulted on their mortgages for a number of reasons, none of which related to the Defendants' alleged 'reverse redlining.'" *City of Birmingham*, Exhibit 2, at 8. In addition, the *City of Birmingham* Court found, just as is the case in Baltimore, that "loss of tax revenue from property taxes and the increase in spending, like the depreciation in home values, could have been caused by any number of factors having nothing to do with the Defendants' alleged 'reverse redlining.'" *Id.*

Consistent with the *City of Birmingham* decision "that the alleged injuries to the City are too tenuously connected, and so not fairly traceable, to the Defendants' alleged misconduct in this case," (*Id.*), Wells Fargo moves herein to dismiss the Amended Complaint. In so doing, Wells Fargo renews its argument that the City of Baltimore is unable to establish the traceability requirement for standing and incorporates by reference the other arguments made in its Motion to Dismiss the original Complaint.[3]

In its presentation during the June 29, 2009 Hearing on the Motion to Dismiss, Wells Fargo highlighted the attenuated nature of the City's alleged injury using a large sample of loans identified by the Court and highlighted, in particular, those properties identified by the City itself as the most salient examples of the harm allegedly suffered by the City. ("June 29 Hearing

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[3] While the instant Motion responds to the Amended Complaint and so does not duplicate the original Motion to Dismiss, the Court has discretion to consider anew all issues underlying the original Motion to Dismiss to the extent they overlap. *See, e.g., Plotkin v. Lehman*, 178 F.3d 1285 (4th Cir. 1999).

Presentation," attached as Exhibit 4). Examining the Court-designated sample — residential mortgages originated in or after January 2000 and foreclosed upon between 2005 and 2008 — Wells Fargo demonstrated that it completed foreclosure on less than 150 loans in the City of Baltimore during a four-year time period that included the height of the recent financial crisis. [4] Experts from Deloitte & Touche conducted a detailed analysis of the factors contributing to each of these foreclosures and concluded that, in each and every case, the foreclosure was precipitated by life circumstances unrelated to the terms of the loan — illness, divorce, death, job loss, non-payment of rent by investors, and the like. Not a single one of these 143 foreclosures was caused by the terms of the Wells Fargo loan.

While Wells Fargo is confident in its ability to make similar loan-by-loan showings for each property at issue in this case, as a matter of law, it is both unnecessary and improper for Wells Fargo to be required to make a specific showing with respect to each and every loan in dispute in the case. The Court should look to the illustrative examples, with *City of Birmingham* as a guide, and determine that to make the necessary causal connections between the City's claims of property tax revenue diminution and increased municipal costs, it would have to draw a series of speculative inferences dispositive of the standing question.

For the reasons set forth in the Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint, in the June 29 Hearing Presentation, and herein, the Court must not make the speculative inferences necessary to connect the City's asserted injuries to the wrongful conduct alleged in order to confer standing, and should dismiss the Amended Complaint for lack of jurisdiction.

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[4] Plaintiff alleges that there have been more than 33,000 Baltimore City homes that have been subject to foreclosure filings since 2000. (Am. Cmplt. ¶ 1). Wells Fargo's foreclosures are miniscule by comparison.

**ARGUMENT**

To satisfy the standing requirements of the case-or-controversy limitation on judicial authority under Article III, Section 2 of the Constitution, the party invoking federal court jurisdiction must show that (i) it has suffered injury in fact; (ii) the injury is fairly traceable to the defendant's actions; and (iii) 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, 153-55 (4th Cir. 2000). As discussed at length in Wells Fargo's Memorandum in Support of its Motion to Dismiss the original Complaint, the plaintiff must demonstrate that it is "likely [that] 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). Accordingly, a party does not have standing to bring an action when "the 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. v. Montgomery County, Md.*, 401 F.3d 230, 235 (4th Cir. 2005) (internal quotations and citations omitted) (emphasis in original).

*Allen*, 468 U.S. 737, is the seminal Supreme Court case addressing traceability. In *Allen*, parents of African-American public schoolchildren sued the Internal Revenue Service, alleging that the agency failed to enforce its policy of denying tax-exempt status to racially discriminatory schools, harming the parents directly and interfering with the ability of their children to receive an education in desegregated public schools. *Id.* at 739-40. The Supreme Court concluded that the parents had no standing because "[t]he line of causation between that conduct [the granting of tax exempt status] and desegregation of respondents' schools is

attenuated at best." *Id.* at 757. Courts have consistently applied the *Allen* analysis, and *City of Birmingham* applies it to allegations identical to those in the instant case.

The City of Baltimore, like the City of Birmingham, has theorized three types of injury: the (1) Property Tax Theory, (2) Crime Theory, and (3) Rehabilitation Theory. Each relies on a lengthy, speculative, and attenuated causal chain that is legally insufficient to support standing:

The Property Tax Theory. This approach theorizes that (i) the Wells Fargo loan (and not some other factor such as illness, divorce, job loss, incarceration, death, or the City's own tax liens) caused the borrower to default; (ii) there was no buyer willing to purchase the foreclosed-upon home, leaving the home abandoned; (iii) this caused potential real estate buyers to become less interested in the surrounding properties (and not any other reason such as a weakening economy, a decline in the shipping and steel industries, a slumping real estate market, or pre-existing "high vacancy rates, low rates of owner occupancy, substantial housing code violations, and low property values" (Am. Cmplt ¶ 109)) in the neighborhoods identified in the Amended Complaint; (iv) this, and not, for example, a weakening economy, a decline in the shipping and steel industries, a slumping real estate market, or pre-existing "high vacancy rates, low rates of owner occupancy, substantial housing code violations, and low property values" (Am. Cmplt ¶ 109), caused "[a] significant decline in the value of nearby homes" (Am. Cmplt. ¶ 100(a)); (v) this caused the Maryland State Department of Assessments & Taxation to lower property assessments; (vi) which led to "a decrease in property tax revenue" collected by the City (*id.*).

The Crime Theory. This approach theorizes that (i) the Wells Fargo loan (and not some other factor, including, for example, those identified above) caused the borrower to default;

(ii) there was no buyer willing to purchase the foreclosed-upon home, leaving the home abandoned; (iii) which led to an increase in the number of vacant homes; (iv) which prompted gangs and criminals to increase their level of illegal activity or to initiate new illegal activity because of fewer than 150 additional vacant homes among the City's tens of thousands in which to create "centers for squatting, drug use, drug distribution, prostitution, and other unlawful activities" (Am. Cmplt. ¶ 110(c)); (v) which led the City to increase "police and fire protection." (Am. Cmplt. ¶ 110(d)).

The Rehabilitation Theory. This approach theorizes that (i) the Wells Fargo loan (and not some other factor, including, for example, those identified above) caused the borrower to default; (ii) there was no buyer willing to purchase the foreclosed-upon home, leaving the home abandoned; (iii) which led to an increase in the number of vacant homes; (iv) which led to the risk of the home being damaged by people, animals, or weather; (v) which led the City to have "[i]ncreased expenditures to secure abandoned and vacant homes" and to make "[a]dditional expenditures to acquire and rehabilitate vacant properties" (Am. Cmplt. ¶¶ 110(e), (f)); (vi) which led to "[a]dditional expenditures for administrative, legal, and social services." (Am. Cmplt. ¶ 110(g)).

The FHA "reverse redlining" allegations in *City of Birmingham* were virtually identical — word for word — to the original Complaint filed in this case, with the exception of geographically-specific allegations. Birmingham alleged that the defendant financial institutions targeted minority borrowers for subprime loans in violation of the FHA and caused foreclosures on homes in Birmingham. Birmingham alleged that this in turn led to decreased property values, decreased tax revenues, increased crime, and increased municipal expenditures. In short,

Birmingham advanced the same Property Tax, Crime, and Rehabilitation Theories as the City has here.

The court in *City of Birmingham* relied at length on the decision of a court in the Fourth Circuit, *Tingley v. Beazer Homes Corp.*, No. 3:07-CV-176, 2008 WL 1902108 (W.D.N.C. Apr. 25, 2008). The plaintiffs in *Tingley* were a group of homeowners who asserted that the defendant real estate agents targeted low-income consumers for home loans and encouraged them to change or falsify information on loan applications, which qualified them for loans they could not afford, resulted in foreclosures, and ultimately, reduced the value of the plaintiffs' own homes in the surrounding area. *Id.* at *4. The court concluded that it would have to make a series of speculative inferences in order to find the necessary causal connection between the alleged diminution in property values and the defendants' conduct. *Id.* The court noted that "it is quite speculative that the depreciation in value of the plaintiffs' property was caused by the foreclosures of these third party properties rather than as a result of a myriad of other factors, such as rising unemployment in the region, changes in the housing market, or other economic conditions." *Id.* The court further determined that the "tenuousness of the connection between the Defendants' alleged actions and the alleged diminished value in Plaintiffs' property becomes greater with each additional link in the chain." *Id.*

Drawing on this reasoning, and noting that the *City of Birmingham* case went even "one step farther than the *Tingley* case" by seeking recovery of purported lost tax revenue and excess municipal costs (*City of Birmingham*, Exhibit 2, at 8), the court granted the defendants' motion to dismiss. The court stated that "a series of speculative inferences must be drawn to connect the injuries asserted with the alleged wrongful conduct by the Defendants" in light of the fact that:

> the minority borrowers in this case could have defaulted on their mortgages for a number of reasons, none of which related to the Defendants' alleged "reverse redlining." Also, the Defendants' decisions to foreclose on the properties after the borrowers defaulted could be, as in *Tingley*, for reasons totally apart from the alleged "reverse redlining." Furthermore, it is quite speculative that the depreciation in value of the neighboring homes in the City was caused by the foreclosures of minority borrowers' properties rather than as a result of "a myriad of other factors," which, as the *Tingley* court noted, could include "rising unemployment in the region, changes in the housing market, or other economic conditions."

*Id.* The court also found that the "loss of tax revenue from property taxes and the increase in spending, like the depreciation in home values, could have been caused by any number of factors having nothing to do with the Defendants' alleged 'reverse redlining.'" *Id.* Therefore, the court concluded "that the alleged injuries to the City are too tenuously connected, and so not fairly traceable, to the Defendants' alleged misconduct in this case." *Id.*

In another case recently decided, *City of Cleveland v. Ameriquest Mortgage Sec., Inc.*, 621 F.Supp.2d 513 (N.D. Ohio 2009), Cleveland advanced a nuisance claim under a similar theory of causation. Cleveland alleged that subprime lending caused "the epidemic of foreclosures afflicting the City," and sought a recovery from financial institutions that originated mortgage loans. *Id.* at 516. The court similarly found that "the borrower may have lost a job . . . suffered a catastrophic injury, borrowed too much on credit cards . . . suffered investment losses that depleted savings . . . or, despite an ability to pay, simply decided to walk away from the mortgage . . . ." *Id.* at 534. The court also acknowledged "the City's struggling, Rust-Belt economy, the fading prominence of the manufacturing sector, and Cleveland's challenges in attracting a meaningful replacement." *Id.* at 535 (internal quotations omitted). Thus, "[i]t would be tremendously difficult, if not completely impossible, to determine which of the City's damages are attributable to Defendants' alleged misconduct and not to some absent party." *Id.* at 533. The court concluded that "[s]orting out these contributing factors in an effort to assign

liability would be a speculation-laden, uncertain endeavor . . . ." *Id.* at 535. The court noted that Cleveland itself had conceded, as the City has here, that "the foreclosure crisis was precipitated by the broad decline in the housing market, which itself was the product of a myriad of factors occurring in unknown and unknowable proportions, many of which were completely beyond Defendants' control." *Id.* *See* Am. Cmplt. at ¶ 27 ("the real estate bubble burst in 2007 and home prices began to fall, and foreclosure rates began their dramatic rise").

The causal chains posited here are similar to those in *City of Cleveland* and precisely the same as those in *City of Birmingham*. Precisely the same conclusion reached in both cases that any alleged injury is not fairly traceable to Defendants is warranted. As demonstrated in the affidavits submitted by Wells Fargo to the Court at the June 29, 2009 Hearing (attached as Exhibit 5):

- As an initial matter, properties once the subject of a Wells Fargo loan and now alleged to be vacant constitute approximately one quarter of one percent of the tens of thousands of vacant properties in the City of Baltimore.

- Between January 1, 2005 and December 31, 2008, Wells Fargo foreclosed on 143 loans originated on or after January 1, 2000. Each of these foreclosures was the result of factors unrelated to the terms of the loan, including excessive debt, decline in income, illness, job loss, and the nonpayment of rent to investor borrowers. (Williams Aff., attached as Exhibit 5, at ¶ 4).

- The City obtained and presented affidavits and evidence of expenditures with respect to 10 of the 143 foreclosures at issue (the "City's 10 Best"). All 10 foreclosures involved borrower life circumstances and economic difficulties — loss of a job, loss of medical insurance combined with illness, the tragedy of a murdered son — and not Wells Fargo's conduct. (*Id.* at ¶¶ 23-32). Most of the foreclosures are located in blocks with a significant number of properties owned by the City or corporate entities, and confirm the City's own allegation that neighborhoods whose decline it attributes to Wells Fargo in fact had "high vacancy rates, low rates of owner occupancy, substantial housing code violations, and low property values" (Am. Cmplt ¶ 109) prior to any Wells Fargo foreclosure.

- The City's 10 Best includes only one non-investor borrower. (Williams Aff., Exhibit 5, at ¶ 21). Four of the ten were never owned or managed by Wells Fargo post-foreclosure, having been sold to third parties at foreclosure or reverted to the owner of the loan for disposition. Only three of the remaining six were owned by African-Americans, and all three of these had documented evidence of extensive damage prior to foreclosure, including housing code violations. (Schares Aff., attached as Exhibit 5, at ¶¶ 15, 16, 20, 21, 23).

The City's 10 Best illustrate vividly the *City of Birmingham* conclusion that the causal chains alleged are — writ large — too speculative and attenuated to confer standing. Moreover, as that opinion impliedly recognized, the Court need not identify and undertake a specific examination of each delinquency, each vacant property, each alleged drug transaction or other criminal offense, each alleged squatter's discarded trash, and each alleged pest infestation in order to conclude that any alleged misconduct by Wells Fargo was not the fairly traceable cause of any alleged injury to the City. Instead, the Court should conclude that any alleged injury may have been caused by a number of factors, including the shift in the housing market (as the City alleged in Paragraph 27 of the Amended Complaint), homeowner personal and financial difficulties, the City of Baltimore's plummeting fortunes, or — even more directly — gangs, criminals, and pests. The alleged injuries are far too tenuously connected, and so not fairly traceable, to Wells Fargo's alleged misconduct. Thus, the City does not have standing to assert its claims, and the Amended Complaint should be dismissed.

## **CONCLUSION**

For the reasons set forth above, in the Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint, and in Wells Fargo's June 29 Hearing Presentation, the Court should dismiss the Amended Complaint.

Respectfully submitted,

/s/ Andrew L. Sandler

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**CERTIFICATE OF SERVICE**

I certify that the foregoing document, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent by first class mail to those indicated as non-registered participants as of September 18, 2009.

Dated: September 18, 2009

/s/ Andrew L. Sandler
Andrew L. Sandler