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

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

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

Andrew L. Sandler
Benjamin B. Klubes
Jonice Gray Tucker
Valerie L. Hletko (*pro hac vice*)
BUCKLEYSANDLER LLP
1250 24th Street, N.W., Suite 700
Washington, D.C. 20037
(202) 349-8000 (Telephone)
(202) 349-8080 (Facsimile)

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

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 Second 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). Because the City has failed to follow the Court's direction to identify and demonstrate a connection between specific damages incurred by the City and alleged conduct fairly traceable to Wells Fargo, the standing analysis set forth in this Court's January 6, 2010 Order dismissing the First Amended Complaint now requires dismissal of the Second Amended Complaint with prejudice.

PRELIMINARY STATEMENT

The City first filed this action on January 8, 2008, against Wells Fargo, which long has brought products and services to Baltimore-area residents, as part of a campaign by the Baltimore City Law Department to generate revenue through lawsuits. (Ex. 1, Brendan Kearney, <u>Baltimore's Hotel Tax Lawsuit Part of Larger Litigation Strategy</u>, Daily Record, Dec. 11, 2008). After two years of litigation by the City and its private lawyers, this Court dismissed the City's lawsuit on January 6, 2010. In its order of dismissal, the Court recognized the steady decline of the Baltimore neighborhoods at issue beginning many years before the City's lawsuit, which resulted from a wide range of societal problems. The Court held that the City had failed to meet its burden in seeking to attribute the foreclosure and vacancy epidemic in Baltimore to the alleged lending practices of a single bank through the use of novel and untested legal theories. <u>Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A. & Wells Fargo Financial Leasing, Inc.</u>, 677 F. Supp. 2d 847, 850 (D. Md. 2010) (Motz, J.). Specifically, the Court found that "the City's allegations. . . of a causal connection between Wells Fargo's alleged misconduct and the damages the City claims is not plausible" in light of the "negligible" portion of vacant housing stock attributable to Wells Fargo even using Baltimore's own figures. Id. The Court's conclusions are consistent with the long-held views of the Baltimore City Council—ironically, one of the plaintiffs in this action—which passed a resolution in 2000 acknowledging the endemic problems created by the then 40,000 vacancies in Baltimore, recognizing that they had become "a magnet for crime, grime, and blight" and a "drain on the City's dwindling resources." (Ex. 2, City of Baltimore Res. File No. 200171 (2000), *available at* http://legistar.baltimorecitycouncil.com/detailreport/?key=164). The problems the City complains of in the instant lawsuit predate the origination of virtually every loan identified in the Second Amended Complaint ("SAC").

The City has now re-filed essentially the same lawsuit, and again attempts to sue Wells Fargo directly under the Fair Housing Act, 42 U.S.C. § 3605 ("FHA"). Defying the strictures of standing and causation, the City seeks to link Wells Fargo's mortgage loans—many to investors—to alleged municipal costs associated with vacant properties. The City's own pleadings and statements demonstrate that it does not have standing to maintain this lawsuit. Nothing more aptly illustrates the City's continuing failure to make a plausible claim that Wells Fargo's loans have a fairly traceable connection to any of the alleged damages than the fact that more than 20 properties specifically cited in the SAC were the subject of loans made through bond and down payment assistance community development programs administered by the State of Maryland and/or the City of Baltimore.[1] Indeed, approximately 15 of the loans identified by the City in the SAC involved City funding for second mortgages made on behalf of the City, or its agent, to facilitate the home purchase, and in connection with which the City or its agent

[1] First mortgage loans made through the Maryland Department of Housing and Community Development's Bond Program, for example, require a loan quality review by a designee of the State, first lien approval from the State, and a full first lien purchase commitment from the State *prior* to Wells Fargo's closing of the first lien. These loans are purchased by and endorsed to the State following origination and closing of the loans.

received a variety of documentation relating to the origination of the Wells Fargo first lien.[2] Stated another way, the City sponsored second-lien loans in order to make possible some of the very Wells Fargo loans about which it now complains.

The City also has continued practices that have contributed in large measure to the vacancy problem for which it now seeks recovery from Wells Fargo. For example, just last week, the City auctioned off a record 12,689 tax liens to grant private investors the right to foreclose on properties whose owners fell even just a few hundred dollars short on their local tax and municipal bills. (Ex. 3, Fred Schulte, Ben Protess and Lagan Sebert, City Auctions Liens on Homes; Investors Can Collect, The Baltimore Sun, May 17, 2010).[3] According to The Baltimore Sun, 400 Baltimore residents lost their homes for non-property-tax debts during the three-year period between 2003 and 2006, half of them for initial debts of less than $500. (Ex. 4, A License to Steal, The Baltimore Sun, May 19, 2010).[4] In contrast, the SAC only identifies 269

[2] A number of these second liens were originated through the City of Baltimore's Settlement Expense Loan Program ("SELP") pursuant to a formal contractual agreement between Wells Fargo and the City of Baltimore, whereby the City provided eligible borrowers with closing cost assistance in order to encourage homeownership.

[3] The corruption infecting the City's tax lien auction process is notorious. See United States v. Nusbaum, 1:09-CR-00328-JFM (D. Md. May 18, 2010) (sentencing one of the defendants to one year and one day in federal prison and an $800,000 fine following guilty plea to a felony charge of bid-rigging at tax lien sales). Tax lien purchasers dramatically inflate the amount that must be paid by mortgagors to satisfy the liens, tacking on interest and legal fees, which make it impossible for a borrower to redeem. A City tax lien placed on 3622 Edmondson Avenue, a property as to which the City claims damages in the SAC, provides an illustrative example. This lien was redeemed by Wells Fargo in January 2009 for more than $5,000, a 418% increase over the $972 in unpaid city assessments that precipitated the lien. (See www.bidbaltimore.com). Far from being the irresponsible, predatory lender that the SAC alleges, a review of the City's public records reveals that Wells Fargo redeemed approximately 440 tax liens in or about 2008 and 2009. (Id.) These redemptions included approximately 28 liens on properties as to which the City claims damages in the SAC. (Id.).

[4] In a particularly egregious example of the results of Baltimore's predatory tax lien practices, which disproportionately impact African-American neighborhoods, a disabled African-American homeowner living in a predominantly African-American neighborhood was evicted because she failed to pay a city water bill of $362, which ballooned to $3,600 once the City's auction winner tacked on interest and fees. (See Ex. 3). This City-precipitated vacancy, befalling a home whose mortgage had been paid off for more than 25 years, now joins more than 30,000 other vacancies, many of which similarly were created by the City's own actions.

foreclosure cases initiated over a 10-year period related to Wells Fargo loans, and of this number only 130 were completed foreclosures by Wells Fargo with City-specified damages.

The president of the City Council, a plaintiff here, attempted to explain the fact that the number of auctioned liens has doubled since 2006, saying that the "jump reflects the pain being felt by Baltimore and other cities across the county. It's definitely indicative of the overall recession." (Ex. 5, Wells Fargo Mortgage Case in Baltimore Dismissed, Reuters, Jan. 7, 2010). According to the City, its own tax lien sales resulting in foreclosures on and evictions of African-Americans, which add to the enormous number of vacancies in Baltimore, are compelled by economic forces beyond its control, but foreclosure by Wells Fargo can only be explained by discrimination. The City's position is both hypocritical and legally unsustainable.

Underscoring the conclusion that the City of Baltimore is acting with wilful blindness regarding the root causes of the purported ills outlined in the SAC, in at least seven instances, the State of Maryland initiated the foreclosure action that the City now tries to attribute to Wells Fargo. This is ironic in light of the fact that Wells Fargo is a lender who, for decades, has partnered with the City and State in efforts to revitalize Baltimore, a city with one of the highest vacancy rates in the country, due, in large measure, to the failed policies and practices of its own government.

SUMMARY OF ARGUMENT

The SAC makes only two changes to the First Amended Complaint, and neither addresses the fundamental deficiency that caused the Court to dismiss the City's case—that the City cannot state a fairly traceable connection between Wells Fargo's lending activity and its purported damages in maintaining certain properties, providing police and fire protection for those properties, and reduced property tax revenues.

First, the City lists 51 pages of costs unspecified by month, day, amount, or nature, which allegedly are associated with various properties that at some point in the past ten years may have been vacant. The City connects these purported damages to Wells Fargo in one sentence of its 100-page SAC with the bald assertion that "[t]hese services would not have been necessary if the properties were occupied" (SAC ¶ 97) and that they were made vacant by Wells Fargo's lending activity. Nothing in the SAC addresses the Court's determination that the City did not have standing in light of the "negligible" portion of the vacant housing stock even arguably attributable to Wells Fargo. City of Baltimore, 677 F. Supp. 2d at 850. In fact, the SAC purports to identify 190 properties that once were the subject of a Wells Fargo mortgage loan as to which it has made expenditures or provided services. (SAC ¶¶ 105-294).[5] Only 138 of these properties are alleged to be vacant currently. (SAC ¶ 104). Of course, the City omits from the SAC statistics publicly available from its own Housing Department that there are approximately 30,000 vacant properties in Baltimore, of which the City itself owns one-third. (Ex. 6, Mayor Dixon Introduces Bold Initiative to Address Vacant Housing, *available at* http://www.baltimorehousing.org/wgo_detail.asp?id=323). Thus, the City's "best case" purports to hold Wells Fargo responsible for $20 million in damages because it allegedly has responsibility for less than one-half of one percent of all vacant properties in the City.[6]

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5 Further departing from the Court's Order requiring articulation of a fairly traceable connection, the City speculates about 34 vacant property addresses at which it anticipates future expenses (SAC ¶ 295), and 45 formerly vacant properties as to which it has "not yet identified costs for providing increased municipal services." (SAC ¶ 296). Such speculative claims cannot be considered. See, e.g., Powers v. U.S. Home Corp., No. 09-cv-2167, 2010 WL 605727, slip op. (D. Md. Feb. 18, 2010); Robinson v. Board of County Comm'rs, No. 07-cv-1903, 2008 WL 2484936 (D. Md. June 19, 2009).

6 Despite its 51 pages of purported damages, the City fails to place any particular dollar value on them in the SAC. Continuing its tactic of litigating this case in the press, however, the City publicly stated that its case is worth $20 million. (Ex. 8, City Changes Tactics on Wells Fargo Lawsuit, The Baltimore Sun, Apr. 21, 2010).

While spending dozens of pages asserting damages, the SAC does nothing to address the fundamental traceability gap between Wells Fargo making a loan and causing the City damages through a vacant property. Just as the Northern District of Alabama reasoned in dismissing a substantially identical case brought by the City of Birmingham against several lenders—and as this Court reasoned in its prior ruling—the City's SAC requires "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.'" (Ex. 7, City of Birmingham v. Citigroup Inc., CV-09-BE-467-S, slip op., at 8 (N.D. Ala. Aug. 19, 2009)). In addition, the City of Birmingham Court found, just as is the case here, "that the alleged injuries to the City are too tenuously connected, and so not fairly traceable, to the Defendants' alleged misconduct in this case," and 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.; see also City of Cleveland v. Ameriquest Mortgage Sec., Inc., 621 F. Supp. 2d 513, 533-34 (N.D. Ohio 2009) (finding that "[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" in light of the fact 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 . . . .").

Understanding the difficulties posed to its case by the limited number of actual foreclosures associated with Wells Fargo properties, the City purports to have identified 640 foreclosure *notices* over a ten-year period from 2000 to 2009. What the SAC omits is that there were more than 45,000 foreclosure notices filed in Baltimore during the same period. (Compl. ¶ 17; Ex. 9, BNIA-JFI Compilation of Baltimore City Foreclosure Filings by Quarter, 2007-2009, *available at* http://www.ubalt.edu/bnia/maps.cfm). Thus, even by the City's own numbers, Wells Fargo's 640 foreclosure notices constitute 1.4% of those filed in the City over a ten-year period. Of course, even the 640 number is grossly inflated. The City's conflation of notices of foreclosure with completed foreclosures defies common sense because of the undeniable fact that many foreclosure notices do not result in foreclosures, and many completed foreclosures do not result in vacancies. Thus, foreclosure notices by themselves provide no basis to establish the necessary fairly traceable connection between Wells Fargo and the City's purported damages.

The second alteration in the SAC is that the City invents a new geographic "sub-neighborhood" methodology solely for the purpose of the SAC and claims to have applied an undisclosed "hedonic regression" analysis to "precise[ly]" quantify the property tax revenues lost by the City. (SAC ¶¶ 306, 310, 312).[7] The City's revamped "property tax" theory ultimately continues to fall short of providing the essential links in the causal chain because it asks the Court to accept an analytical framework invented for no other purpose than this litigation, which is based on bald assertions of expert certainty without disclosure of any methodological specifics, and which is demonstrably false inasmuch as it ignores the statutorily-required property tax assessment process. Specifically, the City ignores the property tax assessment process prescribed by law and regulation (and thus subject to judicial notice), which requires

[7] Strikingly, as discussed below, two of the five neighborhoods in which the City's "sub-neighborhoods" are located do not have majority-minority populations according to the City's own data, though the City's "reverse redlining" claim depends on that designation.

consideration of specific factors by assessment professionals, none of which relate to concentration of foreclosures within the City's newly-created "sub-neighborhoods." The "property tax" theory also focuses solely on the purported effects of foreclosures on the City's tax revenues, while once again failing to establish a sufficiently-pled basis for the essential traceability from Wells Fargo's alleged discriminatory conduct to such foreclosures and lost revenues.

In short, the City asks the Court to accept that this case should move forward to costly and burdensome discovery because it has a secret formula that, when applied to an artificial geographic slice of the City's careful choosing, can purportedly parse and precisely quantify the effects of a single foreclosure event from the effects of the financial crisis, the housing market downturn, poverty, drug abuse, neglect, divorce, illness, job loss, the approximately 30,000 currently vacant properties in Baltimore, neighboring foreclosures (including those resulting from Baltimore's thousands of tax liens resulting in hundreds of foreclosures), neighboring vacancies (many of which are owned by the City itself), and any other factor. (SAC ¶ 310). Rather than establishing a fairly traceable connection, the City's property tax claim defines the concept of an implausible causal chain that cannot serve as the basis for standing.

The City's continuing failure to articulate a plausible link between Wells Fargo's lending, the enormous number of vacant properties in a city besieged by a host of socioeconomic challenges and the purported damages is wholly unsurprising. Wells Fargo has long been a fair and responsible lender with a small and balanced market share in the City of Baltimore.[8] Indeed,

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[8] Wells Fargo did not offer payment option ARM loans, did not offer stated income subprime loans with FICO scores less than 620, did not delegate underwriting, and was the first major lender to implement prefunding fraud screening and income fraud prevention. Indeed, one of the allegations in Securities & Exchange Commission

(cont'd)

Wells Fargo has been embraced by the City as a partner in urban renewal, participating in numerous City-sponsored lending programs commenced well before 2000, some of which continue to the present. Wells Fargo continues to be a "preferred lender" approved by the State of Maryland's Community Development Administration for Live Baltimore, a non-profit partner of the City of Baltimore Government and Housing Department, which promotes population growth. (Ex. 10, Live Baltimore Preferred Mortgage Lenders, *available at* http://www.livebaltimore.com/resources/preferredpartners/mortgagelenders).

As demonstrated at the hearing on Wells Fargo's Motion to Dismiss the original Complaint, Wells Fargo again will be able to show through loan-by-loan analyses for each property at issue that it engaged in judicious underwriting, but that life circumstances such as illness, job loss, death, divorce, and investments gone awry are the true causes of delinquency. Such analyses will also show that many of these properties were in close proximity to non-Wells Fargo properties either foreclosed upon, vacant, or in disrepair, including many owned by corporations, investors, and the City itself. As a matter of law, however, it is unnecessary for Wells Fargo to bear the burden of making such a specific showing where the City's own allegations plainly demonstrate that to make the necessary causal connections between the Wells Fargo's lending practices and the City's claims of property tax revenue diminution and increased municipal costs, the Court would have to draw a series of wholly speculative inferences

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v. Goldman Sachs & Co., 10-cv-03229 (S.D.N.Y. filed Apr. 16, 2010), relates to the well-known quality of Wells Fargo loans. In that lawsuit, the SEC alleges that Goldman Sachs made materially misleading statements in connection with a synthetic collateralized debt obligation ("CDO") tied to the performance of subprime residential mortgage-backed securities, and that the reference portfolio was selected by a hedge fund, Paulson & Co. Inc., with economic interests directly adverse to investors in the CDO. The SEC alleged that an internal e-mail relating to the selection asked, "Did [Paulson] give a reason why they kicked out all the Wells [Fargo] deals?" and the SEC itself noted in explanation that "Wells Fargo was generally perceived as one of the higher-quality subprime loan originators." Compl. at ¶ 34, Securities & Exchange Commission v. Goldman Sachs & Co., 10-cv-03229 (S.D.N.Y. filed Apr. 16, 2010).

dispositive of the standing question. The Court need not undertake a specific examination of each delinquency, each vacant property, each drug transaction or other criminal offense, each squatter's discarded trash, and each pest infestation in order to conclude that alleged misconduct by Wells Fargo was not the fairly traceable cause of any alleged injury to the City. Just as it did with the First Amended Complaint, the Court should dismiss the SAC for failure to establish the injury-in-fact and traceability necessary to establish standing. Wells Fargo respectfully requests that the Court dismiss this action with prejudice.[9]

ARGUMENT

I. THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

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). Under Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 1239 S.Ct. 1937 (2009), a plaintiff is required to plead facts permitting a reasonable inference that a defendant is liable for the misconduct alleged, and the court is to draw on judicial experience and common sense in its review. A district court "has

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9 Wells Fargo incorporates by reference the other legal arguments made in its Motion to Dismiss the original Complaint (attached as Ex. 11, with exhibits thereto omitted and available at Docket No. 10). Wells Fargo also incorporates by reference its background discussion, which addressed the thousands of City tax lien sales, the loss of more than a quarter of the Baltimore population over the last 50 years, and Baltimore's crushing burdens of crime, poverty, joblessness, failing schools, urban decay, high property tax rates, violence, drug addiction, and the declining economy. (Ex. 11, Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint, at 3-8).

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) (internal quotation and citation omitted). "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 exists." Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993) (internal quotation and citation omitted); see also White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459 (4th Cir. 2005).

As the City did in the First Amended Complaint, it has again, in the SAC, theorized three types of injury: the (1) Property Tax Theory, (2) Crime Theory, and (3) Rehabilitation Theory. The only theory that is substantially altered from the First Amended Complaint is the Property Tax theory. All three theories, however, still fail because they rely on lengthy, speculative, and attenuated causal chains that are 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 a weakening economy, illness, divorce, job loss, incarceration, death, or the City's own tax liens) caused the borrower to default; (ii) the mere notice of foreclosure caused the home to be abandoned, and there was no buyer willing to purchase the subsequently foreclosed-upon home; (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, housing code violations, and low property values in the "sub-neighborhoods" identified in the SAC; (iv) this, and not any other factor, such as those cited above, caused a "loss in assessed property value" (SAC ¶ 311); (v) this caused the Maryland State Department of Assessments & Taxation to lower property assessments; (vi) which led to a "corresponding loss in property tax revenues" collected by the City (Id.), which is "distinguishable from any loss attributable to non-Wells Fargo foreclosures or other causes" through "hedonic regression" analysis. (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) the mere notice of foreclosure caused the home to be abandoned, and there was no buyer willing to purchase the subsequently foreclosed-upon home; (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 269 additional vacant homes among the City's 30,000 vacant properties, in a city with one of the highest crime rates in the country (78.25 Part I offenses per 1,000 people in 2008) (Ex. 12, BNIA Citywide Vital Signs, *available at* http://www.bniajfi.org/vs/indicators/29); (v) which led the City's fire department to "send personnel and fire trucks . . . to respond to fire hazards and other public health and safety threats" and led the City's police department to "send personnel and police vehicles . . . to respond to public health and safety threats," including "crime, squatting, loitering, trash, burst pipes, rat infestation, and other problems" (SAC ¶¶ 99, 100, 297).

The Rehabilitation Theory. This approach theorizes that: (i) the Wells Fargo loan (and not some other factor, including, for example, a weakening economy, illness, divorce, job loss, incarceration, death, or the City's own tax liens) caused the borrower to default; (ii) the mere notice of foreclosure caused the home to be abandoned, and there was no buyer willing to purchase the subsequently foreclosed-upon home; (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 to municipal housing code violations, "vermin infestation, burst water pipes, and more" (SAC ¶¶ 98, 101); (vi) which led the City's housing department and "other City departments" to devote "personnel time" and incur unspecified "out-of-pocket costs" and other "administrative costs." (SAC ¶¶ 98, 101).

In support of these theories, the City has recycled its 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. (SAC ¶¶ 46-71).[10] As well, in an attempt to support its allegations of injury, the City has recycled the declarations included in the First Amended Complaint of neighbors of properties once the subject of a Wells Fargo loan who complain of purported disrepair, loitering, rats, crime, and burst pipes. (SAC ¶¶ 114-18). Among these properties are investor-purchased homes in disrepair long before they were noticed for foreclosure and properties situated on blocks with numerous vacancies (many of which are owned by the City). The home of one of the declarants is immediately adjacent to a City-owned property that was vacant at the time that the declaration was executed and within several houses of two other City-owned properties that have been condemned. The Wells Fargo property at issue is located several houses away from the declarant's home—yet the City remarkably asserts

[10] 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. (See SAC Attachment A). Distancing herself from alleged past misconduct, Ms. Jacobson now has recast herself as a consumer rights champion, exploiting her new-found status while making the rounds on television and radio programs nationwide. She has made a variety of statements that contradict her affidavit, significantly undermining the credibility of her allegations. (See, e.g., Interview by Marc Steiner with Elizabeth Jacobson, Marc Steiner Show, *available at* http://www.steinershow.org/radio/the-marc-steiner-show/september-1-2009-hour-1, 40:04-40:11, Sept. 1, 2009). Her allegations should be considered in the context of her own four Wells Fargo foreclosures actions, as well her other meritless legal disputes with Wells Fargo. 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.

that all harm to that property comes from the foreclosure initiated by Wells Fargo, not its own vacant properties.[11]

The neighbors' declarations only highlight what is missing from the SAC—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 the 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. The City's SAC must be dismissed because it fails to assert (i) any injury fairly traceable to Wells Fargo's alleged conduct; or (ii) an injury-in-fact.

A. The City Fails to Allege an Injury Fairly Traceable to Wells Fargo's Conduct.

Consistent with the governing Supreme Court precedent on the strictures of "fairly traceable" causation, each court to have adjudicated the theories of causation advanced here has rejected them. See, e.g., City of Baltimore, 677 F. Supp. 2d 847; City of Birmingham, CV-09-BE-467-S, slip op.; City of Cleveland, 621 F.Supp.2d 513. Allen v. Wright, 468 U.S. 737 (1984) is the seminal Supreme Court case addressing traceability. In Allen, parents of African-American public school children 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

[11] Even if a vacancy could be attributed to a Wells Fargo loan, the City does not address whether the vacant properties it owns may have contributed to the persistence of a Wells Fargo vacancy, inasmuch as prospective homebuyers, under the City's theory of liability, are not interested in purchasing homes on blocks with vacancies.

an education in desegregated public schools. Id. at 739-40. The Supreme Court concluded that the parents did not have 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.

To satisfy this fair traceability element, 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).

Consistently applying the Allen analysis, the City of Birmingham court applied it to allegations fundamentally identical to those in the instant case. 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 of Baltimore has here.

Notably, 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 Birmingham's complaint went even "one step farther than the Tingley case" by seeking recovery of purported lost tax revenue and excess municipal costs (Ex. 7, City of Birmingham, CV-09-BE-467-S, slip op., at 8), the court in City of Birmingham 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. (citation omitted). 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, Cleveland advanced a nuisance claim under a similar theory of causation. City of Cleveland, 621 F. Supp. 2d at 515-16. 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 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.

In dismissing the City of Baltimore's First Amended Complaint, this Court similarly concluded that "the alleged connection [between purported conduct by Wells Fargo and the City's alleged injuries] is even more implausible when considered against the background of other factors leading to the deterioration of the inner city, such as extensive unemployment, lack of educational opportunity and choice, irresponsible parenting, disrespect for the law, widespread drug use, and violence." City of Baltimore, 677 F. Supp. 2d at 850.

Nothing in the SAC alters the soundness of this Court's prior analysis—consistent with the analyses of other courts addressing the same theories—that the City's Property Tax, Rehabilitation, and Crime Theories fail to set forth plausible causal chains as required by Allen and Frank Krasner Enterprises.

1. The Recycled Crime and Rehabilitation Theories Fail to Articulate Fairly Traceable Causation.

The City has identified 190 vacant properties—in a city with approximately 30,000 vacant properties—that allegedly were once the subject of a Wells Fargo residential mortgage loan, in connection with which it has made unspecified expenditures or provided certain services. (SAC ¶¶ 105-294). Once again, however, the City has failed to explain how, for example, a Wells Fargo loan made in 2002 plausibly caused the City to incur an expense in 2008 when mice showed up in the property or someone sold heroin in the property, which years before had been secured by the loan and then subsequently was sold to a third party. As in City of Birmingham and City of Cleveland, any alleged injury here was caused by a number of intervening factors, including the steep decline in the housing market, homeowners' personal and financial difficulties, the City of Baltimore's inveterate social and economic problems, or—even more directly—gangs, criminals, and pests.

The true driver of any disparity in foreclosure rates between African-American and Caucasian neighborhoods, insofar as the City tries to argue that one exists, has nothing to do with discriminatory lending and everything to do with the unfortunate reality of socioeconomic disparities. The City's dot map of Wells Fargo foreclosures at paragraph 38 of the SAC underscores the gulf between its allegations and this reality. For example, the dot map at paragraph 38 draws an arrow to the Madison/East End neighborhood, designated as over 80% African-American. Alleged Wells Fargo foreclosures are indicated with fewer than 20 dots. At the end of 2008, 24.4% of the 3,262 residential homes in this neighborhood were vacant. (Ex. 13, BNIA Neighborhood Profile, *available at* http://www.bniajfi.org/neighborhood_data). Notably, the neighborhood's unemployment rate is 24.16%, its median household income is $26,372, and its high school dropout rate is 9.34%. (Id.). Thus, the City's "best case" is that all of the alleged Wells Fargo foreclosures became vacant, and that fewer than 20 of nearly 800 vacancies —only two and a half percent— are somehow attributable to Wells Fargo. Similarly, the City's dot map points to fewer than 20 foreclosures in Upton/Druid Heights, which is also designated as over 80% African-American. At the end of 2008, 33.93% of the 2,240 residential homes in this neighborhood were vacant. (Ex. 14, BNIA Neighborhood Profile, *available at* http://www.bniajfi.org/neighborhood_data). Notably, the neighborhood's unemployment rate is 21.17%, its median household income is $13,051, and its high school dropout rate is 12.77%. (Id.). Thus, the City's "best case" is that all of the Wells Fargo foreclosures became vacant, and that fewer than 20 of approximately 760 vacancies are somehow attributable to Wells Fargo.

By contrast, the City's dot map points to the North Baltimore/Guilford/Homeland neighborhood, which is designated as 20% or less African-American and where Wells Fargo is alleged to have only four foreclosures, making the baseless argument that the difference in foreclosure rates is attributable to discrimination. At the end of 2008, only one-quarter of one percent of the 5,300 residential homes in this neighborhood were vacant. (Ex. 15, BNIA Neighborhood Profile, *available at* http://www.bniajfi.org/neighborhood_data). This is a predictable result when considered in the context of key socioeconomic factors. The neighborhood's unemployment rate is 6.81%, its median household income is $106,172, and its high school dropout rate is 3.25%. (Id.). Put simply, the homeowners in this neighborhood are less likely to face foreclosure because they earn more, have a greater level of education, and are more likely to have steady employment.

The City's effort to show that Wells Fargo foreclosures in minority neighborhoods are out of proportion to its foreclosures in non-minority neighborhoods falls flat. Neighborhoods where Wells Fargo foreclosures are alleged to be "concentrated" are the same neighborhoods with vacancy rates many times the (already-high) Baltimore City average, with unemployment and dropout rates three and four times the rates in neighborhoods where foreclosures are rare, and median household incomes that are a fraction of those in neighborhoods where foreclosures are rare. It is telling that the City of Baltimore determined that many of these neighborhoods were unstable and deteriorating long before Wells Fargo tried to help resurrect them by extending credit to their residents.[12] At issue here are troubled

[12] Many of the properties identified in the SAC are located in Baltimore's Empowerment Zone, which is comprised of neighborhoods identified as deteriorating and in need of stabilization (and thus worthy of the investment of federal funds to assist prospective homeowners with acquisition funds). Baltimore's Urban Empowerment Zone was one of the first six such areas in the nation, qualifying it for an initial $100 million in accelerated anti-poverty funding and revitalization efforts through the United States Department of Housing and Urban Development. (Ex. 16, M.R. Cheshire, Baltimore Fights for "Empowerment Zone" $100 Million Grant, Baltimore Afro-American, Apr. 9, 1994). It was so designated in 1994 after successful efforts by city leaders to affirm that the proposed zone met such regulatory criteria as suffering from "pervasive poverty, unemployment, and general distress." See Designation of Empowerment Zones and Enterprise Communities, 59 Fed. Reg. 2700 (Jan 18, 1995) (to be codified at 24 C.F.R. pt. 597).

neighborhoods, not troubled lending practices, and any alleged increased prevalence of Wells Fargo's foreclosures is simply commensurate with the increased socioeconomic problems therein.

2. The Revamped Property Tax Theory Fails to Articulate Fairly Traceable Causation.

The City continues to propose to isolate the damages caused in connection with allegedly diminished property tax revenue by a single foreclosure from all surrounding foreclosures and any other causal factors through "hedonic regression" analysis. (SAC ¶¶ 310-312). In dismissing the First Amended Complaint, the Court indicated that it was not persuaded that the opportunity to perform such analysis could overcome common sense and justify millions of dollars in discovery costs: "a court is a forum in which facts and theory must converge . . . however academically acceptable an expert's opinion might be, in order to be admissible as evidence, it must bear—from the perspective of judges, not only fellow experts—a coherent relationship to the underlying facts." City of Baltimore, 677 F. Supp. 2d at 851. As the Fourth Circuit has explained, "[f]ederal jurisdiction cannot lie if the alleged injury is merely 'an ingenious academic exercise in the conceivable.'" Friends of the Earth, 204 F.3d at 156 (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973)).

As an initial matter, the City simply has failed to allege any plausible connection between Wells Fargo's alleged discriminatory conduct and the foreclosures that it claims have diminished its tax base. All of the City's discussion of "hedonic regression" analysis does not, and cannot, remedy this logical flaw in the SAC.

The City itself defines "predominantly" African-American neighborhoods as those comprised of "60% or greater" African-American population, and its cause of action depends on that definition. (SAC ¶¶ 4, 319, 320). However, two of the five "African-American neighborhoods" (SAC ¶ 307) with "sub-neighborhoods" as to which the City claims damages under the Property Tax Theory do not even meet its own definition. Specifically, the City's own data compilations show that, as of the 2000 census, 56.5% of Northwood's population is African-American and 40.9% of Waltherson's population is African-American. (Ex. 17, BNIA Neighborhood Profiles, *available at* http://www.bniajfi.org/neighborhood_data).

In addition to the problems of speculation and attenuation inherent in the elaborate causal chain devised and the City's failure to identify any period during which Wells Fargo completed "at least one-third of all foreclosures" in the City's identified "sub-neighborhoods" (SAC ¶ 306), the Property Tax Theory also ignores the actual property tax assessment process, which requires consideration of certain factors specifically excluding any concentration of foreclosures. A theory of liability that conflicts with processes prescribed by statute must be rejected. See, e.g., Arthur v. Ticor Title Ins. Co. of Florida, 569 F.3d 154, 159 (4th Cir. 2009) (rejecting plaintiff's "ingenious" attempt to nullify the plain language of a statute permitting charge for title insurance by splitting subject charge into "valid" and "invalid" components).

In the State of Maryland, the valuation of all real property for purposes of ad valorem taxation is a function of State government under the Maryland State Department of Assessments and Taxation ("SDAT"). Real estate is to be assessed and valued according to Tax-Property Article §8-102, and 103. A property's market value includes such factors as the quality of construction, the number of bathrooms, and the type of land on which it is situated, and is "the most probable price which a specified interest in real property is likely to bring" under conditions including an open and competitive market and a typically motivated buyer and seller. (Ex. 18, Skolnik Aff., at ¶ 12).

Property tax assessments are performed on a rotating three year cycle, with the City of Baltimore divided into three districts for property tax assessment purposes. The assessor's analytical process involves identifying comparable properties in geographic proximity as to which there have been market transactions in the two and two-thirds years immediately preceding the revaluation date. The identified properties are included in the Area Sales Analysis. According to SDAT, the sales in a given area or neighborhood "are reviewed and the sales that are considered to be valid arms-length transactions are included on the area sales analysis report." (Id., at ¶¶ 19-20). Thus, Maryland assessors are to exclude foreclosure sales from their determination of real property tax assessments. (Id., at ¶¶ 17, 22). Finally, even if "sub-neighborhoods" were used in the property tax assessment process, the City ignores the fact that approximately 40% of the properties at issue in the SAC have not been assessed and valued since foreclosure, and therefore the City could not have associated diminished property tax revenue collections as a result of foreclosure actions on these properties.[13]

In other words, the City has completely ignored the actual process of property tax assessment. Instead, it has completely invented a process that focuses solely on foreclosures in artificially compressed geographic areas that fit within its undisclosed, "trust me" "hedonic regression" analysis. The Court should not accept such an "ingenious academic exercise in the conceivable" as a basis for federal court jurisdiction. Friends of the Earth, 204 F.3d at 156 (quoting SCRAP, 412 U.S. at 688).

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[13] Moreover, in general, foreclosures do generate tax revenue for the City in several ways. First, the City collects unpaid property taxes (if any) that are brought current by the lender at or before foreclosure. Second, while the properties are held by the lender, property taxes typically are paid on time by the lender. Third, the lender pays realty transfer taxes when it acquires a property in foreclosure and pays realty transfer taxes once again on the sales price when the lender sells the property to a purchaser. Fourth, the Homestead Property Tax Credit (*i.e.,* tax cap) of the previous owner is rescinded at foreclosure and property taxes going forward are not suppressed by the tax assessment cap.

3. While the City's Causal Chains are Uniformly Implausible, Many Are Also Simply Impossible.

The City of Baltimore has identified only 190 properties, over a ten-year period, in connection with which it allegedly can point to a calendar year in which it expended any resources. An examination of publicly-available information regarding these loans demonstrates that even this miniscule statistic is inflated as Baltimore has included in this population loans that were not originated by Wells Fargo, loans that were foreclosed upon by entities other than Wells Fargo, and a significant number of properties that never completed foreclosure. At best, approximately 130 properties as to which the City specifies damages in the SAC had loans that were originated by Wells Fargo and completed a foreclosure initiated by Wells Fargo. Of these properties, only approximately 112 were located within census tracts that are primarily African-American, a claim upon which Plaintiff's theory of discrimination depends. Approximately 50% of the loans made on these 112 properties were made to borrowers believed to be investors. An analysis of the remaining loans, approximately 60, reveals that, as to the vast majority, life circumstances such as curtailment of income, job loss, illness, divorce, death, and structural problems at the property were the root causes of default.[14] In sum, the City's causal chains fail.

In addition, the timelines for the City's alleged damages at the identified properties do not align with the alleged Wells Fargo foreclosure in a significant number of cases. Nearly 40% of the loans identified in the SAC have one or more damage allegations that predate the notice of foreclosure. That number may be as high as 65%, but the City has failed to make

[14] Available data on these loans indicates that they were far from predatory. Nearly 70% of the loans had a fixed rate, and it appears that only approximately five of the adjustable rate mortgages had an interest rate increase prior to foreclosure. With respect to loans for which data was available, the average interest rate was less than 8.5% at origination and debt-to-income ("DTI") and loan-to-value ratios ("LTV") were conservative. The average DTI was approximately 37% and the average LTV was approximately 85%.

sufficient allegations about the dates of expenditures to permit such a determination with respect to loans whose notice of foreclosure occurred in the same year as an identified expenditure.[15] For example, the City claims damages in connection with four properties where such claims predate foreclosures on the loans securing them by more than two years, and claims damages in connection with two properties where such claims predate even notices of foreclosure on the loans securing them by more than a year. The City even claims damages in connection with one property for a year predating Wells Fargo's origination of the loan at issue.

In its presentation during the June 29, 2009 Hearing on the Motion to Dismiss the original complaint, 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 Presentation," attached as Ex. 19). The City obtained and presented affidavits and evidence of expenditures with respect to ten foreclosures at issue (the "City's 10 Best"). All ten remain in the list of 269 properties as to which the City seeks damages in the SAC, and the relevant affidavits have been recycled. All ten 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. (Ex. 18, Williams Aff., at ¶¶ 23-32). Most of the foreclosures are located in blocks with a significant number of properties owned by the City or corporate entities.

The City's 10 Best include only one non-investor borrower. (Ex. 18, Williams Aff., at ¶ 21). Four of the ten were never owned or managed by Wells Fargo post-foreclosure,

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[15] Prior to the completion of foreclosure proceedings and the expiration of any applicable confirmation period, title to a foreclosed property is held by the mortgagor. Until title to the property is assumed by Wells Fargo, or another lienholder for whom Wells Fargo is servicing the mortgage loan, the responsibility for the property's maintenance rests with the mortgagor. (Ex. 18, Schares Aff.. at ¶¶ 5, 6).

having been sold to third parties at foreclosure or reverting 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. (Ex. 18, Schares Aff., at ¶¶ 15, 16, 20, 21, 23).

The property located at 3803 Bonner Road provides a particularly poignant example of the insufficiency of the City's causation allegations. The borrower was an African-American investor and co-owner of a real estate investment firm who owned at least seven other properties, including several that went into foreclosure during the same time period. The City's own records reflect that the property received citations for Housing Code violations prior to the notice of foreclosure, and public court records show that the property ultimately was found to be unfit for human habitation by the District Court of Maryland for Baltimore City long before Wells Fargo initiated foreclosure. (Ex. 18, Schares Aff., at ¶ 21). Accordingly, the assertion that a Wells Fargo notice of foreclosure triggered a vacancy in this property and caused resulting damages to the City is implausible.

Further undermining the City's claims against Wells Fargo, its suggestion that the Bonner Road property continues to cause damage due to Wells Fargo's conduct is demonstrably false. (SAC ¶ 298). Through the highly-publicized efforts of Wayland Baptist Church ("WBC"), which has owned the property since early 2008, WBC's associated community development corporation, and the efforts of other non-profits, the property is being rehabilitated and will house a senior apartment complex to be called Wayland Village Senior Apartments.[16] (Ex. 20,

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[16] Notably, the City's counsel used the Bonner Road property as an exemplar in a presentation approximately three weeks after filing the SAC regarding the instant case and a virtually identical lawsuit filed in the Western District of Tennessee. Although carefully avoiding quantifying its alleged damages in the SAC, the presentation includes a tally of purported City expenditures on certain properties, including the Bonner Road property. As to this property, which the City highlights as one of the most egregious of the 269 in the SAC, the City's alleged expenditures were a mere $2,600. Even if all expenditures were accepted as accurate, they would call into question

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Bon Secours of Maryland Foundation, Wayland Baptist Church CDC and Enterprise Homes Break Ground for Wayland Village Senior Apartments in West Baltimore, PR Newswire, May 7, 2010). The Bonner Road property is illustrative of the fact that—writ large—the City's arguments regarding fairly traceable causation are implausible.

B. The City Fails to Allege an Injury-in-Fact.

In addition to failing to demonstrate a fairly traceable connection between alleged act and injury, the City also has failed to satisfy the injury-in-fact element, which requires a plaintiff to show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "This requirement is designed to filter out claims of highly attenuated injuries." Crutchfield v. United States Army Corps of Eng'rs, 230 F. Supp.2d 687, 694 (E.D. Va. 2002). An injury must be "distinct and palpable" and not "abstract" or "conjectural" or "hypothetical." Allen, 468 U.S. at 751 (internal quotations and citations omitted).

It is pure speculation to argue that Wells Fargo caused the City to make municipal expenditures that otherwise it would not have made, particularly in light of the enormous number of foreclosures initiated by others, including the more than 19,000 initiated as a result of the City's own tax lien sales. The City's claims are further undermined because the State of Maryland precipitated foreclosure actions in connection with government-sponsored programs,

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the City's assertions that this is a multi-million dollar case. As well, the municipal efforts identified in the presentation are at variance with those identified in the SAC. (Brad Blower, Cities as a Source of Consumer Protection: Baltimore and Memphis, Address before the Fordham University School of Law (Apr. 26, 2010), attached as Ex. 21).

including actions on at least seven of the loans it has placed at issue in this case. The City bases its entire claim on the conclusory assertion that "[t]hese services would not have been necessary if the properties were occupied." (SAC ¶ 97). Indeed, the City's claim is even more speculative because the gravamen of the SAC is that Baltimore residents received loans they could not afford. (SAC ¶ 3). Even if this were true, and it is not, the City's essential allegation is that such loans caused the real estate market to have an artificial surplus of buyers, that the market demand for residential real estate in Baltimore was higher than it otherwise should have been, that property tax assessments rose higher than they otherwise should have risen, and that the City received more property tax revenue for a period than it otherwise should have received. As well, there were buyers for residential properties that otherwise should have been vacant—and would have, under the City's theory of the case, imposed municipal costs relating to fire and police protection, crime, and rehabilitation.

In addition, the SAC includes 79 properties at which the City claims "there are or will soon be housing code violations" and at which "there may be housing code violations . . . in the future." (SAC ¶¶ 295, 296). However, a "plaintiff alleging a future injury at some indefinite time does not support a finding of an 'actual or imminent injury.'" Powers, 2010 WL 605727, at *3 (quoting Lujan, 504 U.S. at 564). As this Court has noted, to have standing, plaintiffs "must allege that they have been harmed in fact, not that they 'can imagine circumstances in which [they] could be affected.'" Doe v. Blue Cross Blue Shield of Md, Inc., 173 F. Supp. 2d 398, 403 (D. Md. 2001) (quoting SCRAP, 412 U.S. at 688).

It is clear under relevant case law that the injuries claimed with respect to these 79 properties fall especially short of the "discrete and palpable" standard. In Robinson, 2008 WL 2484936, this Court dismissed a claim for lack of standing that was contingent on events that a plaintiff, like the City in this case, said were certain to occur. In that case, a developer pledged to donate land to a non-profit organization so that it could be used to construct low- and moderate-income housing. County officials denied a request for upgraded water and sewer services necessary to the development, and the intended builder filed suit. The Court said that, in order for the builder to show an injury-in-fact, both (i) the developer must go forward with the donated land, and (ii) the non-profit must actually contract with the builder. Because neither event was "guaranteed to occur," the Court held that the builder did not have standing. Id. at *6.

Similarly, in Stasko, 282 F.3d 315, local residents and an association sued the United States Fish and Wildlife Service to enjoin a proposed land transaction, which they asserted would preclude construction of a planned roadway (Ferrell Parkway) and would deprive them of attendant benefits such as an emergency route and dispersed traffic flow. The Fourth Circuit found that the effects posited were "wholly speculative," and that the plaintiffs would not suffer any injury by the transaction complained of itself. Id. at 321. Further, the court noted that it "is pure conjecture to believe that, absent the [transaction] . . . Ferrell Parkway would be built anytime in the near future." Id. at 322. See also Crutchfield, 230 F.Supp.2d at 696 (finding that landowners who filed suit against the Army Corps of Engineers to invalidate anticipated Clean Water Act permit had no standing in light of the fact that the "asserted threatened injury is remote, not imminent, and its occurrence is predicated on [] surmise").

Here, the City's injuries (and prospective threatened injuries) depend not only on the speculative occurrence of acts by criminals, vagrants, or vermin far beyond Wells Fargo's control, it also rises or falls on the bald assertion that, but for a Wells Fargo loan, the subject properties would be both occupied and free of code violations requiring municipal expenditures. (SAC ¶ 97). As such, the City has failed to demonstrate both the necessary fairly traceable connection between alleged act and injury and an injury-in-fact sufficiently concrete and palpable to confer standing in federal court.

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 SAC.

Respectfully submitted,

/s/ Andrew L. Sandler

Andrew L. Sandler (MD Fed. Bar No. 22950)
Benjamin B. Klubes (MD Fed. Bar No. 08085)
Jonice Gray Tucker (MD Fed. Bar No. 26484)
Valerie L. Hletko (*pro hac vice*)
BUCKLEYSANDLER LLP
1250 24th Street, N.W., Suite 700
Washington, D.C. 20037
(202) 349-8000 (Telephone)
(202) 349-8080 (Facsimile)
asandler@buckleysandler.com
bklubes@buckleysandler.com
jtucker@buckleysandler.com
vhletko@buckleysandler.com

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

CERTIFICATE OF SERVICE

I certify that the foregoing document, filed through the Electronic Case Filing (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 May 25, 2010.

Dated: May 25, 2010

/s/ Andrew L. Sandler
Andrew L. Sandler