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.	No. 1:08-cv-00062-JFM

PLAINTIFF MAYOR AND CITY COUNCIL OF BALTIMORE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STANDARD OF REVIEW 10

ARGUMENT 14

I. THE SECOND AMENDED COMPLAINT DEMONSTRATES THAT BALTIMORE HAS STANDING 14

A. Baltimore Has Followed the Court's Directions In Full and Narrowed the Damages It Seeks In the Second Amended Complaint 14

B. Baltimore Does Not Seek Damages for Preexisting Socioeconomic Problems or Any Other Generalized Injuries Not Directly Attributable to Wells Fargo's Illegal Lending Practices at Specific Wells Fargo Properties 19

C. Baltimore's Allegations Establish a Plausible Connection Between Discriminatory Lending By Wells Fargo and the City's Damages 21

1. Wells Fargo's Predatory and Discriminatory Lending Practices, Targeted at Baltimore's African-American Neighborhoods, Plausibly Result In an Increased Likelihood of Notices of Foreclosure and Completed Foreclosures On the Wells Fargo Loans 23

a. Detailed Allegations Based On Direct Evidence 23

b. Detailed Allegations Based On Statistical Evidence 29

2. Foreclosures at the Wells Fargo Properties Plausibly Result in Many of the Wells Fargo Properties Becoming Vacant When They Would Otherwise Be Occupied 31

3. Baltimore Is Injured By Vacancies and Foreclosures at the Wells Fargo Properties 32

a. The City's Records Show that Vacancies at the Wells Fargo Properties Plausibly Have Caused the City to Spend Precisely Quantifiable Funds to Provide Specific Services at the Properties 33

b. High Concentrations of Wells Fargo Foreclosures In Particular Areas Reduce Tax Revenues By Plausibly and Negatively Affecting the Value of Other Houses In Close Proximity 34

D. Baltimore Satisfies the Injury-In-Fact and Traceability Requirements for Standing 36

1. Baltimore Has Standing Under the Supreme Court's Seminal Fair Housing Act Case on Standing 36

2. Traceability Is Not Defeated When Third Parties Play Some Role in the Causal Chain 38

II. WELLS FARGO'S OBJECTIONS TO STANDING DO NOT WITHSTAND SCRUTINY 41

A. Wells Fargo's General Factual Assertions Are Irrelevant and Wrong 42

1. Wells Fargo Misrepresents Injuries Alleged by the City 42

2. Socioeconomic Challenges In Some Neighborhoods Do Not Explain Wells Fargo's Disproportionately High Foreclosure Rate in African-American Parts of the City 43

3. Baltimore's Injuries Are Not Self-Inflicted 46

a. Tax Lien Sales 47

b. Vacant Properties Owned By the City 50

c. City and State Loan Programs 51

B. Wells Fargo's Untested Assertions About Facts Purportedly Found In Its Own Undisclosed Files Do Not Provide a Proper Basis to Challenge Standing 52

C. Wells Fargo's Factual Assertions Relating to Specific Allegations in the Second Amended Complaint Are Irrelevant, Wrong, and Have No Bearing on Standing 55

1. Assertions About Demographic Data 55

2. Assertions About Maryland's Property Tax Assessment Process 56

3. Assertions About the Level of Detail in the Second Amended Complaint....57

4. Assertions About the Purported Impossibility of Some of the City's Damages....58

D. Wells Fargo Misconstrues the Law Regarding Standing....59

1. Wells Fargo's Assertion That the Speculative Possibility of Third Party Involvement In the Foreclosure Process Defeats Traceability Is Wrong As a Matter of Law....59

a. *City of Birmingham*....60

b. *City of Cleveland*....62

2. Wells Fargo's Additional Arguments About the Injury-In-Fact Requirement Have No Merit....64

CONCLUSION....65

TABLE OF AUTHORITIES

Cases

Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982) 8, 10, 12

Allen v. Wright, 468 U.S. 737 (1984) 39, 40

American Canoe Ass'n, Inc. v. Murphy Farms, Inc., 326 F.3d 505 (4th Cir. 2003) 36, 46

Anderson v. Sara Lee Corp., 508 F.3d 181 (4th Cir. 2007)....................8, 10

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 4, 10, 21, 57, 60, 62

Barkley v. Olympia Mortgage Co., Nos. 04-CV-875 *et al.*, 2007 WL 2437810
(E.D.N.Y. Aug. 22, 2007)....................36

Bazemore v. Friday, 478 U.S. 385 (1986) 18

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 10, 21, 60, 62

Bennett v. Spear, 520 U.S. 154 (1997) 38

Boleski v. American Export Lines, Inc., 385 F.2d 69 (4th Cir. 1967)....................50

Bryant v. Yellen, 447 U.S. 352 (1980) 38, 39, 40

City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086
(7th Cir. 1992)....................37

Cardio-Med. Assocs., Ltd. v. Crozer-Chester Med. Ctr., 721 F.2d 68 (3d Cir. 1983) 12

Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir. 1993) 12

Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1337 (D.C. Cir. 1986) 40

CHRP v. Wells Fargo Bank, N.A., No. 08-CVH-3139
(Cleveland Mun. Ct. June 18, 2009) 64

City of Birmingham v. Citigroup, Inc., No. CV-09-BE-467-S
(N.D. Ala. Aug. 19, 2009) 7, 8, 42, 60-62

City of Cleveland v. Ameriquest Mortgage Secs., Inc., 621 F. Supp. 2d 513
(N.D. Ohio 2009).................... 7, 8, 42, 60, 62-64

Clinton v. City of New York, 524 U.S. 417 (1998) 7, 38, 39, 40

Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992) 11

Conservation Council of N. Carolina v. Costanzo, 505 F.2d 498 (4th Cir. 1974) 50

Crutchfield v. United States Army Corps of Engineers, 230 F. Supp. 2d 687 (E.D. Va. 2002) 50

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) 59, 65

Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979) .... *passim*

Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211 (4th Cir. 1993)....................12

Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7 (D.D.C. 2000) 36

Heights Cmty. Congress v. Hilltop Realty, Inc., 774 F.2d 135 (6th Cir. 1985) 37

Hennesy v. Penril Datacomm Networks, Inc., 69 F.3d 1344 (7th Cir. 1995) 13

Holmes v. SIPC, 503 U.S. 258 (1992) 62, 63

In re Attorney's Fees in Tax Sales Foreclosures, No. 24-C-03-3443 (Cir. Ct. Balt. City Dec. 11, 2007) 48

Kerns v. United States, 585 F.3d 187 (4th Cir. 2009)....................12

Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001)....................13

Logan v. Denny's, Inc., 259 F.3d 558 (6th Cir. 2001) 12

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) 11

McConnell v. FEC, 540 U.S. 93 (2003)....................9, 46

McMellon v. United States, 387 F.3d 329 (4th Cir. 2004) 39

New West, L.P. v. City of Joliet, 491 F.3d 717 (7th Cir. 2007) 63

North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., 278 F. Supp. 2d 654 (E.D.N.C. 2003) 12

Pennsylvania v. New Jersey, 426 U.S. 660 (1976) 37

Peters v. Delaware River Port Authority, 16 F.3d 1346 (3d Cir. 1994)....................12

Pina v. Henderson, 752 F.2d 47 (2d Cir. 1985)....................47

Sch. Dist. of Kansas City v. State of Missouri, 460 F. Supp. 421 (W.D. Mo. 1978) 37

Schweikert v. Bank of America, N.A., 521 F.3d 285 (4th Cir. 2008)....................10

Shanty Town Assocs. v. EPA, 843 F.2d 782 (4th Cir. 1988)....................39

Southern California Edison Co. v. FERC, 502 F.3d 176 (D.C. Cir. 2007)....................12

Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990)....................40

St. Pierre v. Dyer, 208 F.3d 394 (2d Cir. 2000)....................50

Tingley v. Beazer Homes Corp., No. 3:07-cv-176, 2008 WL 1902108
(W.D.N.C. Apr. 25, 2008)....................62

United States v. North Carolina, 180 F.3d 574 (4th Cir. 1999)....................12

United States v. SCRAP, 412 U.S. 669 (1973)....................38, 39, 40

Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990)....................37

Warren County v. State of North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981)....................37

Young v. City of Mount Ranier, 238 F.3d 567 (4th Cir. 2001)....................18

Zenith Elecs. Corp. v. WH-TV Broadcasting Corp., 395 F.3d 416 (7th Cir. 2005)....................18

Other Authorities

13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper,
Federal Practice & Procedure § 3531.5 (2008)....................9, 46

Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*....................45

Fair Housing Act, 42 U.S.C. § 3601 *et* seq....................*passim*

Fed. R. Civ. P. 12....................*passim*

Fed. R. Evid. 201....................12, 44, 47, 59

Md. Code Ann., Tax-Prop. §§ 14-801 to 14-854....................47, 48

INTRODUCTION

In their motion to dismiss, Defendants Wells Fargo Bank, N.A. and Wells Fargo Financial Leasing, Inc. (collectively "Wells Fargo") thoroughly and deliberately misrepresent the Second Amended Complaint filed by Plaintiff Mayor and City Council of Baltimore ("Baltimore" or "City"). Wells Fargo contends that Baltimore is seeking generalized damages to compensate for broad socioeconomic problems in the City and injuries based on all foreclosures and all vacant properties throughout the City. This could not be further from the truth. Because this false proposition is the foundation of Wells Fargo's core argument – that Baltimore lacks standing since generalized damages are not the plausible result of the illegal and discriminatory lending practices alleged – the motion to dismiss should be denied in its entirety.

In considering the City's prior complaint, the Court held that the City did not have standing because the complaint could be read as seeking generalized damages. *See* Op. (Jan. 6, 2010) (Docket No. 141) ("Opinion"). But the Court also explained that Baltimore could proceed if it amended its complaint to make clear that it was narrowing the scope of its damages in two respects. *See id.* at 1, 6. First, the City would have to limit its claim for damages based on municipal services to "specific houses that became vacant allegedly because of Wells Fargo's lending activities." *Id.* at 6. Second, it would have to limit its claim based on reduced property tax revenues to "specific neighborhood[s]" where there was a high enough concentration of Wells Fargo foreclosures. *Id.*

Baltimore has followed the Court's instructions precisely in the Second Amended Complaint. The Second Amended Complaint identifies 190 specific Wells Fargo foreclosure properties in African-American neighborhoods that became vacant because of Wells Fargo's predatory and discriminatory lending practices. It sets forth specific municipal services that

Baltimore provided at each Wells Fargo foreclosure property during and as a direct consequence of the vacancy. Baltimore's claim for municipal services damages is limited to these properties and services (and any others precisely like them identified during discovery, which has yet to be allowed). The properties and services are carefully specified in full detail in 190 property-specific paragraphs in the new complaint. Second Am. Compl. ("SAC") ¶¶ 105-294. For example, the City alleges that it boarded the vacant Wells Fargo foreclosure property at 240 North Rose Street in 2004 and reboarded it in 2004, 2006, and 2007. *Id.* ¶ 115. Property-by-property and service-by-service, the Second Amended Complaint includes 52 pages with this extraordinary level of detail about the City's damages. The City spent hundreds of hours reviewing its records to provide this level of specificity and comply with the Court's directions.

The City likewise followed the Court's instruction to narrowly circumscribe its claim for diminished property tax revenues. It analyzed all foreclosures in the City to identify compact and uniformly-sized areas (each approximately two blocks by two blocks) where Wells Fargo foreclosures constitute at least one-third of all foreclosures. There are 37 such areas (or "sub-neighborhoods") in parts of Baltimore that are majority African-American. Each is identified in the Second Amended Complaint. SAC ¶¶ 306, 308. Many of them are clustered in stable and improving neighborhoods like Cylburn and Original Northwood. *Id.* ¶ 307. Baltimore now explicitly limits the property tax damages it seeks to reduced tax revenues from these sub-neighborhoods. *Id.* ¶¶ 306, 309. The high concentration of Wells Fargo foreclosures in these limited and compact areas assures that the connection between the foreclosures and lost tax revenue stemming directly from the devaluation of properties that sit in close proximity to the foreclosed Wells Fargo properties is concrete and not merely theoretical. Baltimore's expert analysis confirms that the City has suffered a real and quantifiable loss that is due to the

concentrated Wells Fargo foreclosures in these areas and not other factors. *Id.* ¶¶ 310-12.

Baltimore also makes clear that it seeks only the damages specified in the Second Amended Complaint and does not seek to recover for any generalized harm. Contrary to Wells Fargo's contention, the City does not seek any damages for socioeconomic ills, "30,000 currently vacant properties" (Mem. Law Supp. Defs.' Mot. Dismiss Second Am. Compl. (Docket No. 155-1) (May 25, 2010) ("Defs.' Mem.") at 8), or foreclosures in general. *See* SAC ¶¶ 14 ("the City does not seek to hold Wells Fargo responsible for injuries caused by non-Wells Fargo foreclosures or injuries suffered by the City as a result of foreclosures generally"), 93 ("The City does not seek redress in this action for injuries resulting from foreclosures on mortgages originated by lenders that are not associated with Wells Fargo."). It does not seek to hold a "single bank" liable for "a wide range of social problems." Defs.' Mem. at 1. Baltimore only seeks to hold Wells Fargo responsible for particular harm caused by particular discriminatory Wells Fargo loans at particular Wells Fargo foreclosure properties. Baltimore therefore makes abundantly clear in the Second Amended Complaint that it fully understands the Court's concerns and has gone to great lengths to demonstrate that it has addressed them.

Despite these clear and significant changes in the Second Amended Complaint, Wells Fargo nonetheless asserts that Baltimore "has now re-filed essentially the same lawsuit." Defs.' Mem. at 2. This statement is not simply a distortion; it is palpably false. Wells Fargo's disregard of the wealth of detail that Baltimore has added and the clarity with which the City disclaims any generalized damages is an intentional effort to confuse the record and argue against a complaint that does not now exist. The imaginary complaint that Wells Fargo envisions serves its purpose by allowing it to falsely claim that Wells Fargo is unfairly being held responsible for every imaginable ill that currently plagues the City of Baltimore. It also

permits Wells Fargo to complain about alleged standing concerns that bear no relationship to the present allegations of this case.

While Wells Fargo attempts to obfuscate and misrepresent the contents of the Second Amended Complaint, the City's actual allegations clearly show that it has standing because it has suffered injuries-in-fact that are traceable to Wells Fargo's conduct. The City's allegations need only plausibly support the injury-in-fact and traceability components of standing at the pleading stage, *see* Opinion at 3-4; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("[t]he plausibility standard is not akin to a 'probability requirement'"), and they more than satisfy this standard.[1]

Three steps connect Wells Fargo's unlawful acts to the City's injuries. First, Wells Fargo's discriminatory targeting of predatory lending practices at Baltimore's African-American neighborhoods plausibly causes increased notices of foreclosure and increased completed foreclosures. The connection between targeting African-American neighborhoods for predatory lending and a greatly increased likelihood of foreclosures on the resulting loans is more than plausible, it is facially apparent. Borrowers who are charged more for a loan than they qualify for, or are deceived into taking a loan that they cannot afford, are far more likely to find themselves noticed for foreclosure or losing their home to a completed foreclosure. Substantial direct and statistical evidence in the Second Amended Complaint supports this part of the causation chain. Declarations (attached to the SAC) from former Wells Fargo employees and a mortgage broker whose company was hired by Wells Fargo explain how Wells Fargo targeted the City's African-American neighborhoods with predatory subprime lending practices by, among other things, targeting African-American zip codes and churches, refusing to let white employees make presentations to African-American audiences, and drafting subprime marketing

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[1] Wells Fargo does not challenge the redressability prong of standing and concedes that prudential standing requirements do not apply here because Congress has extended standing under the Fair Housing Act to the full extent of Article III. *See* Defs.' Mem. Law (Docket No. 10-2) (Mar. 21, 2008) at 10 n.3.

materials on the basis of race by using software to "translate" the materials into what Wells Fargo literally defined as the "language" of "African American." White neighborhoods were not targeted. Using a wide array of deceptive and dishonest techniques, loan officers increased their commissions by steering targeted borrowers into loans that they could not afford and that were much costlier than loans for which they qualified. In light of the routine use of these practices, Wells Fargo subprime employees joked morbidly among themselves that they were "riding the stagecoach to Hell." *See* SAC ¶¶ 46-71, 84, Attachs. A-C.

A wealth of statistical allegations in the Second Amended Complaint corroborates the declarants' testimony. *See id.* ¶¶ 36-43, 72-92. Wells Fargo's foreclosure rate is three times higher in African-American neighborhoods than in white neighborhoods, *id.* ¶ 39, and Wells Fargo's high-cost loans are disproportionately concentrated in African-American neighborhoods, *id.* ¶¶ 72-75. All of the statistical disparities set out in detail in the complaint are fully consistent with the outcome one would expect given the direct evidence of targeting provided by Wells Fargo's own ex-employees and former broker.

The second step in the causal chain is that foreclosures plausibly cause properties to become vacant. Chief Judge Legg previously directed the parties to engage in limited discovery in large measure to test this connection. *See, e.g.*, Mem. to Counsel (Feb. 20, 2009) (Docket No. 48). The resulting data demonstrates that the connection is strong. Out of 486 foreclosure notices on Wells Fargo loans in Baltimore's African-American neighborhoods from 2000 to 2009 of which the City is currently aware, 269 (55%) of the properties became vacant. SAC ¶¶ 96, 104.[2] This is a much higher percentage of homes than ordinarily becomes vacant. The connection is also logical – a borrower who is seriously in default and unable to make the

[2] Paragraph 96 of the Second Amended Complaint mistakenly refers to 270 vacancies instead of 269. *Compare* SAC ¶ 96 *with id.* ¶¶ 105-296 (providing addresses for 269 vacancies).

mortgage payments is likely to leave the property. But for Wells Fargo's targeted predatory practices and failure to make loans commensurate with borrowers' ability to repay them, these foreclosures and vacancies would have been avoided.

The final step in the causal chain is that the City is injured by foreclosures and vacancies at Wells Fargo properties. This happens in the two ways discussed above, both of which are clearly plausible. First, the City has been required to provide additional municipal services at the 190 vacant properties. *Id.* ¶¶ 97-104. These services are detailed in the Second Amended Complaint and include, among others, boarding properties that are open to casual entry, inspecting properties for health and safety risks, performing structural maintenance and repairs, cutting grass and weeds, and rodent control. *Id.* ¶¶ 105-294. The problems that require the City to provide these services would not occur if the properties were occupied or would only occur at a dramatically reduced rate; for example, occupied properties do not need to be boarded. Second, the City has lost property tax revenues from the sub-neighborhoods where the Wells Fargo foreclosures are concentrated because the foreclosures reduce the values of other houses in close proximity. *Id.* ¶¶ 306-13. The City's expert analysis confirms that the concentrated Wells Fargo foreclosures cause this harm in the discrete sub-neighborhoods. *Id.* ¶¶ 310-12.

The injury-in-fact and causation chain shown by Baltimore establish standing under clear case law. Baltimore's allegations are much more specific and concrete than ones that the Supreme Court held were sufficient to support a local government's standing under the Fair Housing Act. In *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the Supreme Court held that where racial "steering" by realtors might diminish a town's property tax revenues, and the possible diminution was not even alleged but could only be inferred from the complaint, the town faced an injury-in-fact sufficient to confer standing. *See id.* at 109-11.

Baltimore's standing allegations are even stronger because the City alleges specific financial injuries that have already occurred.

With respect to traceability, *Gladstone* is again dispositive. The Supreme Court found the town's loss of revenue adequately traceable to the challenged steering practices because steering might eventually cause white residents to leave the town, which might in turn lower demand for housing, which would lower property values and therefore lower property tax revenues. *See id.* Thus, the mere potential that a critical mass of non-parties would in the future respond to the challenged steering in such a way as to produce the injury satisfied the traceability requirement. Here, Baltimore alleges that Wells Fargo's Fair Housing Act violations have actually caused foreclosures and vacancies at Wells Fargo properties, and that those particular foreclosures and vacancies have actually caused harm to the City. SAC ¶¶ 93-313. These allegations are plausible and backed by substantial direct and statistical evidence in the Second Amended Complaint. They are sufficient under *Gladstone*.

Defendants nevertheless argue that traceability is defeated because third parties play some role in the causal chain here. As shown by *Gladstone*, as well as numerous other controlling authorities, this misrepresents the law. As long as it is likely that Wells Fargo's discriminatory acts contribute to Baltimore's injury, the role of third parties is irrelevant to standing. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417 (1998).

Wells Fargo further misconstrues case law by arguing incorrectly that *City of Birmingham v. Citigroup, Inc.*, No. CV-09-BE-467-S (N.D. Ala. Aug. 19, 2009), and *City of Cleveland v. Ameriquest Mortgage Secs., Inc.*, 621 F. Supp. 2d 513 (N.D. Ohio 2009), have some persuasive value here. They do not. The complaint and record in each case were utterly void of the kind of exceptional detail presented by Baltimore in support of each element of

standing. Birmingham did not include any allegations explaining why a single one of the seven companies it sued did anything wrong or identifying a single concrete injury. Cleveland did little more than say that twenty-two companies destroyed "entire streets, blocks, and neighborhoods" by purchasing securitized loans on the secondary market. Both cities' allegations about liability and consequent injury were conclusory and generalized, and the decisions dismissing their complaints therefore lack any relevance here.

Wells Fargo also raises a multitude of purely factual objections to the Second Amended Complaint. Some are general while others attempt to discredit isolated pieces of Baltimore's injuries. While Wells Fargo's factual assertions are wrong, misleading, and in many cases irrelevant to the claims actually alleged by the City, it is important to first note that they have no place here. Because this is a motion to dismiss, Baltimore's plausible factual allegations must be accepted as true. *See*, *e.g.*, *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir. 2007). Though courts usually have some discretion to assess facts that concern jurisdiction, they may not resolve at the Rule 12 stage factual disputes that also go to the merits of the case, as do Wells Fargo's factual assertions about injury and causation. *See, e.g.*, *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). These kinds of factual attacks must instead be tested through discovery and reserved until the merits stage. *See id.* Moreover, the Court should not accept at any stage Wells Fargo's untested and unsupported statements of "fact," yet that is exactly what Wells Fargo asks the Court to do by filling its motion with so many untested statements.

In any event, Wells Fargo's assertions do not withstand scrutiny. Its claim that socioeconomic problems in certain African-American neighborhoods are the "true driver" of its foreclosures instead of its lending practices is belied by the fact that, as discovery will show, Wells Fargo has a much higher foreclosure rate in African-American neighborhoods than its

peers. *See* SAC ¶ 40. Wells Fargo's claim also misses the point; Baltimore does not seek to hold Wells Fargo liable for any socioeconomic problems, only the direct results of its own discriminatory practices. Wells Fargo's parallel claim that the recession is to blame fails for the same reasons. Defendants likewise assert that the City has caused its own injuries through the sale of tax liens, ownership of vacant properties, and a program whereby it helps residents with the closing costs for a mortgage. These assertions fail legally and factually. An injury is only "self-inflicted" such that traceability is defeated if the injury is completely caused by the plaintiff's personal choices. *See McConnell v. FEC*, 540 U.S. 93, 228 (2003); 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531.5 (2008). Tax lien sales, however, are required by Maryland law and have a much more modest impact – if any – on the Wells Fargo foreclosures at issue than Defendants contend. The City frequently acquires and uses vacant properties to benefit neighborhoods by returning derelict properties to productive use; this is the opposite of inflicting injury. Finally, Wells Fargo vastly overstates the very minor role the City has played in helping some borrowers (only eight out of 190 vacancies) with closing costs, and also misrepresents the program.

Wells Fargo's assertion that it reviewed its own secret files and found that it only made good loans must be disregarded as an attempt to deny Baltimore the most basic procedural protections. Its assertion that some of the Wells Fargo foreclosure properties identified by Baltimore are not in African-American areas is simply wrong. Its assertion that concentrated foreclosures cannot influence the assessed values of nearby houses is at odds with common sense and based on its expert's overly narrow and mechanical description of the assessment process. Moreover, many of these assertions and others – such as assertions about the timing of the City's injuries and other vacant properties near some of the vacant Wells Fargo properties – go only to

the amount of Baltimore's damages, not standing. If Wells Fargo can ultimately show that the harm at, for example, twenty of the 190 vacant Wells Fargo foreclosure properties was caused by something other than a predatory Wells Fargo loan, it would mitigate damages but not defeat standing. Wells Fargo's various factual assertions, in sum, have no place at this stage of the case, are legally irrelevant, and are factually inaccurate.

For all of these reasons and others, as shown in greater detail below, Baltimore has fully satisfied the requirements for standing under Article III. Wells Fargo's motion to dismiss should therefore be denied in its entirety.

STANDARD OF REVIEW

Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the allegations in a complaint must be plausible. This standard applies to allegations about standing challenged under Fed. R. Civ. P. 12(b)(1), as well as to challenges under Rule 12(b)(6). *See* Op. (Jan. 6, 2010) (Docket No. 141) at 3-4 ("Opinion"). *Twombly* and *Iqbal* do not create a heightened pleading standard, however, and *Iqbal* specifically states that "[t]he plausibility standard is not akin to a 'probability requirement.'" 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556).

When the facial sufficiency of a complaint is challenged under Rule 12(b)(1), "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). The Rule 12(b)(6) standard requires a court to "accept as true all of the factual allegations contained in the complaint," *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir. 2007) (citation and quotation marks omitted), "construe the factual allegations of the complaint in the light most favorable to the plaintiff," *Schweikert v.*

Bank of America, N.A., 521 F.3d 285, 288 (4th Cir. 2008) (same), and "presume that general allegations embrace those specific facts that are necessary to support the claim," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation, brackets, quotation marks omitted).

Because Wells Fargo vacillates as to whether its Rule 12(b)(1) challenge is facial or factual, *compare, e.g.*, Defs.' Mem. at 9 (saying that the Court should look to Baltimore's allegations and not make factual determinations) *with id.* at 2-4, 13, 18-20, 22-28 (making numerous fact-based arguments), we also address strict limitations concerning the resolution of disputed facts pursuant to a factual challenge. First, while the Court has some discretion under Rule 12(b)(1) to examine facts related to subject matter jurisdiction, it is axiomatic that at no stage of a case may a court resolve factual disputes based on one side's untested and unverified presentation of what it claims to be the facts. A court may not rely on factual assertions unless they withstand scrutiny after the other party is given a full and fair opportunity to challenge them after appropriate discovery. *See, e.g.*, *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992) (reversing trial court for failing to give litigant opportunity for discovery; "due process mandates that a judicial proceeding give all parties an opportunity to be heard on the *critical and decisive allegations* which go to the *core* of the parties' claim or defense and to present evidence on the contested facts") (emphasis in original; citation and quotation marks omitted).

Second, even if there were a developed evidentiary record (which there is not), it would still be plainly improper under Rule 12(b)(1) to resolve the factual issues raised by Wells Fargo. Wells Fargo's factual assertions go directly to whether Defendants caused Baltimore's injuries and therefore to the merits of Baltimore's case. It is well-established that on a Rule 12(b)(1) factual challenge, if "jurisdictional facts are intertwined with the facts central to the merits of the

dispute," then they are "appropriately resolved only by a proceeding on the merits." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *see United States v. North Carolina*, 180 F.3d 574, 580 (4th Cir. 1999) ("When a factual attack on subject matter jurisdiction involves the merits of a dispute, the proper course of action for the district court is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.") (citations, brackets, ellipsis, and quotation marks omitted); Mem. (July 2, 2009) (Docket No. 96) (Legg, C.J.) at 3. The Fourth Circuit recently reaffirmed this rule. *Kerns v. United States*, 585 F.3d 187 (4th Cir. 2009). It made clear that when jurisdictional and merits facts are intertwined, a "trial court should then afford the plaintiff the procedural safeguards – such as discovery – that would apply were the plaintiff facing a direct attack on the merits."[3] *Id*. at 193.

Finally, judicial notice may not be used to displace the traditional judicial processes for resolving factual disputes with evidence, especially when the factual disputes involve critical issues. Fed. R. Evid. 201(b) sets strict limits on the types of facts that may be judicially noticed. It excludes factual issues that are "subject to reasonable dispute."[4] Fed. R. Evid. 201(b). With

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[3] *See also Southern California Edison Co. v. FERC*, 502 F.3d 176, 180 (D.C. Cir. 2007) (impermissible "'to bootstrap standing analysis to issues that are controverted on the merits'") (quoting *Public Citizen v. FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989)); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 665 (E.D.N.C. 2003) ("transform[ing] standing analysis into a determination of ultimate liability [] has been specifically rejected by the Fourth Circuit").

[4] *See, e.g.*, *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.,* 6 F.3d 211, 218-19 (4th Cir. 1993) (reversing district court for taking "judicial notice of the facts that many volunteer fire departments operate in Maryland without governmental intervention at all and that all volunteer fire departments operate in a gray area as to the functions they provide"); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1126 (3d Cir. 1993) (reversing district court for taking judicial notice of "rollover problems of vehicles having a high center of gravity"); *Cardio-Med. Assocs., Ltd. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68, 75-76 (3d Cir. 1983) (reversing district court for taking judicial notice of factors considered by patients when choosing a doctor).

In its initial motion to dismiss, Wells Fargo cited two cases from outside of the Fourth Circuit as purported authority for the Court to take judicial notice of Wells Fargo's numerous disputed factual assertions. Neither case permits judicial notice here. In *Logan v. Denny's, Inc.*, 259 F.3d 558 (6th Cir. 2001), the court took notice of the general fact of the defendant's historical discrimination problems, but made clear that this was only of background interest – "Defendant's past record of discrimination is not at issue here." *Id.* at 578. In *Peters v. Delaware River Port Authority*, 16 F.3d 1346 (3d Cir. 1994), the court observed that, "as would be expected," newspaper articles buttressed the proposition that two states' delegations to a joint agency acted as economic competitors. *Id.* at 1356

one exception, Wells Fargo does not acknowledge that it is asking for judicial notice of a wide range of "facts," but that is plainly its purpose in submitting untested exhibits and making myriad extra-record factual assertions. Because Wells Fargo's factual assertions are central to its motion to dismiss yet vigorously disputed, the most the Court may do is take notice of the existence of Wells Fargo's exhibits and statements, but not the truth of their content. In *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), the defendants' motion to dismiss "rest[ed] almost entirely on factual challenges," and "defendants' factual assertions" were the basis for the trial court's decision to grant the motion. *Id.* at 688. The circuit court reversed, explaining that the trial court erred by relying on "judicial notice of *disputed* facts stated in public records," when it was permitted to notice only the "existence" of those records. *Id.* at 690 (emphasis in original). The trial court compounded this error by favoring the judicially noticed "facts" over the reasonable inferences that could be drawn from the complaint. *See id.* Likewise, *Hennesy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995), affirmed the district court's refusal to take judicial notice of the number of employees reported by a company in its own 10-K filing with the SEC. *See id.* at 1354-55. The issue before the court turned on this very number. *See id.* The 10-K could be used for cross-examination, but not to bypass normal evidentiary procedures through judicial notice. *See id.* at 1355.

By showing below that the factual assertions relied on by Wells Fargo are false, Baltimore does not suggest that it is in any way appropriate to consider Defendants' assertions. Rather, the City seeks only to demonstrate that discovery will prove these assertions are thoroughly misleading and wrong.

& n.12. The issue in the case – "whether party affiliation is an appropriate requirement for the effective performance of the position of" head of that agency, *id.* at 1348 – was quite remote from that general proposition.

ARGUMENT

I. THE SECOND AMENDED COMPLAINT DEMONSTRATES THAT BALTIMORE HAS STANDING

A. Baltimore Has Followed the Court's Directions In Full and Narrowed the Damages It Seeks In the Second Amended Complaint

In its January 6, 2010 decision dismissing the First Amended Complaint, the Court focused on specific paragraphs of the complaint that reasonably could be construed as seeking broad, generalized damages, potentially going beyond the illegal practices alleged to be directly attributable to Wells Fargo. As the City attempted to show, this was not its intent. *See* Tr. (Dec. 14, 2009) at 8-9. Its purpose in bringing this suit was to hold Wells Fargo responsible only for the injuries and costs that could be reasonably attributed to its illegal practices with respect to specific borrowers, specific properties, and affected African-American neighborhoods.

Concerned that the City sought to hold Wells Fargo responsible for a wide array of injuries beyond those associated with Wells Fargo's own loans at specific properties and neighborhoods, the Court therefore dismissed the First Amended Complaint and gave Baltimore a choice. It could appeal to the Fourth Circuit or it could amend its complaint by clearly narrowing its claim for damages. *See* Opinion at 6. The Court explained that the latter choice required two changes. One concerned the scope of the City's claim for damages based on the provision of municipal services at vacant Wells Fargo properties, and the other concerned the scope of the City's claim for damages based on the lost taxable value of houses throughout a neighborhood. The Court stated:

> If the City desires to pursue a more limited claim, such as a claim for specific damages allegedly suffered by the City in regard to specific houses that became vacant allegedly because of Wells Fargo's lending activities or a claim for damages allegedly caused to a specific neighborhood in which Wells Fargo made enough allegedly improper loans that its activities bear a plausible causal relationship to the destruction of that neighborhood, it may file a second amended

complaint . . . .

Id. at 6.

Baltimore fully understands the concerns articulated by the Court in its January 6 decision and recognizes that certain paragraphs of the First Amended Complaint, as cited by the Court, were capable of being read to seek broad damages for generalized harms to the City that are not attributable to Wells Fargo's alleged illegal conduct. The City, therefore, has followed the Court's instructions to the letter and made significant changes in its Second Amended Complaint to narrow its claims. *See, e.g.*, SAC ¶ 95. The City now makes clear that it does not seek to hold Wells Fargo responsible for the kinds of broad, generalized harm that led the Court to dismiss the prior complaint. The Second Amended Complaint instead seeks damages only for harm that is directly connected to particular Wells Fargo foreclosures.

The amendments clarifying and narrowing the City's complaint are discussed in detail below. As a general matter, there are two substantial categories of amendments. First, with respect to damages for the costs of providing additional municipal services at vacant properties, Baltimore's claims in the Second Amended Complaint are limited to "specific houses that became vacant allegedly because of Wells Fargo's lending activities," as required by the Court. Opinion at 6. Baltimore has devoted hundreds of hours since the First Amended Complaint was dismissed to identifying these particular properties and, in exhausting detail, the particular services provided at each. The Second Amended Complaint now identifies 190 properties that were the subject of a Wells Fargo loan that went to foreclosure, that became vacant because of the loan and foreclosure, and at which Baltimore had to provide services due to the vacancy. SAC ¶¶ 105-294. The Second Amended Complaint also identifies the services provided on a property-by-property basis. *Id.* The City's Department of Housing and Community

Development, for example, had to inspect many of the 190 vacant Wells Fargo foreclosure properties numerous times for structural damage and violations of City ordinances. It had to board the vacant properties when they were left open to casual entry. It had to cut the grass and weeds at many of the vacant properties that were not maintained. Police and fire personnel had to respond to incidents at the vacant properties as they attracted squatters and crime and became significant fire risks.

All of these municipal services and more, and the particular vacant Wells Fargo foreclosure properties at which they were provided, are catalogued in the Second Amended Complaint. A representative example from the City's 190 property-specific paragraphs reads:

> **240 N. Rose Street:** The housing department devoted personnel time and incurred out-of-pocket expenses to purchase materials to board the property in 2004 and to reboard the property later in the same year. The housing department devoted additional time and expense to reboard the property in 2006 and again in 2007. The housing department devoted personnel time to clean the property in 2004 and again in 2006. The housing department devoted personnel time to conduct seven physical inspections of the property in 2004; one physical inspection of the property in 2005; four physical inspections of the property in 2006, five physical inspections of the property in 2007, one physical inspection of the property in 2008, and three physical inspections of the property in 2009. The housing department incurred out-of-pocket expenses to contact the owner regarding housing code violations at the property three times. The police department dispatched officers to the property twice in 2005 in response to calls for service.

Id. ¶ 115. This is an extraordinary level of detail about damages for any plaintiff to provide in a complaint. It is the result of painstaking work to satisfy the Court's instruction that the City limit its damages to those that are the direct result of Wells Fargo's own conduct.[5] The Second Amended Complaint includes 189 more paragraphs like this one covering a total of 190 unique properties. SAC ¶¶ 105-294. The detailed information in these paragraphs comes from a

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[5] The City also identifies in the Second Amended Complaint 79 additional Wells Fargo foreclosure properties that are or have been vacant. SAC ¶¶ 295-96. At this time the City has not identified services it provided at these properties during a period of vacancy attributable to Wells Fargo. Baltimore will only seek damages based on these vacancies if it identifies such services during discovery.

lengthy and detailed review of the City's records. The financial cost of each of the injuries delineated in these paragraphs can be quantified precisely based on the City's records. *Id.* ¶ 102.

Equally important, in the Second Amended Complaint the City explicitly excludes from its claim any of the generalized damages that the Court previously found are not plausibly connected to discriminatory lending by Wells Fargo. The City does not seek any damages for socioeconomic problems in the City, such as unemployment, poverty, limited educational achievement, drug distribution, drug use, prostitution, or a general increase in crime, police, or fire department activity. It does not seek damages for services provided at vacant non-Wells Fargo foreclosure properties, or for vacant properties generally across the City. It does not seek damages for generally providing housing, police, fire, or other services to any neighborhood in the City; for example, if the City had to respond to a block where a vacant Wells Fargo foreclosure was located, but not to the Wells Fargo property itself, the City does not seek damages for that response. Even at the 190 vacant Wells Fargo properties where it suffered injuries for which it does seek recovery, the City has excluded many other services because it determined that they were not provided during a vacancy period attributable to Defendants. *See* SAC ¶¶ 14 ("the City does not seek to hold Wells Fargo responsible for injuries caused by non-Wells Fargo foreclosures or injuries suffered by the City as a result of foreclosures generally"), 93 ("The City does not seek redress in this action for injuries resulting from foreclosures on mortgages originated by lenders that are not associated with Wells Fargo.").

Second, Baltimore has likewise heeded the Court's requirement that it narrowly circumscribe the damages it seeks for diminished property tax revenues. The Second Amended Complaint seeks tax revenue damages only for properties in close proximity to the Wells Fargo foreclosure properties. Thus, the City identifies 37 uniformly-sized sub-neighborhoods (each

approximately two blocks by two blocks) in which Wells Fargo foreclosures constitute at least one-third of all foreclosures. *Id.* ¶¶ 306, 308. "Houses outside of these sub-neighborhoods are excluded from Baltimore's claim for damages based on lost property tax revenues."[6] *Id.* ¶ 309; *see also id.* ¶ 306. Many of these sub-neighborhoods are clustered within African-American neighborhoods in Ashburton, Cylburn, Original Northwood, Reservoir Hill, and Waltherson, among others. *Id.* ¶¶ 12, 307. These have long been stable middle- and working-class African-American areas and/or have become significantly stronger in the past decade. *Id.* They are not neighborhoods characterized by the type of dysfunctional environment noted by the Court in addressing the City's prior and broader claims. *See* Opinion at 4-5; SAC ¶ 307.

Baltimore's expert statistical analysis confirms that foreclosures have reduced property tax receipts from the 37 sub-neighborhoods, and that the high concentration of Wells Fargo foreclosures is a key cause of these losses. SAC ¶¶ 310-12. This assures that "facts and theory" now "converge" with respect to the narrowed property tax damages sought by the City. Opinion at 5. Baltimore's expert testimony explains how the widely-accepted statistical technique of multivariate regression, known as "hedonic regression" in the context of housing, is used to determine the effect of different property and neighborhood characteristics on each house's value. *See* SAC Attach. T.; Tr. (June 29, 2009) at 49, 82-86; *see also* SAC ¶¶ 310-12. The Supreme Court expressly approved of the use of multivariate regression in discrimination cases in *Bazemore v. Friday*, 478 U.S. 385 (1986). *See also Zenith Elecs. Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 419 (7th Cir. 2005) (testimony of proposed expert unreliable and inadmissible because he did not conduct a multivariate regression analysis, which is

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[6] The only exception is that, insofar as it is technically necessary to preserve its appellate rights, the City continues to seek property tax damages more broadly. *See* SAC ¶ 306 n.5; *Young v. City of Mount Ranier*, 238 F.3d 567, 573 n.4 (4th Cir. 2001).

"[p]erhaps the leading tool to" "isolate the effects of multiple variables and determine how they influence one dependent variable"). One of the characteristics analyzed here through hedonic regression is the number and proximity of foreclosures. *See id.* Simply put, the analysis holds factors that affect property values constant so that it can control for the effect of foreclosures on neighboring properties. By determining how concentrated Wells Fargo foreclosures impact the assessed values of surrounding properties, Baltimore is able to determine how those foreclosures impact corresponding tax revenues. Limiting the tax revenue claim to the compact sub-neighborhoods where Wells Fargo foreclosures constitute at least one-third of all foreclosures assures that the City's injury has real world significance and is not merely of academic note.

Accordingly, Baltimore has substantially narrowed the scope of the damages it seeks as required by the Court's decision dismissing the First Amended Complaint. The changes make plain that the City is not attempting to hold Wells Fargo liable for every ill that has affected the City, nor for every foreclosure or vacancy. Rather, Baltimore's claims are explicitly limited to harm that is the direct result of specific predatory and discriminatory Wells Fargo loans at specific Wells Fargo properties that resulted in foreclosure, vacancies at those properties, and corresponding property-specific costs as documented in City files.

B. Baltimore Does Not Seek Damages for Preexisting Socioeconomic Problems or Any Other Generalized Injuries Not Directly Attributable to Wells Fargo's Illegal Lending Practices at Specific Wells Fargo Properties

Although Baltimore clearly has followed the Court's instructions for narrowing its case, Wells Fargo continues to argue against the kind of broad claim for damages that is simply not found in the Second Amended Complaint. Wells Fargo contends that Baltimore seeks damages for all of its socioeconomic troubles over the past decades, all of its foreclosures, and all of its vacant properties. This proposition is essential to Wells Fargo's argument that the damages at

issue remain too remote from its illegal lending activity to be plausible and to support standing. This argument is nothing but a straw man because, as shown above and in greater detail below, the City only seeks much narrower damages. In short, Wells Fargo argues against a Second Amended Complaint that does not exist.

Wells Fargo contends throughout its brief that Baltimore has ignored the Court's directions and seeks broad, generalized damages. On page one, Wells Fargo describes the First Amended Complaint as an attempt to "attribute the foreclosure and vacancy epidemic in Baltimore to the alleged lending practices of a single bank," and then, on page two, stakes out its position with a blast of false and misleading hyperbole by asserting that "*[t]he City has now re-filed essentially the same lawsuit*," Defs.' Mem. at 1-2 (emphasis added). It says that the City is seeking to hold it responsible for "problems" that "predate the origination of virtually every loan identified in the Second Amended Complaint." *Id.* at 2. These "problems," as Wells Fargo would have it, are "the wide range of societal problems" causing "the steady decline of the Baltimore neighborhoods at issue beginning many years before the City's lawsuit . . . ." *Id.* at 1.

Likewise, Wells Fargo repeatedly states that there are 30,000 to 40,000 vacant properties in Baltimore as if the City were seeking damages in connection with all of them.[7] *See id.* at 2 ("40,000 vacancies"), 5 ("30,000 vacancies"), 8 ("30,000 currently vacant properties"), 18 ("30,000 vacant properties"). Wells Fargo's misconception that Baltimore aims to hold it responsible for each vacancy across the City is particularly apparent when it states that "[n]othing 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," *id.* at 5, and that "[t]he City's continuing failure to articulate a plausible link between

[7] Discovery will show that the actual number of vacant residential structures in the City is currently 16,560.

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," *id.* at 8.

Nothing could be further from the truth. In fact, Baltimore has responded directly to the Court's concerns and the City does not posit any link in the Second Amended Complaint between Wells Fargo and every vacancy in the City. It does not claim damages based on any vacancies except those caused by Wells Fargo's illegal and discriminatory lending practices.[8] *See, e.g.*, SAC ¶¶ 93, 105-294.

In sum, the failure to recognize how the City has narrowed its claim for damages wholly undermines Wells Fargo's core assertion that the connection between the City's damages and the challenged lending activities is too attenuated and implausible to support standing. Contrary to Wells Fargo's claims, Baltimore only seeks damages for harm caused by specific Wells Fargo foreclosures identified in the Second Amended Complaint. As shown in the following section, the connection between Wells Fargo's unlawful conduct and the City's narrowed damages is highly plausible and more than satisfies the pleading requirements of *Twombly* and *Iqbal*.

C. Baltimore's Allegations Establish a Plausible Connection Between Discriminatory Lending By Wells Fargo and the City's Damages

The causal connection between Wells Fargo's discriminatory acts and the narrowed damages sought by the City is plausible and well-supported by the evidence and allegations contained in the Second Amended Complaint. The causation chain is straightforward and uncomplicated. It has three parts:

1. Wells Fargo's predatory and discriminatory lending practices, targeted at Baltimore's African-American neighborhoods, cause borrowers to pay more for their loans than they should or to receive loans that they cannot afford, logically and plausibly resulting in an increased likelihood of notices of foreclosure and

[8] In addition to repeatedly referencing the overall number of vacancies in the City, Wells Fargo does the same with foreclosures based on the same misreading of the Second Amended Complaint. *See* Defs.' Mem. at 7, 27.

completed foreclosures on the Wells Fargo loans in these African-American neighborhoods;

2. Notices of foreclosure and completed foreclosures at the Wells Fargo properties cause borrowers to leave their homes, plausibly resulting in many of those properties becoming vacant when they would otherwise be occupied; and

3. Vacancies and foreclosures at the Wells Fargo properties cause direct injury to the City in two ways: (a) the City must spend money to provide specific services (such as boarding, cleaning, and stabilizing structures, and fire and police services) at the Wells Fargo properties; and (b) the City loses property tax revenues in areas where the foreclosures are highly concentrated as a result of the devaluation of properties that sit in close proximity to Wells Fargo foreclosures.[9]

As shown immediately below, each part of the chain is well-supported by the City's allegations and evidence. In support of the first part, the Second Amended Complaint includes extensive direct evidence in the form of declarations from former Wells Fargo employees that explains exactly how Wells Fargo targeted Baltimore's African-American neighborhoods for predatory and discriminatory loans and steered borrowers in those neighborhoods into subprime loans to increase Wells Fargo's profit. It also includes a wealth of statistical evidence that is consistent with and buttresses the direct evidence. The second part of the chain is supported by evidence developed through a detailed analysis of Baltimore's own records and records produced by Wells Fargo pursuant to the limited discovery ordered by Chief Judge Legg in 2009.

The third part of the chain is supported by the detailed information drawn from the City's files and included in 190 new paragraphs of the complaint. The City combed its records after its prior complaint was dismissed to document in exceptional detail the connection between specific

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[9] Wells Fargo misrepresents the amount of damages claimed by Baltimore in this action. Wells Fargo cites a newspaper article that relies on a long-ago interview for the proposition that the City is seeking $20 million. *See* Defs.' Mem. at 5 & n.6. Defendants and the newspaper reporter fail to recognize that the City has narrowed it claims substantially in the Second Amended Complaint.

Wells Fargo's assertion that Baltimore filed this lawsuit solely to generate revenue is also wrong. *See id.* at 1. Defendants' newspaper article was actually about an unrelated case and merely mentioned this case among others filed by the City seeking affirmative monetary and other relief. Aside from the oddity of suggesting that a plaintiff's Article III standing is suspect when damages are sought, Wells Fargo's attack on the City is belied by the complaint itself. If Baltimore were solely interested in revenue, it would not be seeking injunctive and declaratory relief. Indeed, as Wells Fargo well knows, injunctive relief is a critical component of this case for the City.

Wells Fargo vacancies and foreclosures and its injuries. Based on this effort, the City provides 190 paragraphs itemizing the specific municipal services that it spent City funds to provide at specific vacant Wells Fargo foreclosure properties and identifies the 37 compact sub-neighborhoods where highly concentrated Wells Fargo vacancies are responsible for lost property tax revenues. SAC ¶¶ 105-294, 308.

1. Wells Fargo's Predatory and Discriminatory Lending Practices, Targeted at Baltimore's African-American Neighborhoods, Plausibly Result In an Increased Likelihood of Notices of Foreclosure and Completed Foreclosures On the Wells Fargo Loans

a. Detailed Allegations Based On Direct Evidence

The Second Amended Complaint includes substantial direct evidence that Wells Fargo targeted Baltimore's African-American neighborhoods for predatory lending practices. Declarations from former Wells Fargo employees Elizabeth Jacobson and Tony Paschal, who both have extensive direct knowledge of Wells Fargo's local subprime lending practices, and former mortgage broker Peter Hebert are attached to and incorporated in the Second Amended Complaint. SAC Attachs. A–C ("Jacobson Decl.," "Paschal Decl.," "Hebert Decl."); *id.* ¶¶ 46-71, 84. This testimony demonstrates the lengths to which Wells Fargo has gone to target a range of predatory lending practices at Baltimore's African Americans and predominantly African-American neighborhoods in violation of the Fair Housing Act. Wells Fargo wholly ignores the substance of this evidence and instead resorts to attacking Jacobson's and Paschal's credibility and attacking Jacobson personally. *See* Defs.' Mem. at 13 & n.10. These attacks are baseless and have no place at this stage of the case.[10]

[10] Wells Fargo has launched unfounded attacks against these witnesses and their credibility from the start. As Chief Judge Legg explained, they are "of no moment" under Rule 12. Tr. (June 3, 2009) at 23. Baltimore will demonstrate at the appropriate point in the case that Wells Fargo's accusations about Jacobson and Paschal do not bear scrutiny. Baltimore also notes that Wells Fargo's statement that Tony Paschal's declaration is mostly about employment discrimination is self-evidently false.

The connection between targeting African-American neighborhoods for the predatory lending practices described by Jacobson, Paschal and Hebert and a greatly increased likelihood of foreclosure on the resulting loans is more than plausible, it is facially apparent. Borrowers who are charged more for a loan than they qualify for, or are deceived into taking a loan that they cannot afford, are far more likely to have difficulty making payments on their loans down the road and thus far more likely to find themselves noticed for foreclosure or having lost their home to a completed foreclosure. The direct evidence detailed below demonstrates that Wells Fargo intentionally made loans in African-American neighborhoods in deliberate disregard for well-established underwriting criteria that allow lenders to predict the likelihood that a borrower will successfully repay a loan. *See, e.g.*, SAC ¶ 24, 84. Wells Fargo made these predatory and discriminatory loans to obtain a speedy and exorbitant profit before quickly passing on the risk of default and foreclosure to the secondary market on Wall Street. *See, e.g.*, *id.* ¶¶ 3, 26. In short, the Wells Fargo loans in Baltimore's African-American neighborhoods that are the result of racially targeted predatory practices were made without regard to whether they would fail. Wells Fargo did not need to concern itself with the likelihood that the loans would fail because of the way in which they were bundled and securitized for resale. It is more than plausible that such loans fail at an unusually high rate and in unnecessary numbers.

These practices constitute reverse redlining – the targeting of minority neighborhoods for predatory or discriminatory loans. As explained in Section I D. below, every court to consider the issue has held that reverse redlining violates the Fair Housing Act. Thus, it is the causal link between these illegal practices on the front end, and the increased likelihood of foreclosure that follows, that creates the causal chain for standing under the Fair Housing Act.

Paschal, Jacobson and Hebert explain that Wells Fargo targeted African Americans in

Baltimore for higher interest subprime loans in multiple ways. One was by directing its subprime marketing efforts at zip codes in and around Baltimore with large African-American populations. Paschal Decl. ¶¶ 8, 10. It even tailored its subprime marketing materials on the basis of race by using software to print out subprime promotional materials in different so-called languages, one of which was "African American." *Id.* ¶ 11. A computer screen shot from 2006 showing this option is attached to Paschal's declaration. *Id.* at Ex. A. Another strategy was to focus on African-American churches. Jacobson Decl. ¶ 27, 30. Yet another was to make sure that African-American employees were the face of the company for African-American audiences and customers. Paschal Decl. ¶¶ 10, 12. Wells Fargo even went beyond its own employees and hired mortgage brokers to target Baltimore on its behalf by using methods that disproportionately generated African-American customers. Hebert Decl. ¶¶ 7-13.

At the same time, Wells Fargo did not target whites for subprime loans. Paschal heard colleagues who only made subprime loans say that "Howard County was not good for subprime loans because it has a predominantly White population." Paschal Decl. ¶ 8. Similarly, white churches were not targeted. "When it came to marketing, any reference to 'church' or 'churches' was understood as code for African-American or black churches." Jacobson Decl. ¶ 30.

Combining strategies, Wells Fargo managers told Jacobson that she could not attend presentations at Baltimore's African-Americans churches because she is not "of color;" later she was told she could go if she "carried someone's bag." Jacobson Decl. ¶ 28. In another case, she was told that she was "'too white' to appear before the [virtually all black] audience" at a "wealth building seminar" in Greenbelt designed to market subprime loans. *Id.* ¶ 29. Likewise, a unit in Silver Spring hired an African-American employee for the specific purpose of targeting African-American churches and their members for subprime loans. Paschal Decl. ¶ 12.

Wells Fargo's employees targeted African Americans and other minorities for subprime loans because they held derogatory stereotypes about minorities. This fostered a discriminatory culture, which management tolerated. Paschal heard "employees [from the subprime division] on several occasions mimic and make fun of their minority customers by using racial slurs. They referred to subprime loans made in minority communities as 'ghetto loans' and minority customers by saying 'those people have bad credit' and 'those people don't pay their bills,' and calling them 'mud people.'" Paschal Decl. ¶ 8. Paschal's branch manager Dave Zoldak used the racial slur "nigger" at the office and spoke "about how African Americans lived in 'hoods' and 'slums.'" *Id.* ¶ 16.

The borrowers and neighborhoods targeted by Wells Fargo for subprime loans were subjected to a range of predatory lending practices. These practices included steering borrowers who qualified for prime and Federal Housing Administration ("FHA") loans into costlier subprime loans. Paschal Decl. ¶ 9. Paschal was even reprimanded for placing qualified customers into more desirable FHA loans instead of more expensive and more profitable subprime loans. *Id.* ¶ 19. Jacobson likewise understood that it was her job to take people who qualified for prime loans and "figure out how to get the customer into a subprime loan." Jacobson Decl. ¶ 9. If she had access to Wells Fargo loan files, she could identify customers who were steered like this. *Id.*

Subprime loan officers steered people with better credit into subprime loans because Wells Fargo gave them large financial incentives to do so. The pay of subprime loan officers was "based on commissions and fees," which "were based on the size of the loan and the interest rate." *Id.* ¶ 6. Wells Fargo likewise lavished expensive trips and gifts on successful subprime loan officers, even as foreclosures increased in recent years. *Id.* ¶ 32. Paschal confirms how the

compensation system operates to the detriment of minorities:

> Because Wells Fargo made a higher profit on subprime loans, the company put "bounties" on minority borrowers. By this I mean that loan officers received cash incentives to aggressively market subprime loans in minority communities. If a loan officer referred a borrower who should have qualified for a prime loan to a subprime loan, the loan officer would receive a bonus. Loan officers were able to do this because they had the discretion to decide which loan products to offer and to determine the interest rate and fees charged to the borrower. Since loan officers made more money when they charged higher interest rates and fees to borrowers, there was a great financial incentive to put as many minority borrowers as possible into subprime loans and to charge these borrowers higher rates and fees. I knew many loan officers who made more than $600,000 a year and a few who made more than $ 1 million.

Paschal Decl. ¶ 13. Wells Fargo's underwriting rules and pricing guidelines gave loan officers the broad discretion they needed to engage in these lucrative steering practices and originate the costliest subprime loans.

Jacobson describes in detail the unscrupulous ways in which Wells Fargo loan officers used their discretion to get away with steering people with prime credit into subprime loans, beginning with "A reps" who were supposed to make prime loans:

> In many cases A reps used their discretion to steer prime loan customers to subprime loan officers by telling the customer, for example, that this was the only way for the loan to be processed quickly; that there would be less paperwork or documentation requirements; or that they would not have to put any money down. Customers were not told about the added costs, or advised about what was in their best interest.

Jacobson Decl. ¶ 12. The subprime loan officers then took advantage of their discretion "to qualify the A rep referrals for subprime loans."

> One way was to tell customers not to put any money down on the loan and borrow the entire amount, even if they could afford a big enough down payment to qualify for a prime loan. As soon as the loan was submitted without a down payment, it would "flip" from prime to subprime and a subprime loan officer would be able to get the loan qualified as a subprime loan. Another technique would be to tell the customer that the only way to get the loan closed quickly would be to submit it as a subprime loan. A third technique would be to put a person into a "stated income" loan, even if they had a W-2 statement that verified

> their income. By doing this, the loan was flipped from a prime to a subprime loan. I know that through some of these techniques borrowers with credit scores as high as 780 were steered into expensive subprime loans with as many as four points, even though they could have qualified for a prime loan.

Id. ¶ 17; *see also id.* ¶¶ 15-16; Paschal Decl. ¶ 14. Some loan officers went even further and falsified loan applications in order to put people with prime credit into subprime loans or to make subprime loans to borrowers who did not actually qualify for a loan. Jacobson Decl. ¶ 18.

In 2004 Wells Fargo responded to public criticism by creating "filters" that were supposed to prevent the steering of prime customers into subprime loans. But as senior managers knew, the filters were not effective. Jacobson Decl. ¶¶ 19-20, Paschal Decl. ¶ 18.

Paschal further explains how other predatory subprime practices were used to harm minorities:

> Wells Fargo also discriminated against minority loan applicants by advising them that the interest rate on their loan was "locked", when in fact, Wells Fargo had the ability to lower the interest rate for the applicant if the market rates dropped prior to the loan closing. I believe this was deceptive and discriminatory, particularly since Wells Fargo loan officers lowered interest rates for White loan applicants when market rates dropped after the application but prior to a loan closing. Even though I complained about this differential treatment of minorities to the branch manager, Jennifer Bowman, Wells Fargo did nothing to change the practice.

Paschal Decl. ¶ 5. Wells Fargo also "discriminated against minority loan applicants by not offering them its better or newer products which had lower fixed interest rates and fees." *Id.* ¶ 14. Loan officers likewise deceived subprime borrowers about onerous prepayment penalties associated with their loans, which typically made it difficult for borrowers to refinance into new and better loans. *Id.* ¶ 15.

With Wells Fargo engaged in so many abusive lending practices, Jacobson and her colleagues "morbidly joked that we were 'riding the stagecoach to Hell.'" Jacobson Decl. ¶ 31. Jacobson believes that "many current and former Wells Fargo employees" would corroborate her

testimony if compelled to testify, but that they "may well be reluctant to come forward voluntarily to tell what they know for fear of retaliation, reprisal or other actions that could adversely affect their future careers in the lending industry." *Id.* ¶ 35.

B. Detailed Allegations Based On Statistical Evidence

The statistical evidence in the Second Amended Complaint confirms the strong causal connection between Wells Fargo's race-based targeting of predatory practices in Baltimore and excessive foreclosures on the specific Wells Fargo loans that resulted from that targeting. The foreclosure rate on Wells Fargo's loans in Baltimore neighborhoods that are at least 60% African-American – that is, in neighborhoods that Jacobson and Paschal explain were targeted for predatory lending – is 4.82%. SAC ¶ 39. Yet Wells Fargo's foreclosure rate in Baltimore neighborhoods that are at least 60% white, which were not targeted, is only 1.63%. *Id.* This three-fold difference in foreclosure rates is the plausible and natural result of making unfair and deceptive loans in one community, while refraining from such practices in the other.[11]

Similarly, more than half of Wells Fargo's foreclosures from 2005 to 2009 were in census tracts that are more than 80% African-American and 62% were in tracts that are over 60% African-American, but only 12% were in tracts that are 20% or less African-American. *Id.* ¶¶ 37-38. The figures are virtually identical for Wells Fargo's foreclosures from 2000 to 2004, with more than half in tracts that are more than 80% African-American, 64% in tracts that are over 60% African-American, and only 14.8% in tracts that are 20% or less African-American. *Id.* These figures are particularly revealing because the bulk of Wells Fargo's mortgage lending in Baltimore is in white neighborhoods. *Id.* ¶ 4.

[11] By using foreclosure rates – the number of foreclosures divided by the number of originations – Baltimore controls for differences in the raw number of loans made by Wells Fargo in African-American and white neighborhoods, respectively.

Wells Fargo's high cost loans are also disproportionately concentrated in African-American neighborhoods. *Id.* ¶¶ 72-75. Wells Fargo made high cost loans to 43% of its African-American mortgage customers in Baltimore, but only to 9% of its white customers. In 2006, the respective rates were 65% and 15%; in 2005, they were 54% and 14%; in 2004, they were 31% and 10%. The proportion of refinance loans that are high cost is especially pronounced. From 2004 to 2007, Wells Fargo's refinance loans to African-American borrowers were 3.2 times more likely to be high cost than its refinance loan to white borrowers.[12] *Id.* ¶ 72.

All of these statistical disparities about the locations of Wells Fargo's foreclosures, the rate at which Wells Fargo loans go to foreclosure in white and African-American neighborhoods, and the incidence of Wells Fargo's high- and low-cost loans by race of borrower and neighborhood are fully consistent with the outcome one would expect given the direct evidence of targeting described above.

Wells Fargo argues that the City's statistics do not evidence discrimination and instead merely reflect socioeconomic differences between African-American and white neighborhoods, such as different unemployment rates and income levels. While this type of factual argument is inappropriate at this stage of the case, Wells Fargo's assertion fails in any event because it does not explain why Wells Fargo is an outlier. For example, if Wells Fargo were right, then the banks that Wells Fargo competes with to make mortgage loans in Baltimore would have comparable foreclosure rates in African-American neighborhoods because all of these lenders make loans to borrowers confronting the same socioeconomic issues. Wells Fargo's foreclosure

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[12] Additional statistical evidence in the Second Amended Complaint demonstrates that Wells Fargo targets interest rate increases at homes in African-American neighborhoods and interest rate decreases at homes in white neighborhoods, SAC ¶¶ 76-78; that Wells Fargo incorporates higher interest rate caps on adjustable rate loans made in African-American neighborhoods than on loans in white neighborhoods, *id.* ¶¶ 86-88; and that Wells Fargo's loans in African-American neighborhoods that go to foreclosure do so much more quickly than its loans in white neighborhoods, *id.* at ¶¶ 89-92.

rate in these neighborhoods, however, is much higher than its major competitors. *See Id.* ¶ 40. It is Wells Fargo's targeting of predatory practices in African-American neighborhoods – not socioeconomic factors – that explains why the disparity in Wells Fargo's foreclosure rates between white and African-American neighborhoods is so excessively large compared to other lenders. Overpriced and unaffordable loans cause excessive and unnecessary foreclosures.

2. Foreclosures at the Wells Fargo Properties Plausibly Result In Many of the Wells Fargo Properties Becoming Vacant When They Would Otherwise Be Occupied

It is highly plausible that properties noticed for foreclosure are likely to become vacant. A notice of foreclosure means that the borrower is seriously in default, lacks the means to make the mortgage payments, and faces the threat of being evicted. That the borrower will leave the property unoccupied – whether as a result of giving up or being legally compelled to depart – is a natural and predictable result of the inability to maintain a mortgage and the receipt of a notice initiating foreclosure proceedings. Indeed, that is exactly what the evidence shows.

The Court previously afforded the parties limited discovery in part to test the connection between foreclosure notices on Wells Fargo loans and vacancies. *See, e.g.*, Mem. to Counsel (Feb. 20, 2009) (Docket No. 48). The data developed through that process and independently by Baltimore since then demonstrates that there is a strong connection between a foreclosure notice on a Wells Fargo property and a vacancy at that particular property. Out of 486 foreclosure notices on Wells Fargo loans in Baltimore's African-American neighborhoods from 2000 to 2009 of which the City is currently aware, 269 (55%) of the properties became vacant.[13] *Id.* ¶¶ 96, 104. Plainly, this is a much higher percentage of homes than ordinarily becomes vacant. If Wells Fargo had not engaged in targeted predatory practices and instead made loans

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[13] As Wells Fargo notes, 138 remain vacant, *see* Defs.' Mem. at 5, but this distinction does not matter. What matters is that the City has been injured by having to provide additional municipal services at 190 of the Wells Fargo foreclosure properties during a period of vacancy. All were vacant at the time of injury, and 138 remain so.

commensurate with borrowers' financial resources and ability to repay them, many if not all of these foreclosures would have been avoided. The borrowers could have continued to afford their monthly payments and kept their homes instead of leaving them vacant.

Thus, the connection between reverse redlining by Wells Fargo in Baltimore, the 486 foreclosures on Wells Fargo loans in Baltimore's African-American neighborhoods, and the 269 properties that also suffered vacancy is anything but attenuated. To the contrary, there is a direct and plausible line connecting Wells Fargo's targeted predatory lending practices to the 486 Wells Fargo foreclosures and the 269 Wells Fargo vacancies. But for the predatory practices and resulting foreclosures, these properties, or the vast majority of them at the very least, would have remained occupied. This is precisely what the Second Amended Complaint alleges and the evidence contained in the complaint shows. *See, e.g.*, SAC ¶¶ 96-97, 103.

3. Baltimore Is Injured By Vacancies and Foreclosures at the Wells Fargo Properties

The vacancies and foreclosures at Wells Fargo properties injure Baltimore in two different and independently provable ways. Both are highly plausible and supported by a wealth of detailed property-specific allegations. Baltimore spent hundreds of hours examining its records to provide this detail in response to the Court's concern that the City was claiming damages that were not sufficiently tied to particular Wells Fargo properties. These allegations establish that, to the contrary, the damages are the direct and plausible result of the Wells Fargo foreclosures and vacancies.

First, the City is injured because it must provide increased municipal services to address dangerous code violations, crime, and fires at the specific vacant Wells Fargo foreclosure properties identified in the Second Amended Complaint. Second, its property tax revenues are reduced in sub-neighborhoods where there is a high concentration of Wells Fargo foreclosures as

a result of the devaluation of properties that lie in close proximity to the Wells Fargo foreclosure properties. Both types of injuries are specifically alleged by the Second Amended Complaint even though the City only needs to show that either one is plausible to satisfy the Article III requirements for standing.

a. The City's Records Show that Vacancies at the Wells Fargo Properties Plausibly Have Caused the City to Spend Precisely Quantifiable Funds to Provide Specific Services at the Properties

The municipal services that Baltimore must provide at vacant Wells Fargo foreclosure properties are very specific and closely connected to a property being vacant. Vacant properties are frequently open to casual entry because a lock or a window is broken, for example, and the City must purchase materials and send personnel to board and secure them. The properties frequently become dumping grounds for garbage that must be collected. Often they are not maintained, requiring City services from structural maintenance and repairs to grass cutting to rodent control and more so that the impact on neighbors' health, safety, and quality of life is minimized. Inspectors must be sent to the properties to assess all of these issues and the City must prosecute violations of its housing code that the inspectors identify. The police must come to the vacant Wells Fargo properties because they attract squatters, drug use, and other crime. All of these problems increase the risk of fire at the vacant Wells Fargo properties and the fire department must therefore respond to the Wells Fargo properties at an excessive rate to fight fires. These problems would not occur or would only occur at a dramatically reduced rate if the properties were occupied. Occupied properties, for example, are not left open to casual entry and do not require boarding. Squatters do not move into houses where people are living.[14] *See* SAC ¶¶ 97-102, 297-305, Attach. R ¶¶ 3-9, Attach. S ¶ 3; *see also id.* Attachs. E-O.

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[14] Indeed, some of Wells Fargo's own exhibits make these connections. *See* Defs.' Mem. at 2 & Ex. 2; *id.* Ex. 6; Defs.' Mem. of Law (Mar. 21, 2008) at Ex. F (Docket No. 10-8).

The Second Amended Complaint details the provision of such services at 190 vacant Wells Fargo foreclosure properties. SAC ¶¶ 105-294. These allegations are based on detailed records maintained by the City that allow it to calculate the cost of providing each service to each property down to the dollar. *Id.* Attach. R ¶¶ 4, 9, Attach. S ¶¶ 4-5. These records likewise allow the City to separate costs that are not attributable to Wells Fargo vacancies, such as the costs of sending police officers to investigate a possible crime elsewhere on the same block or boarding an unsecured property that is vacant years after and not because of the Wells Fargo loan. Baltimore devoted hundreds of hours to reviewing these records in response to the decision dismissing the First Amended Complaint so that it could submit to the Court exhaustive detail about the exact municipal services provided at and because of the Wells Fargo vacancies, and so that it could exclude all other services from its claim for damages. The result is the City's itemization of services that it would not have had to provide at these properties if Wells Fargo had not made the predatory loans that caused them to become vacant. Each individual predatory loan and corresponding vacancy has caused incremental harm to the City and the amount of that harm can be determined on a property-by-property basis.

b. High Concentrations of Wells Fargo Foreclosures In Particular Areas Reduce Tax Revenues By Plausibly and Negatively Affecting the Value of Other Houses In Close Proximity

The Court has already explained that where a lender that is engaged in unlawful lending activities plays a large enough role in a particular area, the connection between its unlawful activities and neighborhood decline is plausible. *See* Opinion at 5 n.2, 6. Baltimore analyzed all of the 486 Wells Fargo foreclosures in African-American parts of the City as well as all foreclosures by other lenders to isolate such areas. The result is the compact sub-neighborhoods identified in the Second Amended Complaint. In each, at least one-third of all foreclosures are

Wells Fargo foreclosures. Many of these sub-neighborhoods are clustered in areas that have long been stable or have improved significantly in the past decade. SAC ¶ 307. These are not areas characterized by the problems identified by the Court in dismissing the First Amended Complaint. *Id.*; *cf.* Opinion at 4-5. It is very plausible that in these areas, the high proportion of Wells Fargo foreclosures negatively affects the values of other homes very close to the foreclosure properties. This reduces the City's property tax revenues because property taxes are based on property values.

Baltimore's hedonic regression analysis confirms that the causal connection between Wells Fargo's foreclosures in the sub-neighborhoods and reduced property tax revenues from these areas is plausible. SAC ¶¶ 310-13. The City analyzed property assessment data from each assessment period, assessment procedures, and property characteristics (including the number of neighboring foreclosures) to determine the negative impact of the concentrated Wells Fargo foreclosures on the assessed value of each property in each sub-neighborhood. The City's methodology allowed it to distinguish any effects of nearby foreclosures that are independent of the effects of other characteristics and macroeconomic factors like the recent recession. The City found that the Wells Fargo foreclosures in each sub-neighborhood are responsible for a quantifiable loss in the assessed values of the other residential properties in the same sub-neighborhood, and that the loss in assessed value translates into a precisely quantifiable loss in property tax revenue. *Id.* ¶ 311. These findings exclude any lost value due to foreclosures from outside of the sub-neighborhoods and from any non-Wells Fargo foreclosures. The City's analysis confirms the causal connection between the concentrated Wells Fargo foreclosures and the narrowed property tax damages sought by the City in conformity with the Court's ruling on Wells Fargo's prior motion to dismiss.

D. Baltimore Satisfies the Injury-In-Fact and Traceability Requirements for Standing

The Fair Housing Act prohibits racial discrimination in all aspects of housing, including real estate transactions in particular. *See* 42 U.S.C. §§ 3604, 3605. As discussed above, Baltimore alleges and provides extensive evidence that Wells Fargo has been engaged in a pattern or practice of targeting African-American neighborhoods in Baltimore for deceptive, predatory or otherwise unfair mortgage lending practices. The discriminatory targeting of these neighborhoods for such practices is known as "reverse redlining." SAC ¶ 2. Every court to consider the issue has held that reverse redlining, which begins the causation chain here, violates the Fair Housing Act and is actionable. *See, e.g*., *Barkley v. Olympia Mortgage Co.*, Nos. 04-CV-875 *et al.*, 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000). Standing under the Fair Housing Act requires a plaintiff to allege an injury that is traceable to a violation of the Act. *See, e.g.*, *American Canoe Ass'n, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir. 2003).

1. Baltimore Has Standing Under the Supreme Court's Seminal Fair Housing Act Case on Standing

Baltimore's claim to standing is even stronger than the one that passed muster in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the seminal case on standing under the Fair Housing Act that Wells Fargo wholly fails to address. In *Gladstone,* a municipal corporation sued two local real estate companies and their employees for racial steering.[15] *See* 441 U.S. at 93-94. The Village alleged that it "has been injured by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village." *Id.* at 95 (brackets and ellipsis in original; quotation marks omitted). Drawing

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[15] "[*I*].*e.*, directing prospective homebuyers interested in equivalent properties to different areas according to their race." *Gladstone*, 441 U.S. at 94.

inferences from this allegation, the Supreme Court held that the Village had alleged an injury-in-fact sufficient to support standing in large part because "prices may be deflected downward" by the alleged unlawful acts and "[a] significant reduction in property values directly injures a municipality by diminishing its tax base." *Id.* at 110-11; *see also Pennsylvania v. New Jersey*, 426 U.S. 660, 663-64 (1976) (per curiam) (assuming *sub silentio* that reduced tax revenue is an injury-in-fact and limiting standing inquiry to causation).

Numerous lower court opinions likewise demonstrate that allegations like those made by Baltimore easily show injury-in-fact. The Seventh Circuit has held that Fair Housing Act violations by real estate professionals "cause[] a destabilization of the community and a corresponding increased burden on the City [of Chicago] in the form of increased crime and an erosion of the tax base." *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992). Citing *Gladstone*, the court held that these burdens were injuries that conferred standing. *See id.* 1094-95. The Seventh Circuit reiterated this holding in *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), stating that the issue was "settled" by *Gladstone* and emphasizing the Supreme Court's reliance on an "injury . . . to the tax base." *Id.* at 1525. The Sixth Circuit has also held under the FHA that an injury to a city's tax base provides standing, *see Heights Cmty. Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 138-39 (6th Cir. 1985), as have courts in non-FHA cases, *see Warren County v. State of North Carolina*, 528 F. Supp. 276, 282 (E.D.N.C. 1981) (finding injury-in-fact where county's tax base could be affected by opening of toxic waste dump); *Sch. Dist. of Kansas City v. State of Missouri*, 460 F. Supp. 421, 437-38 (W.D. Mo. 1978) (finding injury-in-fact where school district's tax base allegedly was reduced by segregation in surrounding communities).

Gladstone is also dispositive with respect to traceability. The Supreme Court held that

the traceability of an injury to the Village's purse was satisfied by a much more tenuous causal chain than the one here and without the kind of detailed evidentiary allegations in Baltimore's Second Amended Complaint. The *Gladstone* Court reasoned that racial steering could ultimately bring about what Judge Posner later described as "tipping," *Village of Bellwood*, 895 F.2d at 1525, if enough prospective buyers were led to buy homes in other towns and "if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents," *Gladstone*, 441 U.S. at 110. This could then harm the Village by causing the downward price pressure and reduced tax base noted above. *See id.* at 110-11. The links in this causal chain were far from certain (they required a widespread impact on many people to bring the town to the tipping point, after which an injury might occur) and had to be constructed by the Court, but the Court held them sufficient to satisfy Article III.

2. Traceability Is Not Defeated When Third Parties Play Some Role in the Causal Chain

Additional Supreme Court decisions make clear that, as in *Gladstone* and contrary to Wells Fargo's contentions, traceability is not defeated simply because third parties play some role in the causal chain. Wells Fargo insists that the role of third parties breaks the connection between the discriminatory, unaffordable loans and Baltimore's injuries, but this "wrongly equates injury fairly traceable to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (internal quotation marks and citation omitted). As long as there is a "likelihood" that the injury will result, the traceability requirement is met regardless of the role of third parties. *Clinton v. City of New York*, 524 U.S. 417, 432 (1998) (citations omitted).

Clinton, *Bryant v. Yellen*, 447 U.S. 352 (1980), and *United States v. SCRAP*, 412 U.S. 669 (1973), likewise refute Defendants' view of the law (as does *Gladstone*, discussed above).

In each, private parties challenged acts of the federal government, and traceability was satisfied because third parties were likely to respond to those acts in a manner that would injure the plaintiffs.[16] *Clinton* considered a constitutional challenge to the Line Item Veto Act. The plaintiff alleged that people who might otherwise sell their business to it were not likely to because the President had vetoed a capital gains tax advantage the sellers would otherwise receive. *See* 524 U.S. at 432. The Court found traceability "easily satisfied." *Id.* at 433 n.22. *Bryant* addressed the federal government's position that 233,000 acres held by 800 landowners could not be irrigated under a federal statute. *See* 447 U.S. at 365-66 & n.15. The Court held that intervenors who wanted to buy the land cheaply had standing. *See id.* at 366-68. If the land could not be irrigated, it was "likely" that the 800 owners would choose to sell it at low prices. *Id.* at 368. In *SCRAP*, people who used Washington-area lands for recreation challenged a federal order permitting railroads to increase rates. *See* 412 U.S. at 678, 685. Their standing argument was that "a general rate increase would allegedly cause an increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area." *Id.* at 688. The Court was skeptical of this "attenuated line of causation," but held it sufficient at the Rule 12 stage. *Id.* at 689-90

Though Wells Fargo relies heavily on *Allen v. Wright*, 468 U.S. 737 (1984), *Allen* reflects

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[16] To the extent *Frank Krasner Enters., Ltd. v. Montgomery County*, 401 F.3d 230 (4th Cir. 2005) ("*Krasner*"), holds that traceability is cut off if a third party plays any role, as Defendants suggest, it is at odds with Supreme Court precedents discussed herein. *Krasner* would also not be a valid precedent in the Fourth Circuit for other reasons. The Fourth Circuit considered parallel facts in *Shanty Town Assocs. v. EPA*, 843 F.2d 782 (4th Cir. 1988), and held traceability satisfied notwithstanding the comparable role of a third party. *Krasner* did not consider *Shanty Town* and found otherwise, but the earlier decision is the law of the circuit. *See McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004) (*en banc*) ("when there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed, unless and until it is overruled by this court sitting *en banc* or by the Supreme Court").

the same kind of traceability analysis as *Gladstone*, *Clinton*, *Bryant*, and *SCRAP*. In *Allen*, parents of public school children challenged the IRS's guidelines for determining whether a private school was nondiscriminatory and tax-exempt. *See* 468 U.S. at 739. They alleged that lax guidelines increased the funds available to segregated private schools, reducing the number of white students in public schools, and thereby reducing their children's opportunity to receive a desegregated education. *See id.* at 745-46, 752-53. Even though this chain rested on the decisions of "numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools)," the Court held that the injury "would be fairly traceable to unlawful IRS grants of tax exemption [] if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration." *Id.* at 758-59. Standing was only rejected because plaintiffs had "made no such allegation," alleging instead only that four individual schools across seven states might lose an exemption under proper guidelines. *Id.* at 743, 758 & n.23. *Allen* thus focused on the "chain as a whole," like any other traceability case, and did not shortcut its analysis through a rule that the chain is automatically broken if third parties have some significant role in it.[17]

Accordingly, standing doctrine does not require Baltimore to show that factors or persons other than Wells Fargo have no role in connecting the unlawful acts at issue to the City's injuries. Rather, Baltimore fully supports standing by plausibly alleging that Wells Fargo's acts likely lead to its injuries. The City does precisely this in the Second Amended Complaint.

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[17] Moreover, *Allen* rested heavily on the fact that the plaintiffs challenged federal policy, bringing separation of powers concerns to the fore. *See id.* at 759-61. No such challenge is made here, minimizing separation of powers concerns. *See Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (Ruth B. Ginsburg, J.) (distinguishing *Allen* as type of case that "implicate[s] most acutely the separation of powers"). Separation of powers concerns recede from standing analysis even more where, as here, Congress has extended standing to the limits of Article III. *See Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1337 (D.C. Cir. 1986); *id.* at 1336 (identifying Fair Housing Act as the "premier example").

II. WELLS FARGO'S OBJECTIONS TO STANDING DO NOT WITHSTAND SCRUTINY[18]

Wells Fargo's attack on the City's standing relies on four basic arguments. The first is general and factual in nature, designed to suggest that it is not plausible that Wells Fargo's foreclosures could be responsible for the vast, City-wide injuries and damages that Wells Fargo contends the City's complaint alleges. Thus, Wells Fargo alternately argues that the loans it has made are a relative "drop in the bucket" compared to total vacancies and foreclosures in the City; that socioeconomic forces outside its control have caused many of the City's ills; and that traceability is defeated because the City is responsible for a "self-inflicted" injury. Each of these arguments is addressed in turn below, and all lack merit.

As an initial matter, Wells Fargo misses the point. The City does not hold Wells Fargo responsible for all foreclosures or all vacancies across the City, or for that matter any other preexisting socioeconomic conditions not of its making. It seeks to hold Wells Fargo responsible only for its illegal practices and their provable consequences at specific Wells Fargo properties, and in specific sub-neighborhoods where the concentration of foreclosures has a discernible effect on property values. Even if they were responsive to the actual allegations in the complaint, these arguments are based on facts that in many cases are simply wrong, and at a minimum untested and highly disputed. For that reason alone they are not proper for judicial notice, and cannot serve as the basis for deciding a motion to dismiss.

Second, Wells Fargo asserts there is no causal connection between its lending practices and the foreclosures at its properties because it has privately reviewed its own loan files and has found no connection. It provides a multitude of untested facts and analyses it claims exonerate

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[18] Baltimore only addresses in this brief the arguments made by Defendants in their memorandum in support of their motion to dismiss (Docket No. 155-1). To the extent Defendants are permitted to incorporate by reference other arguments and assertions from other filings, as they purport to do, Baltimore likewise incorporates by reference its earlier filings.

the company. None of the files or analyses containing the relevant information upon which Defendants' conclusions are based have been provided to the City or subjected to any form of cross-examination because there has been no opportunity for discovery about these issues. At this stage of the proceedings it would be fundamentally unfair to the City and improper for the Court to rely on these untested assertions to sustain a challenge to traceability and standing.

Third, Wells Fargo attempts to challenge the traceability of the causal chain by purportedly identifying specific factual omissions or inconsistencies in the Second Amended Complaint that relate to particular Wells Fargo properties or loans. Each of these attacks, which are addressed in turn below, is simply wrong. Even if that were not the case, they would go to the amount of damages that the City is entitled to recover, not the issue of standing.

Fourth and finally, Wells Fargo argues that, as a legal matter, the causal chain between its illegal acts and injury to the City is too attenuated to support traceability because of the role that third parties may play in the foreclosure process. Wells Fargo relies heavily on this legal argument, which runs throughout the motion to dismiss. For the reasons set forth in section I.D above, Wells Fargo gets the legal standard wrong. The case law is clear that the possibility that third parties may be involved in a causal chain does not defeat traceability. Wells Fargo nonetheless continues to rely on two inapposite district court rulings – *City of Birmingham* and *City of Cleveland* – to argue the same point. Both cases are readily distinguished and neither provides a basis for ignoring the Supreme Court's more directly relevant precedent in *Gladstone*.

A. Wells Fargo's General Factual Assertions Are Irrelevant and Wrong

1. Wells Fargo Misrepresents the Injuries Alleged by the City

Wells Fargo argues that Baltimore's allegations are not plausible because the City's damages are too broad to have been caused by "the alleged lending practices of a single

bank . . . ." Defs.' Mem. at 1. Defendants protest that their 486 foreclosures in African-American neighborhoods and corresponding vacancies are too modest a portion of the overall number of foreclosures and vacancies in the City for them to be held responsible for all the foreclosures, all the vacancies, and an array of socioeconomic problems like high crime rates and low educational achievement.

As the City has already shown in explaining the precise scope of the Second Amended Complaint, this argument is a *non sequitur*. Wells Fargo's "plausibility" argument is premised on an allegation that it has manufactured purely for the purpose of its motion. Baltimore makes no claim for the kind of broad and generalized damages described by Wells Fargo. To the extent its prior complaint did or could be read as doing so, the City has now made clear that the Second Amended Complaint is much narrower and seeks damages only for harm attributable to specific Wells Fargo foreclosure properties. SAC ¶¶ 104-295, 306-309.

As documented in the 190 new paragraphs specifying the property specific injuries, each additional Wells Fargo foreclosure property adds incremental injury to the City because it costs the City money to provide the necessary municipal services at each additional vacant Wells Fargo property that would otherwise be occupied but for the foreclosure. The existence of other vacancies or foreclosures by other lenders across the City has no bearing on the property specific injuries caused to the City by Wells Fargo's predatory lending practices.

2. Socioeconomic Challenges In Some Neighborhoods Do Not Explain Wells Fargo's Disproportionately High Foreclosure Rate In African-American Parts of the City

Although it has no response to the direct evidence of targeting, steering, and reverse redlining described by its own former employees, Wells Fargo argues that the statistical disparities in foreclosure rates between the City's white and African-American neighborhoods

documented in the Second Amended Complaint are fully explained by preexisting socioeconomic problems found primarily in African-American neighborhoods. Thus, instead of discrimination and predatory practices, Wells Fargo asserts that "socioeconomic disparities" between African-American and white neighborhoods are the "true driver" of its much higher foreclosure rate in Baltimore's African-American neighborhoods. Defs.' Mem. at 19-21.

This argument, of course, requires the Court to take judicial notice of a series of facts and statistics that Wells Fargo has cobbled together from newspaper articles and a myriad of other sources. Even if it were appropriate to consider these facts at this stage, which Fed. R. Evid. 201 does not permit, Wells Fargo's reasoning and "facts" fail to explain why Wells Fargo's foreclosure disparity rate is higher than its peers. If the disparity in socioeconomic conditions explained the disparity in foreclosure rates between African-American and white neighborhoods, Wells Fargo's peers would have similarly lopsided foreclosure rates – high in African-American neighborhoods and low in white neighborhoods – yet they do not. Wells Fargo cites statistics for three of the City's many neighborhoods about unemployment, household income, and high school dropout rates, and talks about neighborhoods in need of substantial government assistance, but all lenders make loans in the same environment. If these factors determine whether a loan winds up in foreclosure, then every lender should have the same proportion of negative outcomes. The evidence will instead show that Wells Fargo's foreclosure rate in African-American neighborhoods is much higher than the rates of its peers. *See* SAC ¶ 40. Its status as an outlier is consistent with the wealth of evidence showing that Wells Fargo intentionally targeted African-American neighborhoods for predatory loans.[19]

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[19] In addition to citing statistics about certain neighborhoods, Wells Fargo suggests that certain areas designated as "empowerment zones" faced greater challenges than others. For the same reasons discussed above, the location of the empowerment zones does not explain Wells Fargo's excessive foreclosure rate and does not

Similarly, Wells Fargo attempts to shift blame from itself to the recent economic troubles in the country as a whole. This fails for the same reason as its attempt to blame socioeconomic problems in particular neighborhoods; all lenders would have similar foreclosure rates in African-American neighborhoods if Wells Fargo were right, but instead Wells Fargo is an outlier. The economy further exposed and accelerated the harm from Wells Fargo's conduct, but it did not cause and does not excuse the harm. Moreover, the recession did not begin until 2008 and Baltimore identifies many vacant Wells Fargo foreclosure properties that caused injury before then. *See* SAC ¶¶ 105-294.

Wells Fargo also suggests that it would somehow be unfair to hold it responsible for any harm it has caused during the recession or in neighborhoods where there are substantial other causes of harm. Even where Baltimore can identify a violation of the law causing a specific injury, Wells Fargo contends that the City should be denied standing because other problems and other bad actors contribute to a neighborhood's overall condition. This logic is deeply flawed and would lead to absurd results. Using Wells Fargo's reasoning, the government would be barred from prosecuting a drug sale in a neighborhood with a substantial drug problem because a single prosecution would not make a large enough dent in the neighborhood's overall problem. The police could not issue a ticket for speeding because one person speeding does not contribute appreciably to the overall incidence of speeding. Such outcomes are self-evidently not what the law requires.

Wells Fargo's approach to traceability would also effectively eviscerate all lending discrimination laws, including the Fair Housing Act, the Equal Credit Opportunity Act (15 U.S.C. § 1691 *et seq.*), and others. No one – not a homeowner, a municipality, or anyone else –

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excuse it from liability for property-specific damages caused by foreclosures on its own discriminatory and predatory loans in those zones.

would ever have standing to challenge steering, reverse redlining, or other discriminatory practices that affect a city or a neighborhood. A defendant could always secure immunity by speculating that no injury would have occurred had the neighborhood, the real estate market, or the job market been stronger, or that a different company or some other factor might have played a role in causing the harm. *Gladstone* and its progeny plainly reject any such proposition, however, and it "would be strange indeed if" a discriminatory lender "were protected from suit simply by virtue of the fact that others were also engaging in the illegal activity." *American Canoe*, 326 F.3d at 520. Contrary to Wells Fargo's position, as long as the connection between illegal activity and harm is plausible – as it is here – Baltimore has standing to bring suit regardless of whether other people, economic conditions, or social conditions are also having a negative impact in the same area as a Wells Fargo foreclosure that has harmed the City.

3. Baltimore's Injuries Are Not Self-Inflicted

Wells Fargo asserts that Baltimore's allegations are not plausible because the City's injuries are purportedly self-inflicted through the City's sale of tax liens, because the City owns vacant properties, and because a few of the 190 vacant properties at which Baltimore has identified damages involved a City or State loan program. These assertions are both legally irrelevant and factually inaccurate. Wells Fargo's assertions do not support any tenable argument about traceability and are nothing more than an attempt to malign the City.

An injury can only be self-inflicted so as to preclude standing if the plaintiff's acts are based on "personal choice." *McConnell v. FEC*, 540 U.S. 93, 228 (2003). "Standing is not defeated merely because the plaintiff has in some sense contributed to his own injury." 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531.5 (2008). Rather, "[s]tanding is defeated only if it is concluded that the injury is so

completely due to the plaintiff's own fault as to break the causal chain." *Id.* The only one of Wells Fargo's "self-inflicted" arguments through which it even attempts to attribute to Baltimore responsibility for all of its damages, and not just damages from a few properties here and there, is its argument about tax lien sales (and that attempt fails).

Furthermore, the Court cannot accept Wells Fargo's assertions as true or resolve at this stage disputed factual questions that go to the merits of Baltimore's claims. *See supra* at 11-13. Because Wells Fargo's arguments about self-inflicted injury depend on its assertions about disputed facts and because they go to the merits, those arguments must be rejected.[20]

a. Tax Lien Sales

As it has done throughout this case, Wells Fargo thoroughly misrepresents the tax lien process in an effort to disparage the City for supposedly contributing to the overall number of foreclosures in the City. Moreover, its assertions about tax liens, *see* Defs.' Mem. at 3-4, 8, 27, are based on untested newspapers articles that have no place here and its implicit request for judicial notice about myriad facts is improper under Fed. R. Evid. 201(b).[21] *See supra* at 12-13.

Most astonishingly, Defendants fail to inform the Court that tax lien sales are a creature of and required by state law. *See* Md. Code Ann., Tax-Prop. §§ 14-801 to 14-854. Maryland

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[20] While unjustifiably blaming Baltimore for causing its own injuries, Wells Fargo portrays itself as "a fair and responsible lender." Defs.' Mem. at 8 & n.8. There is ample reason to believe that discovery will show otherwise. For example, Wells Fargo recently acknowledged in a 10-Q filing with the SEC that "[c]ertain government entities are conducting investigations into the mortgage lending practices of various Wells Fargo affiliated entities, including whether borrowers were steered to more costly mortgage products," Wells Fargo & Co., Form 10-Q (May 7, 2010) at 95 (available at http://www.sec.gov/Archives/edgar/data/72971/000095012310046578/f55268e10vq.htm); Governor O'Malley singled out Wells Fargo in his 2009 State of the State address for "choos[ing] short term profit over long-term homeownership" by failing to work with the state to prevent additional foreclosures, *see* http://www.stateline.org/live/details/speech?contentId=373223; and the Center for Responsible Lending found that Wells Fargo's customers "too often face the loss of their home or financial ruin as a result" of its "predatory practices." SAC ¶ 35.

[21] Newspapers may be judicially noticed for general background information and items like stock prices, but not to resolve disputed facts central to a case. The "more critical an issue is to the ultimate disposition of the case, the less appropriate judicial notice becomes." *Pina v. Henderson*, 752 F.2d 47, 50 (2d Cir. 1985) (citation omitted).

law mandates that Baltimore conduct these sales and include within them any "tax," as defined by state law, that is at least $250, and prescribes nearly the whole of the process and fees associated with it.[22] *See id.* § 14-811. The reckless and misleading assertion that Baltimore bears responsibility for this program is palpably false.

Wells Fargo's contention that tax lien foreclosures dwarf foreclosures on Wells Fargo loans is likewise misleading and inaccurate in key respects. For example, Defendants would have the Court believe that there is no difference between the number of tax liens subject to auction and the number of actual foreclosures; they assert that 12,689 liens were subject to auction this year, but fail to explain that very few foreclosures result from liens included in an auction. Defs.' Mem. at 3. Figures compiled by Judge Evelyn O. Cannon in *In re Attorney's Fees in Tax Sales Foreclosures*, No. 24-C-03-3443 (Cir. Ct. Balt. City Dec. 11, 2007), show that the vast majority of tax lien foreclosure suits filed – and the 12,689 figure does not even purport to represent actual suits, only liens available at auction – do not result in foreclosure. *See id.* at 23 n.26 & App. F in App. Cases Not Generally Reported. Judge Cannon's analysis shows that the Court may and should note that there is significant data from which one could reasonably conclude that relatively few people lose their homes to tax lien foreclosures.

Judge Cannon's opinion also demonstrates that many of the actual foreclosures are part

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[22] Maryland mandates that its counties and the City of Baltimore "shall sell . . . all property . . . on which the tax is in arrears." *Id.* § 14-808. A "tax" is defined by state law as "any tax, or charge of any kind due to the State or any of its political subdivisions, or to any other taxing agency, that by law is a lien against the real property on which it is imposed or assessed . . . . includ[ing] interest, penalties, and service charges," *id.* § 14-401(c), and state law further specifies that "[a]ll unpaid taxes on real property shall be, until paid, liens on the real property . . . ," *id.* § 14-404(a).

The tax lien process generally includes notice by mail to the property owner of the tax delinquency, *see id.* § 14-812; multiple public notices no less than 30 days later, *see id.* § 14-813; public auction no less than 4 weeks later, *see id.* §§ 14-813(a)(3), 14-817; a six-month period following sale during which the property may be redeemed (*i.e.*, a sale may be undone), *see id.* §§ 14-827, 14-828, 14-833(a); and then an eighteen-month period during which the property may still be redeemed unless the buyer first successfully forecloses that right through suit, *see id.* §§ 14-827, 14-833. The tax sale purchase is void if no foreclosure suit is filed by the end of this eighteen-month period. *See id.* § 14-833(c). The payments that an owner must make to redeem a property are also fixed by state law. *See id.* §§ 14-828, 14-843.

of Baltimore's "Project 5000" program. *See id.* at 9 n.14. As indicated by a public memorandum from the Commissioner of the City's Department of Housing and Community Development, discovery will show that Project 5000 is a program whereby the City uses tax foreclosures to obtain title to thousands of already vacant and abandoned properties. *See* Attach. A (Decl. of G. Schlactus) ("Schlactus Decl.") at Ex. 1. Project 5000 allows the City to turn dilapidated and empty homes back into homes that people live in and that benefit the surrounding community, *i.e.*, the opposite of what happens when foreclosures caused by Wells Fargo's discriminatory lending practices lead to vacant homes. *See id.* Because Defendants fail to account for Project 5000 foreclosures on vacant properties and other aspects of the tax lien sale process, their claims about the number of people who actually lose their homes to tax lien foreclosures are vastly overstated and misleading.

Wells Fargo's assertion that the number of liens auctioned has recently doubled is also thoroughly misleading. *See* Defs.' Mem. at 8. In truth, as discovery will show, the number of liens purchased at the auction has dropped dramatically.

Finally, Wells Fargo's footnote about tax liens it has redeemed demonstrates that it has caused additional harm for its borrowers. *See* Defs.' Mem. at 3 n.3. Wells Fargo takes credit for redeeming the tax lien on 3622 Edmonson Avenue, but by waiting until late in the process to redeem the lien Wells Fargo allowed a private party to add $3,800 in legal fees to the redemption cost. Wells Fargo could easily have redeemed the lien during the months before state law allowed any legal fees to be added, but failed to do so.[23]

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[23] Wells Fargo's additional statement about corruption related to the purchasing of tax liens in Maryland is not connected to any legal argument and is purely gratuitous. Defs.' Mem. at 3 n.3. Wells Fargo offers no explanation of how any such corruption somehow defeats Baltimore's standing to sue Wells Fargo for discriminatory lending. Nor has the issue been addressed through discovery. In addition, the City was recognized as a victim of private persons with respect to this incident.

b. Vacant Properties Owned By the City

At various points in its motion Wells Fargo sets forth variations on the "self-inflicted" theme, focusing chiefly on vacant properties allegedly owned by the City. Wells Fargo suggests their proximity to Wells Fargo properties in certain neighborhoods is the true cause of the City's injuries. Wells Fargo makes the same claim about vacant properties that the City does not own. *See* Defs.' Mem. at 13-14.

Wells Fargo does not contend, however, that the existence of other vacant properties serves to break the causal chain at every property specified as a source of injury in the Second Amended Complaint. These arguments therefore only go to the amount of the City's damages, not standing. If Wells Fargo can ultimately prove that the harm at a few of the properties was caused by City-owned or other vacant properties, and not unlawful terms and conditions for which Wells Fargo was responsible, it would only mean that Baltimore's damages would be marginally reduced, not eliminated. As stated in one of the cases Defendants rely on, standing only concerns the existence of a traceable injury, not its amount. *See Crutchfield v. United States Army Corps of Engineers*, 230 F. Supp. 2d 687, 694 (E.D. Va. 2002) ("As the Fourth Circuit has noted, 'the claimed injury need not be great or substantial; an identifiable trifle, if actual and genuine, gives rise to standing.'") (quoting *Conservation Council of N. Carolina v. Costanzo*, 505 F.2d 498, 501 (4th Cir. 1974)) (brackets omitted). Moreover, any objection by Wells Fargo to the cause of a foreclosure at a particular property is to be examined through discovery and, unless summary judgment is proper, presented to the trier of fact. *See St. Pierre v. Dyer*, 208 F.3d 394, 403 (2d Cir. 2000) ("this is a matter more properly viewed as going to the merits rather than to standing"); *cf. Boleski v. American Export Lines, Inc.*, 385 F.2d 69, 76 (4th Cir. 1967) (discussing situation "where the trier of fact had applied the comparative negligence

rule to reduce the plaintiff's damage award by reason of his contributory negligence") (emphasis added). Such an objection is not susceptible to resolution on a motion to dismiss.

Thus, Wells Fargo's repeated references to vacant properties owned by the City are irrelevant to the question of standing. Defs.' Mem. at 5, 8, 9, 13, 14. For all of Defendants' generalized talk about City-owned vacancies, they identify but a handful that are allegedly contemporaneous and close to Wells Fargo vacancies.

Moreover, Defendants misrepresent these vacancies by implying that they are a monolithic collection of decaying properties. To the contrary, discovery will show that the City acquires many vacant properties through Project 5000 or otherwise so that it can put them back into productive use, whether individually or by consolidating properties for development. Indeed, one of Wells Fargo's own newspaper articles states that the tax sale foreclosure process (which Project 5000 utilizes) is "a primary tool in clearing title to abandoned property" so that the City can restore vacant properties to better use. Defs.' Mem. Ex. 6.

It bears repeating here that Baltimore does not seek damages for harm related to City-owned or other vacancies, only for harm from vacant Wells Fargo foreclosure properties.

c. City and State Loan Programs

Wells Fargo asserts that Baltimore is to blame for Wells Fargo's foreclosures because of programs through which the City and Maryland help residents purchase homes. Even if the assertion were true (which it is not), this argument provides no basis to deny standing. Out of 190 vacant Wells Fargo foreclosure properties identified by the City as sources of municipal services damages, Wells Fargo contends that "more than 20" involved a City or state program, that "approximately 15" involved a City program, and that Maryland instituted the foreclosures on seven of the Wells Fargo loans (Defendants do not explain how Maryland foreclosed on

seven loans when only five were in its program). Defs.' Mem. at 2, 4, 27-28. Wells Fargo contends that "[n]othing more aptly illustrates" that Baltimore does not have standing. *Id.* at 2.

Even if these programs justified blaming Baltimore for foreclosures and vacancies at 20 Wells Fargo properties – which they do not – there would still be 170 vacant Wells Fargo foreclosure properties to which the assertions do not apply. Setting aside 20 of 190 properties could only be relevant to the amount of damages, not standing. Furthermore, Wells Fargo does not explain why Baltimore is responsible for something purportedly done by Maryland.

In addition to these facially apparent defects, the limited inquiry Baltimore has been able to make to date indicates that Wells Fargo's claims about the City program (called "SELP" and which only provides up to $5,000 in assistance that is forgiven over time) are wrong. The City does not assess the creditworthiness of the borrower under the SELP program; that is the responsibility of the private lender that is providing the first lien mortgage and, by far, the bulk of the funds. Wells Fargo's suggestion that the City signed off on the quality of the loan ("the City or its agent received a variety of documentation" about the Wells Fargo loan) is simply wrong. *Id.* at 2-3. In addition, Baltimore's initial assessment indicates that only eight of the vacant Wells Fargo foreclosures were purchased with SELP assistance, not fifteen as Defendants suggest.[24] This demonstrates why courts do not resolve factual questions without first allowing discovery and a process for weighing the evidence.

B. Wells Fargo's Untested Assertions About Facts Purportedly Found In Its Own Undisclosed Files Do Not Provide a Proper Basis to Challenge Standing

In patent disregard for elementary fairness, Wells Fargo tells the Court that it has reviewed its own records about each loan at the 190 vacancies identified by the City and concluded that "as to the vast majority," the foreclosure was not due to its lending practices.

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[24] Wells Fargo did not attach any records about these loans.

Defs.' Mem. at 9, 24-25. Wells Fargo asserts that the "root causes" of "the vast majority" of the foreclosures were instead intervening causes like "curtailment of income, job loss, illness, divorce, and structural problems," without even specifying which factor purportedly excuses which loan. *Id.* at 24. Therefore, according to Defendants, "the City's causal chain fails." *Id.* Yet the loan files, servicing records, and other documents that Wells Fargo relies on have not been disclosed. Early in the case Baltimore requested the opportunity for discovery of such documents, but the request was denied. *See* Letter from John P. Relman to Hon. Benson E. Legg (Mar. 3, 2009) (Docket No. 56); Tr. (Mar. 4, 2009) at 5. Thus, these documents have never been tested and remain exclusively in Wells Fargo's control.

All that Wells Fargo has produced about the documents is a conclusory affidavit from a consultant it hired for this case. Defs.' Mem. Ex. 18 (Aff. of D. Williams). The City has not even been permitted a deposition of this consultant.[25] Nonetheless, Wells Fargo asks the Court to unquestioningly accept its assertions that "data on these loans indicates that they were far from predatory" and that the foreclosures were caused by a litany of ills but "not Wells Fargo's conduct." Defs.' Mem. at 24 n.14, 25. These untested and unverified assertions have no place in the resolution of a motion to dismiss.

At the same time that it tenders its "trust me" explanation for its version of causation, Wells Fargo tries to hide the fact that a key component of its consultant's affidavit supports the City's case. The consultant concluded that the most frequent reason for the Wells Fargo foreclosures in Baltimore's African-American neighborhoods was what he termed "excessive obligation." *Id*. Ex. 18 (Docket No. 155-20 at 47, 60). At the evidentiary hearing conducted by

[25] Baltimore was not even given a copy of the affidavit until the middle of the evidentiary hearing conducted by Chief Judge Legg. To this day, Wells Fargo has not provided any of the files that its consultant considered and offered opinions about in his affidavit. The bare provision of the affidavit is not an adequate substitute for proper discovery and a fair opportunity to contest Wells Fargo's assertions about the contents of its hidden files.

Chief Judge Legg, the Court recognized that this did not help Wells Fargo's case and stated that a borrower's excessive obligations could be caused by discriminatory underwriting of the loan. Tr. (June 29, 2009) at 158. Wells Fargo's consultant agreed. *Id.*

At a later hearing, the Court stated that if Wells Fargo relied on the excessive obligations factor in support of a summary judgment motion, the motion would likely be denied because of how closely the factor can be related to the terms of the Wells Fargo loan. Tr. (Aug. 6, 2009) at 48-49, 50. Defendants now list in their motion to dismiss some of the other factors that their consultant cited as causing the foreclosures but no longer make any reference to "excessive obligation." Wells Fargo's conspicuous omission cannot hide the fact that testimony from its own expert requiring denial at the more exacting summary judgment stage also requires denial at the Rule 12 stage.

Wells Fargo also asserts that its secret documents reveal other reasons why the City's damages at certain properties cannot be the result of the loans. It claims the documents show that some borrowers were investors, some of the loans were made by somebody else, some of the loans were serviced by somebody else at the time of foreclosure, and some of the properties were in disrepair before the foreclosure notice. *See* Defs.' Mem. at 2, 9, 13, 24-26. None of these assertions, even if true, would justify excluding consideration of any properties identified by the City (and if it they did, it would again only go to the amount of damages, not standing, because Defendants do not assert that these factors apply to all the properties identified in the complaint). Regarding investors, the Fair Housing Act makes no distinction concerning whether or not a borrower rents a property to another person; if Wells Fargo targeted the borrower for predatory practices because of the racial composition of the property's neighborhood or the race of the borrower, it broke the law. Nor can Wells Fargo necessarily escape liability as to any particular

property if another company made the loan; large lenders like Wells Fargo often increase their business by having smaller companies in effect front for them. In fact, Wells Fargo recently agreed to pay millions of dollars to settle a lawsuit involving just such an arrangement through which it made 14,210 mortgage loans in Maryland. *See* Schlactus Decl. Exs. 2-3. Likewise, who was servicing the loan is irrelevant because this case is about discrimination in the origination of loans (and in any event, Wells Fargo has told the Court that it generally retains servicing rights on most loans; *see* Tr. (Jan. 28, 2009) at 28). Finally, what matters is whether a property deteriorated as a result of Wells Fargo's actions or otherwise required additional municipal services, not whether it was in pristine condition before the foreclosure.

C. Wells Fargo's Factual Assertions Relating to Specific Allegations in the Second Amended Complaint Are Irrelevant, Wrong, and Have No Bearing on Standing

1. Assertions About Demographic Data

Wells Fargo contends that not all of the vacant Wells Fargo foreclosures identified in the Second Amended Complaint are in African-American parts of the City. Defs.' Mem. at 24 ("approximately" 18 unidentified properties not in "census tracts that are primarily African-American"). Defendants provide no support for this assertion. In truth, and as discovery will establish, each of the 269 properties is located within a census block group that is primarily African-American.[26]

Wells Fargo similarly contends that two of the five neighborhoods where the sub-neighborhoods (which form the geographic limits of the City's narrowed property tax revenue claim) are located "do no not have majority-minority populations." Defs.' Mem. at 7 n.7, 21-22. This, too, is wrong. Discovery will show that each of the sub-neighborhoods is centered in a census block group that is at least 53% African-American (and in most cases, at least 82%

[26] Census block groups are smaller than census tracts. Several block groups comprise a tract.

African-American). Defendants' contrary assertion is based on misleading citations to demographic statistics for much larger geographical areas than the compact sub-neighborhoods at issue. Defs.' Mem. at 22 & Ex. 17. Baltimore has precisely targeted its tax revenue claim in accordance with the Court's instructions, but Defendants again fail to recognize the narrowed scope of the Second Amended Complaint.

2. Assertions about Maryland's Property Tax Assessment Process

In challenging the City's standing to assert damages for lost tax revenues, Wells Fargo ignores the way in which Baltimore has complied with the Court's instructions in significantly narrowing its claim for tax revenue damages, while at the same time repeating the same thoroughly misleading assertions it made about the process at the evidentiary hearing. All of these misleading assertions are based on a report from a real estate appraiser hired by Wells Fargo who Baltimore has had no chance to depose. Defs.' Mem. at 22-23 & Ex. 18.

Wells Fargo focuses exclusively and much too narrowly on a worksheet that a State tax assessor uses in assessing the value of a property. It states that the assessor writes down the sales price of nearby comparable homes, but that only arms-length sales are counted and that this excludes foreclosure sales. Wells Fargo asserts that the assessor then performs calculations based on these nearby sales to come up with the assessed value of the house under review. From this, Defendants contend that a foreclosure can never have any influence on the assessed value of nearby properties. *See id.*

Wells Fargo's conclusion makes no sense because it ignores the impact of foreclosures on market prices. Wells Fargo itself states that the prices of nearby houses are at the heart of the assessment process, but it does not consider the impact on the price of a house of having foreclosure properties next door, across the street, or up the block. This is akin to saying that the

quality of local schools cannot affect the market prices of houses – and therefore their assessed values – because nothing about local schools is recorded on the assessor's worksheet. Yet it is common sense, which courts are to apply under *Iqbal*, that real estate values are strongly influenced by schools. *See Iqbal*, 129 S. Ct. at 1950. Because it focuses so narrowly on certain mechanical steps in the assessment process, Wells Fargo entirely misses the common sense point that neighborhood characteristics like foreclosures and schools exert a substantial influence on neighborhood property values.

3. Assertions About the Level of Detail in the Second Amended Complaint

Wells Fargo objects that the City's damages for providing municipal services at vacant Wells Fargo foreclosure properties are "unspecified by month, day, amount, or nature . . . ." Defs.' Mem. at 5. This, it contends, raises doubts about traceability. In its original motion to dismiss, Wells Fargo argued that Baltimore lacked standing because the original complaint did not allege specific municipal services provided at specific properties. *See* Mem. of Law (Docket No. 10-2) (Mar. 21, 2008) at 13. That is exactly what the City has now done in the Second Amended Complaint, and so Wells Fargo now states without citing any authority that an even finer level of detail is necessary.[27] Similarly, Wells Fargo appears to take the position that the City's detailed allegations describing its narrowed tax revenue damages are inherently speculative in the absence of the type of detail found in an expert report produced pursuant to Rule 26. *See, e.g.*, *id.* at 7-8.

These objections ignore the extraordinary level of detail in the Second Amended

[27] Ironically, Wells Fargo continues to object later in its brief when it acknowledges that the City provided information about the amount of damages at a few illustrative properties. *See* Defs.' Mem. at 26 n.16. The City provided these examples at the evidentiary hearing to help explain the particular types of municipal services damages at issue. There is no inconsistency between identifying certain illustrative damages at a few sample properties and the level of detail about damages in the Second Amended Complaint.

Complaint about Baltimore's damages. As discussed in section I.A above, Baltimore includes 190 property-by-property paragraphs setting forth each municipal service at each vacant Wells Fargo foreclosure property for which it seeks damages, and the location and basis for identifying each of the sub-neighborhoods that give rise to tax revenue damages. The City devoted hundreds of hours to providing this level of detail. It took great care to include only those injuries that occurred during the timeframe appropriate to each property based on when the loan was made, when the foreclosure occurred, when each property was vacant, and other relevant factors. It belies common sense for Wells Fargo to say that these damages are vague or speculative based on inadequate detail at this stage of the case.

4. Assertions About the Purported Impossibility of Some of the City's Damages

Pulling one example from the 190 property-specific paragraphs, Wells Fargo objects that municipal services provided in 2008 cannot be attributed to a Wells Fargo loan made in 2002 if the property was sold in the intervening period. *See* Defs.' Mem. at 18. To the contrary, where a Wells Fargo loan causes a property to become vacant and it remains vacant before and after being sold, Wells Fargo is responsible for the post-sale harm. And as already noted, the City does not seek damages for many services it provided at Wells Fargo foreclosure properties because the services were not adequately tied to a vacancy caused by Wells Fargo.

Wells Fargo also asserts that for one of the 190 properties, the damages precede the origination of the loan. *See* Defs.' Mem. at 25. The City disagrees. This difference could be explained by the fact that the limited discovery ordered by Chief Judge Legg revealed that Wells Fargo's origination dates do not always match the origination dates on public documents. Such discrepancies further demonstrate why courts may not make factual determinations prematurely.

D. Wells Fargo Misconstrues the Law Regarding Standing

1. Wells Fargo's Assertion That the Speculative Possibility of Third Party Involvement In the Foreclosure Process Defeats Traceability Is Wrong As a Matter Of Law

Wells Fargo argues that the chain of causation is too attenuated to support standing because "illness, divorce, job loss, incarceration, death," or "some other factor" might be responsible for an individual foreclosure and not Wells Fargo's predatory loan. Defs.' Mem. at 11; *see id.* at 24. But Wells Fargo cannot defeat standing by simply speculating about factors apart from its own acts that might have played some role in contributing to some portion of Baltimore's injuries. As the Supreme Court has held, a plaintiff does not have to "negate . . . speculative and hypothetical possibilities" to satisfy Article III. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978) (rejecting speculative challenge to causal link as "not responsive"). Wells Fargo's speculation says nothing about what actually caused the City's injuries, as to which the well-supported and plausible allegations of the Second Amended Complaint must be taken as true.

Wells Fargo's litany of hypotheticals also fails because it is an attempt to go outside the complaint by seeking judicial notice of Defendants' imagined view of the role of third parties in causing Baltimore's injuries. This is prohibited by Fed. R. Evid. 201(b), which only permits judicial notice of facts that are "not subject to reasonable dispute." How third parties make or affect foreclosure-related decisions does not meet this high standard. *See supra* at 12-13.

Wells Fargo's speculation about the possible role of third parties likewise reflects a mistaken view of the law of standing. As shown in section I.D above, Baltimore does not have to show that factors or persons other than Wells Fargo have no role in connecting the unlawful acts at issue to the City's injuries. Rather, Baltimore fully supports standing by plausibly

alleging, as it does in the Second Amended Complaint, that Wells Fargo's acts likely lead to its injuries. Moreover, should Wells Fargo be able to show after discovery that the cause of a particular foreclosure at a particular property was an illness or death, for example, and not a predatory loan, it would mitigate damages as to that property but it would not defeat the City's standing in this case.

Wells Fargo nonetheless relies on *City of Birmingham v. Citigroup, Inc.*, No. CV-09-BE-467-S (N.D. Ala. Aug. 19, 2009), and *City of Cleveland v. Ameriquest Mortgage Secs., Inc.*, 621 F. Supp. 2d 513 (N.D. Ohio 2009), both district court cases (one unpublished) from outside this Circuit, to argue that traceability is defeated when third parties play a role in the causal chain. The cases do not stand for that proposition. Rather, they reflect the unremarkable proposition that complaints wholly lacking in specific allegations of wrongdoing and injury, and relying instead on generalizations and conclusory statements, do not satisfy *Twombly* and *Iqbal*'s plausibility requirement. *City of Birmingham* and *City of Cleveland* are not remotely analogous to this case, which is instead controlled by the Supreme Court's directly on point decision recognizing municipal standing in *Gladstone*.

a. *City of Birmingham*

City of Birmingham has no relevance here because the record in that case was utterly void of any allegations or evidence linking the seven defendants to any unlawful practices or to any specifically-identified harm. A review of Birmingham's complaint[28] demonstrates that it merely made general allegations (copied from the first part of Baltimore's original complaint) about subprime lending, predatory practices sometimes associated with subprime lending, reverse redlining, and the harm that can result. Remarkably, Birmingham simply stopped there. Unlike

[28] It is attached to Wells Fargo's prior motion to dismiss. *See* Ex. 3 to Mem. of Law (Docket No. 126-5) (Sept. 18, 2009).

Baltimore in the Second Amended Complaint, Birmingham provided no reason to think that any particular defendant had done anything wrong, and it failed to identify any particular damages it had allegedly suffered due to loans at particular properties. Wells Fargo's statement that the allegations in *City of Birmingham* were "fundamentally identical to those in the instant case" could not be further from the truth. Defs.' Mem. at 15.

It is clear from a review of the *City of Birmingham* complaint, Judge Bowdre's opinion, and the entire docket (available on PACER) that Birmingham did not offer any allegations or evidence regarding testimony about discriminatory practices from former employees, brokers, or anyone else; whether the practices resulted in foreclosure rates that differed in African-American and white neighborhoods; the incidence of loans with high interest rates and how they differed by neighborhood; any other statistical analysis of loans or foreclosures in neighborhoods that differed by racial concentration; the properties that were foreclosed on or became vacant because of discriminatory practices; or the injuries associated with each such property. Nor did Birmingham attempt to explain what distinguished the seven defendants it sued from other lenders or how their relative responsibilities should or even could be apportioned. Anyone reading the record in *City of Birmingham* is left with no understanding at all about why Birmingham thought the particular companies it sued had anything to do with the unlawful practices and the attendant harm that the complaint described in exclusively general terms; all that is apparent is that Birmingham named them as defendants. Some of the defendants evidently had not even done any business in Birmingham.

By contrast, Baltimore's Second Amended Complaint contains detailed evidence that Wells Fargo has injured the City by engaging in discriminatory lending. Baltimore presents a detailed and plausible causal connection between Wells Fargo's unlawful acts and its injuries,

while Birmingham only set forth the kind of "conclusory statements [that] do not suffice" under *Twombly* and *Iqbal*. *Iqbal*, 129 S. Ct. at 1949.

Wells Fargo also relies on *City of Birmingham* to raise an unpublished case cited therein, *Tingley v. Beazer Homes Corp.*, No. 3:07-cv-176, 2008 WL 1902108 (W.D.N.C. Apr. 25, 2008). But in *Tingley*, the record was as empty and void of any details as the record in *City of Birmingham*. Likewise, the complaint in *Tingley* set forth only the barest and most generalized allegations purportedly connecting the actions of the defendant home builders to any foreclosure or any injury. *See* Schlactus Decl. Ex. 4 at ¶¶ 6-7, 31-32 (Class Action Compl. in *Tingley*). Thus, while it is understandable that Judge Bowdre in *City of Birmingham* looked to *Tingley* given the similarly barren records and conclusory allegations in both cases, neither is remotely analogous to the detailed and focused claims presented by Baltimore here.

b. City of Cleveland

City of Cleveland is inapposite for many reasons, including reasons specifically identified by Judge Lioi in her opinion. One of the most significant is that (like *City of Birmingham* and *Tingley*) it involved a generalized complaint wholly lacking in specificity as to liability or damages. Cleveland sought "hundreds of millions of dollars" from twenty-two companies for the deterioration of "entire streets, blocks, and neighborhoods," none of which were identified. Schlactus Decl. Ex. 5 at ¶¶ 2, 5 (Second Am. Compl. in *City of Cleveland*). It "challeng[ed] securitization activity generally, not the legality of any specific [mortgage-backed securities] or of the loan given to any specific borrower." *City of Cleveland*, 621 F. Supp. 2d at 531 n.15.

Because it was a state common law public nuisance case, *City of Cleveland* also relied on prudential limitations that do not apply here. Judge Lioi repeatedly made plain that her analysis of causation was premised on the "directness requirement" of *Holmes v. SIPC*, 503 U.S. 258

(1992), which is a prudential requirement. 621 F. Supp. 2d at 531-36. As Judge Easterbrook has explained, the *Holmes* directness requirement does not apply under the Fair Housing Act. *New West, L.P. v. City of Joliet*, 491 F.3d 717, 721 (7th Cir. 2007). The inapplicability of the *City of Cleveland*/*Holmes* "directness requirement" under the FHA is further demonstrated by the fact that its application would preclude a municipality from maintaining a Fair Housing Act challenge to racial steering by real estate agents. Yet one of the precise holdings of *Gladstone* is that municipalities may pursue exactly such a case. 441 U.S. at 109-10.

City of Cleveland is also inapposite because the defendants were sued for nothing more than providing secondary market funding for subprime loans. 621 F. Supp. 2d at 516. Judge Lioi held that it was "materially" important that the secondary market players (unlike Wells Fargo here) did not "originate the underlying subprime loans or initiate foreclosures." *Id.* at 536. Discussing the alleged causal connection between companies that securitized loans and Cleveland's injury, she stated: "Then someone – very importantly, not Defendants – foreclosed on the property." *Id.* at 534 (emphasis added). Baltimore, to the contrary, has sued Wells Fargo for its actions in making loans and causing foreclosures.

Cleveland's basic legal proposition that facilitating subprime lending was *per se* unlawful likewise renders the case inapt. *See* 621 F. Supp. 2d at 516 ("Plaintiff claims that subprime lending was categorically inappropriate for Cleveland due to its 'unique' economic situation"). Baltimore makes no such sweeping generalizations. Baltimore's allegations are narrowly focused only on those subprime lending policies and practices that target African-American neighborhoods for abusive lending practices and for loans that are less advantageous than loans given to similarly situated people in white neighborhoods.

Indeed, in a case decided against Wells Fargo last year, the court concluded that when a

municipality's damages are based on unlawful acts related to particular properties, its damages are real and undeniable when those properties become vacant. *See CHRP v. Wells Fargo Bank, N.A.*, No. 08-CVH-3139 (Cleveland Mun. Ct. June 18, 2009), App. Cases Not Generally Reported. Based on an evidentiary record, *CHRP* found that:

> Unoccupied, boarded properties pose a hazard to neighborhood residents, in that they are an attractive nuisance for juveniles and others. They pose an arson risk greater than that of the average occupied building. Unoccupied structures attract criminal activity . . . . These vacant structures, often a favorite target of arsonists, pose a heightened hazard to firefighters, as the interior of a vacant home often has been vandalized, and the structural integrity compromised. . . . Vacant, boarded properties contribute to the decline of both property values and neighborhood appearance and pride. . . .
>
> The public has a pecuniary interest in the maintenance of properties also; vacant, vandalized properties lead to the decline of neighborhoods and a reduction in property values. In addition, municipalities are forced to provide services (e.g., grass cutting, yard cleaning, demolition) to neglected properties and the taxpayers must bear this financial burden.

Id. ¶¶ 32, 43.

The remaining reasons why the motion to dismiss in *City of Cleveland* was granted are likewise inapplicable here. Jude Lioi also dismissed the case on the basis of preemption under Ohio law, *see* 621 F. Supp. 2d at 517-20; state tort law regarding damages, *id.* at 521-26; and state tort law regarding the substantive requirements of a public nuisance claim, *id.* at 526-31. None of these state law issues are relevant to Baltimore's case under federal law.

For all of these reasons, *City of Cleveland* provides no support for the motion to dismiss.

2. Wells Fargo's Additional Arguments About the Injury-In-Fact Requirement Have No Merit

In arguing against injury-in-fact, Wells Fargo offers unsupported speculation that its discriminatory lending actually benefitted the City by generating increased municipal revenues. *See* Defs.' Mem. at 23 n.13, 28. This is an attempt to turn Rule 12 on its head by asking the

Court to draw the least favorable conclusion possible from the allegations. Moreover, Wells Fargo would have the Court do so based on assertions about how real estate markets purportedly function that are properly the subject of expert analysis (if they are even relevant). It is much more reasonable and plausible to conclude that Defendants' discriminatory lending causes people in African-American neighborhoods to lose their homes to foreclosure in disproportionately high numbers and that this harms, not helps, the City by causing it to incur increased costs for municipal services at particular properties and to lose tax revenues from particular areas where the foreclosures are disproportionately concentrated. *See Duke Power Co.*, 438 U.S. at 78 (plaintiff does not have to "negate . . . speculative and hypothetical possibilities" to satisfy Article III).

Finally, Wells Fargo falsely contends that Baltimore bases its standing on 79 of the 269 vacant Wells Fargo foreclosure properties as to which the City has not yet identified damages, but may during discovery. *See* Defs.' Mem. at 5 n.5, 28-29. To the contrary, the City's standing to seek municipal services damages is based on its 190 paragraph property-by-property detailed description of damages it has already incurred and that it has already identified. SAC ¶¶ 105-294. The City notes the additional 79 vacancies in the Second Amended Complaint to present a fuller picture of the consequences of Wells Fargo's illegal lending practices and to give notice of likely sources of additional harm that will be shown as the case develops. It is hardly unusual for additional damages to occur and be identified while a lawsuit is pending, and Baltimore has merely given detailed notice of this likelihood.

CONCLUSION

For all of the reasons stated above, Baltimore respectfully submits that Defendants' Motion to Dismiss the Second Amended Complaint should be denied in its entirety.

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Respectfully submitted,

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