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 THIRD AMENDED COMPLAINT

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INTRODUCTION

In its September 14, 2010 ruling on Defendants Wells Fargo Bank, N.A. and Wells Fargo Financial Leasing, Inc.'s (collectively "Wells Fargo") Motion to Dismiss the Second Amended Complaint, the Court held that Plaintiff Mayor and City Council of Baltimore ("Baltimore" or "City") had cured the problem that led to dismissal of the First Amended Complaint, could go forward on its first claim (steering), and could add allegations that would allow it to go forward on its second type of claim (unqualified borrowers). *See* Memo to Counsel (Sept. 14, 2010) (Docket No. 174) ("Memo to Counsel"). Wells Fargo now relies on a plainly incorrect reading of the Memo to Counsel to argue yet again for dismissal of the entire case. Instead of acknowledging what the Court actually ruled, Wells Fargo wrongly asserts that the Court required Baltimore to add allegations explaining why *any* of Wells Fargo's loans with respect to either claim has a causal connection to vacancies and injuries at the specific Wells Fargo properties identified in the complaint, and to do so with new allegations about specific individual borrowers. According to Wells Fargo, the Court found that the whole complaint must be dismissed if Baltimore did not add these borrower-specific allegations.

In Wells Fargo's view, the causation issues must be relitigated in their entirety because the Court purportedly did not decide any issues in the Memo to Counsel that advance the case beyond where it was last August. To the contrary, the Court actually made five important decisions about causation. With these five decisions, the Court substantially narrowed the issues left for resolution under Rule 12.

The Court's first decision in the Memo to Counsel was that the City had satisfactorily addressed the problem that required dismissal of the First Amended Complaint. The Court explained that Baltimore had "focus[ed] upon 'property specific,' rather than generalized,

damages in the second amended complaint," and thereby "cured the fundamental flaw I found to exist in the first amended complaint." Memo to Counsel at 1. "[T]he external conditions affecting the value of real estate in Baltimore City may ultimately have some relevance to the City's damages claims," the Court explained, but not to whether the complaint should be dismissed. *Id.* In other words, while social and economic conditions ("external conditions") might be relevant to determining damages at a subsequent stage of the case, the Court held that they do not defeat standing under Rule 12(b)(1).

Second, the Court examined Baltimore's causal chain and found that causation requires allegations showing that the unlawful Wells Fargo loans caused vacancies that otherwise would not have occurred: "the City's property specific damages . . . are premised upon the fact that the properties foreclosed upon by Wells Fargo would not have been vacant during the period for which the City claims damages but for the improper loans made by Wells Fargo." *Id.*

The Court reached its third decision by analyzing whether this necessary link is present with respect to the first of the two types of improper lending alleged by Baltimore, *i.e.*, steering. As to these improper loans, the Court held that the City's allegations do satisfy the causation requirement: "This factual premise is adequately alleged to the extent that the City asserts that Wells Fargo steered borrowers who were eligible to obtain prime loans into a more expensive subprime loan they could not afford. Presumably, in such instances (subject to any factual defense asserted by Wells Fargo) the borrowers would have continued to make payments on their mortgages and would have remained in possession of the subject premises." *Id.* Thus, the Court held that the City has met the standing requirements and may go forward on its steering claim.

Fourth, the Court found that this essential element of the causation chain was not yet sufficiently alleged as to the other type of improper lending activity – "making subprime loans to

borrowers whose credit rating would not have permitted them to obtain a loan at all . . . ." *Id.* With respect to this circumscribed aspect of the Third Amended Complaint, the Court found the allegations insufficient to show that the properties at which Wells Fargo made such loans were occupied before the loan and would have remained occupied absent the loan. *See id.* at 1-2. The Court granted Baltimore leave to amend the complaint if it could allege facts demonstrating a link between lending to unqualified borrowers and vacancies that would not otherwise occur. *See id.* at 2. The Court made clear that if the City could do so, then any objection by Wells Fargo to the truth of the allegations would not defeat standing, but would instead "provid[e] Wells Fargo with a defense it could raise by way of a motion for summary judgment after discovery has been conducted." *Id.*

Fifth, the Court made clear that if Baltimore could not amend its complaint to add adequate allegations in support of its claim that it was injured by Wells Fargo's practice of making loans to unqualified borrowers, then it could still proceed on its steering claim. In that instance, "the City should limit the claims asserted in the anticipated third amended complaint to those instances where Wells Fargo steered into subprime loans borrowers who could have afforded prime loans." *Id.* Wells Fargo mistakenly overlooks this important decision because it fails to recognize that the Court looked at Baltimore's two claims of wrongdoing independently and reached separate conclusions about each.

Baltimore added fourteen new paragraphs in its Third Amended Complaint in response to the Memo to Counsel. *See* Third Am. Compl. (Oct. 21, 2010) (Docket No. 176) ("TAC") ¶¶ 96-109. These paragraphs fill in the gap identified by the Court by plausibly connecting Wells Fargo loans to unqualified borrowers with vacancies in the City's African-American neighborhoods at properties that would have been occupied during the damages period but for

the loans. The new allegations both explain the logic of this connection and aver that the City's investigation of Wells Fargo loans at issue here has confirmed the connection.

As set forth in the City's new allegations, refinance and home equity loans logically and plausibly establish the "but for" link between loans to unqualified borrowers and vacancies. *See* TAC ¶¶ 98, 104-06. These kinds of loans are given to borrowers who already own and occupy (or rent out) their homes. *See id.* ¶ 98. Some of these borrowers even own their homes outright without any mortgage or other encumbrance. *See id.* A new refinance or home equity loan frequently causes the debt secured by the house, and the corresponding monthly payments, to increase. *See id.* ¶¶ 98-102, 104-06. These loans must be underwritten properly to ensure that the borrower is qualified for and can afford the new, larger loan. *See id.* ¶¶ 98, 104-06. This is especially true when existing homeowners are refinanced from fixed rate into adjustable rate mortgages because of the potential for the monthly payments to rise when interest rates go up. *See id.* ¶¶ 98, 103. When lenders make new refinance and home equity loans to unqualified borrowers,

> the plausible and likely result of such practices is to cause homeowners who are otherwise occupying properties without a mortgage, or comfortably making payments on a modest existing mortgage, to be unable to make payment on a new, unaffordable loan. This, in turn, causes foreclosures and vacancies.

Id. ¶ 98. Without the new, larger, and unaffordable refinance or home equity loans for which they do not qualify, the borrowers would remain in circumstances where their resources are sufficient to cover their housing debt, if any. *See id.* ¶¶ 96, 98, 104.

These unaffordable refinance and home equity loans to unqualified borrowers come about in several ways. One way is through debt consolidation. *See id.* ¶ 100. Homeowners are solicited to consolidate unsecured debts like credit card balances with an existing mortgage to create a new, larger loan that places the house at greater risk. *See id.* Another is with "cash out"

mortgages whereby homeowners receive cash in exchange for saddling their homes with greater debt. *See id.* ¶ 99. Higher interest rates, points, and origination fees on the new refinance and home equity loans likewise cause the total debt secured by the house to grow. *See id.* ¶¶ 101-02. Engaging in these lending practices without regard to whether borrowers qualify for the new, larger loans logically and plausibly causes vacancies at homes that would otherwise remain occupied and affordable. *See id.* ¶ 104. As Baltimore has previously explained, lenders are able to avoid the risk of engaging in these practices by selling the loans on the secondary market. *See id.* ¶¶ 3, 26.

Baltimore further alleges, based on its investigation of Wells Fargo's loans in the City's African-American neighborhoods in response to the Memo to Counsel, that Wells Fargo has caused vacancies by engaging in predatory practices that involved making loans to unqualified borrowers. *See id.* ¶¶ 107-09. The investigation has shown, through both new analysis of the limited loan-level information available and new contacts with borrowers who could be located,[1] in addition to the statistics and direct evidence previously incorporated in the complaint, "that Wells Fargo has engaged in at least some of the[se] practices at properties located in Baltimore's African-American neighborhoods which are the subject of this lawsuit," causing properties to become vacant. *Id.* For example, "Wells Fargo encouraged borrowers to refinance and take more cash out of their homes than they wanted, needed, or could afford, even if the house was owned debt-free before the Wells Fargo loan. These constitute loans that Wells Fargo knew or should have known the borrower could not afford and that should not have been made." *Id.* ¶

[1] As counsel for Baltimore stated at the September 8 hearing, the City's ability to contact borrowers is limited at this stage of the case because they have generally been forced to move due to the foreclosures. Tr. (Sept. 8, 2010) at 27. Wells Fargo is in a much better position to locate borrowers because of its loan files and servicing records, which have not been disclosed.

108. The resulting vacancies were caused by the improper loans to unqualified borrowers. *See id.*

Throughout its consideration of Wells Fargo's several motions to dismiss, the Court has held Baltimore's causation allegations to a plausibility standard. *See* Op. (Jan. 6, 2010) (Docket No. 141) at 3-4. This is the proper standard and is consistent with *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("[t]he plausibility standard is not akin to a 'probability requirement'"), and *Bell Atlantic Corporation. v. Twombly*, 550 U.S. 544 (2007). The City's new allegations in support of causation satisfy the plausibility standard. They are part of the logical, three-step causation chain described by Baltimore previously: (1) the discriminatory targeting of both types of improper lending practices – steering borrowers to overpriced loans and lending to unqualified borrowers – plausibly causes increased notices of foreclosure and increased completed foreclosures; (2) foreclosures on both types of improper loans plausibly cause properties to become vacant that would otherwise be occupied; and (3) the City is plausibly injured by foreclosures and vacancies at the 190 Wells Fargo properties identified in the complaint by having to provide additional municipal services at those properties and by losing property tax revenues from the compact areas where the Wells Fargo foreclosures are concentrated because the foreclosures reduce the values of other houses in close proximity. The new allegations further demonstrate the plausibility of the causal chain with respect to the second claim addressed in the Memo to Counsel.

Contrary to Wells Fargo's contention, allegations about individual borrowers are not necessary to meet *Iqbal*'s plausibility requirement with respect to the second claim. As with the first claim, Baltimore does not have to present at the pleading stage all the evidence it may ultimately introduce in support of its claims at summary judgment or trial. Rather, at the

pleading stage, "general allegations" are sufficient as long as they plausibly support the City's claims; the "specific facts" need only be alleged after discovery. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). This basic sequencing of a plaintiff's burden has particular force here because the wealth of borrower-level information in Wells Fargo's files has never been disclosed to the City. To require Baltimore to make specific allegations about specific borrowers would be to subject it to a summary judgment standard without an opportunity for discovery, which *Lujan* prohibits. At this stage, the proper question is whether the City's allegations show that the causation element of standing is plausible, not whether the allegations are enough to actually prove standing. As summarized above and shown in greater detail below, and as the Court has already held with respect to the steering claim, Baltimore's allegations satisfy this standard.

Furthermore, Wells Fargo's assertion that the Court issued a "direction" that Baltimore "provide detail relating to individual borrowers" in the Third Amended Complaint is simply incorrect. Mem. Law Supp. Defs.' Mot. Dismiss Third Am. Compl. (Dec. 3, 2010) (Docket No. 181-1) ("Opp.") at 2. Tellingly, Wells Fargo does not cite to anything in the Memo to Counsel in support of this assertion. It cites only to the transcript of the September 8, 2010 hearing on the last motion to dismiss, which it misrepresents. What actually happened at the hearing was that the Court questioned the City about whether it must make allegations about individual borrowers. Baltimore explained that such detail is not necessary to establish a plausible causal chain and therefore not necessary at the pleading stage, but is instead a ground of dispute that Wells Fargo may legitimately raise at summary judgment after discovery. The Court stated that, "[w]e may or may not be apart, but I think that's where the issue is." Tr. (Sept. 8, 2010) ("Tr.") at 39. At the very end of the hearing, in its final statement, counsel for the City reiterated its

position that it is not appropriate to require borrower-specific allegations at this stage, but specifically requested leave to amend should the court reach the opposite conclusion. *See id.* at 66. In adjudicating the motion to dismiss and providing direction to counsel six days later, the Memo to Counsel is silent as to any such requirement about identifying borrowers. That silence cannot be equated with a "direction" that Baltimore add allegations about individual borrowers. To the contrary, consistent with Rule 8 and *Lujan*, the Court has not required such detailed pleading. As explained in greater detail below, the absence of any requirement of borrower-specific allegations in the Court's ruling was both correct and consistent with *Iqbal* and *Twombly*.

Wells Fargo's remaining arguments are all ones it has made repeatedly in its prior motions to dismiss. While Wells Fargo would have the Court believe that Baltimore is seeking a "fourth bite at this apple," Opp. at 5, it is actually Wells Fargo that persists in making the same arguments for a fourth time while the City has carefully tailored its amendments to respond to the Court's ruling. Wells Fargo contends again that (1) socioeconomic conditions are the cause of all the injuries alleged by the City[2]; (2) personal circumstances noted in Wells Fargo's undisclosed loan files, not improper loans, are the cause of all the foreclosures and vacancies at the properties at issue; (3) dismissals of purportedly similar cases in other jurisdictions counsel dismissal here; and (4) Baltimore has purportedly not alleged an injury-in-fact. Baltimore has shown before that each argument lacks merit and does so again in brief below.

Notwithstanding Wells Fargo's attempts to direct the Court's attention away from what it actually said and held in the Memo to Counsel, (1) the Court has already held that at a minimum

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[2] Here Wells Fargo makes repeated references to a statement by the Mayor concerning the creation of a "Vacants to Value" program for the disposition of vacant properties in the City. *See* Opp. at 4, 13 & Ex. 1. That statement, however, does not address or concern the reasons for specific vacancies at the specific Wells Fargo properties at issue in this case.

Baltimore may go forward as to its claim that Wells Fargo violated the Fair Housing Act by steering borrowers in African-American neighborhoods into more expensive loans than loans for which they were qualified; and (2) Baltimore has now added allegations that address sufficiently the one remaining issue the Court raised in its ruling with respect to the second claim concerning lending to unqualified borrowers. The motion to dismiss therefore should be denied in its entirety.

STANDARD OF REVIEW

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).

There are likewise strict limitations concerning the resolution of disputed facts pursuant to a factual challenge under Rule 12(b)(1). 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 because they 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*, 697 F.2d at 1219; *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.

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[3] *See also S. 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 *Pub. 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,

ARGUMENT

I. BALTIMORE HAS CURED THE LIMITED REMAINING DEFICIENCY THAT THE COURT IDENTIFIED REGARDING ONE OF ITS TWO CLAIMS AND HAS NOW ESTABLISHED A SUFFICIENT FACTUAL PREMISE TO PURSUE BOTH CLAIMS

A. Wells Fargo's Description of What the Court Held Is Incorrect

According to Wells Fargo, "this Court's prior analysis [was] that the City's theories of liability fail to set forth plausible causal chains . . . ." Opp. at 11. Wells Fargo further contends that "the City was directed to make specific allegations" about specific borrowers in the Third Amended Complaint to overcome this defect, which the Court purportedly found applicable to the whole of the prior complaint. These assertions are demonstrably false. Wells Fargo fails to appreciate that, in analyzing whether the City plausibly alleged that it was injured by Wells Fargo's allegedly discriminatory lending practices, the Court looked at Baltimore's two claims of wrongdoing independently. It found one claim sufficient to establish standing, one lacking in a narrow respect that could be corrected by amendment, and did not set forth any requirement that the amendment include allegations about individual borrowers.

Close consideration of the Memo to Counsel, which Wells Fargo avoids, shows that the Court made a number of important decisions about the City's standing. The Court first analyzed the Second Amended Complaint in light of the reasons it had set forth for dismissing the First Amended Complaint. The Court found that the City had satisfied its prior concerns about causation:

> Although the external conditions affecting the value of real estate in Baltimore City may ultimately have some relevance to the City's damage claims, the City has cured the fundamental flaw I found to exist in the first amended complaint by

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665 (E.D.N.C. 2003) ("transform[ing] standing analysis into a determination of ultimate liability [] has been specifically rejected by the Fourth Circuit").

> focusing upon "property specific," rather than generalized, damages in the second amended complaint.

Memo to Counsel at 1. "[E]xternal conditions" is a reference to the myriad socioeconomic conditions that Wells Fargo has repeatedly stressed throughout this case, including with a stack of untested newspaper articles and other exhibits that have no place at this stage of the case. Wells Fargo argued that socioeconomic conditions defeated standing because they were the sole cause of the generalized injuries for which, according to Wells Fargo, Baltimore was seeking redress in the Second Amended Complaint. The Court held that the City had moved past that obstacle to standing by making clear through amendment of its complaint that it is only pursuing property specific damages, not generalized damages.

In the second part of the Memo to Counsel, the Court considered precisely how the City's property specific damages are causally connected to the challenged lending practices. The Court explained that the City's new allegations of property specific damages "are premised upon the fact that the properties foreclosed upon by Wells Fargo would not have been vacant during the period for which the City claims damages but for the improper loans made by Wells Fargo." *Id.* The Court further explained that the City alleges that Wells Fargo loans could be improper in two ways – either because Wells Fargo steered a borrower with prime credit into a more expensive subprime mortgage, or because it gave a mortgage to someone who did not have good enough credit to qualify for any loan. *See id.* This distinction, which is central to the Memo to Counsel, is wholly unaddressed in Wells Fargo's motion to dismiss.

As to the causal connection between the first claim – steering – and injury to Baltimore, the Court held that the "factual premise is adequately alleged" because "[p]resumably, in such instances . . . the borrowers would have continued to make payments on their mortgages and would have remained in possession of the subject premises." *Id.* Thus, but for the improper

loan, the property would not have been vacant during the damages period. The Court found that this type of claim, by itself, provides an adequate basis for the City to move past Rule 12. There is no reference in the Memo to Counsel of any remaining obstacles that the City must overcome to satisfy the standing requirements or state a claim as to discriminatory steering, or to any allegations that must be added about individual borrowers (or about anything else). As to steering, the Court found the complaint plausible and sufficient. Wells Fargo's assertion that as to all loans, "the City has not offered any plausible reason to conclude either that the properties would have been occupied absent the Wells Fargo loan or that the City has suffered any 'distinct and palpable' injury due to these vacancies," Opp. at 13, is belied by the Court's finding that the steering claim is "adequately alleged."

The Court then addressed the City's allegations about the second type of predatory conduct – making loans to unqualified buyers who should not have received any loan at all. The Court found that the complaint did not allege a sufficient causal connection between this particular predatory lending practice and vacancies. Memo to Counsel at 1-2. If the loans had not been made, the Court explained, the properties securing the loans "would have been vacant in any event" unless two conditions were met: (1) that the property was occupied before Wells Fargo made the improper loan, and (2) that it would have remained occupied during the damages period. *See id.* at 1-2. The Court stated that, if the City could, it should add allegations showing that these conditions were met in connection with this second type of improper loan. *See id.* at 2. If the City could make these allegations, the Court explained that it could go forward with respect to both types of claims, not just the steering claim, because "[t]he question would then become a factual one, providing Wells Fargo with a defense it could raise by way of a motion for summary judgment after discovery has been conducted." *Id.* The Court therefore gave the City

the option of amending the complaint if it could plausibly support the causal connection between loans to unqualified borrowers and vacancies at properties that would otherwise be occupied. The Court did not say that allegations about specific borrowers were necessary to do so.

Finally, the Court's Memo to Counsel made clear that, at a minimum, the City may go forward on its claim of discriminatory steering. The Court specifically offered Baltimore the choice of "limit[ing] the claims asserted in the anticipated third amended complaint to those instances where Wells Fargo steered into subprime loans borrowers who could have afforded prime loans," *i.e.*, the first type of improper loan. *Id.* at 2.

Wells Fargo nonetheless ignores the distinction emphasized by the Court between the two types of improper lending practices and its decision that the complaint is adequate as to steering. This allows it to repeat its sweeping arguments that the Court should dismiss the Third Amended Complaint in its entirety.[4] Throughout its motion, it repeats the same generalized arguments it has made before which have no bearing on the key distinction highlighted by the Court between the two types of improper loans. These arguments are misplaced because the only question that the Court left to resolve is whether the City has, in its Third Amended Complaint, adequately alleged support for its second type of claim.

B. Baltimore Has Amended Its Complaint In Accordance With What the Court Actually Required

Baltimore has now amended its complaint by adding fourteen new paragraphs that specifically address the causation issue identified by the Court concerning loans made by Wells Fargo when no loan should have been made at all. *See* TAC ¶¶ 96-109. The City's new allegations plausibly establish a causal connection between this type of improper loan and vacancies that injure the City. The first set of new allegations explains how, as a practical and

[4] These arguments are addressed in Section III, below. Baltimore has also addressed them in prior submissions, which the City, like Wells Fargo, incorporates by reference. *See* Opp. at 4 n.2.

realistic matter, making loans to people who are not qualified can cause foreclosures and vacancies at properties that would otherwise remain occupied. The second set of new allegations affirms that Baltimore's investigation of Wells Fargo's loans in the City's African-American neighborhoods has shown that Wells Fargo did make such loans which did, in fact, cause foreclosures and vacancies.

Wells Fargo nonetheless fails to consider the content, logic, and plausibility of the City's new allegations. Instead, when Wells Fargo even acknowledges the new allegations, it misstates them. It asserts that Baltimore's new allegations merely describe "industry-wide wrongful practices" and contain "speculati[on]" and "guesses" that Wells Fargo has engaged in those practices. Opp. at 5, 6, 8; *see also id.* at 2. To the contrary, the allegations directly fill in the gap identified by the Court, and Wells Fargo does not even attempt to refute them.

As explained in the new allegations in the Third Amended Complaint, refinance and home equity loans frequently cause vacancies when given to borrowers who should not get a loan. *See id.* ¶¶ 98-106. With both refinance and home equity loans, the first condition identified by the Court is satisfied because the property is occupied by the borrower (or the borrower's tenant) before the loan is made. In some cases there is not even a mortgage on the property before the new loan is made; in other cases, there is a mortgage that the owner can afford. *See id.* ¶ 98. These new loans commonly cause the debt secured by the house to increase (in fact, this is inherent with mortgages given to people who previously owned their house without any encumbrance and with home equity loans). *See id.* When the new, larger loan is made without proper underwriting to ensure that the borrower is qualified for and will be able to make payments on the larger loan, "the result is plausibly and likely to be that the borrower will be unable to make payments on the mortgage." *Id*. This is especially true when a homeowner

with an affordable fixed rate mortgage is refinanced into an adjustable rate mortgage without regard to whether the new loan will be sustainable should interest rates rise. *See id.* ¶¶ 98, 103. It is likewise true when the new lender, aware of the borrower's present debt obligations and present financial resources, knows that the resources are insufficient to handle the increased monthly payments on the larger loan. *See id.* For example, it is highly plausible that giving a cash out refinance loan to an unqualified homeowner with a very low credit score that causes the payments to rise significantly and turns a fixed rate loan into an adjustable rate loan with a balloon payment will result in a foreclosure and vacancy.

> In such circumstances, the plausible and likely result of such practices is to cause homeowners who are otherwise occupying properties without a mortgage, or comfortably making payments on a modest existing mortgage, to be unable to make payment on a new, unaffordable loan. This, in turn, causes foreclosures and vacancies.

Id. This satisfies the second condition identified by the Court. If these borrowers remain in their prior circumstances instead of taking out a new unaffordable refinance or home equity loan, the default and vacancy does not happen.

Lenders encourage people who already own their homes to take out these kinds of unnecessary and unaffordable loans in several ways. With refinances, the new, larger loans may result from the lender soliciting homeowners to consolidate various unsecured debts, such as credit card debts and auto loans, with their existing mortgage into a new and larger mortgage. *See id.* ¶ 100. Such a loan may also be the result of lenders soliciting homeowners for "cash out" refinances, in which the lender gives the homeowner cash to make home improvements or to use in other ways. *See id.* ¶ 99. These loans may entail higher interest rates than borrowers are currently paying. *See id.* ¶ 101. They may also entail points and fees on both refinance and

home equity loans that are "rolled" into the principal of the loan and increase the amount that the borrower owes. *See id.* ¶¶ 101-02. As the Third Amended Complaint summarizes:

> All of these practices can cause borrowers' monthly mortgage payments to increase, whether by increasing the overall size of the debt secured by their home, increasing the interest rate, or both. Lenders have the underwriting tools and indicators – such as credit scores, debt-to-income ratios, and loan-to-value ratios – to predict with great accuracy whether the increase is too much for the borrower to afford. When lenders engage in these practices without regard to whether borrowers qualify for and can afford a refinance loan or a home equity loan based on proper underwriting criteria, it causes borrowers who could afford their old mortgage loans or had no mortgage at all to be saddled with new mortgage loans that they cannot afford. These practices cause foreclosures and vacancies at properties that would not be vacant had the offending loans not been made.

Id. ¶ 104. Lenders using these practices to make new loans to existing homeowners often do so with borrowers who lack the necessary credit rating or other underwriting qualifications for the additional debt or for the potential increase in monthly payments on new adjustable rate loans. *See id.* ¶¶ 105-06.

After explaining these practices and how they cause vacancies when targeted at existing homeowners who do not qualify for a new refinance or home equity loan, the City then confirms in the Third Amended Complaint that Wells Fargo has engaged in such practices in Baltimore. Wells Fargo contends that these new allegations are mere "guesses" and "speculat[ion]" about "phantom 'borrowers,'" Opp. at 6, 8, but the Third Amended Complaint specifically says that the new allegations are the result of investigation, not speculation. The new allegations that Wells Fargo has engaged in these practices in Baltimore are explicitly based on the City's contacts with Wells Fargo borrowers and its analysis of Wells Fargo loan data. *See* TAC ¶¶ 107-09.

The City avers that its analysis of loan data in response to the Court's Memo to Counsel shows that "Wells Fargo gave cash-out or debt consolidation refinance or home equity loans to owners of occupied properties at issue in this Complaint that significantly increased the

borrower's mortgage debt and/or replaced the borrower's fixed rate loan with an adjustable rate loan." *Id.* ¶ 107. This is consistent with the testimony of former Wells Fargo loan officers Elizabeth Jacobson and Tony Paschal, described in the complaint and set forth in their declarations attached to the complaint. *See id.* ¶ 69 & Attach. A; *id.* Attach. B ¶ 14.

Baltimore further alleges based on its contacts with Wells Fargo borrowers "that Wells Fargo has engaged in at least some of the practices [described above] at properties located in Baltimore's African-American neighborhoods which are the subject of this lawsuit." *Id.* ¶ 108. Specifically, the City alleges that it has confirmed through its investigation of loans at these properties that:

> Wells Fargo encouraged borrowers to refinance and take more cash out of their homes than they wanted, needed, or could afford, even if the house was owned debt-free before the Wells Fargo loan. These constitute loans that Wells Fargo knew or should have known the borrower could not afford and that should not have been made. At properties where this type of loan was made, the property was occupied prior to the time Wells Fargo made the loan and the Wells Fargo loan caused the property to become vacant. Had the loan not been made, the property would have remained occupied.

Id. Baltimore has likewise found through its investigation of loans at the properties at issue here that Wells Fargo encouraged owners of occupied properties to refinance their mortgages into adjustable rate loans with increasing payments. *See id.* ¶ 109. Wells Fargo did not use proper underwriting criteria to ensure that these borrowers were qualified and instead made loans that were not affordable and should not have been made. *See id.* This caused previously occupied properties to become vacant; had the borrowers not received these new adjustable rate refinance loans, they could have continued to afford the payments under their prior loans and avoided foreclosure. *See id.*

In sum, through the new allegations in the Third Amended Complaint, the City explains the circumstances and lending practices whereby a loan to an unqualified borrower causes the

borrower's previously occupied home to become vacant. The City then alleges based on its investigation of lending by Wells Fargo in Baltimore's African-American neighborhoods that Wells Fargo has engaged in these practices in these circumstances with respect to at least some of the properties for which the City claims damages in this case, and that this has in fact caused vacancies. This satisfies the requirement set forth in the Memo to Counsel that the City demonstrate the connection between loans to unqualified borrowers and vacancies for which the City seeks damages. Wells Fargo misses the mark in response by failing even to address the City's allegations about what has plausibly happened because of the refinance and home equity loans that Wells Fargo has given to unqualified owners of properties at issue here. The motion to dismiss should therefore be denied in full.

II. *TWOMBLY* AND *IQBAL* ONLY REQUIRE THE CAUSAL CHAIN TO BE PLAUSIBLE, NOT PROBABLE, AND BALTIMORE'S THREE-STEP CHAIN SATISFIES THIS REQUIREMENT

The Court has properly required Baltimore's allegations of causation to satisfy the plausibility requirement articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which apply 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. Importantly, *Twombly* and *Iqbal* did not create a heightened pleading standard, 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). The Court's application of the plausibility requirement in the Memo to Counsel is consistent with these limitations.

The causation chain establishing the City's standing entails only three steps that connect both types of Wells Fargo's discriminatory lending to the City's injuries. These steps are well-

supported by the City's allegations and substantial direct and statistical evidence incorporated in the complaint. The three steps are:

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 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.

As shown in this section, each of these steps and the causation chain as a whole are plausible. Indeed, the Court has already found that the causation chain is plausible with respect to discriminatory steering by finding that the steering claim is "adequately alleged." Memo to Counsel at 1. The City's new allegations show that causation is likewise plausible with respect to discriminatory lending to unqualified borrowers; for example, when unqualified borrowers are refinanced from affordable mortgages into new, larger mortgages that they cannot afford, it is plausible that they will lose their homes.

A. 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

1. Detailed Allegations Based On Direct Evidence

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 Third Amended Complaint. TAC Attachs. A-C ("Jacobson Decl.," "Paschal Decl.," "Hebert Decl."); *id.* ¶¶ 46-71, 84. Their 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.

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 for which they are not qualified, are far more likely to face foreclosure down the road. 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.*, TAC ¶¶ 24, 84. These practices constitute reverse redlining – the targeting of minority neighborhoods for predatory or discriminatory loans. *See id.* ¶ 2.[5] It is more than plausible that the resulting loans fail at an unusually high rate and in unnecessary numbers.

The declarations 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 & Ex. A. Another strategy was to focus on African-

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[5] Every court to consider the issue has held that reverse redlining violates the Fair Housing Act. *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).

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; *see also* Paschal Decl. ¶ 12.

The borrowers and neighborhoods targeted by Wells Fargo for subprime loans were subjected to a range of predatory lending practices. Jacobson explains that loan officers put people with prime credit into subprime loans and made subprime loans to borrowers who did not actually qualify for a loan. Jacobson Decl. ¶ 18. This is corroborated by the City's investigation of loans to unqualified borrowers in response to the Memo to Counsel. *See* TAC ¶¶ 107-09. Loan officers did this in part by falsifying loan applications; Jacobson reported this conduct to management but was not aware of any corrective action. Jacobson Decl. ¶ 18. Wells Fargo also

underwrote adjustable rate loans as if the borrower would pay the "teaser" rate for the full life of the loan instead of assessing whether the borrower could afford the increased payments after the teaser rate expired, often in only two years. *Id.* ¶ 16. Wells Fargo's predatory practices also included steering borrowers who qualified for prime and Federal Housing Administration loans into costlier subprime loans. Paschal Decl. ¶¶ 9, 19.

Loan officers engaged in these practices 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." Jacobson Decl. ¶ 6; *see id.* ¶ 32; Paschal Decl. ¶ 13. Wells Fargo's underwriting rules and pricing guidelines gave loan officers the broad discretion they needed to originate the costliest subprime loans. *See* Jacobson Decl. ¶¶ 11-17, 22, 24; Paschal Decl. ¶ 13.

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.

Id. ¶ 17; *see also id.* ¶¶ 15-16; Paschal Decl. ¶ 14.

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. 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." Paschal Decl. ¶ 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.

2. Detailed Allegations Based On Statistical Evidence[6]

The statistical evidence in the Third 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

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[6] Wells Fargo's footnote citation to the unpublished case of *United States v. Nara Bank*, No. 09-07124, 2010 WL 2766992 (C.D. Cal. May 28, 2010), is irrelevant to Baltimore's statistical allegations. *Nara Bank*, in which the government alleged discrimination in favor of Asians, involved statistical allegations that explicitly ignored many people. For example, while one defendant allegedly gave loans to 1200 non-Asians, the government's statistics only accounted for 600 of them. *See id.* at *1, *3 ("to say that half of the non-Asians were treated worse than the average Asian is not to say much at all"). The government could have isolated the non-Asians with the worst loans to present misleading statistics. By contrast, Baltimore's statistics leave nobody out. Additional problems pervaded the government's allegations in *Nara Bank* that are not present here.

for predatory lending – is 4.82%. TAC ¶ 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.[7]

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. *Id.* These figures are particularly revealing because the bulk of Wells Fargo's mortgage lending in Baltimore is in white neighborhoods. *Id.* ¶ 4.

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 in 2007, 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%. *Id.* ¶ 72.[8]

All of these statistical disparities are fully consistent with the outcome one would expect given the direct evidence of targeting described above and the investigation conducted by Baltimore in response to the Memo to Counsel.

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[7] 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.

[8] Additional statistical evidence in the Third 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, TAC ¶¶ 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.

B. 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.

Whether loans are improper because of steering into higher cost loans than the borrowers qualified for or because the borrowers were unqualified, the result is vacancies at properties that would be occupied if the loans had never been made. As the Court already found, Baltimore's allegations establish that this causal connection is plausible with respect to steering. *See* Section I.A, *supra*. For the reasons discussed above, the new allegations in the Third Amended Complaint establish that it is also plausible with respect to lending to unqualified borrowers. For example, a homeowner who does not have a mortgage, but is then given an unaffordable home equity loan that he does not have the resources to repay and is not qualified for, is likely to face foreclosure and leave the property unoccupied.

The limited discovery previously afforded the parties to test the connection between foreclosure notices on Wells Fargo loans and vacancies likewise affirms the connection. *See, e.g.*, Mem. to Counsel (Feb. 20, 2009) (Docket No. 48). 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. *See* TAC ¶¶ 110, 118. If Wells Fargo had only made loans commensurate with borrowers' financial resources and ability

to repay them, many if not all of these foreclosures and vacancies would have been avoided. The borrowers could have continued to afford their monthly payments and their homes would have remained occupied instead of becoming vacant. *See, e.g.*, *id.* ¶¶ 96-98, 104, 108-11, 117.

C. 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. The City only needs to show that either one is plausible to satisfy the Article III requirements for standing.

1. 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. *See* TAC ¶¶ 111-16, 311-19, Attach. R ¶¶ 3-9, Attach. S ¶ 3; *see also id.* Attachs. E-O.

The Third Amended Complaint details the provision of such services at 190 vacant Wells Fargo foreclosure properties. *Id.* ¶¶ 119-308; *see id.* Attach. R ¶¶ 4, 9, Attach. S ¶¶ 4-5. 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 and separated from 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.

2. 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 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* Op. (Jan. 6, 2010) (Docket No. 141) 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 37 compact sub-neighborhoods identified in the Third 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. TAC ¶ 321. 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 regression analysis 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.* ¶ 325. These findings exclude any lost value due to foreclosures from outside the sub-neighborhoods, from any non-Wells Fargo foreclosures, and from macroeconomic factors like the recent recession. The City's analysis confirms the causal connection between the concentrated Wells Fargo foreclosures in the specified sub-neighborhoods and the narrow property tax damages sought by the City.

III. THE VARIOUS ARGUMENTS THAT WELLS FARGO REPEATS FROM ITS PRIOR MOTIONS CONTINUE TO LACK MERIT

Apart from mischaracterizing the Memo to Counsel, Wells Fargo relies chiefly on several arguments that are holdovers from its prior motions to dismiss. Each argument is sweeping in scope and, if accepted, would apply to both types of improper loans identified in the Memo to Counsel despite the Court's clear conclusion that they must be analyzed separately. Nonetheless, Wells Fargo continues to argue that the Third Amended Complaint should be dismissed in its entirety because (1) Baltimore did not include allegations about individual borrowers and their loans and foreclosures; (2) socioeconomic conditions are the cause of all the injuries alleged by the City; (3) personal circumstances noted in Wells Fargo's undisclosed loan files, not improper loans, are the cause of all the foreclosures and vacancies at the properties at issue; (4) dismissals of purportedly similar cases in other jurisdictions counsel dismissal here; and (5) Baltimore has purportedly not alleged an injury-in-fact.

A. Baltimore Does Not Have To Make Allegations About Individual Borrowers At the Pleading Stage

Despite the wealth of detailed, plausible allegations and evidence in the Third Amended Complaint demonstrating each step of the causation chain, Wells Fargo insists that Baltimore has not supported causation adequately because it has not made allegations identifying individual

borrowers who received Wells Fargo loans that caused vacancies. *See* Opp. at 1, 2, 3, 6, 11, 13. This contention, made by Wells Fargo repeatedly in this case, is an attempt to hold Baltimore to a summary judgment standard before it has had an opportunity for discovery. The law does not compel Baltimore to include such specific allegations at this point in the case and the Court correctly did not require them.

Wells Fargo's position is at odds with the Supreme Court's oft-repeated statement in the leading case of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), that standing:

> must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

(Citations and brackets omitted.) The fundamental reason for the difference between what is required of Baltimore at the pleading and summary judgment stages is, of course, that discovery has yet to occur.

This reason has particular force here because the files that identify all the borrowers and the circumstances of their loans and foreclosures are solely in Wells Fargo's possession. Even when Wells Fargo relied on its borrower-by-borrower loan files and servicing records at the 2009 evidentiary hearing before Chief Judge Legg, it was not required to disclose them. Months earlier Baltimore had 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 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. *See* Aff. of D. Williams (Docket No. 155-20) at 43-64. The City has not even been permitted a deposition of this consultant. Until Baltimore receives full discovery it would be fundamentally unfair – and contrary to the limited requirements of Rule 8 as articulated in *Lujan* and elsewhere – to require the City to present evidentiary allegations at the level of detail found in Wells Fargo's undisclosed individual borrower files. This would be tantamount to holding Baltimore to a summary judgment standard before an opportunity for discovery. Moreover, simply locating most of these borrowers to obtain details from them about their individual circumstances requires the kind of information found in Wells Fargo's undisclosed borrower-specific files because the foreclosures have caused them to move to unknown places. *See* Tr. (Sept. 8, 2010) at 27, 31 (statement of Plaintiff's counsel explaining advantage Wells Fargo has in locating borrowers and identifying borrower-specific information).

The proper test at this stage is instead whether Baltimore has provided enough detail in its allegations to show that the causation element of standing is plausible, not whether its allegations are sufficient to prove standing. As long as Baltimore's allegations demonstrate plausibility, as they do, it is not required to include with its complaint all the additional borrower-by-borrower or other evidence it has obtained through its investigation. Indeed, Baltimore is no more required to do so than Wells Fargo is required under Rule 8 to provide every piece of evidence it believes supports its defense.

The Court did not hold otherwise in ruling on Wells Fargo's Motion to Dismiss the Second Amended Complaint. At the September 8, 2010 hearing on that motion, Wells Fargo's first and foremost argument was that Baltimore had not identified individual borrowers who received improper loans. *See, e.g.*, Tr. at 3, 14, 62. The Court questioned Plaintiff about the

issue, *see, e.g.*, *id.* at 25-26, 36-37, and it was discussed at length. Plaintiff presented the position that while a factual, borrower-by-borrower analysis of the causes and consequences of individual loans is a legitimate defense that Wells Fargo may raise after discovery, no such borrower-by-borrower details are needed at the pleading stage to establish a plausible and therefore sufficient inference that Wells Fargo's wrongdoing injured the City. *See, e.g.*, *id.* at 38-39. The Court recognized the distinction and stated, "[w]e may or may not be apart, but I think that's where the issue is." *Id.* at 39. Plaintiff reiterated its position at the conclusion of the hearing after Wells Fargo again argued that the lack of allegations about individual borrowers and their loans was fatal to the Second Amended Complaint, but stated in the alternative that if the Court found that such allegations were necessary, then the City should have an opportunity to amend the complaint accordingly:

> if that is the only thing that in the Court's mind stands in the way of our going forward, then I would ask respectfully in the alternative – I don't think it's necessary, but ask in t[h]e alternative for leave for a period of time for us to be able to amend the complaint to add the borrowers to that. If that's the only thing blocking it. But just in the alternative . . . .

Id. at 66. Thus, the issue of whether the complaint must include allegations about specific borrowers was raised and considered at the hearing, and the Court's decision issued six days later contains nothing indicating that such allegations are needed.[9]

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[9] Wells Fargo does not even attempt to identify any part of the Memo to Counsel that purportedly sets forth such a requirement. Wells Fargo instead cites only to the September 8, 2010 hearing transcript, which it characterizes incorrectly in asserting that "[t]he City has failed to follow the Court's direction and to abide by its own indication that it would provide detail relating to individual borrows." Opp. at 2; *see also id.* at 6 (similarly mischaracterizing an earlier part of the hearing transcript). Wells Fargo's attempt to turn every thought expressed by the Court while probing the parties' arguments at the hearing into an actual holding is entirely at odds with the purpose of motion hearings and with the judicial process.

Elsewhere, Wells Fargo presents a similarly inaccurate characterization of the December 14, 2009 hearing transcript with its insertion of bracketed language in the following quote from Baltimore's counsel: "'our ability to [allege fairly traceable causation] hinges . . . on things that we find out in discovery.'" Opp. at 7 (citing Tr. (Dec. 14, 2009) at 72) (brackets and ellipsis added by Wells Fargo). Baltimore has always said that it will require discovery to prove its case, but never that it requires discovery to make sufficient allegations to defeat a motion to dismiss. Moreover, Wells Fargo's citations to the December 14, 2009 hearing on the Motion to Dismiss the [First]

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

As it did at greater length in its prior motions to dismiss, Wells Fargo continues to assert that the stark disparity between its foreclosure rates in African-American and white neighborhoods in Baltimore merely reflects a "complex weave of social and economic factors," not discrimination. Opp. at 3. This is a shorthand reference to the series of purported facts and statistics that Wells Fargo has cobbled together in past briefs from newspaper articles and a myriad of other untested sources, to which it adds one new newspaper article in the current iteration of the motion to dismiss. The Court may not take judicial notice of these "facts" under Fed. R. Evid. 201.[10]

Amended Complaint are generally irrelevant, *see* Opp. at 4, 7; the Court has held that the City has already "cured the fundamental flaw I found to exist in the first amended complaint . . . ." Memo to Counsel at 1.

[10] 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." Fed. R. Evid. 201(b); *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). Although Wells Fargo has not acknowledged that it is asking for judicial notice of a wide range of "facts," that has plainly been its purpose in submitting untested exhibits and making myriad extra-record factual assertions.

Because Wells Fargo's factual assertions about the role of socioeconomic issues in the City 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.

Even if the Court could take judicial notice of these "facts," which it may not, they 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. All lenders make loans in the same environment; if socioeconomic factors determine whether a loan winds up in foreclosure, then every lender that Wells Fargo competes with to make mortgage loans in Baltimore should have the same proportion of negative outcomes. The evidence will instead show that the disparity in Wells Fargo's foreclosure rates between white and African-American neighborhoods is excessively large compared to its peers. *See* TAC ¶ 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.

Furthermore, when Wells Fargo cites the December 14, 2009 motion hearing in support of its assertion that the "problems that the City complains of in the instant lawsuit predate the origination of virtually every loan identified in the TAC as this Court has noted," Opp. at 4, it is addressing the relevance of socioeconomic issues to the wrong complaint. In the decision that followed that hearing, the Court expressed its concern that socioeconomic issues stood in the way of standing because it construed the First Amended Complaint as seeking generalized, City-wide damages. *See* Op. (Jan. 6, 2010) (Docket No. 141). But the Court made clear in the Memo to Counsel that, with the Second Amended Complaint clarifying that the City only seeks property specific damages, this issue has been "cured." Memo to Counsel at 1. The "problems that the City complains of in the instant lawsuit" are discriminatory and predatory lending

practices by Wells Fargo, and nothing else. These are not independent problems that "predate" the loans; rather, they are the cause of the loans.

Wells Fargo's reliance on its new newspaper article is similarly misleading. *See* Opp. at 4, 13 & Ex. 1. The article contains statements from Baltimore officials that merely acknowledge that the overall issue of vacancies in the City, which Wells Fargo terms "the City's endemic vacancy problems," Opp. at 11, is due to a variety of causes. Wells Fargo would have the Court believe this exonerates it. Aside from the impropriety of taking judicial notice of this article under Fed. R. Evid. 201, the officials quoted do not in any way address the reasons for specific vacancies at the specific Wells Fargo properties at issue here, much less say that Wells Fargo does not bear responsibility. Wells Fargo's conflation of generalized conditions in Baltimore with the specificity of the claims at issue in this case continues to undermine its argument about socioeconomic conditions.

C. Wells Fargo's Untested Assertions About Facts Purportedly Found In Its Own Undisclosed Files Do Not Provide a Proper Basis to Challenge Standing Under Rule 12

In continued patent disregard for elementary fairness, Wells Fargo again tells the Court that it "has demonstrated that it can show through loan-by-loan analyses that life circumstances such as illness, job loss, death, divorce, and investments gone awry are the true causes of delinquency." Opp. at 11. But as discussed above, the loan files, servicing records, and other documents that Wells Fargo relies on have not been disclosed. To this day, Wells Fargo has not provided any of the files that its consultant considered and offered opinions about in the affidavit Wells Fargo submitted at the 2009 evidentiary hearing based on his review of Wells Fargo's files. 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. Wells

Fargo's untested and unverified assertions about the "true causes" of its excessive foreclosures in African-American neighborhoods therefore have no place in the resolution of this motion to dismiss. *Id.*

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." Aff. of D. Williams (Docket No. 155-20) at 47, 60. At the evidentiary hearing conducted by 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.* The ratio of a prospective borrower's debt to the borrower's income is a principal measure for responsible underwriting. 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 48-50. Testimony from its own expert requiring denial at the more exacting summary judgment stage likewise also requires denial at the Rule 12 stage.

D. *Birmingham*, *Cleveland*, and *Tingley* are Inapposite

Wells Fargo again relies on *City of Birmingham v. Citigroup, Inc.*, No. CV-09-BE-467-S (N.D. Ala. Aug. 19, 2009), *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*, 615 F.3d 496 (6th Cir. 2010), and *Tingley v. Beazer Homes Corp.*, No. 3:07-cv-176, 2008 WL 1902108 (W.D.N.C. Apr. 25, 2008), and goes so far as to assert that "[h]oldings from these opinions are applicable verbatim" to the Third Amended Complaint. Opp. at 11; *see generally id.* at 8-12.

Yet these cases only 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*, *City of Cleveland*, and *Tingley* 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, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). *Gladstone* is the seminal case on standing under the Fair Housing Act, which Wells Fargo again wholly fails to address. *See* Section IV, *infra*.

1. *City of Birmingham*

Birmingham's complaint (attached as Ex. 3 to Defs.' Mot. to Dismiss [the First] Am. Compl. (Sept. 18, 2009) (Docket No. 126-5)) lacked any allegations or evidence linking the seven defendants to any unlawful practices or to any specifically-identified harm. Birmingham merely made general allegations (which were copied from the first part of Baltimore's original complaint without Baltimore's participation or consent) about subprime lending, predatory practices, reverse redlining, and the harm that can result. It did not include any detailed allegations about particular discriminatory practices, statistical disparities, or injuries, and included no direct evidence of discrimination. Birmingham therefore 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 assertion that Birmingham's allegations were just like the allegations at issue here could not be further from the truth. *City of Birmingham* is not remotely analogous to this case.

2. *City of Cleveland*

City of Cleveland is likewise inapposite here. It was not a Fair Housing Act case, as this Court has noted, *see* Tr. (Sept. 8, 2010) at 10, but a state law public nuisance case. The decision is based explicitly on the "directness requirement" of *Holmes v. SIPC*, 503 U.S. 258 (1992), and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). *See City of Cleveland*, 615 F.3d at 502-06. "Directness" under *Holmes* and *Anza* refers to the causal connection between the defendant's conduct and the plaintiff's injury. The reliance on *Holmes* and *Anza* wholly distinguishes *City of Cleveland* because there is no directness requirement under the Fair Housing Act. This is because of the lack of prudential limitations on standing in FHA litigation. Thus, the analytical framework of *City of Cleveland* does not apply here and that decision's analysis of causation is inapposite.

The Seventh Circuit addressed this issue in *New West, L.P. v. City of Joliet*, 491 F.3d 717 (7th Cir. 2007). The lower court had held that the plaintiff lacked standing because its claim was based on harm it suffered as an indirect result of discrimination against someone else. *See New West L.P. v. City of Joliet*, No. 05-C-1743, 2006 WL 2632752 (N.D. Ill. Sept. 8, 2006). The Court explained that the lower court had analyzed the issue of standing incorrectly:

> For some statutes it matters whether the injuries are direct or derivative. *See, e.g.*, *Anza v. Ideal Steel Supply Corp.*, ___ U.S. ___, 126 S. Ct. 1991 (2006); *Holmes v. SIPC,* 503 U.S. 258 (1992). The Fair Housing Act is not among those statutes; the Supreme Court has held that only the Constitution's own requirements, and not any prudential supplements, apply to litigation under this statute.

New West, L.P., 491 F.3d at 721. The Court then immediately turned to *Gladstone* and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), and explained that they, not *Holmes* and *Anza*, control the proper analysis of causation under the FHA:

"New West relies on these decisions; defendants' brief ignores them, and the district court did not mention them. They are dispositive in favor of New West's standing."[11] *Id.*

As in *New West, L.P.*, *Gladstone*, not *City of Cleveland*, controls here and requires that Wells Fargo's motion to dismiss be denied. *Gladstone* specifically rejects the contention that parties "who have not been harmed directly by [defendant]s' alleged conduct" lack standing to bring suits under the FHA. 441 U.S. at 102. *City of Cleveland* was a nuisance case, not a FHA case. It is for this reason that *Gladstone* is nowhere mentioned in the Sixth Circuit's opinion. Thus, the Court's discussion of the role of homeowners or other third parties who might affect the "directness" analysis arises in the context of a doctrine that has no application here.

This point is demonstrated by the fact that the application of the *City of Cleveland*/*Holmes*/ *Anza* "directness requirement" would preclude a municipality from maintaining a FHA 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. *Id.* at 109-10. *Gladstone* involved the very same type of municipal tax base injury alleged by Baltimore; indeed, the causal connection between the illegal activity and the injury was much more tenuous in *Gladstone* than here. The Village of Bellwood's injury was not the "direct" result of steering. Rather, it required certain decisions by many third parties and could have been affected by many independent factors. For example, the causal chain relied on people who were steered deciding not to obtain real estate information from other sources (*e.g.*, newspapers or other real estate companies) and not choosing a property based on unrelated personal preferences related to location or schools. The economy could have affected

[11] Wells Fargo previously asserted that the way in which Judge Easterbrook used the directness concept has nothing to do with standing, even though that is explicitly how Judge Easterbrook used it. *See* Reply Mem. (July 30, 2010) (Docket No. 168) at 14 n.8. But even if Wells Fargo were reading *New West, L.P.* correctly (which it is not), it would still mean that *Holmes* and *Anza*, and therefore *City of Cleveland* which wholly relies on them, have nothing to do with FHA standing. That is because *Holmes* and *Anza* are the explicit source of the directness requirement discussed and rejected in *New West*. This means that Wells Fargo's assertion that directness in *New West* is irrelevant to standing here is an admission that *Holmes* and *Anza* (and therefore *City of Cleveland*) are also irrelevant to standing here.

housing prices and tax revenue. One could postulate many steps between the defendants' steering and the Village's injury, but the Supreme Court held that the causal connection was sufficiently plausible to satisfy Article III's standing requirements. *Id.* at 115.

The causal chain here, described in Section II above, is much simpler. It is more than sufficient to maintain standing to bring a FHA claim under *Gladstone*. This is clear when one compares the allegations in *City of Cleveland* and those here. The allegations in *City of Cleveland* required a much longer and generalized causal chain, making it essentially impossible to identify and apportion damages. Cleveland did not even challenge lending. Rather, it attempted to place "principal[] responsib[ility] for the financial crisis" and its effects throughout Cleveland on 22 companies that engaged in the "financing, purchasing, and pooling of vast amounts of [subprime mortgages], to create mortgage-backed securities to sell to their customers . . . ." *City of Cleveland*, 615 F.3d at 499; Docket No. 163-2 (July 6, 2010) at 2-3 (¶¶ 2, 5) (Second Am. Compl. in *City of Cleveland*). Securitizing loans is an inherently legal activity. *City of Cleveland*, 615 F.3d at 505 n.6. Cleveland did not seek to connect any particular defendant to any particular foreclosures, or even to connect the defendants collectively to all of the foreclosures for which it sought recovery. *Id.* at 505. These factors were crucial to the Sixth Circuit's application of *Holmes* and *Anza*. *See, e.g.*, *id.* at 505 n.6 (difference between legal and illegal conduct is "*critical*" to analysis) (emphasis in original), 506 (better suit would be "limit[ed] . . . to the specific Defendants that financed [specific] subprime loan or loans"). They precluded the attribution of specific damages to each defendant; created the possibility of multiple recoveries based on the same conduct; and meant that the causal chain relied exclusively on voluntary acts, not acts coerced by illegal conduct. *See id.* at 503-06.

These obstacles are not present here. Thus, even if the *Holmes*/*Anza* framework that *City of Cleveland* applied were relevant – which it is not – Baltimore would still have standing under the

Holmes three-factor test. *See id.* at 503 (discussing test). Plaintiffs have sued only Wells Fargo and exclusively for damages at particular Wells Fargo properties resulting from particular illegal loans made by Wells Fargo. The recipients of these loans did not freely "cho[o]se to enter into a subprime mortgage and to default on their loans," *id.* at 505, but were deceived into taking unaffordable loans. Instead of suing securitizers, Baltimore has sued a "[c]ompan[y] that sold mortgages to home buyers [and] decided which loans should be made and on what conditions." *Id.* at 504. There is no risk of multiple recovery because the City only seeks – and has identified – precise damages that are unique to itself. In sum, while Cleveland tried to blame a host of securitizers acting lawfully for general harm to the city, Baltimore's suit is the very opposite – a suit to hold Wells Fargo responsible for the specific consequences of specific illegal loans.

Finally, *City of Cleveland* is not even a standing case, but a Rule 12(b)(6) case. As discussed above, the partial overlap of the causation analyses under Rules 12(b)(1) and (b)(6) requires the Court to find that jurisdiction exists and address causation as a merits issue at the appropriate stage of the case.

3. *Tingley*

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* Docket No. 163-2 (July 6, 2010) at 45-51 (Class Action Compl. in *Tingley*). Thus, while it is understandable that the court 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.

E. Baltimore Has Adequately Alleged Injury-In-Fact, Which Is The Final Step In The Causation Chain

Wells Fargo also takes issue again with the third and final step in the causation chain, which connects vacancies to the property specific injuries suffered by the City. *See* Opp. at 12-13. It asserts that "vacancy itself results in no cost to the City" and that the City "has failed to establish that it incurred costs directly attributable to a vacant property that was unoccupied because the property owner had an improper Wells Fargo loan." *Id.* at 3-4, 12. To the contrary, the connection between the vacancies and both types of damages – the costs of providing additional municipal services and lost property tax revenues – is alleged in great detail in the complaint. As discussed above, these allegations are plausible and have been confirmed by the City's exhaustive review and expert analysis of its records.[12]

Moreover, the connection to damages is an explicit focus of the Memo to Counsel. The Court's starting point is its statement that standing requires "a causal connection between the injuries [Baltimore] claims and Wells Fargo's conduct of which it complains." Memo to Counsel at 1. The very basis for the Court's holding that socioeconomic conditions do not defeat standing is its consideration of the nature of the damages sought, *i.e.*, property specific instead of generalized. *See id.* Thus, the implication of Wells Fargo's argument about injury-in-fact is that the Court failed to consider whether the injury was sufficient when it explicitly considered whether the injury was causally connected to the alleged discrimination. Wells Fargo offers no basis for this criticism of the Court's reasoning. Rather, the Court's narrow focus on the

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[12] To the extent Wells Fargo is arguing that Baltimore has not even alleged any injury based on the vacancies identified in the complaint, *see* Opp. at 2, that is plainly incorrect. The Third Amended Complaint specifically alleges that the City has been injured by the vacancies at these properties, *see* TAC ¶¶ 111-18, as did the Second Amended Complaint, *see* Second Am. Compl. ¶¶ 97-104. For the reasons stated above, the City's allegations are plausible.

connection between improper loans and vacancies is consistent with the proper conclusion that the allegations of injury are plausible and sufficient under *Twombly* and *Iqbal*.

Wells Fargo makes the additional assertion that if the injuries alleged by the City are sufficient to confer municipal standing, it would "expand the law of standing to give every neighbor with a pest infestation and every crime victim within a few blocks of a house in foreclosure access to financial institutions in federal court." Opp. at 5. There is no basis for this "slippery slope" argument. The only claims about standing made by Baltimore are that its own specific financial injuries attributable to unlawful lending practices at specific properties are cognizable under Article III. This has no bearing on whether different alleged injuries unique to nearby residents may form the basis of a federal lawsuit.

IV. BALTIMORE HAS STANDING UNDER THE SUPREME COURT'S SEMINAL FAIR HOUSING ACT CASE ON STANDING, WHICH WELLS FARGO IGNORES

Wells Fargo again does not address *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the leading decision on standing under the Fair Housing Act. Baltimore's claim to standing is even stronger than the one that passed muster in that case.

In *Gladstone*, a municipal corporation sued two local real estate companies and their employees for racial steering.[13] *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 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

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

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).

Gladstone is also dispositive with respect to causation. 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 the Seventh Circuit later described as "tipping," *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525 (7th Cir. 1990), 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.

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).

Bryant v. Yellen, 447 U.S. 352 (1980), *United States v. SCRAP*, 412 U.S. 669 (1973), and *Clinton* all refute Defendants' view of the law (as does *Gladstone*). 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. *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.[14] *Id.* at 689-90.

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[14] Wells Fargo has attempted to distinguish *Gladstone*, *Clinton*, *Bryant*, and *SCRAP* by asserting that the cases somehow involved an explicitly "coercive" effect on third parties, but that simply misrepresents the Supreme Court's decisions. *See* Reply Mem. (June 19, 2008) (Docket No. 18) at 13 n.11. Wells Fargo also attempted to distinguish *Gladstone* by noting the Supreme Court's observation that the area that was the focus of the steering was

CONCLUSION

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

If the Court nonetheless concludes that the portion of the Third Amended Complaint addressed to discriminatory lending to unqualified borrowers has not been adequately alleged, the City respectfully requests that, as stated in the Court's Memo to Counsel, it be permitted to proceed with its claim that Wells Fargo discriminated by steering borrowers into higher priced loans than the loans for which they were qualified.

"relatively compact," *see id.* at 6, but that was only relevant to the Supreme Court's analysis of whether the individual plaintiffs had standing, not whether the Village had standing. *Gladstone*, 441 U.S. at 114.

Wells Fargo also continues to rely on *Allen v. Wright*, 468 U.S. 737 (1984), *see* Opp. at 9, 11, 12, but *Allen* reflects 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.

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Respectfully submitted,

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