UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

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

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

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

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

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Defendants Wells Fargo Bank, N.A. and Wells Fargo Financial Leasing, Inc. (collectively "Wells Fargo") respectfully submit this Memorandum of Law in Support of their Motion to Dismiss the Third Amended Complaint for Declaratory and Injunctive Relief and Damages filed by the Mayor and City Council of Baltimore ("the City") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The City once again—and for the third time—has failed to follow the Court's direction to identify and demonstrate a fairly traceable causal connection between specific injuries claimed by the City and alleged conduct by Wells Fargo. The City has identified the same 190 properties purportedly used as collateral to secure a Wells Fargo loan and alleged to have been vacant at some point during the last decade. It presents no specific borrowers as to whom it alleges a causal connection between Wells Fargo's lending practices, the alleged vacancies at those properties, and the routine municipal expenditures and diminution in property tax revenues that the City claims as damages.

PRELIMINARY STATEMENT

In dismissing the City's complaint for the second time, this Court held that standing doctrine requires the City to establish "that there was a causal connection between the injuries it claims and Wells Fargo's conduct of which it complains" and, more specifically, that the sites of alleged injury are "properties that would not have been vacant but for improper loans made by Wells Fargo." (Memo to Counsel (ECF No. 174) at 1, 2 ("Dismissal Order")). In other words, the City must make allegations sufficient to establish that wrongful conduct on the part of Wells Fargo is the traceable cause of a vacancy and that this vacancy resulted in property-specific injury to the City. As this Court articulated during the hearing on Wells Fargo's Motion to Dismiss the Second Amended Complaint, "causation of vacancy requires that [a Wells Fargo loan] is what caused the vacancy." (Mot. Hr'g Tr. 6:18-19, Sept. 8, 2010). Indeed, the Court

stated and the City agreed that the City was required to "make credible allegations that the properties would not have been vacant but for the bad loan." (Mot. Hr'g Tr. 30:16-19, Sept. 8, 2010).

In permitting leave to file a Third Amended Complaint ("TAC"), the Court directed the City to allege (if it could, consistent with Rule 11) that the properties relied upon were (1) occupied before the sale facilitated by the Wells Fargo loans, and (2) would have remained occupied during the period for which the City claims damages. (Dismissal Order at 1-2). The latitude afforded to the City was consistent with its request "for leave for a period of time for us to be able to amend the complaint to add the borrowers, to add individual borrowers to that." (Mot. Hr'g Tr. 66:8-10, Sept. 8, 2010). The City has failed to follow the Court's direction and to abide by its own indication that it would provide detail relating to individual borrowers. Instead, the City responded to the Dismissal Order by refiling its the Second Amended Complaint with 14 additional paragraphs largely focused on alleged improper "practices" committed by "lenders" generally in the past decade. (See TAC ¶¶ 96-109). There is no mention of Wells Fargo in 11 of the new paragraphs, and the three paragraphs that do reference Wells Fargo fail to identify a single borrower, loan, or property that satisfies the Court's pleading requirement for standing.

Specifically, the City has failed to make a specific allegation that any one of the 190 properties identified in the TAC would be occupied but for Wells Fargo subprime loans to knowingly unqualified African-American borrowers, or to African-American borrowers steered into subprime loans whose credit ratings qualified them for less expensive products. (See TAC

¶¶ 119-308).[1] While the City seeks to parrot the words it believes to be required by the Court's Dismissal Order, it has failed to connect any purported property-specific damages to any alleged conduct by Wells Fargo. Although the City was directed to make specific allegations sufficient to address the threshold issue of causation if it chose to file another complaint, the City's TAC again fails to identify a single borrower who got an improper loan from Wells Fargo or a single property address where a vacancy purportedly was caused by a Wells Fargo loan.

As this Court previously indicated, the City has "a tough time [making a causal connection], without [the City] coming in with . . . evidence of a single borrower." (Mot. Hr'g Tr. 25:24-25, Sept. 8, 2010). The City "can't come in and say this is what we think and get discovery. That's not the way the legal process works." (Id. at 28:2-4). Moreover, even if the TAC had connected its generalized allegations to specific loans that triggered vacancies at identifiable property addresses—which it did not—it has failed to demonstrate that any borrower default and/or property vacancy was caused by an improper Wells Fargo loan, rather than from the complex weave of social and economic factors the City itself has acknowledged to be responsible for the overall sky-high vacancy rate in Baltimore. These factors include job loss, illness, death, divorce, or ill-conceived speculative home purchases.

Finally, the City also has failed to establish that it incurred costs directly attributable to a vacant property that was unoccupied because the property owner had an

[1] The TAC includes 79 properties at which the City claims "there are or will soon be housing code violations" and at which "there may be housing code violations . . . in the future." (TAC ¶¶ 309-310). However, a "plaintiff alleging a future injury at some indefinite time does not support a finding of an 'actual or imminent injury.'" Powers v. U.S. Home Corp., No. WMN-09-2167, 2010 WL 605727, at *3 (D. Md. Feb. 18, 2010) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992)). As this Court has noted, to have standing, plaintiffs "must allege that they have been harmed in fact, not that they 'can imagine circumstances in which [they] could be affected.'" Doe v. Blue Cross Blue Shield of Md, Inc., 173 F. Supp. 2d 398, 403 (D. Md. 2001) (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973)). It is clear under relevant case law that the injuries claimed with respect to these 79 properties fall especially short of the "discrete and palpable" standard.

improper Wells Fargo loan.[2] The problems the City complains of in the instant lawsuit predate the origination of virtually every loan identified in the TAC as this Court has noted. (See, e.g., Mot. Hr'g Tr. 14:23-15:4, Dec. 14, 2009 ("it's simply implausible to say that because Wells caused [a property] to be vacant, a police call was made to that house. That is not plausible when one knows what the inner city is like, and knows that if the squatters hadn't been there, they would have been next door, where there are plenty of vacant buildings.")).

The City repeatedly has acknowledged as much. Just a few weeks ago, the City's housing commissioner observed that the City's vacancy problem and its attendant ills are attributable to a variety of causal factors over the past 50 years, including the mass exportation of jobs and the "suburbanizing" of America. (Ex. 1, Melody Simmons, Mayor Rawlings-Blake Unveils Aggressive Push to Reduce Vacant Properties, The Daily Record (Balt.) (Nov. 3, 2010), http://mddailyrecord.com/2010/11/03/mayor-unveils-agressive-push-to-reduce-vacant-properties-in-city/.) Mayor Rawlings-Blake, a plaintiff in this action, recently described Baltimore's vacancy epidemic as "a problem of too much supply and not enough demand." (Id.) The Court identified this precise issue in its September 14, 2010 Order dismissing the City's Second Amended Complaint, noting that the City's damages claims "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" and

[2] For the sake of efficiency, Wells Fargo addresses herein only the limited number of paragraphs novel to the TAC. Wells Fargo incorporates by reference the legal arguments (none of which are diminished by the TAC) made in its Motion to Dismiss the Second Amended Complaint (attached as Ex. 2, with exhibits thereto omitted and available at ECF No. 155). Wells Fargo additionally incorporates by reference its discussion of the real drivers of increased foreclosure rates in Baltimore, including the thousands of tax lien sales, the loss of more than a quarter of the Baltimore population over the last 50 years, and Baltimore's crushing burdens of crime, poverty, joblessness, failing schools, urban decay, high property tax rates, violence, drug addiction, and the declining economy.

ultimately concluding that the City failed to allege facts necessary to make this showing. (Dismissal Order at 1).

The City now seeks a fourth bite at this apple with a TAC that fails to cure the persistent and fundamental causal deficiency that resulted in the dismissal of this case twice before. The City seeks to 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. Therefore, the TAC should be dismissed with prejudice.

ARGUMENT

The Dismissal Order directed the City to supply a critical nexus. (See Dismissal Order at 2 ("If the City can make such allegations [sufficient to confer standing] consistent with Fed. R. Civ. P. 11 in the third amended complaint, it should do so")). Notwithstanding, the 14 new paragraphs in the TAC articulate only allegations against lenders in general without any reference to particular properties, Wells Fargo loans, or borrowers, and thus they fall far short of showing causation or satisfying basic standards of pleading.

The only references to Wells Fargo in the TAC are ambiguous and conclusory assertions that "Wells Fargo's discriminatory lending practices," including "steering borrowers into loans that are more onerous than loans for which they qualify and giving loans to people who do not qualify for them cause foreclosures and vacancies that injure the City." (TAC ¶ 96). Other assertions mention Wells Fargo as an example of industry-wide wrongful practices and appear to charge Wells Fargo with only some unidentified fraction of the claims advanced: "Wells Fargo has engaged in *at least some of the practices* identified in paragraphs 98-104 above at properties located in Baltimore's African-American neighborhoods." (TAC ¶ 108 (emphasis added)). It is not even clear which practices Wells Fargo is accused of engaging in, much less

that these allegations are sufficient to establish that Well Fargo's purported conduct violated the Fair Housing Act, 42 U.S.C. § 3601 et seq.

The TAC's 14 new paragraphs also fail to satisfy the Court's requirement that subject properties "would not have been vacant but for improper loans made by Wells Fargo." Dismissal Order at 2. As the Court previously observed, the City had an obligation "to interview a borrower who said, but for the terms of the loan I would have paid the loan and that's what caused the vacancy." (Mot. Hr'g Tr. 37:2-4, Sept. 8, 2010). The TAC refers to a phantom "property" where "this type of loan was made" that "was occupied prior to the time Wells Fargo made the loan and the Wells Fargo loan caused the property to become vacant." (TAC ¶¶ 108-109). The TAC refers to phantom "borrowers" who "could have avoided foreclosure if Wells Fargo had not made the loan to them." (Id. at ¶ 109). However, the absence of any specificity in these allegations shows that the City could not make such claims with respect to even one actual property address or borrower, leaving a persistent "gap" between allegations of wrongdoing and allegations of damages. (Mot. Hr'g Tr. 38:1, Sept. 8, 2010). Instead, the City is speculating that some properties among the 190 identified in the TAC could have been occupied prior to the homeowner securing a Wells Fargo loan, and speculating that such loans may have been infected by wrongful lending practices. This pair of guesses does not satisfy either the Dismissal Order or the pleading requirements set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), and their progeny.

Instead of making the specific causation allegations necessary to withstand a Motion to Dismiss under Iqbal and Twombly, the City seeks to do an end-run around these well-settled pleading precedents by convincing this Court to permit discovery. Despite the Court's reiteration of the pleading burden, the City has made no progress since acknowledging hopes for

an evidentiary fishing expedition last year: "our ability to [allege fairly traceable causation] hinges . . . on things that we find out in discovery, the ability to know facts, to know what's in the files, understand so that we can make—have our experts make what we believe are credible, supportable statements that this is how we are screening out those costs [attributable to Wells Fargo]." (Mot. Hr'g Tr. 72:20-25, Dec. 14, 2009). The Court should reject the City's invitation to allow expensive discovery that somehow will inject substance into a complaint without legal merit.

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

To satisfy the standing requirements of the case-or-controversy limitation on judicial authority under Article III, Section 2 of the Constitution, the party invoking federal court jurisdiction must show that (i) it has suffered injury in fact; (ii) the injury is fairly traceable to the defendant's actions; and (iii) it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 153-55 (4th Cir. 2000). "The standing doctrine, of course, depends not upon the merits, but on whether the plaintiff is the proper party to bring the suit." McBurney v. Cuccinelli, 616 F.3d 393, 402 (4th Cir. 2010) (internal quotation omitted). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570). Under Twombly and Iqbal, a plaintiff is required to plead facts permitting a reasonable inference that a defendant is liable for the misconduct alleged, and the court is to draw on judicial experience and common sense in its review.

A "sheer possibility that a defendant acted unlawfully" is not enough to demonstrate either standing to proceed under Federal Rule of Civil Procedure 12(b)(1) or a plausible claim under Federal Rule of Civil Procedure 12(b)(6). Iqbal, 129 S. Ct. at 1949. Rather, the standard "requires the plaintiff to articulate facts" showing "the 'plausibility of entitlement to relief.'" Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009) (quoting Iqbal, 129 S. Ct. at 1949, Twombly, 550 U.S. at 557). Here, the Court directed the City to overcome the difference in its pleading between "possibility" and "plausibility" and it could not. A pair of guesses that properties maybe would have been occupied but for Wells Fargo loans and that such loans were discriminatory will not suffice.[3] This is especially so when the plaintiff itself has offered a litany of alternative explanations for the vacancies at issue. (See, e.g., Ex. 1).

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

Consistent with the governing Supreme Court precedent on the strictures of "fairly traceable" causation, each court to have adjudicated the theories of causation advanced here has rejected them. See, e.g., City of Baltimore v. Wells Fargo Bank, 677 F. Supp. 2d 847

[3] A recent decision in the Central District of California underscores the point that the Court need not accept the City's inference of discrimination at this stage of the litigation. In United States v. Nara Bank, No. CV-09-07124, 2010 WL 2766992 (C.D. Cal. May 28, 2010), the government presented statistical evidence of discrimination in pricing on the basis of race or national origin in auto loan financing. In dismissing the case, the court found that the statistics were incomplete and that loan rates not included in the government's analysis may have undermined it. Therefore, the statistics did "not say much at all." Nara Bank, 2010 WL 2766992, at *3. The court so concluded even in light of the fact that the statistics were tied to particular borrowers at issue. Here, the City's pleading falls short even of the complaint in Nara Bank. It has failed to provide anything more than conclusory statistical and generalized allegations relating to alleged discriminatory practices and then, separately, the existence of certain vacant properties. (TAC ¶ 37). In other words, the statistics are empty, unsupported assertions and, worse, bear no relationship to the properties that form the basis of the TAC.

In addition, the government in Nara Bank utilized the racial classifications "Asians" and "non-Asians" in its disparate impact analysis, which the court viewed to be "vague at best and meaningless at worst." Id. at *2. Here, the City has used "African-American neighborhoods" as a proxy for African-Americans in an effort to state a Fair Housing Act claim. (See, e.g., TAC ¶ 37). The use of geography as a proxy for race is likewise imprecise at best and meaningless at worst. The crude assumption that subject loans were originated by African-American borrowers simply because they were secured by properties in neighborhoods populated by a certain percentage of African-American residents is a paltry foundation for a Fair Housing Act claim.

(D. Md. 2010); Dismissal Order; City of Birmingham v. Citigroup, Inc., No. CV-09-BE-467-S, 2009 U.S. Dist. LEXIS 123123 (N.D. Ala. Aug. 19, 2009); City of Cleveland v. Ameriquest Mortgage Sec., Inc., 621 F. Supp. 2d 513 (N.D. Ohio 2009). To establish the "line of causation between that conduct" and damages articulated by the Supreme Court in Allen v. Wright, 468 U.S. 737, 757 (1984), the City must demonstrate that it is "likely [that] the plaintiff's injury was caused by the challenged conduct of the defendant, and not by the independent actions of third parties not before the court." Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4th Cir. 2002). Accordingly, the City does not have standing to bring the instant action if "the existence of one or more of the essential elements of standing depends on the *unfettered choices made by independent actors not before the courts* and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." Frank Krasner Enters., Ltd. v. Montgomery Cnty, Md., 401 F.3d 230, 235 (4th Cir. 2005) (internal quotations and citations omitted) (emphasis in original).

The court in City of Birmingham stated that "a series of speculative inferences must be drawn to connect the injuries asserted with the alleged wrongful conduct by the Defendants" in light of the fact that "the minority borrowers in this case could have defaulted on their mortgages for a number of reasons, none of which related to the Defendants' alleged 'reverse redlining.'" (City of Birmingham, 2009 U.S. Dist. LEXIS at *12). The court also found that the "loss of tax revenue from property taxes and the increase in spending, like the depreciation in home values, could have been caused by any number of factors having nothing to do with the Defendants' alleged 'reverse redlining.'" Id. at *13. Therefore, the court concluded on the basis of basic standing principles—and not for lack of a record of particularized damages by address that might have led to a different outcome—"that the alleged injuries to the City are

too tenuously connected, and so not fairly traceable, to the Defendants' alleged misconduct in this case." Id.

Upon reviewing allegations of a similar causal chain relating to uncreditworthy borrowers, the court in Tingley v. Beazer Homes Corp., No. 3:07-CV-176, 2008 WL 1902108, at *5 (W.D.N.C. Apr. 25, 2008), found that:

> it does not necessarily follow from this allegation that these third party home buyers subsequently defaulted on their mortgages due to the Defendants' conduct rather than those buyers having failed to make their mortgage payments as a result of other factors, such as unemployment, health problems, a general weakening in the economy, or other financial conditions . . . To the extent that any diminished values resulted from the foreclosures, however, the connection remains too tenuous to provide standing.

Id. at *4. Also reviewing allegations relating to the causal nature of default, the court in City of Cleveland, found that "the borrower may have lost a job . . . suffered a catastrophic injury, borrowed too much on credit cards . . . suffered investment losses that depleted savings . . . or, despite an ability to pay, simply decided to walk away from the mortgage . . . ." and that "[s]orting out these contributing factors in an effort to assign liability would be a speculation-laden, uncertain endeavor . . . ." City of Cleveland, 621 F. Supp. 2d at 534-35.

In affirming the district court's decision, the Sixth Circuit recently held in City of Cleveland v. Ameriquest Mortgage Sec., Inc., 615 F.3d 496, 506 (6th Cir. 2010), that it was "impossible for Cleveland to plead proximate cause." The court explained:

> The alleged damages [to the City] that subsequently occurred [after foreclosure]—eyesores, fires, drug deals, and looting—were also not directly caused by the Defendants. Homeowners, whether the initial buyers or mortgagees that later took possession of a home, were responsible for maintaining their properties. Fires were likely started by negligent or malicious individuals or occurred because a home was poorly built. Drug dealers and looters made independent decisions to engage in that criminal conduct. Additionally, other companies not listed in the

> complaint financed sub prime loans and properties not subject to a sub prime loan nevertheless entered into foreclosure. Similar to Holmes and Anza, Cleveland had not stated a viable claim when these actions could have occurred for 'any number of reasons unconnected to the asserted pattern of [misconduct].'

Id. at 505.

Holdings from these opinions are applicable verbatim to the TAC. It does not follow from the City's allegation of discriminatory lending practices that third-party home buyers in Baltimore defaulted on their mortgages because of alleged misconduct by Wells Fargo rather than as a result of other factors. The City has identified no borrower with a "bad" loan causing a foreclosure. Likewise, the City has identified no property with a Wells Fargo foreclosure causing a vacancy not otherwise attributable to the City's endemic vacancy problems in the nearly three years since it filed the first predecessor complaint to the TAC—despite the Court's clear direction that such a showing was a prerequisite to pursuing the action. (See, e.g., Mot. Hr'g Tr. 37:2-4, Sept. 8, 2010).

Moreover, it does not follow from default that a property will, for example, become infested by vermin or that a gang will use it to conduct illegal activity. Because other factors inexorably interrupt the causal chain that the City must establish to have standing, the City has not pleaded proximate cause in this case. Indeed, nothing in the TAC alters the soundness of this Court's prior analysis—consistent with the analyses of other courts addressing the same theories—that the City's theories of liability fail to set forth plausible causal chains as required by Allen and Frank Krasner Enterprises.

Wells Fargo already 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. However, as a matter of law, it is unnecessary for Wells

Fargo to bear the burden of making such a specific showing. As illustrated by the City of Birmingham case, this is abundantly clear where, as here, the City's own allegations plainly demonstrate that to make the necessary causal connections between Wells Fargo's lending practices and the City's claims of property tax revenue diminution and increased municipal costs, the Court would have to draw a series of wholly speculative inferences dispositive of the standing question. Even if the City had been able to provide the Court with a single borrower as to whom it claims any basis to make such inferences—and it could not—the Court need not undertake a specific examination of each default, each vacant property, each drug transaction or other criminal offense, each squatter's discarded trash, and each pest infestation to conclude that it is not possible to establish that alleged misconduct by Wells Fargo was the fairly traceable cause of any alleged injury to the City.

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

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

The 14 additional paragraphs in the TAC purport to address whether lending practices may lead to vacancy. Since vacancy itself results in no cost to the City, the City attempts to connect purported damages inflicted by unrelated third parties to Wells Fargo in one

sentence of its 112-page TAC with the bald assertion that "[t]hese services would not have been necessary if the properties were occupied" (TAC ¶ 111) and that they were made vacant by Wells Fargo's lending activities. These assertions ignore the fact that 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. The 14 paragraphs added to the TAC do nothing to address it. More importantly, the City does not point to a single borrower, whose default resulted in a vacancy at a specific property address, alleged to have received a subprime loan instead of a prime loan or a loan without appropriate credit qualifications at all. Indeed, recent statements by the City's Mayor and Housing Commissioner contradict any inference that Wells Fargo's conduct triggered vacancies, as these City officials rightly cite broad social and economic factors as the cause of Baltimore's vacancy problems. (See Ex. 1). Put simply, the TAC offers no basis for concluding that vacancies at the 190 properties cited by the City were triggered by any factor other than the decades-old problems acknowledged by the plaintiff itself.

CONCLUSION

For the reasons set forth above and in the Memorandum of Law in Support of Defendants' Motion to Dismiss the Second Amended Complaint, the Court should dismiss the Third Amended Complaint with prejudice.

Respectfully submitted,

Dated: December 3, 2010

/s/ Andrew L. Sandler

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

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

CERTIFICATE OF SERVICE

I certify that the foregoing document, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent by First Class Mail to those indicated as non-registered participants as of December 3, 2010.

Dated: December 3, 2010

/s/ Andrew L. Sandler
Andrew L. Sandler