UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

On July 2, 2009, the Court denied Defendants Wells Fargo Bank, N.A. and Wells Fargo Financial Leasing, Inc.'s (collectively "Wells Fargo") motion to dismiss Plaintiff Mayor and City Council of Baltimore's ("Baltimore" or "City")'s original Complaint. *See Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A.*, 631 F. Supp. 2d 702 (D. Md. 2009) ("Opinion" or "Op."). The Court's ruling was based on extensive written submissions from the parties totaling more than 2500 pages and multiple in-person and telephonic hearings, culminating in a day-long evidentiary hearing on June 29, 2009. The record was developed in such detail because Judge Legg wanted to "look under the hood" before deciding whether Baltimore was entitled to proceed with its case. Hr'g Tr. (Mar. 4, 2009) at 6; Hr'g Tr. (June 3, 2009) at 14, 24.

Judge Legg took the unusual step of ordering a full evidentiary hearing on the initial motion to dismiss because he wanted to take a more detailed look at the evidence of injury and causation in support of the City's standing. The hearing proved to be as searching as one could expect at the Rule 12 stage. At the Court's request, *see* Mem. to Counsel (Mar. 6, 2009) (Docket No. 58) at 1-2, the City presented evidence that Wells Fargo targeted African-American borrowers and African-American neighborhoods in Baltimore for less favorable loan terms than similarly situated whites; that Wells Fargo employees used their discretion to steer African-American borrowers who qualified for prime loans into subprime loans; that these discriminatory practices resulted in disproportionate rates of foreclosure and vacancy in Baltimore's African-American neighborhoods; and that the injury caused by Wells Fargo's discriminatory practices is fully capable of precise measurement. *See* Mem. to Counsel (Mar. 6, 2009) (Docket No. 58) at 1-2. All told, the City presented nineteen sworn declarations and live testimony from three witnesses. Wells Fargo, of course, was afforded equal time to present its evidence in support of the very arguments against standing and causation that it is making for the second time in its new motion to dismiss. At the conclusion of the hearing, Judge Legg held that "the facts in support of the City's claim of standing are sufficiently plausible and grounded in fact to permit the case to proceed to merits discovery," and that the City had "proffered sufficient proof" of discrimination to state a claim. Op. at 3. On August 6, 2009, at the conclusion of a hearing on the parties' respective discovery plans, this Court directed the parties to proceed with discovery pursuant to the framework proposed by the City. *See, e.g.*, Hr'g Tr. at 43, 50.

Defendants' new motion to dismiss (Sept. 18, 2009) (Docket No. 126) ("MTD II"), though technically aimed at Baltimore's First Amended Complaint ("FAC"), is in reality nothing more than a motion to reconsider the July 2 decision. The motion must be denied because Defendants themselves do not even purport to satisfy any of the essential predicates for a motion to reconsider, *i.e.*, the identification of newly discovered evidence, an intervening change in controlling law, or a manifest error of law. *See, e.g.*, *Potter v. Potter*, 199 F.R.D. 550, 552 n.1 (D. Md. 2001). Wells Fargo simply wants the Court to "'change its mind,'" but that is not a proper basis for seeking reconsideration. *Johnson v. Montminy*, 289 F. Supp. 2d 705, 706 (D. Md. 2003) (Motz, J.) (quoting *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982)). Indeed, of the 332 pages filed by Defendants in support of their new motion to dismiss, virtually all were submitted by Wells Fargo in support of its first motion to dismiss. Of the pages that are not identical, all of the points made merely restate in a different form the same arguments that the Court has already rejected. Moreover, Defendants' motion is untimely because motions for reconsideration must be filed within ten days of the underlying ruling. *See* Local Rule 105(10).

The sole new item in Defendants' submission is its reference to *City of Birmingham v. Citigroup, Inc.*, No. CV-09-BE-467-S (N.D. Ala. Aug. 19, 2009), a case about the causation prong of standing that provides no support for reconsideration. This unpublished decision from outside the Fourth Circuit does not raise any issue that Judge Legg did not already consider and that he did not require Baltimore to address with detailed evidence. Indeed, Judge Legg was focused on the issue of causation from the beginning of the first hearing on the first motion to dismiss. *See, e.g.*, Hr'g Tr. (Jan. 28, 2009) at 10 ("The trickier issue in thinking about the City's complaint is trying to find some way of quantifying the damage of the increased cost to the City . . ., figuring out what portion of the harm is caused by these Wells Fargo vacancies when there are so many vacant houses in the city."). In response, Baltimore created a record containing extensive evidence of causation. Judge Legg held that Baltimore's evidence was sufficient and therefore rejected Wells Fargo's causation challenge.

The record in *City of Birmingham*, to the contrary, included no evidence at all of causation (or anything else). Birmingham copied the background portion of Baltimore's original complaint, but the similarity between the cases ends there. Birmingham made no allegations whatsoever that were particular to the seven lenders it sued and presented no evidence, by way of declarations, witness testimony or statistics of any kind, that those lenders were engaged in any wrongdoing, much less wrongdoing that caused injury to Birmingham. Baltimore, by contrast, has submitted nineteen detailed declarations, live testimony from three witnesses, and additional evidence showing how Wells Fargo discriminates against City residents, the many ways that the City has been injured by Wells Fargo's discriminatory acts, and the scientific methodology by which the City's injuries will be traced to those acts and quantified. Baltimore has incorporated most of this evidence in its amended complaint. Birmingham did none of this, relying instead on generalized allegations about subprime lending that had nothing to do with the defendants in that case. Thus, Wells Fargo's claim that *City of Birmingham* and this case are "identical," MTD II at 6, 7, could not be more plainly wrong, and the dismissal of Birmingham's unsupported complaint is neither surprising nor relevant.

Moreover, the direct and powerful evidence presented here, but wholly absent in *City of Birmingham*, has already answered all of Judge Legg's questions about discrimination, discretion, and standing, including the question of causation that was also raised in *City of Birmingham*.

First, Baltimore's evidence goes to the heart of its claims of reverse redlining and demonstrates in detail how Wells Fargo used discretion in pricing and financial incentives to encourage its employees to target African-American neighborhoods in Baltimore for deceptive, high priced loans that resulted in unnecessary foreclosures. In graphic terms, declarations from former Wells Fargo loan officers describe first-hand how employees specifically targeted zip codes in Baltimore and nearby areas that are African-American for subprime mortgage loans; targeted African-American churches and their congregations in Baltimore for subprime loans, but did not target white churches; selected African-American employees to solicit subprime business from African-American audiences and communities, and actually refused to let white employees make presentations to African-American audiences; drafted subprime marketing materials on the basis of race by using software to "translate" the materials into what Wells Fargo literally defined as the "language" of "African American;" referred to subprime loans located in minority communities as "ghetto loans;" referred to minority customers as "mud people," "niggers," those with "bad credit" and those who "don't pay their bills;" and generally fostered a discriminatory culture that was tolerated by management. *See* FAC Attach. M ("Jacobson Decl."); Attach. N ("Paschal Decl.").[1]

[1] Tony Paschal and Elizabeth Jacobson, as described in greater detail in their declarations and below, were longtime Wells Fargo loan officers until 2007.

These declarations are further supported by a declaration from mortgage broker Peter Hebert, who describes how Wells Fargo used brokers to target Baltimore for abusive subprime mortgage practices. Hebert testifies that Wells Fargo was the only one of the many lenders he worked with that targeted Baltimore in this way. *See* June 29, 2009 Hr'g Ex. ("Hr'g Ex.") 3 ("Hebert Decl."). *See also infra* at 15-18.

Second, the evidence also makes clear precisely how Wells Fargo employees used the discretion they were afforded under Wells Fargo rules to steer borrowers who qualified for prime loans into subprime loans. Wells Fargo employees steered borrowers who qualified for prime and Federal Housing Administration ("FHA") loans into much more costly subprime loans; gave loan officers broad discretion and large financial incentives to steer customers into subprime products with increased interest rates, points, and fees that put, in one declarant's words, a "bounty" on African Americans targeted for subprime loans; deceived customers in order to give them subprime loans by, for example, telling them not to put any down payment on a property or not to submit full documentation for their loan, which would cause the loans to "flip" from prime to subprime; deceived African-American borrowers by telling them their interest rates were locked, when in fact they were not and could be reduced; and deceived African Americans about the full range of more advantageous products that were available to them and for which they qualified. *See* Jacobson Decl.; Paschal Decl. In light of the routine use of these practices, Wells Fargo subprime lenders joked morbidly among themselves that they were "riding the stagecoach to Hell." Jacobson Decl. ¶ 31. *See infra* at 18-23.

Third, the evidence clearly shows that Baltimore has standing. The Court explained in considering Wells Fargo's standing argument the first time that "the big issue is, are the [properties] vacant or not?" *See* Hr'g Tr. (Jan. 28, 2009) at 106. The Court suggested that if the

Wells Fargo foreclosure properties were vacant, it would not be difficult to see that Baltimore has been injured and has standing. *See id.* at 106, 111-12. The evidence demonstrates that they are. Dr. Ira Goldstein's testimony shows that of the 401 Wells Fargo foreclosures from 2005 to 2008 that have been identified to date, 230 of the properties were vacant after the Wells Fargo loan was originated. Of these 230 vacant properties, 163 (71%) are located in predominantly (*i.e.*, over 60%) African-American neighborhoods; 80 of these 163 remain vacant. *See* Hr'g Tr. (June 29, 2009) at 71-81; FAC Attach. O ("Goldstein Decl."); Hr'g Ex. 5 ("Goldstein Suppl. Decl.").

The evidence also confirms that these vacancies cause substantial injuries to the City. Jason Hessler, Acting Director of Baltimore Housing's Code Enforcement Legal Section, testified in writing and in person that vacancies typically create a range of public health and safety problems that the City must devote substantial resources to address. Hessler testified that the resulting costs can be quantified precisely using detailed property-by-property records maintained by the City. He provides examples of the extensive responses required of the City at several of the Wells Fargo foreclosure properties, showing that Baltimore is repeatedly forced to allocate costly resources to address one problem after another at vacant houses. *Id*. Hessler also describes the typical costs associated with such responses and establishes that the costs associated with individual properties can be identified and quantified. Hr'g Tr. (June 29, 2009) at 54-70; Hr'g Ex. 7 ("Hessler Decl."); Hr'g Ex. 8 ("Hessler Suppl. Decl.").

Declarations from eleven City residents who live next door to or a few houses down from some of the vacant properties further explain how the public health and safety problems identified by Hessler and other problems created by the vacancies cause their neighborhoods to deteriorate and their properties to lose value. FAC Attachs. P-S; Hr'g Exs. 13-19. This shows that, as Baltimore alleges, vacancies also cause the City to lose significant property tax revenue by bringing down the value of surrounding homes. Dr. Goldstein and Dr. Richard Voith both confirm that the City's tax loss attributable to each Wells Fargo foreclosure can be quantified precisely using a well-established methodology. Hr'g Tr. (June 29, 2009) at 82-86; Goldstein Decl.; Goldstein Suppl. Decl.; Hr'g Ex. 6 ("Voith Decl."). *See infra* at 24-32.

This voluminous evidence plainly establishes that Baltimore has standing under the leading Fair Housing Act case on municipal standing, *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979) ("*Gladstone*"), and its progeny. *Gladstone* found that a village had standing under a motion to dismiss standard of review based on mere *allegations* of injury to the village's property tax base that were much less specific than the detailed *evidence* of injury to the tax base submitted by Baltimore.

In sum, Baltimore's evidence shows that Wells Fargo has targeted African Americans, that Wells Fargo employees have discretion to select loan products and terms and have used their discretion to the detriment of African Americans, that Wells Fargo employs subjective and discretionary underwriting practices that have disparately impacted African Americans, and that Baltimore has been injured by Wells Fargo's unlawful acts. No such evidence as to any defendant was presented in *City of Birmingham*, where seven lenders were sued at the same time. Accordingly, Baltimore's detailed evidence once again requires the denial of Wells Fargo's motion to dismiss.

STANDARD OF REVIEW

A motion for reconsideration must be filed "not later than 10 days after entry of the order" unless Fed. R. Civ. P. 60 provides otherwise. Local Rule 105(10).

A motion for reconsideration is only appropriate in three circumstances: to correct a manifest error of law, to present newly discovered evidence, or because there has been an intervening change in controlling law. *See, e.g.*, *Potter v. Potter*, 199 F.R.D. 550, 552 n.1 (D. Md. 2001) (quotation marks and citations omitted). It is "improper to use such a motion to ask the Court to rethink what the Court has already thought through – rightly or wrongly." *Id* at 552 (quotation marks and citation omitted). Thus, when a motion to reconsider is "nothing more than a request that [the court] change its mind," the motion should be denied. *Johnson v. Montminy*, 289 F. Supp. 2d 705, 706 (D. Md. 2003) (Motz, J.) (same).

Defendants try to avoid the strict requirements for a motion to reconsider by asserting that, pursuant to the unpublished decision in *Plotkin v. Lehman*, 1999 WL 259669, 178 F.3d 1285 (table) (4th Cir. Apr. 30, 1999) (per curiam), "the Court has discretion to consider anew all issues underlying the original Motion to Dismiss to the extent they overlap." MTD II at 3 n.3. Contrary to this assertion, *Plotkin* does not support *de novo* reconsideration of issues already decided by the Court. *Plotkin* merely relied on the well-established (and inapposite) proposition that an interlocutory district court order does not constitute the law of the case. *See Plotkin*, 1999 WL 259669, at *1.[2] Only in limited circumstances may an interlocutory order be subject to a motion for reconsideration, *see, e.g.*, *Potter*, 199 F.R.D. at 552 n.1, and those circumstances are absent here.

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[2] The City also notes that Defendants misleadingly cite *Plotkin* as if it were a published decision. It is not.

BACKGROUND

A. WELLS FARGO'S FIRST MOTION TO DISMISS

Baltimore commenced this case by filing a detailed complaint alleging that Wells Fargo has violated the federal Fair Housing Act ("FHA") by targeting predatory lending practices at African Americans and residents of African-American neighborhoods in Baltimore since at least 2000. *E.g.*, Compl. (Jan. 8, 2008) (Docket No. 1) ¶¶ 3-6. The City further alleged that Wells Fargo's unlawful conduct has resulted in unnecessary foreclosures in African-American neighborhoods that have caused it tens of millions of dollars in direct and empirically quantifiable harm. *See id.* ¶¶ 67-70. This includes harm from vacancies caused by the completed foreclosures and from the filing of foreclosure actions, which contribute in a precisely quantifiable way to declines in property values and property tax revenues. *See id.* ¶¶ 66-70. Baltimore alleged that Wells Fargo discriminates intentionally and that its acts have a disparate impact on African Americans. *See, e.g., id.* ¶¶ 4-6.

Wells Fargo responded to the complaint by filing a motion to dismiss. *See* Defs.' Mot. to Dismiss the Compl. (Mar. 21, 2008) (Docket No. 10). Wells Fargo asserted that Baltimore lacks standing because it cannot establish injury or traceability; that disparate impact claims are not cognizable under the FHA; and that Baltimore failed to state a claim upon which relief can be granted. *See* Mem. of Law in Supp. of Defs.' Mot. to Dismiss the Compl. (Mar. 21, 2008) (Docket No. 10-2) ("MTD I").

The Court scrutinized Wells Fargo's initial motion to dismiss and Baltimore's opposition in great detail over the next 15 months. The Court held multiple hearings on the motion (including three in person); instructed counsel to address 30 written questions; and ordered limited discovery regarding a subset of the loans at issue. The purpose of the Court's thorough investigation was to see if the City had enough evidence to support standing and demonstrate a plausible basis for alleging FHA violations. Collectively the parties submitted over 2500 pages of argument and evidence to the Court with respect to the motion to dismiss.

The Court's investigation culminated in an all-day evidentiary hearing on June 29, 2009, to "determine whether the City's damage allegations in support of its standing are sufficiently plausible and grounded in fact to permit the case to proceed to full-fledged merits discovery . . . ." Op. at 2. Baltimore submitted nineteen declarations, live testimony from three witnesses, and additional evidence. Wells Fargo relied on a 74 page PowerPoint presentation, four affidavits, and live testimony from one of its affiants to make the very same arguments it is now asserting in this second motion to dismiss.[3] In addition, in a filing one week before the hearing, Wells Fargo argued that a decision from May 2009 – *City of Cleveland v. Ameriquest Mortgage Secs., Inc.*, 621 F. Supp. 2d 513 (N.D. Ohio 2009) – supported dismissal of Baltimore's complaint for lack of standing. *See* Defs.' Responsive Filing Pursuant to the Court's June 3, Order Regarding Pl.'s Prior Submissions (June 22, 2009) (Docket No. 85) at 2-4.

The Court denied Wells Fargo's motion to dismiss after the evidentiary hearing. *See* Op. The Court first held that Baltimore stated a claim based on declarations from two former Wells Fargo loan officers, Elizabeth Jacobson and Tony Paschal. *Id.* at 3. The Court then stated that, "[w]ith respect to standing, the Court has determined that the facts in support of the City's claim of standing are sufficiently plausible and grounded in fact to permit the case to proceed to merits discovery." *Id.*

In the same opinion denying the motion to dismiss, the Court directed the parties to submit a proposed plan for discovery. *Id.* at 3-4. At a hearing on August 6, 2009, the Court

[3] Baltimore had not been afforded access to the documents on which Wells Fargo's affiants relied or the opportunity to depose them.

accepted Baltimore's proposal and rejected Wells Fargo's, which would have sharply limited the amount of discovery available to Baltimore before summary judgment. Hr'g Tr. (Aug. 6, 2009) at 43 ("essentially, I'm buying the plaintiff's position"). Discovery is now underway.

B. BALTIMORE'S FIRST AMENDED COMPLAINT

While Wells Fargo's first motion to dismiss was pending, Baltimore filed its First Amended Complaint on June 1, 2009. The FAC incorporated most of the evidence that Baltimore later presented at the June 29 evidentiary hearing. The FAC updated the City's statistical allegations, added voluminous evidence, and did not alter the nature the City's claims in any respect. Nothing was subtracted from Baltimore's original complaint, and substantial rich and supported detail was added.

In a telephonic hearing on June 3, 2009, the Court stated that the June 29, 2009 evidentiary hearing would proceed as scheduled, notwithstanding the filing of the FAC. Hr'g Tr. (June 3, 2009) at 22. The Court added that if the initial motion to dismiss were denied after the evidentiary hearing, Wells Fargo would then be permitted to file a new motion to dismiss with respect to the FAC. *Id.* at 36.

C. WELLS FARGO'S SECOND MOTION TO DISMISS

The second motion to dismiss was filed on September 18, 2009. Wells Fargo's fourteen page brief only addresses Baltimore's standing and makes the same arguments about standing and causation that it asserted in the initial motion to dismiss. Just as it did in support of that earlier motion, Wells Fargo again casts aspersions on Baltimore's declarants; again relies heavily on *Allen v. Wright*, 468 U.S. 737 (1984), *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315 (4th Cir. 2002), *Frank Krasner Enters., Ltd. v. Montgomery County*, 401 F.3d 230 (4th Cir.

2005), and *City of Cleveland*; again attempts to disparage Baltimore's damages allegations and evidence as property tax, crime, and rehabilitation "theories;" and again touts the materials it presented at the June 29 hearing.

Likewise, Wells Fargo's three leading submissions in support of its first motion to dismiss reappear as exhibits to its new motion: the 49 page brief it submitted in March 2008, *see* MTD II at Ex. 1; the 74 page PowerPoint presentation it relied on at the June 29, 2009 evidentiary hearing, *see id.* at Ex. 4; and the 157 page collection of four affidavits it also relied on at the June 29, 2009 evidentiary hearing, *see id.* at Ex. 5.

Despite filing 332 pages in support of its second motion to dismiss, the sole item that was not before Judge Legg when he ruled on July 2 is the *City of Birmingham* case. Given that the record here is extensive, exceptionally detailed, and otherwise unchanged, it is not surprising that Wells Fargo relies so heavily on *City of Birmingham* in its new motion. This reliance, however, is misplaced. *City of Birmingham* and this case are not remotely analogous, much less "identical" as Wells Fargo claims, MTD II at 6, 7, and its citation by Wells Fargo does nothing to revive the standing argument that Judge Legg has already rejected. Birmingham rested on generalized, unsupported allegations about lending and injury unconnected to itself or the defendants it sued, while Baltimore has produced exactly the kind of detailed evidence requested and determined to be sufficient by the Court.

EVIDENCE IN SUPPORT OF BALTIMORE'S ALLEGATIONS[4]

A. EVIDENCE OF REVERSE REDLINING FROM FORMER WELLS FARGO LOAN OFFICERS WITH EXTENSIVE KNOWLEDGE OF DEFENDANTS' SUBPRIME LENDING PRACTICES

To evaluate the City's evidence of standing and causation, Judge Legg first focused on the evidence of "reverse redlining," or the practice of targeting African-American borrowers and African-American neighborhoods for predatory lending practices. Reverse redlining plausibly and logically results in higher rates of foreclosure in African-American neighborhoods than white neighborhoods because African-American borrowers either receive loans on materially worse terms than white borrowers or receive loans that should not have been made or are simply unaffordable.

Two of the declarations incorporated in Baltimore's FAC are from former Wells Fargo employees, Elizabeth Jacobson and Tony Paschal. Both have extensive direct knowledge of Wells Fargo's local subprime lending practices.[5]

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[4] Baltimore's reliance on evidence in opposition to the current motion to dismiss, as with its reliance on the same evidence in opposition to the first motion to dismiss, does not convert the motion into a Rule 56 summary judgment motion. With respect to the standing challenge under Rule 12(b)(1), the Court may accept evidence under Rule 12, as Judge Legg did. With respect to the Rule 12(b)(6) challenge, consideration of evidence incorporated in a complaint does not cause conversion. *See, e.g.*, *Schultz v. Braga*, 290 F. Supp. 2d 637, 651 n.8 (D. Md. 2003). Consistent with *Schultz*, Baltimore's evidence regarding the Rule 12(b)(6) argument is part of the First Amended Complaint. Baltimore's additional evidence – such as the live testimony from the June 29 hearing – goes to standing (or, in minor respect, merely confirms the evidence attached to the First Amended Complaint).

Moreover, as required under Rule 12 and recognized by Judge Legg, the Court must "accept[the City's evidence] and view[] it in the light most favorable to the Plaintiff." Hr'g Tr. (June 3, 2009) at 24; *see also id.* at 14 ("did not intend the hearing to be a mini trial," "did not intend to resolve credibility determinations"), 23 ("credibility issue . . . is reserved for trial"). As Judge Legg further stated, any objection by Wells Fargo that Baltimore's evidence is "incomplete and misleading" "is essentially a determination to be made either at a summary judgment hearing . . . or [] trial if there is simply a dispute of facts." *Id.* at 22-23.

In addition to the evidence and arguments addressed in this brief, Baltimore also incorporates by reference its earlier submissions in opposition to Wells Fargo's first motion to dismiss. This is wholly proper because Wells Fargo has incorporated its earlier motion by reference. *See* MTD II at 3.

[5] Wells Fargo's continued gratuitous attacks on these individuals and their credibility are, as Judge Legg explained, "of no moment" under Rule 12. Hr'g Tr. (June 3, 2009) at 23.

Jacobson worked for Wells Fargo as a loan officer and then a sales manager from August 1998 until December 2007. Jacobson Decl. ¶ 2. She "worked directly with loan applicants to make subprime loans." *Id.* ¶ 3. She made the loans in a geographic area called "Region 12" that includes Baltimore, Prince George's County, Northern Virginia, and other places. *Id.* "Much of [her] business came from referrals from Wells Fargo loan officers who were on the prime side of the business," known as "A reps." *Id.* Many of the customers referred to Jacobson by A reps lived in Prince George's County or Baltimore, and a large majority of her customers were African Americans. *Id.* ¶ 26.

Jacobson was one Wells Fargo's most successful subprime loan officers in the country. *Id.* ¶ 4. "In 2004 [she] made more subprime loans than any other loan officer at Wells Fargo anywhere in the country" and she "was always one of the top three Wells Fargo subprime loan producers in the country." *Id.* Jacobson completed approximately $50 million in subprime loans per year between 2003 and 2007. *Id.* ¶ 5. This translates into about 180 loans per year. *Id.* Because she made so many subprime loans and worked at Wells Fargo for so long, Jacobson "learned all of the 'ins and outs' of the subprime loan process at the company." *Id.* ¶ 7. Jacobson is white. FAC ¶ 62.

Tony Paschal, like Jacobson, has extensive experience in mortgage lending at Wells Fargo. He was a Wells Fargo loan officer from September 1997 to September 2007 (with a hiatus of approximately 2½ years beginning in June 1999) in the Sales and Marketing section in Annandale, Virginia. Paschal Decl. ¶¶ 2-3, 6. His job was to solicit Wells Fargo borrowers to refinance their home mortgage with a prime or FHA loan.[6] *Id.* ¶¶ 3, 7.

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[6] "FHA loans . . . offered lower interest rates that are closer to prime rates" than subprime rates. Paschal Decl. ¶ 23.

Paschal worked on the same floor as the Mortgage Resource division, "which is known by the acronym MORE and exclusively originated higher interest subprime loans." *Id.* ¶ 7. When borrowers did not qualify for prime or FHA loans, Paschal referred them to MORE. *Id*. He "communicated with [the MORE employees] every day." *Id.* Paschal is African-American. *Id.* ¶ 4.

B. EVIDENCE THAT WELLS FARGO TARGETS AFRICAN AMERICANS

The declarations from Tony Paschal and Elizabeth Jacobson demonstrate the lengths to which Wells Fargo has gone to target Baltimore's African Americans and neighborhoods that are predominantly African-American, as alleged in the FAC and in violation of the Fair Housing Act.

Paschal states that MORE employees in his office "targeted minority consumers for both purchase and refinance subprime loans," Paschal Decl. ¶ 8, and Jacobson confirms that "Wells Fargo Home Mortgage [an unincorporated division of Wells Fargo Bank, N.A.] tried to market subprime loans to African Americans in Baltimore," Jacobson Decl. ¶ 27. "The MORE division targeted zip codes in Washington, D.C. east of the Anacostia River, Prince George's County, Maryland and the City of Baltimore with predominantly African-American populations." Paschal Decl. ¶ 8; *see also id.* ¶ 10. "Subprime managers joked that Prince George's County was the 'subprime capitol of Maryland.'" Jacobson Decl. ¶ 26. At the same time, Wells Fargo refrained from targeting whites for subprime loans; Paschal "heard employees in the MORE division comment that Howard County was not good for subprime loans because it has a predominantly White population." Paschal Decl. ¶ 8.

Wells Fargo targeted African Americans in a variety of ways. One way was by directly sending marketing materials to zip codes with predominantly African-American populations. *Id.*

¶¶ 8, 10. It even tailored its subprime marketing materials on the basis of race. It devised software to print out subprime promotional materials in different so-called languages, one of which was "African American." *Id.* ¶ 11. A computer screen shot from 2006 showing this option is attached to Paschal's declaration. *Id.* at Ex. A. Wells Fargo did not remove the "African American" language option until Paschal complained. *Id.* ¶ 11.

Another "strategy used to target African-American customers [in Baltimore] was to focus on African-American churches." Jacobson Decl. ¶ 27. Like their lack of interest in targeting white areas such as Howard County, "[s]ubprime loan officers did not market or target white churches for subprime loans. When it came to marketing, any reference to 'church' or 'churches' was understood as code for African-American or black churches." *Id.* ¶ 30.

Wells Fargo combined its strategy of targeting African-American churches with another strategy – making sure that African-American employees were the face of the company for African-American audiences and customers. Jacobson was told by managers 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. She was likewise 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. Jacobson "complained to several higher ranking managers . . . . [but] the company did not respond to [her] complaints and no action was taken." *Id.* Likewise, a unit in Silver Spring hired an African-American employee for the specific purpose of targeting African-American churches and their members for subprime loans. Paschal Decl. ¶ 12. Paschal further confirms that Wells Fargo "us[ed] minority subprime loan officers to solicit loans in [the minority] communities" it targeted. *Id.* ¶ 10. It "hired African-American loan officers exclusively from other subprime lenders," and "[i]n the Annandale office, all the MORE loan officers were African-American, even though their two managers were White." *Id.* ¶ 12.

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

This evidence is further supported by a declaration from Peter Hebert demonstrating that Wells Fargo also used mortgage brokers to target African-Americans in Baltimore. Hebert was a loan officer from 2002 to 2008 at Allied Home Mortgage Capital Corporation ("Allied"), a correspondent lender and mortgage broker that originated many loans for Wells Fargo in Maryland. Hebert Decl. ¶¶ 2-4, 8. Allied focused on borrowers with credit scores in the "sweet spot" of 580-620 because they were viewed as having good enough credit to qualify for a loan, but as having insufficient financial literacy to shop around for a better loan if Allied offered them a subprime loan. *Id.* ¶ 9. This made them "easy targets." *Id.* ¶ 11. Most of its customers in this credit score range were African American and it was known that the likely recipients of subprime loans in Baltimore were African American. *Id.* ¶ 10. Hebert learned from his branch manager that Wells Fargo asked Allied to target Baltimore. *Id.* ¶ 11. Hebert explains that it would have been obvious to anyone that the borrowers in the "sweet spot" pulled in by targeting

Baltimore would very likely be African American. *Id.* That is exactly what happened when Allied targeted Baltimore for Wells Fargo and "it exploited African-American borrowers." *Id.* ¶¶ 12-13. As a broker, Hebert worked with hundreds of lenders in addition to Wells Fargo, but he is not aware of any others that targeted Baltimore, and thereby African Americans, like Wells Fargo did. *Id.* ¶¶ 3, 11.

C. EVIDENCE THAT WELLS FARGO STEERS PEOPLE WHO QUALIFY FOR PRIME MORTGAGES INTO SUBPRIME MORTGAGES AND ENGAGES IN OTHER ABUSIVE SUBPRIME PRACTICES

1. Steering by Wells Fargo

Jacobson and Paschal also confirm that Wells Fargo regularly steered borrowers who qualified for prime and FHA loans into costly subprime loans. Paschal states that "I had access to Wells Fargo customers' loan records and application files for my work in the Sales and Marketing Division and regularly saw minority customers who had good credit scores and credit characteristics in subprime loans who should have qualified for prime or FHA loans." Paschal Decl. ¶ 12. He and others in his section were explicitly instructed by management to refer borrowers to the subprime unit even though they could have qualified for more desirable prime or FHA loans with additional time or assistance from him. *Id.* ¶ 9. He was even "reprimanded . . . for placing too many customers in FHA loans, when the company wanted me to refer them to a subprime loan officer . . . so that the company could make a greater profit on the loan." *Id.* ¶ 19.

Jacobson similarly states that "many of the referrals I received [from A reps] could qualify for a prime loan," but that "[w]hen I got the referrals, it was my job to figure out how to get the customer into a subprime loan." Jacobson Decl. ¶ 9. She adds that "[i]f I had access to

Wells Fargo's loan files right now and could review these files, I could point out exactly which of these customers who got a subprime loan could have qualified for a prime loan." *Id.*

2. Financial Incentives That Induce Wells Fargo Employees to Steer Borrowers

The reason loan officers steered people with better credit into subprime loans is that 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. Because "Wells Fargo charged higher interest rates and fees not only on its 2/28 and 3/27 subprime loans, but also on its subprime fixed-rate loans, than it did for prime loans," *id.* ¶ 22, it was more lucrative to originate subprime loans. This compensation system and the incentives it created allowed Jacobson to "gross[] more than $700,000 in sales commissions [in 2004]" and "more than $550,000 in commissions and pay" the following year. *Id.* ¶ 6. Wells Fargo likewise lavished expensive trips and gifts on successful subprime loan officers, even as foreclosures increased in recent years. *Id.* ¶ 32. This was part of a culture at Wells Fargo that focused exclusively on making the most money possible from a loan and not on putting borrowers in loans that were appropriate for them. *Id.*

Paschal confirms how the compensation system operates to the detriment of minorities:

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

Paschal Decl. ¶ 13.

As summarized by Jacobson, "[t]here was always a big financial incentive to make a subprime loan wherever one could." Jacobson Decl. ¶ 24.

3. <u>Broad Discretion That Allows Wells Fargo Employees to Steer Borrowers</u>

As Paschal's statement above indicates, loan officers were able to steer people with prime credit into subprime loans because Wells Fargo gave them broad discretion. Jacobson explains that Wells Fargo's "underwriting guidelines and pricing rules for prime and subprime loans . . . . [provided] more than enough discretion to allow A reps to steer prime loan customers to subprime loan officers like me. Likewise, the guidelines gave me enough discretion to figure out how to qualify most of the referrals for a subprime loan once I received the referral." Jacobson Decl. ¶ 11. This included "discretion to decide which subprime loan products to offer the applicant" "[o]nce I received a referral from an A rep." *Id.* ¶ 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:

> 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 of 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. With the referrals in hand, the subprime loan officers then took advantage of their discretion "to qualify the A rep referrals for subprime loans."

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

> person into a "stated income" loan, even if they had a W-2 statement that verified their income. By doing this, the loan was flipped from a prime to a subprime loan. I know that through some of these techniques borrowers with credit scores as high as 780 were steered into expensive subprime loans with as many as four points, even though they could have qualified for a prime loan.

Id. ¶ 17; *see also id.* ¶¶ 15 ("If, for example, a customer had a high credit score that would make them a good candidate for a prime loan, it was a simple matter to get them qualified for a subprime loan by telling the underwriting department that the customer did not want to provide documentation for the loan, had no source or seasoned assets, or needed to get the loan closed quickly."), 16. Paschal likewise explains that:

> Wells Fargo's loan officers also discriminated against minority refinance applicants by encouraging them to take out more cash from their home equity. By taking out more cash, the borrower would unwittingly increase the commission the loan officer received on the loan, while at the same time eliminating his ability to qualify for a prime or FHA loan. By encouraging the borrower to take out more cash, the loan officer knowingly increased the borrower's risk of foreclosure because of the higher loan amount.

Paschal Decl. ¶ 14.

Some loan officers went even further and falsified loan applications in order to put people with prime credit into subprime loans or to make subprime loans to borrowers who did not actually qualify for a loan. Jacobson Decl. ¶ 18. Jacobson states that "I was aware of A reps who would 'cut and paste' the credit report of a borrower who had already qualified for a loan into the file of an applicant who would not have qualified for a Wells Fargo subprime loan because of his or her credit history. I was also aware of subprime loan officers who would cut and paste W-2 forms." *Id.* She "reported this conduct to management and was not aware of any action that was taken to correct the problem." *Id.* It is predictable that these kinds of practices will result in foreclosures.

In 2004 Wells Fargo responded to public criticism by creating "filters" that were supposed to prevent the steering of prime customers into subprime loans. Jacobson Decl. ¶ 19, Paschal Decl. ¶ 18. It was widely understood that the filters were ineffective. *Id.* Loan officers learned many ways to work around the filters by using the broad discretion that Wells Fargo gave them. *Id.* Senior managers knew that loan officers were using these techniques and eventually made certain changes in response, but the loan officers continued to easily undermine the filters. Jacobson Decl. ¶ 20. The filters were also ineffective because Wells Fargo did not create disincentives to steering prime customers into subprime loans. Paschal Decl. ¶ 18. To the contrary, employees continued to have substantial financial incentives to engage in such steering, *id*, and management knew that these practices continued.

4. <u>Other Abusive Subprime Lending Practices By Wells Fargo</u>

Like the discretion and financial incentives loan officers had to put people who qualified for better loans into subprime loans instead, loan officers had discretion and financial incentives to originate the costliest subprime loans. "Subprime loan officers had discretion to decide what interest, points and fees to charge a borrower." Jacobson Decl. ¶ 22. And increasing the cost of a subprime loan would increase the loan officer's commission. *Id.* ¶ 24.

Paschal further explains how this discretion within the universe of subprime loans was used to harm minorities:

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

Paschal Decl. ¶ 5. Wells Fargo also "discriminated against minority loan applicants by not offering them its better or newer products which had lower fixed interest rates and fees." *Id.* ¶ 14.

Loan officers also deceived subprime borrowers about onerous prepayment penalties associated with their loans. *Id.* ¶ 15. The prepayment penalties typically made it difficult for borrowers to refinance into new and better loans, but loan officers were encouraged by Wells Fargo trainers not to tell applicants about them. *Id*. When the subject was raised, loan officers told borrowers that prepayment penalties could be waived, even though they could not be, or otherwise downplayed their significance. Jacobson Decl. ¶ 13.

With Wells Fargo engaged in so many abusive lending practices, Jacobson and her colleagues "morbidly joked that we were 'riding the stagecoach to Hell.'" *Id*. ¶ 31. Jacobson believes that "many current and former Wells Fargo employees" would corroborate her testimony if compelled to testify, but that they "may well be reluctant to come forward voluntarily to tell what they know for fear of retaliation, reprisal or other actions that could adversely affect their future careers in the lending industry." *Id.* ¶ 35.

D. WELLS FARGO'S REVERSE REDLINING HAS RESULTED IN AN EXCESSIVE RATE OF UNSUSTAINABLE LOANS IN AFRICAN-AMERICAN NEIGHBORHOODS

The discriminatory reverse redlining practices described in detail above have resulted in demonstrably less favorable outcomes for borrowers in Baltimore's African-American neighborhoods than borrowers in white neighborhoods. From 2005 to 2008, for example, over 60% of Wells Fargo's foreclosures were in Baltimore census tracts that are more than 60% African-American, while only 12% were in tracts that are less than 20% African-American. FAC ¶¶ 3, 51. The statistics are virtually the same for the period from 2000 through 2004. *Id.* ¶

51. Likewise, the percentage of Wells Fargo mortgages in Baltimore with high interest rates is dramatically higher for African-American borrowers. *Id.* ¶ 87. For years, the City's African Americans have been 3-4 times as likely as whites to receive a high-cost mortgage from Wells Fargo. *Id.* The starkness of these racial disparities is reflected in maps prepared by Dr. Goldstein that are incorporated in the FAC. Hr'g Tr. (June 29, 2009) at 73-74; FAC, map following ¶ 51; *id.*, maps following ¶ 89.

E. THE EVIDENCE SHOWS THAT BALTIMORE HAS STANDING BECAUSE IT HAS BEEN INJURED BY WELLS FARGO'S REVERSE REDLINING

With respect to proof of injury to the City and to causation, Judge Legg focused on evidence that the Wells Fargo foreclosures resulted in vacancies. The Court stated that, to determine whether the City has sufficient evidence to satisfy the standing requirement at the Rule 12 stage based on the Wells Fargo foreclosure properties, "the big issue is, are they vacant or not?" Hr'g Tr. (Jan. 28, 2009) at 106; *see also id.* ("Are they vacant or not? That's the significant issue."). The Court suggested that if the Wells Fargo foreclosure properties in African-American neighborhoods were vacant, it would not be difficult to see that the City has been injured by Wells Fargo's practices and that it has standing. *See id.* at 106, 111-12.

All three of the witnesses who testified on behalf of Baltimore at the June 29 hearing, and sixteen of the City's nineteen declarations, speak directly to the issue of the City's injury. The evidence shows that 230 of the 401 Wells Fargo foreclosure properties have been vacant after the Wells Fargo loan was originated, that 163 of these vacant properties (71% of them) are in predominantly African-American neighborhoods, that 80 of the 163 properties are currently vacant, and that the City is injured by the vacancies. Baltimore's evidence on standing comes from:

Jason Hessler, Esq., Acting Director of Baltimore Housing's Code Enforcement Legal Section;

Dr. Ira J. Goldstein, an expert on foreclosures and foreclosure-related research who formerly served as HUD's Director of Fair Housing and Equal Opportunity for the Mid-Atlantic Region;

Dr. Richard Voith, an expert on real estate economics who formerly served as Senior Economist at the Federal Reserve Bank of Philadelphia;

Richard and Stephen Faison, who live next door to a currently vacant Wells Fargo foreclosure property in a neighborhood that is 95.14% African-American;

Lisa Porter, who lives a few houses away from a currently vacant Wells Fargo foreclosure property in a neighborhood that is 97.37% African-American;

Bridget Ross, who lives two houses away from a currently vacant Wells Fargo foreclosure property in a neighborhood that is 81.25% African-American;

Keisha Brooks and Mike England, who live next door to a currently vacant Wells Fargo foreclosure property in a neighborhood that is 71.2% African-American;

Genevieve Matthews, who lives next door to a currently vacant Wells Fargo foreclosure property in a neighborhood that is 96.9% African-American;

Nona and Mishawn Evans, who live two houses away from a currently vacant Wells Fargo foreclosure property in a neighborhood that is 97.5% African-American;

James Mears, who lives next door to a currently vacant Wells Fargo foreclosure property in a neighborhood that is 97.6% African-American; and

Sheena Sykes, who lives next door to a currently vacant Wells Fargo foreclosure property in a neighborhood that is 95.5% African-American.[7]

Dr. Goldstein analyzed the data that the Court directed the parties to produce in limited discovery last spring. The data concerns the 401 Baltimore properties identified to date as

[7] Mr. Hessler, Dr. Goldstein, and Dr. Voith testified at the June 29 hearing. *See* Hr'g Tr. (June 29, 2009) at 54-87. They also submitted five declarations, one of which is attached to the FAC. *See* FAC Attach. Q; Hr'g Exs. 5-8. The remaining witnesses submitted declarations, four of which are attached to the FAC. *See* FAC Attachs. P-S; Hr'g Exs. 13-19.

having been subject to a foreclosure action filed between 2005 and 2008 on a Wells Fargo loan.[8] Goldstein Decl. ¶¶ 7-8; Hessler Suppl. Decl. ¶ 7. The data identifies 230 of these properties as having been vacant after the Wells Fargo loan was originated, including 115 that are currently vacant. Goldstein Decl. ¶ 9; Hessler Decl. ¶¶ 10-11; Hessler Suppl. Decl. ¶ 7. Goldstein determined that 163 of the 230 vacancies (or 71% of them) are located in African-American neighborhoods. Goldstein Decl. ¶ 9; Goldstein Suppl. Decl. ¶¶ 16-18. The concentration of these vacant properties in predominantly African-American areas is reflected on a map attached to Goldstein's initial declaration. *Id.* at Attach. 3. Moreover, 80 of the 115 currently vacant Wells Fargo foreclosure properties (or 69% of them) are in predominantly African-American neighborhoods while only 16% are in predominantly white neighborhoods.[9] *Id.* ¶ 10. Goldstein reiterated some of his findings at the June 29 hearing. Hr'g Tr. (June 29, 2009) at 73-81.

Additional evidence confirms that, as alleged in the FAC, vacant properties inflict particularly significant injuries on the City. *E.g.*, FAC ¶¶ 19-20, 111, 114-118. The evidence show that vacancies cause, among other harms, squatters, increased risk of crime and fire, and infrastructure damage such as burst water pipes and broken windows. Expensive responses by the City are required to address these harms. Vacancies likewise cause especially significant declines in property values and, therefore, in property tax revenues collected by the City.

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[8] The Court did not require production of parallel data for foreclosures between 2000 and 2004 in light of Wells Fargo's representations regarding its practice of archiving pre-2005 data. Hr'g Tr. (Feb. 20, 2009) at 3-4, 11, 14.

[9] Goldstein also confirmed that all of Wells Fargo's foreclosures in Baltimore follow a stark racial pattern. He found that 63% of the 379 properties initially identified are in predominantly African-American neighborhoods, but only 12% are in neighborhoods that are less than 20% African-American. Goldstein Decl. ¶ 8. Wells Fargo's overall lending in Baltimore is not racially concentrated in this manner, however; data for 2004 through 2007 released by Wells Fargo pursuant to the Home Mortgage Disclosure Act shows that Wells Fargo made 38.7% of its mortgage loans in Baltimore in predominantly African-American neighborhoods and 32.2% in neighborhoods that are less than 20% African-American (2008 data had not been released at the time of the evidentiary hearing). *Id.* ¶ 14.

Jason Hessler testified that Baltimore Housing's Code Enforcement Legal Section, of which he is the Acting Director, maintains detailed records of the work that the City has to do to mitigate the harm caused by vacant properties. The records are maintained on a property-by-property basis in a system called "Computerized Housing Inspection Program," or "CHIP." Hr'g Tr. (June 29, 2009) at 55-60, 68; Hessler Decl. ¶ 4; Hessler Suppl. Decl. ¶ 4. CHIP logs each housing code violation identified by City Inspectors, the notes and photographs taken by Inspectors when they visit vacant properties, and actions taken by the City to minimize the harm caused by violations. *Id.* For example, the logs for the Wells Fargo foreclosure property at 3803 Bonner Road – a neighborhood that is 96.9% African-American – shows that Baltimore has cited the property for 13 code violations since January 2007. Hessler Decl. ¶ 17; Goldstein Suppl. Decl. ¶ 15. The property has been boarded by the City eight times and cleaned of trash and debris seven times. Squatters and a fire have been reported at the property. Hessler Decl. ¶ 17.

Hessler also confirms that the City must expend substantial funds to address these kinds of problems at vacant properties. For example, cleaning a vacant property typically costs around $232, though it can cost much more, and boarding costs approximately $275. *Id.* ¶¶ 6-7. When the City has to demolish a vacant property because it is structurally unsound or a blight on the neighborhood, the cost ranges from $4,000 to $70,000. *Id.* ¶ 8.

Using the data from CHIP logs, Hessler testifies that the cost to the City of addressing the problems caused by the vacant Wells Fargo foreclosure properties can be precisely quantified. Hr'g Tr. (June 29, 2009) at 68-69; Hessler Decl. ¶ 17. Hessler likewise testifies that he can obtain police and fire records for the vacant properties and that those departments' costs can also be quantified. Hr'g Tr. (June 29, 2009) at 68; Hessler Decl. ¶ 9; Hessler Suppl. Decl. ¶¶ 9.

The declarations from Keisha Brooks, Mike England, Mishawn Evans, Nona Evans, Stephen Faison, Richard Faison, Lisa Porter, Genevieve Matthews, James Mears, Bridget Ross, and Sheena Sykes demonstrate in concrete and graphic terms that the responses described by Hessler are essential. FAC Attachs. P-S; Hr'g Exs. 13-19. These Baltimore residents highlight the kinds of harm that vacancies compel the City to respond to with costly resources, including resources for police and other municipal services, and how vacancies degrade neighborhoods and thereby harm property values and property tax revenues. *Id.* All of these residents live next door to or a few houses away from homes that are among the currently vacant Wells Fargo foreclosure properties and in neighborhoods that are over 70% African-American (and all but two in neighborhoods that are over 95% African-American). *Id.*; Goldstein Decl. ¶ 15; Goldstein Suppl. Decl. ¶ 15. They describe how the vacant properties have caused the quality of their blocks to decline due to crime, squatters, fires, trash, loitering, rats, burst pipes, and more. These are direct consequences of the Wells Fargo vacancies.

Genevieve Matthews lives next to the Wells Fargo foreclosure property at 3803 Bonner Road discussed by Hessler. Hr'g Ex. 15 at ¶ 3. It has been vacant for at least a year and has been occupied by squatters repeatedly. *Id.* ¶¶ 3-4. Confirming Hessler's testimony, Mathews explains that the City boards the property up, but new squatters break in and the City has to come back and board it again. *Id.* ¶ 5. Last year the squatters caused a fire at the vacant property. *Id.* ¶ 6. City firefighters had to come to put the fire out. *Id.* Mathews has lived on the same block for fifty years and always thought of it as safe and pleasant until the problems began with the Wells Fargo foreclosure property. *Id.* at ¶ 8. Now she is scared because she lives next door to a property that is occupied by squatters who could start another fire in the middle of the night. *Id.* ¶ 7.

Keisha Brooks and Mike England live next door to another vacant Wells Fargo foreclosure property, which the City recently boarded up. Hr'g Ex. 13 ("Brooks Decl.") at ¶¶ 3, 12; Hr'g Ex. 14 ("England Decl.") at ¶¶ 3, 12. Squatters kept a pitbull in the yard until it was taken away by the City. Brooks Decl. ¶ 8; England Decl. ¶ 8. Squatters have also held pitbull fights at the property. Brooks Decl. ¶ 9; England Decl. ¶ 9. The squatters smashed one of Brooks and England's front windows and they have had to call the police on several occasions about the vacant property. Brooks Decl. ¶¶ 10-11; England Decl. ¶¶ 10-11. Trash has been piled high at the property since it became vacant and it has rat and cockroach problems. Brooks Decl. ¶¶ 4-6; England Decl. ¶¶ 4-6. Two children had to be taken to the hospital as a result; a rat bit one and a cockroach became lodged in another's ear. Brooks Decl. ¶¶ 4-5; England Decl. ¶¶ 4-5. Brooks and England have decided to move to a different home in part because of problems associated with the vacant property. Brooks Decl. ¶ 13; England Decl. ¶ 13.

Mishawn and Nona Evans live two doors from another vacant Wells Fargo foreclosure property. Hr'g Ex. 17 ("M. Evans Decl.") ¶ 3; Hr'g Ex. 16 ("N. Evans Decl.") ¶ 3. It has had squatters and been boarded up by the City, but the squatters remove the boards and return. M. Evans Decl. ¶¶ 4-5; N. Evans Decl. ¶ 4. Mishawn has called the police several times about the property. M. Evans Decl. ¶ 5. One time the police came and recovered drugs, drug paraphernalia, and cell phones. *Id.* ¶ 4. Mishawn believes some of the squatters are drug dealers. *Id.* The vacant property has also created trash and rat problems. M. Evans Decl. ¶ 7; N. Evans Decl. ¶ 5. Nona called the City about the rats and the City put down rat poison, but the rats have returned. N. Evans Decl. ¶ 5. She had cement work done in an unsuccessful effort to keep the rats away. M. Evans Decl. ¶ 7; N. Evans Decl. ¶ 5. Nona tried to sell the house but was unable to get a good price; the Evanses believe that the vacant property has harmed the value of their home. M. Evans Decl. ¶ 9; N. Evans Decl. ¶ 6.

Richard Faison has had to call the police several times because of loiterers who hang out and drink at the vacant Wells Fargo foreclosure property next door to him, which was recently boarded. FAC Attach. P ("R. Faison Decl.") ¶¶ 3, 5. He also had to call the City to turn off the water and cap a pipe at the vacant house when the pipe burst. *Id.* ¶ 7. Richard and Stephen Faison both confirm that the vacant house is in serious disrepair and that it has created a rat infestation because loiterers and squatters let trash accumulate. R. Faison Decl. ¶¶ 4, 6, 8, 9; FAC Attach. Q ("S. Faison Decl.") ¶¶ 5-8. They cannot even hang clothing to dry in their backyard because loiterers steal it. S. Faison Decl. ¶ 8. Stephen no longer feels safe when he goes to work early in the morning because of strangers who loiter and sleep at the vacant house next to his. S. Faison Decl. ¶ 5.

The vacant Wells Fargo foreclosure property a few houses from Lisa Porter's home is also in disrepair. FAC Attach. R ¶¶ 4, 6. Trash is scattered in the yard, the grass is not cut, and rats have become an increasing problem since it became vacant. *Id.* ¶¶ 4-5.

Bridget Ross and her neighbors had to call the City to come and board up the vacant Wells Fargo foreclosure property two doors down from her home. FAC Attach. S ¶ 5. Vagrants stayed at the house until it was boarded. *Id.* ¶ 3. It is in disrepair, with a broken door and broken windows and large amounts of trash in the yard, and has also become a source of many rats. *Id.* ¶¶ 3, 6, 7. People have stolen plumbing from the vacant property. *Id.* ¶ 4. Ross has been trying unsuccessfully to sell her house for two years but the nearby vacant Wells Fargo foreclosure property has made her home lose value and has made it less desirable to potential purchasers. *Id.* ¶ 9.

The Wells Fargo foreclosure property next door to James Mears has been vacant for at least two years. Hr'g Ex. 18 at ¶ 3. Squatters and vandals are regularly at the property drinking and using drugs. *Id.* ¶¶ 3-4. Mears has had to call the police multiple times because of the illicit activities at the property. *Id.* ¶ 5. The vacant property has caused rat, mice, and water problems at his home. *Id.* ¶¶ 6-7. Plumbing has been stolen from the property. *Id.* ¶ 4. The condition of the property negatively affects the neighborhood, and Mears and his neighbors have discussed the problems caused by the vacant property at community meetings. *Id.* ¶ 9.

Sheena Sykes lives next to another Wells Fargo foreclosure property. Hr'g Ex. 19 at ¶ 3. It has been vacant since she moved in a year ago. *Id.* ¶¶ 2-3. The property has been inhabited by squatters and the City had to board it and clean up the trash and debris left by the squatters. *Id.* ¶¶ 4-6, 9. The City also had to send the police because of the squatters. *Id.* ¶ 6. The City has also had to come to take care of mice that spread from the vacant property to Sykes's home. *Id.* ¶ 7.

In addition to the cost of providing City services to address the harm caused by the vacant Wells Fargo foreclosure properties, Baltimore alleges that the serious problems described by Hessler and the neighboring residents cause the City to lose significant property tax revenue as property values decline. *See* FAC ¶¶ 1, 19, 110-11, 114, 123. Dr. Voith and Dr. Goldstein confirm that there is a sound, well-established methodology for calculating the City's lost property taxes that can be applied in this case to calculate Baltimore's damages. Hr'g Tr. (June 29, 2009) at 82-86; Voith Decl. ¶¶ 4-10; Goldstein Suppl. Decl. ¶¶ 7-13. The methodology, known as hedonic regression, allows the City to "estimate the impact [on property values] of foreclosures of Wells Fargo loans, even if they represent a fraction of the total loans entering the foreclosure process in Baltimore neighborhoods," and then "estimate City [property tax] revenue impacts." Voith Decl. ¶¶ 8-9.

The testimony from Hessler, Goldstein, Voith, and the neighbors of vacant Wells Fargo foreclosure properties demonstrates that the City is harmed by vacancies stemming from Wells Fargo's foreclosures. They confirm that vacancies cause neighborhoods to deteriorate, which reduces property values, and cause an increased demand for costly City services. They demonstrate that, to respond to the problems caused by the vacancies, the City must devote additional funds to policing, removing trash, boarding up properties, repairing infrastructure such as burst pipes, fire protection, and more.[10] The concentration of vacancies in Baltimore's African-American neighborhoods – shown by Dr. Goldstein – therefore establishes that the City has been injured by Wells Fargo's discriminatory lending practices. Goldstein and Voith further demonstrate that the injury can be quantified through sound scientific methods.

ARGUMENT

A. WELLS FARGO'S MOTION TO DISMISS IS ACTUALLY A MOTION FOR RECONSIDERATION THAT IS UNTIMELY AND FAILS TO MEET THE HIGH STANDARD FOR SUCH A MOTION

Wells Fargo's new motion to dismiss is nothing more than a rehash of its first motion to dismiss, with an added citation to *City of Birmingham*. This is entirely explicit – apart from referencing *City of Birmingham*, Wells Fargo's short memorandum simply repeats its old standing argument and the same case law and evidence in support, incorporates its first and much longer motion to dismiss by reference, and attaches the material it presented at the June 29

[10] These declarations also corroborate studies incorporated in the FAC finding that large measurable foreclosure-related injuries to city governments occur when homes are left vacant. *See* FAC ¶¶ 120-122; W. Apgar, M. Duda & R. Gorey, *The Municipal Costs of Foreclosures: A Chicago Case Study* (Feb. 27, 2005) at 23; Anne B. Shlay & Gordon Whitman, *Research for Democracy: Linking Community Organizing and Research to Leverage Blight Policy* (2004) at 161-62.

hearing. Once again, Wells Fargo refers to the ways in which Baltimore has been injured as "property tax," "crime," and "rehabilitation" "theories," and once again it asserts that the causal connection between reverse redlining and these types of injuries is too speculative and attenuated. *Compare* MTD I at 2, 11-12, 16-20 *with* MTD II at 2-11. Every single factual and legal argument that Wells Fargo relies on was discussed and examined by the Court throughout the lengthy, multi-hearing process that Judge Legg used to assess, and ultimately deny, the first motion to dismiss. Indeed, the vast majority of Wells Fargo's submission is literally the same as what it submitted last time. Even Wells Fargo's reliance on *City of Birmingham* fails to raise any new argument; rather, that case is cited as purported support for the very standing argument rejected by the Court on July 2.

It is, accordingly, apparent that Wells Fargo has not even attempted to satisfy the very high standard applicable to a motion for reconsideration. Wells Fargo does not purport to present any new evidence; it does not assert that the Court committed a manifest error of law; and it does not argue that there has been an intervening change in controlling law. *See, e.g.*, *Potter v. Potter*, 199 F.R.D. 550, 552 n.1 (D. Md. 2001). The only thing new in the instant motion is its citation to *City of Birmingham*, an unpublished district court case from outside the Fourth Circuit that plainly would not constitute controlling law even if it were on point (which, as discussed below, it is not). Wells Fargo is transparently hoping that the Court will simply "change its mind," but such a wish does not provide a valid basis for a motion to reconsider. *Johnson v. Montminy*, 289 F. Supp. 2d 705, 706 (D. Md. 2003) (Motz, J.) (quoting *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982)).

Furthermore, the motion is untimely because a motion to reconsider must be filed within ten days of the underlying decision. *See* Local Rule 105(10). The motion should be denied on this basis alone.

B. *CITY OF BIRMINGHAM* IS ENTIRELY INAPPOSITE

Wells Fargo emphasizes Judge Bowdre's conclusion in *City of Birmingham* that it would require too much speculation to connect Birmingham's alleged loss of tax revenue and added costs for police and fire protection to discriminatory reverse redlining, and that other factors could have caused such injuries. *See* MTD II at 3, 10. Yet these are exactly the same legal arguments that Wells Fargo made from the start, *see* MTD I at 2, 11-12, 16-20, which Judge Legg assessed and rejected in light of a detailed evidentiary record that wholly distinguishes this case from *City of Birmingham*. Thus, from a legal perspective, Wells Fargo's reliance on *City of Birmingham* raises nothing new, and from a factual and evidentiary perspective, the two cases could not be more different.

Even if the Court were to reconsider Wells Fargo's old standing argument in light of *City of Birmingham*, the vastly different records make clear that the case has no relevance whatsoever. The record in *City of Birmingham* was utterly void of any allegations or evidence specifically linking the seven defendants to discriminatory lending or injury to the plaintiff. A review of Birmingham's complaint demonstrates that it merely made general allegations (copied from the first part of Baltimore's original complaint) about subprime lending, predatory practices sometimes associated with subprime lending, reverse redlining, and the harm that can result. *See* MTD II Ex. 3 (Docket No. 126-5). Remarkably, Birmingham simply stopped there. Thus, the dismissal of Birmingham's case was only an ordinary application of the most basic rules of pleading.

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

By contrast, Judge Legg insisted that the record here would have to contain detailed evidence of standing and discrimination if Baltimore were to move past the Rule 12 stage. This included evidence of causation geared to the very same standing argument raised in *City of Birmingham* and geared to Wells Fargo specifically. Indeed, Judge Legg focused on this issue from the very first hearing last January on Wells Fargo's initial motion to dismiss. *See, e.g.*, Hr'g Tr. (Jan. 28, 2009) at 10 ("The trickier issue in thinking about the City's complaint is trying to find some way of quantifying the damage of the increased cost to the City . . ., figuring out what portion of the harm is caused by these Wells Fargo vacancies when there are so many vacant houses in the city."). To see if Baltimore could meet his high standard, Judge Legg set up limited discovery and an evidentiary hearing. After reviewing the evidence, he held that the City was entitled to go forward.

As shown in detail above, while Birmingham stopped after describing illegal lending practices in general, such descriptions only provide the backdrop for the extensive record presented by Baltimore. As the testimony from Hebert, Jacobson, and Paschal shows, this record includes substantial evidence that Wells Fargo has been engaged in discriminatory lending in Baltimore. And as the testimony from Hessler, Goldstein, Voith, and many Baltimore residents shows, the record likewise directly connects Wells Fargo's discriminatory practices to identifiable and quantifiable harm suffered by the City. Baltimore substantiates its allegations, whereas Birmingham did not even try. Thus, as Judge Legg concluded, Baltimore satisfies the plausibility standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and it is clear that Wells Fargo's motion to dismiss must, for the second time, be denied.

Wells Fargo also relies on *City of Birmingham* to raise a case cited therein, *Tingley v. Beazer Homes Corp.*, No. 3:07-cv-176, 2008 WL 1902108 (W.D.N.C. Apr. 25, 2008). It is telling that Wells Fargo did not think this unpublished case worthy of citing even once in support of its first motion to dismiss. Indeed, there is good reason for Wells Fargo to have found the case inconsequential. Unlike Wells Fargo, the defendant in *Tingley* made a facial challenge to standing, not a factual one. *Id.* at *2. Thus, the court did not hold an evidentiary hearing, *id.*, and the evidentiary record was as empty as the record in *City of Birmingham*. Similarly, 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 Tingley*, Class Action Compl. at ¶¶ 6-7, 31-32, App. Cases Not Generally Reported. Thus, while it is understandable that Judge Bowdre in *City of Birmingham* looked to *Tingley* given the similarly barren records and conclusory allegations in both cases, neither is remotely analogous to the instant case that Baltimore has already substantiated in great detail.

C. *CITY OF CLEVELAND* IS ENTIRELY INAPPOSITE

Aside from *City of Birmingham*, Wells Fargo relies on the very same cases in its second motion to dismiss as it did in its first motion. Baltimore has already explained in previous briefs, incorporated herein by reference, why none of those cases support Wells Fargo's position. The only case that Baltimore was not permitted to address in writing before was *City of Cleveland v. Ameriquest Mortgage Secs., Inc.*, 621 F. Supp. 2d 513 (N.D. Ohio 2009), which Wells Fargo first raised a week before the June 29 evidentiary hearing. *See Defs.' Responsive Filing Pursuant to the Court's June 3 Order Regarding Pl.'s Prior Submissions* (Docket No. 85) (June 22, 2009); Order (Docket No. 91) (June 26, 2009). Thus, even though *City of Cleveland* presents nothing new because the case was before the Court when it denied the motion to dismiss on July 2, Baltimore explains here why the case is as inapposite as *City of Birmingham*.

City of Cleveland is inapposite for a multitude of reasons, including reasons specifically identified by Judge Lioi in her opinion. One of the most significant is that it relies on prudential limitations that do not apply here because this case arises under the Fair Housing Act, and standing under the FHA extends to the limits of Article III. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). Another key reason that *City of Cleveland* is inapposite is that the defendants in that case were sued for nothing more than providing secondary market funding for subprime loans. 621 F. Supp. 2d at 516. Judge Lioi highlighted the importance of this distinction and held that it was "materially" important that the secondary market players (unlike Wells Fargo here) did not "originate the underlying subprime loans or initiate foreclosures." *Id.* at 536.

1. Prudential Limitations Applicable in *City of Cleveland* Do Not Apply Here

City of Cleveland was based on a wholly different legal theory than this action. That case alleged a state common law claim for public nuisance, whereas Baltimore's suit is based on the federal Fair Housing Act. Standing under the Fair Housing Act (unlike most statutes) reaches to the limits of Article III and prudential limitations, such as the zone of interest test, are inapplicable. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109, 115 (1979) ("*Gladstone*"); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972). Defendants admitted this in their first motion to dismiss. MTD I at 10 n.3 ("courts lack the authority to dismiss FHA lawsuits based on prudential considerations"). Public nuisance cases, by contrast, are subject to ordinary prudential limitations.

The difference is centrally important. In *City of Cleveland*, Judge Lioi repeatedly made plain that her analysis of causation was premised on the "directness requirement" of *Holmes v. SIPC*, 503 U.S. 258 (1992). 621 F. Supp. 2d at 531-36. But because Congress precluded the application of any prudential limitations in Fair Housing Act litigation, *Holmes* is inapplicable. As Judge Easterbrook explained:

> 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); <u>*Holmes v. SIPC*, 503 U.S. 258 (1992)</u>. The Fair Housing Act is not among those statutes . . . .

New West, L.P. v. City of Joliet, 491 F.3d 717, 721 (7th Cir. 2007) (emphasis added).

Judge Easterbrook then immediately turned to the Supreme Court's decision in *Gladstone* and demonstrated that it, not *Holmes*, controls the proper analysis in lawsuits under the Fair Housing Act. *Id.* As Baltimore has previously set forth, *Gladstone* does in fact control here and requires Wells Fargo's motion to dismiss to be denied. *See, e.g.*, Pl.'s Mem. P. & A. Opp. Defs.' Mot. Dismiss Compl. (Docket No. 15) (May 22, 2008) at 17-18, 23, 25. Because *City of Cleveland* was a public nuisance case, *Gladstone* is nowhere mentioned in Jude Lioi's opinion.

The inapplicability of the *City of Cleveland*/*Holmes* "directness requirement" under the FHA is further demonstrated by the fact that its application would preclude a municipality from maintaining a 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. 441 U.S. at 109-10.

2. The *City of Cleveland* Defendants' Alleged Liability Was Based on Merely Securitizing Loans, Not Making or Foreclosing on Loans

The twenty-two companies sued in *City of Cleveland* were sued because they allegedly played a "role in securitizing subprime loans into mortgage-backed securities." 621 F. Supp. 2d at 516. They were not sued for having actually made any unlawful loans. *Id.* (complaint "targets Defendants not for engaging in direct subprime lending, but instead . . ."). In fact, Cleveland "insist[ed]" on "disclaiming any challenge to the actual subprime lending that occurred in Cleveland." *Id.* at 530. Judge Lioi held that the difference between making loans and merely securitizing loans was crucial to her decision to dismiss the complaint. Discussing the alleged causal connection between companies that securitized loans and Cleveland's injury, she stated: "Then someone – <u>very importantly, not Defendants</u> – foreclosed on the property." *Id.* at 534 (emphasis added).

Judge Lioi then continued to emphasize the "material[]" importance of the fact that the *City of Cleveland* defendants were not sued for making loans or filing foreclosures. *Id.* at 536.

Cleveland had argued that its claim was supported by an Ohio Supreme Court decision which found that causation was adequately pled in a tort case asserting that gun manufacturers and distributors were liable for harm caused by the weapons. *Id.* Distinguishing that case, Judge Lioi stated that "the factual allegations in this case differ markedly and materially . . . justifying a different result." *Id.* She then explained why: "the guns . . . originated with the defendant gun manufacturers, while in this case, Defendants did not originate the underlying subprime loans or initiate foreclosures in Cleveland." *Id.* Baltimore, to the contrary, has sued Wells Fargo under the Fair Housing Act for its actions in making loans and causing foreclosures.

Furthermore, the declarations attached to Baltimore's amended complaint from Peter Hebert, Elizabeth Jacobson, and Tony Paschal demonstrate that Judge Lioi was correct in finding that the causation analysis is wholly different when actual lending is challenged. These declarations establish that, to increase their profit and commissions, Wells Fargo and its employees and brokers routinely and intentionally targeted borrowers in African-American neighborhoods for loans that they would not be able to afford. Far from being merely hypothetical, an unnecessarily high number of foreclosures and vacancies in these neighborhoods – with their attendant drain on City resources – is the inevitable result of these practices.

Furthermore, because the defendants in *City of Cleveland* were far removed from actually making and foreclosing on loans as Judge Lioi emphasized, the court there did not have before it evidence of a methodology by which causation and injury could be established. Here, to the contrary, the City has presented clear and specific evidence of a precise methodology directly connecting Wells Fargo's lending activities to Baltimore's injuries. Hr'g Tr. (June 29, 2009) at 82-86; Goldstein Suppl. Decl. ¶¶ 7-14; Voith Decl. ¶¶ 4-10.

3. *City of Cleveland* Was Based On Broad Allegations That All Subprime Loans are Tortious

In *City of Cleveland*, Cleveland alleged that facilitating subprime lending was *per se* unlawful. *See* 621 F. Supp. 2d at 516 ("Plaintiff claims that subprime lending was categorically inappropriate for Cleveland due to its 'unique' economic situation"); *id.* at 530 ("[i]n essence, [Cleveland] claims that as a whole, its residents were improper candidates for receiving subprime loans").

Baltimore makes no such sweeping and nebulous generalizations. To the contrary, Baltimore affirmatively states that "[w]hen done responsibly, [subprime lending] made credit available much more broadly than had been the case with prime lending" and that subprime loans "have opened the door to homeownership to many people, especially low- to moderate-income and minority consumers, who otherwise would have been denied mortgages." FAC ¶¶ 23-24. Baltimore's allegations, unlike those at issue in *City of Cleveland*, are narrowly focused only on those subprime lending policies and practices that target African-American neighborhoods for abusive lending practices and for loans that are less advantageous than loans given to similarly situated people in white neighborhoods.

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

> Unoccupied, boarded properties pose a hazard to neighborhood residents, in that they are an attractive nuisance for juveniles and others. They pose an arson risk greater than that of the average occupied building. Unoccupied structures attract

> criminal activity . . . . These vacant structures, often a favorite target of arsonists, pose a heightened hazard to firefighters, as the interior of a vacant home often has been vandalized, and the structural integrity compromised. . . . Vacant, boarded properties contribute to the decline of both property values and neighborhood appearance and pride. . . .
>
> The public has a pecuniary interest in the maintenance of properties also; vacant, vandalized properties lead to the decline of neighborhoods and a reduction in property values. In addition, municipalities are forced to provide services (e.g., grass cutting, yard cleaning, demolition) to neglected properties and the taxpayers must bear this financial burden.

Id. ¶¶ 32, 43.

In a focused case like Baltimore's – where the allegations of wrongdoing that the City will prove will be related to specific properties and practices, not merely to providing capital for lending generally – the connection between the challenged practices and the harm from foreclosures and vacancies is not in any way conjectural. It is real and supports standing.

4. **None of the Other Bases for Dismissal in *City of Cleveland* <u>Apply to Fair Housing Act Claims</u>**

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

5. ***City of Cleveland* Did Not Involve Any Laws That <u>Regulate Mortgage Lending</u>**

In *City of Cleveland*, Cleveland did not "allege that Defendants violated any of the myriad laws governing mortgage lending." 621 F. Supp. 2d at 531. Judge Lioi held that this was "fatal to [Cleveland]'s claim." *Id.* She added:

> Without question, it is possible that certain individual lenders engaged in specific transactions that did not comply with applicable regulations [regarding mortgage lending], but that possibility is not presented by the [Second Amended Complaint] and has no impact on the issues before the Court.

Id. at n.15. Baltimore, by contrast, alleges violation of one of the central laws that govern mortgage lending, the Fair Housing Act. Indeed, Judge Lioi specifically identified the Fair Housing Act as one of six key federal statutes that regulate mortgage lending. *Id.* at 528.

* * *

For all of these reasons, *City of Cleveland* continues to provide no support whatsoever for Wells Fargo's motion to dismiss.

D. THE COURT SHOULD NOT CONSIDER WELLS FARGO'S EVIDENCE WITHOUT FIRST ALLOWING BALTIMORE TO HAVE DISCOVERY

Notwithstanding the fact that Judge Legg considered Wells Fargo's 74 page PowerPoint presentation and the four affidavits it submitted at the June 29 evidentiary hearing before denying the initial motion to dismiss, Wells Fargo has chosen to rely on that same evidence once again in support of its second motion to dismiss and its arguments about *City of Birmingham*. See MTD II at 3-4, 10-11. Even if it were not the case that this evidence had already been considered and the *City of Birmingham* causation argument rejected, Wells Fargo's reliance on these materials is improper at this stage of the case, when discovery is only beginning. The discovery that Judge Legg ordered in the spring was very limited and did not involve the vast majority of the materials on which Wells Fargo relies. For example, Wells Fargo had an affiant review the loan files and servicing records for 143 loans (leaving out many in African-American neighborhoods that Baltimore has already identified as relevant to damages) and testify that Wells Fargo is blameless. Yet Baltimore has never seen those files and records and has not deposed Wells Fargo's affiants or any other witnesses. Thus, as Judge Legg recognized in denying the initial motion to dismiss, and as the Court recognized again in ruling in Baltimore's favor with respect to a discovery plan on August 6, 2009, at a minimum Baltimore is entitled to substantial discovery before Wells Fargo may properly raise the factual arguments about standing set forth yet again in its second motion to dismiss.

Thus, even putting aside the lack of any valid basis for Wells Fargo to ask the Court to reconsider its July 2 ruling, Wells Fargo's motion must again be denied because it rests on self-serving assertions about disputed facts that have no place at this stage of the case.[11]

[11] While the City does not believe it necessary in light of the Court's recent rulings entitling it to discovery, Baltimore notes that its incorporation by reference of its submissions in opposition to Wells Fargo's first motion to dismiss includes its Rule 56(f) affidavit submitted on June 1, 2009. *See* Docket No. 75-9.

CONCLUSION

For all of the reasons stated above, Baltimore respectfully submits that Wells Fargo's second motion to dismiss, like its first, should be denied in its entirety.

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Respectfully submitted,

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