IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COBB COUNTY, DEKALB COUNTY, and FULTON COUNTY, Plaintiffs, v. BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE BANK, FSB, COUNTRYWIDE WAREHOUSE LENDING, LLC, BAC HOME LOANS SERVICING, LP, MERRILL LYNCH & CO., INC., MERRILL LYNCH MORTGAGE CAPITAL INC., and MERRILL LYNCH MORTGAGE LENDING, INC., Defendants.	:	CIVIL ACTION NO. 1:15-CV-04081-LMM

ORDER

This case comes before the Court on Defendants Bank of America Corporation, Bank of America, N.A., Countrywide Financial Corporation, Countrywide Home Loans, Inc., Countywide Bank, FSB, Countywide Warehouse Lending, LLC, BAC Home Loans Servicing, LP, Merrill Lynch & Co., Inc., Merrill Lynch Mortgage Capital Inc., and Merrill Lynch Mortgage Lending, Inc.'s Motion to Dismiss [81]. After due consideration, the Court enters the following Order:

I. BACKGROUND[1]

Plaintiffs filed this action on November 20, 2015, Dkt. No. [1], and, after the Court granted Defendants' first Motion to Dismiss on May 2, 2016, Dkt. No. [29], Plaintiffs filed an Amended Complaint on June 17, 2016, Dkt. No. [32]. The Court then stayed this action pending the Supreme Court's decision in Bank of America Corporation v. City of Miami, 137 S. Ct. 1296 (2017), and the Eleventh Circuit's decision in City of Miami v. Wells Fargo & Co. ("Miami (Wells Fargo)"), 923 F.3d 1260 (11th Cir. 2019), vacated as moot sub nom. Wells Fargo & Co. v. City of Miami, 140 S. Ct. 1259 (2020). Dkt. Nos. [38; 41; 49]. The Court reopened this action on November 4, 2019, directing Plaintiffs to file a Second Amended Complaint by January 15, 2020 in light of the Supreme Court and Eleventh Circuit's decisions. Dkt. No. [50]. Plaintiffs filed their Second Amended Complaint on January 15, 2020, see Dkt. No. [61], and Defendants have now moved to dismiss Plaintiffs' Second Amended Complaint, Dkt. No. [81].

In their Second Amended Complaint, Plaintiffs raise two disparate impact claims and one disparate treatment claim under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, and proceed under several provisions of the FHA that prohibit racial discrimination in the sale or rental of housing and in real estate-related transactions. See 42 U.S.C. § 3604(a)-(c) (prohibiting discrimination in

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[1] Unless otherwise indicated, all facts are taken from the Second Amended Complaint [61] and construed in the light most favorable to Plaintiffs as the nonmoving party.

the sale or rental of housing); id. § 3605 (prohibiting discrimination in residential real estate-related transactions). Plaintiffs allege that Defendants engaged in a series of lending practices designed to reduce the overall equity minority borrowers located within their counties had in their homes. According to Plaintiffs, these lending practices—targeted marketing practices, discretionary pricing policies, credit score override practices, underwriting policies, wholesale mortgage funding and mortgage securitization operations, compensation policies, and mortgage servicing operations—caused African-American and Latino borrowers to disproportionately receive higher cost mortgage loans, leading to increased defaults and foreclosures, than similarly situated white, non-Latino borrowers. Taken together, Plaintiffs refer to these practices as an "equity stripping" scheme.

Plaintiffs separate Defendants' equity stripping scheme into two components—(1) mortgage origination and servicing; and (2) mortgage foreclosure and servicing.[2] For mortgage origination practices, Plaintiffs contend that Defendants "allowed or encouraged" improper credit approval decisions for minority borrowers, which, in turn, allowed otherwise unqualified minority borrowers to be approved for and receive loans that they could not afford. Plaintiffs also claim that Defendants utilized inflated appraisal values for

[2] In their Second Amended Complaint, Plaintiffs discuss these discriminatory practices in considerable detail but, for the purposes of this Order, the Court describes them in a high level of generality.

minority homes to support increased loan amounts; charged higher servicing costs to minority borrowers than were objectively due based on the risk of the loan; and targeted minority borrowers for higher cost loan products. As a result, Plaintiffs maintain that these practices and policies increased the likelihood that minority borrowers would become delinquent or default on their loans when compared to similarly situated white counterparts.

Plaintiffs next contend that Defendants' discriminatory practices continued through the foreclosure process. In sum, Plaintiffs allege that Defendants discriminated against minority borrowers in servicing delinquent and defaulted loans by offering more onerous terms for loan modifications and refinances than to white borrowers. Plaintiffs also assert that Defendants were more likely to initiate foreclosure proceedings on minority-owned homes, bypassing mitigation procedures and other practices in place to protect borrowers. According to Plaintiffs, these practices led to "disproportionate rates of delinquencies, defaults, home vacancies and/or foreclosures on loans, originated, purchased, and/or served by Defendants that were made to FHA-protected minority borrowers."

As set out above, Plaintiffs proceed under both disparate impact and disparate treatment theories of liability, consisting of three Counts. In Count One, Plaintiffs allege that Defendants' "mortgage loan origination (pricing, underwriting and compensation) and servicing (payment acceptance, loan modification, and foreclosure)" practices and polices had a disparate impact on minority borrowers in violation of the FHA. See 42 U.S.C. §§ 3604(a)-(c), 3605.

Similarly, in Count Two, Plaintiffs allege that Defendants' mortgage foreclosure and servicing practices, such as evaluations of borrower requests for loan modifications and refinances, servicing of defaulted loans, increases in interest payments and servicing fees, and foreclosure proceedings, had a disparate impact on minority borrowers in violation of the FHA. Last, in Count Three, Plaintiffs allege that Defendants' "equity stripping" scheme—that is, Defendants' discriminatory mortgage origination, servicing, and foreclosure practices—resulted in a disparate treatment of minority borrowers located within the Plaintiffs' counties.

Plaintiffs seek damages for several economic injuries: (1) out-of-pocket costs associated with foreclosure-related processes, such as eviction and foreclosure notices; (2) increased municipal services, such as police, firefighter, and social services, that they had to provide to communities due to the resulting urban blight; (3) loss of franchise tax revenues from abandoned or foreclosed upon properties; and (4) loss of property tax revenues as a result of decreased home values. Plaintiffs also seek injunctive relief to require Defendants to cease any remaining discriminatory practices or policies.

Defendants have now moved to dismiss Plaintiffs' Second Amended Complaint on the basis that: (1) Plaintiffs failed to properly allege their disparate impact claims under Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015); (2) Plaintiffs' economic injuries were not proximately caused by Defendants' discriminatory policies under City of Miami; (3) Plaintiffs lack standing to assert their property tax loss injuries; (4) Plaintiffs claims fall outside the FHA's two-year statute of limitations; (5) Plaintiffs allege no unlawful conduct against Defendants Countrywide Home Loans., Inc., Countywide Warehouse Lending, LLC, Merrill Lynch & Co., Inc., Merrill Lynch Mortgage Capital, Inc., and Merrill Lynch Mortgage Lending, Inc. ("Holding Company Defendants"); and (6) Plaintiffs have failed to allege with sufficient specificity the injunctive relief sought. Dkt. No. [81-1] at 9–39. The parties subsequently filed supplemental authority as to several of Defendants' arguments, which the Court addresses more fully below. Dkt. Nos. [92; 97].

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While this pleading standard does not require "detailed factual allegations," the Supreme Court has held that "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

To withstand a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). A complaint is plausible on its face when the plaintiff pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Id. (citing Twombly, 550 U.S. at 556).

At the motion to dismiss stage, "'all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff.'" FindWhat Inv'r Grp. v. FindWhat.com, 658 F.3d 1282, 1296 (11th Cir. 2011) (quoting Garfield v. NDC Health Corp., 466 F.3d 1255, 1261 (11th Cir. 2006)). However, this principle does not apply to legal conclusions set forth in the complaint. Iqbal, 556 U.S. at 678.

III. DISCUSSION

Defendants raise five arguments in favor of dismissal. The Court addresses each in turn.

A. Disparate Impact[3]

Defendants argue that Plaintiffs' disparate impact claims should be dismissed because Plaintiffs have failed to plead all the required elements for such claims under the Supreme Court's decision in Inclusive Communities, 576 U.S. at 540–43. See Dkt. No. [81-1] at 9–15. Specifically, Defendants argue that Plaintiffs have failed to state a: "(1) facially neutral, (2) artificial, arbitrary, and unnecessary policy, (3) [that] caused the adverse statistical disparities in lending and servicing outcomes they alleged." Dkt. No. [81-1] at 9. Plaintiffs agree that Inclusive Communities governs the Court's analysis of their disparate impact

[3] Defendants do not seek to dismiss Plaintiffs' disparate treatment claim found in Count Three. See Dkt. No. [81-1] at 12 n.2.

claims but nonetheless assert that they have met all of the requirements under that decision. Dkt. No. [87] at 9–16.

In Inclusive Communities, the Supreme Court considered whether a state agency distributed federal low-income housing tax credits in a manner that "caused continued segregated housing patterns by its disproportionate allocation of [those] tax credits." 576 U.S. at 526. Resting on the FHA's "central purpose" of eliminating discriminatory practices in housing, the Supreme Court held that disparate impact claims are cognizable under the FHA. Id. at 539. The Inclusive Communities Court reached this conclusion on the basis that disparate impact claims can help ameliorate practices that unfairly exclude minorities from certain neighborhoods, protect property rights, and help uncover discriminatory intent. Id. at 539–40; see Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, 759 F. App'x 828, 833 (11th Cir. 2018) (per curiam).

But the Supreme Court's recognition of disparate impact claims was not without its caveats. The Inclusive Communities Court explained that disparate impact claims are not meant to displace "valid government policies," but rather remove "artificial, arbitrary, and unnecessary barriers" to equality. 576 U.S. at 540–42. Indeed, and in an effort to "ensure that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact,'" the Supreme Court imposed a "[a] robust causality requirement" for disparate impact claims under the FHA. Id. at 542 (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989)). As the Supreme Court explained, this "robust causality" requirement seeks to cure the "serious constitutional questions [that] . . . might arise . . . if [disparate impact] liability [was] imposed solely on a showing of a statistical disparity." Id. at 540.

Given the Supreme Court's discussion in Inclusive Communities, courts have held that a plaintiff must allege: (1) the defendant maintained a specific policy that caused the disparity, Montgomery County v. Bank of Am. Corp., 421 F. Supp. 3d 170, 181 (D. Md. 2019); (2) the policy was "artificial, arbitrary, and unnecessary," id.; County of Cook v. Wells Fargo & Co. ("Cook County (Wells Fargo) I"), 314 F. Supp. 3d 975, 990 (N.D. Ill. 2018); and (3) there exists "a robust causal connection between the challenged policy (or policies) and the disparate impact," Prince George's County v. Wells Fargo & Co., 397 F. Supp. 3d 752, 765–67 (D. Md. 2019). The parties dispute the requirements of these elements. The Court thus analyzes each of them in turn below.

i. Facially Neutral Policy

Defendants assert that, under Inclusive Communities, Plaintiffs must allege one single, specific policy responsible for the disparate impact that is facially neutral and not the result of discretionary or intentional decisionmaking.[4]

[4] Federal courts disagree on whether a plaintiff must allege a *facially neutral* policy in order to state a disparate impact claim. Compare Cook County (Wells Fargo) I, 314 F. Supp. 3d at 990–91 (explaining that under Inclusive Communities, a disparate impact claim "may be based on any policy, not just a facially neutral policy" (quotation marks omitted)), with Inclusive Cmtys. Project, Inc. v. Heartland Cmty. Ass'n, Inc., ___ F. App'x ____, No. 19-10991, 2020 WL 4589352, at *6 (5th Cir. Aug. 10, 2020) ("The purpose of such disparate-impact liability is to address facially neutral policies with disproportionately adverse

See Dkt. No. [81-1] at 9–12. Defendants contend that the "equity stripping" policy at issue is overbroad and impermissibly involves discretionary and intentional decisionmaking. See id. Defendants thus argue that Plaintiffs have failed to allege a policy fitting the requirements of Inclusive Communities.

Several courts have specifically addressed and rejected arguments identical to those Defendants raise here. The Court similarly finds many faults with Defendants' contentions. To begin, Defendants add several requirements for a "policy" that are wholly absent from Inclusive Communities's discussion of disparate impact claims. Nowhere in Inclusive Communities did the Supreme Court require a plaintiff to assert one, single policy. See 576 U.S. at 526–47; see also County of Cook v. Bank of Am. Corp. ("Cook County (Bank of Am.) I"), No. 14 C 2280, 2018 WL 1561725, at *9 (N.D. Ill. Mar. 30, 2018) (discussing Inclusive Communities and noting that the "[d]efendants offer[ed] no authority to suggest that the 'specific' practice challenged in a disparate-impact claim must be limited to a single component."). Defendants' reliance on Watson v. Fort Worth Bank & Trust, 487 U.S. 997 (1988), is likewise misplaced, as that case held that a plaintiff is "responsible [only] for isolating and identifying the *specific* . . . practices that

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effects on minorities, [which] are otherwise unjustified by a legitimate rationale."), and Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp., 388 F. Supp. 3d 145, 172–73 (E.D.N.Y. 2019) (explaining that "to make out a *prima facie* case of disparate impact, [a plaintiff] must show . . . the occurrence of certain outwardly neutral practices."). But because the parties agree on this point, the Court will assume without deciding that a plaintiff must plead a facially neutral policy. See Dkt. Nos. [81-1] at 9; [87] at 11.

are allegedly responsible for any observed statistical disparities." Id. at 994 (emphasis added); see also Cook County (Bank of Am.) I, 2018 WL 1561725, at *9 (rejecting the argument that Watson requires a plaintiff to allege one, single policy for a disparate impact claim). "Specific" is not synonymous with "single," and the Court rejects Defendants' arguments otherwise.

Next, in an effort to argue that Plaintiffs' policies are not sufficiently specific under Inclusive Communities, Defendants overgeneralize Plaintiffs' allegations. Defendants contend that Plaintiffs' only asserted policy is "equity stripping," which, according to Defendants, amounts to an allegation that "*every* aspect of *every* Defendant's operations" led to the disparate impact. Dkt. No. [81-1] at 10. Contrary to Defendants' characterization, Plaintiffs have set forth a multitude of specific policies that have caused the alleged disparate impact—that is, (1): subjective discretionary pricing, fee payment, and commissions related policies; (2) underwriting policies; (3) mortgage servicing practices; and (4) foreclosure-related practices. See Dkt. No. [61] ¶¶ 143, 148–53, 203–20, 221–51, 347–48, 410–11, 489. Plaintiffs have thus identified several specific policies causing the alleged disparate impact. See County of Cook v. HSBC N. Am. Holdings Inc. ("Cook County (HSBC) II"), 314 F. Supp. 3d 950, 967 (N.D. Ill. 2018) (explaining that the complaint was "replete with examples of HSBC policies that . . . resulted in a disparate impact . . . [including] mortgage lending and services policies; pricing and marketing policies; various underwriting policies; loan servicing and loss mitigation policies; and foreclosure-related policies"); Montgomery County, 421 F. Supp. 3d at 183–84 (finding that the plaintiff properly alleged a policy by describing the "pattern and practice of predatory and discriminatory mortgage origination (pricing, underwriting and compensation) and servicing (payment acceptance, loan modification, and foreclosure)" in the complaint).

In any event, Inclusive Communities does not dictate that a plaintiff is barred from relying on a collective set of practices when asserting a sufficiently specific policy. See 576 U.S. at 526–47; see also Prince George's County, 397 F. Supp. 3d at 756 n.2 ("'Equity-stripping' is defined as a comprehensive set of loan origination and servicing practices that effectively dilutes or eliminates the equity that borrowers have in their homes—comprising numerous components, including predatory lending practices, higher loan origination costs, higher than usual interest rates, exorbitant fees, and increased foreclosure rates." (quotation marks omitted and alterations adopted)). Indeed, several district courts have held that Inclusive Communities allows a plaintiff to base its policy on an equity-stripping scheme in order to state a disparate impact claim. See, e.g., Montgomery County, 421 F. Supp. 3d at 184 ("[T]he Counties can challenge these policies individually or *collectively* as an equity-stripping practice." (emphasis added)); Cook County (Wells Fargo) I, 314 F. Supp. 3d at 979 (recognizing equity stripping as a sufficient policy, as it is composed of "interrelated predatory and discriminatory loan making, loan servicing and foreclosure activities that occur over the entire life of each mortgage loan" (quotation marks omitted)). Because

Inclusive Communities allows a plaintiff to rely on a collective set of practices as a "policy," the Court declines to adopt Defendants' position here.

Relying on Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011), Defendants next assert that discretionary policies cannot serve as a "policy" for a disparate impact claim. See Dkt. No. [81-1] at 11. Dukes, however, supports the opposite conclusion. In Dukes, the Supreme Court analyzed whether, in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, a disparate impact claim could be based *solely* on discretionary promotion decisions by managers. 564 U.S. at 345–46. There, the plaintiffs did not allege that the managers' employer—Wal-Mart—had any sort of "express corporate policy" governing promotions. Id. at 357. Because the plaintiffs could not point to a "specific employment practice" tying their claims together, the Supreme Court rejected their Title VII disparate impact claims. Id.

In reaching its holding, the Supreme Court specifically noted that "giving discretion to lower-level supervisors can be the basis [for] liability under a disparate-impact theory" since "an employer's undisciplined system of subjective decisionmaking can have precisely the same effects as a system pervaded by impermissible intentional discrimination." 564 U.S. at 355 (quotation marks omitted and alteration adopted). The Dukes Court distinguished the plaintiffs' claims, however, because the plaintiffs had failed to identify "a common mode of exercising discretion that pervade[d] the entire company." Id. at 356.[5]

Given the Supreme Court's discussion in Dukes, Defendants are incorrect when they assert that Dukes forecloses disparate impact claims based on discretionary decisionmaking. See id. Instead, Dukes *supports* the conclusion that discretionary policies can do so. See id.; see also Watson, 487 U.S. at 991 (explaining that "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases."). And here, Plaintiffs have alleged several discretionary *policies* applied to minority borrowers—for example, Plaintiffs allege that Defendants' applied their discretionary pricing policies in a manner that disproportionately caused minority borrowers to receive more onerous terms than similarly situated white borrowers. Dkt. No. [61] ¶¶ 203–209. The Court thus finds that these allegations are adequately pled.

Last, Defendants argue that the "disparate impacts were caused by policies intentionally directed at minorities" and, as a result, Plaintiffs' alleged policies are not facially neutral. Dkt. No. [81-1] at 11–12. The Court acknowledges that in ruling on Defendants' previous Motion to Dismiss, the Court dismissed Plaintiffs' disparate impact claims because Plaintiffs "continuously alleged intentional decisions . . . rather than plead a facially neutral policy." Cobb County v. Bank of

[5] The Court also notes that Dukes was decided in the context of Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement. Id. at 345.

Am. Corp., 183 F. Supp. 3d 1332, 1346–47 (N.D. Ga. 2016). Since the Court's decision, several district courts have addressed whether intentional conduct can be the basis for a disparate impact claim, holding that they may do so. See, e.g., Montgomery County, 421 F. Supp. 3d at 181 ("[A]lthough a plaintiff is not required to explicitly allege, or, ultimately, to prove intent as part of a disparate-impact theory, a plaintiff is not precluded from doing so." (quotation marks omitted)); Cook County (HSBC) II, 314 F. Supp. 3d at 968 ("In fact, one of the factors that a court considers to determine whether a plaintiff has made a *prima facie* disparate impact case is 'the presence of some evidence of discriminatory intent, even if circumstantial and less than sufficient to satisfy' the standards required for disparate treatment.").

The Court agrees with these district courts and finds that intentional conduct does not preclude Plaintiffs from asserting their disparate impact claims. While disparate treatment claims—as Plaintiffs also bring here—require a defendant to have discriminatory intent or motive, see Cook County (HSBC) II, 314 F. Supp. 3d at 966, Federal Rule of Civil Procedure 8(d) allows a plaintiff to proceed under both disparate impact and disparate treatment claims as alternative theories of recovery. Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."). Therefore, to the extent that Defendants' intentional conduct underlies both Plaintiffs' disparate treatment and disparate impact claims, the Court need not dismiss Plaintiffs' disparate impact claims on that basis at this time. See Cook County (Wells Fargo) I, 314 F. Supp. 3d at 994 ("It is true that Cook County also alleges that Wells Fargo intentionally targeted minority borrowers. But Civil Rule 8(e) allows plaintiffs to plead alternative theories, provided that they use a formulation from which it can be reasonably inferred that this is what they were doing." (quotation marks omitted)).

Further, the Court also finds that intentional acts of discrimination may support a disparate impact claim when such claim is premised on discretionary policies. This is because "intentional acts of discrimination are often what cause delegated discretion to have a disparate impact." City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321-EMC, 2018 WL 3008538, at *12 (N.D. Cal. June 15, 2018), rev'd on other grounds ___ F. 3d. ___, 2020 WL 503515, at *18 (9th Cir. Aug. 26, 2020); see also Watson, 487 U.S. 990 (explaining that intentional acts of discrimination often cause delegated discretion to have a disparate impact). Thus, evidence of "discriminatory intent that is not enough to plead disparate treatment may support a disparate impact claim." Montgomery County, 421 F. Supp. 3d at 181 (quotation marks omitted). The Court therefore holds that Plaintiffs' allegations of intentional conduct do not foreclose their disparate impact claims.

ii. Artificial, Arbitrary, and Unnecessary

The Court next turns to the second pleading requirement of Inclusive Communities—that is, the requirement that a plaintiff must allege an artificial, arbitrary, and unnecessary policy. Defendants assert that Plaintiffs must plead not only an "artificial, arbitrary, and unnecessary policy," but also demonstrate *why* the alleged policy meets that standard. Dkt. No. [81-1] at 12. In response, Plaintiffs maintain that they need not allege an "artificial, arbitrary, and unnecessary" policy because Inclusive Communities requires them to plead only a "a causal connection between a defendant's [policies] and the alleged disparate impact." Dkt. No. [87] at 10, 13–14.

Although the Eleventh Circuit has not yet decided whether a plaintiff must allege an "arbitrary, artificial, and unnecessary policy," the Eighth Circuit has held that a plaintiff must do so, Ellis v. City of Minneapolis, 860 F.3d 1106, 1112 (8th Cir. 2017) ("Under Inclusive Communities, a plaintiff must, at the very least, point to an 'artificial, arbitrary, and unnecessary' policy causing the problematic disparity."), and several district courts have followed suit, see, e.g., Montgomery County, 421 F. Supp. 3d at 181 (explaining that to state a claim for disparate impact in violation of the FHA, "the challenged policy must be 'artificial, arbitrary, and unnecessary'"); Cook County (Wells Fargo) I, 314 F. Supp. 3d at 991 (same).

The Court agrees with the reasoning found in these decisions and finds that, to state a disparate impact claim under the FHA, a plaintiff must allege an "artificial, arbitrary, and unnecessary" policy. As the Court explained above, the Inclusive Communities Court stated that "disparate-impact liability . . . mandates the removal of *artificial, arbitrary, and unnecessary* barriers, not the displacement of valid governmental policies." 576 U.S. at 540, 543 (emphasis added) ("[G]overnment or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"). Given the Supreme Court's discussion, it is inapposite to conclude that a plaintiff would not be required to make this showing when asserting a disparate impact claim under the FHA. The Court therefore rejects Plaintiffs' assertion that they need not meet this element.

Defendants do not contest that Inclusive Communities requires a plaintiff to allege an "artificial, arbitrary, and unnecessary" policy. See Dkt. No. [81-1] at 13. However, Defendants assert that, in addition to alleging an "artificial, arbitrary, and unnecessary" policy, Inclusive Communities requires a plaintiff to allege *why* the challenged policy meets that standard. See id. Defendants point the Court to Ellis in support of their argument and assert that Plaintiffs have not met this element because they have failed to "offer any real explanation" as to why Defendants' policies were "artificial, arbitrary, and unnecessary." See id.

In Ellis, the plaintiffs alleged that the City of Minneapolis's ("Minneapolis") enforcement of its housing code at for-profit, low-income rental housing had a disparate impact on the availability of housing for minority individuals. 860 F.3d at 1107. The plaintiffs "mount[ed] no serious challenge to the housing code itself," but instead alleged that Minneapolis had targeted their properties with inspections, issuing citations for code violations that did not exist, and threatening to revoke their rental licenses. Id. at 1108–09, 1112. The Eighth Circuit deemed the plaintiffs' complaint as "no more than [a] disagreement . . . on the extent of [the plaintiffs'] deficiencies based on [Minneapolis's] reasonable housing-code provisions." Id. at 1112–13. Because the plaintiffs had failed to "allege facts plausibly demonstrating that the housing-code standards were arbitrary and unnecessary under the FHA," the Eighth Circuit held that the plaintiffs had failed to state a FHA disparate impact claim. Id. Nowhere in Ellis did the Eighth Circuit require a plaintiff to offer the reason or cause behind an "artificial, arbitrary, and unnecessary" policy. See id.

The inadequacies of the Ellis plaintiffs' disparate impact claim are not present in this case. Throughout the Second Amended Complaint, Plaintiffs point to several "artificial, arbitrary, and unnecessary" policies—for example, Plaintiffs allege that Defendants' policies: (1) increased the cost of mortgage loans without regard to objective factors and the risk of the loan, Dkt. No. [61] ¶¶ 490, 498; and (2) lacked any "business necessity" because the increased prices violated "safe and sound banking practices and regulations," id. ¶¶ 499–500, 522.[6] And these

[6] Citing Plaintiffs' First Amended Complaint, see Dkt. No. [32], Defendants assert that Plaintiffs raise "allegations essentially the same as the ones found to be inadequate the last time around" when the Court ruled on Defendants' previous Motion to Dismiss. Dkt. No. [81-1] at 13 (citing Dkt. No. [32] ¶¶ 387, 433, 484). Defendants are incorrect. Plaintiffs filed their First Amended Complaint on June 17, 2016, *after* the Court entered its May 6, 2020 Order granting Defendants' first

claims are supported by Plaintiffs' detailed factual allegations describing Defendants' equity stripping scheme. See id. ¶¶ 124–410; cf. Ellis, 860 F.3d at 1114 (holding that the plaintiffs did "not plead[ ] sufficient facts to plausibly support the existence of such a policy"). The Court therefore finds that Plaintiffs have properly alleged "artificial, arbitrary, and unnecessary" policies as required by Inclusive Communities. See Montgomery County, 421 F. Supp. 3d at 184 (holding that the plaintiff alleged "artificial, arbitrary, and unnecessary" policies where the plaintiff pointed to the defendants' predatory loan origination, servicing, and foreclosure practices).

iii. Robust Causality

Defendants last argue that Plaintiffs have failed to establish a "robust causal" connection under Inclusive Communities. Dkt. No. [81-1] at 14. In particular, Defendants assert that Plaintiffs have failed to offer any "connective tissue" between the policies and the alleged statistical disparities Plaintiffs set forth in their Second Amended Complaint. Id. at 14–15.

Defendants construe Plaintiffs' Second Amended Complaint too narrowly. Plaintiffs provide a multitude of detailed statistical data, showing that Defendants issued a disproportionate number of high-cost, subprime, or other nonprime loans to minority borrowers located within their counties. See, e.g., Dkt. No. [61] ¶¶ 319–35. And Plaintiffs also provide a robust amount of statistical

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Motion to Dismiss. See Dkt. Nos. [29; 32]. As a result, the Court never ruled on these allegations.

data, in the form of heat maps, showing that Plaintiffs' neighborhoods with more minority homeowners suffered more foreclosures—and thus, equity stripping—than similarly situated neighborhoods with fewer minority homeowners. Id. ¶¶ 384–98. Indeed, these heat maps demonstrate that in Cobb County between January 2012 and May 2019, Defendants were six times more likely to foreclose upon homes in areas with significant minority populations, id. ¶ 387; in Fulton County, five times more likely, id. ¶ 398; and, in Cobb County, six times more likely, id. ¶ 392. The Court thus finds that Plaintiffs have alleged genuine statistical disparities in mortgage origination and foreclosures to minority borrowers.

Plaintiffs have also established a "robust causal" connection between these statistical disparities and Defendants' conduct. Inclusive Cmtys., 576 U.S. at 541–42. In particular, Plaintiffs allege that "key aspects" of Defendants' mortgage origination and foreclosure practices, such as Defendants' more onerous loan origination terms, denial of loan modification requests, and foreclosure decisions, led minority borrowers to receive a disproportionate number of mortgage loans with unfavorable loan terms. Dkt. No. [61] ¶ 403 ("Defendants' discretionary pricing policies, reduced underwriting standards, increased fees and costs, high loan to value lending practices and predatory and discriminatory servicing practices ultimately caused FHA-protected minority borrowers in Plaintiffs' communities and neighborhoods to pay higher costs for obtaining mortgage loans than similarly situated nonminority borrowers."). These predatory loan origination and servicing practices subsequently caused minority borrowers to face a disproportionate number of foreclosures. Id. ¶ 404 ("Th[ese practices], in turn, caused a downward spiral of additional mortgage delinquencies, defaults and home foreclosures in Plaintiffs' communities and neighborhoods both with higher percentages of FHA-protected minority borrowers."). Plaintiffs have thus demonstrated that Defendants' policies were causally connected in a "robust" way to the racial disparity. See Cook County (Wells Fargo) I, 314 F. Supp. at 994; Montgomery County, 421 F. Supp. 3d at 184–85; cf. City of Los Angeles v. Wells Fargo & Co., 691 F. App'x 453, 454 (9th Cir. 2017) (finding that the plaintiff failed to establish a robust causal connection between the defendant's policies and the disparate impact where the defendant's policies "affect[ed] borrowers equally regardless of race."). The Court therefore finds that Plaintiffs' disparate impact claims surmount the plausibility standard required at this stage of the proceedings. As a result, the Court denies Defendants' Motion to Dismiss as to Plaintiffs' disparate impact claims.

B. Proximate Cause

In addition to meeting the requirements of Inclusive Communities, Plaintiffs must also establish causation between their alleged injuries and Defendants' unlawful conduct to bring their disparate impact and disparate treatment claims. See City of Miami, 137 S. Ct. at 1305; Montgomery County, 421 F. Supp. 3d at 184–85. Defendants seek to dismiss Plaintiffs' disparate impact and disparate treatment claims on the basis that Plaintiffs have failed to make this showing. See Dkt. No. [81-1] at 21–36. In particular, Defendants argue that Plaintiffs' injuries are too remote from their unlawful conduct and, thus, Plaintiffs cannot establish that Defendants proximately caused their injuries. See id.; see also City of Miami, 137 S. Ct. at 1306 ("[P]roximate cause generally bars suits for alleged harm that is "too remote" from the defendant's unlawful conduct." (quotation marks omitted)).

In City of Miami, the Supreme Court held that "[p]roximate cause under the FHA requires *some direct relation* between the injury asserted and the injurious conduct alleged." 137 S. Ct. at 1306 (quotation marks omitted and emphasis added). There, the City of Miami ("Miami") brought nearly identical allegations to those Plaintiffs raise here against Bank of America and Wells Fargo (collectively, "the Banks"). Id. at 1300–01. First, Miami asserted that the Banks engaged in discriminatory lending practices by "intentionally issuing riskier mortgages on less favorable terms to African-American and Latino customers" than similarly situated white customers. Id. Second, as with here, Miami alleged that the Banks' discriminatory lending practices caused increased foreclosures of minority homes, which, in turn, decreased the home values in minority neighborhoods, reduced Miami's property tax revenues, and forced Miami to spend more on municipal services. Id. at 1301.

In reaching its decision, the Supreme Court rejected the Eleventh Circuit's holding that foreseeability, standing alone, was sufficient to establish proximate cause. Id. at 1301, 1305–06; see also City of Miami v. Bank of Am. Corp., 800

F.3d 1262. 1282 (11th Cir. 2015) ("We agree with the City that the proper standard, drawing on the law of tort, is based on foreseeability."), vacated and remanded sub nom. City of Miami, 137 S. Ct. 1296 (2017). The Supreme Court explained that "[a] violation of the FHA may . . . 'be expected to cause ripples of harm to flow' far beyond the defendant's misconduct" since "the housing market is deeply connected with economic and social life." City of Miami, 137 S. Ct. at 1306 (quoting Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 534 (1983)). Because "[n]othing in the statute suggest[ed] that Congress intended to provide a remedy wherever those ripples travel," the Supreme Court held that foreseeability of an injury was not, by itself, enough to establish proximate cause in the context of the FHA. Id.

In remanding the case, the Supreme Court did not reach a definitive conclusion about whether Miami's property tax and municipal services injuries satisfied its "some direct relation" standard and, instead, offered some parameters to guide "lower courts'" analyses. Id. at 1306. In assessing the link between a harm and an injury, the City of Miami Court highlighted that the "'general tendency'" in analogous tort cases was not to go "'beyond the first step'" in the causal chain. Id. (quoting Hemi Group, LLC v. City of New York, 559 U.S. 1, 10, (2010)). But, nonetheless, the Supreme Court reiterated that "'what falls within that first step'" depends on the "'nature of the statutory cause of action,'" id. at 1394 (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133 (2014)), and "'an assessment of what is administratively possible and convenient,'" id. (quoting Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268 (1992)). The City of Miami Court then remanded the case to the Eleventh Circuit for a determination on the merits. Id.

In 2019, the Eleventh Circuit issued its decision in Miami (Wells Fargo), 923 F.3d at 1264. Interpreting City of Miami, the Eleventh Circuit held that "[p]romixate cause asks whether there is a direct, logical, and identifiable connection between the injury sustained and its alleged cause. If there is no discontinuity to call into question whether the alleged misconduct led to the injury, proximate cause will have been adequately pled." Id. Observing that "some direct relation" is an "easier [standard] to meet" than "a direct relation," as all that is needed is "'an unspecified but appreciable or not inconsiderable quantity, amount, extent or degree," id. at 1272 (quoting City of Miami, 137 S. Ct. at 2171), the Eleventh Circuit held that "an intervening step" between an alleged wrong and an injury does "not [necessarily] vitiate proximate cause"— particularly in the context of the FHA, id. at 1273. Then, looking to the FHA's text and purpose, the Eleventh Circuit held that Miami had established proximate cause between its property tax injuries and the Banks' discriminatory policies but that it had failed to do so for its municipal services injuries. Id.

Plaintiffs raise four economic injuries at issue here: (1) loss of property tax revenues; (2) increased expenditures on municipal services, such as police, firefighter, and social services; (3) increased foreclosure processing costs; and (4) loss of franchise taxes due to vacant properties. Dkt. No. [81-1] at 23–36.

Defendants assert that under the reasoning of City of Miami and Miami (Wells Fargo), Plaintiffs have failed to establish that Defendants' conduct proximately caused these injuries. See id. With the principles of City of Miami and Miami (Wells Fargo) guiding its analysis,[7] the Court turns to each of Plaintiffs' alleged injuries.

i. *Property Tax Injuries*

Here, as in City of Miami and Miami (Wells Fargo), Plaintiffs seek monetary damages for: (1) loss of property tax revenues from abandoned or foreclosed upon properties; and (2) "the erosion of Plaintiffs' tax base due to reduced property values on foreclosed properties and surrounding properties." Dkt. No. [61] ¶ 412. Defendants challenge Plaintiffs' property tax injuries on the basis that Plaintiffs have not suffered any monetary losses due to the structure of Georgia's tax code. Dkt. No. [81-1] at 21–27.

As set out above, in Miami (Wells Fargo), the Eleventh Circuit held that the Banks' discriminatory lending practices proximately caused Miami's property tax injuries. 923 F.3d at 1268. Of particular relevance here, the Eleventh Circuit rested its decision on Miami's allegations that a Hedonic regression technique could be used to identify the portion of Miami's decreased property taxes attributable to the Banks' discriminatory conduct. Id. at 1283 ("The pleadings

[7] The Court recognizes that it is not bound by the Miami (Wells Fargo) decision because the Supreme Court has vacated the Eleventh Circuit's judgment as moot. However, the Court finds the Eleventh Circuit's reasoning persuasive and thus follows it here.

strongly suggest, then, that the tax-revenue injury to the City attributable to the Banks' alleged discriminatory practices is readily calculable."). Indeed, the Eleventh Circuit noted that "[t]he plausibility of hedonic regression analysis has a direct bearing on how difficult it is to ascertain the amount of [Miami's] damage attributable to the violation, as distinct from other, independent, factors, and thus helps determine 'what is administratively possible and convenient,' in terms of damages calculation." Id. at 1284 (internal citations omitted).[8]

Plaintiffs allege that a Hedonic regression analysis will allow them to "isolate and calculate their property tax damages attributable to Defendants' FHA violations [and] to prove the direct relationship between the two." Dkt. No. [87] at 29; see also Dkt. No. [61] ¶¶ 451–53 ("Hedonic regression techniques enable Plaintiffs to show the reduction in the assessed values and decline in property tax collections on foreclosed properties, and the properties surrounding them, at various points in time."). Plaintiffs' statistical allegations are not vague or overly conclusory. See, e.g., id. ¶ 451 ("Routinely maintained property tax and other financial data allow precise calculation of the diminution in Plaintiffs' tax digests caused by Defendants' discriminatory housing practices, and the resulting property vacancies and foreclosures. . . . The culled data can then be run through

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[8] Recently, the Ninth Circuit adopted this same reasoning. See City of Oakland, 2020 WL 5035815, at *10 ("[R]elying on its proposed statistical regression analysis, Oakland plausibly alleges that it can precisely calculate the exact loss in property values attributable to foreclosures caused by Wells Fargo's predatory loans, isolated from any losses attributable to non-Wells Fargo foreclosures or other independent causes, such as neighborhood conditions.").

regression models by Plaintiffs' experts to determine the changes in assessed values and taxes collected on each property, and surrounding properties, that are directly related to Defendants' discriminatory foreclosures."); cf. Prince George's County, 397 F. Supp. 3d at 762–63 (finding that the plaintiff's statistical allegations were too vague and conclusory where the plaintiff alleged solely that damages "can be established with statistical evidence and expert testimony"). The Court thus finds that Plaintiffs have plausibly alleged their property tax injuries. See Miami (Wells Fargo), 923 F.3d at 1283–84 ("The pleadings strongly suggest, then, that the tax-revenue injury to [Miami] attributable to the Banks' alleged discriminatory practices is readily calculable.").

Despite Plaintiffs' Hedonic regression claims, Defendants argue that Plaintiffs have not establish proximate cause because Plaintiffs have not suffered any overall tax losses as a result of Defendants' discriminatory policies. Dkt. No. [81-1] at 22–27. Defendants assert that Georgia's tax code requires "Georgia counties [to] set a budget each year, and as part of that budget, . . . set a target amount for property tax revenue." Id. (citing O.C.G.A. §§ 36-5-22.1, 48-5-31.1). Because the target amount stays constant, Defendants explain that Plaintiffs "retain the ability to collect the same amount (or more), regardless of the assessed values" of homes. Id. Defendants thus contend that Plaintiffs' "own political decision-making, and not Defendants' alleged conduct, . . . determines how much they receive in property tax revenue year over year." Id. at 24.

In addition, Defendants also posit that even if foreclosures decreased an individual home's property tax payments, Plaintiffs "redistribute[ed] the property tax burden" from blighted neighborhoods to more affluent ones in order to offset any losses in property tax revenues. Id. at 21–22 (quotation marks omitted). Defendants assert that Plaintiffs accomplished this "redistribution" by increasing millage rates, or predetermined tax rates, per each unit of assessed home value, thus collecting more property taxes from properties with greater values. See id. Because of this redistribution, Defendants maintain that Plaintiffs have not "suffered a drop in overall property tax revenue," and, for that reason, Defendants could not have proximately caused Plaintiffs' property tax injuries. Id. at 20–27.

Plaintiffs disagree with Defendants' positions. First, Plaintiffs assert that Georgia counties "do not have unfettered ability to increase millage rates," and their tax assessors "take. . . reduced [home] prices into account as comparable sales to help establish market value, i.e., property values" when setting millage rates. Dkt. No. [87] at 29–30. Next, Plaintiffs assert that despite Georgia's tax code, a Hedonic regression model can be used to readily determine the amount of lost tax revenues. See id.

The Court is not persuaded by Defendants' contentions. In raising their arguments, Defendants seek to dispute whether—given Plaintiffs' tax structure—a regression model can be used to ascertain Plaintiffs' purported tax losses, if they suffered any losses at all. See Dkt. Nos. [81] at 20–27; [87] at 29. But this is a *factual* dispute, not a legal one. See City of Los Angeles v. Citigroup Inc., 24 F. Supp. 3d 940, 948 (C.D. Cal. 2014) (describing the defendants' argument that the plaintiff suffered no property tax losses as a factual attack). At this stage of the proceedings, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." FindWhat Inv'r Grp., 658 F.3d at 1296 (quotation marks omitted). Construing Plaintiffs' allegations as true, the Court must conclude that Plaintiffs have suffered tax losses that are readily determinable based on Plaintiffs' alleged statistical models. See id.; see also City of Oakland, 2020 WL 5035815, at *16 ("It is important to note that this case reaches us at the motion to dismiss stage, where Oakland has the burden of meeting a plausibility standard, not a reasonable probability or more-likely-than-not standard.").

Defendants point the Court to two Orders in support of their argument that Georgia's tax structure operates as an intervening cause severing proximate cause. Dkt. No. [81-1] at 26–27 (citing County of Cook v. Wells Fargo & Co. ("Cook County (Wells Fargo) II"), No. 14-cv-9548, Dkt. No. [322] (N.D. Ill. Feb. 6, 2020); County of Cook v. Bank of Am. Corp. ("Cook County (Bank of Am.) II"), No. 14-cv-2280, Dkt. No. [423] (N.D. Ill. Dec. 19. 2019)). But neither of these cases supports Defendants' position because, in both cases, the plaintiffs conceded that the foreclosures did not lead to any losses in overall property tax revenues. See Cook County (Wells Fargo) II, Dkt. No. [256] at 2–6 ("[T]he County concedes that the amount of the property tax revenue it collects has no relationship to the value of the properties it taxes."); Cook County (Bank of Am.) II, at 3 ("Here, the County does not allege any decline in its aggregate tax revenues as a result of defendants' discrimination. To the contrary, the County agrees that its total property tax revenue was relatively stable throughout the period in which the tax digest was allegedly depleted."). In both cases, the parties agreed that the plaintiff suffered no direct tax losses as a result of the defendants' conduct, and there were no factual disputes regarding the possible calculation, if any, of those losses. See id.[9]

In this case, however, Plaintiffs allege that they suffered some decrease in tax revenues as a result of Defendants' conduct. Dkt. No. [61] ¶ 427 ("Monetary damages to Plaintiffs include the . . . diminishment in property taxes collected on foreclosed and surrounding properties"); id. ¶ 441 ("[A]t a given millage rate, the amount of property taxes Plaintiffs can collect from their tax base to pay for the services they provide declines on an aggregated property basis."); id. ¶ 446 ("Concentrations of foreclosures and increasing rates of foreclosures create a downward spiral in home prices, in assessed home values and in property tax collections."). Further, although Plaintiffs acknowledge that they were "forced to raise millage rates in order to redistribute the property tax burden," id. ¶ 448,

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[9] The Court also notes that these cases rejected the Eleventh Circuit's decision and reasoning in Miami (Wells Fargo), finding that, regardless of the plaintiffs' tax structures, the plaintiffs' property tax injuries did not meet the proximate cause standard set forth in City of Miami. See id.

Plaintiffs contend that the millage rate increases "have legal and practical caps," id. ¶ 449. Because Plaintiffs have alleged that they suffered tax losses attributable to Defendants' conduct, a ruling to the contrary based on Defendants' factual assertions is not appropriate at this time. See County of Cook v. HSBC N. Am. Holdings Inc. ("Cook County (HSBC) I"), 136 F. Supp. 3d 952, 965 (N.D. Ill. 2015) ("[T]his amounts to a factual attack on causation that is best deferred to a motion for summary judgment.").

Last, Defendants assert that tax assessor discretion "serves [as] an independent, intervening role that breaks the chain of proximate causation, such that there is no 'direct relation' between Defendants' purported conduct and [Plaintiffs'] Property Tax Injury." Dkt. No. [81-1] at 25. In Miami (Wells Fargo), the Eleventh Circuit rejected this argument, finding that a reduction in home values and "concomitant tax assessment" did not break the causal chain. 923 F.3d at 1277. Defendants have pointed the Court to no precedent holding to the contrary. The Court declines to adopt Defendants' position.

The Court therefore finds that Plaintiffs have plausibly alleged that Defendants' conduct proximately caused their property tax injuries. See Miami (Wells Fargo), 923 F.3d at 1283–84 ("The pleadings strongly suggest, then, that the tax-revenue injury to [Miami] attributable to the Banks' alleged discriminatory practices is readily calculable. . . . There could be a battle of the experts down the line over whether the regression analysis really shows what the [Miami] says its does but, as we see it, that would be for a later stage of the litigation."). The Court therefore denies Defendants' Motion to Dismiss as to Plaintiffs' property tax injuries.

ii. Municipal Services Injuries

Plaintiffs seek damages for increased expenditures on a variety of governmental services, such as police, fire, and sanitation services, relating to vacant or foreclosed properties. Dkt. No. [61] ¶¶ 470–72. Defendants move to dismiss these injuries on the basis that Plaintiffs "have not explained how they can attribute increases in municipal services expenditures to [them]." Dkt. No. [81-1] at 29. Plaintiffs respond that they "have alleged a plausible method to isolate and identify the municipal services costs they incurred" as a result of Defendants' conduct. Dkt. No. [87] at 30–31.

In Miami (Wells Fargo), the Eleventh Circuit addressed whether Miami had alleged a sufficiently direct connection between the Banks' conduct and its municipal services injuries. 923 F.3d at 1285. Holding that Miami had failed to do so, the Eleventh Circuit explained that "[t]here [was] nothing in the pleadings that suggest[ed] the plaintiff [would] be able to sort out the extent to which these damages [were] attributable to the Banks' misconduct." Id. The Miami (Wells Fargo) Court further noted that Miami's "complaint fail[ed] to explain how [the Eleventh Circuit could] ascertain with any level of detail or precision which expenditures [would] be attributable to the Banks." Id. Thus, the Eleventh Circuit held that Miami had not alleged proximate cause between its municipal services injuries and the Banks' policies. Id.

In their Second Amended Complaint, Plaintiffs explain that, relying on Defendants' mortgage loan origination and servicing data ("Loan Data"), they can "correlate their own event and cost data to the specific property address at issue within the time period for which Defendants should be held responsible." Dkt. No. [61] ¶ 473. Plaintiffs propose the following methodology to calculate these injuries: using Defendants' "reason codes," Plaintiffs will first determine whether a home vacancy is attributable to Defendants' discriminatory conduct; next, Plaintiffs will determine when or if any police, fire, or social services were called to the designated address; and, once Plaintiffs have determined an estimated number of municipal services called, they will "produce their documentary support to prove the amount of those damages from their records, including their budgets and appropriations, various contracts, tasks performed and task performance information, including average task-time estimates." Id. ¶¶ 473–75.

The Court finds that Plaintiffs' municipal services injuries suffer the same fate as the municipal services claims in Miami (Wells Fargo). In describing their methodology, Plaintiffs assume a one-to-one ratio between a vacancy attributable to Defendants' policies and the use of municipal services. Plaintiffs have thus failed to account for "intervening causes and independent variables [that] will inevitably run up . . . [municipal services] damages because [Plaintiffs'] expenditures occur at some obvious level of remove from the foreclosures." Miami (Wells Fargo), 923 F.3d at 1285. Neither do Plaintiffs explain how their municipal services injuries "are anything more than merely foreseeable consequences" of Defendants' discriminatory acts. Id. at 1264. Plaintiffs' allegations are thus too conclusory and have not been "plausibly presented as directly and automatically resulting from [Defendants'] alleged misconduct." Id. at 1294. Because these injuries are "precisely the ripples that City of Miami cautions flow far beyond the defendant's misconduct, . . . risking massive and complex damages litigation," the Court grants Defendants' Motion to Dismiss as to Plaintiffs' municipal services injuries.[10] Cook County (Wells Fargo) I, 314 F. Supp. 3d at 988 (quoting City of Miami, 137 S. Ct. at 1307).

iii. Foreclosure Processing Injuries

Plaintiffs next seek damages for costs associated with administrating foreclosure proceedings and their related enforcement. Dkt. No. [61] ¶¶ 464–69. Defendants argue that Plaintiffs have not adequately alleged proximate cause for these injuries because they are "felled by independent, intervening factors that break up the causal chain." Dkt. No. [81-1] at 32–33.

The Court finds that City of Miami's "some direct relation" standard is easily met here. 137 S. Ct. at 1306. Foreclosure is "the final process in the discriminatory equity-stripping cycle that [Plaintiffs] allege Defendants have perpetrated against FHA-protected minority residents" and, as a result, Plaintiffs' "costs in processing those foreclosures would be a direct first-step consequence of

[10] Because the Court determines that Plaintiffs have failed to adequately allege their municipal services injuries, the Court need not address Defendants' argument that Georgia's "free public service doctrine" bars recovery. Dkt. No. [81-1] at 31–32.

that cycle." Prince George's County, 397 F. Supp. 3d at 760; see also Cook County (Wells Fargo) I, 314 F. Supp. 3d at 984 (explaining that there could "be no question that proximate cause is satisfied" because foreclosure processing costs were an "integral . . . aspect of the violation alleged"). Every court to have addressed this issue has ruled that foreclosure processing injuries meet City of Miami's proximate cause standard. See, e.g., id.; Montgomery County, 421 F. Supp. 3d at 187; Cook County (Wells Fargo) I, 314 F. Supp. 3d at 984; Cook County (Bank of Am.) I, 2018 WL 1561725, at *7 (N.D. Ill. Mar. 30, 2018); Cook County (HSBC) II, 314 F. Supp. 3d at 963. For these reasons, the Court denies Defendants' Motion to Dismiss as to Plaintiffs' foreclosure processing injuries.

iv. Franchise Tax Injuries

Last, Defendants seek to dismiss Plaintiffs' franchise tax injuries for failure to adequately plead proximate cause. Dkt. No. [81-1] at 34–36. Plaintiffs describe these "franchise tax injuries" as "lost municipal income claims" because they seek to recover for lost utility revenues, such as unpaid water bills, and other taxes homeowners would have paid on telephone and cable services in the event that their homes were not foreclosed upon. See Dkt. Nos. [87] at 33–34; [61] ¶¶ 460. Defendants argue that these injuries are too "derivative" to warrant recovery under City of Miami. Dkt. No. [81-1] at 34–36.

To date, no court has *specifically* addressed whether franchise tax injuries are recoverable under City of Miami. See, e.g., Miami (Wells Fargo), 923 F.3d at 1271–95; Montgomery County, 421 F. Supp. 3d at 186–89; Prince George's

County, 397 F. Supp. 3d at 763–64. However, the Eleventh Circuit's analysis in Miami (Wells Fargo) is instructive. There, as the Court noted above, the Eleventh Circuit dismissed Miami's municipal services claims because Miami failed to explain "with any detail or precision" how those expenditures were attributable to the Banks' discriminatory conduct. 923 F.3d at 1285; see also City of Oakland, 2018 WL 3008538, at *8 (dismissing the City of Oakland's ("Oakland") municipal services injuries because "Oakland ha[d] not proffered any statistical analyses compared to those in the property tax analysis"). Miami's allegations were entirely devoid of any statistical assertions accounting for "independent variables that [would] inevitably run up the measure of [municipal services] damages." Miami (Wells Fargo), 923 F.3d at 1285. While the Eleventh Circuit noted that a Hedonic regression analysis was not *required* to plead proximate cause, the Miami (Wells Fargo) Court nonetheless determined that Miami had not established how, under any methodology, it would attribute its municipal services injuries to Banks. Id. at 1286.

Here, Plaintiffs attest that their franchise tax injuries are the "direct result" of the home vacancies and foreclosures caused by Defendants' equity stripping scheme. Dkt. No. [87] at 33–34; see also Dkt. No. [61] ¶¶ 460, 463 ("[Vacancies] result[] in lost revenue which the governmental affiliated utility would otherwise have, *but for* the vacancy."). Plaintiffs state that for every vacant home, they no longer collect taxes on utility, telephone, and cable services because those services are not being used by the homeowner. Dkt. No. [61] ¶¶ 458–63. Relying on the time and dates of vacancies and foreclosures, Plaintiffs state that damages "can be proven with certainty to have been proximately caused by Defendants' alleged discriminatory housing practices on a foreclosure-by-foreclosure or property-by-property basis by examining those lost revenue items within the time-frame for which Defendants are responsible." Dkt. No. [61] ¶ 459.

Like their municipal services injuries, Plaintiffs assume a one-to-one relationship between a home vacancy or foreclosure and their loss of franchise tax revenues. See id. However, contrary to Plaintiffs' assertions, it is not evident that the "*entire*" decrease in franchise tax revenues could "possibly be fairly attributed to the Banks' conduct." Miami (Wells Fargo), 923 F.3d at 1285. Defendants contend that homeowners could very well "cut the cord" for a multitude of reasons separate and distinct from foreclosure, such as job loss or illness. Dkt. No. [81-1] at 34–35. And Defendants also posit that homeowners may have chosen not to subscribe to these services in the first place. See id. The Court agrees with Defendants that these intervening variables impact causation between Plaintiffs' franchise tax injuries and Defendants' discriminatory policies.

While these intervening variables do not necessarily vitiate Plaintiffs' claims for franchise tax injuries, Plaintiffs do not account for them when describing their methodology to attribute these damages to Defendants' conduct. See Dkt. No. [61] ¶¶ 458–63 ("Plaintiffs' damages are a *direct result* of Defendants' conduct." (emphasis added)); see also Miami (Wells Fargo), 923 F.3d at 1286 ("We also see no explanation of how [Miami] will identify the amount of increase attributable to the foreclosures or to the Banks' conduct."). Indeed, Plaintiffs do not offer *any* methodology that would consider outside variables impacting Defendants' liability. See Dkt. No. [61] ¶¶ 458–63. These allegations thus stand in stark contrast with Plaintiffs' property tax injuries, as Plaintiffs have not provided any analysis—statistical or otherwise—showing that they "will be able to sort out the extent to which these damages are attributable to [Defendants'] misconduct." Miami (Wells Fargo), 923 F.3d at 1285. Because Plaintiffs have not accounted for intervening variables when pleading proximate cause, the Court finds that Plaintiffs' franchise tax injuries have not been properly alleged here. The Court therefore grants Defendants' Motion to Dismiss as to Plaintiffs' franchise tax injuries.

C. Standing

Defendants also seek to dismiss Plaintiffs' property tax injuries for lack of standing. Dkt. No. [81-1] at 27–29. Similar to their proximate cause arguments directed at these injuries, Defendants assert that Plaintiffs have not established an "injury-in-fact" because they "have not alleged that they have suffered a drop in overall property tax revenue." Id. at 27. Relying on Los Angeles Unified School District v. Citigroup Inc., No. 2:14-cv-07368-ODW(RZx), 2015 WL 476303, at *1 (C.D. Cal. Feb. 3, 2015), Defendants contend that "if a defendant's alleged wrongful conduct leaves a municipal entity's overall revenues unchanged, but merely changes the *source* of those revenues, that is not a cognizable Article III injury." Dkt. No. [81-1] at 28.

Article III of the Constitution limits the subject matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. "To have a case or controversy, a litigant must establish that he has standing." United States v. Amodeo, 916 F.3d 967, 971 (11th Cir. 2019). Standing requires the proof of three elements: (1) injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision. Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560–61 (1992). Defendants take issue with the first of these elements and argue that because Plaintiffs suffered no overall decrease in property tax revenues, they have not suffered an injury for standing purposes.

The Supreme Court has held that "a significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 110–11 (1979). Thus, as long as Plaintiffs allege that they suffered a reduction in property values, they have standing to bring their property tax injury claims. See City of Los Angeles, 24 F. Supp. 3d at 947–48 (relying on Gladstone and stating that "it need go no further with respect to L.A.'s alleged injuries of decreased property-tax revenue and increased municipal services."). Here, Plaintiffs have raised these allegations and, for that reason, the Court finds that they have standing to pursue them. Bischoff v. Osceola County, 222 F.3d 874, 878 (11th Cir. 2000) (finding that when standing is raised on a motion to dismiss, general factual allegations of injury resulting from the defendant's conduct are sufficient to survive dismissal).

In support of their argument, Defendants again posit that because Plaintiffs did not lose any overall tax revenues, they do not have standing to assert their property tax injury claims. Dkt. No. [81-1] at 27–28. For the same reasons explained in the Court's discussion of Defendants' proximate cause contentions, this argument amounts to a factual attack on standing. See Citigroup, 24 F. Supp. 3d at 948. And although the Court need not accept Plaintiffs' allegation as true when ruling on a factual attack to jurisdiction, see Gardner v. Mutz, 962 F.3d 1329, 1340 (11th Cir. 2020) ("[F]actual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings." (quotation marks omitted)), Defendants have not provided any evidence—other than their own conclusory allegations—that Plaintiffs' tax property revenues remained constant over the time period at issue in this litigation. See Dkt. No. [81-1] at 27–29. Indeed, and for comparison, in Cook County (Wells Fargo) II and Cook County (Bank of Am.) II, the defendants provided the court with quantifiable data showing that the plaintiff had not, in fact, suffered any overall decrease in tax revenues as a result of their conduct. See Cook County (Wells Fargo) II, Dkt. No. [256] at 3 ("[T]he total amount of money Cook County billed such taxpayers in the aggregate for the years 2003 through 2018 remained stable at approximately $720.4 million per year." (quotation marks omitted)); Cook County (Bank of Am.) II, Dkt. No. [408-2] (deposition testimony stating that the

"Cook County property tax levy did not change between . . . 2006 and 2014" and, as a result, Cook County suffered no overall "collection loss" in property tax revenues). The same level of evidence is simply not present in Defendants' Motion to Dismiss. The Court therefore declines to dismiss Plaintiffs' property tax injuries on this basis.

D. Statute of Limitations

Defendants seek to dismiss Plaintiffs' Second Amended Complaint on the basis that Plaintiffs failed to allege sufficiently specific allegations within the FHA's two-year statute of limitations. Dkt. No. [81-1] at 15–17. In sum, Defendants contend that Plaintiffs have: (1) pointed only to discriminatory mortgage origination practices within the two-year time period, which is not sufficient; (2) failed to identity foreclosures that occurred within the relevant two-year time period; and (3) failed to identify the race or identity of minority borrowers. Id. Plaintiffs agree that the FHA has a two-year statute of limitations period[11] but, citing their allegations, asserts that they have identified the loans at issue with requisite level of specificity. Dkt. No. [87] at 19–20.

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[11] Although Plaintiffs agree that the FHA imposes a two-year statute of limitations, Plaintiffs argue that the statute of limitations does not begin running until the *termination*, as opposed to the occurrence, of a defendant's discriminatory conduct. See Dkt. No. [87] at 16–20. The Court need not address this argument because, for the reasons set out below, the Court finds that Plaintiffs have raised timely allegations of discriminatory conduct. In any event, the Court notes that it rejected this exact argument when it ruled on Defendants' previous Motion to Dismiss. Cobb County, 183 F. Supp. 3d at 1342–43. While Plaintiffs point the Court to a recent district court opinion ruling to the contrary, County of Cook v. Wells Fargo & Co., 335 F.R.D. 166, 167 (N.D. Ill. 2020), the

The Eleventh Circuit has held that "'[a] Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint that the claim is time-barred' because '[a] statute of limitations bar is an affirmative defense, and . . . plaintiff[s] [are] not required to negate an affirmative defense in [their] complaint.'" Lindley v. City of Birmingham, 515 F. App'x 813, 815 (11th Cir. 2013) (quoting La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845 (11th Cir. 2004)). Thus, "[a]t the motion-to-dismiss stage, a complaint may be dismissed on the basis of a statute-of-limitations defense only if it appears beyond a doubt that Plaintiffs can prove no set of facts that toll the statute." Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1288 n.13 (11th Cir. 2005) (quotation marks omitted).

Plaintiffs brought this action on November 20, 2015 and, thus, Plaintiffs must allege Defendants' discriminatory conduct occurred on or after November 20, 2013. See Dkt. No. [1]. As Defendants concede, Plaintiffs have pointed to 27 loans foreclosed upon on or after November 20, 2013, detailing the property's address, whether the loan was an adjustable-rate mortgage or FHA loan, the interest rate, and the entity that acquired or "originated the loan." Dkt. No. [61] ¶ 405; see also Dkt. No. [81-1] at 16. Plaintiffs also allege that these loans were

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Court nonetheless continues to find the reasoning set forth in its earlier Order to be persuasive, Cobb County, 183 F. Supp. 3d at 1342–43 ("[T]he Court finds that the limitations period has begun to run on any and all prohibited actions that occurred before the start of this suit."). The Court therefore rejects Plaintiffs' interpretation of the FHA's statute of limitations provision.

made in a predatory and discriminatory manner, highlighting that the "interest rates on [these loans] at the time of foreclosure [were] substantially higher than most other foreclosed loans." Dkt. No. [61] ¶ 405. Plaintiffs rely on the borrowers' names to allege that each individual borrower was "likely African American or Latino/Hispanic." Id.

Plaintiffs' allegations are unlike those that the Eleventh Circuit has held to be insufficient. See Bank of Am. Corp., 800 F.3d at 1283–84 (explaining that Miami "listed ten specific property addresses that it claimed "corresponded to these foreclosures, but provided no specific information . . . for each address" (quotation marks omitted)). Plaintiffs have designated each loan's address, type of interest payment, interest rate, and acquiring entity. See Dkt. No. [61] ¶ 405. Plaintiffs have also alleged details about these loans occurring within the FHA's the two-year statute of limitation period. See id. Thus, on the face of the Second Amended Complaint, it appears that Plaintiffs "can prove a set of facts" showing a timely violation of the FHA. Tello, 410 F.3d at 1288. The Court therefore denies Defendants' Motion to Dismiss as it is directed to Defendants' statute of limitations defense.

E. Dismissal of Holding Company Defendants

The Holding Company Defendants seek dismissal from this lawsuit on the basis that Plaintiffs "failed to allege specific facts showing that [they] violated the FHA within the limitations period." Dkt. No. [81-1] at 18. In ruling on Defendants' previous Motion to Dismiss, the Court explained that Plaintiffs had not alleged with sufficient specificity "the holding companies' participation in the scheme." Cobb County, 183 F. Supp. 3d at 1345. At that time, Plaintiff raised only one allegation against the Holding Company Defendants—that is, Defendants "used their bank holding company corporate structure to conceal their discriminatory lending practices by shifting loans and loan applications between their mortgage lending operations at their regulated banking entities and their non-regulated mortgage lending subsidiaries and affiliates." See id. (quotation marks omitted). The Court thus ruled that Plaintiffs had "not properly alleged the Holding Company Defendants' participation in the equity stripping scheme." Id.

Now, however, Plaintiffs raise numerous allegations against the Holding Company Defendants. In particular, Plaintiffs posit that the Holding Company Defendants enacted and participated in the discriminatory policies violating the FHA. See, e.g., Dkt. No. [61] ¶¶ 40–44. Plaintiffs also allege that the Holding Company Defendants operated in an "interrelated manner" with the other Defendants named in this action in order to maximize profits at the expense of minority borrowers. See id. ¶ 41. Plaintiffs have thus stated a widespread scheme of discriminatory lending which involved *all* of the various Defendants. Id. ¶¶ 40–44. And, as the Court set out above, Plaintiffs have properly alleged discriminatory practices within the relevant two-year statute of limitations period. Plaintiffs' Second Amended Complaint thus does not suffer from the same infirmities as the Court previously discussed when it ruled on Defendants' first

Motion to Dismiss. The Court therefore declines to dismiss Plaintiffs' claims against the Holding Company Defendants.

To the extent Defendants argue that the Holding Company Defendants could not have participated in the discriminatory scheme, the Court finds this argument unavailing. See Dkt. No. [90] at 13 (arguing that "the 'participation' argument is nonsensical. Countywide, Merrill, and Bank of America were competitors prior to 2008, so they could not have possibly 'participated' together."). Like many of the arguments Defendants raise in support of their Motion, this argument attacks Plaintiffs' Second Amended Complaint on its factual basis. It is thus not appropriate for consideration at this time. See FindWhat Inv'r Grp., 658 F.3d at 1296.

F. Non-Economic Injuries

Last, Defendants seek to dismiss Plaintiffs' non-economic injuries because they lack specificity. Dkt. No. [81-1] at 36. Defendants assert that Plaintiffs "merely ask for 'injunctive relief[]' without specifying what that relief should look like, or what [the] Court can order." Id. The Court finds that Plaintiffs' request for injunctive relief is sufficiently specific at this time. Defendants cite Burton v. City of Belle Glade, 178 F.3d 1175, 1201 (11th Cir. 1999) in support of their argument that Plaintiffs' requested injunctive relief is too broad. But Burton details the requirements for granting injunctive relief, not what a plaintiff is required to plead for a court to award it. See id. Here, Plaintiffs have specifically requested injunctive relief to enjoin "Defendants . . . from continuing to publish, implement, and enforce their illegal, discriminatory conduct described herein through the foreclosure process and directing Defendants . . . to take all affirmative steps necessary to remedy the effects of the illegal, discriminatory conduct . . . and to prevent additional instances of such conduct or similar conduct from occurring in the future." Dkt. No. [61] at 304. These allegations are proper at this time.

IV. CONCLUSION

In light of the foregoing, Defendants Bank of America Corporation, Bank of America, N.A., Countrywide Financial Corporation, Countrywide Home Loans, Inc., Countywide Bank, FSB, Countywide Warehouse Lending, LLC, BAC Home Loans Servicing, LP, Merrill Lynch & Co., Inc., Merrill Lynch Mortgage Capital Inc., and Merrill Lynch Mortgage Lending, Inc.'s Motion to Dismiss [81] is **GRANTED IN PART** and **DENIED IN PART**. The Court **DENIES** Defendants' Motion to Dismiss as it relates to Plaintiffs' disparate impact claims, property tax injuries, foreclosure processing injuries, lack of standing, timely filing of FHA discrimination claims, and non-economic injuries. The Court also **DENIES** Defendants' Motion as it relates to the dismissal of Defendants Countrywide Home Loans., Inc., Countywide Warehouse Lending, LLC, Merrill Lynch & Co., Inc., Merrill Lynch Mortgage Capital, Inc., and Merrill Lynch Mortgage Lending, Inc. The Court **GRANTS** Defendants' Motion to Dismiss as to Plaintiffs' municipal services and franchise tax injury claims.

IT IS SO ORDERED this 18th day of September, 2020.

Leigh Martin May
United States District Judge