IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CITY OF PHILADELPHIA, Plaintiff, v. WELLS FARGO & CO, and WELLS FARGO BANK, N.A., Defendants.	:	CIVIL ACTION NO. 2:17-cv-02203-LDD

DEFENDANTS WELLS FARGO & CO.'S AND WELLS FARGO BANK, N.A.'S MEMORANDUM OF LAW SUPPORTING THEIR MOTION TO DISMISS

Respectfully submitted,

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Dated: July 21, 2017

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I. INTRODUCTION

Defendants Wells Fargo & Co. and Wells Fargo Bank, N.A. (collectively, "***Wells Fargo***") move to dismiss the City of Philadelphia's ("***City***" or "***Philadelphia***") Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In support of this Motion, Wells Fargo respectfully submits that there are five independent reasons that the single Fair Housing Act claim should be dismissed:

- ***First***, the City's indirect injuries are too remote to satisfy the Fair Housing Act's proximate causation requirement of directness under the standard recently announced by the Supreme Court in *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017);
- ***Second***, the City's unique public record contradicts and renders implausible the copycat theory of damages alleged in the Complaint—the City has not conducted annual property value assessments, and thus changes in actual property values (up or down) have not impacted property tax revenues;
- ***Third***, the City's claim is barred by *res judicata* because it repeats the same claim that was previously pursued by the Commonwealth of Pennsylvania and resolved as part of a Department of Justice ("***DOJ***") Consent Decree;
- ***Fourth***, the City fails to state a disparate impact claim under the pleading standard announced by the Supreme Court in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015); and
- ***Fifth***, the claim is time barred by the Fair Housing Act's two year statute of limitations.

II. BACKGROUND

A. The Complaint's Theory of Recovery.[1]

The City's Complaint largely copies assertions made in nearly identical suits filed against Wells Fargo, and other national lenders, by the cities of Los Angeles and Miami, among others. Those cities are represented by the same outside counsel representing the City here.

[1] Wells Fargo vigorously disputes that it engaged in any lending discrimination, but the issue of whether it did or not is not before the Court on this Motion. Even if the non-conclusory fact allegations are accepted as true, except to the extent that the allegations are contradicted by the public record, the Complaint should be dismissed as a matter of law.

The Complaint was filed on May 15, 2017. Like those that came before, it attempts to use the Fair Housing Act, 42 U.S.C. 3601 *et seq*., to challenge loans dating back to "at least 2004" as "discriminatory."[2] Comp. ¶ 5. The City never alleges that it received "discriminatory" loans or was a direct victim of discriminatory lending but rather focuses exclusively on loans to residents. The City asserts that Wells Fargo engaged in "redlining" and "reverse redlining," which it defines as an alleged "practice of issuing exploitative loan products" to minorities "as compared to the mortgage loans issued to similarly situated white borrowers."[3] *Id.* ¶ 7.

The Complaint concentrates almost exclusively on alleged subprime lending practices from the 2004-2008 time period,[4] with only two allegations about lending during the Fair Housing Act's two year statute of limitations. *Id.* ¶ 134. In paragraph 134, the City lists six "sample" property addresses allegedly corresponding to "discriminatory loans issued subsequent

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[2] The City's naked conclusions of "discriminatory lending" are contradicted by its own conclusions reached annually during its meticulous analysis of Wells Fargo's fair lending performance. As reported on its website, the "City adopted legislation that requires the Office of the City Treasurer to commission an annual report to examine lending practices of authorized City depositories" like Wells Fargo, including an analysis of "fair lending performance of banks." CITY OF PHILA., http://www.phila.gov/Treasurer/Pages/AuthorizedDepositories.aspx. In accordance with its laws, the City conducted statistical analyses of Wells Fargo's fair lending performance—such as analyses of "redlining" and "subprime home lending in Philadelphia"—and ***never*** concluded Wells Fargo engaged in discrimination. *See, e.g.,* Examining the Lending Practices of Authorized Depositories for the City of Philadelphia FY2015 (June 2017), http://www.phila.gov/Treasurer/pdfs/LendingFinal.pdf ("***Fair Lending Analysis***"). To the contrary, the City repeatedly approved Wells Fargo as a depository, which approval process involved the City's review of Wells Fargo's fair lending plan. *See* Philadelphia Code Section 19-201(8)(c)(i); *see, e.g.,* Exhibit A (Bill No. 160510, approving Wells Fargo as a City depositor and attaching Wells Fargo's fair lending plan (July 1, 2016)). Wells Fargo also provided quarterly updates to the City on its fair lending plan, in accord with Phila. Code § 19-201(8)(d). The Court may take judicial notice of this public information presented in government records, as well as other public official documents referred to in this Motion. *See* Fed. R. Evid. 201(b); *Brooks v. CBS Radio, Inc.*, 2007 WL 4454312, at *4 n.4 (E.D. Pa. Dec. 17, 2007), *aff'd*, 342 F. App'x 771 (3d Cir. 2009) (citing *Tellabs, Inc. v. Makor Issues & Rts.*, 127 S. Ct. 2499, 2509 (2007)).

[3] The City provides a "list of the types of loans" at issue, such as "subprime" loans and features associated with subprime loans, loans for which pricing information is reported under the Home Mortgage Disclosure Act and "higher cost government loans, including FHA and VA loans" (*i.e.*, loans under Federal Housing Administration or Veterans Affairs programs). *Id.* ¶ 67.

[4] Comp. ¶¶ 14, 67, 76, 81, 90 (subprime loans); *id.* ¶¶ 14, 40(e), 52(c), 55, 67, 80-81, 137-138 (subprime loan characteristics); *id*. ¶¶ 7, 17-18, 75-82, 90, 96-99, 120, 132 (studies on subprime).

to September 23, 2014"—the start of the limitations period[5]—but alleges no facts about the borrowers or loans except that four of the six are FHA or VA "government loan[s]." *Id.*

The City alleges that "discriminatory" subprime loans made to residents set in motion a multiple step causal chain that eventually resulted in "reduced . . . property tax revenues, and increased [] cost of providing municipal services." *Id.* ¶ 3. The ***first step*** is the origination of allegedly discriminatory loans or discrimination in refusing to extend credit for refinancing. *Id.* ¶ 1. The ***second step*** requires borrower defaults ***because of*** the "discriminatory" loan terms.[6] The City never alleges that defaults occurred solely because of supposedly discriminatory loans but only that "discrimination contributed to and accelerated the problems." *Id.* ¶ 9. The City also admits equally plausible causes of defaults, stating "[i]t is well-established that [] unemployment rates for minorities exceed those of whites."[7] *Id.* ¶ 18. The ***third step*** in the City's causation theory is that after at least 4.046 years, some defaults on allegedly discriminatory loans supposedly led to foreclosures. *Id.* ¶ 88. Yet, the City never identifies any instance when this actually occurred, instead speculating that (1) "foreclosures ***often*** occur when a minority borrower [] received a discriminatory loan," and (2) "[g]iving a loan to an applicant who does not qualify for the loan . . . ***can*** also cause foreclosures." *Id.* ¶¶ 11, 93. The ***fourth***

[5] To state a timely claim, Fair Housing Act plaintiffs must plausibly plead an actionable violation occurring within the two year statute of limitations period. 42 U.S.C. § 3613(a)(1)(A). Here, the City and Wells Fargo agreed to toll the statute of limitations on September 23, 2016, with the agreement to expire two weeks after the Supreme Court rendered its decision in *City of Miami*. The Supreme Court issued the decision May 1, 2017, and the tolling agreement thus expired by its own terms May 15, 2017, the same day that the City filed the Complaint. Accordingly, the statute of limitations applicable to the City's claim began to run on September 23, 2014—*i.e.*, two years before the parties entered the tolling agreement.

[6] The City never alleges facts about the reasons for borrower defaults but speculates that more expensive loans "***can*** cause the borrower to be unable to make payments on the mortgage" and that if underwriting is deficient, "the result ***is likely to be*** that the borrower will be unable to make payments." *Id.* ¶¶ 92-93 (emphasis added throughout unless indicated to the contrary).

[7] The Complaint also references the remarks of then Federal Reserve Chairman Ben Bernanke that "loss of employment or income makes it more difficult for families to pay their mortgages . . . and avoid foreclosure." (Remarks cited at Comp. ¶ 7).

step is a showing that "vacancies result[] from Wells Fargo's foreclosures." *Id*. ¶ 113. But the Complaint admits that only "20% of homes undergoing foreclosure are vacated," making vacancy a mere possibility. *Id.* ¶ 122. The ***fifth step*** is that "foreclosures depress property values." *Id*. ¶ 92. For its ***sixth step***, the City concludes with no factual support that "Philadelphia loses substantial[] amounts of property tax revenues from the suppressed value of the foreclosed homes." *Id.* ¶ 108; *see also id.* at ¶ 111. (But, as discussed in Section III(B), *infra*, this assertion is contradicted by the City's own public records.) The City also concludes with no factual support that "foreclosure[] properties directly cause costs to the City because the City is required to provide increased municipal services at these properties." *Id.* ¶ 122. But the Complaint never describes a single incident in which the City actually expended "municipal services" at a property securing an allegedly discriminatory Wells Fargo loan that foreclosed.

The City then concludes with no factual support and without making any distinction between the two theories or supporting allegations, that the "unlawful conduct alleged herein consists of both intentional discrimination and disparate impact discrimination." *Id*. ¶ 4.

B. The Complaint Repeats The Claim That Was Pursued By The Commonwealth of Pennsylvania And Resolved As A Component of A DOJ Consent Decree.

The Complaint references, and thereby incorporates, a 2012 Consent Decree entered between Wells Fargo and DOJ regarding subprime lending. Comp. ¶ 56; *United States v. Wells Fargo Bank, N.A.*, No. 1:12-cv-01150, ECF No. 10 (D.D.C. Sept. 21, 2012), attached as Exhibit B. The DOJ Consent Decree also resolved claims of the Commonwealth of Pennsylvania, acting through the Pennsylvania Human Relations Commission ("***PHRC***"). *Id.* at 15.

The PHRC complaint, attached as Exhibit C, and the City's Complaint address largely overlapping issues. Here are ***eleven examples***:

- Both complaints challenge an alleged "pattern or practice" of "discriminatory lending."

Compare Comp. ¶¶ 2-5, *with* Ex. C ¶ 45.

- Both bring claims alleging Wells Fargo's "acts, policies and practices. . . constitute intentional discrimination on the basis of race." *Compare* Comp. ¶ 137, *with* Ex. C ¶ 68.

- Both bring disparate impact claims and allege Wells Fargo's "acts, policies, and practices have had an adverse and disproportionate impact" on minorities "in Philadelphia as compared to similarly situated whites." *Compare* Comp. ¶ 138, *with* Ex. C ¶ 69.

- Both challenge "reverse redlining" in "Philadelphia." *Compare* Comp. ¶¶ 2, 7, 9, *with* Ex. C ¶¶ 10-11, 14, 22.

- Both challenge "subprime" loans in the City. *Compare* Comp. ¶¶ 13, 67, *with* Ex. C ¶¶ 5, 50.

- Both challenge "high-cost loans (*i.e.*, loans with an interest rate that was at least three percentage points above a federally-established benchmark)." *Compare* Comp. ¶ 67, *with* Ex. C ¶ 17.

- Both challenge pricing "discretion." *Compare* Comp. ¶¶ 16, 40, *with* Ex. C ¶¶ 33-37, 49.

- Both allege a failure to "prudently underwrite adjustable rate mortgages ('ARMs'), such as 2/28s." *Compare* Comp. ¶ 52, *with* Ex. C ¶ 28.

- Both allege a "disproportionately high rate of foreclosure" in the City. *Compare* Comp. ¶ 100, *with* Ex. C ¶ 22.

- Both say a "comparison of the time from origination to foreclosure" shows a "disparity with respect to the speed with which loans to [minorities and whites] move into foreclosure." *Compare* Comp. ¶ 88, *with* Ex. C ¶ 38.

- Both allege "declining property values" and "reduced property tax[es]" in Philadelphia. *Compare* Comp. ¶ 106, *with* Ex. C ¶ 72.

The PHRC concluded that, even by 2010, claims regarding subprime lending in Philadelphia were barred by the statute of limitations (*see* PHRC Recommendation and Final Order, attached as Exhibit D), but the DOJ Consent Decree nevertheless provided a remedy:

> [N]o less than $2 million to allegedly aggrieved persons who lived in the City of Philadelphia at the time of loan origination to resolve the issues presented in the investigation that the Pennsylvania Human Relations Commission ("PHRC") sought to conduct against Wells Fargo.

Ex. A at 15. PHRC and Wells Fargo thus entered a "Pre-Determination Settlement Agreement,"

attached as Exhibit E, which provided that "entry of the [DOJ] Consent Decree [] and the execution of this Settlement Agreement fully resolve and release Respondents from all claims that were raised, or could have been raised by the Commission" regarding "discrimination" in "lending."[8]

III. ARGUMENT

A. The City's Alleged Indirect Financial Injuries Are Too Remote To Satisfy The *City of Miami* Proximate Cause Standard Under Any And All Circumstances.

Just two weeks before the City filed suit, the Supreme Court considered nearly identical Fair Housing Act complaints. In doing so, the Court articulated the standard a city must satisfy to sufficiently plead that alleged property tax and municipal services injuries were "proximately caused" by allegedly discriminatory loans made to its residents.[9] *See City of Miami*, 137 S. Ct. at 1305-1306. This threshold analysis must be conducted "in the first instance."[10] *Id*. at 1306.

This Court may well be the first to apply the Supreme Court's proximate cause requirement to one of the copycat complaints brought by another city. And here, even assuming that the City plausibly alleged facts establishing that each of the myriad steps in its long causal

[8] In September 2016, the United States and Wells Fargo submitted a "Joint Motion for Termination of the Consent Order," stating the government's agreement that Wells Fargo "has satisfied each term of the Consent Order," including compliance with the Fair Housing Act. *United States v. Wells Fargo Bank, N.A.*, No. 1:12-cv-01150 (Sept. 14, 2016), ECF No. 24.

[9] Miami's complaint (and, by extension, Philadelphia's) says enough to "arguably fall within the FHA's zone of interests, as [the Court] previously interpreted that statue." *Id.* at 1305.

[10] *City of Miami* confirmed that proximate cause is an "element" of a Fair Housing Act claim. *Id*. at 1306. And "like any other element of a cause of action, it must be adequately alleged at the pleading stage in order for the case to proceed." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678–679 (2009)). Thus, the Supreme Court remanded *City of Miami* to the Eleventh Circuit (where it is still pending) to decide whether Miami's complaint (which is nearly identical to the Complaint at issue here) meets the proximate cause requirement. "***If a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed***[.]" *Id.*

chain actually occurred (it does not),[11] application of the *City of Miami* pleading standard confirms that the City nevertheless has failed to plead that any of Wells Fargo's actions proximately caused the City's indirect injuries. Thus, this lawsuit must come to its end.

The term "proximate cause" refers to the judicial limitation of "a person's responsibility for the consequences of that person's own acts." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). The "question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Id.* ***Proximate cause thus "generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct."*** *City of Miami*, 137 S. Ct. at 1305 (quoting *Lexmark*, 134 S. Ct. at 1390).

In the Fair Housing Act context, the Supreme Court emphasized the "close connection that proximate cause requires" between the complained of injury and conduct. *Id.* at 1306. This is not surprising, nor is the requirement unique to the Fair Housing Act. Indeed, the Supreme Court and circuit courts typically have found ***no*** liability in federal causes of action for damages that were multiple steps removed—and thus too remote—from the complained of conduct:

- *Holmes v. Sec. Inv'r Prot. Corp*., 503 U.S. 258 (1992) (plaintiff failed to establish proximate cause in a RICO claim alleging five steps (1) defendants made misrepresentations regarding six companies; (2) which, when revealed, caused stock prices to plummet; (3) which caused broker-dealers' financial troubles; (4) which caused the companies' liquidation; and (5) which led plaintiff to advance $13 million to cover customer claims);
- *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519 (1983) (union failed to establish proximate cause in an antitrust claim alleging three steps (1) defendants coerced third parties to hire non-union contractors; (2) which caused business to be diverted to non-union contractors; and (3) injured the union's business);
- *Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014) (failure to establish proximate cause in an Endangered Species Act claim alleging seven steps (1) defendants' practices

[11] To connect challenged conduct (discriminatory loans) with alleged injuries (lost property taxes and municipal costs), the City must plausibly allege each step in its causal chain ***actually occurred***. Instead, the Complaint contains only "possibilities" and "speculations," which are legally insufficient. *Iqbal*, 556 U.S. at 682 (citations omitted).

caused third parties to take water from rivers; (2) which caused less freshwater inflows in in the ecosystem; (3) which, along with a drought, caused more salinity; (4) which caused less drinkable water; (5) which caused fewer blue crabs and wolfberries; (6) which caused endangered cranes that eat those species to starve; and (7) caused the cranes to die).

- *Talbert v. The Judiciary of the State of New Jersey*, 420 F. App'x 140 (3d Cir. 2011) (affirming dismissal of discrimination claims under Title VII, § 1981, and § 1983 for failure to establish actions of member of state judiciary proximately caused damages sustained by former judge as result of governor's decision not to reappoint her).

Consistent with such cases, a Fair Housing Act plaintiff must establish the required "close connection" by showing "some direct relation between the injury asserted and the injurious conduct alleged." *City of Miami*, 137 S. Ct. at 1306 (quoting *Holmes*, 503 U.S. at 268). The directness inquiry focuses on evaluating the plaintiff's "chain of causation"—*i.e.*, the nature and number of causal "links" or steps between the challenged conduct and the alleged harm. *Associated Gen. Contractors,* 459 U.S. at 540. ***The "general" rule of directness in a Fair Housing Act case*** like the City's ***is that proximate cause does not extend "beyond the first step" in the causal chain***. *City of Miami*, 137 S. Ct. at 1306 (citing *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 10 (2010) (Roberts, C.J.)). This rule comports with common speech—Webster's Third New International Dictionary defines "proximate" as "immediately preceding or following (as in a chain of events, causes or effects)." Def. 1 (1981).

As part of the directness evaluation, a court must also consider whether the alleged harm "may have been produced by independent factors." *Associated Gen. Contractors*, 459 U.S. at 542. The more steps between the challenged conduct and the alleged harm, the less direct the injury, and "the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Holmes*, 503 U.S. at 269. A plaintiff fails the directness requirement and cannot establish proximate cause where the alleged injury "is not surely attributable" to the defendant's conduct, "but might instead have

resulted from any number of other reasons." *Lexmark*, 134 S. Ct. at 1394 (alterations omitted) (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006) (Kennedy, J.))

The Fair Housing Act's directness requirement is grounded in the practical reality that the "housing market is interconnected with economic and social life." *City of Miami*, 137 S. Ct. at 1306. As the Supreme Court explained, ***"[a] violation of the [Fair Housing Act] may, therefore, be expected to cause ripples of harm to flow far beyond the defendant's misconduct. Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel."*** *Id*. (citations and quotations omitted). Absent application of the directness requirement, Fair Housing Act liability could stretch to any remote yet imaginable aspect of "economic and social life" in a never ending causal chain—like in the children's book *If You Give a Mouse a Cookie*.

Significantly, all eight members of the Supreme Court agreed with the proximate cause standard announced by the *City of Miami* majority. The Court thus vacated the Eleventh Circuit's opinion and remanded for further consideration of proximate cause in light of the Fair Housing Act's newly announced directness rule.[12] Yet in concurring, Justices Thomas, Alito, and Kennedy would have gone beyond merely articulating the standard. They observed that "***the majority opinion leaves little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause that the Court adopts***." *Id.* at 1311 (Thomas J., concurring). In particular, the concurrence emphasized that "Miami's own account of causation shows that the link between the alleged [Fair Housing Act] violation and its asserted injuries is exceedingly attenuated," and, applying that standard on remand, the lower court "will

[12] As the Supreme Court made clear in vacating the Eleventh Circuit's decision (which applied a wider scope, looking only to whether Miami's asserted injury was "foreseeable" and thus "possible"), mere possibility—*i.e.*, foreseeability—is not enough. The challenged conduct must have a sufficiently "close connection" to the alleged injuries to be seen as the ***direct*** cause of damages.

not need to look far to discern other, independent events that might well have caused the injuries Miami alleges in these cases." *Id.* The concurrence would have held "that Miami has failed to sufficiently plead proximate cause under the [Fair Housing Act]." *Id.* at 1311-12.

Application of the *City of Miami* standard here compels the conclusion the concurrence found unavoidable: the Complaint does not—because it cannot—sufficiently plead proximate cause. Indeed, contrary to the "general" rule that proximate cause does not extend "beyond the first step," as shown in the chart below, the City's injuries are not just one step removed, but ***at least five steps*** removed from allegedly discriminatory loans made to its residents:

Step 1	Step 2	Step 3	Step 4	Step 5	Step 6
Discriminatory loans to borrowers;	Defaults because of discriminatory loan terms;	Foreclosure because of defaults;	Vacant foreclosed properties;	Properties decline in value and become blighted;	Less property taxes, and more City spending.

The City's causal chain begins with ***first***, alleged discriminatory loans to non-party borrowers, but then requires a cascade of at least five additional steps: ***second***, defaults because of alleged discriminatory payment differentials (as opposed to some other reason); ***third***, foreclosures of properties secured by the loans (instead of sale or loan modifications or other foreclosure alternatives); ***fourth,*** vacancies of foreclosed properties (instead of occupancy by new owners); ***fifth***, declines in the values of properties because of foreclosures (rather than because of general market or neighborhood trends); and ***sixth***, lower property tax collections because of lower property values. Also, the theory requires instances of blight and crime at foreclosed properties because of vacancies (not simply because of chance or general social conditions) that caused the City to spend money on services that otherwise would not have been spent. The City thus "complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts," and thus "stand[s] at too remote a distance to recover."

Holmes, 503 U.S. at 268-269.

Further defeating proximate cause, each link in the City's causal chain involves a host of independent actors and variables: (1) borrowers—whose financial circumstances might have changed due to other independent factors such as job loss, sickness, divorce, or mismanagement—who defaulted; (2) loan servicers, who foreclosed; (3) prospective buyers, who gave lower or no offers; (4) property assessors, who discerned lower home values; (5) squatters, vandals, or other criminals, who congregated in or near the empty homes; and (6) police and fire departments (or policymakers above them), who adjusted the level of municipal services. All of these independent actors and variables entered the scene long after Wells Fargo had exited. There can be no certainty that the City's "damages [are] attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269; *Lexmark,* 134 S. Ct. at 1394.

Hemi Group was relied on by the Court in *City of Miami*. It offers a useful analogy. As here, a city claimed that statutory violations resulted in diminished tax revenues. *See* 559 U.S. at 6. Also as here, that city relied on a multistep causal theory involving independent actors.[13] Yet, *Hemi Group* concluded the city could not establish proximate cause because its "theory of causation requires us to move well beyond the first step," "is far too indirect," and "rests on the independent actions of third and even fourth parties." *Id.* at 10, 15. The City's theory requires even more steps and implicates even more independent actors.[14] The result in *Hemi Group*

[13] In particular, the defendant had allegedly committed a multiple step RICO fraud by (1) failing to provide information to the state about customers purchasing cigarettes; (2) the state in turn was unable to provide the information to the city; (3) the city in turn could not determine which of defendant's customers had and had not paid a cigarette tax; and (4) the city thus could not pursue customers who had not paid to collect the unpaid taxes. *Id*. at 9.

[14] Here, the City would have to establish at least six steps to link the challenged conduct and alleged injuries—and as discussed above, each of these steps involves myriad other possible causes, thus decreasing the mathematical probability that the challenged acts (discriminatory loans) had anything at all

certainly follows here.[15]

Moreover, "[p]artly because it is indirect, and partly because the alleged effects on the [City] may have been produced by independent factors, the [City's] damages claim is also highly speculative." *Associated Gen. Contractors*, 459 U.S. at 542. Ignoring proximate cause and allowing the City's claim "would risk massive and complex damages litigation," far beyond that which "is administratively possible and convenient." *City of Miami*, 137 S. Ct. at 1306.

Looking at the proof that would be required to support a verdict in this case confirms the claim must be dismissed. It would be necessary to hold mini-trials on every single loan, requiring a deep dive into the financial circumstances of borrowers. ***First***, the City would need to prove, for each and every loan, that the borrower qualified for certain loan terms, but instead received discriminatory loan terms, and defaulted because of the discriminatory payment differential—and not because of a job loss, divorce, or other variables. Such mini-trials would necessarily implicate the private financial lives of individuals who are not parties to this case and who have not complained about their loans, thus raising serious privacy concerns. ***Second***, another set of mini-trials would be required regarding foreclosure proceedings for each of the properties owned by the borrowers who received discriminatory loans and defaulted because of the terms. These mini-trials would implicate issues individual to each borrower and each

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to do with the asserted injury (lost tax revenue). A borrower may be able to show a direct injury as a result of a discriminatory loan (100% causation), but the City must show, through six steps of outward ripples, that allegedly discriminatory loans caused the City to lose taxes (to the exclusion of all other causes)—a virtual mathematical impossibility.

[15] Another consideration "relevant" to the directness inquiry is "whether better situated plaintiffs would have an incentive to sue." *Id*. at 990-991. The need to resolve challenging questions of causation and damages of downstream victims "is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes,* 503 U.S. at 269-270. Just so here—both the Commonwealth and DOJ pursued the same claims as the City, and obtained relief for City residents. *See* Section II(B), *supra*. Because direct victims have already obtained relief, the City is simply unjustified in pursuing its attenuated claims.

property, like borrower decisions regarding foreclosure alternatives (such as sales or loss mitigation), borrower decisions to live in or abandon homes during foreclosure proceedings, determinations of whether foreclosures were completed, determinations of when, if ever, properties became vacant, and determinations of when new owners moved in. ***Third***, yet another set of mini-trials would be required regarding the valuation of foreclosed properties, including facts about each property's value before and after foreclosure, the methods for conducting valuations, and independent factors impacting property values (such as home improvements, neighborhood trends, and natural disasters).[16] And so on, and so on.

The *City of Miami* proximate cause requirement does not permit the City's allegations of cause and effect, and effect, and effect. The case must be dismissed.

B. The City's Unique Public Record Contradicts And Renders Implausible The Theory That Foreclosures Caused Declines In Property Values And Property Tax Revenue.

Even if the Complaint could satisfy the *City of Miami* proximate cause standard (it cannot), the City's theoretical chain of causation irreparably breaks down at the point where the City concludes with no plausible fact support that "[w]hen a home falls into foreclosure, it suppresses the property value of the foreclosed home," and "[t]hese suppressed property values in turn suppress property tax revenues to the City." Comp. ¶¶ 107, 111. In copying the same theory of financial injury previously advanced by municipal plaintiffs like Miami, the City picked a shoe that does not fit. Philadelphia's unique history and public record plainly contradict the allegations and render them implausible. *See Bolick v. Pennsylvania*, 2011 WL 941394, at

[16] For example, the City's "river wards" neighborhoods suffer from "hazardous levels of lead contamination," the "toxic legacy" of 14 lead plants that operated there. Wendy Ruderman, et al., *In booming Philadelphia neighborhood, lead-poisoned soil is resurfacing*, THE PHILA. INQUIRER: PHILLY.COM (Jun. 18, 2017). Also, Philadelphia communities have been destabilized by an "opioid epidemic" from which "no part of the city has been spared." Sam Wood, *Fatal drug overdoses in Philly surged to 900 in 2016*, THE PHILA. INQUIRER: PHILLY.COM (Jan. 11, 2017).

*5 (E.D. Pa. Mar. 16, 2011) (the Court "cannot accept as true an allegation that is plainly contradicted by a matter of public record"); *Sourovelis v. Phila.*, 2017 WL 1177101, at *13 (E.D. Pa. Mar. 30, 2017) (same).

Unlike other cities that have advanced the same theory, ***Philadelphia's property tax revenues have not been tied to actual property values because Philadelphia did not conduct annual assessments of property values for purposes of assessing and collecting property taxes***. Thus, Philadelphia "***properties were [] assessed at only a fraction of their actual value, and assessments had often not kept up with changes in value***."[17] In 2014, the City implemented the Actual Value Initiative, a reform measure that was designed to finally link actual property values with property tax assessments and collections and "resulted in the first major reassessment of all 579,000 parcels in the City of Philadelphia in several decades."[18]

Thus, a hypothetical decline in the market value of a house following a foreclosure would have ***no impact*** on the property tax revenue due to the City. Not surprisingly, the Complaint alleges no facts about any property in Philadelphia where reduced property tax revenue actually occurred. Because no property value assessment would have been conducted either before or after the hypothetical foreclosure, the City's damages theory—*i.e.*, lost property taxes caused by decreased property values following foreclosure—is contradicted by the judicially noticeable information of public record maintained by the City, and is entirely implausible.

A review of the City's records regarding the five "sample" properties secured by

[17] Michael A. Nutter, *City of Philadelphia Five Year Financial and Strategic Plan* (Five Year Plan No. 24, 2015), http://www.phila.gov/Newsletters/FY16FY20FiveYearPlanFINAL.pdf. The City's Finance Director addressed the situation in City Council testimony, explaining "there's been growth in values actually going back to the time we really did an assessment, which was, you know, almost a decade ago." *Hearing on Res. 110061 Before the Comm. of the Whole*, 162 (Mar. 22, 2011) (statement of Rob Dubow, Finance Director, City of Philadelphia).

[18] OFF. OF PROP. ASSESSMENT, FISCAL YEAR 2017 BUDGET TESTIMONY, 5 (Apr. 6, 2016), http://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/WebServerResources/CMSResources/OPACouncilTestimonyApril062016.pdf.

allegedly "discriminatory" loans that "resulted in foreclosure" provides a case in point. Comp. ¶ 133; *see* City Office of Prop. Assessment records, attached as Exhibit F. Although the City does not say when the properties foreclosed, that information is not necessary to confirm the implausibility of the damages theory—between 2004 and 2014, ***each of the five "sample" properties was reassessed only once, and all five properties increased in value***. *See* Ex. F. And in 2014, when the Actual Value Initiative was implemented, all five properties were reassessed and dramatically increased in value. *See id*. The copycat damages theory does not fit here, and the case cannot survive the unique realities of "economic and social life" in Philadelphia. *City of Miami* at 11.

C. The *Res Judicata* Doctrine Bars The City's Challenge.

Under the *res judicata* doctrine, a final adjudication on the merits bars any future suit where there is "(1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued." *Heimbecker v. 555 Assocs.*, 2003 WL 21652182, at *10 (E.D. Pa. Mar. 26, 2003) (Davis, J.) (applying Pennsylvania law and granting motion to dismiss on *res judicata* grounds), *aff'd*, 90 F. App'x 435 (3d Cir. 2004). A "consent decree is a final judgment on the merits." *Munoz v. Sovereign Bank*, 323 F. App'x 184, 187 (3d Cir. 2009). As this Court has held, "res judicata must be liberally construed and applied without technical restriction" to achieve the "purpose of the doctrine of res judicata [*i.e.*,] to minimize the judicial energy devoted to individual cases, establish certainty and respect for court judgments, and protect the party relying on the prior adjudication from vexatious litigation." *Heimbecker*, 2003 WL 21652182, at *10.

Here, the *res judicata* doctrine bars the FHA claim for two reasons. ***First***, the first two *res judicata* elements turn upon the "essential similarity of the underlying events giving rise to the various legal claims," including "the identity of the acts complained of, the demand for

recovery, the identity of witnesses, documents, and facts alleged." *McArdle v. Tronetti*, 426 Pa. Super. 607, 627 (1993). Under this standard, there can be no doubt there is an identity of issues and causes of action between the City's suit and PHRC proceeding. As described in detail at Section II(B), *supra*, the City's Complaint and the PHRC complaint assert the same causes of action based on duplicative allegations challenging the same lending practices.[19] And the conduct the City challenges is the same conduct that already resolved in the PHRC action through the 2012 settlement and the DOJ Consent Decree with Wells Fargo. *Res judicata* bars the City's duplicative assertion of any claims that were raised or "could have been but were not raised" in the earlier PHRC suit. *Heimbecker*, 2003 WL 21652182, at *10 (Davis, J.) (applying Pennsylvania law and granting motion to dismiss on *res judicata* grounds).

Second, this and the PHRC action involve an identity of parties or their privies suing in the same legal capacity. While "there is no prevailing definition of 'privity' which can be applied automatically to all cases," *Day v. Volkswagenwerk Aktiengesellschaft*, 318 Pa. Super. 225, 233 (1983), this Court has explained that privity turns on "whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights," *Heimbecker*, 2003 WL 21652182, at *12. The sole focus of that action was the attempt by the Commonwealth to obtain relief for conduct occurring in Philadelphia, and ***the PHRC action alleged the same property tax injury that the City repeats now***. *See* Section II(B), *supra*. PHRC obviously acted in the City's interests, even asserting the City's injuries. While the 2012 settlement and DOJ Consent Decree resolving the PHRC action directed funds to Philadelphia residents, the City could have asserted an

[19] This identity is further shown by the assigning of a HUD case number to the PHRC action, meaning it was investigated under the Fair Housing Act. PHRC has been certified as a "substantially equivalent" agency, which required a demonstration that the Pennsylvania Human Relations Act protects the same "substantive rights" as the Fair Housing Act and allows the same "remedies," including the "availability of judicial review." *See* 42 U.S.C. §3610(f)(3)(A).

entitlement to relief based on alleged property tax damages. But the City never argued monies should go to it rather than to its citizens and never otherwise contested the relief. The City seeks to bring "the same cause between essentially the same parties" but should not be permitted to "nullify" the *res judicata* doctrine with "a mere shuffling of plaintiffs on the record." *Heimbecker*, 2003 WL 21652182, at *12. The City does not get a second bite at the apple.

D. The City Fails To State A Claim For Disparate Impact Discrimination.

The City dedicates a substantial portion of its Complaint on a purported claim of "disparate impact." *See* Comp. ¶¶ 1, 4, 31, 37, 40-66, 100, 135, 138-139, 146. Two years ago, the Supreme Court's *Inclusive Communities* decision articulated the Fair Housing Act standard of disparate impact and imposes a gatekeeping role requiring district courts to evaluate such claims "***at the pleading stage.***" 135 S. Ct. at 2523 (a "plaintiff who fails to allege facts at the pleading stage . . . cannot make out a prima facie case of disparate impact," and such cases require "prompt resolution").

Inclusive Communities emphasizes that a disparate impact claim cannot proceed "based solely on a showing of a statistical disparity" because "racial imbalance does not, without more, establish a prima facie case of disparate impact." *Id.* at 2522-2523 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)). Rather, "***a disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to the defendant's policy or policies causing that disparity***." *Id.* at 2523; *Wards Cove*, 490 U.S. at 657 (plaintiff must isolate "specific or particular . . . practice that has created the disparate impact"); *Hardie v. NCAA*, 2017 WL 2766096, at *12 (9th Cir. June 27, 2017). The specific policy under attack must be "***facially neutral*** in the[] treatment of different groups," meaning that the policy itself does not reflect intentional discrimination and is applied fairly and uniformly to minorities and non-minorities alike. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *City of Los*

Angeles v. Wells Fargo & Co., 2017 WL 2304375, at *1 (9th Cir. May 26, 2017); *City of Miami v. Wells Fargo & Co.*, 2016 WL 1156882, at *5 (S.D. Fla. Mar. 17, 2016). The plaintiff must meet a "robust causality requirement" by showing the specific policy caused the alleged statistical disparity. *Inclusive Communities*, 135 S. Ct. at 2523-2524.

The City fails to allege plausibly any facts satisfying any of the essential elements of disparate impact under *Inclusive Communities*. The claim is deficient at the first step because the City nowhere identifies a ***specific*** and ***facially neutral*** business practice that is the subject of the disparate impact challenge. Instead, the City says the entire business of lending—from marketing, to underwriting, to pricing, to compensation, to monitoring—is "united." Comp. ¶ 139. Such a generalized allegation, however, provides no basis for a disparate impact claim.

Nor does the City's citation to policies of "marketing certain more expensive or riskier loan products to residents in predominantly minority neighborhoods" and "incentivizing employees to issue discriminatory loans" aid its cause. Comp. ¶ 138. These alleged policies would require express consideration of race and are not race neutral. Rather, as the Southern District of Florida concluded in dismissing a nearly identical complaint, "[t]his is alleged intentional conduct, which is not a basis for a disparate impact FHA claim under *Inclusive Communities*." *City of Miami*, 2016 WL 1156882, at *5.

The City describes other alleged practices of "failing to underwrite loans based on traditional underwriting criteria," "placing borrowers in more expensive, risker loans," "failing to properly underwrite refinances," "requiring substantial prepayment penalties," and "charging excessive points and fees." Comp. ¶ 138. But if such practices were applied uniformly to minority and non-minority borrowers—as must be assumed for a disparate impact claim—the only plausible inference is "they would affect borrowers equally regardless of race." *City of Los*

Angeles, 2017 WL 2304375, at *1. On the other hand, if the City contends that these practices were applied ***only*** to minority borrowers, then the City is alleging intentional discrimination (*i.e.*, minority borrowers were treated differently). "Inconsistent application of housing standards, of course, may be the basis for a disparate treatment claim under the FHA," but "an FHA disparate-impact claim may not be used . . . merely because housing standards are inconsistently applied." *Ellis v. City of Minneapolis*, --- F.3d ---, 2017 WL 2735423, at *5 (8th Cir. June 27, 2017).

The City also presents legally insufficient allegations regarding purported practices of "failing to adequately monitor the Bank's practices regarding mortgage originations" and "failing to monitor and ensure compliance with federal fair lending laws."[20] Comp. ¶ 138. As a matter of law, these allegations cannot support a disparate impact claim because an alleged failure to monitor "is not a policy at all."[21] *City of Los Angeles*, 2017 WL 2304375, at *1.

Because the City fails to identify a specific, race neutral policy subject to challenge, it cannot establish a "causal connection" sufficient to meet the *Inclusive Communities* "robust causality requirement" by linking the policy and an alleged disparity. 134 S. Ct. at 2523. Rather, flouting the Supreme Court's rule, the City seeks to bring a disparate impact claim "based solely on a showing of a statistical disparity." *Id.* at 2522. The City asks the Court to sanction the archetypal "abusive disparate-impact claim" that *Inclusive Communities* guards

[20] The DOJ Consent Order contradicts the "failure to monitor" claims. DOJ agreed that Wells Fargo "satisfied each term of the Consent Order," including maintaining its then existing "comprehensive fair lending monitoring program." *See* n.8, *supra*; Ex. B at ¶ 9. And Philadelphia has continually monitored Wells Fargo's fair lending without raising any issue. *See* n.2, *supra*.

[21] The City's allegation concerning the alleged practice of "providing loan officers discretion" in their jobs, Comp. ¶ 40, is contrary to the holding in *Wal-Mart Stores, Inc. v. Dukes*, that discretion is "a policy *against* having uniform employment practices." 131 S. Ct. 2541, 2554 (2011). *See* Order Denying Pls.' Mot. for Class Cert. *In re Wells Fargo Residential Mortgage Lending Discrimination*, M:08-md-01930 (N.D. Cal. Sept. 6, 2011), ECF No. 401; *Rodriguez v. Nat. City Bank*, 726 F. 3d 372, 384-386 (3rd Cir. 2013) (FHA case, applying *Dukes*, holding "the exercise of broad discretion by an untold number of unique decision-makers in the making of thousands upon thousands of individual decisions undermines the attempt to claim, on the basis of statistics alone, that the decisions are bound together by a common discriminatory mode").

against. *Id.* at 2522. The claim "must fail." *Id.* at 2523.

E. The Complaint Is Time Barred By The Two Year Statute of Limitations.

Fair Housing Act suits must be filed "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). A Fair Housing Act "claim for issuing a discriminatory loan begins to run from the date that the loan closes." *City of Miami*, 800 F.3d at 1274; *Silvas v. G.E. Money Bank*, 449 F. App'x 641, 644 (9th Cir. 2011); *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 532 (7th Cir. 2011). Thus, the Complaint must plausibly plead an actionable violation of the Act occurring on or after September 23, 2014. *Id.*; *see also City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1285 (11th Cir. 2015) (holding these lawsuits may proceed only "***if*** the City is able to identify FHA violations within the limitations period"), *rev'd on other grounds*, 137 S. Ct. 1296. Philadelphia has failed to do so.

1. The Time Period to Challenge Subprime Loans Expired Long Ago.

As shown above, the Complaint overwhelmingly focuses on Wells Fargo's origination of subprime mortgage loans. *See* Section II(A), *supra*. Yet the City never alleges that Wells Fargo made any subprime loans in Philadelphia during the two year limitations period preceding the filing of the Complaint. Nor could it. Subprime lending ended long ago, as the materials cited in the Complaint confirm. *See* Comp. ¶ 56 (citing DOJ Consent Order ("in May, 2008 [Wells Fargo] stopped originating nonprime loans")); Comp. ¶ 18 (citing *A Racial Financial Crisis*, 83 Temple L. Rev. 941, 942 (2011) ("subprime lending has come to a standstill in the wake of the financial crisis")). In July 2012, PHRC concluded it was too late to challenge subprime loans in Philadelphia. *See* Ex. D. If the claim was time barred then, it is certainly time barred now.

2. The City Fails to Identify "Discriminatory" Loans in the Limitations Period.

The Complaint contains just two allegations—paragraphs 134 and 135—that correspond

to loans which allegedly "closed (*i.e.*, 'originated') during the limitations period." The City lists six random addresses and alleges that the loans "are discriminatory because they were issued to minority borrowers and were more expensive than the loans issued to similarly situated white borrowers." Comp. ¶ 134. This is a legal conclusion and the City alleges no facts to support it.

To start, the City never alleges that any of the minority borrowers who received the six "sample" loans complained about the loan product or terms they received. The City never alleges any facts about the financial circumstances or desires of the minority borrowers who received the six "sample" loans or about the white borrowers who supposedly received less expensive loans to allow an inference that the borrowers are "similarly situated." Indeed, the Complaint gives no indication that the City knows any facts about any borrowers ***whatsoever***.

Paragraph 134 is entirely devoid of the fact allegations required to meet the plausibility standard. *Iqbal*, 556 U.S. at 678-699; *City of Miami*, 2016 WL 1156882, at *3 (holding claim is time barred because the "sole [] paragraph attempting to identify a timely FHA violation within the two-year limitations period is too conclusory to meet the *Twombly/Iqbal* pleading standard"). To the extent the City claims the six "sample" loans are intentionally discriminatory, it must "plead sufficient facts to state a claim for purposeful and unlawful discrimination" by "plausibly showing" Wells Fargo made unfavorable loans to minorities "because of their race, religion, or national origin." *Iqbal*, 556 U.S. at 682. In other words, the City must plausibly allege that race "was the 'but-for' cause of the challenged [lending] decision." *Gross v. F.B.L. Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (interpreting language of the Age Discrimination in Employment Act nearly identical to that of the Fair Housing Act).[22]

[22] The City is misguided to the extent it believes it can state a claim simply by saying a minority borrower paid more for a loan than a white borrower. Loan pricing is "inherently complex," Final HMDA Rule, 80 Fed. Reg. 66128, 6691 (Oct. 28, 2015), and under *Iqbal* it is not enough that pricing differences might be ***correlated*** with race. *See* 556 U.S. at 681 (despite alleging a correlation with race, complaint lacked

In a parallel case, the Eleventh Circuit held that a timely complaint requires plausible facts about the "characteristics that made [the limitations period loans] predatory or discriminatory," including facts about "what type of loan was made" and "how that loan was supposedly discriminatory." *City of Miami*, 800 F.3d at 1283-84; *City of Miami*, 2016 WL 1156882, at *3-*4 (S.D. Fla. Mar. 17, 2016) (applying Eleventh Circuit's standard on remand and dismissing claim as untimely). Philadelphia does not come close to meeting this standard. The only information provided is that four of the six "sample" loans are "government" loans and the remaining two are "conventional" loans. Comp. ¶ 134 and n.48-53. This adds no factual support to a claim of "discrimination." The Complaint provides a list of the "types of loans" the City challenges as "discriminatory," and specifically references "government loans, including FHA and VA loans." Comp. ¶ 67. Coupled with the City's identification of four limitations period loans as "government" loans, this suggests the City seeks to present a timely claim through a categorical challenge to these federal loan programs.

But such a challenge defies logic—not to mention the plausibility test. For decades these loan programs have been the bedrock of the federal housing policy for veterans and for low and moderate income borrowers, expanding homeownership opportunities and promoting affordable housing. The FHA loan program is routinely praised by HUD and Congress for specifically benefiting minority borrowers.[23] The allegation is also implausible because these government loan programs ***prohibit*** other loan "types" the City challenges as "discriminatory" in paragraph

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factual allegations that Arab Muslim men were detained because of race, and thus failed to state a plausible discrimination claim). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id*. at 678.

[23] *See* Fed. Hous. Admin. Annual Report to Congress, Fiscal Year 2016, at 18 (Nov. 15, 2016), http://portal.hud.gov/hudportal/documents/huddoc?id=FY2014FHAAnnRep11_17_14.pdf ("FHA also plays a critical role in supporting minority homeownership").

67.[24] As a matter of law, FHA and VA loans are neither predatory nor discriminatory. Indeed, in an identical suit brought against Wells Fargo by Los Angeles, represented by the same private lawyers as the City, the Central District of California admonished Los Angeles for its "scorched-earth approach" of labeling the FHA program as "predatory" or "discriminatory." *City of Los Angeles v. Wells Fargo & Co.*, 2015 WL 4398858, at *13 (C.D. Cal. July 17, 2015), *aff'd*, 2017 WL 2304375 (affirming summary judgment because "the City did not show a discriminatory loan during the limitations period"); *City of Los Angeles v. Bank of Am. Corp.*, 2015 WL 4880511, at *6 (C.D. Cal. May 11, 2015) (dismissing related claim as time barred and noting "misgivings that the City's Complaint advanced somewhat novel claims for which there would be a lack of evidentiary support" became "apparent" at summary judgment), *aff'd*, No. 15-55897, 2017 WL 2323441 (9th Cir. May 26, 2017). That admonition applies equally here.

The allegations regarding the six "sample" loans also fail to state a timely claim when viewed from the perspective of disparate impact. The City never even ***attempts*** to present any statistical analysis of lending during the limitations period, but rather amalgamates loans originated during the entire time period from 2004 through 2014. *See* Comp. ¶¶ 9, 69-72, 84-85, 88-89, 94-95. Yet only about three months of this eleven year period falls with the Fair Housing Act's two year statute of limitations—stated differently, 97.5% of the data points are completely outside the limitations period and cannot establish what occurred after September 23, 2014.

The City's excuse for not conducting a statistical analysis of limitations period loans is that "the small size of the available sample does not lend itself adequately to statistical analysis in isolation." *Id.* ¶ 135. Yet the Supreme Court has found a pool of as few as "seventy-seven"

[24] *See* 38 C.F.R. § 36.4310(a) (VA loans); 24 C.F.R. §§ 203.17(c)(2), (c)(3) (FHA loans); 24 C.F.R. § 203.21 (FHA loans); 24 C.F.R. § 203.24(a) (FHA loans). *See* 38 C.F.R. §§ 36.4340(f)(1),(h) (VA loans); FHA Single Family Housing Handbook (HUD 4155.1), § 1.B.2 (FHA loans). *See* 38 C.F.R. § 36.4311 (VA loans); 24 C.F.R. § 203.22(b) (FHA loans). *See* FHA Single Family Housing Handbook (HUD 4155.1), § 6.B.2.a.

individuals large enough to statistically test for a "racial adverse impact." *Ricci v. DeStefano*, 557 U.S. 557, 566, 586-587 (2009). And records made publicly available by the City Treasurer confirm that the City itself has carefully conducted statistical analyses of the fair lending performance of Wells Fargo and other depositories ***every year***, without ever raising a concern that Wells Fargo made too few loans. *See* n.2, *supra*. The City itself conducts fair lending reviews on "lenders in Philadelphia that originated 25 home loans or more," and Wells Fargo made "1,117" home-mortgage loans "within Philadelphia's low and moderate-income neighborhoods in 2015" alone. *Fair Lending Analysis* at 14, 52. The City fails to explain why performance cannot be analyzed over a ***two year*** period—unless, of course, "small size" means that the City cannot identify "discriminatory" loans. Comp. ¶ 135. In any event, the failure to present a statistical analysis of limitations period lending is fatal to the disparate impact claim.

3. The City Fails to Allege It Was Harmed by Limitations Period Loans.

Even if the City plausibly alleged "discriminatory" loans in the limitations period (it did not), it fails to allege that it suffered any injury from a limitations period loan. Of course, "[u]nder City's own theory, not all discriminatory loans result in harm to the City for which it seeks redress; instead, only those loans that both end up in foreclosure and either reduce property tax values or require additional city services cause the City any harm." *City of Miami*, 2016 WL 1156882, at *4. Yet the Complaint does not allege that any of the six "sample" loans foreclosed, that any of the properties are vacant, that the values of the properties decreased,[25] that the City recovered less property tax revenues, or that the properties required municipal services. The City merely offers the possibility that, at some unidentified future time, some "number of the properties corresponding to the issuance of discriminatory loans subsequent to September 23,

[25] To the contrary, the property values have remained the same or increased during the limitations period for each of the six "sample" properties. *See* City Office of Prop. Assessment records, attached as Exhibit G.

2014 will result in foreclosures." *Id*. Comp. ¶ 134. The Supreme Court held that "allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).[26] The City fails to plead a timely and actionable claim.[27]

F. The Claim Against Wells Fargo & Co. Should Be Dismissed.

The Court should dismiss the case as to Wells Fargo & Co. because the City fails to make any allegations specific to that entity or show why, as a parent corporation, it is responsible for the activities of Wells Fargo Bank, N.A. *See United States v. Bestfoods*, 524 U.S. 51, 63 (1998).

IV. CONCLUSION

WHEREFORE, Wells Fargo respectfully requests that the Motion be granted for the five reasons stated above.

Respectfully submitted,

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Dated: July 21, 2017

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[26] Disturbingly, apparently without permission of homeowners, the City has identified specific property addresses and has predicted that the borrowers may "result in foreclosure or other adverse events" at some unidentified future time. Comp. ¶ 134.

[27] The continuing violation theory lacks merit. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116-17 (2002) (Title VII context). *See also Kimbrew v. Fremont Reorganization Corp.*, 2008 WL 5975083, at *3 (C.D. Cal. Nov. 17, 2008) (holding that the continuing violations theory is inapplicable in a lending case presenting similar circumstances to this case).