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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE CITY OF OAKLAND,
Plaintiff,
v.
WELLS FARGO BANK, N.A., et al.,
Defendants.

Case No. [15-cv-04321-EMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS’
MOTION TO DISMISS**

Docket No. 107

I. INTRODUCTION

The City of Oakland (“Oakland”) brings this suit against Wells Fargo & Co. and Wells Fargo Bank, N.A. (herein collectively “WF”), alleging violations of the Fair Housing Act of 1968 (“FHA”), 42 U.S.C. §§ 3601, *et seq.*, and the California Fair Employment and Housing Act (“FEHA”), Cal. Gov. Code §§ 12900, *et seq.* Specifically, it alleges that WF offered mortgage loans to Oakland residents on a race-discriminatory basis, constituting both intentional and disparate-impact discrimination. This discrimination allegedly caused high rates of foreclosures which heavily impacted minority borrowers and harmed Oakland in various ways. In light of new guidance from the Supreme Court, *see Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), WF brings this motion to dismiss primarily challenging Oakland’s ability to demonstrate proximate cause.

Oakland claims it suffered three kinds of injuries resulting from WF’s unlawful loan practices: (1) decreases in property-tax revenues, (2) increases in municipal expenditures, and (3) neutralized spending in Oakland’s fair-housing programs. The motion is **DENIED** as to claims based on the first injury. The motion is also **DENIED** as to claims based on the second injury insofar as those claims seek injunctive and declaratory relief, but they are **DISMISSED**

1 **WITHOUT PREJUDICE** to the extent they seek damages. Oakland’s claims based on the third
2 injury are **DISMISSED WITHOUT PREJUDICE**.

3 **II. FACTUAL BACKGROUND**

4 The First Amended Complaint alleges the following.

5 A. Discrimination

6 WF discriminated against racial minorities in both the origination of mortgage loans and
7 loan refinancing decisions. Docket No. 104 (“FAC”) ¶ 3. In doing so, WF engaged in both
8 intentional discrimination and disparate-impact discrimination. *Id.* ¶ 4.

9 As to Oakland’s intentional-discrimination claim, Oakland alleges that “Wells Fargo’s
10 employees intentionally steered minority borrowers into high cost loans because of their race.” *Id.*
11 ¶ 31. Additionally, WF employees “used race as a factor in determining” what loans to offer
12 borrowers. *Id.* ¶ 32. For example, WF steered minority borrowers into adjustable-rate loans
13 instead of fixed-rate loans, failed to explain loan terms, and failed to provide product brochures in
14 Spanish. *Id.* ¶¶ 33-37. Minority borrowers were “particularly susceptible” to not understanding
15 loan terms. *Id.* ¶ 34. WF targeted minorities for disadvantageous loan terms regardless of their
16 qualifications. *Id.* ¶ 148.

17 As to the disparate-impact claim, Oakland alleges that WF engaged in various practices
18 which, though facially neutral, “created an ‘arbitrary, artificial, and unnecessary’ barrier to fair
19 housing opportunities” for minorities, *id.* ¶ 39, and “contributed to the adverse borrowing terms
20 experienced by minority borrowers.” *Id.* ¶ 41. These practices primarily consisted of giving loan
21 officers discretion and incentivizing them to offer loans that were costlier and entailed risks
22 beyond which borrowers were qualified to handle. *See id.* ¶¶ 39, 48, 53. In trying to sell such
23 loans, “[l]oan officers frequently use[d] race . . . as [a] prox[y] for their ability to sell more
24 expensive loan products.” *Id.* ¶ 47. In part, this targeting was because “minority borrowers did
25 not always appear to understand” the loans’ terms. *Id.* ¶ 36. WF loan officers sold expensive
26 loans to minority borrowers more frequently than they did to similarly situated white borrowers.
27 *Id.* ¶¶ 44-48, 50, 62, 67. Despite this disparity and due to “[s]ystematic problems with Wells
28 Fargo’s culture, employment practices, and internal controls,” *id.* ¶ 58; *see id.* ¶¶ 53-61, WF

1 allegedly failed to monitor and correct loan officers' actions. *Id.* ¶ 50.

2 B. Foreclosures

3 As a result of WF's loan practices, minority borrowers from WF were more likely than
4 similarly situated white borrowers to have a high-cost, high-risk ("HCHR") loan which Oakland
5 calls "discriminatory loan[s]." *Id.* ¶ 68. These loans "have higher costs and risk features than
6 more favorable and less expensive loans for which the borrower was eligible and which are
7 regularly issued to similarly situated white borrowers." *Id.* ¶ 1. These HCHR loans include "loans
8 that are rate-spread reportable under the Home Mortgage Disclosure Act, subprime loans, negative
9 amortization loans, 'No-Doc' loans, balloon payments, and/or 'interest only' or teaser loans that
10 also carry a prepayment penalty." *Id.* ¶ 12 n.5. A regression analysis shows that African
11 American borrowers are 2.583 times more likely to receive HCHR loans than a similarly situated
12 white borrower, while Latino borrowers are 3.312 times more likely to receive such loans.
13 *Id.* ¶ 68. That analysis controlled for a variety of independent factors such as credit score, *see id.*
14 ¶ 92 (listing factors controlled for), but it does not control for factors such as job loss, medical
15 hardship, or divorce. *Id.* ¶ 93.¹

16 Because HCHR loans are more expensive and riskier than normal-cost, normal-risk loans,
17 borrowers of HCHR loans are more likely to default and enter foreclosure. *Id.* ¶ 88; *see also id.*
18 ¶ 68 (regression analysis shows HCHR loans were more likely to result in foreclosure than non-
19 HCHR loans). HCHR loans from WF were concentrated in minority-heavy neighborhoods. *Id.*
20 ¶ 70. Hence, those neighborhoods have suffered from a higher rate of foreclosure than that in
21 white-heavy neighborhoods. *Id.* ¶¶ 73, 82, 87-88.

22 C. Injuries

23 These foreclosures—as well as vacancies and "short sales" occurring prior to the
24 completion of foreclosure—injured Oakland in three ways. First, they depressed the property
25 value of the foreclosed homes and nearby properties. *Id.* ¶¶ 110-11, 115. The lower property

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27 ¹ Oakland also alleges that borrowers in minority-heavy neighborhoods were more likely to
28 receive an undesirable loan than borrowers in white-heavy neighborhoods, though Oakland does
not plead that such borrowers were similarly situated financially or of different racial groups.
FAC ¶ 70.

1 values then resulted in lower property-tax revenues for Oakland, injuring the city financially.
2 *Id.* ¶¶ 111-12.

3 Second, foreclosed properties resulted in a variety of municipal problems, such as
4 “vagrancy, criminal activity, fire hazards, and threats to public health and safety.” *Id.* ¶¶ 131-33.
5 Oakland expended resources to remedy these problems, further injuring the city. *Id.* ¶¶ 130-33,
6 135-39. These problems further depressed neighborhood property values and therefore had an
7 additional impact on property taxes. *Id.* ¶ 134.

8 Third, disproportionately higher rates of foreclosure for minority borrowers resulted in a
9 disproportionate number of minorities losing their homes; this “impair[ed] the City’s goals” of
10 racial integration and non-discrimination in housing, *id.* ¶¶ 103-07, and “adversely impact[ed] the
11 City’s numerous programs” in pursuit of those goals, *id.* ¶¶ 103-07, “neutralizing” spending on
12 those programs. *Id.* ¶¶ 3, 17.

13 Oakland calls the first two injuries “economic injuries” and the third injury “non-economic
14 injuries.” *See id.* at ¶¶ 99-139.

15 **III. BANK OF AMERICA V. MIAMI**

16 The principal question before the Court is whether Oakland’s injuries were proximately
17 caused by WF’s actions under the FHA in light of the Supreme Court’s recent decision addressing
18 the FHA’s standard for proximate cause in *Bank of America v. Miami*, 137 S. Ct. 1296.² In
19 *Miami*, the City of Miami sued Bank of America and WF under the FHA for intentional and
20 disparate-impact racial discrimination in mortgage lending. Miami alleged that the banks issued
21 riskier, less favorable loans to black and Latino borrowers as compared to similarly situated white
22 borrowers. Miami claimed that this discrimination damaged its racial composition and goals for
23 integration and caused a high number of foreclosures, which reduced Miami’s property taxes and
24 raised its municipal costs. Two questions were before the Court: (1) whether Miami had

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26 ² Because the FEHA is “substantially equivalen[t]” to the FHA, absent an indication from the state
27 courts to the contrary, the conclusion as to the FEHA claim tracks that of the FHA claim.
28 *Sisemore v. Master Fin., Inc.*, 151 Cal. App. 4th 1386, 1420 (2007); *see also Walker v. City of Lakewood*, 272 F.3d 1114, 1131 n.8 (9th Cir. 2001) (holding that “we apply the same standards to FHA and FEHA claims” (citing *Sada v. Robert F. Kennedy Med. Ctr.*, 56 Cal. App. 4th 138, 150 n.6 (1997))).

1 prudential standing (also called statutory standing) to bring suit under the FHA, and (2) whether
2 Miami’s injuries were proximately caused by the discriminatory lending, a substantive element of
3 an FHA claim. *Id.* at 1301.

4 As to the first question, the Court noted that prudential standing required the plaintiff’s
5 claim to at least “arguably” fall within the “zone of interests protected by the law invoked.” *Id.* at
6 1302 (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388
7 (2014)). The FHA’s “zone of interests” turns on the statutory text which permits any person
8 “aggrieved” by a discriminatory housing practice to bring suit. *Id.* at 1303 (quoting 42 U.S.C.
9 § 3613(a)). The Court had previously held that an aggrieved person included all who had Article
10 III standing, but Bank of America argued that those decisions were overbroad. *Id.* (quoting
11 § 3602(i)). The Court held that even if prudential standing did not extend to all those with Article
12 III standing, Miami’s property-tax and municipal-spending injuries nonetheless fell within the
13 FHA’s zone of interest and satisfied prudential standing. *See id.* at 1305 (relying on *Gladstone*
14 *Realtors v. Village of Bellwood*, 441 U.S. 91, 95, 110-11 (1979), which held that a village had
15 prudential standing under the FHA where realtors’ steering practices caused the village to lose
16 racial balance and threatened to decrease property taxes). Though not expressed in the opinion, it
17 follows that a finding of prudential standing perforce establishes Article III standing.

18 As for the question of proximate cause, the Court first noted that claims for damages under
19 the FHA must be proximately caused by the unlawful conduct. *See id.* at 1305. It noted that “[i]n
20 the context of the FHA, foreseeability alone does not ensure the close connection that proximate
21 cause requires.” *Id.* at 1306. Because “[t]he housing market is interconnected with economic and
22 social life,” a violation of the FHA would be expected to cause “ripples of harm” that spread
23 beyond a defendant’s misconduct. *Id.* “Nothing in the statute suggests that Congress intended to
24 provide a remedy wherever those ripples travel.” *Id.* In assessing proximate cause under the
25 FHA, the “[p]roximate-cause analysis is controlled by the nature of the statutory action.” *Id.* at
26 1305. Because “[a] damages claim under the [FHA] is analogous to a number of tort actions
27 recognized at common law,” where the Court “ha[s] repeatedly applied directness principles,”
28 “proximate cause under the FHA requires ‘some direct relation between the injury asserted and the

1 injurious conduct alleged.” *Id.* at 1306 (quoting *Holmes v. Sec. Investor Protection Corp.*, 504
2 U.S. 258, 268 (1992)). Rephrased, “the general tendency” in suits for damages under statutes
3 analogous to common-law torts “is not to go beyond the first step.” *Id.* (quoting *Hemi Grp., LLC*
4 *v. City of New York*, 559 U.S. 1, 10 (2010)). The “first step” is measured beginning with the
5 defendant’s unlawful conduct. *See id.* (quoting *Lexmark*, 134 S. Ct. at 1390). “What falls within
6 that ‘first step’ depends in part on the ‘nature of the statutory cause of action’ and an assessment
7 ‘of what is administratively possible and convenient.’” *Id.* (citations omitted) (quoting *Lexmark*,
8 134 S. Ct. at 1390, and *Holmes*, 504 U.S. at 268).

9 Notwithstanding the fact that the claim of causation leading to Miami’s asserted injuries
10 clearly went beyond the “first step,” the Court, rather than ordering dismissal, remanded the case
11 for further analysis of proximate cause. *See id.* at 1301-02, 1306.

12 **IV. APPLICATION OF BANK OF AMERICA V. MIAMI**

13 In the instant case, the FAC alleges that WF pushed HCHR loans onto minority borrowers
14 at a higher frequency than onto whites. Minorities accepted these loans at higher rates than
15 whites. When these borrowers ran into financial hardship (in part because of the higher cost and
16 risk of these loans), WF refused to refinance minority borrowers’ loans on favorable terms.
17 Minority borrowers, having higher loan payments and less flexible terms, defaulted more often
18 than white borrowers and suffered foreclosure at higher rates than white borrowers. As noted
19 above, Oakland alleges three consequences for the City: (1) foreclosures made the affected
20 properties and neighboring properties less desirable, and their property values dropped, causing
21 Oakland to collect less property tax; (2) criminals, litterers, and others who caused municipal ills
22 were more likely to gather around the foreclosed property, thus causing Oakland to expend law
23 enforcement and other resources to ameliorate these problems; (3) Oakland’s goals and spending
24 in programs for non-discrimination in housing were undermined. WF argues Oakland fails
25 adequately to allege proximate cause.

26 Oakland asserts two threshold arguments to avoid the thrust of *Miami*’s proximate cause
27 analysis. First, Oakland argues that it must by definition satisfy proximate cause under the FHA,
28 because it clearly has standing under the FHA. “It would be illogical for Oakland to have standing

1 under the FHA to pursue lost property taxes and increased municipal expenses, but still be unable
 2 to state a claim for those very same injuries under the FHA’s causation standard.” Docket No. 116
 3 (“Opp.”) at 10; *see also id.* at 8. For support, Oakland cites *Gladstone*, 441 U.S. at 111, which
 4 held that a municipality had prudential standing to sue under the FHA where real estate brokers’
 5 steering practices disrupted the municipality’s “racial balance and stability” and thereby
 6 threatened to reduce property values and tax receipts. *Miami* reaffirmed *Gladstone*, noting that
 7 prudential standing encompasses anyone who even “arguably fall[s] within the zone of interests”
 8 protected by the relevant statute. *Miami*, 137 S. Ct. at 1309-10. In the case of the FHA, prudential
 9 standing is defined “as broadly as is permitted by Article III,” so as to include “any person who
 10 . . . claims to have been injured by a discriminatory housing practice.” *Id.* (quoting 42 U.S.C.
 11 § 3602(i)).

12 But while the Court held the City of Miami had standing under the FHA, it also applied the
 13 standard for proximate cause on the substantive FHA claim and remanded the case for further
 14 analysis. Standing is a separate issue from proximate cause. *Miami* clearly contemplated the
 15 possibility that one might satisfy prudential standing yet fall short on proximate cause. The
 16 former does not per se suffice to establish the latter as Oakland seems to suggest.

17 Second, Oakland proposes a standard for proximate cause: “the proper proximate causation
 18 standard for the FHA should be a traditional ‘but-for’ causation test” whereby “the alleged
 19 unlawful conduct [is] the but-for cause of the alleged injury and . . . the injury [is] reasonably
 20 foreseeable from the unlawful conduct.” Opp. at 12. Oakland contends this standard is consistent
 21 with *Miami*’s holding that “foreseeability alone” is insufficient. *Id.* (quoting *Miami*, 137 S. Ct. at
 22 1305). Oakland is mistaken. But-for cause is a predicate of proximate cause; it does not add to
 23 proximate cause. *See Paroline v. United States*, 134 S. Ct. 1710, 1722 (2014). *Miami* implicitly
 24 rejected reliance on cause-in-fact in assessing proximate cause, 137 S. Ct. at 1306 (liability does
 25 not extend to every “ripple[] of harm”), and held that foreseeability alone is not the touchstone for
 26 proximate cause. Oakland’s proposed formulation disregards that holding.

27 Oakland’s reliance on *Paroline v. United States*, 134 S. Ct. 1710 (2014), and *Goodyear*
 28 *Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186-87 (2017), to support its argument is

1 misplaced. In *Paroline*, the Court cast causation in fact as the “threshold requirement” to the
 2 proximate cause analysis. 134 S. Ct. 1722. It specifically pointed out that proximate cause was
 3 “distinct from mere causation in fact.” *Id.* In *Goodyear*, the Court held that certain judicial
 4 sanctions such as attorney’s fees must be “compensatory rather than punitive in nature.” 137 S.
 5 Ct. at 1186. Thus, only those fees caused by the misconduct may be awarded. This requires the
 6 court to establish a “causal link . . . between the litigant’s misbehavior and the legal fees paid by
 7 the opposing party.” *Id.* The required causal link in that context was the but-for standard, *see id.*
 8 at 1187; *Goodyear* did not analyze proximate causation as a requisite to recovery of damages
 9 under tort law.

10 Oakland also cites *CSX Transportation, Inc. v. McBride*, 564 U.S. 685, 700 (2011). There,
 11 the Supreme Court held that the relevant causation standard for the Federal Employees Liability
 12 Act (“FELA”) was whether the conduct “played any part” in causing the injury—a sort of but-for
 13 standard. However, that was because FELA’s standard “was determined by the statutory phrase
 14 ‘resulting in whole or in part,’” a “straightforward phrase” that was “incompatible” with
 15 determinations of “whether a particular cause was sufficiently ‘substantial’ to constitute a
 16 proximate cause.” *Id.* at 696. Importantly, FELA “does not incorporate ‘proximate cause’
 17 standards developed in nonstatutory common-law tort actions.” *Id.* at 694 (internal quotation
 18 marks omitted). In contrast, the Court in *Miami* held that the FHA *does* incorporate a proximate
 19 cause standard that is explicitly drawn from common-law tort. *See Miami*, 137 S. Ct. at 1306.
 20 *McBride* is therefore inapposite.

21 Oakland argues that the FHA’s remedial purpose counsels for a more lenient proximate-
 22 cause standard here than in *Holmes* and the other RICO cases. *See Opp.* at 14. But a similar
 23 argument was rejected in *Holmes*. In *Holmes*, “SIPC[] reli[ed] on the congressional admonition
 24 that RICO be ‘liberally construed to effectuate its remedial purposes,’” but that “does not deflect
 25 our analysis.” 503 U.S. at 274. “There is . . . nothing illiberal in our construction: We hold not
 26 that RICO cannot serve to right the conspirators’ wrongs, but merely that the . . . customers, or
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1 SIPC in their stead, are not proper plaintiffs.”³ *Id.* In other words, even if a cause of action is
2 remedial in nature, that action must be brought by the “proper plaintiff.” As *Miami* indicates, the
3 same is true with the FHA. Although the legislative history of the FHA reveals Congress’
4 concerns with the ripples of harm visited upon cities by housing discrimination, including a
5 “[d]eclining tax base, poor sanitation, [and] loss of jobs,” 114 Cong. Rec. 2274 (Feb. 6, 1968)),
6 the Supreme Court nonetheless cautioned that “[n]othing in the statute suggests that Congress
7 intended to provide a remedy wherever those ripples travel.” *Miami*, 137 S. Ct. at 1306.

8 Hence, Oakland’s general arguments for a qualitatively different measure of proximate
9 cause cannot be sustained. The Court must therefore ascertain the proper parameters of proximate
10 cause, grounded in common law. *Miami*’s citation of prior proximate-cause cases provides some
11 but not conclusive guidance. *See* 137 S. Ct. at 1306.

12 V. ECONOMIC INJURIES

13 A. Length of the Causal Chain

14 In establishing the applicability of proximate cause, *Miami* cites three Supreme Court cases
15 that interpreted and applied the directness requirement: *Holmes v. Securities Investor Protection*
16 *Corp.*, 503 U.S. 258 (1992), *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Hemi*
17 *Group LLC v. City of New York*, 559 U.S. 1 (2010).

18 In *Holmes*, the plaintiff was Securities Investor Protection Corporation (“SIPC”), a private
19 corporation charged by statute to reimburse customers of registered broker-dealers who were
20 unable to meet their financial obligations. *Holmes*, 503 U.S. at 261-62. SIPC sued *Holmes* for
21 RICO violations, alleging that *Holmes* engaged in stock-market fraud, which, when uncovered,
22 caused stock prices to drop. The price drop resulted in financial difficulties for two registered
23 broker-dealers, which liquidated. As a result, the broker-dealers were not able to meet their
24 obligations to their customers, who then sought reimbursement from SIPC. The Court held RICO

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26 ³ The *Holmes* Court additionally expresses its concern that the remedial purpose of RICO would
27 actually be “hobbled” by a broad proximate cause, because it would cause “massive and complex
28 damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the
effectiveness of treble-damages suits.” 503 U.S. at 274 (alterations in original) (quoting
Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 545
(1983)).

1 borrowed from the common law in establishing the element of proximate cause. *See id.* at 267-68.
2 The proximate-cause question on appeal was whether there was “some direct relation” between
3 Holmes’ fraud and the harm to the customers of broker-dealers (which SIPC had to reimburse).
4 *Id.* at 268. In this inquiry, “a plaintiff who complained of harm flowing merely from the
5 misfortunes visited upon a third person by the defendant’s acts was generally said to stand at too
6 remote a distance to recover.” *Id.* at 268-69. Given this, “the link is too remote between the stock
7 manipulation alleged and the customers’ harm, being purely contingent on the harm suffered by
8 the broker-dealers. That is, the conspirators have allegedly injured these customers only insofar as
9 the stock manipulation first injured the broker-dealers and left them without the wherewithal to
10 pay customers’ claims.” *Id.* at 271. This fact put the customers’ (and SIPC’s) harm “beyond the
11 first step” and failed to satisfy the directness requirement. *See id.* at 271-72 (quoting *Associated*
12 *Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983)).

13 In *Anza*, mill-products purveyor Ideal Steel Supply sued its primary competitor National
14 Steel Supply for RICO violations. 547 U.S. at 453-54. Ideal alleged that National engaged in tax
15 fraud through the mails and wires and used the proceeds of the fraud to lower its prices. Ideal, as
16 National’s competitor, was harmed by National’s lower prices. The mail and wire fraud was the
17 alleged RICO violation by National. The proximate-cause question was whether National’s fraud
18 proximately caused Ideal’s competitive harm. The Court’s analysis focused on the divergence
19 between the unlawful conduct and the conduct that harmed the plaintiff. While acknowledging
20 that Ideal suffered harm when National engaged in the fraud, “[t]he cause of Ideal’s asserted
21 harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO
22 violation (defrauding the State).” *Anza*, 547 U.S. at 458. “National . . . could have lowered its
23 prices for any number of reasons unconnected to the asserted pattern of fraud. . . . Its lowering of
24 prices in no sense required it to defraud the tax authority.” *Id.* at 458-59 (listing other reasons why
25 National might have lowered its prices). “Likewise, the fact that a company commits tax fraud
26 does not mean the company will lower its prices” *Id.* at 458-59 (listing uses to which the
27 fraudulently retained money might have been employed). The harm suffered by Ideal resulted
28 from lower prices, an arguably incidental effect which did not necessarily flow from the RICO

1 fraud.

2 *Hemi* applied and extended *Anza* in another RICO case. 559 U.S. at 1. In *Hemi*, the City
3 of New York had imposed taxes on sales of cigarettes. Out-of-state cigarette sellers were not
4 required to collect and remit the tax themselves; that onus was on the purchasers. Instead, sellers
5 were required to file a report with a New York state agency detailing each purchase by state
6 residents. New York State would then forward the information to New York City, which would
7 then be able to locate residents who had failed to pay the tax. *Id.* 559 U.S. at 5-6. New York City
8 sued *Hemi*, an out-of-state cigarette seller, alleging that *Hemi* did not file the required reports with
9 the state agency and thereby caused the City to lose significant sums in uncollectable tax revenue.
10 *Id.* Using *Anza*'s analysis, the Court held that the City's injury failed the directness requirement.
11 *Id.* at 10. "The conduct directly responsible for the City's harm was the customers' failure to pay
12 their taxes. And the conduct constituting the alleged fraud was *Hemi*'s failure to file . . . reports."
13 *Id.* at 11. "Thus, as in *Anza*, the conduct directly causing the harm" was "distinct" from the
14 unlawful conduct. *Id.* *Hemi* found that this would have been sufficient to destroy proximate
15 cause, but the conduct was even more remote from the injury, because "the City's theory of
16 liability rests not just on separate *actions*, but separate actions carried out by separate *parties*"—
17 the customer and *Hemi*. *Id.* Worse still, these parties' actions directly injured different entities:
18 *Hemi*'s action directly injured the State, to whom his obligation to file reports was owed, while the
19 customers' actions directly harmed the City, stretching the analysis to include a "*fourth party*." *Id.*
20 The *Hemi* Court did not find directness, and proximate cause was not satisfied.

21 The Ninth Circuit followed the general proximate cause framework focusing on the nature
22 and quality of the chain of causation. *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir.
23 2008). In *Canyon County*, the county sued four companies and an individual for hiring and
24 harboring undocumented immigrants in the county, which allegedly imposed health-care and law-
25 enforcement expenses on the county. Similar to the cases above, the Ninth Circuit found that the
26 unlawful conduct did not directly cause the injury. "[J]ust as in *Anza*, the cause of the plaintiff's
27 asserted harms is a set of actions (increased demand by people within Canyon County for public
28 health care and law enforcement services) entirely distinct from the alleged RICO violation (the

1 defendants’ knowing hiring of undocumented workers).” *Id.* at 982.

2 Three district court decisions have applied *Miami* in finding government injuries similar to
 3 those asserted here too indirect to establish proximate cause. *See Cty. of Cook v. HSBC N. Am.*
 4 *Holdings Inc.*, No. 14 C 2031, 2018 WL 2431987 (N.D. Ill. May 30, 2018); *Cty. of Cook v. Bank*
 5 *of Am. Corp.*, No. 14 C 2280, 2018 WL 1561725 (N.D. Ill. Mar. 30, 2018); *Cty. of Cook v. Wells*
 6 *Fargo & Co.*, No. 14 C 9548, 2018 WL 1469003 (N.D. Ill. Mar. 26, 2018). For instance, in
 7 *County of Cook v. Wells Fargo*, Cook County alleged that WF targeted minority borrowers in the
 8 county for HCHR loans, resulting in foreclosures that, *inter alia*, decreased the county’s property-
 9 tax revenue, increased municipal expenditures related to crime and blight, and increase the
 10 county’s costs for processing foreclosures. 2018 WL 1469003, at *5, *9. The court held that the
 11 property-tax and municipal-expenditure injuries involved too many intervening factors such that
 12 proximate cause was not satisfied. But it also held that the increased foreclosure processing costs
 13 “fall[] within the first step” and satisfy proximate cause, “despite running through an ‘intervening
 14 link of injury’ to borrowers.” *Id.* at *5 (quoting *Lexmark Int’l, Inc. v. Static Control Components,*
 15 *Inc.*, 134 S. Ct. 1377, 1394 (2014)). This is because “foreclosures . . . necessarily require[] the
 16 expenditure of County funds,” *id.* at *6, in order to “post[] foreclosure and eviction notices,
 17 serv[e] foreclosure summonses, execut[e] evictions, and process[] foreclosure suits.” *Id.* at *5.
 18 And while the court acknowledged that it could be difficult to determine the number of
 19 foreclosures attributable to the discrimination, statistical analysis could well overcome that hurdle.
 20 *See id.* at *7, *8.

21 As recognized by *County of Cook v. Wells Fargo*, the fact that an injury “runs through a
 22 separate injury” to a third party “does not by itself require dismissal on proximate cause grounds.”
 23 *Id.* at *6. For instance, in *Lexmark*, 134 S. Ct. 1377, Static Control brought a counterclaim against
 24 Lexmark for false advertising in violation of the Lanham Act. Lexmark sold toner cartridges and
 25 competed with remanufacturers who refurbished used cartridges for sale. Static Control produced
 26 parts for remanufacturers’ use in the refurbishment process. Static Control alleged, *inter alia*, that
 27 Lexmark warned remanufacturers that it was illegal to refurbish Lexmark cartridges and that this
 28 caused remanufacturers and therefore Static Control to lose sales. On appeal, the Supreme Court

1 held that proximate cause was met. In doing so, it addressed two points of attenuation: Static
2 Control’s harm was contingent on the harm to remanufacturers, which in turn was contingent on
3 the harm to consumers. As to the first point of attenuation, the Court chose to depart from the
4 “general tendency not to stretch proximate causation beyond the first step,” because there was
5 “something very close to a 1:1 relationship” between the harm suffered by the remanufacturers
6 and Static Control. *Id.* at 1394 (internal quotation marks omitted) (quoting *Holmes*, 503 U.S. at
7 271). This 1:1 relationship arose because the parts manufactured by Static Control “both (1) were
8 necessary for, and (2) had no other use than, refurbishing Lexmark toner cartridges.” *Id.* “[I]f the
9 remanufacturers sold 10,000 fewer refurbished cartridges because of Lexmark’s false advertising,
10 then it would follow more or less automatically that Static Control sold 10,000 fewer microchips
11 for the same reason, without the need for any ‘speculative . . . proceedings’ or ‘intricate, uncertain
12 inquiries.’” *Id.* (quoting *Anza*, 547 U.S. at 459-60). There was not the type of “discontinuity” that
13 “ordinarily” exists between the injury to a direct victim and the injury to an indirect victim. *Id.*
14 Under this “relatively unique” circumstance, “the remanufacturers are not ‘more immediate
15 victim[s]’ than Static Control.” *Id.* (alteration in original) (quoting *Bridge v. Phoenix Bond &*
16 *Indem. Co.*, 553 U.S. 639, 658 (2008)). As to the fact that “all commercial injuries from false
17 advertising are derivative of those suffered by consumers,” the Court was clear that “the
18 intervening step of consumer deception is not fatal to the showing of proximate cause” because
19 “the Lanham Act authorizes suit only for commercial injuries.” *Id.* at 1391.⁴

20 B. *Holmes* Factors

21 In addition to the length of the causal chain, *Holmes* examined three factors that bear on
22 proximate cause: (1) the difficulty of “ascertain[ing] the amount of a plaintiff’s damages
23 attributable to the [unlawful conduct], as distinct from other, independent factors,” (2) whether

24
25 ⁴ Oakland’s citation of *Paroline v. United States*, 134 S. Ct. 1710 (2014), as a case in which the
26 chain of causation was long yet satisfied proximate cause is misplaced. *Opp.* at 15. The unlawful
27 conduct at issue in *Paroline* was possession of child pornography; mere possession of child
28 pornography, even without viewing, could inflict emotional distress on the victim, given the
victim’s loss of control and autonomy. Further, as in *Lexmark*, possession of child pornography is
“both (1) . . . necessary for, and (2) ha[s] no other use than” viewing of the material. *Lexmark*,
134 S. Ct. at 1394. And the victim’s knowledge of the possession and viewing of the pornography
is inherently implicit in the filing of the suit. *Paroline*’s causal chain was therefore direct.

1 permitting the suit to proceed “would force courts to adopt complicated rules apportioning
2 damages among plaintiffs at different levels of injury from the violative acts, to obviate the risk of
3 multiple recoveries,” and (3) whether the “general interest in deterring injurious conduct” justifies
4 grappling with these complex issues, accounting for the extent to which more directly injured
5 victims can “generally be counted on to vindicate the law.” *Holmes*, 503 U.S. at 269. These
6 factors were the “motivating principle[s]” for the directness requirement in *Holmes*, and appear to
7 function as a cross check on the analysis of the length of the causal chain. *See Anza*, 547 U.S. at
8 458-60; *Canyon Cty.*, 519 F.3d at 982-83.

9 In *Holmes*, all three factors cut against a finding of proximate cause. On the first factor,
10 allowing the suit to move forward would require the district court to determine to what extent the
11 broker-dealers’ inability to pay their customers “was the result of the alleged conspiracy to
12 manipulate, as opposed to, say, the broker-dealers’ poor business practices or their failures to
13 anticipate developments in the financial markets.” 503 U.S. at 273. Even if this calculation could
14 be done, under the second factor, “the district court would then have to find some way to
15 apportion the possible respective recoveries by the broker-dealers and the customers.” *Id.* As to
16 the third factor, directly injured broker-dealers could be counted on to bring suit to vindicate the
17 law. *See id.* All three factors therefore militated against proximate cause.

18 In *Anza*, the *Holmes* factors also confirmed the Court’s finding of no proximate cause. The
19 corporate plaintiff had alleged that it lost sales because its competitor—the defendant—lowered its
20 prices due to tax fraud. As to the first *Holmes* factor, the Court noted that the defendant “could
21 have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud,”
22 and that the plaintiff’s lost sales could be due to “many reasons.” 547 U.S. at 458-59. Calculating
23 the portion of price drop due to the fraud and then the portion of the lost sales due to the price drop
24 would be a “speculative” and “complex assessment,” and the directness requirement was “meant
25 to prevent these types of intricate, uncertain inquiries.” *Id.* at 459-60. The third *Holmes* factor
26 also counseled against finding proximate cause in *Anza*, because the state, being the victim of the
27 tax fraud, could be expected to vindicate the law. *See id.* at 460. As for the second factor, there
28 was no “appreciable risk of duplicative recoveries,” but that was not sufficient to establish

1 proximate cause. *Id.* at 459.

2 The *Holmes* factors also indicated that proximate cause was not satisfied in *Canyon*
3 *County*. As for the first factor, the difficulty of attributing the county’s damages to the
4 employment of unauthorized workers, “the asserted causal chain in this instance is quite
5 attenuated, and there are numerous other factors that could lead to higher expenditures by the
6 County.” 519 F.3d at 982. Furthermore, to calculate the portion of the county’s injuries
7 attributable to the plaintiffs’ unlawful conduct, the district court could not “simply estimat[e] the
8 number of undocumented immigrants employed by the companies and their average usage of
9 County services.” *Id.* at 983. Instead, “the court would have to construct the alternative scenario
10 of what would have occurred” if the companies had employed legally authorized workers, “an
11 intricate, uncertain inquiry” that militated against finding proximate cause. *Id.* (internal quotation
12 marks omitted). As for the second factor, the risk of multiple recoveries, the court noted even
13 though the county’s harm did not flow through intervening victims, proximate cause can fail even
14 where the harm is not “passed-on” or contingent on harm to another. *See id.* The court did not
15 analyze the third factor. *See id.*

16 C. The Instant Case

17 1. Length of the Causal Chain

18 The causal relationship between WF’s conduct and Oakland’s alleged harm is indirect and
19 goes through several links. As in *Holmes* and the cases cited above, the economic injuries here are
20 contingent, *inter alia*, on the harm suffered by a third party, namely the minority borrowers. Both
21 the depressed property-tax revenues and the increased municipal expenditures were the result of
22 minority borrowers’ foreclosures. As in *Hemi*, where “[t]he conduct directly responsible for the
23 City’s harm was the customers’ failure to pay their taxes,” 559 U.S. at 11, the immediate conduct
24 here that ultimately resulted in Oakland’s harm was the homeowners’ failure to pay their loans.
25 The harms suffered by Oakland—*e.g.*, lower property taxes and increase police costs—are
26 “entirely distinct” from the WF’s unlawful discrimination in the issuance of HCHR loans. *Canyon*
27 *Cty.*, 519 F.3d at 982. Indeed, as in *Hemi*, various actions in the chain of causation here were
28 carried out by multiple parties: the unlawful discrimination was carried out by WF, leading to

1 default by WF's customers, which in turn led to foreclosures by WF, which led to lower property
2 values and consequently lower property taxes collectable by Oakland. Likewise, the alleged law-
3 enforcement costs incurred by Oakland requires additional links in the causal chain: evictions and
4 vacancies after foreclosure by the lender or new owner, resulting in crime and code violations by
5 law-breakers (not the homeowners), resulting in increased municipal law enforcement responses
6 and costs and lowering property values causing property owners in affected neighborhoods to pay
7 less property taxes. As in *Hemi*, Oakland suffered economic harm at the hands of third and fourth
8 parties. Unlike *Lexmark International*, there is no obviously direct 1:1 relationship between harm
9 to direct victims and the harm to the plaintiff. Accordingly, the length of the causal chain counsels
10 against a finding of proximate cause.

11 On the other hand, while Oakland's injuries are several steps removed from WF's conduct,
12 that fact does not appear to be determinative. Similar facts were present in *Miami*, yet as noted
13 above, the Supreme Court remanded the case instead of simply holding there was no proximate
14 cause as matter of law. This suggests that despite the lengthy chain of causation, there may be
15 factual allegations in this kind of case that can survive a 12(b)(6) motion. Thus, while the
16 contingent nature of Oakland's economic injuries counsels against proximate cause, it does not
17 end the inquiry. Instead, the analysis must proceed to the *Holmes* factors.

18 2. *Holmes* Factors

19 The first *Holmes* factor requires this Court to determine whether it would be difficult to
20 ascertain the portion of Oakland's economic damages resulting from WF's unlawful conduct. The
21 concern underlying the first *Holmes* factor is uncertainty and difficulty in determining damages
22 attributable to the defendant's unlawful conduct. Here there are two factors that mitigate this
23 concern. First, unlike *Holmes* and *Anza*, the injury here is not individualized; it is aggregative;
24 where damages are aggregative, precision is not expected. Invariably some approximation is
25 required. While the fact of aggregative injury itself does not obviate proximate cause analysis as
26 *Hemi* and *Canyon County* illustrate, there is an additional consideration here. Oakland suggests
27 based on aggregative data that it can prove there is a clear quantifiable link between WF's
28 challenged practice and foreclosure rates and consequent harm to the city. In particular, Oakland

1 has proffered a specific statistical analysis in regard to its property-tax injury. The FAC describes
2 a regression analysis that links Oakland’s alleged unlawful conduct to an increase in foreclosures.
3 See FAC ¶¶ 12, 68-69, 90-92. Furthermore, the increase in foreclosures can be linked to
4 Oakland’s decreased property taxes by way of Hedonic analysis. See *id.* ¶¶ 120-27. *Anza* and
5 *Canyon County* did not address this situation where there is an alleged provable and quantifiable
6 causal link between the defendant’s conduct and plaintiff’s injury despite there being multiple
7 links in the chain.⁵ Hence, the first *Holmes* factor counsels in favor of proximate cause, at least
8 with respect to Oakland’s claim of lost tax revenues for which it has alleged the existence of an
9 available statistical model.

10 To be sure, the Ninth Circuit has referenced the relevance (or not) of statistical analysis to
11 the first *Holmes* factor. In *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip*
12 *Morris Inc.*, 185 F.3d 957 (9th Cir. 1999), employee health and welfare benefit plans sued tobacco
13 companies and related entities under RICO to recover the cost of treating the plans’ beneficiaries
14 for smoking-related injuries. The court held that the plaintiffs failed to satisfy proximate cause. In
15 analyzing the first *Holmes* factor, the court quoted the Third Circuit:

The Funds’ alleged damages are said to arise from the fact that the tobacco companies prevented the Funds from providing smoking-cessation or safer smoking information to their participants In order to calculate the damages . . . the Funds must demonstrate how many smokers would have stopped smoking if provided with smoking-cessation information, how many would have begun smoking less dangerous products

It is apparent why the Funds argue that they can demonstrate all of this through aggregation and statistical modeling: it would be impossible for them to do so otherwise. Yet we do not believe that aggregation and statistical modeling are sufficient to get the Funds over the hurdle of the *AGC* factor focusing on whether the “damages claim is . . . highly speculative.”

25 ⁵ In *County of Cook v. Wells Fargo*, the district court acknowledge that statistical analysis of
26 aggregative data might establish “the likelihood that a loan modification denied would lead to
27 foreclosure,” 2018 WL 1469003, at *8, and thus sufficiently link the Wells Fargo conduct to at
28 least part of the county’s harm. Although the court found that less direct injuries such as loss of tax revenues were not proximately caused by Wells Fargo, the court was not presented with specific statistical analysis as alleged in this case linking Wells Fargo’s conduct with the loss of tax revenues.

1 *Id.* at 965 (quoting *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171
 2 F.3d 912, 929 (3d Cir. 1999)). The language in the block quotation suggests that the possibility of
 3 statistical analysis may not aid the plaintiff in establishing proximate cause under the first *Holmes*
 4 factor. However, this language appears to be dicta. Nothing in the rest of the Ninth Circuit’s
 5 decision refers to any statistical analysis or any argumentation thereon. Moreover, the fact that
 6 statistical modeling for quantifying the city’s harm was asserted in *Miami*, *see Miami*, 137 S. Ct.
 7 at 1302, could well have been a consideration in the Supreme Court’s decision to remand rather
 8 than order dismissal, particularly since all the harms asserted by Miami were beyond the “first
 9 step” of injury; remand was required to sort out “first step” from indirect injuries as was done in
 10 *County of Cook v. Bank of America*, *County of Cook v. Wells Fargo*, and *County of Cook v. HSBC*
 11 *North America Holdings*.

12 Hence, the role of statistical analysis in proximate cause analysis appears to be an open
 13 question. Because statistical analysis plausibly can permit the calculation of Oakland’s property-
 14 tax injury caused by WF’s policies with some reasonable certainty, the first factor supports
 15 proximate cause, at least at the pleading stage. That is not the case, however, for Oakland’s
 16 municipal-expenditure injury, for which Oakland has proffered no statistical analysis.

17 The second *Holmes* factor concerns the need to “adopt complicated rules apportioning
 18 damages among plaintiffs at different levels of injury from the violative acts.” *Holmes*, 503 U.S.
 19 at 269. So phrased, this concern appears to be focused on the dangers of overlapping and
 20 duplicative damages. *Cf. Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (indirect purchasers of
 21 concrete blocks could not recover higher costs passed on from their suppliers, which were the
 22 victims of a price-fixing scheme). Here, Oakland’s injuries are distinct and different from those
 23 suffered by the minority borrowers. Unlike indirect buyers in *Illinois Brick*, Oakland’s economic
 24 injuries are not the same injury passed on from the borrowers to Oakland; recovery by Oakland
 25 would not threaten double compensation for the same injury. The second factor does not weigh
 26 against proximate cause.

27 The third factor does weigh against proximate cause; minority borrowers are directly
 28 injured victims who can bring suit. In fact, the borrowers have evidently already achieved by way

1 of a consent order in a suit brought by the United States. Docket No. 107 (“Mot.”) at 11; *see* Mot.,
2 Exs. A (consent order establishing \$125 million relief fund for affected borrowers), B (agreement
3 to terminate consent order). Considering the third factor’s focus on deterrence and vindication of
4 the law even without Oakland’s suit, this factor weighs against proximate cause.

5 3. Conclusion

6 On balance, the property-tax injury survives the pleading stage because Oakland’s
7 proffered statistical analyses have the potential to provide certainty to the damages calculation. Of
8 course, WF is not precluded from challenging proximate cause on a fuller record (including close
9 analysis of Oakland’s statistical model(s)). At this the pleading stage, however, the motion to
10 dismiss is **DENIED** as to the property-tax injury.

11 As for the municipal-expenditure injury, Oakland has not proffered any statistical analyses
12 comparable to those in the property-tax analysis. The first *Holmes* factor weighs against Oakland,
13 along with the basic context of its harm being indirect and derivative. Moreover, as noted above,
14 the municipal expenditure harm contains more links including intervening conduct of additional
15 actors (*e.g.*, criminals who destroy or deface vacant, foreclosed homes) than the claim for
16 property-tax loss. For that reason, claims based on the municipal-expenditure injury are
17 **DISMISSED WITHOUT PREJUDICE** to the extent they seek damages.

18 While *Miami*’s directness requirement appears to apply to claims for damages, it does not
19 appear to extend to claims for injunctions or declaratory relief, *see Miami*, 137 S. Ct. at 1305-06
20 (holding that “[a] damages claim under the [FHA]” is “analogous to a number of tort actions” to
21 which the directness requirement applies (quoting *Curtis v. Loether*, 415 U.S. 189, 195 (1974))),
22 and WF makes no argument that it does. Rather, WF’s main complaint regarding injunctive relief
23 is that Oakland has not specified what injunctive relief would entail. *See* Docket No. 130, at 29-
24 31 (“I don’t know what they want as an injunction. We are certainly willing to go forward, if the
25 money claims are dismissed, to talk about what injunctive relief might be appropriate . . .”).
26 Therefore, WF’s motion is **DENIED** as to the claims based on the municipal-expenditure injuries
27 that seek injunctive and declaratory relief.

28 The non-economic injuries are analyzed below.

1 frustration of its organizational mission; and (2) diversion of its resources to combat the particular
 2 housing discrimination in question.” *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th
 3 Cir. 2004); *cf. La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d
 4 1083, 1088 (9th Cir. 2010) (litigation costs to challenge the conduct do not qualify as diversion of
 5 resources).

6 The Ninth Circuit has addressed the parameters of organizational standing. In *Valle del*
 7 *Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013), three organizational plaintiffs challenged
 8 Arizona Revised Statutes § 13-2929, a part of Arizona S.B. 1070 that criminalized harboring and
 9 transporting unauthorized aliens within Arizona. All three organizations had diverted resources to
 10 educate their members about § 13-2929. *See id.* at 1018. In addition, § 13-2929 frustrated their
 11 programs and organizational missions to offer shelter and transportation services to unauthorized
 12 aliens. This was sufficient to establish standing.

13 In *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216
 14 (9th Cir. 2012), two nonprofit organizations sued Roommate.com, a service that helped users find
 15 roommates. The plaintiffs alleged that Roommates.com violated the FHA by permitting its users
 16 to filter potential roommates by sex, sexual orientation, and familial status. The Ninth Circuit held
 17 that the organizations had Article III standing to sue, because they had expended resources to
 18 investigate the alleged violations and launch educational and outreach campaigns in response. *See*
 19 *id.* at 1219; *see Smith*, 358 F.3d at 1105-06 (organization possessed standing to sue for defendant’s
 20 violation Fair Housing Amendments Act where the violation frustrated organization’s “principal
 21 purpose” of eliminating discrimination against disabled persons and where the organization
 22 diverted resources to promote awareness of and compliance with accessibility laws); *Fair Housing*
 23 *of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (nonprofit organization possessed standing
 24 to sue for housing discrimination where it diverted resources to investigate and counteract
 25 defendant’s discrimination).

26 In the case at bar, Oakland has not specifically alleged that it was required to divert
 27 resources to “combat the particular housing discrimination in question.” *Smith*, 358 F.3d at 1105.
 28 Instead, Oakland alleges that WF’s conduct harmed “the ability of minority residents to own

1 homes” in Oakland, “the City’s goals to assure that racial factors do not” affect individuals’ ability
 2 to find housing, “the City’s numerous programs designed to promote fair housing and a safe,
 3 integrated community,” and Oakland’s objective of “identify[ing] and thwart[ing] predatory
 4 lending practices.” FAC ¶¶ 103-05. It also alleges that WF’s conduct “directly undermines the
 5 City’s use of resources in support of fair housing, rendering the expenditures a nullity and
 6 warranting compensation.” *Id.* ¶ 105. There are no allegations, however, that WF’s conduct
 7 caused the City to divert resources toward combating WF’s housing discrimination.

8 Although the FAC mentions diversion of resources several times, each mention regards the
 9 diversion of resources to address blight conditions, *see id.* ¶¶ 3, 129, 167; *see also* Opp. at 21, and
 10 not to “combat the particular housing discrimination in question.” *Smith*, 358 F.3d at 1105.
 11 Oakland’s use of resources to combat crime, fires, and code violations, at bottom, is an extension
 12 of the municipal-expenditure portion of the economic injury addressed above. *Compare with*
 13 *Valle del Sol*, 732 F.3d at 1018 (organizations expended resources to educate members about the
 14 challenged statute); *Roommate.com, LLC*, 666 F.3d at 1219 (organizations spent resources
 15 investigating the violation and launching educational and advocacy campaigns in response).
 16 Oakland does not allege a diversion of resources specifically in response to advance its fair-
 17 housing program or particular efforts to assist low-income homebuyers. It does not allege it had
 18 to, *e.g.*, devote additional resources to counsel foreclosed homeowners, investigate claims of
 19 lending discrimination, or promote awareness of WF’s lending practices.

20 Finally, though the loss of a municipality’s “racial balance and stability” constitutes an
 21 injury in fact, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 111 (1979), Oakland has
 22 not alleged that it suffered such a loss. *See* FAC; Docket No. 130 (Hearing Transcript) at 49
 23 (Oakland agreeing that it has not alleged an impact on its racial composition). Indeed, at least in
 24 the short run, the availability of financing (though on unfavorable terms) could well have
 25 increased minority homeownership in Oakland.

26 Hence, the Court **DISMISSES WITHOUT PREJUDICE** Oakland’s claims to the extent
 27 they are based on the non-economic *Havens* injuries. Because Oakland has not sufficiently
 28 alleged standing for claims based on its non-economic harms, the Court does not reach the

1 proximate-cause issue for those harms.

2 **VII. DISPARATE-IMPACT CLAIM**

3 As part of its motion to dismiss, WF argues that the Court should dismiss Oakland’s claim
4 for disparate-impact discrimination. Oakland responds that the law of the case doctrine bars
5 reconsideration of the WF’s argument, because the Court had previously determined that Oakland
6 stated a disparate-impact claim in its initial Complaint. *See* Docket No. 38.

7 A. Law of the Case

8 Under the law of the case doctrine, “a court is generally precluded from reconsidering an
9 issue that has already been decided by the same court.” *Thomas v. Bible*, 983 F.2d 152, 154 (9th
10 Cir. 1993). The district court’s decision to apply or not apply the law of the case is discretionary.
11 *See Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005).

12 The law of the case doctrine does not apply here, because Oakland’s FAC substantially
13 revised the initial Complaint’s disparate-impact allegations, removing many of its complained-of
14 practices and policies and substituting in new ones. *Compare* Docket No. 1 ¶ 22, with FAC ¶¶ 39,
15 50. Whether the new allegations pass muster is not “an issue that has already been decided.”
16 *Thomas*, 983 F.2d at 154; *see King v. Wang*, No. 2:14-cv-1817 KJM DB P, 2017 WL 3188949, at
17 *3 (E.D. Cal. July 27, 2017) (holding that the law of the case does not apply, because “the
18 allegations in the complaint and second amended complaint are sufficiently different”), *report and*
19 *recommendation adopted*, 2017 WL 4386868 (E.D. Cal. Oct. 3, 2017).

20 B. Alleged Practices and Policies

21 A disparate-impact claim relying on statistical evidence must “point to a defendant’s policy
22 or policies causing [the] disparity.” *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty.*
23 *Projects, Inc.*, 135 S. Ct. 2507, 2523 (2015). At the pleading stage, a disparate-impact plaintiff
24 must “allege facts . . . or produce statistical evidence demonstrating a causal connection” “between
25 the . . . policy and the disparate impact.” *Id.* at 2423-24.

26 The FAC alleges that WF “engaged in numerous facially neutral lending practices” which
27 resulted in a disparate impact on minority borrowers by:

- 28 a. providing loan officers discretion to place borrowers in more

- 1 b. providing loan officers discretion to sell lender credits without
- 2 disclosing the true effect of the pricing of those credits;
- 3 c. marketing certain more expensive or riskier loan products to
- 4 residents in predominantly minority neighborhoods;
- 5 d. utilizing a compensation scheme that incentivized loan officers
- 6 to sell more expensive and riskier loans than borrowers qualified
- 7 for;
- 8 e. requiring substantial prepayment penalties that prevent
- 9 borrowers whose credit has improved from refinancing their
- 10 discriminatory loan to a prime loan;
- 11 f. charging excessive points and fees that are not associated with
- 12 any increased benefits for the borrowers; and
- 13 g. providing loan officers with information about loan pricing that
- 14 is higher than the lowest price Wells Fargo could offer the
- 15 borrowers.

16 FAC ¶ 39. The FAC further alleges that WF loan officers, encouraged by WF’s compensation
17 plan to sell HCHR loans, *see id.* ¶ 48, “used their discretion to sell more expensive FHA loans to
18 minority borrowers” by “us[ing] race and educational background as proxies for their ability to
19 sell more expensive loan products.” *Id.* ¶¶ 44, 47. The more expensive loans often had high
20 closing costs that led the borrower to purchase lender credits, a kind of loan to which minority
21 borrowers were especially receptive. *See id.* ¶¶ 46, 47.

22 Exacerbating this situation, the FAC alleges that WF is responsible for various “omissions
23 and failures to act . . . to combat against the discriminatory effects of its conduct.” FAC ¶ 50.

24 These omissions are:

- 25 a. knowing about lending practices that either created high risk and
- 26 higher cost loans to minorities compared to comparably credit
- 27 situated white borrowers or failing to adequately monitor the
- 28 Bank’s practices regarding mortgage loans, including but not
- limited to originations, marketing, sales, and risk management;
- b. failing to underwrite loans based on traditional underwriting
- criteria such as debt-to-income ratio, loan-to-value ratio, FICO
- score, and work history;
- c. failing to prudently underwrite hybrid adjustable-rate mortgages
- (“ARMs”), such as 2/28s and 3/27s;
- d. failing to prudently underwrite refinance loans, where borrowers
- substitute unaffordable mortgage loans for existing mortgages
- that they are well-suited for and that allow them to build equity;
- e. failing to monitor and implement necessary procedures within
- Wells Fargo’s Internal Audit, Corporate Risk, Human
- Resources, Law Department, and Board of Directors throughout
- the Community Banking segment, which includes Wells Fargo’s
- retail mortgage banking business responsible for the unlawful
- activities set forth herein, to ensure compliance with federal fair
- lending laws;
- f. failing to abide by the terms of Wells Fargo’s Vision & Values,

1 which purportedly guides Defendants’ business practices and
relationships with customers; and
2 g. failing to ensure that Wells Fargo’s decentralized organizational
structure was capable of properly monitoring mortgage lending
3 activities within Community Banking.

4 *Id.*

5 Together, these practices caused a “statistically significant adverse effect on minority
6 borrowers.” *Id.* ¶ 51. These allegations draw a sufficient causal link between the specific policies
7 and practices and the disparate impact on minority borrowers for pleading purposes.

8 C. Delegation of Discretion as the Basis for Disparate-Impact Claim

9 The parties debate whether giving loan officers discretion can constitute a “policy or
10 practice” that can support a disparate-impact claim. WF argues it is not, relying on *Wal-Mart*
11 *Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In *Dukes*, the plaintiffs alleged that Wal-Mart gave
12 local supervisors broad discretion over pay and promotion decisions and that the supervisors
13 exercised their discretion in a biased manner, resulting in a disparate impact on female employees.
14 The plaintiffs sought certification of a class of all female Wal-Mart employees in the United
15 States. Class certification requires “commonality,” which requires the class to have suffered “the
16 same injury” such that their claims “depend upon a common contention” that is “capable of
17 classwide resolution.” *Id.* at 350.

18 The Court held that the *Dukes* plaintiffs had not satisfied this requirement for class
19 certification, because the “‘policy’ of allowing discretion” is “the opposite of a uniform
20 employment practice” that would have inflicted the “same injury” on the entire class. *Id.* at 355
21 (emphasis omitted). This is so because managers are likely to exercise their discretion in varied
22 ways; some may intentionally discriminate or create disparate impacts, while others may not, *see*
23 *id.*, so that it was “quite unbelievable” that all female Wal-Mart employees would have suffered
24 the same injury. *Id.* at 356. The Court recognized, however, that a policy of delegating discretion
25 may satisfy commonality where plaintiffs “identif[y] a common mode of exercising discretion that
26 pervades the entire company,” such as “some common direction.” *Id.* Where plaintiffs are able to
27 “identif[y]” this “common mode,” they establish that the class suffered the “same injury.” *Id.*; *cf.*
28 *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 518 (N.D. Cal. 2012) (holding that “absolute

1 uniformity” in the exercise of discretion is not needed for class certification, given the “common
2 practices and policies [that] . . . affect and guide that discretion”). But the *Dukes* plaintiffs failed
3 to identify such a common direction. *See Dukes*, 564 U.S. at 356. Moreover, the Court noted
4 even the statistical disparities identified by the plaintiffs failed to establish commonality because
5 disparities did not exist in each of Wal-Mart’s stores. Thus, the class-certification requirements
6 were not satisfied.

7 *Dukes* is not controlling here because the issue presently before the Court is not
8 commonality and class certification, but whether a substantive claim of disparate impact has been
9 stated for purposes of Rule 12(b)(6). To be sure, the Court in *Dukes* noted:

10 In the landmark case of ours which held that giving discretion to
11 lower-level supervisors can be the basis of Title VII liability under a
12 disparate-impact theory, the plurality opinion *conditioned* that
13 holding on the corollary that merely proving that the discretionary
14 system has produced a racial or sexual disparity *is not enough*.
15 “[T]he plaintiff must begin by identifying the specific employment
16 practice that is challenged.” That is all the more necessary when a
17 class of plaintiffs is sought to be certified. Other than the bare
18 existence of delegated discretion, respondents have identified no
19 “specific employment practice”—much less one that ties all their 1.5
20 million claims together. Merely showing that Wal-Mart’s policy of
21 discretion has produced an overall sex-based disparity does not
22 suffice.

23 *Id.* at 357 (citation omitted) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994
24 (1988) (plurality opinion), and citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656
25 (1989)). Importantly, however, the Ninth Circuit held after *Watson* that delegating discretion is a
26 “specific employment practice properly subject to a disparate impact analysis.” *Rose v. Wells*
27 *Fargo Co.*, 902 F.2d 1417 (9th Cir. 1990). *Rose* appears to be good law notwithstanding the quote
28 from *Dukes*; *Dukes* acknowledged the distinction between the substantive law of disparate-impact
discrimination and class certification: “in appropriate cases, giving discretion to lower-level
supervisors can be the basis of Title VII liability under a disparate-impact theory But the
recognition that this type of Title VII claim ‘can’ exist does not lead to the conclusion that *every*
employee in a company using a system of discretion has such a claim in common.” *Id.* at 355
(internal quotation marks omitted) (emphasis added) (quoting *Watson*, 487 U.S. at 990-91). *Dukes*
addressed class certification, not substantive disparate impact analysis. Subsequent to *Dukes*,

1 courts have applied disparate-impact theory to varying circumstances involving delegated
 2 discretion. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489
 3 (7th Cir. 2012) (teaming policy permitting employees to form their own teams can be the basis of
 4 disparate-impact suit), *abrogated on other grounds as recognized by Phillips v. Sheriff of Cook*
 5 *Cty.*, 828 F.3d 541 (7th Cir. 2016); *Nat’l Fair Housing Alliance v. Fed. Nat’l Mortg. Ass’n*
 6 *(“Fannie Mae”)*, 294 F. Supp. 3d 940, 947-48 (N.D. Cal. Mar. 21, 2018) (permitting local Fannie
 7 Mae employees to decide which foreclosed properties to maintain was a cognizable policy under
 8 disparate-impact theory). Indeed, the district court in *County of Cook v. HSBC North America*
 9 *Holdings* specifically found the complaint stated a disparate-impact claim in a similar case even
 10 though much of HSBC’s conduct was discretionary. *See* 2018 WL 2431987, at *12.

11 In any event, Oakland has identified specific employment practices in addition to the mere
 12 delegation of discretion. For instance, WF allegedly incentivizes loan officers to sell more
 13 expensive loans than that for which borrowers qualify, requires prepayment penalties that prevent
 14 borrowers from refinancing HCHR loans, and fails to underwrite loans based on objective
 15 underwriting criteria. *See* FAC ¶¶ 39, 50.

16 D. Intentional Discrimination and Disparate-Impact Discrimination

17 Finally, WF argues that allegations which suggest intentional discrimination, *see, e.g., id.*
 18 ¶¶ 44, 47, cannot state a claim for disparate impact, because they do not state a facially neutral
 19 policy. Mot. at 21 (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15
 20 (1977)). However, as *Watson* recognized, intentional acts of discrimination are often what cause
 21 delegated discretion to have a disparate impact. *See* 487 U.S. at 990 (policing intentional
 22 discrimination by those with discretion is one reason that disparate-impact analysis applies to
 23 policies of delegating discretion). The two aspects of discrimination are not mutually exclusive.
 24 *See also County of Cook v. HSBC North America Holdings*, 2018 WL 2431987, at *12 (“In fact,
 25 one of the factors that a court considers to determine whether a plaintiff has made a *prima facie*
 26 disparate impact case is ‘the presence of some evidence of discriminatory intent, even if
 27 circumstantial and less than sufficient to satisfy’ the standards required for disparate treatment.”
 28 (citation omitted)).

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E. Conclusion

For the above reasons, Oakland successfully states a claim for disparate-impact discrimination.

VIII. CONCLUSION

For the reasons stated above, the motion to dismiss is **DENIED** as to the claims based on property-tax injuries. The motion is also **DENIED** as to claims based on the municipal-expenditure injury insofar as they seek declaratory and injunctive relief. The municipal-expenditure claims are **DISMISSED WITHOUT PREJUDICE** insofar as they seek damages. Oakland's claims based on non-economic damages are **DISMISSED WITHOUT PREJUDICE**.

This order disposes of Docket No. 107.

IT IS SO ORDERED.

Dated: June 15, 2018



EDWARD M. CHEN
United States District Judge