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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY OF OAKLAND, a municipal Corporation,

Plaintiff,

vs.

WELLS FARGO & CO., and WELLS FARGO BANK, N.A.,

Defendants.

Case No: 3:15-cv-04321-EMC

AMICUS BRIEF OF NATIONAL FAIR HOUSING ALLIANCE, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, POVERTY & RACE RESEARCH ACTION COUNCIL, and HOUSING SCHOLARS

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INTEREST OF AMICUS CURIAE

The National Fair Housing Alliance, Inc. ("NFHA") is a non-profit corporation that represents approximately 75 private, non-profit fair housing organizations throughout the country. Through education, outreach, policy initiatives, community development programs, advocacy, and enforcement, NFHA promotes equal housing, lending, and insurance opportunities. Relying on the Fair Housing Act, NFHA and its members undertake important enforcement initiatives across the country and in cities most impacted by the foreclosure crisis. It filed amicus curiae briefs in the Eleventh Circuit and Supreme Court in cases brought by the City of Miami against Bank of America and Wells Fargo Co. that raised issues similar to those in this case.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization founded in 1963 by the leaders of the American Bar, at the request of President John F. Kennedy, to help defend the civil rights of racial minorities and the poor. For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination. The Lawyers' Committee and its affiliates have litigated numerous claims under the Fair Housing Act. They have seen firsthand how cases brought pursuant to the Fair Housing Act are essential to meeting the Act's central goal of integrating American communities.

The Poverty & Race Research Action Council ("PRRAC") is a civil rights policy organization based in Washington, D.C., committed to bringing the insights of social science research to the fields of civil rights and poverty law. PRRAC's housing work focuses on the government's role in creating and perpetuating patterns of racial and economic segregation, the long term consequences of segregation for low-income families of color in the areas of health, education, employment, and economic mobility, and the government policies that are necessary to remedy these disparities.

Amici curiae Housing Scholars are sociologists, economists, demographers, urban planners, historians, law professors, and other scholars who study housing policy, housing finance, segregation, and discrimination. The amici, listed in the appendix, are university faculty and researchers who have written numerous books and articles on housing markets, mortgage finance, and discrimination in housing. Amici file this brief to acquaint the Court with the history—and continuing practice—of discrimination in mortgage lending on the basis of race and ethnicity, its contribution to concentrated foreclosures and neighborhood blight, and its impacts on municipalities.

INTRODUCTION

Before the Court is Defendant Wells Fargo's motion to dismiss Plaintiff City of Oakland's First Amended Complaint. The primary ground for this motion is the argument that the City has not adequately pled proximate cause. This issue arises out of the Supreme Court's decision in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017) (hereinafter *City of Miami*). There, the Supreme Court affirmed the Eleventh Circuit Court of Appeals' holding that the City had Article III standing to bring its claim, but found the Court of Appeals had erred in holding that foreseeability is itself sufficient to establish proximate cause under the Fair Housing Act ("FHA"). The Supreme Court declined to define "the precise contours of proximate cause under the FHA" and remanded the case to the Court of Appeals to permit "the lower courts [to] define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property tax revenue and increased municipal expenses." *Id.* at 1306.

The Eleventh Circuit has yet to address the issue on remand. Bank-Defendants have raised arguments in motions to dismiss in at least two other district court cases in which municipalities have brought claims similar to those of the City of Oakland; those motions are pending.[1] The

[1] Def.'s Mot. Dismiss, *City of Philadelphia v. Wells Fargo & Co.*, No. 2:17-cv-02203-LDD (E.D.

application of proximate cause to the FHA after the Supreme Court's *City of Miami* decision is thus an issue of first impression and of great importance to amici, whose missions include vigorous enforcement of the FHA. We file this brief in support of Plaintiff City of Oakland.

Initially, when deciding a motion to dismiss, well-established pleading standards apply. The court must ask whether the complaint "contains sufficient allegations of underlying facts to give fair notice and to enable [Wells Fargo] to defend itself effectively," *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), and "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Swierkewicz v. Sorema N. A.*, 534 U.S. 506, 513 (2002) (*citing Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)); *see also Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996) (a court must assume the factual allegations in the complaint are true, and must construe the complaint in the light most favorable to the non-moving party). The complaint must allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "The plausibility standard is not akin to a 'probability requirement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). Instead, the standard "calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]." *Twombly*, 550 U.S. at 556. "A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id*. at 555 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Pa. July 21, 2017); Def.'s Mot. Dismiss, *County of Cook v. HSBC N.A. Inc.*, No. 1:14-cv-02031 (N.D. Ill. Aug. 7, 2017)

SUMMARY OF ARGUMENT

A damages action under the FHA sounds in tort—"the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Curtis v. Loether*, 415 U.S. 189 (1974). Where a statute defines the duty, the nature of the statutory cause of action dictates the definition of proximate cause. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). The Supreme Court in *City of Miami* suggested that plaintiffs must allege some combination of foreseeability and directness in order to establish proximate cause under the FHA. 137 S. Ct. at 1299. Following the Court's instructions in other recent proximate cause cases, this Court should understand directness in FHA cases in terms of "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Id.* Identifying the contours of proximate cause under the FHA thus requires an overview of proximate cause doctrine, the background and purpose of the FHA, and the "nature of the [FHA] statutory cause of action" in this case. *Id.* at 1306. In enacting the FHA, Congress recognized that the direct effects of housing discrimination extend beyond the immediate victims of a discriminatory act and do so in predictable and measurable ways. The directness requirement for establishing proximate cause under the FHA should be based on this understanding.

Applying the proximate cause principles discussed in this brief to City of Oakland's First Amended Complaint demonstrates that the City's claims plainly meet the plausibility pleading standard of *Twombly* and *Iqbal*. Accordingly, the motion to dismiss should be denied.

ARGUMENT

I. THE FAIR HOUSING ACT'S BROAD REMEDIAL GOALS DEFINE THE SCOPE OF THE PROPER PROXIMATE CAUSE ANALYSIS.

A. The proximate cause doctrine is driven by policy concerns.

Proximate cause is a flexible doctrine and defining it is notoriously complicated. The Supreme Court has noted "the lack of consensus on any one definition of 'proximate cause,'"

alluding to several formulations, including "the 'efficient, producing cause' test, the 'substantial factor' test, the 'natural and probable' or 'foreseeable' consequence test." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011) (citations omitted). As a leading treatise on the subject points out, "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 263 (W. Page Keeton ed., 5th ed. 1984). The lack of a consistent definition stems from the fact that, unlike factual causation, proximate causation is not actually about causation at all, but about the appropriate scope of a defendant's legal responsibility, that is, it is one of "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Sec. Investor Prot. Corp*., 503 U.S. 258, 268 (1992). As such, its application inherently involves policy considerations. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692–93 (2011) ("What we ... mean by the word 'proximate' … is simply this: '[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.'") (quoting *Palsgraf v. Long Island R. Co*., 248 N.Y. 339, 352 (1928) (Andrews, J., dissenting)). Because the consequences of an actor's conduct can "go forward to eternity" and "go back to the dawn of human events," Keeton § 41, at 264, proximate cause expresses a normative preference about where the line should be drawn. *See also* Sandra F. Sperino, *Statutory Proximate Cause*, 88 Notre Dame L. Rev. 1199, 1204 (2013).

Wells Fargo wrongly attempts to fashion a proximate cause and directness standard using maxims that have long since been abandoned. For example, Wells Fargo argues that because the doctrine uses the word "proximate," the tortious conduct must have immediately preceded the result. *See* Def.'s Mot. Dismiss at 6 (citing Webster's Third New International Dictionary (1981)). While this interpretation may have gained some traction in early English common law, it has long since been discarded. *See* Keeton § 42, at 273 ("The term 'proximate cause' … had connotations of

proximity in time and space which have long since disappeared. It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness."). Likewise, Well Fargo argues that it cannot be held liable for issuing predatory and discriminatory loans because the homeowners took the independent steps of defaulting on the loans and vacating the properties. *See* Def.'s Mot. to Dismiss at 7-8. Yet courts have long recognized that the immediate cause of a harm and the creation of a condition upon which that cause operated are functionally the same because the law's interest in deterring the conduct is no different. *See* Keeton § 42, at 277. If a defendant places gasoline around a home, he may be culpable even though he does not directly spark the flame that ignites the gasoline. *Id.* In the same fashion, Wells Fargo may be held liable for issuing predatory and discriminatory loans because it targeted borrowers and neighborhoods of color for toxic loans that resulted in concentrated foreclosures in those same neighborhoods, even if there were subsequent steps on the path to default.

Proximate cause has also been described as a question of duty—"whether the defendant is under any duty to the plaintiff, or whether the duty includes protection" against the consequences of the defendant's actions. Keeton § 42, at 273. Thus, Wells Fargo has a duty not only to protect its customers from predatory lending practices, but also a duty towards the neighborhoods and communities in which it does business. Banks are aware of the effects of their predatory and discriminatory lending practices on the larger communities in which they operate. As discussed in more detail in Part IV, Wells Fargo itself has recognized its responsibility towards these communities in several statements by top company officials.

B. Statutory proximate cause standards are dictated by the purpose of the statute in question.

Because defining proximate cause ultimately requires the exercise of policy judgment about where liability should end, its definition depends on the underlying claim to which it is attached. The Supreme Court has repeatedly held that proximate cause is dependent upon the policy goals of the

underlying statute and that courts addressing proximate cause in the context of a statutory tort must directly address the legislative purpose of that statute. *See, e.g.*, *Lexmark*, 134 S. Ct. at 1390; *CSX Transp., Inc.* 564 U.S. at 695.

In *CSX Transportation, Inc.*, the plaintiff locomotive engineer filed suit under the Federal Employers' Liability Act (FELA) for injuries sustained using a hand-operated brake. 564 U.S. at 689. The district court rejected CSX's proposed jury instruction on proximate cause, which required finding a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 690. The Court found that FELA did not incorporate common-law proximate cause standards into the statute because Congress had explicitly detailed the extent of liability under the statute, and therefore the jury instruction was proper. *Id.* at 688. In so holding, the Court was "informed by the statutory history" of FELA, including its goal of addressing the "exceptionally hazardous" risks associated with the railroad business at the time the statute was enacted. *Id.* at 695. Given the expansive remedial purpose of the statute, along with the statute's broad language on causation, the Court found that Congress did not intend to limit liability through the use of common-law concepts of directness and foreseeability. *Id.* at 696. *See also* Sperino, *Statutory Proximate Cause*, 88 Notre Dame L. Rev. at 1210 (noting courts applying proximate cause to a statute must respect the appropriate balance between the judicial and legislative branches).

C. Proximate cause analysis must recognize that the proponents of the FHA envisioned broad enforcement.

While the Supreme Court in *City of Miami* held that proximate cause under the FHA would entail some notion of both foreseeability and directness, it nonetheless recognized that this application is highly dependent upon the specific character of that statute. *See* 137 S. Ct. at 1305 ("Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits[.]") (citing *Lexmark*, 134 S.Ct., at 1390)). In considering the proper proximate cause

analysis under the FHA, then, this Court must identify the statute's purpose and determine whether the particular harms alleged are within its scope. A proximate cause analysis must recognize that the drafters of the FHA envisioned broad enforcement.

Through the 1960s, cities across the United States were convulsed by protests against segregated housing policies and urban inequality. During the summer of 1967, more than 150 uprisings erupted in cities across the country. In response, President Johnson convened the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11,365, 3 CFR 674 (1966–1970 Comp.). The Kerner Commission's report, released in February of 1968, described the nation as "moving toward two societies, one black, one white—separate and unequal." Nat'l Advisory Comm'n on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders* 1 (1968). The report determined that housing discrimination, residential segregation, and economic inequality were causes of the increasing societal division, and recommended that Congress "enact a comprehensive and enforceable open housing law." *Id.* at 13, 28.

On April 4, 1968, Martin Luther King, Jr. was assassinated, and the threat of widespread civil unrest loomed in cities throughout the nation. One week later, Congress passed the FHA "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1988); *see also* H.R. Rep. No. 100–711, at 15 (explaining the FHA "provides a clear national policy against discrimination in housing"). Congress set out a sweeping goal of providing for fair housing throughout the nation and created a broad definition of standing and causation in order to advance that goal. Senator Javits, speaking in support of the Act, warned that "the crisis of the cities…is equal to the crisis which we face in Vietnam." 114 Cong. Rec. 2703 (1968). Senator Mondale, the primary drafter of the FHA, cautioned that "our failure to abolish the ghetto will reinforce the growing alienation of white and black America. It will ensure two separate Americas constantly at

war with one another." 114 Cong. Rec. 2274 (1968). This crisis motivated Congress to pass an ambitious bill, one with "teeth and meaning," as Senator Mondale described it, to address the conditions that fostered civil unrest. *Id.* at 2275. And the continuing consequences of housing discrimination "remain today, intertwined with the country's economic and social life." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515 (2015)

The legislative record makes clear that Congress had a broad understanding of the harms caused by housing discrimination, including the harms to the nation's cities and communities. It focused on discrimination in the sale, rental, and financing of housing as a central factor in the social crisis precisely because the victims of that discrimination were not limited to those who were the direct targets of discrimination. Discriminatory housing practices hurt not only individuals who were denied access to housing but "the whole community." 114 Cong. Rec. 2706 (1968). Senator Mondale emphasized that citywide problems are "directly traceable to the existing patterns of racially segregated housing." *Id.* at 2276. The scope of the remedy Congress created in the FHA, therefore, matched the scale of the problem. The FHA aimed to replace segregated ghettos with "truly integrated neighborhoods." *Id.* at 3422. As the Supreme Court recognized in 1972 in its first FHA decision, this neighborhood focus reflected Congress's understanding that "those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

Congress intended the FHA to address exactly the types of shared, municipal harms that the City of Oakland alleges here. The Kerner Commission drew attention to the financial plight of Detroit as one of the causes of unrest: "Because of its financial straits, the city was unable to produce on promises to correct such conditions as poor garbage collection and bad street lighting." Nat'l Advisory Comm'n on Civil Disorders, *supra*, at 51. The sponsors of the FHA argued that cities were overburdened and underfinanced as a result of discrimination in housing. For instance, Senator

Mondale stated that the bill was necessary to address the "[d]eclining tax base, poor sanitation, loss of jobs, inadequate education opportunity, and urban squalor" that central cities faced. 114 Cong. Rec. 2274 (1968). Senator Brooke similarly emphasized that the "tax base on which adequate public services, and especially adequate public education, subsists has fled the city, leaving poverty and despair as the general condition of the ghetto dwellers. We cannot immediately recreate adequate services in the central city, but we must move toward that goal." 114 Cong. Rec. 2280 (1968). The drafters of the FHA recognized that housing discrimination perpetuates racial segregation and that racial segregation leads to substantial economic disparities between neighborhoods that continue to the present.

Against this background, Congress defined an "aggrieved person" under the Act broadly: as any party "who claims to have been injured by a discriminatory housing practice" or believes that such an injury "is about to occur." 42 U.S.C. § 3602(i) (1988). The Supreme Court has consistently interpreted that phrase broadly and has recognized that when Congress amended the FHA in 1988, "it retained without significant change the definition of 'person aggrieved' that this Court had broadly construed." *City of Miami*, 137 S. Ct. at 1303 (*citing Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2515). As in *CSX Transportation, Inc.*, 564 U.S. at 691, the language in the FHA conveys a broad conception of causation in order to ensure the fulfillment of a broad remedial purpose.

Indeed, an expansive view of causation and of those directly harmed by housing discrimination has been central to the FHA and to courts' holdings concerning standing under the FHA. In *Trafficante v. Metropolitan Life Insurance Company*, the Supreme Court confirmed that the FHA protects both those who are the immediate victims of discrimination as well as those who suffer as a result of the continuing effects of that discrimination. 409 U.S. at 208. In *Trafficante*, two tenants, one White and one Black, alleged that their landlord had discriminated against non-White

tenants. Neither of the plaintiffs were the direct targets of that discrimination, but they alleged that as a result of the discrimination, they lost the social benefits of living in an integrated community; missed business and professional advantages which would have accrued if they lived with members of minority groups; and suffered economic damage in their social, business, and professional activities. *Id.* The Court explicitly recognized that "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices," and that the only way to "give vitality" to the FHA is through the generous construction intended by Congress of the statute's standing and causation requirements. *Id.* at 368.

In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979), the Court considered a challenge by the Village of Bellwood and six individuals who served as "testers" to determine whether the defendant realtors were engaged in racial steering. Bellwood alleged that the racial steering negatively affected the local housing market, exacerbating segregation and reducing home values. The Court concluded that a "significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services," and giving rise to an FHA claim. *Id.* at 110–11. Likewise here, direct harm to the City of Oakland from Wells Fargo's discrimination in violation of the FHA extends beyond the immediate victim of the discriminatory act to the shared harms experienced by the City. *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding that even if the fair housing organization plaintiff was not the immediate victim of discrimination, if the discriminatory practices impaired its "ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact").

The breadth of the FHA's scope and vision, made plain in its legislative history and in the Supreme Court's repeated interpretations of that history, require a proximate cause analysis that

recognizes that the close relationship between housing discrimination and harms experienced by our nation's cities and communities satisfies the directness requirement articulated by the Court in *City of Miami*.

II. THE PROXIMATE CAUSE STANDARD UNDER RICO DOES NOT DICTATE THE PROXIMATE CAUSE STANDARD UNDER THE FHA.

The Court in *City of Miami* declined to draw the "precise boundaries" of proximate cause under the FHA and made clear that the definition depends on the "nature of the statutory cause of action." 137 S. Ct. at 1306 (internal citations omitted). Defendants argue that this court should use the causation standard found in cases arising under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), but that is the wrong standard to apply here because the statutory considerations giving rise to definitions of proximate cause under the RICO statute differ dramatically from those in the FHA, as discussed below.

The Supreme Court referenced three RICO cases in City of Miami—*Holmes v. Secs. Investor Protection Corps.*, 503 U.S. 258 (1992), *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Hemi Group LLC v. City of New York*, 559 U.S. 1 (2010)—for the purpose of explaining that the scope of causation should be measured with reference to the purpose of the statute. The FHA's purposes are much broader than RICO's purposes and the scope of causation for an FHA case is correspondingly broader. The statutes that gave rise to these cases justified the application of a "first step" standard and a definition of first step on grounds inapplicable to the FHA. Instead, the Court's reference to these cases should be read as a directive to carefully examine the legislative intent and policy considerations behind each statute in drawing the line on proximate cause.

Holmes, *Anza*, and *Hemi* all arise under the same statute—RICO . The *Holmes* Court narrowed the scope of proximate cause under RICO by importing the "first step" proximate cause standard used under the Clayton Antitrust Act. 503 U.S. at 271 (*quoting Southern Pac. Co. v. Darnell Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). The Court did so for two reasons: (1)

When RICO was created, Congress indicated an intent to base the RICO standard on that of the Clayton Act, *id*. at 268 ("We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in §7 of the Sherman Act, and later in the Clayton Act §4"); and (2) Policy considerations under RICO parallel policy considerations in the context of antitrust laws like the Clayton Act, *id.* at 272-74.

The *Holmes* Court notes three of these policy considerations: (1) Difficulty in parsing the damages flowing from the RICO violation from those caused by independent factors ("the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the [RICO] violation, as distinct from other, independent factors"). *id*. at 269; (2) concern over allowing "multiple recoveries" by indirectly affected plaintiffs, *id.* (allowing recovery by indirectly-injured plaintiffs "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury ... to obviate the risk of multiple recoveries"); and (3) the expectation that directly injured victims can be counted on to bring their claims and force the violating party to account for the full amount of the harm caused, *id.* ("directly injured victims can generally be counted on to vindicate the law").

The reasons for applying the "first step" proximate cause standard under RICO—as noted in *Holmes*, and later *Anza* and *Hemi*—do not apply to the FHA for multiple reasons. First, as demonstrated above in Section I(C), Congress intended a broad reading of proximate cause under the FHA and made no reference to the standards under either the RICO or the Clayton Act. Second, the policy justifications for applying the Clayton Act's "first step" analysis under RICO are not present in the context of the FHA. Neither the concern over "multiple recoveries" nor the expectation that directly injured victims can be "counted on to vindicate the law" exist here. *Holmes*, 503 U.S. at 261. This is because the harm done to the City of Oakland by Wells Fargo is separate and distinct from the harm done to individual victims of the discriminatory targeting of high-cost mortgage loans to

Black and Latino borrowers. The practice of reverse redlining by Wells Fargo led to independent injuries for the City in the form of depressed municipal tax revenues and increased municipal costs. Thus, were the City able to recover for these injuries, this would not amount to "multiple recoveries" because the City would not be recovering for the same harm done to the borrowers. Further, the borrowers cannot recover for the separate injuries sustained by the City and thus cannot fully vindicate the law.

Moreover, the individual minority borrowers targeted by Wells Fargo's discriminatory loans face significant obstacles that have prevented similar plaintiffs from bringing successful FHA claims. For instance, an individual must file suit within two years of the discriminatory loan transaction unless the individual plaintiff possesses concrete information that the conduct was part of a larger discriminatory scheme. 42 U.S.C. § 3613(a)(1)(A) (1988); *Cervantes v. Countrywide Home Loans, Inc*., 2009 WL 3157160, at *7 (D. Ariz. Sept. 24, 2009), *aff'd*, 656 F.3d 1034 (9th Cir. 2011) ("Even if the Court assumed that Defendants' actions violated the FHA, the discriminatory act took place at the time Defendants extended the loan to Plaintiffs. Therefore … Plaintiffs' FHA claims are time-barred."). Unlike plaintiffs in the RICO context who have a great deal of resources and financial sophistication, victims of discriminatory lending practices rarely have the numbers, resources or statistical expertise necessary to show systemic discriminatory conduct. This further confirms the special role municipalities must play in vindicating the rights established in the statute.

The inapplicability of a strict "first step" analysis to the FHA becomes even clearer when the FHA is compared with the original source of the "first step" proximate cause standard in *Holmes*—the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C.A. §§ 12-27 (2002), 29 U.S.C.A. §§ 52-53 (2002), and other antitrust laws (*e.g*., the Sherman Act, 26 Stat. 209 (1890), 15. U.S.C.A. §§ 1-7 (2004)). It was in the antitrust context that the "ripples of harm" metaphor was first developed, and it is a precise metaphor used to describe the type of harm that certain antitrust violations cause. *Blue Shield*

of Virginia v. McCready, 457 U.S. 465, 476–77 (1982) ("An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736–48 (1977) (discussing how an overcharge in a price-fixing case is distributed between the overcharged party and its customers).

A monopolist in violation of an antitrust law sells to a set of direct buyers at an unlawfully high price; in order to avoid potential losses, those direct buyers then sell to indirect buyers at a price that reflects their higher input costs—a phenomenon known as "passing on." Richard A. Posner, *Economic Analysis of Law* at 316-17 (4th ed. 1992). The nature of the harm in the context of an antitrust violation is therefore just like a "ripple," passing through a series of actors but erasing itself at each step outward, leaving only the final buyers to bear the injury. *Id.*

A long-established principle of antitrust jurisprudence is that only direct buyers—the "first step" along the consumer chain—may recover from the monopolist. *See*, *e.g.*, *Illinois Brick* 431 U.S. at 745. The justification for cutting off proximate causation at the first step in this context is rooted in policy considerations. As Judge Posner has noted:

> It makes sense to permit the [direct buyers] to sue the monopolist for the entire monopoly overcharge, even though they will in all likelihood have passed on the bulk of the overcharge to the [indirect buyers] who in turn will have passed it on to the consumers...the [direct buyers] may yield them windfall gains, yet the most important thing from an economic standpoint—deterring monopoly—will have been accomplished more effectively than if such suits are barred.

Posner, *supra*, at 317.

The nature of the harm done to the City of Oakland in violation of the FHA is markedly different from the "ripple" caused by an antitrust violation. First, there is no "passing on" the harm caused by an FHA violation, and certainly not the harm caused to individual victims of predatory lending in Oakland. Rather, far from erasing itself, the harm done to individual borrowers yields an independent harm to the City. If recovery is limited to the borrowers, the full amount of the harm

caused, which includes the harm to the City, will not be redressed. Since the borrowers cannot themselves recover on behalf of the City, defendants would not have to pay for the full damage caused by their violations, thus reducing the deterrent effect of the FHA. The policy considerations for limiting proximate causation to the first step under antitrust laws, therefore, do not apply.

A further policy consideration for limiting proximate cause in the antitrust context to a first step analysis is judicial economy. As the hiked price extends outward through the chain of buyers, the more "distant" buyers are subject to smaller injuries, since they are less likely to buy in bulk. The full recovery of the harm caused by the monopolist at these distant steps in the commercial chain would require that every indirect buyer bring suit. Indirect buyers are thus "less efficient antitrust enforcers" than direct buyers due to the splintering of the harm. *Id.* at 318-19. Again, no such concern presents itself in the FHA context. The situation in the present matter is actually the *reverse* of the antitrust pattern: The harm caused beyond the "first step" of the borrowers was not splintered into smaller claims but rather consolidated into a larger injury against the City, which is perfectly capable of recovering its losses in a single claim.

The determination of where to draw the line of proximate cause under a given statute relies primarily on legislative intent and policy considerations. *CSX Transp., Inc.* 564 U.S. at 695. An examination of these justifications in the antitrust context makes clear that the context is markedly different from that under the FHA and that the reasons for cutting off proximate causation in the antitrust context to the first step do not apply to the FHA. Proximate cause under the FHA in light of *City of Miami* must, therefore, rely on an independent examination of the legislative intent and policy considerations under the FHA and not of RICO and the antitrust laws.

III. THE HARMS CAUSED BY THE PREDATORY LENDING PRACTICES THAT FUELED THE RECENT FORECLOSURE CRISIS WERE BOTH FORESEEABLE AND DIRECT.

Wells Fargo proximately caused harm to the City of Oakland by creating policies that

facilitated racial discrimination in the pricing of home loans in Oakland that directly resulted in harms to the City itself. Congress intended the FHA to remedy these harms. Wells Fargo targeted families in communities of color for high-risk loans not justified by objective credit standards during the lending boom and extracted many millions of dollars in excess interest and fees. The direct and foreseeable consequences of this reverse redlining were increased rates of foreclosure for Black and Latino borrowers, concentrated property vacancies, and disproportionate declines in home values in predominantly Black and Latino neighborhoods. Daniel Immergluck, *Foreclosed: High-Risk Lending, Deregulation, and the Undermining of America's Mortgage Market* 78-84, 101-110 (2009) (hereinafter Immergluck, *Foreclosed*). These harms directly mirror the injuries experienced by central cities in the 1950s and 1960s as a result of discriminatory blockbusting, redlining, and contract sales. Beryl Satter, *Family properties: Race, real estate, and the exploitation of Black Urban America* (2009).

A. Wells Fargo and Other Lenders Engaged in Predatory Lending.

The City's First Amended Complaint alleges that Wells Fargo created incentives for brokers and loan officers to charge higher rates and to impose riskier but more profitable terms, including prepayment penalties, than those for which mortgage applicants qualified, a practice that had become widespread in the home loan industry in the years leading up to the foreclosure crisis. First Am. Compl. ¶¶ 12, 39; Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex. L. Rev. 1255, 1259-70 (2002). This compensation structure systematically disfavored Black and Latino borrowers, who had long been denied credit in the past and continued to live in neighborhoods less likely to be served by mainstream banks. First Am. Compl. ¶ 47; Alan White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S.C.L. Rev. 3, 677-706, 690-691 (2009). Researchers have consistently found disparities in the amount of compensation earned by mortgage originators, as well as disparities in

costs charged to borrowers, based on the race and ethnicity of the borrowers to whom they made loans. Howell E. Jackson & Laurie Burlingame, *Kickbacks Or Compensation: The Case Of Yield Spread Premiums*, 12 Stan. J.L. Bus. & Fin. 289, 354 (2007); Susan E. Woodward, U.S. Dep't. Hous. Urb. Dev., *A Study of Closing Costs for FHA Mortgages*, 45-48 (2008). Expert reports offered by both parties in another fair lending case against Wells Fargo demonstrated that Black mortgage borrowers were steered to lending divisions with higher-priced and riskier loan products, and were charged higher fees by loan brokers, even after controlling for objective credit qualifications. White, *supra*, at 694-98 (summarizing reports in *Walker v. Wells Fargo Bank*, N.A., No. 05-cv-6666 (E.D. Pa. 2008)). Wells Fargo profited from higher interest rates than those justified by the economic risk (which also increased the value of the loans on the secondary market), while its loan officers collected larger compensation. Borrowers, however, suffered from significantly higher costs over the life of the loan that then led to increased risks of default and foreclosure. *See* Immergluck, *Foreclosed* at 141-43.

In addition to creating incentives for the origination of loans with wider spreads between the loan's interest rate and the prevailing interest rate, Wells Fargo encouraged the origination of loans with unfavorable terms for borrowers, such as adjustable rates that increased the risk of foreclosure and prepayment penalties that locked consumers into their loans. First Am. Compl. ¶¶ 80, 89. Adjustable rates and prepayment penalties increased the value of mortgage-backed securities and made them more attractive to investors by shifting the risks of interest rate changes onto the borrower. Explicit and implicit racial and ethnic biases, combined with these incentives, resulted in loan officers steering some black and Latino customers to products that were not only higher cost, but also higher risk. *See, e.g.*, William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending, in The Geography of Opportunity* (Xavier de Souza Briggs ed., 2005); Derek S. Hyra et al.,, *Metropolitan Segregation and the Subprime Lending*

Crisis, 23 Hous. Pol'y Debate 177 (2013).

B. Discrimination Compounded the Harm Wrought by Predatory Lending.

The social science evidence demonstrates that the compensation structure used by Wells Fargo encouraged loan officers to "deliberately [seek] out financially vulnerable borrowers for deceptive sales tactics and predatory mortgages" in Black and Latino neighborhoods. Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & Pol'y 121, 122, 124 (2009). The direct and foreseeable consequences of Wells Fargo's policies were, first, the concentration of expensive mortgage loans with onerous terms in minority communities that had previously been denied credit and, subsequently, increased rates of foreclosure for Black and Latino borrowers. Adam Levitin & Susan Wachter, *Explaining the Housing Bubble*, 100 Georgetown L. J. 1177 (2012); Immergluck, *Foreclosed* at 101-10.

Research has conclusively demonstrated that, even when controlling for income and credit risk, financial institutions including Wells Fargo disproportionately targeted people of color for predatory loans during the subprime boom of the 1990s and early 2000s. A seminal 2000 study found that African Americans, Asians, Native Americans, and Latinos paid higher rates than Whites for home loans, even after controlling for borrower income, debt, and credit history. Anthony Pennington-Cross et al., *Credit Risk and Mortgage Lending: Who Uses Subprime and Why?* 13, 16 (Research Institute for Housing America, Working Paper No. 00-03, 2000). Black borrowers were more than 30 percent more likely than Whites to receive loans with higher interest rates and prepayment penalties, even after controlling for credit risk. Debbie Gruenstein Bocian et al., *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages* 16-19 (Center for Responsible Lending Report 2006). Low-income African Americans had subprime loans 2.4 times as often as similarly-situated low-income Whites; among upper-income homeowners, African Americans were three times as likely to end up in the subprime market as Whites with comparable

incomes. Calvin Bradford, *Risk or Race? Racial Disparities in the Subprime Refinance Market* 8 (Center for Community Change 2002).

C. Predatory and Discriminatory Lending Had a Foreseeable, Direct, and Major Impact on Cities.

This discrimination had a foreseeable and direct negative economic impact on minority neighborhoods and the cities in which those neighborhoods are located. Systematically higher interest rates and worse loan terms for Black and Latino borrowers led directly to higher rates of foreclosure among those borrowers receiving loans on discriminatory terms. Jacob Rugh et al., *Race, Space and Cumulative Disadvantage*, 62 Social Problems 186-218, 200-202 (2015). Among borrowers with mortgages that were originated between 2005 and 2008, nearly 8% of both African American and Latinos have lost their homes to foreclosures, compared to 4.5% of Whites. Debbie Gruenstein Bocian et al., *Foreclosures by Race and Ethnicity: The Demographics of a Crisis* 2, Center for Responsible Lending (2010). The concentration of foreclosures in particular neighborhoods has led not only to dramatic declines in property values surrounding these clusters of foreclosures, but also to an increase in municipal spending to maintain a decent quality of life in these neighborhoods. This process is directly analogous to that experienced by redlined communities targeted by unscrupulous contract sellers prior to the passage of the FHA. Satter, *supra*, at 64-97. Through the Chicago Freedom Movement, which helped inspire the enactment of the FHA, Dr. Martin Luther King Jr. directly confronted this historical antecedent to reverse redlining. Satter, *supra*, at 183-212; Taylor Branch, *At Canaan's Edge: America in the King Years, 1965-68* 501-522 (2006).

At the time the discriminatory subprime loans at issue here were made, it was already well established that concentrated foreclosures cause increased municipal expenditures. Discriminatory lending based on race and ethnicity has meant a decline in property values and tax revenue, disproportionately affecting neighborhoods and cities with high shares of Black and Latino residents.

Long before the foreclosure crisis peaked, well-publicized government and academic studies showed that high-cost mortgages were highly concentrated in communities of color and were causing spatially concentrated high rates of foreclosures. *See* U.S. Dept. of Housing and Urban Development, U.S. Dept. of the Treasury, Predatory Lending Task Force, *Final Report*, at 47-51 (2000), https://www.treasury.gov/press-center/press-releases/Documents/treasrpt.pdf. The harms from foreclosures stretch municipalities and their services and diminish their ability to alleviate the injuries to their poorest and most heavily minority communities.

Foreclosures reduce the value of nearby homes because of the direct effects on neighborhoods from poor property maintenance and vacant homes, weak property appraisals based on comparable sales prices, and the creation of an imbalance of demand and supply in an illiquid neighborhood housing market. John Harding et al., *The Contagion Effect of Foreclosed Properties*, 66 J. Urb. Econ.164 (2009). The independent causal effects of foreclosures on property values translate into direct negative consequences for municipal revenues. Howard Chernick et al., *The Impact of the Great Recession and the Housing Crisis on the Financing of America's Largest Cities*, 41 Regional Sci. & Urban Econ. 372 (2011). Conservative estimates indicate that each foreclosure within an eighth of a mile of a house causes a 0.9 percent decline in property value, leading to a decreased municipal tax base. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 Hous. Pol'y Debate 57 (2006). Lost tax revenue limits a municipality's ability to provide community services, including public education, sanitation and police protection. At the same time, municipalities must provide increased services to the segregated minority communities that have suffered the harms of discriminatory lending and the resultant mass foreclosures. What was true of Chicago in 1966 is equally true of Oakland in 2017: a city is left holding the bag when widespread foreclosures blight its neighborhoods.

In addition to decreased revenues, cities have faced increased expenditures from foreclosures. The direct increased costs to cities for each foreclosed, abandoned property include expenditures that cities are forced to make for increased police and fire services, building inspections, sanitation activities, and demolition contracts. First Am. Compl. ¶ 3, 17-18; William C. Apgar et al., *The Municipal Cost of Foreclosures: A Chicago Case Study*, Housing Finance Policy Research Paper 2005-1 (2005); *see also* Dan Immergluck, *Preventing the Next Mortgage Crisis: The Meltdown, the Federal Response, and the Future of Housing in America* (2015). Increased foreclosures predictably lead to increased complaints about property maintenance, vandalism, and crime. A study of property complaints in the City of Boston from 2008 to 2012 found that the typical single-family property was over nine times as likely to receive a complaint when owned by a bank following foreclosure compared to when its previous owner was current on their mortgage. Lauren Lambie-Hanson, *When Does Delinquency Result in Neglect? Mortgage Distress and Property Maintenance*, Federal Reserve Bank of Boston Public Policy Discussion Paper 13-1 (2013). Foreclosures attract criminal activity, and with each percentage point increase in the rate of foreclosures, the rate of violent crime in the same area rises by more than two percent. Dan Immergluck, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime* 21 Hous. Studies 851, 863 (2006); *see also* Ingrid Gould Ellen et al., *Do Foreclosures Cause Crime?*, 74 J. Urb. Econ. 59 (2013). An investigation by *amicus* NFHA found that foreclosed homes often attract squatters and vandals and become venues for late-night parties, resulting in increased calls to police and additional city services. National Fair Housing Alliance, *Zip Code Inequality: Discrimination by Banks in the Maintenance of Homes in Neighborhoods of Color* 11 (2014). These harms are similar to increased fire risk in neighborhoods plagued by contract sales prior to the passage of the FHA. Satter, *supra*, at 60-62.This pattern would be entirely familiar to municipal officials in the 1960s who sought to counteract the effects of discriminatory practices prior to the adoption of the FHA. As

a result, in addition to having a far-reaching negative impact on individuals, foreclosures create significant, readily anticipated economic and social costs for neighborhoods, cities, and counties of the type that Congress intended the FHA to remedy.

In sum, Wells Fargo's discriminatory reverse redlining practices have resulted in direct and foreseeable harms to the City of Oakland for which no other party would have standing to seek a remedy. That the impact of predatory lending extends beyond the targeted victim to other impacted entities throughout the community was clear from abundant social science evidence long before the subprime mortgage bubble burst. Congress passed the FHA in direct response to the type of practices of which Wells Fargo's reverse redlining is the modern day iteration. Accordingly, the broad remedial goals of the FHA recognize that the harm to cities from reverse redlining is sufficiently direct to confer standing on such municipalities.

IV. WELLS FARGO RECOGNIZES ITS DUTY TO PROTECT NEIGHBORHOODS IT SERVES

As noted in Section I.A above, proximate cause has also been described as a question of duty—"whether the defendant is under any duty to the plaintiff, or whether the duty includes protection" against the consequences of the defendant's actions. Keeton § 42, at 273. The duty is not just to protect its customers from predatory lending but also a duty and responsibility to the neighborhoods it serves.

Statements by top officials at Wells Fargo demonstrate its awareness of this duty and further demonstrate how its actions are the proximate cause of injuries to the City. Wells Fargo's CEO and an Executive Vice President have explicitly recognized this duty. Tim Sloan, Wells' CEO, said in a statement:

> "[R]estoring trust in Wells Fargo and building a better bank for our customers and our communities is our top priority. Wells Fargo is deeply committed to economic growth, sustainable homeownership and neighborhood stability in low- and moderate-income communities and will

> continue to invest above and beyond what is required by CRA."[2]

Jon Campbell, Wells Fargo executive vice president and head of corporate responsibility and community relations, added:

> "Wells Fargo believes in the financial and social benefits of owning a home and we recognize that—both as a lender and as a servicer—we can do more to address the homeownership rates within the African American community."[3]

Wells Fargo has recognized its direct economic responsibility towards the communities it serves, and cannot be absolved from that responsibility after engaging in lending practices that erode the economic stability of these neighborhoods.

CONCLUSION

In its *City of Miami* decision, the Supreme Court remanded the issue of proximate cause to "the lower courts [to] define, in the first instance, the contours of proximate cause under the FHA." 137 S. Ct. at 1306. It emphasized that the "nature of the statutory cause of action" was central to determining how to analyze proximate cause under the FHA. An examination of the FHA demonstrates the broad remedial purpose and reach that Congress intended when it passed the FHA in 1968 and how it has been interpreted by courts since then. When viewed in the context of the purpose and reach of the FHA, the factual allegations in the City of Oakland's complaint detail the close relationship between the Bank's discriminatory actions and the injuries alleged to have been caused by these actions, and fall well within the FHA's purpose and intended reach. In short, they

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[2] Evan Weinberger, *Feds Flunk Wells Fargo on Community Lending Exam*, Law360 (N.Y.C.) (Mar. 28, 2017 2:42 PM), https://www.law360.com/articles/907064/feds-flunk-wells-fargo-on-community-lending-exam.

[3] Housing Opportunities Made Equal of Virginia, Inc., *HOME and Wells Fargo Create $4 Million Partnership to Increase African-American Housing Opportunities*, (July 17, 2017) http://homeofva.org/Portals/0/Images/PDF/pressrelease/HOME_WellsFargo_Partnership_PressRelease.pdf?timestamp=1500298939507.

are plausible and allow the court to draw a reasonable inference that the these actions are the proximate cause of the alleged injuries suffered by the City. Accordingly, the Defendant's Motion to dismiss should be denied.

Dated: November 13, 2017

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CERTIFICATE OF SERVICE

Pursuant to Rule 5 of the Federal Rules of Civil Procedure, on November 13, 2017, I served by email pursuant to the Court's ECF system a copy of the attached document – **AMICUS BRIEF OF NATIONAL FAIR HOUSING ALLIANCE, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, POVERTY & RACE RESEARCH ACTION COUNCIL, and HOUSING SCHOLARS** – upon the following attorneys:

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