UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 14-CV-22205-DIMITROULEAS

CITY OF MIAMI, a Florida municipal corporation,

Plaintiff,

v.

JPMORGAN CHASE & CO., and JPMORGAN CHASE BANK, N.A.,

Defendants.

CITY OF MIAMI'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT

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Plaintiff City of Miami ("Plaintiff" or "the City") respectfully files this response in opposition to Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint (Dkt. No. 58) ("Br.").

I. Introduction

The City's Third Amended Complaint (Dkt. No. 102) ("TAC" or "Complaint") remedies the pleading defects this Court identified in dismissing the City's prior complaint. It provides details on discriminatory practices in issuing loans during the limitations period, and ties those loans to Defendants' "longstanding, unbroken policy and practice of both intentionally steering minority borrowers in Miami into 'discriminatory' mortgage loans (defined [in the Complaint] as loans that have higher costs and risk features than more favorable and less expensive loans issued to similarly situated white borrowers) and engaging in facially neutral business policies and practices that created an 'artificial, arbitrary, and unnecessary' barrier to fair housing opportunities for minority home purchasers and owners." TAC ¶ 1. The Complaint sets forth in detail the policies and practices that resulted in a disparate impact on minority borrowers, and the devastating impact Defendants' practices have had on these borrowers and on the City. The Complaint draws on publicly available information, loan data from Defendants, including residence-level information on specific loans, and information from confidential witnesses.

The City's Complaint satisfies the standard set forth by the Eleventh Circuit in *City of Miami v. Bank of America Corp.*, 800 F.3d 1262 (11th Cir. 2015), as well as this Court's instruction in its last order. Even though discovery has not commenced, the City has tied specific allegations of discriminatory practices in issuing loans during the limitations period to extraordinarily detailed allegations of Defendants' longstanding discriminatory practices, supported by statistical analysis, information from confidential witnesses, and other publicly available information.

Defendants continue to argue that the City's claim is time-barred because of a lack of information about the limitations period loans, but misinterpret *City of Miami* to require more specificity and detail than required by that opinion or controlling authority. They also argue, in the face of well-established contrary authority, that the City must show injury during the limitations period from loans issued within that period, and misinterpret the Supreme Court's disparate impact jurisprudence. Defendants also argue that it faces improper group pleading,

even as the City's allegations give them clear notice of the claims they face and the basis for them. Defendants' motion should be denied, and this case permitted to proceed to the merits.

II. Legal Standard

On a Rule 12(b)(6) motion to dismiss, the Court must accept the City's allegations as true and construe them in the light most favorable to the City. *See Speaker v. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010). The plaintiff's complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See also Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007) (holding that in *Twombly*, the Supreme Court "has instructed us that the rule 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary element.") (quoting *Twombly*, 550 U.S. at 556). A complaint must merely provide the defendant with fair notice of the claim and grounds for relief and does not require detailed factual allegations. *See Gilbert v. Daniels*, No. 14-14032, 624 Fed. Appx. 716, at *1 (11th Cir. Aug. 28, 2015) (citing *Twombly*, 550 U.S. at 555, and *Iqbal*, 556 U.S. at 678).

III. The City's Claim Is Timely.

A. The City Has Remedied the Defects That This Court Identified.

1. The City's New Allegations

In *City of Miami*, the Eleventh Circuit held that this case may proceed if the City alleges the issuance of a loan reflecting the same discriminatory practice during the two-year limitations period as the loans issued in the pre-limitation period. *City of Miami*, 800 F.3d at 1285. After remand, the Court dismissed the City's complaint, holding that the Financial Institutions Reform, Recovery and Enforcement Act deprived the Court of subject matter jurisdiction over acts or omissions relating to a failed depository institution, including Washington Mutual Bank. *See City of Miami v. JPMorgan Chase & Co., et al.*, 2016 WL 1072488, at *3 (S.D. Fla. Mar. 17, 2016) ("*Dismissal Opinion*"). The Complaint now before the Court does not name WaMu. The Court also held that the prior complaint did not sufficiently distinguish among the four named defendants. *Id.* Although the City's new complaint names only two defendants, the two

remaining defendants continue to argue that the City has engaged in group pleading, an argument addressed below.

The Court also adopted the holdings of two other orders it issued the same day in parallel cases brought by the City. In those orders, the Court held that the City's allegations of loans issued pursuant to the discriminatory practice during the limitations period were "too conclusory to meet the *Twombly*/*Iqbal* pleading standard." *City of Miami v. Bank of Am. Corp.*, 2016 WL 1072488, at *3 (S.D. Fla. Mar. 17, 2016); *City of Miami v. Wells Fargo & Co.*, No. 13-24508-CIV, 2016 WL 1156882, at *3 (S.D. Fla. Mar. 17, 2016). The Court held that the City's substantially similar complaints lacked specific information as to (a) the borrower(s)'s minority status, (b) the type of loan, (c) the characteristics that made it predatory or discriminatory, (d) when the loan closed, or (d) what basis Miami has to claim the loan will default or enter foreclosure. *Id.* The Court held that the City had failed to allege that it suffered any injury from the loans it identified as issued pursuant to the defendants' discriminatory practices. The City's Complaint remedies these pleading defects.

The City's Complaint adds specific allegations concerning six limitations period loans. It also sets forth the borrowers' race, the type of loan, and the date the loan closed. TAC ¶ 128 nn.39-44. Further, the Complaint makes clear that the loans "violate the FHA and are discriminatory because they were issued to minority borrowers and were more expensive than the loans issued to similarly situated white borrowers during the limitations period based upon the regression analysis described earlier." *Id.* ¶ 128. In addition, based on a review of publicly available information on loans issued during the limitations period, the Complaint alleges that such data "strongly supports the conclusion that a greater number of more expensive and/or riskier loans were issued to minority borrowers than non-minority borrowers" during the limitations period." *Id.* ¶ 129.[1]

Despite Defendants' demand for an ever-increasing level of specificity about the limitations period loans, these allegations (in concert with the other meticulous and detailed allegations in the Complaint) more than provide Defendants with fair notice of the claim and

[1] However, the small size of the sample does not lend itself adequately to statistical analysis in isolation if the data is limited to the limitations period. *Id.* Nevertheless, the Complaint sets forth ample allegations and information that make the City's claims plausible and well-pled under binding Supreme Court authority.

grounds for relief, and address each of the concerns that this Court expressed. *See Gilbert*, 624 Fed. Appx. 716, at *1 (internal citations omitted).

2. Application of the Continuing Violation Doctrine

The FHA provides that a civil enforcement action must be filed "not later than 2 years after the occurrence *or the termination* of an alleged discriminatory housing *practice*." 42 U.S.C. § 3613(a)(1)(A) (emphasis added). This provision provides that a continuing violation claim is timely so long one instance of the same discriminatory practice occurs during the two-year limitations period, thereby demonstrating that the continuing violation did not terminate prior to the limitations period. *See City of Miami*, 800 F.3d at 1284 (holding that the continuing violation doctrine "applies to 'the continued enforcement of a discriminatory policy'") (quoting *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1221 (11th Cir. 2001)). Where a city "alleges that the Bank has engaged in a longstanding practice of discriminatory lending in which it extends loans to minority borrowers only on more unfavorable terms than those offered to white borrowers … [t]he various instances of discriminatory lending comprise the practice, which continues into the limitations period." *City of Miami*, 800 F.3d at 1285. This finding holds regardless whether "the predatory qualities of the loans [took] slightly different forms over time" so long as "the essential discriminatory practice has remained the same." *Id.* As the Eleventh Circuit explained, "a 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination." *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

Pursuant to the continuing violation doctrine, a plaintiff may "sue on otherwise time-barred claims *as long as one act of discrimination has occurred . . . during the statutory period.*" *City of Miami*, 800 F.3d at 1284 (emphasis added). In *Havens*, the Supreme Court recognized that "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the limitations period] of the last asserted occurrence of that practice." *Havens*, 455 U.S. at 380-81. The *Havens* Court held that "a continuing violation of the Fair Housing Act should be treated differently from one discrete act of discrimination." *Id*. at 380. In *Havens*, only one instance of discrimination took place during the limitations period, but the continuing violation doctrine applied to make previous incidents under the same policy actionable. *Id.*

Relying on *Havens* and assessing similar allegations of ongoing and continuing policies and practices, the Eleventh Circuit held that the "continuing violation doctrine" applies to FHA claims like those alleged in this case. *See City of Miami*, 800 F.3d at 1285. The Eleventh Circuit recognized that the City "has alleged not just one incident but an unlawful practice that continues into the limitations period." *Id.* The doctrine allows the City to sue on an otherwise time-barred claim as long as the plaintiff alleges that one act of discrimination has occurred during the statutory period. *Id.*

the City alleges a continuing violation that includes allegations of six loans that closed during the limitations period, demonstrating that the practice continued into the limitations period. However, these loans should not be viewed in isolation, but instead in connection with the allegations of the rest of the Complaint. Indeed, the City's Complaint focuses on a "longstanding, unbroken policy and practice of steering minority borrowers in Miami into mortgage loans" on less favorable terms than those for which the borrower was eligible and that are regularly issued to similarly situated white borrowers, TAC ¶ 1, and alleges that the "unlawful pattern and practice continues through the present and has not terminated." *Id.* ¶ 6. The Complaint offers voluminous detail, based on a regression analysis of Defendants' loans that controls for race and risk characteristics such as credit history, as well as government reports and other information, about the disproportionate incidences of foreclosures of Defendants' loan originations, especially in African-American and Hispanic neighborhoods in Miami. TAC ¶¶ 31-77. The Complaint also alleges that Defendants' loans to minority borrowers cause foreclosures, and enter into foreclosure faster than those issued to similarly situated white borrowers. *See* TAC ¶¶ 78-93.[2]

[2] Multiple district courts have rejected statute of limitations arguments on motion to dismiss in which the plaintiff alleged an unterminated practice or continuing violation of the FHA. *See Cnty. of Cook v. Bank of Am. Corp.*, 2015 WL 1303313, at *5 ("The County alleges that Defendants *continue* to charge minority borrowers discriminatory fees and costs during the servicing of home loans."); *Cnty. of Cook v. HSBC*, 136 F. Supp. 3d at 965 ("Here, the County has alleged that Defendants are still engaged in their discriminatory mortgage lending practices and continue to service the loans in a discriminatory manner."); *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1059 (C.D. Cal. 2014) ("The exact type of loan issued to minority borrowers may have changed, but the City alleges the loans issued to minorities continued to be more high-risk than loans issued to white borrowers."); *Dekalb Cnty., Ga. v. HSBC N. Am. Holdings, Inc.*, No. 1:12-cv-003640-ELR, 2015 WL 1608094, at *2 (N.D. Ga. Mar. 3, 2015) ("Plaintiffs have properly pled an ongoing pattern of discriminatory housing

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Combined with the specific allegations concerning the six limitations-period loans, the Complaint pleads sufficient facts from which a reasonable and reasonable inference of discrimination may be drawn for the limitations-period loans. Collectively, these allegations suffice to satisfy the requirements of a continuing violation. *City of Miami*, 800 F.3d at 1285.

3. The City's Allegations of Limitations Period Loans Are Sufficient.

a. The Limitations Period Loans Are Linked to Allegations of Previous Conduct.

Defendants' argument that the statute of limitations bars the City's claim ignores the Eleventh Circuit's holding that the continuing violation doctrine applies to the City's FHA claim. It asks the Court to read the Complaint's allegations in isolation, rather than focusing on the comprehensive picture it paints of continuing violations of the FHA, including in the limitations period. Ignoring the five loans issued pursuant to discriminatory practices and the detailed information concerning each, Defendants mischaracterize the City's allegations as limited to pre-2010 conduct, and based solely on confidential witnesses whose employment ended prior to the limitations period. *See* Br. at 9. These arguments fail.

First, the inclusion of the regression analysis, which revealed that an African-American borrower was 6.351 times likely to receive a discriminatory loan than a white borrower, and a Hispanic borrower was 1.982 times more likely, provides substantially more detailed allegations than the statements of the confidential witnesses. TAC ¶ 15; *see also* ¶¶ 63-70. Defendants' attempt to erase the detailed supporting allegations and context for the limitations period loans is contrary to the well-established rule that a complaint's allegations are not to be "parsed and read in isolation, but must be read as a whole." *Rosky ex rel. Wellcare Health Plans, Inc. v. Farha*, 8:07-cv-1952, 2009 WL 3853592, at *2 (M.D. Fla. Mar. 30, 2009) (quotation and citation omitted). *See also, e.g., Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1172 (11th Cir. 2014) (reversing dismissal of case in which an allegation "may appear conclusory when read in isolation," but is plausible in light of complaint's previous additional factual allegations).

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practices which was alleged to have been continuing at the time of the filing of the Complaint."); *City of Oakland v. Wells Fargo & Co., Inc., et al.*, 3:15-cv-04321 (N.D. Cal.), Dkt. No. 38 (Apr. 18, 2016) (denying motion to dismiss and holding that plaintiff had sufficiently alleged continuing violation to satisfy the statute of limitations).

Second, the inclusion of pre-limitations period information is proper and relevant, particularly in a continuing violations case. As numerous cases have held, it is well-established that statistical evidence that includes data from outside the statute of limitations is relevant to help prove discrimination. *See, e.g., Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135, 152 (2d Cir. 2012).

Third, the statements of confidential witnesses, even if limited to the pre-limitations time period, raise a plausible inference of discrimination during the limitations period when combined with the City's allegations concerning the specific limitations period loans and the statistics that bridge the gap between the witnesses' employment and the limitations period loans. The City need not prove discrimination at this stage. Rather, it need only plead facts sufficient to create a plausible inference of discrimination. *Iqbal*, 556 U.S. at 678; *Watts*, 495 F.3d at 1295-96. Plaintiff's allegations are more than sufficient to create a reasonable, plausible inference of discrimination.[3]

b. <u>The City Has Sufficiently Described the Loans.</u>

Although Defendants concede that the City has identified six loans which closed during the limitations period, including the race of the borrower, the type of loan, the precise date of closing, and the precise address for each loan, they still purport to need more information about each loan to understand the nature of the City's claim. *See* Br. at 10-11. Defendants are mistaken.

In its dismissal orders in the parallel cases, this Court held that the City must show how the limitations period loans were discriminatory. *City of Miami v.* 2016 WL 1072488, at *3.

[3] Defendants also make too much of paragraph 58 of the Complaint, in which Confidential Witness 4 stated that "after the real estate market crashed, the Bank stopped making no doc loans, ***and generally***, the Bank's mortgage lending ground to a halt." TAC ¶ 58 (emphasis added). Defendants argue that the allegation "contradict[s] the City's own legal theory" and requires dismissal with prejudice. Br. at 2-3. Defendants' argument robs the statement of context and misconstrues it. This statement appeared in a section of the Complaint discussing Defendants' inducement of foreclosures by failing to offer refinancing of the discriminatory high-cost loans Defendants had issued. Moreover, the "halt" in mortgage lending was not described as absolute but rather a "general[] … halt." TAC ¶ 58. To conclude that the allegation describes an absolute cessation of lending, as Defendants urge the Court to do, would require ignoring Plaintiff's specific and well-pleaded allegations of lending practices that continued well beyond the market crash and included specific loans during the limitations period, and making an inference in Defendants' favor.

The Eleventh Circuit, stating it intended to "provide guidance on remand" of "the application of the continuing violation doctrine to this case," 800 F.3d at 1284, held that a plaintiff must show an "occurrence of th[e discriminatory] practice" during the limitations period. *Id.* at 1285. Miami has met this Court's and the Eleventh Circuit's direction, alleging the issuance of higher cost loans to minorities as compared with similarly situated white borrowers. *Id.* at 1285.[4] These allegations are sufficient to put Defendants on notice of the City's FHA claim.[5]

c. The City Has Alleged a Cognizable FHA Injury.

Defendants do not argue that the City has not shown Article III injury during the two-year limitations period. Indeed, the City has alleged injury during the limitations period, including suppressed property values from the blight caused by the continuing violation, resulting in lost tax revenues and remediation costs. Those are injuries that are concrete and particularized. Instead, Defendants argue that the City must show a sequence of events, all stemming from limitations period activity, and leading to injury during the limitations period. Br. at 12-13. This argument conflicts with the Supreme Court's controlling *Havens* decision, and should be rejected. The City alleges that it is aggrieved by the continuing violation predicated on a discriminatory pattern and practice in issuing loans, which continued into the limitations period. That the City is "aggrieved" is not a function of whether a specific discriminatory act during the limitations period yielded an injury, but whether the continuing practice of discrimination demonstrates an injury.

[4] Defendants cite to *Cobb Cnty. v. Bank of Am. Corp*, No. 15-cv-4081 (N.D. Ga. May 2, 2016), and *Merritt v. Countrywide Fin. Corp.*, 2015 WL 5542992, at *17 (N.D. Cal. Sept 17, 2015), in support of their contention that more details are needed to allow the City's claim to proceed. Both are distinguishable. The plaintiffs in *Cobb County* allege claims, relating to (among other things) predatory loan servicing and foreclosures. Here, Miami's claim is narrowly focused on the issuance of more expensive loans to minority borrowers as compared to the less expensive loans issued to similarly situated white borrowers. *Merritt* was a *pro se* case in which the plaintiffs did not allege, as Miami does here as to the limitations loans, that they would have been qualified for the loans they were denied.

[5] Although it appears to have nothing to do with the statute of limitations, Defendants throw in an argument that certain types of loans discussed in the Complaint cannot "inherently" violate the FHA. Br. at 12. But Miami's complaint is not based on the characteristics of particular loans, or on whether it is insured by the Federal Housing Administration or guaranteed by the U.S. Department of Veterans Affairs, as Defendants suggest. *Id.* It is based on Defendants' practice of issuing minority borrowers loans that were more expensive and/or possessed higher risk features than the more favorable loans they were otherwise eligible to receive, and that were regularly issued to white borrowers. *See, e.g.,* TAC ¶ 1.

In *Havens*, three individual plaintiffs and one organization (Housing Opportunities Made Equal ("HOME")) brought suit over allegations that a landlord falsely represented the availability of housing to minority borrowers to "steer" them away from living in the landlord's property.[6] *See* 455 U.S. at 368-69. The plaintiffs alleged five different specific instances of allegedly discriminatory acts in violation of the FHA, but four of the instances were outside of the limitations period and the fifth instance was within the limitations period but only involved one of the minority plaintiffs. *Id.* at 380. The Court held that because the fifth instance was during the limitations period, none of the claims were barred. *Id.* The Court found that the organization plaintiff, HOME, had adequately alleged injury because it "claims injury not only from the [discrete alleged pre-limitations incidents], but also from a continuing policy and practice of unlawful racial steering that extends through the last alleged incident." *Id.* at 381. HOME claimed that it was "frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services" and "had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Id.* at 379. Importantly, HOME did not claim that, and the Court did not analyze whether, the fifth instance of discriminatory conduct injured HOME in this way. *See id.* Rather, the Court appropriately examined whether HOME had adequately alleged that it was injured by the continuing violation, concluded HOME had, and ended the inquiry. *Id.*

The *Havens* Court's reasoning is instructive. The Court analyzed the claimed injuries to determine whether the injuries stemmed from the challenged discriminatory practice, ***but not*** the specific instance of discrimination, *see id.*at 381, as should this Court. the City has detailed the economic and noneconomic injuries it sustained both before and during the limitations period from Defendants' continuing violation. *See* TAC ¶¶ 94-126. It also alleged discrete instances of discriminatory conduct during the limitations period which demonstrate that the continuing violation did not stop prior to the limitations period. *See* TAC ¶¶ 127-29. To allege a cognizable injury under the FHA, the City need do no more.[7]

[6] The three individual plaintiffs consist of two minority applicants and one white applicant. The minority applicants' claims involved discriminatory misrepresentations about the availability of housing.

[7] Similarly, the Eleventh Circuit held that the City must only plead that the "specific practices continued into the statutory period." *City of Miami*, 800 F.3d at 1283. Miami has done that.

In arguing that injury must be "imminent," Defendants rely on this Court's Dismissal Opinion, which in turn cited to the Eighth Circuit's decision in *Paraquad v. St. Louis Housing Authority*, 259 F.3d 956, 959 (8th Cir. 2001). The City respectfully submits that *Paraquad* is inapposite. *Paraquad* involved a discrete and speculative claim, not a continuing violation that involved prior injury. There, the plaintiffs challenged a plan that had not yet been implemented and still required approval by the Department of Housing and Urban Development. Thus, it was not ripe and persons (if any) who might be injured were unknown. *Paraquad*, 259 F.3d at 959. Here, the City has alleged past injuries continue into the present, alleging that over the course of a decade, Defendants engaged in a discriminatory practice of issuing loans on different terms to minority borrowers which caused injury in the form of suppressed property tax revenues, increased remediation and other costs, and impairment of the City's goals to assure that racial factors do not adversely affect the ability of any person to choose where to live in the City, among others. TAC ¶¶ 94-126. As the past discriminatory practices of the same kind resulted in injury to the City, it is expected that the same unlawful acts today will cause the same types of injuries to the City.[8]

IV. The City Sufficiently Alleges a Disparate Impact Claim.

A. *Inclusive Communities* Did Not Create a Heightened Pleading Requirement.

The Supreme Court issued a landmark civil rights ruling in *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015), which represents the continuation of the Court's unbroken pronouncements that it is a bedrock principle of law that the FHA is to be interpreted according to the broad remedial intent of Congress embodied in the Act. *Id. See also Havens*, 455 U.S. at 380; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 209 (1972) ("The language of the [FHA] is broad and inclusive."). The Eleventh Circuit recently noted that, given the FHA's remedial purpose, "the Supreme Court has repeatedly instructed us to give the Fair Housing Act a 'broad and inclusive' interpretation." *Hunt v. Aimco Properties,*

[8] Moreover, *Paraquad* was not an FHA case. Rather, it focused upon whether the District Court erred in granting summary judgment in favor of defendants on the basis that plaintiff's claim, seeking declaratory and injunctive relief, had not yet ripened. The prerequisites to obtaining declaratory and injunctive relief have no bearing upon the Article III standing analysis in this case, nor do they require a demonstration of standing during the discrete limitations period.

L.P., 814 F.3d 1213, 1223 (11th Cir. 2016). In holding that disparate impact claims can be brought under the FHA, the Supreme Court recognized that the Act's "central purpose" is "to eradicate discriminatory practices within a sector of the Nation's economy." *Inclusive Communities*, 135 S. Ct. at 2511.

In its prior ruling in this case, the Eleventh Circuit flagged *Inclusive Communities* for the parties and the Court to consider how it may impact resolution of this case. *See City of Miami*, 800 F.3d at 1287. The Eleventh Circuit did not set out a new or heightened pleading standard.

This Court subsequently dismissed the City's SAC, and set a new pleading standard for FHA disparate impact claims as follows:

> Inclusive Communities requires that an FHA disparate impact complaint (1) show statistically-imbalanced lending patterns which adversely impact a minority group; (2) identify a facially-neutral policy used by Defendants; (3) allege that such policy was "artificial, arbitrary, and unnecessary;" and (4) provide factual allegations that meet the "robust causality requirement" linking the challenged neutral policy to a specific adverse racial or ethnic disparity.

City of Miami v. Bank of America Corp., No. 13-24506, 2016 WL 1072488, at *4-5 (S.D. Fla. Mar. 17, 2014); *see* Order, Dkt. No 54 (incorporating dismissal orders). This Court found that while the SAC met the first of these pleading requirements, the SAC failed to meet the second, third and fourth requirements, and granted leave to amend. *Id.* As discussed below, the City's TAC more than meets these requirements as pleaded. In addition, however, the City also respectfully requests that this Court reconsider its prior ruling regarding the appropriate pleading standard for FHA disparate impact claims, and submits that *Inclusive Communities* did not create a heightened pleading requirement for its disparate impact claims.

Specifically, *Inclusive Communities* did not modify the Supreme Court's earlier ruling that it had "never indicated that the requirements for establishing a *prima facie* case under *McDonnell Douglas* [which established the burden-shifting framework for disparate-impact cases] also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). In fact, the unanimous *Swierkiewicz* decision criticized the Second Circuit for imposing a heightened requirement of pleading a prima facie case in discrimination actions, because it would "too narrowly constric[t] the role of the pleadings" and "conflict[] with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 512. The Court added:

> Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Id.

The Supreme Court affirmed *Swierkiewicz*'s plainly stated rejection of a heightened pleading requirement in 2007 in *Twombly*. *See* 550 U.S. at 569-70 ("*Swierkiewicz* did not change the law of pleading, but simply re-emphasized ... that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements."). The pleading standard in *Twombly* and *Swierkiewicz* was not overturned by *Inclusive Communities*.

Justice Kennedy's caution, in dicta, that courts should avoid "abusive disparate-impact claims," is simply not applicable in this case. This lawsuit does not concern a "one-time decision" which "may not be a policy at all." 135 S. Ct. at 2522-24. It does not concern a state actor or private developer attempting to further a "valid interest" in "revitalizing dilapidated housing." This lawsuit concerns the longstanding and continuing irresponsible lending practices of a bank that "induced a national foreclosure crisis," and which has been the target of investigations and lawsuits by the Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System, the U.S. Department of Justice, the U.S. Department of Housing and Urban Development, the Consumer Financial Protection Bureau and the state attorneys general. (TAC ¶¶ 16-18.) The Complaint properly alleges that the artificial barriers created by Defendants had a disparate impact on minority borrowers, resulting in a disproportionate number of foreclosures on minority-owned properties, and a disproportionate number of exploitative loans in minority neighborhoods. The widespread abuse that has been alleged is not the type of isolated or beneficial action that concerned Justice Kennedy in *Inclusive Communities*.

The only two pleading requirements for a FHA disparate impact claim even after *Inclusive Communities* are a showing of statistical disparities, and allegations that facially-neutral policies of the defendant explain these disparities. *Inclusive Communities*, 135 S. Ct. at 2523. For example, in *County of Cook v. HSBC*, 136 F. Supp. 3d 952 (N.D. Ill. 2015), an opinion reached after *Inclusive Communities*, the district court held that the complaint stated a claim for disparate impact under the FHA by alleging, among other things, that the pricing policies lender

designed increased the costs for loans made to minority borrowers within the county, thereby reducing their home equity, and caused a downward spiral of mortgage delinquencies and failures amongst minority borrowers. 136 F. Supp. 3d at 967. In so ruling, the district court held that "to state a disparate impact claim under the FHA requires allegations that Defendants' actions, despite being unintentional, had a "discriminatory effect" upon a protected class." *Id.* at 966.

The City respectfully requests that the Court not carve out FHA disparate impact claims and impose a stricter standard at the pleading stage than Rule 12(b)(6) or the Eleventh Circuit impose. Such a requirement would be contrary to *Twombly*'s holding that a complaint contain "only enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570.

B. <u>The City States A Claim For Disparate Impact Liability.</u>

The City has satisfied the requirements for a disparate impact pleading: statistical disparities and allegations that certain policies of the defendant explain the disparities. *Inclusive Communities*, 135 S. Ct. at 2523; *see also* TAC ¶¶ 9-15, 20, 31, 63-70, 127-129, 132. As described above, a plaintiff can establish a violation under FHA by showing a significant discriminatory effect or disparate impact on a protected group. *See Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *see also Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Bonasera v. City of Norcross*, 342 Fed. Appx. 581, 585 (11th Cir. 2009). According to the federal agency charged with responsibility for enforcing the FHA, a "practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons." 24 C.F.R. § 100.500(a).[9] *See also Cnty. of Cook v. HSBC*, 136 F. Supp. at 966 ("to state a disparate impact claim under the FHA requires allegations that Defendants' actions, despite being unintentional, had a "discriminatory effect" upon a protected class").

Even evaluated under this Court's four-part pleading standard, the City's TAC states a claim for disparate impact liability. *First*, as the Court previously found, the City has shown statistically-imbalanced lending patterns which adversely impact a minority group. *City of Miami*, 2016 WL 1072488, at *4. The TAC is no different. The TAC provides an extensive data

[9] The City's TAC further alleges that Defendants knew, or should have known of the adverse consequences of its lending misconduct to borrowers for a number of reasons, including the Defendants' sophisticated risk analysis policies and procedures articulated in its 2014 Annual Report, the existence of offices within the City, the use of detailed underwriting technology, analytic tools, data, and reports. TAC ¶ 12 n.8.

analysis that is more than sufficient to satisfy the requirements for pleading disparate impact discrimination. For example, a regression analysis that takes into account borrower race and numerous objective risk characteristics and controls for credit history establishes that African-American borrowers were 6.351 times more likely to receive a higher cost loan than a white borrower possessing similar characteristics, and a Latino borrower was 1.982 times more likely as a white borrower to receive such a loan. TAC ¶ 15. For borrowers with FICO scores exceeding 660, the Complaint alleges that an African-American borrower was 5.500 times more likely to receive a higher cost loan than a white borrower with similar underwriting and borrower characteristics, and a Latino borrower was 2.209 times more likely to receive such a loan than a white borrower with similar underwriting and borrower characteristics. *Id*.; *see also* TAC ¶¶ 54-66. A similar regression analysis found that borrowers in heavily minority census tract in Miami were 1.923 times more likely to receive a high-cost loan than a borrower with similar characteristics in a non-minority neighborhood. *Id.* ¶ 67. Data reported by the Bank and available through public databases shows that in 2004-2012, 25.6% of loans made by Defendants to African-American and Latino customers in Miami were high-cost, but only 9.30% of loans made to white customers were high-cost. *Id.* ¶ 68. This data is further supported corroborated by additional nationwide studies and reports. *Id.* ¶¶ 71-77. Miami has more than satisfied its burden.

Second, the City has met any substantive requirement that it identify facially neutral policies used by Defendants by alleging that Defendants created financial incentives for employees that resulted in the disparities complained-of; that they placed borrowers in more expensive, riskier loans than they qualified for; that they failed to properly underwrite loans; that they permitted mortgage brokers to charge "yield spread premiums" for qualifying a borrower for an interest rate that is higher than the rate the borrower qualifies for and can actually afford; that they required substantial prepayment penalties that prevent borrowers whose credit has improved from refinancing their discriminatory loan to a prime loan; that they charged excessive points and fees that are not associated with any increased benefits for the borrower; and that they failed to properly monitor numerous aspects of its mortgage business, among other policies. *See* TAC ¶¶ 31, 132.

Defendants' assertion that the City has failed to allege facially-neutral policies simply ignores the bulk of these allegations. *See* Br. at 16-17. the City alleges a detailed list of lending

practices occurring during the pertinent time period, including financial incentives to loan officers, that are "united because they represent manifestations of the same continuous and unbroken practice of steering minority borrowers into disadvantageous loans." TAC ¶¶ 31, 132. These practices are not limited to intentional misconduct, and courts in similar cases have recognized them as cognizable policies for purposes of alleging a disparate impact claim, rejecting similar arguments by defendant banks. *See Cnty. of Cook v. HSBC*, 136 F. Supp. 3d at 966-67 (holding, post-*Inclusive Communities*, discretionary mortgage lending policies sufficient to support claim of disparate-impact discrimination); *Cnty. of Cook v. Bank of Am. Corp.*, 2015 WL 1303313, at *7-8 (N.D. Ill. Mar. 19, 2015) (complaint alleging that Defendants' discretionary pricing policies, credit approval decisions, and appraisal practices resulted in minority borrowers receiving a disproportionate share of high cost home loans was sufficient to establish prima facie claim of disparate impact discrimination at the motion to dismiss stage). The Complaint here similarly alleges that the Defendants had policies or practices that had an adverse disparate impact on minority borrowers during the entire period in issue.

Third, the TAC alleges that the policies described above constituted "artificial, arbitrary, and unnecessary" barriers to fair housing opportunities for minority home purchasers and owners. *See* TAC ¶¶ 1, 3, 13, 86-87, 132. The essence of Miami's claim is that Defendants' business policies and practices of promoting loans that have higher costs and risk features were done for Defendants' financial gain, and the burdens of such actions fell disproportionately on minority communities in Miami. *See, e.g.*, TAC ¶¶ 20 ("The discriminatory lending practices at issue herein have resulted in what many leading commentators describe as the 'greatest loss of wealth for people of color in modern US history.'"); 82-84 (describing how Defendants' loans to minorities result in especially quick foreclosures in Miami). The entire gist of Miami's claims is that these practices were artificial, arbitrary, and unnecessary. To the extent Defendants intend to argue that their lending practices served a valid interest,[10] they may make such arguments at a

[10] Defendants' argument that FHA loans are "not – by definition – harmful to minority communities" misunderstands the City's allegations. Defendants cite *City of Los Angeles v. Wells Fargo Bank & Co.*, No. 2:13-cv-09007-ODW, 2015 WL 4398858, at *8, 10 (C.D. Cal. Jul. 17, 2015), currently on appeal to the Ninth Circuit, for finding FHA loans cannot be characterized as predatory. Mot. to Dismiss at 20. However, the district court in that case erred in failing to credit that the Los Angeles claim was not about the styling of the loan but the policy or practice of steering minority borrowers to loans that were more expensive than loans that they qualified for, both through intentionally discriminatory and facially neutral policies encouraging

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later stage of the case, as anticipated by the burden-shifting analysis established in discrimination cases and endorsed in *Inclusive Communities*. *See* 135 S. Ct. at 2522-23. These allegations are sufficient to state a plausible claim that Defendants' "policies" created an "artificial, arbitrary, and unnecessary" barrier. There is no requirement that the City anticipate any justifications that the Bank might adduce.

Fourth, the City has provided factual allegations linking the challenged neutral policies to a specific adverse racial or ethnic disparity. The TAC alleges that these practices resulted in the statistical disparities documented in the detailed regression analysis. *See*, *e.g.*, TAC ¶¶ 63-70. Moreover, the statistical regression analysis that underlies the allegations in the TAC, which was performed by Professor Ian Ayres of Yale's law and business schools, and who served as the expert economist on mortgage lending for the U.S. Department of Justice, controlled for plausible non-race characteristics, and found that minority borrowers were more likely to receive the higher cost loans than white borrowers. TAC ¶ 65. As the Eleventh Circuit held, the "alleged chain of causation is perfectly plausible: taking the City's allegations as true, the Bank's extensive pattern of discriminatory lending led to substantially more defaults on its predatory loans, leading to a higher rate of foreclosure on minority-owned property and thereby reducing the City's tax base." 800 F.3d at 1273. The Eleventh Circuit's determination that the City of Miami's substantially similar allegations "ha[ve] made an adequate showing" of proximate cause governs. *Id.* at 1282. *Inclusive Communities'* discussion of "rigor" is fully met by Professor Ayres's analysis and does not change the validity of the Eleventh Circuit's conclusion in light of the Supreme Court's latest decision. The City here has satisfied any causality requirement in its pleadings at this early stage.[11]

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such loans. The Eleventh Circuit, by contrast, expressly recognized that the City's complaint asserted that the bank steered black and Latino customers to "loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white customers, and created internal incentive structures that encouraged employees to provide these types of loans." *City of Miami*, 800 F.3d at 1266.

[11] Defendants' citation to *Ellis v. City of Minneapolis*, No. 14-cv-3045 SRN/JJK, 2015 WL 5009341 (D. Minn. Aug. 24, 2015) is distinguishable. In *Ellis*, currently on appeal to the Eighth Circuit, the district court dismissed the plaintiff building owners' complaint for failing to demonstrate a causal connection between the city's implementation of heightened enforcement policies and the loss of housing to minorities where the plaintiffs could not even allege that they lost a rental license or were unable to rent a unit, or that any protected-class tenant had been

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Defendants overreach by contending that the City must specifically isolate disparities in its regression analysis that are caused by facially neutral policies (rather than alleged intentionally discriminatory policies) at the pleading stage. Br. at 15. Defendants' argument again ignores the totality of the allegations and seeks to impose a requirement that the City disaggregate each alleged policy or practice in its Complaint and before any discovery.[12] Such a requirement is directly contradictory with the Supreme Court's holding that "recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Communities*, 135 S. Ct. at 2511-12. Requiring a plaintiff to disaggregate statistical disparities between allegedly intentionally discriminatory policies and allegedly facially-neutral policies would undermine the rationale behind *Inclusive Communities*, as well as the broader purposes of the FHA.

Defendants also assert that the statistics proffered must be limited to the limitations period. Br. at 18. This argument misapprehends the nature of a disparate impact claim and the continuing violations doctrine. Pursuant to *Havens* and *City of Miami*, all of the alleged loans issued between 2004 and 2012 are at issue in this case because the City has pleaded that the conduct continued into the limitations period. *See* § III(A)(1), *supra*. Further, all of these loans are appropriately included in the regression analysis to determine the plausibility of the City's disparate impact claim—not just those issued during the relatively short limitations period as Defendants contend. *City of Miami*, 800 F.3d at 1285; *Chin*, 685 F.3d at 152 (holding that statistical evidence outside the limitations period may be used to prove discrimination). Moreover, because *Havens* holds that a single instance of the discriminatory conduct in the limitations period is sufficient to bring in all the prior instances of that same discriminatory

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displaced. *See Ellis v. City of Minneapolis*, 2016 WL 1222227, at *7 (D. Minn. Mar. 26, 2016). Miami's complaint contains no similar deficiencies.

[12] Another reason why the statistical analysis need not disaggregate Miami's claim of intentional discrimination from the disparate impact discrimination is that the statistics provide circumstantial evidence of discriminatory intent, subject to rebuttal. *See Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012).

conduct, it makes no sense that the disparities must be proven within the limitations period. A single instance of such conduct will never yield a statistically significant disparity.[13]

To the extent that such an analysis is required, the City has satisfied this requirement in the TAC. Specifically, the City has alleged that Defendants have continued to issue loans to Miami subsequent to June 12, 2012 that were issued to minority borrowers and were more expensive than the loans issued to similarly situated white borrowers, and the TAC identifies some sample loans. TAC ¶ 128. The TAC further alleges that an examination of publicly available information on loans issued during this period strongly supports the conclusion that a greater number of more expensive and riskier loans were issued to minority borrowers than to non-minority borrowers during the two years preceding the filing of the complaint. *Id.* ¶ 129.

Moreover, nothing in *Inclusive Communities* requires the City to perform the full-blown disparate impact analysis at the pleading stage, without the benefit of discovery that would be required to prove, rather than plead, this claim. Because the City has pleaded a continuing violation, the continuance of the same lending practices that result in a discriminatory disparate impact melds the timely instances of that practice into the pre-limitations period instances of that practice to constitute a single claim, requiring but a single evaluation of the overall disparate impact. *Id.* Absent from the Eleventh Circuit's discussion of *Inclusive Communities* is any requirement that a plaintiff must plead and prove the existence of a disparate impact specifically within the two-year limitations period. *See City of Miami*, 800 F.3d at 1286-87. The Supreme Court could have, but did not, modify its prior decision in *Havens* to incorporate such a requirement. The City has sufficiently alleged its disparate impact claim.

[13] The approach mandated by *Havens* makes good sense, as pattern or practice claims, whether gauged in terms of disparate treatment or disparate impact, "are attacks on the systemic results of [discriminatory] practices." *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984). In disparate impact cases, violative actions are typically spread out over time, and across the protected group, as there must be more than "sporadic discriminatory acts." *Cherosky v. Henderson*, 330 F.3d 1243, 1247 (9th Cir. 2003) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)). A disparate impact claim cannot be limited to a snapshot in time when evidence establishes a longstanding and unbroken pattern and practice. If it could be so limited and still depend on statistical disparities, a violator need only space out its violations to avoid liability, and the continuing violation doctrine would have little value.

V. The City's Allegations Do Not Reflect Improper Group Pleading.

Defendants argue that the Complaint "indiscriminately groups the defendants together" and thus "fails to comply with the minimum standard of Rule 8." Br. at 14 (quoting *Joseph v. Bersten*, 612 F. App'x 551, 555 (11th Cir. 2015)). This argument fails. Although "[t]he use of group pleading may also result in a complaint failing to meet the more lenient pleading standard in Rule 8(a)," such a violation of Rule 8(a) occurs when the plaintiff's "group pleading" "fails to give each defendant fair notice of the claims against it." *In re Auto Body Shop Antitrust Litig.*, 2015 WL 4887882 (M.D. Fla. June 3, 2015) (quoting *Holmes v. Allstate Corp.*, 2012 WL 627238, at *22 (S.D.N.Y. Jan. 27, 2012)); *see also Sprint Solutions, Inc. v. Fils-Amie*, 44 F. Supp. 3d 1224, 1227 (S.D. Fla. 2014) (same). Thus, group pleading is not *per se* unacceptable, and indeed, "can and usually are to be read in such a way that each defendant is having the allegation made about him individually." *Williams v. Wells Fargo Bank, N.A.*, 2011 WL 4901346, at *12 (S.D. Fla. Oct. 14, 2011); *see also Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir.1997) (same).

Furthermore, "[c]ollective references to defendants most often create problems where broad allegations are directed at a large and diverse group of defendants, leaving unclear just who is alleged to have committed which acts." *Sprint Solutions, Inc. v. Fils-Amie*, 44 F. Supp. 3d 1224, 1227 (S.D. Fla. 2014) (citing *Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, 619 F. Supp. 2d 1260, 1271-74 (M.D. Fla. 2009). That is not the case here, where each Defendant is a member of the same corporate family of financial institutions who are alleged to have engaged in the same discriminatory practices, but in different loans.

Defendants further argue that the City "attempts to hold each Chase Defendant liable for the acts and loans of at least six predecessor companies … without alleging any particular facts about any such predecessor company." Br. at 14-15. This argument ignores that these predecessor companies, along with Defendants are alleged to have issued the loans that comprise the dataset from which the City's regression analysis was performed. *See, e.g.*, TAC ¶¶ 63-70. To the extent Defendants assert that they are not liable for the loans issued by these predecessor companies, that is an issue of fact for discovery. But the plain fact is that Miami offers detailed allegations about the loans issued pursuant to a common discriminatory practice that form the basis for Plaintiff's continuing violation case. Indeed, the Complaint does not allege that each Defendant engaged in some part or act forming the basis of a single, discrete violation of the

FHA. Rather, the Complaint alleges the issuance of thousands of loans on a discriminatory basis, with each Defendant being responsible for issuing some subset of these loans. *See, e.g.*, TAC ¶¶ 22-27 (describing the Defendants and the lending activities for which they are responsible). The Complaint alleges that, collectively, these loans are both (1) interrelated evidence of the continuing violation of the FHA, and (2) the basis for liability for each Defendant. The allegations as to these thousands of loans are identical and need not distinguish between the Defendants because each Defendant is on notice of the claims against it. *See Equal Employment Opportunity Comm'n v. Gargiulo, Inc.*, 2006 WL 752825, at *2 (M.D. Fla. Mar. 22, 2006) (indicating that if "plaintiff's contention [is] that the identical events apply to all five individuals" that it does not constitute impermissible "group pleading.").

VI. Conclusion

For the foregoing reasons, Defendants' motion should be denied.

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Respectfully submitted,

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