UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:14-CV-22205-WPD

CITY OF MIAMI, a Florida Municipal Corporation,

Plaintiff,

v.

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

Defendants.

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT

I. INTRODUCTION

The City's opposition asks this Court to disregard the City's own allegations and controlling Supreme Court and Eleventh Circuit law. It also asks this Court to abandon its well-reasoned opinion dismissing the City's previous, nearly identical complaint against the Chase Defendants (the "Dismissal Order"). It is abundantly clear that the City cannot plead a timely FHA claim against any Chase Defendant because it cannot cure the defects identified in the Dismissal Order. The City's third Complaint should be dismissed with prejudice for three independent reasons.

First, the City's FHA claim is time-barred. The City does not dispute that, as alleged, its own confidential witnesses *expressly disclaim any discriminatory lending after the crash of the real estate market in 2009*, when, according to the Complaint, all "mortgage lending" by unidentified Chase Defendants "ground to a halt." (Compl. ¶ 58, ECF No. 57.) This alone mandates dismissal.

In addition, disregarding this Court's Dismissal Order, the City fails to identify a *single* fact—as opposed to conclusory statements— showing how any Chase Defendant committed an FHA violation *during the limitations period* (*i.e.*, after December 10, 2011). The City again relies on a single Paragraph that lists property addresses corresponding to six loans to minority borrowers that originated within the limitations period (Compl. ¶ 128), but the City fails to identify *any* facts showing that such loans were racially discriminatory, such as the terms or circumstances of the loan, the credit of the borrower, the status of the loan, or what terms other similarly-situated non-minority borrowers received. Worse, the City concedes that it has not alleged an actual or imminent injury from any of these loans (or any others within the limitations period)—a necessary requirement to plead a timely FHA violation. Thus, the City's FHA claim is time-barred.

Second, ignoring the Court's Dismissal Order, the City continues to acknowledge that its Complaint lumps together eight separate corporate entities, including a parent holding company and six predecessor companies, under the fictional name "JPMorgan"—without pleading *any* facts

about the conduct of any specific Chase Defendant. Although the City continues to argue that Rule 8 permits this pervasive group pleading tactic, this Court already rejected this approach as inconsistent with controlling Eleventh Circuit law.

Lastly, the City's opposition shows that it cannot cure the defects in its disparate impact claim. The City still has not identified a specific facially neutral lending practice by any Chase Defendant during the limitations period. It also concedes that it has pled no statistics about any racial disparity during the limitations period and is unable to show that any specific facially neutral practice caused any adverse impact on minorities in Miami during the limitations period. Unable to meet the standards set forth in *Inclusive Communities* and this Court's Dismissal Order, the City instead can only ask this Court to reconsider its prior ruling. The Court should reject the City's improper disregard of controlling law. It should dismiss the disparate impact claim with prejudice.

II. LEGAL ARGUMENT

A. The City's FHA Claim Is Barred By The Statute Of Limitations.

The City contends that the "continuing violation" theory saves its untimely claim. (Pl.'s Br. In Opp. MTD ("Pl.'s Br."), ECF No. 64, at 4-7.) But to invoke this doctrine, the City must allege facts to "plead a cognizable claim of an FHA violation within [the] limitations period." *City of Miami v. Bank of Am. Corp.*, 2016 WL 1072488, at *3 (S.D. Fla. Mar. 17, 2016) ("*BOA Op.*") (citing *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1285 (11th Cir. 2015)). The City's opposition makes clear that it has failed to do so for three *independent* reasons.

1. The City's Confidential Witnesses Show That There Was No Discriminatory Lending During The Limitations Period.

The primary factual basis for the City's FHA claim rests upon confidential witnesses, yet the City does not dispute that they all stopped working for some unidentified Chase Defendant by 2010 (at the latest) and that they allege no facts about any practices after 2010. (Compl. ¶¶ 33-36; Defs.'

MTD ("Defs.' Br."), ECF No. 58, at 7-15.) In addition, the witnesses allege that the Chase Defendants' practices with respect to issuing loans drastically changed in 2009, two years prior to the start of the limitations period, when lending "went from one extreme to the other" and "generally, the Bank's mortgage lending ground to a halt." (*Id.*¶¶ 57-58.) Thus, there was no practice of issuing discriminatory loans during the limitations period.

The City argues that the Court should simply ignore the statements of its own witnesses because the Chase Defendants have somehow taken them out of "context." (Pl.'s Br. 7 & n. 3.) But these allegations form the factual cornerstone of the City's FHA claim, and they make clear that the very alleged practice at the heart of the City's Complaint—the alleged racial steering of minorities into predatory loans (Pl.'s Br. 15)—stopped in 2009. Notably, the City fails to identify a *single* fact about a *single* practice by a *single* Chase Defendant *during the limitations period*. This dooms the City's claim. Based upon the City's own allegations, the FHA claim is time-barred.

2. The City Has Not Identified A Single Discriminatory Loan During The Limitations Period.

The City argues that Paragraph 128 saves its untimely FHA claim because it identifies six addresses that purportedly correspond to "six loans that violate the FHA and are discriminatory . . ." (Pl.'s Br. 3 (quoting Compl. ¶ 128)). But simply labeling a loan "discriminatory" does not make it so. *Ashcroft v. Iqbal*, 556 0 U.S. 662, 678 (2009). While the City argues that it has now identified the race of the borrower and whether the loan is a governmental or conventional loan (Pl.'s Br. 3), these facts are woefully insufficient to plead a FHA claim. It is not plausible that any such loan was "discriminatory" (much less part of a discriminatory pattern and practice) merely because it was issued to a minority borrower. Indeed, the City's theory asks this Court to assume that all loans issued to minority borrowers are discriminatory. This, of course, defies common sense.

Tellingly, the City still alleges no details about the characteristics of any of the six loans during the limitations period, such as its terms, the borrower's qualifications, or what about the loan or its circumstances make it *racially discriminatory*. The City does not even allege which Chase entity originated the loan. Although the City argues that these loans were "more expensive than loans issued to similarly situated white borrowers during the limitation period" (Pl.'s Br. 3 (quoting Compl. ¶ 128)), there is not a single fact pled to support this wholly conclusory allegation—which must be disregarded under *Iqbal*. Indeed, the City fails to allege a single fact identifying a more favorable loan to a non-minority borrower during the limitations period, the terms of that loan, the credit history of that borrower, or why the City believes that borrower is similarly-situated. *Henderson v. JP Morgan Chase Bank, N.A.*, 436 F. App'x 935, 937 (11th Cir. 2011) (affirming dismissal of discrimination claim because plaintiff failed to allege "facts showing that similarly-situated loan applicants outside of her class were offered more favorable loan terms").

Remarkably, the City contends that it need not plead these critical details, contending that its complaint "is not based upon the characteristics of particular loans." (Pl.'s Br. 7-8 & n. 6.) But this Court already rejected this very argument, requiring the City to plead facts showing how "the loan was supposedly discriminatory." *BOA Op.*, 2016 WL 1072488, at *3. Moreover, the Eleventh Circuit has made clear that a municipality, just like an individual bringing an FHA claim, must plead "specific information" to show such a timely FHA violation, including "the type of loan, the characteristics that made it predatory or discriminatory, when the loan closed, when the property went into foreclosure, etc." *City of Miami*, 800 F.3d at 1283-84. Because the City concedes it cannot plead these fundamental facts, its claim fails.

Unable to meet *Iqbal*'s pleading requirements, the City by necessity relies on its alleged regression analysis (of loans between 2004 and 2012) to try to satisfy its burden of pleading an FHA violation during the limitations period. (Pl.'s Br. 5-6.) But this is the very regression analysis that

the Court previously found insufficient to state a timely FHA violation. *BOA Op.*, 2016 WL 1072488, at *5 n.3 ("lumping together eight years of data (2004–2012)" to allege violation during the limitations period "does not make out a plausible claim"). This regression analysis offers *no facts* about any particular loan, and it does not isolate or identify any loans during the limitations period. In fact, the City concedes it cannot perform a meaningful statistical analysis during the limitations period. (Compl. ¶ 129; *see also* Pl.'s Br. 17-18.)

Lastly, the City argues that it has satisfied its burden because it alleges that a review of "publicly available information on loans issued during the limitations period strongly supports the conclusion that a greater number of more expensive and/or risker loans were issued to minority borrowers than to non-minority borrowers." (Pl.'s Br. 3 (quoting Compl. ¶ 129).) This wholly conclusory allegation, of course, cannot satisfy the City's burden. The City fails to allege what information it reviewed, what loans are at issue, or any facts to support its "conclusion." The City does not even allege that the borrowers who received the supposedly "riskier" loans were similarly situated to the non-minority borrowers. Thus, the City's claim fails.

3. The City Concedes That It Has Not Sustained Any FHA Injury During The Limitations Period.

This Court has held that to invoke the "continuing violation" doctrine, the City *also* must plead facts showing it was injured as a result of the purportedly discriminatory loans during the limitations period or that any such injury is "imminent." *BOA Op.*, 2016 WL 1072488, at *4. The City concedes that it cannot do so. (Pl.'s Br. 10 (City merely "*expect[s]* that the same unlawful acts today will result in the same types of injuries to the City").) The mere possibility of future injury, however, fails to plead an FHA violation.[1] The City identifies no facts to show that a single borrower has defaulted on any loan originated during the limitations period; that any such loan has

[1] Nor is it sufficient to generate Article III standing to sue for an FHA violation. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (threatened future injury must "be *certainly impending* to constitute an injury in fact").

entered the foreclosure process; or that the City has suffered or will imminently suffer a loss of tax revenue or increased costs as a result of any such loan. This is fatal to the City's FHA claim.

Conceding that it cannot plead an injury from a loan during the limitations period, the City argues that it need not do so. Instead, the City argues that it need only identify some lingering harm during the limitations period based upon *conduct prior to that period*. (Pl.'s Br. 8-9.) But the Court already has properly rejected this argument, mandating that the injury must result from conduct *within* the limitations period. *BOA Op.*, 2016 WL 1072488, at *4; *see Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 659-60 (11th Cir. 1993) ("continuing effects" from conduct outside limitations period does not trigger continuing violation); *City of Los Angeles v. Bank of Am. Corp.*, 2015 WL 4880511, at *5 (C.D. Cal. May 11, 2015) (applying rule to reject similar FHA claim).

The Court's ruling is entirely consistent with the Eleventh Circuit's command that the City must plead "*FHA violations* within the limitations period." *City of Miami*, 800 F.3d at 1285 (emphasis added). Under the FHA, there is no violation unless the City is "aggrieved" by the alleged discrimination, 42 U.S.C. § 3613(a)(1)(A), which requires an actual or imminent injury. *Id.* § 3602(i) (defining "aggrieved" party). Notably, the Eleventh Circuit also held that the City must plead facts about "when the property" associated with the allegedly discriminatory loan (within the limitations period) "went into foreclosure"—a necessary element of its injury theory. *City of Miami*, 800 F.3d at 1283-84. Because the City admittedly cannot show any such facts, its claim fails. *See BOA Op.*, 2016 WL 1072488, at *4.

In addition, the City fails to identify a single case supporting its position that its FHA claim can be based upon conduct dating back to 2004, without ever identifying a loan within the limitations period that injured the City. The City chiefly relies upon *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), but the individual plaintiffs there, unlike the City, alleged a concrete incident of discrimination (*i.e.*, being told that housing was not available, while white renters were

told that housing was available) and an accompanying FHA injury (*i.e.*, receiving untruthful information and loss of an integrated community) during the limitations period. *Id.* at 368, 374, 381. Likewise, the organization plaintiff alleged an "injury to its counseling and referral services" as a result of alleged discrimination during the limitations period. *Id.* at 381. The City, however, does no such thing. The City is not injured merely because a discriminatory loan is issued. Thus, the City must plead that it suffered an injury resulting from an allegedly discriminatory loan within the limitations period to show a continuing FHA "violation." It admittedly cannot do so.

Put simply, the City's opposition brief confirms that the City has not pled—and cannot plead—facts showing that *any* "discriminatory" act took place after December 2011, or that *any* "discriminatory" loan closed after December 2011, or that the City suffered *any* injury from an act during the limitations period. Thus, the City's lone FHA claim should be dismissed with prejudice.

B. The Complaint Resorts To Pervasive Improper Group Pleading and Fails to Allege Wrongdoing Against Each Chase Defendant.

The City does not dispute that: (1) it lumps together two separate and distinct entities as a fictional composite entity; (2) it seeks to hold each Chase Defendant liable for the lending conduct of six predecessor companies over a 12-year period; and (3) it fails to allege particular facts about the conduct of any specific Chase Defendant. (Pl.'s Br. 19-20.) Under controlling Eleventh Circuit law and this Court's Dismissal Order, this pervasive group pleading "fails to comply with the minimum standard of Rule 8." *Joseph*, 612 F. App'x at 555; *City of Miami v. JPMorgan Chase Bank, N.A.*, 2016 WL 1621632, at *3 (S.D. Fla. March 18, 2016 ("*Chase Op.*").

Ignoring *Joseph* and this Court's Dismissal Order, the City contends that Rule 8(a) expressly permits the massive group pleading so long as each defendant has notice of the claims against it. (Pl's. Br. 11-12.) It does no such thing. While Rule 8(a) requires a "short and plain statement of the claim showing that the pleader is entitled to relief," it demands facts sufficient to state a

plausible claim against each defendant. *Iqbal*, 556 U.S. at 663. The City, therefore, must allege *facts* to plausibly support *each* FHA claim against *each* Chase Defendant, including what, if anything, each defendant did wrong. By merging two separate Chase Defendants and six predecessor companies together, the City has not done so. *Joseph*, 612 F. App'x at 555.[2]

The City further argues that it is entitled to engage in rampant group pleading because "defendants are all within the same corporate family and are alleged to have engaged in the same discriminatory practices, but in different loans." (Pl.'s Br. 19.) But the Court has already rejected this argument. *Chase Op.*, 2016 WL 1621632, at *3. The City has made serious allegations against separate and distinct companies about different types of alleged FHA violations over a 12-year period, yet pleads no facts specific to any of these entities. The City's FHA claim fails yet again.

C. The City Cannot Satisfy The Supreme Court's Heightened Pleading Standard For A Disparate Impact Claim.

As the Chase Defendants have demonstrated, the City's disparate impact claim fails under *Inclusive Communities* because the City does not allege facts showing: (a) a facially neutral policy; (b) a statistical disparity between minority and non-minority borrowers; (c) a causal nexus between the facially neutral policy and the cited disparity; or (d) the policy presented an artificial, arbitrary, and unnecessary barrier to fair housing. (Defs.' Br. 16-20); *see BOA Op.*, 2016 WL 1072488, at *4.

The City spends much of its brief arguing that this Court should "reconsider" its articulation of the elements for FHA disparate impact claims. (Pl's. Br. 10-13.) But, again, this is contrary to "law of the case" principles, which make clear that a legal ruling "should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*,

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[2] The City again relies upon *Williams v. Wells Fargo Bank*, N.A., No. 11-23233, 2011 WL 4901346 (S.D. Fla. Oct. 14, 2011), but Judge Altonaga there acknowledged that a complaint is typically found "insufficient where it grouped its allegations *against all named defendants*." *Id.* at *12 (emphasis added). *Williams* therefore supports dismissal of the City's FHA claim, as do the other decisions cited by the City. *See, e.g., In re Auto Body Antitrust Litig.*, No. 6:14-CV-6006, 2015 WL 4887882 (M.D. Fla. June 3, 2015) (recommending dismissal of complaints for improper group pleading); *Sprint Sols., Inc. v. Fils-Amie*, 44 F. Supp. 3d 1224, 1227 (S.D. Fla. 2014) (group pleading improper "when broad allegations are directed a large and diverse group of defendants").

486 U.S. 800, 815-16 (1988). Moreover, the Court was correct. *Inclusive Communities* imposes rigorous "safeguards" and "limitations" to "prompt[ly]" weed out implausible claims at the pleadings stage. 135 S.Ct. at 1523-24. The City's FHA claim cannot survive this scrutiny.[3]

Facially Neutral Policy. The City contends that it has sufficiently pled a facially neutral policy by providing a "detailed list of lending practices." (Pl.'s Br. 14-15.) But merely listing practices is not sufficient. The City still fails to *identify* which of these alleged practices are supposedly facially neutral, concedes that many are not, and still admits that they are all part of a larger supposed policy of racial "steering" (*id.* at 15), which, as this Court found, is "intentional conduct." *BOA Op.*, 2016 WL 1072488, at *4; *see also Cobb County v. Bank of Am. Corp.*, ECF No. 58-2, slip op. at *31 (N.D. Ga. May 2, 2016) (dismissing similar FHA disparate impact claim because counties based claim upon intentional conduct, not facially neutral policies).) The City also ignores the Chase Defendants' arguments that many of its practices are simply not actionable because, for instance, they are based upon a lack of policy. (Defs.' Br. 17.)

Even more fundamentally, the City's opposition still fails to identify a *single* fact about a *single* policy of a *single* Chase Defendant during the limitations period. The City simply cannot do so because its own witnesses allege that, in 2009, lending "went from one extreme to the other" and "ground to a halt." (Compl. ¶¶ 57-58.) This alone requires dismissal of the City's claim.

Statistical Imbalance. The City argues that it has pled a disparate impact on minority borrowers because its vague "regression analysis" purportedly shows that minority borrowers were more likely to receive a "predatory loan" between 2004 and 2012. (Pl.'s Br. 16.) Yet, the City pleads no facts about any such loans, and concedes that it has not alleged and cannot show any disparate impact *during the limitations period*. (*Id.* at 18 (arguing that "it makes no sense" that

[3] The City again argues that such standards would be inconsistent with *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). (Pl.'s Br. 11-12.) But that case pre-dated *Inclusive Communities* and *Iqbal*, and addressed an intentional employment discrimination claim, not the pleading standard for a disparate impact claim under the FHA. *Id.* at 514 Thus, *Swierkiewicz* involved a different claim, brought under a different legal theory, with a different fact pattern.

disparities must be shown within limitations period).) This concession is fatal, because, as this Court held, "[l]umping together eight years of data (2004-2012) to allege a disparity does not make out a plausible claim that a disparity tied to Defendants' policies resulted in a single year (2012) within that data set." *BOA Op.*, 2016 WL 1072488, at *5 & n.3.

Robust Causation. The City concedes that it has not offered any statistical analysis or data showing how *each* alleged facially neutral practice caused a purported disparity in loan terms and foreclosures rates within the City, much less did so during the limitations period. (Pl.'s Br. 17.) Although the City argues that it does not need to plead facts linking a racial disparity to each alleged facially neutral policy as opposed to other factors (*id.*), this is precisely what *Inclusive Communities* requires. 135 S.Ct. at 2523 (requiring facts showing that specific policy "cause[ed] that disparity"). The City, therefore, has not satisfied the FHA's "robust" causality requirement.

Artificial, Arbitrary, And Unnecessary Policy. The City's opposition fails to identify facts showing that any practice presented an "artificial, arbitrary, and unnecessary barrier[ ]" to fair housing for minorities. The City argues that the Chase Defendants "knowingly" placed minority borrowers into loans they could not afford for their own financial gain (Pl.'s Br. 15), but the City alleges no facts about a single loan, this alleged policy, or how it continued into the limitations period (particularly when the City's own witnesses say the opposite). Nor does the City explain why high-risk loans pose an "artificial" or "arbitrary" barrier to fair housing, particularly when they are often essential tools for borrowers who have less-than-perfect credit to purchase a home, while ensuring that the lender is compensated for taking a greater risk. (Defs.' Br. 20.) Because the City merely parrots the language of this element, its claim must be dismissed.

III. CONCLUSION

After three attempts to plead a FHA claim during the limitations period, it is crystal clear that the City cannot do so. Thus, this Court should dismiss the City's FHA claim with prejudice.

Dated: June 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2016, a true and correct copy of Defendants' Reply Memorandum In Support Of Their Motion To Dismiss Plaintiff's Third Amended Complaint was filed electronically and served on all counsel of record via the Court's ECF system.

/s/ Robert M. Brochin
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