APPENDIX

APPENDIX A

956 F.3d 1319

United States Court of Appeals, Eleventh Circuit.

CITY OF MIAMI GARDENS, a Florida municipal corporation, Plaintiff - Appellant,
v. WELLS FARGO & CO., Wells Fargo Bank N.A., Defendants - Appellees.
No. 18-13152-AA
|
04/27/2020

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Appeals from the United States District Court for the Southern District of Florida
BEFORE WILSON, Acting Chief Judge, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, and LUCK, Circuit Judges.*

BY THE COURT:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service having voted against it (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc is DENIED.

Opinion

WILLIAM PRYOR, Circuit Judge, joined by NEWSOM and BRANCH, Circuit Judges, respecting the denial of rehearing en banc:

A majority of the Court has voted not to rehear en banc our decision in *City of Miami Gardens v. Wells Fargo & Co.*, 931 F.3d 1274 (11th Cir. 2019), which held that the City of Miami Gardens lacked standing to bring its lawsuit under the Fair Housing Act against Wells Fargo. *Id.* at 1277–78. As members of the panel, we write to explain why our decision adheres to both Supreme Court and our precedent and to respond to Judge Wilson's dissenting opinion.

It is well established that the City, as the party invoking federal jurisdiction, bore the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). And that burden increased with the successive stages of litigation: although mere allegations sufficed at the pleading stage, actual evidence was required to withstand summary judgment. *Id.*

In addition, federal courts *always* have "an independent obligation to assure that standing exists." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). To be sure, the Supreme Court has explained that, in limited circumstances, "elementary principles of procedural fairness" mandate that a court provide the party with "an opportunity to provide evidence of [its standing]" instead of *sua sponte* dismissing the action for lack of jurisdiction. *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 271, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015). And our Court has held that the absence of notice of the need to prove standing may sometimes mandate the application of a more lenient standard for assessing standing. *Church v. City of Huntsville*, 30 F.3d 1332, 1336 (11th Cir. 1994).

Our decision adhered to these principles. The City failed to satisfy its burden of establishing standing. And we respected the concerns of fairness and notice demanded by precedent.

The City faced an uphill battle to establish its standing because it relied on an attenuated theory of injury. Its principal theory was that Wells Fargo steered minority borrowers into higher-cost loans that were more likely to go into foreclosure. These foreclosures then allegedly decreased the value of the vacant properties and neighboring properties, which allegedly caused economic injury to the City because property tax revenues decreased and its spending "to remedy blight and unsafe and dangerous conditions" increased. *Miami Gardens*, 931 F.3d at 1278–79. To establish its standing, the City needed to prove that at least one of the purportedly discriminatory loans caused or would cause it to suffer a *de facto* injury that a favorable decision could redress. *Id.* at 1283.

In addition to standing, the City faced another hurdle: the statute of limitations. The City's complaint largely focused on purportedly discriminatory lending practices outside the applicable two-year limitations period. *See* 42 U.S.C. § 3613(a)(1)(A). But the City contended that all of Wells Fargo's alleged violations were actionable under the continuing-violation doctrine, which makes violations outside the limitations period actionable if the defendant engaged in "an unlawful practice that continue[d] into the limitations period ... [and] the last asserted occurrence of that practice" was within the limitations period. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (footnote omitted). If the City could not establish a violation of the Act during the limitations period, its complaint would be untimely.

Wells Fargo moved to limit initial discovery to the threshold question whether the City's complaint was timely. The City objected to that motion on the grounds that it would prevent it from "prov[ing] its continuing violations and disparate impact allegations." The district court limited initial discovery to loans issued during the limitations period and later granted Wells Fargo's motion for summary judgment on the ground that the City had failed to establish that Wells Fargo violated the Act within the limitations period.

The focus on the limitations period in the district court does not mean that the parties ignored standing. To the contrary, Wells Fargo raised Article III standing "during the meet and confer process," in its answer to the operative complaint, and in its motion for summary judgment. In the motion for summary judgment, Wells Fargo recited the City's attenuated theory of standing and argued that, because the litigation was at the summary judgment stage, the City needed to "actually produce some evidence that [it], and not just the borrower, ha[d] Article III standing to sustain a claim under the Fair Housing Act." Wells Fargo contended that the City lacked standing because it failed to establish that it suffered an injury from a loan issued during the limitations period. That argument was mistaken because a discriminatory loan issued at any point could have established the City's Article III standing. Nevertheless, Wells Fargo repeatedly contended that the injury and causation elements of standing were lacking.

The district court also considered the City's standing. It dismissed the City's initial complaint with a warning that any amended complaint would need to "allege ... the facts that confer standing to complain about private home foreclosures, the specific injury to the [City], the precise number and dates of foreclosures, and the specific costs to the City of Miami Gardens." It even explained what the City would need to allege to satisfy each element of standing: "(1) how Miami Gardens is injured, (2) how that injury is traceable to the conduct of each Wells Fargo defendant, and (3) how the injury can be redressed with a favorable decision in this case."

The City modeled its complaint after allegations in similar litigation that we held met the requirements of Article III standing. *See City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1272–73 (11th Cir. 2015), *vacated and remanded on other grounds*, ––– U.S. –––, 137 S. Ct. 1296, 197 L.Ed.2d 678 (2017). But, as the Supreme Court has made clear, mere *allegations* are insufficient as the litigation progresses. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. To this end, the district court had told the City to read *City of Miami*, 800 F.3d at 1273, which expressly warned Miami that it would need to prove its allegations as the litigation progressed—a task that we predicted might be "difficult." *Id.*

On appeal, Wells Fargo again argued in its brief that the City had failed to establish that it suffered an injury as a result of any loan issued during the limitations period. We then asked the parties to address standing at oral argument, and they did so.

The City pointed to two kinds of evidence to establish its standing. First, it pointed to an allegedly discriminatory loan, HC2, that "has been delinquent since it was issued," unlike a purportedly comparable loan issued to a nonminority borrower. *Miami Gardens*, 931 F.3d at 1283. The City contended that the delinquent loan "will likely go into foreclosure and cause the City to suffer the kind of economic injuries asserted in the operative complaint." *Id.* Second, it pointed to ten loans issued before the limitations period that have gone into foreclosure and argued that those loans have led to the economic injuries identified in the complaint. *Id.*

This evidence failed to satisfy either the injury or causation requirements of standing. *See id.* at 1283–84. As to loan HC2, we were left only to speculate whether its delinquency will lead to foreclosure, and if so, whether that foreclosure will impact property values, property-tax revenues, or municipal spending. And even if we were to assume those links in the causal chain were satisfied, nothing in the record supported an inference that it would be Wells Fargo's conduct that contributed to those injuries. Nor did the ten loans issued before the limitations period that have gone into foreclosure establish standing because the City failed to present evidence of the effect of the foreclosures on property-tax revenues or municipal spending. And nothing suggested that Wells Fargo issued these loans on discriminatory terms or that Wells Fargo's conduct contributed to the decline in property values. In short, the City failed to satisfy its burden at the summary-judgment stage of introducing evidence to establish its standing. Because the City failed to satisfy its burden, we were obliged to vacate the summary judgment against the City and remand for the district court to dismiss the action for lack of subject-matter jurisdiction.

Judge Wilson argues that our decision conflicts with our precedent in *Huntsville* and with the precedent of the Supreme Court in *Alabama Legislative Black Caucus*. He argues that *Huntsville* stands for the proposition that "it is unfair to expect plaintiffs to conjure proof of standing if they were never put on notice that they would need to, and if they had limited opportunity to discover or present such evidence." Dissenting Op. at 1325 n.1. He also stresses that in *Alabama Legislative Black Caucus*, as here, the defendant made a meritless challenge to the plaintiff's standing, and he suggests that the presence of a meritless challenge to standing means that a plaintiff lacks adequate notice of its need to prove standing. *See id.* at 1326–27. But those decisions do not control here.

The contrast between this appeal and *Huntsville* is stark. In *Huntsville*, we applied only the pleading standard to determine whether the plaintiffs had standing to seek a preliminary injunction. 30 F.3d at 1336. We applied this more lenient standard because the defendant had not made any standing argument and "the plaintiffs had only a few hours of hearing time to present their preliminary injunction case and were thereby forced to limit their evidence to what they reasonably understood to be the contested issues." *Id.* Unlike the limited time the plaintiffs had in *Huntsville* to prepare their case, the City had more than two years between Wells Fargo's filing of its motion for summary judgment and the district court's order granting it. The City could have sought additional discovery to establish its standing in response to Wells Fargo's motion, which raised standing, but it failed to do so. *See* Fed. R. Civ. P.

56(d). It was not unfair to require the City to meet the summary-judgment standard for standing in this circumstance.

Alabama Legislative Black Caucus too is inapposite. In *Alabama Legislative Black Caucus*, the Supreme Court held that fairness concerns required giving the plaintiff an opportunity to present evidence of its standing instead of *sua sponte* dismissing for lack of subject-matter jurisdiction. 575 U.S. at 270–71, 135 S.Ct. 1257. Fairness concerns arose because the plaintiff had introduced evidence that led to at least a "common sense inference" that it had standing, neither the defendant nor the district court challenged the basis of that inference, and the plaintiff was easily able to proffer evidence that would have established its standing. *Id. Alabama Legislative Black Caucus* concluded that it was unfair to dismiss absent special notice to the plaintiff because the plaintiff reasonably believed that it had established its standing and the defendant had not argued to the contrary. *Id.* But contrary to Judge Wilson's suggestion, the lack of a meritorious challenge to a plaintiff's standing does not by itself make it unfair to dismiss *sua sponte* for lack of standing. Because the plaintiff in *Alabama Legislative Black Caucus* had introduced some evidence to establish at least an inference of standing, and the defendant had not challenged the plaintiff's evidence of standing, the Supreme Court reasoned that the plaintiff might have thought that the defendant did not contest the factual basis for its standing. *Id.* at 270, 135 S.Ct. 1257. So in the absence of special notice that the plaintiff had not established its standing before dismissing the action, the Supreme Court required the district court to give the plaintiff another opportunity to prove its standing. *Id.* at 270–71, 135 S.Ct. 1257.

That special notice of the need to establish standing was not required here. The City not only failed to establish its standing, it failed to so much as create an *inference* that it had standing. And it received repeated notice of its need to prove its standing throughout the litigation from both the district court and Wells Fargo. That Wells Fargo's argument lacked merit does not mean that it failed to provide the City with notice that it needed to establish its standing at the summary-judgment stage. After all, Wells Fargo repeatedly grappled with the City's theory of standing—even if in a different time-frame—and the elements of standing that we held were lacking: injury and causation. The City faced those repeated challenges and knew from *City of Miami* that it would need to produce evidence of its standing. But unlike the plaintiff in *Alabama Legislative Black Caucus*, it failed to introduce evidence to create even an inference that it had suffered an injury fairly traceable to Wells Fargo's challenged conduct. In the face of Wells Fargo's repeated challenges, the City could not reasonably believe that it did not need to respond with evidence of its standing.

Judge Wilson also argues that the limitation on discovery by the district court makes this dismissal unfair. *See* Dissenting Op. at 1326–27. To be sure, a district court should not grant summary judgment "until the party opposing the motion has had an adequate opportunity for discovery," but we have made clear that "the party opposing the motion for summary judgment bears the burden of calling to the district court's attention any outstanding discovery." *Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870–71 (11th Cir. 1988). If the opposing party fails to satisfy that burden, it cannot argue that the district court granted summary judgment prematurely by failing to order or await the results of further discovery. *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1063–64 (11th Cir. 2015); *Reflectone, Inc. v. Farrand Optical Co.*, 862 F.2d 841, 843–44 (11th Cir. 1989). In the same way, it is not unfair if a plaintiff fails to alert the district court to its need for further discovery to prove its standing at summary judgment and a circuit court decides in the first instance that the plaintiff failed to establish standing. In either circumstance, the plaintiff has effectively consented to adjudication of the issues raised in the summary-judgment motion based on the existing record by failing to avail itself of the opportunity to seek further discovery.

The City failed to satisfy its "burden of calling to the district court's attention any outstanding discovery" on the standing issue. *Snook*, 859 F.2d at 871. The City filed a declaration under Federal Rule of Civil Procedure 56(d)—the preferred vehicle for advising the district court of the need for additional discovery—but did not mention standing and later retracted the declaration and opposed Wells Fargo's motion for summary judgment on the merits. The City filed that Rule 56(d) declaration with a motion to strike or, in the alternative, stay or deny Wells Fargo's refiled motion for summary judgment to allow for additional discovery. And, to reiterate, Wells Fargo refiled its initial motion for summary judgment from over a year earlier that had raised the issue of Article III standing. Yet neither the City's declaration nor its motion stated that it needed additional discovery to satisfy its burden of establishing standing.

The City again failed to mention its need for additional discovery to establish its standing when the district court held a hearing to determine whether to consider Wells Fargo's refiled motion for summary judgment or to expand discovery. The district court specifically asked the City what additional evidence it would find useful before it ruled on Wells Fargo's motion. The City said that additional evidence would be "helpful to put some of the disputed issues and noise in perspective," but it never said that it needed any evidence to establish its standing.

The City cannot now contend that it is unfair to hold it to the record before the district court. It was the City's obligation to comply with Rule 56(d) by "specifically demonstrat[ing] how postponement of a ruling on the motion" would enable it, "by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Reflectone*, 862 F.2d at 843 (internal quotation marks omitted). Although we have acknowledged a limited "interests of justice" exception that allows district courts to postpone ruling on a motion for summary judgment in the absence of a party's compliance with the technical requirements of Rule 56(d), that limited exception still requires the opponent to provide notice in a manner equivalent to Rule 56(d). *Snook*, 859 F.2d at 871; *see also Reflectone*, 862 F.2d at 844. The City failed to satisfy that burden and so consented to the adjudication of the issues raised in Wells Fargo's motion based on the existing record.

And even when we gave the City the opportunity on appeal to explain how further discovery would have enabled it to establish its standing, the City came up short. It stated at oral argument that the additional evidence it would have sought was access to Wells Fargo's worldwide database of loans. *See* Oral Argument at 26:57–27:45 (June 14, 2019). Presumably, the City would have used that data to run the statistical analysis that it referred to in its complaint, but the City's averment left us only to speculate about how that analysis would turn out. That speculative contention is yet another reason why the fairness concerns in *Alabama Legislative Black Caucus* are not present. *See Ala. Legislative Black Caucus*, 575 U.S. at 271, 135 S.Ct. 1257 (explaining that because of the evidence the plaintiff proffered to the Supreme Court, it had "no reason to believe that the [plaintiff] would have been unable to provide [evidence to establish its standing]").

Judge Wilson contends that the panel "treat[ed] the City like the teacher who takes away a student's pencils before a test, refuses to give them back, and then gives the student a failing grade when she turns in a blank page." Dissenting Op. at 1327. But a more accurate analogy would be that the City opted to take an exam—one that it had every reason to know would be challenging and would require the use of pencils—yet it showed up with no writing instruments at all and failed to let the proctor know about its predicament. The City was obliged to come to this litigation prepared to prove its standing or to let the district court know that it did not have the discovery it needed to do so. The City cannot now complain that it was unfair to hold it responsible for its failing.

WILSON, Circuit Judge, joined by MARTIN, Circuit Judge, dissenting from the denial of rehearing en banc:

A panel of this court dismissed the City of Miami Gardens's Fair Housing Act (FHA) case for lack of Article III standing, sua sponte. It did so even though the City received neither proper notice that it failed to prove standing nor a legitimate opportunity to discover or produce the requisite evidence. But, in *Alabama Legislative Black Caucus v. Alabama*, the Supreme Court held that, when a plaintiff receives neither proper notice that it failed to prove standing nor an opportunity to produce the requisite evidence, sua sponte dismissal on Article III standing grounds violates "elementary principles of procedural fairness." 575 U.S. 254, 268–71, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015). The panel's decision clearly conflicts with *Alabama Legislative Black Caucus*.[1] When a panel decision conflicts with Supreme Court precedent, en banc consideration is "necessary to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A); *see* Fed. R. App. P. 35(a)(1). Therefore, I dissent from the denial of rehearing en banc.

In *Alabama Legislative Black Caucus*, a racial gerrymandering case, a three-judge district court panel held that an organizational plaintiff lacked standing, citing insufficient evidence to demonstrate members' residency in the relevant districts. 575 U.S. at 268–69, 135 S.Ct. 1257. The Supreme Court vacated and remanded. *Id.* at 258, 271, 135 S.Ct. 1257. It held that "in these circumstances, elementary principles of procedural fairness required that the [court], rather than acting *sua sponte*, give the [plaintiff] an opportunity to provide evidence" supporting its standing. *Id.* at 271, 135 S.Ct. 1257.

The "circumstances" in *Alabama Legislative Black Caucus* were these. Before trial, the defendant had attacked the organizational plaintiff's Article III standing. *See id.* at 270, 135 S.Ct. 1257 (citing defendant's memorandum in support of motion for summary judgment). The case went to trial. *Id.* at 260, 135 S.Ct. 1257. There the plaintiff had the quintessential opportunity to put on evidence of standing and did so—at least enough for an "inference" of standing. *See id.* at 269–70, 135 S.Ct. 1257. And, "had it been asked," the plaintiff could have provided more evidence of standing, such as its own member residency list; it did not need discovery to access or produce such evidence. *See id.* at 270–71, 135 S.Ct. 1257.

If "elementary principles of procedural fairness required that the [court], rather than acting *sua sponte*, give the [plaintiff] an opportunity to provide evidence" supporting its standing there, *see id.* at 271, 135 S.Ct. 1257, they do even more so here. To start, in *Alabama Legislative Black Caucus*, the Supreme Court recognized that the defendant's Article III standing attack was off-base and thus failed to put the plaintiff on notice that it needed to shore up its standing. *See id.* at 270, 135 S.Ct. 1257 (noting that the state had attacked the organizational plaintiff's standing based on the idea that an organization "lives" nowhere, not based on "inadequate member residency"). As in that case, the defendant here—Wells Fargo—had attacked the City's Article III standing.[2] But, as the panel here recognized, Wells Fargo's argument was off-base too because it focused on the "*statutory* requirement of timeliness"—i.e., the statute of limitations—rather than "the *constitutional* requirements of standing." *See City of Miami Gardens*, 931 F.3d at 1283. So, as in *Alabama Legislative Black Caucus*, Wells Fargo's meritless argument failed to put the City on notice that it needed to demonstrate that it met the *constitutional* requirements of standing.[3]

What is more, unlike in *Alabama Legislative Black Caucus*, the City of Miami Gardens had *no* opportunity to prove its standing, much less the opportunity of a trial. Not only that—despite its repeated requests, the City never even got the necessary *discovery* to prove its standing, something the *Alabama Legislative Black Caucus* plaintiff didn't need.

Here, unlike in *Alabama Legislative Black Caucus*, the defendant Wells Fargo controlled the evidence that the City needed to prove its Article III standing. For example, one of the City's alleged injuries was reduced property tax revenues. To prove that Wells Fargo caused reduced property tax revenues, the City first needed to identify more FHA-violative loans by Wells Fargo dating years before the statute-of-limitations period. For that, the City needed information from Wells Fargo's database, as it alleged in its complaint. And it could only access this information in this database via discovery. Yet from the outset, and over the City's objections, the district court limited discovery to the statute-of-limitations period and stayed "discovery on all matters unrelated to Wells Fargo loans originated [during the statute-of-limitations period] until resolution of the parties' partial summary judgment motions."

Because of this dependency on and deprivation of discovery, unlike in *Alabama Legislative Black Caucus*, the City could not have snapped its fingers and produced evidence to prove standing. It thus asked *repeatedly* for full discovery, i.e., discovery related to Wells Fargo loans originated before the statute-of-limitations period—discovery necessary to prove its injuries were fairly traceable to Wells Fargo's conduct. But the City never got that discovery. Not after it objected to the initial discovery limitation and stay. Not after it argued time and again for full discovery. Not after its motions to compel full discovery. Not ever. Under *Alabama Legislative Black Caucus*, "elementary principles of procedural fairness required that the [panel], rather than acting *sua sponte*, give the [City]" that which it never got—full discovery. *See* 575 U.S. at 271, 135 S.Ct. 1257.

The panel tried to frame appellate briefing and oral argument as legitimate opportunities for the City to produce evidence of its standing. But briefing and oral argument are no substitutes for discovery. An "opportunity" to show evidence of standing is worthless if the plaintiff never had the opportunity to discover such evidence. Thus, it is no surprise to me—nor should it have been to the panel—that the City showed up empty handed at briefing and oral argument.

In the end, the panel afforded the City nothing more than the illusion of procedural fairness. It treats the City like the teacher who takes away a student's pencils before a test, refuses to give them back, and then gives the student a failing grade when she turns in a blank page. That is simply not fair.

Footnotes

* Chief Judge Ed Carnes and Judge Barbara Lagoa recused themselves and did not participate in this proceeding.

1 The panel's decision is also inconsistent with our precedent in *Church v. City of Huntsville*, in which we held that it is unfair to require standing evidence beyond the allegations in the complaint when the defendant did not "put[ ] the plaintiff[s] on notice that standing is contested" and the plaintiffs had a limited opportunity to present evidence. 30 F.3d 1332, 1336 (11th Cir. 1994). Although *Church* addressed standing in the context of a hearing on a preliminary injunction, *id.*, the point remains the same—it is unfair to expect plaintiffs to conjure proof of standing if they were never put on notice that they would need to, and if they had limited opportunity to discover or present such evidence.

2 The panel distinguishes *Alabama Legislative Black Caucus* by saying that it did "not purport to speak to circumstances like those of this appeal, in which the opposing party raised the

issue of standing." *City of Miami Gardens v. Wells Fargo & Co.*, 931 F.3d 1274, 1286 (11th Cir. 2019) (per curiam). The panel is demonstrably wrong; in fact, *Alabama Legislative Black Caucus* spoke to nearly identical circumstances. *See Ala. Legislative Black Caucus*, 575 U.S. at 270, 135 S.Ct. 1257.

3 Note that there were other circumstances that gave the City every reason to believe that the district court had no concerns whatsoever about the City's standing at partial summary judgment, which was limited to the statute-of-limitations issue. Suffice it to say, the district court diligently evaluated and monitored its jurisdiction and the City's standing for *years*. The district court stayed this case pending the results of appeals to this court in two other cases: *City of Miami v. Bank of Am. Corp.*, No. 13-24506, 2014 WL 3362348 (S.D. Fla.) and *City of Miami v. Wells Fargo & Co.*, No. 13-24508, 2014 WL 3362348 (S.D. Fla.), both of which involved standing issues for FHA claims virtually identical to those here. After this court held in both cases that the city plaintiff had adequately alleged facts to show Article III standing, *see City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1272–73 (11th Cir. 2015); *City of Miami v. Wells Fargo & Co.*, 801 F.3d 1258, 1265–66 (11th Cir. 2015), the district court in this case lifted the stay. When the Supreme Court granted certiorari in those cases, the district court stayed this case again. Ultimately the Supreme Court vacated and remanded the cases without addressing or suggesting any issue with Article

III standing. *Bank of Am. Corp. v. City of Miami*, 581 U.S. ——, 137 S. Ct. 1296, 1306, 197 L.Ed.2d 678 (2017). Thus, following the appeals, everyone thought the City of Miami Gardens had Article III standing. The district court lifted its stay and allowed this case to proceed.

APPENDIX B

931 F.3d 1274

United States Court of Appeals, Eleventh Circuit.

CITY OF MIAMI GARDENS, a Florida Municipal Corporation, Plaintiff-Appellant,
v.
WELLS FARGO & CO., Wells Fargo Bank N.A., Defendants-appellees.

No. 18-13152
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(July 30, 2019)

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Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:14-cv-22203-FAM

Before WILLIAM PRYOR, NEWSOM, and BRANCH, Circuit Judges.

Opinion

PER CURIAM:

This appeal requires us to decide whether the summary-judgment standard applies in determining whether a plaintiff has standing when the district court has limited discovery and the merits issues to be considered on summary judgment, and, if so, whether the plaintiff in this appeal introduced sufficient evidence of standing under that standard. The City of Miami Gardens filed a complaint against Wells Fargo & Co. and Wells Fargo Bank, N.A., alleging that they violated the Fair Housing Act, 42 U.S.C. §§ 3601–19, by steering black and Hispanic borrowers into higher-cost loans than similarly situated white borrowers. The district court bifurcated discovery, with the initial phase focused on whether the City could identify a violation that occurred within the two-year limitation period provided by the Act, *id.* § 3613(a)(1)(A). After initial discovery, the district court entered summary judgment in favor of Wells Fargo on the merits. The City challenges this ruling, but Wells Fargo argues that the district court should have dismissed the suit because the City failed to establish standing. Before oral argument, we asked the parties to address whether the City established standing under the standard ordinarily applicable at summary judgment and, if not, whether the limitations on the subject matter of discovery and summary judgment imposed by the district court mandate the application of a more lenient standard. We conclude that the ordinary standard applies and that the City has not established standing. We vacate and remand with instructions to dismiss for lack of subject-matter jurisdiction.

I. BACKGROUND

The City filed its initial complaint on June 13, 2014, alleging that between 2004 and 2008, Wells Fargo originated mortgage loans in "numerous geographic markets around the country" that violated the Fair Housing Act. The City did not allege that it had received such loans from Wells Fargo. Instead, the City asserted that Wells Fargo engaged in both redlining—the practice of denying credit to particular neighborhoods based on race—and reverse redlining—the practice of "flooding a minority community with exploitative loan products"— by "refusing to extend mortgage credit to minority borrowers ... on equal terms as to nonminority borrowers" and "extending mortgage credit on predatory terms to minority borrowers in minority neighborhoods in Miami Gardens."

The district court dismissed the initial complaint without prejudice and instructed the City that any amended complaint would have to state "the exact violations of the Fair Housing Act" and "what specific predatory practices occurred in Miami Gardens and how minorities were allegedly targeted there." The district court also determined that an amended complaint would need to "allege ... the facts that confer standing to complain about private home foreclosures, the specific injury to the governmental entity, the precise number and dates of foreclosures, and the specific costs to the City of Miami Gardens." To that end, the district court directed the City to detail "(1) how Miami Gardens is injured, (2) how that injury is traceable to the conduct of each Wells Fargo defendant, and (3) how the injury can be redressed with a favorable decision in this case." The City twice amended its complaint.

The amended complaint alleged that "African-Americans and Hispanics and residents of predominantly African-American and Hispanic neighborhoods in Miami Gardens ... receive[d] mortgage loans from Wells Fargo that have materially less favorable terms than mortgage loans given by Wells Fargo to similarly situated whites and residents of predominantly white neighborhoods in Miami Gardens." The complaint outlined a list of kinds of "predatory loans" that Wells Fargo allegedly "steered minorities into when they otherwise qualified for less expensive and less risky loans," including high-cost loans (i.e., loans with an interest rate at least three percent above the Treasury rate prior to 2010 and one-and-a-half percent above the prime mortgage rate thereafter), subprime loans, interest-only loans, balloon-payment loans, loans with prepayment penalties, negative-amortization loans, no-documentation loans, higher-cost government loans, such as Federal Housing Administration and Veterans Affairs loans, home-equity line-of-credit loans, and adjustable-rate mortgage loans with "teaser rates" (loans in which the lifetime maximum rate is greater than the initial rate plus six percent).

The amended complaint also addressed standing by alleging that loans issued to minority borrowers in Miami Gardens were more likely to go into default or foreclosure as a result of Wells Fargo's alleged practice of steering those borrowers into higher-cost loans. These effects on the housing market in Miami Gardens allegedly caused the City to suffer "economic injury based upon reduced property tax revenues resulting from (a) the decreased value of the vacant properties themselves, and (b) the decreased value of properties surrounding the vacant properties." Apart from the asserted impact on property-tax revenues, the foreclosures and defaults allegedly increased the "cost[s] of municipal services ... to remedy blight and unsafe and dangerous conditions which exist at properties that were foreclosed as a result of Wells Fargo's illegal lending practices." The amended complaint also alleged that the City sustained non-economic injuries because Wells Fargo's lending "impaired 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 or ... detract from the ... benefits of living in an integrated society" and "adversely affected the City's longstanding and active interest in promoting fair housing and securing the benefits of a stable racially non-discriminatory community."

The statute of limitations for claims under the Act requires a plaintiff to file suit "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). Wells Fargo filed its first complaint on June 13, 2014, so for the complaint to be timely, an act of housing discrimination must have occurred on or after June 13, 2012. Although much of the amended complaint concerned subprime lending practices that ended before June 13, 2012, it also alleged that Wells Fargo "continued to issue predatory mortgage loans to minorities in Miami Gardens subsequent to June 13, 2012." The alleged violations that occurred outside of the limitation period were actionable in principle under the continuing-violation doctrine of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). Under that doctrine, if a plaintiff "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" if the "last asserted occurrence of that practice" occurred within the limitation period. *Id.* at 380–81, 102 S.Ct. 1114.

Because the City could invoke the continuing-violation doctrine only if it could identify a loan violative of the Act that occurred within the limitation period, Wells Fargo moved to divide discovery into phases, with the initial phase focused on the threshold question whether the City could satisfy the statute of limitations. On January 19, 2016, the district court entered a scheduling order accepting Wells Fargo's proposed bifurcation. The order instructed the parties "to complete initial discovery related to loans originated between June 13, 2012, and June 12, 2014," by February 19, 2016, and imposed a deadline of February 29 to file "summary judgment motions on the statute of limitations issue."

On January 20, the City served requests for production of documents, requests for admission, and interrogatories. Five days later, Wells Fargo produced electronic data concerning 153 loans originated in Miami Gardens during the limitation period that included information about the characteristics of the borrowers and the details of the loans. Wells Fargo also produced "formal written policies" that the City requested. The City deposed three Wells Fargo officials, and Wells Fargo conducted two depositions, including a deposition of the City through its corporate representative. Fed. R. Civ. P. 30(b)(6).

On January 29, the City filed one discovery motion, but it did not challenge the restriction of the subject matter of discovery or Wells Fargo's responses or document production. Instead, the motion requested "a 30 day extension of time to conduct discovery," so that the deadline for the completion of initial discovery would fall on March 21, and the deadline to file motions for summary judgment would fall on March 31. The City also filed an unopposed motion for a "14 day extension of time" for summary-judgment briefing.

At a hearing on the City's motions held on February

25, the magistrate judge asked the parties whether there was "other discovery that needs to be done for [Wells Fargo] to file [a] motion for summary judgment or for [the City] to file [its] response." The City requested data concerning loans originated outside Miami Gardens in Miami-Dade County. The magistrate judge granted the City's request for an extension of the period for briefing but denied the City's other requests. It concluded that "discovery was in large part completed within the time frame set by [the district court] and the discovery the plaintiff is now seeking should have been raised with opposing counsel and the Court earlier."

On March 14, Wells Fargo moved for summary judgment. After the City filed its opposition, the district court placed the case "in civil suspense" because the Supreme Court granted certiorari to review a decision of this Court in an appeal that arose from a similar suit brought against Bank of America and Wells Fargo by the City of Miami. *See City of Miami v. Bank of Am. Corp.* (*City of Miami I*), 800 F.3d 1262 (11th Cir. 2015), *cert. granted*, —— U.S. ——, 136 S. Ct. 2545, 195 L.Ed.2d 867 (2016), *vacated and remanded sub nom. Bank of Am. Corp. v. City of Miami* (*City of Miami II*), —— U.S. ——, 137 S. Ct. 1296, 197 L.Ed.2d 678 (2017). The district court granted leave to Wells Fargo to refile its motion for summary judgment after the Supreme Court's decision. Wells Fargo refiled on May 31, 2017.

On June 13—more than a year after the parties completed briefing on the initial motion for summary judgment and the hearing on the City's initial request for expanded discovery—the City moved to "defer

Wells Fargo's [motion] due to the need to conduct additional discovery under Federal Rule of Civil Procedure 56(d)." One month later, the district court held a hearing on the City's motion to defer consideration of the motion for summary judgment. At the hearing, the City explained that it requested deferral because Wells Fargo had raised "new business necessity defenses" that were beyond the limited scope of the statute-of-limitations issue. But when the district court reiterated that the only merits issue to be considered on summary judgment was whether the City could satisfy the statute of limitations, the City stated that the only "discovery" it "would need" would be permission to introduce a supplemental expert report by Ian Ayres, a professor at the Yale Law School and the Yale School of Management. The district court granted that request and the report was admitted into evidence.

Wells Fargo's motion for summary judgment raised three principal arguments. First, it argued that the City was bound by the testimony of its representative who testified under Rule 30(b)(6), and because that testimony "conceded ... that the City could not identify any 'predatory' or 'discriminatory' loans in the Limitations Period," the City could not introduce new evidence of discriminatory lending to supplement the representative's profession of ignorance. Second, the motion contended that the City had not presented sufficient evidence to support a reasonable inference that the 153 loans originated by Wells Fargo in Miami Gardens during the limitation period were unlawful under either a disparate-treatment or a disparate-impact theory of discrimination. And third, the motion argued that the City had not introduced sufficient evidence to establish standing because the undisputed evidence "reflect[ed] that none of the 153 loans Wells Fargo originated in Miami Gardens during the Limitations Period foreclosed."

With respect to standing, the City argued that because it was proceeding under a continuing-violation theory of liability, it had no duty to identify an injury causally attributable to a loan originated during the limitation period. The City also argued that "the loans issued during the statutory period [were] likely to injure the City in the same manner as the loans" that were identified in the City's complaint "as part of the continuing violation from the pre-limitations period." In support of this conjecture, the City pointed out that Ayres had "identified a loan" originated in the limitation period "that ha[d] already been delinquent since it was issued, whereas the lower cost loan issued to the similarly situated white borrower ha[d] not encountered similar problems."

The City's response on the merits relied principally on Ayres's reports, which identified two government-insured home-purchase loans, referenced by the parties as loans HC2 and HC6, that were allegedly more expensive after controlling for various factors than loan NHW8, which was issued to an allegedly similarly situated white borrower. Ayres opined that the cost differential between the loans was "consistent with the hypothesis" of race-based discrimination, but he acknowledged that Wells Fargo "also issued some loans to minority borrowers that were priced lower than loans made to non-Hispanic white borrowers with similar characteristics."

Ayres's conclusions were partly at odds with those of Wells Fargo's expert, Bernard Siskin, who argued in a rebuttal report that there were key differences between loans HC2 and HC6 on the one hand and loan NHW8 on the other. Loan NHW8 was originated during a two-week period in which Wells Fargo offered a promotional pricing discount on all loans. And the minorities who received loans HC2 and HC6 opted to receive a higher interest rate in exchange for more lender credits, which operate as rebates to offset closing costs. The borrowers of loans HC2 and HC6 received $8,000 and $1,877 in lender credits, respectively, whereas the borrower of loan NHW8 received only $479.

The district court granted summary judgment to Wells Fargo on the merits. It declined to address the issue of standing and ruled that the City had failed to establish a genuine issue of material fact as to whether Wells Fargo engaged in disparate-impact or disparate-treatment discrimination within the limitation period. The district court accepted Wells Fargo's argument that the City was "bound by the testimony of its Rule 30(b)(6) representative." Because that representative "conceded during his deposition that the City could not identify any 'predatory' or 'discriminatory' loans in the limitations period" and "was unaware of any information providing a basis for the City's allegation that borrowers were or may have been eligible for 'more favorable and less expensive loans,' " the district court concluded that the City was not permitted to supplement that testimony with additional evidence of discrimination under Rule 30(b)(6).

The district court ruled, in the alternative, that even if Rule 30(b)(6) did not bar the introduction of other evidence of discrimination, the City's evidence was insufficient to support a prima facie case that disparate-impact or disparate-treatment discrimination occurred within the limitation period. The district court concluded that the City's disparate-impact claim failed because the City identified only two loans issued to minorities that were purportedly more expensive than loans issued to similarly situated white borrowers, which was not enough "to show the policies produced statistically-imbalanced lending patterns." The district court also concluded that the City failed to present any evidence of a causal connection between Wells Fargo's lending policies and the cost disparity. As for the City's disparate-treatment claim, the district court concluded that because "[t]he minority borrowers opted to receive a higher rate of interest in exchange for lender credits ... to defray closing costs" while their nonminority comparator received *de minimis* lender credits and a promotional discount, the minority borrowers of the higher cost loans identified by the City were not similarly situated to their alleged comparator.

II. STANDARD OF REVIEW

We review questions of subject-matter jurisdiction *de novo*. *United States v. Pavlenko*, 921 F.3d 1286, 1289 (11th Cir. 2019).

III. DISCUSSION

Wells Fargo argues that the district court should have dismissed the City's suit for lack of standing because "the undisputed evidence confirmed that none of the 153 loans originated by Wells Fargo [within the limitation period] foreclosed," so the City could not have suffered an injury as a result of any of these loans. We agree that the City has not satisfied the injury or causation elements of standing, but not for the reason provided by Wells Fargo.

Article III limits the subject-matter jurisdiction of the federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. "To have a case or controversy, a litigant must establish that he has standing, which must exist 'throughout all stages of litigation.' " *United States v. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013)). "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (alteration adopted) (citation and internal quotation marks omitted).

Article III standing has three elements. First, "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations and internal quotation marks omitted). Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (alterations adopted) (citation and internal quotation marks omitted). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561, 112 S.Ct. 2130 (internal quotation marks omitted).

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of litigation." *Id.* Although "[a]t the pleading stage, ... factual allegations of injury resulting from the defendant's conduct may suffice," "[i]n response to a summary judgment motion, ... the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' ... which for purposes of the summary judgment motion will be taken as true." *Id.* (quoting Fed. R. Civ. P. 56(e)). At the summary-judgment stage, the burden to establish standing is satisfied only if " 'affidavits or other submissions indicate that a genuine issue of material fact exists concerning standing.'" *Bischoff v. Osceola County*, 222 F.3d 874, 881 (11th Cir. 2000) (quoting *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st Cir. 1983)).

Wells Fargo's argument about the City's standing rests on a flawed premise. Wells Fargo assumes that the City has standing only if it suffered an injury that was caused by a loan originated during the limitation period, but this assumption conflates the *constitutional* requirements of standing with the *statutory* requirement of timeliness. Article III requires, among other things, that the plaintiff establish an injury in fact and causation, *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, but an injury need not occur as a result of conduct that occurred within the timeframe provided by the statute of limitations applicable to the plaintiff's cause of action to satisfy those requirements. The City has standing so long as one of the loans challenged as discriminatory has caused or will cause the City to suffer a *de facto* injury redressable by favorable decision. Whether a complaint about that loan or loans would be timely is a separate issue.

In its initial briefing on appeal, the City did not point to *any* evidence that it sustained an injury traceable to the conduct of Wells Fargo, but in response to our request that parties address standing at oral argument, the City relied on two pieces of evidence drawn from the summary-judgment record. First, the City asserted that one of the allegedly discriminatory loans identified in Ayres's reports, HC2, has been delinquent since it was issued, but that the loan issued to that borrower's purported nonminority comparator, NHW8, has not. The City speculated that loan HC2 will likely go into foreclosure and cause the City to suffer the kind of economic injuries asserted in the operative complaint. Second, the City pointed to ten loans identified in the complaint and an attached exhibit that were originated before the limitation period. According to the complaint, the value of the properties associated with these loans has declined since they entered foreclosure between 2008 and 2012.

This evidence is insufficient to establish standing. The City's evidence of a risk that loan HC2 will go into foreclosure at some point in the future does not satisfy the requirement that a threatened injury be "imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (citation and internal quotation marks omitted). As the Supreme Court has explained, a "threatened injury must be *certainly impending* to constitute injury in fact," and "[a]llegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (citations and internal quotation marks omitted). The delinquency of a single loan does not establish a certainly impending risk that the City will lose property-tax revenues or be forced to increase municipal spending to remediate blight. Whether the delinquency on this loan will result in foreclosure, and whether that foreclosure will have any impact on property values, property-tax revenues, or municipal spending, are questions left entirely open by the evidence in the summary-judgment record.

The evidence that loan HC2 may go into foreclosure also fails to satisfy the requirement of causation. The complaint concedes that "isolat[ing] the lost property value attributable to Wells Fargo foreclosures" would have required the use of a "statistical regression technique that focuses on effects on neighboring properties" "known as Hedonic regression," which involves the "study[ ] [of] thousands of housing transactions." The City never conducted any analysis of this kind and probably could not do so in the light of the paucity of allegedly discriminatory loans identified by the City. So even if we were to assume that loan HC2 will enter into foreclosure and that the value of the property associated with that loan will decline as a result, we would not be able to determine the extent to which any decline in the value of the property would be "fairly traceable to the challenged action[s] of the defendant." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (alterations adopted) (citations and internal quotation marks omitted).

The complaint's reference to ten loans that have gone into foreclosure also does the City no good. The exhibit attached to the complaint attests that the values of the properties associated with these loans have declined since they entered foreclosure, but the City did not produce any evidence of the effect of these foreclosures on property-tax revenues or municipal spending. Nor did the City present any evidence that these loans were issued on discriminatory terms or otherwise attempt to isolate the contribution of Wells Fargo's actions, if any, to the decline in property value sustained by these properties, presumably because that would require the kind of hedonic-regression analysis that the City avers would require an analysis of thousands of housing transactions. So these loans are inadequate to establish that the City suffered an "actual or imminent" injury that was "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," *id.* (alterations adopted) (citations and internal quotation marks omitted), under the standard applicable at summary judgment.

The City contends that because the district court specified that it would entertain "summary judgment motions on the statute of limitations issue" in its January 19, 2016, scheduling order, it would be unfair to hold the City to its burden to establish a genuine dispute of material fact as to standing. But the legal effect of the scheduling order was not to bar the parties from raising jurisdictional issues on summary judgment. The order limited the merits issues to be considered and stayed discovery on unrelated matters. The order adopted a "[d]eadline to file partial summary judgment motions on the statute of limitations issue," and stayed "discovery on all matters unrelated to Wells Fargo loans originated between June 13, 2012, and June 12, 2014 ... until resolution of the parties' partial summary judgment motions on the statute of limitations issue." The order was silent on whether consideration of the City's standing would be deferred until a later date. Although the order's reference to "partial summary judgments on the statute of limitations issue" might be taken to suggest that the statute of limitations was the *only* issue to be considered on summary judgment, that interpretation would unreasonably impute to the district court a disregard of its basic obligation to "first satisfy itself of [its] own jurisdiction" before proceeding to resolve any merits issue. *Amodeo*, 916 F.3d at 971; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (rejecting the doctrine of "hypothetical jurisdiction," under which a court may "resolve contested questions of law when its jurisdiction is in doubt").

Its later actions confirm that the district court did not intend to defer consideration of threshold issues other than the statute-of-limitations defense. The district court stayed proceedings on June 30, 2016—after Wells Fargo had filed a motion for summary judgment raising the issue of standing under Article III—until the Supreme Court resolved the issue of the "standing of cities" to sue mortgage originators "for alleged ... discriminatory lending practices" in *City of Miami II*. True, the question addressed in *City of Miami II* was whether comparable allegations of discriminatory lending satisfied the requirement of "prudential standing," 137 S. Ct. at 1303, not standing under Article III. But the decision to stay proceedings pending the resolution of that issue would have made little sense if the district court intended to impose a strict limit on the consideration of any and all issues other than the statute of limitations at summary judgment.

Even on the supposition that the initial intended effect of the scheduling order was to defer consideration of standing, the parties had made standing a contested issue by the time the district court reviewed Wells Fargo's motion for summary judgment. Wells Fargo's initial motion for summary judgment prominently challenged the City's standing under Article III. The motion advised the City that "at the summary judgment stage, the City must actually produce some evidence that the *City*, and not just the borrower, has Article III standing to sustain a claim under the Fair Housing Act," and it reminded the City that it could "no longer rest on ... mere allegations," but instead had the burden to "set forth by affidavit or other evidence specific facts showing that it has suffered a cognizable injury-in-fact." This motion was filed in March 2016 and refiled in late May 2017. The City's response to the motion disputed Wells Fargo's challenges to its standing using the same evidence that the City raised in support of standing at oral argument—Ayres's conclusion that loan HC2 was delinquent and the ten loans that had entered into foreclosure mentioned in the complaint. So for more than two years before the district court entered summary judgment in late June 2018, both parties operated under the assumption that the City's standing was in dispute and actively litigated that issue.

To be sure, both this Court and the Supreme Court have determined that in limited circumstances, the absence of notice of the need to prove standing may mandate either the application of a more lenient standard or remand for further development of the record. In *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994), we applied the pleading standard in determining whether the plaintiffs had standing to seek a preliminary injunction because the defendant "did not question [the] plaintiff[s'] standing" and "the plaintiffs had only a few hours of hearing time to present their preliminary injunction case" to the district court and were "forced to limit their evidence to what they reasonably understood to be the contested issues." *Id.* at 1336. And in *Alabama Legislative Black Caucus v. Alabama*, —— U.S. ——, 135 S. Ct. 1257, 191 L.Ed.2d 314 (2015), the Supreme Court concluded that, under the circumstances at issue, the evidence in the record was "strong enough to lead the [plaintiff] reasonably to believe" that it satisfied a requirement of standing and the defendant failed to argue otherwise, so "elementary principles of procedural fairness" required the district court to provide notice and an opportunity to respond before deciding *sua sponte* that the plaintiff had not satisfied that requirement. *Id.* at 1269.

Both *Huntsville* and *Alabama Black Legislative Caucus* circumscribe the power of a court to consider standing *sua sponte* without providing a plaintiff with notice and an opportunity to respond, but these precedents do not purport to speak to circumstances like those of this appeal, in which the opposing party raised the issue of standing. *See Ala. Legislative Black Caucus*, 135 S. Ct. at 1269 (limiting the district court's authority to "act[ ] *sua sponte*" without first giving the plaintiff "an opportunity to provide evidence" that it satisfied the standing requirement at issue); *Bischoff*, 222 F.3d at 882 n.8 (explaining that *Huntsville* only applied a "more lenient standard of review because the standing issue was decided by the district court so early in the case and without any notice to plaintiffs that standing was at issue"). In *Huntsville*, our analysis turned on the notion that "[i]t might well be unfair ... to impose a standing burden beyond the sufficiency of the ... pleadings on a plaintiff seeking a preliminary injunction, unless the defendant puts the plaintiff on notice that standing is contested," at least insofar as the plaintiff had little time to present his case. 30 F.3d at 1336. In contrast, more than two years elapsed between Wells Fargo's filing of its motion for summary judgment and the order granting it, so the City had more than enough time to take any steps necessary to ensure that it would be able to prove standing. And *Alabama Legislative Black Caucus* assumed that special notice was only necessary in a circumstance in which the plaintiff reasonably believed that he had satisfied a requirement of standing and the defendant had not argued the contrary. 135 S. Ct. at 1269. But as we have explained, Wells Fargo actively contested the City's proof of injury and causation, the very elements of standing that we have determined the City failed to establish.

At oral argument, the City maintained that it would be unfair to apply the summary-judgment standard because the district court limited discovery to matters related to loans originated within the limitation period, but this contention fails too. Although "summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery," we have made clear that "the party opposing the motion for summary judgment bears the burden of calling to the district court's attention any outstanding discovery." *Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870–71 (11th Cir. 1988). Failure to satisfy this burden is fatal to an argument that the district court granted summary judgment prematurely by failing to order or await the results of further discovery. *See Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1063–64 (11th Cir. 2015); *Reflectone, Inc. v. Farrand Optical Co.*, 862 F.2d 841, 843–44 (11th Cir. 1989). By the same token, no unfairness occurs if a plaintiff fails to advise the district court of the need for further discovery to prove standing at summary judgment and a circuit court decides in the first instance that the plaintiff failed to establish standing. In either circumstance, the plaintiff has effectively consented to adjudication of the issues raised in the summary-judgment motion based on the existing record by failing to avail itself of the opportunity to seek further discovery. So the City's argument could prompt the application of a more lenient standard in evaluating standing or remand for additional discovery only if the City satisfied its "burden of calling to the district court's attention any outstanding discovery" on the issue of standing. *Snook*, 859 F.2d at 871.

The City failed to satisfy that burden. The preferred vehicle for advising a district court of the need for further discovery is an affidavit or declaration submitted under Federal Rule of Civil Procedure 56(d). That Rule provides that "[i]f a nonmovant shows by affidavit or declaration that ... it cannot present facts essential to justify its opposition" to summary judgment, "the court may (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." To invoke this Rule, a party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts," but "must specifically demonstrate how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Reflectone*, 862 F.2d at 843 (citation and internal quotation marks omitted).

The City filed a declaration under Rule 56 at one point in the litigation, but it did not mention standing, and the City later retracted the declaration and opposed Wells Fargo's motion on the merits. The City responded to Wells Fargo's refiled motion for summary judgment with a motion to strike or, in the alternative, to stay or deny the motion to allow for additional discovery under Rule 56(d). The motion argued that Wells Fargo had "attempt[ed] to turn a partial motion for summary judgment limited to the issue of the statute of limitations, into a fully briefed motion for summary judgment that would decide the entire case," but neither the motion itself nor the accompanying declaration mentioned the need for additional discovery to produce evidence of standing or otherwise clarify the basis of its objection to Wells Fargo's motion.

At a hearing conducted on July 20, 2017, the City explained that its motion and declaration were prompted by concerns that Wells Fargo's motion had raised "new business necessity defenses." The City conceded that if the only merits issue was "whether there were loans issued in that two-year time period where a minority was treated disparately and adversely relative to a similarly situated white," it "ha[d] the data" to prevail, but it did not mention the need for additional discovery to support standing. When the district court intimated that the only merits issue under consideration was the statute of limitations and asked the City if it nonetheless needed more discovery, the City said that the only "discovery" it needed was for the district court to admit "the supplemental declaration of Dr. Ayres." After the district court admitted the report into evidence, the City changed course and opposed the motion for summary judgment on the merits.

We have no difficulty concluding that the City failed to "specifically demonstrate how postponement of a ruling on the motion" would enable it, "by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Reflectone*, 862 F.2d at 843 (citation and internal quotation marks omitted). The City's declaration under Rule 56(d) was not sufficient for this purpose because it never even mentioned the need for further discovery to support standing. And although we have held that in limited circumstances, "the interests of justice will sometimes require a district court to postpone its ruling on a motion for summary judgment even though the technical requirements" of Rule 56(d) "have not been met," we have limited that exception to the requirement to comply with Rule 56(d) to circumstances in which "the nonmovant properly apprised the district court of the outstanding discovery request" through an equivalent form of notice. *Snook*, 859 F.2d at 871; *see also Reflectone*, 862 F.2d at 844 (holding that the nonmovant was not entitled to invoke the exception because it "did not even make any motion to compel discovery" and "did not raise the issue anywhere in its papers opposing summary judgment"). The City's later remarks to the district court did not suggest that its request for further discovery involved the need for additional information to establish standing, so this exception cannot apply. By withdrawing its opposition under Rule 56(d) and opposing the motion for summary judgment on the merits, the City acceded to the entry of judgment on any issue raised in the motion for summary judgment based on the existing record. And even on appeal, the City has failed to provide us with any explanation of how further discovery would have enabled it to establish standing.

The City failed to satisfy its "burden of calling to the district court's attention any outstanding discovery" that might have been necessary to support its standing, *Reflectone*, 862 F.2d at 844, so we cannot conclude that it would be unfair to the City to require it to establish standing under the standard ordinarily applicable at summary judgment. Because we have determined that the City has not satisfied that standard, we conclude that the City has not established "that a genuine issue of material fact exists concerning standing." *Bischoff*, 222 F.3d at 881 (citation and internal quotation marks omitted). The district court should have dismissed the action for lack of standing. The parties briefed the issue at summary judgment, and it was clear that the City had no evidence of injury or causation.

IV. CONCLUSION

We **VACATE** the summary judgment in favor of Wells Fargo and **REMAND** with instructions to dismiss for lack of subject-matter jurisdiction.

WILLIAM PRYOR, Circuit Judge, joined by BRANCH, Circuit Judge, concurring:

Despite our earlier decision about the sufficiency of the pleadings in a related case, *see City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260 (11th Cir. 2019), it would be difficult to overstate how misguided this litigation has proved to be. For example, even if we had jurisdiction to decide the merits of this appeal, we would have to agree with the district court that Wells Fargo is entitled to summary judgment. To explain why, I recount below the City's evidence of discrimination and then explain that the City failed to create a genuine dispute of material fact with respect to its disparate-treatment claim and that the City abandoned any challenge to the summary judgment against its disparate-impact claim.

A. The City's Evidence of Discrimination.

The City's principal evidence of discrimination was a pair of reports prepared by its expert, Ian Ayres. The first report concluded that "Wells Fargo issued loans to minority borrowers in Miami Gardens between June 13, 2012 and June 12, 2014 ... that [were] more expensive or riskier than loans issued to non-Hispanic white borrowers with similar characteristics in Miami Gardens." Ayres reached this conclusion by conducting a matched-pair analysis using data on 153 first-lien mortgages originated by Wells Fargo between those dates.

To identify "high-cost loans," Ayres relied on the standards adopted by the Federal Financial Institutions Examination Council under the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801–11. Under the then-applicable regulation, 12 C.F.R. pt. 203, app. A(I)(G)(1)(a) (2016) 12 C.F.R. pt. 203, app. A(I)(G)(1)(a) (2016), *rescinded by* Home Mortgage Disclosure, 82 Fed. Reg. 60673 (Dec. 22, 2017), a lender was required to report the "rate spread" for a loan if the spread was equal to or greater than 1.5 percentage points for a first-lien loan. As Ayres explained, the "rate spread for a loan origination is the spread between the Annual Percentage Rate (APR) and a survey-based estimate of [Annual Percentage Rates] offered on originated prime mortgage loans of a comparable amortization type, interest rate lock-in date, fixed term (loan maturity) or variable term (initial-fixed rate period), and lien status." "The survey-based estimates are referred to as the 'average prime offer rate' ...." Using the regulatory threshold, Ayres classified a loan as high-cost if its rate spread was equal to or greater than 1.5 percentage points. By this standard, Ayres identified "seven High-Cost Loans in Wells Fargo's data, six of which were made to African-American borrowers and one of which was made to [a] Hispanic borrower." No rate-spread reportable loans in the dataset were made to non-Hispanic white borrowers.

From there, Ayres attempted to determine "whether a High-Cost Loan was issued to a minority borrower whereas a non-Hispanic white borrower with similar characteristics did not receive a High-Cost Loan." Because the "rate spread already accounts for differences in the date of the loan's rate lock, the length of the loan term, and whether the loan was a fixed-rate or [adjustable-rate mortgage] loan," Ayres focused "only on those core underwriting differences not accounted for in the rate spread, such as occupancy status, [credit] score [as determined through the Fair Isaac Corporation's model], the loan-to-value ratio (LTV), debt-to-income ratio (DTI), and the underwriting history of bankruptcy, foreclosures, charge-offs, collections, late payments, delinquencies, judgments, and public records on the borrower's credit report."

After controlling for these variables, Ayres ultimately identified two high-cost loans issued to minority borrowers—labeled HC2 and HC6—that had a greater rate spread than a loan issued to a non-Hispanic white, NHW8. HC2 is a loan issued to a Hispanic borrower. The credit score for this borrower is 712, the borrower's loan-to-value ratio is 98 percent, and the borrower's debt-to-income ratio is 47 percent. HC6 is a loan to an African-American borrower with a credit score of 741, a loan-to-value ratio of 98 percent, and a debt-to-income ratio of 43 percent. NHW8, in contrast, is a loan issued to a non-Hispanic white borrower with a credit score of 702, a loan-to-value ratio of 98 percent, and a debt-to-income ratio of 41 percent. The rate spread for loan HC2 is 2.03 percent and its Annual Percentage Rate is 5.58 percent. The rate spread of loan HC6 is 1.58 percent and its Annual Percentage Rate is 6.00 percent. But the rate spread of loan NHW8 is 1.12 percent and its Annual Percentage Rate is 5.32 percent.

Based on his definition of relative loan cost in terms of the rate-spread differential, Ayres determined that loans HC2 and HC6 "were priced higher ... than Loan NHW8 that was originated to a non-Hispanic white borrower with similar (and in some cases, riskier) characteristics." He explained that the borrowers of loans HC2 and HC6 "had higher [credit] scores, the same occupancy status, the same [loan-to-value ratios], the same underwriting history of bankruptcy, foreclosures, charge-offs, collections, late payments, delinquencies, judgments, and public records on the borrower's credit report, but had slightly higher debt-to-income ratios than the Loan NHW8 borrower." Ayres concluded that the evidence was "consistent with the hypothesis that Wells Fargo issued more expensive loans to minority borrowers than non-Hispanic white borrowers with similar characteristics even after controlling for plausible and generally accepted business justifications."

In his rebuttal report, Bernard Siskin, the expert for Wells Fargo, posited two alternative explanations of the rate-spread discrepancy. First, he explained that the borrowers of loans HC2 and HC6 "chose a higher note rate in exchange for significant lender credits to be used at settlement to pay closing costs," but the borrower on loan NHW8 "received only de minimis lender credits." The borrower on loan HC2 opted for $8,000 in lender credits—representing 7.34 percent of the loan amount—and the borrower on HC6 opted for $1,878 in lender credits—2.12 percent of the loan amount—but the borrower on loan NHW8 opted for only $479 in lender credits—equal to 0.38 percent of the loan amount. Second, Siskin argued that Ayres "fail[ed] to account for the fact that the white borrower received a loan during the two-week period when a promotional pricing discount was applied to all conventional and government purchase loans." As a result of its origination date, NHW8 "received a 50 basis points pricing discount."

Based on data provided by an official of Wells Fargo named Jill Hunt, Siskin calculated the hypothetical rate spread and Annual Percentage Rate on each of these loans after controlling for the effects of lender credits and the promotional discount. Hunt attested that the note rate of NHW8 would have been 0.125 percent higher if the pricing discount had not been applied, which led Siskin to conclude that zeroing that discount would yield an Annual Percentage Rate of 5.4431 percent and a rate spread of 1.25 percent. Hunt also stated that if the borrowers on loans HC2 and HC6 had elected not to receive lender credits, the note rate on the loans would have been 3.25 and 4.125 percent, respectively. Based on these numbers, Siskin calculated that, "[a]ssuming the lender credits were all applied to fees included in the [Annual Percentage Rate] computation and the calculation of the [Annual Percentage Rate] did not include the fees paid with lender credit," zeroing the lender credits elected by HC2 would result in an Annual Percentage Rate of 4.71 percent and a rate spread of 1.16. With respect to HC6, the same calculation yielded an Annual Percentage Rate of 5.86 percent and a rate spread of 1.44 percent.

So under the analysis conducted by Ayres, HC2 has an Annual Percentage Rate of 5.58 percent and a rate spread of 2.03 percent, HC6 has an Annual Percentage Rate of 6.00 percent and a rate spread of 1.58 percent, and NHW8 has an Annual Percentage Rate of 5.32 percent and a rate spread of 1.12 percent. But eliminating the promotional discount and zeroing the lender credits on loans HC2 and HC6 yields an Annual Percentage Rate of 4.71 percent and a rate spread of 1.16 for loan HC2, an Annual Percentage Rate of Annual Percentage Rate of 5.86 percent and a rate spread of 1.44 percent for loan

HC6, and an Annual Percentage Rate of 5.4431 percent and a rate spread of 1.25 percent for loan NHW8. Under Siskin's analysis, loan HC2 is slightly cheaper than NHW8 by 0.09 percent and HC6 is more expensive than NHW8 by 0.19 percent.

In his supplemental report, Ayres argued that Siskin's calculations were distorted by his apparent failure to zero the lender credits received by NHW8. As Ayres explained, Siskin did not "explicitly state whether his calculation of the hypothetical rate spread for NHW8 includes the actual lender credits or whether he assumes a hypothetical lender credit of zero." Instead, Siskin's report only "provide[d] the hypothetical note rate and [Annual Percentage Rate] that would have been offered on [HC2 and HC6] if no lender credit had been provided or no promotional pricing discount had been offered," and failed to "provide[ ] the note rate that would have been offered for loan NHW8 if no lender credit had been provided to that borrower."

Despite this alleged insufficiency, Ayres constructed hypothetical comparisons of the rate spreads of loans HC2, HC6, and NHW8 on the assumption that "NHW8's lender credits remain $479 in Dr. Siskin's hypothetical rate spread calculation." Ayres "attempted to replicate Dr. Siskin's calculations under the incomplete hypothetical scenario in which HC6 received no lender credit (and their note rates adjusted accordingly to the note rates specified by Ms. Hunt), NHW8 continued to receive a lender credit, and neither loan received the 50 basis point promotional discount allegedly given to loan NHW8." He applied the same procedure to develop a comparison of loans HC2 and NHW8. But Ayres departed from Siskin's method in one key respect. Ayres faulted Siskin for failing to "control for the difference in [Federal Housing Administration] Mortgage Insurance Premiums ("MIP") policies that were in place at the times HC2 and NHW8 were originated." Because "HC2 was originated in

November 2012, whereas NHW8 was originated in December 2013" and "the government increased the cost and duration of [mortgage insurance premiums] in April 2013 and June 2013," Ayres projected that "adjusting for the differences in [mortgage insurance premiums] policies would serve to *increase* the difference between the rate spreads of HC2 and NHW8." So Ayres attempted to control for the difference in mortgage-insurance premium costs.

Ayres's analysis yielded somewhat different results from Siskin's. Ayres calculated the Annual Percentage Rates of HC2, HC6, and NHW8 as 5.4118 percent, 5.9560 percent, and 5.4448 percent, respectively. He deduced a rate spread of 1.86 percent for loan HC2, 1.54 percent for loan HC6, and 1.25 percent for loan NHW8. So although Ayres agreed with Siskin's conclusion that the hypothetical rate spread of NHW8 would equal 1.25 percent, Ayres's estimates of the rate spreads for HC2 and HC6 were higher than Siskin's estimates of 1.16 percent and 1.44 percent. Under Ayres's projections, HC2 is more expensive than NHW8 by 0.61 percent and HC6 is more expensive than NHW8 by 0.29 percent. The results of each expert analysis are replicated in the following table:

Actual and Projected APR & Rate Spreads for Loans HC2, HC6, & NHW8			
	Actual	*Siskin Hypothetical Assuming $0 Lender Credits for HC2 & HC6 & No Promotional Discount*	*Ayres Hypothetical Assuming 2013 MIP Policies, $0 Lender Credits for HC2 & HC6 & No Promotional Discount*
HC2	**APR** 5.5816% **Rate Spread** 2.03%	**APR** 4.71% **Rate Spread** 1.16%	**APR** 5.4118% **Rate Spread** 1.86%
HC6	**APR** 5.9978% **Rate Spread** 1.58%	**APR** 5.86% **Rate Spread** 1.44%	**APR** 5.9560% **Rate Spread** 1.54%
NHW8	**APR** 5.3181% **Rate Spread** 1.12%	**APR** 5.4431% **Rate Spread** 1.25%	**APR** 5.4448% **Rate Spread** 1.25%

The City's only other evidence of discrimination was the declaration of a former Wells Fargo loan officer named Alvaro Orozco who worked for Wells Fargo for a "very short period of time in 2010," before the limitation period began. Orozco attested that when he worked for Wells Fargo, his manager told him "to push borrowers into certain types of loans" that were more expensive than other loans for which he believed borrowers might be eligible. Orozco also asserted that

"Wells Fargo's desire to sell government loans ... hit African-American and Hispanic borrowers the hardest," and he conjectured that "if African-American or Hispanic borrowers in a community received loans with higher rate spreads than similarly situated non-Hispanic Caucasian borrowers, that result would be consistent with a bank's decision to target African-American or Hispanic borrowers for more expensive mortgage loans."

B. The City Failed to Create a Genuine Dispute of Material Fact with Respect to Its Disparate-Treatment Claim.

"Disparate treatment claims require proof of discriminatory intent either through direct or circumstantial evidence." *Equal Emp't Opportunity Comm'n v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000). Proof of intent by circumstantial evidence relies on the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Sec'y, U.S. Dep't of Hous. & Urban Dev. v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990) (holding that the "test developed in McDonnell Douglas" governs suits brought under the Fair Housing Act). Under this framework, "the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination." *Lewis v. City of Union City*, 918 F.3d 1213, 1217 (11th Cir. 2019) (en banc). "If the plaintiff succeeds in making out a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions." *Id.* at 1221. "[S]hould the defendant carry its burden, the plaintiff must then demonstrate that the defendant's proffered reason was merely a pretext for discrimination." Id. This burden "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* (alterations omitted) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

The "elements of a prima facie case are flexible and should be tailored ... to differing factual circumstances." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1123 (11th Cir. 1993) (citation and internal quotation marks omitted). In this appeal, a prima facie case of intentional discrimination required proof that (1) the borrower was a member of a protected class, (2) the borrower applied for and was qualified to receive loans from the defendant, and (3) the loan was offered on less favorable terms than a loan offered to a similarly situated person who was not a member of the borrower's class. *Cf. McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817. A plaintiff and a comparator are "similarly situated" under *McDonnell Douglas* if they are "similarly situated in all material respects." *Lewis*, 918 F.3d at 1226 (internal quotation marks omitted).

The district court ruled that the City failed to establish a prima facie case because the borrowers of HC2 and HC6 are not similarly situated to the borrower of NHW8. It concluded that the loans were " 'apples and oranges' that cannot be compared" because "the borrowers elected different structures to either finance closing costs over time or pay them at the outset" and NHW8 received a promotional discount. The district court refused "to consider Dr.

Ayres's efforts to extrapolate what the [Annual Percentage Rate] would be on HC2 and HC6 without the lender credits" because the credits were "simply a term of the loan that [the] Court cannot ignore." In the alternative, the district court ruled that even if the City could establish a prima facie case, it failed to establish pretext because Ayres's "method of comparison also reveal[ed] situations in which Wells Fargo originated loans to minority borrowers that were less expensive than loans issued to white borrowers," undermining any inference that the difference in loan cost posited by Ayres was caused by an intent to discriminate.

The City argues that the district court erred by refusing to credit Ayres's calculation of the Annual Percentage Rate and rate spread for each loan after controlling for lender credits and the promotional discount because it is possible to prove a prima facie case of discrimination in this context merely by establishing that "one more expensive or riskier loan [was] given to a minority borrower." Interpreted charitably, the City's argument is that the discount and lender credits had an ascertainable impact on the bottom-line cost of the loans in question, so it was possible, using Ayres's methodology, to control for the effect of those differences on the rate spread of each loan and determine whether the loans issued to minority borrowers were more costly than NHW8. In the City's view, the continued existence of a cost disparity between loans HC2 and HC6 and loan NHW8 after controlling for lender credits and the discount supports a reasonable inference that the most likely explanation of the residual cost difference is the race or ethnicity of the borrowers, which suffices to establish a prima facie case. *See Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) ("A prima facie case under *McDonnell Douglas*" must establish that the challenged acts, "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.").

This Circuit has never held that a plaintiff can establish that individuals are similarly situated by reductively analyzing apparent differences between them in terms of a common metric of comparison, but even if we assume that a plaintiff can do so, we should nevertheless conclude that the City failed to establish an inference of discriminatory intent. Wells Fargo volunteered "legitimate, nondiscriminatory reason[s] for its actions," *Lewis*, 918 F.3d at 1221, namely (1) the difference in lender credits, and (2) the availability of the promotional discount, so "the inquiry proceeds to a new level of specificity" at which "the plaintiff must show the ... proffered reason[s] to be a pretext for unlawful discrimination." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1326 (11th Cir. 2011) (citation and internal quotation marks omitted). To establish pretext, the plaintiff must produce evidence sufficient to support a reasonable inference "that a discriminatory reason more likely motivated" the defendant or that the defendant's "proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089. But under either avenue of proof, the ultimate question is "whether the evidence ... yields the reasonable inference that the [defendant] engaged in the alleged discrimination." *Smith*, 644 F.3d at 1326.

The City failed to establish a reasonable inference that a discriminatory motive accounted for the cost differential between loans HC2 and HC6 and loan NHW8. Even if the lender-credits and promotional-discount explanations failed to account for the totality of the cost difference between HC2 and HC6 on the one hand and NHW8 on the other, it is undisputed that Wells Fargo also issued two loans to minority borrowers similarly situated to the borrower on loan NHW8 that were less expensive than NHW8. These loans, ML1 and ML2, were Federal Housing Administration purchase loans issued to minority borrowers who had, respectively, credit scores of 671 and 693, loan-to-value ratios of 98 percent, and debt-to-income ratios of 46.3 percent and 41.1 percent. The borrower of NHW8 had a credit score of 702, a loan-to-value ratio of 98 percent, and a debt-to-income ratio of 41 percent. Although the underwriting characteristics of the borrower of NHW8 are similar to those of the borrowers of ML1 and ML2 under Ayres's criteria, the rate spreads of ML1 and ML2 are 0.74 percent and 0.94 percent while the rate spread of NHW8 is 1.12 percent.

As the district court correctly ruled, this evidence precludes any inference "that a discriminatory reason more likely motivated" Wells Fargo. *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089. Apart from the declaration of Orozco—which, as discussed below, provides no support for the City's position—the City's case for disparate treatment is based entirely on the theory that one can rationally infer that intentional discrimination explains the residual cost discrepancy between loans HC2 and HC6 and loan NHW8. But this theory of intentional discrimination cannot account for the existence of nonminority borrowers who received more costly loans than similarly situated minorities. If Wells Fargo priced membership in a minority race or ethnicity into its loans, one would expect that minority borrowers would be systematically charged more than non-Hispanic white borrowers. But the evidence does not bear out that prediction. Indeed, the City's theory of intentional discrimination is less accurate than a competing hypothesis of *random variation* in pricing because that explanation would at least potentially account for the existence of loans both more and less favorable to minorities. The City's theory renders the existence of the former class of loans inexplicable.

The City does not attempt to establish pretext by arguing that Wells Fargo's "proffered explanation[s] [are] unworthy of credence," *id.*, and with good reason. True, Ayres's hypothetical calculations of the rate spreads of HC2, HC6, and NHW8, may allow a reasonable inference that the lender credits and discount fail to explain the entirety of the cost discrepancy, as Wells Fargo maintained. But although "a plaintiff's prima facie case, combined with sufficient evidence to find that the [defendant's] asserted justification is false, may permit the trier of fact to conclude that the [defendant] unlawfully discriminated," that proof will not "*always* be adequate to sustain a jury's finding of liability." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The issue on summary judgment is whether a genuine dispute of material fact exists, and there are "instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* As I have explained, this appeal is one of those instances because of the "uncontroverted independent evidence" that Wells Fargo's lending behavior produced unexplained cost discrepancies favorable to minority borrowers as well as one favorable to a nonminority borrower. *Id.*

The City also argues that the district court should have considered Orozco's affidavit and the testimony of a Wells Fargo executive named Mary Woodward, but this evidence does nothing to improve the City's position. Orozco attested that his manager told him "to push borrowers into certain types of loans," such as Federal Housing Administration loans, instead of other loans that might be cheaper. He also opined that "if African-American or Hispanic borrowers in a community received loans with higher rate spreads than similarly situated non-Hispanic Caucasian borrowers, that result would be consistent with a bank's decision to target African-American or Hispanic borrowers for more expensive mortgage loans." But Orozco did not provide any reason to believe that Wells Fargo "targeted" African-American or Hispanic borrowers for more expensive loans any more than they targeted members of other racial or ethnic groups. Indeed, he admitted that he was instructed to push borrowers into more expensive loans not because of their race, but "because these loans made more money for the bank and were easier to sell on the secondary market." So his affidavit provides no basis for an inference of intent.

Woodward testified only that she was unaware of any analysis prepared by Wells Fargo's Internal Audit Department or any other department of the bank concerning allegations of violations of fair-lending laws and did not know of any reports, memoranda, or other written documents regarding the results of internal investigations into compliance with such laws. The ignorance of a single Wells Fargo executive about whether the bank had conducted any internal investigation into its compliance with fair-lending laws does not support an inference of discriminatory intent at all, so this testimony adds nothing to the City's case. At bottom, even if one were to consider all of its evidence, the City failed to establish a genuine issue of material fact.

C. The City Abandoned Any Challenge to the District Court's Ruling on its Disparate-Impact Claim.

Disparate-impact liability under the Fair Housing Act requires proof that a policy or practice of the defendant has "a 'disproportionately adverse effect on minorities,' " *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, ––– U.S. ––––, 135 S. Ct. 2507, 2513, 192 L.Ed.2d 514 (2015) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009)), for which a prima facie case has three distinct elements. First, a prima facie case requires "the identification of a specific, facially-neutral ... practice" or policy. *Joe's Stone Crab*, 220 F.3d at 1268; *see also Inclusive Cmtys.*, 135 S. Ct. at 2523 (holding that "a disparate-impact claim" under the Fair Housing Act "must fail if the plaintiff cannot point to a ... policy or policies"). Second, the plaintiff must establish the existence of a "significant statistical disparity" between the effects of the challenged policy or practice on minorities and non-minorities. *Joe's Stone Crab*, 220 F.3d at 1274. Third, in the light of the "serious constitutional questions that might arise ... if such liability were imposed based solely on a showing of statistical disparity," a plaintiff proceeding on a disparate-impact theory must also establish a "robust causality" connecting the challenged policy and the statistical disparity. *Inclusive Cmtys.*, 135 S. Ct. at 2512. "A plaintiff who fails to ... produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." *Id.* at 2523.

The district court ruled that the City failed to produce sufficient evidence with respect to the statistical-disparity and causation elements of its claim. The district court interpreted the City's claim as a challenge to (1) Wells Fargo's Product Validation Process, which "examines borrowers to determine if they are eligible for less expensive loans," and (2) Wells Fargo's "practice of allowing lender credits on certain [Federal Housing Authority] loans," which purportedly was "a vehicle for differential pricing." The City's principal evidence of disproportionate effect was Ayres's reports, which identified two loans issued to minorities that allegedly were more expensive than loans issued to a similarly situated white borrower. The district court rejected the City's contention that these loans supported an inference of a disproportionate adverse impact on minority borrowers because "[t]wo loans, even assuming they were more expensive, is insufficient record evidence to show the policies produced statistically-imbalanced lending patterns." The district court also ruled that the City failed to produce any "evidence of the robust causation needed to show the polic[ies] caused the statistical disparity."

The City argues that it was error for the district court to require evidence of a statistical disparity because its burden was only to "identify at least one loan in the [limitation] period that exemplifies the discriminatory practice pleaded by the City," but the City does not so much as attempt to challenge the district court's alternative ruling on the causality element. So the City abandoned any challenge to the district court's ruling on its disparate-impact claim. As we have explained, "[w]hen an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014).

The district court was also right to conclude that the City produced no evidence of causation. Even if one grants the City's tendentious assumption that the two loans identified by Ayres suffice to establish "a disproportionately adverse effect on minorities," *Inclusive Cmtys.*, 135 S. Ct. at 2513 (citation and internal quotation marks omitted), the City never pointed to any evidence that even suggests that Wells Fargo's policies caused this disparity in loan cost. For all we can infer from the evidence, the putative divergence in cost is attributable to *ad hoc* decisions, rounding errors, small differences between the borrowers, or factors not accounted for in Ayres's analysis. So even if the City had not abandoned its disparate-impact claim, its failure to come forward with anything more than groundless speculation that a Wells Fargo policy *must* account for the cost discrepancy is fatal to its claim.

Even if one ignores these glaring problems with the City's position and considers the merits of its challenge to the district court's ruling on the statistical-disparity element, the City comes up short. The City faults the district court for concluding that the two loans identified by Ayres failed to establish a violation on a disparate-impact theory. The City argues that under the continuing-violation doctrine its only "task [was] to identify at least one loan in the [limitation] period that exemplifies the discriminatory practice pleaded by the City." But to invoke the continuing-violation doctrine, a plaintiff must establish that *a violation* of the Act occurred in the limitation period. *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1221 (11th Cir. 2001). And under a disparate-impact theory of liability, proof of a violation requires the plaintiff to establish that the challenged policy produced a "significant statistical disparity," *Joe's Stone Crab*, 220 F.3d at 1274; *see also Ricci*, 557 U.S. at 587, 129 S.Ct. 2658 ("[A] prima facie case of disparate-impact liability" is "essentially, a threshold showing of a significant statistical disparity.").

The City failed to present any evidence of a statistical correlation between the race of a borrower and the cost of the loan Wells Fargo would issue to him under its existing policies. Ayres never conducted a statistical analysis of whether Wells Fargo's lending practices disproportionately impacted minorities.

Indeed, he stated that he would forgo any attempt to analyze the "disparate impact of Wells Fargo's mortgage lending," but would "prepare a detailed analysis" if the case survived the summary-judgment stage. So even if the City had not abandoned its disparate-impact claim or failed to produce any evidence of causation, the City still would have failed to create a genuine issue of material fact with respect to this claim.

APPENDIX C

328 F.Supp.3d 1369
United States District Court, S.D. Florida,
Miami Division.
CITY OF MIAMI GARDENS, Plaintiff,
v.
WELLS FARGO & CO. and Wells Fargo Bank, N.A.,
Defendants.
Case Number: 14-22203-CIV-MORENO
|
Signed 06/29/2018

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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FEDERICO A. MORENO, UNITED STATES DISTRICT JUDGE

Born out of the assassination of Dr. Martin Luther King, Jr. in 1968, the Fair Housing Act addressed the denial of housing opportunities on the basis of race, color, religion, or national origin. Half a century later, the City of Miami Gardens is invoking the law to remedy discriminatory lending by Defendant Wells Fargo. The City contends that discriminatory lending persists even amidst the changes in lending practices implemented since the Great Recession. The theory of its case is that discriminatory loans in Miami Gardens have defaulted at greater rates, causing foreclosures, and reducing property values in the City, which, in turn, impacts the City's property tax revenue. At the outset of this case, the Court identified the Fair Housing Act's applicable statute of limitations and the threshold issue: whether Wells Fargo issued any predatory loans or discriminatory loans during the limitations period in Miami Gardens that violated the Fair Housing Act. If the City can show a Fair Housing Act violation during the limitations period, the continuing violations doctrine allows it to recover for past violations.

At summary judgment, the parties agree that despite the allegations in the Third Amended Complaint, Wells Fargo did not issue any predatory loans to minorities in Miami Gardens during the limitations period. That leaves the question of whether there were any other discriminatory loans, i.e. did Wells Fargo make loans to minorities that were more expensive than loans to non-minorities during the limitations period. To make that showing, the City must satisfy the prima facie case for disparate impact or disparate treatment discrimination. Because there is insufficient record evidence to support a claim for disparate impact, the parties' summary judgment pleadings focus on whether the City can make a showing of disparate treatment discrimination.

For a prima facie showing of disparate treatment, the City of Miami Gardens must set forth evidence of loan comparators that are similarly situated. The loans identified by the City's expert, Dr. Ian Ayres, have different origination dates, different lender credits, and different promotional offerings, all factors affecting the loan price. Accordingly, the Court grants Wells Fargo's motion for summary judgment because the City cannot make a prima facie showing of disparate treatment during the limitations period. Even if the City could make the necessary showing, Wells Fargo has sufficiently established legitimate nondiscriminatory reasons for the difference in the loan pricing. Finally, the record evidence is insufficient to establish Wells Fargo's reasons are pretextual.

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment **(D.E. 162)**, filed on **May 31, 2018**.

THE COURT has considered the motion, the response, the supplemental briefing, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED.

I. Background

A. Procedural History of this Case and Past Rulings

Plaintiff, the City of Miami Gardens, is suing Wells Fargo for intentional lending discrimination and disparate impact discrimination in violation of the Fair Housing Act. The crux of the claim is that the loans made to white borrowers in Miami Gardens were less expensive than loans made to African-American and Hispanic borrowers. Miami Gardens argues that because the loans to minority borrowers were more expensive, they resulted in defaults, and foreclosures, which in turn lowered property values and decreased the City's tax revenue.

The Court issued an order requiring an amended complaint in this case on October 1, 2014. In that Order, the Court dismissed the 57-page complaint and required the City of Miami Gardens to specify exact violations of the Fair Housing Act in Miami Gardens. "The Complaint should state what specific predatory practices occurred in Miami Gardens and how minorities were allegedly targeted there.... The second amended complaint must be precise in detailing (1) how Miami Gardens is injured, (2) how that injury is traceable to the conduct of each Wells Fargo defendant, and (3) how the injury can be redressed with a favorable decision in this case." The case was subsequently stayed pending resolution of *City of Miami v. Bank of America Corp.*, 800 F.3d 1262 (11th

Cir. 2015), which addressed whether a city had standing to sue under the Fair Housing Act. Following the Eleventh Circuit's decision, the Court reopened this case.

Next, this Court bifurcated discovery, allowing limited discovery on the narrow issue of whether there were loans during the two-year statute of limitations, June 13, 2012 to June 12, 2014, that violated the Fair Housing Act. This is a threshold issue in the case because under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) there could no continuing violation if there was none during the limitations period. At the conclusion of the limited discovery, Wells Fargo moved for summary judgment arguing that none of the 153 loans originated between June 13, 2012 and June 12, 2014, violated the Fair Housing Act. That is the motion at issue now before this Court.

While the motion for summary judgment was pending, this Court again stayed this case when the Supreme Court granted certiorari on the *City of Miami* case. The Supreme Court addressed the issue of standing in this context and held cities are "aggrieved persons" with standing to sue for damages under the Fair Housing Act. *Bank of America Corp. v. City of Miami*, ––– U.S. ––––, 137 S.Ct. 1296, 1302, 197 L.Ed.2d 678 (2017). The Supreme Court added that to recover damages the city must do more than show that its injuries foreseeably flowed from the alleged statutory violation. *Id.* Consistent with the Supreme Court's direction, the Court of Appeals is now deciding the "contours of proximate cause under the Fair Housing Act and how it applies in these cases." This case remained stayed during the pendency of the Supreme Court decision given the dispositive nature of the standing issue, but this Court reopened this case once the Supreme Court found standing. Wells Fargo's position in this case is that the Eleventh Circuit's decision regarding proximate cause does not affect this case, where its motion for summary judgment is pending. The Court agrees with Wells Fargo as the procedural trajectory of this case differs from the *City of Miami* case as the question before the Court is whether the record evidence establishes a violation of the Fair Housing Act during the Limitations Period. At this juncture, the Court does not need to decide the pleading requirements of proximate cause in the context of a Fair Housing Act complaint.1

Currently pending before the Court are Wells Fargo's Motion for Summary Judgment and supplemental briefs filed by both sides. The summary judgment motion argues that Miami Gardens lacks evidence of discriminatory loans and evidence of foreclosures attributable to those loans, during the statute of limitations period, June 13, 2012 to June 12, 2014.

B. Factual Background

The record shows a total of 153 loans secured by properties in Miami Gardens during the limitations period, including 130 loans to minority borrowers and 8 loans to non-Hispanic white borrowers. They were divided between conventional loans and government loans, stemming from the Federal Housing Administration program. The loans at issue in this motion for summary judgment are all government FHA purchase loans.

The City's Third Amended Complaint states that Wells Fargo "steered" minorities into certain types of predatory loans when the borrowers qualified for better terms. The Third Amended Complaint lists 12 types of loans, including high-cost loans, subprime loans, interest-only loans, balloon payment loans, loans with prepayment penalties, negative amortization loans, no documentation loans, higher cost government loans (including FHA and VA loans), *1375 home equity lines of credit, and adjustable rate mortgages with teaser rates where the lifetime maximum rate is greater than the initial rate plus 6%. The record shows that of the 153 loans made during the limitations period, the only loans at issue are the government refinance loans under the FHA program, and loans that have to be reported under the Home Mortgage Disclosure Act, known as rate-spread reportable loans.2

To support its claims, the City provided the testimony of its City Manager, Cameron Benson, as a Rule 30(b)(6) representative. Benson did not identify any discriminatory, or predatory loans. He also could not identify borrowers in Miami Gardens, who received more expensive loans when they qualified for better financing.3 Benson also could not identify any minority borrowers, who received Wells Fargo loans that were made on different terms than loans to white borrowers. Benson also had no information to support the allegations in paragraph 76 of the Third Amended Complaint, which identifies four addresses corresponding to predatory loans in Miami Gardens. In answering interrogatories regarding predatory loans, the City listed the four addresses identified in paragraph 76 of the Third Amended Complaint.

In addition, the City did not provide evidence that any residents complained about these types of loans in Miami Gardens. Community Development Director, Laurin Yoder, and City Manager Benson were not aware of any complaints made to the City by any borrowers about any of the 153 loans made during the limitations period.

1. Loans at Issue

In the initial summary judgment briefing, the City pointed to four loans issued in Miami Gardens during the limitations period that violated the Fair Housing Act. After oral argument and in the supplementary briefing, the City focuses on two loans that it claims violated the Fair Housing Act during the limitations period.

The City's expert, Dr. Ian Ayres, presents two matched pairs of loans that he claims are suitable for comparison. The first matched pair is loan HC6 and loan NHW8. HC6 is an FHA purchase loan made to an African-American borrower. The FICO score for this borrower is 741, the borrower's loan-to-value ratio is 98%, and the borrower's debt-to-income ratio is 43%. Loan NHW8 is also an FHA purchase loan to a white borrower. That borrower on loan NHW8 has a lower FICO score of 702, the same loan-to-value ratio (98%), and the borrower's debt-to-income ratio is 41%. The actual APR for HC6 is 5.9978% resulting in a rate spread of 1.58%, and the actual APR for NHW8 is 5.3181% resulting in a rate spread of 1.12%. The City's position is that the minority borrower received a rate-spread reportable high-cost loan (HC6) whereas a non-Hispanic white borrower received a lower cost loan (NHW8).

Dr. Ayres identifies a second matched pair, HC2 (minority loan) and NHW8 (non-minority loan). HC2 is an FHA purchase loan made to a Hispanic borrower, whose FICO score is 712, the loan-to-value ratio is 98%, and borrower's debt-to-income ratio is 41%. Dr. Ayres indicates that HC2 has a rate spread of 2.03%, and NHW8 has *1376 a rate spread of 1.12%. The City's position is that HC2 is a higher cost loan than NHW8. HC2 experienced delinquencies, while NHW8 did not. Although HC2 suffered delinquencies, it did not result in foreclosure.
Wells Fargo's expert, Dr. Bernard Siskin, contends there are two reasons why loans HC6 and HC2 are not similarly situated to loan NHW8 and should not be deemed matched pairs. Namely, HC2 and HC6 received lender credits to defray closing costs at the outset of the loan in exchange for a higher interest rate. In addition, the borrower on loan NHW8 received a promotional 50 basis point pricing discount that Wells Fargo offered to all loans, government and conventional, originated during October 21, 2013 and November 4, 2013, in the Miami or Fort Lauderdale Metropolitan Divisions. That promotion was not available when loans HC2 and HC6 originated. Dr. Siskin also differentiates the loans because the federal government increased FHA annual mortgage insurance premiums due to a higher incidence of rate-spread reportable lending. For example, HC2 originated in November 2012 and NHW8 originated in December 2013 after the government increased the cost of mortgage insurance premiums earlier during 2013. This is another factor that influenced pricing.

Dr. Ayres suggests that this is a reason why loan NHW8 should have been more expensive than HC2 because of the increased insurance requirement.

Dr. Siskin explains that in both matched pairs of loans, the minority borrowers chose to receive a higher rate of interest in exchange for a lender credit to pay for expenses associated with closing the loan. Lender credits occur when a borrower elects to have a higher interest rate, and the bank gives the borrower a credit for the fees necessary to pay what they would otherwise have to pay out-of-pocket at closing. For loan HC2, the minority borrower received $8,000 in lender credits and for HC6, the minority borrower elected to receive $1,878 in lender credits, whereas the non-minority borrower for loan NHW8 received $479 in lender credits to cover closing costs. The City's position at summary judgment is that Wells Fargo has not met its burden to show how the lender credits numerically affect the APR (annual percentage rate).

Dr. Ayres recalculated the hypothetical APR's that loan HC2 and NHW8 would have received if HC2 did not receive the lender credits in the amount of $8,000, and NHW8 did not receive the promotional pricing. Under his hypothetical scenario, the APR for loan HC2 would be 5.4118% with a corresponding rate spread of 1.86% and for NHW8, the APR would be 5.4448% with a rate spread of 1.25%. In his view, HC2 remains a rate spread reportable discriminatory loan issued to a minority borrower, whereas NHW8 is not rate spread reportable. Dr. Ayres performs a similar analysis on loan HC6 and NHW8. Dr. Ayres conducts a similar analysis regarding loan HC6 and what the hypothetical APR and rate spread would be without the lender credits and without the promotional pricing. He concludes that loan HC6 would have an APR of 5.9560% with a corresponding rate spread of 1.54%, while loan NHW8 would have an APR of 5.4448% with a corresponding rate spread of 1.25%.

Dr. Siskin rebuts this analysis by stating that "[w]hen differences are accounted for (i.e., if the minority borrowers receiving HC2 and HC6 had not chosen lender credits and the non-Hispanic white borrower's loan (NHW8) had been originated when *1377 the promotion was not in effect), we see a very different picture. Neither of the loans to the minority borrowers (HC2 and HC6) are rate-spread reportable, and one of the minority loans is slightly less expensive by .09 percentage points (HC2) than the non-Hispanic white loan (NHW8) and one is slightly more expensive by .19 percentage points (HC6) than the non-Hispanic white loan (NHW8) ... These results do not support a conclusion that the lower rate spread for NHW8 as compared to HC6 is due to race (adversely), any more than we could conclude that the lower rate spread for HC2 is due to race (favorably)."

II. Legal Standard

[1] [2]Summary judgment is authorized where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials of the pleadings; the non-

moving party must establish the essential elements of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The non-movant must present more than a scintilla of evidence in support of the non-movant's position. A jury must be able reasonably to find for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III. Legal Analysis

The Court has defined the Fair Housing Act's limitation period as June 12, 2012 through June 12, 2014. To survive summary judgment, the record evidence must show a violation of the Fair Housing Act during the limitations period. The parties disagree about what actions constitute a violation. The City's position is that it can prove a violation by merely showing differential pricing in a loan to a minority borrower versus a white borrower. Wells Fargo adds that to prove a violation of the Fair Housing Act, the City must make a prima facie showing of disparate impact discrimination or disparate treatment (i.e., intentional discrimination).

In *City of Los Angeles v. Wells Fargo & Co.*, No. 13-CV-09007, 2015 WL 4398858 (C.D. Ca. July 17, 2015), *aff'd City of Los Angeles v. Wells Fargo & Co.*, 691 F. App'x 453 (9th Cir. 2017), the district court analyzed whether the city could establish a prima facie case for disparate impact liability to determine whether any violation occurred during the limitations period. This

Court, likewise, will examine whether the City can establish a prima facie case of disparate impact or intentional discrimination to determine if there is a violation of the Fair Housing Act. It is not simply enough to show that one loan is more expensive than another, rather there has to be a violation of the Fair Housing Act.

The purpose of the Fair Housing Act is to "provide within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Section 3605(5) of the Act provides:

> It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex handicap, familial status, or national origin.

42 U.S.C. § 3605(a); *see also* 42 U.S.C. § 3604(b) (prohibiting discrimination in the "sale or rental of a dwelling."). A plaintiff can bring a claim under the Act under two different theories: disparate treatment or disparate impact. In a disparate treatment case, the plaintiff must establish "that the defendant had a discriminatory intent or motive," while in a disparate impact case, the plaintiff challenges a practice or policy that has a "disproportionately adverse effect on minorities, and are otherwise unjustified by a legitimate rationale." *Texas Dep't of Housing & Comm. Affairs v. Inclusive Communities Project*, ——

U.S. ——, 135 S.Ct. 2507, 2513, 192 L.Ed.2d 514 (2015) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009)).

The core issue for this phase of the litigation is whether Wells Fargo violated the Fair Housing Act during the limitations period. 42 U.S.C. § 3613(a)(1)(A) (stating that any claim under the Act must be brought within two years of "the occurrence or the termination of an alleged discriminatory housing practice...."). If that occurred, then the continuing violations doctrine allows the City to sue for conduct that occurred outside the limitations period. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) ("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 180 days of the last asserted occurrence of that practice."). A "pattern-or-practice theory of liability may revive acts outside the statutory period if those acts are part of a 'continuing violation.' " *City of Los Angeles,* 2015 WL 4398858, at *4 (quoting *Havens*, 455 U.S. at 380-81, 102 S.Ct. 1114).

A. The effect of the City's 30(b)(6) representative's testimony

The City Manager, the City's designated 30(b)(6) corporate representative, conceded during his deposition that the City could not identify any "predatory" or "discriminatory" loans in the limitations period. The City's designee was unaware of any information providing a basis for the City's allegation that borrowers were or may have been eligible for "more favorable and less expensive loans."

Because the City, through its corporate representative, failed to identify any loans made in the limitations period that violated the Fair Housing Act, Wells Fargo argues this case is time-barred.

The dual requirements of Rule 30(b)(6) are that the corporate designee (1) must "testify about facts within the corporation's collective knowledge" and (2) "must also testify about the corporation's position, beliefs and opinions," including its interpretations of documents and events. *QBE Ins., Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012) (citing *Great Am. Ins. Co. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 539 (D. Nev. 2008)). "[T]he corporation has a duty to make a good faith, conscientious effort to designate appropriate persons and to prepare them to testify fully and non-evasively.... In other words, a corporation is expected to create an appropriate witness or witnesses from information reasonably available to it if necessary." Id. at 689 (quoting *Great Am.*, 251 F.R.D. at 540). As a corollary, a corporation "must perform a reasonable inquiry for information that is reasonably available to it." *Id.*

The City argues this case is procedurally different from *QBE* because the 30(b)(6) representative was deposed months before the expert disclosure cutoff. Plaintiff argues the interrogatory responses provided evidence of discrimination, even though the 30(b)(6) representative from the City had no knowledge of discriminatory lending. Although the City is correct that the expert discovery was not imminent when the Rule 30(b)(6) deponent testified, the City had an obligation to prepare the City Manager to testify and advise Defendant of the basis for the lawsuit under the rule. Moreover, the City's reliance on conclusory interrogatory responses does not create sufficient evidence to negate the testimony of the City's 30(b)(6) representative, who indicated the City had no basis for its claims against Wells Fargo. *Id.* at 689 ("[A] corporation cannot point to interrogatory answers in lieu of producing a live, in-person corporate representative designee.").

Therefore, the Court finds the City is bound by the testimony of its Rule 30(b)(6) representative. *Id.* at 690 ("[C]orporation which provides a 30(b)(6) designee who testifies that the corporation does not know the answers to questions 'will not be allowed to effectively change its answers by introducing evidence at trial.' ") (quotations omitted); *Wausau Underwriters Ins. Co. v. Danfoss, LLC*, 310 F.R.D. 683, 687 (S.D. Fla. 2015) (holding that a corporate representative's " 'I don't know' answers" are "deemed fully binding," and corporation "may not proffer any testimonial evidence regarding [its] collective position on the notice topics contrary to or in addition to what [its Rule 30(b)(6) designee] answered on [its] behalf.").

B. Disparate Impact

Even if the Court were to find the City Manager's testimony inconsequential, the City would need to establish a prima facie case of disparate impact or intentional discrimination (disparate treatment) to survive summary judgment. To establish a prima facie case for disparate impact liability under the Act, a plaintiff must prove the occurrence of certain outwardly neutral policies and a disproportionately adverse impact on persons of a particular class caused by the defendant's facially neutral practices. *City of Los Angeles*, 2015 WL 4398858 at *5.

Following *Inclusive Communities*, the Department of Housing and Urban Development codified a three-part burden-shifting test for disparate impact claims under the Act. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460-01 (Feb. 15, 2013). First, the plaintiff "bears the burden of proving its prima facie case that a practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic." *Id.* at 11460. If the plaintiff can make a *prima facie* showing, the burden shifts to the defendant "to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests." Id. "If the respondent or defendant satisfies this burden, then the charging party or plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect." *Id.*; *see also City of Miami v. Wells Fargo & Co.*, No. 13-24508-CIV-DIMITROULEAS, 2016 WL 1156882, at *4 (stating a plaintiff must "(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.") (quoting *Inclusive Communities*, 135 S.Ct. at 2522-24).

Inclusive Communities further instructs this Court to examine the Plaintiff's *prima facie* showing "with care" using "cautionary standards." *Inclusive Communities*, 135 S.Ct. at 2523-2524. The Supreme Court cautioned against imposing liability "based solely on a showing of statistical disparity." *Id.* at 2522. The Court explained that if a plaintiff relies on a statistical disparity, the claim "must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." *Id.* at 2523. Additionally, a plaintiff must prove a "robust causality" between the policy and the statistical disparity to ensure "that [r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact," and that defendants are not found liable for racial disparities they did not create." *Id.* (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)). The Supreme Court later added in *City of Miami*, 137 S.Ct. at 1306, that proximate cause under the Fair Housing Act requires "some direct relation between the injury asserted and the injurious conduct alleged." (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)). "[F]oreseeability alone does not ensure the close connection that proximate cause requires." *Id.* at 1306.

1. Prima Facie Case

To state a claim for disparate impact, the City must identify a race neutral policy that when applied uniformly causes a disparate impact on minorities. The City identifies Wells Fargo's Product Validation

Process as a policy that causes a disparate impact.4 That process examines borrowers to determine if they are eligible for less expensive loans. Another practice identified by the City is Wells Fargo's practice of allowing lender credits on certain FHA loans, which the City contends were a vehicle for differential pricing.

The City relies on the declaration of Alvaro Orozco to support its claim that race-neutral policies cause a disparate impact on minorities. Orozco is a former employee of Wells Fargo, who did not work within the City of Miami Gardens and who only worked at Wells Fargo for 46 days over two years before the limitations period began. The Court granted Wells Fargo's motion to strike the declaration of Alvaro Orozco for these reasons. Even if this Court found the testimony of Alvaro Orozco should remain on the record, his testimony clearly does not suffice to convince a reasonable jury. In any event, the City also falls short of meeting the other prongs of a prima facie case of disparate impact. There is no evidence of a statistical disparity, let alone evidence of the robust causation needed to show the policy caused the statistical disparity.

The evidence shows Wells Fargo issued 153 loans during the limitations period. Of the 153 loans, 130 of them were to minority borrowers and 8 loans were made to non-Hispanic white borrowers. There are only two loans that the City is alleging were at a higher cost to minorities. Two loans, even assuming they were more expensive, is insufficient record evidence to show the policies produced "statistically-imbalanced lending patterns." Accordingly, the Court finds the

City fails to show a violation of the Fair Housing Act during the limitations period under a disparate impact theory.

C. Intentional Discrimination or Disparate Treatment in the Credit Context

The City rests its claim of intentional discrimination (disparate treatment) on two "matched pairs," comparing two loans to minority borrowers with one loan to a white borrower. In his supplementary report, Dr. Ayres concludes that "Wells Fargo issued some loans to minority borrowers that were more expensive than loans made by Wells Fargo to non-Hispanic white borrowers with similar characteristics during the limitations period." Supplemental Ayres Report at ¶ 24.

1. Prima Facie Case

The Eleventh Circuit in *Boykin v. Bank of Am. Corp.*, 162 F. App'x 837, 839 (11th Cir. 2005) established the standard for comparing minority and non-minority borrowers with "loan details" that are "nearly identical." *Boykin* followed the now-familiar framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) to evaluate the claim of discrimination under the Fair Housing Act. *See also Sec'y, U.S. Dep't of Hous. & Urban Dev. v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990).

"[T]he elements of a prima facie case are flexible and should be tailored on a case-by-case basis, to differing factual circumstances." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1123 (11th Cir. 1993) (quotations omitted). In this credit discrimination context, the City can establish a prima facie case of discrimination by offering evidence showing: (1) that the borrower is a member of a protected class; (2) that the borrower applied for and was qualified for a loan from the defendant; (3) that the loan offered by the defendant was on more unfavorable terms than a loan to an applicant outside the borrower's protected class with similar qualifications.

To meet the comparability requirements of the prima facie case, the City must show that the borrower is "similarly situated in all relevant aspects to the non-minority" comparator. *Boykin*, 162 F. App'x at 839 (quoting *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001)). Comparators must be "nearly identical." *Id*. The Eleventh Circuit in Boykin emphasized that a "comparator's credit qualifications and loan details must be 'nearly identical' ... in order to prevent this court from second guessing the bank's business decision and confusing apples with oranges." *Id*. (quoting *Cooley v. Sterling Bank*, 280 F.Supp.2d 1331, 1340 (M.D. Ala. 2003), *aff'd*, No. 03-14727, 116 F. App'x 242 (11th Cir. July 16, 2004)).

a. Evidence of Comparators

Defendant hinges its motion for summary judgment on the City's failure to show that the "matched pairs" are nearly identical. The City opposes summary judgment arguing it has shown evidence of the borrowers' financial background, which differentiates this case from *Boykin*. In this case, the City's expert, Dr. Ayres, matches two pairs of loans to make a prima facie case.

The first “matched pair” is loan HC6 and loan NHW8, which are both FHA *1382 purchase loans. HC6 is a loan to an African-American borrower, whose FICO score is 741, the loan-to-value ratio is 98%, and the debt-to-income ratio is 43%. The white borrower of loan NHW8 has a FICO score of 702, the same loan-to-value ratio of 98%, and a debt-to-income ratio of 41%. The rate spread on loan HC6 (1.58%) is higher than NHW8 (1.12%), which Dr. Ayres concludes makes HC6 a more expensive loan.

The other matched pair, HC2 and NHW8, are also both FHA purchase loans. The Hispanic borrower of HC2 had a FICO score of 712, as compared to NHW8’s borrower, who had a FICO score of 702. Both had the same loan-to-value ratio of 98%. HC2’s borrower had a debt-to-income ratio of 47%, while NHW8’s borrower had a lower ratio of 41%. HC2 has a rate spread of 2.03%, where NHW8’s rate spread is 1.12%. The City’s position is that HC2 was a higher cost loan that suffered delinquencies.

Defendant’s expert, Dr. Bernard Siskin, explains that HC6 and HC2 have a higher rate spread because those borrowers elected to receive lender credits to defray closing costs, in exchange for a higher APR. A second reason is that the borrower on NHW8 received a promotional 50 basis point pricing discount, which Wells Fargo gave to all loans originating during a particular two-week period. Wells Fargo Vice President, Jill Hunt, testifies that HC6’s borrower received $1,878 in lender credits and HC2’s borrower received $8,000 in lender credits. Defendant’s position is that the lender credits increased the APR’s on HC6 and HC2, while the promotional discount and the lower lender credits reduced it on loan NHW8. In his supplemental report, Dr. Ayres states that even if the lender credits on these loans were the same, HC6 and HC2 would still be more expensive.5

It is undisputed that loan HC2, which obtained the highest amount of lender credits of $8,000, also had the highest rate spread of 2.03%. Loan HC6, which had $1,878 in lender credits had a lower rate spread of 1.58%. Loan NHW8, which had $479 in lender credits and was eligible for a promotional discount due to its origination date, had the lowest rate spread of 1.12%. This evidence shows that the loan with the highest lender credits had the highest rate spread, while the loan with the lowest lender credits and the promotional discount had the lowest rate spread.

b. Does the evidence meet the comparability standard?

Unlike *Boykin* where the record was deficient to compare the credit qualifications of the borrowers, the Court agrees with the City that this record provides evidence of the similar characteristics of the borrowers on these loans, like credit scores, loan-to-value ratios, and debt-to-income ratios.6 Boykin, however, also specifies that the "loan details must be nearly identical." *Boykin*, 162 F. App'x at 839-840. The Bureau of Consumer Financial Protection has explained that "comparisons between loans with and without lender credits [are] misleading" because "the prices of loans with such offsetting credits would appear artificially high." 80 Fed. Reg. 66128; 66213 (2015); Final Rule at 66,213. Recognizing the same concept, the Eleventh Circuit has explained that comparators are not " 'early identical' " if they had different "costs ... of their loans." *Boykin*, 162 F. App'x at 840.

There is no factual dispute that the "loan details" between the minority and non-minority borrowers in these two circumstances are not "nearly identical." The minority borrowers opted to receive a higher rate of interest in exchange for lender credits ($1,878 and $8,000) to defray closing costs, while the non-minority borrower of loan NHW8 only received $479 as a credit to close, in addition to receiving a promotional discount.7 The loans originated at different times, and the borrowers elected different structures to either finance closing costs over time or pay them at the outset. These variations are sufficient for the Court to find that the comparator loans are not nearly identical. The Boykin standard requires this Court to end the inquiry and find the comparisons the City offers cannot support a claim of discrimination. The Court will not consider Dr. Ayres's efforts to extrapolate what the APR would be on HC2 and HC6 without the lender credits. That is simply a term of the loan that this Court cannot ignore and renders these loans "apples and oranges" that cannot be compared by a jury. *Boykin*, 162 F. App'x at 839 (explaining that comparing nearly identical loans is necessary to "prevent this Court from second guessing the bank's business decision and confusing apples with oranges.").

Aside from the lack of suitable comparators, the City's argument that the Defendant failed to meet its summary judgment burden fails. The City makes much of Dr. Siskin's failure to connect the numerical relationship between a lender credit and the impact on APR. It is well-established that receiving money upfront at closing in the form of a lender credit equates with an increased interest rate. In fact, the Department of Housing and Urban Development describes options that "permit a borrower to pay a slightly higher interest rate in exchange for the lender paying the borrower's closing costs" as having "been very successful and are acceptable to HUD." Dep't of Hous. & Urban Dev., Mortgagee Letter 94-7 (Feb. 2, 1994).[8] Even if Dr. Siskin's testimony failed to make the numerical connection, this Court cannot find that the City is able to make its *prima facie* case by showing that the "matched pairs" are "nearly identical" as required by *Boykin*.

Even if the City could make a prima facie case of discrimination, the burden then shifts to Wells Fargo to show legitimate nondiscriminatory reasons motivated the different pricing. Wells Fargo has offered the loan origination dates, the lender credits, and promotional pricing on loan NHW8 as legitimate nondiscriminatory reasons that motivated the different pricing. Once the Defendant proffers legitimate nondiscriminatory reasons, *Boykin* then places on the City "the ultimate burden of establishing by a preponderance of the evidence that a discriminatory intent motivated the [lender's] action." *Id*. (quoting *Perryman v. Johnson Products Co*., 698 F.2d 1138, 1142 (11th Cir. 1983)).

Dr. Ayres does not conclude that his analysis shows discrimination, nor does he state the differences are caused by the borrowers' race. Rather, he concludes that "Wells Fargo issued some loans to minority borrowers that were more expensive than loans made by Wells Fargo to non-Hispanic white borrowers with similar characteristics during the limitations period." The law, however, requires the City to have evidence that the differential pricing is caused by race, and not by the reasons proffered—lender credits, promotional pricing, and timing. In addition, Dr. Ayres admits his assignment was limited to determine only whether Wells Fargo "had issued any loans to minority borrowers that were more expensive than loans made by Wells Fargo to non-Hispanic white borrowers with similar characteristics." Supplemental Ayres Report at ¶ 23. Dr. Ayres does not dispute that his method of comparison also reveals situations in which Wells Fargo originated loans to minority borrowers that were less expensive than loans issued to white borrowers. He states: "The fact that Wells Fargo may have also issued some loans to minority borrowers that were priced lower than loans made to non-Hispanic white borrowers with similar characteristics does not contradict my findings." Id. His method shows that in certain instances both minorities and non-minorities might have advantageous or disadvantageous pricing. The racial differences here can point in both directions, and therefore it cannot be said that the difference is caused by race. Accordingly, the Court grants the motion for summary judgment finding even if the City could state a prima facie case by providing "nearly identical" comparators, the City ultimately cannot carry its burden to show by a preponderance of the evidence that Wells Fargo's reasons for the price differentials were mere pretext for discrimination.

Because the Court finds the City has failed to make a prima facie case for a Fair Housing Act violation in the limitations period, the Court need not decide whether the City's failure to show an injury in the limitations period requires summary judgment.

DONE AND ORDERED in Chambers at Miami, Florida, this 29th of June 2018.

Footnotes

1 In ruling on summary judgment, the Court is mindful of the Supreme Court's statement: "In the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires. The housing market is interconnected with economic and social life. A violation of the FHA may, therefore, 'be expected to cause ripples of harm to flow' far beyond the defendant's misconduct. Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel. And entertaining suits to recover damages for any foreseeable result of an FHA violation would risk 'massive and complex damages litigation.' " *City of Miami*, 137 S.Ct. at 1306 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)).

2 At oral argument before Magistrate Judge O'Sullivan, the Plaintiff's counsel conceded that none of the loans at issue are inherently predatory. (D.E. 166, Hr'g Tr. at 70).

[3] Wells Fargo argues this lack of knowledge is detrimental to the City's case.

[4] The Product Validation process requires Wells Fargo's finance department to review every FHA purchase loan to determine whether an equivalent and available conventional loan might be more financially beneficial to the borrower. In this case, however, the City does not claim that the borrowers who received FHA purchase loans should have received conventional loans.

[5] Both sides hypothesize what the rate spread would be without the lender credits and without the promotional pricing. While Dr. Ayres concludes that HC2 and HC6 would still be rate spread reportable, Dr. Siskin concludes they would not be.

[6] In so stating, the Court is not necessarily finding the borrowers have sufficiently similar characteristics to render them comparators. There are differences in credit scores, debt-to-income ratios, and, of course, timing, which are factors that all affect the pricing of a loan. Because the Court finds the loan terms are not nearly identical, the Court need not address whether the borrowers' credit qualifications are sufficiently similar.

[7] The record also suggests that the mortgage insurance premiums on these loans were at different rates, which is another factor that differentiates the loans.

[8] The letter can be found at https://www.hud.gov/sites/documents/DOC_36143.TXT