No.

In the Supreme Court of the United States

EMIGRANT MORTGAGE COMPANY, INC.,
AND EMIGRANT BANK, PETITIONERS

v.

JEAN ROBERT SAINT-JEAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI *TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

In *Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), this Court held that disparate impact discrimination claims are cognizable under the Fair Housing Act ("FHA"), but that such claims must be cabined by important guardrails. The 2-1 decision below from the Second Circuit raises the following important questions on which the circuits are now divided:

1. Did the Second Circuit apply the wrong legal standard when, in the words of Judge Park's dissent, it created a special "fairness-based" test for equitable tolling of discrimination claims that "breaks with other circuits" by not requiring plaintiffs to show they acted diligently in pursuing their claims?

2. Did the Second Circuit apply the wrong legal standard for disparate impact claims when it split with the Third, Fourth, Ninth, Eleventh, and D.C. Circuits by allowing plaintiffs to prove their claims by showing lending practices had an "adverse *or* disproportionate" effect on borrowers of one racial group, as opposed to requiring that the practices be disproportionately bad for that group compared to other racial groups?

3. *Inclusive Communities* requires plaintiffs to demonstrate a "robust causality" between the challenged policy or practice and the alleged disparate impact. The Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have split over the meaning of "robust causality," while the Second Circuit has jettisoned it as "non-binding." Should the Court clarify *Inclusive Communities'* "robust causality requirement" or, in the alternative, overrule *Inclusive Communities* because it has proven unworkable?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Emigrant Mortgage Company, Inc. and Emigrant Bank (together, "Emigrant").

Emigrant Mortgage Company, Inc. is a wholly owned subsidiary of Emigrant Credit Corporation ("ECC"). ECC is a wholly owned subsidiary of Emigrant Bank. Emigrant Bank is a wholly owned subsidiary of Emigrant Bancorp, Inc. ("EBI"). EBI is a wholly owned subsidiary of New York Private Bank and Trust Corporation. New York Private Bank and Trust Corporation is not publicly traded, and no publicly traded corporation holds 10% or more of its stock.

Respondents are Jean Robert Saint-Jean, Edith Saint-Jean, Felex Saintil, Yanick Saintil, Linda Commodore, Beverley Small, Jeanette Small, and Felipe Howell, Jr., as Administrator of the Estate of Felipe R. Howell.

RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

Saint-Jean v. *Emigrant Mortgage Company*, No. 11-cv-2122 (Aug. 30, 2018)

United States Court of Appeals (2d Cir.):

Saint-Jean v. *Emigrant Mortgage Company*, No. 22-3094 (Feb. 19, 2025)

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The opinion of the court of appeals (App., *infra*, 1a) is reported at 129 F.4th 124. The opinions of the district court are reported at 50 F. Supp. 3d 300 (App. *infra*, 143a) and 337 F. Supp. 3d 186 (App., *infra*, 203a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 2025. App., *infra*, 88a. The order of the Court of Appeals denying the petition for rehearing or rehearing *en banc* was entered on March 28, 2025. App., *infra*, 254a.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Section 802 of the Fair Housing Act, 42 U.S.C. § 3602, provides in relevant part:

> "Aggrieved person" includes any person who—
>
> (1) claims to have been injured by a discriminatory housing practice; or
>
> (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

Section 804 of the Fair Housing Act, 42 U.S.C. § 3604, provides in relevant part:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> . . .

[1] On June 4, 2025, Justice Sotomayor extended, from June 26 to August 26, Emigrant's time within which to file its petition for a writ of certiorari. *Emigrant Mortgage Co., et al.* v. *Saint-Jean, et al.*, No. 24A1177 (June 4, 2025).

> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

Section 805(a) of the Fair Housing Act, 42 U.S.C. § 3605, provides:

> It shall be unlawful for any person or other entity whose business includes engaging in residential 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.

Section 813(a)(1)(A) of the Fair Housing Act, 42 U.S.C. § 3613 (a)(1)(A), provides:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

INTRODUCTION

In February 2025, a divided Second Circuit panel affirmed a general verdict finding Emigrant liable for disparate impact discrimination under the FHA. That decision departs from this Court's precedent, splits with other circuits on three important legal questions, and results in a dramatic expansion in the disparate impact claims that can be brought under the FHA.

First, the Second Circuit created a special "fairness-based" rule for equitable tolling for mortgage discrimination claims that departs from this Court's long-standing precedent requiring that plaintiffs prove that they were diligent in pursuing their claims to benefit from such tolling. *See, e.g.*, *Menominee Indian Tribe of Wisconsin* v. *United States*, 577 U.S. 250, 255 (2016). As Judge Park explained, the majority's "new fairness-based tolling rule for discrimination claims" was a "novel and wrong" application of equitable tolling that "defies binding precedent" and "breaks with other circuits." App., *infra*, 62a, 71a, 87a. The Second Circuit's "fairness" test dramatically lowers the bar for invoking equitable tolling and will allow plaintiffs—as respondents did here—to bring claims *years* after the statute of limitations expired, making it effectively a dead letter for discrimination claims.

Second, the Second Circuit applied its erroneous disjunctive "adverse *or* disproportionate" test to bless an instruction that allowed a jury to find disparate impact discrimination if borrowers of one racial group were merely adversely impacted by the lending practice, even if borrowers of all racial groups faced the same adversity. That test splits with the standard applied by the Third, Fourth, Ninth, Eleventh, and D.C. Circuits, and subverts the very purpose of disparate impact liability by allowing a lender to be liable for discrimination when its loans were merely "adverse" or bad for everyone, without any showing that

the loans were discriminatory against certain racial groups.

Third, the Second Circuit discarded as "non-binding" dicta this Court's "robust causality requirement" that was a condition to this Court recognizing disparate impact claims as cognizable under the FHA. *Inclusive Communities*, 576 U.S. at 542. The Second Circuit's failure to require robust causality makes it more likely that plaintiffs will bring (and succeed on) disparate impact claims that are based on pre-existing disparities across groups rather than disparities caused by defendants' allegedly discriminatory policies or procedures. The Second Circuit's decision comes on the heels of other circuits that have reached varying and conflicting conclusions on how to apply the "robust causality" requirement. Given the divide in the circuits, this Court should clarify what it meant by, and how to apply, the "robust causality" requirement, or, in the alternative, overrule *Inclusive Communities* on the ground that the "robust causality requirement" has proven unworkable in practice. Indeed, only two months after the Second Circuit's decision, it became "the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible" because it is "contrary to equal protection under the law" and "violat[es] the Constitution." Exec. Order No. 14281, *Restoring Equality of Opportunity and Meritocracy*, 90 Fed. Reg. 17537, 17537 (Apr. 23, 2025). Given this policy, this Court should, at minimum, call for the views of the Solicitor General on this petition.

The Court should grant the petition because it presents a good vehicle to provide clarity and guidance on one or more of these three critical legal issues that have divided the lower courts on the scope of FHA disparate impact claims.

STATEMENT OF THE CASE

A. Background

1. In 1968, Congress passed the FHA to eliminate discrimination in the housing market. 42 U.S.C. § 3601 *et seq.* The stated purpose of the FHA was to "provide, within constitutional limits, fair housing throughout the United States." Section 801, Pub. L. 90-284 (Apr. 11, 1968). Consistent with that purpose, the FHA makes it unlawful for any person or entity "whose business includes engaging in residential 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." 42 U.S.C. §§ 3604(b), 3605(a). The FHA permits "any person" who "claims to have been injured by a discriminatory housing practice" to commence a civil action "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).

2. Nearly 50 years later, in *Inclusive Communities*, a five-Justice majority of this Court recognized for the first time that claims for "disparate impact" discrimination were cognizable under the FHA. 576 U.S. at 545. Unlike disparate treatment claims, which are based on facially discriminatory conduct, disparate impact claims arise when a practice, although neutral on its face, is shown to have a "'disproportionately adverse effect on minorities.'" *Id.* at 524 (quoting *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009)). To establish a "disproportionately adverse effect," a plaintiff must demonstrate that the challenged policy is harmful to borrowers of one racial group as compared to other racial groups. *Inclusive Communities*, 576 U.S. at 524. The Court held that recognizing such claims was "consistent with the" FHA, but cautioned that disparate impact liability must be "properly limited" to "avoid

the serious constitutional questions that might arise . . . if such liability were imposed based solely on a showing of a statistical disparity." *Id.* at 539-540. In particular, this Court was concerned that the risk of disparate impact liability could lead to the "injection of race into the public and private transactions covered by the FHA," *id.* at 545, and to lenders "resort[ing] to the use of racial quotas," *id.* at 521. Not only would this pervert the stated goal of the FHA in eliminating racial considerations in residential housing transactions, but it would raise serious constitutional concerns of equal treatment under the law.

Accordingly, as a condition to recognizing that disparate impact claims are cognizable under the FHA, this Court required that a plaintiff demonstrate "robust causality" between the racial imbalance and the challenged policy. *Inclusive Communities*, 576 U.S. at 542. To demonstrate "robust causality," a plaintiff must "point to a defendant's policy or policies causing [the] disparity," a potentially "difficult" requirement to meet because there are "multiple factors that go into investment decisions" in housing. *Id.* at 542. The Court further explained that the "robust causality" requirement "protects defendants from being held liable for racial disparities they did not create." *Id.*

Four Justices dissented and would have held that disparate impact claims were not cognizable under the FHA. *Inclusive Communities*, 576 U.S. at 560 (Alito, J., dissenting).

3. Before the Second Circuit's decision, lower courts had generally tried to heed the Court's instruction and attempted to apply (albeit in mixed and inconsistent ways) the Court's two limits on disparate impact litigation claims brought under the FHA: (i) disproportionately adverse effect; and (ii) robust causality between the challenged policy and the effect. Since *Inclusive*

Communities, the Third, Fourth, Ninth, Eleventh, and D.C. Circuits have required that plaintiffs prove *both* an adverse *and* a disproportionate impact on borrowers of one racial group to establish a claim for disparate impact discrimination under the FHA. *See infra* at 21-26. The Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have required plaintiffs to prove "robust causality" to bring a disparate impact claim under the FHA, but have applied different standards when assessing whether plaintiffs have met that burden. *See infra* at 26-31.

4. The constitutional concerns over disparate impact liability identified by this Court in *Inclusive Communities* have not subsided and continue to this day. In an April 23, 2025 Executive Order, President Trump explained that, because "[d]isparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability," "[i]t not only undermines our national values, but also runs contrary to equal protection under the law and, therefore, violates our Constitution." Exec. Order No. 14281 at 17537. As a result, the President announced that it "is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." *Id.* The Executive Order further directed federal agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability," and instructed the Attorney General to "initiate appropriate action to repeal or amend the implementing regulations" that "contemplate disparate-impact liability." *Id.*

Since then, various federal agencies involved in regulating mortgage lending, including the Office of the Comptroller of the Currency ("OCC"), the Consumer Financial

Protection Bureau ("CFPB"), and the Department of Housing and Urban Development ("HUD"), have rescinded or indicated that they were considering rescinding guidance providing for disparate impact claims and enforcement.[2]

B. Facts and Procedural History

1. Petitioner Emigrant is a community bank and mortgage lender privately owned since 1986 by the Milstein family. Beginning in 1999, as one product in its suite of mortgage loan offerings, Emigrant introduced a NINA ("no income, no assets") loan program in response to demand for loan products that did not require that applicants disclose their income or assets. App., *infra*, 3a.

STAR NINA loans were NINA loans that were available to borrowers based on their credit score (below 600) and the ratio of the loan amount to the equity they had in their properties, and provided an opportunity for homeowners unable to qualify for other loans to refinance their existing high-interest debt and pay off other significant debts, like tax and utility bills. *Id.* at 9a. STAR NINA loans were often used by borrowers, like respondents, whose mortgages were on the verge of foreclosure. *Id.* at 9a-10a. To help incentivize borrowers to remain current on their mortgage payments, STAR NINA loans—like many other mortgage loans—included a default interest provision, which imposed an 18 percent default rate if the borrower missed a monthly payment. *Id.* at 9a. These were standard terms that were used in all STAR NINA

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[2] OCC, "Fair Lending: Removing References to Disparate Impact," *OCC Bulletin 2025-16* (July 14, 2025) (OCC); Status Report, *Tex. Bankers Ass'n, et al.* v. *Consumer Fin. Prot. Bureau*, Case No. 24-40705, Dkt. No. 139 (5th Cir. July 2, 2025) (CFPB); Status Report, *Nat'l Ass'n Mut. Ins. Co.* v. *Dep't of Hous. & Urban Dev.*, Case No. 23-5275 (D.C. Cir. June 6, 2025) (HUD).

loan transactions, regardless of the borrower's race. C.A. Dkt. 111, at JA2071. The majority of STAR NINA loans were made to white borrowers.[3] For example, between 2004 and 2006, white borrowers received 1,720 STAR NINA loans and Black borrowers received 709 loans, C.A. Dkt. 131, at EA711, and in 2004, white borrowers made up a total of 58 percent of the STAR NINA portfolio compared to only 17 percent for Black borrowers, C.A. Dkt. 127, at EA045.[4] Emigrant voluntarily terminated the STAR NINA program in November 2008. App., *infra*, at 10a.

The STAR NINA loans satisfied, in part, Emigrant's federal obligations to make efforts to extend credit on flexible terms to individuals who otherwise may be ineligible for conventional credit due to poor credit histories. *See* Community Reinvestment Act ("CRA"), 12 U.S.C. § 2901 *et seq.*; 12 C.F.R. § 345.11 *et seq.*; C.A. Dkt. 118, at EA718-719 (noting that end of STAR NINA program in 2008 would have "negative CRA implications" for Emigrant and terminate a "service to consumers who may have no other alternatives to obtain residential financing"). Indeed, the Federal Deposit Insurance

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[3] *See, e.g.*, C.A. Dkt. 127, at EA044-045 (demographic breakdown of STAR NINA loan recipients in draft Fair Lending Committee Meeting Minutes, Nov. 24, 2004); C.A. Dkt. 131, at EA711 (demographic breakdown of STAR NINA loan recipients in July 13, 2006 email); C.A. Dkt. 112, at JA2282-83, 2300 (expert testimony regarding demographic breakdown of STAR NINA loan recipients).

[4] For context, in the 2000 census, the population of New York City was 35% white; 24.5% Black; 9.8% Asian; 27% Hispanic origin; and 3.7% some other race or two or more races. *Demographic Characteristics - New York City 1990 and 2000 Census*, Population Division - New York City Department of City Planning (October 2004), https://www.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/census2000/demonyc.pdf.

Corporation ("FDIC") approvingly described the STAR NINA program as an "innovative and flexible" product that allowed individuals with "non-traditional financial histories" to qualify for mortgage loans. *See*, *e.g.*, C.A. Dkt. 113 at JA2635-2636.

2. Respondents are eight African-American borrowers who received STAR NINA loans between 2004 and 2008. Although Emigrant did not require respondents to verify their assets or income to receive a STAR NINA loan, Emigrant provided respondents with "Resource Letters" that provided the cost of each loan and the level of income that would be needed to repay it. App., *infra*, 204a. Respondents signed those Resource Letters twice—both as part of their initial application and at closing—representing that they had the ability to repay their loans.[5] Seven respondents also received and signed letters from Emigrant that identified nonprofit homeownership counseling organizations that provided credit counseling services.[6] Despite respondents' representations, each defaulted on their STAR NINA loans between 2004 and 2008.

3. Three to 10 years after closing on their loans, respondents filed their claims against Emigrant for, among other things, disparate impact discrimination under the FHA.

On April 29, 2011, respondents the Saint-Jeans initiated this suit against Emigrant. App., *infra*, 14a. The Saint-Jeans had closed on a STAR NINA loan in

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[5] *See* C.A. Dkt 127, at EA7, EA46, EA47-51, EA156; C.A. Dkt. 130, at 622 (pre-closing resource letters); C.A. Dkt. 127, at EA5, EA15; C.A. Dkt. 128, at EA363, EA365; C.A. Dkt. 130, at EA594 (resource letters signed at closing).

[6] C.A. Dkt. 111, at JA2014, 2017-18; C.A. Dkt. 127, at EA43, EA54-57; C.A. Dkt. 129, at EA583; C.A. Dkt. 130, at EA628.

January 2008, defaulted in September 2008, and went into foreclosure proceedings—all more than two years before they brought suit. *Id.* at 64a.

In June 2011, Emigrant moved to dismiss the Saint-Jeans' complaint, arguing, *inter alia*, that their claims were time-barred by the FHA's two-year statute of limitations. App., *infra*, 14a. The District Court denied Emigrant's motion to dismiss, concluding that the statute of limitations should be equitably tolled *as a matter of law* as, in the District Court's view, discriminatory mortgage lending is "inherently self-concealing." *Id.* at 174-76a. The District Court made no findings that Respondents had diligently pursued their claims. *Id.* at 174a-78a.

On October 2, 2014, the Saint-Jeans filed an amended complaint adding the other six respondents. App., *infra*, 15a. All six had closed on STAR NINA loans between 2004 and 2009, defaulted on their loans, and had foreclosure proceedings initiated against them. *Id.* at 3a. Respondents Howell, the Smalls, and Commodore each testified that they initiated their claims only after being approached by counsel in 2013—at least six and as many as 10 years after defaulting. *Id.* at 65a.

On August 3, 2015, Emigrant moved for summary judgment, arguing, among other things, that the District Court should revisit its ruling as to timeliness because discovery had demonstrated that neither equitable tolling nor the discovery rule was applicable to respondents, all of whom brought their claims outside the limitations period. App., *infra*, 15a. On February 26, 2016, the district court heard oral argument on the motion and denied it, ruling, without reasoning, that "there is a genuine dispute as to material facts." D. Ct. Dkt. 490, at 54.

4. In 2016, the District Court held a jury trial on the issues of liability and damages. At trial, respondents did not focus their case on the discriminatory nature of the

loans. In fact, the evidence showed that the majority of STAR NINA loans were made to white borrowers, C.A. Dkt. 127, at EA45, and respondents' own expert contended that STAR NINA loans were "bad for everyone" and "not . . . disproportionately bad for minorities," C.A. Dkt. 106, at JA0924. Respondents did not present any evidence at trial that Black STAR NINA borrowers defaulted or entered foreclosure at statistically higher rates than white borrowers.

The only alleged evidence concerning race introduced at trial was that Emigrant had engaged in advertising in publications that catered to Black and Hispanic communities to satisfy its CRA obligations. C.A. Dkt. 127, at EA059 (2007 CRA advertising in *Caribbean Life*, *Hoy*, and *Mizona Hispana*). But the evidence also showed that Emigrant also advertised in publications geared towards other groups, such as *The Greek National Herald*, *The Irish Echo*, the *Long Island Catholic*, and *The Jewish Press*, and generic community publications like *The Park Slope Courier* and *Parkchester News*. C.A. Dkt. 112, at JA2414. Notwithstanding the variety of publications in which it advertised, Emigrant's advertising budget was minimal. Respondents' own expert presented figures indicating that Emigrant's entire newspaper advertising budget for 2005 through 2010 was $137,000, or approximately $22,833 per year. C.A. Dkt. 111, at JA2562. All eight respondents further testified that they had not seen an Emigrant advertisement prior to applying for a STAR NINA loan, and the overwhelming number of advertisements presented at trial were not for the STAR NINA program.[7]

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7 C.A. Dkt. 107, at JA1149; C.A. Dkt. 106, at JA0875-76; C.A. Dkt. 108, at JA1339; C.A. Dkt. 109, at JA1450-51, JA1529; C.A. Dkt. 110, at JA1660-61, JA1746, JA1810.

After the close of evidence at trial, the District Court charged the jury on respondents' disparate impact and disparate treatment theories of discrimination. App., *infra*, 256a-292a. For the disparate impact charge, both parties proposed instructions that included disproportionality. C.A. Dkt. 105 at JA562-618.[8] Over the objection of Emigrant's counsel, the District Court *sua sponte* struck "disproportionate" from both parties' proposed jury instructions on disparate impact claims, instructing the jury that they need only find a "substantial adverse impact" on borrowers of certain racial groups. App., *infra*, 45a. The District Court also refused to include any instruction to the jury on *Inclusive Communities*' requirement that plaintiffs prove a "robust causality" between the statistical disparity and the policies causing that disparity. *Id.* at 45a-47a.

After deliberations, the jury returned a general verdict form finding Emigrant liable and awarding respondents $950,000 in compensatory damages, but no punitive damages. App., *infra*, 4a.

6. Emigrant subsequently moved for judgment as a matter of law or a new trial because Respondents' claims were time-barred and the jury had been improperly instructed. App., *infra*, 15a. After a two-year wait, the District Court denied these motions, reiterating its position that the charge properly instructed the jury on both causation and disproportionality, *id.* at 223a-227a, and rejected Emigrant's timeliness argument for the same reasons it had previously rejected the argument, including that "discriminatory mortgage lending is inherently self-

[8] Emigrant requested an instruction with the disjunctive language "significantly adverse or disproportionate" because that language mirrored the Second Circuit's precedential and erroneous caselaw. *See* App., *infra*, at 42a, 44a n.10.

concealing," *id.* at 230a-232a. The District Court then *sua sponte* ordered a new trial solely on damages, after which a second jury ordered Emigrant to pay less than the prior jury—$722,048 in compensatory damages and, again, no punitive damages. *Id.* at 4a. The District Court entered final judgment on November 16, 2022. *Id.* Emigrant timely appealed to the Second Circuit on December 6, 2022. *Id.*

7. The Second Circuit (Park, Robinson, and Chin) affirmed the District Court in a 2-1 decision. App., *infra*, 4a-5a.[9] First, to hold that respondents' claims were timely, the majority invented a special "fairness-based" equitable tolling rule for discrimination claims that departed from precedent in not requiring respondents to show they acted diligently in pursuing their claims. *Id.* at 27a. Second, the majority applied the Second Circuit's disjunctive "adverse *or* disproportionate" test to hold that the District Court did not err when it struck disproportionality from the jury instruction. *Id.* at 42a (emphasis

[9] Respondents brought disparate treatment and disparate impact discrimination claims under the FHA. Because the Court (over Emigrant's objection) elected to use a general verdict form, App., *infra*, 85a, it is not possible to determine on which claim the jury found Emigrant liable. That does not matter, however, as under the general verdict rule, both instructions had to be correct. *United New York & N. J. S. H. P. Asso.* v. *Halecki*, 358 U.S. 613, 619 (1959) (holding that a "new trial" is "required" because "there is no way to know that the invalid claim . . . was not the sole basis for the verdict"). In addition to the FHA, respondents also brought claims arising from the same facts under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq*. *See* App., *infra*, 3a. Because all of those claims are inherently linked, *see id.* at 278a-279a (jury instructions for disparate impact claim same for all three statutes), the Second Circuit analyzed them together and reversing or vacating Second Circuit's decision as to the FHA claim will also apply to the ECOA and NYCHRL claims as well.

added). Third, the majority held that the District Court did not err in failing to include an instruction on "robust causation." *Id.* at 46a-47a. In the majority's view, the "robust causality" language in *Inclusive Communities* was "non-binding" and not required in the jury instruction. *Id.* at 47a n.13. The majority also reasoned that the District Court's inclusion of the word "had" in the phrase "had a substantial impact" was sufficient to "ma[k]e clear" to the jury that respondents "were required to demonstrate a causal link between the STAR NINA loans and the discriminatory effect" on respondents. *Id.* at 46a.

8. Judge Park dissented. According to Judge Park, the majority's "new fairness-based tolling rule for discrimination claims" was a "novel and wrong" application of equitable tolling that "defies binding precedent" and "breaks with other circuits." App., *infra*, 62a, 70a-71a. Judge Park also explained that the jury instructions contradicted the binding Supreme Court precedent of *Inclusive Communities*, and that the majority's holding would allow a jury to "find liability based on a 'significantly adverse impact' even if it found that non-minority borrowers suffered *the same impact*" as minority borrowers. *Id.* at 82a (emphasis in original).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE A CIRCUIT SPLIT ON EQUITABLE TOLLING FOR DISCRIMINATION CLAIMS.

As this Court has explained, "[e]quitable tolling is a rare remedy to be applied in unusual circumstances." *Wallace* v. *Kato*, 549 U.S. 384, 396 (2007). In recognition of the doctrine's limited application, this Court has repeatedly held that a statute of limitations can be equitably tolled only if the plaintiff establishes two elements: "(1) that he has been pursuing his rights diligently, and

(2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee*, 577 U.S. at 255; *Pace* v. *DiGuglielmo*, 544 U.S. 408 (2005). Diligence and extraordinary circumstances are "'*elements*,' not merely factors of indeterminate or commensurable weight." *Menominee*, 577 U.S. at 255 (emphasis added). The two elements are distinct and operate on different actors: the "extraordinary-circumstances prong . . . is meant to cover matters outside" the litigant's control, while the "diligence prong . . . covers those affairs within the litigant's control." *Id.* at 256-57. Failure to prove *either* diligence *or* extraordinary circumstances is independently fatal to a plaintiff obtaining the benefit of equitable tolling. *Pace*, 544 U.S. at 418.

Although this Court has never applied the general equitable tolling test to a discrimination claim brought under the FHA, it has uniformly applied the same test for equitable tolling in a variety of contexts.[10] Until the Second Circuit's decision below, however, no Court of Appeals had any difficulty applying this Court's equitable tolling test to discrimination cases. The Second Circuit's novel test splits with other Courts of Appeals, is erroneous, and will eliminate the FHA statute of limitations with serious implications for the housing market.

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[10] *Pace*, 544 U.S. at 408 (AEDPA); *Lawrence* v. *Fla.*, 549 U.S. 327, 331 (2007) (AEDPA); *Holland* v. *Fla.*, 560 U.S. 631, 634 (2010) (AEDPA); *McQuiggin* v. *Perkins*, 569 U.S. 383, 383 (2013) (AEDPA); *Credit Suisse Sec. (USA) LLC* v. S*immond*s, 566 U.S. 221, 222 (2012) (Exchange Act); *Heimeshoff* v. *Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 99 (2013) (ERISA); *United States* v. *Wong*, 575 U.S. 402, 405 (2015) (Federal Tort Claims Act); *Menominee Indian Tribe of Wisconsin* v. *United States*, 577 U.S. 250 (2016) at 252 (Indian Self-Determination and Education Assistance Act).

A. The Second Circuit's Approach Splits With Multiple Circuits.

The Third, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have all applied this Court's two-element test for equitable tolling in the federal anti-discrimination context, requiring that litigants demonstrate both diligence and extraordinary circumstances. As Judge Park put it bluntly, the Majority's "new fairness-based tolling rule for discrimination claims" "breaks with other circuits." App., *infra*, 62a, 70a.

Most notably, the Eleventh Circuit, sitting *en banc*, expressly considered and rejected the application of a "special test" for equitable tolling in the anti-discrimination context. *Villarreal* v. *R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 971 (11th Cir. 2016). Instead of applying a special fairness-based test as the Second Circuit did here, the Eleventh Circuit applied this Court's two-element test to claims under the Age Discrimination in Employment Act. *Id.* Writing on behalf of the *en banc* court, Judge Pryor explained that this Court's decision in *Menominee* established "[t]he general test for equitable tolling." *Id.* In rejecting plaintiff's contention that a special test should instead apply to his age discrimination claims, the Eleventh Circuit relied on this Court's precedent to conclude that "'[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" *Id.* (*quoting Baldwin Cty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984)). The Eleventh Circuit ultimately concluded that "requiring proof of diligence and extraordinary circumstances serves the[] goals" of applying equitable tolling only "sparingly." *Id.* (*quoting Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

The Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits have also applied the general two-element test for

equitable tolling to discrimination claims. The Fifth Circuit considered this issue in the context of a plaintiff who "failed to timely file" her claims for gender-based discrimination under Title VII within the 90-day limit. *Strunk* v. *Methanex USA, L.L.C.*, 2024 WL 366173, at *1 (5th Cir. Jan. 31, 2024). On appeal, the Fifth Circuit acknowledged that it was "sympathetic to [the plaintiff's] circumstances," but declined to apply equitable tolling because the plaintiff had failed to satisfy the two-step test from *Menominee*. *Strunk*, 2024 WL 366173, at *1-2 (citing *Menominee*, 577 U.S. at 255).

The Third, Seventh, Ninth, Tenth, and D.C. Circuits have likewise all required a litigant to demonstrate diligence in order to equitably toll discrimination claims brought under Title VII. *Grant* v. *U.S. Dept. of Homeland Sec.*, 698 Fed. Appx. 697, 701 (3rd Cir. 2017) ("equitable tolling is not appropriate" where appellant is not "able to show that he used reasonable diligence in pursuing his discrimination claims under Title VII"); *Lee* v. *Cook Cty.*, 635 F.3d 969, 972-73 (7th Cir. 2011) (holding that equitable tolling did not apply because appellants' lawyer "did not pursue his clients' rights diligently"); *Aquino* v. *Mayorkas*, 2022 WL 18919, at *2 (9th Cir. 2022) (no equitable tolling where court was "not persuaded that [appellant] pursued his rights diligently"); *Panicker* v. *Compass Group U.S.A. Inc.*, 712 Fed. Appx. 784, 788 (10th Cir. 2017) (appellant "did not exhibit the diligence required to merit equitable tolling"); *Dyson* v. *Dist. of Columbia*, 710 F.3d 415, 421 (D.C. Cir. 2013) (equitable tolling not available where "facts certainly do not suggest that Appellant was pursuing her rights diligently").

B. The Second Circuit's Approach to Equitable Tolling Is Legally Erroneous.

Without even acknowledging the cases from this Court and the circuit courts,[11] the Second Circuit majority instead created a "new fairness-based tolling rule for discrimination claims." App., *infra*, 70a. That test is legally incorrect.

The majority rooted its novel test on its view that "unfairness to a plaintiff who is not at fault" is the "core inquiry of our equitable tolling analysis." App., *infra*, 27a. Focusing on "fairness," the majority argued that equitable tolling may be especially necessary for disparate-impact claims because the injury of those claims is "self-concealing" in that it may take longer for a plaintiff to "realize that their experience was part of a larger pattern of discrimination." *Id.* at 31a-32a. Accordingly, the majority reasoned that it would be "unfair[]" to deny respondents a claim when they had "no way of knowing" until much later whether the loans were being targeted at only certain racial communities. *Id.* at 29a.

Applying this novel test, the majority—without finding that *any* of the respondents diligently pursued their claims—held that respondents' failure to exercise diligence was excused because they "could not reasonably be expected" to learn through "due diligence" that their known injuries were the result of discrimination. App., *infra*, 27a. The majority's approach thus casts aside the well-established diligence requirement for equitable tolling in favor of a rule where "avoiding unfairness to the

[11] The only Supreme Court opinion the majority quotes is a sole-justice concurring opinion that articulates the standards for two other equitable doctrines (equitable estoppel and fraudulent concealment), not equitable tolling. App., *infra*, 26a (quoting *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 164 (2013) (Sotomayor, J., concurring)).

plaintiff is reason enough to equitably toll a statute of limitations." *Id.* at 29a n.7.

By electing to apply this test, the majority effectively eliminates the FHA statute of limitations for disparate impact claims. The majority's approach would permit seemingly any plaintiff asserting disparate impact claims to benefit from equitable tolling, regardless of the amount of time that has passed.

First, the majority's test does away entirely with the requirement that plaintiffs demonstrate diligence to have their claims equitably tolled. By removing that requirement, the Second Circuit's special test for equitable tolling of discrimination claims treats each borrower identically for purposes of equitable tolling. Indeed, the majority's equitable tolling analysis treated all eight respondents here as a unitary block, ignoring entirely the differences in how each of them obtained their loans and when they brought claims. App., *infra*, 27a-35a.

Second, the Second Circuit "agree[d] with the district court that equitable tolling was appropriate" because disparate impact claims were inherently self-concealing and that this fact in itself would constitute an "extraordinary circumstance" that "alone would be enough to support" equitable tolling. App., *infra*, 27a; 175a (describing the claims as "inherently self-concealing"). That analysis means that every disparate impact claimant would be able to satisfy the "extraordinary circumstances" prong.

By eliminating the diligence element, the majority's approach will dramatically expand the availability of equitable tolling to entire classes of plaintiffs. *Wallace*, 549 U.S. at 396 (holding that equitable tolling is a "rare remedy" to be applied in an "unusual circumstance"); *Pace*, 544 U.S. at 418 (plaintiff's failure to prove its diligence is independently fatal to obtaining the benefit of equitable tolling).

C. The Second Circuit's Approach to Equitable Tolling Will Have Important Implications for the Housing Market.

In holding that disparate impact claims were cognizable under the FHA, this Court emphasized that "prompt resolution of" those claims "is important." *Inclusive Communities*, 576 U.S. at 521. The Second Circuit majority's equitable tolling test undermines this goal by effectively eliminating the statute of limitations, which will have dramatic implications for housing market participants of all stripes. Mortgage lenders will be open to suits for decades-old conduct, leading to increased lending costs. Potential homeowners will in turn face increased borrower costs as lenders pass along the costs associated with increased risk of exposure to their customers. The effective elimination of the statute of limitations also adds uncertainty and risk to the secondary mortgage market: without the ability to rely on the statute of limitations, potential mortgage loan portfolio purchasers will need to account for the risk of additional lawsuits, adversely affecting the value of their loan portfolios.

II. THE COURT SHOULD ALSO GRANT THE PETITION TO RESOLVE A CIRCUIT SPLIT ON THE APPROPRIATE LEGAL TEST FOR DISPARATE IMPACT CLAIMS.

As this Court made clear in *Inclusive Communities*, to establish that a practice has a "disproportionately adverse effect on minorities," a plaintiff must show both an adverse—*i.e.*, negative—effect, and that the adverse effect did not impact all groups equally. 576 U.S. at 524.

The Second Circuit has long applied a disjunctive test for a disparate impact claim: a plaintiff must demonstrate "a significantly adverse *or* disproportionate impact on minorities." *Fair Hous. in Huntington Comm. Inc.* v. *Town*

of Huntington, 316 F.3d 357, 366 (2d Cir. 2003) (emphasis added); *Tsombanidis* v. *West Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003) (same). That test departs from *Inclusive Communities* and the decisions of other Courts of Appeals.

A. The Second Circuit's Disjunctive "Disproportionate or Adverse" Test Splits With Multiple Circuits.

No other circuit applies a disjunctive test like the Second Circuit. The Third, Fourth, Ninth, Eleventh, and D.C. Circuits have all instead required that plaintiffs bringing disparate impact claims demonstrate that the challenged practice has *both* an adverse *and* a disproportionate impact on minorities rather than just one of the two.

Even before *Inclusive Communities*, the Third Circuit held that to establish a *prima facie* case of FHA disparate impact discrimination, plaintiffs "must offer proof of disproportionate impact, measured in a plausible way." *Mt. Holly Gardens Citizens in Action, Inc.* v. *Twp. of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011). Reversing the district court, it found that this standard was satisfied where plaintiffs used statistics to demonstrate that Black and Hispanic residents were "disproportionately burdened" by a proposed redevelopment plan. *Id.* at 383.

After *Inclusive Communities*, the Fourth, Ninth, Eleventh, and D.C. Circuits have all held that an FHA disparate impact claim must show a "disproportionately adverse effect on minorities." *Reyes* v. *Waples Mobile Home Park Ltd. P'ship*, 91 F.4th 270, 276 (4th Cir. 2024); *Sw. Fair Hous. Council, Inc.* v. *Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 962 (9th Cir. 2021) (plaintiff must demonstrate a "a significant, adverse, and disproportionate effect"); *Binns* v. *City of Marietta Ga.*

(Hous. Choice Voucher Program), 704 F. App'x 797, 802 (11th Cir. 2017) (affirming dismissal of FHA disparate impact claims where plaintiff did not satisfy the requirement of demonstrating a "disproportionately adverse effect on minorities"); *Boykin* v. *Fenty*, 650 F. App'x 42, 45 (D.C. Cir. 2016) (affirming dismissal of FHA disparate impact claim premised on the closure of a homeless shelter where plaintiff failed to establish disproportionate impact, reasoning that "the evidence did not suggest an adverse impact on the homeless generally, let alone any disproportionate adverse impact on a protected class").

Consistent with *Inclusive Communities* and the decisions by other Courts of Appeals, the leading model federal jury instruction for disparate impact claims under the FHA requires that the conduct "actually or predictably had a substantial discriminatory impact on the protected group," where "substantial discriminatory impact" means "a manner plainly *disproportionate to how it affects other people*." Leonard B. Sand, et al., *Modern Federal Jury Instructions* § 87-33 (emphasis added).

B. The Second Circuit's Disjunctive "Disproportionate or Adverse" Test Is Wrong.

Disregarding this Court's decision and the decisions by other circuits, the majority applied the Second Circuit's disjunctive test, which requires a plaintiff to demonstrate "a significantly adverse *or* disproportionate impact on minorities," to uphold a verdict that did not include the word disproportionate at all in the charge for disparate impact. App., *infra*, 49a-50a.[12]

[12] The Second Circuit also wrongly stated that the District Court nonetheless properly instructed the jury as to the comparative aspect of the claim because it included the word "disproportionate" in its opening remarks to the instructions, App., *infra*, 52a-53a. But the District Court did not begin to provide its flawed instructions on

The District Court instructed the jury that it only needed to establish "a substantial adverse impact on African-American[] or Hispanic[] borrowers" to hold Emigrant liable. App., *infra*, 280a-81a. The jury instruction is wrong and a reflection of the Second Circuit's legally erroneous disjunctive test.

The omission of disproportionality rendered the instruction fatally incomplete. "Adverse" means "acting against or in opposition [to]; opposing, contrary, antagonistic, actively hostile." *See* Oxford English Dictionary (2023). The word "disparate," in contrast, means "dissimilar, unlike, [and] distinct." *Id.* Similarly, "disproportionate" means "[o]ut of proportion; failing to observe or constitute due proportion; inadequately or excessively proportioned." *Id.* Hence, unlike "adverse," the essence of both disparate and disproportionate is a comparison of two different subjects or classes. The District Court's instruction completely failed to convey to the jury that this comparison between different harms is required in order to find liability under the FHA.

Indeed, as this case shows, under that test a plaintiff can state a *prima facie* claim for FHA disparate impact discrimination where a policy adversely affects one racial group but has the exact *same* adverse effect on market participants of all other racial groups. The instruction means that there is no requirement that the jury compare the impact on one racial group to the impact on other racial groups in order to hold a defendant liable for disparate impact—an incoherent result that is inconsistent with the very nature of a discrimination claim.

Respondents' disparate impact claims until *23 pages later* in the transcript. C.A. Dkt. 112, at JA3072-73, JA3095. The reference to disproportionality in the introductory remarks does not cure the otherwise clearly improper instruction.

Because the Second Circuit here allowed the jury's verdict to stand expressly because of the Second Circuit's disjunctive legal test, App., *infra*, 39a, this petition provides a good vehicle for this Court to address the erroneous disjunctive legal test applied by the Second Circuit and resolve the split between the Second Circuit and multiple Courts of Appeals on the appropriate legal test for disparate impact claims under the FHA.

C. The Second Circuit's Test Will Expand Disparate Impact Liability.

The Second Circuit's erroneous disjunctive test, which allows disparate impact claims to proceed without a showing of disproportionality, will have serious, far-reaching consequences. The Second Circuit's test means that a jury could find a mortgage lender liable for a disparate impact claim by simply showing that the loans were "bad."

That is exactly what happened here. As described above, the majority of STAR NINA loans were made to white borrowers; they were made on the same terms to borrowers of all races; and Black borrowers did not default or enter foreclosure at statistically higher rates than white borrowers. *See supra* at 12. Given these facts, respondents' expert testified that STAR NINA loans were "not . . . disproportionately bad for minorities," but were instead "bad for everyone." *See supra* at 12. Despite the fact that the record was devoid of evidence of discrimination,[13] Emigrant was found liable because the instruction

[13] The only arguable evidence of disproportionality was "negligible" advertising by Emigrant in publications that catered to Black and Hispanic communities that none of the respondents had seen prior to trial. Emigrant also advertised in various other local publications not targeted towards Black and Hispanic communities, and Emigrant had placed those advertisements in part to satisfy its CRA obligations. *See supra* at 12.

required only that the jury find an "adverse impact" on African-American or Hispanic borrowers.

As the facts of this case demonstrate, the Second Circuit's legal test for disparate impact claims under the FHA reflects a dramatic expansion of potential liability that is completely untethered from the purposes of the FHA: to prevent discriminatory treatment. This expansive interpretation of the FHA will also lead to many of the same harmful impacts, including increased risks to lenders of frivolous lawsuits and higher borrowing costs to homeowners, *supra* at 21.

III. THE COURT SHOULD RESOLVE A CIRCUIT SPLIT ON THE APPROPRIATE CAUSATION STANDARD FOR FHA DISPARATE IMPACT CLAIMS.

Expressing concern that "serious constitutional questions" could arise if disparate impact liability did not remain "properly limited," this Court imposed a "*robust causality* requirement" on disparate impact claims brought under the FHA. *Inclusive Communities*, 576 U.S. at 521 (emphasis added). This requirement would prevent judgments being imposed "based solely on a showing of statistical disparity," *id.*, which could result in defendants "being held liable for racial disparities they did not create," *id.* at 541. To that end, this Court held that "[a] disparate-impact claim relying on a statistical disparity must fail" if plaintiffs cannot establish a robust causality between the statistical disparity and "a defendant's policy or policies causing that disparity." *Id.* at 521.

The circuits that have considered the question—other than the Second Circuit—have made clear "robust causality" is required, but have articulated different understandings of it because the Court, in the Fifth Circuit's words, "did not clearly delineate its meaning or

requirements." *Inclusive Communities Project, Inc.* v. *Lincoln Prop. Co.*, 920 F.3d 890, 903-05 (5th Cir. 2019) (summarizing the four "varying views" of robust causality set forth in decisions in the Fourth, Eighth, and Eleventh Circuits). Remarkably, the Second Circuit held that that requirement from this Court was "non-binding" and blessed a jury instruction that had no instruction on robust causality *at all*. App. *infra*, at 47a n.13.

Given the divide in the lower courts and the centrality of the "robust causality requirement" to the holding in *Inclusive Communities*, this Court should grant the petition to clarify "robust causality" or overrule *Inclusive Communities* on the ground that the "robust causality requirement" has resulted in "inconsistent application by the lower courts" and thus proven "unworkable." *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 407-08, 411 (2024) (overruling statutory precedent that imposed a test which had "evaded meaningful definition" and "invite[d] different results in like cases").

A. The Courts of Appeals Are Divided on the Causation Standard for Disparate Impact Claims.

"[D]ebate has developed about the contours of the robust causality requirement" in the lower courts. *Sw. Fair Hous. Council, Inc*, 17 F.4th at 966.

The Fourth Circuit acknowledged that this Court had imposed the "robust causality requirement" "[a]s one safeguard to ensure that disparate-impact claims would be properly limited." *Reyes* v. *Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 425 (4th Cir. 2018). The Fourth Circuit held that to satisfy this safeguard, a plaintiff must show that there are "statistical disparities . . . sufficiently substantial that they raise such an inference of causation." *Id.*

Comparing the language in a HUD regulation implementing the FHA, 24 C.F.R. § 100.500, to the language in *Inclusive Communities*, the Fifth Circuit held that the inclusion of "robust causality" language in *Inclusive Communities* means that it must require more than merely "showing that 'a challenged practice caused or predictably will cause a discriminatory effect.'" *Lincoln Prop. Co.*, 920 F.3d at 902 (quoting 24 C.F.R. § 100.500(c)(1)).

The Eighth Circuit acknowledged the "robust causality requirement" as one of the "cautionary standards" set out in *Inclusive Communities*, and held that in order to make out a prima facie case of disparate impact discrimination, a plaintiff's allegations must "point to an 'artificial, arbitrary, and unnecessary' policy causing the problematic disparity." *Ellis* v. *City of Minneapolis*, 860 F.3d 1106, 1114 (8th Cir. 2017) (quoting *Inclusive Communities*, 576 U.S. at 540).

The Ninth Circuit held that the "robust causality requirement . . . necessitates that the plaintiff 'produce statistical evidence demonstrating a causal connection' between an identified neutral policy and any alleged disparities that adversely affect members of a protected class." *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 961 (quoting *Inclusive Communities*, 576 U.S. at 542-53). The Ninth Circuit further clarified that "robust causality requires that plaintiffs prove with a preponderance of the evidence that the policy itself, and not some other factor . . . created or exacerbated a disproportionate effect." *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 962.

The Eleventh Circuit described *Inclusive Communities* as having "promulgated detailed causation requirements as a means of cabining disparate-impact liability." *Oviedo Town Ctr, II, L.L.L.P.* v. *City of Oviedo Florida*, 759 Fed. Appx. 828, 833-35 (11th Cir. 2018).

In sum, although well-intentioned, the Court's "robust causality" overlay has proven difficult to apply in practice, with the circuits reaching divergent views as to its meaning.

Properly limiting the scope of disparate impact liability has not proven difficult only for the courts. Congress and agencies have undertaken their own efforts to do so. Take HUD's disparate impact regulations as an example. When the Court decided *Inclusive Communities*, it appears to have been influenced by the then-existing burden shifting framework reflected in the HUD rulemaking. *Mhany Mgmt., Inc.* v. *Cnty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) ("The Supreme Court implicitly adopted HUD's approach . . ."). In 2013, HUD enacted *HUD's Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460, 11473 (Mar. 18, 2013) ("2013 Rule"), that set forth a burden-shifting rule for disparate impact liability under the FHA. Since *Inclusive Communities*, HUD has issued a rule rescinding the 2013 Rule, reinstated the prior rule, and is now likely to rescind it again in the near term.[14] And the Senate recently introduced legislation attempting to disallow claims for disparate impact discrimination in certain contexts. *Restoring Equal Opportunity Act*, S.2343, 119 Cong. (2025).

B. The Second Circuit Applied an Erroneous Standard.

Evidencing the difficulty the lower courts have had with ascertaining the meaning of the "robust causality"

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[14] *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, 85 Fed. Reg. 60288 (September 24, 2020); Status Report, *Nat'l Ass'n Mut. Ins. Co.* v. *Dep't of Hous. & Urban Dev.*, Case No. 23-5275 (D.C. Cir. June 6, 2025) (HUD).

requirement, the Second Circuit elected to disregard the robust causality requirement altogether as 'non-binding" dicta. App. *infra*, at 47a n.13. The majority provided no support for its conclusion and complete departure from *Inclusive Communities*.

Worse, based on that conclusion, the Second Circuit embraced a jury instruction that had *no causation instruction at all*. App., *infra*, at 45a-47a. The District Court's instruction on disproportionate impact stated only that Respondents had to show that "making STAR NINA loans actually or predictably had a substantial adverse effect on African American or Hispanic borrowers." *Id.* at 280a. Although the instruction included no explicit discussion of causation—much less a separate instruction on causation—the Second Circuit affirmed the instruction noting that the single word "had" in the instruction was sufficient to "make clear" that there needed to be a "causal link." *Id.* at 47a.

This clearly falls far short of the standard this Court had contemplated when it held that robust causality was necessary to dispel the "serious constitutional questions" that arise when disparate impact discrimination is not properly limited. *Inclusive Communities*, 576 U.S. at 521.

C. The Second Circuit's Causation Standard Will Increase Disparate Impact Litigation.

The Second Circuit's decision to do away with the safeguard of the robust causality requirement invites the very constitutional questions *Inclusive Communities* sought to avoid. Under the Second Circuit's approach, plaintiffs will have an incentive to bring disparate impact lawsuits premised on the barest allegations, including "based solely on a showing of a statistical disparity," *Inclusive Communities*, 576 U.S. at 540, to see whether such suits

will be successful under the new, lower causality standard. Defending against these frivolous lawsuits imposes burdens on lenders, and leads to increased capital costs for banks, landlords, developers, and other participants in the housing market, which will inevitably be passed on to borrowers and renters.

To avoid liability, market participants may take precautionary steps to ensure that practices and policies do not invoke the specter of discrimination. Lenders may begin offering only "cookie cutter loans with rigid criteria" or the "complete[] remov[al] [of] certain credit products for which the financial risk of litigation outweighs the expected revenue." Ballard J. Yelton, *The Direct Impact of Disparate Impact Claims on Banks*, 20 N.C. BANKING INST. 167, 175 (2016). "These adjustments will ultimately hurt the consumer who would no longer be able to receive traditional loans under strengthened criteria." *Id.*

Even more insidiously, unchecked disparate impact discrimination liability pushes "private entities towards erecting 'numerical quotas,' a deeply troubling event." *Oviedo Town Center II, L.L.L.P.*, 759 Fed. Appx. at 834; *see also Inclusive Communities*, 576 U.S. at 542-43 ("[W]ithout adequate safeguards, then there is a danger that potential defendants may adopt racial quotas."); Yelton, *supra*, at 175 ("Another possible result of the increased litigation and the associated costs would be lenders unintentionally moving towards numerical quotas.").

The broad range of potential negative impacts underscores the importance of the robust causality requirement and reaffirms that review is warranted here to ensure that the requirement is rigorously applied by the lower courts.

Alternatively, if the Court determines that the "robust causality requirement" has proven too unworkable in practice, this Court should grant review to overrule *Inclusive Communities*. *Kimble* v. *Marvel Ent., LLC*, 576

U.S. 446, 459-60 (2015) ("unworkability" is one of "the most usual reasons for abandoning stare decisis"). In recognizing disparate impact claims as cognizable in *Inclusive Communities*, this Court placed heavy reliance on its "robust causality requirement" to ensure that "serious constitutional questions" did not arise, 576 U.S. at 521, but "left space" for the lower courts to set forth meaning of that requirement, *Oviedo Town Ctr, II, L.L.L.P.* v. *City of Oviedo, Florida*, 759 Fed. Appx. 828, 834 (11th Cir. Dec. 28, 2018). Given the divide in the lower courts and the Second Circuit's rejection of the requirement altogether, if this Court does not grant review to clarify the meaning of "robust causality," it should instead grant review and hold that *Inclusive Communities* was wrongly decided and disparate impact claims are not cognizable under the FHA.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should call for the views of the Solicitor General.

Respectfully submitted.

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AUGUST 2025

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED FEBRUARY 19, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2023

Docket No. 22-3094-cv

JEAN ROBERT SAINT-JEAN, EDITH SAINT-JEAN, FELEX SAINTIL, LINDA COMMODORE, BEVERLEY SMALL, YANICK SAINTIL, JEANETTE SMALL, FELIPE HOWELL JR., AS ADMINISTRATOR OF THE ESTATE OF FELIPE R. HOWELL,

Plaintiffs-Appellees,

FELIPE HOWELL,

Plaintiff,

v.

EMIGRANT MORTGAGE COMPANY, EMIGRANT BANK,

Defendants-Appellants,

EMIGRANT SAVINGS BANK-MANHATTAN, EMIGRANT BANCORP, INC.,

Defendants.

Appendix A

On Appeal from the United States District Court
for the Eastern District of New York

(Argued: February 14, 2024 Decided: February 19, 2025)

Before: CHIN, PARK, and ROBINSON, *Circuit Judges.*

In this "reverse redlining" case, eight Black homeowners in New York City sued the defendant-appellant lending institution and affiliated entities, alleging that the lender violated federal, state, and city antidiscrimination laws by making mortgage refinancing loans at extraordinarily high default interest rates to Black and Latino individuals in poor neighborhoods who had no income, no assets, and low credit scores, but high equity in their homes, and then foreclosing on the loans when the individuals defaulted. Following a jury verdict in favor of the homeowners, the United States District Court for the Eastern District of New York (Brodie, C.J.) entered final judgment awarding four of the homeowners $722,044 in compensatory damages and four other homeowners nominal damages.

On appeal, the lender argues that the district court erred in three ways: first, by finding the homeowners' claims timely under the doctrine of equitable tolling and the discovery rule of accrual; second, in its instructions to the jury on disparate impact and disparate treatment theories of discrimination; and third, in holding, contrary to the first jury's verdict, that a release-of-claims provision in a loan modification agreement signed by two homeowners was unenforceable as a matter of law.

AFFIRMED.

Judge Park dissents in a separate opinion.

CHIN, *Circuit Judge.*

In 1999, defendants-appellants Emigrant Mortgage Company, Inc. and Emigrant Bank (together, "Emigrant") introduced the STAR NINA ("no income, no asset") loan program. The STAR NINA program did not require potential borrowers to disclose their income or assets to receive a loan.

Plaintiffs-appellees ("Plaintiffs") are eight Black homeowners in New York City who applied for and received STAR NINA loans between 2004 and 2009. All Plaintiffs eventually defaulted on their loans and were the subject of foreclosure proceedings. Plaintiff Felipe Howell, for example, lost his home after Emigrant foreclosed on his STAR NINA loan. Although Howell had $424,000 in equity in his home when he took out the loan, he received nothing when the home was sold in foreclosure. Three other Plaintiffs lost their homes, and four remained in foreclosure as of oral argument on February 14, 2024. Plaintiffs sued Emigrant under various federal, state, and city laws, including, as relevant to this appeal, the Fair Housing Act (the "FHA"), 42 U.S.C. §§ 3604, 3605, the Equal Credit Opportunity Act (the "ECOA"), 15 U.S.C. § 1691 *et seq.*, and the New York City Human Rights Law (the "NYCHRL"), N.Y.C. Admin Code § 8-101 *et seq.*, alleging that Emigrant's lending practices in connection with the STAR NINA loans discriminated against Black and Latino borrowers.

Appendix A

After a six-week trial in 2016, the jury found that Emigrant's STAR NINA loan program discriminated on the basis of race and awarded Plaintiffs $950,000 in compensatory damages. In resolving the parties' post-trial motions under Rules 50 and 59 of the Federal Rules of Civil Procedure, the district court (Johnson, *J.*) *sua sponte* ordered a new trial as to all Plaintiffs limited to the issue of damages after finding that "the source of the damages assessed is not clear." *Saint-Jean v. Emigrant Mortg. Co.*, 337 F. Supp. 3d 186, 206 (E.D.N.Y. 2018). The second jury awarded four Plaintiffs compensatory damages totaling $722,044 and nominal damages of $1 each to the four Plaintiffs whose foreclosure proceedings were ongoing. The district court (Brodie, *C.J.*) entered final judgment on November 16, 2022.[1] Emigrant timely appealed on December 6, 2022.

On appeal, Emigrant argues that the district court erred in three ways: first, by finding Plaintiffs' claims timely under the doctrine of equitable tolling and the discovery rule of accrual; second, in its instructions to the jury on disparate impact and disparate treatment theories of discrimination; and third, in holding, contrary to the first jury's verdict, that a release-of-claims provision in a loan modification agreement signed by two Plaintiffs was unenforceable as a matter of law.

We conclude that the district court did not abuse its discretion in holding that Plaintiffs' claims were timely

1. Judge Sterling Johnson presided over the case through both jury trials. The case was reassigned to Chief Judge Margo K. Brodie on October 13, 2022, after Judge Johnson's passing.

under the doctrine of equitable tolling. We also conclude that there was no error in the district court's instructions to the jury. Finally, we agree that the release-of-claims provision contained in a loan modification agreement between Emigrant and two Plaintiffs is unenforceable as a matter of law. Accordingly, we AFFIRM the judgment of the district court.

BACKGROUND

On appeal following a jury verdict, we construe the evidence at trial in favor of the prevailing party – here, Plaintiffs. *See Triolo v. Nassau Cnty.*, 24 F.4th 98, 102 (2d Cir. 2022). During the first trial, Plaintiffs presented evidence, through their own testimony, expert witnesses, and documents, that showed not only that Emigrant's STAR NINA loan was designed to fail, but also that Emigrant targeted Black and Latino borrowers.

I. The Facts

A. The Plaintiffs and Their Loans

In 1979, Howell and his wife moved into a new home on 158th Street in Jamaica, Queens with their young children.[2] Over the next thirty years, the Howells paid down their mortgage until they owned their home

2. Howell died intestate on May 1, 2020. On March 22, 2022, the district court (Johnson, *J.*) granted Plaintiffs' motion, pursuant to Rule 25 of the Federal Rules of Civil Procedure, to substitute Felipe R. Howell, Jr., the administrator of Howell's estate, for Howell.

outright. Howell even burned his loan paperwork with friends to celebrate being debt-free.

By February 2008, Howell's home was worth $430,000. With only a $6,000 lien on the property, Howell had $424,000 in equity in his home. One day, a contractor knocked on Howell's door and told him that he could make some extra money by constructing a rental property in his yard. Howell, who was retired by then, expressed his interest in generating extra income and the contractor introduced Howell to a broker who helped him apply for loans. The broker introduced Howell to Emigrant.

Emigrant approved Howell for a $200,750 STAR NINA loan with an initial interest rate of 10.375%. Howell and Emigrant closed on the loan on February 6, 2008. Although Howell did not realize it at signing, his loan contained a provision providing for an 18% default interest rate if he missed a single payment. The default provision appeared in a separate rider to the main loan papers, and no one otherwise informed him of the default rate.

Howell could not afford the $1,817.61 monthly payments on his STAR NINA loan. Indeed, his inability to make a single payment triggered the 18% default rate, which quickly caused him to fall deeper into the debt he owed Emigrant. In March 2009, Emigrant obtained a judgment of foreclosure on Howell's home and purchased it for $1,000 in August 2009. Despite having had over $400,000 in equity in his home before he took out the STAR NINA loan, Howell lost his home – what he had called his "castle" – and received no part of the foreclosure proceeds. J. App'x at 807.

The other Plaintiffs presented similar stories at trial. All are Black homeowners who, having poor credit and low incomes but high equity in their homes, were candidates for Emigrant's STAR NINA loan program. Plaintiffs had largely similar experiences with Emigrant. First, seeking to refinance existing loans or mortgages, Plaintiffs went to Emigrant because the STAR NINA loan, unlike other loans, did not require income or asset verification. Then, at closing, when Plaintiffs felt rushed, Emigrant would produce a stack of documents for the borrowers to sign. Buried in those documents was a "default interest rate rider" separate from the main mortgage document giving Emigrant the power to impose an 18% default interest rate if a payment was overdue by thirty days. Ex. App'x at 662.

Eventually, and generally soon after closing, each Plaintiff defaulted on their loan and was subject to the 18% interest rate. Emigrant then initiated foreclosure proceedings against Plaintiffs' homes. Like Howell, Plaintiff Linda Commodore lost her home to Emigrant; most of the foreclosure proceeds went to paying Emigrant. Plaintiffs Jeanette and Beverely Small, a mother and daughter who lived with Beverley's young son, sold their apartment to avoid foreclosure, though most of the proceeds went to paying Emigrant. Two married couples – Jean Robert and Edith Saint-Jean and Felex and Yanick Saintil – were still in foreclosure proceedings at the time of oral argument in this case.

The Saintils delayed foreclosure by requesting two loan modifications from Emigrant. In March 2010, the couple entered into their second modification agreement

with Emigrant whereby Emigrant reduced their monthly payments to $2,804.38 and reduced the interest rate on the loan to 6% per year for five years, after which the contract provided that "the interest rate shall be reset to the original fixed rate term of the mortgage." Ex. App'x at 631. In exchange, the Saintils submitted an initial payment of $5,632.98 to Emigrant. As part of the modification agreement, the Saintils agreed to "release and forever discharge Emigrant . . . from any and all claims" they might have against Emigrant. *Id.* at 632-33.

The Saintils still could not afford the reduced monthly payment, but they entered the agreement out of fear that if they did not modify their loan Emigrant would "take [their] house." J. App'x at 1788. Indeed, Emigrant eventually stopped accepting payments from them and initiated foreclosure proceedings.

B. The STAR NINA Loan Program[3]

Emigrant offered STAR NINA loans in response to an apparent "marketplace demand for a no-income verification loan product for people with low credit scores." J. App'x at 2396. Because Emigrant did not ask potential borrowers to report their income or assets on the loan application, STAR NINA loans were "based solely on the strength of collateral values with no consideration given to the borrowers' capacity to repay." Ex. App'x at 672.

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3. The facts in this section and the next are drawn primarily from the testimony of expert witnesses at trial.

STAR NINA loans had four unusual characteristics. First, Emigrant did not verify borrowers' income or assets; second, a credit score below 600 was *required*; third, each loan came with a default interest rate of 18%; and fourth, borrowers had to have high equity – in the ballpark of 50% – in their homes.

When considered together, these characteristics made it likely that STAR NINA loans would fail from the outset: "[b]ecause these loans were underwritten based on the collateral value of the underlying property and not on the borrower's ability to repay, there was little assurance that borrowers who defaulted on the loan would be able to make any payments at the default interest rate." Ex. App'x at 662 (findings of 2009 New York State Banking Department report).

No income, no asset loans are not uncommon, but a typical no-income, no-asset borrower is an individual with a "[great] deal of equity" and "extremely high credit," who has "difficulty identifying their income." J. App'x at 713. Emigrant's STAR NINA loan – which looked to credit scores only to *require* a low one – was therefore "absolutely" different from a typical no-income, no-asset loan. *Id.* Rebecca Walzak, a mortgage lending consultant and expert in underwriting and mortgage industry practices, explained that STAR NINA loans were "targeted to some of the most vulnerable individuals in the community," *id.* at 771, and described the terms as "the worst [she] had ever seen in a mortgage loan." *Id.* at 701.

Despite the high risk of default, the loans were highly profitable for Emigrant; indeed, it is apparent

that Emigrant made these loans *because* it was likely the borrowers would default. *See* Ex. App'x at 662 ("[Emigrant's] sole consideration in granting these mortgages seems to be whether there is sufficient equity cushion to cover arrears, default costs, and legal fees in a foreclosure proceeding.") (findings of New York Banking Department). The typical STAR NINA borrower had high equity in their home, generally because of years of paying down an original mortgage, and so there was a "sufficient equity cushion" to more than cover Emigrant's original loan as well as costs and legal fees in a foreclosure proceeding. *Id.* at 662. Indeed, STAR NINA loans were "highly profitable" for Emigrant, *id.* at 695, and generated $50 million in interest revenue in 2008 alone.

While conducting an audit of Emigrant, the New York Banking Department determined that Emigrant did not "disclose[] [the default interest rate] in the underlying mortgage note but only in the rider," Ex. App'x at 662, and "there is no evidence . . . that brokers from whom [Emigrant] received applications . . . disclosed the 18% default interest rate to the borrower at the time of application or thereafter." *Id.* After the New York Banking Department criticized the use of the 18% default interest rate in 2008, Emigrant discontinued the STAR NINA loan program.[4]

4. At a December 2008 board meeting, Emigrant's CEO Howard Milstein "noted that the Bank has withdrawn from the STAR mortgage lending program, resulting from a criticism . . . regarding the Bank's default interest rider." Ex. App'x at 719 (Emigrant board meeting minutes dated December 9, 2008).

C. The Discriminatory Nature of the STAR NINA Program

There was another dimension to the STAR NINA program beyond the unusual features of the loan that often led to default – Emigrant also made the loans to Black and Latino borrowers more frequently than to borrowers of other races. Statistical evidence at trial showed that STAR NINA loans given between 2004 and 2010 were disproportionately sold to Black borrowers in neighborhoods that were majority Black and Latino. In communities with 10% or less Black or Latino residents, 23% of Emigrant's refinancing loans were STAR NINA loans. But as the percentage of Black and Latino residents increased to upwards of 80% of a given census tract, Emigrant's STAR NINA loans increased too, almost doubling to comprise up to 45% of its refinancing loans issued in the same area.

A different statistical analysis compared neighborhoods that were similar in terms of creditworthiness, median household income, homeownership rate, and level of educational attainment. As the proportion of Black and Latino residents in a neighborhood increased, the number of STAR NINA loans also increased by a statistically significant percentage, even when controlling for credit score and other non-race-related factors.

Emigrant also targeted Black and Hispanic communities through their STAR NINA advertising campaigns. Between 2005 and 2008, Emigrant spent $102,734 – 76% of its overall advertising budget – on

running ads in four newspapers catering to Black and Hispanic readerships: *Caribbean Life, Black Star News, Oui* (a Spanish-language newspaper), and *Mi Zona Hispana*.

After 2008, once the STAR NINA loan program ended, Emigrant stopped advertising in those newspapers. From 2009 to 2010, Emigrant's newspaper spending dropped from $102,734 to $200. Emigrant devoted 82% of its total advertising spending to advertising in newspapers that circulated in areas with a combined Black and Hispanic population of over 80%. And 96% of the images in Emigrant's ads featured families who were either Black or Hispanic. According to a statistical analysis, this constituted a "positive and strong correlation" between the Black and Hispanic population and Emigrant's advertising spending.

Emigrant's internal communications and policies showed that Emigrant was aware of race-based disparities in its STAR NINA loan-writing, and that it encouraged race-based targeting of the loan. For instance, Vice Chairman James Woolsey acknowledged the racial disparity in a July 2006 email, writing to a colleague that there is a "[v]ery simple answer to why the pricing of loans to blacks is higher than to whites." Ex. App'x at 711. He went on to explain that in 2004, 2005, and 2006, the percentage of loans made to Black borrowers that were STAR NINA loans was 50%, 75%, and 70%, respectively, compared to 22%, 40%, and 48% of the loans to White borrowers. *Id.*

Other documents showed that Emigrant targeted "ethnic parts of the community," J. App'x at 993, and tracked advertising expenditures in "African-American," "Caribbean," "Haitian," and "Hispanic" newspapers. *Id.* at 481. Emigrant did not similarly track advertising targeted at White neighborhoods or readerships. Moreover, STAR NINA loans were sold "almost exclusively by brokers." *Id.* at 989 (testimony of CEO Howard Milstein).

D. Plaintiffs Learn of Emigrant's Discriminatory Lending Practices

Even though all Plaintiffs experienced similar issues with their STAR NINA loans – rushed closings, hidden terms, unaffordable monthly payments, a punitive interest rate, foreclosure or threats of foreclosure, and mental and emotional turmoil over their debt and losing their homes – none of the Plaintiffs was aware of the possibility that the loans were discriminatory until May 2009, when the Saint-Jeans arrived at foreclosure court for a proceeding with Emigrant.

As the Saint-Jeans waited in the courthouse lobby, they realized that there were other individuals also waiting for proceedings involving Emigrant. Jean Robert Saint-Jean observed that the other borrowers were also "people of color." *Id.* at 1601-02. He saw that when cases involving Emigrant were called, "[e]verybody [] standing in the room" were "[a]ll these other people of color," and that this observation "push[ed]" him to ask his lawyer about what he had observed. *Id.* at 1601.

Felex and Yanick Saintil joined the case in May 2012. Prior to joining the case, Felex Saintil did not know anyone else who received a STAR NINA loan, nor did he know to whom Emigrant was targeting its advertising. Beverley Small also did not know of anyone else who had received a STAR NINA loan when she closed on hers. In August 2013, however, she and Jeanette learned about other Black borrowers who had lost their homes as a result of defaulting on STAR NINA loans, and after learning these facts they began to suspect discrimination. Linda Commodore explained: "I met with my now attorneys and after discussing my situation, I realized that there was information that I wasn't aware of and I believe that it was, it was discriminatory." *Id.* at 1736. The Smalls joined the case in 2014. The remaining Plaintiffs learned of Emigrant's discrimination in 2013 and likewise joined the case in 2014, also after learning facts of their discrimination and speaking with counsel.

II. Proceedings Below

On April 29, 2011, Jean Robert and Edith Saint-Jean filed this action against Emigrant, alleging, *inter alia*, racial discrimination in violation of the FHA, 42 U.S.C. §§ 3604 and 2605, the ECOA, 15 U.S.C. § 1691 *et seq.*, and the NYCHRL, N.Y.C. Administrative Code § 8-101 *et seq.*

On June 8, 2011, Emigrant moved to dismiss the complaint, arguing, *inter alia*, that the claims were time-barred under the applicable statutes of limitation. On May 4, 2012, while Emigrant's motion to dismiss was pending, Plaintiffs filed a first amended complaint adding Felex and Yanick Saintil as parties.

On September 25, 2014, the district court denied Emigrant's motion to dismiss, adopting the report and recommendation of the magistrate judge (Orenstein, *M.J.*) to conclude that the discovery rule and the doctrine of equitable tolling applied to Plaintiffs' claims. On October 2, 2014, Plaintiffs filed a second amended complaint adding the remaining Plaintiffs. On August 3, 2015, Emigrant moved for summary judgment, arguing, *inter alia*, that Plaintiffs' claims were time-barred and neither the discovery rule nor the doctrine of equitable tolling could save the claims. On February 26, 2016, the district court heard oral argument on the motion and denied it, ruling from the bench.

The first trial took place on issues of liability and damages from May 23 to June 27, 2016. The jury found Emigrant liable as to all Plaintiffs except the Saintils and awarded compensatory damages of $950,000. The jury determined that the Saintils knowingly and voluntarily agreed to release their claims against Emigrant in their March 2010 modification agreement. After trial, Emigrant moved, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, for judgment as a matter of law or, in the alternative, a new trial. Plaintiffs also moved for a new trial as to the Saintils, arguing that contrary to the jury's verdict, the release provision in Saintils' loan modification agreement was unenforceable.

Two years later, the district court denied Emigrant's post-trial motions in their entirety and granted Plaintiffs' Rule 50 motion as to the Saintils, ruling that the Saintils' waiver was unenforceable as a matter of law. The district

court also *sua sponte* ordered a new trial as to all Plaintiffs, solely on damages, reasoning that the original jury award was "against the weight of the evidence," and that "the damages . . . [did not] succeed at restoring Plaintiffs to their pre-STAR NINA loan positions," *Saint-Jean*, 337 F. Supp. 3d at 208-09.

Following a second trial on damages that took place from May 7 to May 22, 2019, a jury awarded $722,044 in compensatory damages to the four Plaintiffs who had lost their homes, and $1 each in nominal damages to the four Plaintiffs whose foreclosure proceedings remained ongoing. The district court entered final judgment in favor of Plaintiffs on November 16, 2022.

This appeal followed.

DISCUSSION

On appeal, Emigrant argues principally that the district court: (1) erred in holding that Plaintiffs' claims were timely pursuant to the doctrine of equitable tolling and the discovery rule; (2) incorrectly instructed the jury on disparate impact and intentional discrimination claims; and (3) erroneously overturned the jury's verdict as to the Saintils by finding that the release-of-claims provision is unenforceable as a matter of law. We address each issue in turn after first providing an overview of the FHA.

I. The Fair Housing Act

Section 3604 of the FHA, also known as Title VIII of the Civil Rights Act of 1968, makes it unlawful to

"make unavailable . . . a dwelling to any person because of race, color, . . . or national origin." 42 U.S.C. § 3604(a); *see LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995). Section 3605 of the FHA makes it unlawful for "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate . . . in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, . . . or national origin." 42 U.S.C. § 3605(a).

As the Supreme Court has held, disparate impact discrimination claims are cognizable under the FHA. *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.* ("*Inclusive Communities*"), 576 U.S. 519, 545-46, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015) ("The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.").

Courts have held that "redlining" violates the FHA. *See, e.g., Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1359 (6th Cir. 1995); *NAACP v. American Fam. Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992); *Ring v. First Interstate Mortg., Inc.*, 984 F.2d 924, 927-28 (8th Cir. 1993). Redlining is "the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents." *United Companies Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203 n.5

(D. Mass. 1998); *see also, e.g., Crawford v. Signet Bank*, 179 F.3d 926, 928 n.4, 336 U.S. App. D.C. 316 (D.C. Cir. 1999) ("[R]edlining is the practice of financial institutions intentionally not lending to certain neighborhoods or parts of a community." (internal quotation marks omitted)); Raymond H. Brescia, *Subprime Communities: Reverse Redlining, The Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 Albany Gov't L. Rev. 164, 178 (2009) ("The term 'redlining' derives its origins from lending practices where bankers would literally draw a red line on maps, identifying the communities – typically communities of color – where the bank would *not* extend credit." (emphasis added)).

Courts have also recognized "reverse redlining" claims under the FHA. Reverse redlining is "'the practice of *extending* credit on unfair terms' because of the plaintiff's race and geographic area." *Steed v. EverHome Mortg. Co.*, 308 F. App'x 364, 368 (11th Cir. 2009) (quoting *Hargraves v. Cap. City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000)) (emphasis added). In reverse redlining cases, lenders engage in "predatory" lending practices, including imposing "exorbitant interest rates, lending based on the value of the asset securing the loan rather than a borrower's ability to repay . . . , repeated foreclosures, and loan servicing procedures in which excessive fees are charged" in certain neighborhoods. *Hargraves*, 140 F. Supp. 2d at 20-21.[5]

5. In 1993, the Senate Committee on Banking, Housing, and Urban Affairs conducted a hearing on reverse redlining. Senator Alfonse M. D'Amato called "reverse redlining [] among the most pernicious forms of racial and ethnic discrimination and consumer

Reverse redlining is a product of redlining, because the latter creates "a credit-vacuum filled by predatory lenders" who know that borrowers in historically redlined areas "are a captive market with no access to reasonably-priced credit." *Equity Predators: Stripping, Flipping and Packing Their Way to Profits, Hearing Before Special Comm. On Aging*, 105th Cong. 1, 86 (Mar. 16, 1998) (statement of William J. Brennan, Jr., Atlanta Legal Aid Society, Inc.). Instead of *not* making loans, as in a traditional redlining case, a lender engages in reverse redlining when it *makes* loans in a community based on race and does so in an unfair and predatory way.

In *Hargraves*, to proceed on a reverse-redlining theory, the plaintiff was required to show that the defendant's lending practices were "unfair" and "predatory" and that the defendants either intentionally targeted borrowers on the basis of race or that there was a disparate impact on the basis of race. *Hargraves*, 140 F. Supp. 2d at 20-21. Hence, the court considered two prongs of a reverse redlining claim: first, whether there were "unfair" and "predatory" loan terms, and second, whether there was discrimination based on the familiar theories of disparate treatment or disparate impact discrimination.

While we have not addressed a reverse redlining case in our Circuit, the Supreme Court has instructed that the FHA is to be given a "generous construction," *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725,

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fraud." *Reverse Redlining; Problems in Home Equity Lending: Hearings Before the Senate Comm. On Banking, Hous., and Urban Affairs*, 103d Cong. 243, 246 (Feb. 17, 1993).

731, 115 S. Ct. 1776, 131 L. Ed. 2d 801 (1995), and district courts (including in our Circuit) have permitted reverse redlining claims to proceed under the FHA, the ECOA, and the TILA. *See, e.g., M&T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 574 (E.D.N.Y. 2010) (FHA and ECOA); *Barkley v. Olympia Mortg. Co.*, Nos. 04-CV-875 (RJD), 05-CV-187 (RJD), 05-CV-4386 (RJD), 05-CV-5302 (RJD), 05-CV-5632 (RJD), 05-CV-5679 (RJD), 2007 U.S. Dist. LEXIS 61940, 2007 WL 2437810, at *13-15 (E.D.N.Y. Aug. 22, 2007) (FHA); *Hargraves*, 140 F. Supp. 2d at 20-21; *Henderson v. Vision Prop. Mgmt., LLP*, 2021 U.S. Dist. LEXIS 158556, 2021 WL 3772882, at *4-5 (E.D. Mich. Aug. 23, 2021) (FHA and ECOA). Moreover, Emigrant has not contested the cognizability of a reverse redlining claim under the FHA. Accordingly, we hold that where a defendant lender engages in "unfair" or "predatory" lending practices targeting borrowers based on race, or where those lending practices have a disparate impact based on race, this is reverse redlining in violation of the FHA.

II. Timeliness of Plaintiffs' Claims

Emigrant contends the district court erred in determining that Plaintiffs' claims, though brought after the expiration of the otherwise applicable limitations periods, were timely under the discovery rule of accrual and the doctrine of equitable tolling.

To bring a claim under the FHA, "[a]n aggrieved person may commence a civil action . . . 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). The applicable statutes of limitation are two years under the FHA and the ECOA, and three years under the NYCHRL. 42 U.S.C. § 3613(a)(1)(A) (FHA); 15 U.S.C. § 1691e(f) (eff. Oct. 28, 1974) (ECOA); N.Y. C.P.L.R. § 214 (NYCHRL).

The timeliness dispute stems from the parties' different conceptualizations of Plaintiffs' injury. Claims under the FHA, like other federal causes of action, accrue when a "plaintiff knows or has reason to know of the injury that is the basis of the action." *Leon v. Murphy*, 988 F.2d 303, 309 (2d Cir. 1993) (internal quotation marks omitted). Accordingly, we must first identify the injury that animates Plaintiffs' claims. Emigrant's position is that Plaintiffs' injury is the unfavorable loan itself, meaning that any claims accrued at closing, or, at the latest, upon default. On the other hand, Plaintiffs contend that they are not suing because they received financially unfavorable loans; rather, their claims for relief arise from the fact that, as the jury found, they were "discriminated against in a systemic fashion." Pl. Br. at 17, 26. Alternatively, Plaintiffs argue that even if their claims accrued at closing or upon default, equitable tolling should apply.

We agree that the relevant injury is discrimination and not the loan itself. The "discriminatory housing practice" is not the making of an onerous loan but it is, instead, Emigrant's targeting of Black and Latino borrowers and pattern of writing STAR NINA loans to a disproportionate number of Black borrowers knowing that the loans were likely to fail. While Plaintiffs were

no doubt harmed by the loans themselves, their claims against Emigrant sound in discrimination, and not, for instance, fraud related to the loans. As the district court in *Phillips v. Better Homes Depot, Inc.* put it, "[t]here is a difference between being aware that you got a bad deal and being aware that you were discriminated against in a systematic fashion." No. 02-CV-1168 (ERK), 2003 U.S. Dist. LEXIS 27299, 2003 WL 25867736, at *25 (E.D.N.Y. Nov. 12, 2003); *see also id.* (discussing *Barrett v. United States*, 689 F.2d 324, 327-30 (2d Cir. 1982)) (holding that, "in a case of discrimination, a victim may not know he or she has been the target of discrimination until meeting other victims or learning more about lending practices in minority communities").

Accordingly, and as we explain further below, we hold that even if Plaintiffs' claims accrued at closing or upon default when they first learned of the onerous default interest rate, the district court did not abuse its discretion in exercising its equitable power to toll the statute of limitations until the date when Plaintiffs knew or had reason to know of their injury – that they were victims of Emigrant's sophisticated and systemic pattern of discriminatory lending. Because we conclude that the claims are timely under the doctrine of equitable tolling, we do not reach the issue of whether they are also timely under the related, but distinct, doctrine of the federal rule of discovery.[6]

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6. While "[t]he distinction between equitable tolling and the diligence-discovery rule has not always been clear in our caselaw," we see the difference as follows: the discovery rule "*delays* the date of accrual" whereas "the doctrine of equitable

A. Standard of Review

"A decision whether to equitably toll a statute of limitations is left to the sound discretion of the district court, and should not be disturbed absent an abuse of that discretion." *Kregos v. Associated Press*, 3 F.3d 656, 661 (2d Cir. 1993); *accord A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 144 (2d Cir. 2011) (district court's grant of equitable tolling is generally reviewed for "abuse of discretion"). We have also explained, however, that "the operative review standard" for equitable tolling depends on "what aspect of the lower court's decision is challenged." *Belot v. Burge*, 490 F.3d 201, 206 (2d Cir. 2007). "[W]e review the legal premises for [the district court's] conclusion *de novo*, the factual bases for clear error, and the ultimate decision for abuse of discretion."

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tolling applies *after* the claim has already accrued, suspending the statute of limitations to prevent unfairness to a diligent plaintiff." *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 801 (2d Cir. 2014) (internal citations and quotation marks omitted). We decline to consider whether Plaintiffs may have an argument that the discovery rule applies to their claims, and instead analyze Plaintiffs' claims under the equitable tolling doctrine because *even assuming* an accrual date of signing (which is Emigrant's position), the statutes of limitation should still be tolled to when Plaintiffs began or had reason to suspect discrimination, as a matter of equity. *Dillman v. Combustion Eng'g, Inc.*, 784 F.2d 57, 60 (2d Cir. 1986) (holding that in the context of a Title VII claim, "when an employer's misleading conduct is responsible for the employee's unawareness of his cause of action" and is "extraordinary" enough, "equitable tolling will defer the start of the . . . filing period from the time of the discriminatory action to the time the employee should have discovered the action's discriminatory nature").

DeSuze v. Ammon, 990 F.3d 264, 268 (2d Cir. 2021). Only where the court "has understood the governing law correctly, and has based its decision on findings of fact which were supported by the evidence, but the challenge is addressed to whether the court's decision is one of those within the range of possible permissible decisions," will we review for abuse of discretion in both "name" and "operation." *Belot*, 490 F.3d at 206-07.

The district court addressed the issue of timeliness four times throughout the life of the case: in denying Emigrant's motion to dismiss, its motion for summary judgment, its motion at the close of trial, and its posttrial motion. The magistrate judge also addressed the issue of timeliness. We have emphasized that, because "equitable tolling often raises fact-specific issues premature for resolution on a Rule 12(b)(6) motion, before a plaintiff can develop the factual record . . . it is generally improper to dismiss a complaint as untimely." *Clark v. Hanley*, 89 F.4th 78, 94 (2d Cir. 2023). On summary judgment, "where a reasonable factfinder could conclude" that a plaintiff's claims are timely, "courts routinely . . . deny summary judgment." *Id.* at 95. Judge Johnson's denials of Emigrant's motions to dismiss and for summary judgment based on timeliness were proper.

At the close of trial and again in subsequent motion practice, with the benefit of six weeks of evidence and a jury verdict for Plaintiffs, Judge Johnson denied Emigrant's requests for judgment as a matter of law on the timeliness issue. The facts as established by the evidence at trial show that the district court did not abuse its discretion in equitably tolling the statutes of limitation.

B. Applicable Law

"Statutes of limitations are generally subject to equitable tolling where necessary to prevent unfairness to a plaintiff who is not at fault" for lateness in filing. *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004). "The taxonomy of tolling, in the context of avoiding a statute of limitations, includes at least three phrases: equitable tolling, fraudulent concealment of a cause of action, and equitable estoppel." *Pearl v. City of Long Beach*, 296 F.3d 76, 81 (2d Cir. 2002). We conclude here that the doctrine of equitable tolling applies to render Plaintiffs' claims timely in this case.

A district court may exercise its discretion to equitably toll the statute of limitations once a litigant has demonstrated "'that some extraordinary circumstance stood in her way' and . . . 'that she has been pursuing her rights diligently.'" *Doe v. United States*, 76 F.4th 64, 71 (2d Cir. 2023) (alterations adopted) (quoting *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 144 (2d Cir. 2011)). "This standard calls for reasonable diligence, not maximum feasible diligence, which a [plaintiff] may satisfy by showing that he acted as diligently as reasonably could have been expected under the circumstances." *Harper v. Ercole*, 648 F.3d 132, 138-39 (2d Cir. 2011) (emphases, internal quotation marks, and internal citations omitted). Importantly, equitable tolling is appropriate where, "despite all due diligence," a plaintiff "is unable to obtain vital information bearing on the existence of his claim" within the statute of limitations period. *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 182 (2d Cir. 2008)

(quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990)). Equitable tolling may be appropriate even if there are lengthy delays in filing. *See, e.g., Baskin v. Hawley*, 807 F.2d 1120, 1123, 1130 (2d Cir. 1986) (tolling the statute of limitations for eight years).

"While equitable tolling extends to circumstances outside both parties' control, the related doctrines of equitable estoppel and fraudulent concealment may bar a defendant from enforcing a statute of limitation when its own deception prevented a reasonably diligent plaintiff from bringing a timely claim." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 164, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013) (Sotomayor, *J.*, concurring). This Circuit has explicitly clarified that "fraudulent concealment is not essential to equitable tolling." *Valdez*, 518 F.3d at 182; *Veltri*, 393 F.3d at 323 ("The relevant question is not the intention underlying defendants' conduct, but rather whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action.").

To show fraudulent concealment, a plaintiff must establish that: (1) the defendant concealed the existence of the cause of action from the plaintiff; (2) the concealment prevented plaintiff's discovery of the claim within the limitations period; and (3) the plaintiff's ignorance of the claim did not result from a lack of diligence. *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988). A plaintiff can prove concealment by showing "either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing." *Id.*

C. Application

In the circumstances here, we agree with the district court that equitable tolling was appropriate because, through no fault of their own, Plaintiffs did not learn of their cause of action, and could not reasonably be expected to do so with the exercise of due diligence, within the limitations period. Plaintiffs demonstrated that their inability to discover the discriminatory practice was an extraordinary circumstance standing in their way of bringing suit, and that they were inhibited from pursuing their rights diligently until they were on notice of their claims. Though that alone would be enough to support the district court's discretionary equitable tolling determination, the court's determination is further supported by the fact that Emigrant took steps to conceal the discriminatory nature of the STAR NINA loan such that Plaintiffs were reasonably prevented from learning about their *discrimination* cause of action within the statutory period.

The core inquiry of our equitable tolling analysis is whether there is "unfairness to a plaintiff who is not at fault" such that a district court may exercise its discretion and equitable power to toll the statute of limitations. *See Veltri*, 393 F.3d at 322. While the dissent criticizes our decision as creating a "fairness-based tolling rule," Diss. Op. at 8, equitable tolling has always been based on principles of fairness and equity. *See Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 48-49 (2d Cir. 1985) ("Though ordinarily the applicable period starts to run on the employer's commission of the unlawful act

and is not tolled pending the employee's realization that the conduct was discriminatory, a court might in some cases permit tolling as a matter of fairness." (internal quotation marks omitted)). Of course, we do not rely solely on notions of fairness to conclude that equitable tolling is appropriate in this case.

It is the egregious nature of Emigrant's discriminatory lending practice that makes this case extraordinary. Emigrant targeted Black and Hispanic borrowers who owned substantial equity in their homes and imposed exorbitant default interest rates designed to lead them to default on their loans. Although Plaintiffs had owned their homes from a minimum of five years to as many as thirty years, foreclosure proceedings were initiated against them within two years of the origination of their Emigrant origination loans. And unbeknownst to Plaintiffs until years later, they were targeted for the loans because of their race.

We therefore agree with the district court that the extraordinary facts here support equitable tolling because Plaintiffs, through no lack of diligence of their own, were unaware of the facts of discrimination within the statutory period. Each Plaintiff signed his or her loan with Emigrant without knowledge of other borrowers or Emigrant's marketing and business strategies surrounding the STAR NINA loan. It was not until 2009, when the Saint-Jeans observed other Black borrowers in foreclosure court, that those Plaintiffs learned that there were others like them who were subjected to the predatory loans.

Moreover, Emigrant took steps to conceal the predatory nature of the loans and Plaintiffs had no reason to suspect the discriminatory nature of the lending practices. Indeed, Emigrant almost exclusively targeted Black and Hispanic media outlets. Plaintiffs had no way of knowing that these loans were not similarly targeted towards White communities. And, because of the individualized nature of each Plaintiff's transaction with Emigrant, there was nothing at closing to indicate to Plaintiffs that the STAR NINA loans were being given disproportionately to Black borrowers. All Plaintiffs testified that Emigrant rushed them to sign stacks of documents at closing, and a New York Banking Department review of Emigrant's policy revealed that the 18% default interest rate was left out of the main documents and included only in a separate rider to the loan, further obfuscating the true financial impact of the STAR NINA loan. Emigrant also dissuaded Plaintiffs from bringing lawyers to closing, representing to Plaintiffs that a lawyer at closing would represent their interests. On this record, and construing the facts in Plaintiffs' favor, there is sufficient evidence that Emigrant took steps to conceal the discriminatory nature of STAR NINA loans.[7] *Jones v. Treubig*, 963 F.3d 214, 224 (2d Cir. 2020) ("[W]e must 'consider the evidence in the light most favorable to the party against whom the motion was made . . . .'" (quoting *Black v. Finantra Cap., Inc.*, 418 F.3d 203, 209 (2d Cir. 2005))).

7. Though we agree with the district court that there was concealment here, we emphasize that concealment is not a requirement for equitable tolling – avoiding unfairness to the plaintiff is reason enough to equitably toll a statute of limitations. *See Veltri*, 393 F.3d at 322-23.

Our conclusion flows from well-settled principles of equitable tolling and fraudulent concealment. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11, 134 S. Ct. 1224, 188 L. Ed. 2d 200 (2014) ("Congress is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law.") (citing *Rotella v. Wood*, 528 U.S. 549, 560, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)). The dissent paints equitable tolling as a rigid, stepwise doctrine, but that is not correct. Indeed, "[a]s the courts in this country recognized early on, 'the essence of the doctrine of equitable tolling is that a statute of limitations does not run against a plaintiff who is unaware of his cause of action.'" Joseph A. Seiner, *Time, Equity, and Sexual Harassment*, 12 U.C. Irvine L. Rev. 573, 595 (2022) (alterations adopted) (quoting *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1363 (Fed. Cir. 2008)). Additionally, despite the dissent's assertion that "Title VII [and ADEA] claims accrue at the time a plaintiff learns of the discriminatory *act*," Diss. Op. at 17, we have held that the time period is tolled or delayed pending the employee's realization that the conduct was discriminatory when "the employee was actively misled by his employer, he was prevented in some extraordinary way from exercising his rights, or he asserted his rights in the wrong forum, in which event tolling of the time bar might be permitted as a matter of fairness," *Miller v. IT&T*, 755 F.2d 20, 24 (2d Cir. 1985).

And there are district court cases in the Second Circuit that apply both the doctrines of equitable tolling and fraudulent concealment in similar discriminatory

lending contexts where, as here, the parties did not have any reason to suspect discrimination until they learned facts that caused them to realize that their experience was part of a larger pattern of discrimination.

For instance, *Barkley v. Olympia Mortgage Co.* involved an allegedly discriminatory and fraudulent property-flipping scheme, where plaintiffs alleged that defendants bought damaged properties at foreclosure sales and, working with appraisers, lenders, and lawyers, targeted persons of limited financial means and savvy in low-income Black and Latino communities and sold them the properties at inflated appraisal values while saddling the buyers with "unconscionable loans." 2007 U.S. Dist. LEXIS 61940, 2007 WL 2437810, at *1, 9. In denying defendants' motion to dismiss on timeliness grounds, the court noted that, "[w]ithout meeting [the] other [defendant's] clients or explaining their circumstances to an attorney who responsibly represented their interests, plaintiffs had no way of knowing exactly how and why they had been victimized," even though the plaintiffs "quickly realized they were on the receiving end of a defective product." *Id.* 2007 U.S. Dist. LEXIS 61940, at *17.

In *Council v. Better Homes Depot, Inc.*, the district court concluded it was "reasonable that the Plaintiffs were not aware that they were the victims of wrongdoing," because a "victim of discrimination may not know that he or she has been the target of discrimination until meeting other victims or becoming familiar with lending practices in minority communities." 2006 U.S. Dist. LEXIS 57851, 2006 WL 2376381, at *9.

The principles articulated by the district courts in these cases are readily applicable here. The structure of the STAR NINA lending program included features by which Emigrant sought to conceal the discriminatory nature of its predatory practices. Plaintiffs may have been injured individually by harsh interest rates and hidden terms, but it took knowledge of Emigrant's treatment of Plaintiffs in the aggregate to alert Plaintiffs to the probability of a claim for discrimination. *See Gabelli v. SEC*, 568 U.S. 442, 450-51, 133 S. Ct. 1216, 185 L. Ed. 2d 297 (2013) ("Usually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running. But when the injury is self-concealing, private parties may be unaware that they have been harmed. Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded. And the law does not require that we do so."). Indeed, had Plaintiffs individually sued Emigrant at the time of closing (or default) for discrimination, "they would not have survived a motion to dismiss the claims they now bring." Pl. Br. at 18.

For instance, to make out a claim of disparate impact, Plaintiffs would have needed to know facts showing a substantial adverse impact on Black borrowers at the time they took out their loans. To show disparate treatment, they would have needed to show that Emigrant was motivated at least in part by race to target them and other Black and Latino borrowers. Without any knowledge or facts as to other borrowers, and without knowledge

of the steps Emigrant took to target Black and Latino neighborhoods, none of the Plaintiffs would have been able to state a claim based on the information known to them at signing. And nothing in the record indicates that any Plaintiff had reason to inquire more into the possibility of discrimination at the time of signing. The district court thus did not abuse its discretion in tolling the statutes of limitation to the date when the Saint-Jeans first began to suspect discrimination. We affirm that decision; "[t]o hold otherwise would reward [Emigrant] for [its] evasiveness" stemming from its sophisticated, multifaceted pattern of targeting the STAR NINA loan to Black and Latino borrowers. *Phillips*, 2003 U.S. Dist. LEXIS 27299, 2003 WL 25867736, at *25.

We are not persuaded by Emigrant's arguments to the contrary. For instance, Emigrant cites *Pantoja v. Scott* as an example of a case where, in an FHA claim, the "alleged discriminatory act concluded with the closing on the apartment," No. 96-CV-8593 (AJP), 2001 U.S. Dist. LEXIS 17374, 2001 WL 1313358, at *10 (S.D.N.Y. Oct. 26, 2001). The facts of *Pantoja* are readily distinguishable. *Pantoja* involved an individual Puerto Rican resident who, pursuant to a lease providing the right to purchase the apartment he rented, applied to the owner of his condominium building for financing. The plaintiff alleged "that it was [the owner's] practice to provide secondary financing to purchasers but that [the owner] refused to do so for him, based on [racially] discriminatory reasons." *Id.* 2001 U.S. Dist. LEXIS 17374, at *1.

In granting defendants' motion to dismiss on timeliness grounds, the district court held that the owner's "refusal

to provide secondary financing (which Pantoja claims was due to a discriminatory motive) 'occurred or terminated,' at the *latest*, on [] the date of the real estate closing, when Pantoja purchased the apartment without secondary financing from [the owner]." *Id.* 2001 U.S. Dist. LEXIS 17374, at *9 (internal citations omitted). Thus, unlike our case, *Pantoja* involved one plaintiff and one alleged discrete act of discrimination – an instance that plaintiff himself alleged he was aware of even prior to closing. *See id.* 2001 U.S. Dist. LEXIS 17374, at *11. The plaintiff in *Pantoja* had all the information he needed to assert a claim under the FHA by his closing date, if not earlier. Not so here. At their respective STAR NINA closings, Plaintiffs were, at best, arguably advised of the loan terms – but they had no basis to infer racial discrimination.[8] While *Pantoja* is an example of an injury occurring, and ending, at closing, it does not help Emigrant's argument here because the evidence at trial supports a conclusion that Plaintiffs did not have *any* information about a possible discrimination claim at their respective closings.

By arguing that Plaintiffs were given all the terms of the predatory loans upfront at signing, Emigrant obfuscates the injury that forms the basis of Plaintiffs' discrimination claims. Emigrant is wrong that the "default interest rate . . . forms the core of Plaintiffs' case." Def.

8. As the extensive record in this case shows, whether Plaintiffs were properly apprised of the actual loan terms is also not clear. *See* Ex. App'x at 662 (New York Banking Department report noting conflicting information about the cost of Emigrant loans in its disclosures). We resolve this ambiguity on appeal in favor of Plaintiffs.

Br. at 31. Plaintiffs are not suing for the bad loans or the predatory terms; instead, they are suing for discrimination – Emigrant subjected them to predatory lending practices at least in part because of their race. Thus, even if Plaintiffs were apprised of the loan terms at closing, that would be of no moment in analyzing whether Plaintiffs knew or should have known about the *discrimination* at the time of closing. For the same reason, Emigrant's argument that "Plaintiffs also failed to offer any evidence that Emigrant representatives concealed material terms of the loans through untrue representations" is also irrelevant to the issue of whether Emigrant's conduct at the closings concealed their discrimination. *Id.* at 34.

In short, reasonable borrowers in Plaintiffs' position could not have known that they were victims of discrimination at signing, closing, default, or even foreclosure. Moreover, by misleading Plaintiffs into thinking that counsel at closing represented their interests, Emigrant took steps to conceal its discriminatory scheme. Accordingly, we hold that, on these facts, the district court did not abuse its discretion in applying the doctrine of equitable tolling, and the statute of limitations was thus tolled to the date on which Plaintiffs became aware of the discriminatory lending scheme.

III. The Jury Instructions

Emigrant argues that the district court's jury instructions on disparate impact and disparate treatment theories of discrimination were erroneous and require reversal. We find no reversible error in the challenged portions of the district court's instructions.

A. Standard of Review

We review challenges to a district court's jury instructions *de novo*. *Mirlis v. Greer*, 952 F.3d 36, 44 (2d Cir. 2020) (citing *Uzoukwu v. City of New York*, 805 F.3d 409, 414 (2d Cir. 2015)); *Boyce v. Soundview Tech. Grp., Inc.*, 464 F.3d 376, 390 (2d Cir. 2006) ("When a party challenges a court's jury charge, [the Second Circuit] reviews the jury instructions *de novo* and as a whole."). We will overturn a verdict on a challenge to jury instructions only if (1) the instructions were erroneous, and (2) the error was prejudicial. *See Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 152-53 (2d Cir. 2014).

"Jury instructions are erroneous if they mislead the jury or do not adequately inform the jury of the law," *Uzoukwu*, 805 F.3d at 414, and error is prejudicial where the appellant can show that the error, "in light of the charge as a whole," *Turley*, 774 F.3d at 153, improperly "influence[d] the jury's verdict," *Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000).

Moreover, in determining whether a jury instruction was so prejudicial as to warrant overturning the verdict, we must examine the jury charge "in its entirety," rather than "scrutinize[] [it] strand-by-strand." *Warren v. Dwyer*, 906 F.2d 70, 73 (2d Cir. 1990); *accord Coquina Invs. v. TD Bank, N.A.*, 760 F.3d 1300, 1309 n.8 (11th Cir. 2014) ("[W]hen the instructions, taken together, properly express the law applicable to the case, there is no error even though an isolated clause may be inaccurate, ambiguous, incomplete or otherwise subject to criticism."

(internal quotation marks omitted)). And, though our review is *de novo*, we emphasize that "a trial court has discretion in the style and wording of jury instructions, so long as the instructions . . . do not mislead the jury as to the proper legal standard." *Parker v. Sony Pictures Ent., Inc.*, 260 F.3d 100, 106-07 (2d Cir. 2001) (internal citation and quotation marks omitted).

B. Disparate Impact

We conclude that the district court's disparate impact jury instruction was neither erroneous nor unfairly prejudicial. The disparate impact instruction read, in relevant part:

> Plaintiffs are alleging that Defendants' practice of making STAR NINA loans has a discriminatory effect. For you to assess Plaintiffs' claim, you will consider the following.
>
> *First*, Plaintiffs must establish by a preponderance of the evidence that Defendants' practice of making STAR NINA loans actually or predictably had a substantial adverse impact on African-American[] or Hispanic[] borrowers.
>
> *Second*, if you find that Plaintiffs have proven the first factor, then you must decide whether Defendants have established by a preponderance of the evidence that the practice of making STAR NINA loans was necessary to achieve one or more substantial, legitimate,

> nondiscriminatory interests of Defendants. If you find that Defendants failed to establish that the practice was actually necessary to achieve their substantial, legitimate and nondiscriminatory interests, you must find for Plaintiffs on their discriminatory effect claim.
>
> *Third*, if you find that the STAR NINA loan program was necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of Defendants, then you must decide whether Plaintiffs have established by a preponderance of the evidence that Defendants' interests could have been served by another practice that had a less discriminatory effect. If Plaintiffs make this showing, then you must find for Plaintiffs on their discriminatory effect claim.
>
> I instruct you that Plaintiffs are not required to show that Defendants intended to discriminate in order to establish their claim of discriminatory effect.

J. App'x at 2461-63 (emphases added).

Emigrant asserts three challenges to the disparate impact instruction. First, Emigrant argues that the district court's articulation of the disparate impact burden – that Plaintiffs had to show a "substantial adverse impact on African-American[] or Hispanic[] borrowers" – was erroneous and prejudicial because it

"materially altered the [disparate impact] standard" by "fail[ing] to instruct the jury that disparate impact discrimination requires proof that African-American borrowers . . . suffered a *disproportionately* adverse effect from the STAR NINA loan program, as compared to non-African-American borrowers." Def. Br. at 24-25 (emphasis in original). Second, Emigrant argues that the instruction inadequately conveyed the requirement of a causal relationship between STAR NINA loans and the adverse impact on Black and Latino communities required to make a finding of disparate impact. Finally, Emigrant contends that the district court erred by not instructing the jury on Plaintiffs' "burden of proving an *available* alternative practice" that serves Emigrant's legitimate nondiscriminatory interests. Def. Br. at 46 (emphasis in original) (quoting *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016)).

1. Applicable Law

In the FHA context, "[a] disparate impact analysis examines a facially-neutral policy or practice . . . for its differential impact or effect on a particular group." *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988). To make out a claim of disparate impact under the FHA, a plaintiff must first establish a prima facie case by showing "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." *Regional Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35,

52-53 (2d Cir. 2002). This is a "modest" burden. *Francis v. Kings Park Manor, Inc.*, 992 F.3d 67, 73 (2d Cir. 2021). If the plaintiff makes this showing, the burden shifts to the defendant to "prove that its actions furthered, in theory and in practice, a legitimate, bona fide [business] interest and that no alternative would serve that interest with less discriminatory effect." *Huntington Branch, NAACP*, 844 F.2d at 936 (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148-49 (3d Cir. 1977)).

Thus, "[t]he basis for a successful disparate impact claim involves a comparison between two groups – those affected and those unaffected by the facially neutral policy." *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003). This comparison, which lies at the core of disparate impact liability, "must reveal that although neutral, the policy in question imposes a significantly adverse or disproportionate impact on a protected group of individuals." *Id.* (internal quotation marks omitted).

As for the causation requirement, the Supreme Court in *Inclusive Communities* noted that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." 576 U.S. at 542. Requiring a link between a defendant's policy and disparate impact therefore ensures that "racial imbalance does not, without more, establish a prima facie case of disparate impact." *Id.* (alterations adopted and internal quotation marks omitted).

2. Application

Examining the jury charge in its entirety, we conclude that there was no error, much less reversible error, in the district court's disparate impact instructions. Despite Emigrant's arguments to the contrary, the instructions properly apprised the jury of the elements of a disparate impact claim under settled Supreme Court and Second Circuit precedent.[9]

First, Emigrant argues that the district court should have instructed the jury that to succeed on their disparate impact claims, Plaintiffs had to show that Emigrant's practice of making STAR NINA loans "actually or predictably" had a "significantly adverse or disproportionate impact" on Black or Latino borrowers.

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9. As a threshold matter, Plaintiffs argue that Emigrant has waived its challenge to two of its objections to the jury instructions -- the comparative element and robust causation. *See* Pl. Br. at 33. Emigrant responds that it properly preserved all challenges to the jury instructions it now raises on appeal. Based on our review of the record, we find that Emigrant properly preserved its objection to the lack of "disproportionate" language. At the charge conference, counsel for Emigrant requested that "significantly disproportionate" be added to the charge. J. App'x at 2246. After the district court instructed the jury, Emigrant stated that it had "no additional [objections] besides the ones counsel mentioned" before. *Id.* at 2475.

With respect to Emigrant's objections on appeal to the lack of "robust causation" and a disparity "over and above" a certain baseline with respect to causation, for the reasons set forth in the discussion, we conclude that even if Emigrant had preserved these objections, its arguments have no merit.

J. App'x at 571. Emigrant contends that by omitting the word "disproportionate" in this phrase, the district court committed reversible error. We disagree.

We have consistently used the "significantly adverse or disproportionate" language to describe the comparative aspect of a disparate impact claim under the FHA. *See, e.g., Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, N.Y.*, 316 F.3d 357, 366 (2d Cir. 2003) ("[A] plaintiff must demonstrate that an outwardly neutral practice actually or predictably has a discriminatory effect; that is, has a *significantly adverse or disproportionate impact* on minorities.") (emphasis added); *Tsombanidis*, 352 F.3d at 575 ("To establish a prima facie case under [a disparate impact] theory, the plaintiff must show[] . . . a *significantly adverse or disproportionate impact on persons of a particular type* produced by the defendant's facially neutral acts or practices.") (emphasis in original) (internal quotation marks omitted); *MHANY*, 819 F.3d at 617 (setting forth the standard as "a significantly adverse or disproportionate impact on persons of a particular type").

Here, the district court instructed the jury that, to prevail on their disparate impact claim, Plaintiffs had to prove that Emigrant's STAR NINA lending practices "actually or predictably had a substantial adverse impact on African-American[] or Hispanic[] borrowers," J. App'x at 2462. The district court's "substantial adverse impact" language is not significantly different from our Circuit's settled "significantly adverse or disproportionate impact" language. It also mirrors, nearly word-for-word, the

model instruction from the leading set of pattern federal jury instructions. *Compare* Sand et al., Modern Federal Jury Instructions, Civil Instruction 87-33 (a defendant violates Title VIII under a disparate impact theory where the conduct "actually or predictably had a substantial discriminatory impact on the protected group," where "substantial discriminatory impact" means "a manner plainly disproportionate to how it affects other people") *with* J. App'x at 2462 ("Plaintiffs must establish by a preponderance of the evidence that Defendants' practice of making STAR NINA loans actually or predictably had a substantial adverse impact on African Americans or Hispanic[] borrowers.").

Emigrant contends that by leaving out the word "disproportionate," the district court improperly relieved Plaintiffs of their burden of proof and permitted the jury to find for Plaintiffs simply if the jury found that Plaintiffs suffered an adverse impact from the loans, without regard to the effect on Black borrowers as compared to non-Black borrowers. While we agree that disparate impact claims must apprise the jury of the requirement of a disproportionate or disparate effect on a protected class, we disagree that the district court's failure to use the word "disproportionate" at that particular point in the charge was prejudicial.

The district court's failure to include the word "disproportionate" in this part of the charge does not render the instruction as a whole an inaccurate statement of law requiring reversal. Indeed, the word appears elsewhere, and read as a whole, the charge made clear to

the jury that, to find for Plaintiffs, the jury had to compare the impact on Plaintiffs to similarly situated non-Black or Hispanic borrowers. For instance, in describing Plaintiffs' claims at the outset of the charge, the district court stated to the jury that

> the plaintiffs . . . claim that the defendants, Emigrant Mortgage Company and Emigrant Bank violated their rights under the Fair Housing Act, Equal Credit Opportunity Act and New York City Human Rights Law by offering loans on terms that were grossly unfavorable to the borrowers and by allegedly making those loans *disproportionately in African-American and Hispanic communities*.

J. App'x at 2438-39 (emphasis added).[10]

Accordingly, we are satisfied, based on our review of the charge in its entirety, that the instruction sufficiently described the requirement that the adverse impact be disproportionate on a protected class, in this case, on

10. We also note that Emigrant included the "significantly adverse or disproportionate impact" language in its own proposed jury instructions submitted to the district court. *See* J. App'x at 571. The proposed jury instruction reads verbatim, "Plaintiffs must prove by a preponderance of the evidence that Defendants (1) maintained a race-neutral practice or policy, that (2) had a significantly adverse or disproportionate impact on Black borrowers. Plaintiffs must also establish that the race-neutral policy or practice is the cause of the significantly adverse or disproportionate impact." J. App'x at 571 (footnotes omitted).

Black borrowers. We conclude that "the entire charge delivered a correct interpretation of the law." *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006). By focusing the jury on a "substantial adverse impact on African-American or Hispanic borrowers," J. App'x at 2462, the charge captured the necessary comparison of White borrowers to Black and Hispanic borrowers.[11] Moreover, there was substantial evidence adduced at trial from which a jury could (and did) find that Black borrowers were disproportionately affected by the predatory STAR NINA loans.

Second, Emigrant argues that the district court erred in its instruction on the causation element. According to Emigrant, the district court should have instructed the jury on the so-called "robust" causation requirement for disparate impact claims. For starters, nothing in Emigrant's proposed instruction references "robust" causation, and Emigrant does not provide its desired language in its brief before our Court.[12]

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11. While Emigrant may have wanted additional language explicitly advising the jury that it must base its finding by comparing the experience of Black borrowers to similarly situated White borrowers, there is no requirement that jury instructions be favorable to a party, *see Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 346 (2d Cir. 1994) ("While a more specific instruction might have been helpful, there is no basis for concluding that the jury was given a misleading or inaccurate impression of the law.").

12. As for its proposed jury instructions submitted to the district court, Emigrant requested the court instruct the jury that "Plaintiffs must also establish that the race-neutral

Emigrant argues that the Supreme Court "has emphasized that 'a robust causality requirement ensures that racial imbalance does not, without more, establish a *prima facie* case of disparate impact and thus protects defendants from being held liable for racial disparities they did not create.'" Def. Br. at 47-48 (quoting *Inclusive Communities*, 576 U.S. at 542 (alteration adopted)). Relying on this language in *Inclusive Communities*, and language in a Second Circuit case requiring plaintiffs "to show that there existed some demonstrable prejudicial treatment of minorities over and above that which is the inevitable result of disparity in income," Emigrant argues that the district court failed to instruct the jury that Emigrant could not be held liable for racial disparities outside of its control. *Boyd v. Lefrak Org.*, 509 F.2d 1110, 1113 (2d Cir. 1975).

We disagree that the cases require "robust" causation, and we agree with Plaintiffs that the requirement of a "causal link" between the STAR NINA lending practices and the adverse impact on Plaintiffs "is apparent on the face of the instruction." Pl. Br. at 39. Here, the district court instructed the jury to consider whether STAR NINA loans "*had* a substantial adverse impact" on Black and Hispanic communities. J. App'x at 2462 (emphasis added). A plain reading of the instruction makes clear that Plaintiffs were required to demonstrate a causal link between the STAR NINA loans and the discriminatory effect on Plaintiffs. We are unconvinced by Emigrant's

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policy or practice is the cause of the significantly adverse or disproportionate impact." J. App'x at 571.

argument that the district court should have instructed on a requirement of "robust causality" – that is not the law of disparate impact in our Circuit, or under the applicable regulations.

While we agree that a defendant may not be held liable for racial disparities it did not cause, we think that the standard causation language in the charge is sufficient to convey this principle, and the "robust causality" language is not necessary. In *MHANY*, for example, we affirmed the district court's finding of race-based disparate impact even though that disparity flowed from underlying socioeconomic disparities across races, which the defendant in *MHANY* did not create. 819 F.3d at 597-99, 606, 616-19. Moreover, we read *Inclusive Communities* to require, in terms of causation, that "a defendant's policy or policies caus[ed] [a] disparity." 576 U.S. at 521. There was ample evidence presented at trial that Emigrant's lending policies and practices caused a disproportionate number of STAR NINA loans to be written to Black borrowers. We see no reason to overturn the jury's verdict based on Emigrant's reliance on non-binding language from the above-referenced cases.[13]

13. The HUD regulations support our conclusion as well. The relevant regulation simply requires "a plaintiff to link a specific practice to a current or predictable disparity" to prove causation. Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19450, 19461 (Mar. 31, 2023). Thus, though we acknowledge that *Inclusive Communities* states that a "robust causality requirement ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact," 576 U.S. at 542 (alterations adopted and internal quotation marks

Finally, Emigrant's issue with the district court's instruction on the requirement of a "less discriminatory alternative" boils down to the district court's omission of the word "available." *See* Def. Br. at 46 (arguing the "instructions omitted entirely the requirement that any alternative actually be available"). According to Emigrant, this failure permitted Plaintiffs to suggest alternatives that were "mere conjecture" and not practically possible. *Id.* at 47.

We are not persuaded that this was error. As Plaintiffs point out, the jury instructions track HUD regulations nearly word-for-word. *Compare* J. App'x at 2462 (instructing that jury must consider whether Plaintiffs established that Emigrant's interests "could have been served by another practice that had a less discriminatory effect") *with* 24 C.F.R. § 100.500(c)(3) (a plaintiff may prevail by proving that the interests "could be served by another practice that has a less discriminatory effect"). And implicit in the language the district court used is the suggestion that there had to have been a viable alternative: the requirement that Plaintiffs *establish* that Emigrant's interests *could have* been served by another practice implies that the practice must be a viable alternative rather than mere speculation.

Accordingly, there was no error in the disparate impact jury instructions.

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omitted), we do not read *Inclusive Communities* to set forth a new rule requiring use of the words "robust causality," and, in any event, that language is not at odds with the instructions in this case.

C. Disparate Treatment

The district court gave the following instruction on disparate treatment:

> In order to prevail on their claim that the Defendants intentionally discriminated in lending practices that violated the Fair Housing Act, the Equal Credit Opportunity Act, and the New York City Human Rights Law, Plaintiffs must establish that:
>
> (1) the STAR NINA loan product was grossly unfair to the borrower; and
>
> (2) Defendants' effort to make STAR NINA loans in certain communities was motivated [] at least in part[] by race, color, or national origin.
>
> If you find that Plaintiffs have established these elements by a preponderance of the evidence, then you must find that Defendants violated the Fair Housing Act, the Equal Credit Opportunity Act, and the New York City Human Rights Law.
>
> Plaintiffs are not required to show that Defendants acted with racial animus, which means hatred or dislike for a particular racial or ethnic group. Nor do they need to prove that race, color, or national origin was the only

> reason for Defendants' conduct. Rather, they are only required to show that race, color, or national origin was one motivating factor. This means that in order for Defendants to be found liable for violating the Fair Housing Act, Equal Credit Opportunity Act, and New York City Human Rights Law, race, color, or national origin need only have played some role in Defendants' conduct.

J. App'x at 2460-61.

Emigrant contends that the district court erred by instructing that a finding of animus, defined as "hatred or dislike," was not a predicate to finding discrimination. Emigrant also argues that the district court erred by not stating that race had to be a "significant" factor in the decision. In our view, the disparate treatment instruction was also legally sufficient and thus we affirm.

Disparate treatment discrimination "involves differential treatment of similarly situated persons or groups" on account of race. *Huntington Branch, NAACP*, 844 F.2d at 933. An FHA plaintiff can show disparate treatment or intentional discrimination, however, without having to establish that the defendant was motivated by hatred, dislike, or bias. *See Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 177 (3d Cir. 2005); *see also Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 696 (E.D. Pa. 1992) ("In order to prove intentional discrimination it is not necessary to show an evil or hostile motive. It is a

violation of the FHAA to discriminate even if the motive was benign or paternalistic.").

The disparate treatment instruction here accurately stated the law and was sufficient to instruct the jury.[14] The district court correctly stated that a finding of ill will, hatred, or bias is not required to find intentional discrimination. Read as a whole, the district court's instruction on animus reads as a caution to the jury that animus, defined as hatred or ill-will, is not necessary for a finding of disparate treatment. This is correct; a party may intentionally discriminate without harboring hatred or ill-will toward a particular group. *See Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) (A plaintiff does "not need to allege discriminatory animus for her disparate treatment claim to be sufficiently pleaded" under the FHA.).

Our sister circuits have come to similar conclusions. *See, e.g., Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (A "plaintiff need not prove the *malice or*

14. Like the court's instructions on disparate impact, the disparate treatment instruction also mirrored Judge Sand's model jury instruction. *Compare* Sand et al., Modern Federal Jury Instructions, Civil Instruction 87-35 ("To establish a claim of disparate treatment under Title VIII, a plaintiff must prove by a preponderance of the evidence that the defendant intentionally deprived the plaintiff of a right protected by Title VIII, . . . and that the defendant did so, at least in part, because he intended to discriminate against plaintiff on account of plaintiff's [race].") *with* J. App'x at 2460. ("Defendants' effort to make STAR NINA loans in certain communities was motivated[,] at least in part, by race, color, or national origin.").

discriminatory animus of a defendant to make out a case of intentional discrimination.") (emphasis added); *Cmty. Servs., Inc.*, 421 F.3d at 177 (A defendant's "discriminatory purpose need not be malicious or invidious" to constitute intentional discrimination.); *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 472-73 & n.7 (11th Cir. 1999) ("[R]acial animus and intent to discriminate are not synonymous. . . . In other words, ill will, enmity, [and] hostility are not prerequisites of intentional discrimination."); *accord Weiss v. La Suisse*, 141 F. App'x 31, 33 (2d Cir. 2005) (summary order) (same).

Emigrant's next argument – that race must be a *significant* motivating factor in a disparate treatment case – is also unavailing. In *MHANY*, we held that "if *one of the motivating factors* for an act was unlawful, the act violated the FHA." 819 F.3d at 616 (emphasis added). Although we also said in *MHANY* that "[a] plaintiff can establish a prima facie case of disparate treatment 'by showing that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive,'" *id.* at 606 (quoting *LeBlanc-Sternberg*, 67 F.3d at 425), we did not hold that this was a requirement of a successful disparate treatment claim.

Plaintiffs were entitled to, and did, prove disparate treatment at trial by showing that one of Emigrant's motives was to intentionally target communities of color for the STAR NINA loan. And it is not required, as part of a disparate treatment theory, that Emigrant harbored

malicious or invidious biases against those communities while doing so. Accordingly, because the district court's instructions accurately captured governing law on disparate treatment, the jury was properly instructed.

IV. The Saintils' Release

We now turn to the enforceability of the release-of-claims provision contained within the Saintils' 2010 loan modification agreement with Emigrant. The district court determined that the provision is unenforceable as a matter of law because of legal prohibitions against waiver in residential mortgages and because it is void as against public policy. Emigrant contends on appeal that this was error. The release provision reads:

> *Release in Favor of Emigrant.* Except for the obligations and rights expressly set forth and reserved in this Agreement and those portions of the Loan Documents not modified herein, Borrower . . . hereby unconditionally and irrevocably remise[s], release[s], and forever discharge[s] Emigrant, and any entities related to it . . . from any and all claims, counterclaims, actions, causes of action, suits, setoffs, costs, losses, expenses, sums of money, accounts, reckonings, debts, charges, complaints, controversies, disputes, damages, judgements, executions, promises, omissions, duties, agreements, rights, and any and all demands, obligations and liabilities, . . . arising at law or in equity, . . . which Borrower may

> have against [Emigrant], including . . . any and all claims that were or that could have been asserted in any legal proceeding or action; . . . and any and all claims that are relating to, concerning, or underlying the Loan.

Ex. App'x at 632-33.

We agree with the district court that the release provision of the loan modification agreement is unenforceable because it contravenes public policy against broad waivers of claims in mortgage transactions.

A. Standard of Review

We review "*de novo* [] legal issues as to . . . contract enforceability." *United States v. Twenty Miljam-350 IED Jammers*, 669 F.3d 78, 87 (2d Cir. 2011).

B. Applicable Law

Federal law determines the validity of release of federal statutory claims. *Olin Corp. v. Consol. Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993). "[A] release that is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced." *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 463 (2d Cir. 1998). This principle extends to the release of claims under the federal antidiscrimination laws. For instance, we have held that employees may prospectively waive a claim of discrimination under Title VII and the ADEA so long as it is done knowingly and voluntarily. *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399, 402 (2d Cir. 1989). In *Bormann*, we adopted the Third Circuit's "totality of

the circumstances" standard to determine whether an employee in the ADEA context waived discrimination claims "knowingly, willingly and free from coercion." *Id.* at 403; *see Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 523 (3d Cir. 1988) (citing a six-factor totality of the circumstances test).

When faced with the question of whether a contractual provision violates federal public policy, we recognize that "[t]he term public policy is obviously a broad one; it embraces a multitude of virtues and sins. It is clear that public policy circumscribes agreements between private parties in order to prevent the courts from becoming vehicles of discrimination." *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 73 (2d Cir. 1982) (internal quotation marks and citation omitted). "Federal 'public policy' is typically found in the Constitution, treaties, federal statutes and regulations, and court cases." *Thomas James Assocs., Inc. v. Jameson*, 102 F.3d 60, 66 (2d Cir. 1996). And:

> while violations of public policy must be determined through definite indications in the law of the sovereignty, courts must not be timid in voiding agreements which tend to injure the public good or contravene some established interest of society.

Stamford Bd. of Educ., 697 F.2d at 73 (internal quotation marks and citation omitted).

"It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. It is also "unlawful for

any creditor to discriminate against any applicant, with respect to any credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status or age." 15 U.S.C. § 1691(a)(1).

Section 1639c(e)(3) of the Truth in Lending Act ("TILA") provides, in pertinent part:

> *No waiver of statutory cause of action.* No provision of any residential mortgage loan . . . and no other agreement between the consumer and the creditor relating to the residential mortgage loan . . . shall be applied or interpreted so as to bar a consumer from bringing an action in an appropriate district court of the United States . . . for damages or other relief in connection with . . . any . . . Federal law.

15 U.S.C. § 1639c(e)(3).

New York contract law governs the enforceability of provisions purporting to waive state claims. *Albany Sav. Bank, FSB v. Halpin*, 117 F.3d 669, 672 (2d Cir. 1997). The New York Court of Appeals "deem[s] a contractual provision to be unenforceable where the public policy in favor of freedom of contract is overridden by another weighty and countervailing public policy." *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 104 N.Y.S.3d 1, 128 N.E.3d 128, 133 (N.Y. 2019). "[B]ecause freedom of contract is itself a strong public policy interest in New York," New York courts "may void an agreement only after balancing the public interests favoring invalidation of a term chosen by the parties against those served by

enforcement of the clause and concluding that the interests favoring invalidation are stronger." *Id.* (internal citation and quotation marks omitted). New York courts conducting this balancing have found unenforceable agreements that contravene the protections of New York's housing laws and regulations. *See Riverside Syndicate, Inc. v. Munroe*, 10 N.Y.3d 18, 882 N.E.2d 875, 877-78, 853 N.Y.S.2d 263 (N.Y. 2008); *Thornton v. Baron*, 5 N.Y.3d 175, 833 N.E.2d 261, 263, 800 N.Y.S.2d 118 (N.Y. 2005).

C. Application

We agree with the district court that the release provision contained within the Saintils' 2010 loan modification agreement violated public policy and is therefore unenforceable as a matter of law. In reaching our conclusion, we find support in both New York state and federal public policy against the waiver of claims in mortgage transactions and modifications.

The federal housing laws articulate a broad and clear public policy against discrimination in housing and housing-related transactions, like the loan modification at issue here. *See* 42 U.S.C. § 3601; 15 U.S.C. § 1691(a)(1). Section 1639c(e)(3) of TILA also sets forth public policy against broad waivers of the right to bring a cause of action in agreements concerning residential mortgage loans. *See* 15 U.S.C. § 1639c(e)(3).

Emigrant argued in its opposition to Plaintiffs' Rule 50 motion that Section 1639c(e)(3) is inapplicable to the public policy analysis for two reasons: first, because the section deals with arbitration, and second, because the section took effect in June 2013 and is not retroactive to

the Saintils' 2010 modification agreement. While we do not agree with either proposition, the section provides useful guidance even if they are correct.

We begin with the text of the statute. *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) ("Statutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there.") (internal quotation marks omitted and alterations adopted). Nothing in the plain text of Section 1639c(e)(3) limits its application to arbitration. Emigrant reasons that the title of Section 1639c(e) is "Arbitration," but the text of Section 1639c(e)(3) uses the broad language of "any residential mortgage loan" and "no other agreement" in setting forth its prohibition on a broad release of claims pursuant to a mortgage agreement. *See* 15 U.S.C. § 1639c(e)(3); *see also Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998) ("The title of a statute cannot limit the plain meaning of the text. For interpretive purposes, it is of use only when it sheds light on some ambiguous word or phrase.") (alterations adopted). Sections 1639c(e)(1) and (2), by contrast, explicitly reference "arbitration or any other nonjudicial procedure." Accordingly, we do not read Section 1639c(e)(3) to govern only arbitration agreements. *See also Attix v. Carrington Mortg. Servs., LLC*, 35 F.4th 1284, 1307 (11th Cir. 2022) (noting that "Section 1639c(e)(3) governs several types of agreements, including an agreement between a consumer and a creditor relating to a residential mortgage loan") (internal quotation marks omitted and alterations adopted).[15]

15. Our reading is further supported by the CFPB Regulation, which states:

Emigrant also contends (and it argued below) that the prohibition on releases in mortgage contracts did not become effective until 2013 and that it does not have retroactive effect. But as Plaintiffs point out, however, the statute was passed in July 2010. While the statute's interpreting regulation did not become effective until June 2013, that does not mean the statute did not take effect when it was passed. Indeed, federal courts have disagreed about the effective date of Section 1639c(e). *Compare Weller v. HSBC Mortg. Servs., Inc.*, 971 F. Supp. 2d 1072, 1077 (D. Colo. Sept. 11, 2013) (statute became effective July 2010), *with Richards v. Gibson*, No. 15-CV7-LG-RHW, 2015 U.S. Dist. LEXIS 26325, 2015 WL 926594, at *2 (S.D. Miss. Mar. 4, 2015) (statute became effective June 2013).

We agree with Plaintiffs that Section 1639c took effect on the date of enactment, *i.e.*, in July 2010. There is simply nothing in the statute that suggests otherwise. The statute does not specify a date when it took effect, nor does it contain language to the effect that the statute becomes effective upon the adoption of an implementing regulation. *See Johnson v. United States*, 529 U.S. 694, 702, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000) (The omission of an express effective date "simply remits us to the general rule

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> The statute further provides in section [1639c(e)(3)] that no covered transaction secured by a dwelling, and no *related agreement* between the consumer and creditor, may be applied or interpreted to bar a consumer from bringing a claim in court in connection with any alleged violation of Federal law.

78 Fed. Reg. 11280, at 11387 (emphasis added).

that when a statute has no effective date, 'absent a clear direction by Congress to the contrary, [it] takes effect on the date of its enactment.'") (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 404, 111 S. Ct. 840, 112 L. Ed. 2d 919 (1991)).

Moreover, Emigrant did not even raise the defense until November 2014, after the date the regulation was adopted. The statutory text provides that "no provision . . . shall be *applied or interpreted*" to bar borrowers from seeking judicial resolution of their claims related to the mortgage. 15 U.S.C. § 1639c(e)(3) (emphasis added). This language brings the focus of our inquiry to the time of enforcement or application, and not the time the agreement was entered. *Compare id.* (applying to the "appli[cation] or interpret[ation]" of waiver clauses) *with id.* § 1639c(e)(1) (applying to "inclu[sion]" of waiver clauses).

Even assuming Section 1639c(e)(3) is limited to arbitrations or that it does not apply retroactively, it still serves as persuasive authority. Against the backdrop of clear federal public policy against racial discrimination in housing and lending transactions and given Section 1639c(e)(3)'s clear expression of a policy against waiving those claims pursuant to mortgage agreements, we agree that the release provision in the Saintils' modification agreement undermined federal public policy.

We conclude that New York state public policy supports this result as well. A state banking regulation enacted prior to the Saintils' modification agreement discourages waiver of claims by providing that "[a] servicer shall not

require a homeowner to waive legal claims and defenses as a condition of a loan modification, reinstatement, forbearance or repayment plan." N.Y. Comp. Codes R. & Regs, tit. 3, § 419.7(j).[16] This clear articulation of a state policy against waiver of legal claims as a condition of loan modification supports a finding that enforcing the loan modification agreement here would undermine New York state public policy.

In urging reversal, Emigrant correctly notes that we have stressed the important public policy in favor of settling disputes. *See Anita Founds., Inc. v. ILGWU Nat. Ret. Fund*, 902 F.2d 185, 190 (2d Cir. 1990). But, upon our own review of the extensive trial record in this case, we agree with Plaintiffs and the district court that the strong public policy against coercive agreements and against the broad waiver of discrimination claims specifically in residential housing outweighs the policy in favor of settlement. Accordingly, we affirm the district court's conclusion that Paragraph 19 of the Saintils' loan modification agreement is unenforceable as against federal and state public policy.

CONCLUSION

For the reasons set forth above, we AFFIRM the district court's judgment.

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16. This provision was initially codified at 3 N.Y.C.R.R. § 419.11(h).

PARK, *Circuit Judge*, dissenting:

In this case, the district court sent untimely claims to an improperly instructed jury two separate times. To affirm the resulting judgment, the majority blesses significant legal errors and upends established doctrine.

First, this suit is time-barred. The statute of limitations for claims under both the Fair Housing Act and the Equal Credit Opportunity Act is two years. But Plaintiffs did not file suit until 2011 and 2014, even though their claims accrued between 2003 and 2008. Equitable tolling can extend statutory deadlines only if Plaintiffs exercise diligence and show extraordinary circumstances. The district court found neither, and the majority's decision to affirm based solely on fairness defies binding precedent, breaks with other circuits, and unsettles doctrine surrounding analogous statutes.

Second, even if the claims were timely, the district court's charge allowed the jury to find disparate-impact discrimination based only on a "substantial adverse impact," with no showing of disproportionate effects on minority borrowers. The majority's approval of the erroneous jury instructions based on commentary outside the instruction itself also stretches our precedent.

Third, the district court erred in presenting the Saintil Plaintiffs' claims to the jury even though a provision in their loan agreement explicitly released such claims. The majority reads into federal law novel grounds for invalidating such knowing and voluntary releases based

on an unprecedented public-policy analysis.

I would vacate the judgment of the district court with instructions to dismiss Plaintiffs' claims as untimely. Short of that, I would vacate and remand for a new trial with a proper disparate-impact instruction after dismissing the released claims. I respectfully dissent.

I. BACKGROUND

A. Facts

Plaintiffs claim that Emigrant discriminated against them by targeting minority homeowners with unfavorable loans. Emigrant offered STAR NINA ("no income, no asset") loans to subprime borrowers with low credit scores, no proof of income, and substantial home equity between 1999 and 2008. All such loans included an 18% penalty interest rate after 30 days in default. Most borrowers were white.

Plaintiffs received and defaulted on STAR NINA loans between 2004 and 2008. Plaintiffs found these loans through their self-selected, third-party brokers. Although Emigrant's advertising allegedly targeted minority communities, Plaintiffs do not claim to have seen these ads. Like many borrowers, Plaintiffs chose the STAR NINA program because they wanted to borrow against their home equity but lacked the credit or verifiable income required for other loans. Plaintiffs received and signed the same set of documents as other STAR NINA borrowers. These documents included standalone sheets explaining

their payment obligations and the penalty default rate. Plaintiffs, like other borrowers, either had counsel at closing or chose to disregard Emigrant's suggestion that they retain counsel.

Despite receiving the same loans on the same terms as thousands of other borrowers, Plaintiffs sued Emigrant for "targeting them" with unfavorable loans based on their race. As relevant here, Plaintiffs alleged disparate-impact and intentional discrimination in violation of the Fair Housing Act ("FHA"), the Equal Credit Opportunity Act ("ECOA"), and the New York City Human Rights Law ("NYCHRL"). The FHA and ECOA limit suits to two years from the alleged violation, and the NYCHRL has a three-year limitation.

Plaintiffs filed their claims three to ten years after closing on their loans. The original Plaintiffs, the Saint-Jeans, closed on a $370,000 loan in January 2008 and defaulted in September of that year. They claim to have noticed discrimination because of the number of black Emigrant debtors during their foreclosure proceedings in the spring of 2009. They met with a lawyer about their potential claims in July 2009. But for reasons unexplained in the record, the Saint-Jeans did not file this suit until April 2011—more than three years after closing on their loan.

The other Plaintiffs joined the Saint-Jeans' amended complaint in October 2014—three and a half years later. Ms. Commodore had closed and defaulted on her loan back in 2004—a decade before suing. The Saintils had

closed and defaulted in 2006—eight years before suing. The Smalls had closed and defaulted in 2007—seven years before suing. Finally, Mr. Howell had closed and defaulted in 2008—six years before suing. None of these Plaintiffs offered any evidence of their efforts to investigate potential claims relating to their loans before joining this suit. Howell, Commodore, and the Smalls joined only after the Saint-Jeans' lawyer approached them in 2013.

B. Proceedings Below

Emigrant argued that Plaintiffs' suit was untimely, but the district court denied its motions to dismiss, for summary judgment, and for judgment as a matter of law. Although all claims were filed more than three years after Plaintiffs closed on their loans, the district court held that the discovery rule and equitable tolling rendered the claims timely. First, the district court concluded that the FHA and ECOA "are silent as to the discovery rule," so it applied the rule to Plaintiffs' claims because Emigrant's scheme of discriminatory lending "would be invisible to individual borrowers" without conferring with counsel.

The district court also concluded that equitable tolling applied to Plaintiffs' claims because Emigrant's discriminatory lending scheme was "self-concealing." *See* Special App'x at 175 ("[D]iscriminatory mortgage lending is inherently self-concealing."). As part of its concealment analysis, the district court pointed to Emigrant's "overt and intentional acts," including allegedly rushing borrowers during closing and dissuading them from bringing counsel. *Id.* at 70. The district court held that

Plaintiffs were entitled to equitable tolling because they "had little or no basis to fully understand their claims and the nature of a systemic" scheme. *Id.* But the district court made no findings about Plaintiffs' diligence in pursuing their claims or whether extraordinary circumstances prevented them from filing sooner.

Plaintiffs tried their case twice. The first jury returned a verdict for Plaintiffs, awarding $950,000 in compensatory damages, but found that the Saintils' waiver precluded their recovery. The district court rejected Emigrant's motions for judgment as a matter of law and for a new trial. But it ordered a new trial sua sponte because the award did not "succeed at restoring Plaintiffs to their pre-STAR NINA loan positions." The second jury awarded Plaintiffs $722,048—that is, less—in compensatory damages, including nominal damages to the Saint-Jeans and Saintils.

The district court instructed both juries that they could find disparate-impact liability if the loans "actually or predictably had a substantial adverse impact on African-American or Hispanic borrowers." Emigrant repeatedly objected to this instruction for failing to require a comparison to non-minority borrowers. Plaintiffs' own proposed instructions had also included that element. The district court nevertheless omitted the comparative instruction from its disparate-impact charge.

Finally, Emigrant argued that the Saintils' 2010 loan-modification agreement barred their recovery in this suit. The Saintils had agreed to "release and forever discharge

Emigrant . . . from any and all claims" arising from its prior loan. In exchange, Emigrant reduced the Saintils' interest rate and waived some of their interest and late charges. The district court, however, denied Emigrant's motion for summary judgment as to the Saintils' claims without explanation. After the first jury found that the Saintils had knowingly and voluntarily released their claims, the district court declared the provision void as against public policy. Acknowledging that no particular federal law supported invalidation, the district court considered the release in the context of its earlier "historical overview" of housing discrimination. Based on this history and the Saintils' continuing struggle with payments, the district court allowed the Saintils' claims to proceed, and the second jury awarded them nominal damages.

II. TIMELINESS

It is undisputed that Plaintiffs failed to file their claims within the applicable statutes of limitations. The question is whether equitable tolling or the discovery rule excuses their delay. Neither does.

A. Legal Standards

The FHA provides that "[a]n aggrieved person may commence a civil action . . . 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). Until 2010, the ECOA stated that no action "shall be brought later than 2 years after the date of the occurrence." 15 U.S.C.

§ 1691e(f) (2009). And New York law limits claims under the NYCHRL to those "commenced within three years." N.Y. C.P.L.R. § 214(2).

Plaintiffs filed all of their claims outside the applicable statutes of limitations, whether they accrued at closing or upon default.[1] A statute of limitations begins to run when a claim accrues. *See Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589, 22 L. Ed. 427 (1875). Accrual is the date on which a plaintiff is first able to sue—usually the date on which the plaintiff is injured. *See Green v. Brennan*, 578 U.S. 547, 554, 136 S. Ct. 1769, 195 L. Ed. 2d 44 (2016); *see also Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997) (accrual occurs "when the plaintiff has a complete and present cause of action" (quotation marks omitted)).

The district court excused the untimeliness of Plaintiff's lawsuits based on the discovery rule and equitable tolling. The discovery rule delays accrual until a plaintiff knows that he has been injured or learns of the

1. The parties dispute when Plaintiffs were injured. Plaintiffs say it was when Emigrant discriminated against them, while Emigrant says any injury would have occurred when it "imposed a higher default interest rate." Even accepting that "the relevant injury is discrimination and not the loan itself," *ante* at 26, that means Plaintiffs' claims accrued at closing, when they suffered the dignitary harm of a discriminatory loan. But regardless whether the limitations period began at closing or default, Plaintiffs had a complete and present cause of action more than two years before they sued.

cause of the injury.[2] *See, e.g., United States v. Kubrick*, 444 U.S. 111, 120, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979) (noting that lower courts apply a discovery rule for medical-malpractice claims); *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998). But this rule typically applies only when a statute's text provides for it. *Rotkiske v. Klemm*, 589 U.S. 8, 14, 140 S. Ct. 355, 205 L. Ed. 2d 291 (2019) ("It is not our role to second-guess Congress' decision to include a 'violation occurs' provision, rather than a discovery provision.").

While the discovery rule delays the start of a limitations period, equitable tolling "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Arellano v. McDonough*, 598 U.S. 1, 6, 143 S. Ct. 543, 214 L. Ed. 2d 315 (2023) (quotation marks omitted); *see Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255, 136 S. Ct. 750, 193 L. Ed. 2d 652 (2016) ("[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." (quotation marks omitted)).

"Generally, a litigant seeking equitable tolling bears the burden of establishing [these] two elements." *Pace v.*

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2. Accrual never depends, however, on a plaintiff's knowledge of his legal rights—only of the facts that would allow him to sue. *See Valez ex rel. Donely v. United States*, 518 F.3d 173, 177 (2d Cir. 2008).

DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). First, a plaintiff must show a "level of diligence which could reasonably be expected in the circumstances," *Gonzalez v. Hasty*, 651 F.3d 318, 322 (2d Cir. 2011) (quotation marks omitted), and that he "acted with reasonable diligence *throughout* the period he seeks to toll," *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (emphasis added). "[T]he second prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control." *Menominee*, 577 U.S. at 257. "Extraordinary circumstances" thus refers "not to the uniqueness of a party's circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period." *Harper v. Ercole*, 648 F.3d 132, 137 (2d Cir. 2011).

B. Equitable Tolling

The majority misapplies equitable tolling by excusing Plaintiffs of their burden to prove the threshold elements of diligence and extraordinary circumstances. In so doing, it creates a new fairness-based tolling rule for discrimination claims.

To begin, the majority mischaracterizes the district court's equitable-tolling decision as factual and discretionary. *Ante* at 28-31. But the district court committed an error of *law* by concluding that Plaintiffs did not need to prove diligence and extraordinary circumstances because "[t]he law prohibits a judge from exercising her discretion where these two elements

are missing." *Doe v. United States*, 76 F.4th 64, 71 (2d Cir. 2023).

The majority's affirmance of the district court's equitable-tolling decision disregards binding precedent. The majority says that Plaintiffs meet the requirements for equitable tolling because they "could not reasonably be expected" to learn of their cause of action through due diligence within the limitations period. *Ante* at 34. And "that alone would be enough" because "unfairness to a plaintiff who is not at fault" is the "core inquiry of our equitable tolling analysis." *Id.* at 33. (quotation marks omitted). That analysis is novel and wrong. Plaintiffs here have shown neither diligence nor extraordinary circumstances, even though these are requisite "elements, not merely factors of indeterminate or commensurable weight." *Menominee*, 577 U.S. at 256 (quotation marks omitted). The majority's decision to excuse these deficiencies is untenable.

First, the majority simply assumes that all Plaintiffs were diligent. It concludes that Plaintiffs "through no lack of diligence of their own, were unaware of the facts of discrimination within the statutory period." *Ante* at 34. But the district court made no findings at all about Plaintiffs' diligence. Instead, the district court disregarded that requirement because the "nature of this type of discrimination" shows that Plaintiffs' "ignorance of their claim was not for lack of due diligence." Special App'x at 71. But a plaintiff's actual "ignorance" is irrelevant and a court may not assume that diligence would have been futile.

Plaintiffs did not satisfy their burden of showing diligence. The Saint-Jeans, the original Plaintiffs, closed on their loan in 2008. They claim to have noticed discrimination during their foreclosure proceedings in the spring of 2009. But they offered no evidence of their diligence between contacting an attorney in 2009 and filing this suit in April 2011. In other words, the Saint-Jeans *were aware* of potential claims in 2009. The other Plaintiffs fare no better. The record contains no evidence of diligence by Commodore, Howell, the Smalls, or the Saintils, all of whom joined the amended complaint in October 2014—six to ten years after closing on their loans and three and a half years after the Saint-Jeans filed suit. Of these Plaintiffs, Howell, Commodore, and the Smalls admitted that *the Saint-Jeans' attorney contacted them* in 2013 about potential claims, but they did not join this suit until October 2014. These Plaintiffs failed to pursue their claims diligently under any standard. Absent a showing of diligence, the district court had no discretion to afford equitable tolling.

Second, the majority also overlooks Plaintiffs' failure to prove extraordinary circumstances. It simply offers the conclusory statement that "Plaintiffs demonstrated that their inability to discover the discriminatory practice was an extraordinary circumstance." *Ante* at 32.[3] To the majority, Plaintiffs' failure to recognize their

3. The majority also offers that "the egregious nature of Emigrant's discriminatory lending practice . . . makes this case extraordinary." *Ante* at 35. But the nature of the claim has no bearing on whether an "extraordinary circumstance stood in [Plaintiffs'] way and prevented timely filing." *Menominee*, 577 U.S. at 255 (cleaned up).

claims "would be enough to support the district court's discretionary equitable tolling determination." *Id.* at 33. This is wrong.

Ignorance is not an extraordinary circumstance. Such circumstances must be "both extraordinary *and* beyond [a plaintiff's] control." *Menominee*, 577 U.S. at 257. "Nor can equitable tolling be premised on . . . ignorance of the right to bring a claim." *Watson v. United States*, 865 F.3d 123, 133 (2d Cir. 2017). The district court found only that the Saint-Jeans "alleged that they did not discover the discriminatory scheme underlying their claims until they met with counsel within the limitations period." Special App'x at 23. But that says nothing about the mortgage scheme being "extraordinary" or whether any external obstacle prevented the Saint-Jeans—or any of the other dilatory Plaintiffs—from exercising their rights within the limitations period.

In the employment-discrimination context, a plaintiff alleging discriminatory discharge can satisfy the extraordinary-circumstances requirement only if "it would have been *impossible* for a reasonably prudent person to learn that his discharge was discriminatory." *Miller v. IT&T*, 755 F.2d 20, 24 (2d Cir. 1985) (emphasis added). Employment-discrimination claims thus "are not tolled or delayed pending the employee's realization that [his employer's] conduct was discriminatory unless the employee was actively misled by his employer, [or] he was prevented in some extraordinary way from exercising his rights." *Id.* at 24.[4] The same principle applies here.

4. The majority asserts that "equitable tolling has always been based on principles of fairness and equity." *Ante* at 33 (citing

The majority contends that its finding of extraordinary circumstances is "further supported by the fact that Emigrant took steps to conceal the discriminatory nature of the STAR NINA loan." *Ante* at 34. But its concealment analysis is unfounded.[5] "Concealment by mere silence

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Cerbone v. Int'l Ladies' Garment Workers' Union, 768 F.2d 45, 48-49 (2d Cir. 1985)). But *Cerbone* affirmed a timeliness dismissal precisely because "fairness" applied only to "relieve a plaintiff who was 'actively misled by his employer' or who was 'prevented in some extraordinary way from exercising his rights.'" 768 F.2d at 49 (quoting *Miller*, 755 F.2d at 24).

5. The majority purports to ground its decision in "well-settled principles of equitable tolling and fraudulent concealment." *See ante* at 36. But these are distinct doctrines. *See Pearl v. City of Long Beach*, 296 F.3d 76, 81 (2d Cir. 2002) ("The taxonomy of tolling, in the context of avoiding a statute of limitations, includes at least three phrases: equitable tolling, fraudulent concealment of a cause of action, and equitable estoppel."). To be sure, "[o]ur Court has used 'equitable tolling' to mean fraudulent concealment of a cause of action." *Id.* at 82. But we have been clear that fraudulent concealment requires the plaintiff to establish "(1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part." *New York v. Hendrickson Bros.*, 840 F.2d 1065, 1083 (2d Cir. 1988); *see Phhhoto Inc. v. Meta Platforms, Inc.*, 123 F.4th 592, 601-04 (2d Cir. 2024) (discussing "equitable tolling based on fraudulent concealment" under *Hendrickson Bros.*). In contrast, standard equitable tolling applies "only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee*, 577 U.S. at 255 (quotation marks omitted). The majority errs by muddling the two doctrines to conclude that any concealment entitles Plaintiffs to tolling—regardless of their ability to prove each element of

is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Wood v. Carpenter*, 101 U.S. (11 Otto) 135, 143, 25 L. Ed. 807 (1879). Plaintiffs never alleged—let alone pleaded with the specificity Rule 9 requires—that Emigrant lied to them or otherwise attempted to cover up its alleged discrimination after execution of the loan documents.[6]

The majority's misguided reasoning threatens to unsettle equitable tolling doctrine beyond this case.

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fraudulent concealment or equitable tolling. For example, the majority cites *Baskin v. Hawley*, 807 F.2d 1120, 1123, 1130 (2d Cir. 1986), for the proposition that "[e]quitable tolling may be appropriate even if there are lengthy delays in filing." *Ante* at 31. But *Baskin* concerns a jury's finding of *fraudulent concealment*, not equitable tolling. *See Baskin*, 807 F.2d at 1129-32.

6. The majority nevertheless concludes that "there is sufficient evidence that Emigrant took steps to conceal the discriminatory nature of STAR NINA loans." *Ante* at 35-36. This active-concealment analysis finds no support in the record. First, the majority says that "Plaintiffs testified that Emigrant rushed them to sign stacks of documents at closing." *Id.* at 35. But simply feeling "rushed" at closing cannot constitute active concealment when Plaintiffs received and signed these documents *before* closing. Second, it claims that the default rate was "included only in a separate rider to the loan, further obfuscating the true financial impact." *Id.* at 35. But this ignores the fact that all Plaintiffs *signed* this standalone sheet acknowledging their payment obligations and the default interest rate. *See, e.g.*, Exhibit App'x at 585. Finally, we are told that Emigrant "dissuaded Plaintiffs from bringing lawyers to closing." *Ante* at 35. But the record again disproves this falsity: Emigrant *encouraged* the Saint-Jeans to retain counsel, *see* Exhibit App'x at 623 ("The hiring of an attorney is not required but is definitely recommended."), and Howell was, in fact, represented by outside counsel, *see* Joint App'x at 840-42.

The majority discards the prerequisites of diligence and extraordinary circumstances for equitable tolling, replacing them with a fairness-based discovery rule for discrimination claims. *See ante* at 27 ("[T]he district court did not abuse its discretion in exercising its equitable power to toll the statute of limitations until the date when Plaintiffs knew or had reason to know of their injury—that they were victims of Emigrant's sophisticated and systemic pattern of discriminatory lending."). It insists that concealment—which was not proved here—is unnecessary for its holding because "avoiding unfairness to the plaintiff is reason enough to equitably toll a statute of limitations." *Id.* at 36 n.7. But that is wrong—unfairness is not sufficient for equitable tolling; courts must find both diligence and extraordinary circumstances *before* weighing the equities.

C. Discovery Rule

The majority also leaves open the district court's expansive misunderstanding of the discovery rule. *Id.* at 27 n.6. It incorrectly suggests that the discovery rule applies to all federal causes of action. *See id.* at 25 ("Claims under the FHA, like other federal causes of action, accrue when a plaintiff knows or has reason to know of the injury that serves as the basis for the action." (quotation marks omitted)). But "[t]his expansive approach to the discovery rule is a bad wine of recent vintage." *Rotkiske*, 589 U.S. at 14 (quotation marks omitted).

The discovery rule requires a statute-by-statute textual inquiry that neither the FHA nor ECOA can

support. The applicable limitations provisions are clear in their focus on the *occurrence*—rather than *discovery*—of discrimination. *See* 42 U.S.C. § 3613(a)(1)(A) (FHA) ("not later than 2 years after the occurrence"); 15 U.S.C. § 1691e(f) (2009) (ECOA) (no "later than 2 years after the date of the occurrence"). Whether these statutes implicitly incorporate the discovery rule is a matter of first impression in this Circuit. The Supreme Court has held that a similar statute of limitations in the Fair Debt Collection Practices Act ("FDCPA") does not incorporate the discovery rule. *See Rotkiske*, 589 U.S. at 10, 14-15; 15 U.S.C. § 1692k(d) ("within one year from the date on which the violation occurs"). As with the FDCPA, the statutory language in the FHA and ECOA "unambiguously sets the date of the violation as the event that starts the . . . limitations period." *Rotkiske*, 589 U.S. at 13. Such language represents Congress's decision to reject the discovery rule for these statutes, and we are not free to decide otherwise.[7]

The two other courts of appeals that have considered the question agree. The Ninth Circuit has held that the

7. Some district courts have concluded that the FHA's status as a tort analogue, *see Curtis v. Loether*, 415 U.S. 189, 195, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974), means that the statute of limitations does not begin to run until "the wrongful act or omission results in damages," *see, e.g., Fair Hous. Just. Ctr., Inc. v. JDS Dev. LLC*, 443 F. Supp. 3d 494, 501 (S.D.N.Y. 2020) (citing *Wallace v. Kato*, 549 U.S. 384, 391, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007)). These courts mistake the injury: discrimination results in damages immediately. That is why dignitary harm alone is recoverable. Here, for example, the jury awarded nominal damages to the Saint-Jeans and Saintils.

FHA is not subject to the discovery rule. *See Garcia v. Brockaway*, 526 F.3d 456, 465 (9th Cir. 2008) (en banc) ("Holding that each individual plaintiff has a claim until two years after he discovers the [violation] would contradict the text of the FHA, as the statute of limitations for private civil actions begins to run when the discriminatory act occurs—not when it's encountered or discovered."). And the Fifth Circuit has held the same in the ECOA context. *See Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008). In short, the FHA and ECOA make clear that the discovery rule does not apply to Plaintiffs' claims. The district court erred by relying on the rule and the majority's tacit endorsement of that error is misguided.

D. Title VII and the ADEA

The majority's opinion also departs from precedent involving analogous antidiscrimination statutes. The Supreme Court instructs that "cases interpreting Title VII and the [Age Discrimination in Employment Act ("ADEA")] provide essential background and instruction" for interpreting the FHA. *Texas Dep't of Hous. and Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015). The same is true of the ECOA. *See Smith v. City of Jackson*, 544 U.S. 228, 233, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005) ("[When Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."). Like the FHA and ECOA, Title VII and the ADEA provide that the limitations period begins

with the occurrence—not the discovery—of an unlawful act. *See* 42 U.S.C. § 2000e-5(e)(1). Timeliness precedents under these analogous statutes thus guide this Court's reading of the FHA and ECOA.

Title VII claims accrue at the time a plaintiff learns of the discriminatory *act*, not when he realizes that the act was discriminatory. *See Flaherty v. Metromail Corp.*, 235 F.3d 133, 137 (2d Cir. 2000) ("It has long been settled that a claim of employment discrimination accrues for statute of limitations purposes on the date the employee learns of the employer's discriminatory conduct."); *Miller*, 755 F.2d at 24 (holding the same under the ADEA). This Court applies this principle broadly: "As with *all discrimination claims*, plaintiffs' claims accrued when they knew or should have known of the discriminatory *action*"—not the discriminatory nature of that action. *Washington v. County of Rockland*, 373 F.3d 310, 319 (2d Cir. 2004) (Sotomayor, *J.*) (emphases added). Other circuits agree.[8]

8. *See, e.g., Ayala v. Shinseki*, 780 F.3d 52, 58 (1st Cir. 2015); *Hamilton v. 1st Source Bank*, 928 F.2d 86, 88-89 (4th Cir. 1990) ("To the extent that notice enters the analysis, it is notice of the employer's actions, *not* the notice of a discriminatory effect or motivation, that establishes the commencement of the pertinent filing period."); *Pacheco v. Rice*, 966 F.2d 904, 906 (5th Cir. 1992) ("To allow plaintiffs to raise employment discrimination claims whenever they begin to suspect that their employers had illicit motives would effectively eviscerate the time limits prescribed for filing such complaints."); *Amini v. Oberlin Coll.*, 259 F.3d 493, 498-99 (6th Cir. 2001) ("[T]he starting date for the . . . limitations period is when the plaintiff learns of the employment decision itself, not when the plaintiff learns that the employment decision may have been discriminatorily motivated."); *Thelen v. Marc's*

The majority barely acknowledges our Title VII and ADEA jurisprudence. Not only does this raise doubts about the soundness of the majority's legal reasoning, it leaves open the possibility that its new fairness-based approach to equitable tolling will reach far beyond this case.

III. JURY INSTRUCTIONS

The majority also overlooks the district court's erroneous jury instruction on disparate-impact liability, which required no finding that Emigrant harmed Plaintiffs more than borrowers of other races. The district court's instruction allowed the jury to find disparate impact based on only a "substantial adverse impact" on minority borrowers, not a "disproportionately" adverse impact. This contradicted the plain meaning of "disparate impact" and binding precedent. The legal error is obvious: for an impact to be "disparate," a comparison is necessary. The district court's general-verdict form thus left open the possibility that the jury imposed liability without

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Big Boy Corp., 64 F.3d 264, 267 (7th Cir. 1995) ("A plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful."); *Humphrey v. Eureka Gardens Pub. Facility Bd.*, 891 F.3d 1079, 1081-82 (8th Cir. 2018); *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1048-51 (9th Cir. 2008) ("Plaintiffs argue that their claims did not accrue until they knew both that they were not being hired *and* of the Defendants' alleged discriminatory intent. . . . [But] the claim accrued when the plaintiffs received notice they would not be hired."); *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 558-59 (10th Cir. 1994).

considering, much less finding, any disproportionate effects on minority borrowers. This error requires vacatur.

A. Error

We review a district court's jury instructions de novo. "An instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury of the law." *Ashley v. City of New York*, 992 F.3d 128, 142 (2d Cir. 2021) (quotation marks omitted).

The district court's instruction here misstated the law. The Supreme Court has made clear that a disparate-impact claim requires a disproportionate effect on minorities. *See Inclusive Cmtys.*, 576 U.S. at 524 ("[A] plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009)).[9] The district

9. Although *Inclusive Communities*, 576 U.S. at 545, held "that disparate-impact claims are cognizable under the Fair Housing Act," we have yet to decide whether the ECOA provides for such liability. Appellants do not raise this issue on appeal, so we should "express no opinion about whether a disparate impact claim can be pursued under ECOA." *Garcia v. Johanns*, 444 F.3d 625, 633 n.9, 370 U.S. App. D.C. 280 (D.C. Cir. 2006); *see id.* ("Both Title VII and the Age Discrimination in Employment Act (ADEA) prohibit actions that 'otherwise adversely affect' a protected individual. The Supreme Court has held that this language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. ECOA contains no such language."

court thus erred by instructing the jury that it could find liability based on a "significantly adverse impact" even if it found that non-minority borrowers suffered *the same impact*.

The majority, however, concludes that the district court's instruction was close enough. That's because a "substantial adverse impact" is "not significantly different" from the correct instruction, which would require a "significantly adverse or disproportionate" impact. *Ante* at 50. But even that instruction would not be proper.[10] The disjunctive phrasing would permit liability for conduct that has only a "significantly adverse" impact, but not a disproportionate one. Such an instruction strays from *Inclusive Communities*. The majority ignores that precedent and misreads others.

(citations omitted)); *cf. Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005) ("Neither the Supreme Court nor this Court have previously decided whether disparate impact claims are permissible under ECOA. However, it appears that they are.").

10. The majority maintains that "Emigrant included the 'significantly adverse or disproportionate impact' language in its own proposed jury instructions submitted to the district court." *Ante* at 52 n.10. But Emigrant's proposed instructions included the critical element of disproportionate impact: "In order to show a 'significantly advance or disproportionate impact,' Plaintiffs must show that a race-neutral practice or policy actually or predictably resulted in *discrimination against Black borrowers*. If Plaintiffs only raise an inference of discrimination, they have not proven a 'significantly adverse or disproportionate impact.'" Joint App'x at 571 (footnote omitted) (emphasis added).

For example, the majority notes that this Court used the phrase "significantly adverse or disproportionate" effect to describe disparate-impact liability in *Regional Economic Community Action Program, Inc. v. City of Middletown* ("*RECAP*"), 294 F.3d 35, 53 (2d Cir. 2002). But *RECAP* did not concern the proper wording of a jury instruction. We have "cautioned that trial judges should not import uncritically language . . . developed by appellate courts for use by judges" into jury charges. *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 118 (2d Cir. 2000) (cleaned up). Even if we could lift jury instructions from language in appellate opinions, *RECAP* stated that a "disparate impact analysis examines a facially-neutral policy or practice . . . for its *differential impact or effect on a particular group*." *RECAP*, 294 F.3d at 52 (quotation marks omitted) (emphasis added). Indeed, we concluded that the plaintiff had failed to allege a disparate-impact claim because "[n]o comparison of the act's disparate impact on different groups of people" in that case was "possible." *Id.* at 53. The majority similarly overlooks comparisons among groups in our other disparate-impact precedents.[11] These cases make clear that disparate

11. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003) ("The basis for a successful disparate impact claim involves a comparison between two groups."); *MHANY Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016) ("The district court concluded that Plaintiffs had established a prima facie case of disparate impact, finding that Garden City's [zoning decision] had a significant disparate impact on minorities because it largely eliminated the potential for the type of housing that minorities were disproportionately likely to need." (quotation marks omitted)). *See also Huntington Branch, NAACP v. Town of*

impact requires a *disproportionate* effect on a particular group of people.[12] A jury instruction that omits this requirement fails to inform the jury of the law.[13]

Huntington, 844 F.2d 926, 933 (2d Cir. 1988) ("A disparate impact analysis examines a facially-neutral policy or practice . . . for its *differential* impact or effect on a particular group." (emphasis added)).

12. Our sister circuits take a similar approach. The Ninth Circuit has required a "significant, adverse, *and disproportionate effect* on a protected class" to show disparate impact under the FHA. *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 962 (9th Cir. 2021) (emphasis added). The Fourth and Fifth Circuits agree that "disproportionate"—not merely "substantial"—adverse effects are necessary. *See Reyes v. Waples Mobile Home Park Ltd.*, 903 F.3d 415, 424 (4th Cir. 2018); *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 903 (5th Cir. 2019); *see also id.* at 913 (Davis, *J.*, concurring in part and dissenting in part).

13. The majority says that the district court's instruction "mirrors, nearly word-for-word, the model instruction" from *Sand's Modern Federal Jury Instructions*. *See ante* at 50-51. But those model instructions plainly state that disparate-impact liability requires a "substantial discriminatory impact"—meaning an impact "plainly disproportionate to how it affects other people." *Id.* at 51. The district court's phrase of choice—"substantial adverse impact"—does not include the comparative element of "discriminatory" or "disproportionate." The ordinary meaning of "adverse" is merely "unfavorable," "harmful," or "opposed to one's interests." *See Adverse*, Merriam-Webster's Collegiate Dictionary 19 (11th ed. 2020). Absent any clarifying instruction from the district court, we must presume that the jury gave the term its ordinary meaning. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 12-16, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (evaluating jury instructions according to their ordinary meaning).

B. Prejudice

The jury here returned only a general-verdict form, so the error in the jury instruction means that "a new trial will be required, for there is no way to know that the invalid claim . . . was not the sole basis for the verdict." *United New York & N. J. S. H. P. Asso. v. Halecki*, 358 U.S. 613, 619, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959); *see Hathaway v. Coughlin*, 99 F.3d 550, 554-55 (2d Cir. 1996) ("[W]here jury instructions create an erroneous impression regarding the standard of liability, it is not harmless error because it goes directly to plaintiff's claim, and a new trial is warranted." (citing *Hendricks v. Coughlin*, 942 F.2d 109, 113-14 (2d Cir. 1991)). The jury may have returned a verdict for Plaintiffs because it found that Emigrant's conduct had an adverse—but not disproportionate—impact on minority borrowers. As a result, the error requires remand for a new trial.

The majority asserts that Emigrant was not prejudiced by any error in the disparate-impact instruction because "*read as a whole*, the charge made clear to the jury that, to find for Plaintiffs, the jury had to compare the impact on Plaintiffs to similarly situated non-Black or Hispanic borrowers." *Ante* at 52 (emphasis added). In support, the majority points to a sentence near the beginning of the jury colloquy in which the district court said that "the plaintiffs . . . claim that the defendants . . . violated their rights . . . by offering loans on terms that were grossly unfavorable to the borrowers and by allegedly making those loans disproportionately to African-American and Hispanic communities." Joint App'x at 2438-39; *ante* at

52. But that was merely the judge's comment on Plaintiffs' claims, not a jury instruction. *See United States v. Tracy*, 12 F.3d 1186, 1201 (2d Cir. 1993) (distinguishing "the court's own comments" from its charge in a jury colloquy).

"Disparate impact" requires a jury to find an impact that is disparate. But the district court here instructed the jury that a "substantial adverse impact" is enough. That instruction was wrong, contrary to precedent, and prejudicial. The error cannot be saved by a separate comment describing Plaintiffs' claims preceding the jury instruction.

IV. SAINTILS' RELEASE

Finally, a claims-release provision in the Saintil Plaintiffs' renegotiated loan agreement barred their recovery in this suit. The first jury found as much in denying damages to the Saintils because they had "knowingly and voluntarily agreed to release their claims against Emigrant." The district court nevertheless voided the Saintils' release as against public policy based on its "historical overview of mortgage lending in the United States." Special App'x at 177-78. But there is no legal basis for invalidating the Saintils' waiver.

The majority points to the federal policy of ending housing discrimination and a bar on waiving claims under the Truth in Lending Act, a statute not at issue here. *See ante* at 64-65. But none of the district court, Plaintiffs, or the panel majority identifies a single case in which federal

fair-housing policy trumped the longstanding policy of respecting settlements. *See, e.g., ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997 (2d Cir. 1983) (collecting cases). The district court thus erred by disregarding the Saintils' knowing and voluntary release of their federal claims. It then presented those waived claims to the second jury, which in turn awarded only nominal damages. However small, that award was based on yet another error of law.

* * *

In conclusion, the claims underlying this suit were time-barred when the Saint-Jean Plaintiffs filed in 2011 and when the other Plaintiffs joined in 2014. The majority excuses this untimeliness by turning equitable tolling into a fairness-based discovery rule in discrimination cases. In doing so, the majority defies Supreme Court and Second Circuit precedent and raises troubling questions about the reach of its holding to Title VII and ADEA cases. On top of that, the majority affirms a jury instruction for disparate-impact liability that lacked any comparative component. Finally, the majority takes the unprecedented step of voiding a contractual release provision on federal housing policy grounds. All three of these conclusions are wrong. I respectfully dissent.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED FEBRUARY 19, 2025

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 22-3094

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of February, two thousand twenty-five.

Before: Denny Chin,
Michael H. Park,
Beth Robinson,
Circuit Judges.

JEAN ROBERT SAINT-JEAN, EDITH SAINT-JEAN, FELEX SAINTIL, LINDA COMMODORE, BEVERLEY SMALL, YANICK SAINTIL, JEANETTE SMALL, FELIPE HOWELL, JR., AS ADMINISTRATOR OF THE ESTATE OF FELIPE R. HOWELL,

Plaintiffs-Appellees,

FELIPE HOWELL,

Plaintiff,

v.

Appendix B

EMIGRANT MORTGAGE COMPANY,
EMIGRANT BANK,

Defendants-Appellants,

EMIGRANT SAVINGS BANK-MANHATTAN,
EMIGRANT BANCORP, INC.,

Defendants.

JUDGMENT

The appeal in the above captioned case from a judgment of the United States District Court for the Eastern District of New York was argued on the district court's record and the parties' briefs.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's judgment is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX C — REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED MARCH 31, 2014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11-CV-2122 (SJ) (JO)

JEAN ROBERT SAINT-JEAN, *et al.*,

Plaintiffs,

v.

EMIGRANT MORTGAGE COMPANY, *et al.*,

Defendants.

Filed March 31, 2014

REPORT AND RECOMMENDATION

James Orenstein, Magistrate Judge:

Plaintiffs Jean Robert Saint-Jean and his wife Edith Saint-Jean accuse defendants Emigrant Mortgage Company, Emigrant Bancorp, Emigrant Bank and Emigrant Savings Bank Manhattan (collectively, "Emigrant") of engaging in a practice of originating discriminatory and abusive home mortgage refinance loans. *See* Proposed Second Amended Complaint, Docket Entry ("DE") 171-1 at 15-78 ("Complaint"). They seek to

amend the initial complaint to include additional facts and legal claims and to join several new plaintiffs and defendants. *See* DE 42 (first motion to amend); DE 171 (second motion). Emigrant, arguing that none of the existing or proposed claims have merit, moves to dismiss the Saint-Jeans' original claims pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), and opposes the proposed amendments. *See* DE 3 (motion to dismiss); DE 43 (opposition to first motion to amend); DE 172 (second motion to amend). Upon a referral from the Honorable Sterling Johnson, Jr., United States District Judge, I respectfully recommend that the court Emigrant's motion to dismiss the plaintiffs' claims under state and municipal law, deny the motion to dismiss their claims under federal law, deny the plaintiffs leave to add new claims under state and municipal law, and grant the plaintiffs leave to add all of the new defendants and federal claims they have proposed.

I. Background

A. Facts

1. The Saint-Jeans

The Saint-Jeans, together with their four daughters, have lived in their home in the Canarsie section of Brooklyn since they purchased it in 1995.[1] Behind on their gas and

1. Emigrant cites evidence extrinsic to the Complaint to assert that the home in Canarsie is not Jean Robert Saint-Jean's principal residence. It suggests that the court may properly consider such evidence, notwithstanding established law to the contrary, on the

water bills, in 2007 the Saint-Jeans sought a home equity loan through an acquaintance, Kennis Mason ("Mason"), whom they believed to be a mortgage broker. Mason was an employee of a company named N.Y. Financial Mortgage Lending. However, upon learning that the Saint-Jeans both had credit scores in the 500s, Mason told them that they would not qualify for a home equity loan of $50,000 to $100,000. Complaint ¶¶ 62-63, 65-66, 68.

Mason proceeded to have the Saint-Jeans' home appraised and found it was worth $742,000. At the time, the Saint-Jeans had $255,000 remaining on their existing mortgage with a manageable monthly payment of $2,650. Because of the equity they had in their home, Mason suggested that the Saint-Jeans could obtain the cash that they needed by refinancing their mortgage through Emigrant. Mason requested pay stubs and tax returns from the Saint-Jeans, which they provided. Mason later told the Saint-Jeans that the new mortgage would have a fixed interest rate of nine percent and a monthly payment of $3,000 but that, after six months, he would help them get

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ground that it undermines the Saint-Jeans' standing. DE 4 at 4 n.1. The argument lacks merit: the Saint-Jeans' burden to establish that the house is their primary residence is an element of some of their substantive claims but is not necessary to their standing to assert such claims at all. Emigrant's attempt to blur that distinction, if accepted, would allow virtually any fact dispute going to an element of a claim to be treated as a standing issue, and would thus render meaningless the court's obligation under Rule 12(b)(6) to assume the truth of the facts alleged in the complaint. I therefore disregard Emigrant's citation to such extrinsic evidence and respectfully urge the court to do likewise.

that rate lowered to six percent with a monthly payment of $2,700. Prior to the closing Mr. Saint-Jean told Mason that they were seeking counsel to represent them at the closing; Mason told Mr. Saint-Jean that an attorney would be unnecessary, and that in any event an attorney would be present at the closing to look out for their interests. *Id.* ¶¶ 69-71, 73-74.

The Saint-Jeans closed on their new mortgage on January 10, 2008. Present were the Saint-Jeans, Mason, an attorney and a notary. Mason stated that the attorney would be representing the Saint-Jeans, which the attorney did not dispute. Mr. Saint-Jean was surprised that the closing documents included an interest rate of 11.75 percent, but ultimately agreed to go forward with the closing after Mason reiterated to him in a private conversation and at the closing table that a fixed six percent interest rate would apply after six months of on-time payments. The Saint-Jeans were not given a chance to read through the documents, but signed the documents anyway based on what they had been told by Mason. They were not told that the loan included a prepayment penalty and an adjustable interest rate. The Saint-Jeans were not aware of a "resource letter" included in the closing documents that stated that the loan had been originated without consideration of the Saint-Jeans' ability to make payments on the loan and indicated that an annual income of $102,000 would be necessary in order to do so. The HUD-1 Settlement Statement accompanying the loan indicated that Emigrant had made a payment of $1,387.50 to "NY Financial"—*i.e.*, Mason's employer, *see id.* ¶ 66—outside of the closing and that, from the loan proceeds,

$12,357.50 went to "N.Y. Financial Mortgage Lending" and $835 went to Mattone & Mattone for attorneys' fees. *Id.* ¶¶ 75-79, 81-85, 89.

The initial monthly payment on the loan was $4,174. The Saint-Jeans made six monthly payments, but were informed by Mason that they would not qualify for the lower six percent interest rate. They were unable to continue making payments, and as a result an eighteen percent "default" interest rate was imposed, raising their monthly payment over $6,000. Three payments behind, the Saint-Jeans contacted Emigrant in November of 2008 and offered to make two payments at the previous monthly payment of $4,174, which Emigrant declined to accept. Emigrant initiated foreclosure proceedings against the Saint-Jeans in May of 2009. *Id.* ¶¶ 66, 81-87. Only two months later, in July 2009, after the Saint-Jeans had consulted counsel who explained the matter to them, did they come to understand that Emigrant's loan was discriminatory in nature. *Id.* ¶ 109.

2. The Saintils

Felex and Yanick Saintil live with their children in a two-family home in the Canarsie section of Brooklyn. They purchased the home in 2001 and, in 2005, took out a second mortgage to make some repairs to the home and for legal costs associated with a non-paying tenant. They later sought financing to pay off that second mortgage and were referred to Isaac Rochlitz ("Rochlitz"), a mortgage broker with Evergreen Funding of the Tri-State. Rochlitz requested pay stubs and tax returns and the Saintils provided them only as to Mr. Saintil because Mrs. Saintil

was not working at the time. Rochlitz did an appraisal of their home and told them that Mr. Saintil had qualified for a refinance of their two existing mortgages. He told them that the monthly payment would be $2,700, which was approximately what they had been paying for the two existing mortgages put together, but did not explain that the mortgage Mr. Saintil had qualified for was a variable rate mortgage. *Id.* ¶¶ 111-14, 116-19.

The Saintils closed on their new mortgage on August 2, 2006. Present were the Saintils, Rochlitz, a notary and an attorney who the Saintils were told would represent their interests. The Saintils were not given a chance to read through the documents, but signed the documents based on what they had been told by Rochlitz and the attorney. They were not told that the loan included a prepayment penalty and an adjustable interest rate with a default rate of eighteen percent. The Saintils were also not aware of a "resource letter" included in the closing documents that stated that the loan had been originated without consideration of their ability to make payments on the loan and indicated that an annual income of $94,384 would be necessary in order to do so. The HUD-1 Settlement Statement accompanying the loan indicated that Emigrant had made a payment of $3,250 to "Evergreen Funding"—*i.e.*, Rochlitz's employer, *see id.* ¶ 114—outside of the closing and that $800 from the loan proceeds went to Nathan Erlich, PC, for attorneys' fees. *Id.* ¶¶ 120-24, 126-28, 132.

The Saintils had trouble making payments on the loan and learned in December of 2006 that Emigrant

had imposed a "default" interest rate of eighteen percent. They continued to make payments during 2007 and the first half of 2008, and agreed to a loan modification offered by Emigrant in October of 2008. The Saintils were only able to make a partial payment in December of 2008, however, so the "default" interest rate of eighteen percent was again imposed on the loan. The Saintils agreed to a further modification in the Spring of 2010, but ultimately fell behind once again. In August of 2011, Emigrant filed a foreclosure action. *Id.* ¶¶ 140-48.

The Saintils first discussed their claims with counsel in June of 2011. *Id.* ¶ 150. Because the recorded documents on the Saintils' loan were incomplete, counsel was required to conduct significant research on the loan and did not have all of the necessary information until late in 2011. DE 42 at 3-4.

3. Linda Commodore

Linda Commodore purchased her apartment on West 101st Street in New York, New York, in 1991. She was able to make her mortgage payments without difficulty until 2004, when she lost her job. She contacted HomeTrust Mortgage Bankers in the Fall of 2004 to see if she could refinance her mortgage and provided them with background information about her financial history and her income from part-time employment. Her credit score at the time was 553. Complaint ¶¶ 152-56.

Commodore closed on her new mortgage on August 27, 2004. She was present at the closing with a friend, but

she did not have an attorney. Nobody explained the terms of the loan to her, but she signed the loan documents even though she did not understand all of the terms. She was not aware that the interest rate on the loan was adjustable and had a "default" rate of eighteen percent. The "resource letter" included in her loan documents stated that the loan had been originated without consideration of Commodore's ability to make payments on the loan and indicated that an annual income of $54,792 would be necessary in order to do so. *Id.* ¶¶ 159-62, 165.

Unable to find steady work, Commodore was able to make only one full payment on the loan between September of 2004 and February of 2005 and her monthly payment doubled after the "default" interest rate of eighteen percent was imposed. She struggled to make payments during the subsequent years and her apartment ultimately entered foreclosure in 2007. *Id.* ¶¶ 169-70, 173-75.

Commodore did not discover the discrimination underlying her loan until she met with counsel on August 20, 2013. *Id.* ¶ 176; Declaration of plaintiffs' counsel Rachel Geballe, DE 171-1 at 1-5 ("Geballe Decl.") ¶ 3. She requested to be a plaintiff in this lawsuit on October 8, 2013. Geballe Decl. ¶ 3.

4. The Smalls

Jeanette Small and her daughter Beverley purchased their home on East 57th Street in Brooklyn in 1996. In 2006, when the Smalls were having trouble making the payments on their mortgage, they spoke to Shazeem

Ali ("Ali") of 1st Republic Mortgage Bankers about a refinancing loan. They told Ali that Beverley was not working at the time and provided him with Jeanette's employment information; Ali had the house appraised and told the Smalls that they were qualified to refinance their mortgage with Emigrant. At the time, Jeanette had a credit score of 573 and Beverley had a credit score of 495. Ali told the Smalls that the initial payment on the loan would be $2,800, but that the payment would go down to $1,100 after two months. Complaint ¶¶ 177-84.

The Smalls closed on their new mortgage on August 11, 2006. Ali attended the closing with the Smalls, along with an attorney who the Smalls were told would represent their interests. None of the loan documents were explained to the Smalls, and they did not understand that the loan came with a "default" interest rate of eighteen percent. The Smalls also were not alerted to the "resource letter" included in the closing documents that stated that the loan had been originated without consideration of their ability to make payments on the loan and indicated that an annual income of $82,728 would be necessary in order to do so. The HUD-1 Settlement Statement accompanying the loan indicated that Emigrant had made a payment of $3,300 to 1st Republic—*i.e.*, Ali's employer, *see id.* ¶ 179—outside of the closing and that $800 of the loan proceeds went to Cullen and Dykman for attorneys' fees. *Id.* ¶¶ 185-90, 192, 194.

Beverley Small was not aware of the discrimination underlying her loan until a phone call with counsel on August 28, 2013. *Id.* ¶ 204; Geballe Decl. ¶ 4. She requested

to be a plaintiff in this lawsuit on October 9, 2013. Geballe Decl. ¶ 4. The plaintiffs became aware of Jeanette Small's claims on October 4, 2013, and she requested to be included in this lawsuit on October 21, 2013. *Id.* ¶ 5.

5. Felipe Howell

Felipe Howell owned his home on 158th Street in Jamaica, New York, outright when he was approached by a local contractor in 2007. The contractor proposed that Howell, who is retired and does not earn any income, build a separate residence on his land to generate rental income. The contractor introduced him to Purelight Allah, an employee of mortgage broker Stur-Dee Funding ("Stur-Dee"). Stur-Dee informed Howell that he could get a cash-out refinance with Emigrant. Stur-Dee was aware that Howell had no income with which to make mortgage payments other than the prospect of rental income from new construction on the property, which was to be funded by the loan. Complaint ¶¶ 206-09.

The closing for Howell's loan took place on February 6, 2008. Present were Howell, his ex-wife, a representative of the contractor, several executives from Emigrant, and an attorney who Mr. Howell was told would represent his interests. Howell did not understand the documents presented to him at the closing, but he signed them anyway. Howell was not aware of a "resource letter" included in the closing documents that stated that the loan had been originated without consideration of his ability to make payments on the loan and indicated that an annual income of $51,527 would be necessary in order

to do so. The HUD-1 Settlement Statement accompanying the loan indicated that Emigrant had made a payment of $2,007 to Stur-Dee outside of the closing and that $835 of the loan proceeds went to "Mattone" for attorneys' fees. *Id.* ¶¶ 212-17.

The $1,800 monthly payments on the loan were more than Howell could afford, and he was unable to make a single payment. With the help of The Legal Aid Society of Queens, he tried to negotiate with Emigrant but did not receive a response. Emigrant obtained a judgment of foreclosure in March of 2009 and purchased Howell's home for $1,000 dollars at a foreclosure auction in August of 2009. *Id.* ¶ 216, 222, 224.

Howell discovered that he was the victim of discrimination and requested to be included as a plaintiff in this lawsuit during a meeting with counsel on August 21, 2013. *Id.* ¶ 225; Geballe Decl. ¶ 6. He was not given any information about potential discrimination claims when he consulted with The Legal Aid Society of Queens. Complaint ¶ 226.

6. The NINA Loan Program

Central to the plaintiffs' claims are their allegations that the individual loans described above were part of a program through which Emigrant marketed predatory loans to individuals with poor credit in minority communities in New York City in order to strip those individuals of the equity they had in their homes. That program is a "no income no assets" ("NINA") loan

program that Emigrant created in 1995. Unlike a "stated income" loan requiring borrowers to state their income (albeit without requiring any proof), a NINA loan does not require any information on the borrowers' income and relies instead on their credit report and the equity they have in their home. NINA loans are therefore more risky for lenders; as a result, a NINA borrower is generally expected to have a moderate to high credit score and even then will be charged higher fees and more interest. By 2004, more than 80 percent of Emigrant's mortgage refinance loans secured with one-to-four family buildings were NINA loans. *Id.* ¶¶ 26, 28, 31.

It was in 2004 and 2005, according to the plaintiffs, that Emigrant's NINA loan program evolved to become more costly and abusive to borrowers. The Complaint describes several features of Emigrant's NINA loans that allegedly distinguished Emigrant from other lenders. First, Emigrant made NINA loans to borrowers with poor credit who would not qualify for such loans at other banks. Second, Emigrant and its subsidiaries held on to most of the loans they originated, rather than selling them on secondary markets, thereby sidestepping risk assessments by ratings agencies and investors. Third, Emigrant's NINA loans included an eighteen percent "default" interest rate that could be imposed on borrowers who were late on a single payment by only 30 days. Fourth, Emigrant utilized brokers to identify potential borrowers with significant equity in their homes, and offered them incentive payments to induce borrowers to take out loans with interest rates above those for which they would otherwise qualify. *Id.* ¶¶ 32-34, 36-37, 39.

In part because of those unorthodox practices, the Complaint alleges, Emigrant's NINA loan program has had a foreseeable disparate impact on minority communities. Because residents of minority neighborhoods in New York City tended to have lower credit scores, Emigrant's willingness to make NINA loans to borrowers with credit scores in the 500s foreseeably resulted in a concentration of costly loans in such neighborhoods. Between 2005 and 2008, over 60 percent of Emigrant's NINA loans were originated in census tracts in which minorities made up 50 percent or more of the residents. *Id.* ¶¶ 48-52.

The Complaint further alleges that Emigrant targeted minority communities for its NINA loan programs. The plaintiffs allege that Emigrant took note of the profitability of the loans it originated and the race of the borrower, and of the correlation between minority borrowers and higher interest rates. Emigrant therefore targeted its advertising toward minority communities by grouping potential New York newspapers according to the minority community each served; concentrating its advertising in communities with large minority populations; and relying on advertisements that featured "racial identity cues shown to have great appeal to blacks and Latinos." *Id.* ¶¶ 58-59, 61.

B. Proceedings

The Saint-Jeans filed their initial complaint on April 29, 2011. DE 1. They alleged violations of the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3604, 3605; the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, *et seq.*; New

York Human Rights Law, N.Y. Exec. Law § 296-a; New York City Administrative Code § 8-502; and the Truth in Lending Act ("TILA"), 15 U.S.C. § 1691, *et seq.* Complaint ¶¶ 227-78. Emigrant moved to dismiss the complaint on June 8, 2011, and the parties completed their briefing on the motion on August 29, 2011. DE 3 (Notice of Motion); DE 4 (Emigrant Memorandum of Law) ("Def. 12(b)(6) Memo."); DE 15 (Plaintiffs' Memorandum of Law in Opposition) ("Pl. 12(b)(6) Opp."); DE 14 (Emigrant Reply Memorandum of Law) ("Def. 12(b)(6) Reply"). The court heard oral argument on May 24, 2012, and referred the motion to me by order dated July 29, 2013.

Following briefing on the motion to dismiss, the parties submitted a jointly proposed discovery schedule. *See* DE 17. I held a discovery planning conference on September 27, 2011, and issued a scheduling order that contemplated that the parties would complete discovery within approximately eleven months. DE 19; DE 20. Eight months later, on May 31, 2012, Emigrant moved for a stay of discovery pending resolution of its motion to dismiss. DE 48. I denied that motion in an order dated June 11, 2012. Discovery continued well past the original deadline, and has yet to conclude. The delay is in part the result of an extraordinary number of discovery disputes, only the broad outlines of which are relevant here for purposes of analyzing the motions to amend.

At a conference on May 3, 2012, I discussed the nature and scope of discovery at length with the parties and addressed several contested issues. DE 40 (minute entry); DE 65 (transcript) ("Tr."). First, without

foreclosing the parties from briefing the issues in more depth if they wished, I made a preliminary ruling that a statistical analysis of loan-level data was relevant to the plaintiffs' discriminatory impact claims and therefore that the data necessary to perform such an analysis was discoverable, subject to any objections that arise as to specific data fields. *Id.* at 12-16. Second, I indicated that I was not inclined to limit discovery to the particular loan program from which the Saint-Jeans' loan originated, as it was "at least possible" that a "suite of programs that share common characteristics" and "together have a discriminatory impact" could be relevant to their claims and therefore subject to discovery. *Id.* at 19-20. Third, I concluded that programmatic documents, such as "communications about how things are marketed [and] how loans are handled," would be relevant to the plaintiffs' discriminatory impact claim, even if also relevant to a separate claim of disparate treatment. *Id.* at 25-27. The parties subsequently requested, and I granted, further consideration of these issues through formal motions. *See* DE 55 through DE 64.

Consistent with the discussions that took place at that conference, and over Emigrant's objections regarding the overall nature and scope of such discovery, I granted the plaintiffs' motion to compel discovery along the outlines discussed above at a hearing on August 2, 2012. DE 67 (minute entry). Notwithstanding that ruling, Emigrant has resisted providing much of the information to which I concluded the plaintiffs were entitled; and as a result the plaintiffs have made, and I have granted, several subsequent requests for discovery relief, each of which

was consistent with my ruling on August 2, 2012. DE 75 (minute entry dated March 6, 2013) (granting motion to clarify that my earlier ruling was not limited to custodians with a direct connection to the Saint-Jeans' loan); DE 114 (minute entry dated December 2, 2013) (permitting the plaintiffs, over Emigrant's objections, to conduct depositions in substantial conformance with joint proposed discovery plan filed by the parties on September 23, 2011, *see* DE 17); DE 168 (minute entry dated January 30, 2014) (resolving numerous discovery disputes). As a result of the significant delays arising from these and other disputes, I have adjourned the discovery deadlines four separate times. DE 70; DE 76; DE 84; DE 89.

The plaintiffs served their motion to file a first amended complaint adding the Saintils as plaintiffs and three additional Emigrant entities as defendants on March 30, 2012. DE 37; *see also* Order dated March 16, 2012 (extending deadline for joinder of additional parties and amendment of pleadings to March 30, 2012). Briefing on that motion was completed and filed on the docket on May 4, 2012. *See* DE 42-3 (Plaintiffs' Memorandum of Law); DE 43 (Emigrant Memorandum of Law in Opposition); DE 44 (Plaintiffs' Reply Memorandum of Law). The court referred the motion to me by order dated July 29, 2013

The plaintiffs first stated their intention to seek leave to file a second amended complaint adding four new plaintiffs and making allegations of intentional targeting and discriminatory intent in a pre-motion conference letter filed on November 15, 2013. DE 110. They served the proposed second amended complaint—that is, the

pleading I have cited as the "Complaint" in providing the foregoing factual description of the case—on December 20, 2013, and the parties completed briefing on the motion to file this latest amendment on January 31, 2014. *See* DE 171-2 (Plaintiffs' Memorandum of Law) ("Pl. SAC Memo."); DE 172 (Emigrant Memorandum of Law in Opposition) ("Def. SAC Opp."); DE 174 (Plaintiffs' Reply Memorandum of Law) ("Pl. SAC Reply"). The court referred the motion to me by order dated January 31, 2014.

II. Discussion

Emigrant has moved to dismiss the Saint-Jeans' claims under Fed. R. Civ. P. 12(b)(6) on the grounds that they are untimely and that they fail to state a claim on which relief can be granted. DE 3; DE 4. Emigrant also argues that both of the plaintiffs' proposed amendments to the original complaint, which add multiple plaintiffs and supplement the grounds for relief on the plaintiffs' civil rights claims, are futile because they are both untimely and they fail to state a cognizable claim for relief. DE 43; DE 172.[2] As set forth below, the standard of review for futility mirrors that applicable to a motion to dismiss

2. Emigrant objects to the joinder of Emigrant Bancorp, Emigrant Bank and Emigrant Savings Bank Manhattan as defendants solely on futility grounds. DE 43 at 14. To be more specific, Emigrant rehashes its arguments in favor of dismissal of the plaintiffs' claims altogether and does not dispute the plaintiffs' contentions that the additional Emigrant entities are necessary parties to their claims. *See* DE 42-3 at 8-13. Thus, I construe Emigrant to concede that, to the extent the plaintiffs' claims are not futile, the additional Emigrant entities may properly be joined as defendants.

under Rule 12(b)(6). Accordingly, after discussing the pertinent standards, I will analyze the two motions in tandem to the extent they overlap, and then separately address Emigrant's arguments that are particular to the proposed amendments.

A. Applicable Legal Standards

1. Motion to Dismiss

In considering a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the court should consider the "legal sufficiency of the complaint, taking its factual allegations to be true and drawing all reasonable inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009) (citations omitted). To survive a motion to dismiss, the assertions in the complaint must suffice to "state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), meaning that the plaintiff must plead factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (alterations in original) (quoting Fed. R. Civ. P. 8(a)(2)).

When assessing the sufficiency of a complaint, the court must distinguish factual contentions, which allege behavior on the part of the defendant that, if true, would satisfy one or more elements of the claim asserted, from "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. Although for the purposes of a motion to dismiss the court must assume the veracity of the facts asserted in the complaint, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quotation marks omitted).

2. Motion to Amend

The motion to amend a complaint to add both new claims and new defendants implicates Rules 15(a) and 21. *See Momentum Luggage & Leisure Bags v. Jansport, Inc.*, 2001 WL 58000, at *1-2 (S.D.N.Y. Jan. 23, 2001). The former allows a party to amend its pleading once as a matter of course within 21 days after a responsive pleading is served or "with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a). The latter provides that a court "may at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. Both rules trigger the same standard of review. When a party seeks to add a new claim, in the absence of reasons to deny the application such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . futility of amendment, etc.[,] the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962)

(quoting Fed. R. Civ. P. 15(a)). Rule 21 likewise allows a court broad discretion to add a party, *Sullivan v. W. N.Y. Residential, Inc.*, 2003 WL 21056888, at *1 (E.D.N.Y. Mar. 5, 2003), and the exercise of that discretion should be "guided by the same standard of liberality afforded to motions . . . under Rule 15." *Rissman v. The City of New York*, 2001 WL 1398655, at *1 (S.D.N.Y. Nov. 9, 2001).

Where a party opposes a proposed amendment on the ground that it is futile, the court should review the proposed claim as it would in considering a motion for dismissal under Rule 12(b)(6). *See, e.g., Amna v. N.Y. State Dep't of Health*, 2009 WL 6497844, at *1 (E.D.N.Y. Sept. 3, 2009) (citing *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002)). I therefore accept the proposed second amended complaint's material factual allegations as true, and I may not deny leave to amend on the ground of futility unless the proposed pleading fails to set forth a plausible claim for relief under the authority set forth above. "The non-moving party bears the burden of demonstrating why leave to amend should be denied on futility grounds." *Semper v. N.Y. Methodist Hosp.*, 786 F. Supp. 2d 566, 582 (E.D.N.Y. 2011) (citing *Blaskiewicz v. Cnty. of Suffolk*, 29 F. Supp. 2d 134, 137-38 (E.D.N.Y. 1998)). A court may deny leave to amend a complaint on the ground of futility if the proposed new claims are barred under the relevant statute of limitations. *See Semper*, 786 F. Supp. 2d at 581-582; *Farbstein v. Hicksville Pub. Library*, 323 F. Supp. 2d 414, 422 (E.D.N.Y. 2004).

Where a defendant opposes an amendment on the grounds of undue delay, a court may deny leave to amend

only if the plaintiff waited an "inordinate" amount of time to seek leave to amend, and only then if the plaintiff offers "no satisfactory explanation . . . for the delay, and the amendment would prejudice the defendant." *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir. 1990). "Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981). The standard for seeking an amendment in the face of delay is more exacting if the moving party fails to seek leave within the time prescribed in a scheduling order entered under the authority of Rule 16(b); in such circumstances, the moving party must demonstrate "good cause" for the delay. *See* Fed. R. Civ. P. 16(b)(4); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003); *Perfect Pearl Co., Inc. v. Majestic Pearl & Stone, Inc.*, 889 F. Supp. 2d 453, 457 (S.D.N.Y. 2012); *Alexander v. Westbury Union Free Sch. Dist.*, 829 F. Supp. 2d 89, 117 (E.D.N.Y. 2011); *Hogan v. J.P. Morgan Chase Bank*, 2008 WL 4185875, at *2 (E.D.N.Y. Sept. 4, 2008). A party seeking to establish such good cause must show that it has been reasonably diligent in trying to meet the applicable deadline—a standard that is not satisfied if the proposed amendment relies on information that the party knew or should reasonably have discovered in advance of the deadline. *See*, *e.g.*, *Perfect Pearl Co.*, 889 F. Supp. 2d at 457; *Lamothe v. Town of Oyster Bay*, 2011 WL 4974804, at *6 (E.D.N.Y. Oct. 19, 2011).

Prejudice to the non-movant is "among the 'most important' reasons to deny leave to amend." *AEP Energy*

Servs. Gas Holding Co. v. Bank of Am., N.A., 626 F.3d 699, 725 (2d Cir. 2010) (quoting *Fluor Corp.*, 654 F.2d at 856). The longer the "unexplained delay," the less that will be required to make a showing of undue prejudice. *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993) (quotations omitted). Amendment may be prejudicial where it would significantly delay resolution of the dispute or require further expenditure of resources toward discovery or trial preparation. *Id.*

B. Timeliness of the Civil Rights Claims

Emigrant argues that the plaintiffs' discrimination claims are barred under the applicable statutes of limitations. Def. 12(b)(6) Memo. at 11.[3] The applicable limitation periods are two years under both the FHA and the ECOA, and three years for the claims under both state and municipal law. *See* 42 U.S.C. § 3613(a)(1)(A); 15 U.S.C. § 1691e(f); N.Y. C.P.L.R. § 214; New York City Administrative Code § 8-502(d). Absent some basis for tolling the limitations periods or some reason to conclude that the plaintiffs' claims accrued after the date on which they closed on the loans about which they complain—which occurred, in the case of each loan, more than three years before they sued Emigrant—all of the plaintiffs' discrimination claims are untimely. As set forth below, I conclude that the Complaint adequately pleads that the discrimination claims under federal law are timely pursuant to the discovery rule and the doctrine

3. I address the timeliness of the TILA claims separately in Part C below.

of equitable tolling; however, I further conclude that the latter rules do not apply to the claims under state and municipal laws, and that those claims should therefore be dismissed as time-barred.

1. Continuing Violation

The plaintiffs contend that Emigrant's NINA loan program constitutes a "continuing pattern of discriminatory conduct" of which each subject loan is a part, and that Emigrant's commission of a continuing violation therefore warrants tolling of the statute of limitations applicable to their claims. Pl. 12(b)(6) Opp. at 5. A continuing violation may be found "where there is proof of specific ongoing discriminatory policies or practices." *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994). Where a plaintiff establishes such a practice, the statute of limitations begins to run upon the "last asserted occurrence of that practice." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (applying the continuing violations theory to the FHA); *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 17-19 (D.D.C. 2000) (applying the continuing violations theory to the ECOA). Thus, where a continuing violation has been shown and the plaintiff files suit within the limitations period following the last act or occurrence, the plaintiff may recover for earlier instances of discrimination if they are part of the same policy or practice. *Cornwell*, 23 F.3d at 704. "[T]he continuing violation doctrine is heavily disfavored in the Second Circuit and courts have been loathe to apply it absent a showing of compelling circumstances." *Gentile v. Potter*, 509 F. Supp. 2d 221,

234 (E.D.N.Y. 2007) (citing *Trinidad v. N.Y. City Dep't of Corr.*, 423 F. Supp. 2d 151, 165 n.11 (S.D.N.Y. 2006)).

I conclude that the analysis in *Havens Realty* is dispositive. In that case, plaintiff Coles sought to rent an apartment from the defendants and was falsely informed, allegedly because of his race, that no apartments were available. *Havens Realty*, 455 U.S. at 368-69. A second plaintiff named Coleman was not actually seeking to rent an apartment, but was acting as a "tester"—she visited the same apartment complex around the same time as Coles to see if she would get a similar response. *Id.* Coleman asserted a violation of her statutory right to truthful information, and both Coles and Coleman alleged that the defendants' discriminatory practices had deprived them of the benefits of living in an integrated community. *Id.* at 369. Coles was misinformed within the limitations period whereas Coleman, the tester, alleged a series of acts of misinformation that all occurred outside of the statutory period. *Id.* at 369-70. The Court held that the "continuing violation" theory saved Coleman's claim regarding the benefits of living in an integrated community because that claim was based on at least one discriminatory practice (the false information given to Coles) within the statutory period. *Id.* at 381. In other words, the misinformation provided to Coles led to a less integrated community, thereby causing injury particular to Coleman and her "integrated community" claim. However, the Court dismissed as untimely Coleman's claim that the defendants had failed to give her the truthful information to which she was entitled. *Id.* The Court reasoned that Coleman's misinformation claim did not fall under the continuing

violation theory because it could not be said that the false information provided to Coles "deprived Coleman of her [statutory] right to truthful housing information." *Id.*

Thus, the Court tolled the statute of limitations for Coleman's more diffuse "integrated community" claim because an act that took place within the limitations period (providing the misinformation to Coles) could be said to have contributed to the claimed injury, and that act and the instance of discrimination against Coleman outside of the limitations period were part of the same discriminatory practice. By contrast, the Court found Coleman's misinformation claim untimely because, with respect to the injury of being misinformed, the several acts of which Coleman complained were "discrete incidents of discrimination." *Cornwell*, 23 F.3d at 704; *accord Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 313-14 (E.D.N.Y. 2008) (collecting cases) ("[M]ost courts have interpreted the Supreme Court's ruling on continuing violations in *Havens Realty* as requiring a plaintiff to establish not only an unlawful policy but also a violation *that specifically affects the plaintiff* within the limitations period." (emphasis in original)). *But cf. Barkley v. Olympia Mortg. Co.*, 2007 WL 2437810, at *16 (E.D.N.Y. Aug. 22, 2007) (allegation that the "defendants continued to target other minorities for predatory sales after plaintiffs purchased their homes" sufficient to withstand a motion to dismiss).

Moreover, requiring an act or violation specific to the plaintiff within the limitations period is consistent with the rationale behind the continuing violations theory, which is to allow a plaintiff who "can not reasonably be expected

to recognize" his cause of action immediately to assert it once it has become clear that it is a policy or custom. *Joseph S.*, 561 F. Supp. 2d at 314; *see also Hargraves*, 140 F. Supp. 2d at 18 (continuing violations applicable to act if its "character as a violation did not become clear until it was repeated during the limitations period").

Although they allege that Emigrant's discriminatory loan practices continued "through 2009," the plaintiffs do not allege any specific injuries apart from those stemming from the loans they received from Emigrant.[4] Specifically, they do not allege as individuals that the loans to their co-plaintiffs or other unnamed borrowers resulted in injuries particularized to each of them; instead, they rely on the mere fact that Emigrant continued to make loans as part of its allegedly discriminatory programs as providing the policy or practice necessary to show a continuing violation. That theory appears to be insufficient under the applicable case law.

The plaintiffs' claims are also vague as to the acts of discrimination that took place during the limitations period. They allege only that Emigrant's practices continued through 2009, and they leave it to the court to infer that an unknown individual received a discriminatory loan under the program on or after April 29, 2009, which would be necessary to render the plaintiffs' claims timely

4. Most importantly for the purposes of this motion, the plaintiffs do not allege that they were injured in any more diffuse manner, such as by the effects of Emigrant's allegedly discriminatory loan programs on their community akin to the testers in *Havens Realty*.

under the continuing violations theory. Accordingly, I conclude that the plaintiffs have not shown a continuing violation and are therefore not entitled to tolling of the statute of limitations on their discrimination claims on that basis.

2. The Discovery Rule and Equitable Tolling

Although an injury normally accrues for purposes of federal law at the time it is inflicted, "where a plaintiff 'would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted, the so-called diligence-discovery rule of accrual applies.'" *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 139-40 (2d Cir. 2011) (quoting *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998)). Claims subject to the discovery rule are therefore deemed to accrue when the plaintiff "knows or has reason to know of the injury that serves as the basis for the action." *Clement v. United Homes, LLC*, 914 F. Supp. 2d 362, 371-72 (E.D.N.Y. 2012) (quoting *Dombrowski v. City of N.Y.*, 1997 WL 314770, at *1 (2d Cir. 1997)).

Citing *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), Emigrant argues that the discovery rule does not apply either to the FHA or the ECOA because "[f]ederal courts may not apply the discovery rule to a Federal statute when the language of the statute does not expressly contemplate the application of the discovery rule." Def. 12(b)(6) Memo. at 13. In *TRW*, the Court considered a statute of limitations provision in the Fair Credit Reporting Act ("FCRA") that explicitly applied the discovery rule to certain explicitly specified types of material misrepresentation. 15 U.S.C.

§ 1681p. Under review in the case was an appellate decision holding that the discovery rule applied generally to federal statutes, including claims under the FCRA, absent an express direction otherwise from Congress. *TRW*, 534 U.S. at 27. The Supreme Court rejected that holding and observed that, if a discovery rule were to be applied generally to claims under the FCRA, the provision for use of the discovery rule in specific circumstances would be rendered meaningless. *Id.* at 29. The Court therefore reversed and held that "Congress can convey its refusal to adopt a discovery rule . . . by implication from the structure or text of the particular statute." *Id.* at 27-28. More precisely, the Court wrote, "Congress implicitly excluded a general discovery rule by explicitly including a more limited one" in the FCRA. *Id.* at 28. Thus, contrary to Emigrant's contention, *TRW* stands for no more than the proposition that, as a matter of statutory interpretation, Congress may tacitly preclude a discovery rule—but that does not mean that Congress can never write a statute that tacitly allows such a rule. Moreover, nothing in the case law that Emigrant cites from other circuits finds in *TRW* the rule that Emigrant purports to read into that decision. *See Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008); *Thompson v. Mountain Peak Assocs., LLC*, 2006 WL 1582126, at *3 (D. Nev. June 5, 2006).

In contrast to the FCRA (the statute at issue in *TRW*), the FHA and the ECOA are silent as to the discovery rule and do not contain a carve-out similar to that in the FCRA. Courts in this circuit have generally applied the discovery rule to ECOA claims because such claims

tend to allege discrimination of the sort that cannot be discovered until the victim meets with other victims or learns about the alleged discrimination from an attorney. *E.g., Jones v. Ford Motor Credit Co.*, 2002 WL 88431, at *13-14 (S.D.N.Y. Jan. 22, 2002). Several courts in this circuit have also applied the discovery rule to the FHA. *See Adkins v. Morgan Stanley*, 2013 WL 3835198, at *5-6 (S.D.N.Y. July 25, 2013); *Clement*, 914 F. Supp. 2d at 371-72; *but see*, *e.g.*, *Garcia v. Brockway*, 526 F.3d 456, 465 (9th Cir. 2008) (concluding based on text of the FHA that Congress did not intend to apply discovery rule).

It is no mere coincidence that several of the cases cited above involve allegations of discrimination that are similar in nature to those the plaintiffs advance here. Such insidious discrimination as the plaintiffs allege (but of course have yet to prove) is precisely the kind of injury that its victim would be expected to have "difficulty discerning . . . at the time it [is] inflicted." *Castillo*, 656 F.3d at 139-40. I therefore conclude, consistent with the case law of this circuit, that the discovery rule applies to the plaintiffs' claims.

The plaintiffs also seek refuge under the related doctrine of equitable tolling, which applies to those "induced by fraud, misrepresentation, or deception to refrain from timely commencing an action." *M&T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 556 (E.D.N.Y. 2010) (citations omitted). To establish that the doctrine applies, a plaintiff must establish:

> (1) that the defendant concealed the existence of the cause of action from the plaintiff; (2) that

> the plaintiff brought suit within the applicable limitations period upon learning of the cause of action; and (3) that the plaintiff's ignorance of the claim did not result from a lack of diligence.

Id. at 556 (citing *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988)). Equitable tolling has in some instances been treated as a species of the discovery rule. *See, e.g.*, *Phillips v. Better Homes Depot, Inc.*, 2003 WL 25867736, at *24-25 (E.D.N.Y. Nov. 12, 2003) (treating an argument for the "federal discovery rule" under the equitable tolling doctrine). Courts in this circuit have commonly evaluated FHA and ECOA claims under this rubric and held that actions by the defendant to steer the plaintiff toward banks, brokers or attorneys who are familiar with the alleged scheme will satisfy the concealment element. *E.g., White*, 736 F. Supp. 2d at 556-57; *Council v. Better Homes Depot, Inc.*, 2006 WL 2376381, at *9 (E.D.N.Y. Aug. 16, 2006) (E.D.N.Y. Aug. 16, 2006); *Barkley*, 2007 WL 2437810, at *16-17. The plaintiffs have alleged that they were steered to Emigrant by brokers who convinced them to take out costly loans when a more modest one might have been available; that they were assured that their interests were being represented at closing by attorneys who were in fact retained by Emigrant; and that the loans they received included terms that were not disclosed to them or that were at odds with Emigrant's (or its brokers') prior representations. Those allegations suffice at this stage to plead that Emigrant and its agents deliberately concealed the alleged discriminatory scheme from the plaintiffs.

Finally, the plaintiffs must additionally show under both doctrines that they did not know or have reason to know of their claims until a date within the limitations period, *see Clement*, 2012 WL 6720701, at *8, and that once they learned of the claims they pursued them with diligence. In that regard the plaintiffs have all alleged that they did not discover the discriminatory scheme underlying their claims until they met with counsel within the limitations period, and nothing within the four corners of the Complaint undercuts those assertions or suggests a lack of diligence.[5] Accordingly, viewing the Complaint in the light most favorable to the plaintiffs, I conclude that the Complaint adequately pleads facts that, if proved, will render the plaintiffs' federal claims timely under both the discovery rule and the doctrine of equitable tolling.[6]

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5. I consider here only whether the plaintiffs' claims should be dismissed or deemed futile as untimely, and therefore consider only the contents of the Complaint. To the extent Emigrant cites facts in the record of this litigation extrinsic to the Complaint to argue that the plaintiffs have not acted diligently in prosecuting their claims, I address their arguments below in Part F, where I consider whether the plaintiffs have unduly delayed seeking leave to file their proposed amendments.

6. For the same reason that I reject Emigrant's improper reliance on extrinsic evidence for other purposes, *see supra* n.1, I decline to consider Emigrant's proffer of the Saint-Jeans' tax returns to support their argument that the Saint-Jeans are not entitled to equitable tolling because they lack clean hands. DE 179. Even if Emigrant's argument were not procedurally improper, which it assuredly is, it would in any event be unpersuasive. The argument is not that the Saint-Jeans do not deserve equitable tolling because they engaged in misconduct that is somehow relevant to the timeliness of their claim, it is instead tantamount to an argument that only those

3. State and Municipal Claims

The parties do not address in any detail the application of the tolling doctrines discussed above to the three-year statute of limitations applicable to the plaintiffs' claims under state and municipal law. Emigrant persuasively argues that "the discovery rule does not exist under New York law," Def. 12(b)(6) Memo. at 14, and the plaintiffs do not contend that the discovery rule or any equivalent rule under state or municipal law saves their claims. *See* Pl. 12(b)(6) Opp. at 7-10. Accordingly, I conclude that the discovery rule is inapplicable to the plaintiffs' state and municipal claims.

The plaintiffs contend, however, that a New York equivalent of the continuing violations doctrine saves their state and municipal claims. *See* Pl. 12(b)(6) Opp. at 7. The plaintiffs argue that New York doctrine is "broader" than the federal doctrine because it focuses on the existence of a "continuing impact" on the plaintiff. *Id.* (citing *Sunshine v. Long Island Univ.*, 862 F. Supp. 26, 30 (E.D.N.Y. 1994);

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who have led entirely blameless lives may appeal to the court for equity. Such an argument is of course wholly at odds with the law. *See, e.g.*, *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) ("equity does not demand that its suitors shall have led blameless lives as to other matters," but instead requires only "that they shall have acted fairly and without fraud or deceit as to the controversy in issue") (internal quotations and citations omitted); *Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC*, 149 F.3d 85, 90 (2d Cir. 1998) (quoting same, and noting that "[t]he doctrine of unclean hands also may be relaxed if defendant has been guilty of misconduct that is more unconscionable than that committed by plaintiff ") (internal quotations and citations omitted).

McClary v. Marine Midland Bank, 450 N.Y.S.2d 109, 110 (App. Div. 1982)). As a threshold matter, I disagree that the "continued impact" rationale should apply here because the cases cited by the plaintiffs involved employment discrimination on an ongoing basis and required either an act within or a policy that extended into the limitations period. *See Sunshine*, 862 F. Supp. at 29-30 (annual denials of tenure to female college professor); *McClary*, 450 N.Y.S.2d at 110 (ongoing policy by employer to deny pregnancy-related disability claims). Here, by contrast, each of the plaintiffs alleges discrimination in a discrete financial transaction; while the consequences of each transaction persist, such collateral effects do not appear to be the type of "continued impact" that *Sunshine* and *McClary* contemplated, and the plaintiffs cite no other authority for their argument. Moreover, even if the plaintiffs' reading of *Sunshine* and *McClary* has merit, they fail to explain how that saves a pleading that alleges no specific continuing harm. The Saint-Jeans vaguely assert only that they "continue to experience the impact of Emigrant's conduct"—a manifestly conclusory allegation that the court need not accept as true in deciding the motion to dismiss. *See* Pl. 12(b)(6) Opp. at 7. I therefore conclude that the continuing violations theory is inapplicable to the plaintiffs' claims under state and municipal law, and that those claims are thus untimely.

C. Timeliness of the TILA Claims

TILA was enacted to provide "meaningful disclosure of credit terms" to consumers. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (quoting 15 U.S.C. § 1601(a)).

It therefore requires lenders to accurately disclose the terms of various credit transactions and to provide clear notice to borrowers of their rights. *See, e.g.*, 15 U.S.C. §§ 1631, 1635. Lenders who do not comply with TILA are subject to civil liability, including statutory and actual damages (to the extent such damages are traceable to a failure to disclose or provide notice), together with costs and attorneys' fees. *Id.* § 1640. Though its requirements are highly technical, TILA "achieves its remedial goals by a system of strict liability" in which any lender who fails to comply with its terms will be held liable without regard to intent or the severity of the violation. *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896, 898 (3d Cir. 1990). "TILA is a remedial statute that, in accordance with Congressional intent, is liberally construed in favor of consumers." *Pechinski v. Astoria Fed. Savs. & Loan Ass'n*, 238 F. Supp. 2d 640, 642 (S.D.N.Y. 2003) (citing *N.C. Freed Co. v. Bd. of Governors of the Fed. Reserve Sys.*, 473 F.2d 1210, 1214 (2d Cir. 1973)).

In any non-purchase-money loan transaction in which the lender takes a security interest in the borrower's principal dwelling, TILA allows borrowers to rescind with "no questions asked" within three days of closing or of receiving the required notices and disclosures, whichever is later. 15 U.S.C. § 1635(a). Where there are material violations of TILA in connection with the loan, the borrower's right to rescind extends until three years after its consummation. *Id.* § 1635(f); 12 C.F.R. § 226.23(a)(3) ("material" violations include, *inter alia*, inaccurate disclosure of the annual percentage rate, failure to give notice of the right to rescind or failure to provide two

copies of the required disclosures). A borrower may exercise his right to rescind "by notifying the creditor, in accordance with [applicable] regulations . . . of his intention to do so," 15 U.S.C. § 1635(a); the regulations, in turn, provide for notification "by mail, telegram or other means of written communication." 12 C.F.R. § 226.23(a)(2). An action for damages under TILA "may be brought . . . within one year from the date of the occurrence of the violation. . . . " *Id.* § 1640(e).

Emigrant argues that the Saint-Jeans' TILA claims are untimely because they failed to file suit within three years of the closing on the loan. Def. 12(b)(6) Reply at 6-7; *see also* DE 46 at 4-5. Its argument implicates a legal question that has divided other circuits and that has not been conclusively resolved in this one. The courts of appeals for the Third and Fourth Circuits, as well as some district court decisions in the Seventh Circuit, have held that borrowers need only give the lender notice of their intent to rescind the subject loan in order to exercise their right of rescission. *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013); *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012); *Cocroft v. HSBC Bank USA, N.A.*, 2012 WL 1378645 (N.D. Ill. Apr. 20, 2012); *Stewart v. BAC Home Loans Servicing, LP*, 2011 WL 862938 (N.D. Ill. Mar. 10, 2011); *Obi v. Chase Home Fin., LLC*, 2011 WL 529481 (N.D. Ill. Feb. 8, 2011). The reasoning of the cited appellate decisions is straightforward: "neither 15 U.S.C. § 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them." *Gilbert*, 678 F.3d at 277; *accord Sherzer*, 707 F.3d at 261 (declining "to infer that the statute contains

additional, unwritten requirements with which obligors must comply").

The courts of appeals for the Eighth, Ninth and Tenth Circuits, on the other hand, have held that commencement of a suit is required to exercise the right to rescind. *Keiran v. Home Capital, Inc.*, 720 F.3d 721 (8th Cir. 2013); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2012). The opinions in those cases rely primarily on the Supreme Court's opinion in *Beach*. The Beaches took out a qualifying loan in 1986, defaulted on it in 1991, and sought to assert their right to rescind based on a failure to provide the requisite TILA disclosures as an affirmative defense in a foreclosure proceeding. *Beach*, 523 U.S. at 413-14. The Court observed that in providing that the "right of rescission shall expire three years after the date of consummation of the transaction," 15 U.S.C. § 1635(f), Congress used language that "talks not of a suit's commencement but of a right's duration[.]" 523 U.S. at 417. Accordingly, the Court held that the three-year rescission period "govern[s] the life of the underlying right" and therefore acts as a statute of repose. *Id.* From there, the Court ruled that the statute provides no right to rescind, defensive or otherwise, after the three-year period of repose has run. *Id.* at 419. The Court further noted that TILA specifies that the one-year limit on an action for damages does not bar the assertion of the TILA violations underlying such an action "as a matter of defense by recoupment or set-off in such action," 15 U.S.C. § 1640(e), but does not provide a corresponding protection for the right of rescission. 523 U.S. at 417-18. This bolstered its

reading, the Court reasoned, in that Congress could well have concluded that "a statutory right of rescission could cloud a bank's title on foreclosure." *Id.* at 418.

No case in this circuit appears to have addressed the limitations issue under TILA presented here, and indeed there are few decisions in this circuit addressing any aspect of the statute. *See Diaz v. Paragon Motors of Woodside, Inc.*, 424 F. Supp. 2d 519, 529 (E.D.N.Y. 2006) (noting that courts in this circuit considering TILA claims "have relied on authorities in other circuits . . . due to the general absence of applicable decisions in this Circuit."). I therefore rely on two basic principles in making a recommendation as to which of the two competing approaches from other jurisdictions this court should embrace. First, "[s]tatutory interpretation always begins with the plain language of the statute, assuming the statute is unambiguous." *Universal Church v. Geltzer*, 463 F.3d 218, 223 (2d Cir. 2006) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). Second, TILA's purpose is remedial and its provisions therefore must be "liberally construed in favor of consumers." *Pechinski*, 238 F. Supp. 2d at 642; *see also Sherzer*, 707 F.3d at 261.

Construed in light of those principles, I conclude that TILA requires only notice to the creditor "by mail . . . or other means of written communication," 12 C.F.R. § 226.23(a)(2), in order to exercise the right of rescission. The Supreme Court's analysis in *Beach* reveals only the nature of the limitations period; the decision says nothing about how the right of rescission must be exercised. As a result, the plain text reading is entirely consistent with

Beach. *See Sherzer*, 707 F.3d at 261; *Gilbert*, 678 F.2d at 278. Moreover, nothing in any pertinent statutory or regulatory provision makes any mention of a requirement of court action of any kind prior to rescission. *See* 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(a)(2).[7] To the contrary, TILA provides that any security interest held by the creditor "becomes void upon such a rescission" and requires the creditor to return any down payment or earnest money paid "within 20 days after receipt of a notice of rescission"—without mention of a court proceeding or legal judgment of any kind. 15 U.S.C. § 1635(b).

Finally, the three-year period is not the only provision under TILA's regulatory regime that allows a borrower to rescind a loan. The same provision that allows a borrower three years to rescind in response to a material TILA violation also allows the borrower to rescind for any reason within three days of closing a loan. *See* 15 U.S.C. §§ 1635(a), (f). The method for exercising either kind of rescission is set forth in a single provision. *See* 12 C.F.R. § 226.23(a)(2). Presumably, then, the requirement to file a lawsuit before rescinding would apply to both kinds of rescission or to neither. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (considering "operative language" of statute that "applies without differentiation to . . . three categories of aliens" and finding that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one"). But requiring a borrower to file a lawsuit in order to exercise

7. The parties do not argue, and in any event I do not conclude, that the word rescission impliedly requires court involvement or approval. *See Sherzer*, 707 F.3d at 259 n.3.

her statutory right to rescind a qualifying loan within three days of closing would effectively nullify that right. Putting such a gloss on TILA would be antithetical to its remedial purpose, and I therefore reject it. Instead, I conclude that no lawsuit need be filed before a borrower may exercise the right of rescission within the three-day period after closing, and that the same must therefore also be true of the three-year period applicable to a material violation of the statute.

The Saint-Jeans sent a rescission notice to Emigrant on July 12, 2010, well within the three-year period following the date of their closing on January 10, 2008. Complaint ¶ 275. Emigrant rejected the purported rescission in a letter dated July 26, 2010, and the Saint-Jeans filed the instant lawsuit on April 29, 2011, within a year of their notice of rescission. Complaint ¶ 276. Accordingly, I conclude that their rescission claim is timely.

Emigrant further asserts that the Saint-Jeans' claim for damages is untimely under the one year time period applicable to such claims. *See* Def. 12(b)(6) Reply at 6-7; 15 U.S.C. § 1640(e). I agree with the plaintiffs, however, that a damages claim under TILA may be brought within one year of a creditor's improper handling of a rescission notice. TILA imposes liability on "any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title." 15 U.S.C. § 1640(a); *see id.* § 1635(b) (requiring creditors to respond to a notice of rescission within twenty days and take steps necessary to unwind the subject loan). Thus, the failure of a creditor to take the proper steps upon receipt

of a rescission notice will subject the creditor to liability under Section 1640, triggering the one year limitations period. *Belini v. Washington Mut. Bank, F.A.*, 412 F.3d 17, 19 (1st Cir. 2005); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002). I therefore conclude that the Saint-Jeans' damages claims under TILA are also timely.

D. Merits of the Civil Rights Claims

Although the parties disagree about the legal standard that must be applied to the plaintiffs' discrimination claims, they agree that a single standard applies to all of the plaintiffs' claims under the FHA and the ECOA, as well as to those under state and municipal law. I therefore do not distinguish among those claims in considering Emigrant's arguments that they all lack substantive merit.

Emigrant argues that the plaintiffs are asserting a "reverse redlining" claim, a type of claim that alleges "lending to a group of persons on less favorable terms than those borrowers would have received if they were outside that particular class of persons." *Ng v. HSBC Mortg. Corp.*, 2010 WL 889256, at *11 (E.D.N.Y. Mar. 10, 2010). While the plaintiffs disagree that they assert any such claim, they do agree with Emigrant that the elements of reverse redlining are: "(1) plaintiff is a member of a protected class; (2) plaintiff applied for and was qualified for loans; (3) the loans were made on grossly unfavorable terms; and (4) the transaction was discriminatory." *Williams v. 2000 Homes Inc.*, 2009 WL 2252528, at *5 (E.D.N.Y. July 29,

2009). Emigrant argues that the plaintiffs' claims cannot establish the third and fourth of those elements.

The plaintiffs respond in two ways: first, they contend that their Complaint pleads all four elements of a reverse redlining claim; second, they assert that the standard for reverse redlining claims has been used only in the context of racial targeting, and that a different standard applies to disparate impact claims. Pl. 12(b)(6) Opp. at 17. The latter standard requires the plaintiffs to show "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 575 (2d Cir. 2003). "[A] prima facie case is established by showing that the challenged practice of the defendant actually or predictably results in racial discrimination . . . " *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988) (quotations omitted). The plaintiffs' standard is precisely the test that Emigrant asserts should be applied to the fourth element of a reverse redlining claim. *See* Def. 12(b)(6) Memo. at 19; Def. 12(b)(b) Reply at 8-9. Given that Emigrant does not contest that the plaintiffs have adequately pleaded the first two elements of a reverse redlining claim, the parties' disagreement reduces to two issues. The first is whether the plaintiffs must allege facts that render the terms of their loans "grossly unfavorable," and if so, whether the Complaint actually does so. The second is whether the plaintiffs have adequately alleged that the loans were discriminatory as defined in *Tsombanidis* and *Huntington Branch*.

Emigrant argues that the plaintiffs' loans were not made on "grossly unfavorable" terms for three reasons. Because, as explained below, I disagree as to each of those reasons and conclude that the plaintiffs have indeed adequately alleged that the terms of their loans were grossly unfavorable, I need not and do not decide the antecedent question of whether they must make such a showing to prove their disparate impact claims.

First, Emigrant alleges that its NINA loan programs were approved under federal law, rendering the plaintiffs' claims implausible. *See* Def. 12(b)(6) Memo. at 17 (citing *Lee v. Bd. of Governors of the Fed. Reserve Sys.*, 118 F.3d 905, 916 (2d Cir. 1997); *Powell v. Am. Gen. Fin., Inc.*, 310 F. Supp. 2d 481, 488 (N.D.N.Y. 2004)). The argument is unpersuasive. As a threshold matter, the authority Emigrant cites—the Community Reinvestment Act Performance Evaluations of its NINA loan program[8]—is not a source of law; it is instead, as its name explicitly conveys, an "Evaluation." A positive evaluation made under the authority of a federal statute is not in itself a law; it is instead a source of information for consumers and regulators that a financial institution meets, in the examiner's opinion, certain criteria. Moreover, both of the cases on which Emigrant relies are readily

8. Emigrant does not rely on extrinsic evidence in claiming such approval: it cites the same Community Reinvestment Act Performance Evaluations that the plaintiffs cite in their pleading. *Compare* Def. 12(b)(6) Memo. at 6, 17 *with* Complaint ¶ 29 n.1; *see Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) ("Documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered.").

distinguishable. *Lee*, in a single paragraph, rejected allegations of discrimination based on a regulation that specifically allowed banks to waive transaction fees under certain circumstances. 118 F.3d at 916. The CRA evaluations cited by Emigrant do not constitute "permission" analogous to that cited in *Lee* because they do not purport to examine Emigrant's practices from a civil rights perspective and are instead based on criteria that are largely unrelated to the plaintiffs' claims. *See* 12 U.S.C. § 2903(a). In *Powell*, the plaintiff "allege[d] no specific policy" to support her discrimination claims and the court noted that her broad allegations mentioned only factors, such as credit history and income, that ECOA explicitly allows lenders to consider. 310 F. Supp. 2d at 488. Here, the plaintiffs' claims do not suffer from a lack of specificity, nor do the CRA evaluations cited by Emigrant similarly condone—let alone explicitly allow—the specific practices complained-of. Thus, neither case provides Emigrant with a safe haven.

Emigrant next argues that its loan terms cannot be considered grossly unfavorable because the plaintiffs have used the phrase "high cost" (which they define for purposes of the Complaint) to describe those terms even though, as Emigrant points out, the terms about which the plaintiffs complain do not qualify the subject loans as "high cost" under the definition of that term used in a New York statute. *See* Def. 12(b)(6) Memo. at 18 (citing DE 1 ¶ 20 (corresponding to Complaint ¶ 32); 3 N.Y.C.R.R. § 41.1). The argument is disingenuous and wholly unpersuasive for several reasons. First, Emigrant is manifestly seizing on a convenient shorthand in a pleading and then faulting

the plaintiffs for not allowing for the possibility that the New York legislature had used the same shorthand in a different way for a different purpose. Second, even in the context of the latter unfair tactic, Emigrant has resorted to distortion: the shorthand phrase the plaintiffs use ("very high cost," used to describe "a difference of at least five basis points above the going 'Prime' interest rate[,]" DE 1 ¶ 20; Complaint ¶ 32) is simply not the same statutory phrase upon which Emigrant relies. *See* 3 N.Y.C.R.R. § 41.1(e) (defining the statutory term, "High cost home loan"). Third, and most fundamentally, Emigrant understandably provides no explanation of why the New York statutory definition of a "high cost home loan" would be dispositive of whether a given loan term is grossly unfavorable for purposes of federal housing law—because no such explanation is possible.[9] Emigrant's reliance on the definitional difference between the phrase "very high cost" in the Complaint and the phrase "high cost home loan" in a New York statute is completely irrelevant to the sufficiency of the plaintiffs' federal claims.

Finally, Emigrant asserts that the terms of the loans at issue were not grossly unfavorable because it properly calculated and disclosed the annual percentage rate ("APR"). *See* Def. 12(b)(6) Memo. at 18-19 (citing *DiVittorio v. HSBC Bank, USA, N.A.*, 2009 WL 2246138 (Bankr. D. Mass. July 23, 2009), *aff'd*, 670 F.3d 273 (1st Cir. 2012)). Here again, Emigrant's argument is inapposite:

9. New York's definition of what constitutes a "high cost" loan manifestly could not suffice to defeat a similar challenge under federal law to an identical loan program in a state other than New York.

whether or not Emigrant properly disclosed the APR on its loans is of little importance in considering whether the terms of the loans were "grossly unfavorable" to the plaintiffs. Indeed, the case on which Emigrant relies simply did not consider the fairness of the loan at issue, let alone decide that a sufficiently transparent APR disclosure would preclude a finding that the loans terms were grossly unfavorable.[10]

Emigrant further argues that the plaintiffs have failed to show that its loan programs have had a disparate impact on minorities, and relies on two basic rationales. First, Emigrant argues that it is insufficient for the plaintiffs to allege discrimination based on a high degree of minority participation in its NINA loan program because a "bottom line racial imbalance" by definition does not state a disparate impact claim. *See Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998). Instead, Emigrant argues that any discrepancy is due to the percentage of minorities in New York City who have low credit scores. Second, Emigrant argues that the plaintiffs have failed to demonstrate through a statistical comparison that similarly situated minority and non-minority borrowers have been impacted differently by Emigrant's NINA loan programs. *See* Def. 12(b)(6) Memo. at 20-21. Neither argument is persuasive.

The term "bottom line racial imbalance," which Emigrant uses repeatedly, *see* Def. 12(b)(6) Memo. at

10. The sufficiency of Emigrant's APR disclosure is pertinent only to the plaintiffs' claims under TILA, which I address below in Part E.

20, 21; Def. 12(b)(b) Reply at 9; DE 46 at 1-2, is a term of art that is simply inapposite. It is borrowed from case law pertaining to employment discrimination, and refers to a flawed disparate impact claim that highlights an imbalance in the makeup of the workforce or a group of employees without adequately linking such an imbalance to a discriminatory practice or policy of the employer. *See Brown*, 163 F.3d at 712 (cited in Def. 12(b)(6) Memo. at 20, 21; Def. 12(b)(b) Reply at 9; DE 46 at 2); *EEOC v. Chicago Miniature Lamp Works*, 947 F.3d 292, 305 (7th Cir. 1991) (cited in Def. 12(b)(6) Memo. at 20, 21); *Watson v. N.Y. Pressman's Union No. 2*, 444 F. App'x 500, 501-02 (2d Cir. 2011) (cited in DE 46 at 1-2) (citing *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656-57 (1989)). The plaintiffs have made detailed allegations about the practices that led to the alleged imbalance in the racial and ethnic makeup of borrowers under Emigrant's NINA loan programs; as a result, the substantive shortcomings suggested by the term "bottom line racial imbalance"—in the sense that Emigrant persistently uses the phrase—are not present in the claims the plaintiffs have asserted here.

Moreover, Emigrant's call for statistics on similarly situated minority and non-minority borrowers is both flawed and premature. The plaintiffs need not allege that loans were made on preferable terms to non-minorities in order to prevail on either a disparate impact or intentional targeting claim. Instead, it is enough that the plaintiffs have alleged a predatory loan program concentrated in minority census tracts. *See Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d at 20. The plaintiffs have

alleged a concentration of Emigrant's NINA loan program in minority census tracts in New York City and that is sufficient to withstand a motion to dismiss at this stage.

In sum, I conclude that the Complaint makes sufficient non-conclusory factual allegations to set forth a viable claim at this stage of discrimination regardless of whether the claim is best understood as asserting reverse redlining or merely disparate impact. Accordingly, I conclude that the Complaint states a claim under the FHA and ECOA for unlawful discrimination based on the theories of disparate impact and intentional targeting.

E. Merits of the TILA Claims

Emigrant seeks dismissal of the Saint-Jeans' TILA claims on two grounds. First, Emigrant argues that Mr. Saint-Jean's TILA claims are defective because the statute applies only to a plaintiff's primary residence, and because Mr. Saint-Jean listed a different address as his primary residence on his tax returns for 2007 and 2008. *See* Def. 12(b)(6) Memo. at 22. The factual premise of that argument is at odds with the plaintiffs' allegations, *see* Complaint ¶ 11, which the court must accept as true at this stage. *See supra* n.1. The argument is therefore not cognizable as a basis for dismissal.

Second, Emigrant asks the court to dismiss the Saint-Jeans' claim that Emigrant improperly calculated the annual percentage rate of interest that was disclosed to the Saint-Jeans. Def. 12(b)(6) Memo. at 18-19; DE 46 at 2. Emigrant argues that they need not have taken into

account the eighteen percent penalty rate in calculating the APR of the Saint-Jeans' loan for the purposes of TILA's disclosure requirements. *See DiVittorio*, 670 F.3d at 290-93. In *DiVittorio*, the borrower was entitled to a 0.5% reduction in the interest rate applicable to his loan if he made twenty-two consecutive payments on time. *Id.* at 276-77. He argued, however, that it was improper for the lender to assume the imposition of this reduced rate in calculating the APR it disclosed to him because of the risk inherent in subprime borrowers. *Id.* at 290. Noting that the APR disclosure "shall reflect the terms of the legal obligation between the parties" under 12 C.F.R. § 226.17(c), the court held that the disclosure factoring in a reduced rate was in compliance with TILA. 670 F.3d at 290-91.

The Saint-Jeans argue, and I agree, that calculating the material terms in TILA's disclosure requirements is a complex and fact-intensive task; to dismiss at this early stage would therefore be improper. For instance, Emigrant characterizes its eighteen percent rate as a "default" rate and argues that it therefore need not be factored into the APR disclosed to borrowers; however, a default or delinquency charge is excluded only if it is an "unanticipated late payment." 12 C.F.R. § 226.4(c)(2). The Saint-Jeans allege that Emigrant knew of their financial circumstances and therefore knew that their loan would be unaffordable; if a jury were to accept those allegations and draw all permissible inferences in the plaintiffs' favor, it could easily conclude that Emigrant fully expected to charge interest at the default rate. Accordingly, I recommend against dismissing the TILA claims on the

basis of the purported sufficiency of Emigrant's APR disclosure.

F. Other Objections to the Motions to Amend

Emigrant argues that the Saintils' claims are futile because they released all claims with respect to the subject loan when they entered into two subsequent loan modification agreements. DE 43 at 19. The plaintiffs argue that the Saintils could not have knowingly and voluntarily released the claims they now assert because they did not discover them until they met with counsel in June 2011. DE 44 at 9-10. At this stage, given the facts that must be taken into account in determining if the alleged release was truly voluntary, I conclude that the course urged by the plaintiffs is the more prudent one. *See Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437-38 (2d Cir. 1998).

Emigrant argues that the court should not permit the plaintiffs to add the claims of all of the other proposed new plaintiffs—Linda Commodore, the Smalls, and Felipe Howell—because they waited too long to seek leave to do so. It further contends that adding these new claims will cause it to suffer undue prejudice arising from the discovery obligations the amendment would impose on it as well as from the strategic burden of responding to the new claims of intentional targeting at this late stage of the case. *See* Def. SAC Opp. at 3-15. As explained below, I disagree.

The delay of which Emigrant complains is largely of its own making. The plaintiffs allege that they were

unable to even begin the process of reviewing discovery to identify and seek out other potential borrower witnesses until Emigrant produced certain loan-origination files and loan-level data in March of 2013. Pl. SAC Memo. at 6-7, 9-13; Geballe Decl. ¶¶ 8-9. The plaintiffs base their intentional targeting claims on documents—part of a production totaling 317,000 pages—they received in July of 2013 and a deposition that took place eight days prior to the filing of the second amended complaint. Pl. SAC Memo. at 17; Geballe Decl. ¶¶ 11, 19. If Emigrant had not taken an unduly long time to discharge its duty to provide such discovery, either the request to amend would have come sooner or I would have had a better reason to deem the request untimely. To be sure, the plaintiffs and their counsel were in a position to assert some of the newest claims before others, *see* Def. SAC Opp. at 3-4 (arguing that there was undue delay), and in particular chose to wait approximately two months to seek leave to add Felipe Howell's claims, so as to avoid adding still other plaintiffs in a piecemeal fashion. Pl. SAC Reply at 3-4. Reasonable minds can differ as to whether that decision reflects the most diligent and efficient approach, but under all of the relevant circumstances, I cannot conclude that the plaintiffs delay lacked sufficiently good cause. Moreover, Emigrant has not articulated any prejudice flowing specifically from the addition of Mr. Howell's claims, and it seems obvious that joining those claims with the others would promote judicial economy far better than requiring Mr. Howell to initiate a parallel lawsuit to seek the vindication of his perceived rights.

Emigrant's concerns about prejudice going forward are similarly unavailing. The plaintiffs have stated that

they will seek no additional or new discovery other than document requests, interrogatories and depositions of the new plaintiffs, which can be completed in parallel with those of the Saintils (and which the parties would conduct in any event if, in the absence of leave to amend, the new plaintiffs simply filed a new action). *See* Pl. SAC Memo. at 19-20; Pl. SAC Reply at 4-5. Emigrant nevertheless complains that it will be prejudiced either by limited discovery as to the new plaintiffs or a further delay in final disposition. Def. SAC Opp. at 5. Emigrant's concerns, which ring hollow in light of the many delays it has occasioned, are unwarranted: I will ensure that it receives all of the discovery to which it is entitled, and there is no reason to believe that the production of such discovery will unduly delay the resolution of this case. In any event, with or without leave to amend, Emigrant can anticipate continuing to litigate against the plaintiffs until all of their claims have been resolved by judgment or settlement.

Finally, Emigrant's concern that adding allegations of intentional targeting will unduly add to the burdens of preparing for trial is plainly unwarranted. *See* Def. SAC Opp. at 12-15. Throughout the long course of discovery in this case, it has been evident to all concerned that the scope of disclosures I found permissible on the disparate impact claims could easily include information about whether or not Emigrant intentionally targeted its loan programs to minority communities. Indeed, Emigrant often objected to the plaintiffs' discovery requests for precisely that reason, arguing that those requests were pertinent *only* to a claim of intentional discrimination and repeatedly, if

needlessly, reminding me that the Saint-Jeans had alleged only disparate impact, and not intentional discrimination.[11] Moreover, I have repeatedly explained that the disclosures to which Emigrant objected were appropriate in large part because a fact-finder could rationally conclude that evidence of intentional discrimination, if any existed, would help support an inference of disparate impact.[12] Thus, if Emigrant has not been preparing to litigate this case in a way calculated to dissuade a fact-finder from inferring that it engaged in intentional discrimination—if only as part of a strategy designed to fend off liability on the pending disparate impact claims—it has no one but itself to blame. I therefore conclude that the plaintiffs should be permitted to file their proposed Second Amended Complaint.

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11. *See, e.g.*, Tr. at 11 (Emigrant's counsel arguing that the plaintiffs' theory "is very limited. . . . It's not intentional discrimination, it's not disparate treatment."); *id.* at 13 (Emigrant's counsel arguing that plaintiffs are "trying to create a new theory of liability").

12. *See, e.g.*, Tr. at 13 (noting my position that the disputed discovery was "not discovery in the service of finding a new theory of liability but discovery in the service of supporting an existing theory of disparate impact"); *id.* at 25-28 (justifying discovery of programmatic data on the rationale that "one way . . . you can judge what an impact is or is likely to be is communications about how things are marketed, how loans are handled"—contrary to Emigrant's position that such information would be relevant only to a disparate treatment, a "different theory of liability"); DE 56 at 7-8 (Emigrant's motion for protective order arguing that plaintiffs' discovery requests were overbroad to the extent they implicated discovery pertinent to a targeting claim); DE 67 (minute entry) (granting plaintiffs' motion to compel and denying Emigrant's motion for a protective order).

III. Recommendation

For the reasons set forth above, I respectfully recommend that the court grant Emigrant's motion to dismiss the plaintiffs' claims under state and municipal law, deny the motion to dismiss their claims under federal law, deny the plaintiffs leave to add new claims under state and municipal law, and grant the plaintiffs leave to add all of the new defendants and federal claims they have proposed.

IV. Objections

Any objections to this Report and Recommendation must be filed no later than April 17, 2014. Failure to file objections within this period designating the particular issues to be reviewed waives the right to appeal the district court's order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).

SO ORDERED.

Dated: Brooklyn, New York
March 31, 2014

/s/
James Orenstein
U.S. Magistrate Judge

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED SEPTEMBER 25, 2014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11 CV 2122 (SJ)

JEAN ROBERT SAINT-JEAN, *et al.*,

Plaintiff,

v.

EMIGRANT MORTGAGE COMPANY, *et al.*,

Defendants.

Filed September 25, 2014

MEMORANDUM AND ORDER

JOHNSON, Senior District Judge:

This case comes before the Court on a motion to amend the complaint and on the defendant's motion to dismiss. Jean-Robert and Edith Saint-Jean, Felix and Yantil Saintil, Linda Commodore, Felipe Howell, and Jean and Beverly Small, (the "Plaintiffs"), homeowners and former homeowners who refinanced mortgages, received financing, or had related financial dealings

with Emigrant Mortgage Company, Inc., Emigrant Savings-Bank Manhattan, Emigrant Bancorp, Inc., or Emigrant Bank (collectively "Defendant" or "Emigrant"), claim Emigrant engaged in a predatory practice of originating discriminatory and abusive mortgage refinance instruments through an equity-stripping "No Income, No Assets" ("NINA") loan program until 2009. In short, the plaintiffs allege that Emigrant originated loans to individuals with significant home equity and very low credit scores, disregarding their ability to make payments and ensuring a stake in homeowner equity with very high interest rates triggered upon the inevitable default on these loans. Plaintiffs claim this program, even where facially neutral, disproportionately saddled minority homeowners in New York City with exorbitant, unaffordable mortgages that were expected and intended to fail at origination.

In 2011, Plaintiffs brought the present action, filing a complaint ("Complaint") alleging violations of the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3604, 3605; the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C, § 1691 *et seq.;* New York State Human Rights Law, N.Y. Exec. Law § 296-a; New York City Administrative Code § 8-502; and the Truth in Lending Act ("TILA"), 15 U.S.C. § 1691 *et seq.* (*See* Original Complaint ¶¶ 227-78.) On January 31, 2014, Plaintiffs moved to amend their complaint, attaching the proposed Second Amended Complaint ("SAC"). On March 31, 2014, Magistrate Judge James Orenstein, at this Court's request, issued a Report and Recommendations ("the Report") with respect to Emigrant's pending motion to dismiss and Plaintiffs' pending motion to amend. This

Court reviews those recommendations, and the objections thereto, herein.

BACKGROUND

A. The Report and Recommendation

This Court referred Defendant's motion to dismiss to the assigned magistrate judge in this case, Magistrate Judge James Orenstein, for a Report and Recommendation on July 29, 2013. A district court judge may designate a magistrate judge to hear and determine certain motions pending before the Court and to submit to the Court proposed findings of fact and a recommendation as to the disposition of the motion. *See* 28 U.S.C. § 636(b)(1). Within fourteen days of service of the recommendation, any party may file written objections to the magistrate's report. *See id.* Upon *de novo* review of those portions of the record to which objections were made, the district court judge may affirm or reject the recommendations. *See id.* The Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435(1985).

Presently before the Court is the Report and Recommendation ("Report") prepared by Magistrate Judge James Orenstein. Judge Orenstein issued the Report on March 31, 2014, recommending that this Court grant Emigrant's motion to dismiss Plaintiffs'

claims under state and municipal law, deny Emigrant's motion to dismiss under federal law, deny Plaintiffs' leave to add new claims under state and municipal law, and grant Plaintiffs leave to add new plaintiffs, defendants, and federal claims. *See* March 31, 2014 Report and Recommendation of Magistrate Judge James Orenstein, Docket No. 206 at 1 (the "Report"). All parties filed limited objections to the Report and Recommendation on April 17, 2014 and Plaintiffs responded to Defendant's objections to the Report on May 1, 2014. Upon review of the recommendations, objections, and responses thereto, and for the reasons stated herein, the conclusions in the Report are adopted in part and set aside in part, and the Court adopts and affirms the recommendations that Plaintiffs' motion to amend the complaint should be granted and Defendant's motion to dismiss is denied.

B. Brief Historical Overview

Separate from this Court's analysis of the specific issues raised here, the Plaintiffs have situated their claims in an arena of historical significance. Although this Court's analysis is limited to the sufficiency of the complaint, as is proper on a motion to dismiss, Plaintiffs claim discrimination in lending and cite decades of precedent in housing and lending discrimination in assuring this Court that their present claims in their original and amended complaints are not merely "speculative" or "bald assertions." While a general historical overview is entirely separate from this Court's substantive and procedural analysis of the specific claims in this case in the sections that follow, the Court sees merit in discussing the milieu

in which these claims exist. Therefore, a brief review of the historical context appears warranted.

Historically, racial discrimination in lending barred Blacks and Latinos from home mortgages and financial products, a process known as "redlining." Redlining involved the widespread practice of delineating Black and Latino neighborhoods in red to indicate undesirable investment locations (another narrative locates this term in the drawing of red lines through certain zip codes),[1] in addition to other actions excluding minority neighborhoods from territories where banks would invest or offer financial products.[2] Even where these putative

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1. *See e.g.*, Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1486 (1994) ("Redlining originally referred to the practice of literally drawing a red line around certain neighborhoods on a city map and refusing to make loans for property or businesses located within the demarcated zones."); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, May 2014 (available at http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/) ("The FHA had adopted a system of maps that rated neighborhoods according to their perceived stability. . . . Neighborhoods where black people lived were rated "D" and were usually considered ineligible for FHA backing [and] . . . were colored in red. . . . [Redlining] spread to the entire mortgage industry . . . excluding black people from most legitimate means of obtaining a mortgage.")

2. *See* Taibi, *supra*, at 1486.

> The practice [of redlining] also derives from outright racial discrimination or from the related prejudice that property values in racially changing neighborhoods

minority homeowners were well-qualified for the home loans or housing they sought, their applications were not considered.

The concept of redlining involved ongoing and detailed schemes whereby Black and Latino putative borrowers in minority neighborhoods would be denied opportunities for credit and home ownership.[3] Additional factors at

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> must decline. Furthermore, herd behavior may result if others follow one major lender's decision not to invest. . . . [t]o the extent that Black people live in distinct communities, racially disparate rejection rates indicate that Black communities suffer from systematic under-investment—redlining.

Id. (citations omitted).

3. *See e.g.*, Charles L. Nier, III, *Perpetuation of Segregation: Toward A New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617 (1999).

> "[The] continued existence [of redlining] was related to the marketing practices espoused by lenders in delineating "effective lending territory. . . ." [E]ffective lending territories of major lenders do not arise spontaneously. Rather, they are actively shaped by the marketing strategies of lending institutions. Most major lenders do not wait passively for customers to walk into their offices and request loan application forms. Instead, they actively initiate specific marketing strategies that target certain types of customers, often upscale persons, and particular geographic areas. The lending patterns that emerge are thus the end result of a series of choices by mortgage lenders, such as where to locate retail offices; who to hire as agents to solicit mortgage loan

play sometimes clouded or complicated recognition of the racialized aspects of redlining practices.

> Redlining is a broader concept than discrimination and encompasses issues of class, region, and sector disinvestment . . . in addition to the problems of the inner city. To the extent, however, that there is a significant racial pattern of differential credit grants and high geographical concentration of African-Americans, there is tremendous overlap between redlining and lending discrimination.

See Taibi, *supra*, at 1486. After the Supreme Court struck down racially restrictive covenants in *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), racial discrimination continued in housing and lending through increasingly hidden and insidious redlining practices. The pervasiveness of redlining practices fueled the development of a civil rights litigation and associated social reforms.

A modern iteration of this discriminatory practice, often termed "reverse redlining," discriminates by erecting barriers to favorable credit treatment, even where qualified, in extending credit to minority neighborhoods

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> applications; which real estate brokers and mortgage brokers to cultivate for business relationships; and what advertising tactics to adopt.

Id. at 637.

on unfair terms.[4] *See e.g.*, Linda E. Fisher, *Target Marketing Of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & Pol'y 121, 125-27 (2009) (the strong correlation between race and subprime lending suggests "African-Americans and Latinos were either intentionally singled out for the worst loans or have suffered disproportionately from the effects of facially neutral lending policies"). The practice involved targeting neighborhoods, overwhelmingly Black and Latino, with inflated credit, subprime loans, and other predatory lending practices although consumers might be eligible for preferable credit or loans. The same communities which faced redlining previously now received credit on grossly unfair terms in reverse redlining schemes.[5] Reverse redlining has become a target of civil rights litigation and has been found cognizable as a claim in the federal courts. *See e.g.*, Justin Steil, *Innovative Responses*

4. *See* Taibi, *supra*, at 1487 ("the term [redlining] refers to any set of practices that systematically denies credit to applicants from low- and moderate income, and minority neighborhoods.") (citations omitted).

5. *See e.g.*, Fisher, *supra*, at 140-41 (mortgage brokers and "lenders tailored their advertising and sales pitches to [African-American and Hispanic] populations. . . . while targeting is not *per se* discriminatory, it easily becomes so when the loans offered contain terms significantly worse than those offered to similarly situated white borrowers") (citations omitted); Charles L. Nier, III and Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking The Theory of Reverse Redlining To Combat Predatory Lending Under The Fair Housing Act*, 83 Temp. L. Rev. 941 (2011); Charles Falck, *Equitable Access: Examining Information Asymmetry in Reverse Redlining Claims Through Critical Race Theory*, 18 Tex. J. on C.L. & C.R. 101 (2012).

To Foreclosures: Paths To Neighborhood Stability And Housing Opportunity, 1 COLUM. J. RACE & L. 63 (2011) (citing *Hargraves v. Capital City Mortg. Corp.*, 140 F.Supp.2d 7 (D.D.C.2000); *Matthews v. New Century Mortg. Corp.*, 185 F.Supp.2d 874 (S.D.Ohio 2002); *Barkley v. Olympia Mortg. Co.*, No. 04-cv-875, 2010 WL 3709278 (E.D.N.Y. Sep. 13, 2010)).

Factual Background[6]

Plaintiffs in this case allege that Defendant Emigrant Mortgage Company aggressively marketed and originated high-cost mortgage refinance products to Black and Latino homeowners in majority-minority census tracts in New York City from 2004 through 2009.[7] (SAC ¶¶ 1-2.) Marketed to people with low credit scores and high likelihood of default, Plaintiffs allege that the default 18% interest rate imposed was predatory, targeted toward

6. As this Court conducts its review de novo, a thorough recitation of the facts appears warranted, given that additional facts to those cited in the Report may appear throughout this opinion. In addition, as discussed herein, the Court will consider the allegations set forth in the original complaint, which is the subject of the instant motion to dismiss, in conjunction with the allegations in the proposed amended complaint as Plaintiffs' motion to amend is granted herein. Since the motion to amend will succeed, and for convenience of litigation going forward, citations herein are primarily to Plaintiffs' Second Amended Complaint.

7. For purposes for deciding a motion to dismiss, all allegations of the plaintiff are accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007))

minority homeowners, and functioned, effectively, as an equity-stripping scheme against Black and Latino homeowners. *Id.* In addition, Emigrant did not encounter Black and Latino borrowers innocuously in their NINA lending program. Instead, racially explicit analyses of Emigrant's own lending histories allowed Emigrant to discover and exploit neighborhoods where, historically, NINA loans were most profitable. (SAC ¶ 3.) Emigrant's equity-stripping scheme was facilitated through the use of inaccurate consumer disclosures that concealed the true annual percentage rates ("APR") and through affirmative misstatements by Emigrant's agents, among other things. (SAC at ¶¶ 4, 31-43.)

Plaintiffs situate Emigrant's conduct within widespread practices of predatory lending, subprime lending, mortgage fraud and abuse, and other misconduct underlying the foreclosure crisis in progress at the time Plaintiffs commenced their case, (SAC ¶¶ 21-26.[8]) Plaintiffs note that minority neighborhoods are the "epicenter" of the foreclosure crisis.

Even controlling for income, credit history, and other factors, minority borrowers were more likely to receive costly subprime loans than their white counterparts. (SAC ¶ 25 (citing *Unequal Burden: Income and Racial Disparities in Subprime Lending*, Department of Housing and Urban Development (2000)) (Black neighborhoods four

8. Citing *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, Center for Responsible Lending (2010) (available at http://www. responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf).

times more likely to use subprime products; upper-income Black areas over twice as likely as in middle-income white neighborhoods to refinance in subprime market) (available at http://www.huduser. org/Publications/pdf/newyork.pdf).) In addition, the practice had the effect of draining wealth tied up in people's homes, and critically compromising entire communities.[9]

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9. *See e.g.*, *New Property*, 113 COLUM. L. REV. 1773 at 1840-41:

> The home is both vital in its own right and generative of other defining relationships. Someone who loses her or his home will almost certainly lose her or his neighbors. With greater distance, friendships and numerous informal supports—exchanges of babysitting, help with repairs, and much more—will break down. Worse, losing a home can endanger a family. . . . The lack of stable housing also makes difficult or impossible the retention of other important property, including the clothes that define one's status in society, the mementos that honor one's ancestors, the computers that allow connection with online communities and opportunities to obtain income, and even the basic documents required to establish one's identity.
>
> Property relationships involving the home—whether with grantors, mortgagees, or landlords—thus are typically the most important interaction a low-income person has with strangers. And it is an extremely perilous one, for not only are the stakes extremely high for the home's resident, but the home will also be worth a great deal, albeit much less, to strangers. . . . The centrality of the home and its crucial role as a point of access to other forms of wealth is not new. Neither, unfortunately, are the efforts of powerful strangers to dispossess vulnerable people.

Appendix D

The Equity Stripping Scheme

Plaintiffs allege that Emigrant engaged in a wholesale shift of its lending policies in the mid-1990s. (SAC ¶¶ 26-31.) Whereas Emigrant had traditionally been a conservative lender that experienced few defaults, it began offering NINA loans, traditionally reserved for borrowers with good credit, in 1995. (SAC ¶ 26.) Emigrant made loans overwhelmingly in white, upper-income census tracts in 1994 and prior, with only 4% of its total loans in minority census tracts and 66% in white census tracts. (SAC ¶ 29.) Conversely, by 2004, 83% of Emigrants loans were NINA loans and 57% of those were originated in majority-minority census tracts. (SAC ¶ 31.)

By 2005, Plaintiffs allege that Emigrant had fully developed a predatory lending program delivering high-cost loans to vulnerable minority borrowers who already had substantial equity in their homes. (SAC ¶¶ 32-33.) Unlike other NINA programs, Emigrant would lend to consumers with low credit (applying even higher interest rates and virtually ensuring default), unusual even among Emigrant's competitors. (SAC ¶¶ 34-35.) Whereas many mortgage lenders were selling their loans in the secondary market during this period, and therefore were required to accommodate investor and rating agency loan and credit quality assessments, Emigrant held the loans it issued or transferred them within its family of banking institutions. (SAC ¶¶ 36, 38.)

By identifying individuals with significant equity in their homes, Emigrant was able to profit as borrowers

defaulted. (SAC ¶ 37-44.) Through the use of onerous mortgage terms, like the 18% default APR (used in 83% of Emigrant's 2007 mortgages and 91% of its 2008 mortgages), which could be imposed after a single late payment, Emigrant quickly "stripped" homeowners of their equity. (SAC ¶ 37.) By offering incentives, including payment premiums for brokers closing high-cost loans, Emigrant's brokers had a financial incentive to ignore borrowers' qualifications for preferable loans, in favor of higher cost loans that would generate this premium. (SAC ¶ 39.) In addition, delayed foreclosures allowed Emigrant to maximize accrued default interest on these loans. (SAC ¶ 42.) Despite careful and accurate appraisals of home equity and borrower eligibility, and despite clear evidence these were nonperforming loans as the overwhelming majority of Emigrants' foreclosures in 2007 and 2008 were on loans originating in the last two years, Emigrant's conduct continued. (SAC ¶¶ 38, 42.)

Plaintiffs' loans bear the hallmarks of this scheme, including but not limited to high interest rates and payment premiums rewarding mortgage brokers for locking in higher-cost loans. (SAC ¶ 37-39.) Plaintiffs claim that by focusing on borrowers with low credit scores at high interest rates, Emigrant ensured high default rates; by focusing on borrowers with high pre-existing home equity, Emigrant ensured the profitability of this scheme. (SAC ¶¶ 35, 38, 43.) By 2008, while NINA loans represented only 3% of refinance loans for all other lenders, they comprised 85% of Emigrant's one-to-four family refinance loans. (SAC ¶ 41.) In that same year, in New York City, Emigrant accounted for 30% of citywide

NINA refinance losses, despite originating less than 1.5% of refinance loans citywide. (SAC ¶ 44.)

In addition, Emigrant is charged with misleading consumers as to the nature of the alleged equity-stripping scheme. (SAC ¶¶ 45-47.) Plaintiffs' claim Emigrant used legal disclosure requirements, like those stipulated by the Truth in Lending Act, to obscure rather than clarify the actual financial consequences attendant to this misconduct. (SAC ¶ 46.) Among other things, Emigrant's disclosures omitted foreseeable and fully expected outcomes, including the inevitable 18% APR. (SAC ¶¶ 46-47.) Whereas other lenders limited NINA refinancing to people with high credit scores, given the absence of other key underwriting elements like income, Emigrant failed to even attempt to meet the industry standards in this regard. (SAC ¶ 26, 34.)

Majority-minority census tracts in New York City also contained the majority of residents with poor credit. (SAC ¶¶ 48-53.) Concentrated in minority neighborhoods, Emigrant's NINA product foreseeably impacted minorities disproportionately, including in the context of default and foreclosures. (SAC ¶¶ 54-56.)

Plaintiffs also allege intentional targeting of Black and Latino borrowers by Emigrant. Emigrant selected advertising outlets that would reach Black and Latino neighborhoods and even grouped these outlets on the racial make-up of their audience. Emigrant's marketing, including advertising placement and purchases, was targeted to locations with significant or predominantly

Black and Latino populations by design. Plaintiffs allege this targeting continued as the marketing of this loan package to Black and Latino borrowers enhanced profits for Emigrant, as Emigrant's own internal analyses demonstrated.[10] (SAC ¶¶ 57-61.)

The Plaintiffs

Plaintiffs in this case are five families alleged to be severely impacted by Emigrant's equity-stripping scheme and subject to subsequent foreclosure proceedings. For these Plaintiffs, Emigrant disclosed interest rates which did not reflect the foreseeable and expected 18% default APR; instead Emigrant disclosed the rate for uninterrupted on-time payments—in some cases, assuming five or more years of timely payments plus a subsequent rate reduction. None of the Plaintiffs had high credit scores and all had modest incomes, often lower than the payments imposed. Ignorant of sophisticated credit transactions and terminology, the adjustable-rate mortgages and instruments driving Emigrant's alleged discriminatory conduct misled even those borrowers with pre-existing fixed-rate mortgages and experience

10. If Plaintiffs' allegations are proven, the effect of such a scheme is, quite literally, to drain the wealth from a community. *See e.g.*, David Super, *A New New Property*, 113 Colum. L. Rev. 1773, 1790 (2013) ("Between 2007 and 2010, white families lost 11% of their net worth, while African Americans lost almost one-third and Latinos and Latinas saw their assets decline 44%. This reflects many Latino/Latina and African American households' lack of asset cushions as well as the large fraction of their wealth tied up in their homes, which left them vulnerable to the collapse of the housing market.").

meeting lender obligations. Many indicia, including prepayment penalties, premiums to brokers who secured higher cost loans, and attorneys representing Emigrant but characterized as a resource to the borrower, obscured the cost and risks of the loan to Plaintiffs. In the end, Emigrant often recovered outstanding balances, default fees, and other costs as the homes at issue were sold or repurchased by Emigrant at auction after foreclosure. None of the Plaintiffs realized they were part of an alleged discriminatory lending scheme until they met with counsel with expertise in this area in 2011 and after. (*See generally* SAC ¶¶ 62-226).

Jean-Robert and Edith Saint-Jean head a Haitian-American family residing in Brooklyn, homeowners since 1995. (SAC ¶¶ 62-63.) In 2007, they sought a home equity loan but were steered toward a mortgage refinance. (SAC ¶¶ 65-69.) They had modest incomes and low credit scores. (SAC ¶¶ 68, 72.) Among other things, their mortgage broker dissuaded them from hiring counsel, claiming he would provide them an attorney at closing; represented that their interest rates and their monthly payments would decrease after six months of timely payments; and received a payment premium from Emigrant for closing a higher cost loan. (SAC ¶¶ 73-74, 80, 83.) At or before closing, the mortgage broker failed to disclose the fact the mortgage rate was adjustable, the 18% default interest rate, or the prepayment penalties attendant to the loan. (SAC ¶ 82.)

The Saint-Jeans closed on their mortgage on January 10, 2008. (SAC ¶ 75.) Counsel for Emigrant never denied

assertions that he would represent the Saint-Jeans' interests. (SAC ¶ 77.) The interest rates and payments were higher than promised (nearly all of their net income) but the broker dissuaded them from walking away from the deal by again assuring the Saint-Jeans the rate would be lowered after six months. (SAC ¶¶ 78-80.) Despite having provided the mortgage broker with pay stubs and tax returns, the Saint-Jeans were qualified for a loan whose payments represented almost all of the Saint-Jeans' monthly net income and nearly 80% of their gross monthly income. (SAC ¶ 85.) It was suggested that the Saint-Jeans use the loan itself to make monthly payments until the interest rate was lowered, as promised, after six months. (SAC ¶ 80.)

Prior to closing, the Saint-Jeans received no documentation relating to the loan. (SAC ¶ 75.) Emigrant disclosed only an 10.119% APR (lower than the pre-default rate as it factored in a rate decrease after five years of uninterrupted on-time payments), failed to factor in a predicted and foreseeable default rate of interest, failed to provide each of the Saint-Jeans with adequate disclosure information pursuant to the Truth in Lending Act, and buried a set of documents in the closing papers that neither the attorneys nor the mortgage brokers explained to the Saint-Jeans. (SAC ¶¶ 80, 82-92, 94, 96-100.) These included a "Resource Letter" indicating an effective income exceeding $100,000 would be required to make payments on the loan. (SAC ¶ 89.) In addition, the closing proceeded amidst a host of fees that cut into proceeds of the loan, (SAC ¶¶ 86-87.)

After six on-time payments, the Saint-Jeans sought the promised lower interest rate to no avail. (SAC ¶ 101.) The mortgage broker stopped accepting their calls and their attempts to contact Emigrant were fruitless. (SAC ¶¶ 103-05.) When they could not continue making full payments, the 18% default interest rate was imposed. (SAC ¶ 105.) The Saint-Jeans' monthly payments increased to over $6,000, exceeding their entire net and gross monthly incomes. (SAC ¶¶ 72, 105-07.) Once contacted, Emigrant declined to accept partial payments the Saint-Jeans offered at the prior rate. (SAC ¶ 106.) Emigrant filed for foreclosure in mid-2009, after allowing over $30,000 in default fees to accrue over eight months. (SAC ¶ 107.) Two months after that, the Saint-Jeans first consulted counsel, learned their loan was discriminatory in nature, and rescinded their loan via letter on July 12, 2010. (SAC ¶¶ 109-10.)

Felex and Yantil Saintil owned a home in Brooklyn with fixed rate first and second mortgages. (SAC ¶¶ 111-13.) They had modest incomes and low credit scores. (SAC ¶¶ 116-18.) Informed their payments would remain nearly the same, the Saintils refinanced both mortgages with Emigrant. (SAC ¶ 119.) They were never informed that this mortgage, unlike their other mortgages, was an adjustable rate mortgage. (*Id.*) Like the Saint-Jeans, the Saintils were not notified of prepayment penalties or the 18% default interest rate; they were told an attorney who represented their interests would be provided at closing; a host of redundant and unexplained fees ate away the proceeds of the loan; and the mortgage broker received a $3,250 premium and additional fees. (SAC ¶¶ 124-28.)

Appendix D

The Saintils were approved for a loan far in excess of their ability to pay, despite presenting tax returns and paystubs for the mortgage broker's consideration prior to the loan. (SAC ¶¶ 116-17.) They received no documents prior to closing and, at the closing, they relied on representations from the mortgage broker and the attorney (whom the Saintils were told represented them and whose fee was deducted from the proceeds of their loan) in executing the loan documents. (SAC ¶¶ 121, 131.) The Saintils were unaware of the "resource letter" in the closing documents that indicated they would need an income in excess of $94,000 to adhere to the payment schedule. (SAC ¶ 132.) The mortgage documents did not include riders setting forth the prepayment penalty or the 18% default interest rate, both of which later applied to the Saintils. (SAC ¶ 125.) The initial monthly payments represented more than 100% of the Saintil's gross monthly income and they soon were unable to timely make payments. (SAC ¶¶ 130, 140-42.) They learned about both the 18% default APR and the prepayment penalties as they were imposed by Emigrant. (SAC ¶¶ 141-42.) Although they negotiated with Emigrant and entered a series of unworkable modifications, in August 2011, Emigrant filed a foreclosure action. (SAC ¶¶ 144-48.)

Like the Saint-Jeans, the Saintils were not made aware of the true cost of the loan through TILA disclosures or discussions with the mortgage broker or the attorney purportedly representing them. (SAC ¶¶ 129, 131, 137-39.) Also similar, the Saintils had disclosed adequate information for Emigrant to be aware of their income and its inadequacy to meet the terms of the loan. (SAC

¶¶ 135-36.) Plaintiffs allege these loans were 'designed to fail' at origination and that it was entirely foreseeable that the 18% default rate would be triggered early on in the life of the loan. (SAC ¶¶ 136.) Like the Saint-Jeans, the foreclosure occurred years after Emigrant had been collecting high-cost interest and fees under the 18% default rate. (SAC ¶¶ 144-48.) Like the Saint-Jeans, the Saintils discovered a discriminatory scheme only after conferring with counsel. (SAC ¶ 150.)

Linda Commodore, who owned an apartment in Manhattan, sought refinancing after she lost her information technology job in the general economic slump in the financial institutions in lower Manhattan after 9/11. (SAC ¶¶ 151-53.) At the time of her refinance in 2004, she was working only part time and had a low credit score. (SAC ¶¶ 156-57.) She was unaware her new loan was an adjustable rate mortgage, or that it contained a default 18% interest rate, and she immediately struggled with payments as she couldn't find steady work. (SAC ¶¶ 158-62, 169-70.) As Commodore continued to struggle to find work, Emigrant declined to accept partial payments, refused to modify the loans. (SAC ¶¶ 171-72.) In 2006, Emigrant commenced a foreclosure action and Emigrant sold her home to a third party in 2007. (SAC ¶¶ 174-75.)

Like the other plaintiffs, Ms. Commodore's loan was accompanied by a host of undisclosed fees, including attorneys' fees for an attorney who represented Emigrant during the closing. (SAC ¶¶ 160, 163.) Ms. Commodore was unaware of the "Resource Letter" indicating her income was clearly insufficient to make ongoing and timely

payments on the loan. (SAC ¶ 165.) Ms. Commodore was not made aware of the true cost of the loan through TILA disclosures or discussions with the mortgage broker or the attorney purportedly representing her. (SAC ¶¶ 162, 166.) She learned of the 18% default rate only at imposition, when her payments doubled. (SAC ¶¶ 162, 170.) After foreclosure and sale of her home, like the other plaintiffs, most proceeds were absorbed by accrued default fees and other fees imposed by Emigrant over the three-year life of the loan. (SAC ¶¶ 175.) Plaintiffs claim Ms. Commodore's loan was 'designed to fail' at origination because Emigrant knew or had reason to know that the monthly payments on the loan were unsustainable for Ms. Commodore. (SAC ¶¶ 167-68.) Like the others, Ms. Commodore discovered a discriminatory scheme only after conferring with counsel. (SAC ¶ 176.)

Mother and daughter, Jean and Beverley Small, bought a home in Brooklyn in 1996. (SAC ¶ 178.) Ten years later, they spoke with a mortgage broker about refinancing because of their difficulty making payments on their original mortgage. (SAC ¶ 179.) Despite modest incomes and low credit scores, both of which were disclosed, the Smalls were approved for a mortgage refinance. (SAC ¶¶ 179, 183.) They were also told that, after two monthly payments of $2,800, their payments would decrease permanently to $1,100, a 60% decrease. (SAC ¶ 184.) They were dissuaded from bringing a lawyer, and told that a lawyer present at the closing would represent their interests. (SAC ¶ 186.)

As with the other Plaintiffs, the mortgage broker received a sizeable premium payment at closing, and redundant and unexplained fees ate away proceedings from the loan, including attorneys' fees. (SAC ¶ 190-92.) The promised decrease in monthly payments never came to fruition and the Smalls struggled immediately with the payments. (SAC ¶ 193, 198.)

The Smalls were unaware of the adjustable rate mortgage, the prepayment penalties and other fees, and the 18% default rate of interest until imposition. (SAC ¶¶ 188-89.) The resource letter in the loan stated dependable income exceeding $82,000 would be required for this loan but this was not disclosed to the Smalls, flagged by the attorney purportedly representing them at closing, nor considered by Emigrant despite the income disclosures the Smalls made. (SAC ¶ 194.) Nor would Emigrant agree to a loan modification when approached by the Smalls once they realized their incipient financial crisis. (SAC ¶ 200.) Instead, Emigrant continued with foreclosure proceedings. (SAC ¶ 200.) Once aware of their financial predicament, the Smalls sold their house in 2008; most proceeds of the sale went to Emigrant's outstanding balance, including thousands of dollars in "default fees." (SAC ¶¶ 202-03.)

After a decade of being homeowners, the Smalls now rent an apartment. (SAC ¶ 177.) Like other plaintiffs, they learned of the 18% default APR at the time of imposition. (SAC ¶ 188.) Like the other plaintiffs, the Smalls were not made aware of the true cost of the loan through disclosures or discussions with the mortgage broker or the attorney

purportedly representing them. (SAC ¶¶ 195-97.) Also similar, the Smalls had disclosed adequate information for Emigrant to be aware of their income and its inadequacy to meet the terms of the loan. (SAC ¶ 196.) Plaintiffs allege these loans were 'designed to fail' at origination and that it was entirely foreseeable that the 18% default rate would be triggered early on in the life of the loan. (SAC ¶¶ 197.) Like the other plaintiffs, the Smalls discovered a discriminatory scheme only after conferring with counsel. (SAC ¶ 204.)

In 2007, Felipe Howell had lived in his Jamaica, New York home for nearly thirty years and owned his home outright, having paid off his mortgage in full. (SAC ¶¶ 205-06.) Despite having *no income* beyond prospective rental income for the construction of a new residential building (for which he sought the loan), Mr. Howell was referred to a mortgage broker by a contractor working in his neighborhood and qualified for a cash-out refinance from Emigrant. (SAC ¶ 209.) He had no income and a low credit score. (SAC ¶¶ 209-10.) Despite voicing concerns at the fact he had no income, Mr. Howell was persuaded by the mortgage broker to proceed with the loan. (SAC ¶ 201.) Like the other plaintiffs, the mortgage broker received a premium at the time of the closing, additional redundant and unexplained fees were deducted from the proceeds of the loan, and Mr. Howell was unaware that an income of $51,527 would have been required for this loan (he had no income). (SAC ¶¶ 214-15, 217.)

By March 2009, Howell had lost his home to Emigrant's foreclosure proceeding. (SAC ¶ 205.) Like

other plaintiffs, Mr. Howell learned of the 18% default APR at the time of imposition. (SAC ¶ 214.) Like the other plaintiffs, Mr. Howell not made aware of the true cost of the loan through disclosures or discussions with the mortgage broker (who received a premium) or the attorney purportedly representing him (and whose fees he paid). (SAC ¶¶ 214, 218.) Also similar, Mr. Howell had disclosed adequate information for Emigrant to be aware of his total absence of income and its inadequacy to meet the terms of the loan; he was unable to make even a single payment. (SAC ¶¶ 219, 221.)

Plaintiffs allege these loans were 'designed to fail' at origination and that it was entirely foreseeable that the 18% default rate would be triggered early on in the life of the loan. (SAC ¶ 220.) Like the other plaintiffs, Mr. Howell discovered a discriminatory scheme only after conferring with counsel familiar with discrimination law. (SAC ¶ 225.) At the time of the foreclosure, Emigrant purchased Mr. Howell's home at auction for $1,000 despite its earlier appraisal at $430,000. (SAC ¶ 224.)

DISCUSSION

The foreclosure crisis has been characterized by revelations of predatory lending in various forms, including exorbitant fees, prepayment penalties, inflated interest rates, steering and targeting of loans toward vulnerable groups, "exploding" adjustable interest rates, and deceptive sales tactics, including false representations that apparent problems or concerns would be healed later, during the life of the loan. Although this conduct was

widespread for years, it falls to this Court to determine whether and how Plaintiffs' grievances are actionable under federal law, in the context of the instant motion to dismiss.

I. Motion to Dismiss

To survive a Rule 12(b)(6) motion to dismiss, the Complaint "does not need detailed factual allegations" but must set forth the grounds for entitlement to relief with "more than labels and conclusions." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). The grounds for relief must be plausible. *See* 550 U.S. at 556, 127 S.Ct. 1955. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*); *see also Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 ("Factual allegations must be enough to raise a right to relief above the speculative level") (citation omitted). Bald assertions are insufficient to state a claim under this standard. *See* 556 U.S. at 678, 129 S.Ct. 1937 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," including those "couched as factual allegation[s].").

On a motion to dismiss, the court has the discretion to consider the allegations in a proposed amended complaint in conjunction with the original complaint upon which the 12(b)(6) motion was filed. *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 87-88, 89 (2d Cir. 2002) (review in light of allegations in original and proposed complaints). *Palm Beach Strategic Income, LP v. Salzman*, 457 Fed.Appx. 40 (2d Cir. 2012) (same); *Hamzik v. Office for People with Developmental Disabilities*, 859 F.Supp.2d 265 (N.D.N.Y.2012) ("Where a plaintiff seeks to amend his complaint while a motion to dismiss is pending, a court [may consider] . . . the merits of the motion in light of the amended complaint"); *Roller Bearing Co. of Am., Inc. v. Am. Software, Inc.*, 570 F.Supp.2d 376, 384 (D.Conn.2008) (same); *Allstate Ins. Co. v. Passaro-Henry*, 660 F.Supp.2d 317, 324 (D.Conn.2009) (evaluation of motion to dismiss "directed to final product").

1. Plaintiffs' Civil Rights Claims

In this motion to dismiss, Emigrant has challenged both the timeliness and the substance of Plaintiffs' claims, as set forth herein.

a. Plaintiffs' Civil Rights Claims Are Timely

Reviewing the timeliness of Plaintiffs' civil rights claims, this Court finds the Report's analysis well-reasoned and sound. In the Report, the magistrate judge found that the discovery rule and the doctrine of equitable tolling applied, and that Plaintiffs' federal civil rights claims were timely. (Report at 20-22.) Emigrant objects

to this recommendation, distinguishing Plaintiffs' injury from Plaintiffs' legal theory and claiming that the accrual of Plaintiffs' claims must be determined by the date of the injury, rather than the date Plaintiffs understood Emigrant's alleged discriminatory motives. Emigrant also claims the discovery rule does not apply to ECOA and FHA claims, and that Plaintiffs have not pled adequate facts, or advanced sufficient arguments, to appropriately conclude the doctrine of equitable tolling applies. (Def. Obj. 7-11.)

Plaintiffs respond to Emigrant's objections, claiming the doctrine of equitable tolling and the discovery rule provide independent and sufficient grounds to find Plaintiffs' discrimination claims timely. (Pl. Resp. at 6.) Plaintiffs claim the inherently self-concealing nature of discriminatory mortgage lending schemes and Second Circuit precedent supports the applicability of the discovery rule and equitable tolling to Plaintiffs' claims. (Pl. Resp. at 6-13.) Plaintiffs also object to the recommendation, insofar as it fails to include their state and municipal claims among those equitably tolled, *i.e.*, Plaintiffs object to the recommendation that their state and municipal claims are untimely. (Pl. Obj. at 14-15.)

i. The Discovery Rule Tolls the Applicable Statute of Limitations

The discovery rule is "a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it. The rule arose in fraud cases as an exception to the general limitations rule that a cause of action accrues once

a plaintiff has a 'complete and present cause of action.' " *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 644, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010). The discovery rule tolls the statute of limitations only "where a plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted.' " *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 139-40 (2d Cir. 2011) (quoting *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998)). In the case of discrimination or fraud, "where a defendant's deceptive conduct may prevent a plaintiff from even knowing that he or she has been defrauded. . . . , the law which was designed to prevent fraud could become the means by which it is made successful and secure." *Merck*, 559 U.S. at 644, 130 S.Ct. 1784 (citations omitted). The discovery rule is both a commitment to fundamental fairness and a safeguard against sophisticated schemes that use parameters of the law to facilitate injustices.

In its objections to the Magistrate Judge's Report, Emigrant opposes application of the discovery rule. Emigrant would draw a distinction between Plaintiffs' discovery of their injury and Plaintiffs' discovery of the alleged discriminatory animus, *i.e.*, Emigrant's alleged equity-stripping scheme involving widespread use and targeting of predatory mortgages to predominantly minority neighborhoods. Using the same premise, Emigrant also argues that the date of accrual occurs around six months of closing, at the time of the Saint-Jeans' default, and that Plaintiffs' claims are time-barred even with application of the discovery rule. (Def. Obj. at 7-8.)

Emigrant's attempts to distinguish injury from legal theory, for purposes of 'discovery' of Plaintiffs' claims, ignores relevant authority in this circuit that speaks to the contrary. The Second Circuit recognizes prevailing case law defining Plaintiffs' injuries through the lens of their ability to plead a complete cause of action. "The fact that *Merck* specifically referenced pleading requirements when discussing the limitations trigger indicates to us that the *Merck* Court thought about the requirements for 'discovering' a fact in terms of what was required to adequately plead that fact and survive a motion to dismiss." *City of Pontiac Gen. Employees' Retirement Sys. v. MBIA, Inc.*, 637 F.3d 169, 174-75 (2d Cir. 2011). Thus, for purposes of the discovery rule, it is the law in this circuit that "a fact is not deemed 'discovered' until a reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in a complaint." *Id.* at 175.

In objecting, Emigrant fails to acknowledge that the discrimination alleged was unknown to Plaintiffs at the time of their individual defaults, *Compare Merck*, 559 U.S. at 644-45, 130 S.Ct. 1784 ("where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered"). Emigrant would characterize Plaintiffs' injury as defaulting on the mortgage when the 'complete and present cause of action,' *i.e.*, the actual injury, requires understanding Emigrant's broader conduct in enacting a predatory, equity-stripping lending scheme that targeted minority homeowners and neighborhoods. Plaintiffs'

injury involves a discriminatory, fraudulent scheme, a "complete and present cause of action" Plaintiffs could not appreciate absent context unavailable to them as individual borrowers at the time of default.

Moreover, Emigrant's claim that FHA and ECOA claims are not properly subject to the discovery rule is unavailing. Both statutes are silent as to the discovery rule, *i.e.*, application of a general discovery rule is excluded under neither statute, and courts in this circuit have applied the discovery rule to FHA and ECOA claims in similar cases. *See e.g.*, *Adkins v. Morgan Stanley*, No. 12-CV-7667, 2013 WL 3835198 (S.D.N.Y. July 25, 2013) (discovery rule applies to FHA claims); *Clement v. United Homes, LLC*, 914 F.Supp.2d 362, 372 (E.D.N.Y.2012) (discovery rule applies to FHA); *Jones v. Ford Motor Credit Co.*, 2002 WL 88431, at *5 (S.D.N.Y. Jan. 22, 2002) (discovery rule applies to ECOA discriminatory lending claims); and *Phillips v. Better Homes Depot, Inc.*, No. 02-CV-1168, 2003 WL 25867736, at *25 (E.D.N.Y. Nov. 12, 2003) (discovery rule applies to ECOA claims; "a victim may not know he or she has been the target of discrimination until meeting other victims or learning more about lending practices in minority communities").

In this case, the Court cannot credit Emigrant's claim that Plaintiffs understood the nature of their injury at the time of their default. Plaintiffs' specific allegations that the injury was not apparent until meeting with counsel in 2009 credibly suggest these claims—which, if proven, appear to demonstrate discriminatory and predatory lending practices—could not have been raised without application

of the discovery rule. The patterns and practices defining Plaintiffs' allegations of discriminatory lending to particular neighborhoods and persons on the basis of race, and despite the availability of better or cheaper mortgage products, bespeaks a widespread scheme. Such a scheme, if proven, would be invisible to individual borrowers and sufficiently sophisticated to require the development of a critical mass of cases involving defaults under these circumstances, as well as the understanding of counsel experienced in discrimination litigation, to appreciate and explain the discriminatory conduct.

Plaintiffs' claim that the accrual date commences when Plaintiffs met with counsel and understood they were victims of a discriminatory lending scheme is credible and consistent with authority in this circuit. Accepting and adopting the recommendation contained in the Report, upon *de novo* analysis and given the additional reasoning set forth *infra*, the Court finds that the discovery rule applies to Plaintiffs' ECOA and FHA claims, that Plaintiffs' did not discover their claims prior to conferring with counsel in July, 2009, and that Plaintiffs' civil rights claims are timely.

ii. Plaintiffs' Claims are Equitably Tolled

Even if the discovery rule did not apply, the doctrine of equitable tolling applies to Plaintiffs' federal and state claims. Under federal law, where Plaintiff can demonstrate fraudulent concealment, Emigrant is equitably estopped from asserting a statute of limitations defense with respect to these claims. *See New York v. Hendrickson*

Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988) (equitable tolling appropriate in enduring fraudulent enterprise involving multiple contracts and participation incentives); *Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir. 1985) (equitable tolling appropriate in age discrimination claim). The doctrine of equitable tolling requires a demonstration that (1) the defendant concealed the existence of the cause of action; (2) the action commenced within the applicable limitations period once plaintiff was aware of the cause of action; and (3) a lack of due diligence was not the basis for plaintiffs' ignorance of the claim. *Hendrickson*, 840 F.2d at 1083. *See also*, *M & T Mortg. Corp. v. White*, 736 F.Supp.2d 538, 555-56 (E.D.N.Y.2010) (FHA, ECOA claims timely given fraudulent concealment).

Emigrant's objection to the Report relies on its claim that there is no evidence of intentional concealment and their rejection of the idea that the alleged misconduct was self-concealing in nature. (Def. Obj. at 10-11; Def. Reply at 5-6.) However, Emigrant ignores a significant body of case law, including in this district, finding that FHA, ECOA, and other claims similar to those advanced by Plaintiffs in the context of discriminatory mortgage lending, are inherently self-concealing. *See e.g.*, *White*, 736 F.Supp.2d 538, 555-56 (ECOA and FHA claims equitably tolled given establishment of intentional and self-concealing nature of claim); *Council v. Better Homes Depot, Inc.*, No. 04-CV-5620, 2006 WL 2376381, at *9 (E.D.N.Y. Aug. 16, 2006) (FHA, ECOA, and TILA mortgage fraud claims subject to equitable tolling); *Phillips v. Better Homes Depot Inc.*, No. 02-CV-1168, 2003 WL 25867736, at *25 (E.D.N.Y.

Nov. 12, 2003) (equitable tolling appropriate for reverse redlining claims under ECOA).

Courts have also found that Plaintiffs have little basis to understand their claims exist until they have met with counsel, satisfying the second prong of the fraudulent concealment.[11] *White*, 736 F.Supp.2d 538, 555-56 (accrual of limitations period only after plaintiffs meet with counsel and understand nature of claims); *Council*, 2006 WL 2376381, at *10-11 (same); *Phillips*, 2003 WL 25867736, at *25 (ECOA limitations period accrual only after plaintiffs met with counsel who understood and conveyed scope of defendant's misconduct; "[t]here is a difference between being aware that you got a bad deal and being aware that you were discriminated against in a systematic fashion.").

As in the referenced cases, Plaintiffs in this case had little or no basis to fully understand their claims and the nature of a systemic, discriminatory equity-stripping scheme due to fraudulent concealment by Emigrant. Although the scheme as alleged was inherently self-concealing, Plaintiffs have supplemented the 'concealment' analysis with allegations of intentional acts attendant to Emigrant's concealing of the fraud. These overt and intentional acts include: steering Plaintiffs to mortgage brokers who directed them toward the more costly loans

11. One analyst suggests the federal courts bear some responsibility to ensure "information asymmetry" such as this does not disadvantage plaintiffs unfairly. *See* Charles Falck, *Equitable Access: Examining Information Asymmetry in Reverse Redlining Claims Through Critical Race Theory*, 18 Tex. J. on C.L. & C.R. 101 (2012).

associated with this scheme; assuring Plaintiffs, despite specific questioning, that their interests were represented by attorneys who actually represented Emigrant;[12] and explicit and repeated representations made by Emigrant about terms and conditions of Plaintiffs' loan that were untrue or unavailing during the life of the loan.

With respect to the federal claims, this Court finds that the concealment prong is adequately demonstrated, both in the inherent self-concealing nature of this type of discrimination, and through the overt and intentional conduct alleged by the Plaintiffs. The very questions and assurances referenced above demonstrate that Plaintiffs' ignorance of their claim was not for lack of due diligence. Nor did Plaintiffs have any other basis to understand the nature of this cause of action prior to speaking to counsel representing them in this action. For these reasons, equitable tolling of Plaintiffs claims is appropriate and the Court adopts the recommendation of the magistrate judge in this regard.

Plaintiffs' state and municipal claims also benefit from equitable estoppel in this analysis. The standard for equitable tolling under New York State law is

12. As an aside, the Court views the allegations of misconduct by attorneys and mortgage brokers with great concern, particularly attorneys representing a defendant but allowing the explicit or implicit inference that they represent or guarantee the Plaintiffs' interests during these closings. Attorneys and brokers complicit in such misconduct, if proven, could be subject to disciplinary proceedings and face threats of loss of license, malpractice, and, perhaps, criminal prosecution.

substantially similar to the federal standard and applies to Plaintiffs' claims under New York State and New York City antidiscrimination laws. *See e.g.*, *Council*, 2006 WL 2376381, at *11 (state equitable tolling standard substantially similar to federal standard). Plaintiffs have advanced credible allegations of an ongoing and widespread equity-stripping scheme in Black and Latino neighborhoods involving discriminatory mortgage lending using deceptive or misleading conduct, including actual misrepresentations by the Emigrant or its agents.

As set forth above, with respect to the federal claims, Plaintiffs credibly allege that Emigrant's conduct obscured Plaintiffs' claims, and that failure to raise these claims earlier was not attributable to lack of due diligence. Under New York State law, where, as here (*see infra*), there is a credible allegation that the Emigrant's "conduct was calculated to mislead and [Plaintiffs] relied on it, that is enough and the estoppel is imposed to prevent him from obtaining an unconscionable advantage." *Arbutina v. Bahuleyan*, 75 A.D.2d 84, 86, 428 N.Y.S.2d 99, 100 (1980). Emigrant is equitably estopped from asserting a statute of limitations defense to Plaintiffs' claims and, as a result, Plaintiffs state and municipal claims are not subject to dismissal as time-barred.

For the foregoing reasons, the recommendation with respect to equitable tolling of the federal claims is accepted and adopted. The recommendation with respect to dismissal of the state and municipal claims is set aside, given the availability of the doctrine of equitable tolling to Plaintiffs' state and municipal claims under the analysis

set forth above, and Emigrant is equitably estopped from asserting a statute of limitations defense to Plaintiffs' state and municipal claims.

iii. Continuing Violations Theory

In the Report, Magistrate Judge Orenstein ruled that the continuing violations theory did not apply to Plaintiffs' federal and state civil rights claims. (Report at 17-20.) The Court has reviewed this recommendation and is unpersuaded by that analysis, in light of Plaintiffs' supplemental briefing on this issue. Plaintiffs objected to the recommendation and set forth detailed arguments in support of the applicability of the continuing violations theory in these circumstances, offering a far more detailed analysis of the issue than was presented in their original briefing. (Pl. Obj. at 7-14.) In addition, having found the statute of limitations equitably tolled and subject to the discovery rule, *see supra*, Plaintiffs' claims may proceed and the Court sees no reason to reach the issue of whether the theory of continuing violations would toll the statute of limitations in this case. The Court will set aside the recommendation from the Report and decline to rule on the viability or applicability of the continuing violations theory in this context.

b. Plaintiff's Successfully State a Disparate Impact Claim

In the Report, the magistrate judge rejected Emigrant's motion to dismiss for failure to state a claim, including Emigrant's interpretation of Second Circuit

precedent, and concluded Plaintiffs' successfully stated a disparate impact claim. Citing *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), the Report notes that "a prima facie case is established by showing that the challenged practice of the defendant actually or predictably results in racial discrimination," and rejects the "substantive shortcomings" in the claims argued by Emigrant. (Report at 30, 34.) The Magistrate Judge was unpersuaded by Emigrant's claims that these loans were approved or endorsed by federal law, their invitation to construe words used by Plaintiffs, like 'high cost,' as legal terms or terms of art, or Emigrant's claim that the APR disclosure mitigates claims the loans were grossly unfavorable to Plaintiffs. (Report at 31-33.) In addition, the Report references Emigrant's improper substitution of the standards to *prevail* on a disparate impact claim for the lesser standards to *plead* such a claim. (Report at 34-35.) Having alleged predatory lending within the NINA programs in minority census tracts in New York City, the magistrate judge concludes Plaintiffs met their pleading burden and recommends denying Defendant's 12(b)(6) motion.

Emigrant objects to the Report's conclusion that Plaintiffs' disparate impact claims are properly pled. (Def. Obj. at 14-17.) Citing *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565 (2d Cir. 2003) and *Watson v. New York Pressman's Union No. 2*, 444 Fed.Appx. 500 (2d Cir. 2011), Emigrant claims Plaintiffs failed to adequately plead impact to minority borrowers different from similarly-situated white borrowers. (Def. Obj. at 14-15.) In

addition, Emigrant claims Plaintiffs proceed on a "racial quota theory" and that the Magistrate Judge focuses on inappropriate legal authority. (Def. Obj. at 16.)

In response, Plaintiffs argue that Emigrant misconstrues or misstates the Second Circuit standard for pleading a disparate impact case, reading in requirements that do not exist; that Plaintiffs' allegations contained adequate statistical and factual demonstrations of disparate impact; and that the legal authority relied upon by the magistrate judge was directly related to the allegations in the Complaint. (Pl. Resp. at 15-17.) In addition, Plaintiffs' Second Amended Complaint, which adds new plaintiffs, claims, and allegations, includes intentional targeting claims.

Analyzing claims of fair housing discrimination post-trial in *Tsombanidis*, the Second Circuit stated that "a successful disparate impact claim involves a comparison between two groups—those affected and those unaffected by the facially neutral policy." *Tsombanidis*, 352 F.3d at 575. The prima facie case of discrimination "must reveal that although neutral, the policy in question imposes a significantly adverse or disproportionate impact on a protected group of individuals." *Id.* The Circuit noted the customary use of statistical evidence and the importance of developing appropriate comparison groups in demonstrating disparate impact. *Id.* at 575, 576-77. In *Watson*, an unpublished opinion, the Circuit rejected Plaintiffs' premise that disparate impact could be demonstrated solely through actions locking in the effects of alleged past discrimination. *Watson*, 444 Fed.Appx. at

502. In that case, the effects of the defendant's conduct in the employment discrimination context involved rejecting reliance on a "bottom line racial imbalance," without a clear link to discriminatory practices or policies.

It is clear to this Court that, at the motion to dismiss stage, Plaintiffs do state a viable discrimination claim. *Watson*, which relies on a line of cases specific to employment discrimination, is inapposite in this context but also inadequately descriptive of Plaintiffs' allegations. Plaintiffs in this case link evidence of racial imbalance to their discrimination claims with detailed allegations about practices under Emigrant's NINA program that led to these imbalances. Plaintiffs also offer statistical evidence for their claims, which is consistent with the support that has been persuasive in other disparate impact cases. *See e.g.*, *Hargraves v. Capital City Mortgage Corp.*, 140 F.Supp.2d 7 (D.D.C.2000) (allegations of predatory lending concentrated in minority census tracts, supported by statistical evidence, adequately plead disparate impact without favorable loans outside protected class); *Huntington Branch, NAACP*, 844 F.2d at 937-38 (statistical analysis supports disparate impact claim).

While Plaintiffs and Emigrant might define relevant comparison groups and evidence differently, the task for the Court is to determine whether, accepting all allegations in the complaints as true, a viable disparate impact claim exists. It is clear to this Court that Plaintiffs have set forth allegations that adequately support a disparate impact claim. Plaintiffs' intentional targeting allegations also appear viable given the allegations in

the complaints. Plaintiffs offered evidence of an equity-stripping scheme targeted to homeowners with low income, low credit scores, and homeowner equity. The program was marketed to Black and Latino borrowers through intentional analysis and exploitation of this data to target certain communities with advertising outlets of particular and race-based appeal. A high default rate of interest facilitated Emigrant's scheme. Statistical evidence and mapping data confirmed disparate, and devastating, impact to non-white homeowners. Plaintiffs allege the costliest loans and disproportionate foreclosures have resulted for people of color and in minority neighborhoods.

Having reviewed the parties' submissions and the Report, and considered the arguments *de novo*, and offered the supplemental analysis *supra*, it is clear to the Court that Plaintiffs successfully state discrimination claims under federal and state law. This Court will accept and adopt the recommendation of the magistrate judge in the Report and deny Emigrant's motion to dismiss Plaintiffs' federal claims for failure to state a claim. In addition, Plaintiffs' state and municipal claims survive as well.

2. Plaintiffs' Truth in Lending Act Claims

Emigrant also challenges Plaintiffs' claims under the Truth in Lending Act. The Truth in Lending Act ("TILA") was enacted by Congress in 1968 in order to promote the "informed use of credit." 15 U.S.C.A. § 1601 *et seq.* Recognizing that "economic stabilization would be enhanced and the competition . . . would be strengthened"

where consumers were aware of actual costs involved in credit-based transactions, TILA mandates the "meaningful disclosure of credit terms . . . to protect the consumer against inaccurate and unfair credit billing . . . practices." 15 U.S.C.A. § 1601(a). *See also*, *Crawford v. Franklin Credit Management Corp.*, 758 F.3d 473 (2d Cir. 2014).

In this case, Plaintiffs claim Emigrant's TILA representations masked, rather than clarified, the true cost of the home loans. Plaintiffs argue a material violation of TILA through Emigrant's failure to meaningfully disclose the credit terms of the loan. Among other material violations, Plaintiffs claim that the annual percentage rate (APR) disclosed did not account for the fully anticipated 18% penalty rate, which should not have been withheld from disclosure as an "unanticipated late payment." *See* 12 C.F.R. § 226.4(c)(2). In other words, Plaintiffs claim Emigrant's NINA loans were granted with the expectation that these particular borrowers would default and that the 18% penalty interest rate would apply.

As expected, and as discussed *supra*, Plaintiffs did not receive the promised benefits. The Saint-Jeans never received the lowered interest rate after six timely payments, nor did any other plaintiff see promises made with respect to lowered payments come to fruition after closing. Ultimately, Plaintiffs could not maintain timely payments, triggering the penalty interest rate. The law allows for a three-year rescission period where there

are material violations of TILA.[13] On July 12, 2010, approximately ten months before the commencement of this lawsuit, Plaintiffs mailed a notice of rescission to Emigrant. Emigrant argues this notice inadequately rescinds, absent concomitant commencement of a lawsuit within the three-year window.

In the Report, the Magistrate Judge concluded that Plaintiffs' TILA claims are timely and state a cognizable claim. (*See* Report at 25-29, 35-36.) Noting the unconditional three-day rescission period under TILA (which does not require a lawsuit) and citing 12 C.F.R. § 226.23(a)(2) and United States Supreme Court authority, the Magistrate Judge noted "[t]he method for exercising either kind of rescission is set forth in a single provision. Presumably, then, the requirement to file a lawsuit before rescinding would apply to both kinds of rescission or to neither." (Report at 28.) Citing the plain language of the statute and the mandate of TILA's remedial purpose, *i.e.*, liberal construction of the statutory language in favor of consumers, the Report concludes that the right to rescission under TILA merely requires notice to the creditor by mail or other written communication, not the actual commencement of a lawsuit. (*See* Report at 27-28.)

Emigrant objects to the Magistrate Judge's conclusion that Plaintiffs' TILA claims are timely or substantively viable, arguing no cognizable TILA violation was pled and that no three-year right to rescind applies. (Def.

13. In the absence of a material violation of TILA, borrowers hold only a three-day unconditional right to rescind, *see* 12 C.F.R. 226(23).

Obj. at 11-13.) Even if Plaintiffs were entitled to benefit from the three-year rescission period, Emigrant denies that Plaintiffs adequately rescinded the loan. (Def. Obj. at 13-14.) Plaintiffs respond to these objections, using the same case law cited by Emigrant, to claim that the actual, reasonable expectations of the lender, *i.e.*, default and rising interest rates in the context of subprime lending, do give rise to a TILA violation and that Plaintiffs' notice of rescission was timely and proper. (Pl. Responses to Def. Obj. at 17-22.)

a. Plaintiffs' TILA Claims are Timely

In reviewing the TILA claims, and TILA's rescission provisions,[14] *de novo*, this Court finds the Report

14. TILA's right to rescind is codified at 15 U.S.C. § 1635. Rescission within three years is addressed in Section 1635(f) and provides in relevant part:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years

persuasive. As discussed below, *see infra* at Section 2(b), and accepting the allegations in the Complaint as true, it does appear that Plaintiffs have stated a viable TILA claim, including material violations of TILA. The credible pleading of material violations of TILA in the Complaint justifies Plaintiffs' invocation of the three-year rescission period under the statute.

Emigrant cites *Beach v. Ocwen*, 523 U.S. 410, 412, 118 S.Ct. 1408, 140 L.Ed.2d 566 (1998) in support of its argument that "TILA's extended right to rescind functions as a deadline for bringing suit" and references the Court's recognition that "[t]he terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time." *Beach*, 523 U.S. at 416, 118 S.Ct. 1408.[15] This is, however, precisely

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> after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

15. Defendant also cites *Murphy v. Empire of Am., FSA*, 746 F.2d 931, 934 (2d Cir. 1984) to suggest there is relevant authority in this Circuit suggesting a rescission notice is an unenforceable legal nullity. (Def. Obj. at 14.) However, Defendant fails to recognize, or note, that *Murphy* involved analysis of effective "consummation" of a consumer credit transaction under state law, rather than the examination of rescission limitations periods under the federal TILA. Thus, *Murphy* is entirely inapposite as it does not involve examination or enforcement of the three-year rescission window triggered by material violations of TILA, but the instead merely acknowledges the availability of unilateral rescission which expires, by law, three days after the consummation of a TILA-

the point; TILA does not offer the parties a "typical" statute of limitations setting forth explicitly the expiration of a private right of action and, as a result, the Court recognizes the split in Circuit law renders treatment of this issue far less straightforward than the Court suggests in *Beach*.[16] *See id.*

In *Beach*, the Court considered whether the right to rescind could be asserted as an affirmative defense in a collection action brought after the expiration of the three-year rescission period and concluded it could not. *Id.* at 411-12, 118 S.Ct. 1408. Without ever reaching the

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eligible transaction and clearly does not require a lawsuit at invocation. Since no issue relating to this case was at issue there, the snippet of *Murphy* quoted by Defendant is irrelevant, *dicta*, or both.

16. There is a divide in the circuits as to whether consumers must file civil actions or merely provide written notice in order to exercise their rights to rescission at the three-year mark. Although the Second Circuit has not considered the issue, the Third, Fourth, and Eleventh Circuits have found that written notice to the creditor is sufficient, a conclusion grounded in analysis the plain text of the TILA statute and its implementing regulation. The First, Sixth, Eighth, Ninth, and Tenth Circuits read a requirement into the right to rescind, namely that a consumer must file a civil action within three years in order to exercise rescission rights. Although these circuits rely on an alternative interpretation of *Beach*, this Court concludes, as set forth herein, that reading a filing requirement into the right to rescind under TILA is neither a necessary nor an appropriate extension of *Beach*. This is particularly true in light of the question presented in that case, TILA's statutory text and implementing regulations, and the legislative history and intent, all of which are entirely devoid of such a requirement or its suggestion.

issues presented in this case,[17] the Court acknowledged the TILA statute did not, in fact, function as a typical statute of limitations, but that the statute governed the life of the underlying right to rescind. *Id.* The Court noted that "[t]he subsection says nothing in terms of bringing an action but instead provides that the right of rescission under the Act shall expire at the end of the time period. It talks not of a suit's commencement but of a right's duration. . . . " *Beach*, 523 U.S. at 417, 118 S.Ct. 1408 (referencing 15 U.S.C. § 1635(f)) (citations omitted). The limitation in TILA, explicitly set forth in 15 U.S.C. § 1635(f), *is a limitation to the right that neither expressly nor implicitly further limits the remedies attached to that right.* In the absence of legislative language or intent to the contrary, TILA's right to rescind is entitled to the liberal construction afforded the rest of the statute and may be exercised by consumers variously in writing until its nearly unconditional expiration at the three-year mark.

This is consistent with the Supreme Court's ruling in *Beach* and with its precedent with respect to statutory construction as well. Citing its own precedent in *Bates*

17. In *Beach*, the plaintiffs argued that the three-year right to rescission applied to the commencement of a lawsuit but not the assertion of an affirmative defense. The Supreme Court adopted that dialectic in discussing plaintiffs' claim without ever examining the merits of what action suffices to express the right to rescind under the three-year statute, basically using a lawsuit under 15 U.S.C.A. 1635(f) as a foil to discuss the assertion of an affirmative defense, *i.e.*, the actual question presented, and assuming *arguendo* but not ruling that a lawsuit accurately and adequately expressed TILA rescission provisions, perhaps because it best illustrated the contrast to plaintiffs' claims in that case.

v. United States, 522 U.S. 23, 29-30, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997), the *Beach* Court recognized that where the legislative process "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* (citations and quotations omitted). The express inclusion of language relating to private civil actions, damages, and enforceability throughout TILA, *see e.g.*, 15 U.S.CA. §§ 1635(b), (g), 1640(a), (e) (contemplating court action *after* rescission) is noticeably absent from the rescission provisions. *Cf.* 15 U.S.C.A. § 1635(f). Even more telling, in the *very same provision* discussing rescission, Congress clearly and explicitly tolls the expiration of TILA's rescission right upon the "institution of a proceeding" by an interested agency without ever suggesting that such a high bar, *i.e.*, institution of a legal proceeding, shall be the sole method by which a consumer may express his intent to exercise his right to rescind at the three-year mark. *See* 15 U.S.C.A. § 1635(f).

Drawing inferences from the plain language of the statute, and the omission of language in one section of the statute that is used elsewhere in the same statute (a version of *expressio unius est exclusio alterius*), it is apparent that written notice of rescission at the three-year mark is sufficient. These canons of statutory construction have been relied upon to clarify legislative intent and statutory meaning at every level of the American judiciary, which Congress recognizes in the drafting and adoption of new legislation. *See e.g.*, Congressional Research Service, *Report for Congress, Statutory Interpretation: General*

Principles and Recent Trends (2008) at 1, 14 (available at http://fas.org/sgp/crs/misc/97-589.pdf). This Court sees no reason to depart from time-honored principles of statutory interpretation in evaluating the mechanism by which to exercise the right to rescind under TILA.

In addition, the legislative history and the relevant regulations are relevant to the question of whether valid rescission at the three-year mark requires the commencement of a lawsuit. At its enactment, Congress delegated broad authority to promulgate relevant rules under TILA to the Federal Reserve Board, *see*, *e.g.*, 15 U.S.C. 1604(a), which promulgated Regulation Z, the implementing regulations of TILA, located at Section 226 of Volume 12 of the Code of Federal Regulations. *See generally* 12 C.F.R. § 226. Regulation Z deals with the consumer's right to rescission both (1) unilaterally within three days, or (2) subject to material violations of TILA within three years, in the same provision. *See* 12 C.F.R. § 226.23(a)(3).

In Section 226.23, Regulation Z fails to redefine the term rescission or its enforcement based on when or how the right is exercised; the regulation clearly contemplates the right to rescission is one right with multiple routes of access. Regulation Z sets forth generally applicable principles for providing notice of rescission immediately in advance of setting forth parallel timelines to exercise a single, internally congruous right to rescission. *Compare* 12 C.F.R. § 226.23(a)(3) *with* 12 C.F.R. § 226.23(a)(2). According to Regulation Z, in order to exercise the rescission right, consumers "shall notify the creditor of

the rescission by mail, telegram or other means of written communication." 12 C.F.R. § 226.23(a)(2). Thus, the rules make no mention of the commencement of a lawsuit in order to properly exercise a rescission right at any time, nor do they contemplate a fundamental difference in the substantive right to rescind at the three-day mark versus the three-year mark, beyond availability criteria. This Court has no basis to find that proper rescission in the three-year context requires more than the written notice set forth in the regulations, which clearly applies to both the three-year and the three-day exercise of rescission. *See* 12 C.F.R. § 226.23(a)(2).

Consequently, this Court finds no basis to conclude that exercising the right to rescission at the three-year mark requires bringing a lawsuit, rather than serving written notice, where clearly no such requirement exists with respect to the three-day rescission right under the same statute. The recognition of the Court's proper role, fairness to the parties (including unsophisticated individuals for whom filing fees, added legal requirements and procedures, filing fees, and lawyers' fees pose added and unnecessary barriers to accessing justice or asserting and defending their rights), and judicial economy preclude this Court from mandating the premature filing of a lawsuit when a simple legal notice of rescission will suffice to achieve the same goals.

The courts are meant to be a resource of last resort, within the generally accepted principle that the courts (and, for that matter, the government) should avoid overreaching or inserting itself prematurely into private

disputes potentially capable of resolving without court intervention. It is patently unnecessary for the courts to referee a dispute between lender and borrower where the possibility of an adequate negotiated solution without governmental interference may exist, Certainly service of a notice of rescission in writing—which requires neither the presence of counsel nor the vast machinery of the federal government—adequately puts defendants on notice. To require, rather than permit, the filing of a lawsuit in order to trigger rescission at the three-year mark is to ask the federal judiciary to babysit every questionable long-term credit transaction nationwide. This is both impractical and undesirable. Even at the three-year mark, written notice of rescission facilitates a pre-filing period of dialogue, negotiation, and potential mutually satisfactory resolution of a claim by the parties outside of court or in advance of litigation. To paraphrase well-known words on negotiation and resolution, albeit out of context, this is an outcome "devoutly to be wished."[18]

Finally, this Court is aware the United States Supreme Court recently granted a writ of certiorari relating to the three-year rescission period and how it may be exercised under TILA. *See Jesinoski v. Countrywide Home Loans, Inc.*, 729 F.3d 1092, 1093 (8th Cir. 2013), *cert. granted*, ___ U.S. ___, 134 S.Ct. 1935, 188 L.Ed.2d 959 (2014). Presumably the Supreme Court will hear arguments to determine whether a notice of rescission or the filing of a lawsuit that must occur before the

18. The Court refers, of course, to the famous "To Be or Not To Be . . . " soliloquy by Hamlet in Shakespeare's play of the same name. *See* Shakespeare, William. *Hamlet*. Act III, Scene 1 (1604).

expiration of the TILA three-year rescission period in its next session. If necessary, this Court will revisit this decision in light of new authority from the Supreme Court. With respect to Plaintiffs' TILA claims, the Court adopts the recommendation of the Magistrate Judge and offers additional *de novo* analysis above, and finds these claims are timely.

b. Plaintiffs State a Claim Under TILA

In addition, taking the Plaintiffs' allegations as true, it is clear that the Complaint succeeds in stating a TILA claim. Plaintiffs' status as consumers, Emigrant's status as creditors, and the loan in question clearly fall within the scope of TILA. *See generally*, 15 U.S.C.A. §§ 1601 *et seq.*, *and* 15 U.S.C.A. §§ 1602(f), 1602(h), 1602(i). Moreover, the transgressions alleged fit the type of conduct TILA was enacted to capture. *See* 15 U.S.C.A. § 1601(a).

In this case, Plaintiffs' allegations, if proven, demonstrate specific and material violations of TILA. TILA sets forth specific disclosure requirements for creditors, including the expected APR. According to the statute and its implementing Regulation Z, 12 C.F.R. § 226, TILA requires disclosure of the amount financed, the finance charge, the schedule and total of payments, and rescission rights under specific circumstances in order to avoid liability. *See* 15 U.S.C. §§ 1635, 1638(a)(2)(A), 1638(a)(3), 1638(a)(6), 1639; 12 C.F.R. §§ 226.18; and 226.23(b)(1). *See also Crawford v. Franklin Credit Management Corp.*, 758 F.3d 473, 490-91 (2d Cir. 2014). TILA is a remedial statute, requiring courts to liberally construe its provisions in favor of consumer claims. *See*

e.g., *Kurz v. Chase Manhattan Bank*, 273 F.Supp.2d 474 (S.D.N.Y.2003) ("TILA, being a remedial statute, must be strictly construed"). As discussed below, Plaintiffs' argument that the appropriate APR ought to factor in the fully anticipated penalty rate—given the Plaintiffs' ability to pay, representations made to alleviate Plaintiffs' concerns in this regard prior to the consummation of the loan, and the frailty of the arguments denying the inevitable penalty rate constituted "unanticipated late payment" within the meaning of 12 C.F.R. § 226.4(c)(2) in the context of widespread subprime lending in this period—is not an unreasonable interpretation of TILA's language or intent. At the motion to dismiss stage, plaintiffs need not do more than credibly allege plausible TILA violations in order to maintain their claims.

Here, Plaintiffs claim that Emigrant failed to accurately and properly disclose the finance charge, the amount financed, the annual percentage rate (APR), the payment schedule, and the total of payments. Plaintiffs claim Emigrant inaccurately disclosed the terms of the APR as set forth *supra*, failed to provide each Plaintiff with two copies of the notice of right to cancel, and failed to provide each Plaintiff with a copy of the required TILA disclosure statement. (Comp. at 122; SAC ¶¶ 273, 274.) If proven, these allegations demonstrate material violations of TILA, even under a narrow construction of relevant authority. Insofar as TILA must be liberally construed, Plaintiffs have alleged adequately material violations of TILA sufficient to state a claim.

Plaintiffs also allege misconduct by Emigrant which, if proven, situates Emigrant's NINA program squarely

within widespread conduct (1) underlying the subprime lending crisis, (2) instrumental in the near-collapse of the capital markets by 2008-2009 and the subsequent recession, and (3) underlying millions of foreclosures, considerable and/or total loss of equity for nearly a quarter of American homeowners, and a significant loss of wealth to middle-income Americans, particularly in black and Latino communities.

The "economic stabilization" TILA was enacted to promote was arguably a casualty of both irresponsible lending and irresponsible borrowing throughout this period. And, in fact, some of the earliest cases on point reveal the legislative intent of TILA contemplated precisely situations such as those pled by Plaintiffs in the Complaint. *See e.g.*, *N.C. Freed Co., Inc. v. Board of Governors of Federal Reserve System*, 473 F.2d 1210, 1214 (2d Cir. 1973) *cert. denied*, 414 U.S. 827, 94 S.Ct. 48, 38 L.Ed.2d 61 (1973) (TILA "is remedial in nature, designed to remedy what Congressional hearings revealed to be unscrupulous and predatory creditor practices throughout the nation. . . . [and] its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated."). The Court finds that the allegations in the Complaint, if proven, are consistent with the plain language and the legislative intent in the enactment of TILA and its amendments.

II. Motion to Amend the Complaint

Judge Orenstein determined that Plaintiffs should be allowed to amend the Complaint to add claims,

additional defendants, and additional plaintiffs. In doing so, the magistrate judge rejected Emigrant's untimeliness arguments, arguments that some plaintiffs knowingly and voluntarily released claims against the Emigrant, and arguments that Emigrant would face undue prejudice arising from added discovery obligations or strategic and defensive obligations attendant to new claims involving intentional targeting. *See* Report at 36-39.

The Report notes that Emigrant is largely responsible for the delay of which they complain, given unusual and extraordinary delays in producing discovery and complying with timely requests to produce discovery. *Id.* at 37. Judge Orenstein found Emigrant's claims of prejudice with respect to (1) the addition of new plaintiffs and (2) intentional targeting claims, unavailing. The additional plaintiffs only slightly increased the scope of discovery which remained incomplete. *Id.* at 37-38. The additional intentional targeting issues were raised repeatedly by Emigrant in the course of arguing issues in the case and thus Emigrant is well-aware of their potential relevance defensively, even prior to Plaintiffs' prosecution of the case in this manner. *Id.* at 38-39. Emigrant objects to these conclusions, claiming amendment would be futile and untimely, that the addition of new plaintiffs repeats defects in timeliness of the claims, fails to state substantive claims, and, interestingly at this stage of the proceedings, Emigrant questions the credibility of the Plaintiffs. (*See* Def's. Obj. to Report at 17-18.)

In addition, Plaintiffs' first motion to amend seeks joinder of additional defendants, Emigrant Savings Bank-Manhattan, Emigrant Bank, and Emigrant Bancorp,

Inc. (*See* Pls. 1st Mot. Amend at 8-12.) These parties are subsidiaries of Defendant Emigrant, transferees in some transactions, current owners of some of Plaintiffs' loans, or otherwise involved in the misconduct alleged by Plaintiffs. (*See id.*) As parties jointly and severally liable if Plaintiffs' allegations prove true, and as parties alleged to be intimately involved with a discriminatory predatory lending scheme, joinder of the additional defendants does appear to be warranted pursuant to Rule 19 and Rule 20 of the Federal Rules of Civil Procedure. Defendants' principal argument against joinder (*see* Opp. 1st Mot. Amend, Dkt. No 43, at 14), that joinder is futile as it merely seeks to impose derivative liability for unfounded and non-meritorious claims, is unavailing in this context.

Thus, despite review of the substantive briefing on the motion to amend and the Objections to the Report, the Court is not persuaded by Emigrant's arguments. The addition of parties and legal theories in Plaintiffs' Second Amended Complaint was both foreseeable and fails to unduly prejudice Emigrant in this case. Judge Orenstein's ruling with respect to the motion to amend the complaint is sound and Plaintiffs will be allowed to proceed with their Second Amended Complaint.

SO ORDERED.

Dated: September 25, 2014
Brooklyn, NY

/s/ Sterling Johnson, Jr.
Sterling Johnson, Jr., Senior U.S.D.J.

APPENDIX E — VERDICT FORM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED JUNE 27, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11 CV 2122 (SJ) (RLM)

JEAN ROBERT SAINT-JEAN, EDITH SAINT-JEAN, FELEX SAINTIL, YANICK SAINTIL, BEVERLEY SMALL, JEANETTE SMALL, LINDA COMMODORE AND FELIPE HOWELL,

Plaintiffs,

v.

EMIGRANT MORTGAGE COMPANY AND EMIGRANT BANK,

Defendants.

Filed June 27, 2016

VERDICT FORM

(1) Have Plaintiffs proven by a preponderance of the evidence that Defendant **Emigrant Bank** violated the federal Fair Housing Act and Equal Credit Opportunity Act?

Yes [Illegible]
No ____

(2) Have Plaintiffs proven by a preponderance of the evidence that Defendant **Emigrant Bank** violated the New York City Human Rights Law?

Yes [Illegible]
No _____

(3) Have Plaintiffs proven by a preponderance of the evidence that Defendant **Emigrant Mortgage Company** violated the federal Fair Housing Act and Equal Credit Opportunity Act?

Yes [Illegible]
No _____

(4) Have Plaintiffs proven by a preponderance of the evidence that Defendant **Emigrant Mortgage Company** violated the New York City Human Rights Law?

Yes [Illegible]
No _____

(5) Did Emigrant prove by a preponderance of the evidence that **Felex and Yanick Saintil** knowingly and voluntarily agreed to release their claims against Emigrant in their March 2010 Modification Agreement and release?

Yes [Illegible]
No _____

If you answered "Yes" to Question 5, do not answer Question 6. Skip to Question 7.

(6) If you answered "yes" to one or more of Questions 1 through 4, please enter the amount of compensatory damages Plaintiffs **Felex and Yanick Saintil** are entitled to as a result of Defendants' violation of the Fair Housing Act, Equal Credit Opportunity Act, and/or New York City Human Rights Law.

Felex Saintil $ _____

Yanick Saintil $ _____

(7) If you answered "yes" to one or more of Questions 1 through 4, please enter the amount of compensatory damages **Plaintiffs Jean Robert and Edith Saint-Jean** are entitled to as a result of Defendants' violation of the Fair Housing Act, Equal Credit Opportunity Act, and/or New York City Human Rights Law.

Jean Robert Saint-Jean $ 180,000

Edith Saint-Jean $ 180,000

(8) If you answered "yes" to one or more of Questions 1 through 4, please enter the amount of compensatory damages **Plaintiffs Beverley and Jeanette Small** are entitled to as a result of Defendants' violation of the Fair Housing Act, Equal Credit Opportunity Act, and/or New York City Human Rights Law.

Beverley Small $ 70,000

Jeanette Small $ 110,000

(9) If you answered "yes" to one or more of Questions 1 through 4, please enter the amount of compensatory damages **Plaintiff Linda Commodore** is entitled to as a result of Defendants' violation of the Fair Housing Act, Equal Credit Opportunity Act, and/or New York City Human Rights Law.

Linda Commodore $ 185,000

(10) If you answered "yes" to one or more of Questions 1 through 4, please enter the amount of compensatory damages **Plaintiff Felipe Howell** is entitled to as a result of Defendants' violation of the Fair Housing Act, Equal Credit Opportunity Act, and/or New York City Human Rights Law.

Felipe Howell $ 225,000

IF YOU ANSWERED "YES" TO QUESTION 5 ABOVE, THEN YOU MUST NOT CONSIDER FELEX OR YANICK SAINTIL IN ANSWERING QUESTIONS 11 AND 12.

(11) If you find that Defendants violated the Fair Housing Act and/or the New York City Human Rights Law, do you find that punitive damages should be awarded against **Emigrant Bank**? If you find "yes," enter the amount of punitive damages you award.

Yes _____
No [Illegible]

Amount: $ _____

(12) If you find that Defendants violated the Fair Housing Act and/or the New York City Human Rights Law, do you find that punitive damages should be awarded against **Emigrant Mortgage Company**? If you find "yes," enter the amount of punitive damages you award.

Yes _____
No [Illegible]

Amount: $ _____

PLEASE SIGN AND DATE YOUR VERDICT.

Dated: June 27, 2016
Brooklyn, NY

/s/ [Illegible]
Signature of Foreperson

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED AUGUST 20, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11 CV 2122 (SJ) (RLM)

JEAN ROBERT SAINT-JEAN, *et al.*,

Plaintiffs,

-against-

EMIGRANT MORTGAGE COMPANY, *et al.*,

Defendants.

Filed August 20, 2018

MEMORANDUM AND ORDER

JOHNSON, Senior District Judge:

The facts and circumstances surrounding this action have been set forth in two previous orders and in the transcript of the February 26, 2016 oral argument after which the Court denied defendants Emigrant Mortgage Company's, and defendant Emigrant Bank's ("Emigrant" or "Defendants") motion for summary judgment. (*See* Dkt. Nos. 206, 258; *see generally* Tr. of 2/26/16.) Familiarity therewith is assumed. However, due to both the voluminous

nature of the record since developed in this case and the verdict entered on June 27, 2016 against Defendants in the amount of $950,000 following a jury trial, the following additional summary is in order.

The plaintiffs ("Plaintiffs") are Black property owners or former property owners living in various parts of New York City who, prior to the subprime mortgage meltdown of the late 2000s, applied for and received "STAR NINA" loans from Emigrant, loans for which Emigrant did not require proof of income or assets. Plaintiffs claim those loans were predatory and targeted certain minority communities (particularly Black and Hispanic), designed specifically to strip the equity from their homes by imposing an onerous 18% interest rate upon the occurrence of one late payment. They argue that the one late payment triggering the 18% interest rate was a calculated plan by Emigrant to so deprive them of that home equity, given Plaintiffs' 600 or below credit scores; their payment histories on prior mortgages; the fact that Emigrant's advertising and mortgage closing practices were designed to obscure the likelihood of default (such as allegedly "burying" the rider disclosing the default interest rate in stacks of closing documents); and Plaintiffs' lack of sophistication. Additionally, it is undisputed that none of the Plaintiffs had salaries equaling or exceeding that which would be otherwise required by Emigrant for loans of the amounts disbursed. According to Plaintiffs, Emigrant attempted to avoid responsibility for the inevitable default by having the homeowners sign "Resource Letters" drafted by Emigrant which stated, *inter alia*, that Plaintiffs had access to funds from family

and friends to repay the loans in the event of default, and that Plaintiffs understood they would have to be willing to sell their homes to foot the bill in the event of default.

Eight Plaintiffs are involved in this suit, all of whom had significant equity in their homes prior to borrowing from Emigrant, and all of whom have either been forced to sell their homes or live in homes that, pursuant to the terms of their respective STAR NINA loans, were secured by mortgages that applied an 18% interest rate once each of the Plaintiffs made a late payment, which each of the Plaintiffs did.

Jean Robert Saint-Jean and his wife Edith Saint-Jean (the "Saint-Jeans") live in a Canarsie home subject to a foreclosure action. At the relevant time, Jean Robert Saint-Jean had a credit score of 540 and Edith Saint-Jean had a credit score of 545. They were approved for a $370,000 loan with an interest rate of 11.75%. Pursuant to their loan, the mortgage payment was $4,174, about $2,000 more per month than their previous mortgage. After they fell behind on their payments and the 18% default interest rate was applied, their monthly payment became $6,130. During the relevant time period, Mr. Saint-Jean worked as a paraprofessional for the New York City Department of Education, and Mrs. Saint-Jean as a home health aide. They never earned the required $102,000 per year otherwise required to obtain this loan.

Felex and Yanick Saintil (the "Saintils") also live in a forecloseable Canarsie home. Mr. Saintil works as a truck driver and Mrs. Saintil, prior to the stroke she suffered

during the pendency of this action, worked as a home health aide. The Saintils closed on a $325,000 STAR loan with an initial interest rate of 9.65% and a monthly payment of $3,145.85. They never earned the approximately $94,000 otherwise required for their loan, and their approximately $3,000 per month payment ballooned to over $4,000 per month by 2007. The Saintils made several unsuccessful attempts to modify their loan. By March 2010, Emigrant approved a loan modification for the Saintils, waived both the default interest provision and approximately $14,000 in "unpaid charges" and reduced their monthly payments to $2,804.38 and their interest rate to 6% for five years. As part of the modification, the Saintils signed a document intended to waive and release all claims they may have had up to the date of the modification. The Saintils were unable to keep up with the $2,804.38 monthly payment and remain in several years' worth of arrears.

Jeanette and Beverley Small (the "Smalls"), a mother and daughter, refinanced their home with Emigrant in August of 2006. They borrowed $330,000 with an interest rate of 9.875%, and a monthly payment of $3,261. After one late payment, their monthly payment shot up to $5,480. The Smalls never earned the approximately $82,000 required for their loan. The Smalls eventually sold their home to avoid foreclosure. The parties dispute the extent of the financial loss the Smalls suffered from their STAR NINA loan, but it is undisputed that the Smalls repaid the amounts then-owed Emigrant in full.

Linda Commodore ("Commodore") refinanced the mortgage on her Manhattan co-op in 2004 through

Emigrant's STAR NINA program, and received $125,000. Commodore did not earn the annual income of $54,792 required for the loan and her credit score was 553. Her payments ballooned from $983.38 to almost double that amount after a missed payment. Like other Plaintiffs, she too was denied the opportunity to make a late payment and, like the Smalls, also sold her home to avoid foreclosure. Indeed, Commodore sold her home for $40,000 less than its value.

Finally, Felipe Howell owned his Queens property outright and did not work. He took out a STAR NINA loan from Emigrant requiring a $2,100 monthly payment in order to finance the construction of a rental property on the same lot with the residence that secured the mortgage. Howell's construction project failed, he was unable to make a single payment, and his mortgage increased to $3,378 per month. As he was unemployed, he did not earn the $51,527 annually that would have been required for him to obtain a full-documentation loan or the amount necessary to make his monthly mortgage payments. Howell's property was foreclosed upon and purchased at auction by Emigrant for $1,000.

Plaintiffs filed suit pursuant to following anti-discrimination statutes: the Fair Housing Act, 42 U.S.C. §§ 3604, 3605 ("FHA"); the Equal Credit Opportunity Act, 15 U.S.C. § 1691, et seq.; and of New York City Human Rights Law. Additionally, Edith Saint-Jean asserts a fifth cause of action under the Truth in Lending Act, 15 U.S.C. §1601 et seq. ("TILA"). Emigrant argues, *inter alia*, that the loans were not predatory, were not targeting minority

communities but simply those who could not otherwise obtain loans; and that the claims are time-barred.

On May 23, 2016, a jury trial commenced. The jury determined that Emigrant violated the Federal Fair Housing Act, Equal Credit Opportunity Act and the New York City Human Rights Law. The Saint-Jeans were awarded $180,000 apiece in compensatory damages, the Smalls were awarded $70,000 (to Beverley) and $110 (to Jeanette), Commodore was awarded $185,000 and Howell was awarded $225,000. On June 27, 2016, the jury found that the Saintils were not entitled to any compensatory damages because they knowingly and voluntarily a 2010 loan modification that purported to release all existing claims against Emigrant. None of the parties were awarded punitive damages.

Following the trial, both Plaintiffs and Emigrant filed post-trial motions pursuant to Federal Rule of Civil Procedure ("Rule") 50. Defendants take issue with several provisions in the instructions read to the jury by the Court and demand a new trial. They also believe they are entitled to a new trial because (A) Plaintiffs failed to present sufficient evidence of discrimination, either through their own testimony or their experts; (B) certain expert testimony by Plaintiffs was impermissible; (C) Defendants' proffered FDIC expert should have been permitted to testify; (D) the jury award is excessive; (E) Plaintiffs' claims are time-barred; and (F) a juror should not have been excused mid-trial. They also argue that are entitled to judgment as a matter of law as to the Truth in Lending Act claim brought by the Saint-Jeans. Plaintiffs'

Rule 50 motion seeks a new trial for the Saintil's, arguing that the 2010 loan modification entered into between Emigrant and the Saintil's is unenforceable. Plaintiffs also argue that, in light of the jury finding that Emigrant violated the FHA, ECOA and NYCHRL, the Court should issue an injunction against certain allegedly predatory behavior, including the appointment a monitor to oversee Emigrant's lending practices, and that the Court should retain jurisdiction over the action for a period of three years while such monitoring is conducted.

Based on the submission of the parties, the oral argument held before this Court on June 28, 2017, and for the reasons stated below Defendants' motion is GRANTED IN PART AND DENIED IN PART, and Plaintiffs' motion is GRANTED IN PART AND DENIED IN PART.

DISCUSSION

I. Standard of Review under Rules 50 and 59

A. Rule 50

Rule 50(b) permits the Court to enter a judgment as a matter of law and/or order a new trial when there is "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded [person] could not arrive at a verdict against [it]." *Canjura v. Laschet*, No. 12 CIV. 1524 (JCM), 2016 U.S.

Dist. LEXIS 62445, 2016 WL 2755920, at *3 (S.D.N.Y. May 10, 2016) (quoting *Wiercinski v. Mania 57, Inc.*, 787 F.3d 106, 112 (2d Cir. 2015) (citations omitted) (alterations in original).

"A district court must deny a motion for judgment as a matter of law unless, viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.'" *Cruz v. Local Union No. 3 of Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1154-55 (2d Cir. 1994) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)); accord *Vasbinder v. Ambach*, 926 F.2d 1333, 1339 (2d Cir. 1991).

"A party is generally entitled to a new trial if the district court committed errors that were a 'clear abuse of discretion' that were 'clearly prejudicial to the outcome of the trial' . . .Prejudice is measured by assessing the error in light of the record as a whole." *Marcic v. Reinauer Transp. Companies*, 397 F.3d 120, 124 (2d Cir. 2005) (quoting *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 17 (2d Cir.1996)).

B. Rule 59

Rule 59 permits the Court to grant a new trial "on some or all of the issues" and to do so for "any reason a new trial has been heretofore granted in an action in federal court." Fed. R. Civ. P. 59(a)(1)(A).

II. Sufficiency of the Evidence

Sweepingly, Emigrant argues that Plaintiffs failed to present "sufficient evidence of any type of discrimination." This argument fails because the jury verdict indicates that they credited the testimony and/or evidence of the Plaintiffs and/or their witnesses over the testimony and/or evidence presented by Defendants, and the jury was entitled to do so, as Plaintiffs offered over a dozen witnesses. The following brief summary of Plaintiffs' key witnesses provides sufficient evidence from which a jury could find against Emigrant on liability.[1]

A. Plaintiffs' Witnesses

1. Rebecca Walzak

Plaintiffs called Rebecca Walzak ("Walzak") as an expert witness. Walzak is a mortgage consultant who testified that she has worked in "all aspects of mortgage lending," including overseeing loan closings in all 50 states, evaluating, reviewing and training lenders on various loan products, working in risk management and quality assurance, underwriting guidelines, monitoring and managing brokers and lenders, analyzing information from servicing groups. The holder of a Master's in Business Administration from the University of Maryland

1. As discussed, *supra*, much of the factual background involving the individual plaintiffs is incorporated by reference herein and/or is not in dispute. Therefore, this summary is intended to supplement the backdrop of the loan process beyond the particulars of each Plaintiff's loans.

with a Certification in Quality Management from George Washington University, Walzak testified that she has underwritten or reviewed over 100,000 loans during the course of her career and that the STAR NINA loan "contained numerous predatory loaning aspects that . . . were the worst [she] had ever seen in a mortgage loan."

Specifically, Walzak testified that STAR NINA's focus on credit scores under 600 indicated that Emigrant was "looking for the borrowers that had the least likelihood to be able to repay the debt." Further, Walzak stated that "No Income No Asset" ("NINA") loans are typically extended to people with credit scores in the 800 range—not the 500s—and that she was unfamiliar with any residential loan product that provided for an 18% interest rate in the event of default. These reasons, along with Walzak's observation that the STAR NINA product contained excessive fees,[2] involved the use of insufficiently monitored brokers, suffered from risk management deficits and "focused on people in situations where they were desperate" through advertising designed to allay the borrowers' fears, led Walzak to conclude that the loans were predatory. Walzak also found that the loans were not actually risky given the equity in the collateral (i.e., Plaintiffs' homes) and believed that Emigrant expected a large tranche of these loans to fail, resulting in its collection of an inordinate amount of interest and/or its successful foreclosure of the homes. Walzak made these observations after reviewing both the terms of the

2. As to broker's fees alone, Walzak testified that "the typical broker fee is probably $2000-3000," but that Emigrant's "started out as $20,000 and they raised it later to $35,000."

loan product and minutes from meetings of Emigrant's Board of Directors which evinced the profitability of these high interest loans notwithstanding the incidence of foreclosure. Walzak also found the default rate of the STAR NINA product to reach as high as 50%, whereas with a prime loan, delinquency rates were about 3-4%, with subprime loans averaging 6% delinquency. In sum, Walzak testified that

> These loans were targeted to some of the most vulnerable individuals in the community. [The loans] were identified as a solution to their financial problems, but instead, simply put them further behind into payments that they could not possibly pay, and it was a foregone conclusion that they would end up paying the 18 percent default interest and eventually would lose their homes to foreclosure.

(Tr. at 128.)

2. Ian Ayres

Professor Ian Ayres also testified for Plaintiffs. Ayres holds a doctorate in Economics from the Massachusetts Institute of Technology and a degree from Yale Law School, where for 23 years he has taught and studied statistical tests of race and gender discrimination, including mortgage lending. He was offered as and permitted to testify as an expert in statistical tests of predatory lending and discrimination. Ayres defined "predatory [lending] terms" as "terms in a mortgage that

artificially increase the chance that the mortgage will fail," such as pre-payment penalties and default interest, both of which were present in the STAR NINA program. In particular, Ayres testified that in Emigrant's STAR NINA program, the default interest provision made the loans more profitable in that the loans were "issued primarily on the basis of the equity that was built up in the house and not on the credit characteristics of the borrow," which he referred to as "perverse" and unlike any of the other mortgage portfolios he reviewed.

Ayres also compared the census track of communities in relation to the number of STAR NINA borrowers in that community. According to Ayres, in communities with 10% or less African-American or Latino residents, Emigrant's STAR NINA loans constituted 23% of their refinance loans. However, Ayres testified that as the percentage of African-American and Latino residents increased upwards of 80% of a given community, Emigrant's STAR NINA loans comprised 45% of those offered in the area.

3. Holly Perlowitz

Holly Perlowitz ("Perlowitz"), former Senior Vice President at Emigrant Mortgage Company, and former Co-President of Emigrant Mortgage Company, testified as to the structure of Emigrant's broker program. She at one point managed both the broker and sales programs. Perlowitz testified that she supervised salespeople and sales managers, who in turn managed Emigrant's Broker Direct Account Managers ("BDAMs"). According to Perlowitz, BDAMs are loan originators employed by

Emigrant who were given a higher rate of compensation for closing on STAR NINA loans than other loans. Perlowitz testified that Emigrant's BDAMs in New York City (minus the borough of Manhattan) were managed by Paul Rizzo, an individual who Emigrant cited as having "recruited and developed several ethnic BDAMs that consistently produce 2-4 mill [sic] a month each."

Perlowitz admitted that after the STAR program was discontinued, Emigrant's salesforce saw a sharp decrease in "enhanced incentives" that Emigrant offered them for closing on STAR NINA loans. Moreover, Perlowitz admitted that Emigrant did not wish to work with brokers who could not find potential "no doc"[3] borrowers with low credit scores. Indeed, Plaintiffs elicited through Perlowitz that Black STAR NINA borrowers increased from 50% of borrowers in 2004 to 70% in 2006.

4. Howard Milstein

Howard Milstein ("Milstein"), the Chief Executive Officer ("CEO") of Emigrant since 2004 testified that STAR NINA loans were nonperforming at a rate of up to 20%, but such failure rate did not result in losses to the bank and he was "not especially" concerned about the level of delinquencies. So unconcerned was Milstein, he testified, that the Board of Directors (chaired by Milstein) approved an increase in the amount of STAR NINA lending that Emigrant would undergo.

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3. A "no doc" loan was defined by Ayres as one in which the lender does not verify the borrower's ability to pay, a "red flag for something that might artificially increase the chance that [the borrower] won't be able to repay."

Milstein testified that he was aware that the bank was developing relationships with brokers of color or with ties to communities of color, comparing those relationships to the bank's need for Korean-speaking brokers if he wished the bank to do business among Korean-Americans. Specifically, Milstein was asked whether he "targeted particular ethnic groups who were not in the mainstream so that they would receive information about [Emigrant's] loan products." Milstein answered "[w]ell, they would be groups considered underserved by our regulators."

5. Charlton McIlwain

Dr. Charlton McIlwain ("McIlwain") is the Associate Dean of Faculty Development at New York University. There, he is also a Professor of Media, Culture and Communications. McIlwain holds a doctorate in Communication from the University of Oklahoma and in addition to teaching, has for at least 18 years conducted research on areas of race and media, "particularly studying racial queuing, racial targeting, the ways that racial messages and other forms of racialized communication advance certain ends and the way they affect both our attitudes and behavior." McIlwain was permitted by the Court to testify as an expert in marketing advertising. McIwain testified that he reviewed Emigrant's advertising budget between 2005 and 2008 and found that 76% of its advertising went into four publications: *Caribbean Life* newspaper, *Black Star News, Hoy* (a Spanish-language newspaper) and *Mizona* (another Spanish-language newspaper). McIlwain also testified that 82% of Emigrant's overall advertising was in newspapers circulated in areas

with a combined Black and Latino population of greater than 80%. Finally, McIlwain took into account that that 96% of the human images in the advertisements were of Black or Latino individuals. With these three criteria, McIlwain concluded that Emigrant's advertising was unethical, in that the STAR NINA product was a "high-interest, low-income product that is predatory and has adverse effects" to the market form which it heavily recruited.

Accordingly, this Court finds that Emigrant has not met its burden of demonstrating that the jury verdict on liability was the result of "surmise" or "conjecture," or was otherwise unreasonable.

III. Emigrant's Objection to the Court's Jury Instructions

Emigrant argues that the jury instructions on intentional discrimination, disparate impact and gross unfavorability misstated the law and warrant a new trial. They also argue that certain instructions they proffered were incorrectly altered or incorrectly omitted altogether.

On June 20, 2016, the Court held a charge conference at which Emigrant made the same or similar arguments, all of which were rejected. On Emigrant's Rule 50 motion, the Court again rejects Emigrant's arguments following reasons.

Appendix F

A. Intentional Discrimination

The Court charged the jury that if it believed that that the evidence demonstrated that the STAR NINA loans were grossly unfavorable and intentionally targeted certain groups based in part on race, color or national origin, it could find discrimination under the FHA, ECOA and NYCHRL. The plain words of the instruction are as follows:

> In order to prevail on their claim that Defendants intentionally engaged in lending practices that violated the Fair Housing Act, Equal Credit Opportunity Act, and New York City Human Rights Law, Plaintiffs must establish that:
>
> (1) the STAR NINA loan product was grossly unfavorable to the borrower; and
>
> (2) Defendants' effort to make STAR NINA loan s in certain communities was motivated, at least in part, by race, color, or national origin.
>
> If you find Plaintiffs have established these elements by a preponderance of the evidence, then you must find that Defendants violated the Fair Housing Act, Equal Credit Opportunity Act, and the New York City Human Rights Law.
>
> Plaintiffs are not required to show that Defendants acted with racial animus, which

> means hatred or dislike for particular racial or ethnic group. Nor do they need to prove that race, color or national origin was the only reason for Defendants' conduct. Rather, they are only required to show that race, color, or national origin was one motivating factor. This means that in order for Defendants to be found liable for violating the Fair Housing Act, Equal Credit Opportunity Act, and the New York City Human Rights Law, race, color, or national origin need only have played some role in Defendants' conduct.

(Dkt. No. 522 at 33.) Emigrant presents three arguments that this instruction requires the Court to grant them a new trial. They argue that "the jury was not instructed in any way on Plaintiffs' intentional-targeting theory;" that evidence of animus is a necessary component of intentional discrimination and that it was improper to reference Hispanic borrowers when none of the Plaintiffs are Hispanic.

Emigrant's argument that the charge fails to take into account Plaintiffs' theory of targeting is plainly specious and semantic: the intentional offering of "grossly unfavorable loans" to members of "certain communities" with "race, color, or national origin" in mind is, in fact, targeting. That the court did not use the precise word "target" in this instruction does not warrant a new trial when the evidence is viewed as a whole. The charge requires the jury to find that Emigrant was "motivated, at least in part" by the impermissible factors of race, color or

national original. It strains logic to imagine that the jury based its verdict on intentional discrimination, found that Emigrant was motivated at least in part by race, color or national origin, did in fact obtain grossly unfavorable loans from certain communities, but that these communities were not targeted. *See e.g., Barkley v. Olympia Mortg. Co.*, 2007 U.S. Dist. LEXIS 61940, 2007 WL 2437810, at *11 (E.D.N.Y. Aug. 22, 2007) (finding an example of targeting to be the placement of advertisements in *Caribbean Life*, a "community newspaper that serves the West Indian immigrant community, while not advertising in community papers that are part of the same newspaper chain but serve primarily white neighborhoods.").

Next, Emigrant argues that Plaintiffs were required to show discriminatory animus, and that the instructions failed to inform them of that. This Court disagrees. In *Village of Arlington Heights v. Metropolitan Hous.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), the Supreme Court summarizes "*without purporting to be exhaustive*, subjects of proper inquiry in determining whether racially discriminatory intent existed." *Id.* at 565 (emphasis added). Those subjects include "sensitive inquir[ies] into such circumstantial and direct evidence of intent[,] . . . [t]he historical background of the decision," and "[t]he specific sequence of events leading up to the challenged action." *Id.*; *see also Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2015) ("[W]hen Congress amended the FHA in 1988, the circuits were largely in agreement that if one of the factors for an act was unlawful, the act violated the FHA.") (collecting cases); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032,

1042 (2d. Cir. 1979) ("[W]hile [the court] did not doubt that the defendant's primarily goal was to make money. . . [the court] need not and [did] not find that racial prejudice dominated defendant's mind during the negotiations. It is enough that race was one significant factor he considered in his dealings with the men.") (quoting *United States v. Pelzer Realty Co.*, 484 F.2d 438, 443 (5th Cir. 1973) (internal quotation marks omitted)); *Barkley*, 2007 U.S. Dist. LEXIS 61940, 2007 WL 2437810, at *11 ("[A] factfinder might determine that defendants had harbored ill will toward racial minorities, *or* that they had used race as a proxy, doing business exclusively with minorities out of the biased perception that those individuals would be especially vulnerable to fraud.") (emphasis in original).) Accordingly, this Court finds the word "animus" need not appear in a charge on intentional discrimination and that the charge read was correct.[4]

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4. In Defendants' Memorandum of Law, Emigrant argues that this instruction improperly included reference to Hispanic borrowers. (Def. Mem. of Law at 5.) However, the instruction makes no reference to a specific race. Insofar as the instructions as a whole do make reference to Hispanics, this Court finds no error in giving instructions that included Emigrant's alleged targeting of low-income Hispanic communities. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L. Ed. 2d 415 (1972) ("The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the [Civil Rights Act of 1968], 'the whole community.'"); *Ragin v. Harry Macklowe Real Estate*, 6 F.3d 898 (2d Cir. 1993) (reversing district court's finding that nonprofit agency lacked standing to bring discrimination claim against real estate advertisers because the agency had redirected significant resources (constituting an injury in fact) in order to identify and counteract alleged discriminatory conduct).

B. Pretext

The Court's charge on pretext was as follows:

> The fact that Defendants offer explanations for their actions does not mean that they are not liable for intentional discrimination. If you conclude that the explanations are false or unworthy of credence, you may infer that Defendants' actions were motivated by discrimination on the basis of race, color or national origin.
>
> If you find by a preponderance of the evidence that Defendants' explanations for their actions are not the true reason for their actions, you may infer that Defendants' actions were motivated by race, color or national origin, and therefore violated the Fair Housing Act, Equal Credit Opportunity Act, and New York City Human Rights Law.

(Dkt. No. 522 at 34.) Emigrant takes issue with this charge because it "it is not enough to *dis* believe [sic] the [defendant]; the factfinder must *believe* plaintiff's explanation of intentional discrimination." (Def. Mem. of Law at 5 (emphasis in original).) However, Defendants rely in that regard on *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), which conversely states that "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." (emphasis in original). Therefore, this charge does not support a finding that a new trial is warranted.

C. Disparate Impact

Emigrant posits four objections to the Court's disparate impact jury instruction. Each are without merit.

The relevant instruction read as follows:

> As I said earlier, there are two ways the Plaintiffs may prove discrimination under the three statutes I mentioned earlier—the Fair Housing Act, the Equal Credit Opportunity Act and the New York City Human Rights Law. They can prove by a preponderance of the evidence that Defendants intentionally discriminated against them, which I just described to you. They can also prove that a particular practice had a discriminatory effect, even if the practice was not motivated by discriminatory intent.
>
> Plaintiffs are alleging that Defendants' practice of making STAR NINA loans has a discriminatory effect. For you to assess Plaintiffs' claim, you will consider the following.
>
> *First*. Plaintiffs must establish by a preponderance of the evidence that Defendants' practice of making STAR NINA loans actually or predictably had a substantial adverse impact on African-American or Hispanic borrowers.
>
> *Second*, if you find that Plaintiffs have proven the first factor, then you must decide

> whether Defendants have established by a preponderance of the evidence that the practice of making STAR NINA loans was necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of Defendants. If you find that Defendants failed to establish that the practice was actually necessary to achieve their substantial, legitimate, and nondiscriminatory interests, you must find for Plaintiffs on their discriminatory effect claim.
>
> *Third*, if you find that the STAR NINA loan program was necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of Defendants, then you must decide whether Plaintiffs have established by a preponderance of the evidence that Defendants' interests could have been served by another practice that had a less discriminatory effect. If Plaintiffs make this showing, then you must find for Plaintiffs on their discriminatory effect claim.
>
> I instruct you that Plaintiffs are not required to show that Defendants intended to discriminate in order to establish their claim of discriminatory effect.

(Dkt. No. 522 at 35-36.) Emigrant argues that this charge warrants a new trial because this charge relieved Plaintiffs of their burdens of identifying a specific discriminatory practice or policy and demonstrating that it caused

disparity; because the instruction would have permitted the jury to find Emigrant liable if STAR NINA loans had an identical impact on white borrowers, and because the third step in the analysis did not require Plaintiffs to prove the existence of an actual available alternative to the STAR NINA loan product but simply a theoretical alternative with "less discriminatory effect."

The first two arguments are simply meritless and need not detain us long: the instruction did not relieve Plaintiffs of either the burdens alleged. First, the plain language of the instruction states that the specific discriminatory practice alleged is Emigrant's practice of offering the STAR NINA loan product. Second, Plaintiffs offered evidence at trial that STAR NINA loans had a substantial adverse impact on African-American or Hispanic borrowers. Emigrant's contentions to the contrary merely attack the level of specificity required to prove these allegations. A jury instruction is not a summation. The Court is not required to summarize all of the evidence presented by Plaintiffs of each element of the STAR NINA loan product – its advertising, its target audience, its relationship to its broker, or each and every one of its narticulars. *See Huntington Branch N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 936-7 (2d. Cir. 1988). Second, the instruction includes the language "had a substantial adverse impact on African-American or Hispanic borrowers." Emigrant argues that this language relieves Plaintiffs of the "robust causality requirement" articulated in *Texas Dept. of Hous. and Cmty Affairs v. Inclusive Cmtys. Proj., Inc.*, 135 S. Ct. 2507, 2523, 192 L. Ed. 2d 514 (2015). However, the full text of that passage ought to be cited here for context:

> [A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance. . .does not, *without more*, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create.

Id. (emphasis added). The Court does not see a reading of this instruction that would permit a jury "without more," to rule against Emigrant for disparities Emigrant did not create. So, too, is Emigrant's reliance on *Boyd v. Lefrak Org.*, 509 F.2d 1110 (2d Cir. 1975) misplaced. In that case, a Black applicant and a Puerto Rican applicant denied an apartment in defendants' complex sued under the FHA, claiming that the defendants' requirements that, in the absence of an acceptable co-signer, their net weekly income be equivalent to 90% of a month's rent had a discriminatory impact on them. The circuit held:

> While blacks and Puerto Ricans do not have the same access to Lefrak apartments as do whites, the reason for this inequality is not racial discrimination but rather the disparity in economic level among these groups. While a showing of a disproportionate effect on non-whites is sufficient to require application of the compelling state interest standard in the context of an equal protection challenge to government action, *see, e.g., Hunter v.*

> *Erickson*, 393 U.S. 385, 391-392, 89 S.Ct. 557, 21 L. Ed. 2d 616.393 U.S. 385, 89 S. Ct. 557, 21 L.Ed.2d 616 (1969), such an analysis is inappropriate in the context of a purely private action asserting a claim of racial discrimination. A businessman's differential treatment of different economic groups is not necessarily racial discrimination and is not made so because minorities are statistically overrepresented in the poorer economic groups. The fact that differentiation in eligibility rates for defendants' apartments is correlated with race proves merely that minorities tend to be poorer than is the general population. In order to utilize this correlation to establish a violation of the Fair Housing Act on the part of a private landlord, *plaintiffs would have to show that there existed some demonstrable prejudicial treatment of minorities over and above that which is the inevitable result of disparity in income.*

Boyd, 509 F.2d at 1113 (emphasis added). As stated, *supra*, the challenged charge does instruct that "Plaintiffs are alleging that Defendants' practice of making STAR NINA loans has a discriminatory effect." Therein lies the alleged cause (beyond mere ethnicity – or even credit scores, as Emigrant argues – but including the entire loan product and its marketing to Black and Hispanic communities, the absence of income or asset verification, its longevity notwithstanding its rate of failure) of the impact on the communities targeted.

D. Emigrant's Remaining Challenges to the Instructions

Emigrant's additional objections to the jury instructions have been considered by this Court and are without merit.

E. Plaintiff's Objection to Jury Instruction on Waiver

Plaintiff argues that the Court erred in instructing the jury as to whether the waiver executed by the Saintils was knowing and voluntary. The Court instruction read as follows:

> During this trial, you heard evidence that in March 2010, Plaintiffs Felex and Yanick Saintil signed an agreement releasing and discharging Emigrant from all claims and demands that they had against Emigrant, including claims related to their August 2, 2006 mortgage loan. This agreement has been referred to as a "release." As I stated earlier, this is the one issue on which Defendants bear the burden of proof.
>
> To be enforceable, a release must be made knowingly and voluntarily. In determining whether, under the totality of the circumstances, the Saintils' release was made knowingly and voluntarily, you must consider:

(1) the Saintil's level of education and business experience;

(2) the amount of time they had possession of or access to the agreement before signing it;

(3) the Saintils' role in deciding the terms of the release;

(4) the clarity of the agreement;

(5) whether the Saintils were represented by or consulted with an attorney; and

(6) whether what the Saintils received in exchange for the waiver exceeded any benefits to which the Saintils were already entitled by contract or law.

These factors are not exhaustive. No one factor is necessarily controlling, which means there is no particular factor that must be in Emigrant's favor for the release to be found to be knowing and voluntary. Rather, you must consider all of these factors under the totality of the circumstances.

(Dkt. No. 522 at 38.)

Plaintiffs argue that, by using the language "there is no particular factor that must be in Emigrant's favor,"

this instruction would have allowed two impermissible outcomes: (1) the jury may have found for Emigrant on only one factor of the six non-exhaustive factors but found the waiver to be knowing and voluntary nevertheless based on an incorrect assumption that one factor is sufficient; and (2) the jury may have believed that all six non-exhaustive factors needed to favor the Saintils to in order for them to invalidate the waiver.

Plaintiffs' arguments are meritless. As to the former, the instruction explicitly states that the jury is to consider the factors "under the totality of the circumstances." Therefore, the instruction both provides the jury with a nonexhaustive list and a mandate to consider the six factors given. As to the latter, the jury was instructed that the burden of proof was on Emigrant to establish that the waiver was knowing and voluntary. (Dkt. No. 522 at 10.) It would have been impermissible (and not a result of the reading of this instruction) for them to have shifted the burden to the Saintils to prove all six factors.

IV. Timeliness of Plaintiff's Claims

Emigrant claims they are entitled to judgment as a matter of law because Plaintiffs' claims were untimely, given the two year statute of limitations on FHA. However, this argument was presented to this Court and rejected by this Court at the motion to dismiss stage. (*See* Dkt. No. 258 at 30-31.) Nothing has changed to alter the Court's decision and no new evidence has been overlooked by the Court. Therefore, for the reasons stated then, and for the reasons stated hereinbelow, this argument is rejected.

Appendix F

A. Equitable Tolling

The requirements for equitable tolling are (1) that the defendant concealed the existence of a cause of action; (2) the action commenced within the applicable limitations period; and (3) plaintiffs' failure to bring the action sooner was not from the absence of due diligence. Of these prongs, Emigrant primary argues there was no concealment involved in the offering of the STAR NINA loan. Where fraudulent concealment can be demonstrated, a defendant may not present a statute of limitations defense as to any such claim. *New York v. Hendrickson Bros. Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988).

While Emigrant cites *Hendrickson Bros*, on the issue of concealment, the case is more supportive of Plaintiffs' view of the case. In *Hendrickson Bros*, the Second Circuit found that "the plaintiff may prove the concealment element by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing." *Id.* (holding that plaintiff in contract big rigging case had adequately proven concealment on appeal of final judgment). This Court's order of September 24, 2014 already held that discriminatory mortgage lending is inherently self-concealing and cited three authorities with fact patterns comparable to the instant case in support. *See M&T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 555-56 (E.D.N.Y. 2010); *Council v. Better Homes Depot. Inc.*, No. 04-CV-5620, 2006 U.S. Dist. LEXIS 57851, 2006 WL 2376381, at *9 (E.D.N.Y. Aug. 16, 2006); *Phillips v. Better Homes Depot, Inc.*, No. 02-CV-1168, 2003 U.S. Dist.

LEXIS 27299, 2003 WL 25867736, at *25 (E.D.N.Y. Nov. 12, 2003). Emigrant cites to *Clement v. United Homes, LLC*, 914 F. Supp. 2d 362, 374 (E.D.N.Y. 2012), in which the court actually found the requisite concealment prong to be met. Therefore, Emigrant has not presented any evidence to persuade the Court that its reasoning on concealment should change.

V. Enforceability of the Saintils' Waiver

While, as explained, *supra*, the jury found that the waiver signed by the Saintils was knowing and voluntary, the question of its enforceability is, at this stage, purely legal, and as such, raises a question distinct from Plaintiffs' objection to this Court's jury instruction. Emigrant has argued that the Saintils' execution of the waiver constitutes an affirmative defense to violations of all three statutes presented to the jury. Plaintiffs in turn argue that the release is unenforceable as a matter of law.

"There is no magic formula for determining when a contract . . . is void as against public policy." *Anders v. Verizon Comms., Inc.*, (VSB) 15 CV 5654, 2018 U.S. Dist. LEXIS 95303, 2018 WL 2727883, at *9 (S.D.N.Y. Jun. 5, 2018) (quoting *SI Venture Holdings, LLC v. Catlin Specialty Ins.*, 118 F. Supp. 3d 548, 551 (S.D.N.Y. 2015)); *see also Estate of Walker*, 64 N.Y.2d 354, 359, 476 N.E.2d 298, 486 N.Y.S.2d 899 (N.Y. 1985) ("A legacy is contrary to public policy, not only if it directly violates a statutory prohibition . . . but also if it is contrary to the social judgment on the subject implemented by the statute."); *cf. Walters v. Fullwood*, 675 F. Supp. 155, 161 (S.D.N.Y.

1987) (foreclosing a party from "collect[ing] the rewards of corruption" by holding that the underlying agreements violate public policy); *but see AXA Inv. Managers UK Ltd. V. Endeavor Capital Management LLC*, 890 F. Supp. 2d 373, 389 (S.D.N.Y. 2012) (upholding the imposition of a 25% default interest rate where, inter alia, "no disparity [in sophistication] between the parties impugns the valid and binding agreement they reached.")

"It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Additionally, it is "unlawful for any creditor to discriminate against any applicant, with respect to any credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status or age (provided the applicant has the capacity to contract)." 15 U.S.C. § 1691(a)(1). These are among the terms found in the FHA and ECOA, both of which the jury found Emigrant to have violated. Moreover, in issuing the STAR NINA loan program in the matter they did, Defendants were also found to have violated them more broadly interpreted NYCHRL, the provisions of which must "be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws . . . have been so construed." *Dillon v. Ned Mgmt., Inc.*, 85 F. Supp. 3d 639, 653-4 (E.D.N.Y. 2015) (quoting the Restoration Act sec. 7 (amending N.Y.C. Admin. Code § 8-130).).

Of course, the existence alone of statutes meant to prevent certain harms is not sufficient to render

unenforceable waivers of claims that could have been brought pursuant to those statutes. More is needed.

Policies ought not be considered in a vacuum. Indeed, in denying Emigrant's motion to dismiss, this Court put the instant action in context by providing a historical overview of mortgage lending in the United States, (Dkt. No. 258 at 5-8), fraught as it has been with the systematic demarcation of zones largely population by Black and Latino residents and parsing of them as exempt from investment locations, while cultivating "effective lending territories" in other neighborhoods. (*See e.g., id.* at 6 n.2 ("Most major lenders do not wait passively for customers to walk into their offices and request loan application forms. Instead they actively initiate specific marketing strategies that target certain types of consumers.").) While the feature of last generation's housing discrimination was the act of giving no investment quarter to Black and Latino communities, the iteration of the late 2000s was to offer to those communities the loans most likely to result in equity-stripping and/or foreclosure of their properties altogether. In short, these communities went from no loans to the worst loans.

Although Emigrant modified the Saintil's loan in 2010 to terms not subject to FHA, ECO A or NYCHRL scrutiny by the jury, the Saintils were back in default within five months of the modification and owing Emigrant over $700,000 at the time of trial, with monthly payments of $3,750 expected of them, notwithstanding their reduced incomes, Mrs. Saintil having suffered a stroke in the interim, and Emigrant's policy of refusing to accept

partial payments from STAR NINA customers.

The modification thus did little to bring the Saintils within reach of making regular payments for any considerable length of time, which "raise[s] concerns about [Emigrant's] motivations." *Anders*, 2018 U.S. Dist. LEXIS 95303, 2018 WL 2727883, at *9 (finding an agreement void as against public policy where plaintiff paid $16,000 in consideration for an anticipated high-profile publicity stunt in order to gain employment opportunities). Therefore, this Court finds the release to be void as against public policy and orders a new trial to the Saintil's on the issue of damages.

VI. Dismissal of Juror Number 3

Emigrant argues that it is entitled to a new trial because, prior to deliberation, the Court dismissed Juror Number 3, who repeatedly expressed concerns about missing a personal planned event if the jurors did not reach a verdict in the first and only day of deliberation that occurred before her event.

As Emigrant correctly articulates, pursuant to Federal Rule of Civil Procedure 47(c), "the court may excuse a juror for good cause." Fed. R. Civ. P. 47(c). According to the Advisory Committee Notes, "[s]ickness, family emergency or juror misconduct that might occasion a mistrial" are potential grounds for dismissing a juror, while a juror's refusal "to join with fellow jurors in reaching a unanimous verdict" is not. The Advisory Committee Notes on what may constitute "good cause"

are not exhaustive. *See Interpool Ltd. v. Patterson*, 874 F. Supp. 616, 618 (S.D.N.Y. 1995). The single case Emigrant cites to support its argument that Juror No. 3 deserved a hearing, *Harris v. Folk Constr. Co.*, involved a juror who was inappropriately dismissed on the only grounds specifically singled out as improper by the Advisory Committee Notes. *See Harris v. Folk Constr. Co.*, 138 F.3d 365, 367-68 (8th Cir. 1998) (finding court should have held a hearing before dismissing lone juror holding out from unanimous verdict).

The trial in this matter commenced on May 23, 2016. On Wednesday June 22, 2016, Juror No. 3 privately expressed to the courtroom deputy her displeasure with the length of the trial because on Friday June 24, the juror was expected to attend a bachelorette party in the Hamptons and did not wish to deliberate that day (or possibly did not wish to deliberate any day beyond June 23). The jury had yet to begin deliberating.

The Court called Juror No. 3 into the courtroom and, outside the presence of the other jurors, informed her that she would not be getting Friday off. (*See id.* at 2675.) She questioned whether or not the deliberations might be "expedited" by having everyone "come in a little earlier or stay a little later" on Thursday May 23 in order to finish deliberations that day. (*See id.*) The Court explained that the case would only be done Thursday if she and her fellow jurors reached a decision by that time. (*See id.*) The Court declined to excuse Juror No. 3 at this stage, a decision the juror characterized as "unfortunate." (*See* Tr. at 2677.) Plaintiffs' counsel expressed concern that

Juror No. 3 might "rush to judgment" on a complicated case "so she can get to a bachelorette party." (*See id.*) The Court nevertheless decided to allow Juror No. 3 to stay. (*See id.* at 2678.)

The Court only revisited the question of keeping Juror No. 3 after she again approached the courtroom deputy outside of the courtroom, increasing her level of disbelief and vexation, adding that "she can't believe she's been here this long, she has a life, and that she can't believe she's being made to stay." (*See id.* at 2744.) Only then did the Court decide, outside the presence of all of the jurors, that she was a "divisive factor" whose attitude had the potential to negatively impact deliberations. (*See id.*) Even Emigrant's counsel noted that she could potentially affect the other jurors and was "probably talking" about her complaints with them. (*See id.* at 2745.) The Court called Juror No. 3 in and informed her that she could leave. (*See* Tr. at 2745.) She questioned, "What do you mean, we're all done for the day?" to which the Court replied, "Not 'we,' you." (*See id.*) She did not object; nor did Emigrant. (*See id.*)

Based on the facts of Juror No. 3's excusal, Emigrant claims that it is entitled to a new trial. (*See* Defs.' Mem. at 24.) It is not. Juror No. 3's expressed sense of urgency and resentfulness naturally led the Court to deem her presence "cancerous," as she evinced the desire to hasten deliberation in order to avoid returning on Friday for even a second day of deliberation. (*See* Tr. at 2745.) These concerns about her commitment to serve constitute sufficient good cause for her excusal. *See Interpool*

Ltd. v. Patterson, 874 F. Supp. 616, 618 (S.D.N.Y. 1995) (finding dismissal of juror upset over missing planned trip appropriate as he would have adversely affected deliberations).

Emigrant also claims that there should have been a hearing before Juror No. 3 was excused. (*See* Defs.' Mem. at 24.) No hearing was necessary in this case, as she twice put her objections on record and both parties agreed that her continued presence could taint other jurors. *See United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994) (finding the question of whether or not to hold a hearing prior to a juror's excusal to be "within the trial judge's sound discretion" and finding that no hearing was required); *see also Interpool*, 874 F. Supp. at 618-19 (dismissing juror without hearing).

VII. Adequacy of Damage Award

"It is well settled that calculation of damages is the province of the jury." *Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir. 1990). However, "[t]he Court may grant a new trial, pursuant to [Rule 59] if the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice, i.e., that the verdict is against the weight of the evidence, that the damages awarded were excessive, or that for the stated reasons the trial was not fair to the moving party." *Hicks v. Vane Line Bunkering, Inc.*, 2013 U.S. Dist. LEXIS 55043, 2013 WL 1747806, at *4 (S.D.N.Y. Apr. 16, 2013) (collecting cases); *see also Lang v. Birch Shipping Co.*, 523 F. Supp. 1112, 1114 (S.D.N.Y. 1981) ("Where . . . the Court's conscience is shocked by

the jury's grossly inadequate award . . . it becomes the bounded duty of the Court to intervene, lest a grave justice result.") (quoting *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978)).

Moreover:

> unlike judgment as a matter of law, a new trial may be granted even if there is substantial evidence supporting the jury's verdict. . . .trial judge is free to weigh the evidence himself, and need not view it in the light most favorable to the verdict winner. . . . However, a motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.

See Morris v. Flaig, 511 F. Supp. 2d 282, 304 (E.D.N.Y. 2007); *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004); *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133-134 (2d. Cir. 1998).

In the instant case, the jury found that Emigrant violated the FHA, ECOA and NYCHRL. In doing so, they implicitly credited at least some of Plaintiffs' witnesses over those brought by the Defendants, as they were permitted to do. However, the source of the damages assessed is not clear, and a new trial is therefore warranted.

Appendix F

A. The Saint-Jean Damage Award

The jury found that Edith Saint-Jean was entitled to $180,000 in damages, and that Jean Robert Saint-Jean was also entitled to $180,000, for a total of $360,000 to the mortgagors of the Saint Jean property. As of the date of the verdict, Emigrant posited that the Saint-Jeans owe $789,081.39, which amount constitutes $369,311.93 in principal, $259,085.88 in "base rate" interest, $95,785.02 in default interest, $505,02 in late charges, $43,665.33 in taxes paid Emigrant, $13,366 in insurance paid by Emigrant, $5,756.21 in water bills paid by Emigrant and $1,606.00 in "other" fees paid by Emigrant. Plaintiffs, on the other hand, ask the court to carve out "charges that would never have accrued had the Saint-Jeans never met Emigrant or been subjected to Emigrant's discriminatory loans" (such as interest, penalties and fees) from the amounts due and hold the Saint-Jeans responsible for $384,035.95. Though this amount is a little more than half of what Emigrant deems owed, it is still nearly $25,000 more than the $360,000 awarded to the Saint-Jeans by the jury. Viewing the jury award as the sole method available to the jury to compensate the Saint-Jeans for three laws they found to have been broken by Emigrant, an award of $360,000 falls short of the amount the Saint-Jeans owe (even under Plaintiffs' conservative estimate of the sum due), to say nothing of the issue of losses due to emotional or mental anguish, if any.[5]

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5. Both Edith and Jean Robert Saint-Jean testified to the stress and sadness they felt after the 18% default interest rate was imposed and they were unable to rehabilitate the loan once they learned that Emigrant would not accept a partial payment. They remain under threat of foreclosure.

B. The Smalls Damage Award

Jeanette Small was awarded $110,000 by the jury and Beverley Small was awarded $70,000, for a total of $180,000 to the former mortgagors of the Small's property. In May 2008, the Smalls satisfied their 2006 STAR NINA loan from Emigrant by selling their property after they defaulted on their $330,000 loan.[6] Their home was sold for $620,000 and the Smalls now rent an apartment. Of the amount gained by the sale, the Smalls paid $328,281.27 to Emigrant pursuant to their STAR NINA loans including the "charges that would never have accrued had the [Smalls] never met Emigrant or been subjected to Emigrant's discriminatory loans" (such as interest, penalties and fees that the Saint-Jeans seek to avoid allotting their damage award to paying). Jeanette Small testified to feeling "crushed," "lost," "terrible," unable to provide for her grandchildren, and generally alone, as her extended family lives abroad. Beverley Small testified to experiencing fear after fielding calls made on behalf of Emigrant by individuals threatening that she would come home one day and find the door to her home chained and "be out in the streets living in a cardboard box" with her son.

C. Linda Commodore's Award

After falling behind in payments on her August 2004 $125,000 STAR NINA loan and borrowing $26,512.63

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6. The Smalls defaulted after Beverley Small was diagnosed with a brain hemorrhage in October 2006 and was unable to work.

to catch up on her arrears (most of which consisted of past-due interest), Linda Commodore fell behind again in 2006. Her efforts to catch up were thus far thwarted by Emigrant's policy of refusing partial payments. Commodore's loan was secured by her property, which in 2007 was valued at $350,000. In August 2006, Emigrant initiated foreclosure of her loan for a mere $6,844 in arrears. In October of 2007, Commodore's property sold at auction for $310,000. Of that amount, she remitted approximately $161,000 to Emigrant, an amount *exceeding* the principal borrowed from Emigrant, notwithstanding her 18 months of payments and $25,000 personal loan she took to catch up on arrears once the 18% default interest rate was triggered. Commodore testified as to the stress and sadness that accompanied the process of attempting to catch up, failing to do so, and ultimately losing her home to avoid foreclosure: "I was just devastated. I couldn't open mail. I couldn't sleep. I couldn't do anything. I had a friend come to my . . . apartment and open my mail for me and read it for me which is how I found out about the foreclosure." (Tr. at 1706.) Commodore, who described herself as "in a very, very dark place," moved in with her children in North Carolina and put her lifelong belongings in storage, of which she eventually lost possession.

The jury awarded Commodore, who has since rented her own studio, $185,000. As with the Smalls, it is not possible to determine how this amount was selected; and, as with the Smalls, Commodore's satisfaction of her STAR NINA loan means that she did repay in full a loan (with its concomitant fees, penalties and default interest rate) found by the jury to violate the law. There was substantial

testimony about the emotional effect this process had on Commodore, which could have played a factor in her award. Yet, the Court cannot determine how much credence this testimony was given compared to either the complaints of emotional damages made by the other Plaintiffs or to Commodore's financial loss.

D. Felipe Howell's Damage Award

The largest individual jury award went to Felipe Howell. As stated, *supra*, Howell was the only homeowner whose property was unencumbered when he entered into his $200,750 STAR NINA loan with Emigrant in February 2008. The interest rate attached to Howell's loan was 10.375%. Howell was unemployed and Howell's property was valued at $430,000. Howell's monthly payment pursuant to the loan was to be $2,104. Howell used the $200,750 loan to pay his ex-wife her share in the property and to pay off other bills, including $28,709.03 in closing costs. Outside of these responsibilities, Howell did not receive any liquid proceeds of the loan, which closed on February 6, 2008. By February 2009, a judgment of foreclosure and sale was entered in the Supreme Court of Queens County, and ultimately Howell's property was purchased at auction by Emigrant for $1,000. Howell now lives in an apartment. Howell was awarded $225,000 in damages, an amount close to the $430,000 value of his former home minus the principal sum of $200,750 he received from Emigrant. Again, this award may or may not include damages for the alleged emotional distress Howell testified that he endured, including embarrassment and shame over not just the foreclosure of his home but

on account of the amounts he borrowed from friends throughout this process that he could not repay.

E. Analysis

In any event, it is not within the province of this Court to speculate as to how the jury arrived at the amount of damages awarded to Plaintiffs. Indeed, as demonstrated, *supra*, any such effort would in any event be fruitless, for the Court can neither bifurcate economic from emotional damages at this stage nor determine the weight, if any, afforded to the very critical differences between the Plaintiffs.

Some homeowners still occupy the subject property (and have not paid Emigrant in accordance with the loan). Others sold (or lost) their homes and fully satisfied the terms of loans deemed illegal by the jury, remitting various fees and large sums of interest and penalties that the still-occupying homeowners are being asked to remit. Some are currently renting apartments and have lost their status as homeowners and possibly the creditworthiness to become homeowners in the near or distant future. And in what may be the most extreme case, Howell went from owning a home outright to having his home sold back to Emigrant for $1,000. In short, the STAR NINA program had very different emotional and economic effects on each of the Plaintiffs and this Court cannot determine the extent that the jury weighed that testimony or arrived at each Plaintiffs actual damages. *See* 15 U.S.C. § 1691e(a); *see also Anderson Group. LLC v. City of Saratoga Springs*, 805 F.3d 34, 52 (2d Cir. 2015) ("[G]eneral

tort principles govern the award and calculation of damages in FHA cases. . . .[C]ompensatory damages are designed to place the plaintiff in a position substantially equivalent to the one he would have enjoyed had no tort been committed.") (citations omitted).

Because the relationship between the damages awards and the various losses alleged (loss of equity, loss of home ownership or home ownership potential, and/or emotional distress damages) cannot be sufficiently ascertained, it cannot be said that the damages awards succeed at restoring Plaintiffs to their pre-STAR NINA loan positions.[7] The awards are thus against the weight of the evidence and a new trial on damages is warranted.

VIII. Injunctive Relief

Because this Court has determined that a new trial on damages is warranted, it is at this stage premature to

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7. For example, the award to the Saint-Jeans of $360,000 neither satisfies the principal due nor the interest accumulated on their loan (and they are currently in foreclosure), whereas the $225,000 awarded to Howell is unencumbered by any claim brought by Emigrant. (*See* Dkt. No. 602 at 1 n.1 (stating that Howell "has no balance due to Emigrant at the time of verdict."); *see also Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 635 (2d Cir. 1986) ("Only when jury verdicts are logically incompatible is it error for the district court not to grant a new trial.") (collecting cases); *Portee v. Hastava*, 853 F. Supp. 597, 612 (E.D.N.Y. 1994) (granting a new trial on issue of damages for emotional distress where jury "was presented with a great deal of evidence" and court sought to "parse out the damages for emotional distress due to the constitutional violation.").

address Plaintiffs' requests for (1) a disposition of Edith Saint-Jean's Truth in Lending Claim[8] and (2) Plaintiffs' motion for injunctive relief pursuant to 42 U.S.C. § 3613. Both results turn on the damages awarded to (and level of solvency of) the Plaintiffs on re-trial.[9] These motions are

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8. At the motion to dismiss phase, this Court found Edith Saint-Jean's TILA claim to be timely, plausible and satisfied by the borrower's provision to the lender of written notice of an intent to rescind. (Dkt No. 258 at 37-49.) The Court rejected the argument that the 18% default interest rate was "unanticipated" (as defined by 12 C.F.R. 226.4(c)(2)) in light of Plaintiffs' allegations about the method in which the closings were conducted. This argument has only been strengthened by the evidence at trial, which included, *inter alia*, testimony from Howard Milstein indicating that, as early as 2004, Emigrant's Board of Directors discussed the high rate of delinquencies of the STAR NINA program, the continued growth of the number of STAR NINA loans that were not performing, did not anticipate losses from these delinquencies, were not concerned by those delinquencies and even approved in increase in the amount of lending authority under those loans. (Tr. 524-534.) The evidence presented at trial that Emigrant refused to accept partial payments when STAR NINA borrowers fell behind on their mortgages further supports the claim that the 18% default interest rate was far from "unexpected."

9. It is important to note that while certain aspects of Plaintiffs' motion for injunctive relief will turn on the extent of the damages award after re-trial, the evidence presented on the issue of liability strongly suggests that, at a minimum, education and training of major decision-makers at Emigrant as to reverse redlining and predatory lending would benefit Emigrant, its principals, and the communities they serve. For example, CEO Howard Milstein testified that while he has held that position since 2004 and chaired every meeting of the Board, he had not read the complaint in this action but "knew" that "it includes outrageous

therefore denied with leave to renew upon a jury finding as to damages.

IX. Remaining Claims

All remaining arguments (most of which were raised and rejected *in limine*) have been considered and are without merit.

CONCLUSION

For the foregoing reason, Defendants' motion is granted in part and denied in part. Plaintiff's motion is granted in part and denied in part. The parties are hereby directed to appear on September 27, 2018 at 9:30am for a status conference.

SO ORDERED.

Dated: August 20, 2018
Brooklyn, New York

/s/ Sterling Johnson Jr. USDJ
Sterling Johnson, Jr., U.S.D.J.

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claims of racial discrimination." Milstein was unfamiliar with the term "reverse redlining;" unconcerned with the rate of defaults among the STAR NINA loans to the point of expanding the product; and could not define "subprime loan." (*See, e.g.*, Tr. at 519-559.)

APPENDIX G — VERDICT FORM OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED JUNE 6, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11 CV 2122 (SJ) (RLM)

JEAN ROBERT SAINT-JEAN, EDITH SAINT-JEAN, FELEX SAINTIL, YANICK SAINTIL, BEVERLEY SMALL, JEANETTE SMALL, LINDA COMMODORE AND FELIPE HeOWELL,

Plaintiffs,

v.

EMIGRANT MORTGAGE COMPANY AND EMIGRANT BANK,

Defendants.

Filed June 6, 2019

VERDICT FORM

(1) Please enter the amount of compensatory damages Plaintiffs Jean Robert Saint-Jean and Edith Saint-Jean are entitled to as a result of Defendants' violation of the Fair Housing Act, Equal Credit Opportunity Act and/or New York City Human Rights Law.

Jean Robert Saint-Jean $ θ 1.00

Edith Saint-Jean $ θ 1.00

(2) Please enter the amount of compensatory damages Plaintiffs Felex and Yanick Saintil are entitled to as a result of Defendants' violation of the Fair Housing Act, Equal Credit Opportunity Act and/or New York City Human Rights Law.

Felex Saintil $ 0 1.00

Yanik Saintil $ 0 1.00

(3) Please enter the amount of compensatory damages Plaintiffs Jeanette and Beverley Small are entitled to as a result of Defendants' violation of the Fair Housing Act, Equal Credit Opportunity Act and/or New York City Human Rights Law.

Jeanette Small $ 108,916

Beverley Small $ 178,374

(4) Please enter the amount of compensatory damages Plaintiff Linda Commodore is entitled to as a result of Defendants' violation of the Fair Housing Act, Equal Credit Opportunity Act and/or New York City Human Rights Law.

Linda Commodore $ 230,504

(5) Please enter the amount of compensatory damages Plaintiff Felipe Howell is entitled to as a result of Defendants' violation of the Fair Housing Act, Equal

Appendix G

Credit Opportunity Act and/or New York City Human Rights Law.

Felipe Howell $ 204,250

PLEASE SIGN AND DATE YOUR VERDICT.

Dated: May 22, 2019 /s/ [Illegible]
Brooklyn, NY SIGNATURE OF FOREPERSON

APPENDIX H — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED NOVEMBER 16, 2022

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 11-cv-2122 (MKB)(RLM)

JEAN ROBERT SAINT-JEAN, EDITH SAINT-JEAN, FELEX SAINTIL, YANICK SAINTIL, LINDA COMMODORE, BEVERLEY SMALL, JEANETTE SMALL, AND THE ESTATE OF FELIPE R. HOWELL, SR.,

Plaintiffs,

v.

EMIGRANT MORTGAGE COMPANY AND EMIGRANT BANK,

Defendants.

Filed November 16, 2022

JUDGMENT

It is hereby ORDERED that:

1. This case was tried by jury with Judge Johnson presiding.

2. Judgment is entered in favor of Plaintiff the Administrator of the Estate of Felipe Howell against Defendants Emigrant Mortgage Company and Emigrant Bank (collectively "Defendants") in the amount of $204,250 in compensatory damages.

3. Judgment is entered in favor of Plaintiff Linda Commodore against Defendants in the amount of $230,504 in compensatory damages.

4. Judgment is entered in favor of Plaintiff Beverley Small against Defendants in the amount of $178,374 in compensatory damages.

5. Judgment is entered in favor of Plaintiff Jeanette Small against Defendants in the amount of $108,916 in compensatory damages.

6. Judgment is entered in favor of Plaintiff Edith Saint-Jean against Defendants in the amount of $1 in nominal damages.

7. Judgment is entered in favor of Plaintiff Jean Robert Saint-Jean against Defendants in the amount of $1 in nominal damages.

8. Judgment is entered in favor of Plaintiff Felex Saintil against Defendants in the amount of $1 in nominal damages.

9. Judgment is entered in favor of Plaintiff Yanick Saintil against Defendants in the amount of $1 in nominal damages.

10. Any and all prior rulings made by the Court disposing of any claims or requests for relief against any parties are incorporated by reference herein, and this Order shall be deemed to be a Final Judgment within the meaning of Federal Rule of Civil Procedure 58;

11. The Clerk is directed to send a copy of this Order to the parties; and

12. The Clerk is directed to CLOSE this case.

SO ORDERED:

s/ MKB 11/16/2022
Margo K. Brodie
United States District Judge

APPENDIX I — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MARCH 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 22-3094

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of March, two thousand twenty-five.

JEAN ROBERT SAINT-JEAN, EDITH SAINT-JEAN, FELEX SAINTIL, LINDA COMMODORE, BEVERLEY SMALL, YANICK SAINTIL, JEANETTE SMALL, FELIPE HOWELL, JR., AS ADMINISTRATOR OF THE ESTATE OF FELIPE R. HOWELL,

Plaintiffs-Appellees,

FELIPE HOWELL,

Plaintiff,

v.

EMIGRANT MORTGAGE COMPANY, EMIGRANT BANK,

Defendants-Appellants,

Appendix I

EMIGRANT SAVINGS BANK-MANHATTAN,
EMIGRANT BANCORP, INC.,

Defendants.

ORDER

Appellants Emigrant Bank and Emigrant Mortgage Company filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX J — FINAL JURY INSTRUCTIONS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED JUNE 27, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11 CV 2122 (SJ) (RLM)

JEAN ROBERT SAINT-JEAN, EDITH SAINT-JEAN, FELEX SAINTIL,YANICK SAINTIL, BEVERLEY SMALL, JEANETTE SMALL, LINDA COMMODORE AND FELIPE HOWELL,

Plaintiffs,

v.

EMIGRANT MORTGAGE COMPANY AND EMIGRANT BANK,

Defendants.

Filed June 27, 2016

JURY CHARGE

[TABLES OMITTED]

JOHNSON, Senior District Judge:

Ladies and gentlemen of the jury, now that the evidence in this case has been presented and the attorneys have

concluded their closing arguments, it is my responsibility to instruct you as to the law that governs this case.

As you know, the Plaintiffs, Jean Robert Saint-Jean, Edith Saint-Jean, Felex Saintil, Yanick Saintil, Jeanette Small, Beverley Small, Linda Commodore and Felipe Howell, claim that Defendants Emigrant Mortgage Company and Emigrant Bank, violated their rights under the Fair Housing Act, Equal Credit Opportunity Act and New York City Human Rights Law by offering loans on terms that were grossly unfavorable to the borrowers and by allegedly making those loans disproportionately in African American and Hispanic neighborhoods.

Defendants deny each of Plaintiffs' claims. Defendants allege that the STAR NINA loans were not grossly unfavorable and that Plaintiffs benefited from their loans because they utilized the monies borrowed for their needs or desires. Defendants also deny that the STAR NINA loan product disproportionally impacted African-American and Hispanic borrowers. Finally, Defendants deny that they targeted African-American or Hispanic borrowers.

My instructions will be in three parts:

FIRST: I will instruct you regarding the general rules that define and govern the duties of a jury in a civil case,

SECOND: I will instruct you as to the legal elements of the claims alleged in the complaint—that

is—the specific elements that the Plaintiff must prove by a preponderance of the evidence, and

THIRD: I will give you some important principles that you will use during your deliberations.

When you retire for your deliberations, I will provide you with copies of these instructions.

PART I: GENERAL RULES

Juror Attentiveness

You are about to enter your final duty, which is to decide the fact issues in the case. You must pay close attention to me now. I will go as slowly as I can and be as clear as possible.

It has been obvious to me and to counsel that you have faithfully discharged your duty to listen carefully and observe each witness who testified. Your interest never lagged, and it is evident that you followed the testimony with close attention. I would also like to express my gratitude to each of the attorneys for their conscientious efforts on behalf of their clients and for work well done.

I ask that you now give me that same careful attention that you gave at trial as I instruct you on the law.

Role of the Court & Jury

It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as

it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law ought to be, it would violate your sworn duty to base a verdict upon any view of the law other than that which I give you.

You, the members of the jury, have the important responsibility to pass upon and decide the fact issues that are in the case. You are the sole and exclusive judges of the facts. You alone pass upon the weight of the evidence; you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony; and you draw whatever reasonable inferences you decide to draw from the facts as you have determined them.

With respect to any question concerning the facts, it is your recollection of the evidence that controls, not that of counsel and not that of the Court. Anything I may have said during the trial or may say during these instructions with respect to a fact matter is not to be taken in substitution for your own independent recollection. What I say is not evidence.

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Since you are the sole and exclusive judges of the facts, I do not mean to indicate my opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be.

I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly not intended to suggest any opinions on my part as to the verdict you should render or whether any of the witnesses may have been more credible than any other witnesses. You are expressly to understand that the Court has no opinion as to the verdict you should render in this case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are reminded that you took an oath to render judgment impartially and fairly. In determining the issues of fact and rendering a verdict in this case, you should perform your duty with complete impartiality and without bias, sympathy, or prejudice to any party. All persons are equal before the law, and are entitled to the same fair consideration. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Questions and Objections

Let me emphasize that a question put to a witness is never evidence. It is only the answer which is evidence.

But you may not consider any answer that I directed you to disregard or that I directed struck from the record. Any evidence as to which any objection was sustained and any answer ordered stricken must be disregarded in its entirety.

You should also not give any consideration to the fact that the attorneys on either side may have objected to certain questions being asked or to certain evidence being received. It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the Court to make rulings of law and to request conferences at the sidebar out of the hearing of the jury. All those questions of law must be decided by me, the Court. You should not show any prejudice against an attorney or his or her client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury, or asked the Court for rulings on the law. You should also not be concerned with the reason for those rulings, and you are not to draw any inferences from them.

As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

Appendix J

All Persons Equal Before the Law

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons, including corporations, stand equal before the law, and are to be treated as equals.

Burden of Proof: Preponderance of the Evidence

The party with the burden of proof on any given issue has the burden of proving every disputed element of his or her claim to you by a preponderance of the evidence. It is each Plaintiff who, as a general matter, has the burden of proof. If you conclude that the Plaintiff has failed to establish her claims by a preponderance of the evidence, you must decide against the Plaintiff on the issue you are considering. There is one exception in this case. As I will explain to you later on in these instructions, Defendants claim that Felex and Yanick Saintil waived any claims against them by signing a release as part of their 2010 loan modification. This is called an affirmative defense. Defendants are responsible for proving this affirmative defense by a preponderance of the evidence.

What does a "preponderance of evidence" mean? To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a

preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who produced them.

If you find that the credible evidence on a given issue is evenly divided between the parties—that it is equally probable that one side is right as it is that the other side is right—then you must decide that issue against the party having this burden of proof. That is because the party bearing this burden must prove more than simply equality of evidence— he or she must prove the element at issue by a preponderance of the evidence. On the other hand, the party with this burden need not prove more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof—that what the party claims is more likely true than not true—then that element will have been proved by a preponderance of the evidence. Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this and you should put it out of your mind.

Evidence

The evidence in this case consists of the sworn testimony of the witnesses, regardless of who may have called them; all the exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.

Appendix J

I remind you again that what the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions, is not evidence, and that what I say is not evidence.

Direct and Circumstantial Evidence

There are two types of evidence which you may properly use in deciding whether a Defendant is liable or not. One type of evidence is called direct evidence. Direct evidence is where a witness testifies to what he saw, heard, or observed. In other words, when a witness testifies about what is known to him of his own knowledge by virtue of own senses—what he sees, feels, touches, or hears—that is called direct evidence. The other type is circumstantial evidence. Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts.

There is a simple example of circumstantial evidence which is often used in this courthouse. Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom was without windows, as this courtroom is, and you could not look outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Somebody else then walked in with a raincoat which also was dripping wet. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But, on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer, on the basis of reason and experience and common sense, from an established fact, the existence or the nonexistence of some other fact.

Testimony & Exhibits

The evidence in this case consists of the sworn testimony of the witnesses and the exhibits received in evidence.

Turning to the subject of exhibits, exhibits that have been marked for identification but have not been received in evidence, however, may not be considered by you as evidence.

You should consider the evidence in light of your own common sense and experience, and you may draw reasonable inferences from the evidence.

Impeachment by Deposition Testimony

You have heard evidence that, at some earlier time, the witness gave deposition testimony that counsel argues is inconsistent with the witness's trial testimony.

Evidence of that deposition testimony is not to be considered by you as affirmative evidence in determining liability. The prior deposition testimony was placed before you for the more limited purpose of helping you decide whether to believe the trial testimony of the witness who may have contradicted him or herself. If you find that

the witness made an earlier statement that conflicts with his or her trial testimony, you may consider that fact in deciding how much of his or her trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based on all the evidence and your own good judgment, to determine whether the prior deposition testimony was inconsistent, and if so how much, if any, weight to give to the deposition testimony in determining whether to believe all or part of the witness's testimony.

Note Taking by Jurors

Any notes that you have taken during this trial are only aids to your memory. If your memory differs from your notes, you should only rely on your memory and not on your notes. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

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Inference Defined

During the trial you have heard the attorneys use the term "inference," and in their arguments they have asked you to infer, on the basis of your reason, experience and common sense, from one or more established facts, the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact which you know exists.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. Plaintiff asks you to draw one set of inferences, while the defense asks you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw, but not required to draw, from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.

So, while you are considering the evidence presented to you, you are permitted to draw, from the facts which you find to be proven, such reasonable inferences as would be justified in light of your experience.

Here again, let me remind you that, whether based upon direct or circumstantial evidence or upon the logical, reasonable inferences drawn from such evidence, you must be satisfied that Plaintiff has established her claim by a preponderance of the evidence.

Witness Credibility

You have had an opportunity to observe all of the witnesses. It is now your job to decide how believable each witness was in his or her testimony. As jurors, you are the sole judges of the credibility of each witness and of the importance of his or her testimony.

It must be clear to you by now that you are being called upon to resolve various factual issues in the face of the different pictures painted by the attorneys. You now will have to decide where the truth lies, and an important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed.

Your decision whether or not to believe a witness may depend on how the witness impressed you. Was the witness candid, frank, and forthright? Or, did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent in his or her testimony or did the witness contradict himself or herself? Did the witness appear to know what he or she was talking about and did the witness strike you as

someone who was trying to report his or her knowledge accurately?

How much you choose to believe a witness may be influenced by the witness' bias. Does the witness have a relationship with Plaintiff or Defendants which may affect how he or she testified? Does the witness have some incentive, loyalty, or motive that might cause him or her to shade the truth; or, does the witness have some bias, prejudice, or hostility that may have caused the witness—consciously or not —to give you something other than a completely accurate account of the facts he testified to?

Keep in mind, though, that it does not automatically follow that testimony given by an interested witness is to be disbelieved. There are many people who, no matter what their interest in the outcome of the case may be, would not testify falsely. It is for you to decide, based on your own perceptions and common sense, to what extent, if at all, the witness' interest has affected his or her testimony.

Even if you think a particular witness was impartial, you should consider whether the witness had an opportunity to observe the facts he or she testified about and should also consider the witness' ability to express himself or herself. Ask yourselves whether the witness' recollection of the facts stands up in light of all other evidence.

In other words, what you must try to do in deciding credibility is to size a person up in light of his or her

demeanor, the explanations given, and in light of all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember that you should use your common sense, your good judgment, and your experience.

Interest in Outcome

In evaluating the credibility of the witnesses, you should take into account evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive on the part of the witness to testify falsely, and may sway the witness to testify in a way that advances his own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. There are many people, who, no matter what their interest in the outcome of a case may be, would not testify falsely. It is for you to decide, based on your own perceptions and common sense, to what extent, if at all, the witness' interest has affected or colored his or her testimony.

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Expert Testimony

You have heard the testimony of what we call expert witnesses in this case. Ordinarily, witnesses are restricted to testifying concerning matters of fact. There are occasions, however, when there is some technical or other specialized area of knowledge that will assist the jury in deciding a disputed fact. On those occasions, a witness who is specially qualified by training, knowledge, experience, or education may be called to testify about some evidence or facts at issue in the form of an opinion.

In weighing expert testimony, you may consider the expert's qualifications, the opinion given, the witness' reasons for testifying, as well as all the other considerations that ordinarily apply when you are deciding whether or not to believe a witness. You may give expert testimony whatever weight, if any, you find it deserves in light of all the other evidence before you. You should not, however, accept a witness's testimony merely because he is an expert in a field. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Corporations as Defendants

Both Defendants in this case are corporations. A corporation can act only through individuals as its agents or employees. In general, if any agent or employee of a corporation acts or makes statements while acting within the scope of his or her authority as an agent, or within the scope of his or her duties as employee, then under the law those acts and statements are of the corporation.

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Corporate Responsibility

A corporation is a creation of state law and can act only through its agents — that is, its employees, officers or authorized representatives. In order to find that the act of an agent (in this case, a broker) was binding on the corporation you must find that the broker had authority to act in the manner in which he or she is alleged to have acted.

This authority may be express, apparent or inherent. Express authority is created by the direct verbal or written giving of that authority by the corporation to its agent. For example, express authority to perform certain duties may be part of an employee's contract.

Apparent authority, on the other hand, is the authority which a principal by reason of its acts and conduct leads a third person reasonably to believe that its agent possesses. Apparent authority can be created by appointing a person to a position, such as manager, treasurer or other, which position carries generally recognized duties. In other words, apparent authority is based on a "holding out to the world" of the agent, in his particular position, by the corporation. To third parties who deal with this agent, knowing of his position, the agent has apparent authority to do all those things ordinarily done by someone in that position, regardless of any unknown limitations which are imposed on the particular agent. In such circumstances, the corporation is bound to third parties, who are unaware of any lack of authority to the same extent as if the power to act had been directly conferred. Therefore, if you find

that the corporation has, by reason of its words or conduct, led a third party to rely on the appearance of the agent's authority to act on behalf of all the facts and circumstances of the particular case, then the corporation is responsible for such acts of its agents as if the corporation itself committed the acts.

There are also situations in which an agent has inherent authority to bind the corporation even when the corporation has not granted the employee either the express or apparent authority to act on its behalf. This inherent authority may exist, provided the acts in question are within the scope of his or her employment, even though the acts may be criminal or tortious. An act is within the scope of employment if it is sufficiently related to the kind the employee was employed to perform, if it was done substantially within the time and space limits of the job and was actuated, at least in part, by a purpose to serve the corporation.

Therefore, if you find that a broker acted with express, apparent, or inherent authority to bind the corporation, you may find that the corporation was responsible for his conduct.

Statistical Evidence

You have been shown statistics in this case by both sides. Statistics are one form of evidence that may show whether Defendants intentionally discriminated against African-Americans and Hispanics and whether Defendants' conduct had a discriminatory effect on

African-Americans and Hispanics. You should consider the statistical evidence together with all the other evidence presented, and give it the weight you think it deserves.

Impeachment of a Witness

A witness may be discredited or impeached by contradictory evidence, or by evidence that at some other time the witness has said or done something or has failed to say or do something which is inconsistent with the witness' present testimony. If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly or willfully to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you think it deserves.

Evidence of discrepancies in a witness' testimony may be a basis to disbelieve a witness' testimony. On the other hand, discrepancies in a witness' testimony or between his or her testimony and that of others do not necessarily mean that the witness' entire testimony should be discredited. People sometimes forget things and even a truthful witness may be nervous and contradict himself or herself. It is also a fact that two people witnessing an event will see or hear it differently, and innocent mistaken recollection, like failure of recollection, is not an uncommon experience. Whether a discrepancy pertains

to a fact of importance or only to a trivial detail should be considered in weighing its significance; but a willful falsehood always is a matter of importance and should be considered seriously.

It is for you to decide, based on your total impression of the witness, how to weigh the discrepancies in his or her testimony. You should, as always, use common sense and your own good judgment.

No Duty to Call All Witnesses

In determining the factual issues in the case, bear in mind that the law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Sympathy

Under your oath as jurors you are not to be swayed by sympathy. You should be guided solely by the evidence presented during the trial, without regard to the consequences of your decision.

You have been chosen to try the issues of fact and reach a verdict on the basis of the evidence or lack of evidence. If you let sympathy interfere with your clear thinking there is a risk that you will not arrive at a just

verdict. All parties to a civil lawsuit are entitled to a fair trial. You must make a fair and impartial decision so that you will arrive at the just verdict.

Improper Considerations — Matters the Jury May Not Consider

Your verdict must be based solely upon the evidence developed at this trial, or the lack of evidence.

It would be improper for you to consider any personal feelings you may have about one of the parties' race, religion, national origin, sex, age, or disability, either mental or physical.

It would be equally improper for you to allow any feelings you might have about the nature of the claim against the Defendant to influence you in any way.

The parties in this case are entitled to a trial free from prejudice. Our judicial system cannot work unless you reach your verdict through a fair and impartial consideration of the evidence.

PART II: THE LAW CONTROLLING THIS CASE

I will now turn to the second part of my instructions. In this part, I will instruct you as to the legal elements of the claims in this case. That is to say, I will now instruct you as to the specific elements that Plaintiffs must prove by a preponderance of the evidence to warrant a finding of liability in this case.

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The Statutes

Plaintiffs contend that Defendants have engaged in discrimination in violation of three civil rights laws: the federal Fair Housing Act, the federal Equal Credit Opportunity Act, and the New York City Human Rights Law.

The federal Fair Housing Act was enacted to eliminate all forms of discrimination in the housing context. It prohibits racial discrimination in transactions related to housing, including in mortgage transactions. Under the Act, it is "unlawful for any person or other entity whose business includes engaging in residential real estate 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 . . . or national origin."

The federal Equal Credit Opportunity Act was enacted to eradicate discrimination in credit transactions. Under the Equal Credit Opportunity Act, it is unlawful for a creditor to discriminate "with respect to any aspect of a credit transaction[,] on the basis of race, color, . . . [or] national origin[.]"

The New York City Human Rights Law was enacted to eliminate and prevent discrimination from playing any role in actions relating to, among other contexts, housing and other real estate transactions. Under Section 8-107.5(d) of the Law, it is unlawful for banks, mortgage companies, or other financial institutions or lenders doing

business in New York City to discriminate against an applicant on the basis of race, color, or national origin, in the "granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions" of credit. The New York City Human Rights Law is to be construed liberally for the accomplishments of the uniquely broad and remedial purposes of the statute.

Plaintiffs may prove a violation of these statutes through one of two legal theories: intentional discrimination and/or discriminatory effect. I will now instruct you on the specific standards for intentional discrimination and discriminatory effect.

Intentional Discrimination

In order to prevail on their claim that Defendants intentionally engaged in lending practices that violated the Fair Housing Act, the Equal Credit Opportunity Act, and the New York City Human Rights Law, Plaintiffs must establish that:

(1) the STAR NINA loan product was grossly unfavorable to the borrower; and

(2) Defendants' effort to make STAR NINA loans in certain communities was motivated, at least in part, by race, color, or national origin.

If you find that Plaintiffs have established these elements by a preponderance of the evidence, then you must find that Defendants violated the Fair Housing Act,

the Equal Credit Opportunity Act, and the New York City Human Rights Law.

Plaintiffs are not required to show that Defendants acted with racial animus, which means hatred or dislike for a particular racial or ethnic group. Nor do they need to prove that race, color, or national origin was the only reason for Defendants' conduct. Rather, they are only required to show that race, color, or national origin was one motivating factor. This means that in order for Defendants to be found liable for violating the Fair Housing Act, Equal Credit Opportunity Act, and New York City Human Rights Law, race, color, or national origin need only have played some role in Defendants' conduct.

Pretext—Intentional Discrimination

The fact that Defendants offer explanations for their actions does not mean that they are not liable for intentional discrimination. If you conclude that the explanations are false or unworthy of credence, you may infer that that Defendants' actions were motivated by discrimination on the basis of race, color, or national origin.

If you find by a preponderance of the evidence that Defendants' explanations for their actions are not the true reason for their actions, you may infer that Defendants' actions were motivated by race, color, or national origin, and therefore violated the Fair Housing Act, Equal Credit Opportunity Act, and New York City Human Rights Law.

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Discriminatory Effect

As I said earlier, there are two ways the Plaintiffs may prove discrimination under the three statutes I mentioned earlier—the Fair Housing Act, the Equal Credit Opportunity Act and the New York City Human Rights Law. They can prove by a preponderance of the evidence that Defendants intentionally discriminated against them, which I just described to you. They can also prove that a particular practice had a discriminatory effect, even if the practice was not motivated by discriminatory intent.

Plaintiffs are alleging that Defendants' practice of making STAR NINA loans has a discriminatory effect. For you to assess Plaintiffs' claim, you will consider the following.

First, Plaintiffs must establish by a preponderance of the evidence that Defendants' practice of making STAR NINA loans actually or predictably had a substantial adverse impact on African-American or Hispanic borrowers.

Second, if you find that Plaintiffs have proven the first factor, then you must decide whether Defendants have established by a preponderance of the evidence that the practice of making STAR NINA loans was necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of Defendants. If you find that Defendants failed to establish that the practice was actually necessary to achieve their substantial, legitimate, and nondiscriminatory interests, you must find for Plaintiffs on their discriminatory effect claim.

Third, if you find that the STAR NINA loan program was necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of Defendants, then you must decide whether Plaintiffs have established by a preponderance of the evidence that Defendants' interests could have been served by another practice that had a less discriminatory effect. If Plaintiffs make this showing, then you must find for Plaintiffs on their discriminatory effect claim.

I instruct you that Plaintiffs are not required to show that Defendants intended to discriminate in order to establish their claim of discriminatory effect.

Liability under New York City Human Rights Law

The New York City Human Rights Law is the City's anti-discrimination statute and was enacted to eliminate discrimination and prevent it from playing any role in New York City. The New York City Human Rights Law is to be liberally construed for the accomplishment of the uniquely broad and remedial purposes of the statute. You must undergo a separate inquiry to decide whether Defendants' actions violated the New York City Human Rights Law. In making this inquiry, you must take into consideration the uniquely broad purposes of this statute and construe its provisions broadly.

If you find that Defendants' action violated the federal Fair Housing Act and Equal Credit Opportunity Act, then you must find that they violated the New York City Human Rights Law.

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Release of Claims: Felex and Yanick Saintil

During this trial, you heard evidence that in March 2010, Plaintiffs Felex and Yanick Saintil signed an agreement releasing and discharging Emigrant from all claims and demands that they had against Emigrant, including claims related to their August 2, 2006 mortgage loan. This agreement has been referred to as a "release." As I stated earlier, this is the one issue on which Defendants bear the burden of proof.

To be enforceable, a release must be made knowingly and voluntarily. In determining whether, under the totality of the circumstances, the Saintils' release was made knowingly and voluntarily, you must consider:

(1) the Saintil's level of education and business experience;

(2) the amount of time they had possession of or access to the agreement before signing it;

(3) the Saintils' role in deciding the terms of the release;

(4) the clarity of the agreement;

(5) whether the Saintils were represented by or consulted with an attorney; and

(6) whether what the Saintils received in exchange for the waiver exceeded any benefits

to which the Saintils were already entitled by contract or law.

These factors are not exhaustive. No one factor is necessarily controlling, which means there is no particular factor that must be in Emigrant's favor for the release to be found to be knowing and voluntary. Rather, you must consider all of these factors under the totality of the circumstances.

Damages

I am now going to instruct you as to damages, which are applicable to the claims brought by Plaintiffs under the Fair Housing Act, Equal Credit Opportunity Act and New York City Human Rights Law. But let me caution you that just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not the Defendants should be held liable. If the Plaintiff has proven by a preponderance of the evidence that the Defendants are liable on each Plaintiffs claims, then you must determine the actual damages to which the Plaintiff is entitled. It is exclusively your function to decide upon liability, and I am instructing you on damages only so that you will have guidance should you decide that any Plaintiffs are entitled to recovery. If you return a verdict for the Defendants on all claims, then you need not consider damages.

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Compensatory Damages under the Fair Housing Act, Equal Credit Opportunity Act and New York City Human Rights Law

If you return a verdict for the Plaintiffs under the Fair Housing Act, Equal Credit Opportunity Act or New York City Human Rights Law, you must then award Plaintiffs the sum of money that will justly and fairly compensate them for any injury they suffered as a direct result of the Defendants' misconduct. Plaintiffs have the burden of proving damages by a preponderance of the evidence, but it can include reasonable approximations. The damages you award may include any costs or expenses Plaintiffs incurred as a result of the Defendants' discriminatory conduct, and may also include reasonable compensation for emotional distress and humiliation.

Multiple Claims: Damages under the Fair Housing Act, Equal Credit Opportunity Act and New York City Human Rights Law

Plaintiffs are entitled to only one recovery, if at all, sufficient to reasonably compensate them from any injury you find any of them to have suffered. I therefore instruct you that if you find that a Plaintiff has prevailed on more than one claim, you may not award additional compensatory damages for the same injury. You should award an amount of compensatory damages equal to the total damages you believe will fairly and justly compensate a plaintiff for the separate injuries he or she suffered. But you should not compensate a plaintiff for the same injury twice simply because you find a defendant liable for multiple claims.

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Nominal Damages under the Fair Housing Act, Equal Credit Opportunity Act and New York City Human Rights Law

If you return a verdict for any of the Plaintiffs on their Fair Housing Act or Equal Credit Opportunity Act or New York City Human Rights Law, but find that a Plaintiff has failed to prove by a preponderance of the evidence that he or she suffered any actual damages, then you must return an award of damages not to exceed one dollar, evidencing that liability has been proved. This is called "nominal damages."

Nominal damages are awarded as recognition that a Plaintiff's rights have been violated. You should award nominal damages if you conclude that the only injury that a plaintiff suffered was the deprivation of her or her rights, without any resulting physical or emotional damage.

You may also award nominal damages if, upon finding that some injury resulted from a given unlawful act, you find that you are unable to compute monetary damages except by engaging in pure speculation and guessing.

You may not award both nominal and compensatory damages to a plaintiff. Either he or she was measurably injured, in which case you must award compensatory damages, or else he or she was not, in which case you may award nominal damages.

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Punitive Damages under the Fair Housing Act and New York City Human Rights Law

If you should find that the Defendants are liable for a Plaintiff's injuries under the Fair Housing Act and New York City Human Rights Law, then you have the discretion to award punitive damages. You may award punitive damages regardless of whether or not you award the Plaintiff actual damages. Punitive damages are not awarded as a matter of right but are awarded only if you believe the Defendants acted so outrageously and evidenced such a degree of malice or callousness that they deserve to be punished, and that an example and deterrent needs to be provided to assure that the Defendants and others will be less likely to engage in such conduct in the future.

You may award a Plaintiff punitive damages if you find the acts or omissions of the Defendants were done "maliciously" or "wantonly." An act is maliciously done if it is prompted by ill will or spite toward the Plaintiff. An act is wantonly done if it is done in reckless or careless disregard of or with indifference to the rights of the injured Plaintiff. Each Plaintiff has the burden of proving by a fair preponderance of the credible evidence that the defendant acted maliciously or wantonly with regard to his or her rights. I instruct you, however, that even if a Plaintiff succeeds in proving that the Defendants acted maliciously or wantonly, an award of punitive damages is entirely discretionary; that is, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them.

In making this particular decision, you should consider the underlying purpose of punitive damages. Punitive damages are awarded to punish a defendant for outrageous conduct and to deter a defendant and others in a similar situation from engaging in similar conduct in the future. Thus, in deciding whether to award punitive damages, you should consider whether the Defendants may be adequately punished by an award of actual damages only or whether the conduct is so extreme and outrageous that actual damages are inadequate to punish the wrongful conduct. You should also consider whether actual damages, standing alone, are likely to deter or prevent these Defendants and others like them from engaging in the wrongful acts that may have been performed or whether punitive damages are necessary to provide deterrence.

If you decide to award punitive damages, these same purposes should be considered by you in determining the appropriate sum of money to be awarded as punitive damages. That is, in fixing the same to be awarded, you should consider the degree to which the Defendants should be punished for their wrongful conduct, and the degree to which an award of one sum or another will deter the defendants or others like them from committing wrongful acts in the future.

I can give you no objective yardstick for measuring punitive damages. You will have to use your own common sense and experience and determine what amount would be appropriate to punish the Defendants and to create a deterrent example. The amount of punitive damages

should be fair and reasonable. It should take into account the degree of reprehensibility of the Defendants' conduct and the relationship to the actual harm inflicted on the Plaintiff. It should be proportionate to the need to punish the Defendants and to deter them and others from like conduct; it should not be based on whim or on unrestrained imagination.

Final Word on Damages under the Fair Housing Act, Equal Credit Opportunity Act and New York City Human Rights Law

Again, let me repeat that the fact that I have instructed you as to the proper measure of damages should not be considered as intimating that I have any view as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are required to be given for your guidance in the event you should find that any actual damages were proved by a preponderance of the evidence by the Plaintiff in this case according to the instructions I have given to you.

PART III: GENERAL REMARKS REGARDING DELIBERATION

Duty to Consult and Need for Unanimity

Now that I have outlined for you the rules of law applicable to the charges in this case and the processes by which you should weigh the evidence and determine the facts, I will give you some guidance for use in your deliberations.

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You are about to go into the jury room and begin your deliberations. Your function, to reach a fair conclusion from the law and the evidence, is an important one. Your verdict must be unanimous. That is, all of you must ultimately reach the same conclusion.

But keep in mind that each juror is entitled to his or her opinion; each should, however, exchange views with his or her fellow jurors. That is the very purpose of jury deliberation—to discuss and consider the evidence; to listen to the arguments of fellow jurors; to present your individual views; to consult with one another; and to reach an agreement based solely and wholly on the evidence.

Each of you must decide the case for yourself after consideration with your fellow jurors of the evidence in the case. You should not hesitate to change an opinion which, after discussion with your fellow jurors, appears erroneous. If, however, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a view that differs from the others, you are not to yield your decision simply because you are outnumbered. Each of you must decide the case for yourself and not merely acquiesce in the conclusion of your fellow jurors. Nevertheless, I do ask you to examine the issues and the evidence before you with proper deference to and regard for the opinions of one another.

Selection of a Foreperson

When you get into the jury room, before you begin your deliberations, you should select someone to be the

foreperson. The foreperson will be responsible for signing all communications to the Court and for handing them to the Marshal during your deliberations.

Communications with the Court

Until this case has concluded, no member of the jury should ever attempt to communicate with the Court by any means other than a signed writing passed to the Marshal, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

Bear in mind also that you are never to reveal to any person—not even to the Court—how the jury stands, numerically or otherwise, on any questions before you, until you have reached a unanimous verdict.

Right to See Exhibits & Hear Testimony

If during your deliberations you want to see any of the exhibits that are not already available to you in the jury room, you may make a request in writing and give it to a Marshal. If you want any of the testimony read, that can also be done. But, please remember that it is not always easy to locate what you might want, so be as specific as you possibly can in requesting exhibits or portions of testimony which you may want.

Final Verdict

When you have reached a verdict, simply send me a note signed by your foreperson that you have reached a

verdict. Do not indicate in the note what the verdict is. I have prepared a special verdict sheet which you will have with you in the jury room. The special verdict sheet contains questions and the answers to those questions that will constitute your verdict. After all the questions are completed, the foreperson should sign with his or her juror number and date the verdict sheet and return the written verdict sheet to the deputy clerk. You may not infer from the fact that questions are submitted to you or from the wording of the questions, or from anything that I say in instructing you concerning the questions, that it is the Court's view that your answer to any of the questions should be one way or the other.

Use of Electronic Communication

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service or any text or instant messaging service; or any internet chat room, blog, websites such as Facebook, Linked In, YouTube, Google Plus, Instagram, Snapchat, Weibo, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. You should not consult dictionaries or Wikipedia, or reference materials or use any other electronic tools to obtain information about the case or to help you decide the case. Please do not try to find out information from any source outside of the confines of this courtroom.

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Final Comments

I am sending a copy of these instructions into the jury room for you to have during your deliberations.

Again, I remind you that your final vote must reflect your conscientious conviction as to how the issues should be decided. Your verdict must be unanimous.

Remember that the parties and the Court are relying upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. Your oath sums up your duty, and that is: without fear or favor, you will truly try the issues between these parties according to the evidence given to you in court and the laws of the United States.

Now if you will wait quietly while I ask counsel to approach. Counsel, please approach.