UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
-v.-	:	12 Civ. 2502 (KBF)
	:	
	:	
GFI MORTGAGE BANKERS, INC.,	:	ECF Case
	:	
Defendant.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

THOMAS E. PEREZ
Assistant Attorney General

PREET BHARARA
United States Attorney for the
Attorney for Plaintiff
86 Chambers Street
New York, New York 10007
Telephone: (212) 637-2733
E-mail: david.kennedy2@usdoj.gov

JON M. SEWARD
SAMEENA SHINA MAJEED
BURTIS M. DOUGHERTY
Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section

DAVID J. KENNEDY
JEAN-DAVID BARNEA
Assistant United States Attorneys
– Of Counsel –

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Plaintiff the United States of America respectfully submits this memorandum of law in opposition to defendant GFI Mortgage Bankers, Inc. ("GFI")'s motion to dismiss the Complaint.

PRELIMINARY STATEMENT

GFI presents an extraordinary demand. It asks this Court to declare that the Fair Housing Act, 42 U.S.C. §§ 3601–3619 ("FHA"), and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq. ("ECOA"), no longer encompass disparate impact liability, and thereby overrule nearly 25 years of binding precedent in this Circuit, ignore the identical holdings of ten other circuits stretching over three decades, flout the Department of Housing and Urban Development's ("HUD") authoritative interpretation of the FHA, and distort the holdings of two Supreme Court cases. Moreover, GFI asks this Court to do so for reasons already rejected by over a dozen courts. This Court too should reject GFI's arguments and deny its motion.

First, the Complaint alleges sufficient facts to support its claims under well-settled precedent in this Circuit. Second, the Supreme Court's decision in Smith v. City of Jackson, 544 U.S. 228 (2005) — not an FHA or ECOA case — did not overturn decades of precedent recognizing disparate impact claims under the FHA and ECOA sub silentio. Third, the Supreme Court's decision in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) — also not an FHA or ECOA case — does not apply here. Wal-Mart's holding was limited to the class certification requirements under Fed. R. Civ. P. 23(a), and neither applies to federal enforcement actions like this one, nor supports dismissal of a complaint. Finally, GFI is wrong that certain provisions of the FHA do not address mortgage lending at all.

BACKGROUND

The United States filed this lawsuit pursuant to its statutory mandate to enforce the FHA and ECOA. See 42 U.S.C. § 3614(a); 15 U.S.C. § 1691(a). For at least five years, from 2005

through 2009, GFI charged hundreds of African-American and Hispanic borrowers significantly higher interest rates and fees on home mortgage loans, compared to the rates and fees that GFI charged similarly situated white borrowers, after controlling for relevant loan characteristics and credit risk factors. (Complaint ¶¶ 13, 24–25, filed Apr. 2, 2012 ("Compl.").) The overcharges are a direct result of GFI's lending policies, which allow loan officers to overcharge borrowers without regard to creditworthiness (id. ¶¶ 16, 27), reward loan officers for these overcharges by increasing their compensation (id. ¶¶ 18, 29), and lack any fair lending controls to ensure non-discriminatory lending (id. ¶¶ 19, 30). As a result of GFI's actions, several hundred black and Hispanic borrowers paid thousands of dollars more than similarly situated white borrowers in just the first few years of their loans because of their race or national origin. (Id. ¶¶ 13–15, 24–26.) The United States seeks compensation for these borrowers and injunctive relief to order GFI to remedy its discriminatory practices.

ARGUMENT

I. THE COMPLAINT SUFFICIENTLY STATES CLAIMS UNDER THE FAIR HOUSING AND EQUAL CREDIT OPPORTUNITY ACTS

A complaint need only set forth "a short and plain statement . . . showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss, a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The plaintiff need only "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The Court must accept as true all well-pleaded factual allegations, and "draw[] all inferences in the plaintiff's favor." Allaire Corp. v. Okumus, 433 F.3d 248, 249–50 (2d Cir. 2006) (internal quotation marks omitted). GFI's vouching for its

lending practices (Memorandum of Law, June 1, 2012 ("GFI Br.") at 1) is irrelevant on this motion.

A. The Legal Framework for FHA and ECOA Disparate Impact Claims

The Complaint alleges that GFI "engaged in a pattern or practice of discrimination." (Compl. ¶ 2.) A "pattern or practice of discrimination" means "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). This pattern or practice of discrimination alleged in the Complaint gives rise to claims under the FHA and ECOA. (Compl. ¶ 35.) Section 804(b) of the FHA provides that it shall be unlawful:

> 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.

42 U.S.C. § 3604(b). Section 805(a) of the FHA provides that:

> 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.

Id. § 3605(a). And ECOA provides that: "It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction — (1) on the basis of race, color, religion, national origin, sex or marital status . . . ." 15 U.S.C. § 1691(a)(1).

The FHA and ECOA prohibit not merely intentional acts of discrimination, but also policies that have a disparate impact. "Under disparate impact analysis . . . a prima facie case is established by showing that the challenged practice of the defendant actually or predictably results in racial discrimination; in other words that it has a discriminatory effect." Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir.) (internal quotation marks

omitted), judgment aff'd, 488 U.S. 15 (1988); see Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 575 (2d Cir. 2003) (under FHA, "[a] plaintiff need not show the defendant's action was based on any discriminatory intent."); United States v. Starrett City Assocs., 840 F.2d 1096, 1100 (2d Cir. 1988) ("Housing practices unlawful under [the FHA] include not only those motivated by a racially discriminatory purpose, but also those that disproportionately affect minorities."); United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1217 (2d Cir. 1987) ("As to a claim under the Fair Housing Act . . . the consensus is that a plaintiff need prove only discriminatory effect, and need not show . . . discriminatory intent.");[1] Ng v. HSBC Mortg. Corp., 07-CV-5434 (RRM)(VVP), 2010 WL 889256, at *11 (E.D.N.Y. Mar. 10, 2010) ("FHA and ECOA claims may be prosecuted on the basis of disparate treatment . . . or on the basis of disparate impact . . . ."); Jones v. Ford Motor Credit Co., 00 Civ. 8330 (LMM), 2002 WL 88431, at *3 (S.D.N.Y. Jan. 22, 2002) ("The ECOA allows for disparate impact actions.").

To demonstrate a prima facie case of disparate impact, a plaintiff must allege: "(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, 352 F.3d at 574 (internal quotation marks and emphasis omitted). Similarly, in an ECOA case, the plaintiff must: "(1) identify a specific practice or policy used by the defendant; and (2) demonstrate, through statistical evidence, that the practice

[1] See also Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, 316 F.3d 357, 366 (2d Cir. 2003) (under FHA, "[t]he plaintiff need not make any showing of discriminatory intent"); Robinson v. 12 Lofts Realty, 610 F.2d 1032, 1036–38 (2d Cir. 1979) ("The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated . . . ."); Fair Hous. Justice Ctr. v. Edgewater Park Owners Coop., 10 Civ. 912 (RPP), 2012 WL 762323, at *10 (S.D.N.Y. Mar. 9, 2012) (same); Cales v. New Castle Hill Realty, 10 Civ. 3426 (DAB), 2011 WL 335599, at *4 (S.D.N.Y. Jan. 31, 2011) (same).

or policy has caused an adverse effect on the protected group." Jones, 2002 WL 88431, at *3.

B. The Complaint Properly Alleges a "Specific Policy or Practice"

The Complaint challenges three specific elements of GFI's lending policy and practice that operate together to cause a disparate impact: (1) a system of subjective decision-making that allows loan officers to use Optimal Blue, a computer pricing program, to manipulate rates and fees without regard to creditworthiness (Compl. ¶¶ 17, 28); (2) a loan officer compensation scheme that "provided strong financial incentives to loan officers to overcharge" when exercising discretion (id. ¶¶ 18, 21); and (3) the absence of fair lending controls that would ensure that loan officers exercised subjective decision-making in a non-discriminatory manner (id. ¶¶ 19, 21).

District courts consistently conclude that discretionary pricing policies, like the ones challenged here, are actionable under the FHA and ECOA, and deny motions to dismiss on the same grounds GFI advances. In Jones, the district court denied a motion to dismiss, reasoning that because plaintiffs alleged that "Ford Credit is involved in a subjective [mark-up] scheme which has a disproportionate negative effect on African-Americans, plaintiffs have stated a claim for disparate impact" under ECOA. 2002 WL 88431, at *4. In Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251 (D. Mass. 2008), the court denied a motion to dismiss, finding the "'specific and actionable policy' that plaintiffs challenge is [the lender's] discretionary pricing policy, which allows [the lender's] retail salesmen, independent brokers, and correspondent lenders to add various charges and fees based on subjective non-risk factors." Id. at 255; see also Barrett v. H&R Block, Inc., 652 F. Supp. 2d 104, 110 (D. Mass. 2009) (denying motion to dismiss where "Discretionary Pricing Policy . . . permitted loan officers and brokers to impose additional discretionary charges unrelated to a borrower's creditworthiness"); Ramirez v.

GreenPoint Mortg. Funding, Inc., 633 F. Supp. 2d 922, 928–29 (N.D. Cal. 2008) (same); Hoffman v. Option One Mortg. Corp., 589 F. Supp. 2d 1009, 1010–11 (N.D. Ill. 2008) (same); Taylor v. Accredited Home Lenders, Inc., 580 F. Supp. 2d 1062, 1067–69 (S.D. Cal. 2008) (same). GFI ignores these cases (GFI Br. at 15–19), which establish that a discretionary pricing policy may be a "facially neutral policy," which "actually or predictably results in . . . discrimination," Tsombanidis, 352 F.3d at 575, just as the Complaint alleges here.

C. The Complaint Properly Alleges that GFI's Pricing Practices Caused an Adverse Impact on African-American and Hispanic Borrowers

Next, the Complaint alleges "a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." Tsombanidis, 352 F.3d at 575. The Complaint asserts substantial statistical evidence showing that, from 2005 through 2009, African-American and Hispanic borrowers suffered from statistically significant and sizable adverse pricing disparities. (See Compl. ¶¶ 12–15, 23–26.) GFI asserts that the Complaint fails to show a "plausible causal connection" between GFI's pricing practices and its overcharges to minority borrowers. (GFI Br. at 19.) The Complaint, however, alleges that the statistically significant disparities did not result from differences in objective measures of a borrower's creditworthiness, but instead, "are a result of GFI's home-loan pricing policy." (Compl. ¶¶ 16, 27.)

The Complaint alleges that its statistical regression analyses "account[ed] for all factors related to borrowers' credit risk and loan characteristics," controlling for other possible non-racial explanations for the disparities. (Id. ¶¶ 13, 24.) Causation is established through statistical evidence. See Tsombanidis, 352 F.3d at 575–76. Whether the regressions "take into account all factors" GFI deems relevant (GFI Br. at 18) is a dispute for trial, not a basis for dismissal. See

Bazemore v. Friday, 478 U.S. 385, 400 (1986) ("Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.").

Next, GFI claims the allegations of the Complaint relating to loan officer compensation cannot support a disparate impact claim, contending that "this incentive would exist regardless of the race of the borrower." (GFI Br. at 19.) GFI thus seeks to turn the law on its head. Well-settled authority requires that plaintiffs plead a "facially neutral policy," Tsombanidis, 352 F.3d at 575, which is why the Complaint addresses, among other things, the loan officer compensation scheme and its interaction with other GFI policies. It cannot be the case that once a plaintiff alleges a facially neutral policy, the very allegation of that neutral policy requires dismissal of the Complaint. Thus, applying these well-settled requirements for alleging disparate impact under the FHA and ECOA, the Complaint properly states a claim.[2]

D. The Complaint Properly Alleges Disparate Treatment

GFI also argues erroneously that the Complaint must be dismissed because it does not allege a disparate treatment claim. (GFI Br. at 20–21.) The Complaint does allege facts that would support such a claim. Sufficiently large statistical disparities, like those alleged here (Compl. ¶¶ 12–15, 23–26), can support a finding of discriminatory intent. See Hazelwood Sch.

[2] GFI claims that "[t]his is not the first time plaintiff has failed to meet the pleading standards when relying on statistics in a fair lending disparate impact case." (GFI Br. at 19.) But United States v. Nara Bank, No. CV 09-07124 RGK (JCx), 2010 WL 2766992 (C.D. Cal. May 28, 2010), is on appeal. See 10-56177 (9th Cir.). And United States v. Citizens Republic Bancorp, Inc., No. 11-11976, 2011 WL 2014873, at *11 (E.D. Mich. May 24, 2011), did not "raise[ ] concerns about the content of plaintiff's fair lending complaints." The cited order criticizes the proposed settlement in the case, but states not one word about the complaint.

Dist. v. United States, 433 U.S. 299, 309–12 (1977). The Complaint also alleges that GFI knew as early as June 2007 that HUD was investigating its discriminatory lending practices (Compl. ¶ 21) yet failed to take any steps to impose "fair lending controls," anti-discrimination policies, employee training, managerial oversight, or changes to pricing practices. Id. ¶¶ 19–21, 30–32. GFI's discriminatory pricing continued through at least 2009. Id. ¶ 2. Continuation of a policy or practice known to have a discriminatory impact may be evidence of intent. See Pers. Adm'r v. Feeney, 442 U.S. 256, 279 n.25 (1979) ("When the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the statute], a strong inference that the adverse effects were desired can reasonably be drawn"). These allegations support a disparate treatment claim.

II. THE SUPREME COURT IN SMITH DID NOT OVERRULE, EXPLICITLY OR IMPLICITLY, DECADES OF FHA AND ECOA PRECEDENT

The crux of GFI's motion is that the Supreme Court's decision in Smith swept away decades of precedent from eleven Courts of Appeals, including this Circuit, without even saying so. (GFI Br. at 3–14.) Smith held that the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), permitted disparate impact claims, by comparing language in the ADEA to certain language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). Smith did not hold either that language identical to the ADEA or Title VII was mandatory to assert disparate impact claims, nor that the ruling applied beyond the ADEA. Consequently, every court to have considered the issue has rejected GFI's argument that Smith precludes disparate impact claims under the FHA and ECOA, and this Court should do the same.

A. Every Court of Appeals to Consider the Issue Has Held that the FHA Permits Disparate Impact Claims, Before and After Smith

To begin with, GFI's analysis of Smith provides no basis for this Court to ignore the

overwhelming authority in the Second Circuit permitting disparate impact claims to proceed. See, e.g., Tsombanidis, 352 F.3d at 575; Fair Hous. in Huntington Comm., 316 F.3d at 366; Town of Huntington, 844 F.2d at 934; Starrett City Assocs., 840 F.2d at 1100; Yonkers Bd. of Educ., 837 F.2d at 1217. And Smith has had no effect whatsoever on Second Circuit FHA and ECOA jurisprudence since it was decided. See, e.g., Smith v. NYCHA, 410 F. App'x 404, 406 (2d Cir. 2011) (disparate impact claims available under FHA); Ungar v. N.Y.C. Housing Auth., 363 F. App'x 53, 55 (2d Cir. 2010) ("Title VII disparate impact analysis applies also to claims arising under the FHA."). This Second Circuit precedent alone disposes of GFI's motion.

Nevertheless, GFI asks this Court to disregard this Circuit's binding precedent based solely on GFI's speculation about the implications of Smith. (GFI Br. at 10). To adopt GFI's argument would be legal error. "The Supreme Court has repeatedly stated that the Circuit Courts are to apply the law as it exists, unless it is expressly overruled." Ognibene v. Parkes, 671 F.3d 174, 184 (2d Cir. 2011). Moreover, this Court is bound to apply the law of the Second Circuit. See, e.g., Unicorn Bulk Traders Ltd. v. Fortune Mar. Enters., Inc., 08 Civ. 9710 (PGG), 2009 WL 125751, at *2 (S.D.N.Y. Jan. 20, 2009); Bass v. Coughlin, 800 F. Supp. 1066, 1071 (N.D.N.Y. 1991) (same)), aff'd, 976 F.2d 98 (2d Cir. 1992). Unless and until the Supreme Court or the Second Circuit sitting en banc holds otherwise, disparate impact claims are cognizable under the FHA in this Circuit.

GFI's contention that Smith has effectively overruled this precedent sub silentio is further belied by the facts. (GFI Br. at 6–8.) Prior to Smith, ten other circuits agreed with the Second Circuit that the FHA authorizes disparate impact claims. Several courts of appeals

similarly recognized disparate impact liability under the ECOA.[3] No court of appeals has revisited this issue, much less overruled or repudiated its prior decisions, in light of Smith. To the contrary, the Circuit courts have repeatedly affirmed, after Smith, that the FHA permits disparate impact claims. See Mt. Holly Gardens Citizens in Action v. Township of Mount Holly, 658 F.3d 375, 381 (3d Cir. 2011) ("The FHA can be violated by either intentional discrimination or if a practice has a disparate impact on a protected class."), cert. petition filed, June 11, 2012; Astralis Condo. Ass'n v. Sec'y, HUD, 620 F.3d 62, 66 (1st Cir. 2010) (recognizing disparate impact claim under FHA); Graoch Assocs. v. Louisville / Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 371–74 (6th Cir. 2007) (setting standard for FHA disparate impact claim); Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1229 (10th Cir. 2007) (FHA disparate impact claim need not prove intent); Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1194–95 (9th Cir. 2006) (standard for FHA disparate impact claim).

GFI incorrectly claims that "[t]wo circuit courts . . . have questioned whether such use of the disparate impact theory in such cases remains appropriate in light of City of Jackson." (GFI Br. at 8.) GFI first quotes Garcia v. Johanns, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006), but cuts

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[3] The FHA cases are Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Arthur v. City of Toledo, 782 F.2d 565, 574–75 (6th Cir. 1986); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); Mountain Side Mobile Estates P'ship v. HUD, 56 F.3d 1243, 1251 (10th Cir. 1995); United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984). Only the D.C. Circuit has not decided the issue. See Greater New Orleans Fair Hous. Action Ctr. v. HUD, 639 F.3d 1078, 1085 (D.C. Cir. 2011).

The ECOA cases are Golden v. City of Columbus, 404 F.3d 950, 963 n.11 (6th Cir. 2005); Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 893 (1st Cir. 1992); Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1100 (5th Cir. 1987); Miller v. Am. Express Co., 688 F.2d 1235, 1239–40 (9th Cir. 1982). No circuit court has held otherwise.

off the quote before the relevant portion, which states: "We express no opinion about whether a disparate impact claim can be pursued under ECOA," id., and does not refer to the FHA at all. "Expressing no opinion" is not the same as "question[ing]" the theory. GFI also cites to a dissent from a denial of en banc rehearing, see Gallagher v. Magner, 636 F.3d 380, 383 (8th Cir. 2010) (Colloton, J., dissenting), which, obviously, is a minority opinion.

B. Every Court to Have Considered GFI's Argument that Smith Forecloses FHA and ECOA Disparate Impact Claims Has Rejected It

Every court that has considered GFI's Smith argument has rejected it:

- City of Memphis v. Wells Fargo Bank, N.A., No. 09–2857–STA, 2011 WL 1706756, at *13 n.45 (W.D. Tenn. May 4, 2011) ("The Court finds no support for Defendants' argument that a disparate impact claim for violation of the FHA is no longer available in light of City of Jackson.");

- Barrett v. H&R Block, Inc., 652 F. Supp. 2d 104, 108–09 (D. Mass. 2009) (rejecting claim that Smith precludes disparate impact claim under FHA and ECOA);

- NAACP v. Ameriquest Mortg. Co., 635 F. Supp. 2d 1096, 1104-05 (C.D. Cal. 2009) ("Smith does not address FHA or ECOA claims at all");

- Guerra v. GMAC LLC, No. 2:08-cv-01297-LDD, 2009 WL 449153, at *3 (E.D. Pa. Feb. 20, 2009) ("[W]e decline to hold that the Smith decision, by implication, overruled prior precedent recognizing disparate impact liability under the FHA and the ECOA.");

- Rodriguez v. SLM Corp., No. 07cv1866 (WWE), 2009 WL 598252, at *3 (D. Conn. Mar. 6, 2009) ("In light of the early stage of this action and the recent decisions that Smith does not preclude ECOA disparate impact claims as recognized in pre-Smith precedent, the Court will deny the motion to dismiss on this ground.");

- Ramirez v. GreenPoint Mortg. Funding, Inc., 633 F. Supp. 2d 922, 926–27 (N.D. Cal. 2008) (defendant "reads Smith too broadly, and no court has applied Smith to find that disparate impact claims are not cognizable under the FHA or ECOA.");

- Hoffman v. Option One Mortg. Corp., 589 F. Supp. 2d 1009, 1010–11 (N.D. Ill. 2008) ("I too conclude that Alexander and Smith do not preclude disparate impact claims under the FHA and the ECOA.");

- Taylor v. Accredited Home Lenders, Inc., 580 F. Supp. 2d 1062, 1066–67 (S.D. Cal. 2008) ("[T]his Court finds Smith has not overruled prior precedent recognizing th[at]

ECOA and the FHA permit disparate impact claims.");

- Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co., 573 F. Supp. 2d 70, 79 (D.D.C. 2008) ("NCRC") ("[T]he Court finds that Smith does not preclude disparate impact claims pursuant to the FHA.");

- Payares v. JP Morgan Chase & Co., No. 07-cv-05540 ABC (SHx), 2008 WL 2485592, at *1 (C.D. Cal. June 17, 2008) ("Defendants simply reiterate the argument . . . that the Supreme Court cases of [Alexander] and [Smith], should be interpreted as barring disparate impact claims under [the FHA and ECOA]. The Court rejected this argument in ruling on the Motion to Dismiss, and that decision was not a close call.");

- Garcia v. Country Wide Fin. Corp., No. EDCV 07-1161-VAP (JCRx), 2008 WL 7842104, at *3-4 (C.D. Cal. Jan. 17, 2008) ("[T]his Court declines to hold that Smith overturned Ninth Circuit precedent recognizing disparate impact claims under the FHA and ECOA.");

- Zamudio v. HSBC N. Am. Holdings Inc., No. 07 C 4315, 2008 WL 517138, at *2 (N.D. Ill. Feb. 20, 2008) (rejecting claim that Smith precludes FHA and ECOA claims because "the Smith decision does not reach so far as to prohibit disparate-impact claims under other statutes that do not contain this same language; nor does it set forth a new test for determining whether a statute supports disparate-impact claims"); and

- Beaulialice v. Fed. Home Loan Mortg. Corp., No. 8:04-CV-2316-T-24-EAJ, 2007 WL 744646, at *4 (M.D. Fla. Mar. 6, 2007) (rejecting argument that Smith forecloses either FHA or ECOA claim).

These cases uniformly reject GFI's Smith argument, compelling denial of GFI's motion here.[4]

First, these cases hold that Smith does not apply beyond the ADEA or extend to the FHA or ECOA. See, e.g., Ameriquest Mortg. Co., 635 F. Supp. 2d at 1104-05 ("Smith does not address FHA or ECOA claims at all"); Zamudio, 2008 WL 517138, at *2 ("the Smith decision does not reach so far as to prohibit disparate-impact claims under other statutes that do not contain this same language"). Second, they reject GFI's argument that Smith requires that a

[4] With one exception (GFI Br. at 8 n.9), GFI neither addresses these cases nor tries to distinguish them, even though GFI's counsel represented the defendants in four of them. See Wells Fargo, 2011 WL 1706756, at *1; Ameriquest Mortg. Co., 635 F. Supp. 2d at 1098; Taylor, 580 F. Supp. 2d at 1063; NCRC, 573 F. Supp. 2d at 72.

statute contain talismanic words to permit disparate impact liability. Barrett, 652 F. Supp. 2d at 109 ("Smith . . . does not require 'adverse effects' language as a necessary prerequisite to allowing disparate impact liability"). Third, they note that had the Supreme Court intended to erase decades of FHA and ECOA precedent, it would have said so expressly. See, e.g., Guerra, 2009 WL 449153, at *3 (lower courts should follow precedent unless Supreme Court clearly requires a different result). Fourth, they recognize that the legislative history of the FHA, including its 1988 amendments, confirm that Congress intended disparate impact claims to be cognizable under the FHA. See, e.g., NCRC, 573 F. Supp. 2d at 77–78 (endorsing argument that "the legislative history of the FHA demonstrates Congress's intent that the FHA include disparate impact claims").[5]

Fifth, they defer to the long-standing agency interpretation of HUD and the Federal Reserve Board, which recognizes disparate impact liability. See, e.g., Barrett, 652 F. Supp. 2d at 108–09 (deferring to agency interpretation of ECOA); NCRC, 573 F. Supp. 2d at 78 (deferring to agency interpretation of FHA). Finally, they have reasoned that the text of the FHA and ECOA support disparate impact liability, even under Smith's analysis of the ADEA. See, e.g., NCRC, 573 F. Supp. 2d at 78. For the same reasons that led over a dozen courts to reject GFI's arguments, this Court should deny GFI's motion.

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[5] When it amended the FHA in 1988, Congress was aware that the circuits consistently concluded that the FHA permitted disparate impact claims. See Fair Housing Amendments Act of 1987: Hearings Before the Subcomm. on the Constitution of the S. Comm. of the Judiciary, 100th Cong., 1st Sess., at 529-57 (1987) (testimony of Prof. Robert Schwemm). Congress enacted the FHA amendments without any change to the provisions interpreted as allowing disparate impact claims, thus endorsing this caselaw. See Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

C. GFI Misrepresents the Supreme Court's Decision in Smith

Not only has GFI side-stepped all relevant case law (see supra Sections II.A–B), but it has misrepresented the analysis in Smith. It argues that Smith overturned unanimous circuit precedent on disparate impact by announcing a new per se rule – in dicta and in a single footnote (GFI Br. at 6) – that all anti-discrimination statutes must have "required" language that "expressly allow[s] for evidence of effects" to support disparate impact liability (GFI Br. at 3.) GFI's argument is meritless for several reasons.

First, Smith only held that disparate impact claims were cognizable under Section 4(a)(2) of the ADEA. Smith did not hold that language identical to the ADEA was mandatory to assert disparate impact claims under other anti-discrimination statutes. GFI misstates the holding in Smith by claiming that Smith "clarified . . . that the disparate impact theory may be used in cases relying on federal anti-discrimination statutes only where those statutes expressly allow for evidence of effects." (GFI Br. at 3.) No statements to that effect, or anything similar, appear in Smith, which alone is sufficient reason to reject GFI's argument.

Second, GFI is wrong that Smith undermined circuit precedent by repudiating the approach in Griggs v. Duke Power Co., 401 U.S. 424 (1971), which relied on the purpose and history of Title VII to conclude that disparate impact liability arose under that statute. (GFI Br. at 3, 4, 10.) Smith did not announce a new rule on the exclusive "primacy of text." (GFI Br. 3, 8, 10.) To the contrary, the Smith plurality expressly stated that its holding was based on the history, purpose, and agency interpretation of the ADEA. Smith, 544 U.S. at 238 ("As we have already explained, we think the history of the enactment of the ADEA . . . supports the . . . consensus concerning disparate impact liability"); id. at 239–40 (considering the statutory text and the agency's regulations to conclude disparate impact claims were cognizable). To be sure,

the Smith plurality concluded that Section 4(a)(2) of the ADEA is consistent with disparate impact liability because, like Section 703(a)(2) of Title VII in Griggs, it "focuses on the effects of the action on the employee rather than the motivation for the action of the employer." Id. at 235–36 (plurality). But the Smith Court never suggested that the specific language in Section 4(a)(2) was a statutory prerequisite for disparate impact claims.

Third, GFI speculates that "if given the chance, the Supreme Court will confirm that the FHA and ECOA do not permit disparate impact claims." (GFI Br. at 5.) GFI relies on the Supreme Court's grant of certiorari in Magner v. Gallagher, 132 S. Ct. 548 (U.S. Nov. 7, 2011), a petition that was subsequently withdrawn and certiorari dismissed, see 132 S. Ct. 1306 (U.S. Feb. 14, 2012). GFI argues that the Court was signaling an intention to limit disparate impact claims (GFI Br. at 4–5 & n.7), but the Court has warned against drawing exactly this conclusion. In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), the Court refused to vacate the lower court's decision once the case settled after certiorari was granted. The Court rejected the argument that the grant of certiorari predicted a reversal. See id. at 25. For the same reason, GFI's effort to dismiss adverse district court cases because these cases preceded the grant of certiorari in Magner (GFI Br. at 8 n.9) is irrelevant. GFI's speculation is no basis for any court to overturn decades of settled precedent.[6]

[6] GFI's reliance on a brief submitted to the Supreme Court by the Solicitor General in 1988 (GFI Br. at 8 n.8) ignores that in 2011, the Solicitor General argued to the Court that disparate impact claims are cognizable under the FHA, noting that since 1988: (1) the FHA had been amended, with Congress presumed to have adopted the judicial consensus that the FHA permits disparate impact claims; (2) consistent HUD adjudications recognized disparate impact claims; (3) in November 2011 HUD proposed a rule setting forth agency standards for disparate impact claims under the FHA; and (4) courts addressing the question unanimously came to the same conclusion. See Brief for the United States as Amicus Curiae Supporting Neither Party, Magner v. Gallagher, No. 10-1032, at 10-24 (U.S. filed Dec. 29, 2011), 2011 WL 6851347.

Finally, GFI's entire argument is based on Part III of Smith, which did not command a majority of the Court. See United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003) ("[T]here is . . . no law of the land [when] no one standard commands the support of a majority of the Supreme Court."); Smith v. Am. President Lines, Ltd., 571 F.2d 102, 109 (2d Cir. 1978) (same). The fifth vote for the result in Smith came from Justice Scalia, who declined to join Part III and instead concurred in the judgment on the basis of judicial deference to agency interpretations.[7] Thus, the premise of GFI's motion — that Smith overturned decades of FHA and ECOA precedent without anyone realizing it — is baseless because the critical section of Smith it relies upon has no precedential weight. See also Payares v. JP Morgan Chase & Co., 07-cv-05540 ABC (SHx) (C.D. Cal. Order of May 15, 2008, at 4) (dkt. no. 49) (available on PACER) ("As for Smith, Defendants rely primarily on language taken from a section of the opinion not joined by a majority of the Justices.").

D. The Text of the FHA and the ECOA Encompass Disparate Impact Liability

Even if GFI were correct that Smith's analysis of the ADEA applies to the FHA and ECOA, the text of the relevant FHA and ECOA provisions encompass disparate impact liability.

The Complaint alleges violations of 42 U.S.C. § 3604(b), § 3605, and 15 U.S.C. § 1691(a)(1). None of those provisions mirrors Section (4)(a)(1) of the ADEA, which the Court noted did not support disparate impact liability because of its focus on a "targeted individual."

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[7] GFI misrepresents Justice Scalia's position in Smith, citing only a portion of his opinion. (GFI Br. at 6.) Justice Scalia "join[ed] all except Part III of its opinion." 544 U.S. at 243. That Part is the section of Smith upon which GFI relies. Justice Scalia continued: "As to that Part, I agree with all of the Court's reasoning but would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the Equal Employment Opportunity Commission . . . ." Id. (citation omitted). But deferring to the views of the agency is exactly what GFI argues this Court should not do. (GFI Br. at 11–14.)

Smith, 544 U.S. at 236 n.6. To the contrary, their text supports disparate impact liability. For example, Section 3605 of the FHA prohibits anyone "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." (emphasis added). Like Section 4(a)(2), the "making available" language focuses on the "effects of the action" on the borrower rather than the motivation for the action" by the lender. Smith, 544 U.S. at 235–36. By their own terms, sections 3604(b) and 3605 of the FHA further prohibit discrimination in a broad range of activities beyond a refusal to sell, rent, or lend to a particular person; they reach generally applicable "terms, conditions, privileges" or the "provision of services or facilities in connection therewith." And they prohibit these actions against "any person" because of prohibited characteristics. Thus, just as Section (4)(2) of the ADEA was directed at "employees generally" and not at a "targeted individual," Smith, 544 U.S. at 236 n.6, sections 3604 and 3605 of the FHA encompass disparate impact liability, as they are directed at activities that apply to borrowers or homeowners generally. The FHA also contains three exemptions from liability which are only necessary if the statute contemplates disparate impact claims. The FHA's sections 3607(b)(1), permitting reasonable occupancy restrictions; 3607(b)(4), permitting housing practices taken with respect to persons with drug convictions; and 3605(c), permitting appraisers to consider relevant factors other than prohibited characteristics, are unnecessary if the FHA prohibits only intentional discrimination. The ECOA, 15 U.S.C. § 1691(c), protects creditors from disparate impact claims for the operation of "any credit assistance program" or "any special purpose credit program" for "an economically disadvantaged class of persons" or "to meet special social needs."

Moreover, textual similarity does not require that the FHA, ECOA, and ADEA be

interpreted identically, which is why GFI's comparison chart is so misleading. (GFI Br. at 6–8.) The Supreme Court has "not hesitated to give a different reading to the same language — whether appearing in separate statutes or in separate provisions of the same statute — if there is strong evidence that Congress did not intend the language to be used uniformly." Smith, 544 U.S. at 260–61 (O'Connor, J., concurring in the judgment). A majority of the Justices in Smith noted that Congress recognized that "race" and "age" discrimination "were qualitatively different kinds of discrimination" and could seek to remedy them differently. Id. at 238 n.7, 240–41, 253–55. Moreover, the FHA, unlike the ADEA, contains a statement of purpose that makes clear that Congress intended that the FHA be enforced broadly: "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; Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982) (§ 3601 reflects Congress's "broad remedial intent"). There is no comparable ADEA or Title VII counterpart. Thus, § 3601 attests to Congress's broad remedial intent, which would encompass disparate impact liability.

Finally, as Smith recognized, had Congress intended an anti-discrimination statute to cover only intentional discrimination, it would have said so explicitly. Smith, 544 U.S. at 239 n.11 (noting Congress's express intent to bar disparate impact claims under Equal Pay Act). Congress simply could have inserted the word "intentionally" before "discriminate" in the relevant FHA and ECOA provisions had it wanted to bar disparate impact claims. It did not. Congress omitted the one word essential to GFI's argument.

E. HUD and the Federal Reserve Board's Authoritative Interpretations that the FHA and ECOA Permit Disparate Impact Claims Merit Deference

GFI argues that HUD and the Federal Reserve Board's authoritative interpretations of the

FHA and ECOA, respectively, are not entitled to deference because they "are based on now-discredited case law" after Smith. (GFI Br. at 11.) The only argument GFI raises against these interpretations is that HUD and the Board, like everybody else, have failed to adopt GFI's interpretation of the secret meaning of Smith. (GFI Br. at 11.) As the agencies' interpretations have been shared by every circuit court to have addressed the question, they cannot be deemed either arbitrary or capricious. Thus, even if the Court were to look beyond the overwhelming judicial authority to the agencies' interpretations of these statutes, these interpretations are correct and provide yet more reason to deny GFI's motion. Smith itself reinforces that deference is due. Both the plurality and Justice Scalia's concurrence relied on the EEOC's interpretation in holding that Section 4(a)(2) of the ADEA permitted disparate impact claims. See Smith, 544 U.S. at 240 (plurality), id. at 247 (Scalia, J., concurring in part and in the judgment).

In this case, HUD has the express delegated authority to interpret and enforce the FHA, including through formal adjudications carrying the force of law, 42 U.S.C. § 3612, and through rule-making, 42 U.S.C. § 3614a. See United States v. Mead Corp., 533 U.S. 218, 230 & n.12 (2001) (explaining that Chevron deference is warranted for "the fruits of notice-and-comment rulemaking or formal adjudication"). HUD's reasonable interpretation is entitled to deference. See Meyer v. Holley, 537 U.S. 280, 287–89 (2003); Chevron, U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984); Higgins v. Holder, 677 F.3d 97 (2d Cir. 2012). For two decades, HUD has consistently exercised its authority to recognize disparate impact claims, in formal adjudications that became final agency action, see, e.g., HUD v. Mountain Side Mobile Estates P'ship, No. 08-92-0010-1, 1993 WL 307069, at *5 (July 19, 1993), aff'd in relevant part, 56 F.3d 1243 (10th Cir. 1995), and through a proposed regulation recognizing disparate impact claims, see Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921

(Nov. 16, 2011). GFI's claim that HUD's analysis is "manifestly inconsistent with the statute" (GFI Br. at 13) is belied by the view of every court to have considered the issue.

Similarly, the Federal Reserve Board has authoritatively interpreted the ECOA and its implementing regulation, Regulation B, 12 C.F.R. 202, pursuant to the express delegation of congressional authority, 15 U.S.C. § 1691b. The Official Staff Interpretation of the ECOA and Regulation B expressly provides for disparate impact liability: "The Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face." 12 C.F.R. pt. 202, supp. I, § 202.6(a)(2). The Board, every federal financial regulatory agency, see Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266 (Apr. 15, 1994), and the new Consumer Financial Protection Bureau, have consistently interpreted the ECOA to allow disparate impact claims,[8] consistent with the intent of Congress in enacting the ECOA.[9] These interpretations are entitled to judicial deference.

III. WAL-MART IS IRRELEVANT TO THIS CASE

GFI argues that the Complaint must be dismissed in light of Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), because "the applicability of . . . Wal-Mart is much broader than Rule 23 class certification motions." (GFI Br. at 16 n.16.) GFI offers no support for this claim,

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[8] The Consumer Financial Project Bureau ("CFPB") has the statutory authority to supervise and enforce compliance with the ECOA for entities within its jurisdiction. Pursuant to this authority, on April 18, 2012, the CFPB issued a Bulletin reaffirming "that the legal doctrine of disparate impact remains applicable." See http://www.consumerfinance.gov/guidance/.

[9] See S. Rep. No. 94-589 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 406 ("The prohibitions against discrimination on the basis of race, color, religion or national origin are unqualified. . . . [C]ourts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions").

nor identifies any court that has exported the Wal-Mart's analysis of Fed. R. Civ. P. 23 and applied it to pleading requirements under Fed. R. Civ. P. 8. This Court should not be the first.

A. The Class Action Requirements of Wal-Mart Are Irrelevant to This Case

First, at no point in Wal-Mart did the Supreme Court state that its analysis and holding applied beyond class certification determinations. The question in Wal-Mart was narrow: was the "certification of the plaintiff class consistent with Rule 23(a) and (b)(2)." Wal-Mart, 131 S. Ct. at 2547. The Court held that it was not: An order certifying more than 1.5 million "current and former employees" challenging decisions by thousands of managers could not be "consistent with Rule 23(a) and Rule 23(b)(2)." Id. The Court explained that "the crux of this case is commonality [under Rule 23(a)] — the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" Id. at 2550–51. Nowhere does the Court in Wal-Mart state that "commonality" applies to claims outside the class-action context. Each of the statements GFI plucks from Wal-Mart out of context addresses commonality under Rule 23, not substantive standards under discrimination law. The Wal-Mart Court expressly distinguished between disparate impact claims involving discretion and the commonality determination, a distinction GFI ignores: "[G]iving discretion to lower-level supervisors can be the basis of . . . liability under a disparate-impact theory . . . [b]ut the recognition that this type of claim can exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common." Id. at 2554 (emphasis added; internal quotation marks omitted).

Second, GFI's argument is contrary to the plain language of the statutes. The FHA and ECOA authorize the Attorney General to bring a civil action where there is "reasonable cause to believe" that: (1) "any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights [under the FHA]"; or when (2) "any group of persons

has been denied any of the rights granted by this subchapter . . ." 42 U.S.C. § 3614(a); see also 15 U.S.C. § 1691. The United States may seek all forms of relief, "including monetary damages to persons aggrieved." 42 U.S.C. § 3614(d); 15 U.S.C. § 1691(e). These provisions say nothing of "commonality" or suggest that all "persons aggrieved" must have claims in common. The Supreme Court has long recognized that Rule 23 requirements do not apply to enforcement actions by the government. See Gen. Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) ("the EEOC is not merely a proxy for the victims of discrimination and . . . [its] enforcement suits should not be considered representative actions subject to Rule 23."). This recognition is particularly pertinent here, to the extent Wal-Mart limits private class action suits.

Third, GFI's arguments further ignore that unlike Wal-Mart, where plaintiffs seeking class treatment under Rule 23 had to show "that the discrimination . . . is common to all Wal-Mart's female employees," 131 S. Ct. at 2548, the United States need not allege that all minority borrowers are impacted, just that they are "disproportionately" impacted. See, e.g., Huntington Branch NAACP, 844 F.2d at 936–38. Thus, it is irrelevant whether the Complaint in fact "alleges a 'common' direction or 'common' method of exercising discretion" (GFI Br. at 16, 17). The United States need not allege "commonality" at all.

Finally, the Court in Wal-Mart did not dismiss the complaint. It reversed a certification order. The Court did not say that individual plaintiffs — or even groups of plaintiffs — could not bring their claims in separate suits following denial of class certification. Moreover, the Wal-Mart decision was made after discovery, such that plaintiffs had a full and fair opportunity to present all the evidence to support their claims. That has not happened here. Thus, GFI's argument that Wal-Mart somehow supports dismissal of the Complaint is meritless.

B. Wal-Mart Did Not Alter Either Pleading Requirements for, or Substantive Law on, Disparate Impact Claims

GFI wants to export the "commonality" requirement of Fed. R. Civ. P. 23 and engraft it as an "add-on" pleading requirement to Fed. R. Civ. P. 8 for disparate impact claims. (GFI Br. at 16 n.16.) Wal-Mart stated that "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. But the issue before this Court is precisely whether the Complaint is sufficient under pleading standards. This Court must merely determine whether the Complaint contains "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not apply the more "rigorous analysis" of Rule 23. See Wal-Mart, 131 S. Ct. at 2551.

GFI also maintains that Wal-Mart altered well-established law on disparate impact because "a policy of allowing . . . discretion is not a uniform practice as is required for disparate impact analysis" after Wal-Mart. (GFI Br. at 15.) Just the opposite. Wal-Mart reaffirmed that "we have recognized that 'in appropriate cases,' giving discretion to lower level supervisors can be the basis of Title VII liability under a disparate impact theory — since 'an employer's undisciplined system of subjective decision-making [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.'" Wal-Mart, 131 S. Ct. at 2554 (alteration in original) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988)). Even after Wal-Mart, courts have certified classes alleging discrimination resulting from a policy of discretion authorized to lower-level employees. See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, 672 F.3d 482, 488–91 (7th Cir. 2012). GFI claims that the absence of fair lending controls supports dismissal because it is the "opposite of common direction in exercising discretion required by [Wal-Mart]." (GFI Br. at 18.) But this argument turns the law on its head: Such failures support an inference of discrimination. See Mathis v.

Phillips Chevrolet, Inc., 269 F.3d 771, 778 (7th Cir. 2001) ("leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an 'extraordinary mistake' for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference"). GFI's Wal-Mart argument is therefore meritless.[10]

IV. SECTION 804(A) OF THE FHA APPLIES TO MORTGAGE LENDING

GFI's final argument is that Section 804 of the FHA, 42 U.S.C. § 3604, does not apply to mortgage lending. Like GFI's other arguments, courts have overwhelmingly rejected this claim.

First, GFI asserts that 42 U.S.C. § 3604 cannot apply to mortgage lending because 42 U.S.C. § 3605 applies to mortgage lending. (GFI Br. at 23.) But 42 U.S.C. § 3604 is worded broadly, rendering it unlawful, among other things, to "otherwise make unavailable or deny, a dwelling to any person . . ." Id. (emphasis added). Based on this language, courts have overwhelmingly rejected the assertion that 42 U.S.C. § 3604 does not apply to mortgage lending. As the court in National Community Reinvestment Coalition v. Novastar Financial, Inc., No. CIV. A. 07-0861 (RCL), 2008 WL 977351 (D.D.C. Mar. 31, 2008), explained, "Such an interpretation, however, ignores the broad language in § 3604 which . . . . 'was intended to be flexible enough to cover multiple types of housing-related transactions.'" Id. at *2 (quoting Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 56–57 (D.D.C. 2002) (rejecting argument that mortgage lending claims are confined to § 3605) (additional citations omitted)); see also NCRC, 573 F. Supp. 2d at 76–77 (rejecting same argument made by

[10] GFI relies on a trio of irrelevant cases following Wal-Mart. (GFI Br. at 16.) All three cases are class certification determinations, made after discovery, that resulted not in dismissal of the complaint, but merely denial of class certification. See Rodriguez v. Nat'l City Bank, 277 F.R.D. 148, 155 (E.D. Pa. 2011); In re Countrywide Fin. Mortg. Lending Practices Litig., 2011 WL 4862174 (W.D. Ky. Oct. 13, 2011); In re Wells Fargo Residential Mortg. Lending Discrimination, 2011 WL 3903117, at *3 (N.D. Cal. Sept. 6, 2011).

GFI's current counsel).[11] A proper reading of the two statutory provisions makes clear that they are not redundant but overlapping, as each prohibits some conduct that the other does not.

GFI is misapplying the canon of statutory construction that courts should "avoid a reading which renders some words altogether redundant." In re Air Crash Off Long Island, N.Y., on July 17, 1996, 209 F.3d 200, 207 (2d Cir. 2000) (internal quotation marks omitted). Courts apply this canon to avoid depriving statutes of their force, which is the opposite of what GFI seeks to do here. "[T]hat there may be some overlap [between the two sections of the Act] is neither unusual nor unfortunate." SEC v. Nat'l Secs., Inc., 393 U.S. 453, 468 (1969).

Second, GFI makes the convoluted argument that because one provision of ECOA, 15 U.S.C. § 1691e(i), precludes double recovery under that section as well as § 3605 of the FHA, that isolated cross-reference defines the scope of the FHA as coterminous with § 3605 and precludes fair lending claims under § 3604. (GFI Br. at 24.) But statutes should be interpreted according to canons of construction, not inferences drawn from references in other statutes. As a practical matter, GFI's argument is irrelevant because the United States has no intention of seeking double recovery, and has brought this action simply to remedy the effects of discrimination caused by GFI's lending practices once and for all.

CONCLUSION

The Court should deny GFI's motion in its entirety.

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[11] The only case GFI cites in support of its cramped reading of Section 804 has been widely repudiated. Compare Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423 (4th Cir. 1984) (cited in GFI Br. at 24), with, e.g., Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1357 (6th Cir. 1995) ("We agree . . . that §§ 3604 and 3605 overlap and are not mutually exclusive."; rejecting Mackey); NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 301 (7th Cir. 1992) (rejecting argument that §§ 3604 and 3605 cannot overlap; "Events have bypassed Mackey. We have expressed doubt about the interpretative methods used in that opinion.").

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Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

PREET BHARARA
United States Attorney
Attorney for the United States

By: /s/ Sameena Shina Majeed
JON SEWARD
Deputy Chief
SAMEENA SHINA MAJEED
BURTIS M. DOUGHERTY
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice

/s/ David J. Kennedy
DAVID J. KENNEDY
JEAN-DAVID BARNEA
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Telephone: (212) 637-2733/2679
Facsimile: (212) 637-0033