UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COUNTY OF COOK, Plaintiff, v. BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE BANK, FSB, COUNTRYWIDE WAREHOUSE LENDING, LLC, BAC HOME LOANS SERVICING, LP, MERRILL LYNCH & CO., INC., MERRILL LYNCH MORTGAGE CAPITAL INC., and MERRILL LYNCH MORTGAGE LENDING, INC., Defendants.	)	Case No. 14-cv-2280 Honorable Elaine E. Bucklo Magistrate Judge Sunil R. Harjani

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

On November 19, 2019, the Court directed Plaintiff, County of Cook ("County"), to file a supplemental memorandum of law addressing the "following question: if the alleged injury to the County's 'tax digest' had no impact on its tax revenues, what is the legal authority for awarding money damages to compensate it for tax-related losses?" Order at 2, ECF 374 (Nov. 19, 2019).

First, the Court's question incorrectly presumes, without a developed factual record, that, simply because the County agrees that its total property tax revenue was relatively stable, the County did not incur damages on specific properties that were affected by Defendants' discrimination-related foreclosures. The County has never taken such a position. In fact, the County discussed with the Court, at the August 5, 2019, hearing that its property tax base related

damages included both the reduced assessed values of the affected properties and the **resulting reduced tax revenues collected from them**. All of which the Court seemed to understand. *See* Aug. 5, 2019 Tr. at 51:8-52:2; 53:4-55:4. Thus, the fact that the County's total property tax collections may have remained stable has no bearing on whether the County suffered damages or the amount of those damages on specific properties. Second, Defendants do not have a legal basis to argue that the property tax base related damages that they caused are eliminated by property taxes the County received from another source (such that the County's annual levels of property tax revenue remained relatively stable). Indeed, the fact that the total property tax revenues remained stable is a red herring.

In any event, to fully answer the Court's question, the County separately addresses ***the nature*** of the County's tax base related injuries and right to pursue them, from ***the manner*** in which those damages can be calculated and proven to have been proximately caused by Defendants. First, the County shows that it has the right, as a matter of well-established law, to pursue its tax base related damages. Second, the County identifies the various components of its tax base related injuries resulting from the Defendants' tortious, discriminatory, conduct at issue. Third, the County shows that the amount of damages resulting from its tax base related injuries can be precisely calculated using common hedonic regression analysis techniques, which the Eleventh Circuit directly relied on in permitting the City of Miami to pursue its own tax base related injuries. *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1283 (11th Cir. 2019) ("by indicating and explaining . . . the kind of analysis that would be conducted to quantify the loss of revenue attributable to discriminatory lending, the city has plausibly alleged a calculable harm . . . ."). Fourth, and finally, the County sets out the insurmountable law precluding Defendants from

even arguing that the property taxes collected by the County from other properties should reduce or eliminate the property tax related damages Defendants caused to the County.

In short, the County suffered an injury to its property tax digest; that injury reduced the property tax revenues on the properties affected by Defendants' discriminatory lending, servicing and foreclosure activities; and those damages can be precisely calculated. The County should be permitted to develop this factual record and prove these damages at trial, particularly in light of Supreme Court precedent recognizing that the County's tax base injuries are a cognizable injury under the Fair Housing Act ("FHA"). *See Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 110-11 (1979).

I. The Standard of Proof for the County's Damages

A claim for damages under the FHA "is, in effect, a tort action." *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see also Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017) (stating that a claim for damages under the FHA is akin to a tort action); *Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 52 (2d Cir. 2015) ("general tort principles govern the award and calculation of damages in FHA cases."); and *Fair Hous. Ctr. of the Greater Palm Beaches, Inc. v. Sonoma Bay Cmty. Homeowners Ass'n*, 682 F. App'x 768, 787 (11th Cir. 2017) ("FHA damages claim is, in effect, a tort action governed by general tort rules . . . .").

Traditionally, the plaintiff in a tort action must prove "but-for or factual causation, *i.e.*, whether the harm could have occurred without the alleged tortious act; and proximate [] cause, which attempts to determine the scope of liability for a defendant's actions." *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 390 (7th Cir. 2018). Proximate cause is not a one size fits all test. Rather, it requires looking at "foreseeability, directness, and the substantiality of the defendant's conduct" in causing the plaintiff's injuries. *Id.* at 392. Ultimately, proximate cause is simply a generic label

that refers to the judicial tools courts use to perform an inquiry about what justice demands or what is administratively possible and convenient. *Id.* (quoting *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992).

When a plaintiff establishes that it was damaged by and those damages were caused by the defendant's tortious conduct, the defendant cannot complain that the amount of damages are speculative or cannot be calculated with absolute certainty. When the tort is of "such a nature as to preclude the ascertainment of the amount of damages with certainty," it is enough that the evidence "show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *see also Jastremski v. U.S.*, 737 F.2d 666, 672 (7th Cir. 1984) ("A plaintiff must prove his damages to a reasonable degree of certainty and not with scientific rigor"); *Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285, 293 (7th Cir. 1969) (damages may not be uncertain or speculative, but "the requirement of certainty does not necessitate mathematical precision in fixing the amount of damages. . . only a reasonable basis of computation is required").

II. Plaintiff's Tax Digest Injury is Compensable Under the Fair Housing Act

In its Second Amended Complaint ("SAC") (ECF 177), the County alleged that its "real estate tax digest" declined as a "direct result of Defendants' discriminatory and predatory lending practices and the resulting property vacancies and foreclosures." SAC ¶¶387, 389. The County further alleged that it could precisely calculate the "diminution in . . . tax digest" on foreclosed properties using "routinely maintained property tax and other financial data." *Id.* at ¶389. The County also alleged that it could calculate the "lost property tax digest on properties surrounding

foreclosed properties" by using "GPS mapping techniques that locate specific properties within census tracks [sic], property addresses and mortgage lien and foreclosure data, and well-established statistical regression techniques . . . ." *Id.* at ¶390. Accepting these allegations as true, for the purposes of deciding Plaintiff's Motion for Reconsideration, the relevant precedent permits the County to recover these losses.

In *Gladstone*, 441 U.S. at 110-11, the Supreme Court stated that a "significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." Numerous courts have likewise cited *Gladstone* for the proposition that an alleged reduction in property values is a concrete and recoverable injury in fact. *See City of Miami v. Wells Fargo & Co.*, 923 F.3d at 1279 (finding that the City of Miami's alleged tax injury was a "valid" and "cognizable" injury, citing *Gladstone*); *City of Miami v. Citigroup Inc.*, 801 F.3d 1268, 1275 (11th Cir. 2015) (citing *Gladstone* and finding that allegations of lost property tax revenue adequately alleged injury in fact); and *City of L.A. v. Citigroup Inc.*, 24 F. Supp. 3d 940, 948 (C.D. Cal. 2014) (finding allegations of decreased property tax revenue and increased municipal services adequately alleged an injury in fact, citing *Gladstone*).

Permitting the County to recover for its alleged decrease in property tax digest is consonant with the broad and remedial purpose behind the FHA. It is also consistent with the text of the statute which is written in "broad and inclusive" terms, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972), and permits the court to award damages, injunctive relief, and "any . . . other order" that the "court deems appropriate" to remedy violations of the FHA. 42 U.S.C. § 3613(c)(1). Indeed, in seeking to end housing discrimination, in all of its forms, Congress expressly mentioned harm to a city's tax base as one of the social ills it sought to remedy. As Senator Mondale stated,

"Declining tax base, poor sanitation, loss of jobs, inadequate educational opportunity, and urban squalor will persist as long as discrimination forces millions to live in the rotting cores of central cities." 114 Cong. Rec. 2274 (Feb. 6, 1968).

Because the Supreme Court in *Gladstone* expressly recognized that municipalities are directly injured when unlawful housing discrimination reduces property values and, in turn, the tax base, this suggests that the County's tax base injury is not "overly attenuated or nebulous." *Id.* at 1279. In light of *Gladstone* and the broad and remedial purpose motivating the FHA's enactment, the Court should have no reluctance in determining that the injury to the County's tax digest that was the direct result of Defendants' discriminatory behavior is a compensable and recoverable injury as a matter of law.

III. The Amount of Plaintiff's Tax Base Related Injury is a Question of Fact

The measure or quantification of the County's property tax base related injuries is not controlled by whether the County's "tax revenue has remained steady throughout the period relevant to its claims." Order at 2, ECF 374. It is also not controlled by Defendants' argument that the County was not injured because "you can't collect for . . . a theoretical drop that didn't actually affect money coming in the door to the county." Aug. 5, 2019 Tr. at 44:12-14. Indeed. the court in *City of L.A. v. Citigroup*, 24 F. Supp. 3d 940, explains why the Court's articulated concern, and the Defendants' argument, is not dispositive.

In *City of L.A.*, 24 F. Supp. 3d at 948, defendants argued that the city did not sustain any damages for decreased property tax revenue, as a result of defendants' discriminatory lending practices, because its property tax revenue increased every year except for two. The court rejected this argument because the proffered evidence did not "disprove L.A.'s prima facie showing of injury in fact. Even if L.A.'s overall property-tax revenue [] increased during the relevant time

period, L.A. may still have been injured . . . because [the] property-tax revenue could have been higher absent the discriminatory lending." *Id.*

Defendants next argued that the city could not prove causation because it required too many independent and discretionary decisions by third parties. *Id.* at 948-49. The court rejected this argument because the city relied on a "regression analysis . . . based on publicly available loan data" in its complaint to support its claims and theory of causation. *Id.* at 949. Specifically, the court found:

> Supporting the first link in L.A.'s proffered causal chain—Defendants' discriminatory lending practices—are statistics such as from 2004 to 2011 an African-American borrower was 2.273 times more likely to receive a predatory loan as a white borrower with similar underwriting and borrower characteristics. As for the second link—discriminatory loans resulted in foreclosures—L.A. alleges, for example, that a Citi loan in a predominantly African-American or Latino neighborhood is 4.774 times more likely to result in foreclosure than a Citi loan in a predominantly white neighborhood. Also, a predatory loan made to an African-American is 1.952 times more likely to be foreclosed on than a non-predatory loan to a white borrower. These foreclosures are then alleged to have caused a reduction in property values that diminished the tax base and created an increased need for city services, which demonstrate the third and final link in the causal chain.

Id. (internal citations omitted). The court found these allegations "sufficient to show that Defendants' challenged conduct was determinative or had a coercive effect on lowering a property's assessment." *Id.* As a result, the court concluded that "L.A. must be afforded an opportunity to conduct discovery and obtain more property-specific information to meet its burden of actually proving its claims—including causation." *Id.* at 950.

In this case, the County has similarly alleged statistics supporting its allegations of discriminatory servicing and foreclosures. Specifically, the SAC alleges that in neighborhoods that largely (71-90%) or predominately (91-100%) consist of minority homeowners, Defendants were 2.9 and 3.3 times more likely, respectively, to foreclose on homes in those neighborhoods than a

neighborhood that was largely non-minority (0-30%). *See* SAC ¶369E; *see also id.* at ¶¶369C, D, F, H (other statistics indicating Defendants' discriminatory lending and foreclosure practices). These statistics, along with the regression analyses the County will perform, supports the County's allegations that Defendants' discriminatory and predatory lending, servicing, and foreclosure activities have caused the County to suffer property tax related damages. As such, the County "must be afforded an opportunity to conduct discovery and obtain more property-specific information to meet its burden of actually proving its claims—including causation." *City of L.A.*, 24 F. Supp. 3d at 950.

IV. The County's Tax Injury Is *Not* the Difference in Total Annual Tax Collections

Whether the total property tax revenue the County collected has remained relatively stable since 2004 does not establish, as a matter of fact or law, that the County has not suffered property tax related injuries as a result of Defendants' discriminatory and predatory lending and servicing behavior. Rather, the amount of the County's recoverable injuries relating to its tax base caused by Defendants' discriminatory conduct should not be affected by whether the County's annual tax collections remain constant because it must take other steps – raising other types of taxes and property taxes on others – to keep those revenues constant. Two simple examples illustrate why.

An Individual is hurt in a car crash due to another person's tortious actions. The Individual can no longer work, is immobile and losses his annual income of $100,000 as a result of his injuries. To replace the lost wages, the Individual's wife goes to work and earns $100,000 per year. The fact that the Individual's total household income remains the same does not reduce Individual's ability to recovery against the tortfeasor for his lost wages.

A Corporation with an annual revenue of $1 million has three manufacturing product lines, but revenues from one product line falls by $250,000 due to a third party's tortious actions. The

Corporation shifts its efforts to its other two product lines and still earns the same $1 million in revenue. The third party does not get to avoid paying for the $250,000 in damages caused by its tortious acts because the Corporation was able to earn the same amount of revenue.

Similarly, the County's ability to levy and collect taxes on individual properties whose values have declined due to Defendants' discriminatory lending, servicing and/or foreclosure activities, has been harmed even if its property tax revenues may have remained constant. When the assessed value on specific foreclosed and surrounding properties falls (i.e., due to foreclosures and concentrations of foreclosures), the amount of property taxes the County can levy and collect on those specific properties directly falls. Decl. of Spencer M. Cowan ("S. Cowan Decl.") (submitted in support hereof), at ¶9. For example, if a residential property is assessed at $200,000, but its assessed value declines to $150,000 due to Defendants' foreclosures, the amount of taxes the County can levy and collect from that specific property will be proportionately reduced for each year going forward into the future until the adverse effect of the foreclosures on that property's assessed value is eliminated. This injury is direct, and, as discussed below, readily calculable.

The loss of property taxes on these affected properties means that the County must undertake other measures to make up that lost tax revenue. S. Cowan Decl., at ¶6 n.1. The County cannot, by law, selectively apply different assessment percentages to different properties within the same class of properties. *See* Cook County Code 74-64. Thus, to adjust for the loss in assessed value to the tax base overall (due to specific foreclosed properties) the County must raise the tax rates affecting all similar classes of property and, as Cook County has done, raise other taxes. *See, e.g.,* S. Cowan Decl., at ¶10. On first blush it might seem logical to assume that this effort eliminates the County's tax base related injuries, but it does not.

Raising the property tax rate itself, or raising other types of taxes, to try to mitigate the loss of property tax revenue due to a reduced tax base value (e.g., reduced assessed values on residential properties) has its own negative effects on the County. S. Cowan Decl., at ¶11. These include political repercussions on County officials but, more importantly, they have negative effects on the County's other revenues, and future revenues and growth, because they adversely impact the prosperity of businesses and the community at large, which the County ultimately embodies.[1] *See id.*, at ¶11.

For example, raising the tax rate disadvantages the County in competition for new businesses and business expansion compared to neighboring counties with lower tax rates. *Id.* at ¶12. Indeed, just a one percent increase in property taxes decreases local economic activity by as much as 1.59 to 1.95 percent. *Id.* at ¶13. This increasingly deleterious adverse impact on economic activity itself harms property tax revenues and all other taxes and fees, such as sales taxes and income taxes, that make up the bulk of the County's total revenues. *Id.* Worse, the adverse economic consequences of raising property tax rates continue to harm total revenues on a going forward basis. *Id.* As recognized by the Supreme Court in *Gladstone*, 441 U.S. at 110-11, the reduced tax base along with the "significant reduction in property values [i.e., tax digest] directly injure[d]" the County because it threatened the County's "ability to bear the costs of local government and to provide services."

V. Defendants May Not Offset The County's Tax Base Damages With Other Taxes the County Collected From Any Source

The cornerstone underlying the Court's question, and Defendants' argument that the County has not suffered tax base related damages if it generally maintained its overall level of tax

[1] The County is not seeking recovery for these downstream damages as they arguably may go beyond the standards of proximate cause set out in these FHA cases.

revenues, is that the property taxes raised by the County from any other source may eliminate, reduce, offset, or set-off, the property tax damages caused by the Defendants. This is incorrect, as a matter of law.

First, as the Illinois Supreme Court has repeatedly made clear "[u]nder the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor ***will not diminish damages otherwise recoverable from the tortfeasor***." *Wills v. Foster*, 892 N.E.2d 1018, 1022 (Ill. 2008) (emphasis added) (quoting *Arthur v. Catour*, 833 N.E.2d 847, 851 (Ill. 2005)).[2] As the *Wills* Court explained, payments made or benefits conferred on the "injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." *Id.* at 1022 (quoting *Arthur*, 833 N.E.2d at 847). The collateral source rule, as an evidentiary rule, also prohibits the jury from "learning anything about collateral income" and, as a matter of substantive law, bars the defendant from reducing the plaintiff's damages award by the amounts received from a collateral source. *Id.* at 1022-23.

Recently, Judge Lee issued a ruling on the collateral source rule in *Giuffre v. Jefferson*, No. 14 C 3692, 2017 WL 1375536, at *2 (N.D. Ill. Apr. 17, 2017), denying defendants' motion *in limine* to prohibit the plaintiff from using his paid medical bills to support his compensatory damages claim and simultaneously barring the defendants from submitting evidence to show that the injured plaintiff's medical bills had already been paid. The court explained the rationale behind the collateral source rule:

> Under the collateral source rule, the amount of damages a plaintiff may be awarded is not decreased by the amount of payments he receives from an independent,

[2] Although the factual record is not yet developed, there is unlikely to be any reasonable factual dispute that the property taxes the County raised to generally achieve level annual property tax revenue (i.e., the tax revenue Defendants argue makes up for any property tax injuries caused by Defendants) have in fact come from sources other than the properties damaged by Defendants' foreclosures.

> collateral source in connection with his injury. *See, e.g., E.E.O.C. v. O'Grady*, 857 F.2d 383, 389–90 (7th Cir. 1988); *Stragapede v. City of Evanston*, 125 F. Supp. 3d 818, 826 (N.D. Ill. 2015). "The idea behind the [collateral source rule], which originated in tort law, is that damages measured by the injury are essential to deterrence." *U.S. Can Co. v. N.L.R.B.*, 254 F.3d 626, 631 (7th Cir. 2001). "The collateral source rule thus focuses on what the tortfeasor and collateral source should pay, not on what the plaintiff should receive." *O'Grady*, 857 F.2d at 390; *accord Stragapede*, 125 F. Supp. 3d at 826.
>
> Of particular importance to this case, the identity of the person or entity who makes a collateral payment to the plaintiff is not dispositive of whether the collateral source rule applies. Instead, "'[a]pplication of the collateral source rule depends less upon the source of funds than upon the character of the benefits received.'" *Molzof v. United States*, 6 F.3d 461, 465 (7th Cir. 1993) (quoting *Haughton v. Blackships, Inc.*, 462 F.2d 788, 790 (5th Cir. 1972)). "[I]n order to determine whether the collateral source rule is applicable, courts have looked to the nature of the payment and the reason the payment is being made rather than simply looking at whether the defendant is paying twice." *Id.*

Giuffre, 2017 WL 1375536 at *2.[3] Thus, Defendants are precluded by law from even arguing at trial, let alone introducing evidence to show, that the County was not injured by Defendants' actions because the County levied and received other taxes to maintain level annual taxes revenues.

Second, Defendants are not entitled to the equitable remedy of an offset or setoff. A setoff "refer[s] to a defendant's request for a reduction of the damage award because a *third party has already compensated the plaintiff for the same injury*." *Thornton v. Garcini*, 928 N.E.2d 804, 812 (Ill. 2009) (emphasis added). As stated in *Illinois School District Agency v. Pacific Ins. Co.*, 571 F.3d 611, 615-16 (7th Cir. 2009), a setoff is applied to "offset any amounts that the plaintiff already has collected from *other sources in compensation for the same injury*." (Emphasis added). Here,

[3] In the context of considering Illinois versus federal choice of law, Judge Lee noted the applicability of "the federal common law collateral source rule in § 1983 cases" and that "the Illinois collateral source rule does not appear to conflict with its federal counterpart. . . ." *Giuffre*, 2017 WL 1375536 at *5, n2 (*citing and suggesting comparison* of *Perry v. Larson*, 794 F.2d 279, 286 (7th Cir. 1986) *with City of Chi. v. Human Rights Comm'n*, 637 N.E.2d 589, 592 (Ill. App. Ct. 1994) ("Under the collateral source rule, the amount of damages a plaintiff is entitled to in a civil action will not be decreased by the amount of benefits the plaintiff received from a source wholly independent and collateral to the wrongdoer.")).

the County has not collected "compensation" from any party for any of the County's tax base injuries that the County has suffered as a result of Defendants' discriminatory conduct.[4] Simply because the County's total annual property tax collections have been relatively stable does not, in any way, support a factual finding (nor would it be appropriate to do so on an undeveloped record at the motion to dismiss phase) that the County's other property tax collections are "compensation" for the alleged property tax base injuries caused by Defendants.[5]

Third, allowing the Defendants an offset or setoff is not appropriate because Defendants have to show that they "conferred a special benefit *to the interest of the plaintiff that was harmed*" and that it would be "*equitable*" to consider that the special benefit was conferred in mitigation of the County's damages. Restatement (Second) of Torts § 920 (emphasis added). There is absolutely no basis whatsoever for the Court to determine that Defendants' alleged discriminatory actions have conferred a "special benefit" on the County, let alone a special property tax base benefit.

Assuming arguendo that Defendants conferred some sort of special tax benefit on the County, Defendants still must show that it would equitable, under the circumstances, for the Court to consider the "special" benefit as one that was conferred to mitigate the County's damages. *See* Restatement (Second) of Torts § 920; s*ee also Birdsong Corp. v. Battaglia*, No. 03 Civ. 604 (JWD), 2004 U.S. Dist. LEXIS 12727, at *2 (N.D. Ill. July 7, 2004) ("whether a "setoff should be granted is an equitable determination for a court to decide."); *Haddad Motor Grp., Inc. v. Karp, Ackerman, Skabowski & Hogan, P.C.*, 603 F.3d 1, 7 (1st Cir. 2010) ("[w]hether an offset should be allowed

[4] Again, although the factual record is not yet developed, there is unlikely to be any reasonable factual dispute that the other property taxes the County collected were paid by other property residents specifically to "compensate" the County for the injuries Defendants caused to the County.

[5] To the extent the County's collection of property taxes from unaffected properties made up for losses in property taxes from Defendants' foreclosure-affected properties, the County is entitled to recover these sums from Defendants. *See Toledo P. & W. Ry. v. Metro Waste Sys.*, 59 F.3d 637, 641 (7th Cir. 1995) (allowing plaintiff to recover as "additional damages the costs it incurred in a good faith, reasonable attempt to mitigate its damages . . . .").

could be regarded as a policy choice"); and *Wernick v. United States*, No. 16 Civ. 5313 (SJC), 2016 U.S. Dist. LEXIS 171962, at *5 (N.D. Ill. Dec. 13, 2016) ("[r]ecoupment is an equitable principle of general application.").[6] It is unlikely that Defendants can ever make an equitable showing because the County has alleged that Defendants targeted and originated loans to minorities that had unfavorable or worse terms compared to non-minority borrowers, continued this discrimination through servicing and ultimately foreclosure. *See, e.g.*, SAC ¶ 5-6, 8, 193, 317, and 333. This unlawful behavior precludes Defendants from asserting a right in equity because "one seeking equitable relief cannot take advantage of his own wrong." *Polk Bros., Inc., v. Forest City Enter., Inc.*, 776 F.2d 185 (7th Cir. 1985) (internal citation omitted). "If the [party] creates or contributes to the situation on which it relies, the court denies equitable relief in order to deter the wrongful conduct." *Id.*

Finally, notwithstanding Defendants' inequitable conduct, subtracting other property taxes raised by the County from the property tax base damages the Defendants caused would thwart the FHA's remedial purpose.[7]

VI. The County Can Prove Its Property Tax Related Damages With Certainty[8]

[6] The court may deny equitable relief to a party who has engaged in unlawful or inequitable conduct in connection with the matter from which he or she seeks relief. *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1021 (7th Cir. 2002). This "unclean hands" doctrine allows a court to refuse equitable relief if granting such relief would produce an illegal or unjust result. *Packers Trading Co. v. CFTC*, 972 F.2d 144, 148–49 (7th Cir. 1992). "Wrongful conduct includes any acts which are inequitable, unfair, dishonest, fraudulent, unconscionable, or in bad faith." *Young v. Verizon's Bell Atl. Cash Balance Plan*, 667 F. Supp. 2d 850, 905 (N.D. Ill. 2009) (quoting 27A Am. Jur. 2d Equity § 100 (2d ed. 2009)).

[7] The FHA's language is "far-reaching and takes aim at discrimination that might be found throughout the real estate market and throughout the process of buying, maintaining, or selling a home." *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1279 (11th Cir. 2019). Its remedial aims are to end housing segregation and broadly bring about more racial equality. *See id.* at 1280. To effectuate its remedial purpose, the FHA allows for the award of actual and punitive damages, as well as temporary and injunctive relief.

[8] If the Court deems it necessary, because of any confusion over the term "tax base" related damages, the County can readily amend the damages section of its SAC to make crystal clear that those "tax base" related damages include the taxes from specific foreclosure affected properties and how it will use regression analyses to isolate and calculate those damages.

The County will prove that its property tax base related damages resulting from the decrease in value of residential properties foreclosed on by Defendants, and those properties surrounding them, were proximately caused by the Defendants by examining the actual property tax losses on the individual properties adversely affected by the foreclosures Defendants caused.

Defendants have already produced mortgage loan origination and servicing data from which the County conducted a fair lending and servicing analysis[9] and identified the property addresses of tens of thousands of foreclosures on minority properties resulting from Defendants' discriminatory practices. Using that data, along with Cook County's assessed property value and tax collection data, all of which has already been produced to Defendants in this litigation, Cook County will be able to accurately and confidently isolate the amount of its tax base related damages that were directly caused by the Defendants' discriminatory practices, as opposed to other factors.[10] As Dr. Charles Cowan explains in his accompanying Declaration, he will perform various regression analyses using the property address and tax data to identify the reduction in taxes that are attributable to Defendants' discriminatory and predatory lending and servicing practices, for each of the individual properties that are at issue.

CONCLUSION

Based on the foregoing, the Court should grant the County's pending Motion for Reconsideration and permit the County the opportunity to prove its property tax base damages and other damages that can be demonstrated to have been proximately caused by the Defendants.

[9] There are over 110,000 loans – mostly Bank of America's home equity loans -- for which Defendants failed or refused to produce critically important data so the County could conduct any type of fair lending or servicing analysis. These loans were the subject of a motion filed by the County and the Court directed Defendants to provide the missing data or explain why the data is unavailable. *See* Order, ECF 363 (Oct. 31, 2019).

[10] The parties have now produced the relevant data to run the relevant regression analysis and there will be no additional discovery burden by permitting the County to try and recover these damages.

Dated: December 3, 2019

Respectfully Submitted,

KIMBERLY M. FOXX,
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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the above and foregoing PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION on all parties by causing a true and correct copy to be filed with the court's electronic filing system, which should automatically send a copy to all counsel of record.

Dated: December 3, 2019

/s/ Kenneth A. Wexler