UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SHATONYA HARRIS, MATEO HUERTA and KEVIN NICHOLSON, on behalf of themselves and all others similarly situated, **Plaintiffs,** **vs.** **CITIGROUP, INC., and CITIMORTGAGE, INC.** **Defendants.**		**C.A. No. 08-10417-MWL** Leave to file granted December 7, 2010

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DEFENDANTS TO PRODUCE DOCUMENTS

Plaintiffs Shatonya Harris, Mateo Huerta and Kevin Nicholson, on behalf of themselves and all others similarly situated ("Plaintiffs"), through counsel, hereby submit this Reply in support of their Motion to Compel [Docket No. 72] and in response to the Opposition of Defendants CitiGroup, Inc. and CitiMortgage, Inc. (collectively "Defendant" or "Citi") [Docket No. 75].

I. PLAINTIFFS HAVE NOT RENEGED ON AN AGREEMENT BETWEEN COUNSEL

Defendant's Opposition to Plaintiffs' Motion to Compel suggests that Plaintiffs' request for additional data was in violation of an agreement between the parties. *See* Defendant's Opposition [Docket 75] at 2, 7 (stating "Plaintiffs effectively reneged on part of this agreement" and characterizing Plaintiffs' counsel as "backtracking on their original agreement.") This is plainly wrong and appears designed to mislead the Court. *See* Declaration of Gary Klein in Support of Plaintiffs' Motion to Compel ("Klein Decl.") at ¶ 2.

It is true that Plaintiffs agreed to an initial round of document production that encompassed only the years 2006 through 2008. Klein Decl. at ¶¶ 5-7. Plaintiffs took this step for the sake of expediency and in the interests of advancing the litigation. *Id.* at ¶ 4. However, as a condition of acceptance to this agreement, Plaintiffs reserved their right to ask for a broader swath of documents and data. *Id.* ¶¶ 5-7. This was not merely a general reservation of rights; Plaintiffs required and received an explicit confirmation that their agreement to the initial production would not prejudice their right to obtain documents from an earlier timeframe. *Id.*

Specifically, in a July 9, 2010 email, counsel for Plaintiffs stated, *inter alia*: "These agreements are acceptable providing you confirm our understanding that Plaintiffs are not waiving any right to data and documents for earlier time periods." *Id.* at ¶ 6 & Ex. B. Defendant's counsel confirmed that understanding in a July 14, 2010 email, stating, *inter alia*: "Per your email of July 9, 2010, we confirm that our understanding of this agreement is that Plaintiffs have reserved the [sic] rights as to whether they can seek documents or data prior January 1, 2006 in future proceedings . . . ." *Id.* at ¶ 7 & Ex. C.

Citi thus had a full understanding not just that Plaintiffs reserved their rights generally, but that they specifically reserved the right to seek data from an earlier time period.[1] That data is precisely what Plaintiffs now seek. For Defendant to characterize this effort as being in derogation of an agreement between counsel is thus contradicted by the litigation history of this case. This characterization is wrong and should be rejected outright by the Court.

II. THE DISPUTED DISCOVERY REQUEST IS SPECIFICALLY RELEVANT TO CLASS CERTIFICATION

Defendant suggests that Plaintiffs have not met their burden of explaining how data from the 2004-2005 timeframe is relevant to class certification. As explained in their initial

[1] Defendant acknowledges as much in its Opposition. *See* Opp. at 7 n.3.

memorandum, Plaintiffs' class certification motion will rely on a statistical analysis to show a class-wide disparate impact caused by Citi's Discretionary Pricing Policy. Mem. at 7-8. Where, as here, the alleged discrimination involves subjective decision-making, statistical analysis showing a discriminatory disparity provides the nexus between the subjective decision-making and the pattern of discrimination sufficient to satisfy commonality. *Id.* at 8 & n.3.[2] As the amount of discretionary deviation from the par rate is the gravamen of the complaint, Plaintiffs need to show, by statistical evidence, that those discretionary deviations affect the putative class in a uniform and consistent way. Fed. R. Civ. P. 23(a)(2). This is just as much true for 2004 and 2005 as it is for 2006. In addition, the Plaintiffs from the 2004-2005 timeframe must show that the level of discrimination against them is typical of discrimination against the Class. Fed. R. Civ. P. 23(a)(3). They cannot do so without statistical evidence from those years.

Professor Ian Ayers, who has previously acted as an expert in support of motions for class certification in similar cases, attests to the need to analyze loan-level data from each of the relevant years within the class period in order to maintain the integrity of the statistical analysis. *See* Declaration of Ian Ayers (attached as Exhibit A) at ¶¶ 5-6. This justification of relevance is true for each and every one of the years included in the class period. *Id.* Indeed, in order for

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[2] *See, e.g., Barefield v. Chevron U.S.A. Inc.,* No. C86-2427, 1987 WL 65054, at *3 (N.D. Cal. Sept. 9, 1987) (finding classwide impact in a Title VII employment discrimination case on the basis of plaintiffs' statistical analysis that showed a disparate impact by revealing "a disproportionately low representation of blacks and Hispanics in upper-level jobs . . ."); *Ellis v. Costco Wholesale Corp*., 240 F.R.D. 627, 638-40 (N.D. Cal. 2007); *McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428, 441 (D.D.C. 2002) (plaintiffs' statistical analysis supported a finding of commonality because they showed a pattern of discrimination across the defendants' operating divisions); *Hnot v. Willis Grp. Holdings LTD*, 228 F.R.D. 476, 483 (S.D.N.Y. 2005) (finding commonality based on statistical showing of significant disparity in promotion and compensation between women and men working in defendant's northeast region).

Plaintiffs to offer a comprehensive and robust statistical analysis, they must have a complete dataset from the entirety of the time period at issue. *Id.*[3]

III. THE DISPUTED DISCOVERY REQUEST IS RELEVANT TO PLAINTIFFS EFFORTS TO CERTIFY A CLASS REACHING BACK TO 2004

Plaintiffs have pled a class that reaches back to 2001. *See* Second Am. Compl. at ¶ 118. In addition, Plaintiffs' pleading puts the Defendant on notice that its Discretionary Pricing Policy constitutes a pattern or practice that falls within the "continuing violation" doctrine, as codified in the Fair Housing Act itself, 42 U.S.C. § 3613(a)(1)(A).[4] *See* SAC at ¶¶ 96-115.[5] Based on a statute of limitations defense that Citi failed to raise in either its unsuccessful motion to dismiss [Docket No. 41], or in a motion to strike portions of the complaint, Citi now contends that documents from the 2004-2005 timeframe are irrelevant. Plaintiffs intend to move to certify a class that includes Citi borrowers from the 2004-2005 timeframe. Unless Citi is willing to consent that these borrowers are properly included within the class, the disputed discovery requests will be necessary to show commonality and typicality under Rule 23.

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[3] As the Defendant is likely to assert that its pricing policies changed over time, even absent the continuing violations doctrine, data from 2004 and 2005 is relevant to the question of the whether disparities identified for 2006 are causally connected to the challenged pricing policies.

[4] "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...." 42 U.S.C. § 3613(a)(1)(A) (emphasis added).

[5] These paragraphs of the Second Amended Complaint undermine Citi's reliance on *Steele v. GE Money Bank*, No. 08-1880, 2009 WL 393860 (N.D. Ill. Feb. 17, 2009). Here, Plaintiffs have pled a class of borrowers that reaches back beyond the limitations period. Whether the named plaintiffs are typical and adequate class representatives is an issue to be decided in the context of class certification. Having defeated a motion to dismiss, and pursuant to this Court's scheduling orders, Plaintiffs are entitled to discovery that will support their motion for class certification on the allegations as pled, which include claims for borrowers in the 2004-2005 timeframe. Had Citi wished to limit its exposure in discovery to claims extending only back to 2006, it was incumbent upon it to move to dismiss or strike that portion of the Second Amended Complaint.

Citi's new argument that such borrowers may not be included in the class ignores authority that is directly on point, misreads *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) ("*Havens Realty*") and fails to account for recent developments in the law.

A. Plaintiffs' Inclusion of 2004-2005 Borrowers in the Class Comports with Authority that is Directly On Point

When Plaintiffs move to certify the class, the Court likely will apply the continuing violation doctrine, as pled in the Second Amended Complaint, and consider 2004-2005 borrowers for certification. In a case with nearly identical claims, a class stretching back two years prior to the statute of limitations has recently been certified. *Ramirez v. GreenPoint Mortgage Funding, Inc.*, No. C08-0369, 2010 WL 2867068 (N.D. Cal. July 20, 2010) ("*Ramirez*"). The *Ramirez* Court expressly accepted application of continuing violation doctrine in a prior ruling. *Ramirez v. GreenPoint Mortgage Funding, Inc.*, No. C08-0369-TEH, 2008 WL 2051018 at *5-7 (N.D. Cal. May 13, 2008).

Moreover, this Court has expressly accepted Plaintiffs' application of the continuing violation doctrine at the motion to dismiss stage in another nearly identical case. *See Miller v. Countrywide Bank, N.A.*, No. 07-cv-11275, 2008 WL 3522374, at *7-9 (D. Mass. July 30, 2008) ("*Miller*"). In *Miller,* the Court found that continuing violation theory applied in these circumstances because the plaintiff challenged an ongoing policy that stretched into the limitations period. *Id.*, 2008 WL 3522374 at *8 (noting that the plaintiff "makes a *Havens Realty* type claim, challenging a *policy* that continues into the limitations period" and that "this is a disparate impact case, where both the challenged policy and its disparate effects continue in the relevant period") (emphasis in original). On the basis of *Ramirez* and *Miller* alone, the Plaintiffs stand on firm footing in moving to certify a class including borrowers from the 2004-2005 timeframe.

B. Citi's Argument to the Contrary Misreads *Havens Realty*

Ignoring this directly relevant authority, and citing *Kimbrew v. Fremont Reorganization Corp.*, No. 08-3277-AG, 2008 WL 5975083 (C.D. Cal. Nov. 17, 2008), Citi's opposition now, for the first time, raises an argument that borrowers from 2004 and 2005 may not be included in the class. Citi's position is that the class here at issue may not encompass borrowers from any time prior to 2006 because continuing violation doctrine does not apply. Both *Kimbrew* and Citi's recitation of that court's opinion misjudge the import of the Supreme Court's decision in *Havens Realty.*

Havens Realty was a class action brought by three individuals (one "renter" and two "testers") and one fair housing organization for violations of § 804 of the FHA, its anti-steering provision.[6] Paul Coles, the renter plaintiff, was a black man who intended to rent from the defendant, but was falsely told that no apartments were available. The two tester plaintiffs, Sylvia Coleman and R. Kent Willis (black and white, respectively), were employed by the fair housing organization to make near-simultaneous and repeated inquiries of the defendants – in each instance receiving contrary information about the availability of apartments. Of the three individual plaintiffs, only Coles' (the "renter" plaintiff) incident was within the then-relevant 180-day statute of limitations.

The Supreme Court ruled "that for the purposes of [the statute of limitations], a 'continuing violation' of the FHA should be treated differently from one discrete act of discrimination." Justice Brennan, writing for the Court-- only Justice Powell saw fit to file a

[6] Although the Supreme Court's opinion identifies the complaint in *Havens Realty* as a class action, the appropriateness of the claims for class treatment is not addressed. The Court was reviewing the complaint at the motion to dismiss stage, with the exception of the steering claim of the renter plaintiff, which, unfettered by tolling issues, had previously resulted in a trial after class certification.

separate opinion, in concurrence-- justified the use of continuing violation theory by noting that such conduct by the defendant removes it from the staleness concerns that statutes of limitations are designed to address. To view the statute of limitations differently would "undermine[] the broad remedial intent of Congress embodied in the Act." *Havens Realty*, 455 U.S. at 380. The Court described a proper continuing violation claim as such: "[W]here a plaintiff, pursuant to the FHA, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." *Id.* 455 U.S. at 381. Here, as in the *Ramirez* and *Miller* cases, Plaintiffs challenge a Discretionary Pricing Policy that continued into the limitations period.

In applying the continuing violation doctrine, the *Havens Realty* Court found that the otherwise untimely "neighborhood integration" allegations of Coleman and Willis were rendered timely by the inclusion of Coles' identical and timely claim – all three claims stemmed from a common discriminatory policy. The Supreme Court, however, rejected Coleman's "specific injury" claim arising from the false information given to her. In making this distinction, the Court emphasized that the "neighborhood integration" claims were "based not solely on isolated incidents involving the two respondents, but a continuing violation manifested in a number of incidents -- including at least one (involving Coles) that is asserted to have occurred within the 180-day period." *Havens Realty*, 455 U.S. at 381. By contrast, the Court characterized Coleman's "specific injury" claim as occurring on "four isolated occasions." *Id.*

Similarly, Plaintiffs here do not challenge isolated instances of discrimination, but rather an ongoing policy – the Discretionary Pricing Policy – that continued into the limitations period. Disparate impact claims, by their very nature, allege injury occasioned by the cumulative effect

of an ongoing policy – and are not challenges to individual transactions, in and of themselves. *See Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 990-91 (1988).

This interpretation of continuing violation doctrine is consistent with First Circuit jurisprudence. The First Circuit has made clear that the doctrine applies to toll the applicable statute of limitations in the context of civil rights cases, so long as the discriminatory policy remains in place. *See, e.g., Jensen v. Frank*, 912 F.2d 517, 523 (1st Cir. 1990) (A systemic violation usually "has its roots in a discriminatory policy or practice; so long as the policy or practice itself continues into the limitation period, a challenger may be deemed to have filed a timely complaint," even if he fails to show "an identifiable discrete act of discrimination transpiring within the period.") The *Kimbrew* court, of course, was not bound by *Jensen* as this Court is. Thus, *Havens Realty*, as interpreted by the First Circuit, and as interpreted by the Courts in *Ramirez* and *Miller*, ensures that the Court will likely agree to consider a class encompassing borrowers from 2004 forward on class certification.

C. Even if the *Kimbrew* Court's Interpretation of *Havens Realty* were Correct, the Opposition Ignores Important Developments in the Law that Have Occurred Since that Ruling

Even putting aside whether *Kimbrew* represents a correct interpretation of *Havens Realty*, Citi's argument fails in the face of two important developments in the law since *Kimbrew* was decided. First, on January 29, 2009, the Lily Ledbetter Fair Pay Act, Pub. L. 111-2, became law, amending the definition of an "employment practice" in Title VII. This new law expressly abrogates the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), finding that the decision was "at odds with the robust application of the civil rights laws that Congress intended." *See* Pub. L. 111-2, § 2, (Jan. 29, 2009). Congress specifically rejected the Court's enunciation of an unlawful employment practice as occurring only at the

time the original discriminatory decision is executed. In place of that interpretation, Congress defined an unlawful practice as also occurring "*when an individual is affected by application of a discriminatory compensation decision or other practice*, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." 42 U.S.C. § 2000e-5(3)(a) (emphasis added).

The clear import of the statutory amendment and the congressional findings that heralded its adoption is that federal courts take too narrow a view of civil rights laws if they parse the facts of civil rights claimants who suffer from ongoing discrimination to dismiss claims as untimely. Just as Ms. Ledbetter complained that she continued to be discriminated against long after the original decisions to pay her less money were made, so too can the Plaintiffs in this case illustrate discrimination for as long as they continue to make the more onerous loan payments occasioned by impermissible disparate impact. *See, e.g., Bazemore v. Friday*, 478 U.S. 385*,* 395 ("[e]ach...paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the to the effective date"); Second Am. Compl. at ¶ 108. The codification of continuing violation doctrine in the FHA, *see* 42 U.S.C. § 3613(a)(1)(A), is consistent with the basic premise for which the Lily Ledbetter Fair Pay Act was passed.[7]

Second, the Supreme Court's recent decision in *Lewis v. City of Chicago,* 130 S. Ct. 2191 (2010) ("*Lewis*") reversed the Seventh Circuit opinion that Citi relies on and clearly supports

[7] There is a long and well-established history of reading the Fair Housing Act and Title VII in concert with each other because they were both drafted with broad remedial goals in mind. *See, e.g.*, Gamble v. City of Escondido, 104F.3d 300, 304 (9th Cir.1997) ("Title VII discrimination analysis" applies to FHA discrimination claims); *Pfaff v. U.S. Dep't of Housing & Urban Dev.,* 88 F.3d 739, 745 n. 1 (9th Cir. 1996) (same); *Mille v. American Express Co.*, 688 F.2d 1235, 1239-40 (9th Cir. 1982) (Title VII disparate impact analysis applies to ECOA); *Pina v. Town of Plympton*, 529 F.Supp. 2d 151, (D. Mass. 2007) (applying Title VII standard in FHA case).

application of continuing violation doctrine here. In *Lewis*, the Court considered disparate impact racial discrimination claims of minority firefighter applicants, similar to those here at issue. The city's method of hiring firefighters involved administering an exam once every several years and then using the results from that exam to make hiring decisions into the future. *Lewis*, 130 S. Ct. at 2195-96. The *Lewis* plaintiffs alleged that the 1995 exam produced results that had an impermissible disparate impact on minorities. *Id.* However, the *Lewis* plaintiffs waited two years after the exam to bring their suit – after the first two rounds of hiring based on the 1995 exam had occurred. *Id.* The relevant statute of limitations required any claim of an impermissible employment practice to be brought within 300 days of that practice. *Id.*, 130 S. Ct. 2197-98. Presented to the Court, then, was the question whether the employment practice on which the disparate impact claim was based should be considered to be only the 1995 exam itself, or whether it should also include the subsequent "clerical" act of hiring.

Writing for a unanimous Court, Justice Scalia focused on the fact that Plaintiffs were challenging a discriminatory practice, the use of which continued into the limitations period. The *Lewis* Court thus held that an employer "uses" a particular employment practice not just at the time when it is first adopted and applied, but each subsequent time that it is used to the plaintiffs' detriment. *Id.*, 130 S. Ct. at 2198. Further, the *Lewis* opinion makes clear that the Supreme Court's prior decisions distinguishing between "present effects" and "past discrimination" do not apply in the context of disparate impact cases, where there is no requirement that Plaintiffs illustrate intent. *Id.*, 130 S. Ct. at 2199. Just as in *Bazemore*, *supra*, and *Lewis*, the Citi's 2004 and 2005 borrowers became subject to the Discretionary Pricing Policy at the time their loan closed, but the continuation of that policy into the limitations period is illustrated by their monthly payment on terms that were discriminatorily marked up.

Taken together, the Lily Ledbetter Fair Pay Act and *Lewis* establish that the Court will be applying the continuing violation doctrine against a legal landscape that is vastly different than was before the *Kimbrew* court. Adding these developments to the already overwhelming balance of authority in support of its application, the Court is likely to apply continuing violation doctrine and consider certification of a class extending beyond the strict limitations period. For this reason, the data sought now sought by Plaintiffs is clearly relevant.

IV. THE ADDITIONAL DATA ELEMENTS SOUGHT BY PLAINTIFFS ARE NECESSARY FOR STATISTICAL ANALYSIS AND ARE LIKEWISE RELEVANT

Defendant's Opposition offers no meaningful rebuttal to Plaintiffs' argument that the additional data elements they seek are relevant. Instead, Citi resorts to the same position that was disproved above – that since Plaintiffs initially accepted a narrower range of data than was originally requested, they therefore somehow waived their right to seek additional data elements. This position is supported neither by the litigation history of this case, *see supra* Section I, nor by law. There can be no doubt that the requested data constitutes "nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Because this data is directly relevant to Plaintiffs' claims, they need not even meet the "good cause" standard in Rule 26(b)(1) for discovery of materials that is only generally relevant to the subject matter of the litigation.

In any event, the additional data elements are relevant. Plaintiffs anticipate that Citi will assert that some or all of any disparity is related to differences in minority and non-minority credit characteristics as a group. In order to evaluate this question statistically, Plaintiffs' must have access to all information on which Citi might base a business necessity defense. Of course, if Citi is willing to stipulate that it will not raise a business necessity defense nor otherwise

object to the reliability of Plaintiffs' expert's analysis on the basis of these additional data elements, Plaintiffs will drop this request. As it stands however, it is clear that the additional data elements are relevant to Plaintiffs' expert's statistical analysis. *See* Ayers Decl. at ¶¶ 7-14.

It is particularly bold of Citi to disclaim the relevance of data elements identified by Plaintiffs as necessary for their expert to execute statistical analysis. The effect of this argument is to place Citi in a position where it can micromanage Plaintiffs' expert's analysis and methodology. On the question of what is relevant to their own expert's statistical analysis, Plaintiffs, not Citi, have the prerogative.

V. CONCLUSION

For the reasons stated herein, as well as in the motion and memorandum of points and authorities in support of Plaintiffs' Motion to Compel and the supporting Declarations of Gary Klein and Ian Ayers, the Court should grant Plaintiffs' motion and order production of the requested materials.

Respectfully Submitted,
On behalf of Plaintiffs

Dated: December 7, 2010

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CERTIFICATE OF SERVICE

I, Gary Klein, hereby certify that on December 7, 2010, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent to all registered users through the Court's ECF system.

/s/ Gary Klein
Gary Klein