UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. GFI MORTGAGE BANKERS, INC., Defendant.	**Case No. 1:12-cv-02502-KBF-FM** Judge Katherine B. Forrest Courtroom 15A

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

Andrew L. Sandler
Kirk D. Jensen (*pro hac vice*)
Joseph J. Reilly
Andrew R. Louis (*pro hac vice*)
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington, DC 20037
Tel: (202) 349-8000
Fax: (202) 349-8080

Attorneys for Defendant GFI Mortgage Bankers, Inc.

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PRELIMINARY STATEMENT

The United States has failed to state a cognizable claim against GFI Mortgage Bankers, Inc. ("GFI"). GFI does not discriminate against borrowers on the basis of race or national origin or on any other prohibited basis.[1] As a small, closely-held mortgage lender operating since 1983,[2] GFI provides home loans to borrowers based on underwriting and pricing guidelines set by the institutional loan purchasers to which it sells the loans.[3] *See, e.g.*, Compl. ¶¶ 17, 28. GFI makes loans based on a common and widely-accepted business model that includes loan officers meeting with prospective borrowers, offering appropriate loan products, and obtaining necessary information and documentation, while loan underwriters and processors ensure that the information satisfies the guidelines of the particular loan product. GFI's practices are consistent with state and federal regulations requiring disclosure of the price and terms of the loan being provided.

After nearly five years of investigation, *id.* ¶ 11, plaintiff offers only superficial statistical analyses to support its claims that GFI has violated the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f, and the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3619. *See, e.g.*, Compl. ¶¶ 13-14, 24-25. Plaintiff theorizes—without alleging any support for those theories—a causal relationship between alleged statistical disparities and GFI's policy of allowing loan officers, subject to the review and approval of GFI's underwriters, to use limited discretion in pricing loans and its loan officer compensation structure. *See id.* ¶¶ 16, 18, 27, 29.

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[1] If required to do so, GFI will show that its lending policies are fair and do not discriminate against minority borrowers either in purpose or in effect. GFI will also show, if necessary, that it has a legitimate business justification for its lending policies.

[2] All of GFI's employees would constitute less than 0.5% of the employees of the mortgage operations of the major bank lenders with whom GFI competes.

[3] GFI is a non-portfolio lender, which means that it does not keep the loans it originates, but rather sells the loans it makes on the secondary market. Like other non-portfolio lenders, GFI tailors its lending policies and practices and loan pricing to ensure the loans it makes satisfy the criteria set by the ultimate loan purchasers.

The Complaint fails to state a cognizable claim for a number of reasons. *First*, a plain reading of the FHA and ECOA reveals that neither includes the language that the U.S. Supreme Court has held is required to permit disparate impact claims under a federal anti-discrimination statute. And while cases in the Second Circuit have allowed such claims in the past, those cases preceded the clarifying Supreme Court rulings on disparate impact. *Second*, even if the FHA and ECOA could be interpreted to allow claims under a disparate impact theory, the Complaint fails to state a plausible disparate impact claim. *Third*, assuming that plaintiff intends to pursue a claim for intentional discrimination, the Complaint completely fails to state a plausible claim for disparate treatment. In short, plaintiff's claims are both legally insufficient and insufficiently pled and supported. *Finally*, plaintiff's claims under Section 804 of the FHA must be dismissed because only Section 805 of the FHA applies to mortgage lending claims. For these reasons, the Complaint should be dismissed.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), to avoid dismissal

> [A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted); *see also McKenna v. Smart Technologies Inc.*, No. 11-cv-7673, 2012 WL 1131935, at *7 (S.D.N.Y. April 03, 2012) (Forrest, J.). Under these pleading standards, plaintiff has failed to state any claim upon which relief can be granted, and therefore the Complaint should be dismissed.

I. PLAINTIFF'S CLAIMS MUST BE DISMISSED BECAUSE NEITHER THE FHA NOR ECOA PERMIT DISPARATE IMPACT CLAIMS.

The plain language of the FHA and ECOA shows that neither statute permits disparate impact claims. Although the Supreme Court has not directly considered the availability of disparate impact claims under either Act,[4] the Supreme Court has clarified in its ADEA and Title VII employment discrimination jurisprudence 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. The Supreme Court's rulings, which track a long line of cases requiring faithful examination of the statutory text, cannot be squared with a holding that either the FHA or ECOA permit disparate impact claims.

A. FHA And ECOA Lack The Statutory Language That Would Permit Disparate Impact Claims.

The Supreme Court has made it clear which statutory language permits disparate impact claims—and which cannot. In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Court considered whether the Age Discrimination in Employment Act ("ADEA") permits disparate impact claims. Noting the similarity between the ADEA and Title VII (the statute which has historically provided the basis for interpreting FHA and ECOA),[5] the Court reviewed its Title VII jurisprudence for guidance—and, in the process, clarified and emphasized that its Title VII disparate impact jurisprudence is firmly rooted in the plain language of the statutory text. Justice Stevens' plurality opinion clarifies that the Court's holding in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was based on the "interpretation of § 703(a)(2) of Title VII." *City of Jackson*, 544 U.S. at 234. While the Court acknowledged that its opinion in *Griggs* relied in part on the

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[4] *See, e.g.*, *Sherman Ave. Tenants Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006) (noting that the Supreme Court "has yet to consider the availability of disparate impact claims under the FHA"); *Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) (ECOA).

[5] *See, e.g.*, *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003) ("When examining disparate impact claims under the FHAA and ADA, we use Title VII as a starting point.").

purposes of Title VII, the Court has "subsequently clarified" that its Title VII disparate impact jurisprudence is based on the text of Section 703(a)(2) of Title VII, not on an analysis of the overall purposes of the Act. *Id.* at 235.[6] By showing that the original disparate impact holding in *Griggs* was rooted in specific language in the text of Title VII rather than being implied by the overall purposes of the statute—and by basing its disparate impact analysis under the ADEA on the text of the statute—the Supreme Court's decision in *City of Jackson* reaffirms the primacy of the statutory text in construing anti-discrimination statutes.

City of Jackson is but one in a long line of Supreme Court cases reminding courts and litigants to look to the text of the statute when determining whether a particular cause of action exists. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) ("Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."); *Wards Cove*, 490 U.S. at 655 n.9; *Watson*, 487 U.S. at 991. The most recent reminder of this tenet came in a unanimous decision in May 2012. *See Freeman v. Quicken Loans, Inc.*, No. 10-1042, 2012 WL 1868063, at *12-13 (U.S. May 24, 2012) ("Vague notions of statutory purpose provide no warrant for expanding [a statute's] prohibition beyond the field to which it is unambiguously limited..."). *City of Jackson* is, to date, the clearest example of this rule applied to the availability (or lack thereof) of disparate impact claims in anti-discrimination statutes.

In what would have been a related case, the Supreme Court recently granted certiorari in a case directly addressing the issue of whether the FHA allowed for claims of disparate impact, despite the lack of a split amongst the circuit courts. *See Magner v. Gallagher*, 132 S.Ct. 548 (U.S. Nov. 7, 2011); *see also* Petition for Writ of Certiorari at i, *Magner v. Gallagher*, 2011 WL

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6 *Accord Griggs*, 401 U.S. at 426 (quoting § 703(a)(2) but not § 703(a)(1)); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (same); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 n.9 (1989) (same).

549171 (Feb. 14, 2011) (posing, *inter alia*, the following question presented: "Are disparate impact claims cognizable under the [FHA]?"). But the Petitioner dismissed the case following briefing but before oral argument. *See Magner v. Gallagher*, 132 S.Ct. 1306 (U.S. Feb. 14, 2012).[7] In granting certiorari absent a Circuit split, the Supreme Court signaled that the question of whether disparate impact claims are available under the FHA was an important one to address and resolve.

The Supreme Court's application of textual analysis in *City of Jackson* strongly suggests that, if given the chance, the Supreme Court will confirm that the FHA and ECOA do not permit disparate impact claims. The Court explained that disparate impact claims under Title VII are permitted by the "effects" language of Section 703(a)(2). Section 703(a) provides:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (emphasis added). The Court held that the text of ADEA § 4(a)(2)—which mirrors Title VII § 703(a)(2)—led to the conclusion that the ADEA permits disparate impact claims. *City of Jackson*, 544 U.S. at 235-38. This is because the language of the ADEA, like Title VII, prohibits actions that "otherwise adversely affect" the

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[7] Petitioner the City of St. Paul abandoned the appeal despite its stated confidence that it would prevail on this issue—i.e., that the text of the FHA does not authorize claims of disparate impact. *See* City of Saint Paul seeks to dismiss United States Supreme Court case *Magner vs. Gallagher* at http://www.stpaul.gov/index.aspx?NID=4874 ("While Saint Paul likely would have won in the United States Supreme Court, a victory could substantially undermine important civil rights enforcement throughout the nation.").

employee's status. *Id.* at 236. "Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Id.*; *see also Watson*, 487 U.S. at 991 (explaining that in disparate impact cases, "the employer's practices may be said to 'adversely affect' [an individual's status] as an employee").

In addition to explaining that the "effects" language Title VII § 703(a)(2) permits disparate impact claims, the Court clarified that subsection (a)(1)—the subsection lacking the "effects" language and which the FHA and ECOA mirror—does not. The Court noted that there are "key textual differences" between subsections (a)(1) and (a)(2). *City of Jackson*, 544 U.S. at 236 n.6. Whereas Subsection (a)(2) permits disparate impact claims, the Court explained that Subsection (a)(1) encompasses disparate treatment, but "*does not encompass disparate-impact liability*," and requires a showing of intent. *Id.* at 236-38 (emphasis added). This is because "the focus of the paragraph is on the employer's actions with respect to the targeted individual." *Id.* at 236 n.6. And, while the Justices disagreed as to whether Subsection (a)(2) permits disparate impact claims, the Court was unanimous that Subsection (a)(1) does not. *See id.*; *id.* at 243 (Scalia, J., concurring) ("I agree with all of the Court's reasoning...."); *id.* at 249 (O'Connor, J., dissenting) ("Neither petitioners nor the plurality contend that [subsection (a)(1)] authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent....").

The Court's clarification of the disparate treatment and disparate impact provisions of Title VII shows that neither the FHA nor ECOA permits disparate impact claims. The language of both FHA Section 805 (codified as 42 U.S.C. § 3605) and ECOA Section 1691(a)(1) mirrors Section 703(a)(1) of Title VII, which permits disparate treatment claims but not disparate impact claims. *Compare* Title VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), *with* FHA § 805(a), 42

U.S.C. § 3605(a) and ECOA, 15 U.S.C. § 1691(a)(1). Moreover, neither FHA Section 805 nor ECOA Section 1691(a)(1) contains any "effects" language comparable to Section 703(a)(2)—the provisions of Title VII that permits disparate impact claims. This is illustrated as follows:

	Title VII	**FHA**	**ECOA**
	(a) It shall be an unlawful employment practice for an employer	(a) In general. It shall be unlawful for any person or other entity…	(a) It shall be unlawful for any creditor
Disparate Treatment Language	(1) to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, sex, or national origin;	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.	to *discriminate against any applicant*… (1) *on the basis of* race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
Disparate Impact Language	(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or o*therwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin.	**None.**	**None.**

Neither the FHA nor ECOA contains any language focusing on the effects of actions comparable to the language of Title VII § 703(a)(2), as is required to support disparate impact claims.

These differences are dispositive of Congress's intent in enacting the FHA and ECOA. The Supreme Court has explained that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *City of Jackson*, 544 U.S. at 233-34. Indeed, this was the basis for the Court concluding that an

"effects" provision in the ADEA comparable to Title VII's "effects" provision meant Congress intended to permit disparate impact claims. *Id.* at 235-38. The reverse is also true: "This use of different language in two statutes so analogous in their form and content, enacted so closely in time, suggests that the statutes differ in their meaning...." *Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (Roberts, J., concurring), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). The absence in the FHA and ECOA of an "effects" provision comparable to Title VII § 703(a)(2) and ADEA § 4(a)(2) shows that neither the FHA nor ECOA permit disparate impact claims.[8]

No federal court of appeals has addressed the impact of *City of Jackson* on the availability of disparate impact claims under the FHA and ECOA.[9] Two circuit courts, however, have questioned whether such use of the disparate impact theory in such cases remains appropriate in light of *City of Jackson*. The D.C. Circuit observed that "[t]he Supreme Court has held that this ['effects'] language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA," citing to *City of Jackson*, but noted that "ECOA contains no such language." *Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006). More recently, five judges from the Eighth Circuit dissented from a denial of en banc rehearing in *Magner v. Gallagher*, noting that "recent developments in the law"—primarily *City of Jackson*—

[8] In a brief filed before the Supreme Court, the Solicitor General explained that "[t]he legislative history reinforces the understanding that Congress intended to require a showing of intentional discrimination." Brief of United States as Amicus Curiae, *Town of Huntington v. Huntington Branch, NAACP*, No. 87-1961 (U.S. filed June 1988) (emphasis added and citations omitted), *available at* http://www.usdoj.gov/osg/briefs/1987/sg870004.txt. For a more detailed review of the FHA and ECOA legislative histories, neither of which contemplates the inclusion of disparate impact claims, *see* Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and* Magner v. Gallagher*: An Opportunity to Return to the Primacy of the Statutory Text*, 129 BANKING L.J. 99, 104-107 (2012), and Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words That Actually Are There*, 61 BUS. LAW. 829, 834 (2006).

[9] Plaintiff likely will urge this Court to follow district court cases that address *City of Jackson* in FHA and/or ECOA disparate impact cases. For the reasons discussed herein, these cases cannot be squared with *City of Jackson* and other Supreme Court decisions regarding the primacy of the statutory text. *See, e.g., Barrett v. H & R Block, Inc.*, 652 F. Supp. 2d 104 (D. Mass. 2009). Furthermore, those decisions predate the Supreme Court's granting of certiorari in *Magner v. Gallagher*.

"suggest that the issue [of disparate impact under the FHA] is appropriate for careful review by the en banc court." *Gallagher v. Magner*, 636 F.3d 380, 383 (8th Cir. 2010) (Colloton, J., dissenting).

The Second Circuit and its district courts are no exception.[10] Prior to *City of Jackson* the Second Circuit held that the FHA permits disparate impact claims; but those decisions were based on precedent from other circuits that the Supreme Court subsequently discredited in *City of Jackson* and other cases. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir. 1988), *judgment aff'd*, 488 U.S. 15 (1988); *United States v. Starrett City Assoc.*, 840 F.2d 1096, 1100 (2d Cir. 1988). The incorrect notion that the FHA permits disparate impact claims originated in three lower court decisions in the 1970s—*United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *Metropolitan Housing Development Corp. v. Village of Arlington Heights* ("*Arlington Heights II*"), 558 F.2d 1283 (7th Cir. 1977), and *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977). None of these cases held that the statutory text of the FHA permitted disparate impact claims—indeed, one of these cases, *Arlington Heights II*, acknowledged that the text of the FHA indicated that the FHA requires that claims of discrimination include a showing of intent to discriminate. 558 F.2d at 1288 (acknowledging that a "narrow view of the phrase ['because of race']" in the statute would require intent to discriminate). Instead, these courts focused on what they viewed as the broad purpose of the Act, and on cases decided under other laws and what the courts viewed as the

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[10] GFI found one unreported district court decision that held that the FHA allows disparate impact claims and applied the *City of Jackson* burden shifting disparate impact test. *See Rodriguez v. Bear Stearns Cos.*, No. 07-cv-1816-JCH, 2009 WL 5184702, *6 (D. Conn. Dec. 22, 2009). The court did not, however, consider whether *City of Jackson*'s holding allowed for the application of the disparate impact claim under the FHA. And while GFI located one district court decision (also unreported) that considered the application of *City of Jackson* to ECOA, *see Rodriguez v. SLM Corporation*, No. 07-cv-1866-WWE, 2009 WL 598252, at *3 (D. Conn. Mar. 6, 2009), this case does not engage in the textual analysis required by *City of Jackson*. Instead, it merely relies on other district court cases and "the early stage of this action," apparently leaving open the possibility of revisiting the issue. *Id.* The failure of these courts to fully consider, let alone follow, the *City of Jackson* decision was incorrect.

broad purpose of the FHA.[11] The Supreme Court has repeatedly rejected such a view, *see, e.g., Alexander*, 532 U.S. at 286-87; *Wards Cove*, 490 U.S. at 655 n.9; *Watson*, 487 U.S. at 991, most recently clarifying that "[v]ague notions of statutory purpose provide no warrant for expanding [a statute's] prohibition beyond the field to which it is unambiguously limited...." *Freeman*, No. 10-1042, 2012 WL 1868063, at *12-13 ("No legislation pursues its purposes at all costs, and every statute purposes, not only to achieve certain ends, but also to achieve them by particular means." (citations and internal modifications omitted)).

The Second Circuit has not yet addressed whether ECOA permits disparate impact claims. Although some district courts within this circuit have held that ECOA permits disparate impact claims, they have done so based on the Federal Reserve Board's (the "Board") application of Title VII precedent in Regulation B (the regulation that implements ECOA). *See, e.g.*, *Jones v. Ford Motor Credit Co.*, No. 00 CIV. 8330 (LMM), 2002 WL 88431, at *4 (S.D.N.Y. Jan. 22, 2002). As GFI will discuss in more detail below, *City of Jackson* shows that the Board's regulation is inconsistent with the statutory text and is not entitled to deference.

City of Jackson shows that *Huntington Branch* and *Starrett City* and the cases upon which they relied are no longer viable precedent. *C.f. Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 172 (2d Cir. 2001) ("[W]e have often noted that one panel of this court is not bound by a prior panel decision whose rationale is overruled, implicitly or expressly, by the Supreme Court.") (citations omitted); *Limbach v. The Hooven & Allison Co.*, 466 U.S. 353, 360-61 (1984) (holding that the progeny of overruled cases "must be regarded as retaining no vitality"). The Supreme Court's adherence to the primacy of the statutory text and clarification of its Title VII jurisprudence in *City of Jackson* shows that past FHA and ECOA disparate impact jurisprudence

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[11] For a detailed discussion of these three cases, their rationales, and the cases that later relied upon them, *see* Jensen & Naimon, *supra* note 8, at 125-29.

is without a solid foundation. In the aftermath of *City of Jackson*, the lower courts' FHA and ECOA disparate impact jurisprudence is no longer viable precedent.

B. Federal Agency Interpretations of FHA and ECOA are Neither Reasonable nor Entitled to Deference.

Plaintiff will likely argue that disparate impact claims under FHA and ECOA are authorized by agency interpretations of those statutes. These interpretations, however, are based on now-discredited case law and on the application of Title VII case law to FHA and ECOA. The agency interpretations notably omit any analysis of the statutory text of the FHA and ECOA, and the "key textual differences" between the text of the FHA and ECOA, and the language in Title VII that permits disparate impact claims. *City of Jackson*, 544 U.S. at 236 n.6. *City of Jackson* shows that the agencies' reliance on case law is misplaced. Because the agencies' interpretations are "manifestly inconsistent with the statute" the agencies purported to construe, *see Freeman*, 2012 WL 1868063, at *5, they are not entitled to deference. *See, e.g., TEVA Pharms. USA, Inc. v. FDA*, 441 F.3d 1, 5 (D.C. Cir. 2006) (explaining that an agency's reliance on discredited case law "renders its decision arbitrary and capricious" and noting that "[a]n [agency] order may not stand if the agency has misconceived the law").

The Department of Housing and Urban Development's ("HUD") interpretation of the FHA is based on case law that *City of Jackson* shows conflicts with the FHA itself. Recently, HUD for the first time issued a proposed rule ostensibly to establish standards for determining whether an action or policy has a disparate impact violative of the FHA. 76 Fed. Reg. 70921 (proposed Nov. 16, 2011). HUD bases its interpretation solely on two factors. First, it relies on the holdings by federal courts of appeals that the FHA permits disparate impact claims. *Id.* at 70923. As discussed above, *City of Jackson* and other cases show that this reliance is misplaced because these cases relied on a misunderstanding of the Supreme Court's Title VII jurisprudence

and are inconsistent with the text of the FHA itself. Second, HUD relies on the "broad remedial intent" of the FHA and its own past determinations that the FHA "is directed to the consequences of housing practices, not simply their purpose." *Id.* at 70922. HUD's analysis is flawed, however, as *City of Jackson* makes clear that disparate impact claims must be permitted by the text of the statute, not merely the statute's broad purpose. 544 U.S. at 234-35. Indeed, *City of Jackson* demonstrates that actions aimed at the effects of a practice are permitted only if the statutory text contains the "effects" language. *Id.* at 236-38. Accordingly, the basis for HUD's proposed rule and its past determinations is fatally undermined and not entitled to deference.

Regulation B (implementing ECOA) is similarly not entitled to deference. Indeed, in adopting the relevant guidance, the Board referred to the disparate impact theory as the "effects test," inadvertently underscoring that the statute must have "effects" language in the statute to permit the "effects test." 12 C.F.R. § 202.6(a) n.2; 12 C.F.R. Pt. 202, Supp. I, Comment 6(a)-2.[12] In concluding that ECOA permits use of the "effects test," the Board relied on two pre-*City of Jackson* Title VII cases—reliance now undermined by *City of Jackson*. Additionally, the Board relied on congressional committee reports related to legislation that amended ECOA years after it had already been enacted—amendments that did not alter the "discriminate against ... on the basis of" language. 12 C.F.R. Pt. 202, Supp. I, Comment 6(a)-2.[13] Reliance on contemporary legislative history is generally not appropriate where the language of the underlying statute is clear. It is never appropriate where the purportedly relevant congressional committee reports are from a *subsequent* Congress that did not even amend the relevant text of the statute. *See, e.g.*,

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[12] The Bureau of Consumer Financial Protection ("CFPB") adopted the Board's Regulation B into its own Regulation B, 12 C.F.R. § 1002.6(a), and incorporated the Board's Official Staff Commentary into its commentary to Regulation B, 12 C.F.R. Pt. 1002, Supp. I, Comment 6(a)-2.

[13] The 1976 amendments to ECOA expanded the prohibited bases of ECOA to include race, age, and other attributes, but did not add "effects" language to ECOA or otherwise change the basic "discriminate against … because of" structure of the statute. For a more detailed analysis of why the Official Staff Commentary and footnote contain incorrect interpretations of the legislative history of ECOA, *see* Cubita & Hartmann, *supra* n.8, at 836-39.

Jones v. United States, 526 U.S. 227, 238 (1999).[14]

City of Jackson further shows that the analysis in the interagency "Policy Statement on Discrimination in Lending," 59 Fed. Reg. 18266 (Apr. 15, 1994), is no longer viable. Like the HUD and Board materials, the interagency statement bases its position on the holdings by federal courts of appeal prior to *City of Jackson*. *See, e.g.*, 59 Fed. Reg. at 18268 ("The courts have recognized three methods of proof of lending discrimination under the ECOA and the [FHA]…."); *id.* at 18269 ("Although the precise contours of the law on disparate impact as it applies to lending discrimination are under development...."). Because *City of Jackson* now shows that this reliance is misplaced, the interagency statement also is not entitled to deference.

Finally, none of these agency interpretations is entitled to deference because each is "manifestly inconsistent with the statute" each agency purported to construe. *See Freeman*, 2012 WL 1868063, at *5. When, as here, a regulatory interpretation "goes beyond the meaning that the statute can bear," *id.* (citation omitted), it is not entitled to deference. *See also Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 509-10 (1992) (refusing to defer to administrative interpretation of a statute except where there is ambiguity and only if interpretation is reasonable). A regulatory agency is not authorized to effectuate an interpretation of a statute by prohibiting conduct the statute permits. As Justice O'Connor explained: "an agency's legislative regulations will be upheld if they are 'reasonably related' to the purposes of the enabling statute,…[W]e would expand considerably the discretion and power of agencies were we to interpret 'reasonably related' to permit agencies to proscribe conduct Congress did not intend to prohibit." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 614 (1983) (O' Connor, J.,

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[14] The Board also relied on 1991 legislation that amended Title VII but did not amend any other civil rights law. 12 C.F.R. Pt. 202, Supp. I, Comment 6(a)-2. But *City of Jackson* clarified that the 1991 legislation only amended Title VII—and does not affect the interpretation of any other civil rights law. 544 U.S. at 240.

concurring); *see also id*. at 613 ("'Reasonably related to' simply cannot mean 'inconsistent with.'"); *Am. Fed'n of Gov't Emps., AFL-CIO v. Gates*, 486 F.3d 1316, 1321-22 (D.C. Cir. 2007) ("If the relevant statutory language is plain but is inconsistent with the [agency's] regulations, we must hold the regulations invalid."). "'[R]egulations that would proscribe conduct by the recipient having only a discriminatory *effect*…do not simply "further" the purpose of [the statute]; they go well *beyond* that purpose.'" *Alexander*, 532 U.S. at 286 n.6 (2001) (quoting with approval *Guardians*, 463 U.S. at 613 (O'Connor, J., concurring) (emphasis in original)).

City of Jackson makes clear that disparate impact claims are permitted by the "effects" language in Title VII and other statutes—language that the FHA and ECOA lack. Because the FHA and ECOA contain only language that *City of Jackson* held requires a showing of intent to discriminate, the FHA and ECOA unambiguously prohibit disparate impact claims. Any contrary agency interpretation is therefore not entitled to deference.

II. THE COMPLAINT FAILS TO STATE A DISPARATE IMPACT CLAIM.

Even if ECOA and the FHA were interpreted to permit disparate impact claims, the Complaint fails to state a cognizable disparate impact claim.

In order to avoid dismissal under Rule 12(b)(6), the Complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To state a disparate impact claim, a plaintiff must "isolat[e] and identify[] the specific ... practices that are allegedly responsible for any observed statistical disparities." *Watson*, 487 U.S. at 994.

> [I]t is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the [plaintiff] is responsible for isolating and identifying the specific ... practices that are allegedly responsible for any observed statistical disparities.

City of Jackson, 544 U.S. at 241 (citations omitted); *see also id.* (noting that "failure to identify

the specific practice being challenged is the sort of omission that could result in [defendants] being potentially liable for the myriad of innocent causes that may lead to statistical imbalances" (citations omitted)); *accord Robinson v. Metro–North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001) ("[P]laintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship exists between the two." (citations omitted)).

The Complaint fails to satisfy these pleading standards lacking alleged facts establishing a "specific policy or practice" or a causal connection between the challenged conduct and the statistical disparities on which the Complaint is based. Plaintiff identifies two "policies" on which it bases its disparate impact claims—each of which fails to satisfy the requirement that a plaintiff identify a specific and actionable policy as required of those claiming disparate impact.

A. Plaintiff's Allegations Regarding a Discretionary Pricing "Policy" Fail to Identify an Actionable Policy to Support its Disparate Impact Claim.

The first "policy" plaintiff identifies is the alleged discretionary pricing "policy," which it alleges has a disparate impact on certain protected class borrowers. Compl. ¶¶ 22, 33. But a policy of allowing employees to exercise discretion is not a uniform practice as is required for disparate impact analysis, but is rather a policy *against* having a uniform practice. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2554-55 (2011). Indeed, a "policy of leaving ... decisions to the unchecked discretion of ... supervisors" cannot, in itself, raise an inference of discrimination under a disparate impact theory. *Watson*, 487 U.S. at 990; *see also, e.g., Durante v. Qualcomm, Inc.*, 144 F. App'x 603, 606 (9th Cir. 2005). As *Dukes* makes clear, discretion is "a very common and presumptively reasonable way of doing business—one that ... should itself raise no inference of discriminatory conduct." 131 S.Ct. at 2554 (citation omitted); *accord Watson*, 487 U.S. at 990.

Plaintiff has failed to "identify a specific aspect of subjective decision-making" that

allegedly has a "causal connection to the alleged class-based imbalance...." *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1284 (5th Cir. 1994); *see, e.g.*, *Fulcher v. City of Wichita*, 445 F. Supp. 2d 1271, 1276 (D. Kan. 2006) (dismissing disparate impact claim premised in part on allegations of subjective decision making for failure to specify particular practice or policy). Plaintiff has not alleged plausible causation because it has failed to allege a common direction or common method of exercising discretion. Other courts analyzing FHA and ECOA disparate impact cases in discretionary mortgage pricing cases have followed *Dukes*' logic, holding that alleging a discretionary pricing policy coupled with statistics is not sufficient to demonstrate that employees exercised discretion in a similar or discriminatory manner. *See, e.g., Rodriguez v. Nat'l City Bank*, 277 F.R.D. 148, 155 (E.D. Pa. 2011); *In re Countrywide Fin. Mortg. Lending Practices Litig.*, No. 08-MD-1974, 2011 WL 4862174, at *4 (W.D. Ky. Oct. 13, 2011); *In re Wells Fargo Residential Mortg. Lending Discrimination Litig.*, No. 08-MD-01930 MMC, 2011 WL 3903117, at *3 (N.D. Cal. Sept. 06, 2011).[15]

A company-wide policy of discretionary loan pricing significantly limits the possibility that the policy had any causal relationship to the alleged disparities. *See, e.g., Rodriguez*, 277 F.R.D. at 155. Although decided in the context of settlement class certification under Rule 23,[16] *Rodriguez* demonstrates that plaintiff's conclusory allegation that a discretionary pricing policy caused discrimination is not plausible. In *Rodriguez*, the court held that the proposed class failed

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15 Outside the FHA and ECOA context, courts in this circuit have followed the reasoning of *Dukes* that not all employees will apply a policy in the same manner and therefore mere evidence of a policy is insufficient without evidence that it was applied to discriminate. *See, e.g., Oakley v. Verizon Commc'ns Inc.*, No. 09-Civ-9175, 2012 WL 335657 (S.D.N.Y. Feb. 1, 2012) (denying class certification in Family Medical Leave Act suit because no evidence that all of the identified policies were used to discriminate against each putative class member).

16 The applicability of *Rodriguez* and *Dukes* is much broader than Rule 23 class certification motions, as a "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Dukes*, 131 S.Ct. at 2551-52. In the context of disparate impact claims, proof of commonality necessarily overlaps with the merits contention that the statistical allegations compare borrowers who were similarly situated. *Id*. at 2552. Courts are "bound to apply both the narrow holdings of *Dukes* as well as the reasoning, analysis, and legal rules applied in reaching its result." *Rodriguez*, 277 F.R.D. at 154 (citations omitted).

to satisfy the commonality requirement because a policy granting loan officers discretion in pricing could not have had a common impact on all putative class members.

> In this case, there were many loan officers that were involved in using discretion that created the alleged discrimination. Applying *Dukes*, Plaintiffs would likely have to show the disparate impact and analysis for each loan officer or at a minimum each group of loan officers working for a specific supervisor.

Rodriguez, 277 F.R.D. at 155 (quoting *Dukes*, 131 S.Ct. at 2554).

The Supreme Court has made clear that alleging a policy of granting discretion is not sufficient to conclude that the discretion was used to discriminate or that it was applied in a common way. Therefore it is not plausible to conclude that GFI's loan officers would use a discretionary pricing policy to discriminate. Indeed, to establish a claim of discrimination arising from the use of discretion, plaintiffs must allege that there was a common discriminatory manner in which employees exercised the discretion they were granted—mere allegations of a policy of discretion and statistics showing a disparate impact are insufficient to allege discrimination. *See Dukes*, 131 S.Ct. at 2554-55 ("Respondents have not identified a common mode of exercising discretion that pervades the entire company[. I]t is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."). Here, the Complaint contains no allegations that there was a common direction or bias to apply the pricing discretion in a discriminatory manner.

In fact, accepting the allegations of the Complaint as true for purposes of this motion, plaintiff acknowledges that there existed *no* common direction in exercising discretion at GFI. *See, e.g.*, Compl. ¶¶ 19, 30 (alleging that "GFI failed to supervise, train, or monitor adequately its loan officers to ensure that they were pricing loans in a non-discriminatory manner. GFI did not provide written guidance to loan officers or put in place fair lending policies or practices to prevent or assess whether loan officers were pricing loans in a non-discriminatory manner.").

An allegation that GFI did not train its loan officers regarding the use of the alleged discretion, and otherwise lacked written guidance and controls to guide this discretion, is the *opposite* of common direction in exercising discretion required by *Dukes*.

Rodriguez further reveals the flaw of relying solely on regression analyses[17] in the context of discretionary pricing policies, as plaintiff has done here. Even if a regression analysis were to account for all credit-related factors, "there may be non-credit related reasoning that individual [decision makers] contemplated that is not based on race." *Rodriguez*, 277 F.R.D. at 155; *see also In re Wells Fargo*, 2011 WL 3903117, at *4 ("How the numerous potential differences among prospective borrowers, both as to their stated goals and needs as well as their individual circumstances, such as creditworthiness, may bear on the determinations made by the many loan officers and brokers across the country."). A regression analysis simply cannot take into account all factors—including non-credit relating factors unrelated to race—that could influence a loan officer's decision.

B. Plaintiff's Allegations Regarding Loan Officer Compensation Fail to Identify an Actionable Policy to Support its Disparate Impact Claim.

The second policy plaintiff identifies is GFI's policy of compensating loan officers by paying "a substantial percentage of the profits he or she generates for GFI on each loan." Compl. ¶¶ 18, 29. Plaintiff alleges that this "provided strong financial incentives to [GFI's] loan officers to price their loan products as high as possible...." *Id.* Plaintiff alleges that "[t]he percentage of profits for each loan officer depends on, and increases for, those loan officers originating higher-priced loans and greater profits." *Id.*

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[17] Regression analysis is a statistical technique that studies the correlation between a dependent variable and one or more independent variables by examining how the dependent variable changes when an independent variable is varied while others are fixed. *U.S. v. Yonkers Bd. of Educ.*, 123 F. Supp. 2d 694, 723-24 and n.1 (S.D.N.Y. 2000). Regression analysis does not establish causal relationships because correlation does not imply causation. *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 360 (7th Cir. 1988) (Cudahy, J., concurring in part).

Again, plaintiff has failed to allege a plausible causal connection between this alleged compensation policy and any alleged disparities. The Complaint clearly states that this policy applies generally—not only to loans originated to African-American or Hispanic borrowers. *Id*. Even assuming the Complaint accurately describes the policy, plaintiff notes that this policy would provide a financial incentive to price loans higher—and this incentive would exist regardless of the race of the borrower. Indeed, the only plausible conclusion that can be drawn from such a policy is that GFI loan officers would have an incentive to maximize the price on *all* loans. Plaintiff's statement that this policy "result[ed]" in higher-priced loans for minority borrowers, *id.*, is unsupported by any allegations that could plausibly show a causal connection between this policy and the alleged disparities in pricing. This is precisely the type of self-serving, unsupported allegation that the Supreme Court has held is insufficient to state an actionable claim. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557.

This is not the first time plaintiff has failed to meet the pleading standards when relying on statistics in a fair lending disparate impact case. *See United States v. Nara Bank*, No. CV 09-07124 RGK (JCx), 2010 WL 2766992 (C.D. Cal. May 28, 2010). And *Nara Bank* is not the only court to have raised concerns about the content of plaintiff's fair lending complaints. *See United States v. Citizens Republic Bancorp, Inc.*, No. 11-11976, 2011 U.S. Dist. LEXIS 55221, at *11 (E.D. Mich. May 24, 2011).[18] Just as courts have dismissed plaintiff's fair lending cases when the statistical allegations were insufficient to support the claims, the Court should dismiss plaintiff's complaint here.

[18] When viewing plaintiff's statistics-based fair lending complaint together with the accompanying proposed order settling the case in *Citizens*, the court denied plaintiff's motion to enter the "Agreed Order," noting that the settlement appeared to be forced on the Defendants who had no alternative to avoid the cost of litigation against plaintiff. No. 11-11976, 2011 U.S. Dist. LEXIS 55221, at *11.

III. THE COMPLAINT FAILS TO STATE A COGNIZABLE DISPARATE TREATMENT CLAIM.

Apparently recognizing the weakness of its disparate impact claims, plaintiff refers to the action as a "pattern or practice" case, a phrase that implicates a disparate treatment claim. Regardless of the title of the claim, however, plaintiff fails to include allegations sufficient to satisfy the elements of a disparate treatment claim—nor could it, as GFI did not treat members of any protected class disparately.

Proof of discriminatory purpose is the *sine qua non* of a disparate treatment claim. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Plaintiffs who allege disparate treatment under FHA must show (1) "that they are members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers." *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003) (citing *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir.1979)). The proof required for an ECOA claim is essentially the same, but focuses on the loan rather than the rental or purchase of a dwelling, and varies the fourth FHA element with a requirement that the lender "showed a preference for a non-protected individual." *Powell v. Am. Gen. Fin., Inc.*, 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004).

In order to state a "pattern-or-practice" disparate treatment claim, plaintiffs must allege "widespread acts of intentional discrimination against individuals." *Metro-North*, 267 F.3d at 158. "To succeed on a pattern-or-practice claim, plaintiffs must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant's 'standard operating procedure.'" *Id.* (quoting *Teamsters*, 431 U.S. at 336). Unlike in a disparate impact claim, a facially-race-neutral policy or practice cannot form the basis of a disparate treatment claim. *See, e.g., Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir.

2003). Where a plaintiff challenges a defendant's policy, the plaintiff must establish that the defendant implemented the policy "because of, not merely in spite of," its adverse effects on the protected group. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

Here, the Complaint avers only that the alleged loan pricing disparities result from the combined impact of GFI's "policies" related to discretionary loan pricing and loan officer compensation. *See* Compl. ¶¶ 16, 27 (describing alleged discretionary loan pricing policy) and ¶¶ 18, 29 (describing alleged loan officer compensation policy). There is no question that these alleged policies are facially-race-neutral, however. Even assuming that a discretionary pricing policy and loan officer compensation caused loan officers to make high priced loans, such an allegation is insufficient to form the basis of a disparate treatment claim as a matter of law. *Tsombanidis*, 352 F.3d at 573.

Plaintiff cannot evade Supreme Court rulings barring disparate impact claims in fair lending cases by using disparate treatment claim catchphrases. Plaintiff has failed to allege any intent to discriminate, and therefore its disparate treatment claims must be dismissed.

IV. SECTION 804 OF THE FAIR HOUSING ACT DOES NOT APPLY TO MORTGAGE LENDING.

In enacting the FHA, Congress prohibited discrimination in different parts of the housing market in different sections of the Act. Section 805 of the FHA applies to mortgage lending.[19] Section 804 of the FHA addresses actions other than lending that affect the availability of housing—generally, the sale or leasing of housing. A very specific cross reference in ECOA—addressing situations precisely like this lawsuit in which claims are brought under both the FHA and ECOA—makes clear that Section 804 could not also govern residential mortgage lending. Because plaintiff's claims are based solely on GFI's alleged lending practices, the Complaint

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[19] Section 804 of the FHA is codified at 42 U.S.C. § 3604. Section 805 is codified at 42 U.S.C. § 3605.

fails to state a claim under Section 804.

A. FHA Section 804 Does Not Apply to Mortgage Lending.

When interpreting the meaning of a statute, the search for Congress's intent begins (and, if the statute is clear, ends) with the statute's text and structure. *See, e.g.*, *Alexander*, 532 U.S. at 288. As the Supreme Court holds: "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *accord United States v. Salim*, 549 F.3d 67, 78 (2d Cir. 2008).

When analyzing the text and structure of a statute, "[i]t is 'a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Yuen Jin v. Mukasey*, 538 F.3d 143, 153 (2d Cir. 2008) (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004)). Indeed, it is well-established that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....'" *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:06 (rev. 6th ed. 2000)); *accord In re Air Crash Off Long Island, N.Y., on July 17, 1996*, 209 F.3d 200, 207 (2d Cir. 2000) (holding that courts should "avoid a reading [of statutory language] which renders some words altogether redundant") (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)).

Even a cursory reading of the FHA shows that Congress did not intend Section 804 to apply to mortgage lending. In the FHA as it was originally enacted, Section 805 provided:

> DISCRIMINATION IN THE FINANCING OF HOUSING
>
> Sec. 805. After December 31, 1968, it shall be unlawful for any bank, building and loan association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, *to deny a loan or other financial assistance to a person applying therefor* for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate

against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of race, color, religion or national origin of such person or of any person associated with him in connection with such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given….

Pub. L. 90-284 § 805, 82 Stat. 73, 83 (Apr. 11, 1968) (emphasis added). Thus, Section 805 of the FHA applied to mortgage lending—and only to mortgage lending.[20] In contrast, Section 804 applies only to discrimination in the *sale or rental* of housing and the availability of housing, not to the financing of housing. As originally enacted, Section 804 provided in relevant part:

DISCRIMINATION IN THE SALE OR RENTAL OF HOUSING

Sec. 804. As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—
(a) To *refuse to sell or rent* after the making of a bona fide offer, or to *refuse to negotiate for the sale or rental* of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
(b) To discriminate against any person in the terms, *conditions or privileges of sale or rental* of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.
(c) To make, print, or publish, or cause to be made printed or published any notice, statement, or advertisement, *with respect to the sale or rental* of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation or discrimination.

Pub. L. 90-284 § 804, 82 Stat. 73, 83 (Apr. 11, 1968) (emphasis added). Section 804 did not contain—and still does not contain—any reference to mortgage lending.[21] Congress knew how to draft language applicable to mortgage lending—and did so in Section 805, not Section 804.

Congress's inclusion of Section 805 shows that it did not intend Section 804 to apply to mortgage lending. As originally enacted, Section 805 applied *only* to mortgage lending. Any

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[20] In 1988, Section 805 was amended into its current form, which still plainly applies to mortgage lending. *See* Pub. L. 100-430 § 6(c), 102 Stat. 1619, 1622 (Sept. 13, 1988) (amending FHA § 805, 42 U.S.C. § 3605). Plaintiff acknowledges this by also bringing claims under Section 805. *See* Compl. ¶ 35(b).

[21] The portions of Section 804 relied upon by plaintiff remain the same in all relevant respects as when the FHA was originally enacted. *See* 42 U.S.C. § 3604(a)-(c).

interpretation of the original Section 804 that would also apply it to mortgage lending would have rendered Section 805 superfluous and altogether redundant. *See, e.g.*, *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984). And because Section 804 remains identical in all material respects, it cannot now be interpreted in a way inconsistent with its original enactment. Congress could not have intended the general provisions of Section 804 to render Section 805 wholly superfluous. If Congress intended such a broad reading of the language of Section 804, it would have had no reason to enact Section 805. Whatever the reach of the language of Section 804, it cannot apply to mortgage lending.

Subsequent congressional action in the credit discrimination arena shows that Congress intended only Section 805 to apply to mortgage lending. ECOA prohibits a person bringing a mortgage lending-related discrimination claim from recovering under both it and the FHA:

> No person aggrieved by a violation of [ECOA] and by a violation of [Section 805 of the FHA] shall recover under [ECOA] and [section 812 of the FHA], if such violation is based on the same transaction.

15 U.S.C. § 1691e(i).[22] Thus, a person with a mortgage lending-related discrimination claim can recover either for a violation of ECOA or a violation of Section 805, but not both. The omission of any reference to Section 804 in this section of ECOA shows that Congress believed that only Section 805 applied to mortgage lending. Indeed, any interpretation that Section 804 applies to mortgage lending would lead to an illogical result: If a person brings a mortgage lending-related

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[22] When 15 U.S.C. § 1691e(i) was enacted in 1976, the FHA section governing "Enforcement by Private Persons" was Section 812. *See* Pub. L. 94-239 § 6, 90 Stat. 251, 254-55 (Mar. 23, 1976); Pub. L. 90-284 § 812, 82 Stat. 73, 88 (Apr. 11, 1968). In 1988, the FHA was amended and the section governing "Enforcement by Private Persons" was moved to Section 813. *See* Pub. L. 100-430, § 8(2), 102 Stat. 1619, 1625 (Sept. 13, 1988). While the reference in 15 U.S.C. § 1691e(i) has not been updated to reflect this change, Congress clearly intended this section to reference the section of the FHA that addresses enforcement by private persons. *See, e.g.*, *United States v. Hartsock*, 347 F.3d 1, 6 nn. 7-8 (1st Cir. 2003) (ignoring erroneous cross-reference when Congress's intent was clearly to apply cross-reference to different section); *Estate of Kunze v. Comm'r of Internal Revenue*, 233 F.3d 948, 953 (7th Cir. 2000) (holding that a clearly erroneous cross-reference "can hardly be construed to have changed the legislative intent . . . or to have affected the substantive rights [at stake]").

claim under both the ECOA and Section 805—the section of the FHA that expressly applies to mortgage lending—the person could only recover under one of the statutes. However, if a person brings a mortgage lending-related claim under both the ECOA and Section 804—the section of the FHA that contains no express language addressing mortgage lending—the person could recover under both statutes. Such a result could not have been intended by Congress, and weighs heavily against interpreting Section 804 as applying to mortgage lending. *See, e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Phillips v. Saratoga Harness Racing, Inc.*, 240 F.3d 174, 179 (2d Cir. 2001) (same). Accordingly, plaintiff's Section 804 claims should be dismissed because they do not apply to mortgage lending.[23]

CONCLUSION

For the reasons discussed above, Defendant GFI Mortgage Bankers, Inc. requests that the Complaint, or, in the alternative, portions of the Complaint, be dismissed.

Respectfully submitted,

s/ Joseph J. Reilly

Andrew L. Sandler
Kirk D. Jensen (*pro hac vice*)
Joseph J. Reilly
Andrew R. Louis (*pro hac vice*)
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington, DC 20037
Tel: (202) 349-8000
Fax: (202) 349-8080
Attorneys for Defendant GFI Mortgage Bankers, Inc.

[23] Some courts, without engaging in a similar analysis have reached a contrary conclusion. *See, e.g., N.C.R.C. v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70 (D.D.C. 2008).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 1, 2012, a copy of the above and foregoing was electronically filed in this case and was duly served upon counsel of record by operation of the Court's ECF system

s/ Joseph J. Reilly