Appeal No. 09-3608

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CITY OF CLEVELAND,

Plaintiff-Appellant,

v.

AMERIQUEST MORTGAGE SECURITIES, INC., *ET AL.*,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of Ohio
Case No. 1:08 CV 139
Judge Sara Lioi

APPELLEES' BRIEF

FOR GREENWICH CAPITAL MARKETS INC., n/k/a RBS SECURITIES INC.
and
MORGAN STANLEY & CO., INC.
DEFENDANTS-APPELLEES

/s/ David F. Adler
David F. Adler
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Andrew G. Fiorella
Eric E. Murphy
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FOR AMERIQUEST MORTGAGE CO.
DEFENDANT-APPELLEE

/s/ Robert D. Kehoe
Robert D. Kehoe
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FOR BEAR STEARNS & CO., INC. n/k/a J.P. MORGAN SECURITIES INC.;
JP MORGAN MORTGAGE ACQUISITION CORP;
WASHINGTON MUTUAL BANK; and
CHASE BANK U.S.A., N.A.
DEFENDANTS-APPELLEES

/s/ Michael N. Ungar
Michael N. Ungar
Isaac Schulz
Richik Sarkar
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FOR BANK OF AMERICA, N.A. and
COUNTRYWIDE SECURITIES CORP.
DEFENDANTS-APPELLEES

/s/ William H. Falin
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FOR CITIGROUP GLOBAL MARKETS INC.
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DEFENDANTS-APPELLEES

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/s/ William W. Jacobs

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FOR CREDIT SUISSE (USA), INC.
and
CREDIT SUISSE SECURITIES (USA) LLC
DEFENDANTS-APPELLEES

/s/ Jeffrey Q. Smith

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/s/ William Stuart Dornette

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FOR GMAC-RFC HOLDING CO.
DEFENDANT-APPELLEE

/s/ Robert N. Rapp
Robert N. Rapp
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/s/ Benjamin Klubes
Benjamin Klubes
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FOR HSBC SECURITIES (USA), INC.
DEFENDANT-APPELLEE

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FOR MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED
DEFENDANT-APPELLEE

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FOR NOVASTAR MORTGAGE, INC.
DEFENDANT-APPELLEE

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FOR OPTION ONE MORTGAGE CORP.
DEFENDANT-APPELLEE

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/s/ Joseph T. Dattilo

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REQUEST FOR ORAL ARGUMENT

The grounds for rejecting the City of Cleveland's unprecedented theory of liability are straightforward and adequately presented in the district court's opinion and the parties' briefs. Nevertheless, if the Court would find oral argument helpful, we respectfully request argument time equal to the City's.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: Cleveland v. Ameriquest, et al.

Name of counsel: David F. Adler (OH 0037622)

Pursuant to 6th Cir. R. 26.1, Greenwich Capital Markets Inc., n/k/a RBS Securities Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Greenwich Capital Markets Inc., now known as RBS Securities Inc., is a wholly owned subsidiary of The Royal Bank of Scotland Group plc. No publicly held company owns more than 10% of the shares of The Royal Bank of Scotland Group plc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

The Royal Bank of Scotland Group plc has an interest in the outcome of this appeal based on its ownership of Greenwich Capital Markets Inc., now known as RBS Securities Inc.

CERTIFICATE OF SERVICE

I certify that on June 5, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ David F. Adler (OH 0037622)
Jones Day; 901 Lakeside Avenue
Cleveland, Ohio 44114

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: Cleveland v. Ameriquest, et al.

Name of counsel: David F. Adler (OH 0037622)

Pursuant to 6th Cir. R. 26.1, Morgan Stanley & Co. Incorporated
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Morgan Stanley & Co. Incorporated is a wholly owned subsidiary of Morgan Stanley. Shares of Morgan Stanley trade on the New York Stock Exchange.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Morgan Stanley has an interest in the outcome of this appeal based on its ownership of Morgan Stanley & Co. Incorporated.

CERTIFICATE OF SERVICE

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s/ David F. Adler (OH 0037622)
Jones Day; 901 Lakeside Avenue
Cleveland, Ohio 44114

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest

Name of counsel: Robert D. Kehoe

Pursuant to 6th Cir. R. 26.1, Ameriquest Mortgage Securities, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on June 9, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Robert D. Kehoe

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: Michelle M. Davis

Name of counsel: Isaac Schulz; Michael N. Ungar; Richik Sarkar; Kari C. Samuels

Pursuant to 6th Cir. R. 26.1, Bear Stearns & Co. Inc. n/k/a J.P. Morgan Securities Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. JPMorgan Chase & Co. is a publicly owned corporation. A wholly owned subsidiary of JPMorgan Chase & Co., J.P. Morgan Securities Inc. merged with and into Bear Stearns & Co Inc. Following such merger, Bear Stearns & Co. Inc. changed its name to J.P. Morgan Securities Inc. J.P. Morgan Securities Inc. is a wholly owned subsidiary of JPMorgan Chase & Co.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. JPMorgan Chase & Co.

CERTIFICATE OF SERVICE

I certify that on June 8, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ R S

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: Michelle M. Davis

Name of counsel: Isaac Schulz; Michael N. Ungar; Richik Sarkar; Kari C. Samuels

Pursuant to 6th Cir. R. 26.1, JPMorgan Mortgage Acquisition Corp.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. JPMorgan Chase & Co. is a publicly owned corporation. JPMorgan Mortgage Acquisition Corp. is organized as an operating subsidiary of JPMorgan Chase Bank, N.A., which is a wholly owned subsidiary of JPMorgan Chase & Co.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. JPMorgan Chase & Co.

CERTIFICATE OF SERVICE

I certify that on June 8, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: Michelle M. Davis

Name of counsel: Isaac Schulz; Michael N. Ungar; Richik Sarkar; Kari C. Samuels

Pursuant to 6th Cir. R. 26.1, Washington Mutual Bank
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. In 2008, JPMorgan Chase Bank, NA acquired certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver, including those associated with this matter.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. JPMorgan Chase Bank, NA.

CERTIFICATE OF SERVICE

I certify that on June 8, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: Michelle M. Davis

Name of counsel: Isaac Schulz; Michael N. Ungar; Richik Sarkar; Kari C. Samuels

Pursuant to 6th Cir. R. 26.1, Chase Bank USA, N.A.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. JPMorgan Chase & Co. is a publicly owned corporation. Chase Bank USA, N.A. is a subsidiary of CMC Holding Delaware Inc., which is a wholly owned subsidiary of J.P. Morgan Equity Holdings, Inc., which is a wholly owned subsidiary of JPMorgan Chase & Co.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. JPMorgan Chase & Co.

CERTIFICATE OF SERVICE

I certify that on June 8, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ _____

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest, et al.

Name of counsel: William H. Falin

Pursuant to 6th Cir. R. 26.1, Bank of America, N.A.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Bank of America, N.A. is an indirect wholly owned subsidiary of Bank of America Corporation

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. Bank of America, N.A. is an indirect wholly owned subsidiary of Bank of America Corporation

CERTIFICATE OF SERVICE

I certify that on June 12, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/William H. Falin

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: Cleveland v. Ameriquest et al.

Name of counsel: Moscarino & Treu LLP

Pursuant to 6th Cir. R. 26.1, Countrywide Securities Corp.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Countrywide Securities Corp. is an indirect, wholly owned subsidiary of Bank of America Corporation, a publicly traded company.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. Countrywide Securities Corp. is an indirect, wholly owned subsidiary of Bank of America Corporation, a publicly traded company.

CERTIFICATE OF SERVICE

I certify that on September 18, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/William H. Falin

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest, et al.

Name of counsel: Charles E. Davidow - Paul, Weiss, Rifkind, Wharton & Garrison LLP

Pursuant to 6th Cir. R. 26.1, Citigroup Global Markets Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Citigroup Global Markets Inc. is an indirect, wholly-owned subsidiary of Citigroup Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on June 10, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Gabrielle E. Tenzer
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest, et al.

Name of counsel: Charles E. Davidow - Paul, Weiss, Rifkind, Wharton & Garrison LLP

Pursuant to 6th Cir. R. 26.1, Citibank, N.A.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Citibank, N.A. is an indirect, wholly-owned subsidiary of Citigroup Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on June 10, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Gabrielle E. Tenzer
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest Mortgage Securities, Inc., et al.

Name of counsel: Jeffrey Q. Smith and Scott E. Eckas

Pursuant to 6th Cir. R. 26.1, Credit Suisse (USA), Inc. and Credit Suisse Securities (USA) LLC, formerly known as Credit Suisse First Boston LLC.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Credit Suisse Securities (USA) LLC is a wholly-owned subsidiary of Credit Suisse (USA), Inc., which is wholly-owned by Credit Suisse Holdings (USA), Inc. Credit Suisse Holdings (USA), Inc. is jointly owned by Credit Suisse and Credit Suisse Group. Credit Suisse is a wholly-owned subsidiary of Credit Suisse Group. The shares of Credit Suisse Group are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depository Shares.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Credit Suisse Group has an interest in the outcome of this appeal based on its ownership of Credit Suisse (USA), Inc. and Credit Suisse Securities (USA) LLC.

CERTIFICATE OF SERVICE

I certify that on June 10, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Scott E. Eckas
McKee Nelson LLP
One Battery Park Plaza, 34th Floor
New York, NY 10004

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest

Name of counsel: Richard H. Klapper; Michael T. Tomaino, Jr.; W. Stuart Dornette, Stephen M.

Pursuant to 6th Cir. R. 26.1, Goldman, Sachs & Co.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Goldman, Sachs & Co. is a limited partnership at least 99% owned by The Goldman Sachs Group, Inc. (which itself has shares held by the public).

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. Goldman, Sachs & Co. is a limited partnership at least 99% owned by The Goldman Sachs Group, Inc. (which itself has shares held by the public).

CERTIFICATE OF SERVICE

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s/william stuart dornette
Taft Stettinius & Hollister, LLP
425 Walnut St., Cincinnati, OH 45202

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. AMS

Name of counsel: Thomas R. Lucchesi

Pursuant to 6th Cir. R. 26.1, Deutsche Bank Securities, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Deutsche Bank, AG, is the parent corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on June 9, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Thomas Lucchesi
Baker Hostetler, 1900 East Ninth
Cleveland, Ohio 44144

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest Mortga

Name of counsel: Benjamin B. Klubes

Pursuant to 6th Cir. R. 26.1, GMAC-RFC Holding Company
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Please see attached.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

CERTIFICATE OF SERVICE

I certify that on June 10, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Haylee N. Freeman

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

Corporate Disclosure Statement – GMAC-RFC Holding Company

1. GMAC-RFC Holding Company ("Defendant") is a Delaware limited liability company with the following parents:

   a. Residential Capital, LLC, the direct parent of Defendant;

   b. GMAC Mortgage Group, LLC, an indirect parent of Defendant;

   c. GMAC LLC, an indirect parent of Defendant;

   d. FIM Holdings LLC, an indirect parent of Defendant;

   e. GM Finance Co. Holdings LLC, an indirect parent of Defendant; and

   f. General Motors Corporation, an indirect parent of Defendant.

2. No publicly held corporation owns more than 10% of the stock of Defendant. However, General Motors Corporation, a publicly held Delaware corporation, is the sole beneficiary of a trust that owns more than 10% of the stock of Defendant.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest, et al.

Name of counsel: Robert B. Casarona, Christine M. Garritano , David Kristenbroker, Theresa Davis

Pursuant to 6th Cir. R. 26.1, HSBC Securities (USA) Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes, HSBC Securites (USA) Inc. is a wholly-owned subsidiary of HSBC Markets (USA), Inc. which is a wholly-owned subsidiary of HSBC Investments (North America) Inc., which is wholly owned by HSBC North America Holdings, Inc., which is indirectly owned by HSBC Holdings plc. The shares of HSBC Holdings plc are traded on certain foreign stock exchanges and are traded over the counter in the United States.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes, HSBC Holdings plc is HSBC Securities (USA) Inc.'s ultimate parent

CERTIFICATE OF SERVICE

I certify that on June 9, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Robert B. Casarona

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest, et al.

Name of counsel: Jay B. Kasner, Joseph L. Barloon, Robert N. Rapp

Pursuant to 6th Cir. R. 26.1, Merrill Lynch, Pierce, Fenner & Smith, Incorporated
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc. Merrill Lynch & Co., Inc. is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of Merrill Lynch & Co., Inc. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange. It has no parent company and no publicly-held company owns more than 10% of Bank of America Corporation's shares.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on September 18, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Robert N. Rapp
Calfee, Halter & Griswold LLP, 800 Superior Ave., Cleveland, OH 44114

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest Mortg

Name of counsel: John F. Marsh

Pursuant to 6th Cir. R. 26.1, NovaStar Mortgage, Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. NovaStar Mortgage, Inc. is an indirect, wholly owned subsidiary of NovaStar Financial, Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. NovaStar Financial, Inc. is a publicly traded company.

CERTIFICATE OF SERVICE

I certify that on June 11, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/John F. Marsh

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-3608 Case Name: City of Cleveland v. Ameriquest

Name of counsel: Brian Brooks & Joseph T. Dattilo

Pursuant to 6th Cir. R. 26.1, Option One Mortgage Corporation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Option One Mortgage Corporation is a wholly-owned subsidiary of Block Financial Corporation which is a wholly-owned subsidiary of H&R Block Group, Inc. whose ultimate parent is H&R Block, Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. H&R Block, Inc. is a publicly-traded company with a financial interest in the outcome of this appeal as a result of being the ultimate parent of Option One Mortgage Corporation.

CERTIFICATE OF SERVICE

I certify that on June 17, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Joseph T. Dattilo
1001 Lakeside Avenue, Suite 1600
Cleveland, Ohio 44114

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF ISSUES

1. Should this case be remanded to state court under the "rule of unanimity" even though (i) the City of Cleveland has expressly agreed to the federal forum, (ii) all defendants consented to removal both in individual written consents and in a joint opposition to the City's motion to remand, and (iii) the City has waived its remand arguments?

2. Does Ohio Revised Code § 1.63—which prohibits cities from taking any action, directly or indirectly, to regulate mortgage lending practices—preempt the City's attempt to regulate subprime lending under the guise of the common law of public nuisance?

3. Does the "economic loss rule" bar recovery for the purely monetary injuries alleged by the City?

4. Can the City hold defendants liable for alleged conduct that is many steps and actors in the causal chain removed from the injury asserted?

5. Can the City establish an "unreasonable interference with a public right," an essential element of any public nuisance claim, where the underlying conduct is lawful and subject to specific and detailed government regulation?

STATEMENT OF THE CASE

On January 10, 2008, the City filed its initial complaint in this public nuisance suit, naming twenty-one defendants. (R.1, Ex. A.) On January 16, 2008,

defendant Lehman Brothers Holdings, Inc., removed the case to the United States District Court for the Northern District of Ohio. (R.1.) It had obtained the consent of defendant Bank of America Corp., which had been served with the Summons and Complaint. (*Id.* at 7.) To Lehman's knowledge after reasonable inquiry, the City had not served any other defendants at that time. (*Id.*) The next day, the City moved to remand the case on the ground that all defendants needed to join Lehman's notice of removal. (R.5.) That same day, eleven additional defendants, including the named "The Bear Stearns Companies," consented to removal. (R.4.) The City then filed a supplemental memorandum in support of its motion to remand. It pointed out that not every defendant had consented, but did not challenge any individual written consents provided to date. (R.34 at 1-3.) Over the next two weeks, all remaining defendants gave individual consents to removal. (R.21, R.37, R.49, R.57.)

On February 1, 2008, Lehman filed its memorandum in opposition to the City's motion to remand. (R.68.) All defendants joined that memorandum, again asserting their desire to remain in federal court. (R.71, R.89.) In its subsequent reply brief, the City conceded that "*[a]ll of the defendants did eventually give their consent to removal*," but argued that they should have done so when Lehman filed its notice of removal. (R.91 at 5-7 (emphasis added).)

At oral argument on February 29, 2008, the City contended for the first time that the individual written consent for the Bear Stearns defendant did not in fact give proper consent. (*See* R.172 at 8 n.8.) The City claimed that the individual who signed the consent did not have authority because he worked for a subsidiary (Bear Stearns & Co., Inc.) of the company the City meant to sue (The Bear Stearns Companies, Inc.). (R.163 at 2, 9-12.) The City waited to raise this argument for the first time at oral argument because, in the City's words, raising it earlier "would have given the other side an opportunity to correct the deficiency" that the City alleged. (R.172 at 8 n.8.)

After supplemental briefing, the district court denied the City's motion to remand. (*Id.* at 25.) It first held that Lehman did not need to obtain all defendants' consent when it filed the notice of removal as long as all had consented within the thirty days permitted for removal under 28 U.S.C. § 1446. (*Id.* at 4-6.) The court next noted that it did "not look favorably upon [the City's] maneuvers" to strategically wait until oral argument to raise the adequacy of certain consents. (*Id.* at 8.) It concluded that the City waived the argument, pointing out that any other ruling would "encourage sandbagging and litigation by ambush, tactics which [the] Court [would] not condone." (*Id.* at 9.)

Even if considered, the City's argument would still fail. Specifically, the court noted that defendants could express their consent "merely by joining in

opposition to a motion to remand," which all had done. (*Id.* at 9-11.) The district court also pointed out that the caption to the City's complaint listed a non-existent entity, "The Bear Stearns Companies." (*Id.* at 15.) Given the ambiguity as to whether the City meant to sue "The Bear Stearns Companies, Inc.," or its subsidiary, "Bear Stearns & Co., Inc.," the court found the written consent proper. (*Id.*) That was especially the case because the court found as a factual matter that the individual who signed the consent had authority to consent on behalf of all Bear Stearns entities, as stated in his affidavit. (*Id.*; *see* R.167, Ex. A.)

Once the court denied the motion to remand, the City filed a new action in state court alleging the same public nuisance claim and naming affiliates of many of the original defendants. (*See* R.186 at 3-4.) To avoid litigation over whether the City's new suit was a subterfuge to sidestep the court's ruling (*id.* at 4), most of the parties entered an Agreed Order regarding the new action. As part of that order, the City agreed to "prosecute the public nuisance claim against [defendants], if at all, *exclusively* in [the district court]." (*Id.* at 6 (emphasis added).)

The City subsequently filed the Second Amended Complaint. (R.189.) The City removed some of the original defendants from this complaint and named some of their affiliates. Defendants moved to dismiss. (R.197; R.199; R.202; R.205; R.207; R.208; R.209; R.228.) The court granted the motion. (R.247 at 36.)

STATEMENT OF THE FACTS

A. The City's Allegations.

The City asserts a single claim for "public nuisance" against twenty-two financial institutions for their alleged role in securitizing subprime mortgage loans that were made to Cleveland borrowers. (R.189 ¶¶ 1, 6.) According to the City, "subprime lending involves transactions made at relatively high rates of interest, typically to borrowers with 'high credit risk,' who do not qualify for conventional loans." (*Id.* ¶ 35.) The City alleges that subprime lending in Cleveland led to "[a] rash of defaults," and that "the ensuing foreclosures left many homes abandoned and boarded up." (*Id.* ¶ 1.) The City seeks compensation for: "(a) the cost of monitoring, maintaining, and demolishing foreclosed properties, and (b) decreased tax revenues resulting from the depreciated value of the affected homes and all surrounding real estate." (*Id.* ¶ 70.)

The City claims that defendants are "responsib[le] for Cleveland's plight" based on their alleged role in using subprime mortgages in "the formation of new mortgage-backed securities"—the process that the Complaint[1] calls "securitizing." (*Id.* ¶ 6.) Defendants are not alleged to have originated any loans or foreclosed on any properties in Cleveland. (*Id.* ¶¶ 15-34; R.247 at 2.) The City alleges instead

[1] Except where the distinction between the Second Amended Complaint and earlier versions is significant, we use "Complaint" to refer to the Second Amended Complaint.

that securitization created significant demand for subprime loans, which encouraged mortgage brokers to find willing borrowers. (R.189 ¶¶ 44, 48.) The borrowers later failed to repay their loans for various reasons, including the economic effect on individual borrowers of "the City's struggling Rust-Belt economy, the fading prominence of the manufacturing sector, and Cleveland's challenges in attracting a meaningful replacement" (*id.* ¶ 55), and the reversal of "[t]he booming real estate market in the United States" (*id.* ¶ 51). Borrower defaults led unspecified third parties to foreclose on properties. Whoever then owned the properties (unspecified non-party banks, real estate speculators, or others) allegedly failed to maintain them, and the properties became eyesores, fire hazards, or otherwise deteriorated in condition to such a degree that the City was required to incur costs either maintaining or demolishing them. (*Id.* ¶¶ 1-3.)

The City claims that defendants should have known that Cleveland was an unsuitable place for subprime lending, should have foreseen the "foreclosure crisis," and now should be held responsible for reduced tax revenues and costs incurred in dealing with abandoned property.

B. The District Court's Order Dismissing The Complaint.

The district court dismissed the Complaint on four independent grounds. The court first held that the City's claim is preempted by Ohio Revised Code § 1.63, which expressly precludes municipalities from taking any action, directly

or indirectly, to regulate mortgage lending. (R.247 at 4-9.) Like the U.S. Supreme Court and other courts, the district court recognized that common law actions for damages can be a potent method of regulating conduct. (*Id.* at 5.) Because the City's action "would label as illegal a broad array of lending practices, including much of the mortgage lending that prevailed in the Cleveland market," it "represents, at the very least, an indirect attempt to regulate" mortgage lending. (*Id.* at 7.) The court therefore found it to be expressly preempted. (*Id.* at 9.)

The court also held that the "economic loss doctrine" bars the City's claim because the City seeks recovery in tort for purely economic losses. (*Id.* at 11.) The court rejected the City's unprecedented argument that there should be an exception to the economic loss doctrine for public nuisance actions. (*Id.* at 15-16.)

The court further concluded that the City's failure to allege an unreasonable interference with a public right independently defeats the City's claim. "[I]f the challenged conduct is subject to regulation," the court explained, "and the defendant complied with the regulatory structure, that conduct is not actionable under Ohio law as a public nuisance." (*Id.* at 22.) Based on the comprehensive array of regulations governing mortgage lending, and the defendants' unchallenged compliance with those regulations, the court concluded that defendants cannot as a matter of law be held liable for public nuisance. (*Id.* at 22-24.) The court rejected the City's argument that its lawsuit was not attacking subprime lending in

Cleveland. "[I]f the underlying lending activity was lawful," the court explained, "it is impossible to say that supporting that activity by supplying funds and creating [mortgage-backed securities]—at least one step removed from the actual lending—was itself unlawful." (*Id.* at 26.)

Finally, the district court held that the City's allegations fail to demonstrate proximate cause. Applying the directness requirement of *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which the Ohio Supreme Court has incorporated into Ohio common law, the district court held that the relationship between the City's alleged injury and the defendants' alleged injurious conduct was indirect, highly attenuated, and contingent on the actions of third parties. The court rejected the City's attempt to analogize this case to *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002). "[T]he guns that comprised the illegal firearms market in [*Beretta*] originated with the defendant gun manufacturers, while in this case, Defendants did not originate the underlying subprime loans or initiate foreclosures in Cleveland, but merely provided funding for subprime lending." (R.247 at 35.) Further, "Cincinnati had to bear . . . costs [of] policing the existence of the [illegal firearms] market, irrespective of whether third-parties were actually injured by gun violence," whereas here "[t]he City does not and cannot claim that in the absence of any foreclosures, it was injured by the mere issuance of subprime loans or [mortgage-backed securities]." (*Id.* at 35-36.)

Accordingly, the court held that the alleged injuries were at most indirectly linked to the injurious conduct asserted.

In light of these four independently dispositive holdings, which are applicable to all defendants, the district court declined to address several other proffered grounds for dismissal. (*Id.* at 2-3.)

SUMMARY OF ARGUMENT

I. After defendants properly removed this action to federal court, the City agreed to prosecute its public nuisance claim solely in federal court, waiving objections to removal.

A. After the district court denied its motion to remand, the City agreed to prosecute this claim against defendants *exclusively* in federal court. The City's request for a remand on non-jurisdictional grounds violates the City's agreement.

B. In any event, defendants followed all necessary procedures in removing this action to federal court. The City attempts to challenge the unanimity of defendants' consent to removal. But all defendants consented to removal by (i) filing individual consents and (ii) expressly joining the memorandum in opposition to the City's motion to remand, either of which was sufficient to indicate consent to removal.

C. The City's argument to the contrary is baseless. The City asserts that The Bear Stearns Companies, Inc. (as opposed to its subsidiary, Bear Stearns &

Co., Inc.) did not adequately consent to removal. The district court correctly rejected that argument because the City failed to raise it within thirty days from the filing of the individual Bear Stearns consent and because the City had strategically waited until oral argument to raise the issue. Even if the City had not waived this challenge, the argument would be meritless. The Bear Stearns companies relied upon an individual who could, and did, consent on behalf of both entities. Further, The Bear Stearns Companies, Inc., opposed the City's motion to remand within the thirty-day time period permitted for removal, which also shows its consent to removal.

II. Ohio Revised Code § 1.63 preempts the City's action.

A. Section 1.63 expressly precludes municipalities from taking any action, "directly or indirectly," to regulate mortgage lending practices. Notwithstanding the Ohio Supreme Court's holding that Section 1.63 preempted the City's prior attempt to enact local regulation of lending practices, the City now seeks to use a broad common law nuisance suit to accomplish the same objective. But the City's action falls well within Section 1.63's broad statutory language, especially in light of the well-established principle that a common law action for damages is a form of regulation.

B. The City contends that this lawsuit does not violate the Home Rule Amendment of the Ohio Constitution. Defendants, however, are not arguing that

this action violates the Home Rule Amendment. The district court's preemption holding properly relies on Section 1.63, not on any constitutional provision. In any event, a home-rule analysis only confirms the preemptive effect of Section 1.63.

III. The economic loss doctrine bars the City's public nuisance claim. That doctrine prevents recovery in tort, including under a public nuisance theory, of damages for purely economic losses. Relying on Ohio cases directly on point, the district court properly rejected the City's argument for creating a public-nuisance exception to the doctrine.

IV. The City's allegations fail to demonstrate proximate cause.

A. Defendants were not the direct, and thus not the proximate, cause of the City's alleged injuries. To establish proximate cause, a plaintiff must plead facts sufficient to show a "direct relation between the injury asserted and injurious conduct alleged." *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). As in *Holmes*, the losses alleged here cannot be "direct" because they are contingent upon the inability or unwillingness of third-party subprime borrowers to repay their loans. Further, the City has alleged a highly attenuated chain of causation. According to the City, defendants funded subprime lending through securitization, which created demand for subprime loans, which encouraged mortgage brokers to find willing borrowers. The borrowers later failed to repay their loans for various reasons, and the borrowers' defaults led unspecified third

parties to foreclose on properties. Whoever then owned the properties failed to maintain them, and the City was required to incur costs either maintaining or demolishing them. By no reasonable measure of directness can this chain of events be deemed "direct."

The administrative rationales for the directness requirement reinforce this conclusion. It would be an administratively unworkable and speculative inquiry to attempt to determine which intervening parties and factors caused the alleged harm to the City and in what amount. If unlawful conduct occurred, individual borrowers and homeowners have an array of remedies that are far more straightforward and direct than the City's attenuated and legally deficient tort theory. And the City's injury—reduced tax revenues and increased costs—is entirely dependent upon the harm to third parties—namely, Cleveland property owners whose property values have declined and borrowers who have suffered foreclosures.

B. Contrary to the City's assertions, the directness requirement discussed in *Holmes* has been incorporated into Ohio common law, and is fully applicable at the motion-to-dismiss stage.

C. The district court properly distinguished the proximate cause holding of *Beretta*. In *Beretta*, the guns that comprised the illegal firearms market originated with the defendant gun manufacturers. Here, the City does not allege

that any subprime mortgage originated with defendants. The City instead alleges that defendants *financed* subprime lenders. Further, the claim in *Beretta* did not hinge on the actions of, and harm to, third parties, because Cincinnati would have incurred the costs of monitoring an illegal gun market whether or not individuals were harmed from gun violence. Here, by contrast, there is no allegation that, in the absence of foreclosures on and abandonment of individual homeowners' properties, the mere issuance of subprime loans would cause the City to incur the costs for which it seeks compensation.

V. Mortgage lending practices that are both lawful and heavily regulated cannot form the basis of a public nuisance claim.

A. Extensive government approval and regulation of the subprime mortgage products and practices challenged by the City precludes a public nuisance claim. Under Ohio law, what the law sanctions cannot be held to be a public nuisance. Although there may be categories of conduct that are lawful if performed one way and a nuisance if performed another way, where the details of a particular kind of conduct are governed by a comprehensive set of legislative acts or administrative regulations, such conduct cannot form the basis of a public nuisance claim. The district court properly dismissed the City's public nuisance claim because the activities at the core of City's claim—subprime mortgage

lending and related securitization activities—were permitted, carefully regulated, and even encouraged by government regulators.

B. Neither the City's focus on securitization nor its attack on the volume of otherwise lawful subprime lending can salvage its public nuisance claim. Because the specific challenged forms of subprime lending were sanctioned and regulated by law and thus not subject to challenge on public nuisance grounds, the financing of such lending through securitization cannot form the basis of a public nuisance claim, even if financing activities increased the overall number of subprime loans.

Nor can the City resuscitate its claims by pointing to *Beretta*'s approval of a public nuisance claim against a handgun manufacturer. That case went forward only because it challenged discrete distribution practices that were alleged to create an *illegal* firearms market—practices that were not subject to regulation. Here, by contrast, the City challenges the very existence of *lawful* subprime lending in Cleveland, which is sanctioned and subject to a detailed regulatory scheme.

ARGUMENT

I. THE CITY HAS AGREED TO PROSECUTE ITS PUBLIC NUISANCE CLAIM IN FEDERAL COURT AND, IN ANY EVENT, DEFENDANTS PROPERLY REMOVED THIS ACTION.

A. The City Is Litigating In The Forum Of Its Choice.

The City's present request for a remand is precluded by its agreement to prosecute this public nuisance case exclusively in federal court. (R.186 at 6.) After the district court denied its motion to remand (R.172 at 25), the City filed a new action in state court alleging the same public nuisance claim against affiliates of many of the original defendants. (R.186 at 3-4.) To avoid prolonged argument over whether the City's new action was proper, the parties reached a compromise that led to an Agreed Order. (*Id.*) As part of that compromise, the City agreed to "prosecute the public nuisance claim" against defendants, "if at all, *exclusively* in [the district court]," while other claims would remain in state court. (*Id.* at 6 (emphasis added).) The City cannot now complain that it is somehow being "improperly denied . . . the opportunity to prosecute its claim[] in the forum of its choice" (Appellant Br. at 20), when it *agreed*—in a consented-to order that it is not challenging—to prosecute its claim exclusively in federal court. The City's arguments violate that agreement because they would result in the City prosecuting this suit in state court. The Court should hold the City to the agreed federal forum.

See Page v. City of Southfield, 45 F.3d 128, 133 (6th Cir. 1995) (holding that "procedural defects in removal" "may be waived").

B. In Any Event, Defendants Followed All Necessary Procedures In Removing This Action To Federal Court.

Defendants properly removed this action to federal court. Generally, defendants can remove an action to federal court if that court has original subject-matter jurisdiction. *See* 28 U.S.C. § 1441. To remove an action, the defendants must file a notice of removal in federal court within thirty days of receiving the summons or complaint. *See id.* § 1446(a)-(b); *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 201 (6th Cir. 2004). In a case involving multiple defendants, courts have required that all defendants consent to removal. *See Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 n.3 (6th Cir. 1999). A defendant can show its consent in numerous ways, including: (i) by signing the notice of removal; (ii) by filing a separate consent, *id.* at 531, 533 n.3; or (iii) by joining the opposition to a plaintiff's motion to remand, *Harper*, 392 F.3d at 202. As long as all defendants acknowledge their consent—even if after the thirty-day time period for removal—this "rule of unanimity" is satisfied. *See Klein v. Manor Healthcare Corp.*, Nos. 92-4328, 92-4347, 1994 WL 91786, at *4-*5 (6th Cir. Mar. 22, 1994).

Here, the City filed its complaint in the Cuyahoga County Court of Common Pleas on January 10, 2008. (R.1, Ex. A.) Diversity jurisdiction existed under 28 U.S.C. § 1332 because none of the named defendants was a citizen of Ohio, and

the amount in controversy exceeded $75,000. (R.1 at 2-6.) As such, on January 16, 2008, Lehman Brothers Holdings, Inc., filed a timely notice of removal. (*Id.* at 1, 7.) All other defendants filed individual consents to removal. The last was filed on February 1, 2008, well within any thirty-day time limit for removal. (*See* R.1; R.4; R.21; R.37; R.49; R.57.)

Also within the thirty-day limit, all defendants opposed the City's motion to remand the action to state court. The City filed its motion to remand on January 17, 2008, the day after Lehman filed the notice of removal. (R.5 at 1-2.) In response, on February 1, 2008, Lehman filed a memorandum in opposition. (R.68.) All defendants expressly joined the memorandum, again indicating their consents to removal within any thirty-day time limit for removal. (R.71; R.89.) *See Harper*, 392 F.3d at 202. The City concedes that it is sufficient for defendants to "inform[] the District Court of their own consent to removal within 30 days of receiving service of the Complaint." (Appellant Br. at 28.) Defendants thus expressed their consents to removal not once, but twice, in satisfaction of Section 1446's removal requirements.

C. The City Has Waived Its Contrary Argument, Which Also Fails On The Merits.

The City's sole argument to the contrary is that The Bear Stearns Companies, Inc.—as opposed to its subsidiary and current defendant Bear Stearns & Co., Inc.—did not adequately consent to removal. (*Id.* at 10.) The City

challenged the Bear Stearns consent for the first time during oral argument on its motion to remand, on February 29, 2008. (*See* R.172 at 8 n.8.) By that time, well over thirty days had passed since the named entity had consented to removal. (*See* R.4 at 1 & Ex. A.) The district court, therefore, correctly concluded that the City's claim was untimely under the statutory limits for filing a motion to remand a case to state court. (*See* R.172 at 7.) The City had, at most, thirty days from the filing of the consent to challenge it. *See* 28 U.S.C. § 1447(c); *Page*, 45 F.3d at 133.

As the district court likewise held, "more general[]" waiver principles—that a party cannot belatedly raise new arguments—equally prohibit the City from challenging the consent. (R.172 at 8-9 & n.10 (citing *Bridgeport Music, Inc. v. WB Music Corp.*, 520 F.3d 588, 595 n.4 (6th Cir. 2008).) The City admitted it was "guilty" of waiting until oral argument to raise this new issue—instead of raising it in any of the briefs filed after Bear Stearns consented to removal (*see* R.34; R.91; R.109)—"because those prior filings were made within the 30-day window which would have given the other side an opportunity to correct the deficiency.'" (R.172 at 8 n.8.) Given the City's acknowledged gamesmanship, the district court was well within its discretion to find that the argument had been waived. *See Barany-Snyder v. Weiner*, 539 F.3d 327, 331-32 (6th Cir. 2008); *United States ex rel. Marlar v. BWXT Y-12, L.L.C.*, 525 F.3d 439, 450 n.6 (6th Cir. 2008).

The City contends that the district court should not have found its Bear Stearns argument to be waived because that argument and the arguments the City presented in the briefing in support of its motion to remand all related to the "rule of unanimity." (Appellant Br. at 33-35.) But the arguments were not sufficiently related. Indeed, the City's briefing had previously abandoned its Bear Stearns argument by expressly conceding that "[a]ll of the defendants did eventually give their consent to removal." (R.91 at 7.) And the City's broad contention is analogous to suggesting that it could now, for the first time, challenge the individual consent of yet another defendant because that challenge also generally concerns the "rule of unanimity." The district court did "not look favorably upon [the City's] maneuvers" in saying one thing in its briefs and another at the hearing. (R.172 at 8.) Neither should this Court.

In any event, the City's challenge is meritless. As the district court noted, the caption to the City's complaint made it ambiguous whether the City was suing the parent, The Bear Stearns Companies, Inc., or the subsidiary, Bear Stearns & Co., Inc. (*Id.* at 15-17.) As such, the companies relied upon an individual who could consent on behalf of both entities to provide a consent on behalf of the entity named in the caption, "The Bear Stearns Companies." (*See* R.167, Ex. A.) A non-party subsidiary, therefore, was not consenting on behalf of a party parent, as the City suggests. To the contrary, the district court found "uncontroverted," as a

factual matter, that the parent itself consented through an individual who could consent for it. (R.172 at 15-16.)

Furthermore, the City does not dispute that The Bear Stearns Companies, Inc., opposed its motion to remand within the thirty-day time period permitted for removal. (*See* R.71 at 1-2.) That opposition alone shows that The Bear Stearns Companies, Inc., consented to removal. In response, the City argues that the opposition did not show the consent to removal of The Bear Stearns Companies, Inc., but only that it "endorsed an inaccurate rendition of what really happened with respect to removal." (Appellant Br. at 33.) The City's hyper-technical argument conflicts with this Court's decision in *Harper*—which found a defendant's opposition sufficed where the defendant noted that he had previously consented to removal. *See Harper*, 392 F.3d at 199, 202. It also "contravene[s] the spirit of the more recent case law on the subject" of removal, which has refused "to interpret statutory removal provisions in a grudging and rigid manner, preferring instead to read them in a light . . . more consonant with a modern understanding of pleading practices." *Klein*, 1994 WL 91786, at *4. The district court correctly concluded that there was "no legal support for the City's claim" that joining in the opposition to remand somehow did not show adequate consent. (R.172 at 10-11 & n.11.)

II. OHIO LAW PREEMPTS THE CITY'S PUBLIC NUISANCE CLAIM.

A. Ohio Revised Code § 1.63 Precludes The City From Taking Any Action To Regulate Mortgage Lending.

Ohio law expressly precludes municipalities, including the City of Cleveland, from taking any action, directly or indirectly, to regulate mortgage lending. Specifically, Ohio Rev. Code § 1.63, enacted in February 2002, provides:

> The state solely shall regulate the business of originating, granting, servicing, and collecting loans and other forms of credit in the state and the manner in which any such business is conducted, and this regulation shall be in lieu of all other regulation of such activities by any municipal corporation or other political subdivision. Any ordinance, resolution, regulation, *or other action* by a municipal corporation or political subdivision *to regulate, directly or indirectly*, the origination, granting, servicing, or collection of loans or other forms of credit constitutes a conflict with the Revised Code . . . and is preempted.

Ohio Rev. Code § 1.63(A)-(B) (emphases added).

In *American Financial Services Ass'n v. City of Cleveland*, 858 N.E.2d 776 (Ohio 2006) ("*AFSA*"), the Ohio Supreme Court considered a Cleveland ordinance that purported to prohibit certain allegedly harmful loans defined to include loans with high-interest rates or other features. The court concluded that Section 1.63 preempted the City's ordinance. *Id*. at 785-86. Notwithstanding the Ohio Supreme Court's rejection of the City's attempt to regulate lending practices, the City now seeks to use a broad common-law public nuisance suit to accomplish the same

objective. This attempt at regulation through litigation cannot be countenanced under Section 1.63's unambiguously broad language.

The City's common law suit squarely fits within Section 1.63's bar against any municipal "action . . . to regulate, directly or indirectly," mortgage lending practices. The City cannot seriously contend that the filing of this lawsuit does not constitute "action" on its part. The term "action" is commonly understood to include a lawsuit. *See Webster's Third New Int'l Dictionary* 21 (3d ed. 1981) (defining "action" as "a legal proceeding by which one demands or enforces one's right in a court of justice"); *Black's Law Dictionary* 32 (9th ed. 2009) (defining "action" as "[a] civil or criminal judicial proceeding"). Similarly, lawsuits seek "to regulate" under any ordinary understanding of that phrase: Common law actions for monetary damages "can be, indeed [are] designed to be, a potent method of governing conduct and controlling policy." *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (citation omitted); *see San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief"). The Supreme Court has repeatedly observed that government power "may be exercised as much by a jury's application of a state rule of law in a civil lawsuit," as in a regulation or ordinance. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 573 n.17 (1996). Finally, the City's suit

against securitizers regulates lending practices because it seeks to establish the broad rule that all subprime lending was inappropriate for Cleveland and tortious. (*See, e.g.*, R.189 ¶¶ 4, 8.) Thus, the district court correctly held that the statute's plain language preempts the City's suit.

In an attempt to avoid the statute's broad preemptive effect, the City argues that its public nuisance lawsuit does not "constitute an exercise in 'regulation.'" (Appellant Br. at 56-60.) In so arguing, the City urges the Court (*id.* at 57) to disregard Section 1.63's express language in favor of different language found elsewhere in the Ohio Revised Code, at Section 4905.65(A)(3). That section, however—which pertains to public-utility regulation—does not actually define "regulation" or "action to regulate." Rather, it defines "local regulation" as "any legislative or administrative action of a political subdivision of this state, or of an agency of a political subdivision of this state, having the effect of restricting or prohibiting the use of an existing public utility facility or facilities or the proposed location, construction, or use of a planned public utility facility or facilities." Ohio Rev. Code. § 4905.65(A)(3). In contrast, Section 1.63 broadly encompasses not simply any "local regulation" in this specialized sense but also any "*other action*" that regulates "*directly or indirectly*." *Id.* § 1.63 (emphases added).

The City offers no rationale why the Court should rely on more limited language found in an inapplicable section of the Code instead of Section 1.63's

express terms, other than to cite the general rule that in construing statutory language a court may be "guided by the legislature's use of the same terms defined elsewhere." (Appellant Br. at 57 (citing *Ohio River Pipe Line, LLC v. Gutheil*, 761 N.E.2d 633 (Ohio 2001).) But that canon only applies where, unlike here, the language in the two sections is the same. Given the obvious difference in language here, the district court properly rejected the City's reliance on Section 4905.65. (R.247 at 6.) Indeed, the City's interpretation would render Section 1.63's broad language a nullity, in violation of a basic rule of statutory construction. *See E. Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio*, 530 N.E.2d 875, 879 (Ohio 1988).

The City's alternative argument—that its lawsuit does not "qualify as 'regulation' under any common understanding of what this word means" (Appellant Br. at 57)—simply ignores the above-cited Supreme Court case law holding that common law actions "regulate" conduct. Indeed, courts have repeatedly rejected equally transparent attempts by municipalities to use litigation to bypass state limits on municipal power to regulate. *See, e.g., City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 889-90 (E.D. Pa. 2000) ("What the City cannot do by act of the City Council it now seeks to accomplish with a lawsuit. The United States Supreme Court has recognized that the judicial process can be viewed as the extension of a government's regulatory power."); *Sturm, Ruger & Co., Inc. v. City of Atlanta*, 560 S.E.2d 525, 530 (Ga. Ct. App.

2002) (lawsuit by city to regulate firearms was preempted as no less a "usurpation of State power" than direct legislation); *Penelas v. Arms Tech. Inc.*, 778 So. 2d 1042, 1045 (Fla. Ct. App. 2001) (rejecting public nuisance suit as "round-about attempt . . . to regulate" "through the medium of the judiciary"). These courts have held that a municipality "may not do indirectly" through litigation "that which it cannot do directly" through legislation. *City of Atlanta*, 560 S.E.2d at 530. Section 1.63 codifies this principle by prohibiting municipalities from taking "any action" to regulate lending practices, "directly or indirectly."

The City next argues, apparently without irony, that this litigation does not qualify as an action to regulate because it does not create "a detailed, comprehensive, independent code of lender conduct," but instead takes a broad approach by seeking to turn all subprime lending into a tort. (Appellant Br. at 57.) The City's broad approach does not make its suit any less regulatory. The City could not seriously contend that a single-sentence ordinance prohibiting all subprime lending would fall outside Section 1.63 simply because it did not establish a "detailed scheme." The same holds true for its lawsuit.

In addition, the City attempts to avoid Section 1.63 by arguing that it is merely acting as a private party, "rather than [on behalf] of society as a whole." (Appellant Br. at 58.) That is a bizarre argument in a case where the alleged damages (reduced tax income, increased costs of police and other municipal

services) are uniquely governmental in nature. But that aside, in rejecting this argument, the district court found that the "statute at issue makes no distinction between actions that regulate in a 'governmental' capacity versus a 'proprietary' capacity," and described the distinction drawn by the City, "as far as the statute is concerned, [as] one without a difference." (R.247 at 7.) Common law actions, in other words, can have the necessary regulatory effect, whether styled as in a governmental or proprietary capacity. *See, e.g., Riegel*, 128 S. Ct. at 1008; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

At the same time, however, simply because the City's action is preempted does not mean that Section 1.63 preempts *all* common law actions brought by municipalities, no matter how tenuously related to mortgage lending, as the City suggests with its analogy to a municipality's claim against a broker for mishandling investments. (*See* Appellant Br. at 58-59, citing *City of Vista v. Robert Thomas Sec., Inc.*, 101 Cal. Rptr. 2d 237 (Cal. Ct. App. 2000).) To the contrary, some municipal suits—just like some municipal ordinances—would "affect [the various practices listed in Section 1.63] in too tenuous, remote or peripheral a manner to warrant a finding that the [suits regulate] the [practices]." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983). But "[t]he present litigation plainly does not present a borderline question." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (internal quotation marks omitted).

Because the City seeks a finding that a wide array of lending practices constitutes an unlawful public nuisance (R.189 ¶¶ 4, 8), it unmistakably regulates these practices and is preempted.

Further, even if any artificial distinction could be drawn between suits that regulate in a proprietary capacity and suits that regulate in a government capacity, that would not help the City. Its own allegations make clear that the very harm the City claims gives it standing to pursue a claim for public nuisance—*i.e.*, municipal expenditures and lost tax revenue—is inextricably intertwined with its status as a governmental entity. (*See also* R.247 at 7.) In the authorities the City cites, by contrast, the state or municipality was truly acting as a private litigant or market participant, as opposed to in a governmental capacity. *See, e.g., Cardinal Towing & Auto Repair, Inc. v. City of Bedford,* 180 F.3d 686, 691 (5th Cir. 1999) (finding city acted as a typical private party would act in seeking a towing service and, therefore, preemption should not apply); *Vista*, 101 Cal. Rptr. 2d at 237 (suit brought by city against securities broker for mishandling municipal investments); *State v. McCoy*, 38 N.W.2d 386, 389 (Minn. 1949) (finding state subject to taxation because actions brought by state to seek escheatment of funds was "an ordinary action for the recovery of money or property," and distinguishing an action to enforce the payment of taxes, which would instead be in the state's sovereign capacity).

Lastly, the City suggests that the Ohio General Assembly would not have intended Section 1.63 to bar its suit while, at the same time, permitting "private litigants [to] bring the identical public nuisance claim." (Appellant Br. at 60.) Contrary to the City's suggestion, that dichotomy fits squarely within the General Assembly's intent. Indeed, in 2007, the General Assembly reaffirmed its decision to exclude cities from this arena by passing Ohio Substitute Senate Bill 185, which substantially broadened Ohio mortgage lending laws. *See* Stephen Ornstein et al., *Ohio S.B. 185*, 61 CONSUMER FIN. L.Q. REP. 94 (2007). That law permitted the Ohio Attorney General, county prosecutors (if the Attorney General will not act), and private litigants to enforce its provisions in particular circumstances. *See* Ohio Rev. Code §§ 1321.541, 1322.11, 1345.09, 1349.31. Tellingly, however, the General Assembly retained Section 1.63. The new law thus permitted *private litigants* to enforce it, but *not municipalities*. The same holds true here. Had the General Assembly wanted municipalities like the City to have any role in regulating mortgage lending practices, it would have said so in S.B. 185. It did not, signaling that it was content with the Ohio Supreme Court's decision in *AFSA* that municipalities be denied any regulatory authority over lending practices.

B. The Home Rule Amendment To The Ohio Constitution Is Inapplicable.

The City contends that "[p]rosecution of this lawsuit does not violate the Home Rule Amendment of the Ohio Constitution." (Appellant Br. at 60.) As the

district court correctly noted (R.247 at 9), however, defendants are not arguing that the City's action violates the Home Rule Amendment. Our argument relies on Section 1.63, not any constitutional provision. Because the Ohio General Assembly has well-established authority to restrict state common law actions such as this one, *see, e.g.*, *Strock v. Pressnell*, 527 N.E.2d 1235, 1241 (Ohio 1988), and because it has done so in Section 1.63, the City's public nuisance claim must be dismissed as preempted by Ohio law.

Even if it were somehow necessary to determine whether this lawsuit violates the Home Rule Amendment, the City's suit would fail under *AFSA*. There, the Ohio Supreme Court held that Section 1.63 preempted a Cleveland lending ordinance notwithstanding the Home Rule Amendment. 858 N.E.2d at 780, 786. The City argues here that its public nuisance lawsuit, unlike the ordinance invalidated in *AFSA*, does not "conflict" with Section 1.63. (Appellant Br. at 63-64.) That argument is flatly contradicted by the language of the statute itself, which states that any attempt to regulate the conduct at issue (by whatever means) "*constitutes a conflict* with the Revised Code." Ohio Rev. Code § 1.63(B) (emphasis added).

The City's remaining argument—that its lawsuit is a protected exercise in "local self government," rather than an unprotected "exercise of local police power" (Appellant Br. at 61-63)—fares no better. It is well established that local

government action is not protected under the Home Rule Amendment unless it relates "*solely* to the government and administration of the internal affairs of the municipality." *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 896 N.E.2d 967, 973 (Ohio 2008) (citing matters involving "structure or operation of a charter municipality" as example of local self-government). Here, the subject matter of this lawsuit can hardly be characterized as relating "*solely* to the government and administration of the internal affairs" of the City. Indeed, as the City's own allegations make clear, this lawsuit has statewide—indeed, nationwide—implications for the structure of the mortgage market. (*See, e.g.*, R.189 ¶ 4 ("[s]ubprime lending abuses have inflicted this same kind of damage upon cities across the United States"); *see generally id.* ¶¶ 35-52 (including allegations on a national scale).) The Ohio Supreme Court has repeatedly held that matters of far greater local significance than those at issue here constitute an exercise in police power rather than in purely local self-government. *See, e.g.*, *Marich v. Bob Bennett Constr. Co.*, 880 N.E.2d 906 (Ohio 2008) (ordinance that regulated traffic by placing size requirements on vehicles); *Ohio Ass'n of Private Detective Agencies, Inc. v. N. Olmsted*, 602 N.E.2d 1147 (Ohio 1992) (ordinance that required security officers and private policemen to register with the local police department before commencing employment); *Ohioans for Concealed Carry*, 896 N.E.2d at 967 (ordinance regulating gun control).

In fact, the type of regulation the City seeks through this action is an exercise of police power in its most classic sense because the City concedes that it pertains to "the public health, safety and peace of life in the City." (Appellant Br. at 37 (quotation omitted).) *See Maple Heights v. Ephraim*, 898 N.E.2d 974, 978 (Ohio Ct. App. 2008) (police regulation relates to "the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property") (internal quotation marks and citation omitted). The City's Complaint includes allegations of massive foreclosures (R.189 ¶ 61), a City left in "devastation" (*id.* ¶ 64), significantly decreased home values (*id.* ¶ 66), and "fire hazards" and "prey for looters and drug dealers" (*id.* ¶ 1). The City cannot now argue that this lawsuit is unrelated to its police power.

III. THE ECONOMIC LOSS DOCTRINE BARS THE CITY'S PUBLIC NUISANCE CLAIM.

As the district court correctly held, the economic loss doctrine bars the City's public nuisance claim. The economic loss doctrine "prevents recovery in tort of damages for purely economic loss." *Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.*, 835 N.E.2d 701, 704 (Ohio 2005); *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 667-68 (Ohio 1995). This rule is based on the underlying policy that if tort liability is expanded to include economic damages, parties would be exposed to "liability in an indeterminate amount for an

indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 444 (N.Y. 1931).

Ohio's economic loss doctrine applies to a public nuisance claim because it is a tort claim. (R.247 at 11-12 (discussing *RWP, Inc. v. Fabrizi Trucking & Paving Co., Inc.*, No. 87382, 2006 WL 2777159 (Ohio Ct. App. Sept. 28, 2006) and *Ashtabula River Corp. Group II v. Conrail, Inc.*, 549 F. Supp. 2d 981, 987-88 (N.D. Ohio 2008))). Relying on *RWP* and *Ashtabula River*, the district court held that the City's public nuisance claim, which seeks damages for purely economic loss, must be dismissed as a matter of Ohio law.

The City argues for an exception to the economic loss doctrine for public nuisance cases. The sole authorities cited for this proposition are two law review articles. (Appellant Br. at 51.) One article—Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 824 (2001)—"predate[s] the *Ashtabula River* and *RWP* decisions and make[s] no attempt to address any specifics of Ohio law," offering "little persuasive value in terms of describing Ohio law as it exists today." (R.247 at 13.) "This is particularly so in light of the Ohio Supreme Court's recent reiteration of its commitment to the economic loss doctrine." (*Id.* (citing *Corporex*, 835 N.E.2d at 704).)

The second article—a 43-year-old analysis by Professor Prosser: *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1013 (1966)—is cited for the first time on appeal. But this article does not even discuss the economic loss doctrine (much less analyze Ohio law on the topic) and is therefore entirely inapposite. In the absence of any other authority on this point, the City's law review articles are simply not persuasive regarding the present state of Ohio law, as the district court recognized.

The City next argues that the decision in *Beretta* impliedly recognized an exception to the economic loss doctrine for public nuisance cases. As the district court observed, however, the *Beretta* opinion does not so much as mention the economic loss doctrine. (R.247 at 14.) The district court further explained that, while this might give rise to some "weak implication" in a decisional vacuum, such an implication could not be reasonably drawn where two previous Ohio cases, both decided after *Beretta*, had reached precisely the opposite result "following thorough discussions of the applicable law." (*Id.* at 15.) The district court also noted that the Illinois Supreme Court had concluded that the rule applied in public nuisance actions. (*Id*. (citing *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1141-42 (Ill. 2004).) "To follow the City's invitation and reject these well-reasoned decisions on the basis of a heretofore unrecognized, purported *sub*

silentio holding would be an exercise in judicial recklessness, if not pure folly." (*Id.* at 15.)

The City further argues that *Beretta* implicitly rejects the economic loss doctrine because it adopts the Restatement's formulation of public nuisance, and because an illustration in a comment to Section 821C of the Restatement implicitly suggests an exception to the economic loss doctrine for public nuisance claims. But *Beretta* did not adopt or discuss Section 821C of the Restatement. As the court below noted, there is "exactly one published [Ohio] decision that makes any reference to Section 821C of the Restatement. . . . That case refers directly to the text of the Restatement itself, and it does so in support of an uncontroversial proposition unrelated to the City's argument." (R.247 at 14.)

Similarly, the City argues that *RWP* and *Ashtabula* are unpersuasive because neither addresses Restatement § 821C or the holding of *Beretta*. But, as the district court explained, the *RWP* and *Ashtabula* courts cannot be faulted for not discussing "illustrations buried in the commentary section" of the Restatement when those illustrations "run afoul of the economic loss doctrine and make no pretense of accounting for it." (R.247 at 14.) Moreover, the courts in *Ashtabula* and *RWP* were bound to apply the economic loss doctrine as actually explained by decisions of the State's highest court, not the City's view of a supposed exception to the doctrine that was not so much as mentioned in *Beretta*. (*Id.*)

The City further argues that *RWP* is unpersuasive because it suggests that a plaintiff must show "injury to property" in order to recover for public nuisance. (Appellant Br. at 55.) The City characterizes this statement as inconsistent with *Beretta*, which states "there need not be injury to real property in order for there to be a public nuisance." (*Id.*) That is an unexceptionable statement; obviously there are all manner of physical injuries that could constitute a public nuisance without affecting real property, ranging from widespread injuries to persons to air pollution to excessive noise. As more recent cases demonstrate, the kind of physical damage that can support a public nuisance claim is broader than damage to real property, but not so broad as to include intangible economic losses. *See RWP*, 2006 WL 2777159, at *3-*4 (public nuisance claim requires damage to "persons" or "property," (*i.e.*, "tangible things")). Here, however, the City had no physical injury at all—not to real estate or any other person or thing. It cannot rely upon the physical deterioration of foreclosed homes to constitute its physical injury. The district court correctly found that the City could not escape the economic loss rule by relying on alleged physical injury to the property of others. (R.247 at 16.)

IV. DEFENDANTS DID NOT PROXIMATELY CAUSE THE ALLEGED HARM.

A. Defendants Were Not The Direct, And Thus Not The Proximate, Cause Of The City's Alleged Injuries.

The district court correctly held that defendants were not the proximate cause of the City's alleged injuries. To establish proximate cause, a plaintiff must plead facts sufficient to show a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *see Beretta*, 768 N.E.2d at 1148 (incorporating the *Holmes* directness requirement for purposes of Ohio common law). In *Holmes*, the Securities Investor Protection Corporation ("SIPC") had sued an alleged stock manipulator, contending that his scheme led to the bankruptcy of two brokers, causing them to fail to meet obligations to their clients and requiring the SIPC to bear the reimbursement costs. 503 U.S. at 262-63. The Supreme Court held that the SIPC's claims were too indirect to satisfy proximate causation, because the losses were contingent on the insolvency of the third-party brokers. *Id.* at 271. The *Holmes* Court offered three administrative rationales for requiring "directness" as an element of proximate cause: (1) the difficulty in ascertaining the extent to which a claimed injury is attributable to the indirect defendant's conduct, as distinct from other, independent factors; (2) the complicated rules courts would be

forced to adopt to apportion damages at different levels of injury; and (3) the existence of a directly injured party who potentially can vindicate the law. *Id.* at 269.

In *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), the Supreme Court clarified that proximate cause is lacking under the directness requirement whenever an injury is indirect, whether or not all three administrative rationales for the requirement are implicated. *Anza* held that Ideal Steel had failed to state a claim under the Racketeer Influenced and Corrupt Organizations Act by alleging that a competitor defrauded the state taxing authority and used the proceeds to draw customers away from Ideal. *Id.* at 457-58. The Court found proximate cause lacking because it would have been difficult to ascertain whether the defendants' conduct caused the asserted harm: "Businesses lose and gain customers for many reasons," the Court explained, "and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of [the defendants'] decreased prices." *Id.* at 459. The Court also held that the state taxing authority—though it suffered injuries that were "entirely distinct" from Ideal's, *id.* at 458—could pursue a separate remedy that was more direct and straightforward than the plaintiff's, *id.* at 460. Although there was no risk of duplicative recoveries in *Anza*, that did not make the injury any less indirect. *Id.*; *see also Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir.) (finding proximate cause absent

solely on unworkability grounds without inquiring into either the risk of duplicative recovery or "the question of whether there are more immediate victims"), *cert. denied*, 129 S. Ct. 458 (2008).

Measured by these standards, defendants' conduct cannot be deemed the proximate cause of the City's alleged injuries—the cost of monitoring, maintaining, and demolishing foreclosed, abandoned properties and decreased tax revenues. As the district court explained, the City's losses, like the losses alleged in *Holmes*, are contingent upon the inability or unwillingness of third parties—here, the subprime borrowers whose homes were foreclosed—to repay their mortgage loans and thus are by definition indirect. (R.247 at 31-32.)

Further, the link between alleged injury and injurious conduct in this case is far more attenuated than the link found to be insufficiently direct in *Holmes*. (*Id.*) In *Holmes*, the defendant's stock manipulation was merely one step removed from the SIPC's losses. The defendant had directly caused the brokers' insolvency, and the brokers' insolvency directly triggered SIPC's losses. Here, by contrast, the City has alleged a highly attenuated chain of events.

According to the City, defendants funded subprime lending through securitization. The securitization market then created a significant demand for subprime loans, which (along with the policies of government regulators) encouraged mortgage brokers to find willing borrowers. The borrowers later failed

to repay their loans for various reasons, some of which the City identifies (job losses as a result of changes in the local economy) and some of which the City does not even attempt to account for (*e.g.*, illness, catastrophic injury, divorce, excessively high credit card debt, inability to refinance, loss of savings, or decisions to walk away from a mortgage in light of the property's declining value). The borrowers' defaults led lenders to foreclose on properties. The new owners of the properties (unspecified non-party banks, real-estate speculators, or others) failed to maintain them, and the properties became eyesores, fire hazards, or otherwise deteriorated in condition to such a degree that the City was required to incur costs either maintaining or demolishing them. By no reasonable measure of directness can this chain of events be called direct. "[T]he potential number of intervening causes borders on incalculable." (R.247 at 32-33.)

The administrative rationales for the directness requirement reinforce this conclusion. While no one of these administrative factors is necessary to finding an injury to be indirect, all of them point to an indirect injury here. *First*, as in *Anza*, it would be an administratively unworkable and speculative inquiry to attempt to determine which intervening parties and factors caused the alleged harm to the City and in what amount. As is clear from the foregoing discussion of the City's theory, sorting out the multiple causative factors "would be an 'intricate, uncertain' inquiry of the type that the *Anza* Court warned against." *Canyon County*, 519 F.3d

at 983 (quoting *Anza*, 547 U.S. at 460). The City acknowledges some of the complicated economic factors that would need to be considered, including "the City's struggling Rust-Belt economy, the fading prominence of the manufacturing sector, and Cleveland's challenges in attracting a meaningful replacement" (R.189 ¶ 55), and the reversal of "[t]he booming real estate market in the United States" (*id.* ¶ 51), which itself was the product of a confluence of multiple complicated factors. This unworkable, speculative inquiry alone is reason enough to dismiss the Complaint. *Anza*, 547 U.S. at 460; *Canyon County*, 519 F.3d at 983.

Second, if unlawful conduct occurred, more "immediate victims" could "pursu[e] their own claims," which would be more "straightforward" to adjudicate. *Anza*, 547 U.S. at 460. In cases involving unlawful lending practices or wrongful disclosure, individual borrowers and homeowners have an array of remedies that are far more straightforward and direct than the City's attenuated and legally deficient tort theory. Mortgage lending is subject to "Ohio's predatory-lending statutes [which] are . . . part of a comprehensive and uniform statewide enactment setting forth a police regulation that prescribes a general rule of conduct for lending in Ohio." *Am. Fin. Servs. Ass'n v. City of Cleveland*, 858 N.E.2d 776, 784 (Ohio 2006); *see* Ohio Rev. Code §§ 1.63, 1349.25-1349.37. In 2006, in direct response to increased foreclosures, the Ohio General Assembly enacted the Ohio Home Ownership Protection Act, which comprehensively amended Ohio's

mortgage lending laws to address high foreclosure rates. Am. Sub. S.B. 185 (2006); *see* "Governor Signs Lending Law Rewrite," 75 *Gongwer News Serv*. 116 (June 19, 2006) ("Signing the bill . . . , [the Governor] said the measure should put an end to practices that ha[ve] put Ohio near the top of a dubious list of states with high foreclosure rates."). The Act significantly broadened remedies available against predatory lenders, and expanded the laws to cover other parties, including "loan officers," "mortgage brokers," and "non-bank mortgage lenders." Ohio Rev. Code § 1349.41.

Nor are these the only potential remedies. Individual borrowers facing foreclosure often defend against foreclosure actions and assert affirmative claims for wrongful foreclosure in appropriate cases. *See, e.g.*, *In re Foreclosure Cases*, No. 1:07CV2282, 2007 U.S. Dist. LEXIS 84011 (N.D. Ohio Oct. 31, 2007); *In re Foreclosure Cases*, No. 07-cv-166, 2007 U.S. Dist. LEXIS 95673 (S.D. Ohio Dec. 27, 2007). Further, as the district court noted, the purchasers of mortgage-backed securities, who have a more direct relationship with defendants, also have potential remedies if unlawful conduct occurred. These precisely defined, straightforward remedies available to directly injured parties in cases of unlawful conduct demonstrate the lack of proximate cause with respect to the City's ill-defined and indirect common law attack.

Third, as noted above, the City's injury—reduced tax revenues and increased costs—*is entirely dependent upon the harm to third parties*—namely, Cleveland property owners whose property values have declined and borrowers who have suffered foreclosures. Without the harm to Cleveland property owners, tax revenues would not decline and costs would not increase. The City's injury is, thus, classically derivative. Indeed, this case is even easier than *Anza* because in *Anza* the plaintiff's harm did "not flow through any intervening victims," *Canyon County*, 519 F.3d at 983, whereas here it does. As a result, the City's injury is too remote to be compensable. *Holmes*, 503 U.S. at 271; *Perry v. American Tobacco Co., Inc.*, 324 F.3d 845, 849 (6th Cir. 2003) (tobacco companies did not proximately cause increased premium costs to health care insureds).

B. The Directness Requirement Discussed In *Holmes* Is Fully Applicable Here.

The City's primary response to the district court's proximate cause analysis is to argue that *Holmes*'s directness requirement does not apply here. Relying on this Court's decision in *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004), the City first claims that *Holmes* cannot be applied at the motion-to-dismiss stage. (Appellant Br. at 42.) But *Trollinger* did not hold that the issue of proximate cause cannot be decided on a motion to dismiss, and, even if it had, it would no longer be good law. As the district court correctly explained, the United States Supreme Court's decision in *Anza*—which the City's brief ignores—applied

the *Holmes* inquiry at the motion-to-dismiss stage under Rule 12(b)(6). (R.247 at 30) (citing *Anza*, 547 U.S. at 453); *see also Perry*, 324 F.3d at 850 (affirming 12(b)(6) dismissal of complaint, including state law negligence claims, on proximate cause grounds).)

The City further claims that *Trollinger* precludes deciding proximate cause on the pleadings if there is "uncertainty" about what evidence might eventually turn up in discovery. (Appellant Br. at 43.) No conceivable evidence, however, could overcome the indirectness problems posed by the intervening causes and actors identified in the City's Complaint. At any rate, *Trollinger* was decided at a time when a district court could dismiss a complaint for failure to state a claim "only if it is clear that no relief could be granted under *any set of facts that could be proved consistent with the allegations*," and general allegations of proximate cause were presumed to embrace the facts necessary to support the claim. 370 F.3d at 615 (internal quotation marks and citation omitted). But the Supreme Court's subsequent decisions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) overruled the "no set of facts" standard upon which *Trollinger* relied. Under *Twombly*, a court must dismiss a complaint if it fails to plead "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570. Here, the speculative possibility that the City might uncover evidence of a direct link between alleged injury and injurious

conduct provides no basis for denying a motion to dismiss where the factual allegations of the Complaint fail to establish—and, indeed, where they contradict—the existence of a direct link.

The City next asserts that *Holmes* involved a "standing" issue that is different from the "proximate cause" issue here. (Appellant Br. at 49.) By "using *Holmes* to delineate the requirements of proximate cause," the City argues, the district court "negated" a distinction drawn by *Trollinger* "between . . . standing and the element of proximate causation." (*Id.*) The City's argument is pure semantics. *Trollinger* used the term "standing" because proximate cause is an element of *statutory standing* under RICO. *Trollinger* expressly acknowledged, however, that a plaintiff must satisfy *Holmes*'s directness requirement in order to show *proximate cause*. *See* 370 F.3d at 613 ("'Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts.'") (quoting *Holmes*, 503 U.S. at 268). In any event, the Supreme Court's subsequent decision in *Anza* confirmed (if there were any doubt) that the *Holmes* directness requirement is a "*proximate-cause requirement*." 547 U.S. at 461 (emphasis added); *see also Beretta*, 768 N.E.2d at 1148 ("In *Holmes*, the court explained why directness of relationship is a requirement of *causation*.") (emphasis added). The district court correctly applied *Holmes* in assessing proximate cause.

The City lastly contends that, by applying *Holmes*, the district court "forsaked any meaningful consideration of Ohio case law." (Appellant Br. at 43.) The City is wrong. Meaningful consideration of Ohio case law did not require *lengthy* consideration of Ohio law given that an Ohio Supreme Court decision expressly incorporated the *Holmes* direct-injury requirement for purposes of Ohio public nuisance law. *Beretta*, 768 N.E.2d at 1148. Having incorporated the *Holmes* direct-injury requirement and the rationales for it, the Ohio Supreme Court itself signaled that *Holmes* and the cases applying it are applicable. The cases that the City claims the district court instead should have considered were decided before the Ohio Supreme Court incorporated the *Holmes* direct-injury requirement into Ohio common law. (Appellant Br. at 44-46.)

In any event, the City's cases primarily address the issue of foreseeability. But a conclusory allegation of "foreseeability" cannot overcome the Complaint's proximate-cause problems. "Though foreseeability is an element of the proximate cause analysis, it is distinct from the requirement of a direct injury." *Perry*, 324 F.3d at 850-51; *see also Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235-36 (2d Cir. 1999). In *Anza*, for example, the plaintiff alleged that its injury was not only foreseeable, but intentional. 547 U.S. at 454-55 (it was defendant's conscious "goal" to injure plaintiff's business). The Supreme Court nevertheless held that the plaintiff's injury was indirect and,

therefore, that proximate cause was lacking. *Id.* at 458. A "foreseeable" injury is not necessarily a "direct" one. The issue here is the indirectness of the City's alleged injury.

C. The District Court Properly Distinguished *Beretta*.

When the City finally does address the supposed directness (or lack thereof) of its alleged injury, it relies entirely on the *Beretta* decision. In the City's view, "[i]f a 'direct relation' existed in *Beretta* between the alleged public nuisance and the plaintiff's injury, it necessarily does so in this lawsuit as well." (Appellant Br. at 48.) But the City completely ignores the critical distinctions that the district court found between this case and *Beretta*. In *Beretta*, "the guns that comprised the illegal firearms market . . . originated with the defendant gun manufacturers." (R.247 at 35); *see also* 768 N.E.2d at 1143. Here, defendants "did not originate the underlying subprime loans or initiate foreclosures in Cleveland, but merely provided funding for subprime lending." (R.247 at 35.) As the district court correctly explained, *Beretta* "might be analogous only if the Ohio Supreme Court had concluded that the banks that provided financing to the gun industry could be held liable on a public nuisance theory," but that decision "does not so much as hint at such a broad expansion of public nuisance law." *Id.* *See generally* *Dombroski v. Wellpoint, Inc.*, 895 N.E.2d 538, 545 (Ohio 2008) (in order to sue a shareholder for a tort committed by the corporation, "the plaintiff must

demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act"); *see also Wilmar Corp. v. Akron Tire Supply, Inc.*, No. 17861, 1997 WL 45054, at *3 (Ohio Ct. App. Jan. 29, 1997) (rejecting financiers' liability for entity's debt to a third party).[2] The City does not even attempt to respond to this analysis.

Nor does the City respond to the district court's discussion of another critical distinction between this case and *Beretta*. The claim in *Beretta* did not hinge on the actions of, and harm to, third parties. *Beretta* held that gun manufacturers could be liable for Cincinnati's costs of dealing with an "illegal firearms market" because it was necessary to incur those costs whether or not criminals ultimately used the guns to harm individuals. 768 N.E.2d at 1144. "'Even if no individual is harmed,'" the *Beretta* court explained, Cincinnati would "sustain many of the damages they allege due to the alleged conduct of defendants fueling an illicit market (*e.g.*, costs for law enforcement, increased security, prison expenses and youth intervention services.)." *Id.* at 1148 (internal quotation omitted).

Here, by contrast, there is no allegation that, in the absence of foreclosures on or abandonment of individual homeowners' properties, the mere issuance of subprime loans would cause the City to incur the costs for which it seeks

[2] Of course, for reasons explained above, the City's asserted injuries would be indirect even if it had alleged that defendants engaged in subprime lending. But the causal chain is even more indirect here.

compensation. Rather, without foreclosures and abandonment by third parties and harm to individual homeowners, the City would suffer no damages in the form of decreased tax revenues or increased costs. *Beretta* might be analogous, in other words, only if Cincinnati had attempted to recover for decreased tax revenues and increased costs associated with *harm to individuals* from gun violence by third parties. But *Beretta* expressly disclaimed that theory, and it has been soundly rejected in analogous cases. *See, e.g.*, *Perry*, 324 F.3d at 849.

The district court thus correctly held that the alleged conduct did not proximately cause the City's injuries.

V. THE DISTRICT COURT PROPERLY HELD THAT MORTGAGE LENDING PRACTICES THAT ARE BOTH LAWFUL AND HEAVILY REGULATED CANNOT FORM THE BASIS OF A PUBLIC NUISANCE CLAIM.

A. Extensive Government Approval And Regulation Of The Subprime Mortgage Products And Practices Challenged By The City Precludes A Public Nuisance Claim.

Under Ohio law, "[w]hat the law sanctions cannot be held to be a public nuisance." *Allen Freight Lines, Inc. v. Consol. Rail Corp.*, 595 N.E.2d 855, 857 (Ohio 1992) (quoting *City of Mingo Junction v. Sheline*, 196 N.E. 897, 897 (Ohio 1935) and citing *Toledo Disposal Co. v. State*, 106 N.E. 6 (Ohio 1914), *Francis v. City of Barberton*, 28 Ohio Law Abs. 359 (Ohio Ct. App. 1938)); 72 OHIO JUR. 3D *NUISANCES* § 13 (2008). Although there may be categories of conduct that are lawful if performed one way and a nuisance if performed another way, where the

"details of a particular kind of conduct" are governed by "a comprehensive set of legislative acts or administrative regulations," such conduct cannot form the basis of a public nuisance claim. *See Hager v. Waste Techs. Indus.*, No. 2000-CO-45, 2002 WL 1483913, at *9-*11 (Ohio Ct. App. June 27, 2002)*; see also Brown v. Scioto County Bd. of Comm'rs*, 622 N.E.2d 1153, 1159-60 (Ohio Ct. App. 1993); RESTATEMENT (SECOND) OF TORTS § 812B cmt. f (2008). Applying these standards, the district court properly dismissed the City's public nuisance claim because the activities at the core of the City's claim—subprime mortgage lending and related securitization activities—were permitted, carefully regulated, and even encouraged by government regulators.

As the district court observed, mortgage lending (including subprime mortgage lending) is regulated under numerous federal and state statutes and regulations and by several federal and state agencies. Mortgage lenders are subject to compliance with the federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.*, the Home Mortgage Disclosure Act, 12 U.S.C. § 2801, *et seq.*, the Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3801, *et seq.*, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Equal Credit Opportunity Act, 15 U.S.C. § 1691, *et seq.* To the extent they are subject to Ohio law, mortgage lenders must also comply with the Land Installment Contract Act, Ohio Rev. Code § 5313.01, *et seq.*, the Ohio

Mortgage Loan Act, Ohio Rev. Code § 1321.51, *et seq*., and the Ohio Homeowners Equity Protection Act, Ohio Rev. Code § 1349.25, *et seq*. (R.247 at 22.)

Regulators responsible for financial-institution oversight have provided extensive guidance regarding subprime mortgage lending practices—including specific practices attacked by the City's Complaint, such as the sale of loans with two- and three-year introductory-rate periods, the use of low- and no-documentation loans, and the development of loans with interest-only features. For example, the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Board of Governors of the Federal Reserve Board ("FRB"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA") (collectively, the "Federal Regulators") published their "Interagency Guidance on Subprime Lending" on March 1, 1999 ("1999 Guidance"), describing practices institutions should adopt with respect to, among other things, subprime lending policies and subprime mortgage sales and securitizations.[3] 1999 Guidance at 3-4, 6-7. The Federal Regulators later published "Expanded Guidance for Subprime Lending Programs" ("2001 Guidance") noting that "subprime" lending is not synonymous with "predatory" or

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[3] BD. OF GOVERNORS OF THE FED. RES. SYS., ET AL., INTERAGENCY GUIDANCE ON SUBPRIME LENDING (1999), available at http://www.federalreserve.gov/boarddocs/srLETTERS/1999/sr9906a1.pdf. (last visited Sept. 8, 2009).

"abusive" lending and providing guidance for practices that were consistent with responsible subprime lending.[4]

The Federal Regulators signaled their specific approval of the very practices the City challenges. On March 11, 2004, the FRB and FDIC published guidance entitled "Unfair or Deceptive Acts or Practices by State-Chartered Banks" ("2004 Guidance"), expressly recognizing the use and permissibility of loans with introductory rates.[5] In October 2006, the Federal Regulators issued their "Interagency Guidance on Nontraditional Mortgage Product Risks" ("2006 Guidance"), which addressed a variety of nontraditional mortgage structures, including "interest-only" loans and adjustable-rate mortgages. *See* 71 Fed. Reg. 58672-01 (Oct. 4, 2006). In July 2007, the Federal Regulators warned against presuming that "stated income loans," loans with low introductory rates that reset to higher rates, and similar types of loans were improper.[6] Against this backdrop,

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[4] OFFICE OF THE COMPTROLLER OF THE CURRENCY, ET AL., EXPANDED GUIDANCE FOR SUBPRIME LENDING PROGRAMS (2001), available at http://www.fdic.gov/news/news/press/2001/pr0901a.html (last visited Sept. 8, 2009).

[5] BD. OF GOVERNORS OF THE FED. RES. SYS. & FED. DEPOSIT INS. CORP., UNFAIR OR DECEPTIVE ACTS OR PRACTICES BY STATE-CHARTERED BANKS (2004), available at http://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/attachment.pdf (last visited Sept. 8, 2009).

[6] OFFICE OF THE COMPTROLLER OF THE CURRENCY, ET AL., STATEMENT ON SUBPRIME MORTGAGE LENDING (JULY 2007), available at http://www.occ.treas.gov/ftp/release/2007-64a.pdf (last visited Sept. 8, 2009) ("2007 GUIDANCE").

the district court correctly noted that "[t]he picture that develops from an overview of these laws and agency actions is not just one of significant regulation, but of express governmental encouragement of the type of lending that forms the basis for the City's [public nuisance] claim." (R.247 at 24.)

In an attempt to avoid the effect of this pervasive regulation, the City asserts that "rules adopted by 'federal banking regulators' would not apply to most of the defendants, which are not federal banks." (Appellant Br. at 39.) But the guidance described above includes regulations promulgated under federal statutes that are applicable to both federally-chartered and state-chartered entities. For example, the 1999 Guidance cites Regulation Z, a truth-in-lending regulation that applies to most consumer-credit transactions, regardless of the charter status of the person making the loan. *See* 12 C.F.R. § 226.32(a) (Regulation Z applies to certain consumer credit transaction that is secured by the consumer's principal dwelling). Likewise, the rules, regulations, and statutes discussed in the 2004 Statement extend to state-chartered lenders. Moreover, the City does not (and cannot) dispute that the other statutes and regulations cited by the district court apply to subprime mortgage lending. *See, e.g.*, *Inge v. Rock Fin. Corp.*, 388 F.3d 930, 932 (6th Cir. 2004) (Truth-in-Lending Act applies to all mortgage lenders); 12 U.S.C. § 2802(1)-(4) (Home Mortgage Disclosure Act applies to "any person engaged for profit in the business of mortgage lending"); 12 U.S.C. § 3802(2)(C) (Alternative

Mortgage Transaction Parity Act applies to *inter alia* "any person who regularly makes loans, credit sales, or advances secured by interests in [residential real property]"); 15 U.S.C. § 1691a(e) (Equal Credit Opportunity Act applies to "any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit"). And it is the subprime mortgage lending—overseen by the panoply of federal regulators and their rules—that the defendants' securitization efforts are alleged to have financed here.

The City criticizes the district court's citation to "statutes and rules pertaining to government-sponsored entities Fannie Mae and Freddie Mac." (Appellant Br. at 40). But most of the cited statutes are not related to Fannie Mae and Freddie Mac. Even with respect to Fannie Mae and Freddie Mac, moreover, the City's criticism misses the point. The question is not whether those statutes and regulations specifically governed these defendants, but whether they evidence "express governmental encouragement of the type of lending that forms the basis of the City's claim." (R.247 at 24.) The City cannot dispute that the Department of Housing and Urban Development repeatedly sanctioned and encouraged subprime lending and securitization—exactly the kind of conduct challenged by the City. *See* HUD's Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac),

65 Fed. Reg. 65044, 65106 (Oct. 31, 2000); HUD's Housing Goals for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) for the Years 2005-2008 and Amendments to HUD's Regulation of Fannie Mae and Freddie Mac, 69 Fed. Reg. 63580, 63647 (Nov. 2, 2004). Likewise, the district court cited the Community Reinvestment Act ("CRA") as yet another example of federal statutes and regulations designed to encourage lenders to develop products that would make mortgages available to borrowers who may not have qualified for traditional 20-percent-down, 30-year fixed-rate mortgages. (R.247 at 22-24.) The district court noted that its enumeration of specific statutes was not meant to provide "an exhaustive view of the applicable regulatory universe" because "the state and federal laws cited herein is . . . more than sufficient to establish that subprime lending was and is subject to significant regulation." (*Id.* at 24 n.14.)

The only authority the City cites for a contrary proposition is the law review article Patricia A. McCoy, et al., *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 493 (May 2009). (Appellant Br. at 40-41.) Yet while the authors of this article disapprove of the *substance* of subprime mortgage regulation, they do not dispute the *existence* of a detailed set of rules established to govern and encourage mortgage lending to subprime borrowers. *See, e.g., id.* at 499 (Congress authorized "adjustable rate

mortgages, balloon clauses, and negative amortization loans" in 1982), 500 (Home Owners Equity Protection Act "regulated the so-called high-cost finance market"), 510 ("a majority of the states enacted laws designed to curb imprudent underwriting of subprime loans"), 511 ("the Fed regulates nonbank mortgage lenders owned by bank holding companies but not owned . . . by banks or thrifts"), 518 ("OTS examiners were stationed permanently onsite" at Washington Mutual Bank), 519 (the OCC promulgated a rule "prohibiting mortgages to borrowers who could not afford to repay"), and 522 (the OCC emphasized management of "credit risk through securitization, reserves, and loss recognition"). The City, in short, cannot argue that subprime lending was unregulated simply because it disapproves of the substantive regulations that existed. The district court was clearly correct: "In light of the vast regulatory machinery described [in the district court's opinion], the City does not and cannot dispute the fact that subprime mortgage lending, which is absolutely fundamental to the allegations in the [Complaint], is subject to significant regulation." (R.247 at 24.) That regulation is fatal to the City's public nuisance claim.

B. Neither The City's Focus On Securitization Nor Its Attack On The Volume Of Otherwise Lawful Subprime Lending Can Salvage Its Public Nuisance Claim.

Finding itself unable to challenge the lawfulness of specific loan products and structures, the City attempts to avoid the effect of this sweeping regulatory

framework by characterizing its claim as focused solely on the defendants' securitization activities and not the actual origination of specific kinds of subprime mortgage loans. (Appellant Br. at 12-14, 38, 41-42.) But that would require the Court to ignore large portions of the City's Complaint and the linchpin of its theory.[7] The City asserts that defendants are liable for financing subprime mortgages in Cleveland only because it believes Cleveland's economic realities "eliminated Cleveland as a market for widespread subprime lending." (R.189 ¶ 59) (emphasis added.) In other words, the City's theory is that subprime lending in Cleveland was a public nuisance, so therefore providing cash to entities who engaged in that lending must also constitute a public nuisance.

The City's public nuisance claim cannot be justified by challenging the financing and securitization of loans that were admittedly lawful. *See, e.g., Hager*, 2002 WL 1483913, at *10-*11. In *Hager*, the Ohio appellate court affirmed dismissal of a public nuisance claim against defendants for the operation of an

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[7] *See, e.g.*, R.189 ¶ 1 ("Lenders made high-cost loans available by the thousands to unqualified borrowers . . ."), ¶ 4 ("Subprime lending abuses have inflicted this same kind of damage upon cities across the United States . . ."), ¶ 5 ("With respect to Cleveland, the purveyors of subprime mortgages could have and should have foreseen . . . a foreclosure crisis . . ."), ¶ 8 (the "propagation of subprime loans by securitizers and the corresponding foreclosures constitute a public nuisance . . ."), ¶¶ 35-37 (describing subprime lending as lending that involves higher interest rates and fees), and ¶¶ 49-50 (describing certain classes of subprime loans including adjustable rate mortgages, low- and no-documentation loans, and interest-only loans)).

incinerator because its operation was permitted and regulated by law. *Id.* As the district court reasoned here, if the construction and operation of the waste incinerator in *Hager* complied with applicable regulations and thus was immune from challenge on public nuisance grounds, then banks that financed the construction and operation of the waste incinerator would not be subject to suit on the grounds that doing so creates a public nuisance. (R.247 at 26.) Likewise here, because the specific challenged forms of subprime lending were sanctioned and regulated by law and thus not subject to challenge on public nuisance grounds, the financing of such lending through securitization cannot form the basis of a public nuisance claim.

It is no more persuasive to argue, as the City does, that the problem is too much lawful conduct. In rejecting the City's argument that securitization of lawful subprime mortgages led to a higher-than-optimal level of loan originations and eventual foreclosures, the district court correctly reasoned that, "whether or not defendants' securitization activities were responsible for increasing the overall number of subprime loans, if the underlying lending activity was lawful, it is impossible to say that supporting that activity by supplying funds and creating [mortgage-backed securities]—at least one step removed from the actual lending — was itself unlawful." (*Id.* at 25-26.)

Nor can the City resuscitate its claims by pointing to *Beretta*'s approval of a public nuisance claim against a handgun manufacturer. (Appellant Br. at 41.) For *Beretta* to be even arguably comparable, the plaintiff would have needed to allege that the mere distribution of handguns—in whatever manner—constituted a public nuisance. That suit clearly would have failed because the court in *Beretta* recognized that "a comprehensive regulatory scheme involving the manufacturing, sales, and distribution of firearms" existed. The *Beretta* court allowed that case to proceed only because it challenged discrete distribution practices that were alleged to create an *illegal* firearms market. Those practices were not subject to regulation. Here, however, the City challenges the very existence of lawful subprime lending in Cleveland, which is sanctioned and subject to a detailed regulatory scheme. The resulting foreclosures, although regrettable, were conducted through lawful means, and, in most cases, required specific advance approval by the courts.[8]

In sum, Ohio law is clear that a public nuisance claim is not permitted where the underlying conduct is lawful and is subject to specific and detailed regulation. Given the series of express regulations and guidance put in place by government

[8] The Ohio General Assembly's subsequent disapproval of the result in *Beretta* counsels against extending its reasoning to cover securitization in support of *legal* subprime lending activities, as opposed to conduct that supports an *illegal* market in firearms. Following *Beretta*, the General Assembly statutorily abrogated common law public nuisance claims with respect to products. *See City of Toledo v. Sherwin-Williams Co.*, No. CI 200606040, 2007 WL 4965044, at *2 n.2 (Ohio Com. Pl. Dec. 12, 2007).

regulators dating back more than a decade, the City's public nuisance claim was properly dismissed.[9]

CONCLUSION

This Court should affirm the judgment below.

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[9] In addition to the arguments made here, national banking entities Bank of America, N.A., Chase Bank USA, N.A., Citibank, N.A., JPMorgan Mortgage Acquisition Corp., and Washington Mutual Bank join in the argument contained in Section III of the Brief of Defendants-Appellees Wells Fargo Bank, N.A. and Wells Fargo Asset Securities Corporation, which explains that, as an alternate ground for dismissal, the City's public nuisance claim is preempted by the National Bank Act and the implementing regulations of the Office of the Comptroller of the Currency and the analogous banking regulations of the Office of Thrift Supervision and other federal agencies.

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CERTIFICATE OF SERVICE

In compliance with FRAP Rule 25 and L.R. 25, I hereby certify that on this 18th day of September, 2009, I electronically filed with the Clerk's Office of the United States Court of Appeal for the Sixth Circuit this Brief of Appellees, and further certify that opposing counsel will be notified of this filing through the Notice of Docket Activity generated by this electronic filing.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type limitations of these Rules.

1. Exclusive of the exempted portions in FRAP 32(a)(7)(B)(i) and (iii), the brief contains no more than 13,871 words in its entirety.

2. The brief has been prepared in 14-point Times New Roman typeface using Word.

3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate of the FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a) may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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DESIGNATED CONTENTS

RECORD #	DATE FILED	DESCRIPTION
01	01/16/2008	Notice of Removal
04	01/17/2008	Supplemental Notice of Removal
05	01/17/2008	Motion to Remand
21	01/22/2008	Supplement (Second) to Notice of Removal
34	01/24/2008	Supplemental Brief in Support of Motion for Remand
37	01/24/2008	Supplement (Third) to Notice of Removal
49	01/28/2008	Notice of Consent to Removal by Deutsche Bank Trust Company
57	02/01/2008	Notice of Consent to Removal by HSBC Finance Corp.
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71	02/04/2008	Notice of Defendants Joining in Lehman Brothers' Opposition to Plaintiff's Motion to Remand
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RECORD #	DATE FILED	DESCRIPTION
228	12/15/2008	Motion to Dismiss Joining Certain Securitizer Defendants' Motion to Dismiss by GMAC-RFC
247	05/15/2009	Memorandum Opinion and Order