UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JANELL WINFIELD, TRACEY STEWART,
and SHAUNA NOEL,

Plaintiffs,

15 CV 5236 (LTS)(DCF)

- against -

CITY OF NEW YORK,

Defendant.

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DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR DISMISSAL OF THE FIRST AMENDED COMPLAINT

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Defendant
100 Church Street
New York, New York 10007
(212) 356-2210

SHERYL NEUFELD
JASMINE M. GEORGES
Of Counsel.

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS BECAUSE PLAINTIFFS LACK STANDING 1

a. Plaintiffs Cannot Establish One of the Fundamental Components of Article III Standing: That the Alleged Injury Be Fairly Traceable to the Challenged Action 1

b. Plaintiffs Have Not Adequately Pled Future Harm For Standing Purposes 5

II. EVEN IF THE CITY COMMUNITY PREFERENCE POLICY APPLIED TO THE SUBJECT DEVELOPMENTS AND PLAINTIFFS HAD STANDING, THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR DISCRIMINATION UNDER THE FHA UPON WHICH RELIEF CAN BE GRANTED 7

a. Plaintiffs Have Not Adequately Pled a Prima Facie Case of Disparate Impact 9

b. Plaintiffs Fail to State a Prima Facie Case of Disparate Impact Under a Perpetuation-of-Segregation Theory 10

c. Plaintiffs Have Not Adequately Pled a Prima Facie Case of Disparate Treatment 11

III. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR DISCRIMINATION UNDER THE NYCHRL UPON WHICH RELIEF CAN BE GRANTED 11

CONCLUSION 13

Defendant the City of New York ("City"), by its attorney, Zachary W. Carter, Corporation Counsel of the City of New York, submits this reply memorandum of law in further support of its Motion to Dismiss the First Amended Complaint.

PRELIMINARY STATEMENT

Plaintiffs' opposition brief does not adequately address any of the fundamental—and fatal—flaws in the First Amended Complaint. Indeed, plaintiffs' arguments in opposition to the City's Motion to Dismiss fail to refute that plaintiffs lack standing to challenge the City Community Preference Policy, because any actual or potential alleged injury results from State law, not City policy, and because plaintiffs' allegations of potential future injury are too speculative to present a current case or controversy. Plaintiffs' claims should be dismissed on that ground alone. Even if plaintiffs had standing, plaintiffs' allegations of discrimination and causation are insufficient to make out a prima facie case under the U.S. Supreme Court's heightened pleading standard recently articulated in Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015). Accordingly, the City's Motion to Dismiss should be granted and the First Amended Complaint should be dismissed.

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Claims Because Plaintiffs Lack Standing.

a. Plaintiffs Cannot Establish One of the Fundamental Components of Article III Standing: That the Alleged Injury Be Fairly Traceable to the Challenged Action.

In opposition to the motion to dismiss, plaintiffs persist in contending that they have been, or will be, harmed by the City Community Preference Policy. Pls.' Opp. Br., at Points I and II. But in so doing, plaintiffs essentially ignore the fact that the community

preference to be provided at the subject developments is mandated by the New York State Real Property Tax Law ("RPTL") § 421-a Tax Exemption Program (the "421-a program") and has nothing to do with the City Community Preference Policy.[1] See RPTL § 421-a(7)(d)(iii).

Attempting to bypass this fatality, plaintiffs advance a series of arguments to try to convince the Court that the City could not possibly have meant what it said in its opening brief and that in fact community preference was applied at the subject developments because of the City's policy and not RPTL § 421-a. In so doing, plaintiffs erroneously conflate the State-mandated preference and the City Community Preference Policy throughout their opposition brief.

For instance, plaintiffs allege that the City is "leaving the Court to imagine that [421-a tax benefits] are a State benefit," and that "421-a benefits" are the type of housing assistance that "always triggers the City's outside-restriction policy." Pls.' Opp. Br., at 15. Not so. The fact that "421-a benefits" equate to an exemption from City property taxes does not change the fact that RPTL § 421-a(7)(d) is a State law; nor does it mean that the State-mandated community preference under the RPTL and the City Community Preference Policy are one in the same, as plaintiffs would have this Court believe. As set forth in the City's moving brief, all three subject developments have applied for and received preliminary certificates of eligibility ("PCE") for 421-a tax benefits, and all affordable units in those developments were required to be provided under State law as a condition of receiving those 421-a benefits. See Georges Decl. Ex. C (PCEs for subject developments). Since the community preference is required by State

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[1] Plaintiffs allege that they have applied to three developments located at 160 Madison Avenue, New York, New York; 200 E. 39th St., New York, New York; and 40 Riverside Blvd., New York, New York, which received tax incentives under the 421-a program and density bonuses under the City's Voluntary Inclusionary Housing program.

law, the City Community Preference Policy was not applied at the subject developments and the City has no discretion about whether to apply the preference.

Plaintiffs further erroneously conflate the State-mandated community preference and the City Community Preference Policy in arguing that it is the City's policy that applied at the subject developments because the City "required" the developer to conduct the lottery at the subject developments. See Pls.' Opp. Br., at 14. Plaintiffs are wrong. As the local housing agency obligated to administer the 421-a tax exemption program, HPD processed the 421-a applications and marketed the subject developments' affordable units. See RPTL § 421-a and City Charter § 1802(6)(b). But the City has no discretion with regard to applying the State statutorily mandated requirements of the 421-a Program [See Been Decl. ¶ 15.], and the fact that the City marketed the units does not change the fact that they were created pursuant to a State law requirement and not a City policy.

Plaintiffs also claim that the community preference required by RPTL § 421-a does not apply at the subject developments because under the "unless preempted by federal requirements" language of RPTL § 421-a(7)(d), the application of the State-mandated community preference is preempted by the Fair Housing Act ("FHA") or the affirmatively furthering fair housing ("AFFH") regulations promulgated thereunder.[2] See Pls.' Opp. Br., at 10-11. In essence, plaintiffs argue that because they believe RPTL § 421-a(7)(d) is preempted

[2] Although plaintiffs use the word "preemption," they fail to assert a preemption claim. Indeed, plaintiffs fail to even state whether the alleged preemption is express or implied. See New York Bankers Ass'n v. City of New York, 2015 U.S. Dist. LEXIS 104266, *60-61 (S.D.N.Y. Aug. 7, 2015) ("Federal preemption of a state statute can be express or implied, and generally occurs: [i] where Congress has expressly preempted state law, [ii] where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or [iii] where federal law conflicts with state law.").

under the FHA and AFFH regulations, the City must have applied its Community Preference Policy to the subject developments. Plaintiffs' belief as to the status of RPTL § 421-a(7)(d) does not make it so (indeed, no court has ruled that RPTL § 421-a(7)(d) is preempted or otherwise invalid), nor does it work to undo the fact that the City is following RPTL § 421-a(7)(d) in applying the community preference at the subject developments.

Moreover, even if this Court were to find that RPTL § 421-a(7)(d) is preempted by the FHA and AFFH regulations or is otherwise invalid, that finding would not undo the fact that the City was following this requirement at the time it applied the community preference to the subject developments. Indeed, if a Court were to find that the FHA preempts RPTL § 421-a(7)(d), then any associated relief would be prospective only. See, e.g., MHANY Mgmt. v. County of Nassau, 843 F. Supp. 2d 287, 311 (E.D.N.Y. 2012) ("In a civil FHA case brought by a private person, the court's equitable powers include the power to order such affirmative action as may be appropriate . . . For example, affirmative injunctive relief may be awarded for past discriminatory practices where the trial court believes that the vestiges of prior discrimination linger and remain to be eliminated.") (quotations omitted). City defendant is not aware of any cases suggesting retroactive relief in this context. Nevertheless, in no way would a determination invalidating the State law change the fact that community preference was applied at the subject developments because of the State law requirement. Quite simply, the community preference was not applied at the subject developments because of the City's policy, and the City was never required to make a decision about whether it would apply community preference at the subject developments.

Plaintiffs further attempt to skirt their jurisdictional deficiencies by arguing that the existing RPTL § 421-a does not apply to construction that commences after December 31,

2015. See Pls.' Opp. Br., at 13. This argument does nothing to assuage plaintiffs' standing problem. As stated in defendant's moving brief, fatal to plaintiffs' claim, the First Amended Complaint does not allege that plaintiffs applied to an affordable housing development where the challenged City Community Preference Policy has been or will be applied. Although a preference for community district residents will be provided when the affordable units at 160 Madison Avenue, 200 E. 39th St., and 40 Riverside Blvd. are marketed, this preference is a requirement mandated by State law, since the subject developments were required to provide all of these affordable units in order to be eligible for RPTL § 421-a benefits. The community preference required by State law is distinct from the City Community Preference Policy. Accordingly, plaintiffs cannot establish Article III standing, since any alleged injury cannot be traced to the challenged action, i.e. the City's Community Preference Policy.

b. Plaintiffs Have Not Adequately Pled Future Harm For Standing Purposes.

Despite the fact that plaintiffs have not alleged that they applied to an affordable housing development where the challenged City Community Preference Policy has been or will be applied, plaintiffs claim that they will suffer ongoing and future harm because they intend to apply to the affordable housing lotteries in "high opportunity" and "disproportionately white" neighborhoods (defined by plaintiffs as "neighborhoods of opportunity") where the City Community Preference Policy will be applied in the future. See Pls.' Opp. Br., at 17-22. Specifically, plaintiffs claim that the City "has had and continues to have an across-the-board outsider-restriction policy . . ., and expects to apply it to tens of thousands of housing units, perhaps even more than 100,000 housing units, in the next several years." Pls.' Opp. Br., at 19. Plaintiffs' argument lacks merit for two reasons.

First, plaintiffs' alleged future harm is not "a concrete, particularized, and actual or imminent injury-in-fact . . . that is traceable to defendant's conduct," as is required by Article III. See Woods v. Empire Health Choice, Inc., 574 F.3d 92, 96 (2d Cir. 2009). Plaintiffs' intent to apply to City lotteries for developments that have not yet been advertised or marketed, or even contemplated, is not real or imminent enough for standing purposes. Indeed, plaintiffs have not identified with any degree of particularity the developments to which they intend to apply, or the specific community districts where these unidentified developments are located. Under plaintiffs' broad declaration of intent, plaintiffs could continue to apply to developments that were constructed prior to December 31, 2015, where the State-mandated community preference, and not the City Community Preference Policy, would apply, and thus future injury would be traceable to the State, not the City. Nor is there any guarantee that community preference will not be applied under RPTL § 421-a in the future. Indeed, the amendments to RPTL § 421-a under Chapter 20 of the Laws of 2015 are still in negotiation, and will only come into effect in January 2016 if representatives of residential real estate developers and construction labor unions sign a memorandum of understanding ("MOU") regarding wages of construction workers performing work on 421-a projects that contain more than 15 units. An MOU has not yet been signed. Thus, plaintiffs' argument that community preference will not exist under the amended 421-a program is highly speculative and theoretical.

Second, plaintiffs do not have standing to challenge the City Community Preference Policy on a City-wide basis, since they did not allege that they have applied to, or will be applying to, lotteries in all 59 community districts. Rather, plaintiffs focus their First Amended Complaint on "neighborhoods of opportunity" and continuously allege that they intend to continue to apply to lotteries in these so-called "neighborhoods of opportunity" and "other

disproportionately white community districts." See Pls.' Opp. Br., at 18. But plaintiffs have not alleged that they will apply to lotteries in neighborhoods that they do not consider "neighborhoods of opportunity" or neighborhoods that are not "disproportionately white community districts," and any community preference applied in the future would not have the same effect in all 59 community districts, since each community district has a different racial demographic. So plaintiffs lack standing to assert a City-wide challenge.

II. Even if the City Community Preference Policy Applied to the Subject Developments and Plaintiffs Had Standing, the First Amended Complaint Fails to State a Claim for Discrimination Under the FHA Upon Which Relief Can Be Granted.

A motion to dismiss should be granted where a complaint fails to plead enough facts to state a claim that is plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The factual allegations must be more than speculative, and show the grounds on which a plaintiff is entitled to relief beyond "labels and conclusions, and a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555. Plaintiffs have not met this burden.

In opposition to the motion to dismiss the discrimination claim under the FHA, plaintiffs essentially restate what they alleged in their First Amended Complaint. See Pls.' Opp. Br., at 23-48. Plaintiffs claim that their disparate impact allegations far exceed the "low bar" that exists for pleading a claim under the FHA. See Pls.' Opp. Br., at 23. In support of this contention, plaintiffs cite a slew of cases which set forth general pleading standards for disparate impact discrimination claims. However, plaintiffs fail to analyze these cases in light of the U.S. Supreme Court's recent decision in Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015) (hereinafter referred to as "Inclusive Communities"), which makes clear that concrete facts linking a statistical disparity to the challenged government policy must be asserted at the pleading stage. In this regard, after

the District Court had granted partial summary judgment that the plaintiffs had established a prima facie case by relying solely on two pieces of statistical information, the U.S. Supreme Court agreed with the Fifth Circuit that the District Court had erred in concluding that the plaintiffs had in fact established a prima facie case and, thus, remanded the case to the District Court for further proceedings. In so doing, the Court stated as follows: "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create." Inclusive Communities at 538 (citing Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 653 (1989)). "A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." Id. at 538.

The Supreme Court's concern about the need for concrete facts applies to both motions to dismiss and summary judgment motions. The Court's concern about inducing local governments to use quotas, and its concern about distorting priorities through "abusive" disparate impact claims suggests that local governments should not be subjected to the expense of discovery and defensive litigation, except where the pleadings have alleged facts demonstrating the required causal connection. See Ellis v. City of Minneapolis, 2015 U.S. Dist. LEXIS 111389, *28-29 (D. Minn. Aug. 24, 2015) (finding that the plaintiffs failed to plead a prima facie case of disparate impact under the FHA in their First Amended Complaint, because the plaintiffs failed to "allege facts that plausibly demonstrate a causal link between the

challenged policy and [alleged] disparity," and because "allegations of a statistical disparity alone are insufficient to make out a prima facie case.") (citing Inclusive Properties).

a. Plaintiffs Have Not Adequately Pled a Prima Facie Case of Disparate Impact.

In their opposing brief, plaintiffs do not even attempt to explain how they meet the heightened pleading standard set forth by the U.S. Supreme Court in Inclusive Communities. And they cannot. Indeed, plaintiffs have failed to plead any actual facts demonstrating a discriminatory effect caused by the City Community Preference Policy. Instead, plaintiffs provided limited statistics in their First Amended Complaint regarding: 1) racial segregation in the City as a whole; 2) racial segregation in unidentified community districts; and 3) disparities between the racial and ethnic demographics of community districts versus the City as a whole for all residents and for residents of particular incomes. They have not alleged any statistics or other facts suggesting that the challenged policy caused the alleged segregation or disparities, or that the alleged segregation or disparities caused the policy to have a disparate effect. They have not alleged statistics demonstrating that the City Community Preference Policy has contributed in any way to racial or ethnic segregation either in the City as a whole or in any particular community district. Nor have they alleged any statistics evidencing that the City Community Preference Policy has a disparate impact on African-American or Latino income-eligible households who applied to the three lotteries (in Community Districts 5, 6, and 7) at issue in the First Amended Complaint.

Plaintiffs focus their allegations on "neighborhoods of opportunity" and "other disproportionately white community districts" (without providing a specific list of the community districts they believe meet these criteria) and generally contend that, in these neighborhoods, a "comparison of how the underrepresented group is able to compete compared

to the overrepresented group . . . makes the disparate impact clear," essentially because "the City's policy does more for whites in these districts," and that "[f]or African-Americans in relation to disproportionately white community districts, the picture is radically different." Pls.' Opp. Br., at 28-29. Plaintiffs' assertions appear to be based upon nothing other than an assumption that in any given community district it is the racial majority that will benefit from the Community Preference Policy, however, assumptions are not sufficient to state a plausible City-wide claim for disparate impact. Moreover, plaintiffs have not pled any facts relating to the effect of the City Community Preference Policy in neighborhoods that do not fit into plaintiffs' definition of a "neighborhood of opportunity." They have not even alleged whether or not the "overrepresented group" in a particular "neighborhood of opportunity" represents the racial demographic of the income-eligible residents in that community district - one of many deficiencies that is fatal to plaintiffs' broad and speculative claim.

b. Plaintiffs Fail to State a Prima Facie Case of Disparate Impact Under a Perpetuation-of-Segregation Theory.

Plaintiffs argue in opposition that they have "plausibly alleged that the impact is substantial and not isolated to just one or a few community districts." Pls.' Opp. Br., at 26. However, as required by the heightened pleading standard set forth in Inclusive Communities, plaintiffs have not alleged any statistics that even suggest that the City Community Preference Policy perpetuates racial segregation throughout the City. Indeed, plaintiffs have not asserted any statistics regarding how the City Community Preference Policy has affected the racial demographics of the particular community districts where plaintiffs entered affordable housing lotteries (Community Districts 5, 6, and 7), nor have plaintiffs asserted statistics regarding the racial demographics of the potential applicant pools as compared to the racial demographic of the entire community district in which the affordable housing developments are located. Finally,

and most fundamentally, plaintiffs have failed to plead a sufficient City-wide challenge because the First Amended Complaint is devoid of statistics relating to the effect of the City Community Preference Policy on the racial makeup of all 59 community districts throughout the City from the time the community preference was first implemented to now. Thus, plaintiffs have failed to allege a prima facie case of disparate impact under a perpetuation-of-segregation theory.

c. Plaintiffs Have Not Adequately Pled a Prima Facie Case of Disparate Treatment.

Plaintiffs' opposing brief does nothing to remedy their failure to plausibly allege a prima facie case of disparate treatment against the City. Plaintiffs have alleged absolutely no facts that might show that the decision to use a community preference was made in the face of evidence that other alternatives would have been more pro-integrative, or that the City was conscious of policies that it thought particular groups "wanted," or that the City responded to racially influenced opposition. Although plaintiffs identify their protected class as African-Americans, there is no allegation that the City defendant intentionally treated the plaintiffs differently based on animus toward their race, or that the City Community Preference Policy was created as a result of animus toward African-Americans. Furthermore, the plaintiffs do not specifically identify what other groups are similarly situated to their protected class and how these groups were or are provided differential treatment by the City defendant in the application of the City's community preference. Accordingly, the First Amended Complaint fails to allege sufficient facts for the court to find an inference of intentional discrimination on the basis of race. Thus, plaintiffs' disparate treatment discrimination claims must be dismissed.

III. The First Amended Complaint Fails to State a Claim for Discrimination Under the NYCHRL Upon Which Relief Can Be Granted.

Plaintiffs ignore the City's argument that because RPTL § 421-a(7)(d)(iii) mandates the application of the community preference at the three subject affordable housing

developments, the requirements of NYCHRL are preempted. Where it is determined that the State has preempted an entire field, a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not prescribe or (2) imposes additional restrictions on rights granted by State law." Jancyn Mfg. Corp. v. County of Suffolk, 71 N.Y.2d 91, 96 (1987).

In any event, where, as here, a plaintiff fails to plead facts suggesting that "discrimination was one of the motivating factors for the defendant's conduct," she fails to plead a cause of action for intentional discrimination under the NYCHRL. Chin v. N.Y.C. Hous. Auth., 106 A.D.3d 443, 445 (1st Dep't 2013).

Plaintiffs' discrimination claims under the NYCHRL rely on the same factual allegations asserted for their FHA claims. As described above, plaintiffs have not asserted any statistics regarding how the City Community Preference Policy has affected the racial demographics of the particular community districts where plaintiffs entered affordable housing lotteries (Community Districts 5, 6, and 7), nor have plaintiffs asserted statistics regarding the racial demographics of the potential applicant pools as compared to the entire communities in which the affordable housing developments are located. Furthermore, plaintiffs have not pled specific statistics for all 59 community districts throughout the City, which would be necessary to allege a prima facie disparate impact case challenging the City Community Preference Policy as it applies City-wide. Plaintiffs have also failed to assert statistics relating to the effect of the City's community preference on the racial makeup of each of the 59 community districts throughout the City from the time the community preference was first implemented to now. Moreover, the First Amended Complaint is devoid of any allegation that the City defendant

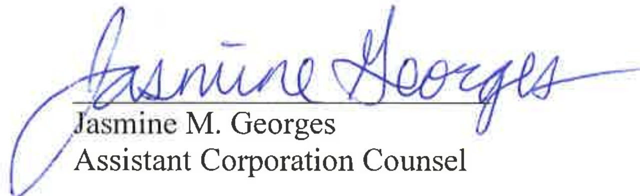
intentionally treated the plaintiffs differently based on animus toward their race, or that the City's Community Preference Policy was created as a result of animus toward African-Americans. Without more, the First Amended Complaint fails to allege facts to support a plausible inference of discrimination under the NYCHRL.[3]

CONCLUSION

For the reasons set forth above and in the moving brief, plaintiffs' First Amended Complaint should be dismissed.

Dated: New York, New York
December 4, 2015

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Defendant
100 Church Street
New York, New York 10007
(212) 356-2210



Jasmine M. Georges
Assistant Corporation Counsel

[3] Finally, the Court should note that plaintiffs' assertion that defendant is somehow seeking to have this Court treat the motion to dismiss as one for summary judgment is wrong. See Pls.' Opp. Br., at 32. The City's motion to dismiss simply outlines the numerous pleading deficiencies contained in the First Amended Complaint, as well as plaintiffs' jurisdictional deficiencies. The fact that the City has pointed to certain public information in support of their motion does not in any way change the nature of defendant's motion. See Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007).