IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

LAQUITA OLIVER, on behalf of herself and all others similarly situated, Plaintiffs, v. NAVY FEDERAL CREDIT UNION, Defendant.	Case No. 23-cv-01731 (LMB) (WEF)

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

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INTRODUCTION

Navy Federal Credit Union ("Navy Federal") is a member-owned, not-for-profit credit union that provides financial services to members of the military, veterans, and their families. Navy Federal's mission is to serve its members, who reflect the diversity of the military and are thus far more diverse than the general population. Unlike a bank that exists to benefit its shareholders, Navy Federal is owned by its members. Its purpose is to help them build financial security by providing a safe place to deposit savings, earn dividends, and obtain loans with affordable rates and manageable terms. Credit unions like Navy Federal arose to serve the banking needs of underserved communities, and Navy Federal is proud to rank first among large lenders in the percentage of mortgage loans made to Black borrowers.

This lawsuit follows a CNN report that compares Navy Federal's mortgage lending to other financial institutions based solely on public data that does not include standard underwriting criteria like credit scores. The Complaint also offers another dated public report from 2019, which suffers from the same defects. As the Complaint acknowledges, much of the underwriting criteria is dictated by government-sponsored entities like Fannie Mae. And, as the Complaint also explains, there are certain demographic disparities in credit profiles as a result of historical inequities. Accordingly, by failing to take into account things like credit scores, CNN's analysis is misleading, and the conclusion it drew is actually backwards: Other lending institutions fared better in that comparison because they do far *less* than Navy Federal to extend credit to these communities.

The Complaint otherwise presents no more than conclusory assertions and misguided accusations, ignoring Navy Federal's proven track record of commitment to expanding economic opportunity and access to credit for its diverse community of members. No alleged instance of

discrimination appears in the Complaint, and the Complaint fails to allege any Navy Federal policy or practice that caused disparate outcomes. To survive a motion to dismiss, Plaintiffs were required to plead factual support for their claims under the Equal Credit Opportunity Act ("ECOA"), the Fair Housing Act ("FHA"), 42 U.S.C. § 1981, and California and Florida state law. Because they have not done so, the Complaint should be dismissed.

FACTUAL BACKGROUND

Navy Federal serves a diverse community. As the Complaint acknowledges, its membership "primarily consists of active-duty military, military families, and veterans," Compl. ¶ 6, and about "43% of the 1.3 million men and women on active duty in the United States military are people of color, as is approximately 26% of the veteran population," *id.* ¶ 32. Although the Complaint questions Navy Federal's commitments, Navy Federal made "more than $3.5 billion in mortgages to Black borrowers in 2022," and is top-ranked in the percentage of mortgage loans made to Black borrowers.[1]

The Complaint relies primarily on CNN's reporting based on an incomplete analysis of limited publicly available Home Mortgage Disclosure Act ("HMDA") data. HMDA requires certain financial institutions to maintain and report information about mortgage applications to regulators, who then publish only a limited subset.[2] For privacy reasons, the published HMDA data does not include critical information, such as applicants' credit scores and precise debt-to-

[1] Press Release, Navy Federal Credit Union, *Navy Federal Credit Union Responds to Allegations Concerning Its Home Lending Practices* (Dec. 18, 2023), https://www.navyfederal.org/about/press-releases/2023/navy-federal-responds-to-home-lending-allegations.html, cited in Compl. ¶ 97. "[A] court may consider [a document affixed to a motion to dismiss] in determining whether to dismiss the complaint [if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity." *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (third and fourth brackets in original).

[2] *See* 12 U.S.C. § 2803; 12 C.F.R. pt. 1003.

income ratios ("DTI").[3] Ex. 1. CNN reported a wide disparity in mortgage approval rates between Black and White applicants based on its review of this incomplete information. Compl. ¶ 4.

The analysis did not (and could not) account for industry standard criteria used by financial institutions to determine eligibility for credit on mortgage loan applications, Compl. ¶ 97, criteria that are dictated by government-sponsored entities like Fannie Mae, Compl. ¶ 87.[4] For example, CNN itself noted that it could not account for credit scores "because the public data released under [HMDA] does not include credit scores due to privacy concerns." Ex. 1. CNN also acknowledged that any potential disparity "could possibly be explained by differences in credit scores between White and minority borrowers," which are a result of "historical discrimination and a continuing lack of access to traditional financial institutions …." *Id.* The Complaint further recounts the long and unfortunate legacy of barriers to credit facing Black and Hispanic Americans, Compl. ¶¶ 39-40, 48-55, without acknowledging that Navy Federal is a leader in serving these communities. The Complaint also ignores that the incomplete nature of CNN's data is exacerbated in a comparison of Navy Federal to other financial institutions for these reasons.

Ms. Oliver initiated this lawsuit in December 2023. Two more class complaints followed, naming four additional plaintiffs. Plaintiffs filed a consolidated complaint on February

[3] *See* Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66128, 66134 (Oct. 28, 2015) (describing the balancing test used by the CFPB to weigh the privacy and disclosure interests at play to determine if a given data field should be included in the published HMDA data).
[4] *See* The Real Deal, *Fannie Mae to Count Rent Payments Toward Mortgage Approval process* (Aug. 12, 2021), https://therealdeal.com/national/2021/08/12/fannie-mae-to-count-rent-payments-toward-mortgage-approval-process, *cited in* Compl. ¶ 87 (Fannie Mae's "system tells lenders if a loan would be eligible to be sold to [Fannie Mae], which packages them into securities for investors.").

20, 2024, removing five plaintiffs and adding eight new ones. The facts pleaded in the Complaint about each plaintiff do not support the conclusory assertions of discrimination. The following charts summarize the allegations regarding Plaintiffs' applications:

	R. Otondi	**D. Walker**	**C. Batchelor**	**J. Jackson**	**L. Oliver**
Race/ Ethnicity	African American	African American	African American	African American	African American
Product	First mortgage	VA cash-out refinance	First mortgage	First mortgage	First mortgage
Income	$100,000	"exceeding $100,000"	"more than $140,000"	*Not alleged*	"over $95,000"
Credit Score	"above 700"	"above 620"	"above 700"	"above 700"	"above 650"
Debt	"minimal outstanding debt"	*Not alleged*	*Not alleged*	"minimal outstanding debt"	*Not alleged*

	C. Gardner	**C. Carr**	**M. Pereda**	**C. Hill**
Race/ Ethnicity	African American	African American	Hispanic/Latina	African American
Product	First mortgage	VA first mortgage	First mortgage; refinance	Cash-out refinance
Income	$92,000	More than $130,000 with spouse	"several hundred thousand dollars per year"	$80,000
Credit Score	"approximately 800"	"above 620"	"above 650"	*Not alleged*
Debt	*Not alleged*	"minimal outstanding debt obligations consisting of minimal credit card debt and a car loan."	"minimal debt, aside from existing mortgage loan"	"minimal debt obligations" including car loan and $10k in credit card debt

Taking these allegations as true, as we must, each named Plaintiff applied with Navy Federal for at least one home loan, although different Plaintiffs applied for different products (e.g., first-lien mortgage, VA loan, refinance). All but one Plaintiff alleges that their loans were denied; one Plaintiff alleges she was approved at a higher interest rate. No Plaintiff provides the

amount of the mortgage sought or the value of the home for which they sought the mortgage, in underwriting terms, the information that provides loan-to-value ("LTV") ratio, an important underwriting metric. Most Plaintiffs do not allege the loan terms sought. Only one Plaintiff provides the available down payment, and only one Plaintiff alleges the sought or offered interest rate. One does not provide his income, and another does not provide her credit score. Five Plaintiffs allege they received loans at higher interest rates from other lenders following Navy Federal's denial. Although statute requires that applicants receive an explanation for the decisions made on their applications, 15 U.S.C. § 1691(d), Plaintiffs tellingly do not plead the reasons that were provided to them by Navy Federal at the time.

ARGUMENT

Plaintiffs allege claims under the FHA, ECOA, Section 1981, and California and Florida state law. Under the FHA and ECOA, two potential theories of discrimination exist: disparate treatment (i.e., intentional discrimination) and disparate impact. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 524 (2015) (FHA); *Carroll v. Walden Univ., LLC*, 650 F. Supp. 3d 342, 360 (D. Md. 2022) (ECOA). Disparate treatment is where a defendant's actions were "motivated by a racially discriminatory purpose," and disparate impact is where its actions "have a disproportionate adverse effect on minorities." *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984); *see also Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 425 (4th Cir. 2018) (imposing "a 'robust causality requirement' … in order to state a prima facie disparate-impact claim" (quoting *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 542)). Disparate treatment is the only theory available under Section 1981, the California Unruh Civil Rights Act, and the Florida statute. *Bobbitt by Bobbitt v. Rage Inc.*, 19 F. Supp. 2d 512 (W.D. N.C. 1998) (citing *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996))

(Section 1981); *Mackey v. Bd. of Trustees of Cal. State Univ.*, 242 Cal. Rptr. 3d 757, 774 (Ct. App. 2019) (Unruh Act).[5]

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility" only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Conclusory allegations of discrimination are insufficient. *Id*. at 681.

Plaintiffs' claims fall short for four independent reasons.

First, as set forth in Section I, Plaintiffs provide no factual support for a claim of intentional discrimination. Plaintiffs fail to allege facts to demonstrate that they were qualified for the mortgage loans for which they applied, or that they were treated differently than similarly-situated applicants. Accordingly, Plaintiffs' disparate treatment claims under the FHA, ECOA, Section 1981, and California and Florida law should be dismissed.

Second, as discussed in Section II, Plaintiffs fail to identify any Navy Federal policy or practice that caused any disparity. Accordingly, Plaintiffs also failed to plead the "robust causality" required between an (unidentified) Navy Federal policy and potential disparities. The

[5] There is a "paucity of interpretive law" applying Section 725.07 of the Florida Statutes, *Soto v. Bank of Am., NA*, No. 6:04-CV-782-ORL28JGG, 2005 WL 2861116, at *11 (M.D. Fla. Nov. 1, 2005), particularly in the lending context. What cases there are suggest that Section 725.07 should be analyzed consistently with ECOA in the context of disparate treatment allegations, *see Bankers Lending Servs. v. First Mia. Bancorp, Inc.*, No. 15-23599-CIV-Scola, 2016 U.S. Dist. LEXIS 132591, at *22-23 (S.D. Fla. Sept. 26, 2016), and there is no precedent for disparate impact claims under Section 725.07.

Supreme Court has called this pleading requirement a "safeguard" against unfounded disparate impact claims like the ones made here. These claims, too, should be dismissed.

Third, as set forth in Section III, Plaintiffs' attempt to tack on a California Unfair Competition Law (UCL) claim fails for three reasons: (1) California law does not apply because of choice-of-law clauses; (2) Plaintiffs failed to plead facts supporting their claim; and (3) they may not pursue a restitution claim when there is otherwise an adequate remedy at law.

Fourth, as explained in Section IV, as a condition of membership in the credit union, each Plaintiff agreed that before bringing a lawsuit they would provide Navy Federal with notice and a reasonable opportunity to respond, which may have allowed for a continued dialogue about the non-discriminatory reasons for the outcomes reached on their loan applications, thereby resolving their grievances. All but one Plaintiff failed to do so.

Finally, and in the alternative, the Court should strike in its entirety or otherwise limit the class definition for the reasons explained in Section V.

I. PLAINTIFFS DO NOT STATE A DISPARATE TREATMENT CLAIM UNDER THE FHA, ECOA, SECTION 1981, OR STATE LAW

To establish disparate treatment, Plaintiffs "must establish that the defendant had a discriminatory intent or motive." *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 524 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)). Without direct or circumstantial evidence of discriminatory intent, Plaintiffs must plead facts sufficient to support such an inference of such intent. *CASA de Maryland, Inc. v. Arbor Realty Tr., Inc.,* No. 21-CV-1778-DKC, 2022 WL 4080320 at *10 (D. Md. Sept. 6, 2022) (citing *Corey v. Sec'y, U.S. Dep't of Hous. & Urb. Dev. ex rel. Walker*, 719 F.3d 322, 325 (4th Cir. 2013)). Plaintiffs fail to show either.

A. Alleged Statistical Disparities Do Not Suffice To Plead Discriminatory Intent

Plaintiffs provide no factual support for the existence of any racial animus or intent. Plaintiffs instead set out statistics that may "show[] a disparity in *outcome*" but no "factual basis to connect that disparity to [Defendant's] intent." *Bankhead v. Wintrust Fin. Corp.*, No. 1:22-CV-02759, 2023 WL 6290548, at *4 (N.D. Ill. Sept. 27, 2023) (emphasis in original). Indeed, "statistical disparities … are rarely sufficient to raise an inference of intentional discrimination." *Cnty. of Cook v. Bank of Am. Corp.*, 584 F. Supp. 3d 562, 572 (N.D. Ill. 2022), *aff'd sub nom. Cnty. of Cook, Illinois v. Bank of Am. Corp.*, 78 F.4th 970 (7th Cir. 2023); *see also Warren v. Halstead Indus., Inc.*, 802 F.2d 746, 753 (4th Cir. 1986) (explaining that "statistics cannot alone prove the existence of a pattern or practice of discrimination, or even establish a prima facie case"), *aff'd en banc*, 835 F.2d 535 (4th Cir. 1988); *Bostron v. Apfel*, 104 F. Supp. 2d 548, 553 (D. Md. 2000) (noting that judges within the district routinely hold that "statistical evidence is entitled to little weight in a disparate treatment case"), *aff'd*, 2 F. App'x 235 (4th Cir. 2001). Simply put, the statistics cited in the Complaint cannot serve as direct or circumstantial evidence of intent.

B. Plaintiffs Do Not Otherwise Plead Sufficient Facts to Support an Inference of Discriminatory Intent

The requirements to plead a prima facie case of disparate treatment under the various statutes are similar. Starting with the FHA and ECOA, Plaintiffs must plausibly allege that: (1) they are members of a protected class; (2) they applied for and were qualified for loans; (3) their loan applications were rejected despite those qualifications; and (4) the defendant approved loan applications for applicants with similar qualifications who are not members of the protected class. *See Wise v. Vilsack*, 496 F. App'x. 283, 285 (4th Cir. 2012) (unpublished) (citing *Rowe v.*

Union Planters Bank of Se. Mo., 289 F.3d 533, 535 (8th Cir. 2002)) (ECOA); *Boykin v. KeyCorp*, 521 F.3d 202, 214-15 (2d Cir. 2008) (FHA).

Under Section 1981, a plaintiff likewise must show that: "(1) he is a member of a protected class; (2) he sought to enter into a contractual relationship with the defendant; (3) he met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) he was denied the opportunity to contract for goods or services that was otherwise afforded to white customers." *Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir. 2004).

Similar elements are required to plead lending discrimination under Florida Statutes Section 725.07 and the Unruh Civil Rights Act. *See Bankers Lending Servs. v. First Mia. Bancorp, Inc.*, No. 15-23599-CV-Scola, 2016 U.S. Dist. LEXIS 132591, at *22-23 (S.D. Fla. Sept. 26, 2016); *James v. US Bancorp*, No. 5:18-CV-01762-FLA (SPx), 2021 WL 4582105, at *6-7 (C.D. Cal. June 4, 2021) (citing the Jud. Council of Cal. Civil Jury Instructions, CACI No. 3060).

Plaintiffs have failed to plead that they were qualified for the loans they applied for, or that Navy Federal approved loan applications for similarly qualified applicants who were not members of the protected class.

1. Plaintiffs Have Not Alleged They Were Qualified

Under each statute, a plaintiff must, at a minimum, allege "the requirements necessary for approval" and the plaintiff's "actual qualifications when [they] submitted each application." *Glenn v. Wells Fargo Bank, N.A.*, No. 15-CV-3058-DKC, 2016 WL 3570274, at *5 (D. Md. July 1, 2016) (citing *Boardley v. Household Fin. Corp. III*, 39 F. Supp. 3d 689, 711 (D. Md. 2014)). Here, Plaintiffs fail to allege either.

First, Plaintiffs have each failed to plead facts sufficient to show the loan approval requirements at the time each applicant applied. Indeed, Plaintiffs make no allegations whatsoever regarding the terms of the credit sought, or "the requirements necessary for approval." *Glenn*, 2016 WL 3570274, at *5. Indeed, Plaintiffs applied for a variety of mortgage products (*e.g.*, first-lien mortgage loans, VA loans, refinances), which could not plausibly have the same credit requirements, but Plaintiffs do not allege any differences among these products.

Second, each Plaintiff fails to allege facts to support their own qualifications for such products, such as credit score, assets, loan value, property value, the ratio of the total amount of debt secured by the property to the value of the property (*i.e.*, LTV), the ratio of an applicant's total monthly debt to total monthly income (*i.e.*, DTI), and more. *See, e.g.*, *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 183 (S.D.N.Y. 2010) (identifying factors relevant to underwriting residential mortgage loans); *see also* Ex. 1 (recognizing relevance of factors such as credit score, LTV, and DTI); Compl. ¶¶ 74-83.[6]

More specifically, none of the Plaintiffs allege the LTV, and only one alleges the potential down payment.[7] Compl. ¶ 112 (alleging that Mr. Otondi "was prepared to make a down payment that was more than 20 percent of the sales price of the home"). Although most of the Plaintiffs (but not Mr. Jackson) allege a rough approximation of their incomes, that is only half of the DTI equation. None of the Plaintiffs allege facts sufficient to determine their debt compared to their income, which lenders use to assess an applicant's ability to repay the loan in relation to other existing debt obligations. Several Plaintiffs provide only conclusory allegations

[6] *See also* Consumer Financial Protection Bureau, *An Updated Review of the New and Revised Data Points in HMDA*, at 53, 57 (Aug. 2020), https://files.consumerfinance.gov/f/documents/cfpb_data-points_updated-review-hmda_report.pdf, *cited in* Compl. ¶ 44.

[7] *See United States v. Norris*, 513 F. App'x 57, 60 (2d Cir. 2013) ("Failing to make a down payment necessarily exposes a bank to a greater risk of loss.").

about having "minimal" debt. *See, e.g.*, Compl. ¶ 221 (alleging that Ms. Pereda and her husband have "minimal debt, aside from their existing mortgage loan"); Compl. ¶ 111 (alleging that Mr. Otondi had "minimal outstanding debt obligations"). And the Complaint does not provide any allegation whatsoever regarding the debt obligations for Mr. Walker, Ms. Batchelor, Ms. Oliver, or Mr. Gardner. And since statute requires that applicants receive an explanation for the decisions made on their applications, 15 U.S.C. § 1691(d), Plaintiffs should be aware of the credit factors that led to their denials.

Although most Plaintiffs (but not Ms. Hill) provide approximate credit scores, those allegations are insufficient to assess their qualifications because they do not allege the credit score requirements of the loans they sought. And Plaintiffs do not otherwise provide any allegations regarding their credit history, such as a lack of delinquent payments or default. Finally, allegations that some Plaintiffs (Mr. Otondi, Mr. Walker, Mr. Jackson, Mr. Gardner, Ms. Pereda, and Mr. Carr) obtained other credit do not suffice. *See Rowe*, 289 F.3d at 535 (plaintiff's evidence that she qualified for credit elsewhere failed to establish that she was qualified for the denied loan). To the contrary, these allegations suggest that they were not qualified for the loans at issue because they were obtained at higher interest rates than the interest rates offered by Navy Federal. *See generally* Compl. ¶¶ 119, 133, 163, 187, 206, 219.

2. Plaintiffs Have Not Alleged That Navy Federal Approved Loans For Comparable White Applicants

Likewise, Plaintiffs fail to sufficiently allege that Navy Federal approved loans for similarly-situated White applicants. Plaintiffs asserting disparate treatment claims can plead this requirement by pointing to a specific, "similarly situated comparator." *See Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 545 (4th Cir. 2003) (in Title VII context); *Wise,* 496 F. App'x at 286. Plaintiffs make no such allegation here; and the articles relied upon do not identify White

applicants who received mortgage loans from Navy Federal, let alone applicants comparable to any of the Plaintiffs. *See Grant v. Vilsack*, No. 5:10-CV-201-BO, 2011 WL 308418, at *3 (E.D.N.C. Jan. 27, 2011) (granting motion to dismiss ECOA claim where Plaintiff had failed to "plausibly demonstrat[e] the existence of a single non-minority who was (1) of similar credit stature as the Plaintiff and (2) given more favorable financial or credit-related treatment than Plaintiff"). And because the Complaint does not adequately describe Plaintiffs' credit profiles, there would be nothing to compare—even if there were allegations regarding a White applicant. The "validity of [plaintiffs'] prima facie case depends upon whether that comparator is indeed similarly situated." *Lawrence v. Global Linguist Solutions, LLC*, No. 1:13-CV-1207, 2013 WL 6729266, at *4 (E.D. Va. Dec. 19, 2013) (quoting *Haywood v. Locke*, 387 F. App'x 355, 359 (4th Cir. 2010)) (in Title VII context).

For the same reason, the one Plaintiff who alleges that Navy Federal approved loans on more favorable terms for White borrowers has failed to state a claim. Ms. Batchelor alleges that Navy Federal approved her mortgage loan application at an interest rate "1% higher than the average prevailing rate," but does not allege that similarly-situated White borrowers with comparable loan profiles were approved at different interest rates. Compl. ¶ 143. Rather, Ms. Batchelor points to the national average of prevailing rates across all lending institutions, without identifying the lender, the type of loan sought, value of the home, or the credit profile of a similarly situated White borrower. *See Grant*, 2011 WL 308418, at *3.

* * *

Thus, Plaintiffs' ECOA, FHA, Section 1981, and state law disparate treatment claims must fail.

II. PLAINTIFFS DO NOT STATE A DISPARATE IMPACT CLAIM UNDER EITHER THE FHA OR ECOA

To plead a prima facie case of disparate impact under the FHA or ECOA, plaintiffs must again show more than a statistical disparity; they must instead allege a policy or policies and it must be one that *caused* that disparity. *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 542. The Supreme Court has emphasized that "one safeguard to ensure that disparate-impact claims [are] properly limited" is "the plaintiff's need to demonstrate a 'robust causality requirement' … in order to state a prima facie disparate-impact claim." *Reyes*, 903 F.3d at 425 (quoting *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 542). "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." *Id.* (alterations in original) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)). "A plaintiff who fails to allege facts at the pleading stage … demonstrating a causal connection cannot make out a prima facie case of disparate impact." *Id.* at 425-26. (quoting *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 542). Here, Plaintiffs have not identified any policy or practice—let alone one that is the purported cause of a disparate impact on a protected class—failing two times over.

First, "[t]o establish causation in a disparate-impact claim, 'the plaintiff must begin by identifying the specific practice that is challenged.'" *Reyes*, 903 F.3d at 425 (quoting *Wards Cove Packing Co.*, 490 U.S. at 656). "In other words, '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.'" *Id.* (quoting *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 542); *see also Montgomery Cnty., Md. v. Bank of Am. Corp.*, 421 F. Supp. 3d 170, 181 (D. Md. 2019) ("To state a claim for disparate impact … 'a plaintiff must allege not only a statistical disparity, but

also that the defendant maintained a specific policy that caused the disparity.'" (quoting *County of Cook, Illinois v. Wells Fargo & Co.*, 314 F. Supp. 3d 975, 995-96 (N.D. Ill. 2018))). Plaintiffs do not identify any Navy Federal policy or practice whatsoever. *See, e.g.*, *Letke v. Wells Fargo Home Mortg., Inc.*, No. 12-CV-3799-RDB, 2015 WL 1438196, at *8 (D. Md. Mar. 27, 2015) (dismissing FHA claim where plaintiff failed to allege a specific lending policy that resulted in disparate impact on member of a protected class); *Bankhead*, 2023 WL 6290548, at *5 (dismissing disparate impact claim under ECOA and FHA when plaintiffs identified only "categories of policies"). And any alleged policy or practice that applied to all named Plaintiffs would be implausible given that Plaintiffs applied for different products with presumably different underwriting requirements. *See, e.g.*, Compl. ¶ 114 (Mr. Otondi applied for a traditional home loan); Compl. ¶ 195 (Mr. Carr and a co-applicant applied for a VA loan); Compl. ¶ 124 (Mr. Walker applied for VA-insured home loan to refinance his existing mortgage); Compl. ¶ 229 (Ms. Hill applied for a cash-out refinance loan for home improvements).

Second, once a policy or practice is identified, a plaintiff must allege a causal connection between the policy or practice and the alleged disparity. "[A] bare statistical discrepancy"—like that asserted in the CNN article—does not suffice. *Reyes*, 903 F.3d at 426. "To hold otherwise would result in [lenders] being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances,'" such as differences in qualified applicants. *Id*. (quoting *Wards Cove Packing Co.*, 490 U.S. at 657). For that reason, the Complaint's reliance on a number of public reports of statistical imbalances do not suffice to show causation. For example, a research note from the National Credit Union Administration ("NCUA") does not identify the statistical results for Navy Federal specifically (as opposed to all federally-insured credit unions generally), let

alone any policy or practice of Navy Federal that might cause those results. "[R]eliance on industry-wide data and studies" does "not support allegations that defendants engaged in discriminatory lending practices." *Hoffman v. Option One Mortg. Corp.*, 589 F. Supp. 2d 1009, 1011 (N.D. Ill. 2008). And those studies specific to Navy Federal indeed recognize that they do not control for legitimate credit factors, such as credit score. *See, e.g.*, Ex. 1.

Because Plaintiffs have not alleged (1) any policy or practice that (2) caused any statistical disparity, Plaintiffs' disparate impact claims should be dismissed.

III. PLAINTIFFS DO NOT STATE A CLAIM UNDER THE CALIFORNIA UCL

Plaintiffs' UCL claim fails for three independent reasons. *First*, it is precluded by choice-of-law clauses. *Second*, Plaintiffs fail to adequately allege that Navy Federal's business practices violate the UCL. *Finally*, Plaintiffs fail to allege that they lack an adequate remedy at law, as required to establish a claim for restitution under the UCL.

A. Valid Choice-Of-Law Clauses Preclude Plaintiffs' UCL Claims

Plaintiffs' Membership Agreement includes a provision that their relationships are "located in the Commonwealth of Virginia, and are maintained and governed in accordance with federal law and the laws of the Commonwealth of Virginia, as amended." Ex. 2. For borrowers who received a loan from Navy Federal, including Ms. Batchelor, the Mortgage Security Instrument contains a provision stating the state law that governs the instrument. *See, e.g.*, Ex. 3 ("This Security Instrument is governed by federal law and the law of the State of Maryland.").[8] A federal court with jurisdiction over a state law claim under 28 U.S.C. § 1332(d) applies the

[8] The Court may consider "loan applications, promissory notes, loan agreements, and the deed of trust" on a motion to dismiss when "the plaintiff has notice of the evidence, does not dispute its authenticity, and relies on it in framing the complaint." *Porter v. GreenPoint Mortg. Funding, Inc.*, No. 11-CV-1251-DKC, 2011 WL 6837703, at *1 n.1 (D. Md. Dec. 28, 2011).

choice-of-law rules of the state in which it sits, *see In re Facebook Biometric Info. Priv. Litig.*, 185 F. Supp. 3d 1155, 1168-69 (N.D. Cal. 2016), meaning that Virginia choice-of-law rules apply. "Virginia law looks favorably upon choice-of-law clauses in a contract, giving them full effect except in unusual circumstances." *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 624 (4th Cir. 1999).

"A valid choice-of-law provision selecting another state's law is grounds to dismiss a claim [based on] California's UCL." *Cont'l Airlines, Inc. v. Mundo Travel Corp.*, 412 F. Supp. 2d 1059, 1070 (E.D. Cal. 2006); *see Run Them Sweet, LLC v. CPA Glob. Ltd.*, 224 F. Supp. 3d 462, 466 (E.D. Va. 2016) (concluding that a Virginia choice-of-law clause precluded a California UCL claim); *accord Lambert v. Navy Fed. Credit Union*, No. 1:19-CV-103-LO-MSN, 2019 WL 3843064, at *5-6 (E.D. Va. Aug. 14, 2019) (concluding that similar Navy Federal choice-of-law clause precluded a claim under the North Carolina Unfair and Deceptive Trade Practices Act). Accordingly, the UCL claim should be dismissed because Maryland law governs the agreement between Ms. Batchelor and Navy Federal, and Virginia law governs the relationship between Navy Federal and all other Plaintiffs.

B. Plaintiffs Do Not Adequately Allege That Navy Federal's Business Practices Violate the UCL

Even if Plaintiffs could assert a UCL claim, Plaintiffs fail to allege any business practice that is violative of UCL. To state a claim under the UCL, a plaintiff must allege an "unlawful, unfair, or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Plaintiffs' conclusory claims that Navy Federal's business practices are "unlawful" and "unfair," Compl. ¶¶ 296-305, do not suffice. They must allege facts to support these claims. They have not done so.

First, to show that a business practice is "unlawful," Plaintiffs must demonstrate that it violates state, local, or federal law. *See Aryeh v. Canon Bus. Sols., Inc.*, 292 P.3d 871, 878 (Cal. 2013). "[I]n determining whether the unlawfulness prong has been met, the court must 'look through' the asserted UCL claim and determine if the underlying statutes cited state a claim for relief." *In re Cap. One Consumer Data Sec. Breach Litig.*, 488 F. Supp. 3d 374, 420 (E.D. Va. 2020). Plaintiffs point to their FHA, ECOA, Section 1981, and the Unruh Act claims, Compl. ¶ 301, but as already discussed, Plaintiffs have not adequately alleged those claims. Thus, Plaintiffs' claim that Navy Federal's business practices were "unlawful" under the UCL should therefore be dismissed. *See Lazar v. Hertz Corp.*, 82 Cal. Rptr. 2d 368, 375 (Ct. App. 1999) (affirming dismissal of UCL claim under "unlawful" prong on basis that predicate claim failed).

Second, to show that a business practice is "unfair," Plaintiffs must allege facts establishing: "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided."[9] *Camacho v. Auto. Club of S. Cal.*, 48 Cal. Rptr. 3d 770, 777 (Ct. App. 2006). Plaintiffs allege no facts; they do no more than mimic the legal test of unfairness. Compl. ¶ 303; *see Feldman v. Discover Bank*, No. 21-CV-1670-DMG (RAOx), 2021 WL 8895125, at *4 (C.D. Cal. Dec. 22, 2021) (dismissing UCL unfairness claim for failing to allege facts demonstrating the three factors).

[9] California appellate courts have applied various tests to consumer claims brought under the "unfair" prong of the UCL. *See Zhang v. Superior Ct.*, 304 P.3d 163, 174 n.9 (Cal. 2013) (declining to resolve the issue). Plaintiffs refer to a different test: a business practice is "unfair" when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164, 177 (Ct. App. 1984). That test appears to have been rejected by the California Supreme Court in *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 543 (Cal. 1999), as discussed in *Camacho*, 48 Cal. Rptr. 3d at 776.

C. Plaintiffs Have Not Alleged They Lack An Adequate Remedy At Law

Plaintiffs' UCL claim fails for a third reason. "Injunctive relief and restitution are the only remedies available under the UCL." *Esparza v. Safeway, Inc.*, 247 Cal. Rptr. 3d 875, 884 (Ct. App. 2019). A plaintiff "must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020). Plaintiffs have not alleged that they lack an adequate remedy at law. Moreover, their other claims in this action provide for damages, indicating that they do have an adequate remedy at law. *See id.* (holding that plaintiff failed to allege she lacked adequate remedy at law where "she seeks the same sum in equitable restitution … as she requested in damages to compensate her for the same past harm").

IV. PLAINTIFFS' CLAIMS ARE PRECLUDED BY NAVY FEDERAL'S NOTICE OF CLAIM PROVISIONS

A credit union is a non-profit cooperative owned by its members, which means the costs of litigation are borne by those members. As such, among other things, members agree to abide by notice of claim provisions in the contracts governing their relationships with Navy Federal.

A. The Membership Agreement Requires Notice of Claim

Each named Plaintiff, and any putative class member, entered into a membership agreement when they joined Navy Federal, which states that:

> Neither Member nor Navy Federal may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this agreement or that alleges that the other party has breached any provision of, or any duty owed by reason of, this agreement, until such party has notified the other party of such alleged breach and afforded the other party a reasonable period after the giving of such notice to take corrective action.

Ex. 2. Any grievances that may arise out of the relationship between any member and Navy Federal, including related to mortgage loan applications, are covered by the notice

of claim provision. *See King v. Navy Fed. Credit Union*, No. 2:23-CV-05915-SPG (AGRX), 2023 WL 8250482, at *3 (C.D. Cal. Oct. 19, 2023) (applying the same Navy Federal notice of claim provision to breach-of-contract and UCL claims).

B. The Loan Agreement Requires Notice of Grievance

Ms. Batchelor and any putative class member who received a loan from Navy Federal also signed Navy Federal's standard Mortgage Security Instrument, which contains the following Notice of Grievance provision:

> Until Borrower or Lender has notified the other party (in accordance with Section 16) of an alleged breach and afforded the other party a reasonable period after the giving of such notice to take corrective action, neither Borrower nor Lender may commence, join, or be joined to any judicial action (either as an individual litigant or a member of a class) that (a) arises from the other party's actions pursuant to this Security Instrument or the Note, or (b) alleges that the other party has breached any provision of this Security Instrument or the Note.

Ex. 3. Courts have found that a "notice and cure provision of a mortgage bars a plaintiff's claims where it 'applies by its terms to [the] action.'" *Charles v. Deutsche Bank Nat'l Trust Co.*, No. 15-cv-21826-KMM, 2016 WL 950968, at *2 (S.D. Fla. Mar. 14, 2016) (quoting *St. Breux v. U.S. Bank, Nat'l Ass'n*, 919 F. Supp. 2d 1371, 1375 (S.D. Fla. 2013)). Statutory claims are also covered when they "relate to the Mortgage." *Kurzban v. Specialized Loan Servicing, LLC*, No. 17-CV-20713, 2018 WL 1570370, at *2 (S.D. Fla. Mar. 30, 2018) (finding that notice of claim provision applies to claims brought under the Real Estate Settlement Procedures Act and Fair Dept Collection Practices Act); *Giotta v. Ocwen Loan Servicing, LLC*, 706 F. App'x 421, 422 (9th Cir. 2017) (applying notice and cure provision to Fair Debt Collection Practices Act claim); *Johnson v. Countrywide Home Loans, Inc.*, No. 1:10CV1018, 2010 WL 5138392, at *2

(E.D. Va. Dec. 10, 2010) (dismissing statutory claims related to the terms of a mortgage because plaintiff did not comply with notice provision in the deed of trust).

Ms. Batchelor alleges she received a mortgage loan at a less favorable interest rate. That rate is charged pursuant to the mortgage note and is therefore subject to the Notice of Grievance provision.

C. Plaintiffs Failed to Provide Reasonable Notice

Plaintiffs were required under their contracts to provide notice and "reasonable period" to take corrective action and/or resolve the grievance before filing a judicial action, Ex. 2; Ex. 3, and must plead compliance to survive a motion to dismiss, *see Jones v. Bank of Am., N.A.*, No. 2:11CV443, 2012 WL 405053, at *6 n.8 (E.D. Va. Feb. 7, 2012) (dismissing claims where plaintiffs failed to allege their compliance with applicable notice provision). Only one Plaintiff (Mr. Carr) attempted to do so. Compl. ¶ 203 (alleging that Mr. Carr "wrote to Navy Federal in January 2022 saying he thought he had been discriminated against by them based on his race"). At most, Mr. Carr should be allowed to proceed as an individual. The claims of the other eight Plaintiffs should be dismissed.[10]

[10] One day after the Consolidated Complaint was filed, Plaintiffs emailed counsel for Navy Federal a letter purporting to provide notice that the Plaintiffs intended to bring claims against Navy Federal. To the extent Plaintiffs intended that letter to provide notice under the Agreements, it does not suffice. *See Kim v. Shellpoint Partners, LLC*, No. 15-CV-611-LAB (BLM), 2016 WL 1241541, at *6 (S.D. Cal. Mar. 30, 2016) (rejecting plaintiff's argument that post-suit notice substantially complied with notice provision in deed of trust because that argument, "if accepted, would gut the 'notice and cure' provision, the purpose of which is to give each party an opportunity to cure problems and prevent the need for litigation").

V. IN THE ALTERNATIVE, THE COURT SHOULD STRIKE OR LIMIT THE CLASS DEFINITIONS

A "court may strike from a pleading" class allegations "on motion made by a party" or "require that the pleadings be amended to eliminate" the class allegations. Fed. R. Civ. P. 12(f)(2) and 23(d)(1)(D). Plaintiffs identify three nationwide classes.

> All minority residential loan applicants from 2018 through the present (the "Class Period") who submitted an application for any home mortgage loan to Defendant, who sought to refinance or modify a home mortgage loan through Defendant, and/or who sought a Home Equity Line of Credit from Defendant and whose application was: (a) denied; (b) approved at higher interest rates and/or subject to less favorable terms as compared to similarly situated non-minority applicants; or (c) processed at a rate slower than the average processing time of applicants submitted by similarly situated non-minority applicants.

Compl. ¶ 241. Plaintiffs separately identify two identical subclasses based on a class member's residence in Florida (Compl. ¶ 242) or California (Compl. ¶ 243).

A motion to strike or limit class allegations "should be granted when it is clear from the face of the complaint that the plaintiff cannot and could not meet Rule 23's requirements for certification because the plaintiff has 'fail[ed] to properly allege facts sufficient to make out a class' or 'could establish no facts to make out a class.'" *Williams v. Potomac Fam. Dining Grp. Operating Co.*, No. 19-CV-1780-GJH, 2019 WL 5309628, at *5 (D. Md. Oct. 21, 2019) (quoting *Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442, 450 (D.R.I. 2002)).

A. The Court Should Strike The Class Allegations In Their Entirety

As noted above in Section IV(A), every member agreed to provide individual notice to Navy Federal under the Membership Agreement. Similarly, members who received a loan from Navy Federal agreed to comply with the Notice of Grievance provision set forth in the mortgage note. *See* Section IV(B). One member (or any one of the nine named plaintiffs) cannot unilaterally override the agreements of their fellow members by pursuing a costly class action to

the detriment of the membership. "[T]he plain language of the provision … require[s] the members of Plaintiff's purported class to provide their own notice to Defendant, affording Defendant the opportunity to take corrective action as it relates to each of their grievances." *Cooper v. Pennymac Loan Servs., LLC*, 509 F. Supp. 3d 1325, 1329 (S.D. Fla. 2020). Moreover, to the extent a member has a grievance about the manner in which their particular loan applications was handled, it is necessarily a highly individualized inquiry, and it would not be possible for Navy Federal to "provide any corrective action to a borrower whose identity and individual grievance has not yet been identified." *Id.* Because the "provision does not include a mechanism by which a Plaintiff can provide such notice on behalf of [] purported class members," the court must strike the class allegations of all putative class members who signed the Membership Agreement or Security Instrument. *Id.*

B. The Court Should Limit the Defined Class to Represent the Circumstances of the Nine Plaintiffs

If the Court does not dismiss the class allegations in their entirety, it should, at minimum, limit the class definitions to the circumstances of the named Plaintiffs in the three ways identified below.

A class action requires that the plaintiffs be a member of the class. *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989), *abrogated on other grounds by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)). To satisfy the typicality requirement for class certification, a class representative "must be part of the class and possess the same interest and suffer the same injury as the class member." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998). The representative plaintiffs' claims "cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own

individual claim." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). Here, the class definition exceeds the circumstances of the nine representative class members in three ways.

First, because Ms. Batchelor cannot proceed as a named plaintiff, *supra* Section IV(B), there is no class representative whose loan was "approved at [a] higher interest rate[] and/or subject to less favorable terms." Compl. ¶ 241. Thus, the Court should strike part (b) of the class definition.

Second, no Plaintiff alleges applying for loan modifications or home equity lines of credit, which can be expected to have different requirements than the products the named Plaintiffs applied for. Thus, the Court should limit the class definition to the products that the named Plaintiffs applied for (i.e., first mortgages, VA loans, and refinances).

Third, Plaintiffs, who all identify as either Hispanic or African American, Compl. ¶¶ 21-29, allege that they were discriminated on the basis of their race. The Court should limit the class definition to Black and Hispanic applicants, rather than all "minority applicants." Compl. ¶ 241.

A Court can strike a class allegation before any motion for class certification where the class allegations are "facially deficient." *Waters v. Electrolux Home Prods., Inc.*, No. 5:13-CV-151, 2016 WL 3926431, at *4 (N.D.W. Va. July 18, 2016). The purpose of a motion to strike "is to avoid the waste of time and money that arises from litigating unnecessary issues." *Godfredson v. JBC Legal Group, P.C.*, 387 F. Supp. 2d 543, 547 (E.D.N.C. 2005). For the above reasons, the Court should strike the class allegations, or limit them to reflect the circumstances of the Plaintiffs based on the allegations in the complaint.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed. In the alternative, Plaintiffs' class allegations should be stricken or limited.

Date: March 21, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2024, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record.

Dated: March 21, 2024

Respectfully Submitted,

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