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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

MITZIE PEREZ, et al.,

Plaintiff,

vs.

WELLS FARGO & CO. and WELLS FARGO BANK, N.A.,

Defendants.

CASE NO. 17-cv-00454-MMC

DEFENDANT WELLS FARGO BANK, N.A.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 16, 2017
Time: 9:00 AM
Courtroom: 7

Complaint Filed: January 30, 2017
Amended Complaint Filed: March 6, 2017

The Hon. Maxine M. Chesney

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 16, 2017 at 9:00 AM in Courtroom 7 of the above captioned court, located at 450 Golden Gate Ave., San Francisco, California 94102, Defendant, Wells Fargo Bank, N.A. ("Wells Fargo") will, and hereby does, move the Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order granting the instant Motion to Dismiss and dismissing the claims against it.

Wells Fargo Bank, N.A.'s Motion to Dismiss is made on the grounds that Plaintiffs have failed to state a claim in the Amended Complaint, including more specifically their claims for (1) alleged discrimination under 42 U.S.C. § 1981; (2) alleged violation of the Unruh Civil Rights Act, California Civil Code §§ 51 and 52 *et seq*. (the "Unruh Act"); or (3) alleged violation of the Unfair Competition Law, California Business and Professions Code §§ 17200 *et seq*. (the "UCL"). The Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq., (the "ECOA") expressly permits the conduct Plaintiffs claim was discriminatory here. Under the ECOA, its implementing regulations and as confirmed in express pronouncements from the agency charged with enforcing these laws and regulations, a lender may consider a borrower's immigration status in deciding whether to extend credit. As the federal government has recognized in numerous areas, immigration status, particularly temporary status afforded Plaintiffs here who were seeking unsecured forms of credit, can give rise to credit risk, and accordingly, lenders may consider this status when determining whether to extend credit. The California statutes similarly recognize that a specific statute condoning the challenged conduct, as well as sound business reasons as the federal government recognizes exist here, preclude Plaintiffs' claims here under California law.

This Motion relies upon this Notice of Motion, the attached Memorandum of Points and Authorities, the papers on file with the Court, and the arguments of counsel at the hearing on this motion.

DATED: April 7, 2017

Respectfully submitted,

MCGUIREWOODS LLP

By: /s/ Mary J. Hackett
Mary J. Hackett
Attorney for Defendant Wells Fargo Bank, N.A.

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I. INTRODUCTION

A bank's decision to lend money depends on creditworthiness and risk of repayment of the loan, and the decision to lend a consumer money is governed by a regulatory framework designed to ensure the safety and soundness of banks, consumers, and the economy alike. The Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq., (the "ECOA") which is a part of that framework, directly and specifically controls the issues in this case. Under the ECOA, the conduct alleged in the Amended Complaint—Wells Fargo Bank, N.A.'s ("Wells Fargo") consideration of Plaintiffs' immigration status in deciding whether to extend credit—was entirely lawful and appropriate.

Plaintiffs, who are recipients of Deferred Action for Childhood Arrivals or "DACA" status, bring claims for lending discrimination based not on ECOA but based upon general civil rights and unfair practices laws. Simply stated, they claim that Wells Fargo's failure to provide a credit option, including student or credit card loans, to DACA recipients is a violation of federal and state civil rights laws. President Obama authorized DACA by way of a federal executive order issued in 2012. *Arizona Dream Act Coalition v. Brewer*, 818 F.3d 901, 906 (9th Cir. 2016). "If granted deferred action under DACA, immigrants may remain in the United States for renewable two-year periods." *Id.* "DACA recipients enjoy no formal immigration status." *Id.* Rather, DACA is discretionary, reversible and "confers no substantive right . . . or pathway to citizenship" *Arpaio v. Obama*, 797 F.3d 11, 17 (D.C. Cir. 2015) (citing Memorandum from Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), J.A. 101), *cert. denied*, 136 S.Ct. 900 (2016). It is a "limited, temporary deferral of removal" that is fully "at the Executive's discretion." *Arizona Dream Act*, 818 F.3d at 917, 917 n.10.

In bringing claims under general laws, and by ignoring the specific provisions of the ECOA and its implementing regulations, Plaintiffs ignore a bedrock principle of statutory interpretation that mandates dismissal of their claims—where specific and general laws overlap, the specific statute controls. The ECOA was designed specifically to address the claims raised here. It prohibits credit discrimination on grounds unrelated to creditworthiness while preserving a lender's ability to make distinctions that matter for repayment purposes. As the ECOA and its regulations recognize,

making loans and extending credit, particularly unsecured credit, to individuals whose residency status is temporary can present a credit risk. Accordingly, the Consumer Financial Protection Bureau (the "CFPB" or "Bureau"), the consumer agency charged with enforcing the ECOA, has determined that immigration status appropriately *matters* for repayment purposes, and the ECOA's implementing regulation *permits* lenders to distinguish between credit applicants based on their immigration status. And when asked whether a student lender may consider an applicant's citizenship, the Bureau's unequivocal answer is yes: "a creditor may consider this information or any additional information that may affect its rights and remedies for repayment."[1]

Allowing lenders to consider immigration status makes sense. Given the risk of non-renewal—or even withdrawal of President Obama's DACA executive order—unsecured loans to individuals granted temporary deferred action status can present a repayment risk for banks. For example, for student loans or credit card accounts, there is typically no collateral, and pursuing collection rights outside of the United States may be impossible or not cost effective. Even the federal government has declined to provide student loans to DACA recipients.

The Plaintiffs should not be able to circumvent the ECOA's specific legislative decision-making as to credit decisions (as well as a bank's reliance upon those provisions to comply with the law) via the general civil rights statute. California law expressly confirms this precept—that the specific statute addressing fair lending issues controls over general civil rights laws. California courts have consistently refused to extend the California Unruh Act to heavily regulated areas involving complex economic business decisions for the same reason. Similarly, under the California Unfair Competition Law ("UCL"), Plaintiffs must plead some unlawful or unfair act—which they cannot do when Wells Fargo's alleged actions were condoned and permitted under the ECOA. This Court should grant Wells Fargo's motion to dismiss.

[1] *See* (https://www.consumerfinance.gov/askcfpb/699/can-student-lender-consider-fact-i-am-not-citizen-united-states.html)").

II. PLAINTIFFS' ALLEGATIONS AND CLAIMS

As alleged in the Amended Complaint ("Cmpl.") (D.E. 37), Plaintiffs are DACA recipients who each claim to have considered but could not find, or applied for but were denied, some form of credit from Wells Fargo, whether student loans, credit cards or other loans. Most acknowledge that their inability to obtain a loan from Wells Fargo did not interfere with their educational process (that is, they were still able to obtain financing to continue on with their education).

Plaintiff Perez alleges that she explored student loan options on the Wells Fargo website, but when she indicated "that she was neither a U.S. citizen nor a permanent resident," she received a message that read: "Thank you for your interest in a Wells Fargo student loan. However, based on information you provided, we do not have a student loan option that meets your needs. This could be due to the school you selected, your field of study, and/or your citizenship status." (Cmpl. ¶¶ 39-40). She admits, however, that she was able to cover her tuition costs via other means. (*Id.* ¶ 41). Plaintiff Rodas sought a student loan from Wells Fargo but was denied because "she was not a permanent resident." (*Id.* ¶¶ 62-67).

Plaintiff Barajah, Plaintiff Diaz Vedoy, and Plaintiff Tabares Villafuerte all allege that they sought credit cards or loans from Wells Fargo, either for student expenses or related to their status as students. Plaintiff Barajah alleges that he applied for a Wells Fargo credit card to pay for his educational expenses, ultimately *cancelled* his credit application when he could not supply certain paperwork, and started a semester later than he wanted. (*Id.* ¶¶ 51, 55-56). Plaintiff Diaz Vedoy claims she sought a personal loan and credit card to "help pay for college-incurred debt and for her parents' immigration application," that she was denied because she was not a "permanent United States resident" but admits that she covered her college-related expenses via other means. (*Id.* ¶¶ 58, 60-61). Plaintiff Tabares Villafuerte alleges that he sought a student credit card while a third year student at California State Polytechnic University in California and that he was denied because his documentation showed that he was "not a permanent United States resident." (*Id.* ¶¶ 68-69, 71).

Finally, Plaintiff Acosta alleges that he has degrees from Texas A&M University, works in Austin, Texas, and held both personal and business checking accounts at Wells Fargo, as well as a loan from dealership services. (*Id.* ¶¶ 42-45). He alleges, however, that he was denied a commercial

equipment loan at a Wells Fargo branch in Texas. (*Id*. ¶ 46). After providing the requested documents, he claims that his loan application was denied because he "was neither a U.S. citizen nor a permanent resident" and that his Wells Fargo credit card account was cancelled shortly thereafter. (*Id*. ¶¶ 46-48). He claims that he had to pay off his credit card balance with money he was saving to purchase a home. (*Id.* ¶ 49). Notably, Plaintiff Acosta pleads that Wells Fargo "dealer services," its auto loan business, did give him a loan which is still outstanding.[2] (*See id.* ¶ 45).

The individual Plaintiffs are joined by Plaintiff California League of United Latin American Citizens ("California LULAC"), an organization that represents DACA-recipient-members and whose factual allegations hinge entirely on assisting Plaintiffs and the alleged class with these claims. (Cmpl. ¶¶ 95, 106, 111). Plaintiffs bring three claims: (1) alienage discrimination under 42 U.S.C. § 1981; (2) violation of the Unruh Civil Rights Act, California Civil Code §§ 51 and 52 *et seq*. (the "Unruh Act"); and (3) violation of the Unfair Competition Law, California Business and Professions Code §§ 17200 *et seq*. (the "UCL").

Notably, Plaintiffs do not contend that Wells Fargo discriminates on the basis of national origin.[3] They cannot complain that Wells Fargo discriminates against non-U.S. Citizens because Plaintiffs specifically allege that *permanent* resident "aliens" (i.e. non-U.S. Citizens) are eligible for student loans. (Cmpl. ¶ 40). Instead, Plaintiffs bring a very narrow subset of an alienage discrimination claim—one premised entirely on Wells Fargo's alleged "policy of denying loans and other financial products to DACA recipients." (Cmpl. ¶ 16). As Plaintiffs rightly recognize, this is alleged discrimination based on "immigration status." (Cmpl. ¶ 104). That indisputable fact has significant (and fatal) implications for Plaintiffs' claims because lenders are expressly permitted to make distinctions based on "immigration status."

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[2] Consistent with Plaintiff Acosta's allegations, Wells Fargo does provide loans to borrowers afforded DACA status in certain circumstances not present in this matter.

[3] Plaintiff could not sustain such a claim under Section 1981. *See e.g., Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004) ("national origin discrimination is not within the ambit of § 1981").

III. ARGUMENT

A. PLAINTIFFS CANNOT STATE A CLAIM UNDER THE GENERAL FEDERAL CIVIL RIGHTS LAWS BECAUSE THE ECOA CONTROLS HERE

1. The ECOA Controls Here and Wells Fargo's Actions Were Proper Under the ECOA

Lending is a central function and defining characteristic of a bank. *See e.g.*, *Hammar v. Cost Control Mktg. & Sales Mgmt. of Virginia*, 757 F. Supp. 698, 702-703 (W.D. Va. 1990). Banks who lend in the United States must comply with a complex, interconnected network of federal and state laws and directives. *See e.g.*, *Weaver v. Marine Bank*, 637 F.2d 157, 169 (3d Cir. 1980) ("[B]ank [] lending activities are closely regulated …"), *rev'd on other grounds*, 455 U.S. 551 (1982).

This regulatory framework is designed to ensure an important balance: the continued safety and soundness of banks while protecting the interests of consumers. Laws impacting bank lending toe this line. The National Bank Act (NBA) controls the business activities of national banks and grants them the power to lend. *See* 12 U.S.C. § 1 et seq., and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC), §§ 24, 93a, 371(a). It requires safe and sound bank practices for the benefit of both banks and their customers. *NCUA v. First Nat'l Bank & Trust Co*., 522 U.S. 479, 495 (1998); *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1013-1014 (E.D. Cal. 2002) (holding that bank's credit activities "are at the heart of the National Bank Act power to lend money" and crucial "to the marketplace" and "the efficient bank operation that is fundamental to bank safety and soundness.")[4] The ECOA is cut from the same cloth and advances these same goals.

In the 1970s, "[c]redit [] ceased to be a luxury item, either for consumers or for business entrepreneurs." S. Rep. 94-589 at 1 (1976). But with the credit boom came a problem. Testimony

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[4] The Federal Deposit Insurance Act similarly instructs banks to establish safe and sound lending practices with policies and procedures that account for lending risks. *See generally* 12 U.S.C. § 1831p-1; Interagency Guidelines Establishing Standards for Safety and Soundness, 12 C.F.R. pt. 364, Appx. A; OCC Comptroller's Handbook, Safety and Soundness (2011). The Truth in Lending Act and its implementing regulation *require* banks to consider a borrower's ability to repay a mortgage loan before consummation. *See generally*, 12 C.F.R. pt. 1026, Subpart B.

suggested "discrimination against credit applicants on account of … characteristics unrelated to creditworthiness." *Id.* at 1. Spurred by this evidence, Congress sought to establish a "clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness." *Id.* at 2. But Congress "also recognize[d] the genuine need of creditors" to know and differentiate between certain attributes "in order to make a determination of creditworthiness." *Id.* at 1-2.

Congress responded with a meticulous inquiry. It identified "characteristics of applicants [that] are, and must be, irrelevant to a credit judgment." *Id.* at 2. "At the same time," Congress "recognize[d] and affirm[ed] the creditor's right to make a rational decision about an applicant's creditworthiness." *Id.* at 3. That balance resulted in "prohibitions against discrimination on the basis of race, color, religion or national origin." *Id.* Congress determined that "these characteristics are totally unrelated to creditworthiness and cannot be considered by any creditor." *Id.* Congress's findings became law in the form of the ECOA—its specific prescription for credit discrimination. The ECOA ensures that credit is available "with fairness, impartiality, and without discrimination" while preserving the "economic stabilization" of the financial institutions engaged in lending. Sec. 502 of Pub. L. 93-495.

The ECOA is a provision of the Consumer Credit Protection Act (the "CCPA"). 15 U.S.C. § 1691, et seq. As its name suggests, the CCPA "is a comprehensive statute designed to protect consumers." *Brothers v. First Leasing*, 724 F.2d 789, 791 (9th Cir. 1984). It mandates full disclosure of financial terms in credit transactions, regulates debt collection and the electronic transfer of funds, and prohibits discrimination in credit transactions. *Brothers*, 724 F.2d at 791. The ECOA implements this last directive: it bans discrimination in lending on the basis of race, color, religion, national origin, marital status, sex, age, or the applicant's receipt of public assistance. *See* 15 U.S.C. §§ 1691 et seq.

In so doing, the ECOA "provides a much-needed addition to the previously existing strict prohibitions against discrimination in employment, housing, voting, education, and numerous other areas." *Brothers*, 724 F.2d at 794. It is broadly construed "in view of the overriding national policy against discrimination that underlies the Act." *Id.* at 793. Indeed, "[t]he ECOA is both a civil rights

law and a consumer credit law." *In re Johnson*, No. 09-49420, 2014 WL 4197001, at *17 (Bankr. E.D.N.Y. Aug. 22, 2014). To properly fulfill its mission, the ECOA delegated regulatory authority over credit discrimination first to the Federal Reserve Board and later to the CFPB. *See* 15 U.S.C. §§ 1691(b).

Regulation B implements the ECOA. *Empire Bank v. Dumond*, No. 13-CV-0388, 2013 WL 6238605, at *5 (N.D. Okla. Dec. 3, 2013) (citing 68 Fed. Reg. 13144, 13144 (March 18, 2003), now 12 C.F.R. § 1202, et seq.). It "sets up a comprehensive scheme outlining when a creditor discriminates." *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV-654, 2010 WL 3931496, at *4 (N.D. Okla. Oct. 5, 2010). "In addition to a general prohibition against discrimination, the regulation contains specific rules concerning[ ] the taking and evaluation of credit applications. . . ." *Empire Bank*, 2013 WL 6238605, at *5 (internal quotation marks omitted). Two are especially pertinent here.

First, Regulation B permits "[a] creditor [to] inquire about the permanent residency and immigration status of an applicant . . . in connection with a credit transaction." 12 C.F.R. § 202.5(e). The Bureau's official interpretation states: "[a] creditor may not refuse to grant credit because an applicant comes from a particular country *but may take the applicant's immigration status into account*." 12 C.F.R. Part 1002 Supplement I, Section 1002.2(2)(z)(2) (emphasis added).

Second, Regulation B provides that a creditor may "consider the applicant's immigration status or status as a permanent resident of the United States, and any additional information that may be necessary to ascertain the creditor's rights and remedies regarding repayment." 12 C.F.R. § 202.6(b)(7). The CFPB's official interpretation reads:

> **National origin—immigration status**. The applicant's immigration status and ties to the community (such as employment and continued residence in the area) could have a bearing on a creditor's ability to obtain repayment. Accordingly, ***the creditor may consider immigration status and differentiate, for example, between a noncitizen who is a long-term resident with permanent resident status and a noncitizen who is temporarily in this country on a student visa***.

Id. at Section 1002.5(6)(b)(7)(1) (emphasis added). The Bureau provides additional similar guidance in the student loan and credit card context. In its "Ask CFPB" section, the question was

posed: "Can a student lender consider the fact that I am not a citizen of the United States?" The Bureau's answer was unequivocal:

> A creditor cannot discriminate on the basis of national origin. However, a creditor may ask about your permanent residency and immigration status or the residency or immigration status of any co-signer. A creditor may consider this information or any additional information that may affect its rights and remedies regarding repayment.

See (https://www.consumerfinance.gov/askcfpb/699/can-student-lender-consider-fact-i-am-not-citizen-united-states.html); *see also*, https://www.consumerfinance.gov/askcfpb/19/what-information-are-card-issuers-not-allowed-to-base-decisions-on-when-considering-a-credit-card-application.html ("In particular, a card issuer can consider immigration status and any additional information that may be necessary to determine its rights and remedies regarding repayment.").[5]

Pursuant to the ECOA, a creditor cannot be liable for "any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau." *See* 15 U.S.C. §§ 1691e(e). Indeed, the ECOA "does not permit individuals to decide which characteristics are irrelevant to credit judgment. Congress made the choice." *Palmiotto v. Bank of New York*, No. 88-CV-1320, 1989 WL 114156, at *2 (N.D.N.Y. Sept. 29, 1989). As one court put it: "Consumers have come to rely upon these rules, and creditors have been trained to follow them." *Citgo Petroleum Corp.*, 2010 WL 3931496, at *9.

Immigration status takes on even greater importance in credit determination when it is temporary in nature and subject to immediate change. The nation's immigration laws provide for the removal from the United States of people who were "inadmissible at the time of entry." *Arizona v. United States*, 132 S.Ct. 2492, 2499 (2012). "A principal feature of the removal system is the broad discretion exercised by immigration officials." *Id.* One form of that discretion is "deferred

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[5] Notably, when the CFPB answers "what is credit discrimination?" it references the ECOA and the Fair Housing Act; it does not reference general civil rights laws. https://www.consumerfinance.gov/fair-lending/#ouroffice. This idea is also applied generally to all types of credit. *See* https://www.consumer.ftc.gov/articles/0347-your-equal-credit-opportunity-rights (discussing credit in general and noting that "[a] creditor may consider your immigration status and whether you have the right to stay in the country long enough to repay the debt.").

action." This entails temporarily postponing the removal of individuals unlawfully present in the United States. *Reno v. Am.-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 484 (1999). DACA is just such a program.

As noted, DACA was authorized by a federal executive order of President Obama. *Arizona Dream Act Coalition v. Brewer,* 818 F.3d 901, 906 (9th Cir. 2016). "If granted deferred action under DACA, immigrants may remain in the United States for renewable two-year periods." *Id.* "DACA recipients enjoy no formal immigration status." *Id.* Rather, DACA is discretionary, reversible and "confers no substantive right . . . or pathway to citizenship" *Arpaio v. Obama,* 797 F.3d 11, 17 (D.C. Cir. 2015) (citing Memorandum from Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), J.A. 101). It is a "limited, temporary deferral of removal" that is fully "at the Executive's discretion." *Arizona Dream Act,* 818 F.3d at 917, 917 n. 10.

The "limited" and "temporary" nature of DACA recipients' immigration status can pose a repayment risk particularly with respect to student loans or credit card debt. For example, student loans, like most other loans, and credit cards, can take many years to pay off. *See* https://www.consumerfinance.gov/askcfpb/597/how-long-does-it-take-pay-federal-student-loans.html ("the standard repayment schedule is 120 months (10 years)" for federal student loans); https://www.consumer.ftc.gov/articles/0333-paying-down-credit-card-debt) (depending on amount charged and paid, repayment could take years). Student loans are also a type of "unsecured debt." *In re Pena,* 155 F.3d 1108, 1114 (9th Cir. 1998). Further, student loans and credit cards are unsecured debt that is "not tied to any particular asset" that can serve as collateral for repayment. *See* https://www.consumer.ftc.gov/articles/0150-coping-debt. In the event of default, the creditor must sue the borrower in court, obtain a judgment, and execute that judgment against the borrower's assets. *See* Black's Law Dictionary 1199 (9th ed. 2009) (definition of "unsecured debt"). Importantly, the federal government also declines to provide student loans to DACA recipients who are only temporarily authorized to remain in the United States. *See* https://studentaid.ed.gov/sa/sites/default/files/financial-aid-and-undocumented-students.pdf ("1. As an undocumented student or DACA student, am I eligible for federal student aid? No.

Undocumented students, including DACA students and Dreamers, are not eligible for federal student aid.").

Despite alleging that Wells Fargo engaged in credit discrimination, Plaintiffs do not bring a claim under the credit discrimination statute—the ECOA. Instead, Plaintiffs bring a claim for credit discrimination under a general federal discrimination statute, 42 U.S.C. Section 1981. This omission was no accident. By the express terms of Regulation B, which implements the ECOA, Plaintiffs cannot state a viable claim under ECOA for credit discrimination claims in these circumstances. 12 C.F.R. § 202.6(b)(7); *Nguyen v. Montgomery Ward & Co., Inc.*, 513 F. Supp. 1039, 1040 (N.D. Tex. 1981) ("[N]either the statute nor its legislative history shows an intent of Congress to proscribe the denial of credit on the ground of lack of citizenship. Moreover, the regulations promulgated pursuant to the [ECOA] specifically provide that a creditor may take immigration status into account in evaluating a credit application.").

DACA-recipients seeking student loans and credit cards are a prime example of why immigration status can be an important consideration in the credit underwriting process. As explained above, DACA is a limited, temporary deferral of removal that is fully at the President's discretion. Student loans are, in fact, unsecured debt with long-term repayment obligations. Similarly, credit cards are long-term repayment obligations that may not be secured to any property interest in the event of default. Extending credit to individuals who have only deferred or temporary residency status and could be removed from the country presents credit risk. The federal government refuses to take on this very risk, as it does not provide student aid to DACA-recipients. Yet, Plaintiffs now seek a judicial decree that every lender in the country must either absorb this risk or face a discrimination lawsuit. Plaintiffs' contentions contradict both the spirit and language of the ECOA.

2. When Statutes Overlap or Conflict, The More Specific Statute Must Control and The Claims Under The General Statute Should Be Dismissed

The genesis of Section 1981 was the Civil Rights Act of 1866. Section 1981 reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give

> evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1981. It was designed to combat slavery's legacy of discrimination and its purpose was to give "real content to the freedom guaranteed by the Thirteenth Amendment." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 433 (1968). It has been construed to forbid all "racial" discrimination in the making of private and public contracts. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 459 n.1 (2008) (citation omitted). It has also been understood to cover public alienage discrimination. *Sagana v. Tenorio*, 384 F.3d 731, 739 (9th Cir. 2004).[6] While Section 1981 generally has been applied to public alienage discrimination, the courts are split as to whether it even applies to private alienage discrimination. But even if it generally does, it cannot and should not apply to conduct covered—and permitted—by the ECOA.

When federal statutory regimes overlap, courts apply a fundamental rule of statutory interpretation: "a specific statute governs a general one." *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) (citing *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992)).[7] This is a "well established canon of statutory interpretation." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). "In a variety of contexts the [Supreme] Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. GSA*, 425 U.S. 820, 834 (1976). The principle has been applied to preclude claims under the Civil

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[6] The *Sagana* court observed without weighing in that "[t]he current controversy over alienage discrimination under § 1981 focuses on whether private distinctions on the basis of alienage are barred." 384 F.3d at 739, n. 6 comparing *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343, 1349 (5th Cir. 1987) (holding that Section 1981 does not prohibit private alienage discrimination) with *Duane v. GEICO*, 37 F.3d 1036, 1042-43 (4th Cir. 1994) (Section 1981 does prohibit private alienage discrimination) and *Anderson v. Conboy*, 156 F.3d 167, 180 (2d Cir. 1998) (same). *Sagana*'s reluctance to extend Section 1981 to the kind of private distinctions made here is another reason to reject that statute's application in this case.

[7] This is not a matter of preemption—it "concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute." *Pom Wonderful LLC. v. The Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014).

Rights Act of 1871, as amended, 42 U.S.C. § 1983. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). It has caused the dismissal of complaints by federal employees "under facially applicable tort recovery statutes." *Brown*, 425 U.S. at 834 (citing *United States v. Demko*, 385 U.S. 149 (1966)); *Patterson v. United States*, 359 U.S. 495 (1959); *Johansen v. United States*, 343 U.S. 427 (1952). And it has thwarted statutory claims that undercut the employee compensation scheme. *See e.g., Fourco Glass Co. v. Transmirra Products Corp*., 353 U.S. 222 (1957); *Stonite Products Co. v. Melvin Lloyd Co*., 315 U.S. 561 (1942).

The principle is at its strongest "where [] Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX*, 556 U.S. at 645. It is "most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one." *Id.* citing *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974).

Multiple Supreme Court cases are instructive. In *Brown*, the Court considered a nearly identical scenario: whether Section 1981's broad reach could be used to circumvent more specific provisions set forth in Section 717 of the Civil Rights Act of 1964 in the federal employment discrimination context. 425 U.S. at 821. The Court relied on the "balance, completeness and structural integrity" of Section 717 in holding that it controlled over Section 1981. *Id.* at 832. The statute was "designed to eradicate federal employment discrimination"—a specific problem. *Id.* at 831. It created "a careful blend" of requirements and delegated "full authority to enforce" its provisions to an agency steeped in expertise—the specific solution. *Id*. at 831, 833. It "would be driven out of currency" if "other, less demanding statutes" like Section 1981 were "permissible" under the circumstances. *Id.* at 833. As the Court made clear: "It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by [the] artful pleading" of a Section 1981 claim. *Id.* The same result should be reached here.

Morton v. Mancari, 417 U.S. 535 (1974) follows a similar analysis. That case involved the Indian Reorganization Act of 1934, which accorded "an employment preference for qualified

Indians in the Bureau of Indian Affairs (BIA)." *Id.* at 537. A group of non-Indian BIA employees challenged the preference "as contrary to the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972." *Id.* The Supreme Court rejected their claim because "the Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 550-551. *See also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (invoking the same rule and holding that the specific statute controlled over the more general).

The Court of Appeals for the Ninth Circuit has followed suit. In *Puget Sound Energy, Inc. v. United States*, 310 F.3d 613, 627 (9th Cir. 2002), the court rejected a claim under the general remedy provision of the Contract Disputes Act because it was "incompatible" with the Northwest Power Act, a "detailed" statute "more narrowly drawn to apply specifically to the" circumstances of the case. In *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1137 (9th Cir 2002), the court applied "a specific provision applying to a specific situation" over "a general statute having broad application" in the environmental setting. *See also 103 Electronic Gambling Devices*, 223 F.3d at 1102 (holding that an electronic bingo game protected by "a specific provision applying to a very specific situation" must be given effect over a general gambling statute prohibiting the device); *Strawberry v. Albright*, 111 F.3d 943, 947 (D.C. App. 1997) ("the mandatory retirement provisions of the [FSRDS] do not run afoul of the ADEA … . a specific statute will not be controlled or nullified by a general one"); *Strackbein v. Wynne*, 282 F. App'x 443, 447 (7th Cir. 2008) ("Because [an Air Force regulation] is a more specific statute than the ADEA, a general statute, [] it supersedes the ADEA.").

Some courts have also applied this rule of construction in the immigration discrimination context. *See e.g., Farmer v. Employment Sec. Comm'n of North Carolina*, 4 F.3d 1274, 1284 (4th Cir. 1993) (affirming dismissal of Fair Housing Act discrimination claim brought by temporary workers because it conflicted with a more specific Immigration Reform and Control Act regulation). And one has even directly held that the ECOA precludes other, more general statutes in the lending context when they conflict. *Barber v. Fairbanks Capital Corp.*, 266 B.R. 309, 321 (Bankr. E.D. Pa.

2001) (holding that "the general assignee liability provision of HOEPA will not trump ECOA's specific limitation on assignee liability").

As the case law demonstrates, the principle that "a specific statute governs a general one" is iron-clad. It should apply with full force here. The ECOA is a comprehensive statute with a laser-focus on combating a specific discrimination problem in the lending world. It is one part of a larger regulatory framework that governs bank lending. That legal structure has been carefully crafted to promote the safety and soundness of banks, consumers, and the overall economy by ensuring that loans only go to those who can repay them.

The ECOA was intended to serve that global and essential objective. Congress sought to establish a "clear national policy" eradicating credit distinctions that had "nothing to do with [] creditworthiness." S. Rep. 94-589 at 1-3. At the same time, it "recognize[d] and affirm[ed]" the right of creditors to make "rational decision[s]" relating to creditworthiness to preserve their "economic stabilization." *Id*.; Sec. 502 of Pub. L. 93-495.

The ECOA conforms to these wishes. It bans consideration of personal characteristics that Congress found irrelevant to the creditworthiness inquiry while allowing distinctions that affect repayment. Regulation B and the Bureau's official interpretation permit lenders to make distinctions based on immigration status because it ***"could have a bearing on a creditor's ability to obtain repayment."*** 12 C.F.R. Part 1002 Supplement I, Section 1002.5(6)(b)(7)(1) (emphasis added). Indeed, the very distinction Plaintiffs pinpoint as discrimination is held up by the Bureau as an acceptable practice: a creditor may "differentiate, for example, between a noncitizen who is a long-term resident with permanent resident status and a noncitizen who is temporarily in this country…" *Id.* And ECOA absolves creditors of all liability for adhering to this guidance—guidance that "[c]onsumers have come to rely upon [] and creditors have been trained to follow". *See* 15 U.S.C. §§ 1691e(e); *Citgo Petroleum Corp*., 2010 WL 3931496, at *9.

In stark contrast to the detail and specificity of the ECOA, Section 1981 is a general remedial statute meant to augment areas of the law where discrimination has not already been addressed. It says nothing about credit. It does not mention how a credit applicant must be treated. Nor does it discuss the interplay between discrimination and lending. As in *Brown*, it cannot be used to

"circumvent" a "careful and thorough remedial scheme" like the ECOA. 425 U.S. at 833. Like the general statute in *Crawford Fitting Co.*, it does not possess the "power to evade th[e] specific congressional command" of the ECOA. 482 U.S. at 442. And similar to the broad prohibition in *103 Electronic Gambling Devices*, it should not "be given effect over" the ECOA's stamp of approval—"a specific provision applying to a very specific situation." 223 F.3d at 1102. Accordingly, Plaintiffs' claims under Section 1981 should be dismissed.

B. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE UNRUH ACT

Plaintiffs allege in their second claim a violation of the Unruh Civil Rights Act, California Civil Code §§ 51 and 52, *et seq.* *See* Cmpl. ¶¶ 98-107. The Unruh Civil Right Act generally "secures equal access to public accommodations and prohibits discrimination by business establishments." *Sargoy v. Resolution Trust Corp.*, 10 Cal. Rptr. 2d 889, 889 n.1 (Cal. Ct. App. 1992). The Unruh Civil Rights Act provides:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Cal. Civ. Code §51(b) (2016). Further, "[t]his Section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law" Cal. Civ. Code § 51(c) (2016). In addition, "[v]erification of immigration status and any discrimination based upon verified immigration status, *where required by federal law*, shall not constitute a violation of this section." Cal. Civ. Code § 51(g) (2016) (emphasis added).

"Although the Unruh Act expressly lists certain classifications as falling within its protections," the California Supreme Court has "made it clear that the list is 'illustrative rather than exhaustive'" *Howe v. Bank of America,* 102 Cal. Rptr. 3d 506, 510 (Cal. Ct. App. 2009) (citation omitted). However, the Unruh Act "does not entirely prohibit businesses from drawing distinctions on the basis of protected classifications or personal characteristics; rather, 'the objective of the Act is to prohibit businesses from engaging in *unreasonable, arbitrary, or invidious discrimination.*'" *Id.* at 510-511 (citations omitted). A plaintiff must "plead and prove a case of ***intentional***

discrimination to recover under the Act." *Harris v. Capital Growth Inv'rs XIV*, 805 P.2d 873, 875 (Cal. 1991) (emphasis added), *superseded by statute on other grounds* as stated in *Munson v. Del Taco, Inc.*, 208 P.3d 623 (Cal. 2009). "Thus, 'certain types of discrimination have been denominated 'reasonable' and therefore not arbitrary.'" *Semler v. Gen. Elec. Capital Corp.*, 127 Cal. Rptr. 3d 794, 803 (Cal. Ct. App. 2011) (citing *Howe*, 102 Cal. Rptr. 3d at 506).

In 1991, the California Supreme Court in *Harris* "reexamined the court's prior decisions and concluded that the act had been applied too broadly." *Semler*, 127 Cal. Rptr. 3d at 802. In *Harris*, the court adopted a three-part analysis[8] to determine the Unruh Act's application in future cases. *Semler*, 127 Cal. Rptr. 3d at 802. "First, a claim must be based on a personal characteristic similar to those listed in the statute." *Id.* (emphasis added). "Second, a court must consider whether the alleged discrimination was justified by a legitimate business reason." *Id.* at 803. "Third, the consequences of allowing the claim to proceed must be taken into account." *Id.* An examination of these elements demonstrates that Plaintiffs here have failed to state a claim, and their claim under the Unruh Act must be dismissed.

1. Any Alleged Discrimination Was Justified By A Legitimate Business Reason

As explained by the California Supreme Court in *Harris*, "[w]hile emphasizing personal characteristics in finding arbitrary discrimination, the California appellate cases have also recognized that *legitimate business interests* may justify limitations on consumer access to public accommodations." *Harris*, 805 P.2d at 884 (emphasis added). The Court noted in its examination that "[i]n each case, the particular business interest of the purveyor in maintaining order, complying

[8] The Court in *Harris*, reviewing the decision on demurrer, rejected plaintiff's argument that the analysis involved "fact-bound determinations [not] cognizable on demurrer." The court found the argument "not supported by the case law decided under the Act" and explained that, "Unruh Act issues ***have often been decided as questions of law on demurrer*** or summary judgment when the ***policy or practice of the business establishment is valid on its face*** because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." *Harris*, 805 P.2d at 886. *See, e.g., Sargoy v. Resolution Trust Corp.*, 10 Cal. Rptr. 2d 889 (Cal. Ct. App. 1992) (emphasis added) (sustaining demurrer of lending discrimination claim).

with legal requirements, and *protecting a* business reputation or *investment* were recognized as *sufficient to justify distinctions among its customers*." *Id.* (emphasis added). Specifically, the court noted that "[b]usiness establishments have an obvious and important interest in obtaining full and timely payment for the goods and services they provide." *Id.* In *Harris*, the court ultimately found that a minimum income policy was "based on the rational economic interest of the landlord to minimize defaults and maintain the solvency of his business establishment…" and was not a violation of the Unruh Act. *Id.* at 885-886.

Similarly, in *Semler*, the court found that GE Capital "had an unquestionable interest in making sure [its] loan was repaid" in looking to an applicant's criminal record, as that information in that situation "provide[d] relevant information about an applicant's creditworthiness…" *Semler*, 127 Cal. Rptr. 3d at 807. As a result, GE Capital could consider the plaintiff's criminal record in declining to make a loan to a business venture in which the plaintiff was involved. *Id.* at 811. *See also Howe v. Bank of America*, 102 Cal. Rptr. 3d at 513 (affirming dismissal in favor of the bank and finding that the bank's practice of applying varying minimum identification requirements to all applicants in opening credit card accounts, whether U.S. citizens or foreign nationals, was in accordance with federal law and a practice that "bore a reasonable relationship to Bank of America's commercial objectives and was consequently valid on its face.")

Here, as explained above, the ECOA and Regulation B specifically permit lenders to take immigration status into consideration in making decisions as to lending and creditworthiness. Specifically, there exist concerns about repayment of an obligation when the individual on the other end of the transaction cannot guarantee that they will continue to be in the country or be able to be contacted years into the future, when a loan or credit card may require repayment. Plaintiffs have alleged no facts showing that Wells Fargo intentionally discriminated, as Wells Fargo's actions were justified by a legitimate business reason relating to risk of repayment—and therefore should not be treated as a violation of the Unruh Act.

2. The Consequences of Allowing the Claim Warrant Dismissal

Even more importantly, California courts look to the consequences of allowing a particular claim to go forward in determining whether an alleged violation of the Unruh Act can be sustained.

As the court in *Harris* explained, any attempt by the court to determine exactly which factors would be the best predictors of default in making considerations as to creditworthiness "would involve the courts of this state in a multitude of microeconomic decisions we are ill equipped to make." *Harris*, 805 P.2d at 887. In analyzing these issues and concluding that courts should not delve into the area of lending and creditworthiness determinations under the Unruh Act, the court explained:

> Many other businesses, including lending institutions and retail and wholesale sellers, are in the position of extending money, goods, or services in exchange for promises to pay or repay in the future. They use minimum income policies as well as other financial criteria to make risk-oriented decisions regarding what customer to deal with on what terms. These businesses, as well as others, could be subjected to legal challenges to their policies based on summary allegations that they acted 'arbitrarily.' Plaintiffs' approach would require that each business defend its policies as 'reasonable' at a trial on the merits. Those trials, like the ones plaintiffs propose here, would generate expense and uncertainty on a massive scale with little or no demonstrable benefit to the antidiscrimination policy of the Unruh Act.

Harris, 805 P.2d at 887-888. "For these reasons, the economics of credit practices, whether those of landlords or other businesses, have traditionally been left to the guidance of market forces or to specific legislative and administrative action designed to address particular grievances." *Id.* at 888 (citing *the ECOA* "prohibiting credit discrimination on specified grounds and creating an administrative regulatory and enforcement scheme").

Similarly, in *Semler*, the court followed *Harris* in finding that a "commercial lending institution that invests in borrowers' ventures has a sufficient interest in 'protecting… [its] investment… to justify distinctions among its customers.'" *Semler*, 127 Cal. Rptr. 3d at 811. In explaining why courts should not get involved in such determinations, it was noted that:

> A trial in such a case would explore issues such as what general [borrower-investor] selection criteria are the best predictors of default; what weight should be given to each criterion; what threshold criteria, if any, are permissible; and what must be shown and by whom to validate general or threshold criteria…

Id. (citing *Harris*, 805 P.2d at 873). The court also determined that the plaintiff's claim was better left to resolution by specific legislative or administrative action tailored to particular lending concerns, and not by expanding the scope of the Unruh Act. *Semler*, 127 Cal. Rptr. 3d at 811.

Ultimately, the court was "unwilling to engage in complex economic regulation under the guise of judicial decisionmaking" and affirmed the dismissal on demurrer. *Id.* (citation omitted).

Not only would delving into issues of creditworthiness be inappropriate and counter to controlling case law under the Unruh Act—and interfere with the scope of the ECOA as discussed above—but courts have also applied Section 51(c) to defer to a more specific statute relating to a particular subject than a more general statute, the Unruh Act. Section 51(c) states:

> This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status, or to persons regardless of their genetic information.

Cal. Civ. Code § 51(c). Courts interpreting this section have applied the same analysis outlined above: "[courts] give effect to a specific statute relating to a particular subject in preference to a general statute." *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1504-1505 (Cal. Ct. App. 1999) (citing *Agricultural Labor Relations Bd. v. Superior Court*, 546 P.2d 687 (Cal. 1976); *Gomes v. Cty. of Mendocino*, 37 Cal. App. 4th 977, 988 (Cal. Ct. App. 1995)). The analysis in *Lazar* is instructive.

The *Lazar* court found that a legislative regulation for vehicle rental agreements was more specific—requiring that renters be at least 25 years of age—than the general anti-discrimination provisions of Unruh, which prohibits age discrimination generally, and the specific regulation controlled. As Wells Fargo has urged this Court to do here with respect to federal law, the court found that the more specific legislation controlled and the plaintiff's Unruh claim could not proceed. *Lazar*, 69 Cal. App. 4th at 1504. The court found further support for this finding under Section 51(c) which it held "anticipates that if there is a conflict between its provisions and those of another statute, the former defers to the latter." *Id.* This reasoning applies with equal force in this action.

Again, the ECOA and Regulation B provide the specific regulatory framework for avoiding and addressing lending discrimination and should control. This is also true under the application of Section 51(c). Here, there is a overlap between the Unruh Act and the provisions of the ECOA and Regulation B. Regulation B permits lenders to consider immigration status in making its lending decisions. The Unruh Act, rightfully so, anticipated such overlap, and provides

specific direction on what to do when that occurs under Section 51(c)—the Unruh Act defers to the more specific statute where a right or privilege is conditioned or limited by relevant law.

Under the foregoing analysis, Plaintiffs cannot bring a claim for violation of the Unruh Act because (1) Wells Fargo was acting pursuant to a legitimate business interest that is valid on its face; and (2) the consequences of substituting the general scope of the Unruh Act in place of the specific scope of the ECOA and Regulation B would lead to outcomes that the California courts do not permit. Plaintiffs' claim under the Unruh Act should be dismissed, with prejudice.

C. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE UCL

Plaintiffs allege in their third claim a violation of the Unfair Competition Law ("UCL"), at California Business and Professions Code §§ 17200, *et seq.* *See* Cmpl. at ¶¶ 108-114. The UCL prohibits "any unlawful, unfair, or fraudulent business act or practice." *Tat Tohumculuk v. H.J. Heinz Co.*, No. 13-0773, 2013 WL 6070483, at *6 (E.D. Cal. Nov. 14, 2013) (citation omitted). To have standing under the UCL, a plaintiff must allege that she "suffered injury in fact and has lost money or property as a result of the unfair competition." *Roussel v. Wells Fargo Bank,* No. C 12-04057, 2012 WL 5301909, at *7 (N.D. Cal. Oct. 25, 2012) (citing Cal. Bus. and Prof. Code § 17204). The remedies under the UCL are limited—a party may seek only injunctive relief and restitution; *compensatory damages are not available*. *Aleksick v. 7-Eleven, Inc.*, 140 Cal. Rptr. 3d 796, 801 (Cal. Ct. App. 2012) (emphasis added). "A plaintiff must state with reasonable particularity the facts supporting the statutory elements of the violation." *Tat Tohumculuk*, 2013 WL 6070483, at *6.

Plaintiffs allege only conclusory allegations that "Wells Fargo's policy and practice of denying loans or other financial products to Plaintiffs…based on their alienage and immigration status harmed Plaintiffs…and constitutes *unlawful* discrimination" in violation of the Unruh Act and 42 U.S.C. Section 1981. Cmpl. at ¶ 11 (emphasis added). Plaintiffs also allege that Wells Fargo's violations of the Unruh Act and 42 U.S.C. Section 1981 "constitute *unfair* business practices in violation of Section 17200" of the UCL. *Id.* at ¶ 75. However, Plaintiffs have failed to state a claim under the UCL for multiple reasons, and this cause of action should be dismissed.

1. Any Alleged "Illegal" Business Practice Must be Dismissed Where There Is No Cognizable Violation of Section 1981 or the Unruh Act

Specifically, "[b]y proscribing 'any unlawful' business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Tat Tohumculuk*, 2013 WL 6070483, at *6. It is well-settled, therefore, that where the underlying claims fail, any derivative UCL claim under the "unlawful" prong of the statute fails, as well. *Id.* at *6-7. Specifically, in *Tat Tohumculuk*, the court dismissed Plaintiff's UCL claim after finding that alleged violations of 42 U.S.C. § 1981 and the Unruh Act failed. *Id.* ("Because neither Section 1981 nor section 51 apply…, plaintiff's claim under the unlawful prong of the UCL fails for lack of statutory predicate.") *See, e.g., AIDS Healthcare Found., Inc. v. Gilead Scis., Inc.*, No. 16-00433, 2016 WL 3648623, at *8 (N.D. Cal. July 6, 2016) (UCL claim under unlawful prong failed where plaintiff sought to "borrow" violations of antitrust claims that also failed); *Das v. WMC Mortg. Corp.*, 831 F. Supp. 2d 1147 (N.D. Cal. 2011) (plaintiffs could not state a claim for UCL violation based on violation of TILA and RESPA where those underlying claims were invalid).

Similarly here, the Plaintiffs make no allegations whatsoever under the UCL claim other than to link those actions as "illegal" under the two other statutory causes of action. Therefore, to the extent that the claims under Section 1981 and the Unruh Act are dismissed, the UCL claims under the "unlawful" prong necessarily must be dismissed as well.

2. Any Alleged "Unfair" Business Practice Must be Dismissed Where There Is No "Illegal" Conduct and Where Plaintiffs Have Failed to Plead Other Conduct

Plaintiffs also make the wholly conclusory allegation that "Wells Fargo's violations of Section 51(b) and 51.5 of the Unruh Civil Rights Act and 42 U.S.C. 1981 constitute *unfair* business practices in violation of Section 17200 of the [UCL]." Cmpl. at ¶ 75. While California courts have not decided on a specific, controlling test for the sufficiency of allegations of "unfair" practices under the UCL, this failure to plead any facts beyond the failed statutory claims, coupled with the analysis already discussed, results in dismissal under any of the tests.

The UCL itself does not define the term "unfair" and the California Supreme Court has not decided the appropriate definition in the context of a consumer action. *Aleksick*, 140 Cal. Rptr. 3d at 806. In earlier cases, the appellate courts attempted to define an unfair business practice as occurring "when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id.* at 807. In the California Supreme Court's decision in *Cel-Tech*, the court developed a test for the "unfair" prong in the antitrust context as involving a threatened "incipient violation of an antitrust law, or violat[ion of] the policy or spirit of one of those laws." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (Cal. 1999). The court in *Cel-Tech* criticized the prior standard in consumer cases as "too amorphous"—though courts have not settled on a particular standard since. *Id.* at 185. Therefore, many courts have read *Cel-Tech* as requiring that any unfair practice predicated on public policy "must be 'tethered' to specific constitutional, statutory or regulatory provisions" in consumer cases.[9] *Aleksik*, 140 Cal. Rptr 3d at 807-808 (citation omitted) (finding that UCL claim under "unfair" prong failed where allegations were based on inapplicable alleged violation of the Labor Code). *See also, Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163 (C.D. Cal. 2014) (requiring alleged "unfair" business practices to be tethered to a specific statutory or regulatory provision in order to avoid exposing businesses to "arbitrary or unpredictable liability"), *aff'd*, 649 F. App'x 424 (9th Cir. 2016); *Tat Tohumculuk*, 2013 WL 6070483, at **7-8.

Here, Plaintiffs have alleged no more facts than those in support of their statutory claims. Even under the "amorphous" test, there are no independent allegations of unfairness, and the

[9] California courts discuss the split in authority as to the appropriate test, with some courts looking to the "impact on the alleged victim, balanced against the reasons, justifications, and motives of the alleged wrongdoer" under the prior "amorphous test," while others look to factors under the Federal Trade Commission Act relating to weighing the injury and whether consumers could have avoided that injury, along with the third test discussed here, which requires any public policy determination to be tethered to a specific statutory or regulatory provision. *Graham v. Bank of America, N.A.*, 172 Cal. Rptr. 3d 218, 233-34 (Cal. Ct. App. May 23, 2014). Under any of these considerations, there is no reason for the UCL to step into the highly regulated area of lending and credit decisions.

allegations related to the statutory claims are met with important policy reasons as to why these statutes should not regulate the area of lending.

Further, courts will not allow an alleged violation of the UCL under the "unfair" prong to survive dismissal where the claims are *not* unlawful, or where they are *permitted* by a particular statute or regulation—just as the ECOA allows the conduct alleged herein. *See, e.g., Chavez v. Whirlpool Corp.*, 113 Cal. App. 4th 363, 375 (Cal. Ct. App. 2001) (holding that conduct is not "unfair" if it is "deemed reasonable and condoned under the antitrust laws"); *Lazar*, 69 Cal. App. 4th at 1506 (affirming dismissal of UCL claim under the "unfair" prong where the minimum age requirement for vehicle rental drivers was authorized by the legislature"). Similarly here, the ECOA and Regulation B expressly permit the consideration of immigration status in lending decisions, and that same consideration should not be deemed "unfair" under the UCL, as it would lead to uncertainty and potential liability for banks in the heavily regulated area of lending. As such, any attempt by Plaintiffs to bring a claim under the "unfair" prong of the UCL must be dismissed.

3. Plaintiffs Have Failed to Plead Sufficiently Loss of Money or Property as a Result of the Offending Action to Confer Standing Under the UCL

Plaintiffs' claims also fail for the independent reason that they lack standing. They have failed to sufficiently plead the loss of money or property as a result of Wells Fargo's alleged actions. "To bring a UCL claim, [p]laintiffs must allege that they have 'suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition." *Walker v. Ditech Financial*, 16-cv-03084, 2016 WL 5846986, at *11 (N.D. Cal. Oct. 6, 2016) (citing Cal Bus. & Prof. Code § 17204). In *Walker*, the court found that conclusory allegations were insufficient to sustain plaintiff's UCL claim on a motion to dismiss, finding that plaintiff "must identify the actual damages and how the alleged violations caused the injury in fact" relating to the defendant's actions during a potential loan modification and ultimate foreclosure. *Id.* at *11. *See also, Reyes v. Nationstar Mortg. LLC*, No. 15-CV-01109, 2015 WL 4554377 (N.D. Cal. July 28, 2015) (UCL claim dismissed for failure to plead lost money or property where the plaintiff had not yet lost property in foreclosure and no claim was made as to exorbitant fees).

Here, Plaintiff Rodas and Plaintiff Villafuerte make no allegations as to loss of money or property as a result of the alleged denial of credit. (Cmpl. ¶¶ 62-71). Plaintiff Perez and Plaintiff Diaz Vedoy make no specific factual allegations they lost money or property other than to state in a conclusory fashion that Plaintiffs Perez was forced to cover her tuition using other credit sources, and Plaintiff Diaz Vedoy also used various credit cards as opposed to the Wells Fargo credit card that she sought. (Cmpl. ¶¶ 41, 61). Finally, Plaintiff Acosta alleges that Wells Fargo's closure of his credit card account, secondary to the alleged denial of credit, caused him to have to pay off that balance with other funds.[10] (Cmpl. ¶ 49).

None of these allegations is sufficient to show standing under the UCL. Whatever decisions Plaintiffs made regarding their education, where to attend school, what the related costs might be, how to finance it, and whether those costs are prudent, are not a result of Wells Fargo. This is not the type of situation or "injury" that the UCL is meant to address. As such, Plaintiffs' UCL claim should be dismissed for failure to plead lost money or property as a result of Wells Fargo's alleged actions to confer standing under the statute. *Roussel,* 2012 WL 5301909, at *7 (noting that there was no duty to consider plaintiff's loan modification, and therefore that refusal could not be a cause of plaintiff's alleged loss).

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs' claims are not prohibited by the Equal Credit Opportunity Act—the specific federal statute that governs credit discrimination and permits lenders to consider the immigration status of its credit applicants. As a result, the claims are not viable under any of the general laws offered in support of their claims. Accordingly, Wells Fargo respectfully requests that this Court dismiss Plaintiffs' Amended Complaint in full and with prejudice.

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[10] Further, Plaintiff Acosta, who alleges all facts relating to Texas and *none* relating to California, cannot bring a claim under either the Unruh Act or the UCL for yet another reason—those statutes do not apply outside of California, based on Plaintiff Acosta's allegations. *See Loving v. Princess Cruise Lines, Ltd*, No. CV 08-2898, 2009 WL 7236419, at *8 (C.D. Cal. Mar. 5, 2009) (holding that Unruh Act and California UCL "do not apply to claims of nonresidents of California injured by conduct occurring beyond California's borders").

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Respectfully submitted,

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