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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 GABRIEL GARCIA, 12 Plaintiff, 13 v. 14 COUNTRY WIDE FINANCIAL CORPORATION and 15 COUNTRYWIDE HOME LOANS, INC., 16 17 Defendants.	Case No. EDCV 07-1161-VAP (JCRx) **[Motion filed on November 8, 2007]** **AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS**

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19 Defendants' Motions to Dismiss came before the Court
20 for hearing on January 7, 2008. After reviewing and
21 considering all papers filed in support of, and in
22 opposition to, the Motion, as well as the arguments
23 advanced by counsel at the hearing, the Court GRANTS IN
24 PART and DENIES IN PART Defendants' Motion to Dismiss.
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26 **I. BACKGROUND**

27 **A. Procedural History**

28 Plaintiff Gabriel Garcia filed a putative class
action Complaint ("Compl.") on September 12, 2007,

alleging that Defendants Countrywide Financial Corporation and Countrywide Home Loans, Inc. (collectively, "Defendants") violated and continue to violate (1) the Equal Credit Opportunity Act ("ECOA"); (2) the Fair Housing Act ("FHA"); and (3) the Civil Rights Act, 42 U.S.C. §§ 1981 and 1982.

On November 8, 2007, Defendants filed a Motion to Dismiss ("Mot.") pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff filed an Opposition ("Opp'n") on December 3, 2007. On December 10, 2007, Defendants filed a Reply.

B. Plaintiff's Allegations

Nationwide, minority consumers "have less-than-equal access to loans at the best prices and on the best terms that their credit history, income, and other individual financial considerations merit." (Compl. ¶ 13 (citing Joint Center for Housing Studies, The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending (2005).) Even after controlling for a borrower's gender, income, property location, and loan amount, federally mandated lender disclosures show that Hispanic and black borrowers were 37.5 to 50 per cent more likely to receive a higher-rate home loan than non-Hispanic whites. (Id. ¶ 15-16.)

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Defendants represent themselves as "America's #1 home lender" and "America's #1 Lender to Minorities." (Id. ¶ 19.) They originate and fund mortgage loans through loan officers, brokers and a network of correspondent lenders (collectively "loan originators"). (Id.) These loan originators act as Defendants' agents in originating loans. (Id. ¶¶ 26-27.)

Defendants encourage and offer incentives to these loan originators to increase interest rates, charge additional fees, and include prepayment penalties and other less favorable terms in loans to certain borrowers. (Id. ¶ 3.) As a direct result of these policies, minorities receive residential loans with higher interest rates and higher fees and costs than similarly situated non-minority borrowers. (Id.)

Specifically, Defendants employ discretionary loan pricing procedures that cause minority borrowers to purchase loans with prepayment penalties and other unfavorable terms, and to pay subjective fees such as yield spread premiums and other mortgage-related finance charges, at higher rates than similarly situated non-minority borrowers. (Id. ¶ 21.) Defendants' loan originators receive more compensation when they steer borrowers into loans with these higher interest rates, penalties and fees. (Id. ¶ 22.)

Moreover, these discretionary charges are unrelated to any objective risk-based credit evaluation. When a loan applicant provides credit information to Defendants through a loan originator, Defendants perform an initial objective credit analysis, evaluating numerous risk-related credit variables, including debt-to-income ratios, loan-to-value ratios, credit bureau histories, debt ratios, bankruptcies, automobile repossessions, prior foreclosures, payment histories, and credit scores. (Id. ¶ 29.) From these objective factors, Defendants derive a risk-based financing rate called the “par rate.” (Id. ¶ 30.)

Defendants, however, authorize and offer incentives to their loan originators to charge discretionary, non-risk-based fees in addition to the "par rate," including "yield spread" or "broker premiums." (Id. ¶ 31.) This practice causes persons with identical or similar credit scores to pay differing amounts for obtaining credit, and disparately impacts Defendants' minority borrowers. (Id. ¶ 34.) Specifically, Defendants' use of yield spread premiums and other discretionary fees disproportionately and adversely affects minorities relative to similarly situated non-minorities. (Id. ¶ 35.)

Defendants have intentionally discriminated against minority borrowers through these policies and procedures,

systematically giving them mortgage loans with less favorable conditions than were given to similarly situated non-minority borrowers. (Id. ¶ 21, 36.) This pattern of discrimination is a direct result of Defendants' mortgage lending policies and procedures, cannot be justified by business necessity, and could be avoided by alternative policies and procedures that have less discriminatory impact and no less business efficacy. (Id. ¶¶ 21, 25, 26.)

These discriminatory practices directly damaged Plaintiff. (Id. ¶ 37.) On or about February 27, 2006, Plaintiff obtained $415,000 in financing from Defendants to purchase a single-family house. (Id.) The loan originator and Defendants knew that Plaintiff was a minority borrower, and because of Defendants' discriminatory practices, Plaintiff received a loan on worse terms with higher costs than similarly situated non-minority borrowers. (Id. ¶¶ 40-41.) Specifically, Plaintiff paid a $8,300 "broker origination fee," a $1,250 "broker administration fee," a $550 "processing fee," a $830 yield spread premium, a $150 "loan tie in fee" and a $995 "underwriting fee." (Id. ¶ 39.) All of these fees were assessed pursuant to Defendants' credit pricing policies. (Id.)

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II. LEGAL STANDARD

Under Rule 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. As a general matter, the Federal Rules require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic Corp. v. Twombly, 550 U.S. __, 127 S. Ct. 1955, 1964 (2007). In addition, the Court must accept all material allegations in the complaint -- as well as any reasonable inferences to be drawn from them -- as true. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic, 127 S. Ct. at 1964-65 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. at 1965.

1 Although the scope of review is limited to the
2 contents of the complaint, the Court may also consider
3 exhibits submitted with the complaint, Hal Roach Studios,
4 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19
5 (9th Cir. 1990), and "take judicial notice of matters of
6 public record outside the pleadings," Mir v. Little Co.
7 of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).
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9 **III. DISCUSSION**
10 Defendants argue that (1) the FHA and ECOA do not
11 authorize disparate impact claims; (2) Plaintiff fails to
12 state a disparate impact claim; (3) Plaintiff fails to
13 state a claim for intentional discrimination; (4)
14 Plaintiff does not have standing to assert claims on
15 behalf of minority populations of which he is not a
16 member; (5) Plaintiff fails to allege liability on the
17 part of Defendant Countrywide Financial Corporation,
18 Inc.; and (6) Plaintiff's allegations regarding tolling
19 of the statute of limitations should be stricken. The
20 Court considers each of these arguments in turn.
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22 **A. Disparate Impact Under the FHA and ECOA**
23 Plaintiff alleges that Defendants violate the FHA and
24 ECOA, in part, because Defendants' policies have a
25 negative disparate impact on minority borrowers. The
26 Fair Housing Act, in relevant part, states that "it shall
27 be unlawful":
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> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a). In the Ninth Circuit, a plaintiff can establish an FHA discrimination claim under a theory of disparate treatment or disparate impact. Gamble v. City of Escondido, 104 F.3d 300, 304-05 (9th Cir. 1996).

The ECOA provides, in relevant part, that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a). A plaintiff can establish an ECOA claim under a theory of disparate treatment or disparate impact. Miller v. American Exp. Co., 688 F.2d 1235, 1240 (9th Cir. 1982).

Defendant argues that the Ninth Circuit cases recognizing disparate impact claims under FHA and ECOA "were wrongly decided" and "cannot be good law in light of the subsequent Supreme Court decision in Smith v. City of Jackson." (Mot. at 14 (citing Smith v. City of Jackson, 544 U.S. 228 (2005)).) In Smith, the Supreme Court held a plaintiff could bring a disparate impact claim under the Age Discrimination in Employment Act

("ADEA"). Smith, 544 U.S. at 235-39. The Court compared the text of the ADEA to the text of Title VII, and reasoned that both statutes authorized disparate impact claims when they prohibited "actions that deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race or age." Id. at 235 (emphasis in original; citations omitted).

Defendants argue that the FHA and ECOA do not support disparate impact claims because, unlike the ADEA and Title VII, they do not contain text expressly prohibiting actions that "otherwise adversely affect" individuals based on their protected status. (Mot. at 15-16.) Smith, however, did not hold that a statute *must* contain this "effects" language in order to authorize disparate impact claims. Indeed, the Court did not rely only on this textual analysis of the statutes, but also held that the purpose and legislative history of the ADEA, as well as unanimous circuit court treatment of the Act, supported disparate treatment claims. Smith, 544 U.S. at 236-39.

Like the Supreme Court in Smith, the Ninth Circuit relied on the purposes of the ECOA in determining that Act supports disparate impact claims. See Miller, 688 F.2d at 1239-40. It held that "not requiring proof of

discriminatory intent is especially appropriate in analysis of ECOA violations because discrimination in credit transactions is more likely to be of the unintentional, rather than the intentional, variety." Id. at 1239 (citations omitted).

Moreover, all eleven circuits that have considered the matter have concluded that the FHA supports disparate impact claims. See 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F3d 673, 679 (D.C. Cir. 2006) (analyzing circuit holdings); Note, The Fair Housing Act and Disparate Impact in Homeowners' Insurance, 104 Mich. L. Rev. 1993, 2006-07 & n.117 (listing cases). Furthermore, in Village of Arlington Heights v. Metropolitan Housing Development Corp., the Supreme Court affirmed summary judgment against the plaintiffs on all claims requiring discriminatory intent, finding that the plaintiffs had failed to prove such intent, but remanded for consideration of an FHA claim, thus implying that discriminatory intent was not necessary for an FHA claim. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270-71 (1977).

Indeed, the Ninth Circuit has recognized the viability of disparate impact claims under the FHA after Smith. See Affordable Housing Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1195-96 (9th Cir. 2006) (affirming

a judgment for the defendants but recognizing the viability of such a claim). The Sixth Circuit similarly has recognized the continuing viability of ECOA disparate impact claims. See Golden v. City of Columbus, 404 F.3d 950, 964-65 (6th Cir. 2005) (same). Accordingly, this Court declines to hold that Smith overturned Ninth Circuit precedent recognizing disparate impact claims under the FHA and ECOA.

B. Disparate Impact

In analyzing discrimination claims under the FHA, courts have borrowed the analysis that they use in assessing claims under Title VII. Gamble, 104 F.3d at 304. To establish discrimination through disparate impact, a plaintiff must (1) identify a specific practice of the Defendant; (2) identify a significant discriminatory impact on the protected class of which the plaintiff is a member; and (3) demonstrate that the identified practice causes the identified discriminatory impact. Paige v. California, 291 F.3d 1141, 1144-45 (9th Cir. 2002); Gamble, 104 F.3d at 304. The causation requirement may be inferred through statistical evidence showing a sufficiently substantial disparity. Id.

1. Specific Practice

Defendants argue that Plaintiff fails to challenge a sufficiently specific practice on the part of Defendants.

(Mot. at 6-10.) To establish discrimination based on disparate impact, a plaintiff must "isolate[e] and identify[y] the *specific* . . . practices that are allegedly responsible for any observed statistical disparities." Smith, 544 U.S. at 241 (emphasis in original; citations omitted). In Smith, plaintiffs challenged a pay plan that granted proportionately greater pay raises to employees with less than five years of tenure, arguing that the plan had a discriminatory impact on older employees. Id. at 231. The Supreme Court held that the plaintiffs failed to identify the specific practice being challenged, and that imposing liability for the pay plan in general could "result in employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances." Id. at 241. Additionally, the Court stressed that the plaintiffs could not successfully challenge the plan as a whole because it "was based on reasonable factors other than age." Id.

The Ninth Circuit similarly has rejected challenges to a defendant's overall processes. In Stout v. Potter, postal inspectors challenged the process by which a review panel screened applicants for promotion. Stout v. Potter, 276 F.3d 1118, 1121 (9th Cir. 2002). The Ninth Circuit held that by merely attacking "the decision-

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making process" or "the process by which the [screening] Panel evaluated applications," the plaintiffs failed toidentify a "specific employment practice or selection criterion." Id. at 1124. The court explained,

> Plaintiffs generally cannot attack an overall decisionmaking process in the disparate impact context, but must instead identify the particular element or practice within the process that causes an adverse impact. A decisionmaking process may be analyzed as a single employment practice if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis.

Id. In Stout, the court did not treat the decision-making process as a single practice because the overall process consisted of discrete elements and the plaintiffs failed to argue that the various elements could not be separated for analysis. Id. at 1124-25.

Similarly, the Ninth Circuit has frowned on a challenge to a complex market-based process. In AFSCME v. State of Wash., the plaintiffs attacked the state's practice of setting salaries based on biennial studies assessing prevailing market rates for each position. AFSCME v. State of Wash., 770 F.2d 1401, 1403 (9th Cir. 1985.) The Ninth Circuit held that "the decision to base compensation on the competitive market . . . involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis." Id. at 1406.

In contrast, challenges to subjective decision-making practices are more likely to survive initial pleading attacks. In Watson v. Fort Worth Bank and Trust, the plaintiff challenged her employer's practice of promoting employees based on the "subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 982 (1988). The Court held that "subjective or discretionary employment practices may be analyzed under the disparate impact approach," but did not decide whether the plaintiff had made out a *prima facie* claim for disparate impact discrimination. Id. at 991, 1000.

Here, Plaintiff challenges Defendants' practice of authorizing and offering incentives to their loan originators to charge discretionary, non-risk-based fees in addition to the "par rate," including "yield spread" or "broker premiums." (Compl. ¶ 31.) Like the practice challenged in Watson, Defendants' practice allows subjective decision-making that is alleged to result in a discriminatory impact. Unlike the practice challenged in Smith, the challenged decision-making, is *not*, on its face, based on objective factors other than prohibited discrimination. See Smith, 544 U.S. at 241 (stressing that the challenged plan is based on reasonable factors other than age).

Defendants argue that, like the practice challenged in AFSCME, the practice attacked here is merely a "policy of allowing pricing to be responsive to supply and demand and other market forces." (Mot. at 9 (quotations omitted).) Plaintiff, however, alleges that Defendants' assessment of fees in addition to the "par rate" is *not* based on market-based factors such as risk or creditworthiness, and indeed is unrelated to legitimate business necessity. (Compl. ¶ 25, 28-35.) From this, it is reasonable to infer that the challenged practices do not merely allow pricing to be responsive to market forces. In the context of a motion to dismiss, the Court takes as true these allegations and reasonable inferences therefrom. See Doe, 419 F.3d at 1062.

Finally, unlike in Stout, Plaintiff does not challenge the overall process by which Defendants determine borrowers' rates and fees. Instead, Plaintiff challenges only the practice of allowing and incentivizing individual loan originators to assess additional, non-risk-based fees. (Compl. ¶ 31.) In the context of a motion to dismiss, this is sufficient to give Defendants "fair notice of what the plaintiff's claim is and the grounds upon which it rests." See Conley, 355 U.S. at 47; Bell Atlantic, 127 S. Ct. at 1964.

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2. Significant Discriminatory Impact

To establish disparate impact discrimination, a plaintiff must demonstrate that there is a significant disparity in outcomes between minorities and similarly situated non-minorities. See, e.g. Wards Cove, 490 U.S. at 651-53. Here, Defendants argue that the nationwide statistics cited by Plaintiff "fail[] to allege a disparate impact because the cited data is not specific to Countrywide." (Mot. at 10.) As Plaintiff points out, however, he is not required at the pleading stage to produce statistical evidence proving a disparate impact on Defendants' customers -- all that is required is fair notice of the claims and the grounds upon which they rest, sufficient to raise a right to relief above the speculative level. Bell Atlantic, 127 S. Ct. at 1964-65 (citations omitted); see also Swierkeiwicz v. Sorema, 534 U.S. 506, 514-15 (2002) (no heightened pleading standard to state a discrimination claim). Here, Plaintiff does allege that Defendants' minority customers, specifically, pay disproportionately higher fees for mortgages than Defendants' nonminority customers. (See Compl. ¶¶ 21, 22, 24, 35.) Moreover, he provides statistical evidence of a nationwide disparate impact which, combined with an allegation that Defendants are "America's #1 home lender," is enough to raise above the speculative level Plaintiff's allegation that Defendants' minority buyers

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pay disproportionately high fees. (See Compl. ¶¶ 13-16, 19.)

Defendants also argue that Plaintiff fails to allege that "the relevant groups of whites and Hispanics are similarly-situated." (Mot. at 10-11.) The Complaint, however, does allege that Defendants charge minorities higher fees "even after controlling for borrowers' gender, income, property location, and loan amount." (Compl. ¶ 15.) Moreover, Plaintiff alleges that Defendants charge minorities higher fees than others with the same "par-rate," a number which takes into account numerous risk-related credit variables, including debt-to-income ratios, loan-to-value ratios, credit bureau histories, debt ratios, bankruptcies, automobile repossessions, prior foreclosures, payment histories, and credit scores. (Id. ¶ 29.) Finally, Plaintiff alleges Defendants' use of yield spread premiums and other discretionary fees disproportionately and adversely affects minorities "relative to similarly situated non-minorities." (Id. ¶ 35.) Accordingly, Plaintiff has alleged that there is a significant disparate impact on minorities compared to similarly situated non-minorities.

3. Causation

To allege causation, Plaintiff must allege facts sufficient to raise above a speculative level the

inference that, but for Defendants' challenged policy, minorities would not receive higher-cost loans than similarly situated non-minority borrowers. See Bell Atlantic, 127 S. Ct. at 1964-65. Here, Plaintiff alleges that Defendants' policy of allowing and offering incentives to its loan originators to add fees in addition to the "par rate" directly causes minorities to receive home loans with higher interest rates and higher fees and costs. (Compl. ¶¶ 3, 21, 24, 35, 62, 80.) Defendants argue that these allegations are conclusory and that Plaintiff fails to "allege a set of facts from which causation plausibly can be inferred." (Mot. at 13.)

Defendants claim that the higher costs imposed on minority borrowers could be explained by such borrowers' lower average credit scores. (Id.) This explanation ignores Plaintiff's allegation that Defendants impose the challenged discretionary fees *in addition to* the "par rate," which is calculated based on a borrower's credit score. (Compl. ¶¶ 15, 29.) Indeed, Plaintiff alleges that the higher costs imposed on minority borrowers cannot be explained by any factor other than Defendants' challenged policies. (Compl. ¶ 15.) These allegations are sufficient to raise above a speculative level the inference that, but for Defendants' policy of offering incentives for discretionary fees, minorities would not

receive higher-cost loans than similarly situated non-minority borrowers. Accordingly, Plaintiff has stated a claim for disparate impact discrimination.

C. Disparate Treatment

To show disparate treatment based on race, a plaintiff must establish that the defendant was *motivated* to discriminate against the plaintiff on the basis of race. See AFSCME, 770 F.2d at 1406-07. Where a plaintiff challenges a defendant's policy, the plaintiff must establish that the defendant implemented the policy "because of, not merely in spite of," its adverse effects on the protected group. Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

Here, Plaintiff alleges that Defendants have intentionally discriminated against minority borrowers through their policy of offering incentives for discretionary loan fees, and that Defendants intentionally designed this policy to discriminate against minority borrowers. (Compl. ¶¶ 21, 36.) Plaintiff maintains that this policy perpetuates past racial discrimination in mortgage lending. (Id. at 12-18.)

To state a claim for disparate treatment, Plaintiff must provide more than mere conclusory allegations of

Defendants' intent to discriminate. See Bell Atlantic, 127 S. Ct. at 1964-65. Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. at 1965. Here, Plaintiff provides no factual allegations regarding intent to discriminate beyond his bare assertion that Defendants "intentionally discriminated" and that Defendants' policy "by design discriminates against minority borrowers." (Compl. ¶¶ 21, 36.) These assertions are not enough to raise Plaintiff's right to relief for disparate treatment above the speculative level. See Bell Atlantic, 127 S. Ct. at 1965. Accordingly, Plaintiff has failed to state a claim for disparate treatment.

D. Standing

To satisfy Article III's standing limitations, a plaintiff must demonstrate that: (1) he or she has suffered an "'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) there is a causal connection between the injury and the conduct complained of -- the injury is "fairly traceable" to the challenged action of Defendants, and not the result of the independent action of some third party not before the court; and (3) it is "likely," as opposed to merely

"speculative," that the injury will be redressed by a favorable judicial decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (citations omitted). "In the class action context, Article III standing simply requires that the class representatives satisfy standing individually." In re Verisign, Inc., 2005 WL 88969, *4 (N.D. Cal. 2005).

Defendants argue that Plaintiff cannot establish standing to sue on behalf of potential class members of minority groups other than Hispanics. (Mot. at 19-20.) To establish Article III standing, however, Plaintiff must only show that he has standing to sue on his own behalf. In re Verisign, 2005 WL at *4. Whether he may represent the claims of the class is a separate inquiry, governed by Federal Rule of Civil Procedure 23. Id.

Defendants do not argue that Plaintiff does not have standing to sue on his own behalf. Indeed, Plaintiff has alleged he has suffered an actual injury that is fairly traceable to Defendants' acts, and the type of injury he alleges (discriminatory fees) is redressible by a federal court. (See Compl. ¶¶ 39-41 (alleging that as a result of Defendants' discriminatory credit pricing policies, Plaintiff received a loan on worse terms with higher costs than similarly situated non-minority borrowers).)
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Accordingly, Plaintiff has established Article III standing.[1]

E. Liability of Defendant Countrywide Financial Corporation, Inc.

Plaintiff's Complaint does not distinguish between the two named Defendants. (Compl. ¶ 1.) Nonetheless, Defendants argue that Defendant Countrywide Financial Corporation ("CFC") cannot be liable because Plaintiff "states no factual allegations at all as to CFC." (Mot. at 21.) The Complaint, however, alleges numerous acts by CFC. Every allegation of an act by Defendants is an allegation of an act by both CFC and Countrywide Home Loans, Inc. (See Compl. passim.) For instance, the Complaint alleges Plaintiff obtained a residential loan from "CONTRYWIDE," which he defines as Countrywide Financial Corporation *and* Countywide Home Loans, Inc. (See Compl. ¶¶ 1, 37-38.) The Complaint also alleges

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[1]At the hearing on this matter, Defendants' counsel argued that Plaintiff lacks Article III standing to represent minority groups of which he is not a part under the Ninth Circuit holding in Black Coalition v. Portland School Dist. No. 1. Black Coalition held that a plaintiff has no standing to challenge a policy or procedure which has not adversely affected that individual plaintiff's interests. Black Coalition v. Portland School Dist. No. 1., 484 F.2d 1040, 1042-43 (1973). In contrast, Plaintiff here challenges a policy that he alleges directly and adversely affected him. Moreover, while Black Coalition considered an appeal of a district court judgment in a class action, here a class has not yet been certified, so the issue of whether Plaintiff may represent all members of the class is not yet properly before the Court.

that Defendants collectively designed, implemented, and oversee the allegedly discriminatory policy of allowing loan officers to add discretionary fees to the objectively determined "par rate." (Compl. ¶¶ 3, 21-25, 29-36.)

Defendant argues that these allegations are untrue and cannot be proven as to CFC, but for the purposes of a Motion to Dismiss, the Court takes Plaintiff's allegations as true. Doe, 419 F.3d at 1062. Accordingly, the Court declines to dismiss Defendant CFC.

F. Motion to Strike Allegations re Tolling of the Statute of Limitations

Under Federal Rule of Civil Procedure 12(f), a party may ask the court to strike any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Proc. 12(f). "'Immaterial' matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded. . . . 'Impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

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"Motions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic." Cal. Dept. of Toxic Substances Control v. Alco Pacific, Inc., 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002). Thus, "courts often require 'a showing of prejudice by the moving party' before granting the requested relief," and "[u]ltimately, whether to grant a motion to strike lies within the sound discretion of the district court." Id. (citing Fantasy, 984 F.2d at 1528). A court should deny "[a] motion to strike under Rule 12(f) . . . unless it can be shown that no evidence in support of the allegation would be admissible, or those issues could have no possible bearing on the issues in the litigation." Gay-Straight Alliance Network v. Visalia Unified Sch. Dist., 262 F. Supp. 2d 1088, 1099 (E.D. Cal. 2001).

Defendant moves to strike the allegations in paragraphs 51-58 of the Complaint. (Mot. 21-22.) These paragraphs allege that class members' claims did not accrue until shortly before the filing of the action, that Defendants fraudulently concealed their discriminatory practices, and that Defendants' discriminatory conduct is continuing and recurrent. (Compl. ¶¶ 51-55.) Accordingly, Plaintiff alleges that "[t]he statute of limitations applicable to any claims

that Plaintiff or other class members have brought or could bring as a result of the unlawful and fraudulent concealment and course of conduct described herein, have been tolled." (Id. ¶ 58.)

Defendants argue that the allegations in paragraphs 51-58 of the Complaint are irrelevant because the named Plaintiff filed his claim within all applicable statutes of limitations. (Mot. 21-22.) This argument is premature. Until the Court has ruled on the issue of class certification, it cannot be shown that the allegations regarding other class members "could have no possible bearing on the issues in the litigation." See Gay-Straight Alliance Network, 262 F. Supp. 2d at 1099.

Defendants further argue that the Court should strike Plaintiff's allegations of fraudulent concealment because Plaintiff failed to plead with particularity sufficient facts showing fraudulent conduct. (Mot. at 22-23.) Indeed, one pleading fraudulent concealment "must plead with particularity the facts which give rise to the claim. Conerly v. Westinghouse Elec. Corp., 623 F.2d 117, 120 (9th Cir. 1980); see also Fed. R. Civ. Proc. 9(b). Here, Plaintiff merely alleges that Defendants "took steps to conceal [their] fraudulent and unfair conduct," but fails to allege what steps were taken, how those steps were intended to mislead Plaintiff and class

members, or why those steps would lead a reasonable person to be misled into believing that he did not have a claim for relief. See Conerly, 623 F.2d at 120. In his Opposition, Plaintiff does not contest that the Complaint fails to plead fraudulent concealment properly.

Plaintiff has failed to plead fraudulent concealment with sufficient particularity, and Plaintiff's allegations regarding fraudulent concealment are stricken.

Finally, Defendants argue that Plaintiff's allegations of a continuing violation are insufficient as a matter of law to justify tolling the statute of limitations under the "continuing violation" doctrine. (Mot. at 24-25.) Defendants cite Ledbetter v. Goodyear Tire & Rubber Co. Inc., which held that the statute of limitations was not tolled when the alleged discriminatory act was a pay decision that occurred before the limitations period, even though the plaintiff continued to receive lower pay during the limitations period. Ledbetter v. Goodyear Tire & Rubber Co. Inc., 127 S. Ct. 2162, 2166-69 (2007). The Court held that a limitations period does not recommence "upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." Id. at 2169.

Unlike the plaintiff in Ledbetter, however, Plaintiff here alleges a discriminatory act -- Defendants' sale to him of an allegedly high-cost loan -- which occurred during the limitations period. (Compl. ¶ 37.) Indeed, in an FHA case similar to this one, the Supreme Court tolled the statute of limitations under a "continuing violation" theory. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982). In Havens Realty, the plaintiffs alleged five specific incidents of alleged FHA violations. Id. Only one of the incidents, involving only one of the plaintiffs, occurred within the limitations period. Id. Nevertheless, the Court tolled the statute as to the other incidents involving the other plaintiff. Id. The Court held, "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." Id. at 380-81.

Here, Plaintiff alleges an occurrence of Defendants' allegedly discriminatory practice within the statute of limitations. (Compl. ¶ 37.) Thus, his allegations regarding a "continuing violation" as to other potential class members are not irrelevant, redundant, or scandalous, and are accordingly not stricken.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS
3 Defendants' Motion to Dismiss as to Plaintiff's claims of
4 disparate treatment discrimination under the FHA, ECOA,
5 and 42 U.S.C. §§ 1981 and 1982 with leave to amend,
6 DENIES the Motion to Dismiss as to Plaintiff's claims of
7 disparate impact discrimination, and STRIKES the
8 allegations of fraudulent concealment in paragraphs 53,
9 57, and 58 of the Complaint.
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11 Defendants shall answer or otherwise respond to the
12 Complaint by January 23, 2008.
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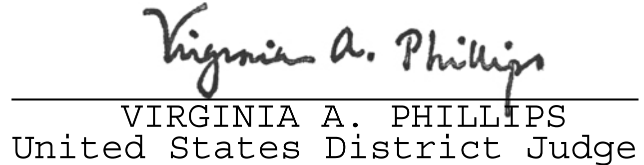
16 Dated: January 17, 2008



VIRGINIA A. PHILLIPS
17 United States District Judge
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