No. 10-56177

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

UNION AUTO SALES, INC., *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION

The United States brought this suit to enforce the anti-discrimination provisions of the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.* (ECOA). See U.S. Br. 7-11.[1] The United States alleged that the defendants, a bank and

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[1] Citations to "U.S. Br. __" are to page numbers in the Brief for the United States as Appellant. Citations to "Union Br. __" are to page numbers in Union Auto Sales, Inc.'s Appellee's Brief. Citations to "R.E. __" are to page numbers in the Record Excerpts filed by the United States in this appeal.

several automobile dealerships, engaged in a pattern or practice of discrimination on the basis of race or national origin by charging non-Asian customers higher automobile loan interest rates than Asian customers. The district court dismissed the amended complaint for failure to state a claim, and this appeal followed. See generally U.S. Br. 6-15.

This Reply Brief responds to the arguments made in Union Auto Sales, Inc.'s (Union) brief as appellee.[2] As a general matter, Union's arguments largely ignore the context of this appeal – an appeal of a dismissal of a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Although Union acknowledges the Supreme Court's recent decisions addressing the federal pleading standards, see *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007); *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), it fails to recognize that those standards are not intended to be onerous, and that the filing of a complaint is the starting point for notice pleading, which relies on discovery rules and summary judgment

[2] Presently, Union is the only active defendant (appellee) in this case. Although defendant Han Kook Enterprise, Inc. (HKE) also filed a brief as appellee, it subsequently filed for bankruptcy. By Order dated March 24, 2011, this Court stayed this case as to HKE until September 26, 2011. For that reason, this Reply Brief does not address arguments made in HKE's brief. See generally U.S. Br. 2 n.2 (addressing status of the other defendants in this case, none of which is a party to this appeal); Union Br. 15 (also noting that presently Union is the only appellee before this Court).

motions to define the issues and dispose of unmeritorious claims. As the Seventh Circuit has explained, under the "plausibility" standard of *Twombly* and *Iqbal* "the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen." *Swanson* v. *Citibank*, 614 F.3d 400, 404 (7th Cir. 2010). Moreover, subsequent to the filing of the government's opening brief, this Court addressed in some detail the pleading standard after *Twombly*, *Iqbal*, and the other recent Supreme Court decisions addressing this issue. See *Starr* v. *Baca*, 633 F.3d 1191 (9th Cir. 2011). The Court found two principles common to these cases: "First, allegations in a complaint * * * must be sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it. Second, the allegations must be sufficiently plausible that it is not unfair to require the opposing party to be subjected to the expense of discovery." *Id.* at 1204. The amended complaint in this case – with its straightforward allegations – is consistent with these principles.

The issue here, therefore, is whether the United States has stated a claim on which relief can be granted, and should have an opportunity to present evidence in support of its allegations, regardless of the likelihood it will ultimately prevail. The amended complaint alleged sufficient facts to state a plausible claim of discrimination, a claim made all the more plausible once all reasonable inferences

are drawn in favor of the United States, which the district court erroneously failed to do. The amended complaint alleged that the defendants discriminated on the basis of race or national origin in violation of the ECOA. R.E. 68. The amended complaint identified defendants' specific lending practice that is being challenged (the policy to allow dealership employees to use their subjective judgment to determine the dealer mark-up), and presented statistical evidence that showed that, as a result of this policy, non-Asian borrowers were charged higher loan rates than Asian borrowers. The amended complaint also asserted that the employees' discretion "was exercised in a manner that discriminated against non-Asian borrowers." R.E. 66. As such, the amended complaint is consistent with Fed. R. Civ. P. 8(a), and therefore the district court erred in granting defendants' motions to dismiss.

Union makes four arguments in support of the district court's dismissal of the amended complaint: (1) the amended complaint's allegation of discrimination against non-Asians does not allege discrimination against a protected class and is tantamount to alleging discrimination *in favor of Asians*, which the ECOA does not prohibit; (2) the amended complaint fails to allege facts showing that the Asian and non-Asian borrowers were otherwise similarly situated, *i.e.*, that the differences in loan rates were not due to credit qualifications or other legitimate factors; (3) the amended complaint does not identify a "policy or practice" that caused an adverse

impact; and (4) the statistics alleged in the amended complaint are insufficient to demonstrate an adverse impact. For the reasons set forth below, and those in the United States' opening brief, these arguments are misplaced.

ARGUMENT

THE FIRST AMENDED COMPLAINT ALLEGED SUFFICIENT FACTS TO SUPPORT A PLAUSIBLE CLAIM OF DISCRIMINATION ON THE BASIS OF RACE OR NATIONAL ORIGIN AGAINST NON-ASIANS IN AUTOMOBILE LENDING RATES

A. The Amended Complaint Alleged Sufficient Facts To State A Plausible Claim Of Discrimination Against Non-Asians On The Basis Of Race Or National Origin

Union argues that the purpose of the ECOA is to prohibit discrimination "against" traditionally disadvantaged minority groups, including Asians, but that here any discrimination was "in favor" of Asians, and therefore falls outside the statute's protections. Union Br. 23. Union also asserts that because Asians constitute approximately five percent of the nation's population, the ECOA could not have been intended to apply to discrimination against 95 percent of the nation. Union Br. 23 & n.3. These arguments are specious.

First, actionable discrimination under the ECOA, as under similar anti-discrimination statutes (particularly Title VII[3]), is not limited to discrimination

[3] As Union acknowledges (Union Br. 20-21), courts generally look to Title VII employment discrimination cases when analyzing claims under the ECOA. (continued…)

against traditionally disadvantaged minority groups. Courts have long held, for example, that prohibited discrimination on the basis of race includes discrimination against whites, and that discrimination on the basis of gender includes discrimination against men. See, *e.g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-279 (1976) (Title VII proscribes racial discrimination against whites on the same terms as racial discrimination against nonwhites); *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) ("Title VII's prohibition of discrimination 'because of … sex' protects men as well as women."); cf. *Orr* v. *Orr*, 440 U.S. 268, 279 (1979) (Equal Protection Clause also applies to discrimination against men); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 289-295 (1978) (strict scrutiny under Equal Protection Clause also applies to discrimination against whites). Similarly, the anti-discrimination statutes protect individuals, not only groups. See, *e.g.*, *Connecticut* v. *Teal*, 457 U.S. 440, 453-454 (1982) (Title VII protects individual employees, not groups; therefore, a nondiscriminatory "bottom line" is not a bar to a discrimination claim); *Diaz* v. *American Tel. & Tel.*, 752 F.2d 1356, 1360 (9th Cir. 1985) (although Title VII "was designed to deter and remedy discrimination on the basis of group

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(…continued)
See, *e.g.*, *Rosa* v. *Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000); *Ramirez* v. *GreenPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922, 927 n.1 (N.D. Cal. 2008).

characteristics," it "protects individuals as well as groups"); cf. *Bakke*, 438 U.S. at 289 (the rights of the Fourteenth Amendment are "guaranteed to the individual") (opinion of Powell, J.).[4]

Therefore, it is simply irrelevant whether the alleged discrimination is against Asians, or in favor of Asians, and whether a particular "group" constitutes a large or small percentage of the population. Rather, the ultimate question is this: did the defendant discriminate against (treat differently) a particular person on the basis of, or because of, the person's race or national origin. Here, the amended complaint alleged that defendants engaged in a pattern or practice of discrimination on the basis of race or national origin by making loans to non-Asians (many of whom were Hispanic) at rates higher than those charged to Asian customers. In other words, the amended complaint alleged that non-Asians were given a worse deal *because of* their race or national origin. That allegation is sufficient, at the pleading stage, to state a claim of discrimination on the basis of race or national origin, the scope of which can be fleshed out during discovery. Indeed, this is not a novel claim; a number of cases have addressed claims of discrimination against non-Asians without questioning whether that type of claim is actionable. See, *e.g.*,

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[4] In addition, the plain language of the ECOA makes clear that it protects individuals: "It shall be unlawful * * * to discriminate against *any applicant*, with respect to any aspect of a credit transaction – (1) on the basis of race * * * [or] national origin." 15 U.S.C. 1691(a) (emphasis added).

Nance v. *Ricoh Elecs., Inc.*, 381 F. App'x 919 (11th Cir. 2010) (unpublished) (Caucasian employee alleged that employer had a discriminatory policy against non-Asians; "there is no dispute that [plaintiff] is a member of a protected class"); *De Los Santos* v. *Panda Express, Inc.*, No. C 10-01370 SBA, 2010 WL 4971761 (N.D. Cal. Dec. 3, 2010) (unpublished) (Title VII claim alleging that company discriminated against its non-Asian applicants and employees seeking managerial positions); *Schanfield* v. *Sojitz Corp. of America*, 258 F.R.D. 211 (S.D.N.Y. 2009) (non-Japanese/non-Asian managerial employees alleged discriminatory practices favoring Japanese and Asian employees in promotions and other benefits).

In short, the allegation that a particular practice (here, the determination of final loan rates) discriminates against non-Asians is a claim that defendants are disadvantaging certain persons (non-Asians) *because of* their race or national origin. It does not matter which group is being favored, and which is being disadvantaged, or whether the disadvantaged non-Asian group is made up of persons of a variety of races and national origins, as long as there is an allegation that discriminatory decisions are being based on race or national origin. That is the case here; *i.e.*, each time a non-Asian was given a worse loan deal because she is not Asian, she was discriminated against on the basis of her race or national origin. The allegations in the amended complaint, therefore, are sufficient at the pleading

stage to give defendants fair notice of claims of unlawful discrimination on the basis of race or national origin.[5]

B. The Amended Complaint Stated A Plausible Claim Of Discrimination On The Basis Of Race Or National Origin And Was Not Required To Allege Facts Negating Other Factors Defendants Might Assert Affected The Disparity In The Loan Rates Charged

Union argues that the amended complaint fails to allege facts showing that the Asian and non-Asian borrowers were otherwise similarly situated, *i.e.*, that the differences in loan rates were not due to credit qualifications or other factors. Union asserts, for example, that "[t]here are many factors that could have affected the interest rates charged," including credit history, credit score, level of income, employment, and citizenship. Union Br. 26; see also Union Br. 29. Union argues that a lender is not required to disregard "legitimate business interests" – presumably, these other factors – in making a credit transaction. Union Br. 25.

This argument confuses pleading requirements and the sufficiency of the allegations in the amended complaint with whether the United States can ultimately prove its claim. As we have noted, at the pleading stage the plaintiff

[5] Union's argument would lead to absurd results: An employer could hire only African-Americans, only Hispanics, or only women and be insulated from a Title VII discrimination claim because the employer is discriminating "in favor of" members of "traditionally disadvantaged groups," and those being discriminated against make up a "disparate group of individuals" who, together, constitute a bulk of the nation's population. Cf. Union Br. 23.

need only allege sufficient facts to make a claim of discrimination plausible. Other factors that may be relevant to the ultimate question of whether the defendant unlawfully discriminated – *e.g.*, the defendant had a legitimate non-discriminatory reason for the higher loan rates, the borrowers were not otherwise similarly situated with respect to their credit worthiness, or the plaintiff failed to show causation (that the challenged policy caused the discrimination)[6] – are properly addressed at summary judgment or trial. See, *e.g.*, *Cupps* v. *Pittsburgh Care P'ship, Inc.*, No. 10-1380, 2011 WL 284468, at *4 (W.D. Pa. Jan. 26, 2011) (unpublished) (denying motion to dismiss without considering defendant's evidence; improper to allow defendant to assert legitimate, nondiscriminatory reason for termination before plaintiff has the opportunity to advance her prima facie case); *Powell* v. *American Gen. Fin., Inc.*, 310 F. Supp. 2d 481, 487 n.6 (N.D.N.Y. 2004) (defendant's assertion that it can provide a legitimate business reason for denying credit does not provide a basis to dismiss the complaint; for motion to dismiss, allegations in the complaint must be accepted as true)[7];

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[6] See U.S. Br. 30-31 n.18 (noting that in disparate impact cases, for purposes of the sufficiency of the complaint, causation between the challenged policy and the resulting discriminatory effect is generally inferred from the complaint and is a question of proof for later stages of the case; citing cases).

[7] Union cites *Powell* for the proposition that "credit may be denied for legitimate reasons such as the lack of a credit history * * * [or] the lack of

(continued…)

Robertson v. *Plaquemines Parish Sch. Bd.*, No. Civ. A. 00-999, 2000 WL 1234565, at *1 (E.D. La. Aug. 31, 2000) (unpublished) (court will not consider defendant's argument that plaintiff was terminated for legitimate reasons in addressing motion to dismiss; "although defendant may be able to *prove* its allegations[,] * * * this is a motion to dismiss, not a motion for summary judgment").[8]

(…continued)
collateral," an assertion true as far as it goes, but irrelevant to whether a complaint alleges sufficient facts to survive a motion to dismiss. Union Br. 25. Union's reliance on *Cooley* v. *Sterling Bank*, 280 F. Supp. 2d 1331 (M.D. Ala. 2003) (granting defendants' motion for summary judgment because, in part, there was no evidence of similarly situated borrowers who were granted loans), fails for the same reason. Union Br. 26. See generally *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 510 (2002) (for purposes of surviving a Rule 12(b)(6) motion, plaintiff is not required to plead elements of a prima facie case of discrimination).

[8] In any event, the amended complaint alleged facts that rebut Union's suggestion that the borrowers may not have been similarly situated: (1) a dealership would obtain a customer's credit characteristics to determine whether the applicant met a lender's underwriting standards (R.E. 64); (2) if yes, the dealership would forward a contract to a lender, which would order a credit report and decide whether to accept the proposed pricing of the loan (R.E. 64); (3) the loans submitted to the lender used a lender's "buy rate," which is a "risk-related finance charge *taking into account a consumer's credit risk and the terms of the deal*" (R.E. 64-65 (emphasis added)); (4) the additional "dealer mark-up" was a "*non-risk related* finance charge" (R.E. 65 (emphasis added)); and (5) Union and the other named dealerships followed those procedures (R.E. 65). In addition, the amended complaint alleged that the pricing differences between Asian and non-Asian customers "cannot be explained fully by factors unrelated to race or national origin *such as differences in the customers' creditworthiness*" (R.E. 66 (emphasis added)).

C. Defendants' "Discretionary Pricing Policy" Is A Policy Or Practice That May Underlie A Disparate Impact Case

Union correctly notes that, in a disparate impact case, the plaintiff must identify a specific policy or practice that has caused a disparate impact. Union Br. 28; see U.S. Br. 24 n.15. Union then argues that the United States failed to identify such a policy. Union Br. 30. The district court neither addressed this issue nor dismissed the amended complaint on this basis. In any event, this argument is baseless.

First, as a threshold matter, Union assumes, as did the district court, that the amended complaint alleged only disparate impact discrimination. That is not correct. The amended complaint alleged a pattern or practice of discrimination without specifying whether the complaint is resting on a disparate treatment or disparate impact theory of liability (or both), and there is no requirement that it do so. See R.E. 68-70; 15 U.S.C. 1691e(h) (authorizing the Attorney General to bring action against creditors engaged in a pattern or practice of discrimination). Although the amended complaint does focus on a specific practice that, it alleged, has resulted in a disparate impact on the basis of race or national origin, it also asserted that the employees' discretion "was exercised in a manner that discriminated against non-Asians." R.E. 66-67. It may be, for example, that discovery will reveal that the defendants adopted the discretionary pricing policy

because of its adverse effects on non-Asians, or chose to implement a facially neutral policy in a manner adverse to non-Asians, and thereby engaged in intentional discrimination. See, *e.g.*, *Pyke* v. *Cuomo*, 567 F.3d 74, 76 (2nd Cir.) (per curiam), cert. denied, 130 S. Ct. 741 (2009); *Orgain* v. *City of Salisbury*, 305 F. App'x 90, 98 (4th Cir. 2008) (unpublished) (citing cases). The amended complaint alleging a pattern or practice of discrimination contained sufficient facts to permit that issue to continue to discovery. See U.S. Br. 24-27. Further, there is no requirement in a discrimination case that the plaintiff plead discriminatory intent with particularity. See *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 513, 515 (2002); *Iqbal*, 129 S. Ct. at 1954.[9] For this reason, the district court should not have dismissed the amended complaint unless it concluded that the complaint failed to allege facts supporting a plausible claim of discrimination under either theory.

In any event, for purposes of a disparate impact claim, the amended complaint sufficiently alleged a policy or practice. Numerous courts have squarely held, in denying motions to dismiss similar ECOA cases, that a subjective or discretionary policy of permitting loan officers to "mark-up" otherwise objective

[9] See also *Bennett* v. *Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (in assessing the sufficiency of allegations in the complaint, intent "is implied by a claim of racial 'discrimination'").

risk-based loan rates, sometimes called a "Discretionary Pricing Policy," is a policy or practice that may underlie a disparate impact action.[10] For example, in *Ramirez* v. *GreenPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922, 927-928 (N.D. Cal. 2008), the court held that plaintiffs adequately identified a specific policy – defendant's Discretionary Pricing Policy – for purposes of stating a disparate impact claim. The court stated that plaintiffs "have singled out the subjective portion of a lending policy that allegedly relies on both subjective and objective criteria, and they need do no more to meet the 'specific policy or practice' requirement for stating a disparate impact claim." *Id.* at 928; see also *Hoffman* v. *Option One Mortg. Corp.*, 589 F. Supp. 2d 1009, 1011-1012 (N.D. Ill. 2008) ("the crux of the complaint is that plaintiffs paid more subjective charges for their loans than white borrowers as a result of the [Discretionary Pricing] Policy"; allegations in complaint found sufficient to withstand dismissal); *Miller* v. *Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 258 (D. Mass. 2008); *Osborne* v. *Bank of America, Nat'l Ass'n*, 234 F. Supp. 2d 804, 812 (M.D. Tenn. 2002); *Jones* v. *Ford Motor Co.*, No. 00 CIV. 8330 (LMM), 2002 WL 88431, at *4 (S.D.N.Y. Jan. 22, 2002) (unpublished); *Guerra* v. *GMAC LLC*, No. 2:08-cv-01297-LDD, 2009 WL

[10] The Supreme Court held that "subjective or discretionary employment practices may be analyzed under the disparate impact approach" in Title VII cases. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988); see also *Rose* v. *Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990).

449153, at *4 (E.D. Penn. Feb. 20, 2009) (unpublished) (citing cases); *Smith* v. *Chrysler Fin. Co*, No. Civ. A. 00-6003(DMC), 2003 WL 328719, at *7 (D.N.J. Jan. 15, 2003) (unpublished); U.S. Br. 27-28 n.17.

Union neither acknowledges nor cites any of these cases, with the exception of *Osborne*, which it attempts to distinguish by arguing that in that case there was a "clearly defined protected class" (African-Americans), and the bank knew that its policy of encouraging subjective markups resulted in African-Americans paying higher finance charges. Union Br. 28-29. These factors, however, are irrelevant to the underlying point, as recognized by the court in *Osborne* and the other cases cited above, that a policy of authorizing subjective markups in setting loan rates is a policy or practice that can underlie a disparate impact discrimination claim.

D. The Statistics Alleged In The Amended Complaint Are Sufficient To Support A Plausible Claim Of Discrimination

Union argues that the statistics alleged in the amended complaint "are, in essence, meaningless," and insufficient to establish a discriminatory effect. Union Br. 30-31. Union variously asserts (with no further discussion) that the statistics fail to show "an adverse effect on the protected group," Asians were "charged overages only slightly less than non-Asians," and the allegation that half of the non-Asians were charged more than the Asians means that "the other half was charged less" and there is no disparate impact. Union Br. 29-30.

As we explained in our opening brief, the statistical allegations in the amended complaint support a plausible inference that defendants, through their pricing policy, discriminated against non-Asians, whether intentionally or by causing an unjustified disparate impact, and that is all a complaint is required to do. U.S. Br. 23-27. The essential statistical allegations, however, are not those on which defendant and the district court focused. Rather, they are the allegations that: Union's "non-Asian borrowers were charged mean overages approximately 35 to 155 basis points higher than Asian borrowers" (R.E. 66-67), and "the differences in the overages * * * cannot be explained fully by factors unrelated to race or national origin * * * [and] are statistically significant." (R.E. 67). The amended complaint therefore asserts that Union charged non-Asian customers higher overages than it charged similarly-qualified Asian customers on a systemic basis. The additional allegation in the amended complaint that half of the non-Asians borrowers were charged overages "higher than the mean overage charged to Asian borrowers" (R.E. 67) simply reflects, based on the data then available, an estimate of the range of the discriminatory pricing, and an initial approximation of the potential victims of the defendants' discriminatory conduct.[11] It follows that

[11] See also U.S. Br. 27 n.16 (noting the limited time period given the United States to file its amended complaint, which precluded the development of more detailed statistics). For this reason, the allegations in the amended complaint stated

(continued…)

the amended complaint does not simply allege, as Union suggests, that Union discriminated against only those borrowers who paid more than the average amount paid by Asian customers. Moreover, after discovery, the statistical evidence may be used to support a claim of intentional discrimination, rather than a disparate impact claim.[12] We have also addressed in our opening brief numerous cases, similar to the instant case, where the court denied a motion to dismiss that asserted that the complaint's statistical showing of disparate impact failed to state a claim for relief. See U.S. Br. 27-30. In sum, the amended complaint's statistical allegations, supplemented by all reasonable inferences in favor of the United States, are sufficient to give the defendants fair notice of the United States' claims and to make those claims plausible.

Finally, Union asserts that "any difference between interest rates charged to Asian and non-Asian borrowers can easily be explained by non-discriminatory factors." Union Br. 31. In support of this argument, Union cites two cases

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(…continued)
an initial approximation of the number of persons affected by defendants' discriminatory conduct, and discovery may reveal that, in fact, the vast majority of non-Asians were charged higher mark-ups compared to similarly situated Asians. See U.S. Br. 26-27.

[12] As we noted on our opening brief, the impact of a challenged practice, as reflected in statistics, may be used to establish intentional discrimination. See U.S. Br. 24-25 (citing cases).

affirming the grant of summary judgment for the defendant because the statistical disparities were either explained by nondiscriminatory factors (*Rose* v. *Wells Fargo & Co.*, 902 F.2d 1417, 1425 (9th Cir. 1990)), or did not in fact indicate that the challenged policy had a disparate impact (*Golden* v. *City of Columbus*, 404 F.3d 950, 963-965 (6th Cir.), cert. denied, 546 U.S. 1032 (2005)). Union Br. 31. Union, of course, will have its opportunity to challenge the United States' statistical showing of disparate impact – assuming, after discovery, that the United States relies on a disparate impact theory of liability instead of, or in addition to, a theory of disparate treatment – through summary judgment or at trial. See U.S. Br. 26. But Union's explanations for why the different loan rates were the result of legitimate nondiscriminatory factors, or its argument that the United States' statistics do not sufficiently establish a disparate impact, are not bases to dismiss the amended complaint for failure to state a claim. The amended complaint is sufficient because it alleged that defendants discriminated against non-Asians on the basis of race or national origin by charging them, through their discretionary pricing policy, higher loan rates, which the statistics "plausibly" assert.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the United States' opening brief, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 4,326 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
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Dated: May 2, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2011, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on May 2, 2011, I served a copy of the foregoing document on the following parties or their counsel of record by First Class Mail:

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