IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MARY MORGAN, *et al*., Plaintiffs, v. RICHMOND SCHOOL OF HEALTH AND TECHNOLOGY, INC., Defendant.	Case No. 3:12-cv-00373-JAG

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Defendant Richmond School of Health and Technology, Inc. ("RSHT") makes two main arguments in support of its Motion to Dismiss. First, RSHT asserts that the discriminatory practice known as "reverse redlining" does not violate the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* ("ECOA"). Second, RSHT contends that the complaint does not state a claim for reverse redlining under ECOA or Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, because Plaintiffs do not allege that RSHT treats its white students more favorably than its African-American students. Extensive and uniform case law, which RSHT fails to address, demonstrates that both arguments are flatly wrong. The cases establish that reverse redlining is actionable under ECOA, *see infra* at 11-13, and that no evidence of better-treated white comparators is required when there is direct evidence that a predatory practice has been targeted on the basis of race, *see id.* at 13-16, 24-26. That is exactly the view that the United States advanced twelve years ago in the leading case of *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7 (D.D.C 2000), where the defendants made the same arguments asserted by RSHT. *See infra* at 13. The court agreed with the government. *See Hargraves*, 140 F. Supp. 2d. at 20, 22-23.

Reverse redlining is the targeting of a predatory practice on the basis of race or the racial makeup of a community. *See id.* at 15, 20. It has two components: (1) a poisonous practice, and (2) targeting of the practice at minorities precisely because of their race. In *M & T Mortg. Corp. v. White*, 736 F. Supp. 2d 538 (E.D.N.Y. 2010), for example, plaintiffs made out a reverse redlining claim by alleging that the defendants sold houses with fraudulently inflated values after making minor cosmetic repairs and concealing structural damage, and targeted their sales at minorities. *Id.* at 574-76. Reverse redlining reflects a belief that minority communities are ripe

for exploitation, and typically flourishes when those communities have historically been denied access to whatever is being sold. The decision to market a predatory practice on the basis of race transforms a consumer fraud issue into that and discrimination.

On the central points of Defendant's argument, the overwhelming weight of the case law is clear. First, it is well-established that reverse redlining constitutes unlawful discrimination under various civil rights statutes, including ECOA. *See, e.g., M & T Mortg. Corp.*, 736 F. Supp. 2d at 574-75; *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874, 886 (S.D. Ohio 2002). As far as Plaintiffs can determine, every decision addressing whether reverse redlining is actionable under ECOA has found that it is. *See infra* at 11-13.

Second, it is likewise well-established that a reverse redlining claim based on race does not require any evidence that whites were treated better than African Americans as long as there is direct evidence of racial targeting. *See, e.g.*, *M & T Mortg. Corp.*, 736 F. Supp. 2d at 575; *Matthews*, 185 F. Supp. 2d at 886-87. Implicit in the targeting of African Americans is that whites are not being targeted; even if some whites are swept up in and similarly harmed by the predatory scheme, that does not somehow shield the perpetrator from liability for discrimination. Thus, in the lending context for example, courts uniformly agree that "the plaintiff need not also show that the lender makes loans on more favorable terms to others" where there is direct evidence of targeting on the basis of a protected classification such as race. *Matthews*, 185 F. Supp. 2d at 886-87. *See infra* at 13-16, 24-26.

RSHT's additional arguments should also be rejected.

RSHT contends that the complaint is "conclusory" and does not satisfy the *Twombly*/*Iqbal* plausibility standard. To the contrary, the complaint explains in detail both components of reverse redlining: the predatory nature of RSHT's practices through which it

induces prospective students to take out large student loans and enroll at a vocational school that provides no real vocational benefits, and the manner in which RSHT intentionally targets those practices at African Americans. *See infra* at 4-8. Extensive evidentiary support confirming Plaintiffs' allegations is attached to and incorporated within the complaint. *See* Second Am. Compl. (Dec. 7, 2011) (Docket No. 21) ("SAC") Exs. 1-48 (declarations from seven former RSHT employees and forty students). Plaintiffs' allegations are hardly conclusory.

RSHT's claim that ECOA applies only when a loan is denied is contrary to clear law. *See, e.g.*, *Martinez v. Freedom Mortg. Team, Inc.*, 527 F. Supp. 2d 827, 834 (N.D. Ill. 2007) (argument is "dead wrong"); *Matthews*, 185 F. Supp. 2d at 886. On its face, ECOA applies to "any aspect of a credit transaction," not merely when credit is denied. 15 U.S.C. § 1691(a)(1).

RSHT's assertion that there is no private right of action for disparate impact under Title VI misconstrues the complaint. Plaintiffs bring a disparate impact claim under ECOA but not under Title VI. *Compare* SAC ¶¶ 400-01 *with id.* ¶ 405. Plaintiffs bring intentional discrimination claims under both federal statutes.

Finally, the Court has broad discretion to exercise supplemental jurisdiction over the state law claims even if it were to accept all of RSHT's arguments (which it should not do). *See Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995). It should exercise jurisdiction to avoid prejudice to Plaintiffs that would otherwise result from Defendant's strategic delay in bringing the instant motion (based on the statute of limitations defense it intends to offer); because of the significant federal interest (assuring that federal student aid is used to benefit and not injure students); and to promote judicial economy (without a class action device, large-scale intervention by individual students would present substantial difficulties for a Virginia court).

For all of these reasons, and as explained in greater detail below, Defendant RSHT's motion to dismiss should be denied in full.

FACTUAL ALLEGATIONS

A. RSHT TARGETS AFRICAN AMERICANS FOR ENROLLMENT

Even without the benefit of discovery, there is already detailed direct evidence that RSHT has made a deliberate decision to target African Americans for enrollment. *See, e.g.*, SAC ¶¶ 325, 330, 347, 355, 378-79. Declarations from former RSHT employees explain that RSHT targets African Americans because it believes it can take advantage of their limited experience and sophistication with respect to education, finances, and student loans. *Id.* ¶¶ 318, 324-25, 330, 347, 355, 372, 379. There is no evidence or indication that whites are targeted because they are white.

As one former RSHT instructor, Tiana Branch, states in her declaration:

> Administrators admitted that the school targeted its marketing efforts at areas that were predominantly low-income and African-American. I talked to the enrollment advisers or "reps" who were responsible for marketing efforts. *They made clear to me that they deliberately targeted African American neighborhoods. I know that particular zip codes were targeted on the basis of race. The reps were told to go to African American zip codes, but not to white zip codes. The reps told me that African American neighborhoods were targeted because it was thought that African Americans were vulnerable. The reps thought that African Americans would agree to take out loans and come to the RSHT without asking any questions and inquiring about terms, costs, price, or what they would get from their education.* These marketing efforts included targeted flyers and telephone calls. Administrators said that prospective students from the targeted areas were easier to persuade to enroll because they did not have much to lose.

Id. Ex. 41 ¶ 14 (emphasis added). Former Academic Dean Brenda Drew states that RSHT recruited "from low income housing projects located in the African American community," and that "RSHT recruiters and administrators knew that they could make a lot of money in the African American community because they could find underprivileged students . . . who would qualify for the government loans that RSHT needed to be profitable." *Id.* Ex. 44 ¶ 21. Other

former employees and many students corroborate this testimony. *See, e.g.*, *id.* Ex. 1 ¶ 23; Ex. 2 ¶ 24; Ex. 42 ¶ 12; Ex. 45 ¶ 18 ("[Racial targeting] was clear to me from the advertising that the school did, and from what I saw about how the school went about recruiting students, and where admissions employees went to recruit students.").

RSHT targets African Americans in its advertising by using channels that disproportionately reach an African-American audience. *See, e.g.*, SAC ¶¶ 6, 174, 260, 381. For example, RSHT runs television advertisements during shows that have a disproportionately high African-American viewership but not during other shows; runs radio advertisements on hip-hop radio stations; and advertises that the school is "on the bus line," which is intended to appeal to African Americans who disproportionately rely on public transportation. *Id.* ¶¶ 6, 44, 174, 239, 381.

Plaintiffs' statistical allegations provide additional support. The population of the greater Richmond area is 30.1% African-American. *Id.* ¶ 376. Of the area population that is 25 years old or older, and whose highest educational attainment is a high school diploma or GED certificate – *i.e.*, those more likely to be interested in a school like RSHT – 33.8% is African-American. *Id.* ¶ 377. RSHT's student body, however, is overwhelmingly African-American at 75%. *Id.* ¶ 376. This disparity shows that the intentional targeting has worked.

B. RSHT ENGAGES IN FRAUDULENT AND DISHONEST PRACTICES TO INDUCE STUDENTS TO BORROW FROM THE FEDERAL GOVERNMENT TO PAY ITS INFLATED TUITION

RSHT's programs[1] cost from $10,140 to $28,152, *id.* ¶¶ 80-81, which its students cannot afford to pay. RSHT instead relies to an extraordinary degree on federal financial aid programs.

[1] All are related to healthcare: Practical Nursing, Medical Assistant, Surgical Technology, Pharmacy Technician, Massage Therapy, Medical Billing and Coding, Radiologic Technology, and, formerly, Community Home Health ("CHH"). SAC ¶ 80.

It enrolls almost exclusively students who receive aid from these programs, mostly in the form of federal student loans. *See, e.g., id.* ¶ 4. RSHT receives over $5 million a year from these programs, or 86.37% of its revenue (just under the legal limit of 90%). *Id.* ¶¶ 75, 83.

RSHT induces students to enroll and take out these loans by making a range of misrepresentations, including about the loans themselves. RSHT intentionally misleads students into believing that they are getting grants when they are really getting loans, *see, e.g., id.* ¶¶ 40, 86, 245-46, and misrepresents how much it will cost every month to repay the loans, *see, e.g., id.* ¶¶ 155, 291. The school likewise induces enrollment and borrowing by misrepresenting the adequacy of its programs and its graduates' earning and job prospects. *See, e.g., id.* ¶ 10, 98-100, 213, 234. RSHT even told prospective CHH students that they would be licensed in Community Home Health, yet there is no such credential. *See, e.g., id.* ¶¶ 14, 123. RSHT sent the CHH students to a different school for a six-week, $900 course to obtain a low-level credential, and kept the balance of the students' tuition for itself. *See, e.g., id.* ¶¶ 111, 142.

These practices parallel myriad other dishonest and fraudulent practices that RSHT engages in to keep the financial aid dollars it relies on flowing and to preserve its accreditation status. *See, e.g., id.* ¶¶ 86, 90, 333, 337-38, 351-52, 368-70. These include, among others, cutting and pasting students' signatures from other documents onto financial aid forms, *id.* ¶¶ 86, 337, 368-70; altering W-2 and other forms to misrepresent students' income, *id.* ¶¶ 86, 337; altering evaluation forms completed by students, ¶ 90; and changing students' grades from passing to failing, *id.* ¶ 90, 323, 336, 351.

C. THE "EDUCATION" SOLD BY RSHT IS A SHAM

The product that RSHT peddles to African Americans is poison. The school exists to make money at the expense of its students and the federal government, not to provide its students

with any of the educational resources they need to succeed. *Id.* ¶ 3. Federal law requires RSHT to "prepare students for gainful employment in a recognized occupation," but it utterly fails to do so. *See, e.g., id.* ¶¶ 69, 97-121. The educational and occupational benefits that RSHT students receive are essentially nonexistent. *See, e.g., id.*, ¶¶ 170-72, 190-92, 315-16.

One of RSHT's most basic failings is that its curriculum does not prepare students for certification and licensing examinations. *See, e.g., id.* ¶¶ 98-100. As a result, students regularly sit for the examinations and find that they bear little relationship to their course of study. *See, e.g., id.* ¶¶ 99-100. Students therefore routinely do not pass the tests; if they do, it is because of their own efforts independent of RSHT. *See, e.g., id.* ¶¶ 53, 99-100.

RSHT also fails to make adequate medical tools and supplies available for teaching and training. *See, e.g., id.* ¶¶ 47, 112-113, 319-20. Students have actually been told to pretend they were changing catheters and bed sheets because the school's lab did not have catheters or sheets. *See, e.g., id.* ¶ 183. Other students have resorted to making photocopies of medical instruments and sharing them with classmates so that they would at least know what the instruments look like, even if they could not gain the kind of hands-on familiarity with the instruments that they needed. *See id.* ¶ 112. Frustrated instructors have done the same thing. *See id.* ¶ 319.

RSHT even fails to assign teachers to some of its classes for extended periods. Instead, it sends administrators who take attendance. *See, e.g., id.* ¶¶ 41, 202, 331. The administrators sometimes hand out crossword puzzles that are unrelated to the class or otherwise create busywork, but they do not try to teach. *Id.* ¶ 115.

RSHT also fails to provide appropriate externships for students, even though this is a prerequisite for certification or licensing in some of the fields that RSHT purports to prepare students to enter. *See, e.g., id.* ¶¶ 3, 36. For example, Surgical Technology students must

perform a specific role in 150 surgical procedures to qualify for certification. *See, e.g.*, *id.* ¶¶ 36, 280. The school instead routinely assigns students to externships in which they merely sterilize and package instruments, which leaves them objectively unqualified to obtain certification in their field of study. *See, e.g., id.* ¶ 104. RSHT has even assigned students to sit in the library for their so-called externship. *See, e.g., id.* ¶¶ 105, 204. Many area health care providers simply do not want RSHT students as externs because the school's reputation is so bad and they have previously found that RSHT students are poorly prepared. *See id.* ¶¶ 103, 113.

These and other basic deficiencies are endemic at RSHT and are documented not just in the detailed allegations in the complaint, including detailed allegations about each Plaintiff's own experience at the school, *id.* ¶¶ 92-118 (general), 122-317 (Plaintiff by Plaintiff), but also in the sworn declarations from forty other students and seven former RSHT employees attached to the complaint, *id.* Exs. 1-48.

D. RSHT'S STUDENTS ARE LEFT MIRED IN DEBT AND WORSE OFF THAN WHEN THEY ENROLLED

As a direct result of these practices, RSHT's students – disproportionately African-American because of the intentional targeting – are left saddled with enormous debts, but without the enhanced career opportunities and earning capacity the school promises. *Id.* ¶¶ 5, 146, 172, 192, 209, 237, 258, 292, 316. Because the school is a sham, the students cannot become certified or licensed in their fields or get decent jobs after attending RSHT and cannot afford to repay their loans. *E.g.*, *id.* ¶¶ 5, 170-72, 190-92, 315-16. Students end up defaulting. *E.g.*, ¶¶ 5, 385. This has dire consequences for RSHT students in many important areas of their lives and for years to come. *E.g.*, *id.* ¶¶ 78, 385, 396. Among other things, it leaves them with impaired credit, which damages their ability to access credit in the future and their ability to find any job because potential employers often run credit checks. *Id.* ¶¶ 5, 78, 385, 396.

STANDARD OF REVIEW

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all of the factual allegations contained in the complaint." *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir. 2007) (citation and quotation marks omitted). The court must also "construe the factual allegations of the complaint in the light most favorable to the plaintiff," *Schweikert v. Bank of America, N.A.*, 521 F.3d 285, 288 (4th Cir. 2008) (same), and must "presume that general allegations embrace those specific facts that are necessary to support the claim," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation, brackets, and quotation marks omitted). The factual allegations must "state[] a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), but this standard is not intended to be onerous, *id.* at 556, 563 n.8; *see also Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 764 (4th Cir. 2003) ("not onerous"). A Rule 12(b)(6) motion should not ordinarily be granted without first affording the plaintiff an opportunity to amend the complaint. *See, e.g., Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999).

ARGUMENT

A. PLAINTIFFS PROPERLY STATE A CLAIM UNDER THE EQUAL CREDIT OPPORTUNITY ACT

"Reverse redlining" is the targeting of a community for predatory practices and products on the basis of its racial or ethnic composition. *See, e.g., Hargraves*, 140 F. Supp. 2d at 15, 19-20; *Barkley v. Olympia Mortg. Co*, No. 04 CV 875 (RJD)(KAM) *et al.*, 2007 WL 2437810, at *13 (E.D.N.Y. Aug. 22, 2007).[2] Reverse redlining is comprised of two basic elements: a predatory product, and the targeting of that product at people because of their race or at

[2] It is distinguished from "redlining," the practice of refusing to do business in a community based on race or ethnicity. *See, e.g., Coelho v. Alliance Mortg. Banking Corp.*, No. 06-2039 (SRC), 2007 WL 1412289 at *2 (D.N.J. May 10, 2007).

neighborhoods because of their racial makeup. The decision to target on the basis of race is a discriminatory act. When a "creditor" makes such a decision in connection with "any aspect" of a loan, it violates ECOA.[3] 15 U.S.C. § 1691(a).

Courts have held repeatedly that reverse redlining is a form of discrimination that violates federal and state civil rights laws, including ECOA. *See, e.g.*, *M & T Mortg. Corp.*, 736 F. Supp. 2d at 574-75. There is simply no validity to RSHT's assertions that reverse redlining is a "novel claim" and that it applies under the federal Fair Housing Act ("FHA") but not ECOA. *See* Defs.' Mem. Supp. Mot. Dismiss (June 15, 2012) (Docket No. 38) ("Defs.' Mem.") at 2, 16. Indeed, every reverse redlining case identified in Plaintiffs' research finds that the practice constitutes discrimination, and each case considering the question finds it actionable under ECOA.

RSHT also errs in asserting that Plaintiffs have not stated a reverse redlining claim under ECOA because they do not allege that RSHT treats whites better than African Americans. This misconstrues the nature of proof ultimately required in a reverse redlining case. It is well-established that reverse redlining may be proved solely with evidence of race-based targeting of the predatory practices or products at issue. As one court put it in the mortgage context:

[3] RSHT is a "creditor" under ECOA because it "regularly arranges for the extension, renewal, or continuation of credit" on behalf of its students. 15 U.S.C. § 1691a(e); *see also* 12 C.F.R. § 202.2(l); SAC ¶¶ 398. RSHT notes this definition in its brief but does not suggest that the definition does not apply. *See* Defs.' Mem. at 10 n.6. For a reverse redlining claim, it is of no moment that RSHT is a school that regularly arranges for loans to its students, and not the provider of federal student loans itself. *See Munoz v. Int'l Home Capital Corp.*, No. C 03-01099 RS, 2004 WL 3086907, at * 6 (N.D. Cal. May 4, 2004) (non-lender defendants are "creditors" under ECOA, and plaintiffs adequately stated an ECOA reverse redlining claim against them). RSHT uses racially targeted predatory practices to induce its victims into taking out loans that will cause them harm. That is no different than in reverse redlining cases where the lender itself is sued. Moreover, RSHT loans students money directly to pay the relatively small portion of its steep tuition that, under the "90/10" rule, cannot be covered by federal student aid. *See, e.g.*, SAC ¶¶ 75, 91, 118, 134.

> if the plaintiff presents direct evidence that the lender intentionally targeted her for unfair loans on the basis of [membership in a protected class], the plaintiff need not also show that the lender makes loans on more favorable terms to others.

Matthews, 185 F. Supp. 2d at 886-87. Courts addressing reverse redlining widely agree. Plaintiffs' detailed allegations satisfy this standard by demonstrating that RSHT targets its sham "education" on the basis of race.

RSHT's contention that ECOA applies only to denials of credit – and not to discrimination in connection with loans that are actually made – is also directly contradicted by ample authority. As the statute plainly says on its face, ECOA prohibits discrimination "with respect to any aspect of a credit transaction." 15 U.S.C. § 1691(a)(1).

1. Targeting Predatory Practices and Products At African Americans Constitutes Reverse Redlining Discrimination In Violation of ECOA Regardless of the Treatment of Whites

a. Reverse Redlining Violates ECOA

RSHT admits that reverse redlining violates the FHA, but then asserts that Plaintiffs' ECOA claim should be dismissed because "[t]his is not a discrimination claim brought under the Fair Housing Act." Defs.' Mem. at 14-15, 16. RSHT can only make that assertion by ignoring numerous precedents.

In *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000), one of the seminal reverse redlining cases, the defendants made the identical argument that reverse redlining is not actionable under ECOA. The United States participated as an *amicus* through the Department of Justice, which enforces ECOA in the courts. *See* 15 U.S.C. § 1691e(h). The government stated: "It is the United States' view that 'reverse redlining' can violate . . . the Equal Credit Protection [sic] Act." *See* Ex. 1 at 15 (United States *amicus* brief). The court

agreed, holding that "plaintiffs' allegations of discriminatory predatory lending . . . are sufficient to allege a violation of [ECOA]." *Hargraves*, 140 F. Supp. 2d at 23; *see also id.* at 19-22.

To Plaintiffs' knowledge, every other court to consider the question has agreed with *Hargraves* and the United States and held that reverse redlining is actionable under ECOA. *See, e.g., M & T Mortg. Corp.*, 736 F. Supp. 2d at 574-75 (denying lenders' summary judgment motion in ECOA reverse redlining case); *Jackson v. Novastar Mortg. Inc.*, 645 F. Supp. 2d 636, 647 (W.D. Tenn. 2007) (plaintiff stated a claim under ECOA by alleging that minorities were targeted for predatory loans); *De Jesus-Serrano v. Sana Inv. Mortg. Bankers, Inc*., 552 F. Supp. 2d 196, 199 (D.P.R. 2007) ("[a] plaintiff could establish a cause of action under ECOA under the theory of reverse redlining"); *Matthews*, 185 F. Supp. 2d at 886 (plaintiffs stated a claim for reverse redlining under ECOA); *Ng v. HSBC Mortg. Corp.*, No. 07-cv-5434 (RRM)(VVP), 2010 WL 889256, at *11 (E.D.N.Y. Mar. 10, 2010) ("reverse-redlining plaintiffs can establish an ECOA claim"); *Johnson v. Equicredit Corp. of America*, No. 01 cv 5197, 2002 WL 448991, at *4 (N.D. Ill. March 22, 2002) (plaintiff stated a claim under ECOA by alleging that minorities were targeted for predatory loans); *see also* Ex. 2 (Excerpt from National Consumer Law Center, CREDIT DISCRIMINATION § 8.4.1 (5th ed. 2009)) ("Courts increasingly accept reverse redlining as a valid claim under the FHA, ECOA, federal Civil Rights Act, and state discrimination statutes.").

The common treatment of reverse redlining under ECOA and the FHA is not surprising. The operative language in the statutes is so similar that it would be illogical for courts to treat the targeting of predatory practices and products as unlawful discrimination under one but not the other. The FHA prohibits taking certain actions "because of race," 42 U.S.C. §§ 3604(a)-(b), 3605(a), while ECOA prohibits certain actions "on the basis of race," 15 U.S.C. § 1691(a)(1). It

is a canon of statutory construction that similarly worded statutes that have similar purposes should be read similarly. *See, e.g., Smith v. City of Jackson, Miss*, 544 U.S. 228 (2005); *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427 (1973) (per curiam). That is exactly what the courts have done with respect to reverse redlining, the FHA, and ECOA.

Accordingly, the Court should reject RSHT's assertion that reverse redlining does not violate ECOA.

b. Plaintiffs Do Not Have to Allege That RSHT Treats White Students Better Than African Americans to State a Reverse Redlining Claim

RSHT relies on an overly narrow understanding of how Plaintiffs may prove their case. RSHT contends that reverse redlining claims always and inherently require proof that members of the non-targeted group (in this case, whites) are treated better than the targeted group. Again, RSHT's contention is contradicted by *Hargraves*, the position of the United States in *Hargraves*, and extensive uniform case law agreeing with *Hargraves* and the United States. Even the few reverse redlining cases cited by RSHT contradict RSHT's argument.

The United States explained in *Hargraves* that:

> Defendants argue that since they provide credit to African American borrowers on the same terms as to non-African Americans, they do not "discriminate" . . . . This argument mistakes a challenge of proof for a statement of legal principle and should be rejected. Comparative evidence is one, but by no means the sole, method of establishing discrimination.

Ex. 1 at 24. The court agreed:

> Defendants argue that plaintiffs have not shown the terms and conditions of their loans to be discriminatory because they have not shown that defendants make loans on preferable terms to non-African-Americans. Plaintiffs have sufficiently alleged that the terms of defendants loans are unfair and predatory; it is not necessary that the defendants make loans on more favorable terms to anyone other than the targeted class.

Hargraves, 140 F. Supp. 2d at 20.

Similarly, one court found just three months ago that in reverse redlining cases "courts have readily adopted evidence of targeting to replace comparisons of the treatment of minorities with the treatment of non-minorities." *Ohio Civil Rights Comm'n v. Wells Fargo Bank, N.A.*, No. 1:11-CV-623, 2012 WL 1288489, at *6 (N.D Ohio Apr. 16, 2012). Or as another put it, "if the plaintiff presents direct evidence that the lender intentionally targeted her for unfair loans on the basis of [membership in a protected class], the plaintiff need not also show that the lender makes loans on more favorable terms to others." *Matthews*, 185 F. Supp. 2d at 886-87. An early decision even termed the requirement advocated by RSHT "obnoxious" and said that, "[i]n logic, it is ridiculous." *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 216 (N.D. Ill. 1969). Courts across jurisdictions have repeatedly and consistently held that reverse redlining claims may proceed on the basis of predatory targeting alone and without regard to comparators.[4]

Not surprisingly, then, RSHT has not identified a single case in which a court held that well-pled allegations of targeting are insufficient to allege discrimination in a reverse redlining case and that a plaintiff must instead identify better treated comparators. To the contrary, each

[4] In addition to the cases cited above, *see, e.g.*, *M & T Mortg. Corp.*, 736 F. Supp. 2d at 575 ("Courts have thus softened the requirements for establishing a *prima facie* case where reverse-redlining forms the substance of the discrimination claim, and have allowed such plaintiffs to show that they . . . were intentionally targeted or intentionally discriminated against."); *Davenport v. Litton Loan Servicing LP*, 725 F. Supp. 2d 862, 876 (N.D. Cal. 2010) (requiring allegation "that the lender either intentionally targeted her for unfair loans or currently makes loans on more favorable terms to others") (emphases added); *Mejia v. EMC Mortg. Corp.*, No. CV 09-9701 CAS(Ex), 2011 WL 2470060, at *4 (C.D. Cal. June 16, 2011) (same); *House v. Cal. State Mortg. Co.*, No. CV-F-08-1880 OWW/GSA, 2009 WL 2031775, at *19 (E.D. Cal. July 9, 2009) ("Finally, while the Defendant is correct that Plaintiffs have not alleged that other similarly situated people were given loans on more favorable terms, the Plaintiffs have nonetheless presented a cognizable claim, as they allege and may be able to show directly that [defendant] targeted them for unfair loans on the basis of [a protected class], thus eliminating the necessity of [identifying more favorably treated comparators]").

reverse redlining case cited by RSHT recognizes that evidence of a comparator is unnecessary when a plaintiff proffers direct evidence of race-based targeting.[5]

RSHT's insistence that Plaintiffs must allege that white students were treated more favorably is not just at odds with established law, but also belies common sense. Discrimination occurs by the very act of deliberately choosing to target the African-American community because of its race. In the course of targeting African Americans based on geography and through selective advertising, it is natural that some whites will also seek to enroll in the school; they may live in majority-minority communities or learn about RSHT through some other channel.[6] That RSHT has had a disproportionately small number of white students who were also defrauded through similarly harmful loans, taken out to obtain a similarly useless "education," does not make Defendant's motivation any less race-based or intentional. That is, it does not somehow insulate RSHT's scheme from federal civil rights law.

Accordingly, Plaintiffs do not have to allege that RSHT treated its white students better than it treated African-American students to maintain their ECOA claim. Plaintiffs need only

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[5] *See Grimes v. Fremont General Corp.*, 785 F. Supp. 2d 269, 295 n.38 (S.D.N.Y. 2011) (in ECOA reverse redlining case, sufficient for plaintiffs to allege "either that they were intentionally targeted because of their race, or that non-African-American buyers received better terms than Plaintiffs[] received") (emphases added)); *Hafiz v. Greenpoint Mortg. Funding Inc*., 652 F. Supp. 2d 1039, 1046 (N.D. Cal. 2009) (same in FHA reverse redlining case); *Diaz v. Bank of America Home Loan Servicing*, No. CV 09-9286 PSG (MANx), 2010 WL 5313417, at *5 (C.D. Cal. Dec. 16, 2010) ("alleging that [the lender] offered sub-prime loans to Spanish-speaking borrowers in order to deceive them, adequately states a discriminatory motivation"); *Barkley*, 2007 WL 2437810, at *15 ("The Court joins the other district courts to have considered reverse-redlining claims premised on targeting allegations and holds that plaintiffs may establish the fourth prong of their *prima facie* case with evidence of intentional targeting."); *Munoz*, 2004 WL 3086907, at *4 ("The absence of an averment that similarly situated people obtained loans on more favorable terms does not defeat the [reverse redlining] claim in that plaintiffs may be able to show directly that [defendant] intentionally targeted them for unfair loans on the basis of their racial status…"). RSHT relies on each of these cases. *See* Defs.' Mem. at 14-15.

[6] Plaintiff Amanda Smith, who is white and not a party to the discrimination claims, learned about RSHT from an African-American co-worker. *See* SAC ¶ 148.

allege, as they do in great detail, that RSHT targeted its predatory practices and products at African Americans. RSHT's contrary contention should be rejected.[7]

2. Plaintiffs Adequately Allege That RSHT Targets Predatory Practices and Products Based on Race

a. Targeting on the Basis of Race

Plaintiffs' detailed allegations about RSHT's racial targeting of predatory practices and products are precisely the kind of allegations that courts have found sufficient to make out a reverse redlining discrimination claim. Case law demonstrates that Plaintiffs have more than adequately pled the targeting element of their claim.

Plaintiffs allege, *inter alia*, that Defendant's enrollment advisors admitted to targeting African-American neighborhoods because the school believes African Americans are unsophisticated, can be taken advantage of, will qualify for the federal student aid that RSHT needs to finance its scheme, and will not ask questions. *See supra* at 4-5. Racial targeting of a population based on the belief that it is vulnerable to the predatory scheme "adequately states a discriminatory motivation." *Diaz v. Bank of Am. Home Loan Servicing*, No. CV 09-9286 PSG (MANx), 2010 WL 5313417, at *5 (C.D. Cal. Dec. 16, 2010).

Plaintiffs further allege that RSHT targets its advertising to reach African-American audiences and crafts its advertising to appeal to African Americans. *See supra* at 4-5. Plaintiffs even allege specific media outlets through which Defendant attempts to reach African Americans, such as advertising on BET and specific hip-hop radio stations. *See, e.g.*, SAC ¶¶ 6,

[7] The principle discussed in this section is also reflected in other areas of civil rights law. For example, a woman who sues her employer under Title VII based on sexual harassment by her supervisor does not have to prove that the supervisor treats male employees better. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998) (listing multiple ways to establish harassment: (1) proposals of sexual activity; (2) sex-specific derogatory terms; or (3) comparative evidence about how harasser treated members of both sexes).

44, 239, 381. Plaintiffs further allege a lack of advertising through outlets that primarily reach whites. *See supra* at 5.

Directing advertising toward minorities is proof of intentional targeting. *See M & T Mortg. Corp.*, 736 F. Supp. 2d at 576 ("advertising in heavily minority neighborhoods" can show intentional targeting); *Hargraves*, 140 F. Supp. 2d at 21-22 (on summary judgment, genuine issue existed as to targeting; evidence included defendant's distribution of flyers and advertisements in African-American communities); *Honorable v. Easy Life Real Estate Sys., Inc.*, 182 F.R.D. 553, 561 (N.D. Ill. 1998) (certifying class upon allegations that "defendants preyed on the plaintiff class by targeting their advertising to unsophisticated, first-time home buyers in the racially segregated Austin community"); *Barkley*, 2007 WL 2437810, at *11 (actions including advertising in newspaper serving West Indian immigrant community, but not advertising in those that primarily serve white neighborhoods, permitted inference that defendants sought to lure minority homebuyers into the fraudulent transactions).

Plaintiffs also allege that a disproportionate number of RSHT's students are African-American. *See supra* at 5. Courts have found that similar statistical disparities support an inference of targeting. *See, e.g., Ohio Civil Rights Comm'n*, 2012 WL 1288489, at *7 (in reverse redlining case, allegation that 60% of defendant's mortgages were in majority African-American communities supported inference of intentional targeting at motion to dismiss stage); *Phillips v. Better Homes Depot, Inc.*, No. 02-cv-1168 (ERK), 2003 WL 25867736, at *23 (E.D.N.Y. Nov. 12, 2003) (in reverse redlining case, company president's testimony "proudly recount[ing] that virtually 80% of her business came from minorities" created genuine issue of fact as to targeting at summary judgment stage).

These decisions reflect the Supreme Court's holdings that statistical disparities may serve

as evidence of discriminatory intent. As the Supreme Court has observed, the "impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 563-64 (1977)); *see also Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-308 (1977) (when "gross statistical disparities can be shown, they alone in a proper case constitute prima facie proof of a pattern or practice of discrimination"); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) ("In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination.") (citation and quotation marks omitted). That RSHT's student body is three-fourths African-American, whereas one would expect it to be only one-third based on the demographics of the area, strongly suggests intentional targeting on the basis of race. SAC ¶¶ 376-77.

Plaintiffs sufficiently allege the targeting element of reverse redlining.

b. Predatory Practices and Products

In a single line in its brief, Defendant avers that Plaintiffs have not made an allegation of predatory lending. *See* Defs.' Mem. at 16. To the contrary, the complaint describes in detail Defendant's unfair and fraudulent practices relating to federal student loans. *See supra* at 5-8.

Predatory lending has been defined by one court as:

> a mismatch between the needs and capacity of the borrower . . . . In essence, the loan does not fit the borrower, either because the borrower's underlying needs for the loan are not being met or the terms of the loan are so disadvantageous to that particular borrower that there is little likelihood that the borrower has the capability to repay the loan.

Coelho v. Alliance Mortg. Banking Corp., No. 06-2039 (SRC), 2007 WL 1412289, *2 (D.N.J. May 10, 2007) (quoting *Assocs. Home Equity Services, Inc. v. Troup*, 343 N. J. Super. 254, 267 (Super. Ct. App. Div. 2001)). Plaintiffs' allegations show that the student loans at issue here are

predatory on both fronts: (1) RSHT fraudulently induces the students to apply for thousands of dollars in loans knowing that the school will not meet their need for a vocational education; and (2) RSHT knows that there is little likelihood that the students can repay the loans because the "education" is so lacking. The allegations show that the loans RSHT is peddling to African Americans are poison for them.

The practices alleged here are comparable to the types of predatory acts that courts have repeatedly found sufficient to make out a reverse redlining claim. "Property flipping" reverse redlining cases are particularly analogous. For example, the defendants in *Barkley* purchased significantly damaged properties at foreclosure auctions or estate sales. They performed minor repairs so that the properties appeared to be sound, when in fact they had severe structural damage. *See, e.g.*, 2007 WL 2437810, at *1-4. The defendants arranged loans for the plaintiffs to buy the properties. They targeted African Americans who had never purchased a home before, rushed the plaintiffs through the loan process so that they would not understand the paperwork, made purposeful misrepresentations about the condition and value of the homes, and convinced the plaintiffs that they would be able to repay the loans by stating (falsely) that they would help the plaintiffs find tenants. *Id.* at *1, *4, *6. The loans in *Barkley* were not usurious, yet the court held that the intentionally inflated-valuation constituted a "grossly unfavorable" term that, when targeted, supported plaintiffs' reverse redlining claim. *Id.* at *14.

In *M & T Mortg. Corp.*, a comparable scheme raised a viable reverse redlining claim, including under ECOA. Plaintiffs were induced to buy houses pursuant to "a systematically fraudulent and discriminatory scheme," which included "conceal[ing] . . . the poor, dilapidated condition of [the] houses, and the extent of the repairs and renovations that were needed so that the houses would approximate the values ascribed to them in the appraisal." 736 F. Supp. 2d at

560, 564; *see also id.* at 562 ("in broad strokes, the claim asserts that, by virtue of false promises, representations, and omissions, the plaintiffs were systematically defrauded into buying the properties"). The defendants' summary judgment motion was denied. *See id.* at 573-76.

Similar predatory practices resulting in loans "designed to fail" were sufficient to state a reverse redlining claim under ECOA in *Munoz*. Real estate brokers persuaded plaintiffs to buy houses using loans from another company by, *inter alia*, misrepresenting that the loans were affordable, rushing plaintiffs through the transactions, concealing how much it would cost to repay the loans, and making "little or no effort to ascertain or verify plaintiffs' ability to repay their loans. 2004 WL 3086907 at *2, *5-6. In numerous other cases, predatory practices designed to get people into loans that were harmful to them have been found sufficient to support reverse redlining claims. *See, e.g.*, *Hargraves*, 140 F. Supp. 2d at 20-21, 23 (ECOA claim; practices included lending without regard to borrowers' ability to repay); *Matthews*, 185 F. Supp. 2d at 877-81, 887-88 (ECOA claim; practices included misrepresenting nature of loans).

Here, Plaintiffs allege that RSHT uses dishonest tactics to induce Plaintiffs to take out thousands of dollars in loans. It purposefully and grossly inflates the utility of an RSHT education. It misrepresents what students will receive if they take out the loans (*e.g.*, externships, teachers, adequate materials and supplies, an adequate education, etc.). RSHT fills out the paperwork and rushes the students through it (even leading students to believe that they are only getting grants, not loans, and misrepresenting the eventual monthly payments). The school falsely promises to assist Plaintiffs in securing high-paying jobs they will need to pay back the loans. These are predatory practices, used by RSHT to sell a predatory product. This scheme allows RSHT to use the lending process to enrich itself with millions of dollars in federal

student aid, leaving the students mired in unaffordable debt. As a wealth of precedent shows, targeting such a scheme on the basis of race is actionable reverse redlining.

3. Unlawful Discrimination Under ECOA Is Not Limited to Denials of Credit

Defendant appears to contend – wrongly – that ECOA only reaches discriminatory denials of credit, and that Plaintiffs cannot state an ECOA claim because RSHT arranged for them to receive loans. *See* Defs.' Mem. at 10-12 (*e.g.*, "[t]o state an ECOA claim, a plaintiff must plead a prohibited reason for *denying a credit application*") (citation and quotation marks omitted; emphasis supplied by RSHT); *id.* at 15-16 (*e.g.*, "there is no allegation that plaintiffs were denied access to credit because of their race"). RSHT's argument is contradicted by the plain language of ECOA, its implementing regulations, and ample precedent.

The statute prohibits discrimination "with respect to any aspect of a credit transaction." 15 U.S.C. § 1691(a)(1). The implementing regulations broadly define "credit transaction" as "every aspect of an applicant's dealing with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures)." 12 C.F.R. § 202.2(m). An "applicant," moreover, includes "any person who requests *or who has received* an extension of credit," *id.* at § 202.2(e) (emphasis added), a definition that would make no sense under RSHT's view that ECOA only protects against denials of credit.

Consistent with the statutory text and regulations, courts routinely recognize that while discriminatory denial of a loan is one way to violate ECOA, it is by no means the only way. Courts reach this conclusion in reverse redlining as well as other ECOA cases. *See*, *e.g.*, *Martinez*, 527 F. Supp. 2d at 834 (argument is "dead wrong" because ECOA "clearly do[es] *not*

require a denial of credit.") (emphasis in original); *JAT, Inc., v. Nat'l City Bank of Midwest*, 460 F. Supp. 2d 812, 820 (E.D. Mich. 2006) (plaintiffs stated a valid ECOA claim even though defendant did not deny their credit applications); *Wilson v. Toussie*, 260 F. Supp. 2d 530, 541 (E.D.N.Y 2003) ("[ECOA] protection is not limited to those applicants who were rejected") (alterations in original) (internal quotation marks omitted)); *Matthews*, 185 F. Supp. 2d at 887 (in ECOA reverse redlining case, "[p]laintiffs need not allege that they were denied credit"); *Hargraves*, 140 F. Supp. 2d at 23 (in reverse redlining case, holding that "[b]y the plain language of [ECOA], protection is not limited to those applicants who were rejected").

Most of the cases relied on by RSHT are cherry-picked to involve denials of credit and therefore include some language that RSHT can cite out of context, *see, e.g.*, Def.'s Mem. at 11 (quoting *Wright v. SunTrust Bank*, No. 1:08cv568 (JCC), 2008 WL 3106884, at *3 (E.D. Va. Aug. 4, 2008)); *id*. at 12 (citing *Moore v. U.S. Dep't of Agric.*, 55 F.3d 991, 992-93 (5th Cir. 1995)), and the others are likewise entirely inapposite, *see, e.g., id*. at 13 n.9 (quoting *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039 (N.D. Cal. 2009) (no ECOA violation because, *inter alia*, plaintiff did not explain how she was harmed or discriminated against)). Such selective citation does nothing to undermine the well-established proposition that ECOA applies to all aspects of lending, including the predatory and racial targeting of loans that serve no purpose but to enrich the company arranging the loans at the expense of the borrowers.

B. PLAINTIFFS PROPERLY STATE A CLAIM UNDER TITLE VI OF THE CIVIL RIGHTS ACT

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

Federal financial assistance." 42 U.S.C. § 2000d. RSHT does not dispute that, as alleged, it is subject to Title VI because of its reliance on federal financial aid. SAC ¶¶ 403-404.

RSHT asserts three reasons why Plaintiffs have purportedly failed to state a Title VI claim: (1) that there is no private right of action for disparate impact under Title VI; (2) that it is impossible to state a Title VI claim without alleging that white students were treated more favorably than African-American students; and (3) that Plaintiffs' allegations that RSHT intentionally discriminated (*i.e.*, intentionally targeted African Americans) are conclusory and insufficient under the *Twombly*/*Iqbal* plausibility standard. Def.'s Mem. at 17-27. These arguments fail because (1) Plaintiffs' Title VI claim is for intentional discrimination; Plaintiffs only advance a disparate impact claim under ECOA; (2) using predatory practices to intentionally target African Americans for a predatory product constitutes unlawful and discriminatory reverse redlining regardless of how whites are treated; and (3) the complaint is replete with detailed, factually-supported allegations that easily satisfy the plausibility standard.[8]

Unlike its ECOA argument, RSHT does not suggest that intentional reverse redlining is not actionable under Title VI. Rather, RSHT argues only that Plaintiffs do not sufficiently allege reverse redlining.

1. Whether Disparate Impact Claims Are Actionable Under Title VI Is Irrelevant Because Plaintiffs' Title VI Claim Is For Intentional Discrimination Only

RSHT argues that "Title VI does not provide a private right of action for disparate impact discrimination." Defs.' Mem. at 25. That argument is irrelevant because Plaintiffs do not assert a disparate impact claim under Title VI; RSHT simply misconstrues the complaint. Plaintiffs advance a disparate impact claim (as well as an intentional discrimination claim) under ECOA,

[8] Additional arguments with respect to Title VI that RSHT only sets forth in its footnotes are also addressed in this section of Plaintiffs' brief.

but only an intentional discrimination claim under Title VI. *Compare* SAC ¶¶ 400-401 (ECOA cause of action) *with id.* ¶ 405 (Title VI cause of action).

RSHT likewise errs by asserting that the lack of a Title VI private right of action for disparate impact is a sufficient basis for dismissing Plaintiffs' Title VI claim in its entirety. *See* Defs.' Mem. at 25 ("Count II should be dismissed for this reason alone"). That assertion makes no sense. It is illogical to contend, as RSHT does, that the lack of a disparate impact claim requires dismissal of an intentional discrimination claim.

2. The Allegations That RSHT Targets Predatory Practices and Products at African Americans State a Claim Regardless of the Treatment of Whites

RSHT next repeats one of the arguments it asserts with respect to ECOA. Citing nothing more than Black's Law Dictionary, RSHT contends that "discrimination involves more favorable treatment (or less favorable treatment) of one person over another for a prohibited reason," and that "[n]o such facts are alleged in this case." Defs.' Mem. at 26. Without allegations that "similarly situated Caucasian students receive better educations or more favorable treatment," RSHT asserts, Plaintiffs cannot state a claim under Title VI. *Id.*

This is, again, an overly narrow understanding of "discrimination" in direct conflict with well-established civil rights case law. *See supra* at 13-16. In the context of reverse redlining specifically, the courts have held repeatedly that intentional targeting of predatory practices and services at African Americans states a claim without regard to how whites are treated or whether some whites get caught up in the same predatory scheme. *See id.* There is no reason for reverse redlining claims to operate differently under Title VI than under ECOA or other civil rights statutes, and RSHT does not claim otherwise. As shown above, the deliberate exploitation of a community on the basis of race constitutes unlawful discrimination. Even before the term "reverse redlining" was coined, courts understood discrimination this way. *See Clark v.*

Universal Builders, Inc., 501 F.2d 324, 330 (7th Cir. 1974) (rejecting notion that discrimination is limited to instances in which defendants offered whites more favorable terms and prices than minorities); *Contract Buyers League*, 300 F. Supp. at 216 (plaintiffs stated claim without allegation about defendants' treatment of whites), *aff'd by Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970).

This principle is further reflected in Title VI cases holding that plaintiffs stated claims of intentional discrimination when defendants targeted disproportionately minority neighborhoods for adverse actions, even though individuals outside the protected class suffered identical harms. *See, e.g., Franks v. Ross*, 293 F. Supp. 2d 599, 605-07 (E.D.N.C. 2003) (plaintiffs stated Title VI claim by alleging they were subject to intentional discrimination when the defendant funded and approved a landfill situated in "largely African-American communities"); *S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*, 254 F. Supp. 2d 486, 497 (D.N.J. 2003) (plaintiffs stated Title VI claim by alleging defendants intentionally discriminated by granting permits to industrial plants in "predominantly minority community"). The argument was not even raised in these cases that the equal harm visited on non-minorities living in the same neighborhoods precluded a claim of discrimination. If RSHT's limited view of what constitutes discrimination were valid – which it is not – these cases would not have been viable.

As discussed above, Plaintiffs allege in detail how and why RSHT intentionally targets African Americans. RSHT's focus on how African-American and white students are treated, once enrolled, picks up the story too late and thereby misses the point. *See* Defs.' Mem. at 26-27. The proper focus of RSHT's discriminatory conduct is its targeting of African Americans to enroll in the school's sham programs by taking out loans they will not be able to repay. That is reverse redlining, it is discriminatory, and it violates Title VI (as well as ECOA).

In its section on Title VI, RSHT attempts to evade the wealth of directly on point reverse redlining cases by instead citing cases referencing the "similarly situated" *prima facie* element from the *McDonnell Douglas* summary judgment burden shifting framework. *See* Defs.' Mem. at 21-23; *see also id.* at 26-27 (relying on same). But that framework provides just one way to support a discrimination claim, and the precedents discussed above clearly establish that it is not the only way. Where there is direct evidence of discriminatory motive – as alleged here – the *McDonnell Douglas* method of supporting an inference of discrimination does not come into play. *See, e.g.*, *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284-85 (4th Cir. 2004); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112-13 (4th Cir. 1981). Moreover, the Supreme Court held in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), that the *McDonnell Douglas prima facie* elements need not be pled in a complaint. Among other reasons, the Court explained that "if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a [*McDonnell Douglas*] prima facie case." *Id.* at 511.[9]

[9] Even if the *McDonnell Douglas prima facie* test were relevant (which it is not, both because this is a Rule 12(b)(6) motion and because there is direct evidence of discriminatory targeting), the *prima facie* elements used to raise an inference of discrimination vary depending on the context of the allegations, and courts often find the "similarly-situated" inquiry irrelevant under Title VI. *See, e.g., Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 758 (E.D. Pa. 2011) (evidence of differential treatment of similarly-situated individuals may raise an inference of discrimination but is not necessary because "[c]omparative evidence is just one manner in which a plaintiff can satisfy the prima facie requirement that the adverse action occur under circumstances giving rise to an inference of discrimination"); *Almendares v. Palmer*, 284 F. Supp. 2d 799, 805 (N.D. Ohio 2003) (rejecting defendant's theory that "plaintiffs can only allege a claim of intentional discrimination by demonstrating they were treated differently than similarly-situated individuals" (internal quotation marks omitted) because that "is not an accurate statement of the law"); *Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.*, No. 4:10-cv-00007, 2011 WL 285694, at *13 (W.D. Va. Jan. 27, 2011) (plaintiff may proceed with "(1) direct evidence of intentional discrimination, or (2) the 'ordinary principles of proof using any direct or indirect evidence relevant . . . and sufficiently probative'") (quoting *Diamond v. Bea Maurer, Inc.*, 128 F. App'x 968, 971 (4th Cir. 2005)). Thus, even at the summary judgment stage, Plaintiffs may establish discrimination through direct evidence of discriminatory targeting, as well as with other indirect evidence of discrimination. It is unnecessary for Plaintiffs to make

RSHT also suggests in a footnote that stating a claim under Title VI requires allegations that the terms of Plaintiffs' student loans were "grossly unfavorable." Defs.' Mem. at 27 n.14. Such a narrow focus on loan terms is misguided because Title VI prohibits discrimination in any "program or activity" of RSHT, defined broadly by statute, not merely the terms of the loans arranged by RSHT. *See* 42 U.S.C. § 2000d-4a; *see also Radcliff v. Landau*, 883 F.2d 1481, 1483 (9th Cir. 1989) (explaining that Congress rejected the Supreme Court's narrow construction of "program or activity"). Title VI would be implicated even if the students received no loans and instead paid their full tuition with federal grants and their own funds. In any event, as discussed above, the loans are grossly unfavorable because RSHT uses fraudulent tactics to induce Plaintiffs to accept them.

3. Plaintiffs Plausibly and in Great Detail Allege Targeting on the Basis of Race

RSHT appears to raise a *Twombly*/*Iqbal* argument in its Title VI section by stating that "the [SAC] is devoid of facts (as opposed to conclusions and bald assertions) demonstrating any direct intentional discrimination by RSHT against its African American students." Defs.' Mem. at 26. That assertion is belied by the extraordinary detail included in the complaint, including in the declarations from former employees and students incorporated within it. As explained above, Plaintiffs' allegations of discriminatory targeting are more than sufficient under Rule 8. There is nothing conclusory about them. *See supra* at 16-18; *see also Franks v. Ross*, 293 F. Supp. 2d at 607 n.7 (considering "proof of disparate impact as a factor in the Court's analysis" of Title VI intentional discrimination claim).

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comparisons to "similarly situated" individuals even at the Rule 56 stage, and RSHT's emphasis on this inquiry in its Rule 12(b)(6) motion is misguided.

Because it ignores the enormous amount of specific factual allegations supporting Plaintiffs' claims of intentional discrimination, cases on which RSHT relies heavily are irrelevant. Unlike here, in the cases cited by RSHT the plaintiffs failed to allege any facts at all to support their discrimination claims. *See Osei v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, No. 10-2042, 2011 WL 4549609, at *7 n.4, *19 (E.D. Pa. Sept. 30, 2011) (claims dismissed where plaintiff "opted to not address any of the legal bases presented in Defendants' Motion to Dismiss" and "failed to allege *any* facts" supporting his discrimination claim) (emphasis in original); *Sawyer v. Columbia Coll.*, No. 09-cv-6962, 2012 WL 929642, at *12 (E.D. Ill. Mar. 19, 2012) (dismissing claim on summary judgment because there "simply is no evidence from which a reasonable person could find" discrimination). RSHT's reliance on these cases is misplaced.[10]

C. EVEN IF NO FEDERAL CLAIMS REMAIN, THE COURT SHOULD EXERCISE ITS DISCRETION UNDER THE SUPPLEMENTAL JURISDICTION STATUTE

Even if the Court were to dismiss all of Plaintiffs' federal claims, which it should not, it would still retain broad discretion to exercise jurisdiction over the state law claims under the federal supplemental jurisdiction statute, 28 U.S.C. § 1367. The Fourth Circuit recently reaffirmed the vitality of "the long-standing principle that . . . 'when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise

[10] RSHT also asserts, only in a footnote, that it cannot be held liable "to the extent that plaintiffs have based their Title VI claim on a theory of vicarious liability . . . ." Defs.' Mem. at 19 n.11. Plaintiffs' claim is not based on vicarious liability. Plaintiffs explicitly allege that RSHT is engaged in an intentional pattern or practice of discriminatory reverse redlining in violation of Title VI. *See, e.g.*, SAC ¶ 405. Plaintiffs seek to hold RSHT liable for its own discriminatory policies and practices, not the independent acts of its employees. The only case cited by RSHT, by contrast, involved *ultra vires* discriminatory and harassing treatment by a police officer. *See Vouchides v. Houston Cmty. Coll. Sys.*, No. H-10-2559, 2011 WL 4592057, at *6 (S.D. Tex. Sept. 30, 2011). There was no suggestion that the police officer was furthering the policies of his employer. Nor was there any suggestion that his employer had sanctioned the officer's actions by failing to act after learning about them. *Vouchides* is inapposite.

supplemental jurisdiction . . . over pendent state-law claims.'" *Crosby v. City of Gastonia*, 635 F.3d 634, 644 (4th Cir. 2011) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)) (ellipsis in original). The grant of discretion is broad:

> Recent case law has emphasized that trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished. Among the factors that inform this discretionary determination are convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy. The doctrine of supplemental jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values.

Shanaghan v. Cahill, 58 F.3d at 110 (citations and internal quotation marks omitted). The Court should exercise supplemental jurisdiction here based especially on fairness, an important underlying issue of federal concern, and judicial economy.

Declining to exercise supplemental jurisdiction would allow RSHT to benefit from gaming the system with respect to the statute of limitations, and would therefore be fundamentally unfair. RSHT always intended to file a motion to dismiss Plaintiffs' federal claims and to challenge federal jurisdiction. *See* Def.'s Mem. Supp. Mot. Dismiss or Transfer (Oct. 4, 2011) (Docket No. 7) at 16-17 n. 14 (so stating explicitly). It nonetheless waited until long after the complaint was filed to do so. At the same time, RSHT is clear in its Answer that it intends to pursue a statute of limitations defense.[11] *See* Answer (June 15, 2012) (Docket No. 39) at 27-28. By waiting so long to challenge federal jurisdiction, RSHT seeks to increase the number of students whose claims might arguably be outside the limitations period at the point when Plaintiffs would have to refile in state court. RSHT should not be permitted to shield itself from meritorious claims through strategic delay. *See Ketema v. Midwest Stamping, Inc.*, 180 F.

[11] At least as to some of Plaintiffs' claims, Plaintiffs submit that such a defense will properly be precluded under the continuing violations doctrine. *See, e.g.*, *Havens*, 455 U.S. at 380-81 (1982).

App'x. 427, 428 (4th Cir. 2006) (per curiam) (district court's decision not to exercise supplemental jurisdiction was abuse of discretion in part because "refiling would be fruitless, as the statute of limitations has run, and thus, [plaintiff] would be prejudiced by dismissal").

The issues that underlie all of Plaintiffs' claims here are also of great federal importance. This case is about an intentional scheme to divert millions of dollars in federal student aid away from its intended use – preparing students for gainful employment – and into the coffers of a company that leaves its students much worse off than when they enroll. *See, e.g.*, SAC ¶¶ 3-6, 121. RSHT's acts, as alleged, directly contravene the purpose of an important and costly federal program. Federal interests are clearly implicated.

Judicial economy also counsels that the Court use its broad discretion to exercise supplemental jurisdiction. Because the class action device is generally unavailable in Virginia state courts, the case would likely otherwise need to proceed on behalf of named individuals only. Undersigned counsel anticipates that scores of individual students, or more, would seek to intervene. The Court has already observed that this case presents significant case management challenges, but those challenges could increase dramatically upon such large-scale intervention.

There are, accordingly, substantial reasons for the Court to retain jurisdiction, as it may under 28 U.S.C. § 1367, even if it were to find that Plaintiffs have not stated a federal claim.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully submit that Defendant's Motion to Dismiss should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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