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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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4 ALEXANDR MAYSTRENKO, et al.,  
5 Plaintiffs,  
6 v.  
7 WELLS FARGO, N.A.,  
8 Defendant.  
9

Case No. 21-cv-00133-JD

**ORDER RE MOTION TO DISMISS**

Re: Dkt. No. 21

10 Plaintiffs Alexandre Maystrenko and Ekaterina Maistrenko are Russian nationals living in  
11 California while their asylum applications are being reviewed.<sup>1</sup> They say that defendant Wells  
12 Fargo denied them banking services, such as checking accounts and credit vehicles, based on a  
13 policy and practice of discriminating against non-United States citizens. On behalf of themselves  
14 and a nationwide and California class of similarly situated individuals, plaintiffs allege that this  
15 violates 42 U.S.C. § 1981 and the California Unruh Civil Rights Act. Dkt. No. 1.

16 Wells Fargo has asked to dismiss the complaint under Federal Rule of Civil Procedure  
17 12(b)(1) for lack of standing, and under Rule 12(b)(6) for failure to state a plausible claim. Dkt.  
18 No. 21. The motion is denied on both grounds.

**BACKGROUND**

20 As alleged in the complaint, Wells Fargo maintains policies that limit the availability of  
21 credit cards, checking accounts, and personal loans “to U.S. citizens or legal permanent residents.”  
22 Dkt. No. 1 ¶ 31. It is said to “categorically exclude” certain non-citizens from obtaining banking  
23 services. *Id.* ¶ 30.

24 On two occasions in 2020, Wells Fargo denied Ekaterina Maystrenko’s online applications  
25 for a cash-back credit card. *Id.* ¶ 6. Wells Fargo sent a letter stating they were denied because she  
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27 <sup>1</sup> Plaintiffs are married, *see* Dkt. No. 1 ¶ 4, but the complaint does not explain the spelling  
28 difference in their names. For ease of reference, the Court refers to both as Maystrenko.

1 was not “a permanent United States resident.” *Id.* Alexandre Maystrenko was denied a Wells  
2 Fargo checking account and personal loan on the same grounds. The letter explaining the denial  
3 stated that “we cannot open accounts online for non-resident citizens aliens [sic],” but encouraged  
4 Maystrenko “to apply in person [at] your local Wells Fargo branch.” *Id.* ¶ 9. The denial of the  
5 personal loan stated: “[w]e’re unable to accept applications for unsecured loans or lines of credit  
6 from non-resident aliens.” *Id.* ¶¶ 9, 10.

7 In plaintiffs’ view, Wells Fargo’s policies and practices amount to “unlawful alienage  
8 discrimination in the making and enforcing of contracts in violation of 42 U.S.C. § 1981.” *Id.*  
9 ¶ 40. Plaintiffs also say that the bank denies “full and equal accommodations, advantages,  
10 facilities, privileges, services, and/or discounts” based on citizenship and immigration status in  
11 violation of the Unruh Civil Rights Act. *Id.* ¶¶ 44-45, 53.

12 For the Rule 12(b)(1) motion, Wells Fargo says that Alexandre Maystrenko declined to  
13 apply in person at a branch for a checking account, as the denial letter invited him to do, and so he  
14 lacks an injury in fact sufficient to establish standing to sue under Article III of the United States  
15 Constitution. For the Rule 12(b)(6) motion, Wells Fargo contends that the complaint does not  
16 plausibly allege any discrimination claims because Wells Fargo was within its rights to rely on  
17 immigration status when extending credit or offering banking services.

## 18 DISCUSSION

### 19 I. RULE 12(B)(1) MOTION

20 The standing challenge is directed solely to Alexandre Maystrenko’s claim with respect to  
21 the checking account application. It does not challenge his standing to sue for the denial of other  
22 services, or Ekaterina Maystrenko’s standing to sue in any capacity. *See* Dkt. No. 21 at 4-5.

23 Under Rule 12(b)(1), dismissal is appropriate if the court lacks subject matter jurisdiction.  
24 Fed. R. Civ. P. 12(b)(1). Federal courts are courts of limited jurisdiction, and the “case or  
25 controversy” requirement of Article III of the U.S. Constitution “limits federal courts’ subject  
26 matter jurisdiction by requiring, *inter alia*, that plaintiffs have standing.” *Chandler v. State Farm*  
27 *Mut. Auto. Ins.*, 598 F.3d 1115, 1121 (9th Cir. 2010). “[A] plaintiff must demonstrate standing to  
28 sue by alleging the ‘irreducible constitutional minimum’ of (1) an ‘injury in fact’ (2) that is ‘fairly

1 traceable to the challenged conduct of the defendants” and (3) “likely to be redressed by a  
2 favorable judicial decision.” *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948, 952 (N.D. Cal. 2018)  
3 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). The “specific element of injury in fact  
4 is satisfied when the plaintiff has suffered an invasion of a legally protected interest that is  
5 concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Id.* (internal  
6 quotations and citations omitted).

7 “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the  
8 challenger asserts that the allegations contained in a complaint are insufficient on their face to  
9 invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the  
10 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air for*  
11 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citations omitted); *see also Patel*, 290 F.  
12 Supp. 3d at 951-52.

13 Wells Fargo challenges Maystrenko’s standing to sue purely on the basis of the allegation  
14 in the complaint that he could apply in person for a checking account. Dkt. No. 21 at 4 (citing  
15 Complaint, Dkt. No. 1 ¶¶ 8-9). Consequently, it raises a facial attack on standing, for which the  
16 Court takes all factual allegations in the complaint as true, and draws all reasonable inferences in  
17 plaintiffs’ favor. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013).

18 Resolving the standing question is short work. Wells Fargo relies almost exclusively on  
19 *Chattopadhyay v. Simple Finance Technology Corp.*, No. 4:19-cv-1541-JST (N.D. Cal. Nov. 2,  
20 2020) for the proposition that Maystrenko was not injured for standing purposes. *See* Dkt. No. 21  
21 at 4-5. This decision was on appeal when the parties filed their motion papers, and the Court took  
22 the matter under submission pending the Ninth Circuit’s disposition. *See* Dkt. No. 31. The results  
23 are now in, and the circuit court reversed *Chattopadhyay* on the standing point. In pertinent part,  
24 the circuit court concluded that Article III standing is established when a plaintiff alleges that a  
25 bank allows United States citizens to apply for accounts and services online, but requires non-  
26 citizens to appear in-person at a branch. *Chattopadhyay v. BBVA USA*, No. 21-15017, 2021 WL  
27 4958850, at \*1 (9th Cir. Oct. 26, 2021) (unpublished). “The fact that Plaintiffs would have

1 ultimately obtained the same checking account given to U.S. citizens does not vitiate the alleged  
2 discriminatory injury.” *Id.*

3 That is exactly the situation here with respect to Article III standing. While it is true that  
4 the circuit’s disposition is an unpublished memorandum that does not carry precedential weight or  
5 binding effect, *see Grimm v. City of Portland*, 971 F.3d 1060, 1066-67 (9th Cir. 2020), the same  
6 can be said of the underlying district court decision on which Wells Fargo relies. The reasoning  
7 for the reversal of the district court’s conclusions with respect to standing are directly on point,  
8 and certainly qualify as instructive at the very least. *See DeHoog v. Anheuser-Busch InBev*, 899  
9 F.3d 758, 764 n.7 (9th Cir. 2018). There is no good reason for reaching a different outcome in this  
10 case, and Wells Fargo has not demonstrated otherwise.

## II. RULE 12(B)(6) MOTION

12 To meet the pleading requirements of Rule 8(a) and to survive a Rule 12(b)(6) motion to  
13 dismiss, a claim must provide “a short and plain statement . . . showing that the pleader is entitled  
14 to relief,” Fed. R. Civ. P. 8(a)(2), including “enough facts to state a claim . . . that is plausible on  
15 its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face  
16 if, accepting all factual allegations as true and construing them in the light most favorable to the  
17 plaintiff, the Court can reasonably infer that the defendant is liable for the misconduct alleged.  
18 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plausibility analysis is “context-specific” and not  
19 only invites but “requires the reviewing court to draw on its judicial experience and common  
20 sense.” *Id.* at 679.

21 The Maystrenkos have plausibly alleged discrimination on the basis of alienage under  
22 Section 1981, and on the basis of citizenship or immigration status under the Unruh Act. To start,  
23 Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the  
24 same right” to “make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C.  
25 § 1981. This right applies as much to alienage as it does to race. *See Sagana v. Tenorio*, 384 F.3d  
26 731, 738 (9th Cir. 2004), *as amended* (Oct. 18, 2004) (“Just as the word ‘white’ indicates that  
27 § 1981 bars discrimination on the basis of race, the word ‘citizen’ attests that a person cannot face  
28 disadvantage in the activities protected by § 1981 solely because of his or her alien status.”). The

1 fact that Wells Fargo might have offered services to some aliens, as it suggests, *see* Dkt. No. 21 at  
2 9-10, is not cause for dismissing the Maystrenkos' claim. Discrimination "within the class of  
3 aliens" is unlawful discrimination; the salient point is that a policy "is directed at aliens and that  
4 only aliens are harmed by it." *Nyquist v. Mauclet*, 432 U.S. 1, 8-9 (1977); *see also Graham v.*  
5 *Richardson*, 403 U.S. 365, 376 (1971) (striking down state welfare laws that restricted eligibility  
6 to some aliens residing in the United States for a specified number of years).

7 The Maystrenkos have also plausibly alleged that alienage was the "but-for" cause of the  
8 discrimination. Under Section 1981, a plaintiff must plead that "but for" alienage, he or she  
9 "would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of*  
10 *Afr. Am.-Owned Media*, 140 S.Ct. 1009, 1019 (2020). The complaint satisfied this element by  
11 alleging that Wells Fargo expressly denied their applications for banking services because they  
12 were not United States citizens. *See, e.g.*, Dkt. No. 1 ¶¶ 2, 6, 7, 30, 38, 45, 53. This leaves no  
13 doubt that alienage was adequately alleged as a but-for cause for purposes of Section 1981. Wells  
14 Fargo suggests it may have had non-discriminatory reasons for denying services to the  
15 Maystrenkos, such as lack of creditworthiness, *see* Dkt. No. 21 at 5, but that is factual matter  
16 outside the boundaries of a Rule 12(b)(6) motion. The Maystrenkos plausibly alleged a claim for  
17 alienage discrimination in the complaint, which is all that is needed at this stage of the case. *See*  
18 *Comcast*, 140 S.Ct. at 1019.

19 Wells Fargo's reliance on regulations implementing the Equal Credit Opportunity Act, 15  
20 U.S.C. § 1691 *et seq.* (ECOA), is misdirected. The ECOA prohibits discrimination in lending on  
21 the basis of race, color, religion, national origin, and other grounds. 15 U.S.C. § 1691(a). Wells  
22 Fargo says that the ECOA implementing regulations permit lenders to take into account an  
23 applicant's immigration status when deciding whether to extend credit, and to inquire about  
24 permanent residency in connection with a credit transaction. *See* Dkt. No. 21 at 9. It also cites  
25 *Vaughn v. City of New York*, No. 06-CV-6547 (ILG), 2010 WL 2076926, at \*10, (E.D.N.Y. May  
26 24, 2010), an unpublished summary judgment order from the Eastern District of New York, for  
27 the proposition that discrimination on the basis of immigration status is not the same as on the  
28

1 basis of alienage or citizenship, Dkt. No. 21 at 8, with the ostensible punchline that Wells Fargo  
2 acted lawfully.

3 The problem with these observations is that they are not germane to the Maystrenkos'  
4 claims. The gravamen of the complaint is that Wells Fargo had a policy and practice of denying  
5 banking services in whole or in part of the basis of alienage. *See, e.g.*, Dkt. No. 1 ¶¶ 2, 6, 7, 30,  
6 38, 45, 53. To that point, the putative classes are defined as consisting of "non-United States  
7 citizens who resid[e] in the United States." *Id.* ¶ 25. Discrimination on the basis of alienage is the  
8 centerpiece of the Maystrenkos' claims. This is enough for the federal claim to go forward.

9 Dismissal of the Unruh Act claims is also not warranted. The Unruh Act guarantees "the  
10 full and equal accommodations, advantages, facilities, privileges, or services in all business  
11 establishments," irrespective of citizenship or immigration status. Cal. Civ. Code § 51(b).  
12 Business establishments are prohibited from discriminating against, or refusing to contract with,  
13 any person on citizenship or immigration status grounds. Cal. Civ. Code § 51.5(a). The complaint  
14 plausibly alleges an Unruh Act claim for the same reasons discussed with respect to the Section  
15 1981 claim.

16 Wells Fargo suggests that legitimate business reasons justified its alienage policies and  
17 practices, but these considerations generally apply only when an Unruh Act claim involves "a  
18 category not enumerated in the statute or added by prior judicial construction." *Koebke v.*  
19 *Bernardo Heights Country Club*, 36 Cal. 4th 824, 840 (2005). Here, citizenship and immigration  
20 status are enumerated in the Unruh Act. To the extent that Wells Fargo invokes "public policy"  
21 reasons for dismissal of the Unruh Act claims, it offers no policy that might reasonably embrace  
22 discrimination in banking services based on alienage.

## 23 CONCLUSION

24 The motions to dismiss are denied.

25 **IT IS SO ORDERED.**

26 Dated: November 10, 2021



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27 JAMES DONATO  
28 United States District Judge