UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION, a federally recognized Indian Tribe, on its own behalf, by Ethel B. Branch, Attorney General of the Navajo Nation, and as *parens patriae* on behalf of the Navajo people, *Plaintiff*, vs. WELLS FARGO & COMPANY; WELLS FARGO BANK, N.A.; and DOES 1-10, *Defendants*.	)	Civ. Action No. 1:17-cv-01219 JAP/SCY

PLAINTIFF NAVAJO NATION'S OPPOSITION TO DEFENDANTS WELLS FARGO & COMPANY AND WELLS FARGO BANK, N.A.'S MOTION TO DISMISS [DKT. 25]

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INTRODUCTION AND BACKGROUND

This case involves a systematic, years-long effort by Defendants Wells Fargo & Co. ("WFC") and Wells Fargo Bank, N.A. ("WFBNA," and together with WFC, "Wells Fargo") to take advantage of members of the Navajo Nation (the "Nation") with unlawful and fraudulent sales practices. Faced with immense pressure to "cross-sell" Wells Fargo products, Wells Fargo employees created bank accounts without consumers' knowledge or authorization, opened customer accounts based on falsified information, and duped customers into creating accounts they neither wanted nor needed. Wells Fargo specifically targeted Native Americans with these practices, especially elderly Navajo citizens whose relative unfamiliarity with the English language and trust in Navajo-speaking Wells Fargo personnel made them easy marks.

Although Wells Fargo's misconduct has been the subject of a nationwide scandal and admissions of wrongdoing, it has not yet been made to account for its particularly egregious practices on the Navajo Nation, or for its targeting of Native Americans. When the Nation began to investigate Wells Fargo's practices, Wells Fargo lied about its conduct, forcing the Nation to engage in extensive investigation and then file this action. The Nation's Complaint asserts causes of action under the Consumer Financial Protection Act of 2010 ("CFPA"), other federal consumer protection laws, state and tribal consumer protection law, and common law. (Dkt. 1 ["Compl."].)

On February 26, 2018, Wells Fargo moved to dismiss. (Dkt. 25 ["Mot."].) Wells Fargo's motion does not dispute that the Nation has properly alleged that Wells Fargo used fraudulent practices to take advantage of Navajo people. Nor does Wells Fargo deny that its practices violated federal, state, and tribal law. Instead, Wells Fargo attempts to escape liability by arguing that because it is involved in other litigation related to its practices, it should not be made to answer for its conduct on the Nation. Wells Fargo is wrong, and the Court should deny its motion.

First, *res judicata* does not bar the Nation's CFPA claims due to the 2016 consent order WFBNA reached with the CFPB (the "Consent Order"). *See Satsky v. Paramount Comms., Inc.*,

7 F.3d 1464, 1468 (10th Cir. 1993). In fact, the Consent Order expressly contemplates that WFBNA will be subject to future enforcement actions—like this one—even if those actions are "based on substantially the same facts" as those underpinning the Consent Order. And, at any rate, Wells Fargo cannot establish the traditional requirements of non-party claim preclusion, particularly at the motion to dismiss stage. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008).

Second, the Nation's *parens patriae* claims are not subject to a *res judicata* bar based on the pending class settlement in *Jabbari, et al. v. Wells Fargo & Co., et al.*, Case No. 3:15-cv-02159-VC (N.D. Cal.) (the "*Jabbari* action"). Wells Fargo has neither shown that *every* Navajo person is a party in the *Jabbari* action, nor that Navajo people were adequately represented in that action and accorded due process. Wells Fargo has also failed to establish that the *Jabbari* action involves the same causes of action as the Nation's claims, and it cannot do so on the pleadings.

Third, the Nation has standing to pursue its *parens patriae* claims, as its Complaint asserts two "quasi-sovereign" interests: an interest in the "economic well-being" of its residents, and a "substantial interest in assuring its residents that it will act to protect them from the . . . political, social, and moral damage of discrimination[.]" *Alfred J. Snapp & Son, Inc. v. Puerto Rico, ex. rel., Barez*, 458 U.S. 592, 605, 607, 609 (1982). Moreover, the statutes under which the Nation asserts its claims are paradigmatic examples of statutes that implicitly permit *parens patriae* enforcement. *See Connecticut v. Physicians Health Servs. of Conn.*, 287 F.3d 110, 121 (2d Cir. 2002).

Fourth, the Nation properly states claims for violations of the Equal Credit Opportunity Act ("ECOA") and for fraud.[1] Wells Fargo is "dead wrong" that a plaintiff must allege a denial of credit to state a claim under the ECOA. *Martinez v. Freedom Mortg. Team, Inc.*, 527 F. Supp. 2d 827, 834 (N.D. Ill. 2007). And the Nation adequately alleges misrepresentations, scienter, and damages on its fraud claims. (Compl. ¶¶ 68-73; 180-82.)

[1] The Nation withdraws its claim for conversion.

Finally, because the Nation's others claims survive, so does its claim for declaratory relief.

LEGAL STANDARD

When considering a motion to dismiss under Rule 12(b)(6), the court must "assume the factual allegations [of the Complaint] are true and ask whether it is plausible that the plaintiff is entitled to relief." *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009). This plausibility requirement is not akin to a "probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal" that the defendant is liable for the misconduct charged. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The Court may not weigh any facts on a motion to dismiss, *E.E.O.C. v. Roark-Whitten Hospitality 2 LP*, 2017 WL 4233017, at *5 n.3 (D.N.M. Sept. 21, 2017), nor may it resolve a motion to dismiss based on any "factual determinations." *Arjouan v. Cabre*, 2017 WL 5891760, at *5 (D.N.M. Nov. 28, 2017).

ARGUMENT

I. The Consent Order Does Not Preclude The Nation's CFPA Claims

Wells Fargo's principal argument is that *res judicata* bars the Nation's CFPA claims on account of the Consent Order, which WFBNA (but not WFC) reached with the CFPB in 2016. But consideration of Wells Fargo's *res judicata* defense is premature. *Res judicata* is an affirmative defense, which may not be raised by motion to dismiss unless the facts necessary to support the defense are apparent on the face of the pleadings and there are no disputed issues of fact. *Leon v. FedEx Ground Package Sys., Inc.*, 2016 WL 814836, at *8-9 (D.N.M. Feb. 21, 2016); *Miller v. Shell Oil Co.*, 345 F.2d 891, 893 (10th Cir. 1965). Here, Wells Fargo's *res judicata* defense implicates numerous issues of disputed fact that would require the Court to evaluate evidentiary matters outside of the Complaint. Accordingly, the Court should not resolve the defense on the pleadings. *See Miller*, 345 F.2d at 893 (error to dismiss action on *res judicata* grounds where court would need to consider evidence outside the complaint).

Even if it were proper to adjudicate Wells Fargo's defense at this juncture, however, the Consent Order does not bar the Nation's CFPA claims for two independent reasons. *First*, because the Consent Order is a consent decree, its preclusive effect is measured by the intent of the parties to it. Intent is the quintessential question of fact, but even a cursory review of the Consent Order reveals that the CFPB and WFBNA did not intend that agreement to preclude actions like this one. And *second*, even if the Consent Order were silent as to its preclusive effects, neither the Nation nor WFC was a party to it. The Supreme Court has limited nonparty claim preclusion to specific circumstances that do not exist here, so the Consent Order does not bar the Nation's CFPA claims.

A. The Consent Order Is A Consent Decree, And Its Preclusive Effect Is Measured By The Intent Of The Parties To It

Wells Fargo contends that the Consent Order, despite being labeled as a consent order and having been entered into by the consent of the parties, is a "final adjudicatory determination" *instead of* a consent decree[2] because the Consent Order "contains findings of fact and conclusions of law" and was issued pursuant to 12 U.S.C. § 5563, which makes reference to "adjudication proceeding[s]." (Mot. at 6.) But § 5563 also provides for orders issued by consent, *see* 12 U.S.C. §§ 5563(b)(1)(c), 5563(b)(2), 5563(b)(4), and a stipulation *signed by WFBNA* and incorporated into the Consent Order by reference makes clear that WFBNA willingly agreed to the Consent Order as part of a settlement with the CFPB. (Dkt. 33 [Pl.'s Request for Judicial Notice ("Pl.'s RJN")] Ex. 1 ¶¶ 3, 9(e).)

The hallmark of consent orders is that they are reached by agreement between the parties. *See United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975) (consent decrees and orders "are arrived at by negotiation between the parties and often admit no violation of law" and "are motivated by threatened or pending litigation and must be approved by the court or administrative agency"); *see also* 12 C.F.R. § 1081.200(d) ("[W]here the parties agree to

[2] The terms "consent order" and "consent decree" are interchangeable. *See* Black's Law Dictionary 498 (10th ed. 2014).

settlement before the filing of a notice of charges, a proceeding may be commenced by filing a stipulation and consent order. . . . The proceeding shall be concluded upon issuance of the consent order by the Director.") Here, the Consent Order and associated stipulation clearly show that WFBNA and the CFPB agreed to the terms of the Consent Order in exchange for the CFPB's agreement not to pursue administrative action. *First*, WFBNA consented to the issuance of the Consent Order "in the interest of compliance and resolution" of the CFPB's contemplated administrative proceeding. (Pl.'s RJN Ex. 1 at 1; *see also* Dkt. 26-1 ¶ 2.) *Second*, WFBNA affirmed that the Consent Order is an "order issued with the consent of the person concerned" under 12 U.S.C. § 5563(b)(4). (*Id.* ¶ 3.) *Third*, WFBNA acknowledged that the Consent Order was the product of a "good faith settlement." (*Id.* ¶ 9(e)); *see also Satsky*, 7 F.3d at 1468 (consent decree reached through a "settlement . . . in good faith" was to be construed according to its terms for the purposes of preclusion). Under any reasonable interpretation, the Consent Order is a consent order.

In the Tenth Circuit, a consent order or decree is to be construed "basically as a contract" for the purposes of *res judicata*, and the preclusive effect of a consent decree "should be measured by the intent of the parties." *Satsky*, 7 F.3d at 1468. Accordingly, insofar as the Consent Order has any *res judicata* effect at all, that effect is governed by the intent of the CFPB and WFBNA.

B. The Consent Order Expressly Contemplates Additional Enforcement Actions Based On Similar Facts

The "mutual intent" of parties to a contract is a "question of fact," *see United Steelworkers of Am. v. CCI Corp.*, 395 F.2d 529, 531 (10th Cir. 1968), unsuitable for resolution on a motion to dismiss. Even if the Court did take up the question at this stage, however, the Consent Order makes clear that WFBNA and the CFPB did not intend it to bar this action. *First*, the Consent Order expressly contemplates so-called "Related Consumer Actions"—actions, like this one, that are either "a private action by or on behalf of one or more consumers or an enforcement action by a governmental agency," based on "substantially the same facts" as the Consent Order. (Dkt. 26-

1 ¶ 3(i).) The Consent Order anticipates that WFBNA will be held liable in Related Consumer Actions, requires WFBNA to notify the CFPB of any judgments or settlements in them, and forbids WFBNA from using any liability in such actions to "offset" its liability to the CFPB. (*Id.* ¶ 61.)

Second, the provisions of the Consent Order that do address its preclusive effect make clear that it will not "bar, estop, or otherwise prevent . . . [a] governmental agency" (like the Nation) from taking additional action against WFBNA (or, of course, against WFC, which was not even a party to the Consent Order). (Dkt. 26-1 ¶ 84.) The *only* claims released by the Consent Order were certain claims asserted by the CFPB, *against WFBNA*, based on the CFPB's knowledge as of September 2016. (*Id.* ¶ 85.) Accordingly, the Consent Order, by its terms, does not bar this action. *See E.E.O.C. v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 202 (E.D.N.Y. 2003) (agency consent decree did not bar future action by New York State, as agency was not "acting on behalf of state governments" when it executed the consent decree); *State of Ark. ex rel. Bryant v. Dow Chem. Co.*, 981 F. Supp. 1170, 1173 (E.D. Ark. 1997) (calling it "abundantly clear" that *res judicata* did not bar claims that were specifically carved out from a consent decree's release).

C. Wells Fargo Has Not Demonstrated The Traditional Elements Of *Res Judicata*

The affirmative defense of *res judicata* does not bar the Nation's CFPA claims in any event, however, because Wells Fargo cannot carry its burden of establishing all three of its prerequisites: (1) a final judgment on the merits; (2) privity; and (3) an identity between the causes of action. *See Pelt v. Utah*, 539 F.3d 1271, 1281 (10th Cir. 2008).

1. The Nation Is Not In Privity With The CFPB

"It is a fundamental rule of civil procedure that one who was not a party to an action is not bound by the judgment." *Id.* "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor*, 553 U.S. at 892-93. For this reason, the

Supreme Court has been reluctant to expand the application of *res judicata* principles to nonparties, recognizing only six exceptions to the general rule against nonparty preclusion.[3] *See id.* at 893-95. Wells Fargo fails to address the exceptions or identify which one it believes applies here. At most it suggests that perhaps nonparty claim preclusion may be exercised against the Nation because it was "adequately represented" by the CFPB in connection with the Consent Order. (*See* Mot. at 6-7.) Wells Fargo is wrong.

"A party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the non-party. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented." *Taylor*, 553 U.S. at 900. Here, to the extent that the CFPB's understanding can be divined on a motion to dismiss, the CFPB clearly was not acting in a representative capacity for any nonparties because it made clear that future consumer or governmental enforcement actions, based on substantially the same facts, were likely to follow. (*See* Dkt. 26-1 ¶¶ 3(i), 61, 65.) Moreover, the Nation's Complaint does not allege (as it must for *res judicata* to apply at this early stage) that the CFPB took special efforts to protect nonparties, or that the Nation received advance notice of the Consent Order. Accordingly, the "adequate representation" exception does not apply.[4]

Wells Fargo's cases are not to the contrary. *Sunshine Anthracite Coal Co. v. Adkins*, 310

[3] The six exceptions are: (1) the nonparty agrees to be bound; (2) the nonparty is in a qualified substantive legal relationship with the party to the judgment; (3) the nonparty was "adequately represented by someone with the same interests who [wa]s a party" to the suit; (4) the nonparty "assume[d] control" over the litigation in which the judgment was rendered; (5) the nonparty is acting as a proxy for a party to the judgment; and (6) a special statutory scheme expressly forecloses successive litigation by nonlitigants. *Taylor*, 553 U.S. at 893-95.

[4] The lack of privity between the Nation and the CFPB also indicates that the Nation did not have a full and fair opportunity to litigate its claims against Wells Fargo. *See Taylor*, 553 U.S. at 892-93.

U.S. 381 (1940), was decided before *Taylor*, and did not involve the preclusive effect of a federal action on a state action. Instead, the Court held that "there is privity between *officers of the same government* so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." *Id.* at 402-03 (emphasis added). This holding is inapplicable here, where the actions are brought by two separate sovereigns. As the Tenth Circuit has recognized, "[i]n general, 'state and federal governments are separate parties for *res judicata* purposes, so that litigation by one does not bind another.'" *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240-41 (10th Cir. 2002) (finding that a state agency was not in privity with the federal government based on the "tenuous connection" that both were enforcing the same statutory scheme). *State Water Control Board v. Smithfield Foods, Inc.*, 261 Va. 209 (2001) is also distinguishable, both on its law and its facts. There, Virginia and the federal government "chose to participate in [a] joint endeavor" with respect to water quality guidelines and made a mutual determination that their interests would be protected by a single set of permits. *Id.* at 215-16. The Supreme Court of Virginia, applying Virginia (and not federal) law, subsequently refused to allow parallel enforcement of the joint permitting scheme. *Id.* at 216. But here, Wells Fargo has not offered any evidence of a "joint endeavor" or ex ante agreement between the CFPB and the Nation that their interests were aligned—nor could it, at the motion to dismiss stage. *See Harvey E. Yates Co. v. Cimarex Energy Co.*, 2014 WL 11512599, at *11 (D.N.M. Mar. 5, 2014) (declining to decide issue of collateral estoppel on motion to dismiss because whether privity existed was basis of factual dispute).

2. The Nation's and the CFPB's Claims Are Not the Same Cause of Action

The Court need not consider whether the Nation's claims constitute the same cause of action as the CFPB's claims, as Wells Fargo's failure to demonstrate privity conclusively defeats its *res judicata* defense here. Nor could it properly do so on the pleadings. But even if the Court did consider this element, Wells Fargo has not shown that the Nation's Complaint concerns the

same cause of action as the Consent Order. Causes of action are identical for *res judicata* purposes only if the claims at issue arise from the exact same transaction. *Nwosun v. Gen. Mills Rests., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997). This is not the case here. The Nation's Complaint alleges in detail that Wells Fargo targeted Native Americans with predatory sales practices—conduct that was not at issue in the Consent Order. (*See* Compl. ¶¶ 49-55; 60-62.) Moreover, when a prior action results in a consent judgment that precludes only certain claims, other claims are *not* precluded. *See Young-Henderson v. Spartanburg Area Mental Health Ctr.*, 945 F.2d 770, 774-75 (4th Cir. 1991). Here, WFBNA and the CFPB manifested an intent that the Consent Order would release only certain CFPB claims and only as to the CFPB. (*See supra* at 5-6.) The Nation's claims therefore constitute a different cause of action, and *res judicata* does not apply.

II. ***Res Judicata* Will Not Bar The Nation's *Parens Patriae* Claims**

Wells Fargo asserts that the Nation's *parens patriae* claims will be barred by the *Jabbari* action, which is awaiting final approval. (Mot. at 12-14.) But this argument is fraught with numerous factual disputes, rendering it inappropriate for resolution on a motion to dismiss. Moreover, Wells Fargo has failed to meet its burden of showing either that the parties in the Nation's action are identical to those in the *Jabbari* action, or that the *Jabbari* action involves the same causes of action as this one. *See Pelt*, 539 F.3d at 1282-83.

A. Wells Fargo Has Not Shown That The Parties Are In Privity

"[C]laim preclusion is an affirmative defense and it is incumbent upon the defendant to plead and prove such a defense." *Id.* To preclude the Nation's *parens patriae* claims, Wells Fargo must show that *every* Navajo person affected by the practices alleged in the Complaint is a class member in the *Jabbari* action. *See id.* at 1281; *Harvey E. Yates Co.*, 2014 WL 11512599, at *11. Wells Fargo must also show that the affected Navajo people were adequately represented by the *Jabbari* class representatives and were accorded due process of law. *Pelt*, 539 F.3d at 1284 ("The preclusive effect of a prior judgment will depend upon whether absent members were 'in fact'

adequately represented by parties who are present.").

Adequate representation in the context of a class action requires that the interests of absent class members "were vigorously pursued and protected in the class action by qualified counsel." *Id.* at 1286. Due process requires that absent members received notice of the settlement agreement and their option to opt out. *Brown v. Wells Fargo Bank, N.A.*, 869 F. Supp. 2d 51, 64-65 (D.D.C. 2012). Wells Fargo has failed to meet its burden with respect to *any* of these requirements.

As discussed above, Wells Fargo's *res judicata* defense is inappropriate for adjudication on a motion to dismiss. In order to properly evaluate Wells Fargo's asserted defense with respect to the *Jabbari* action, the Court would need to consider matters outside the Complaint and not properly subject to judicial notice.[5] Indeed, as discussed below, there are numerous disputed facts regarding whether the Navajo people opted out of the *Jabbari* class, received adequate notice of the *Jabbari* action, and were adequately represented by the *Jabbari* plaintiffs. *See Miller*, 345 F.2d at 893 (when a *res judicata* defense is "raised by a motion under Rule 12(b)(6)," it may not be "based upon matters outside the complaint").

First, Wells Fargo has not shown that all of the affected Navajo people are included in the *Jabbari* class. It has failed to provide any information indicating whether any Navajo people have opted out of the *Jabbari* action, and any such information would not be subject to judicial notice. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (class settlements under Rule 23(b)(3) do not bind class members who request exclusion); *Harvey E. Yates Co.*, 2014 WL 11512599, at *11 (denying motion to dismiss on collateral estoppel grounds where the "face of the [c]omplaint and the documents properly considered by the [c]ourt on a motion to dismiss [] do not establish that . . . [the parties] are in privity").

Second, Wells Fargo has not provided any facts showing that those Nation members who

[5] The Court may not take judicial notice of the *Jabbari* filings for the truth of the matters asserted therein. *See The Estate of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1111 (10th Cir. 2016); *see also* Dkt. 34 [Pl.'s Opposition to Wells Fargo's Request for Judicial Notice] at 2-3.

are included in the *Jabbari* class received adequate notice of the settlement. *See Brown*, 869 F. Supp. 2d at 65 (class settlement did not preclude subsequent suit where defendant "proffer[ed] no actual evidence in support of its claim that notice to [the plaintiff] met Rule 23 and due process requirements"). Wells Fargo's provision of the *Jabbari* settlement agreement is not, on its own, sufficient to meet its burden. *See id.* ("Wells Fargo asks the Court to infer that because [plaintiff] is a class member and because the *Wachovia* court found that class members received notice by direct mail, notice to her was sufficient. The Court declines to make such an inference.").

Moreover, Wells Fargo's misrepresentation to the Nation regarding the scope of its practices, (Compl. ¶¶ 68-73), raises additional factual issues as to whether Navajo people received adequate notice of the *Jabbari* settlement. *See McCarty v. First of Georgia Ins. Co.*, 713 F.2d 609, 612 (10th Cir. 1983) ("[W]here plaintiff's omission of an item of his cause of action was brought about by defendant's fraud, deception, or wrongful conduct, the former judgment has been held not to be a bar to suit."). At this stage, the Court cannot determine whether Wells Fargo has satisfied its burden to prove that Navajo people received due process in the *Jabbari* action.

Finally, Wells Fargo has not provided *any* information from which the Court could properly find that the named *Jabbari* plaintiffs adequately represented the interests of the Navajo people. *See Pelt*, 539 F.3d at 1287-88 ("[S]hared interests do not alone ensure adequate protection. Once the case proceeds to final judgment and is asserted as part of a claim preclusion defense, the question shifts from incentive to litigate to whether the absent parties' interests were *in fact* vigorously pursued and protected.") (emphasis in original). Importantly, the fact that the *Jabbari* court found the class representative and class counsel to be adequate during its preliminary approval hearing is not determinative during a *res judicata* analysis. *Id.* at 1284-85; *see also United States v. McCluskey*, 2013 WL 12329718, at *2 (D.N.M. Aug. 23, 2013) ("[I]t is improper to take judicial notice of another court's findings of fact.").

Wells Fargo's authority does not hold otherwise. It argues that the Nation is in privity with

its people and cites to cases holding that an attorney general is in privity with state consumers for purposes of *res judicata* of a prior class action involving those very consumers. *See, e.g.*, *California v. IntelliGender, LLC*, 771 F.3d 1169, 1178-80 (9th Cir. 2014). This argument is irrelevant at this juncture, because Wells Fargo has not even attempted to show that Navajo people are part of the *Jabbari* class, were adequately represented, or were provided with due process.

B. Wells Fargo Has Not Shown That The Causes Of Action Are Identical

Wells Fargo has also failed to meet its burden of establishing that the *Jabbari* action included the same causes of action as the claims brought by the Nation. This issue is also not appropriate for adjudication on a motion to dismiss. To determine whether the claims involve the same cause of action, the Court would need to consider the facts and evidence underlying the claims brought by each of the parties, which would necessarily require the Court to look at matters outside the Complaint. This alone renders Wells Fargo's defense inappropriate for resolution at this juncture. *See Miller*, 345 F.2d at 893.

Even if it were appropriate for the Court to decide this issue now, however, Wells Fargo has still failed to meet its burden of establishing the defense because this action raises distinct claims and facts from the *Jabbari* action. For example, the Nation asserts a *parens patriae* claim for violations of the ECOA based on allegations that Wells Fargo discriminated against Navajo people due to their race and age. (Compl. ¶¶ 138-47.) This claim is based on an entirely separate transaction—Wells Fargo's intentional targeting of Navajo consumers—that involves questions of law and fact distinct from those at issue in the *Jabbari* action. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 880-81 (1984) (prior class action regarding employer's general pattern of discrimination did not bar subsequent action based on allegations of individual discrimination by employer).

Moreover, under the ECOA, the Nation and its members can recover wholly separate remedies from those available in *Jabbari*, including emotional distress damages, punitive

damages, and injunctive and declaratory relief. *See* 15 U.S.C. § 1691e. This alone establishes that the Nation's ECOA claim is not barred by the *Jabbari* action. *See California v. IntelliGender, LLC*, 771 F.3d at 1178-79 (*parens patriae* action was not barred by prior class action involving same claims where state was entitled to additional remedies than those available in class action).[6]

III. The Nation Has Standing To Pursue Its *Parens Patriae* Claims

A. The Nation Has *Parens Patriae* Standing To Pursue Its Common Law Claims

To establish standing to sue in *parens patriae*, a state (or tribe) must assert a so-called "quasi-sovereign interest," *i.e.*, an interest it "has in the well-being of its populace." *Snapp*, 458 U.S. at 602. There is no "definitive list of qualifying interests," but states have the requisite interest in "the health and well-being—both physical and economic—of [their] residents in general," as well as in "securing residents from the harmful effects of discrimination." *Id.* at 607, 609.

The Nation alleges both of these interests. *First*, the Complaint describes at length how Wells Fargo's fraudulent sales practices have harmed the economic health of the Nation's citizens as a whole, and how this harm is exacerbated by the fact that Wells Fargo is the only national bank that services the Nation's geographic area. (*See* Compl. ¶¶ 75, 176.) Federal courts routinely recognize that states have a quasi-sovereign interest in protecting their citizens from consumer fraud. *See In re Hemingway*, 39 B.R. 619, 622 (N.D.N.Y. 1983) (state had quasi-sovereign interest

[6] Wells Fargo alternatively requests a stay of the Nation's *parens patriae* claims until the *Jabbari* action is final. A stay would serve no purpose here because even if *Jabbari* were final, that case involves different parties and different causes of action and therefore will not bar the Nation's claims in this action. At any rate, it is well-settled that a party seeking a stay "must demonstrate a clear case of hardship or inequity if even a fair possibility exists that the stay would damage another party." *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 987 (10th Cir. 2000). Here, by delaying the availability of injunctive relief, a stay would harm the Nation's ability to protect its members and recover damages for the harm that has been inflicted on them by Wells Fargo's conduct. Moreover, Wells Fargo has not shown any hardship or inequity it will face absent a stay. And it is clear no such hardship exists — even if a stay is granted, Wells Fargo will still need to proceed with overlapping discovery on the Nation's remaining claims. *See E.E.O.C. v. Joslin Dry Goods Co.*, 2007 WL 433144, at *2 (D. Colo. Feb. 2, 2007) (denying stay where defendant would still need to litigate remaining claims during stay).

because "one would be hard-pressed to argue that protection against consumer fraud is *not* a subject of vital importance to the economic well-being of the citizens of New York State") (emphasis in original); *Illinois v. SDS West Corp.*, 640 F. Supp. 2d 1047, 1050 (C.D. Ill. 2009) (explaining that "securing an honest marketplace" is a "well-established quasi-sovereign interest").

Second, the Nation also has a quasi-sovereign interest in protecting its citizens from discrimination. The Complaint alleges that Wells Fargo employees focused unfair and fraudulent sales practices on members of the Nation, targeting Navajo citizens (and other Native Americans) based on their race, gender, or age. (*E.g.*, Compl. ¶¶ 49-55; 60-62.) The *Snapp* Court had "no doubt" that a state could "seek, in the federal courts, to protect its residents from [] discrimination to the extent that it violates federal law." *Snapp*, 458 U.S. at 609. It is therefore settled that a state has *parens patriae* standing in an action to address discriminatory practices, because such an action is "brought to benefit the State's population as a whole." *Colo. Civil Rights Comm'n v. Wells Fargo Bank and Co.*, 2011 WL 2610205, at *6 (D. Colo. July 1, 2011); *see also Commonwealth of Mass. v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 97 (D. Mass. 1998) ("It seems indisputable that a state has a quasi-sovereign interest in preventing racial discrimination of its citizens.").

Wells Fargo's motion wholly ignores the Nation's allegations regarding discrimination. And as for economic harm, Wells Fargo argues that because the Nation's common law claims seek "redress for economic injuries to tribal members," the Nation lacks *parens patriae* standing to pursue them. (Mot. at 14.) Not so. When a state seeks "relief in the form of injunctions or civil penalties, even in conjunction with compensatory damages, courts have held that a quasi-sovereign interest is at stake." *Colo. Civil Rights Comm'n*, 2011 WL 2610205, at *6; *see also State of N.Y. by Abrams v. Gen. Motors Corp.*, 547 F. Supp. 703, 707 (S.D.N.Y. 1982) (state had quasi-sovereign interest in "securing an honest marketplace," even though it was concurrently seeking economic damages for its citizens).

Here, the Nation seeks not just compensatory damages, but also civil penalties and

injunctive relief. (*See* Compl. ¶ 7; *see also id.* at 53-54.) The quasi-sovereign interests these remedies serve confer *parens patriae* standing for the Nation to pursue its common law claims. *Colo. Civil Rights Comm'n*, 2011 WL 2610205, at *6. Wells Fargo's authority is not to the contrary. Its cases involve situations in which a state (a) pursued *only* monetary damages (and not injunctive relief or penalties)[7]; (b) never stated a quasi-sovereign interest to begin with[8]; or (c) failed to allege that the effects of the conduct at issue affected more than a narrow group of specified individuals, rather than, as here, widespread harm, *see* Compl. ¶ 75.[9]

The Nation's requests for civil penalties and injunctive relief also foreclose Wells Fargo's argument that this suit should be dismissed because individual Navajo citizens could sue for private relief. The requirement that a *parens patriae* suit go beyond private relief is "no more than another formulation of the general *parens patriae* standing consideration that the state be more than a nominal party in a private dispute." *Commonwealth of Mass.*, 16 F. Supp. 2d at 101. And "courts typically find that this requirement is satisfied when the relief sought by the state is broader than that which would be sought by private litigants"—for example, when a state seeks "broad injunctive or declaratory relief" rather than the "money damages or a narrowly tailored injunction" that a private individual might seek. *Id.* at 101-02; *see also People by Vacco v. Mid Hudson Med. Grp*, 877 F. Supp. 143, 149 (S.D.N.Y. 1995) ("remote possibility" that a private plaintiff might obtain relief did not preclude state from seeking "'complete relief' for all current and future" harmed individuals); *People v. Peter & John's Pump House*, 914 F. Supp. 809, 813 (N.D.N.Y.

[7] *See People of State of N.Y. by Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) (claim for injunctive relief was moot, and resulting complaint "only s[ought] to recover money damages").
[8] *See People of State of Ill. v. Life of Mid-Am. Ins. Co.*, 805 F. 2d 763, 766 (7th Cir. 1986) ("Indeed, no allegations of any type of injury to the state are made."); *State of Cal. v. Frito-Lay, Inc.*, 474 F.2d 774, 775 (9th Cir. 1973) ("Here, it is for injury to business or property of the state's citizens that recovery is sought."); *Pfizer, Inc. v. Lord*, 522 F.2d 612, 617 (8th Cir. 1975) ("The plaintiff governments assert no quasi-sovereign interest; their only interest is proprietary in nature."); *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1241 n.121 (D.N.M. 2004) (similar).
[9] *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 652 (9th Cir. 2017) ("The complaint contains no specific allegations about the statewide magnitude of [the alleged harm.]").

1996) (private litigants may not achieve complete relief due to incentive to compromise injunctive relief for increased damages). Even Wells Fargo's authority, *Mo. ex rel. Koster v. Harris*, acknowledges that *parens patriae* standing will lie when private relief is "unlikely or unrealistic." 847 F.3d 646, 652 (9th Cir. 2017). Here, there is no reason to believe that individual Navajo citizens are aware of the full extent of Wells Fargo's misconduct, let alone in a position to individually recover. And, tellingly, in the *Jabbari* action, Wells Fargo has neither admitted wrongdoing nor agreed to alter its practices, casting significant doubt on Wells Fargo's insistence that Navajo people are on the cusp of recovering full relief. (Dkt. 26-4 at 46-47.)

B. The Nation Has *Parens Patriae* Standing To Pursue Its Statutory Claims

The Nation also has *parens patriae* authority to pursue its statutory claims. Wells Fargo wrongly argues that although the federal, state, and tribal consumer protection laws identified at issue here "provide[] for a private right of action to damaged individuals," those statutes would only allow for *parens patriae* actions if they affirmatively "permit[ted] enforcement by a tribal entity." (Mot. at 17.) In fact, "states have frequently been allowed to sue in *parens patriae* to . . . enforce federal statutes that . . . do not specifically provide standing for state attorney generals." *Mid Hudson Med. Grp.*, 877 F. Supp. at 146 (collecting cases); *see also Commonwealth of Mass.*, 16 F. Supp. 2d at 103 ("[T]here is nothing unusual about a state seeking enforcement of federal laws that do not specifically provide for state enforcement"). The leading Supreme Court case on *parens patriae* standing, *Snapp*, permitted Puerto Rico to do exactly that. 458 U.S. at 609-10 (authorizing suit to enforce the Wagner-Peyser and Immigration and Nationality Acts). Even Wells Fargo's primary authority, *Connecticut*, went to pains to emphasize that it did not intend to "imply that states may only sue in their *parens patriae* capacity when a statute specifically provides for suits by states." 287 F.3d at 121.

Courts most often permit states to sue in *parens patriae* to enforce federal statutes when those statutes contain "broad civil enforcement provisions that permit suit by any 'person' that is

'injured' or 'aggrieved.'" *Id.* Each of the federal and state statutes at issue here contains such a broad grant of authority, permitting suit by any "aggrieved applicant," in the case of the ECOA; "any consumer," in the case of the Electronic Fund Transfer Act; "any person" harmed by a violation, in the case of the Truth in Lending Act; "any consumer," in the case of the Fair Credit Reporting Act; and "any person who suffers any loss of money or property," in the case of the New Mexico Unfair Practices Act and the Navajo Nation Unfair Consumer Practices Act. 15 U.S.C. § 1691e(a); 15 U.S.C. § 1693m(a); 15 U.S.C. § 1640(a); 15 U.S.C. § 1681n-o; NMSA 1978, § 57-12-10; 5 N.N.C. § 1107; *see also Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576 (Ariz. 1974) (Arizona Consumer Fraud Act authorizes suit by any "person who has been damaged by the practices declared to be unlawful.").

Wells Fargo does not direct the Court to *any* cases holding that a state or tribe lacks *parens patriae* standing to enforce any of the laws at issue here (and the Nation is aware of no such cases). Instead, it relies on *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972). There, however, the question was "not whether Hawaii may maintain its lawsuit on behalf of its citizens" in a *parens patriae* capacity, but whether the Clayton Act authorized the state to obtain a particular remedy—treble damages—as a *parens patriae* plaintiff. *Id.* at 259. Indeed, the Court acknowledged that Hawaii could sue in *parens patriae* to obtain injunctive relief under the Clayton Act. *Id.* at 256 n.7. As the District of Colorado has explained, *Hawaii* is "not instructive" with regard to parsing *parens patriae* standing issues. *Colo. Civil Rights Comm'n*, 2011 WL 2610205, at *4.[10]

Wells Fargo's other authority, *California v. Infineon Technologies AG*, 531 F. Supp. 2d 1124 (N.D. Cal. 2007), is similarly inapposite. That case considered whether a California law permitted "out-of-state parens patriae actions" brought by six states "on behalf of out-of-state

[10]Wells Fargo also wrongly says that in *Hawaii* the Court determined that the "suit warranted dismissal for lack of standing." (Mot. at 17.) In fact, *Hawaii* dismissed a single remedy sought under a single cause of action. The word "standing" does not appear in the opinion, and no entire cause of action—let alone an entire suit—was dismissed.

residents." *Id.* at 1132-34. The court determined that it did not, since the law at issue permitted only in-state government entities to sue. *Id.* at 1134-35. But here, the Nation's suit is brought on behalf of its members who are residents *of Arizona and New Mexico*, or who are residents of the Nation but who own bank accounts within Arizona and New Mexico. (*E.g.*, Compl. ¶ 57.) Wells Fargo identifies no authority holding that tribes cannot bring state-law *parens patriae* actions on behalf of Native Americans who suffer from unfair trade practices *within the states in question*.

IV. The Nation Properly Alleges Violations Of The ECOA

Wells Fargo's motion to dismiss the Nation's cause of action for violations of the ECOA rests on a single argument — that the ECOA does not apply because Wells Fargo did not deny credit to any Navajo people. According to Wells Fargo, the ECOA only applies to a discriminatory denial of credit, and not a discriminatory and predatory extension of credit. (*See* Mot. at 20-21.)

Contrary to Wells Fargo's assertion, the ECOA expressly prohibits discrimination "with respect to *any aspect* of a credit transaction." 15 U.S.C. 1691(a). Its implementing regulations further provide that

> Credit transaction means every aspect of 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 . . .).

12 C.F.R. § 202.2(m). "Extend credit and extension of credit mean the granting of credit in any form (including, but not limited to, credit granted in addition to any existing credit or credit limit)." *Id.* § 202.2(q).

Because of the statute's broad language, Wells Fargo is "dead wrong" that the Nation is required to allege a denial of credit to state a claim. *Martinez*, 527 F. Supp. 2d at 833-34; *see also Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 22-23 (D.D.C. 2000) ("By the plain language of the [ECOA], protection is not limited to those applicants who were rejected."); *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874, 887 (S.D. Ohio 2002) ("[P]laintiffs

need not allege that they were denied credit, so long as they allege that they were *discriminated against in the terms of their credit*[.]") (emphasis added); *M&T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 574 (E.D.N.Y. 2010) (allowing ECOA claim based on allegations that plaintiffs were granted unfavorable loan terms due to their race).

Indeed, courts have made clear that an ECOA claim may be based on allegations that a defendant targeted the plaintiff with predatory lending practices due to the plaintiff's race or age. For example, in *Hargraves*, the plaintiffs alleged that the defendants violated the ECOA by targeting African American communities with unfair and predatory lending practices, including by charging exorbitant interest rates and providing loan servicing procedures through which excessive fees were charged. 140 F. Supp. 2d at 21. The defendants argued that they had not discriminated within the meaning of the ECOA because they had not denied credit to any African Americans. *Id.* at 22-23. The court rejected this argument, emphasizing that the plain language of the statute prohibits discrimination with respect to *any* aspect of a credit transaction, including the terms of credit. *Id.* Because the plaintiffs had alleged that they were targeted with predatory lending due to their race, they had stated a claim under the ECOA. *Id.* at 21-23.

Here, as in *Hargraves*, the Nation has stated a claim under the ECOA by alleging that Wells Fargo's employees specifically targeted tribal members with predatory lending practices due to their race and age. (*See* Compl. ¶¶ 43-59, 143, 145.) Indeed, the Complaint specifically alleges that, among other things, Wells Fargo employees (a) targeted Navajo tribal members due to their lack of financial sophistication; (b) used Navajo-language skills to build camaraderie with (and then swindle) non-English speaking tribal members; (c) specifically targeted vulnerable Navajo youths; and (d) even went offsite to places where Navajo members were likely to congregate to target unsuspecting customers *en masse*. (*Id.* ¶¶ 49-55.) All of these methods of intentional targeting were used to dupe Navajo people into opening unnecessary accounts, including credit card accounts, which resulted in excessive fees and negative credit reports. *Id.* These allegations

are more than sufficient to state a claim under the ECOA. *See Martinez*, 527 F. Supp. 2d at 834 (pressuring racial minorities with predatory lending practices can be a violation of the ECOA); *Hargraves*, 140 F. Supp. 2d at 21 (same); *M&T Mortg. Corp.*, 736 F. Supp. 2d at 576 (employing African American agents who appealed to potential African American purchasers and advertising in heavily minority neighborhoods shows intentional targeting based on race).[11]

Critically, the authorities on which Wells Fargo relies do not involve allegations of predatory lending targeted at individuals due to their race or age. *See, e.g.*, *Thompson v. Bank of America, N.A.*, 773 F.3d 741, 755 (6th Cir. 2014) (plaintiff alleged only that defendant refused to grant a modification on an existing loan); *Das v. WMC Mortg. Corp.*, 831 F. Supp. 2d 1147, 1160 (N.D. Cal. 2011) (alleging only that defendants failed to make plaintiffs' credits scores available to them); *Kamara v. Columbia Home Loans, LLC*, 654 F. Supp. 2d 259, 262 (E.D. Pa. 2009) (plaintiff alleged only that defendant refused to refinance her loan); *Griffin v. Satander Bank*, 2014 WL 204229, at *7 (E.D.N.Y. Jan. 16, 2014) (plaintiff alleged only that defendants denied him "tender of payment"); *Powell v. Am. Gen. Finance, Inc.*, 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004) (plaintiff alleged only bare allegation that she was denied loan because of her race).

V. The Nation Properly Alleges Fraud

A. The Nation Properly Alleges Fraud In Its *Parens Patriae* Capacity

Wells Fargo argues that the Nation fails to state a claim for fraud in its *parens patriae* capacity because it does not allege the who, what, where, and when of the alleged fraudulent misrepresentations and omissions.[12] (Mot. at 22-24.) Wells Fargo also argues that the Nation fails

[11] The ECOA also does not require, as Wells Fargo suggests, (Mot. at 21 n.9), that the Nation allege Wells Fargo extended credit to tribal members on less favorable loan terms than other similarly situated individuals. *See Hargraves*, 140 F. Supp. 2d at 21 ("Plaintiffs have sufficiently alleged that the terms of defendants [sic] 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.").

[12] In a footnote, Wells Fargo argues that Navajo law is unlikely to apply to the Nation's claims. (Mot. at 22 n.17 (citing *Montana v. United States*, 450 U.S. 544, 565 (1981).) Wells Fargo

to allege scienter and damages. (*Id.*) These arguments fail for several reasons.

First, Wells Fargo fails to acknowledge that to state a claim for a fraudulent omission, a plaintiff is not required to plead the precise time, place, and content of the omission. *See In re Arizona Theranos, Inc. Litig.*, 256 F. Supp. 3d 1009, 1023-24 (D. Ariz. 2017) ("[A] plaintiff in a fraud-by-omission suit faces a slightly more relaxed burden due to the fraud-by-omission plaintiff's inherent inability to specify the time, place, and specific content of an omission[.]"); *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1098-99 (N.D. Cal. 2007) ("Clearly, a plaintiff in a fraud by omission suit will not be able to specify the time, place, and specific content of an omission[.]"). The Nation has sufficiently alleged that Wells Fargo employees omitted to inform Navajo members that accounts and credit lines were being opened in their names, failed to obtain proper consent necessary to open accounts, and concealed material information about the nature and effect of forms that Navajo people were asked to sign, as well as the nature of the accounts that were being opened for these individuals. (Compl. ¶¶ 43-59, 183-86.) *See Falk*, 496 F. Supp. 2d at 1093, 1099 (refusing to dismiss fraudulent omission claim alleging that defendant actively concealed material information during parties' relationship).

Second, where a plaintiff alleges a fraudulent scheme based on misrepresentations in numerous transactions that occurred over a long period of time, courts have held that it is impracticable to require the plaintiff to plead the specifics of each fraudulent misrepresentation. *United States ex rel. Harris v. Bernad*, 275 F. Supp. 2d 1, 7-8 (D.D.C. 2003) ("In cases where the complaint alleges complex or extensive fraud schemes, courts often relax the Rule 9(b)

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is incorrect. *See Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 903-906 (9th Cir. 2017). But by failing to argue for the application of a particular state's law to the Nation's common law claims *instead of* Navajo law, Wells Fargo implicitly acknowledges that it is not clear at this stage precisely how many of the Nation's citizens fell victim to Wells Fargo's practices or where those individuals suffered harm. In any event, the Nation has stated a claim for fraud regardless of the applicable law, and the record is not sufficiently developed for the Court to undertake a robust choice-of-law analysis at this time.

standard."). Instead, the key question is whether the plaintiff has "provided an adequate factual basis for its allegations of fraud[.]" *Id.* at *9. Here, the Nation's allegations meet that requirement by alleging that from 2009 to 2016, Wells Fargo engaged in a pervasive scheme of illegal sales practices that included misrepresentations as to the nature of forms, the method for closing accounts, the method for cashing checks, the nature and amount of fees, and the correct birth dates for minors. (Compl. ¶¶ 49-56, 64, 184.) These allegations satisfy Rule 9(b). *Harris*, 275 F. Supp. 2d at 8 (complaint complied with Rule 9(b) by alleging that scheme took place from 1993 to present and providing overview of fraudulent misrepresentations).

Third, contrary to Wells Fargo's assertion, the Nation specifically alleges damages: the Complaint alleges that as a result of Wells Fargo's misrepresentations and omissions, Navajo members suffered excessive fees and penalties. (Compl. ¶ 186.) These are recoverable damages for a fraudulent misrepresentation. *See* Restatement (Second) of Torts (1977) § 549 ("The recipient of a fraudulent misrepresentation is entitled to recover as damages . . . pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.").

Finally, Wells Fargo overlooks that Rule 9(b) expressly states that scienter may be alleged generally. *See* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of mind of a person may be averred generally."). In order to allege scienter, a plaintiff need only assert allegations that raise an "inference of fraud," such as by alleging facts showing "strong circumstantial evidence of fraudulent intent or recklessness." *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 168–69 (2d Cir. 2000) (emphasizing that this does *not* require "great specificity"). Here, the Nation has alleged that although Wells Fargo was alerted to its employees' fraud by complaints that were filed with its ethics committee, it did nothing to change its practices. (Compl. ¶¶ 63-67.) This is sufficient to raise an inference of fraud.

B. The Nation Properly Alleges Fraud In Its Own Capacity

Wells Fargo moves to dismiss the Nation's claim for fraud in its own capacity on the

grounds that the Nation has failed to identify a cognizable injury. According to Wells Fargo, a plaintiff must allege a "substantial and material change of position" to do so. (Mot. at 26.)

Wells Fargo's argument is again misplaced, and it does not cite to a single fraud case in support. Rather, Wells Fargo relies entirely on cases involving promissory estoppel, a wholly distinct cause of action. (*See* Mot. at 27.) Moreover, each of Wells Fargo's cases involves motions for summary judgment. *See, e.g.*, *Emp. Reinsurance Corp. v. GMAC Ins.*, 308 F. Supp. 2d 1010, 1018 (D. Ariz. 2004) (granting motion for summary judgment on plaintiff's promissory estoppel claim); *Weiner v. Romley*, 381 P.2d 581, 584 (Ariz. 1963) (similar).

Contrary to Wells Fargo's contention, a plaintiff is entitled to recover "any pecuniary loss" that results from a fraudulent misrepresentation. *See, e.g.*, *Forsberg v. Burningham & Kimball*, 892 P.2d 23, 27 (Utah Ct. App. 1995); *Ulan v. Richtars*, 8 Ariz. App. 351, 359 (Ariz. Ct. App. 1968) ("The victims of fraud are entitled to compensation for every wrong which was . . . the result of the fraud."). Courts have made clear that this loss includes expenses incurred investigating and litigating a fraudulent misrepresentation.[13] *See W. Techs., Inc. v. Sverdrup & Parcel, Inc.*, 154 Ariz. 1, 4 (Ariz. 1986) (pecuniary loss can include cost of having to defend against lawsuit); *Rawlings v. Apodaca*, 151 Ariz. 149, 161 (Ariz. 1986) (pecuniary loss includes costs of plaintiff's efforts to obtain improperly withheld documents, including cost of hiring attorney).

Here, the Nation has alleged that, among other things, it incurred expenses investigating Wells Fargo and in bringing this lawsuit to recover for Wells Fargo's fraud. (Compl. ¶¶ 72, 181-82.) These allegations are sufficient at this procedural stage. *Sawabeh Info. Servs. Co. v. Brody*, 832 F. Supp. 2d 280, 305 (S.D.N.Y. 2011) ("Rule 9(b) does not require that [a plaintiff] plead injury with particularity in fraud claims . . . plaintiffs have alleged all that is required of them —

[13] Wells Fargo asserts that delay in bringing a lawsuit is not a cognizable injury for fraud, relying on *Employers Reinsurance Corporation*, 308 F. Supp. 2d at 1018. But that case did *not* hold that a delay in filing a lawsuit is not a cognizable injury. Instead, the court granted summary judgment (on a promissory estoppel claim) because "there [was] no evidence that, without [defendant's] 'promise,' the plaintiff would have done *anything* differently." *Id.* at 1019 (emphasis in original).

that they have suffered compensable damages [from the fraud] in an amount to be proven at trial.").

VI. The Nation's Claim For Declaratory Relief Is Not Subject To Dismissal

Finally, the Nation's claim for declaratory relief is not subject to dismissal. In determining whether to dismiss a declaratory judgment claim, a court must evaluate

> (1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to *res judicata*; (4) whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Mid-Continent Cas. Co. v. Village at Deer Creek Homeowners Ass'n, Inc., 685 F. 3d 977, 980-81 (10th Cir. 2012).

These factors weigh in favor of allowing the Nation's declaratory judgment claim to proceed. The declaratory judgment claim will settle the controversy between Wells Fargo and the Nation; will help clarify the legal relations at issue; is not being used for procedural fencing; will not increase friction between federal and state courts; and is not inferior to alternative remedies. Wells Fargo has wholly failed to meet their burden of showing otherwise.

CONCLUSION

For the reasons stated, the Court should deny Wells Fargo's motion to dismiss. Should the Court dismiss any of the Nation's claims, the Nation respectfully requests leave to amend.

Dated: April 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on April 9, 2018, I filed the foregoing **PLAINTIFF NAVAJO NATION'S BRIEF IN OPPOSITION TO DEFENDANTS WELLS FARGO & COMPANY AND WELLS FARGO BANK, N.A.'S MOTION TO DISMISS** electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

Dated: April 9, 2018

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