

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

COPY

ROBERT F. & BETTY T. CASON,)
on behalf of themselves and all)
others similarly situated,)
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)
)
Plaintiffs,)
)
)
)
NISSAN MOTOR ACCEPTANCE)
CORPORATION)
)
Defendant.)

No. 3-98-0223

Judge Campbell
Magistrate Griffin
Jury Demand
Class Action

FOURTH AMENDED CLASS ACTION COMPLAINT

NOW come the Plaintiffs, Robert F. and Betty T. Cason, on behalf of themselves and all others similarly situated, and hereby sue the defendant, stating their cause of action:

I. PARTIES

1. Plaintiffs Robert F. and Betty T. Cason are African American adult citizens and residents of the Middle District of Tennessee. Plaintiffs reside in Nashville, Tennessee.

2. Defendant Nissan Motor Acceptance Corporation ("NMAC") is a foreign corporation with its principal place of business at 990 W. 190th Street, Torrance, California.

NMAC is a corporation organized, existing, and doing business under the laws of the State of California. NMAC is a subsidiary of Nissan Motor Corporation, USA. NMAC is

the American financial arm of Nissan Company, a worldwide Japanese conglomerate.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over this action and venue is proper. Defendant transacts substantial business in Tennessee, primarily the financing of automobiles, and all or part of defendant's acts alleged in this complaint occurred in the Middle District of Tennessee.

4. This action **presents claims based on the Equal Credit Opportunity Act (ECOA)**, 15 USC § 1691 ~~et seq.~~ **This** Court has original jurisdiction pursuant ~~to~~ **28** USC § 1331 to hear claims based upon the ECOA.

III. SHORT AND PLAIN STATEMENT

5. Plaintiffs claim that NMAC has established and used a discriminatory credit pricing system, referred to herein as NMAC's "Finance Charge Markup" system. Plaintiffs contend that NMAC's "Finance Charge Markup" system is unlawful because the system effects **unlawful** discrimination in that **African Americans** and other minorities are charged higher non-risk charges than similarly situated white customers, in violation **of the Equal Credit Opportunity Act**.

6. Plaintiffs contend that they were harmed by NMAC's "Finance Charge Markup" system. Plaintiffs seek class certification, **money** damages, **injunctive** and equitable relief.

IV. TERMINOLOGY

7. The following terms, as used herein, have the following meanings:

a. **Non-recourse** - "Non-recourse" means that the assignee of a loan agreement

cannot require payment by the assignor in the event of the default of the obligor. In a “non-recourse” automobile finance transaction, the finance company (NMAC) bears all the risk of default and the dealer never bears any of the risk of default. After the NMAC finance forms are completed by the customer, the dealer “assigns” the NMAC agreements to NMAC and NMAC then pays the dealer the amount financed as listed on the installment agreement. If the consumer later defaults, the dealer keeps the money it received from NMAC, owes NMAC nothing and has no responsibility regarding the default. **The automobile transactions that are included in the proposed class definition are all “non-recourse” transactions.**

b. Tier -“Tiers” are categories of risk that are assigned after evaluating many factors relative to the person and the proposed purchase. NMAC began using a Tier based financing system in approximately 1990. Letter designations are used. “A” tier is the most credit worthy applicant who receives the lowest available rate. “B”, “C” and “D” tier customers are progressively less credit worthy and are eligible for progressively higher rates. At different times, NMAC “Tiers” have -been referred to by names, numbers and letters. Regardless of the labels given the tiers, the concept is the same, NMAC categorizes its customers by risk and establishes an appropriate risk-related finance charge rate after considering numerous individual and deal attributes. All NMAC customers are assigned a risk tier.

c. Buy Rate - “Buy Rate” is the minimum interest rate required by NMAC for a particular transaction. The “Buy Rate” for a particular transaction is based on the credit risk “Tier” the customer is assigned by NMAC. Thus, the “Buy Rate” is the minimum finance charge for a particular customer after consideration of all risk related variables

pertaining to the customer's purchase. The "Buy Rate" is always set by NMAC and is never set by the dealer.

d. Rate Sheets - "Rate Sheets" refer to the notices that NMAC periodically sends its dealers informing the dealers of the "Buy Rate" for the different "Tier" levels. In addition to informing the dealer of the "Buy Rate" for the different "Tier" levels, the rate sheets inform the dealer how much they are allowed to markup the "Buy Rate" for each particular "Tier."

e. Contract APR - "Contract APR" is the total finance charge stated as a percentage as shown on the-customer's retail installment contract. (Annual-Percentage Rate)

f. Finance Charge Markup - "Finance Charge Markup" is the non-risk finance charge added to the Buy Rate. "Finance Charge Markup" is paid by the customer to NMAC, as a component of the total finance charge (Contract APR), without the customer ever knowing that a portion of their Contract APR was "Finance Charge Markup." The term "points" is sometimes used to describe "finance Charge Markup."

g. Maximum Markup - "Maximum Markup" is the maximum number of percentage points that NMAC authorizes a dealer to markup a particular transaction above the risk based "Buy Rate." NMAC sets the dealer markup limit at various amounts depending on the tier and the particular program that the individual is financing under, such as the college graduate program (1% markup limit). In some cases, NMAC does not allow the dealer to markup the "Buy Rate" at all and in some cases it allows the dealer to markup the "Buy Rate" as much as 5 points.

h. **Dealer Participation** - "Dealer Participation" is that portion of the "Finance Charge Markup" payable to the dealer by NMAC. NMAC refers to "Dealer Participation" as "Dealer Commission." During the relevant time period, the dealer has received either 75% or 77% of the "Finance Charge Markup" and NMAC has kept the remainder. None of the NMAC designed forms that the customers are required to sign inform the customers of the "Finance Charge Markup" system, or about "Dealer Participation".

i. **NMAC Participation** - "NMAC Participation" is that portion of the **Finance Charge Markup** not included in "**Dealer Participation**." During the relevant time period, **NMAC** has kept either **23%** or **25%** of the "Finance Charge Markup" **and the remainder has been paid** to the dealer.

V. NMAC'S STRUCTURE

8. NMAC engages in the business of financing vehicles throughout Tennessee and the United States, through dealer/agents who serve as NMAC's credit arrangers/originators. NMAC finances more than 100,000 vehicles annually, all through its dealer arrangers/originators.

9. NMAC promotes and advertises financing expertise, and simple, flexible and convenient vehicle loans which are provided by NMAC at Tennessee dealerships and over 1200 Nissan dealerships nationwide.

10. Consumers in Tennessee and throughout the United States are encouraged to visit Nissan dealers to obtain NMAC vehicle financing.

11. In 1991, NMAC consolidated its retail financing operations in its Dallas, Texas processing center. Out of its central processing center, NMAC provides retail financing through approximately twelve hundred (1200) Nissan dealers in the United

States.

12. NMAC does not provide automobile financing outside the United States and does not finance anything except vehicles within the United States. NMAC's retail financing system is virtually identical throughout the country.

13. NMAC's buy rates, credit risk tiers, finance charge markup limits, credit worthiness requirements, credit approval process, retail installment contract forms, approval notification form, and application forms **are the same** throughout the United States.

14. The only ~~differences among states involve state usury laws, which~~ **would only** be applicable to cases in which NMAC's buy rate plus NMAC's maximum markup rate exceed the state usury cap. For instance, most of NMAC's business in Arkansas is Tier A (Preferred) because of the Arkansas usury law.

15. NMAC acknowledges the virtual uniformity of its retail financing system throughout the United States.

Without waiving any of the foregoing objections, there are **no** differences between states in the way that NMAC **receives** credit applications, reviews and analyzes credit applications and assigns applicants to the appropriate tier, except from time to time NMAC may choose to limit the number of retail contracts it purchases in certain States. Any differences in buy rates would be limited or qualified by any usury limitations imposed by state statute. Any differences in the number of points that can be added to the buy rate for any particular tier would be dictated by usury and other consumer finance laws in any particular state. There **are** no differences by state in the tier structures, dealers' discretion to charge finance rates greater than NMAC's buy rate, percentage of finance charge paid to dealers or in the way dealers are paid.

(NMAC's Response to Plaintiffs' Second Set of Interrogatories, Interrogatory No. 1)

VI. NMAC'S MARKETING

16. NMAC markets its automobile retail financing services to the public under the name "**SignatureFINANCING** from NMAC:"

When you buy or lease with **SignatureFINANCING** from Nissan Motor Acceptance Corporation (NMAC), you've made a wise choice. Because with NMAC you get a partner dedicated to one business -- providing lease and loan financing for Nissan vehicles. And a company committed to one goal -- exceptional customer service. **SignatureFINANCING** offers attractive rates and terms, fast response, and financing that is simple, flexible, and convenient. Only for Nissan customers and only from Nissan Motor Acceptance Corporation.

(NMAC Web Page, **SignatureFINANCING** from NMAC)

17. In its advertising, NMAC gives consumers two options for applying for credit. For consumers who desire to obtain NMAC's **SignatureFINANCING**, they are given the option of applying directly through NMAC over the internet or they are directed to apply at NMAC dealers.

18. The customers who choose to apply directly to NMAC over the internet and who are approved, are provided a list of dealerships where they can go to complete the financing process.

19. In addition to referring customers to dealers through consumer advertising, NMAC also sends letters to existing customers with good payment records, informs them that they are pre-approved for --additional NMAC financing and --provides them documentation of their pre-approval to take to a NMAC dealership to consummate the new finance transaction.

20. Although there are various marketing programs used by NMAC, all of NMAC's marketing programs ultimately direct consumers to NMAC's dealers for consummation of the finance transaction.

VII. NMAC'S DEALER PROGRAM

21. The contractual relationship between NMAC and its non-recourse dealers is outlined in a one page agreement titled "RETAIL PLAN-WITHOUT RECOURSE."

22. The dealer agreement incorporates by reference "Dealer Bulletins" which are used periodically to convey "Buy Rates," "Maximum Markups," "Dealer Participation" amount, etc.

23. **The dealer bulletins make it clear that NMAC financing must be initiated by a customer completing a NMAC Credit Application.**

24. NMAC provides Credit Applications, Retail Installment Contracts, Agreements to Provide Insurance, Co-Signer Agreements, Corporate/Partnership Resolutions and Warranty Disclaimers to its dealer arrangers/originators, without charge.

25. NMAC provides training to its dealers through a "dealer hotline" including training related to properly filling out NMAC required forms and, when the design of the forms changes, NMAC sends people to its dealers to reprogram the dealer's computers to work with the new forms.

26. NMAC provides training to dealers, including training regarding "basic selling techniques." One of the job duties of NMAC's sales representatives is to "Assess training needs in assigned dealerships and provide appropriate training in product knowledge and basic selling techniques to dealer personnel."

VIII. STRUCTURE OF NMAC'S "FINANCE CHARGE MARKUP" SYSTEM

A. The Dealer's Role

27. In NMAC's "Non-Recourse" retail financing program, the dealer assumes the role of a credit "arranger" or credit "originator."

28. As an arranger/originator, for customers who are not pre-approved by NMAC, **NMAC's** "Non-Recourse" dealers submit loan applications to NMAC via fax and NMAC faxes **back the** credit decision to the dealer.

29. NMAC's **credit decision is analyzed and communicated back to the dealer** anywhere from a nanosecond to thirty (30) minutes.

30. NMAC dealers receive a credit decision on 48% of the applications within a matter of seconds and the remaining 52% average approximately a thirty (30) minute turnaround time.

31. When NMAC is closed, NMAC dealers have the option of using "**Signature**EXPRESS," a NMAC system which grants automatic approval of transactions meeting certain specified criteria.

32. **The "Signature**EXPRESS" program grants automatic approval to credit customers who have a credit bureau credit score that meets a certain criteria and assigns those customers to a credit tier based on the same credit score.

33. Dealers are allowed to add "Finance Charge Markup" to "**Signature**EXPRESS" automatic approvals in the same manner as a pre-approved customer or customers approved through the credit application process.

34. Regardless of the method in which NMAC's credit approval is obtained and the credit tier is assigned, the dealers role is the same. The dealer must comply with

NMAC's "Finance Charge Markup" rules and limitations and must complete the NMAC credit forms properly.

35. After obtaining credit approval from NMAC, and after NMAC assigns the credit worthiness tier and the risk-related Buy Rate, the dealer is then permitted to add the non-risk "Finance Charge Markup".

36. In setting the "Finance Charge Markup" within the rules and limitations established by NMAC, non-recourse dealers have no reason to consider whether the vehicle is new or used, ~~the~~ number of months being financed, credit worthiness of the customer, occupation ~~of the customer, income of the customer, model of the vehicle~~ being purchased, the trade-in being made or any other risk related variable. Those factors have already been considered by NMAC, who bears the risk.

37. Once an NMAC dealer obtains the customers signature on the NMAC documents, the dealer "pays itself" for the automobile with a NMAC "sight draft" which NMAC provides to the dealer and authorizes the dealer to sign.

38. The NMAC dealer plays no role whatsoever in the process of approving or declining the customer's credit application, establishing the credit risk tier of the customer, or establishing the risk based "Buy Rate" component of the finance charge.

39. The dealer's only role in setting the terms of the credit transaction is in the imposition of the non-risk "Finance Charge Markup," which must be within the parameters authorized by NMAC.

40. The controlling mechanism regarding the imposition of "Finance Charge Markup" is the agreement between the finance company and the dealership. All automobile finance companies, like NMAC, have their own rules and guidelines regarding

whether a dealer is allowed to add “Finance Charge Markup” and, for the finance companies that authorize “Finance Charge Markup,” the limitations thereof.

41. NMAC’s “Non-Recourse Dealer Agreement” is the same throughout the United States.

B. NMAC’S Role

42. Unlike the dealer, NMAC bears the full risk of the credit transaction. As the risk-bearer, **NMAC employs a sophisticated and highly automated credit analysis process designed to categorize NMAC applicants into credit risk “tiers.”**

~~43. In determining the appropriate “tier,” NMAC considers numerous risk related~~ variables including credit bureau histories, payment amount, payment to income ratio, debt ratio, monthly rental obligation, monthly mortgage obligation, bankruptcies, automobile repossessions, charge-offs, foreclosures, payment histories and various other risk related attributes or variables.

44. NMAC’s credit evaluation process is a proprietary credit scoring procedure that was **developed** utilizing a computerized regression analysis after reviewing the credit reports and two years of payment history on two hundred and thirty thousand (230,000) NMAC accounts.

45. NMAC’s risk tier assignment process is an objective and automated credit scoring process.

46. NMAC touts its objective and automated “tier” assignment system as being “unbiased.”

47. NMAC is also aware that a purely judgmental system is “more apt to be influenced by bias.”

48. Despite recognizing the virtues of an objective based credit pricing system and the corresponding perils of a purely judgmental system, NMAC authorizes, provides incentives for and shares in the profits of a totally subjective "Finance Charge Markup" system.

49. If a dealer doesn't markup the "Buy Rate," NMAC pays the dealer \$100.00 to \$150.00 out of the "Buy Rate" portion of the finance charge to the dealer as compensation for its role in packaging the finance transaction.

50. **By** providing the dealer an incentive to **markup** the "Buy Rate," NMAC not ~~only can keep for itself 23% - 25% of the "Finance Charge Markup," but can keep the~~ entire "Buy Rate" portion of the finance charge, undiminished by the dealer's \$100.00 - \$150.00 flat rate compensation.

51. NMAC's "Finance Charge Markup" system empowers NMAC's dealer arrangers/originators to subjectively raise rates at will and rewards the dealer arranger/originators and NMAC for doing so.

52. NMAC, by providing a lucrative enticement to **its** dealers, obtains ~~benefits~~ from even the "Dealer Participation" component which promotes dealer "referrals".

53. The "Finance Charge Markup" system destroys the objective and non-bias qualities of the automated risk tier system.

54. Although NMAC has a practice of soliciting credit applications direct from the public over the internet, advertising and promoting its "attractive rates and terms" throughout the country, pre-approving existing customers for additional NMAC financing, requiring all customers to apply for credit via a NMAC credit application, requiring all customers to execute a NMAC retail installment contract, it stringently enforces a company

policy forbidding disclosure of the actual risk based rate to the customers.

55. None of the NMAC documents that finance customers are required to sign disclose the "Buy Rate" or the existence of the "Finance Charge Markup" system.

56. In 1997, Mr. and Mrs. Cason's counsel wrote NMAC and inquired as to whether any portion of the 19.49% rate was kicked back or rebated to the dealer. At the time of the inquiry, neither Mr. or Mrs. Cason nor any representative of Mr. and Mrs. Cason, knew whether or not **Mr. and Mrs. Cason's 19.49% rate was equal to or in excess of NMAC's required rate. The letter asked the following questions:**

1. ~~How was the finance charge that Mr. and Ms. Cason were required to pay determined?~~
2. Who made the determination regarding the finance charge rate that Mr. and Ms. Cason were required to pay?
3. Is any of the finance charge that Mr. and Ms. Cason are paying being "shared" or "rebated" in any manner to any other person or entity?
4. If any of the finance charge that Mr. and Ms. Cason are paying is being "kicked back" or "rebated", or will be in the future, to any other person or entity, please inform me what portion of the finance charge is being "kicked back" or "rebated."

57. NMAC's Legal Compliance Office responded, but refused to acknowledge that the "Finance Charge Markup" system even existed and reported that NMAC's only involvement in Mr. and Ms. Cason's transaction was as a detached after the fact purchaser of the note.

With regard to your questions concerning finance charges, the interest rate or finance charge is based on a number of factors, including credit-worthiness of the customer. NMAC does not disclose information regarding the contractual and business relationship between NMAC and authorized independent Nissan dealerships. NMAC is a financing entity only, and as such, is not privy to the negotiations between the customer and the dealer. We merely purchase, or are an assignee of, the contract. However, in any event, Mr. and Ms. Cason signed the contract agreeing to that interest rate.

58. NMAC's position regarding its involvement in automobile financing, as communicated by its Legal Compliance Office, is starkly different than the image broadcast to the public through radio advertising, television advertising, newspaper advertising, brochures and various other print advertisements. NMAC presents to the world, through its world wide web site, a very involved and active image:

Three million satisfied NMAC customers are proof positive that we not only provide the funds for their dreams, but that we're also there to answer questions, respond to inquiries, and give unsurpassed customer service. The kind of **service that** keeps satisfied customers coming back to NMAC again **and** again.

At NMAC, we have the financing expertise you expect. We provide Nissan shoppers like you with simple, flexible and convenient loans and leases at more than 1,100 Nissan dealerships nationwide.

So visit your Nissan dealer soon. Nissan is ready to help you turn a promising test drive into a long and very rewarding journey.

59. NMAC controls and/or influences every aspect of the dealer based finance program by:

- a. Requiring and providing specific NMAC forms to be used and training dealers regarding how to complete the NMAC required finance forms;
- b. Evaluating the credit worthiness of each customer and assigning each to a credit risk tier;
- c. **Establishing** the "buy rate" for **each** finance transaction based on the risk based "tier" assignment;
- d. Providing a financial incentive for the dealership to add non-risk charges (Finance Charge Markup) to the risk based "tier" charge which rewards both the dealer and NMAC;
- e. Establishing the maximum markup rate for each finance transaction;
- f. Programming dealer's computers to utilize NMAC forms and training its dealers regarding "basic training techniques"; and

- g. Establishing the “Dealer Participation” and “NMAC Participation” split for each transaction which divides the “Finance Charge Markup” between the dealer and NMAC.

IX. NMAC’S ECOA AWARENESS AND FAILURE TO COMPLY

60. The financial industry, including NMAC, has been put on notice for years that commission driven discretionary pricing systems in the real estate mortgage industry, like the system utilized by NMAC, produces significant discriminatory effects.

61. Unlike the real estate mortgage industry, which is required by federal law to collect race information, the automobile financing industry exploits its exemption from gathering race information for ECOA compliance monitoring purposes in order to feign ignorance of the discriminatory impact of its discretionary pricing systems.

62. NMAC, for years, has either sampled its available data, confirmed the discriminatory effects of its commission driven discretionary pricing system and chosen to ignore and conceal the discriminatory impact, or has intentionally avoided confirming the discriminatory impact.

63. Notice of the discriminatory effect of its commission driven discretionary pricing system, which NMAC has known for years, was distributed throughout the financing and banking industry as a result of legal proceedings by the United States Department of Justice involving similar commission driven discretionary pricing systems in the real estate mortgage industry, including:

- a. United States v. First National Bank of Vicksburg, No. 5:94 CV 6(B)(N) (SD. Miss. filed Jan. 21, 1994) (charging African Americans higher interest rates);

- b. United States v. Blackpipe State Bank, Civ. Act. No. 93-5115 (D. S.D. filed

November 16, 1993)(charging American Indians higher interest rates);

c. United States v. Huntinaton Mortgage Co., No. 1; 95 CV 2211 (N.D. Ohio filed October 18, 1995)(charging African Americans higher fees);

d. United States v. Security State Bank of Pecos, No. SA 95 CA 0996 (W.D.Tex. filed October 15, 1995)(charging Hispanics higher interest rates);

e. United States v. First National Bank of Gordon, No. CIV-96-5035 (W.D.S.D. filed April 15, 1996)(charging American Indians higher interest rates);

f. United States v. Fleet Mortaaae Corn., No. ~~96-2279~~ (E.D.N.Y. filed May 7, 1996)(charging African Americans and-Hispanics ~~higher interest rates~~); and

g. United States v. Lona Beach Mortaaae Co., No. CV-96-6159 (C.D. Cal. filed Sept. 5, 1996)(charging African Americans, Latinos, women and persons over age 55 higher interest rates).

64. Notice of the discriminatory effect of its commission driven subjective pricing was also distributed throughout the automobile financing and banking industries as a result of a plethora of articles in trade journals following the United States Department of Justice legal proceedings, including:

Two Banks To Pay Damages Following Justice Probes Into Lending Discrimination, Department of Justice Press Release 94-027 (Jan. 21, 1994)

Steve Cocheo, *Justice Department Sues Tiny South Dakota Bank for Loan Bias*, ABA Banking J., Jan. 1994, at 6.

Miles Maauire, *Blackpipe Case; Banker Charged With Bias Called Friend of the Sioux*, Reg. Compliance Watch, Apr. 18; 1994, at 1.

Steve Cocheo, *Can Banks Lend in Indian Country?*, ABA Banking J., May 1994, at 42.

Jaret Seiberg, *Maryland Thrift In Settlement with Justice Department*, Am. Banker, Aug. 23, 1994, at 1.

Holly Boss, *Chevy Chase Federal Reaches \$77 Million Pact*, **Wall St.J.**, Aug. 23, 1994, at **A2**.

Michelle Sinsletary, *Who's Next After Chevy Chase?*, Wash. Post, Aug. 26, 1994, at B1.

Jaret Seiberg, *industry Sees Dangerous Extension Of Bias for Discrimination Complaints*, Am. Banker, Aug. 23, 1994, at 4.

Chevy Chase Settlement, Wash. Post, Aug. 23, 1994, at A18.

Chicago Area Lender Agrees with Justice Department to Settle Lending Discrimination Claims, Department of Justice Press Release 95-306 (June 1, 1995)

Justin Fox, *Northern Trust Settles U.S. Suit by Agreeing to Pay Minorities*, Am. Banker, June 2, 1995, at 2.

Ohio Mortgage Company Agrees to Compensate African Americans Charged Higher Prices for Home Mortgages than Whites, Department of Justice Press Release 95-540 (October 18, 1995)

Kenneth R. Harney, *Lender Agrees to Settle Suit on Hidden Fees*, L.A. Times, July 7, 1996, at 1.

Ford Finance Settles in Broker Fee Litigation, Mortgage Marketplace, July 8, 1996, at 4.

ford Files Settlement in Case Involving Broker Overages, Inside Fair Lending, Sept. 1996, at 9.

Stephen Phillips, *Lenders Likely to Review-Policies*, Plain Dealer, **Oct. 20**, 1995, at **1C**.

Edward Hulkosky, *HUD Cracks Down on High-Cost FHA Loans*, Am. Banker, Oct. 20, 1994, at 13.

Jaret Seiberg, *Huntington's Loan Bias Settlement with Justice Department Stirs Debate*, Am. Banker, Oct. 25, 1995, at 1.

Texas Banks to Pay \$500,000 for Charging Hispanic Borrowers Higher Interest Rates than Equally Qualified Non-Hispanics, Department of Justice Press Release 95-541 (Oct. 18, 1995).

Justice Department Sues Nebraska Bank for Allegedly Charging Native Americans Higher Interest Rates, Department of Justice Press Release 96-165 (Apr. 15, 1996).

Nebraska Bank Nailed for Illegal Pricing, Regulatory Compliance Watch, Apr. 22, 1996, at 1.

Fleet Subsidiary To Pay \$4 Million to Settle Claims that Blacks and Hispanics Were Charged Higher Loan Prices than Whites, Department of Justice Press Release 96-211 (May 7, 1996).

Kimberly Blanton, *Fleet Mortgage Settles Loan Bias Suit; Will Pay \$4M to Minority Customers, End Justice Probe*, Boston Globe, May 8, 1996, at 33.

Long Beach Lender to Pay \$3 Million for Allegedly Charging Higher Rates to African Americans, Hispanics, Women and the Elderly, Department of Justice Press Release 96-429 (Sept. 5, 1996)

Claret Seiberg, *Calif. Lender Paying \$4M To Settle U.S. Bias Charges*, Am. Banker, Sept. 6, 1996, at 1.

James S. Granelli, *U.S. Settles with Lender Accused of Overcharging*, L.A. Times, Sept. 6, 1996, at D1.

Kenneth Harney, *Justice Settlement Finds Not all Loan Fees Equal*, Newsday, Sept. 13, 1996, at D2.

65. NMAC does not train its staff regarding ECOA compliance related to credit pricing, does not have anyone assigned to ensure ECOA compliance related to credit pricing, does not engage in ECOA self audits, does not audit its dealer arrangers/originators, does not provide any ECOA training to its dealer arrangers/originators and does not provide any information to its dealer arrangers/originators regarding ECOA credit pricing requirements.

66. Despite clear and unequivocal notice of the unfair and discriminatory impact of a commission driven subjective pricing system, NMAC has continued its "Finance Charge Markup" system and has done nothing to monitor or prevent the discriminatory impact of the system.

X. SUMMARY OF NMAC'S RETAIL FINANCE SYSTEM

67. NMAC's retail finance system, one component of which is the "Finance Charge Markup" system, can be summarized as follows:

a. Under NMAC's retail finance system, the finance charges that result from the "buy rate" portion of the contract APR are "credit risk based" charges that NMAC deems to be appropriate for the particular individual, after analyzing all individual "deal" and "buyer" variables.

b. The finance charges that result from ~~the~~ "Finance Charge Markup" ~~portion of the contract A.P.R.~~ pursuant to ~~NMAC's "Finance Charge Markup" system~~ are totally subjective "non credit risk" related charges.

c. Incentives are built into the "Finance Charge Markup" system to encourage imposition of the subjective non risk related charges. NMAC as well as NMAC's dealer's employees, management and owners profit from the imposition of subjective non risk related charges.

i. Initially, the "Finance Charge Markup" is divided between NMAC ("NMAC Participation") and the dealer ("Dealer Participation").

ii. Portions of "Dealer Participation" are typically passed through to dealership management and department employees as bonuses and/or commissions.

d. NMAC maintains no monitoring, training or other compliance components to prevent illegal discrimination impact, despite overwhelming recognitions throughout the credit industry of the dangers associated with subjective pricing systems in a commission driven environment.

e. NMAC's finance customers pay all of their contract finance charges, including

the portion resulting from the "Finance Charge Markup," directly to NMAC.

f. None of the NMAC required finance forms inform the customers that they were charged more than their eligible "buy rate" and do not inform them their actual contract APR was manipulated by the dealer pursuant to NMAC's "Finance Charge Markup" system.

XI. ROBERT F. AND BETTY T. CASDN

68. In August, 1995, Mrs. ~~Betty Cason went~~ to Action Nissan in Nashville, Tennessee for the ~~purpose~~ of buying ~~an automobile~~.

69. Action Nissan is an authorized Nissan dealer and an agent for NMAC. Action Nissan regularly advertises and sells Nissan products and is an arranger/originator of NMAC financing. Action Nissan is located on Thompson Lane, Nashville, Davidson County, Tennessee.

70. On or about August 25, 1995, Mr. and Mrs. Cason applied for credit with NMAC by completing a NMAC credit application which bore a prominent Nissan Motor Acceptance Corporation logo and which had been provided to Action Nissan by NMAC for purposes of assisting Action in arranging/originating consumer finance transactions on behalf of NMAC. The NMAC application which Mr. and Mrs. Cason completed was given to them by an Action Nissan ~~employee~~ who provided the NMAC application with the authority and approval of NMAC.

71. On or after August 25, 1995, Action Nissan faxed Mr. and Mrs. Cason's NMAC application to NMAC in accordance with the standard business practice of NMAC and its affiliated dealers. NMAC reviewed Mr. and Mrs. Cason's application, performed

a risk analysis by considering **all risk related variables NMAC deemed appropriate, and** determined that Mr. and Mrs. Cason were a “SPL tier” credit risk.

72. After performing its risk evaluation and determining which credit risk tier Mr. and Mrs. Cason were eligible for, NMAC faxed Action Nissan an authorization indicating that Mr. and Mrs. Cason were eligible for NMAC financing at “SPL tier”.

73. By referring to NMAC's current rate sheet, Action Nissan was able to **determine that Mr. and Mrs. Cason were** eligible for NMAC financing at 16.49%. **By referring -to the same NMAC rate sheet, Action Nissan was also able to determine that NMAC had authorized Action to markup the rate to a maximum of 19.49% [3 points].**

74. NMAC's arranger/originator, Action Nissan, also presented Mr. and Mrs. Cason with a retail installment contract which prominently bore the Nissan Motor Acceptance Corporation logo and which had been provided to Action Nissan by NMAC for purposes of assisting Action in arranging/originating NMAC consumer finance transactions.

75. The NMAC retail installment contract which Mr. and Mrs. Cason signed was given to them by an Action Nissan employee who **was** acting with the authority and approval of NMAC. Mr. and Mrs. Cason agreed to a price of **\$24,292.00**, and traded a 1990 Chevrolet Blazer as down payment.

76. Mr. and Mrs. **Cason** were presented documents by Action Nissan which indicated they were being financed through NMAC. Mr. and Mrs. Cason agreed to a six year financing plan, which involved **\$20,099.06** in finance charges, and a total sales price of **\$50,388.67**.

77. The documents presented to Mr. and Mrs. Cason represented that the

financing documents were prepared by an authorized representative of NMAC, using NMAC documents, at NMAC's rate and under terms set by NMAC. For example,

a. The application that Mr. and Mrs. Cason completed in order to apply for financing bore a prominent Nissan Motor Acceptance Corporation logo.

b. The retail installment contract had the name "Nissan Motor Acceptance Corporation" and the NMAC logo imprinted in bold at the top of the retail installment contract.

c. The certificate of insurance had the name "Nissan Motor Acceptance corporation, P.O. Box 660368, Dallas, TX 75266-0368" typed in the block labeled "Creditor".

78. The Contract APR [19.49%] on the NMAC retail installment contract was actually a combination of NMAC's required risk based "Buy Rate" [16.49%] and a totally subjective "Finance Charge Markup," [3%] added pursuant to NMAC's "Finance Charge Markup" system.

79. instead of getting a standard and competitive rate from a large national company based on their credit risk tier, Mr. and Mrs. Cason received a significantly higher rate as a result of the undisclosed "Finance Charge Markup" system. In accordance with the standard method of operation employed to affect the unfair, deceptive, and discriminatory scheme, none of the various documents informed Mr. and Mrs. Cason that:

a. The rate printed on the contract titled "Nissan Motor Acceptance Corporation" was a negotiable rate, not a required rate based on NMAC's evaluation of their credit risk.

b. The 19.49% rate typed on the contract titled "Nissan Motor Acceptance Corporation" was in fact a subjective rate manipulated by Action Nissan, pursuant to



NMAC's "Finance Charge Markup" system and with the express approval of NMAC;

c. The 19.49% rate was not required by NMAC as a condition of financing.

d. Mr. and Mrs. Cason were eligible for financing through NMAC at 16.49 %, a rate that **was** 3% points lower than the 19.49% rate on the NMAC contract that was presented to Mr. and Mrs. Cason. [The difference between 16.49% and 19.49% resulted in \$3,504.24 in additional finance charges.]

e. The lower risk based buy **rate** (16.49%) had been secretly communicated to Action Nissan by NMAC in order **to disguise the non-risk related charges imposed by** Action Nissan with the **approval of NMAC**, pursuant to **NMAC's "Finance Charge Markup"** system.

f. There was an agreement between NMAC and Action Nissan that gave Action Nissan a large financial incentive to present Mr. and Mrs. Cason with a contract bearing the name of "Nissan Motor Acceptance Corporation" but with a higher rate than actually required by NMAC, or required by credit risk analysis.

80. Pursuant to the undisclosed **agreement between NMAC and Action Nissan**, NMAC kept 25% of the "Finance Charge Markup" (\$876.06 - "NMAC Participation") and wrote a **\$2,628.18** check to Action Nissan for 75% ("Dealer Participation").

81. After receipt of the **\$2,628.18** "Dealer Participation" payment from NMAC, Action Nissan distributed portions to various employees and managers **as their reward for** secretly adding "Finance Charge Markup" pursuant to NMAC's "Finance Charge Markup" system. The remainder of "Dealer Participation" was kept for corporate profit.

82. The "Finance Charge Markup" system employed by NMAC caused Mr. and Mrs. Cason, and other African Americans and other minorities, to pay higher "Finance

Charge Markup” charges than similarly situated white persons. The additional “Finance Charge Markup charges imposed on African Americans and other minorities were totally unrelated to credit risk factors.

XII. 1998 ACTION NISSAN STUDY

83. In 1998, a sample of Action Nissan data confirmed the discriminatory impact of NMAC’s commission driven credit pricing system. The 1998 statistical sample of data **involved only transactions consummated in 3995, the same year Mr. and Mrs. Cason** purchased their automobile from Action Nissan. All sampled transactions **were originated** in Nashville, Tennessee at Action Nissan, where Mr. and Mrs. Cason purchased their automobile.

84. The sampled transactions utilized NMAC’s “Finance Charge Markup” system. The finance charge markups in the sampled transactions, like in this case, were not risk based charges.

85. The sampled transactions included transactions with appropriate representation of white consumers and African Americans.

86. The sampled transactions indicate that transactions involving white consumers included, on average, an undisclosed Finance Charge Markup of \$621.21 per contract.

87. The sampled transactions indicate that of the average \$621.21 per contract in undisclosed Finance Charge Markups to white consumers, approximately **75%** of the charges were paid to Action Nissan (Dealer Participation) and the remainder of the non-risk related charges were retained by NMAC (NMAC Participation)

88. The sampled transactions indicate that transactions involving African

Americans and other minorities included, on average, an undisclosed Finance Charge Markup of \$1,004.33 per contract. The additional average non-risk related markup to African Americans and other minorities, over and above the amount charged to white consumers, was \$383.12 per contract and greatly exceeds any legally justifiable disparity.

89. The sampled transactions indicate that of the average \$1,004.33 per contract in undisclosed Finance Charge Markup to African Americans and other minorities, approximately 75% of the charges were paid to Action Nissan (Dealer Participation) and the remainder of the non-risk related charges were retained by NMAC (NMAC Participation).

90. The sampled transactions indicate that African Americans and other minorities, on average, were charged 63% more in "Finance Charge Markup" than similarly situated white persons.

91. The sampled transactions indicate that, from four hundred eighty eight (488) of the sampled transactions, there were \$346,064.22 in non-risk related markup charges disguised as part of \$2,965,551.68 which was disclosed as finance charges.

XIII. THE 1999 NMAC STUDY

92. In August, 1999, pursuant to a court order, NMAC produced electronic data containing all finance transactions originated by its thirty-five (35) Tennessee dealer arrangers/originators between January 1, 1995 and December 31, 1998. The court ordered data production was limited to data maintained in NMAC's active database. The data produced consisted of 12,826 finance accounts.

93. A portion of the 12,826 finance accounts were "race coded" in order to perform a statistical analysis of the incidence of Finance Charge Markup and the mean

(average) markup by race.

94. Approximately 10,000 of the accounts were “race coded” using information obtained from the Tennessee Department of Safety drivers license files, representing approximately 75% of all the accounts.

95. Of the accounts that were “race coded”, there were 7,605 with white primary buyers and 1,792 with African American primary buyers.

96. The statistical analyses were performed using **standard statistical analytical procedures.**

97. The 7,605 transactions involving ~~a white consumer as the primary buyer~~ averaged a “Finance Charge Markup” of \$507.94 per contract.

98. Of the average \$507.94 per contract in “Finance Charge Markup” to white consumers, approximately \$125.00 of the charges were kept by NMAC and the remainder of the “Finance Charge Markup” was paid to the dealer arranger/originator.

99. The 1,792 transactions involving an African American consumer as the primary buyer averaged a “Finance Charge Markup” of \$969.91 per contract. The average “Finance Charge Markup” charged to African Americans exceeded the amount of average “Finance Charge Markup” charged to white consumers by \$461.97 per contract and greatly exceeds any legally justifiable disparity.

100. Of the average \$969.91 per contract in “Finance Charge Markup” charged to African American consumers, approximately \$230.00 of the charges were kept by NMAC and the remainder of the “Finance Charge Markup” was paid to the dealer arranger/originator.

101. The sampled transactions indicate that African Americans, on average, were

charged 90.9% more in “Finance Charge Markup” than white persons.

102. The statistical analysis, based on the incidence (frequency) of “Finance Charge Markup”, indicates African Americans are 268% more likely to experience finance charge markups than white persons. Using a statistical analysis cited with approval by the United States Supreme Court, the NMAC markup policy results in fifteen (15) standard deviations for the expected incidence of overages versus actual overages for African-American consumers.

103. **The statistical analysis, based on the “Finance Charge Markup” mean (average), indicates that there is a statistically -significant -difference in the “Finance Charge Markup” mean between white persons and African Americans.**

104. Based on the statistical analyses performed, the significant and substantially larger average non-risk related “Finance Charge Markup” charged to African Americans (than the amount charged to white persons) can only be explained as the result of race discrimination.

105. The existence of such a significant and substantially larger average “Finance Charge Markup” charged to African American customers by 35 different NMAC arrangers/originators dispersed throughout the State of Tennessee, indicates a clear causal connection between NMAC's “Finance Charge Markup” system and the illegal discriminatory result.

‘XIV. ONE EXAMPLE

106. An egregious example of the subjective imposition of “Finance Charge Markup” from the NMAC data analyzed occurred to a young African-American couple, known herein as John and Jane Doe.

107. On July 26, 1995, John and Jane Doe financed an automobile through NMAC. The arranger/originator was a Memphis, Tennessee NMAC dealer operating under the standard non-recourse NMAC plan.

108. NMAC analyzed the credit worthiness of John and Jane Doe, which included consideration of the numerous individual and deal variables, and concluded that the appropriate risk based "Buy Rate" for John and Jane Doe was 10.9%.

109. NMAC's arranger/originator, operating within the rules and guidelines of NMAC's "Finance Charge Markup" system, added a "finance Charge Markup" of 5.0 percentage points, resulting in a "Finance Charge Markup" of \$6,555.32.

110. Of the \$6,555.32 in "Finance Charge Markup," \$4,982.04 was paid to NMAC's arranger/originator as "Dealer Participation" and the remaining \$1,573.28 was kept by NMAC as "NMAC Participation."

111. There are thousands (1,000's) of examples within the Tennessee NMAC data analysis of "Finance Charge Markup" in which the "Finance Charge Markup" exceeds one thousand dollars (\$1,000.00).

112. Although egregious examples of "Finance Charge Markups" involve both minorities and non-minorities, the negative impact of the "Finance Charge Markup" system is borne disproportionately by minorities.

XV. EQUAL CREDIT OPPORTUNITY ACT

113. Plaintiffs incorporate herein all other allegations contained in the complaint.

114. NMAC is a creditor as defined in Regulation B, Section 202.2(l) of the Equal Credit Opportunity Act.

115. NMAC, in the ordinary course of its business, participated in every decision

of whether or not to extend credit to the proposed class representative and all prospective class members.

116. NMAC, at all times relevant to this complaint, was fully aware of the policy and practice that resulted in the discrimination described herein and, in fact, designed, controlled, implemented and profited from the discriminatory policy and practice, referred to herein as the "Finance Charge Markup" system.

117. NMAC is a creditor-as defined in Regulation B, Section 202.2(l), in the capacity of a lender, in that all discriminatory actions that were taken by NMAC dealers were in accordance with the specific-authority-granted to the NMAC dealers by NMAC, all discriminatory actions were implemented using various forms and documents provided by NMAC to the NMAC dealers, the discriminatory actions were taken in furtherance of NMAC's goals and objectives and the discriminatory actions financially benefitted NMAC.

118. NMAC delegated to the NMAC dealers the authority to markup finance charges without regard to credit risk factors pursuant to the "Finance Charge Markup" system, which resulted in unlawful discrimination.

119. All actions taken by NMAC dealers are attributable to NMAC under agency principles based on the doctrines of express authority and apparent authority.

120. NMAC is a creditor as defined in Regulation B, Section 202.2(l), in the capacity of an assignee, since NMAC, in the ordinary course of its business, participated in every decision of whether or not to extend credit to the proposed class representative and all prospective class members.

121. NMAC dealer arrangers/originators are creditors as defined in Regulation B, Section 202.2(l) in that NMAC dealers, "in the ordinary course of business, regularly refers

applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made.”

122. NMAC is liable for any and all ECOA violations committed by NMAC dealers as the assignee of the NMAC dealers. All NMAC retail installment contracts, which were designed and paid for by NMAC, for all dates relevant to this lawsuit, contained the following clause as required by the Federal Trade Commission Holder Rule, 16 CFR Ch.

1, Part 433. (I-I-98) Edition:

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

123. The discriminatory charges that were charged to Mr. and Mrs. Cason and the prospective class members arose directly from “credit transactions” as defined in Regulation B, Section 202.2(m).

124. The discretionary charges that resulted from the “Finance Charge Markup” system were over and above the finance charge that Mr. and Mrs. Cason and prospective class members were eligible for **based on their credit risk rating.**

125. The average of the discretionary non-risk related charges imposed on Mr. and Mrs. Cason and other African Americans pursuant to the **“Finance Charge Markup”** system were significantly greater than the average discretionary non-risk related charges imposed on white consumers.

126. The disparities between the terms of the credit transactions involving African Americans and the terms involving white consumers could not have occurred by chance and cannot be explained by factors unrelated to race.

127. **NMAC's** policies and practices, as described herein, constitute:

- a. A pattern or practice of resistance to the full enjoyment of rights secured by the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f; and
- b. Discrimination against applicants with respect to credit transactions, on the basis of race or national origin in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(l) and Regulation B, § 202.4.

128. Mr. and Mrs. Cason and prospective **class** members **are aggrieved persons as defined in the Equal Credit Opportunity Act and have suffered damages as a result of NMAC's discriminatory conduct as described herein.**

129. Plaintiffs, on their behalf, and on behalf of all persons similarly situated, sue NMAC pursuant to the ECOA, seeking appropriate class certification, and all appropriate and allowable relief.

130. Pursuant to the ECOA and on behalf of all persons similarly situated, plaintiffs seek compensatory damages equal to the difference between the charges imposed on their pursuant to the "finance Charge Markup" system and the average charges imposed on white persons during the same time period.

XVI. ECOA PROOF ANALYSIS - DISPARATE IMPACT

131. The plaintiffs allege that NMAC'S "Finance Charge Markup" system, although facially neutral, has a disproportionately negative effect on African Americans and other minorities.

132. Pursuant to the disparate impact analysis, the plaintiffs specifically allege:
- a. The specific facially neutral NMAC practice that the plaintiffs are challenging is NMAC's "Finance Charge Markup" system;

- b. **The disparity between the amount of “Finance Charge Markup” imposed on African Americans and that charged similarly situated white persons indicates a clear causal connection between the “Finance Charge Markup” system and the discriminatory result;**
- c. The disparities that exist are evidenced by a statistical review of an adequate, competent and relevant data set.
- d. There are no legitimate business reasons to justify **NMAC's** discriminatory “Finance Charge Markup” system that could not be achieved by a practice that has a far less discriminatory impact.

XVII. CLASS ACTION ALLEGATIONS

133. Plaintiffs bring this action on behalf of themselves and all other similarly situated persons. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, plaintiffs seek to represent and seek certification of the following class:

Class Definition - All African American consumers who obtained financing from NMAC in the United States pursuant to NMAC's “RETAIL PLAN - WITHOUT RECOURSE,” between January 1, 1990 and the date of judgement, who were charged a “Finance Charge Markup” greater than the average “Finance Charge Markup” charged white consumers.

134. The requirements of Rule 23(a) and Rule 23(b)(1), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure have been met in that:

- a. **Rule 23(a)(1) Numerosity -** Plaintiffs do not know the exact size of the proposed class, since such information is in the exclusive control of defendant. In Tennessee alone, between January 1, 1995 and December 31, 1998, NMAC

engaged in over 12,500 finance transactions. More than 2500 of the finance transactions during the same time period were for African Americans. Based on these statistics, the nature of the commerce involved, and NMAC publications, plaintiffs believe that the proposed class members exceed 125,000. The members of the proposed class are geographically disbursed throughout the United States so that joinder of all members would be impracticable.

b. **Rule 23(a)(2) Commonality -All of the legal and factual issues in this class action are common to each proposed class member:**

(1) -Whether NMAC's "**Finance Charge Markup**" system is a facially neutral credit pricing system that has effected racial discrimination in violation of the Equal Credit Opportunity Act?

(2) Whether there are disparities between the average amount of "Finance Charge Markup" imposed on African Americans and the average "finance charge markup" imposed on white persons of equal credit worthiness?

(3) If there is a disparity in the "Finance Charge **Markup**" averages, is it statistically significant enough to indicate a causal connection between the "Finance Charge Markup" system and the discriminatory result?

(4) If there is a disparity in the "Finance Charge Markup" averages, is it demonstrated by statistical evidence from an adequate, competent and relevant data set?

(5) If there is a disparity, is there a legitimate business reason to justify NMAC's "Finance Charge Markup" system that could not be achieved by a practice that has a less disparate impact?

c. **Rule 23(a)(3) Typicality** - Plaintiffs' claims are typical of the proposed class members claims for each class. Mr. and Mrs. Cason, African Americans, who were: (1) charged a "Finance Charge Markup," and (2) charged a "Finance Charge Markup" significantly greater than the average "Finance Charge Markup" charged similarly situated white persons during the relevant time period, have a claim that is typical of the claims of the members of the proposed class;

d. **Rule 23(a)(4) Adequacy of Representation** - Plaintiffs can and will fairly and adequately represent and **protect the interest of the proposed classes, and have no interest that conflicts with or is antagonistic to the interest of the proposed classes.** Plaintiffs have employed attorneys who are experienced, competent and able to adequately and vigorously pursue this class action claim. No conflict exists between plaintiffs and proposed class members because:

- i. the claim of the named plaintiffs are typical of the proposed class members;
- ii. all the questions of law and fact regarding the liability of the defendant are common to the proposed class, overwhelmingly predominate over any individual issues that may exist, such that by prevailing on their own claim, plaintiffs necessarily will establish defendant's liability to all proposed class members;
- iii. without the representation provided by plaintiffs, virtually no proposed class member would receive legal redress or representation for their injuries because of the small value of the individual claims and because of the burden of proving a disparate impact claim.;
- iv. plaintiffs and their counsel have the necessary legal support, financial and technological resources to adequately and vigorously litigate this class action, and

the plaintiffs and counsel are aware of their fiduciary responsibilities to the proposed class members, and are determined to diligently discharge those duties by vigorously seeking the maximum recovery for the proposed class.

135. **Rule 23(b)(1)** - Class certification is appropriate pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure because prosecution of separate actions would create a risk of adjudications with respect to individual members of the proposed class which would **as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest.** ~~Since the plaintiffs' proof of discrimination pursuant to the ECOA claim will be~~ based on a disparate impact analysis, the proof is the same for every class member. The proof under a disparate impact analysis is based on a statistical analysis comparing the results of a facially neutral practice on two groups, minorities and non-minorities, not individuals. The first case that is tried by an African American challenging the "Finance Charge Markup" system using the disparate impact theory runs the risk, as a practical matter, of impeding or precluding future claims by the remaining class members because of the negative precedent that could be developed if the case is inadequately prepared. Class certification is also appropriate pursuant to Rule 23(b)(1) because prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members ~~of the class~~ which would establish incompatible standards of conduct for the defendants, particularly related to the injunctive and equitable relief that is sought.

136. **Rule 23(b)(2)** - Certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure because defendants have acted on grounds generally applicable

to the proposed classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Plaintiffs seek to obtain declaratory and injunctive relief requiring NMAC to implement vigorous company policies designed to prevent the illegal discrimination described herein. The plaintiffs are requesting injunctive relief restricting or prohibiting subjective "Finance Charge Markup", requiring ECOA training of NMAC employees; requiring NMAC to provide ECOA training for its dealer arrangers/originators; and requiring ECOA monitoring to ensure an end to the discriminatory impact of the "Finance Charge Markup" system. If NMAC's "Finance Charge Markup" system is declared to be in violation of the ECOA, the Class members damages are concomitant with such finding and can be calculated by automated and objective means. Since any damages would flow directly from the injunctive or declaratory relief, the injunctive or declaratory relief is clearly predominant.

137. Rule 23(b)(3) -A class action is a superior procedural vehicle for the fair and efficient adjudication of the claims asserted herein given that:

a. Common questions of law **and** fact overwhelmingly predominate over any individual questions that may arise, such that there would be enormous economies to the courts and the parties in litigating the common issues on a **class** wide instead of a repetitive individual basis. Since the plaintiffs' proof of discrimination pursuant to the ECOA claim will be based on a disparate impact analysis, the proof is the same for every class member. The proof under a disparate impact analysis is based on proving a facially neutral practice's disproportionately negative impact on minorities as compared to white persons, using relevant data and a competent statistical analysis, not based on what happened to any individual.

- b. **The size of each proposed class members individual damage claim is too small to make individual litigation an economically viable alternative, because of the enormity of the opposition and the difficult problems in amassing statistical proof of discrimination, such that few proposed class members would have any interest in individually controlling the prosecution of separate actions;**
- c. **Class treatment is required for optimal deterrent and compensation and for limiting the court awarded reasonable legal expenses incurred by proposed class members;**
- d. ~~Despite the relatively small size of individual claims, their aggregate~~ volume, coupled with the economies of scale inherent in litigating similar claims on a common basis, will enable this case to be litigated **as a** class action on a cost effective basis, especially when compared with repetitive individual litigation;
- e. No unusual difficulties likely would be encountered in the management of this class in that all questions of law or fact to be litigated at the liability stage are common to the class and all **damage issues are concomitant with** the liability findings which can be calculated by automated and objective **means**.

XVIII. INJUNCTIVE RELIEF

138. ~~Plaintiffs incorporate all other paragraphs contained~~ in the complaint.

139. Pursuant to the Equal Credit Opportunity Act, and the inherent authority of this Court, appropriate injunctive relief should prohibit further use of the "Finance Charge Markup" system employed by NMAC, as it presently exists. Such injunctive relief should include:

- a. Prohibition of non-risk related "Finance Charge Markup," or alternatively,

restrictions limiting the amount of “Finance Charge Markup”;

b. Requiring extensive ECOA training of NMAC employees;

c. Requiring NMAC to provide extensive ECOA training for its dealer arrangers/originators;

d. Requiring NMAC to impose requirements pursuant to its standard “RETAIL PLAN-WITHOUT RECOURSE” agreement regarding the minimum qualifications of persons engaged in arranging/originating NMAC finance transactions;

e. Requiring NMAC to impose requirements pursuant to its ~~“RETAIL PLAN-WITHOUT RECOURSE” agreement, requiring dealers to monitor the racial pattern~~ of “Finance Charge Markup”;

f. Requiring NMAC to monitor and/or audit the racial pattern of “Finance Charge Markup” to ensure the discriminatory impact of the “Finance Charge Markup” system ends.

XIX. PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, plaintiffs on behalf of themselves and on behalf of other similarly situated persons, PRAY:

1. That this complaint be filed, be served on defendant, and that defendant respond as required by law;

2. That **after** appropriate due process, this Court determine that this case may be maintained as a class action, grant **appropriate and permanent class certification, and** determine if notice should be given to each class member;

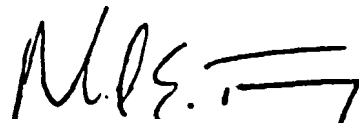
3. For trial by jury;

4. That plaintiffs and class members be awarded any damages allowed by law;

5. That plaintiffs and class members be awarded reasonable attorneys' fees and costs;
6. That plaintiffs and class members be awarded appropriate interest;
7. That after appropriate due process, injunctive relief issue from this Court, as requested more specifically herein;
8. That plaintiffs and class members receive such other further relief as this Court deems just and proper.

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