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

BETTY T. CASON and )  
ROBERT F. CASON, on behalf of )  
themselves and all others similarly situated, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
NISSAN MOTOR ACCEPTANCE )  
CORPORATION, et al., )  
 )  
Defendant. )

No. 3-98-0223  
JUDGE CAMPBELL  
MAGISTRATE JUDGE GRIFFIN  
JURY DEMAND

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PLAINTIFFS' REPLY TO NMAC'S MEMORANDUM IN  
OPPOSITION TO CLASS CERTIFICATION

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Plaintiffs reply to NMAC's Memorandum in Opposition to Plaintiffs' Renewed Motion for Class Certification. Essentially, the issues raised in NMAC's opposition memorandum divide into three categories: (1) disputed issues of material facts related to the questioned NMAC policy and its application; (2) issues related to Rule 23(a) prerequisites; and (3) issues related to Rule 23(b) class certification standards. This reply is organized to focus on only the contested issues in each of these categories.

**SUMMARY**

To be certified pursuant to Rule 23, a class must satisfy the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. If the Rule 23(a) criteria are satisfied, the court must also find that the class fits within one of the three categories of class actions defined in Rule 23(b).

Plaintiff has now learned exactly when NMAC first employed this system of retail credit pricing. Therefore, the date stated in the motion for class certification reflects more accurately the temporal limits of the appropriate class. These customers are persons who have been affected by the mark-up component of the current credit pricing system.

### **CLASS DEFINITION**

Perhaps the primary reason why class certification is so important in this case is that without certification the victims of NMAC's policy will never know of their claim. NMAC's markup policy prohibits the disclosure of markup to the consumer. Most people have never heard of finance charge markup, or dealer reserve, or dealer participation, or dealer commission.<sup>3</sup> Unlike a mortgage transaction where points are disclosed, markup disclosure is specifically prohibited by NMAC. One result from this policy of non-disclosure is that class membership must be determined from NMAC's records, since the consumer has no information to determine markup. Fortunately, NMAC does.

NMAC attacks the class definition as unworkable, and contends "it is not administratively feasible to determine whether a particular individual is a member" [NMAC opp. mem., p. 10]. Essentially, NMAC's contention is premised upon the non-disclosure element of their policy. Class definition is not the real problem. As noted by NMAC, the problem is that class members do not know they are victims of the NMAC policy ["...it seems unlikely that any customer - African American or white, will know the markup involved in his finance contract" NMAC opp. mem., p.8].

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<sup>3</sup>Finance charge markup is known by all of these terms. NMAC's policy documents and employees use several of these terms. See Ex. 1, NMAC Retail Plan - Without Recourse, "NMAC reserves the right to change the Baler's Commission at any time upon written notice to the dealer"; and Ex. 3, NMAC Retail Dealer Reserve Policy document; this document uses both "dealer reserve" and "markup".

This problem can be remedied by identifying class members from NMAC data, and notifying class members with information available in NMAC data. NMAC should not avoid certification as a result of the non-disclosure element of their markup policy. The proposed class definition is simple, and membership may be simply determined from NMAC's records.

The class definition contained in the motion for class certification has four elements. To be a prospective class member, an individual must:

1. be an African American;
2. have obtained non-recourse financing from NMAC in the United States after December 18, 1989;
3. have been charged a finance charge markup;
4. which exceeded the average finance markup charged white consumers.

The first three elements of the class definition can either be obtained directly from NMAC records, or by merging NMAC records with available public records. This process has already occurred for the entire State of Tennessee for a four year period (1995-1998). After fighting data production for more than a year, NMAC was ordered to produce electronic deal tiles for the State of Tennessee for the years 1995-1998.<sup>4</sup> Immediately after production, the electronic deal files were merged with public records, and the first three elements of the class definition were known. Months later, NMAC's expert filed a report that did not question the integrity of the plaintiffs process. In fact, NMAC's expert checked the process used by plaintiff and agreed with the result. ["A comparison of the race obtained by plaintiffs expert and that which NMAC obtained is quite similar.

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<sup>4</sup>Electronic deal file information produced to plaintiff includes name, address, social security number, account number, tier information, monthly payment, term, date of note, buyer birth date, and other information. NMAC produced further information to its expert, Dr. Thornton.

In both data sets, among those with a race of white or African American, 19% are African American”. Thornton report, p.8]. The first three elements are no problem.

The fourth element of plaintiffs class definition involves a calculation and a comparison. Calculation is simply the average markup for white customers during the class period. The actual markup for each African American customer is then compared to the white average to determine class membership, if the first three elements are satisfied. Like the first three elements, any information necessary to perform this simple calculation and comparison is contained in NMAC electronic records, and can be easily accessed.

NMAC’s contention that it is not “administratively feasible” to determine whether a particular individual is a class member is without merit. Administrative feasibility has been demonstrated already. The Lindsey report and the Thornton report contain more complicated manipulations of the NMAC data than would be necessary to determine class membership. Neither party has had any problem race coding NMAC’s electronic records which contain name, address, social security number, telephone number and cosigner information, and much more. Also, for loans originating as early as 1994 and 1995, NMAC has an existing relationship with the customer, since the loan is still being paid. Certainly, contacting these individuals, and determining their eligibility as class members, is administratively feasible.

NMAC also complains that “a ten year average would be a most irrational way to define a class, given that interest rates have declined dramatically over that time”. This contention reflects a misunderstanding of plaintiffs claim and the proposed class definition. A decline in interest rates certainly would affect buy rate, the risk related rate. However, a decline in interest rates has not affected markup. Throughout the class period, NMAC’s policy has authorized markup which is not risk related and not affected by the fluctuation of interest rates. Since class definition is dependant

on markup, and markup averages, the fluctuation in the risk related buy rates does not impact the integrity of the class definition. Simply stated, markup is not interest rate sensitive.

NMAC concedes that “ordinarily, defining class presents a low hurdle for a plaintiff”. At this point, complete exactness is not required. Plaintiffs four elements of class membership are defined by two criteria, race and transactional facts. Plaintiff has further refined the definition of class by the fourth element which limits class membership to persons having suffered injury. The first element (race) can be obtained by merging NMAC data and public records. The second and third elements are transactional facts, which can be and have been obtained from accessible NMAC electronic records. The fourth element requires a simple calculation of readily available transactional facts.

#### **PLAINTIFF HAS ESTABLISHED THE RULE 23(a) PREREQUISITES**

FRCP 23(a) describes four prerequisites to a class action. NMAC’s opposition memorandum concedes two prerequisites, numerosity and commonality.<sup>5</sup> NMAC contends that plaintiffs have not satisfied the prerequisite of typicality and also presents a narrow question regarding adequate representation. NMAC cites three cases for legal generalizations which are not in dispute. NMAC offers no legal authority which directly bears on this case or any factually analogous case. Instead, NMAC offers conclusory argument and focuses on the APR and the dealer. NMAC declines to

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<sup>5</sup>When, as an across the board permeating policy of discrimination is alleged in a class action, the requirement under Rule 23(a)(2) of commonality is satisfied. [citing Edmondson v. Simon, 86 F.R.D. 375 (N.D. Ill. 1980), citing Rich v. Martin Marietta 522 F.2d. 333, 341 (10<sup>th</sup> Cir. 1975)]. In denying NMAC’s motion to add Action Nissan as an indispensable party, this Court found that “plaintiff contends that defendant’s policy, nationwide, creates a racially disparate impact upon minorities, in violation of the ECOA...” [Memorandum, J. Campbell, 3/31/2000, Docket No. 60]. This case is about “an across the board permeating policy”.

address typicality in the context of markup and markup policy, which are the issues before the Court. In fact, NMAC denies the existence of a markup policy.<sup>6</sup> NMAC presents a non-responsive opposition. This Court could properly conclude that NMAC's Rule 23(a) opposition does not effectively contest plaintiffs Rule 23(a) allegations, and therefore, should be ignored. Nevertheless, plaintiff will address the specific typicality and adequacy objections raised in the opposition memorandum.

### TYPICALITY

NMAC claims the plaintiffs claims are not typical for two reasons:

1. Proof of plaintiffs claims would not establish, or even advance any other class members claims;
2. Plaintiffs claims are time blocked.

NMAC claims "the Casons would need to present evidence that all dealers responded to NMAC policy in exactly the same way. Even if plaintiff could prove that discrimination occurred at one car dealership, there would be no reason to conclude ipso facto that discrimination must have occurred at every other car dealership. Indeed, such **uniformity does not seem likely**, given that there are differences in regional competition, differences in demographics from one market to the next, and differences in management approaches used by various dealers." [NMAC opp. mem., p. 11,

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"NMAC's memorandum describes its markup policy as "phantom" and "so-called" and then says "that the NMAC policy...whatever that might be..." [NMAC opp. mem., p. 10-11] The answer to "whatever that might be"? is found in NMAC's policy documents, such as Plaintiffs Ex. 3 & Ex. 4. For example, Exhibit 3 states: "The dealer may markup NMAC's buy rate by three (3) percentage points for the preferred tier, five (5) percentage points for the standard tier, and three (3) percentage points for the special tier". Ex. 1 (Plaintiffs Motion for Class Certification) is perhaps more explicit: "NMAC reserves the right to change dealer commission at any time upon written notice **to** the dealer". No phantoms here. This is a policy about "markup" and "dealer commission" which NMAC obviously controls.

Jim Keras Nissan, Inc.	\$117.28	\$1,016.48	\$(899.20)	99%
Mountain View Nissan, Inc.	\$611.25	\$1,045.36	\$(434.10)	99%
Murdock's Nissan Motors, Inc.	\$406.92	\$1,094.28	\$(687.36)	97%
Rick Hill Nissan, Inc.	\$470.37	\$760.44	\$(290.07)	99%
Ted Russell Nissan	\$249.14	\$774.20	\$(525.06)	99%
United Nissan	\$780.12	\$1057.45	\$(277.33)	99%

As indicated, the result is the same, a statistically significant disparity between the markup imposed on African Americans and the markup imposed on white customers at each dealership. Location makes no difference. Regional competition makes no difference. Management makes no difference. Perhaps most remarkable is that NMAC has this data and still makes this argument. NMAC's expert, Dr. Thornton, retraced plaintiffs analysis of the data and checked the integrity of the data, including race coding. Yet, NMAC offers no dealership by dealership analysis, no regional analysis. NMAC offers only unsupported allegations that somehow these "differences" may make some difference, and that "uniformity does not seem likely". Unfortunately, for the African American consumer, uniformity is not only likely, but established by NMAC's own data.

The first two prerequisites of Rule 23, numerosity and commonality, focus on characteristics of the class. The second two prerequisites, typicality and adequacy of representation, focus instead on the class representative. [Edmondson v. Simon, 86 F.R.D. 375 (N.D. Ill. 1980), citing H. Newberg, Class Action § 115, at 184 (1977); and Moore's Federal Practice Vol. 3b, p. 23.06-2 (2<sup>nd</sup> Ed. 1979)].

A plaintiffs claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and the claim is based on the same legal theory. [See H. Newberg, Class Action § 115b, 11 15f, at 185, 191 (1977)]. Thus, typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it