

Excerpts only (pp. 1-2, 8-32, 48-~~end~~)

IN THE: UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

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BETTY T. CASON and ROBERT F.
CASON, on behalf of themselves and all
others similarly situated, .

Plain tiffs,

v.

NISSAN MOTOR ACCEPTANCE
CORPORATION,

Defendant.

NO. 3-98-0223

Judge Campbell

Magistrate Griffin

Jury Demand

Class Action

PLAINTIFFS' RESPONSE TO NISSAN MOTOR ACCEPTANCE
CORPORATION'S STATEMENT OF UNDISPUTED FACTS

Plaintiffs submit the following responses to Defendant Nissan Motor Acceptance Corporation's ("NMAC") statement of undisputed facts in support of its Motion for Summary Judgment under Fed. R. Civ. P. 56.

INTRODUCTION

NMAC has propounded eighty-five (85) statements of purportedly undisputed facts. Twenty-one (21) statements are undisputed by the plaintiffs. The remaining sixty-four statements actually present only three contested issues:

- (1) How NMAC's retail financing system works;
- (2) Which expert's statistical analysis is correct; and
- (3) When the Casons knew or should have known of their ECOA claim.

Since there are three (3) primary factual disputes presented in sixty-four (64) different ways, there is unavoidable repetition in these responses. To prevent even more repetition, the plaintiffs

have prepared **Plaintiffs' Summary of Disputed Facts - An Explanation of NMAC's Automobile Financing System**, which begins on pg. 48, following plaintiffs' responses to NMAC's statements of "undisputed" facts. There are many components to NMAC's relationship with its dealer arrangers that, when viewed in totality, provide overwhelming evidence that NMAC is the only creditor in NMAC transactions and that NMAC's policies control the financing process. Because of the different components to NMAC's involvement in the process, it can only properly be explained through a comprehensive summary. This summary provides compelling authority supporting plaintiffs' position that NMAC is the creditor and NMAC dealers are arrangers. The summary includes authority for plaintiffs' positions that:

- (1) NMAC *finances* automobiles on a non-recourse basis;
- (2) NMAC contracts are NMAC specific and are designed to be assigned only to NMAC;
- (3) NMAC's credit pricing policy authorizes *finance charge markup* that allows NMAC dealers to set their own *commissions*;
- (4) *Finance charge markup* is totally subjective and is not based on credit risk factors;
- (5) Every NMAC contract is required to conform to NMAC policies, including NMAC's *finance charge markup* rules and limitations;
- (6) NMAC profits from *finance charge markup*; and
- (7) NMAC's financing system is uniform throughout the United States.

To avoid repeating the same portions of the record in this response to NMAC's Statement of Undisputed Facts, the plaintiffs reference the Summary of Disputed Facts. This summary begins on page 48 of this response and is cited approximately 39 times in the responses which follow.

62: 13; Deposition of Fred Alexander: 55:2 - 55: 12; See Exhibit I: “BUYER UNDERSTANDS THAT ALL PAPERWORK WILL BE RELEASED FOLLOWING COMPLETE FINANCE APPROVAL.”)

15. Action Nissan stocks and uses only an NMAC-provided application, whether or not it ultimately sells the contract to NMAC or one of the many other banks and finance companies that buy its contracts. (Adams dep., 111:23-112:15.)

Response: This statement is disputed. Action Nissan is a credit arranger, not a finance company, and does not have finance contracts to sell. (Deposition of David Charles, 54: 16 - 55:21: “[I]t is my understanding that we originate the loans for NMAC.”; 74:13 - 75:4: “Well, we are sort of the in between person. I guess you could consider us an agent for Nissan Motor Acceptance, to prepare the loan document and present it to them for approval.”; 76: 18 - 78: 14: “If NMAC did not approve the loan, then she would not have bought the car, because we weren’t going to finance it for her.”; see Plaintiffs’ Summary of Disputed Facts, pg. 48) This statement is disputed to the extent that NMAC exaggerates Mr. Adams’ response. (“Generally, one single application.”) or it implies or suggests that NMAC “buys paper,” that Action Nissan or other NMAC arrangers “sell paper,” that NMAC policy does not control the financing process, that NMAC arrangers “finance” automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 14)

16. When a customer fills out a credit application, Action Nissan obtains a credit report

³ Mr. Alexander is a former finance manager at Heritage Nissan, the former name of Action Nissan. Mr. Alexander has been in the automobile business since 1987. He has worked for various other dealerships in West Virginia and Tennessee, including Royal Oldsmobile Jeep Eagle (finance manager), Neill-Sandler Toyota Buick Pontiac GMC (finance manager), Earl Dunn Buick Pontiac GMC (finance manager) and Tom Bannen Chevrolet (finance manager). He is currently the general manager at Regent Dodge. *Id.* at 9-12.

and performs its own assessment of the customer's worthiness. (Adams dep., 105:5-16; 108:8-15.)

Response: This statement is disputed to the extent that it suggests that Action Nissan is making a credit assessment in the capacity of a lender. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14) Action Nissan is not a finance company and doesn't approve credit. (Deposition of David Charles, 54:16-55:21: "[I]t is my understanding that we originate the loans for NMAC."; 74: 13 - 75:4: "Well, we are sort of the in between person. I guess you could consider us an agent for Nissan Motor Acceptance, to prepare-the loan document and present it to them for approval."; 76: 18 - 78: 14: "If NMAC did not approve the loan, then she would not have bought the car, because we weren't going to finance it for her."; see Plaintiffs' Summary of Disputed Facts, pg. 48) Mr. Adams was clear that dealers review credit reports for the sole purpose of determining which finance company is most likely to approve the financing and that everything is conditional until lender credit approval. (Deposition of Brent Adams, 18:9 - 19:11; 24:2 - 25:6; 63:11 - 63:24; 76:8 - 78:3; 108:5 - 108:24) Markup is added to create dealer and NMAC profit and is never based on any credit risk considerations. (Deposition of Fred Alexander, 56:25 - 57:14, Deposition of Brent Adams, 49:15 - 54:6, "Q. [Without recourse] And does that mean that the risk of payback is not the risk of Action Nissan? A. Correct. Q. And does that mean that NMAC bears all the risk? A. Correct.")

17. Action Nissan uses its own assessment of the customer's credit worthiness to negotiate the APR (and thus the monthly payments) with a particular car buyer. (Adams dep., 105:17-106:8; 108:8-24.)

Response: This statement is disputed. There cannot be a final APR until credit approval by the lender. According to Mr. Adams, the rate is determined based on the particular lenders buy rate

and markup policy. (Adams dep., 39:15 - 40:12, 42:21 - 43:7; 44:21 - 46:15) Mr. Adams did not indicate that finance rates are negotiated with customers. (Adams dep., 35: 12 - 36: 15) (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Responses to NMAC's Statement of Undisputed Facts, No. 14 and No. 16)

18. The Casons' Contract is a retail installment contract. (Exhibit B.)

Undisputed. The contract was designed by NMAC and provided by NMAC to Action Nissan to enable Action Nissan to arrange transactions for NMAC. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

19. A retail installment contract is an agreement to purchase goods over time at a particular interest rate. The disclosures that must be made on such a contract are strictly regulated and include, among other things, the following information: (i) the amount financed (the price of the goods being sold); (ii) the term or duration of the contract (the number of months payments must be made); (iii) the Annual Percentage Rate (the interest charges, expressed as a percentage); (iv) the total finance charge (the total dollar value of interest to be paid on the contract); and (v) the total of payments (the amount financed plus the finance charge). (12 C.F.R. § 226.18; see *also* Exhibit B.)

Response: This is a conclusion of law, not a statement of fact. To the extent that it purports to list legal requirements concerning financing, it fails to reference the prohibition against discrimination under the Equal Credit Opportunity Act ("ECOA"). This statement is also disputed to the extent that it implies that finance charge markup is separately disclosed.

20. Before the sale and assignment of the Casons' Contract, Action Nissan was the "creditor" and "seller" on the Casons' Contract. (Exhibit B, p. 1)

Response: This statement is disputed. Credit arrangers do not finance automobiles. (Deposition of David Charles, 54:16 - 55:21: “[I]t is my understanding that we originate the loans for NMAC.”; 74: 13 - 75:4: “Well, we are sort of the in between person. I guess you could consider us an agent for Nissan Motor Acceptance, to prepare the loan document and present it to them for approval.”; 76: 18 - 78: 14: “If NMAC did not approve the loan, then she would not have bought the car, because we weren’t going to finance it for her.”, see Plaintiffs’ Summary of Disputed Facts, pg. 48) NMAC was a creditor based on its participation throughout the credit process. NMAC, “in the ordinary course of business, regularly participates in the decision of whether or not to extend credit.” 12 C.F.R. § 202.2 (1). In addition to being *aparticipating* creditor, NMAC was an *assignee* creditor. (*Id.*) The proof in the record is undisputed that NMAC is the only creditor, for purposes of the ECOA, who *extended credit*. (See Plaintiffs’ Summary of Disputed Facts, pg. 48) Plaintiffs do not dispute that Action Nissan was also a creditor, pursuant to its role as an arranger/originator. (12 C.F.R. § 202.(1), “[T]he term also includes a person, who, 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.”)

21. Action Nissan sold the Pathfinder to the Casons “on credit.” (Exhibit B, p.1)

Response: This statement is disputed. Action Nissan sold the Casons a vehicle and arranged financing for the Casons pursuant to the policies of NMAC. Action Nissan never extended credit. (Deposition of David Charles, 76:18 - 78:14, “If NMAC did not approve the loan, then she would not have bought the car, because we weren’t going to finance it for her.”) This statement is also disputed because of its implication that Action Nissan financed the automobile. (See Plaintiffs’ Summary of Disputed Facts, pg. 48) The only financing contract that the Casons signed was an

NMAC specific contract. (Exhibit B to NMAC's Statement of Undisputed Facts; See Response to NMAC's Statement of Undisputed Facts, No. 20) Furthermore, this statement is disputed to the extent that it implies or suggests that NMAC "buys paper," that Action Nissan or other NMAC arrangers "sell paper," that NMAC policy does not control the financing process, that NMAC arrangers "finance" automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

22. Action Nissan subsequently sold and assigned the Casons' Contract to Nissan Motor Acceptance Corporation ("NMAC"). (Exhibit B, p.4)

Response: Action Nissan had no contract to "sell" since NMAC's credit approval, the retail installment contract and assignment to NMAC became operational simultaneously. (Deposition of David Charles, 54: 16 - 55:2 1: "[I]t is my understanding that we originate the loans for NMAC."; 74: 13 - 75:4: "Well, we are sort of the in between person. I guess you could consider us an agent for Nissan Motor Acceptance, to prepare the loan document and present it to them for approval."; 76: 18 - 78: 14: "If NMAC did not approve the loan, then she would not have bought the car, because we weren't going to finance it for her."; see Plaintiffs' Summary of Disputed Facts, pg. 48) This statement is disputed to the extent that it implies or suggests that NMAC "buys paper," that Action Nissan or other NMAC arrangers "sell paper," that NMAC policy does not control the financing process, that NMAC arrangers "finance" automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs' Summary of Disputed Facts, pg. 48 and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

23. Action Nissan's ability to sell the Casons' Contract to a finance company such as

NMAC is a condition of the Retail Buyer's Order between Action Nissan and the Casons. (The Casons' Retail Buyer's Order is attached as **Exhibit E.**)

Response: This statement is disputed to the extent that it mis-characterizes the conditional aspects of the Retail Buyer's Order between Action Nissan and the customer as being based on the dealer's "ability to sell" the contract. (See Plaintiffs' Summary of Disputed Facts, pg. 48) The actual terms of the Retail Buyer's Order states "[T]his Retail Buyer's Order shall become effective only upon the execution of the Conditional Sales Contract and approval of Buyer's credit by a lending institution..." The Casons signed a NMAC specific contract and various other NMAC forms.

Yes, it is our policy to provide forms because there is certain forms that, due to verbage (sp) with NMAC, that they have to use our forms... [W]hen they sign it over, it shows . . . our name on it, on the contract, Nissan Motor Acceptance up here, and then it shows on the back that they are assigning this contract to us... Yes, we make sure that they've signed [a credit application] and that they know we are going to be checking their credit.

(Deposition of Connie Brister, 65:2 - 67:1; emphasis added)⁴

As Ms. Brister admitted and confirmed, the NMAC form provides for assignment of the contract to NMAC and no other lender. Under the terms of the Buyer's Order, there was no agreement until NMAC approved the transactions and the Casons signed an installment contract (which was NMAC specific). Action Nissan had no contract to "sell" since NMAC's credit approval, the retail installment contract and assignment to NMAC became operational simultaneously. (Deposition of David Charles, 54: 16 - 55:21: "[I]t is my understanding that we originate the loans for NMAC."; 74: 13 - 75:4: "Well, we are sort of the in between person. I guess you could consider us an agent for Nissan Motor Acceptance, to prepare the loan document and present it to them for approval.");

⁴ Ms. Brister is the Manager of NMAC's Dealer Assistance Unit. *Id.* at 25-28.

76: 18 - 78: 14: "If NMAC did not approve the loan, then she would not have bought the car, because we weren't going to finance it for her."; see Plaintiffs' Summary of Disputed Facts, pg. 48)

24. Action Nissan sells its contracts to different banks and finance companies. Since 1990, Action Nissan has sold contracts to approximately 25 such companies, including First American, National Bank of Commerce, NMAC, and SunTrust Bank. (Charles dep., p. 41:7-14; Exhibit A, Response to Interrogatory No. 6.)

Response: This statement is disputed to the extent that it asserts that Action Nissan "sells its contracts." Action Nissan is not a finance company and has no finance contracts to sell. (Deposition of David Charles, 76: 18 - 78: 14, "If NMAC did not approve the loan, then she would not have bought the car, because we weren't going to finance it for her.") Action Nissan arranges credit through non-recourse lenders. Any reference to "selling paper" or "buying paper" is a gross mis-characterization of the actual process. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

25. Action Nissan is not required to sell any contracts to NMAC. (Adams dep., 127: 1-8; 134: 11-14; Deposition of Frederick Alexander, "Alexander dep.," 60:23-61: 11.)

Response: This statement is disputed. Arrangers are not lenders and do not have contracts to sell. (Deposition of David Charles, 76: 18 - 78: 14, "If NMAC did not approve the loan, then she would not have bought the car, because we weren't going to finance it for her.") The plaintiffs admit that Action Nissan is not required to exclusively arrange credit on behalf of NMAC. If Action Nissan had arranged the Casons' transaction through another lender, however, it would have been on the forms for that lender and pursuant to the policies and procedures of that lender, including its pricing rules. That was not the case though. The Casons' transaction was arranged pursuant to

NMAC's policies. "Selling" and "buying" contracts or paper may be industry vernacular, but it is a gross distortion of the actual process. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

26. If Action Nissan does not agree with the purchase terms offered by NMAC on a particular retail installment contract, Action Nissan is free to sell the contract to another bank or finance company. (Adams dep., 126:23-127:8.)

Response: This statement is disputed. Arrangers are not lenders and do not have contracts to sell. (Deposition of David Charles, 76: 18 - 78: 14, "If NMAC did not approve the loan, then she would not have bought the car, because we weren't going to finance it for her.") NMAC contracts are NMAC specific. There is only one possible lender when a non-recourse arranger uses a NMAC contract, NMAC:

Yes, it is our policy to provide forms because there is certain forms that, due to verbage (sp) with NMAC, that they have to use our forms... [W]hen they sign it over, it shows . . . our name on it, on the contract, Nissan Motor Acceptance up here, and then it shows on the back that they are assigning this contract to us.... Yes, we make sure that they've signed [a credit application] and that they know we are going to be checking their credit.

(Deposition of Connie Brister, 65:2 - 67:1; emphasis added)

This statement is also disputed to the extent that it implies or suggests that NMAC "buys paper," that Action Nissan or other NMAC arrangers "sell paper," that NMAC policy does not control the financing process, that NMAC arrangers "finance" automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

27. The APR is the customer's cost of credit as a yearly rate on a retail installment

contract. (Exhibit B, p. 1.)

Undisputed.

28. The APR is set as a result of negotiations between Action Nissan and a car buyer. (Adams dep., 119:7-21;133:18-134:5; Alexander dep., 56:8-20.)

Response: This statement is disputed. The citations provided do not even contain the word “negotiate” or any form of it. The Annual Percentage Rate (“APR”) is determined based on the particular lenders buy rate and markup policy. (Adams dep., 39:15 - 40:12, 42:21 - 43:7; 44:21 - 46:15)

29. The APR is set on the retail installment contract before Action Nissan submits a credit application to a finance company. (Adams dep., 118:11-17;119:7-21;133:18-134:5.)

Response: This statement is disputed. The plaintiffs assume NMAC is referring to customers who have not been approved through NMAC’s internet application procedure, have not been pre-approved under NMAC’s pre-approval system for existing NMAC customers and do not qualify for automatic approval based on NMAC’s credit bureau automatic approval system. An arranger of non-recourse transactions cannot *set* anything. A non-recourse arranger can *estimate* a rate based on its experience with the lender and based on the rate sheets provided by the lender. Everything Action Nissan, or any other NMAC arranger, does is conditional until lender approval. If the arrangers estimate is wrong, the NMAC contract has to be redone. (See Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 14)

30. Action Nissan does not disclose the APR to the finance company(ies) at the time that it submits a credit application. (Adams dep., 133:23-134:5; Alexander dep., 57:25-58:3.)

Response: This statement is disputed to the extent that it implies that the APR can be calculated with finality prior to when NMAC completes its analysis and tier assignment. When analyzing a credit application, NMAC assumes for purposes of its analysis that the dealer is going to markup the NMAC determined buy-rate to the maximum level allowed based on NMAC's tier assignment. (Declaration of Chris O'Bannion, ¶ 3, Exhibit J to NMAC's Statement of Undisputed Facts, "For all applications, the *maximum APR allowed for a tier is used as a variable or determinant in the credit decision process*, either by NMAC's internal automated credit decision system or by an NMAC credit analyst."; italics added) Since NMAC's analysis determines tier and tier determines maximum APR, there cannot be a *set* APR until *after* NMAC performs its analysis. This statement also is disputed to the extent that it assumes that a binding contract with a specific APR exists between the customer and Action Nissan prior to NMAC's approval. It does not. Everything Action Nissan does is conditional until lender approval. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

31. The buy rate is the finance rate at which a finance company such as NMAC will purchase a contract from a dealer such as Action Nissan. (Adams dep., 117:4-18:6.)

Response: This statement is disputed. It is NMAC's characterization of what it *believes* Mr. Adams meant when he was discussing the approval process, rather than when he specifically was asked what his definition of "buyrate" was in another portion of his deposition. (Q. And would you tell me what you mean by or understand the term buy rate to be. **A.** The term buy rate is the least amount of percentage interest that you could charge a customer to get them approved for a loan."; 40:1 - 40:7) This statement also is disputed to the extent it implies or suggests that NMAC "buys paper," that Action Nissan or other NMAC arrangers "sell paper," that NMAC policy does not

control the financing process, that NMAC arrangers “finance” automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 14)

32. Action Nissan can earn income on the sale of retail installment contracts through a difference in the APR and the buy rate. (Adams dep. 122:20-123:21.)

Response: This statement is disputed to the extent that it implies that dealer income is simply a result of subtracting the buy rate from the APR. This characterization totally misrepresents how NMAC’s markup system works. Dealer income results from the dealer marking up the buy rate pursuant to NMAC’s finance charge markup system. All of the markup is paid by the customer to NMAC and NMAC shares a portion of the markup with the dealer. NMAC’s own witnesses dispute NMAC’s characterization. (Deposition of Connie Brister, 104:7 -104:18: “[I]t’s a markup that the dealer elected. He elected to mark it up. It was his choice. So he gets anything over what our buy rate is. Q. Does he get to keep it all? A. NoAt this time of this particular deal, in the statement that we’re looking at, it was a 75/25 split. The dealer gets 75 percent. We retain 25...”; Deposition of Dr. Thornton, 85:2 -85:8: “Q....And what is the dealer receiving money for, to your knowledge? A. I believe it’s as a result of a markup.”)

33. Except for “subprime” lenders, all of the banks and finance companies to which Action Nissan sells contracts will purchase contracts where the buy rate is lower than the APR. (Adams dep., 123:5-21; Alexander dep., 58:4-8.)

Response: This statement is disputed. NMAC is re-characterizing the deponents’ testimony to make it appear that they state something different than what they actually said. Unlike NMAC, all finance companies do not authorize automobile dealers to subjectively markup their risk related

rates. (Brent Adams, 123:7 - 123: 10: “The finance companies pay – not all finance companies. Excuse me. Not all finance companies pay, but -because not all finance companies offer it.”) This statement is also disputed to the extent that it implies or suggests that NMAC “buys paper,” that Action Nissan or other NMAC arrangers “sell paper,” that NMAC policy does not control the financing process, that NMAC arrangers “finance” automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 14)

34. When negotiating the APR with a car buyer, Action Nissan has information regarding buy rates from the various banks and finance companies to which it sells contracts. (Adams dep., 113:17-114:10.)

Response: The plaintiffs do not dispute that NMAC and some other lenders provide Action Nissan with rate sheets and markup rules. Since Action Nissan is not a lender, it does not have its own rate sheets. This statement is disputed to the extent it implies or suggests that NMAC “buys paper,” that Action Nissan or other NMAC arrangers “sell paper,” that NMAC policy does not control the financing process, that NMAC arrangers “finance” automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 14)

35. Local market factors, such as credit terms offered by credit unions, affect the financing rates offered by Action Nissan and affect the number of retail installment contracts Action Nissan enters into with its customers. (Adams dep., 91:3-12.)

Response: This statement is disputed. The testimony cited makes no reference to financing rates. At most, Mr. Adams described how some customers make financing arrangements directly

with credit unions when those entities offer special rates. This statement also is disputed to the extent it implies or suggests that NMAC “buys paper,” that Action Nissan or other NMAC arrangers “sell paper,” that NMAC policy does not control the financing process, that NMAC arrangers “finance” automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 14)

36. After its sells a contract, Action Nissan does not collect monthly payments from the car buyers themselves. The finance company to which the contract is sold and assigned administers performance of the contract. (Adams dep., 122:20-123:21; see *also* Exhibit B.)

Response: Plaintiffs admit that all monthly payments are paid to the lender and the contract is administered by the lender. This statement is disputed to the extent it implies or suggests that NMAC “buys paper,” that Action Nissan or other NMAC arrangers “sell paper,” that NMAC policy does not control the financing process, that NMAC arrangers “finance” automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 14)

37. The Casons make all of their monthly payments under their contract directly to NMAC. (Exhibit B, p.2.)

Undisputed.

38. With NMAC, the dealer is paid in full for the price of the car within a few days, and then receives a predetermined amount of the finance charge on the last day of the month in which the contract was booked (this has varied over time). (Declaration of Robin Norris, attached as **Exhibit F, ¶ 5.**)

Response: This statement is disputed to the extent that it misstates how long it takes for a dealer to get paid for an automobile that is financed by NMAC. As the Casons' transaction indicates, Action, Nissan, Inc. prepared a NMAC sight draft payable to Action Nissan, Inc. in the amount of \$28,031.50 on the same day the credit approval was obtained and the NMAC contract was signed. (Sight Draft # 200830, Exhibit 9 to Plaintiffs' Motion for Class Certification; Deposition of Connie Brister, 73:24 - 76:13)⁵ This statement also is disputed based on the mis-characterization that the dealer receives a "predetermined amount of the finance charge." If the dealer does not markup the buy rate, NMAC pays the dealer a \$150.00 fee for arranging/originating the transaction. (Deposition of Connie Brister, 117:6 - 117:9) If the dealer marks up the buy rate, the dealer splits the markup with NMAC as a commission for arranging the loan in lieu of being paid a fixed fee. The proper characterization is that the dealer and NMAC split the finance charge markup, the portion above the buy rate, on an approximately 75/25 basis. (Deposition of Connie Brister, 103:22 - 104:18, "[I]t's a markup that the dealer elected. He elected to mark it up. It was his choice. So he gets anything over what our buy rate is. Q. Does he get to keep it all? A. No. Q. O.k. A. At this time in this particular deal, in the statement that we're looking at, it was a 75/25 split. The dealer gets 75 percent. We retain 25, and the dealer does not have an option of earning that 25 percent.... Q. . . . Under this example here, did NMAC profit as a result of the dealer marking up the interest rate? A. Yes, we profit.") (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

39. Presently, the dealer must repay to NMAC the fee owed for a Contract if the customer fails to make three monthly payments to NMAC. (Charles dep., 176:8-24; Norris Declaration,

⁵ This method subsequently has been replaced with electronic fund transfers. (*Id.*)

Exhibit F, ¶ 5.)

Response: This statement is disputed to the extent that it contradicts NMAC's non-recourse financing plan:

If a Contract is canceled, prepaid, charged off or terminated for any reason within 30 days after the date NMAC enters such Contract on its books, no Dealer Commission shall be owed or paid with respect to such Contract....Thereafter, no additional Chargebacks shall be made.

NMAC's Retail Plan - Without Recourse, ¶ 1 (b), Exhibit G to NMAC's Statement of Undisputed Facts.

This statement also is disputed to the extent that it mis-characterizes the dealer's portion of markup as a "dealer's fee" rather than as a commission. (See Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 38, Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

40. At the time of the Casons' contract, NMAC paid dealers 75 percent of the difference between the APR and the buy rate and did not pay 25 percent. (Deposition of Connie Brister, "Brister dep.," 104: 13-18.) The dealer's fee could be forfeited if the customer failed to make as few as only one of the monthly payments on the Contract. (Norris Declaration, Exhibit F, ¶ 5.)

Response: This statement is disputed to the extent that it contradicts NMAC's non-recourse financing plan:

If a Contract is canceled, prepaid, charged off or terminated for any reason within 30 days after the date NMAC enters such Contract on its books, no Dealer Commission shall be owed or paid with respect to such Contract....Thereafter, no additional Chargebacks shall be made.

NMAC's Retail Plan - Without Recourse, ¶ 1(b), Exhibit G to NMAC's Statement of Undisputed Facts.

This statement also is disputed to the extent that it mis-characterizes the dealer's portion of markup

as a “dealer’s fee” rather than as a commission. (See Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 38, Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 14)

41. NMAC pays the dealer the fee for the Contract on the last day of the month in which the Contract is booked, but NMAC collects the interest due on the retail installment contract over the term of the contract (usually anywhere from 36 to 72 months), provided the contract is not prepaid or does not go into default. (Norris Declaration, Exhibit F, ¶ 5, 6.)

Response: This statement is disputed to the extent that it characterizes the dealer’s portion of markup as a “dealer’s fee.” If the dealer does not markup the buy rate, NMAC pays the dealer a \$150.00 fee for arranging/originating the transaction. (Deposition of Connie Brister, 117:6-117:9) If the dealer marks up the buy rate, the dealer splits the markup with NMAC in lieu of being paid a fee. (See Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 38, Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 14)

NMAC’s tiered-rate financing program

42. NMAC purchases retail installment contracts from Nissan dealers throughout the United States. (Brister dep., 27:17-28:14, 158:7-11.)

Response: This statement is disputed to the extent that it attempts to assert that NMAC “purchases” contracts as opposed to financing automobiles. The citation to Ms. Brister’s testimony reveals how NMAC’s own management naturally describes NMAC as a lender before she caught herself and then re-characterized NMAC’s involvement as only that of a “purchaser.” NMAC does not “purchase” retail contracts. (See Plaintiffs’ Summary of Disputed Facts, pg. 48, and Plaintiffs’

Response to NMAC's Statement of Undisputed Facts, No. 14)

43. NMAC is one of the finance companies to which Action Nissan sells its retail installment contracts. (Charles dep., 40: 16-41: 14, see *also* Retail Plain- Without Recourse between NMAC and Action Nissan, attached as **Exhibit G.**)

Response: This statement is disputed to the extent that it attempts to assert that Action Nissan "sells its retail contracts." The plaintiffs do not dispute that Action Nissan arranges/originates loans for various lenders. When arranging/originating a transaction for NMAC, Action Nissan is required to use NMAC's forms and follow NMAC's rules, including its markup policy. When arranging/originating a transaction for another lender, Action Nissan is required to follow the rules and use the forms of that lender. The record is clear that Action Nissan arranges credit through non-recourse lenders. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

44. There is open competition among finance companies for the business of purchasing retail installment contracts relating to the financing of automobiles. (Adams dep., 149:50-150:6.)

Response: This statement is disputed to the extent that it attempts to assert that non-recourse lenders are simply "purchasing retail installment contracts" from arrangers/originators like Action Nissan. (See Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 43, Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

45. NMAC is not Action Nissan's primary financing source. (Charles dep., 41:3-6.)

Response: This statement is disputed to the extent that the statement implies or suggests that Action Nissan provides financing for any customer. (See Plaintiffs' Response to NMAC's Statement

of Undisputed Facts, No. 43, Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

46. NMAC's share of retail installment sales contracts from Nissan dealers in Tennessee has fluctuated considerably over time, ranging from a high of 51 percent in 1995 to a low of 12 percent in 1997. (Declaration of Randy Brown, "Brown Declaration" attached as **Exhibit H**, ¶ 4.)

Response: The plaintiffs do not dispute that the number of NMAC automobile finance transactions in a particular state is subject to periodic fluctuations:

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 purchase? 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)

47. NMAC has no control over the many deals Action Nissan chooses not to offer to NMAC. (Adams dep., 134:6-10.)

Response: This statement is disputed to the extent it implies or suggests that NMAC "buys paper," that Action Nissan or other NMAC arrangers "sell paper," that NMAC policy does not control the financing process, that NMAC arrangers "finance" automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs'

⁶ For the reasons stated throughout many of these responses, the plaintiffs dispute NMAC's characterization of its automobile financing business as "buying paper."

Response to NMAC's Statement of Undisputed Facts, No. 14)

48. When evaluating the credit application of a particular buyer, NMAC separates accepted transactions into one of three or four credit risk tiers. Buyers whose credit profiles indicate the best credit risk are assigned to the tier with the lowest buy rate, and those buyers whose credit profiles indicate greater risk of non-payment are assigned to a tier with a correspondingly higher buy rate. (Deposition of Chris O'Bannion ("O'Bannion dep."), 32:25-33:14, 55:22-56:19, 57:7-9, 58:18-24; NMAC Retail Financing Plan Rate Sheet, effective 8/1/95, attached as **Exhibit I**.)

Undisputed.

49. When evaluating an application, NMAC scores an applicant for the highest permissible rate within a tier, assuming that the dealer has charged the customer the maximum APR allowed for the tier. (Declaration of Chris O'Bannion, attached as **Exhibit J**, ¶ 3.)

Response: The plaintiffs do not dispute this statement for purposes of Summary Judgment except to the extent that it imprecisely paraphrases what Mr. O'Bannion said in the referenced paragraph. ("For all applications, the maximum APR allowed for a tier is used as a variable or determinant in the credit decision process, either by NMAC's internal automated credit decision system or by an NMAC credit analyst.") Based on Mr. O'Bannion's statement, it is clear that the allowable APR cannot be determined until after NMAC completes its credit analysis and makes its tier assignment, since "maximum allowable APR for a tier" is a variable in tier assignment.

50. Except for promotional financing programs as described in ¶ 51 below, at the time of the Casons' loan, NMAC would not purchase any contract where the maximum permissible APR set by the dealer exceeded NMAC's buy rate by more than three to five percentage points, depending on the tier in which an applicant was placed. (Adams dep., 46:10-15, 47:5-8; Brister dep., 140:6-23.)

Response: This statement is disputed. Plaintiff admits that NMAC has markup rules and limitations. However, NMAC's statement ignores tier movements. NMAC gives dealers the authority to move customers to a more expensive tier. An NMAC dealer can move a person downward to a 'more expensive tier, but cannot move a customer upward to a less expensive tier. (Deposition of Connie Brister, 88:16 - 91:1; Exhibit B, NMAC Policies and Procedures #306 at 8, "Dealers may move customer downward in tier, but must comply with ALL terms of the new tier; including buy rate, advance, CAP, term, and maximum APR.") Among the race coded accounts analyzed by Dr. Lindsey in this case, there were 118 persons who were moved from Preferred (A) or Standard (B) to Special (C). As a result, those customers were marked up greater than NMAC's "theoretical" markup limits of 3 or 5 points. (See Dr. Cohen's Supplemental Report, ¶ 3, collective Exhibit 7 to Plaintiffs' Response in Opposition to Exclude the Report of Dr. Lindsey) This statement also is disputed to the extent it implies or suggests that NMAC "buys paper," that Action Nissan or other NMAC arrangers "sell paper," that NMAC policy does not control the financing process, that NMAC arrangers "finance" automobiles, or that NMAC arrangers make credit risk assessments. (See Plaintiffs' Summary of Disputed Facts, pg. 48, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, No. 14)

51. From time to time, NMAC offers various programs under which there can be no markup or only a limited percentage markup of the finance rate – for example, special low financing rates for particular models of Nissan cars, special financing rates for college graduates, and special financing rates for "Marquee Tier" customers. (Exhibit I; Adams dep., 124: 10-24.)

Response: This statement is disputed. Under NMAC's retail financing system, dealers have the discretion to markup all customers, whether or not there is a special program. This factual

dispute has been extensively briefed by the plaintiffs in response to NMAC's Motion to Exclude Dr. Lindsey's report. Specific portions are repeated herein.

There is a Marquee *Rate* that NMAC does not allow a dealer to mark up but there is no such thing as a *separate and distinct* Marquee *tier*. Under the rate plan cited, there are only three tiers: Preferred, Standard and Special. (i.e. A, B and C). For customers in the Preferred (A) *tier*, NMAC grants the dealer total discretion to give the customer the Marquee *rate* (.5% lower buy rate) and no markup, or to give them the Preferred *rate* and a markup:

A preferred call is the same as marquee. They had the option of either going – writing it at preferred and marking it up three, or whatever they want to mark it up; the max is three. They could mark it up a half or they could mark it up a point, or they could just elect to do a marquee and not make anything.

(Deposition of Connie Brister, 113:17 - 113:23; *see also* 111:3 - 112:5, 113:14 - 113:23)

Even customers eligible for special APR contracts are subject to markup. NMAC, under its policy, grants the originating dealer the sole authority to give the customer the special APR or to use the standard markup program. (Deposition of Connie Brister, 175: 13 - 177: 17) Thus, it is true to say a “Special APR” could not be marked up but it is entirely untrue to say a customer who qualified for a “Special APR” could not be marked up:

Q. The recent program, if Nissan Pathfinders [are] advertised at 1.9, and the dealer wants to finance them through [NMAC] at 15 percent, and assume that's within the tier classification, it's okay with NMAC?

A. And if it's all right with the customer. [OBJECTION] If the customer wants to go ahead and do that, you know, because he's negotiating that with the customer.

(*Id.*, 177:7 - 177:17)

The factual premise behind NMAC's statement of undisputed fact not only is contradicted by NMAC's 30(b)(6) witness, but plainly is contradicted by NMAC's own written policies:

NMAC's "ENJOY THE RATE" PROGRAM

Options: Mark-up is not allowed in conjunction with the "Enjoy the Rate" Program. However, *if you would like to mark-up the rate*, please use NMAC's Published Rates as defined in Rate Card # 8-1-0100.

2. **You** may use **either** the Enjoy the Rate Program **or** the Published Rates. Please see NMAC Rate Card #8-1-0100 for the most recent Published Rates.

(Exhibit C, Bulletin 8-1-0107; Bold and underlining appear in NMAC's document; italics added.)

Each customer who receives a special APR is equally as subject to markup as a customer who does not receive a special APR. Under NMAC's markup policy, the dealer has the discretion and the incentive to impose markup on everyone.

52. NMAC evaluates credit applications through a sophisticated computerized scoring system that analyzes a variety of credit risk factors to predict an applicant's credit worthiness. (O'Bannion dep., 15:15-16:5, 18:8-14, 35:1-36:24.)

Undisputed.

53. NMAC is prohibited from requesting any information regarding an applicant's race. See Federal Reserve Board Regulation B to the Equal Credit Opportunity Act ("Regulation B"), 12 C.F.R. § 202.5(d)(5).

Response: The plaintiffs do not dispute that creditors are prohibited from requesting an applicant's race at the application stage of a consumer transaction. This statement is disputed to the extent that it suggests or implies that there is a prohibition against NMAC race coding samples of its credit portfolio periodically to determine the effects of its credit pricing systems. NMAC's own

expert readily admits that there are various methods available for race coding, that race coding is relatively simple and that NMAC in house counsel has race coded thousands of accounts in conjunction with this case. (Deposition of Dr. Thornton, 71: 11 - 75:8; see also deposition of Connie Brister, 70:20 - 71: 13)' If NMAC had any concern regarding the impact of its pricing policies on minorities, it could legally monitor the effects of its pricing policies. This statement also is disputed to the extent that it suggests or implies that information known to NMAC dealers who are arranging/originating NMAC transactions pursuant to NMAC's policies and procedures are not attributable to NMAC. (See Plaintiffs' Summary of Disputed Facts, pg. 48) NMAC is the only true lender in the transaction. NMAC advertises and promotes the availability of NMAC financing at Nissan dealers and uses its marketing power to generate finance contracts in conjunction with those dealers. NMAC refers to its dealers as "financial partners" and stocks its dealers with all of the forms and brochures needed to represent NMAC. (*Id.*) NMAC also has various approval systems in place that permit NMAC dealers to arrange/originate NMAC transactions without NMAC's participation in the evaluation process. (*Id.*) Finally, NMAC has known or should have known for years that its commission driven subjective pricing system disadvantages African Americans and other minorities. (Report of Dr. Calvin Bradford)*

54. All of NMAC's evaluations of credit applications are performed without any knowledge of the applicant's race. Nothing on the NMAC credit application indicates an applicants

⁷ For example, copies of drivers licenses that are provided to NMAC by dealers as part of the financing process are electronically imaged by NMAC. (*Id.*)

⁸ Dr. Bradford, plaintiffs' expert, is a sociologist who has extensive experience in fair lending issues. Dr. Bradford's report, which is being filed contemporaneous with these responses, opines that it is common knowledge in the lending industry that commission driven subjective pricing systems adversely impact minorities.

race. (Charles dep., 58:12-15, Brister dep., 50:7-51:10; Adams dep., 135:23-25.) NMAC never inquires about an applicant's race when evaluating credit applications. (Adams dep., 136: 1-3).

Response: This statement is disputed to the extent that it implies or suggests that NMAC is not aware of the discriminatory effects of its markup system or that information known to NMAC dealers who are arranging/originating NMAC transactions pursuant to NMAC's policies and procedures are not attributable to NMAC. (See Response to NMAC's Statement of Undisputed Facts, No. 53)

55. It is a violation of NMAC's policy to inquire about an applicant's race when evaluating credit applications. (NMAC's "Credit Discrimination Prohibitions Policy," attached as Exhibit K.)

Response: The plaintiffs do not dispute that Exhibit K is NMAC's formal policy. This statement is disputed to the extent that it implies or suggests that NMAC does not have race identifying information in its files or available for purposes of monitoring the effects of its markup system or that information known to NMAC dealers who are arranging/originating NMAC transactions pursuant to NMAC's policies and procedures are not attributable to NMAC. (See Response to NMAC's Statement of Undisputed Facts, No. 53)

56. The file that NMAC receives from the dealer may include a photocopy of the applicant's driver's license; however, NMAC does not require a copy of the license and does not receive this file until after it has completed its evaluation, placed the applicant in a credit risk tier, and agreed to purchase the contract. (Brister dep., 18:12-18, 19:5-22:7.)

Response: This statement is disputed only to the extent that NMAC characterizes its participation in the financing process as "purchasing a contract." (See Plaintiffs' Summary of

PLAINTIFFS' SUMMARY OF DISPUTED FACTS

An Explanation of NMAC's Automobile Financing System

The plaintiffs offer the following Summary of Disputed Facts which provides an explanation of NMAC's automobile financing system and supports plaintiffs' assertions that:

- (1) NMAC *finances* automobiles on a non-recourse basis (NMAC is not a "paper buyer" - dealers are *arrangers* who do not have credit risk);
- (2) NMAC contracts are NMAC specific (designed to be assigned only to NMAC);
- (3) NMAC's credit pricing policy authorizes *finance charge markup* (*i.e.* authorizes NMAC dealers to raise the NMAC contract rate in order to generate commissions which NMAC shares with the dealers);
- (4) *Finance charge markup* is totally subjective and is not based on credit risk factors;
- (5) Every NMAC contract is required to conform to NMAC policies, including NMAC's *finance charge markup* rules and limitations;
- (6) NMAC profits from *finance charge markup*; and
- (7) NMAC's financing system is uniform throughout the United States.

There are many components to NMAC's relationship with its dealer arrangers that, when viewed in totality, provide overwhelming evidence that NMAC is the only creditor in NMAC financed transactions and that NMAC's policies control the financing process. Because there are so many different components to NMAC's involvement in the process, it can only properly be explained through a comprehensive summary.

Determining who the primary creditor is in a transaction requires consideration of whose

policies and procedures control the transaction. Such a determination is factually based and requires an examination of the roles of the parties. There are clear distinctions in financing transactions between the roles of arrangers and creditors:

Each dealer arranged for the extension of credit but FMCC actually extended the credit. The facts negate any suggestion that the dealers anticipated financing any of these transactions. The sales were contingent upon FMCC's approval of the credit worthiness of the buyer. The acceptance of the contract and the assignment became operational simultaneously, and the assignment divested the dealer of any risk in the transaction. In short, we agree with the Court of Appeals that it would be elevating form over substance to conclude that FMCC is not a creditor...."

Ford Motor Credit Co. v. Cenace, 452 U.S. 155, 158, 101 S.Ct. 2239, 68 L.Ed.2d 744 (1981).

NMAC, like Ford Motor Credit Company, is a creditor and NMAC dealers are arrangers."

As recognized by the Supreme Court, credit arrangers do not approve credit, do not extend credit and do not incur credit risk. It is the creditors who actually approve credit, extend credit and incur credit risk. In the Ford Motor Credit decision, the Supreme Court recognized that there is no credit transaction until credit approval. The following sections (A-F) address various aspects of the

¹⁰ This case was discussing the definition of creditor under the Truth in Lending Act which is not applicable to this case. It is cited, not to argue the statutory definition of creditor under any particular act, but only to illustrate the fundamental difference between an arranger and a creditor.

¹¹ Q. What, or how, rather, would you characterize Action Nissan's role in the financing transaction regarding NMAC?

A. An arranger. (Deposition of Brent Adams, 76:8 - 76:21)

Q.... So in this transaction, which company would you say was the finance company?

A. Nissan Motor Acceptance Corporation is the finance company.

Q. Does Action Nissan [the dealer] ever operate as a finance company?

A. No. (*Id.*, 77:5 - 77:12)

See *also* Deposition of David Charles, 54: 16 - 55:2 1: "[I]t is my understanding that we originate the loans for NMAC."; 74: 13 - 75:4, "I guess you could consider us an agent for Nissan Motor Acceptance, to prepare the loan document and present it to them for approval."

relationship between NMAC and its dealers and provides authority for the plaintiffs' position that NMAC is a *participating* creditor rather than merely a "paper buyer" or assignee.

A. CONTRACTUAL RELATIONSHIP

There is a contractual relationship between NMAC and all of its non-recourse dealers titled "RETAILPLAN-WITHOUT RECOURSE." (Exhibit G to NMAC's Statement of Undisputed Facts; Deposition of David Charles, 54:3 - 54: 15) NMAC will only allow dealers who have signed written agreements to arrange/originate NMAC finance transactions. (Policies and Procedures, No. 301, pg. 5, Exhibit K to NMAC's Statement of Undisputed Facts) In explaining its arrangement with its dealers, NMAC refers to its dealers as "**financial partners:**"

Nissan Motor Acceptance Corporation is dedicated to working with you as a *financial partner* to help you build a more profitable business through sound finance plans, knowledgeable finance personnel, and, above all, complete and total customer satisfaction.

Exhibit F, Retail Plan Summary; emphasis added.

The dealer agreement incorporates by reference "Dealer Bulletins" (Rate Sheets) which are used periodically to convey "Buy Rates," "Maximum Markups," "Dealer Participation" amount, etc. (Exhibits 2-5, Plaintiffs Exhibits in Support of Motion for Class Certification) These documents provide the parameters under which Action Nissan and other dealers are authorized to arrange/originate NMAC finance transactions.

B. TRAINING AND PROGRAMMING OF DEALERS' COMPUTERS

The affiliation between NMAC and its dealers is much more than contractual. NMAC provides training to its dealers through a "dealer hotline"¹² which includes training related to properly

¹² NMAC's Response to Request for Admission No. 92. ("[Objections.] NMAC admits only that it maintains a 'dealer hotline' telephone number through which it answers dealer's questions

filling out NMAC required forms. NMAC sends computer programmers to its dealers to program the dealers' computers to work with NMAC forms. (Deposition of Connie Bister, 26: 17 - 27: 15, 29:2 - 29: 18, 56:3 - 56:22) NMAC provides training to dealers, including sessions regarding "basic selling techniques." (See Exhibit 8, Position Description - Sales Representative, Plaintiffs Exhibits in Support of Motion for Class Certification)

C. NMAC / NMAC DEALERS - COORDINATION OF THE FINANCING PROCESS

NMAC credit applicants can initiate NMAC financing in one of several ways, all of which involve NMAC dealers.

1. NMAC's Internet Credit Approvals are Routed to NMAC Dealers

New customers can apply directly to NMAC over the internet and then are referred to a NMAC dealer to complete the financing transaction:¹³

*Signature*FINANCING offers attractive rates and terms,¹⁴ fast response, and financing that is simple, flexible, and convenient....

You'll find *Signature*FINANCING from NMAC available at over 1,100 Nissan retailers nationwide. For the location of the one nearest you, click on the Retailer Locator or call 1-800-NISSAN1. Stop by and ask about NMAC's *Signature*FINANCING plans....

- **No Hassles** - Apply for credit from the privacy of your home or office computer. No Long forms to fill out and mail: Our application process takes

regarding NMAC financing.“)

¹³ NMAC's Response to Request for Admission No. 109. (“[Objections.] NMAC admits only that potential Nissan car buyers may pre-qualify for NMAC financing pre-approval on the web site.“); NMAC's Response to Request for Admission No. 110. (“[Objections.] NMAC admits only that it maintains a website, www.Nissan-USA.com, and that it has characterized its rates and terms as ‘attractive’ on that site.“)

¹⁴ According to NMAC's position in this lawsuit, it doesn't even have financing rates. NMAC appears to have invented the term, “wholesale rates,” for purposes of this lawsuit.

less than five (5) minutes! . . .

[Q]ualified applicants will receive, in the mail, a certified **NMAC Pre-Approval Certificate** containing:

- The Monthly Payment Amount that they are pre-approved for credit from NMAC.
- A **Pre-Approval Confirmation Number** that will be recognized at any participating Nissan retailer.

IMPORTANT: The certified Pre-Approval Certificate must be brought to a participating Nissan Retailer to activate the pre-approval!...

How Do I Use the Pre-Approval Certificate?

Take the certified NMAC Pre-Approval Certificate with you while you check out the latest Nissan models! With certificate in hand, you can shop for that new or qualified pre-owned Nissan model at a participating Nissan retailer with confidence, knowing exactly how much credit has been pre-approved for your next purchase or lease!

NMAC's World-Wide Web Pages, collective Exhibit G.

2. NMAC's Pre-approvals are routed to NMAC dealers.

Existing customers of NMAC who are pre-approved by NMAC for additional financing are referred by NMAC to a dealer to complete the financing transaction." NMAC's pre-approval program is an on-going program coordinated by NMAC's Marketing Department in conjunction with NMAC dealers. (Exhibit H, NMAC Pre-Approval Program, "An attractive feature of this program is that the customer avoids the conventional process because he/she will have received a pre-approval notification letter with a specified monthly payment amount.")

¹⁵ NMAC's Response to Request for Admission No. 111. ("[Objections.] NMAC admits only that it sometimes pre-qualifies NMAC customers for purchase of their retail installment contract with a dealer.")

3. **Automatic credit bureau approvals.**

NMAC allows its dealers to pull credit bureau reports on customers who desire to finance automobiles and, provided they meet certain conditions, to automatically approve them for NMAC financing without going through the application process. (Deposition of Chris O'Bannion, 22: 13 - 26:16) A customer does not have to be an existing customer of NMAC to qualify for automatic credit bureau approval. The dealer is permitted to approve a customer without interaction with NMAC. Based on the industry standard credit bureau score on the customer's credit bureau report, the dealer also can determine what credit tier the person is in for purposes of determining finance charge markup. (Id.)

4. **. All NMAC finance transactions are arranged/originated at NMAC dealers.**

Customers who do not apply over the inter-net and are not otherwise pre-approved by NMAC, can apply for financing at any NMAC dealer. From the moment that an NMAC dealer begins arranging a NMAC transaction, NMAC policies and procedures govern:

NMAC employees, and the dealers from which NMAC accepts applications for retail and lease contracts, must not request the following information as part of the application process:

...

NMAC employees, and the dealers from which NMAC accepts applications for indirect retail and lease contracts, may request the following information as part of the application process:

...

Approved dealers are to submit a completed application for credit on the appropriate NMAC form or other application form approved by NMAC.

Nissan Motor Acceptance Corporation, Policies and Procedures, No. 301, Exhibit K to NMAC's Statement of Undisputed Facts.

As arrangers/originators, NMAC dealers submit applications to NMAC via fax and NMAC

faxes back the credit decision to the dealer. (Deposition of Brent Adams, 59:9 - 59: 18; Deposition of Connie Brister, 147:17 - 148:20; Deposition of Chris O'Bannion, 15:1 - 17:10, 19:12 - 21:18) Regardless of how NMAC credit approval is obtained, NMAC dealers are the only place where NMAC loans are arranged/originated. (See Deposition of Connie Brister, 168:6 - 169:9.)

NMAC financing¹⁶ and leasing programs are available exclusively through participating Nissan retailers. All NMAC consumer loan” and lease programs require credit application to, and approval by, NMAC as conditions for program enrollment and participation. The terms and conditions of the financing available to you may vary¹⁸ depending upon your credit history, income and other factors.¹⁹ Nissan Motor Acceptance Corporation reserves the right to make changes at any time, without prior notice, to vehicle financing and leasing programs offered by NMAC. See your Nissan retailer for complete program details.”

NMAC's World-Wide Web Pages, collective Exhibit G; emphasis added.

Since NMAC dealers are the exclusive source to arrange/originate all of NMAC's financing transactions, NMAC furnishes them with NMAC Credit Applications and other finance related forms.²¹ All NMAC finance customers are required to apply for credit with NMAC, which

¹⁶ NMAC's world-wide web marketing message, which describes NMAC as an automobile finance company who makes consumer loans, is starkly different from the position it is taking in this lawsuit.

¹⁷ *Id.*

¹⁸ Contrary to its position in this lawsuit, NMAC's world-wide web site informs the public that NMAC's pricing policies affect the cost of credit to the customer.

¹⁹ Based on the reports of Drs. Lindsey and Cohen, one of the most significant factors is race.

²⁰ Consistent with its world-wide web page, NMAC advertisements refer NMAC customers to NMAC dealers to obtain details regarding NMAC financing.

²¹ Interrogatory No. 9: Please list all forms supplied by NMAC to dealers pursuant to the NMAC automobile financing program, and for each form, please indicate any charge or cost to the dealer.

specifically authorizes NMAC to check their credit and are required to sign a retail installment contract that is NMAC specific and which contains an NMAC assignment clause:

Yes, it is our policy to provide forms because there is certain forms that, due to verbage (sp) with NMAC, that they have to use our forms... [W]hen they sign it over, it shows . . . our name on it, on the contract, Nissan Motor Acceptance up here, and then it shows on the back that they are assigning this contract to us...Yes, we make sure that they've signed [a credit application] and that they know we are going to be checking their credit.

(Deposition of Connie Brister, 65-2 - 67-1; emphasis added)²²

Because the assignment clause is specifically drafted to assign the contract to NMAC, the contract is NMAC specific and cannot be used for any other lender.

The actual finance rate that the customer is charged is a combination of buy rate²³ and allowable markup, both of which are determined by NMAC. (Deposition of Fred Alexander, 69:4-69:24, Deposition of Brent Adams, 42: 17 - 43:7) The buy rate is based on the customer's credit tier.²⁴

ANSWER: [Various Objections] Without waiving the foregoing objections, the Retail Finance Documents used by NMAC in Tennessee are listed in the Dealer Bulletins produced in response to Document Request No. 5. They include: Application for Credit, Retail Installment Contract, Agreement to Provide Insurance, Co-Signer Agreement, Corporate/Partnership Resolution and Warranty Disclaimer. Dealers are not charged for the forms. NMAC'S Response to Plaintiffs' Second Set of Interrogatories, Interrogatory No. 9; see *also* Deposition of David Charles, 57:6 - 57:15, 129:24 - 129:13; Deposition of Connie Bister, 63:8 - 64:6, 64:18 - 67:1, 67:9 - 69:9, 71:14 - 74:12).

²² NMAC's Response to Request for Admission No. 55. ("[Objections.] NMAC admits only that currently it provides dealers, among other forms, with a form credit application, a form retail installment contract and an insurance form.")

²³ Buy rate is the minimum rate set by the lender. (Deposition of Fred Alexander, 50:25 - 51:3; Deposition of Brent Adams, 40: 1 - 40:7, "The term buy rate is the least amount of percentage interest that you could charge a customer to get them approved for a loan.")

²⁴ As the risk-bearer, NMAC employs a sophisticated and highly automated credit analysis process designed to categorize NMAC applicants into credit risk tiers. (Deposition of Chris O'Bannon, 35: 1 - 36:24, 37: 13 - 54: 19) In determining the appropriate tier, NMAC considers

NMAC's objective credit scoring system initially determines the customer's credit risk tier. N-MAC, however, allows dealers to move customers to a more expensive tier but prohibits them from moving customers to a less expensive tier. (Deposition of Chris O'Bannion, 65:12 - 66:17, Deposition of Connie Brister, 88: 16 - 91: 1; Exhibit B, NMAC Policies and Procedures #306, pg. 8, "Dealers may move customer downward in tier, but must comply with ALL terms of the new tier; including buy rate, advance, CAP, term, and maximum APR.") Rate sheets reflecting the buy rate and permissible markup for each tier is provided to NMAC dealers by NMAC. (NMAC Retail Financing Plan, No. 95-215, Exhibit I to NMAC's Statement of Undisputed Facts) Markup is added to create dealer and NMAC profit and is never based on any credit risk considerations:

Q. [Without recourse] And does that mean that the risk of payback is not the risk of Action Nissan?

A. Correct.

Q. And does that mean that NMAC bears all the risk?

A. Correct."

Deposition of Brent Adams, 49: 15 - 54:6; see also Deposition of Fred Alexander, 56:25 - 57: 14.

Q. . . . And how much more would he [finance manager], typically, add [finance charge markup]?

A. Depends on the lender.

Q. . . . And how does that affect it?

A. Each lender has their own limitations, and rules and guidelines. (Deposition of

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. (*Id.*)

Brent Adams, 42:21 - 43:2)

Q. How does the finance manager know that he has the right to add zero, one, two, three, four, or five [markup points] to a NMAC transaction?

A. It is the Nissan Motor Acceptance Corporation dealer agreement with the dealer. (*Id.*, 49:1 - 49:7)

Q. So am I correct, then, it is still ultimately NMAC determining, ultimately, whether they qualify for that program?

A. Yes. You still have to get approval.

Q. So does it really work the same way, in that you gather information, you send it to NMAC, and you await their decision?

A. Yes.

Q. Now, if the finance manager was wrong on the tier -- let's assume that he thought the customer was going to get approved [by NMAC] for the best tier, and, in fact, they got approved for the worst tier, would that require redoing the documents?

A. Yes. (*Id.*, 62:2 - 62:8)²⁵

In addition to customer finance forms, NMAC provides dealers with sight drafts that allow dealers to draft funds from NMAC's bank account for automobiles financed by NMAC. (Deposition of Connie Brister, 73:24 - 73:13)²⁶ This payment mechanism allows dealers to be paid for the automobile virtually instantaneously. However, NMAC dealers typically have to wait until the end of the month to receive their commission check for their percentage of finance charge markup.

D. NMAC'S MARKETING DEPARTMENT SUPPORTS NMAC DEALERS

NMAC supports its dealers with various marketing programs. In addition to internet

²⁵ NMAC's expert, Dr. Lindsey, acknowledges that everything is preliminary and subject to change until approved by NMAC. (Deposition of Dr. Thornton, 35:11 - 36:4)

²⁶ This method has been replaced with electronic fund transfers. (*Id.*)

marketing, NMAC promotes its retail financing through magazines, newspapers, television and direct mail, all of which must be consummated at NMAC dealerships.” NMAC also furnishes advertising materials and brochures to NMAC dealers for advertising purposes.²⁸ The purpose of NMAC’s marketing efforts is to create consumer demand for NMAC financing and to direct those consumers to NMAC dealers, the only place NMAC financing is available.

E. EXAMPLE OF NMAC FINANCING IN CONJUNCTION WITH A NMAC DEALER

The following example is based on the Casons transaction, which reflects the total involvement of NMAC with its arrangers/originators. The following is not based on any particular chronology. The chronology is irrelevant.²⁹ NMAC policies and procedures control the process regardless of the particular chronology of a transaction.³⁰ Simply stated, without NMAC’s approval and without adherence to NMAC’s policies and procedures, there is no transaction.

- a. Mr. and Mrs. Cason agreed to purchase a 1995 Nissan Pathfinder. (Retail Buyer’s Order, Exhibit E to NMAC’s Statement of Undisputed Facts) The Buyer’s Order was dated 08/24/95. Under the terms of the Buyer’s Order, **the agreement to purchase became effective only upon credit approval** by a lending institution. (*Id.*)

²⁷ NMAC’s Response to Request for Admission No. 58. (“[Objections.] NMAC admits only that its financing business has been promoted through some magazines, newspapers and television advertisements, as well as through direct mail campaigns.”)

²⁸ NMAC’s Response to Request for Admission No. 56. (“[Objections.] NMAC admits only that NMAC has provided advertising materials to dealers.”); NMAC’s Response to Request for Admission No. 57. (“[Objections.] NMAC admits only that from time to time it has provided brochures to dealers for advertisement purposes.”)

²⁹ See Plaintiffs’ Response to NMAC’s Statement of Undisputed Facts, No. 61

³⁰ NMAC’s expert, Dr. Thornton, acknowledges that dealers are required to adhere to the rules of NMAC’s financing program. (Deposition of Dr. Thornton, 41: 14 - 42: 19)

- b. Mrs. Cason signed a form that reiterated the conditional nature of the transaction. (Deposition of David Charles, 119:26 - 120:14; Exhibit I, "BUYER UNDERSTANDS THAT ACTION NISSAN, INC. IS NOT AGREEING TO FINANCE THIS VEHICLE AND THAT APPROVAL OF BUYER'S CREDIT BY A FINANCE INSTITUTION ACCEPTABLE TO ALL PARTIES IS AN EXPRESSED CONDITION OF THIS SALE. ALSO, BUYER AGREES THAT IN THE EVENT OF FINANCE CONDITIONING OF THIS DEAL, THE CONDITION MUST BE MET OR THE VEHICLE RETURNED TO ACTION NISSAN, INC. IMMEDIATELY.....BUYER UNDERSTANDS THAT ALLPAPERWORK WILL BE RELEASED FOLLOWING COMPLETE FINANCE APPROVAL.")
- c. Mr. and Mrs. Cason signed a NMAC credit application authorizing NMAC to check their credit. (Nissan Motor Acceptance Corporation Credit Application, Exhibit D to NMAC's Statement of Undisputed Facts) The application was not dated. The "PROPOSED FINANCING TERMS" on the NMAC credit application indicated that Action Nissan anticipated the Casons would be assigned to the Standard (STD) tier. (*Id.*)
- d. Action Nissan faxed the credit application to NMAC.³¹
- e. NMAC faxed a Credit Decision to Action Nissan informing Action that the Casons were approved. (Nissan Motor Acceptance Corporation Credit Decision, Exhibit N to NMAC's Statement of Undisputed Facts)³² The credit decision was made on 08/25/95 at 10:46:11. (*Id.*)³³ At this point, under the terms of the Buyers Order, the

³¹ NMAC's Answer to Third Amended Complaint, ¶ 70 ("NMAC admits only that on or about August 25, 1995, NMAC received a credit application on an NMAC form in plaintiffs name.")

³² NMAC's Answer to Third Amended Complaint, ¶ 71 ("NMAC admits only that on or after August 25, 1995, NMAC received and reviewed the credit application submitted in plaintiffs' name and that after review of the application, NMAC agreed to buy the plaintiffs' retail installment contract from Action Nissan upon certain terms and conditions.")

³³ Pursuant to its terms, the buyer's order became effective upon the execution of the Conditional Sales Contract and approval of the Casons' credit by NMAC. (Retail Buyer's Order, Exhibit E to NMAC's Statement of Undisputed Facts) The record is not clear whether the NMAC

agreement to purchase became effective.³⁴ NMAC's credit decision changed the Casons from the Standard (STD) tier that was originally anticipated by Action Nissan to the Special (SPL) tier. (Cf. "PROPOSED FINANCING TERMS" on the NMAC Credit Application, Exhibit D to NMAC's Statement of Undisputed Facts, to NMAC's Credit Decision, Exhibit N to NMAC's Statement of Undisputed Facts.)

- f. The Casons signed a NMAC contract, bearing a prominent NMAC logo dated 08/25/95. (Nissan Motor Acceptance Corporation - Simple Interest Retail Installment Contract - Tennessee, Exhibit B to NMAC's Statement of Undisputed Facts)³⁵ The back of the contract had an "ASSIGNMENT" clause that was designed to only allow assignment of the contract to NMAC. The contract APR was precisely the maximum allowed rate for a Special (SPL) tier customer purchasing the automobile the Casons purchased and financing it for 72 months. (Exhibit I to NMAC's Statement of Undisputed Facts, NMAC RETAIL FINANCING PLAN 95-215, 16.49% plus markup of 3.00% = 19.49% APR.)
- g. The Casons signed a NMAC Agreement to Provide Insurance, dated 08/25/95. (Nissan Motor Acceptance Corporation, Agreement to Provide Insurance, Exhibit J) The agreement was directed to "Nissan Motor Acceptance Corporation ("NMAC")."
- h. The Casons signed an insurance certificate. (Certificate of Insurance - Credit Life - Credit Disability, Exhibit K.) The insurance certificate listed Nissan Motor Acceptance Corp. as the "Creditor (First Beneficiary)"

contract agreement was signed before or after Action Nissan received confirmation that NMAC had approved the Casons' credit. The issue is irrelevant. Even if the NMAC contract had been prepared and even signed prior to NMAC's approval, it was conditional and subject to revocation or re-contracting under different terms.

³⁴ Deposition of David Charles, 76: 18 - 78: 14, "If NMAC did not approve the loan, then she would not have bought the car, because we weren't going to finance it for her."

³⁵ The front page of the contract contained language indicating it would be assigned to NMAC and instructed the Casons to direct all payments and questions concerning the terms of the contract to NMAC. (*Id.*) The back of the contract provide customers information regarding how to contact NMAC. (*Id.*, "To contact Nissan Motor Acceptance Corporation about this contract, call 1-800-456-6622.").

- i. The Casons signed a service agreement. (New Vehicle Mechanical Repair Agreement, Exhibit L) The service contract was dated 08/25/95 and listed Nissan Motor Acceptance Corp. as the Lienholder.
- j. A Tennessee Department of Safety Application for Certificate of Title and Registration was prepared, dated 8/25/95, listing Nissan Motor Acceptance Corp. as 1st Lienholder. (Application for Certificate Title and Registration, Exhibit M)
- k. Action, Nissan, Inc. prepared a Nissan Motor Acceptance Corporation sight draft payable to itself in the amount of \$28,031.50. (Sight Draft # 200830, Exhibit 9 to Plaintiffs' Motion for Class Certification)
- l. NMAC forwarded the original financing documents to NMAC, including a copy of the drivers license containing a photograph of Mrs. Cason. (See Deposition of Connie Brister, 70:20 - 71:13)³⁶
- m. The Certificate and Title Registration was filed with the State of Tennessee recording NMAC as the 1st Lienholder.³⁷
- n. Action Nissan estimated that the markup of 3.00% points would generate a finance charge markup of \$3,504.24, all of which the Casons were required to pay directly to NMAC. As a result of the markup, Action Nissan estimated that it would receive a commission of \$2,628.18, approximately 75% of the estimated total commission. (See deposition of David Charles, 87:5 - 88:8) Consistent with industry practices, the markup commission is shared by every person involved in the transaction and all managers. (See deposition of Brent Adams, 37:15 - 37:24; Deposition of David Charles, 29: 15 - 30:25)
- o. NMAC mailed Action Nissan a commission check on September 30, 1995 which

³⁶ Copies of drivers licenses that are provided by dealers are electronically imaged by NMAC. (Id.)

³⁷ Action Nissan was not a lienholder at any point in the transaction.

included a commission of \$2,640.06 on the Cason transaction. (Consumer Credit Dealer's Statement, Exhibit N) NMAC collected the entire \$3,504.24 markup from the Casons and retained the difference as profit. (Deposition of Connie Brister, 105:16 - 105:20, Q. [D]id NMAC profit as a result of the dealer marking up the interest rate? [Objection] A. Yes, we profit.")

As the above example transaction indicates, everything a non-recourse dealer does is conditional until lender approval. (Deposition of Brent Adams, 18:9 - 19:11; 24:2 - 25:6; 63:11 - 63:24; 76:8 - 78:3; 108:5 - 108:24; Deposition of David Charles, 54:16 - 55:21, 74:13 - 76:4, 76:18 - 78:14, 119:16 - 121:4; *see* Exhibit I: "BUYER UNDERSTANDS THAT ALL PAPER WORK WILL BE RELEASED FOLLOWING COMPLETE FINANCE APPROVAL.") If the lender adds conditions, the conditions must be met. (Id.: "ALSO, BUYER AGREES THAT IN THE EVENT OF FINANCE CONDITIONING OF THIS DEAL, THE CONDITION WILL BE MET OR THE VEHICLE RETURNED TO ACTION NISSAN, INC. IMMEDIATELY.") If a loan has been arranged/originated for a particular lender and that lender doesn't approve or approves different terms, the deal is void by its own terms and has to be processed using the forms and guidelines for the approving lender. (Deposition of Brent Adams, 38:21 - 39:21; 62:2 - 62:13; Deposition of Fred Alexander, 55:2 - 55:12)

As reflected above, NMAC was a *participating* creditor. NMAC was the only creditor. "Buying paper" and "selling paper" is nothing but industry vernacular. NMAC's involvement is "hands on," not detached.

F. THE SYSTEM IS UNIFORM THROUGHOUT THE COUNTRY.

Since it is NMAC that has the capital that is being loaned, it is NMAC that controls the process and NMAC that requires uniformity with its procedures:

Q. And to your knowledge, is this kind of system or way about arranging customer financing uniform, to the extent of your knowledge, between dealerships?

A. It is consistent.

Deposition of Brent Adams, 72:7 - 72: 11.

[Objections.] As to the credit approval process, NMAC admits only that there are no significant differences between states in the way that NMAC receives credit applications, reviews and analyzes credit applications and assigns applicants to the appropriate tier, except that from time to time NMAC may choose to limit the number of retail installment contracts it purchases in certain states.

NMAC's Response to Request for Admission No. 86.

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.

RESPECTFULLY SUBMITTED:
ATTORNEYS FOR PLAINTIFFS



CLINT W. WATKINS (BPRN 15728)
Law Office of Clint W. Watkins
5214 Maryland Way
Suite 402
Brentwood, TN 37027
(615) 376-7000

MICHAEL E. TERRY (BPRN 3856)
Terry & Gore
209 Tenth Avenue South
Suite 3 10 Cummins Station
Nashville, Tennessee 37203
(615) 256-5555

NATIONAL CONSUMER LAW CENTER
Stuart Rossman
Gary Klein
18 Tremont Street, Suite 400
Boston, MA 02108
(617) 523-8010

WYMAN O. GILMORE (BPRN 19906)
Gilmore Law Office
116 Court Street
P.O. Box 729
Grove Hill, AL 36451
(334) 275-3115

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 10, 2000, a true and exact copy of the foregoing document has been forwarded to the persons listed below:

Mr. Charles J. Mataya
Ms. **Karyn** C. Bryant
Boult, Cummings, Conners & Berry
414 Union St Ste 1600
PO Box 198062
Nashville TN 372 19-8062

Ms. **Anne P.** Fortney
Mr. **Markus** B. Heyder
Lovells
Market Square North
401 9th Street, NW, Suite 1150
Washington DC 20004

Mr. James R. Bruinsma
Lovells
330 N. Wabash Avenue
Suite 1900
Chicago IL 60611

by the method identified as follows:

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CLINT W. WATKINS