Q.2 Sample Answer Opposing Leave to Appeal Grant of Certification

Attorneys for Plaintiffs-Appellees
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[*Consumer 1*] and [*Consumer 2*],
On behalf of themselves and all others similarly-situated,

Plaintiffs-Appellees

v.

Nissan Motor Acceptance Corporation,

Petitioner/Defendant-Appellant.

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir.R.26.1, Plaintiffs-Appellees make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? ***NO***

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? ***NO***

_____ _____
(Signature of Counsel) (Date)

Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure and Rule 5 of the Federal Rules of Appellate Procedure, plaintiffs-appellees [*consumer 1*] and [*consumer 2*] ("plaintiffs"), on behalf of themselves and all others similarly situated, respectfully submit this Answer in Opposition to the Petition for Leave to Appeal (the "Petition") under Federal Rule of Civil Procedure 23(f) of the Defendant Nissan Motor Acceptance Corporation ("NMAC" or the "Company") from the United States District Court for the Middle District of Tennessee's September 23, 2000 Order certifying the Class.

INTRODUCTION

This is a class action brought under the Equal Credit Opportunity Act, 15 U.S.C. §1691

et seq. ("ECOA"). Plaintiffs allege, and have demonstrated, that a specific credit financing policy--referred to as NMAC's "Finance Charge Markup Policy"--established and implemented by NMAC, has a significant discriminatory impact on African-American customers. Relying on extensive discovery and detailed expert reports (and counter-reports), the parties cross-moved: NMAC for summary judgment and plaintiffs for class certification. On August 23, 2000, the District Court denied NMAC's motion to strike plaintiffs' expert reports and NMAC's motion for summary judgment, and granted plaintiffs' motion for class certification. NMAC filed a petition for leave to appeal under FRCP 23(f). Plaintiffs respectfully submit this answer in opposition to NMAC's Petition.

STATEMENT OF THE CASE

NMAC, a wholly owned subsidiary of Nissan North America, Inc., is in the business of financing automobile purchases. Plaintiffs contend that NMAC has established and implemented a discriminatory credit pricing system, which includes a component referred to as its "finance charge markup policy." Pursuant to that policy, when a customer is interested in financing an automobile through NMAC, upon its receipt of the customer's application, NMAC performs a thorough risk analysis and communicates to its dealers an annual percentage rate based on the applicant's creditworthiness. This rate is not disclosed to the unwitting applicant--indeed, NMAC's policy forbids its disclosure. The dealer is then authorized to tag onto that risk-based rate an *additional non-risk* charge referred to as "markup"[1] up to and including an upper limit set by NMAC. All markup charges are paid directly to NMAC, and the amount of profit made on the markup is then split between NMAC and the dealer, according to a percentage again determined by NMAC.

Expert statistical analysis of NMAC data indicates a statistically significant disparity between the amount of markup imposed on creditworthy African-Americans and that charged white applicants. Plaintiffs' experts determined that the statistical disparity is not consistent with chance, and, rather, is consistent with race discrimination. Moreover, the markup imposed on African-Americans is not affected by which dealer the customers do business with nor any individual customer's creditworthiness.

Thus, this case is a paradigmatic disparate impact case under ECOA: plaintiffs challenge a nationally uniform credit pricing policy that causes class-wide racial disparities in the price of credit to African-American customers of NMAC. NMAC does not dispute plaintiffs' statistical calculations or even the existence of a racial disparity, but instead blames the dealers. However, NMAC is a creditor under ECOA, and is thus responsible for the effects of its credit pricing policies. This conclusion was fully supported by the United States Department of Justice, in a brief to the District as *amicus curiae*. (Docket Nos. 166, 179.)

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[1] Finance charge markup is analogous to origination "points" being added to a mortgage loan, but differs from mortgage points in that it is completely hidden within the finance charge and the finance customers have no idea that the surcharge is being added. Finance markup is *over and above* all risk-based finance charges that customers are assessed based on their individual circumstances. Markup, based on the evidence in the record, is a totally subjective charge and is not based on any credit risk factors.

Simply stated, plaintiffs contend that NMAC's markup policy violates ECOA, a statute which guarantees to citizens that the extension of credit--and the terms thereof--will be made without discrimination. Here, as the court below properly found, the common question is whether NMAC's markup policy has resulted in African-Americans paying more than white persons for the same credit. Plaintiffs contend that creditworthy African-Americans pay more than white applicants for the same extension of credit. This case is about race discrimination, disparate impact, and the effects of a nationally uniform credit pricing policy. Because this Court has held that race discrimination is peculiarly class discrimination, *see*, *e.g.*, *Senter v. General Motors*, 532 F2d 511, 524 (6th Cir. 1976), this case is particularly amenable to class certification. Aware of this, NMAC attempts to deflect the Court's attention from its proper focus under Rule 23(f)--class certification--to extremely fact-specific liability issues upon which the District Court has already ruled on summary judgment and which NMAC lost.

Finally, plaintiffs' disparate impact claim is based on well-established Supreme Court authority. *See*, *e.g.*, *Wards Cove Pac king Co. v. Atonio* , 490 U.S. 642, 656–658, 109 S. Ct. 2115, 104 L Ed. 2d 733 (1989); *Watson v. Ft. Worth Bank & Trust* , 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988); *Griggs v. Duke Power Company* , 401 U.S. 424, 431 (1971). Moreover, it is undisputed, based on clear legislative history and concordant caselaw, that a disparate impact analysis is appropriate under the ECOA.[2] Thus, there is no novel issue of law for this Court to address, and NMAC nowhere argues otherwise.

PROCEDURAL HISTORY

This case was removed to the District Court in March of 1998. Following removal, the parties engaged in extensive discovery, including numerous depositions, document discovery, interrogatories and expert reports. (*See* Exhibit A, Docket Sheet, Docket No. 8, Order, July 16, 1998.) After a period of delay caused by NMAC's motion practice and change of counsel, among other things, plaintiffs moved for class certification on November 22, 1999, and renewed their motion on April 10, 2000. (*Id*., at Docket Nos. 26, 82 and 113.) On May 31, 2000, NMAC responded to plaintiffs' motion for class certification by simultaneously filing a Motion to Exclude the Report of Plaintiffs' Expert Witness and a Motion for Summary Judgment and an accompanying Statement of Material and Undisputed Facts with exhibits thereto. (*See id*., Docket Nos. 115, 118 and 121.) Plaintiffs deposed NMAC's two experts and filed a report from an additional expert, Dr. Mark Cohen of Vanderbilt University, confirming the results of their

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[2] *Miller v. American Express Co.*, 688 F.2d 1235 (9th Cir. 1982)*; Haynes v. Bank of Wedowee*, 634 F.2d 266 (5th Cir. 1981) ("ECOA regulations endorse use of the disparate impact test to establish discrimination, 12 CFR 202.6(a)."); *Sayers v. General Motors Acceptance Corp.*, 522 F. Supp. 835 (W.D. Mo. 1981) (Congress has determined that the proper test for determining whether a creditor has engaged in the prohibited discrimination is the "effects test" or disparate impact theory as outlined by the Supreme Court in the employment cases of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), and *Albermarle Paper Co. v. Moody*, 422 U.S. 402, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). 12 C.F.R. § 202.6(a) note 7. *A.B. & S. Auto Service, Inc. v. Bonner*, 962 F. Supp. 1056 (N.D. Ill. 1997) (A credit applicant can prove discrimination under the ECOA by using any one of the following three different approaches used in the employment context: 1) direct evidence of discrimination; 2) disparate impact analysis, also called "effects" test; or 3) disparate treatment analysis.)

statistical expert, Dr. Debby Lindsey. (*Id*., Docket Nos. 141 and 152–153.)

When it decided the various motions, the District Court had before it a record containing an array of motions, memoranda in support of those motions, responses, reply briefs, sur-reply briefs, an *amicus curiae* brief filed by the United States Department of Justice supporting the plaintiffs' position, an *amicus curiae* brief filed by a trade organization, the American Financial Services Association, supporting NMAC's position and approximately twelve affidavits, fourteen depositions, eighty-eight exhibits, eighty-five statements of undisputed facts, responses to the eighty-five statements of disputed facts and eight expert reports or supplements. (*Id*., Docket Nos. 28–40, 82–88, 112–130, 147–153, 159–164, 166, 179, 180, 186 and 188.)

On August 22, 2000, at a day-long hearing, U.S. District Court Judge Campbell heard argument on the motions from plaintiffs' counsel, defendant's counsel and the United States Department of Justice. Following oral argument, the court denied NMAC's motion to exclude plaintiffs' expert report, denied NMAC's motion for summary judgment and granted plaintiffs' motion for class certification under FRCP 23(b)(2) and (b)(3). (*Id*., Docket No. 195.) The 185-page transcript of the hearing is Exhibit B to NMAC's Petition.

This case is currently set for trial on February 20, 2001 regarding liability and a trial on damages, if necessary, is set for March 13, 2001. (Ex. B, Case Management Orders.) A mediation session is scheduled for October 2, 2000 in Nashville. (*See id*., Docket No. 193.)

THE PROPER STANDARD OF REVIEW UNDER RULE 23(F)

District courts are afforded broad discretion in dealing with class certification issues and a trial court's grant or denial of class certification is reviewed under an abuse of discretion standard. *McAuley v. International Bus. Mach. Corp., Inc*., 165 F.3d 1038, 1046 (6th Cir. 1999); *Orlett v. Cincinnati Microwave, Inc*., 953 F.2d 224, 228 (6th Cir. 1990). An abuse of discretion is defined as a "definite and firm conviction" that the district court committed a clear error of judgment. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).

The broad grant of discretion to the trial court and the corresponding deferential standard of review counsels heavily against granting a motion for interlocutory review under FRCP 23(f), unless there is both clear evidence of abuse of discretion by the trial court and an expression by the court that the certification decision is no longer subject to review. *See, e.g.*, *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293–294 (1st Cir. 2000) ("By their nature, interlocutory appeals are disruptive, time-consuming, and expensive. Thus, we have elevated the threshold for discretionary review in other instances, endeavoring to discourage piecemeal appeals . . . . We should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order . . . rather than opening the door too widely to interlocutory review").

The circuit courts that have considered petitions under Rule 23(f) have made clear that because interlocutory appeals are disfavored, there are only three very limited circumstances under which a Rule 23(f) appeal may lie: where (i) the denial of class certification is fatal to the plaintiffs' case and plaintiff has a solid argument opposing the district court's decision; (ii) the

"stakes are large" placing considerable pressure on the appellant to settle and the appellant can show that the district court's ruling on class certification was questionable; or (iii) the appeal raises novel legal issues and a decision would facilitate the development of the law on class actions. *Blair v. Equifax Check Servs., Inc.*, 181 F. 3d 832, 835 (7th Cir. 1999).

The First and Eleventh Circuits have recently adopted the same criteria for acceptance of a Rule 23(f) petition as the *Equifax* Court but have narrowed the third category from requiring a "novel legal issue" to one that must be not only novel, but also "unsettled." *Waste Management*, 208 F.3d at 293–94.(winnowing the third category because, as framed, it "may encourage too many disappointed litigants to file fruitless Rule 23(f) applications" . . . because "a creative lawyer almost always will be able to argue that deciding her case would clarify some 'fundamental' issue"); *Prado-Steiman v. Bush*, ___ F.3d ___, 2000 WL 1140680 (11th Cir., August 11, 2000), at *8. Here, NMAC relies exclusively on the second and third criteria as a basis for seeking review, claiming that the lower court's decision has "substantial weakness" which has put "undue pressure" on NMAC to settle; and that the relevant legal issues have a "strong public interest component" that requires resolution. (*See* Pet. at 13.) As set forth below, however, neither the District Court's certification Order--nor the legal issues involved in this case--call for review under the standards set forth in *Equifax* and its progeny.

SUMMARY OF ARGUMENT

1. NMAC's petition is wholly fact-dependent and improperly asks this Court for an interlocutory review of the District Court's decision on summary judgment which is not permitted under Rule 23(f).

2. The District Court class certification decision does not prevent NMAC from continuing this litigation. NMAC has not presented any competent evidence of financial consequence to NMAC or its limited financial resources. The exact size of the class and the amount of restitution sought is not yet known.

3. There are no novel issues requiring interlocutory appellate review. This is a straightforward disparate impact case which courts have consistently found to be peculiarly well-suited for class certification. NMAC's "novel issues" are simply the product of a misstated factual record.

4. The District Court's ruling on class certification is not questionable, much less an abuse of discretion. In fact, NMAC's Petition barely addresses the District Court's ruling on Rule 23 standards.

5. Even were this Court to revisit the District Court's decision on the merits in contravention to Rule 23(f), NMAC's fact-based arguments concerning its substantive liability under ECOA and compliance with the statute of limitations are erroneous and should be rejected.

ARGUMENT

I. NMAC'S PETITION IS WHOLLY FACT DEPENDENT AND THUS DOES NOT

COMPORT WITH RULE 23(F).

The first and best reason for denying NMAC's petition for an interlocutory appeal at this point of the litigation is that NMAC's Petition to this Court effectively depends on having this Court revisit the exhaustive review of a voluminous record already undertaken by the District Court. Rather than addressing the lower court's ruling on class certification, as is appropriate under Rule 23(f), NMAC's Petition is largely devoted to presenting NMAC's spin on the facts and rearguing fact-specific issues decided on summary judgment. As indicated above, this case was removed to the District Court by NMAC in March, 1998, and the record is extensive, detailing disputed material issues of fact which can and should only be resolved at trial. NMAC's Petition recognizes that after extensive briefing and an all-day hearing, the District Court found that this case presented "an old fashioned factual dispute" (NMAC Petition, at 9; *see also* NMAC Ex.B, p. 122.)

The extent of the factual disputes in this case is enormous. A simple review of NMAC's Statement of Facts (*see* NMAC's Petition, pp.3–10, the Fourth Amended Complaint, *see* NMAC Ex. U, and Plaintiffs' Response to NMAC's Statement of Undisputed Facts, *see id.* at Ex. F), demonstrates that the parties do not agree on a myriad number of material issues of fact. There is a mass of underlying evidence that undergirds three primary factual disputes, each of which are raised in NMAC's petition to this Court:

1. How NMAC's retail financing system works;

2. Which expert's statistical analysis is correct; and

3. When [*consumers 1 and 2*] knew or should have known of their ECOA claims.

Moreover, merits discovery is continuing and the entire evidentiary record of the trial court is not before this Court: all that is and would be before this Court on this Rule 23(f) Petition or appeal is and would be the record on class certification. Therefore, to the extent that any of NMAC's fact-based arguments are indeed relevant, it would best serve the purposes of judicial economy to address them at the conclusion of the litigation when the full record is available--not address them in piecemeal fashion as NMAC asks. *See Waste Management*, 208 F.3d at 293–294.

II. NMAC HAS NOT DEMONSTRATED THAT THE LOWER COURT'S CLASS CERTIFICATION DECISION SOUNDS THE "DEATH KNELL" OF THE LITIGATION

NMAC's argues this Court should accept its Petition because "[n]o matter how meritorious its defenses may be, it risks an extraordinary verdict if it does not settle this case now." (Pet. at 14.) NMAC contends that plaintiffs are seeking up to $100 million in damages and that it would be "foolhardy" for the Company to proceed to trial because a loss at trial could financially "cripple" NMAC. (*Id.* at 1.) Thus, defendant claims that it meets the first *Equifax* criteria, and its motion should be granted.

As a preliminary matter, it is pure speculation at this point what the value of the

restitutionary relief may be at trial. As previously discussed, plaintiffs are seeking declaratory and injunctive relief and a restitutionary damage recovery of the subjective finance charges that African-American class members paid that were greater than the amounts charged similarly situated white customers. However, no one other than NMAC has anything more than a hunch regarding the exact class size and thus the approximate value of the requested restitutionary relief. Indeed, those very issues are currently the subject of discovery as the case proceeds to trial.

NMAC, which alone possesses the information concerning its volume of financing business across the country, has chosen to base its "death knell" argument on mere speculation rather than providing this Court with a factual basis drawn from its own data. Thus, while NMAC complains that a sizable verdict will bring the company to its knees, it offers no evidence indicating how and why that would be so. *See, e.g.*, *Prado-Steiman*, 2000 WL 1140680, at *7 (appellant must point to record evidence regarding its financial resources in meeting the first *Equifax* criteria). There is absolutely no factual basis to suggest that NMAC would be compelled to settle a "non-meritorious lawsuit" over the fear that an adverse verdict would create financial ruin. NMAC, in the same manner it declined to present the court below documents concerning class size, has also chosen not to produce evidence of the revenue and assets of NMAC. NMAC's factually unsupported claims of financial ruin are improper under Rule 23(f).

Second, NMAC intentionally misconstrues the proper standard: it is not the death knell of the defendant's "*meritorious defenses*" with which the Court must be concerned under Rule 23(f), but rather the inevitable end of the *litigation*. *See Prado-Steiman*, at *6 (because "even ordinary class certification decisions by their very nature may radically reshape a lawsuit and significantly alter the risk-benefit calculation of the parties," the decision to grant interlocutory review on this factor must be limited to "those cases where the district court's ruling, as a practical matter, effectively prevents the petitioner from pursuing the litigation"). Here, NMAC does not set forth why it will be irreparably harmed by a single appeal at the conclusion of a trial in this case. *Id.* at *5 & 7 ("We anticipate that the number of decisions truly warranting immediate review on this basis alone will be small.") The paucity of grounding upon which NMAC bases its extravagant claims alone should suffice to warrant denial of NMAC's Petition.

III. THERE ARE NO NOVEL ISSUES REQUIRING INTERLOCUTORY APPELLATE REVIEW

The third consideration the Circuit Courts have identified as relevant to a 23(f) determination is whether an appeal "may facilitate the development of law" since "some fundamental issues about class actions are poorly developed." *Equifax*, 181 F.3d at 835; *accord Waste Management*, 208 F.3d at 293 ("clarification of a fundamental issue of law"). As the First and Eleventh Circuits have both recently emphasized, however, because "a creative lawyer almost always will be able to argue that deciding her case will clarify some 'fundamental' issue", *id.*, 208 F.3d at 293, this category should be "restricted" to situations where it would permit "resolution of an unsettled legal issue important to the particular litigation as well as important in itself," *Prado-Steiman* (citing *id.*) or implicates an issue of public policy or an issue "specifically relating to Rule 23 or the mechanics of certifying a class." *Id.*

No matter which formulation or factor is considered, NMAC fails to provide any rationale why it is met. It does not attempt to point to a single "issue" of law in this case, much less Rule 23 jurisprudence generally, or any specific public policy, that would be advanced by an appeal of the certification order. The liability/summary judgment issues it spends its time arguing about would not be presented to this Court by an appeal here, and NMAC does not--because it cannot--contend that they would.

Instead, NMAC raises a specter of a flood of litigation (Petition at 21–22). Pointing to a single other ECOA case in the entire country involving automobile financing, it speculates about an "onslaught of future cases." Even was nothing more than speculation about other potential cases sufficient to present a certification issue worthy of interlocutory consideration, NMAC fails to explain what an appeal now would accomplish in terms of informing how those future cases might proceed or what specific issues might arise in them that an appeal would clarify.[3]

To the contrary, disparate impact class actions involving subjective decision-making have often been certified under ECOA, *e.g.*, *Buycks-Robertson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322 (N.D. Ill. 1995) or under Title VII (with which ECOA is coextensively interpreted, *see id.*, at 332; *Miller v. American Express Co.*, 688 F.2d 1235 (9th Cir. 1982)). *See*, *e.g.*, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999); *Richardson v. Byrd*, 709 F.2d 1016 (5th Cir. 1983); *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976); *McCain v. Lufkin Indus., Inc.*, 187 F.R.D. 267 (E.D. Tex. 1999); *Griffin v. Home Depot, Inc.*, 168 F.R.D. 187 (E.D. La. 1996).

NMAC concludes by hyperbolically asserting that plaintiffs seek to displace the "competitive system" of car financing or would require violation of the antitrust laws (Petition at 22). Putting aside NMAC's complete lack of evidence for its claim that its current policy benefits consumers, implicitly, NMAC is contending that the only way car financing can be done is in a discriminatory manner. This is absurd. There are any number of ways in which NMAC can ensure that it does not lend in a discriminatory manner without jettisoning competition in car sales: it can structure its incentives with its dealers differently (*e.g.*, price commissions on the basis of total or unit sales or use some solely objective criteria), it can provide educational and instructive information to dealers, it can ensure monitoring of loans, and/or it could provide for correction of any future discriminatory impacts. In fact, plaintiffs pointed out to the court below that this is done in such areas as insurance sales and, in fact, similar injunctions have been implemented in other lending cases. (Docket No. ___ at 28 and Exs. 11, 13 (injunctions entered in other discrimination cases).)[4]

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[3] Aside from stating the fact that the other car financing ECOA case, *Coleman v.General Motors Acceptance Corp., et al.*, No. 3-98-0211 (M.D. Tenn.), was certified on (b)(2) grounds only, NMAC does not explain what issues in this case as compared to that case matter or make any difference so that an appeal here is warranted. Simply positing that a different judge exercising his discretion in a different case came to a different result is meaningless. Even to the extent that that court's different conclusion mattered, as the First Circuit appositely wrote, "a stray district court opinion or two does not herald a jurisprudential tangle." *Waste Management* at 295.

[4] NMAC's claim that any injunction here would "do precisely what the Department of Justice sought to prevent 60 years ago in *United States v. General Motors Corp.*," (121 F.2d 376 (7th Cir. 1941)), is frivolous. Beyond the irony that the United States Department of Justice supports

IV. NONE OF NMAC'S "SUBSTANTIAL WEAKNESSES" RISE TO THE LEVEL OF ABUSE OF DISCRETION AND THEREFORE CANNOT SUPPORT A RULE 23(F) PETITION

When NMAC *does* try to address the District Court's certification ruling, its rambling and unfocused argument (Pet. at 17–21) appears to have two contentions; (1) that commonality is not satisfied because, contrary to the District Court's ruling that NMAC's pricing policies are "uniformly applied throughout the country at every dealership," every finance transaction is so individualized as to be impervious to common treatment, and, (2) that class certification must be denied because injunctive relief is not the sole or primary relief, and in any event, such relief would be impossible and meaningless. NMAC is wrong on each and, even giving NMAC's contentions credence, they do not remotely demonstrate an abuse of discretion.

a. NMAC's Claim That Commonality Is Not Satisfied Is Untimely and Wrong

NMAC's argument on commonality fails on multiple grounds.

Initially, the only Rule 23(a) prerequisites that NMAC challenged below were typicality and adequacy (Docket No. ___ at 10, 12.) [(NMAC opp to class cert)] NMAC cannot seek to overturn class certification based on commonality for the first time on appeal. *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 231 (7th Cir. 1983)("[W]e will not address arguments which were not previously raised in the district court."). For this reason alone, NMAC fails to demonstrate any viable "substantial weakness" in the District Court's decision and its petition for appellate review should be denied.

Irrespective of NMAC's waiver, the District Court did not err on commonality. It found that NMAC's uniform finance charge mark-up policy constituted a common issue of fact and that liability under ECOA pursuant to a disparate impact theory constituted a common question of law. (Pet. Ex. B at 151.) Typicality was met, and certification justified, because NMAC's national policy "applied in every dealership even though different dealers are implementing it." *Id.* NMAC now argues that the lower court's ruling regarding the uniformity of NMAC's policy must be incorrect because, in essence, finance rates are caused by such a large "multiplicity of variables" that there can never be sufficient uniformity to justify a class action. (Pet. at 17–21.) NMAC asserts that because African-American consumers are discriminated against to differing degrees (i.e., some overpaid by $300, some by $800), "a multiplicity of factors other than race must affect the amount of mark-up one pays." *Id.* at 18. Yet NMAC's cornucopia of possible factors that "may" influence mark-up imposition (including differences between dealership practices and individual differences in creditworthiness of consumers) fails for several reasons.

First, that other factors might effect the degree of the finance charge mark-up is

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plaintiffs' claims and positions here, that case simply prohibited car companies from coercing dealers to accept financing from affiliated finance companies as a condition for selling cars. *Id*. This case does not involve tying whatsoever; as NMAC's Petition admits, dealers are free to sell contracts to any lender, including NMAC, and nothing plaintiffs seek would change that.

irrelevant. Race is an impermissible factor in causing financing outcomes under ECOA whether it is the *only* factor that affects the outcome or simply one of fifty factors that influence the outcome. As long as financing rates differ on the basis of race, it is irrelevant whether the rates also vary based upon any other acceptable factors. Perhaps realizing this, NMAC absurdly argues that where multiple factors may come into play "there is no reliable way to connect any particular customer's markup with NMAC's pricing policies or to assess the legitimacy of any particular markup" in terms of race discrimination. *Id.* at 19. This is patently untrue: the precise purpose of statistical regression analyses is to neutralize the effects of other factors in order to isolate the impact, if any, of one particular variable. And when the statistical analysis is done, NMAC's possible factors are shown by the record evidence not to have any effect--hence, the members of the class cannot possibly be differently situated from each other. Rather, they are similarly (commonly) situated with respect to the racially discriminatory effects of mark-up.

Plaintiffs' regression analyses demonstrated that all of the potential factors raised by NMAC are phantoms--none of them in any way undercut the impact of race on finance charge mark-up. When plaintiffs' original analysis of the electronic deal file information indicated that white customers had a mark-up mean value of $507.94 and African American customers had a mark-up mean value of $969.91, a difference of $461.97, statistically significant at the 99% level of confidence. (Ex. ___ at 6.) This is a measure of statistical demonstration that alone is sufficient to demonstrate that NMAC's policy of allowing subjective mark-up is causing an illegal, discriminatory result. When presented with this showing, NMAC criticized it on the ground that it did not look at enough other possible explanatory variables besides race. NMAC itself failed to do those analyses, and when plaintiffs did precisely those analyses, they found the exact same results--a common disparate impact.

For example, half of the variables NMAC hypothesizes that "may" be causing the disparity besides race are dealer specific, e.g., competitive pressure on the dealer, the dealer's relationship to other financing sources, the dealer's profit needs, and the practices of the dealers' employees. (Pet. at 18.) Accounting for NMAC's speculative differences between dealerships with a regression analysis *unequivocally* demonstrates that the race discrimination emanates from *NMAC's policies, not the dealers' practices*, because the results *are exactly the same: no matter where African-American applicants go, they pay more mark-up than similarly-situated Caucasians*. Quite literally, as was shown to the court below, when every one of the twelve Nissan dealerships in Tennessee that had a sufficient number of African-American customers for statistical analysis is reviewed, each and every one of them demonstrates a statistically significant disparity between the mark-up imposed on African-Americans and the mark-up imposed on Caucasian customers. (Docket No. ___ at 18.) Thus, nothing that happens at the dealership level is relevant to, nor impacts upon, the discriminatory effect of NMAC's nationwide, uniform mark-up policy. Accordingly, the District Court's ruling that class certification was appropriate based upon NMAC's nationwide financing policy was entirely correct.

Yet, putting aside the factual record, even if there were a factual basis for NMAC's speculations that individualized factors might play a role in finance charge mark-up, as a matter of law, such differences cannot defeat certification. Courts have held time and again that as long as a "common question arises from the same nucleus of operative facts. . . . it is permissible that

the underlying facts of the case may fluctuate over the class period and vary among the individual class members." *Rodriguez v. Berrybrook Farms*, 672 F. Supp. at 1016. "Even relatively pronounced factual differences will generally not preclude" class certification. *Bunnion v. Consolidated Rail Corp.*, 1998 U.S. Dist. Lexis 7727 at *13. Further, class certification "is not defeated because of the varied . . . opportunities at issue or the differing qualifications of the plaintiffs and class members." *Adames v. Mitsubishi Bank*, 133 F.R.D. at 90; *Orlowski v. Dominick's Finer Foods*, 172 F.R.D. at 374 (fact that each individual's claim depends on "her individual qualifications and upon decisions made . . . by different Dominick's personnel" does not defeat certification).

NMAC's argument was rejected in *Buycks-Robertson*, an ECOA case directly on point studiously ignored by NMAC. 162 F.R.D. 322. In *Buycks-Robertson*, the defendant argued that a class could not be certified because "each decision to grant or deny a mortgage loan application depends on a myriad of individual facts. . . Proof that [defendant] allegedly applied its lending criteria in a discriminatory fashion to one applicant would not establish that . . . [defendant] discriminated in applying its lending criteria to [any other] applicant." *Id.* at 333. The court rejected defendant's argument:

Once again, [defendant] misses the point. It is the allegedly discriminatory subjective application of [defendant]'s neutral underwriting criteria as a whole that may have adversely impacted the class. Plainly, the named plaintiffs' claims arise out of the same alleged course of conduct giving rise to the claims of the other class members.

Id. Indeed, in words the succinctly put to rest NMAC's speculations here, the court observed that defendant's argument that every class member's financing would have been determined

based upon "individualized treatment of the applicant's circumstances," *simply lends credence to plaintiffs' theory* that neutral underwriting criteria were being applied to the class members with considerable subjectivity. If the statistical evidence shows that the class members were given "individualized treatment" based upon "circumstances" related to their race . . . then Plaintiffs' claims may be valid.

Id. at 333 n. 14 (emphasis added).

Accordingly, even if defendant could establish that dealing with different dealerships (or different personnel at the same dealership), having different financial backgrounds, or having access to differing financing opportunities made a difference in finance charges--which it did not and could not--such a fact would be of no legal moment. These differences could not defeat class certification here because plaintiffs allege *class-wide* disparate impact discrimination under NMAC's *standarized, uniform, and centralized* finance mark-up policies and practices. Thus, the District Court's ruling on this issue does not only *not* contain a "substantial weakness," but is entirely correct.[5]

[5] Neither *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998), nor *Appleton v. Deloitte & Touche*, 168 F.R.D. 221, 226, 230–231 (M.D. Tenn. 1996) (cited at Pet. at ___) support NMAC. In *Sprague*, this Court denied certification because *no common policy existed*; rather, the claims involved employees who had each signed a unique "individual side deal" and

b. The District Court Correctly Ruled That Injunctive Relief Is an Important Remedy and Capable of Affording Relief to the Class

NMAC's contentions revolving around the injunctive relief sought by plaintiffs (Pet. at 19–21) are absurd.

First, notwithstanding the fact that the court below certified the class under both Rule 23(b)(2) and 23(b)(3), NMAC contends that certification must be incorrect because injunctive relief is neither "the sole or primary relief" sought by the litigation. Apparently now just attacking the (b)(2) certification, NMAC's unsupported assertion that injunctive relief must be the "sole" relief in order for certification to be proper is just wrong. Where injunctive relief "predominates," certification under Ruler 23(b)(2) is proper and, beyond a shadow of a doubt, injunctive relief to cease NMAC's decade plus record of lending discrimination could not be more central to this litigation.

The fact that plaintiffs also seek restitutionary damages[6] does not defeat certification under Rule 23(b)(2), since discrimination plaintiffs are entitled to "a 'make whole' remedy which includes . . . injunctive relief [and] compensatory . . . damages[,] . . . . injunctive relief and damages are intertwined" such that damages cannot be held to predominate." *Shores v. Publix*, 1996 WL 407850 at *49, 56–58. If plaintiffs prove that NMAC's pricing system has a discriminatory impact on African-Americans, which has resulted in African-Americans paying more for credit than similarly situated white persons, all African-Americans who paid more than

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where each was given a different representation upon which he/she relied. *Sprague* at 398. In *Appleton*, plaintiffs could not demonstrate *any* centralized decisionmaking or a single uniform policy of general application that affected the class as a whole. Here, by contrast, plaintiffs have shown *both* centralized decisionmaking (NMAC makes all credit decisions regarding tier assignments and buy rates) *and* a uniform policy (NMAC requires standardized paperwork and sets the maximum mark-up rate uniformly for all dealers).

[6] In this case, plaintiffs request declaratory and injunctive relief and recovery of the restitutionary damages that flow therefrom. (Fourth Amended Complaint, ¶ 136.) The availability under federal law of restitution and/or disgorgement is well established, as is their equitable character, since they flow from and/or support the injunctive relief. *Chauffeurs v. Terry*, 494 U.S. 558, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990)("First, we have characterized damages as equitable where they are restitutionary, such as in action[s] for disgorgement of improper profits.") *Porter v. Warner Holding Co.*, 328 U.S. 395, 400, 66 S. Ct. 1086, 1088, 90 L. Ed. 1330 (1946) ("Future compliance may be more definitely assured if one is compelled to restore one's illegal gains; and the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums."); *United States v. Universal Management Services, Inc.*, 191 F.3d 750, 760 (6th Cir. 1999)("Restitution and disgorgement are part of courts' traditional equitable authority"); *Heinicke v. Parr*, 168 F.2d 194, 197 (6th Cir. 1948) ("Nothing is more clearly a part of the subject matter of an injunction suit than the recovery of that which has been illegally acquired and which has necessitated injunctive relief."); *Schwartz v. Gregori*, 45 F.3d 1017, 1022–23 (6th Cir. 1995) (back pay awarded for retaliatory discharge constituted restitution and was, therefore, an equitable remedy available under ERISA).

similarly situated whites are entitled to a refund of their excess charges. *See* 15 U.S.C. § 1691e (violating creditor subject to equitable and declaratory relief as necessary to enforce ECOA and liable to the credit applicant for actual damages). For this reason, the drafters of Rule 23 listed civil rights actions as "illustrative" of cases appropriate for Rule 23(b)(2) certification. 1966 Advisory Committee Notes to Rule 23. Any other conclusion would defeat the remedial purposes of anti-discrimination statutes because if companies "faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975); *see also Stewart v. General Motors Corp.* 542 F.2d 445, 451 (7th Cir. 1976). Thus, courts have repeatedly certified discrimination class actions, even where monetary relief is sought in addition to injunctive relief because the injunctive relief clearly predominates. *See, e.g.*, *Senter v. General Motors Corp*., 532 F. 2d 511 (6th Cir. 1976); *Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009 (W.D. Mich. 1987); *Barefield v. Chevron*, 1987 WL 65054 (N.D. Cal. 1987); *Mazzie v. Illinois Dept. of Transportation*, 1998 WL 312021 (N.D. Ill. 1998); *Butler v. Home Depot, Inc.*, 1997 WL 605754 (N.D. Cal. 1997).

Second, NMAC contends that injunctive relief would require each individual to demonstrate entitlement to damages and it would be impossible for individuals to prove damages. (Pet. at 20) This borders on the absurd. Although individual damages will defeat certification only in rare cases, individualized proof of damages in this action could not be simpler--damages can be calculated for each class member using computerized data to determine how much more in finance-charge mark-up individual African-Americans paid than their statistically similarly situated non-African-American counterparts, a process that would not require any individualized testimony or submissions. Accordingly, Rule 23(b)(2) (and (b)(3)) certification is eminently proper. *Buycks-Roberston*, 162 F.R.D. 335 (Rule 23(b)(2) certification appropriate where monetary "damages are subject to ready calculation on the basis of a formula or principles uniformly applicable to the class"); *Winkler v. Interim Services Inc.*, 3:98-0042 at page 8 (M.D. Tenn. 1999) (monetary relief does not predominate where damages are capable of computation by objective standards).[7] Further, contrary to NMAC's assertions, the policies of other *potential* lenders that consumers *could* have financed with *but did not* are irrelevant: plaintiffs are challenging NMAC's financing policies and all class members actually financed with NMAC under its uniform finance mark-up policy. Accordingly, there can be no doubt that NMAC is liable and responsible for any damages proved to be caused to plaintiffs and the class.

Finally, it is frivolous for NMAC to contend that any injunction would be "meaningless" because it would only enjoin NMAC's conduct, not dealer conduct nor the conduct of other finance companies. (Pet. at 19–21.) As discussed herein, NMAC hysterical claim that it must

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[7] NMAC's footnote reference to *Buycks-Robertson* (Pet. at 20, n. 15); is misplaced. There, plaintiffs' sued for *denial* of loans, and thus damages were dependent not just on proving discrimination, but also proving that the applicants were otherwise creditworthy such that they would have received loans "but for" the discrimination. *Id* at 336. Thus, damages could not be calculated based upon a formula. Such is not the case here: since all class members here were *already approved for credit at a pre-set buy rate*, neither their creditworthiness nor the rate at which they were entitled to finance their automobiles is an issue and damages can therefore be calculated by a formula. Thus, (b)(2) certification below on both injunctive relief and damages was entirely correct.

violate the law or cease business operations is patently false: discrimination against African-Americans is not an essential component of automobile financing, as there are innumerable ways that NMAC can compensate dealers for originating financing without violating ECOA. NMAC is essentially arguing that unless plaintiffs intend to sue the entire financing industry--dozens of companies--they cannot sue any one of them. However, NMAC cannot escape liability for its actions on the ground that "everyone is breaking the law and it is unfair to single us out," particular since the purpose of civil rights is precisely to protect the vulnerable minority individual from the unjust will of the majority.

c. Even Assuming, *Arguendo*, That the District Court's Rulings Could Have Been Different, Certification of the Class Cannot Constitute an Abuse of Discretion

As shown above, the District Court's rulings on class certification are impervious to any claims of "substantial weakness." Nevertheless, even if defendant's arguments could somehow demonstrate that the District Court *could* reasonably have ruled differently on any given point, NMAC has failed to meet its burden of showing that the District Court's rulings were anything other than a reasonable use of its discretion. All the appellate courts that have considered Rule 23(f) appeals have made it crystal clear that this new provision for permissive interlocutory appeal neither alters the enormous discretion accorded to trial judges in deciding whether to certify a class nor expands the limited nature of appellate review of those decisions. *See*, *e.g.*, *Blair*, 181 F.3d at 835; *Prado-Steiman*, 2000 WL 1140690 at 8.

When viewed against the trial court's broad discretion in deciding whether to certify a class and the fact that its decision, based upon the particular facts of the case, should not be overturned absent an abuse of discretion, *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988), it is readily apparent that NMAC's contentions are, at best, matters of judgment where the District Court cannot be said to have been plainly wrong or abused its discretion.

Matters such as finding an issue of fact as to when the plaintiffs could have discovered the racial claim they are asserting or deciding that differences in the methodologies or conclusions of experts should be resolved by the jury or ruling that a financing company's nationwide policy is sufficiently uniform to ground a claim (to be decided by the jury) under a statute that prohibits a lender's policies from disparately impacting a protected class are not plainly wrong.

Nor can NMAC show that the court below abused its discretion by relying upon an incorrect legal rule or, in making a discretionary ruling, relying upon an improper factor, omitting to consider a factor entitled to substantial weight, or considering the correct mix of factors, but making a clear error of judgment in assaying them. *Waste Management*, 208 F. 3d at 295.

At best, all defendant has done is rehash arguments that the District Court rejected as unpersuasive in the first instance. Repeating them here does not make them any stronger, nor the District Court's exercise of discretion abusive. Because interlocutory appeals are "disruptive, time-consuming and expensive," it is appropriate to "exercise [Rule 23(f)] discretion

judiciously . . . . rather than opening the door too widely," lest they "encourage too many disappointed litigants to file fruitless Rule 23(f) petitions." *Waste Management*, 208 F.3d at 294. Rule 23(f) was not created nor intended to provide a disgruntled litigant with a fast track to a "rematch" of a fight it already lost fair and square. Thus, sour grapes complaints such as NMAC's that amount to no more than "the District Court (in our view) simply got it wrong" should be insufficient to justify interlocutory review. Here, all of the District Court's rulings on class certification were well within the bounds of its substantial discretion, thus its "ruling is impervious to revision [and] there's no point to an interlocutory appeal." *Blair* 181 F.3d at 835. Accordingly, NMAC's petition for leave to appeal must be denied.

V. EVEN IF NMAC'S REMAINING MERITS-BASED ASSIGNMENTS OF ERROR ARE CONSIDERED, IT IS CLEAR THE DISTRICT COURT'S RULINGS WERE CORRECT

NMAC's Petition begins by attacking the District Court's rulings denying defendant's motions for summary judgment and to strike plaintiffs' expert (Pet. at 15–17). As noted, these matters are not what a Rule 23(f) appeal would--or should--entail. But lest the Court be left with the impression that the District Court erred in *any* respect, out of an abundance of caution we demonstrate that NMAC's three purported errors do not exist--in each respect, the District Court's decision was absolutely correct.[8]

a. The District Court Properly Found That There Is a Factual Dispute Regarding Whether Plaintiffs' Claims Are Time-Barred by the Statute of Limitations

NMAC states--utterly without citation to the record--that [*consumer 1*]'s testimony demonstrated that "within two or three weeks of her car purchase, she believed that she had been overcharged for financing," and thus she "discovered" her injury more than two years before she filed her Complaint, time-barring her claims. (Pet. at 15–16.) Aside from the well-established point that statutes of limitations challenges do not defeat certification, *Newberg on Class Actions*, § 4.26 at 4-104, after reviewing the record, the District Court correctly rejected NMAC's position, holding that there were factual "disputes about when [*consumer 1*] knew or should have known about her injury claim" (Pet. Ex. B at 120.) Applying the federal common law discovery rule, the Court recognized that were real questions regarding whether [*consumer 1*] knew her

[8] Citing *Blair*, NMAC justifies its factual disagreement with the court below on the ground that "the potential merits of such a motion [for summary judgment] are relevant and should be considered in support of the request for leave to appeal" (Pet. at 15, citing *Blair*, 181 F.3d at 834–35). The quoted section of *Blair*, however, discusses that appeal may be appropriate where "there is considerable pressure on the defendant to settle, even when plaintiff's probability of success on the merits is slight." *Id.* at 834. While proof of the slim merits of plaintiff's case might support a 23(f) appeal where class certification is (as often) decided early in the course of litigation, for example, before discovery is commenced or completed, or before any treatment of the merits of a plaintiff's claims, such concerns have little bearing here, where defendant's merits-based arguments have already been *raised and roundly rejected* in a fully briefed and denied motion for summary judgment. Surely there is no "risk of a settlement or other disposition that does not reflect the merits of the claim," *id.* at 835, in this case because the District Court has already found plaintiffs' claims to have sufficient merit to survive summary judgment.

financing had been marked-up above the objectively scored credit rate and that there was a factual dispute as to whether NMAC fraudulently concealed the finance charge mark-up. (*Id.* at 120–121.)

NMAC's contention that [*consumers 1 and 2*] were aware of the financing mark-up overcharge--what this case is about--is patently incorrect. While [*consumers 1 and 2*] were aware of the interest rate stated in their retail installment contract (the "APR"), *there is no doubt that* [*consumers 1 and 2*] *were not aware that this rate included a mark-up.* The undisputed record proof is that NMAC prohibits disclosure of the existence of the mark-up policy, the amount of the mark-up, or the buy rate to customers, (Ex. ___ (Brister Dep.) at 152, 153, 158, 159 ["I don't know if she ([*consumer 1*]) would know because we wouldn't have talked to the customer and advised her of what our rate was"]; Ex. ___ (B. Adams Dep., 9/4/98) at 56; Ex. ___ (Charles dep. 9/3/98) at 78–79), and that neither the existence nor amount of the mark-up can be inferred from knowledge of the APR.[9] As [*consumer 1*]'s deposition demonstrates, when she returned to the dealership two weeks after her car purchase, she was concerned about the purchase cost, a maintenance contract and a credit life/disability insurance contract--most certainly not the mark-up or the mark-up policy. Ex. ___ at ___, ___, ___. It was only after this case was filed as a consumer fraud case did discovery in the matter permit plaintiffs to learn of the finance mark-up charge and, only later after that, its discriminatory impact.

Since plaintiffs could not have been aware of the discriminatory nature and impact of the mark-up policy, their claims cannot be said to have accrued outside the limitations period. *See, e.g.*, *Rindley v. Gallager*, 890 F. Supp. 1540, 1550 (S.D. Fla.1995) (plaintiff's claim not time-barred because "to the extent that Plaintiff did not know, or could not have known, that the actions of the defendants were impermissibly motivated, he was not on notice that his civil rights had been violated"). The Court below was thus correct on multiple grounds.

b. The District Court Properly Held That NMAC Can Be Liable for Racial Discrimination as a Result of Its Own Policies

NMAC next argues that because the dealers set the APR rate and NMAC is "not in control of car dealers," the District Court should have held that "the facts preclude the conclusion that NMAC causes dealers to discriminate on the basis of race." (Pet. at 16.) The Court below rejected this argument, holding that "plaintiff [sic] has come forward with sufficient facts that the defendant[']s own acts or policy, if proved, could make it a creditor under the Act [ECOA]" that can be liable for discrimination. (Pet. Ex. B at 121.) The Court stated that plaintiffs had come forward with sufficient evidence to demonstrate that a mark-up policy existed and noted that defendant's own deponent proved that NMAC had "notice, of course, of its own policies, and the potential bias that can result from judgmental credit lending." (*Id.* at 121–22.) Again, the Court's conclusions that NMAC could be liable for the disparate impact of its own policies were eminently correct.

[9] As the District Court recognized, this knowing and fraudulent concealment by NMAC of the challenged mark-up policy by itself creates a factual dispute regarding whether the statute of limitations was tolled, making denial of summary judgment appropriate. (Pet. Ex. B. at 121; *see also EEOC v. Kentucky State Police Department*, 80 F.3d 1095 (6th Cir.).)

Notably, NMAC's portrayal of itself as an innocent bystander to the financing transaction, who never sets the mark-up on any finance rate and who is not even involved in the transaction until after it is completed (Pet. at 16) is unsupported by any citations to the factual record. This is because the record evidence, including *defendant's own documents*, such as [cite to Exhibits], clearly belies defendant's assertions. For example, [cite Exhibit 3] sets the parameters for NMAC's mark-up system, stating: "The dealer may mark-up 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."; *see also* [cite Exhibit 1] ("NMAC reserves the right to change dealer commission at any time upon written notice to the dealer"). These documents demonstrate two things: (1) it is NMAC, not the dealers, who set up the finance charge mark-up system, and (2) the dealer is not a renegade, acting without NMAC's knowledge or consent in loaning money and setting the APR rate, but instead is simply setting the APR in conformance with NMAC's policies and restrictions.

The deposition testimony makes it clear that the dealers do not finance cars at all; only NMAC does. The dealers do not have the capital to finance automobiles, but instead simply act as arrangers or originators of credit on behalf of NMAC. *See* Ex. ___ (Charles Dep.) at 75. The record shows that a dealer cannot originate an NMAC transaction unless the loan complies in every detail with NMAC's lending policy and any additional directives issued by NMAC. [cite] In fact, NMAC provides dealers with specialized computer programs and unique forms for originating its loans and engages in extensive training of dealers to teach them how to maximize their utilization of NMAC's loan system and profit margin therefrom. [cite] NMAC--not the dealership--is identified as the lienholder on all forms, further demonstrating that at all times, NMAC, not the dealership, is the true creditor. [cite] Finally, NMAC does the initial objective credit scoring that sets the customer's risk tier and NMAC sets the buy rate for each risk tier. There is absolutely no evidentiary support for NMAC's claim that the District Court erred in failing to hold, as a matter of law, that it is the dealers, not NMAC who are responsible for any demonstrated discriminatory impact under ECOA--a statute directed at eradicating discrimination in lending policies. [cite]

Nor is there any legal error in the District Court's holdings (and NMAC cannot cite any). In fact, the United States Department of Justice's amicus brief denounced NMAC's disclaimer of responsibility, citing extensive legal authority for the proposition (ultimately adopted by the District Court) that NMAC has a non-delegable duty not to discriminate.[10] Thus, NMAC cannot

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[10] *See*, *e.g.*, *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974) (owner of real estate company liable for the discrimination of its agents despite the fact that "there was no evidence that [he] had personally joined in any discriminatory acts); *Walker v. Crigler*, 976 F.2d 900, 904–5 (4th Cir. 1992) (owner of property liable for acts of manager, even though he "specifically intended that [she] not discriminate"); *Alexander v. Riga*, 208 F.3d 419, 432–33 (3d Cir. 2000)("Here we adopt the general rule applied by other federal courts that the duty . . . not to discriminate . . . may not be delegated"). Title VII cases have similarly not allowed companies to escape class certification or liability simply because they delegate decisionmaking authority in a decentralized manner to low level employees. *See*, *e.g.*, *Publix*, 1996 WL 407850 at *3–6 (certifying class challenging a "centralized policy of decentralized decisionmaking"); *Huguley v. General Motors Corp.*, 638 F. Supp. 1301, 1302 (E.D. Mich. 1986) (certifying class challenging employment policies "heavily dependent upon the subjective assessment" of low-level supervisors); *Senter*, 532 F.2d at 524,

delegate a component of the pricing decision and escape responsibility for the predictable discrimination that results.

c. The District Court Properly Held That Plaintiffs' Expert Report Was Sufficient to Support Their Discrimination Claims

NMAC next argues that the District Court "erroneously ruled that, for purposes of establishing that they had been injured, [*consumers 1 and 2*] could compare themselves to whites who are not similarly situated." (Pet. at 16–17.) The Court held nothing of the kind. Rather, after reviewing a voluminous amount of expert analysis concerning the racial impact (if any) of NMAC's finance charge mark-up, it ruled that "there is enough evidence there" of a disparate racial impact to permit plaintiffs to proceed. (Pet. Ex. B at 121.) While the Court believed that NMAC's criticism of plaintiffs' experts reports might "poke some holes," he ruled "that is a battle of the experts" and "there is a balance in the gate keeping function, in keeping out unreliable experts and usurping the duty of the jury. I think the balance in this case is sufficiently reliable for a jury to consider it." *Id.* at 121, 38.

Indeed, the District Court was entirely correct: what NMAC's expert did was search through the entirety of the 10,000 transaction data pool sample available to him in order to find a particular minuscule sample of only Caucasians who were in the "special tier," financed at the same time, for the same duration, and from the same dealership as [*consumers 1 and 2*], even though there is no evidence that tier, date, duration or dealership have any relationship to finance charge mark-up. [cite] Aside from the fact that such constriction of data is entirely statistically inappropriate, *see*, *e.g.*, *Capaci v. Katz & Besthoff*, 711 F.2d 647, 654–56 (5th Cir. 1983) (recognizing and condemning the defensive "divide and conquer" ploy of data disaggregation)), but *even incorporating* NMAC's experts' criticisms into an appropriate statistical analysis, *the results are the same*: African-Americans continue to experience a higher incidence and amount of mark-up than similarly situated Caucasians, even when a regression analysis controls for tier, date, duration, dealership. [cite and attach Cohen report] In other words, while NMAC's expert criticized plaintiffs' expert (and this is what NMAC quotes), NMAC's expert did not do the relevant statistical analysis and, when it is actually done, the racial disparate impact remains (and this NMAC ignores).

Beyond the fact that it is NMAC whose statistics are wrong, this battle of the experts conflict presents matters that go to the weight, not the admissibility or probativeness of the discrimination findings, and thus should be sorted out by the jury. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 n. 8 (9th Cir. 1997); *U.S. v. Chischilly*, 30 F.3d 1144, 1154 (9th Cir. 1994). It is certainly not an issue that supports a denial of class certification. *Caridad v. Metro-North Commuter Railroad*, No. 98-7825, 1999 U.S. App. Lexis 17892 at * 24 (it is inappropriate for courts to resolve "statistical dueling" regarding the import of statistical evidence because this would improperly draw the Court into resolving the merits of the dispute at the class certification stage); *Shores v. Publix Super Markets, Inc.*, No. 95-1162-CIV-T-25(E), 1996 WL 407850 at *7 (M.D. Fla. March 12, 1996) ("battle of experts" cannot be resolved at class certification stage because impermissibly goes to merits of the case). The District Court's

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528 (same).

conclusion in this respect was therefore also correct.

CONCLUSION

Because NMAC's Petition raises nothing more than the kind of case-specific, factual disputes with the District Court's certification decision that are precluded under Rule 23(f), the Court's acceptance of NMAC's appeal would signal an intention by this Court to hear every single appeal of a certification decision filed by a frustrated appellant. This was not the result envisioned by the Supreme Court in adopting Rule 23(f), and it should not be the result here. Plaintiffs-Appellees respectfully request that this Court deny NMAC's Petition.

Respectfully submitted,

Attorneys for Plaintiffs and the Class