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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SILVAN S. SMITH, JOY E. SMITH and RUTH)
WHITESIDE, on behalf of themselves and all)
others similarly situated,)
)
Plaintiffs,)
)
-against-) CIVIL ACTION NO. 00-6003
) Hon. Dennis M. Cavanaugh
CHRYSLER FINANCIAL COMPANY L.L.C.)
)
Defendant.)

**BRIEF OF AMICI CURIAE
AMERICAN BANKERS ASSOCIATION,
AMERICAN FINANCIAL SERVICES ASSOCIATION,
CONSUMER BANKERS ASSOCIATION AND
FINANCIAL SERVICES ROUNDTABLE**

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SILVAN S. SMITH, JOY E. SMITH and)
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STATEMENT OF INTEREST

The American Bankers Association (“ABA”) is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes – money center banks, regional banks,

and community banks. ABA members hold approximately 95 per cent of the domestic assets of United States banks.

The American Financial Services Association (“AFSA”) is the nation’s largest trade association representing market-funded providers of financial services to consumers and small businesses. Organized in 1916, AFSA represents about 360 companies operating more than 10,000 offices engaged in extending \$200 billion or about 15 to 20 percent of all consumer credit in the United States. AFSA’s members include credit card issuers, independently-owned consumer finance companies, diversified financial services companies, and automobile finance companies.¹ They provide a broad range of financial products and services to consumers throughout the United States, including credit card, checking account, and deposit account services, home mortgage loans, home equity loans, retail installment financing, automobile and mobile home financing, and lines of credit.

The Consumer Bankers Association (“CBA”) is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of

¹ Defendant Chrysler Financial Company L.L.C. is an AFSA member.

investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than \$2.9 trillion.

The Financial Services Roundtable (“Roundtable”) consists of 100 of the largest integrated financial services companies in the United States. Established in 1912, the Roundtable delivers respected leadership on regulatory management and provides superior technology leadership in the areas of setting standards, enhancing consumer privacy and security and rationalizing infrastructure.

The ABA, the AFSA, the CBA and the Roundtable frequently appear as amici curiae in cases raising issues of widespread importance to the consumer finance industry. The ABA, the AFSA, the CBA and the Roundtable wish to aid this Court in ruling on the motion to dismiss by presenting the industry’s perspective. In this lawsuit, and similar lawsuits that Plaintiffs’ attorneys have filed around the country, they seek to impose liability on a sales finance company merely for conducting the business of a sales finance company.² Stated differently, Plaintiffs seek to impose liability

² The New Jersey Retail Installment Sales Act generally defines a “sales finance company” as an entity engaged “in the business of acquiring . . .

on a purchaser of retail installment contracts for doing just that – purchasing retail installment contracts. While the instant Complaint names only Chrysler Financial Company L.L.C. (“Chrysler Financial”), Plaintiffs’ theory of liability similarly could be applied to any purchaser of retail installment contracts. The Complaint therefore involves issues which are vital to the members of amici because, if adopted, this theory of liability could have a ruinous effect on the sales finance industry, including depository institutions such as banks, thrifts and credit unions, which all purchase credit obligations entered into by others, would erode market efficiencies and ultimately harm consumers.

PRELIMINARY STATEMENT

Although the sales finance business has operated for many decades, the Complaint in this action attacks the very legal foundation for the sales finance industry by recharacterizing the subject transactions as loans made by the assignees of the subject retail installment contracts.

retail installment contracts.” N.J.S.A. § 17:16C-1(f). The Massachusetts Retail Instalment Sales of Motor Vehicles Act defines a “sales finance company” as a “person engaged, in whole or in part, in the business of purchasing retail instalment contracts from one or more retail sellers.” Mass. Gen. Laws Ann. ch. 255B, § 1.

In an attempt to confer a veneer of legitimacy on their Complaint, Plaintiffs’ attorneys invent the phrase “Mark-up Policy” and claim that purchasers of retail installment contracts “act[] as the lender[]” using such policy. They then allege that this “policy”, though facially neutral, has a disparate impact on a protected class in violation of the Equal Credit Opportunity Act (“ECOA”). Yet the Complaint obscures the fact that this asserted “policy” consists merely of sales finance companies purchasing retail installment contracts with annual percentage rates of finance charge (“APR”s) that are negotiated by retail sellers and retail buyers. Indeed, Plaintiffs plead that the application of the “Mark-up Policy” has a disparate impact on minorities in violation of the ECOA because *retail installment sellers discriminate in negotiating and agreeing with their customers as to the APRs* contained in the retail installment contracts that are purchased by sales finance companies or other purchasers of retail installment contracts. (*See* Compl. ¶¶ 21, 42 (referring to “actions taken by the dealers”).) Stripped of its inflammatory rhetoric, Plaintiffs’ Complaint amounts to a claim that sales finance companies should be held strictly liable under the ECOA for the actions of retail installment sellers. As demonstrated below, however, the ECOA explicitly precludes the imposition of liability on purchasers of retail installment contracts under these circumstances.

Even the disparate impact claim alleged by Plaintiffs is subject to this explicit regulatory provision. Plaintiffs cannot avoid its effect by asserting that they are attacking Chrysler Financial's alleged "practice" of using a "Mark-up Policy". That "practice", even assuming *arguendo* that it otherwise constitutes a "practice" subject to disparate impact analysis (as opposed to merely engaging in the business of buying retail installment contracts), does not itself result in discrimination. The discrimination alleged in this action is not attributable to the challenged "practices" of Chrysler Financial. If there is discrimination, it results only from the intervening discriminatory conduct of dealers. Thus, notwithstanding Plaintiffs' attempt to circumvent it, the explicit language of Regulation B of the Board of Governors of the Federal Reserve System, which implements ECOA, is controlling and provides that a purchaser of retail installment contracts is not liable under the ECOA for the acts of a retail seller under the circumstances alleged in this Complaint.³

³ Plaintiffs annex to their opposing memorandum an amicus curiae brief filed by the Housing and Civil Enforcement Section of the Civil Rights Division of the Department of Justice (the "Housing Section") in a different action. Although the Housing Section does not adopt Plaintiffs' disparate impact legal theory, it asserts that sales finance companies violate the ECOA if they merely approve and fund "loans" in which minorities are charged a higher APR than similarly-situated whites. Like Plaintiffs'

Plaintiffs' approach ignores state regulatory consumer protection schemes that depend on dealers functioning as retail installment sellers, negotiating finance charge rates and selling retail installment contracts to sales finance companies or other purchasers. In addition, Plaintiffs' approach would raise antitrust concerns relating to control by automobile manufacturers and their affiliated sales finance companies over the business of independent dealers.

NATURE OF AUTOMOBILE SALES FINANCING

According to industry estimates, automotive financing volume in 1999 totaled over \$500 billion. CNW Marketing/Research, Document 270 (Exhibit "A" hereto). Retail purchasers of automobiles may obtain credit by securing a loan or taking dealer-originated financing. In the case of direct lending, a depository institution, such as a bank, thrift or credit union, or a personal loan company makes a purchase-money loan directly to a borrower, and the borrower uses the loan proceeds to pay an automobile dealer the cash sale price of the vehicle.

In dealer-originated financing, the APR paid by the consumer is established in negotiations between the consumer and the dealer, and is not

Complaint, this formulation also ignores the explicit language of the Regulation B vicarious liability provision.

dictated or controlled by the ultimate purchaser of the retail contract. The amici curiae believe that dealer-originated financing accounts for a majority of the automobile finance market, reflecting the fact that this financing mechanism is the preferred choice of most consumers. If a consumer wishes to purchase the vehicle on credit, he or she negotiates with the dealer such terms as the APR, the term of the credit extension, the payment schedule and the monthly payment amount.

The dealer then submits the consumer's credit application and relevant credit terms to one or more prospective purchasers by facsimile, direct computer input or telephone. Prospective purchasers of retail installment contracts do not see, or even deal directly with, the applicant. While both the automobile dealer and the prospective purchasers are aware of the information that appears on the completed application and credit report, only the dealer deals directly with the applicant and, because of that personal contact, may know the race of the applicant.

Frequently, the dealer will deliver the vehicle before it knows that it can sell the retail contract. In these cases, the purchaser makes its decision whether or not to buy a retail contract after the retail contract has been signed by the dealer and retail buyer and the vehicle has been driven away by the buyer. In other words, in this scenario, the dealer bears the risk

that it will be unable to sell the retail contract under the terms agreed upon by the dealer and the retail buyer.

Purchasers of retail contracts include depository institutions and sales finance companies (hereinafter referred to collectively as “sales finance companies” or “purchasers of retail installment contracts”). All domestic manufacturers, and most foreign manufacturers or distributors, of automobiles have established a separate sales finance company subsidiary (a “manufacturer-affiliated finance company”) for the purpose of financing retail sales of their automobiles. The manufacturer-affiliated finance companies, such as Chrysler Financial, are, however, only one segment of the automobile finance industry. There is vigorous competition among depository institutions, such as banks, thrifts and credit unions, and both independent and manufacturer-affiliated finance companies for automobile finance business. According to a study conducted by an automotive research firm, manufacturer-affiliated finance companies, which purchase automobile dealer-originated installment sale contracts, account for only approximately 33.6% of all new automobile sales financed. *See* Exhibit “A” hereto.

When a sales finance company or other prospective purchaser receives a completed application from a dealer, it decides whether it would be willing to purchase a retail contract executed or to be executed by the

retail buyer. That decision will involve credit scoring, judgmental evaluation,⁴ or a combination of the two. Once the evaluation is completed, the prospective purchaser informs the dealer whether it would be willing to purchase the retail contract and the rate of charge that the prospective purchaser will charge the dealer for the contract (“buy rate”). The sales finance companies that purchase dealer-originated contracts typically place applicants in tiers of buy rates, based on their category of risk. Merely by way of example, these tiers might carry the following risks/rates for new vehicles⁵:

Tier A — Very Low Risk — 9.0% buy rate

Tier B — Slight Risk — 10.0% buy rate

Tier C — Medium Risk — 12.0% buy rate

⁴ A judgmental evaluation involves an assessment of the consumer’s creditworthiness (*e.g.*, credit history, monthly income, job and residence stability), the deal structure (*e.g.*, debt-to-income, monthly payment-to-income and loan-to-value ratios, and the size of the down payment), and the quality of the car which serves as collateral for the credit extension (*e.g.*, age, make, model, mileage, and expected depreciation). While the purchaser of retail installment contracts may base its decision on factors such as debt-to-income and payment-to-income ratios, it may not know the actual APR in any proffered transaction, and therefore uses a variety of means to estimate the APR for purposes of these calculations.

Tier D — Highest Risk — 15.0% buy rate

The buy rate also will be a function of additional factors such as the prospective purchaser's cost of funds, responses to developments in the secondary market (if it is intended that the receivables will be pooled and securitized) and, in the case of manufacturer-affiliated finance companies, marketing incentives to stimulate car sales by subsidizing credit costs. If the applicant's credit is approved and the parties enter into the retail contract,⁶ the dealer assigns the completed contract to the sales finance company or

⁵ Buy rates are higher for transactions involving used vehicles, such as that entered into by Plaintiffs Silvan S. and Joy E. Smith.

⁶ Retail installment sales, and the contracts that evidence such transactions, are subject to many technical legal requirements, such as those imposed by state retail installment sales acts, the Truth in Lending Act, certain FTC trade regulation rules and UCC Articles 2 and 9. Given these numerous compliance obligations, purchasers of retail contracts find it risky to accept assignments of retail contracts drafted by or on behalf of individual dealers or other purchasers of retail contracts. Purchasers of retail contracts, therefore, typically supply dealers with forms of retail installment contracts to ensure that the contracts they acquire comply with applicable legal requirements and are not inconsistent with the manner in which those contracts will be serviced. These institutions will purchase retail installment contracts written on these supplied forms and, in some cases, other forms that they have reason to believe comply with applicable law. However, these retail contract forms leave blank the critical, transaction-specific elements of pricing. Without exception, the dealer will fill in the blank spaces reserved for the APR, finance charge, amount financed, total of payments, total sale price and the buyer's payment schedule.

other purchaser and the contract is purchased using the applicable buy rate. If the retail contract has an APR in excess of that rate, the purchaser of the retail installment contract pays the differential, which is subject to charge-back if the retail buyer fails to make payments under the contract. If the contract has an APR below the buy rate, the dealer must pay the difference to the purchaser of the retail installment contract.

The establishment of buy rates by the “Big Three” automobile finance companies – Chrysler Financial, Ford Motor Credit Company and General Motors Acceptance Corporation – was subjected to scrutiny under the ECOA during an investigation by the Department of Justice and Federal Trade Commission beginning in 1995. *See* Angelo Henderson, *U.S. Investigates Whether Big Three Charged Blacks More for Car Loans*, Wall St. J. March 21, 1995, at B11. The government closed its investigations with no finding of a violation by any of the manufacturer-affiliated sales finance companies. Indeed, Plaintiffs admit in their Complaint that Chrysler Financial’s process for making creditworthiness decisions is objective. (*See* Compl. ¶¶ 16-18, 20.)

As an independent business, an automobile dealer continuously seeks advantageous sources of financing for its retail installment contracts. Indeed, dealers typically establish retail sales financing relationships with

various purchasers of retail installment contracts and often submit at the same time the same information about a buyer to several different prospective purchasers. The dealer has a strong incentive to obtain the lowest buy rate, because the dealer usually has negotiated an APR with the buyer that is greater than the anticipated buy rate. The margin between these two rates (the “differential”), or some portion thereof, represents the dealer’s gross margin on the credit sale. A lower buy rate maximizes the differential upon which the dealer’s profit is based. Since automobile dealers are not obligated to sell a motor vehicle retail installment contract to any particular purchaser, there is intense competition among financing sources for the dealer’s business.

The dealer will consider a number of competing factors in deciding upon the ultimate APR to seek from its customers. Two influential factors are the buyer’s negotiation posture and financing alternatives, coupled with the risk that, if the rate offered by the automobile dealer is too high, the buyer may seek an alternative source of credit. If the buyer decides to obtain financing elsewhere, the buyer might change his or her mind and purchase the vehicle from another dealer. Thus, a key to consummating the sale of the vehicle often is to close the credit transaction on the spot.

ARGUMENT

I. State Retail Installment Sales Acts Recognize that a Sales Finance Company May Purchase Retail Installment Contracts for an Agreed-Upon Price

Nearly every state has enacted at least one statute that regulates the retail installment sale of goods and/or services. These statutes were adopted by most states decades ago in order to regulate credit sales of consumer goods and services that previously had been exempt from usury statutes.⁷ Generally, these statutes impose operational and substantive requirements on contracts entered into by retail sellers and retail buyers and mandate certain disclosures in those retail contracts. Their purpose has been stated to be the “equalization of the relation between the installment seller and his buyer; it was to protect the buyer from the myriad of oppressive practices which, under the best of circumstances, seem to characterize installment selling.” *Chrysler Credit Corporation v. Ross*, 28 Ill. App. 3d 165, 328 N.E.2d 65, 69 (App. Ct. 1st Dist. 1975); *accord, Nassau Discount Corp. v. Allen*, 44 Misc. 2d 1007, 1010, 255 N.Y.S.2d 608, 612 (N.Y.C. Civ. Ct. Kings County) (“the purpose of the Retail Instalment Sales Act is to

⁷ As early as 1861, the United States Supreme Court recognized that the sale of goods on credit does not constitute a loan and therefore is exempt from the interest limitations of usury laws. *See Hogg v. Ruffner*, 66 U.S. (1 Black) 115, 118-19 (1861).

afford broader protection to the consumer”), *rev’d on other grounds*, 47 Misc. 2d 671, 262 N.Y.S.2d 967 (App. Term. 2d Dep’t 1965).

The provisions of the statutes of New Jersey and Massachusetts, the states where Plaintiffs reside, are illustrative. Both the New Jersey Retail Installment Sales Act and the Massachusetts Retail Instalment Sales of Motor Vehicles Act historically regulated the time price differential (*i.e.*, finance charge). The New Jersey statute currently authorizes a retail seller to charge any rate of finance charge agreed to by the retail buyer:

A retail seller . . . shall have authority to charge, contract for, receive or collect a time price differential . . . in an amount or amounts as agreed to by the retail seller . . . and the buyer . . .

N.J.S.A. § 17:16C-41. The Massachusetts statute provides that “[a] retail seller may charge, receive and collect for any . . . motor vehicle, a finance charge not in excess of . . . twenty-one per cent.” Mass. Gen. Laws Ann. ch. 255B, § 14. Thus, these statutory schemes acknowledge that the retail seller and the retail buyer establish the APR to be paid by the buyer.⁸

⁸ In their opposition memorandum, Plaintiffs repeatedly refer to their transactions incorrectly as “loans”. See Plaintiffs’ Opposition to Defendant Chrysler Financial Company L.L.C.’s Motion to Dismiss (“Pl. Opp.”) at 3, 9 n.3. Similarly, the financing transactions discussed in the

Significantly, the state retail installment sales acts generally define the term “retail seller” as a person who sells goods or services to a retail buyer on an installment basis. *See* N.J.S.A. § 17:16C-1(c) (defining “retail seller” as “a person who sells . . . goods or services under a retail installment contract”); Mass. Gen. Laws Ann. ch. 255B, § 1 (defining “retail seller” as “a person who sells a motor vehicle to a retail buyer under or subject to a retail instalment contract”) . Thus, in order for a transaction to fall within the scope of these acts, the transaction must be a retail installment sale and the rate on the retail contract must be set by the retail installment seller. Accordingly, if sales finance companies were to deal directly with retail buyers and set the APRs (which is the arrangement advocated by Plaintiffs), then they would have to function as lenders.

Under the state retail installment sales acts, sales finance companies are permitted to purchase retail contracts from retail sellers at any agreed upon price.⁹ *See* N.J.S.A. § 17:16C-47.1 (authorizing sales finance

Housing Section’s brief are repeatedly mischaracterized as loans of money. *See* Exhibit “A” to Pl. Opp. at 2, 3, 10, 11, 13.

⁹ Many states, including New Jersey and Massachusetts, require that purchasers of retail installment contracts obtain a license to engage in the

companies to purchase retail installment contracts from retail sellers “on such terms and conditions and for such price as may be mutually agreed upon”); Mass. Gen. Laws Ann. ch. 255B, § 18 (same). The state statutory schemes therefore explicitly allow a differential between the APR and the buy rate.¹⁰

Plaintiffs’ attempt to overhaul the structure of automobile sales financing would obliterate this consumer protection scheme by eliminating the role of the dealer as the retail installment seller that enters into retail installment contracts, and by ignoring the legislative pronouncements specifically authorizing sales finance companies to purchase retail installment contracts from retail sellers at any agreed upon price.

II. The Equal Credit Opportunity Act Does Not Require an End to the Sales Finance Industry, Yet Plaintiffs’ Complaint Seeks To Hold Chrysler Financial Liable Under the ECOA Merely For Acting As A Sales Finance Company

sales finance business. See N.J.S.A. § 17:16C-2; Mass. Gen. Laws Ann. ch. 255B, § 2.

¹⁰ In addition, both the New Jersey and Massachusetts statutes contain numerous provisions expressly regulating the conduct of “holders” of motor vehicle retail installment contracts. Indeed, the New Jersey statute defines “holder” to include any person “who is entitled to the rights of a retail seller under a retail installment contract.” N.J.S.A. § 17:16C-1(m). The Massachusetts statute defines “holder” to include “the sales finance company or other assignee.” Mass. Gen. Laws Ann. ch. 255B, § 1.

Plaintiffs complain that the “practice” of purchasing retail contracts which contain an APR negotiated by the dealer results in a prohibited disparate impact. Indeed, the Complaint suggests that merely engaging in the sales financing business is tantamount to committing an ECOA violation:

The automobile financing industry in general has long been aware that commission driven discretionary pricing systems, such as those in the real estate mortgage industry that are structurally similar to the system utilized by Chrysler Financial, produce significant discriminatory effects.

(Compl. ¶ 26.) In effect, Plaintiffs are arguing that the ECOA prohibits a person from purchasing retail installment contracts entered into by retail installment sellers. ECOA, however, should not be construed in a manner that would prohibit merely engaging in a line of business that has existed for decades, and is recognized and regulated by consumer protection statutes in nearly every state. *See* Section I *supra*. Clearly, the ECOA never was intended to be applied in such a manner.

It is misleading for Plaintiffs to argue that they are not seeking to hold Chrysler Financial liable for the actions of the dealer, but only for its own acts in using a “Mark-up Policy”. Pl. Opp. at 9-10. This so-called “policy” is a direct consequence of the fact that the dealer is the retail seller

who makes the retail installment sale. In “allowing” the dealer to negotiate the APR with the retail buyer, Chrysler Financial is doing nothing more than acting as a sales finance company by buying retail installment contracts entered into by the retail seller and the retail buyer. Accordingly, Plaintiffs, by their own admission, are seeking to prevent Chrysler Financial from engaging in the sales finance business.

Moreover, Plaintiffs obscure the fact that disparate impact, if there is one, is caused by the *dealer’s* imposition of a discriminatory differential above Chrysler Financial’s buy rate. (Pl. Opp. at 9.) Thus, even if conducting business as a sales finance company could be construed as a practice under ECOA, buying contracts that include a differential cannot be the cause of any disparity. Rather, if there is disparity, it is caused by the act of the dealer in setting the APR.

Failure to recognize this fact leads to absurd results. For example, assume that a finance company purchases a portfolio of only 20 retail contracts, and it turns out that 10 involve white buyers who purchased their cars from a dealer located in Newark and 10 involve African-American buyers who purchased their cars from a dealer located in Jersey City.¹¹

¹¹ Of course, the purchaser of retail installment contracts does not know the race of the dealer’s customer when the credit information is communicated

Under Plaintiffs’ theory, the purchaser would be deemed to be liable for the alleged disparate impact if the retail contracts for the white consumers had an average mark-up over the buy rate of 1%, while the retail contracts for the African-American consumers had an average mark-up over the buy rate of 2%. This would be true even if all customers of the Newark dealership, regardless of race, always paid a 1% mark-up, and all the customers of the Jersey City dealership always paid a 2% mark-up.

Plaintiffs’ theory of liability systematically side-steps any probative analysis of whether the consumers were treated in a nondiscriminatory manner, suggests discrimination where none may exist and, more importantly, does not focus on conduct by the dealer – the only person who directly deals with the buyer and controls the transaction.

III. Assignees Such as Chrysler Financial Are Explicitly Excluded from the Definition of “Creditor” for Purposes of ECOA Unless They Had Knowledge or Reasonable Notice that There Was Discrimination

Chrysler Financial persuasively argues that a disparate impact analysis is not applicable to the pricing of motor vehicle retail installment

to it by fax or electronically. *See, e.g.*, 12 C.F.R. § 202.5(d)(5) (“A creditor shall not inquire about the race, color, religion, or national origin of an applicant or any other person in connection with a credit transaction”).

contracts. (Memorandum in Support of Defendant’s Motion to Dismiss at 10-19.) However, even if disparate impact were applicable to the pricing practices of a creditor, the claim would have to be directed to the creditor that does the pricing. Regulation B expressly addresses the issue of when an assignee may be held liable under the ECOA.

A purchaser of retail installment contracts may be a “creditor” for certain purposes of ECOA. *See* 12 C.F.R. § 202.2(l) (defining the term “creditor” to include an assignee who participates in the credit decision). However, in multiple creditor situations involving both a dealer and a sales finance company such as Chrysler Financial, Regulation B establishes an exception to this rule for assignees (such as Chrysler Financial):¹²

A person is not a creditor regarding any violation of the act or this regulation committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction.

¹² Prior to 1979, the quoted portion of Section 202.2(1) of Regulation B referred to “an assignee, transferee, subrogee, or other creditor”. 42 Fed. Reg. 1242 (Jan.6, 1977). In 1979, this reference was superseded by the current generic reference to “a person” when the regulation was amended to apply to real estate brokers who regularly refer applicants or prospective applicants to creditors. 44 Fed. Reg. 23813, 23814 (Apr. 23, 1979).

Id. (emphasis added). As noted previously, Plaintiffs allege only that Chrysler Financial was aware that “discretionary pricing systems” such as those used in an entirely different industry result in discrimination. (Compl. ¶ 26.) Even if this factual allegation were true, it is legally insufficient. The operative provision of Regulation B makes clear that liability may not attach to Chrysler Financial on this basis. *The Complaint is wholly devoid of the requisite predicate allegation that Chrysler Financial knew or had reasonable notice of any ECOA violation by Global Auto Mall or Classic Chrysler Center, Inc., the dealerships that assigned Plaintiffs’ retail installment contracts to Chrysler Financial.*¹³ Accordingly, under the applicable provision of Regulation B, Chrysler Financial is not a “creditor”

¹³ Even reading the Complaint in the most liberal fashion, there are only two allegations that purport to ascribe to Chrysler Financial knowledge of *any* action by another party: the claim that Chrysler Financial “authorizes the application of a subjective component in its credit pricing system”, (Compl. ¶ 18), and Chrysler Financial’s alleged awareness of discrimination within the mortgage lending industry, (Compl. ¶ 26). These allegations plainly do not constitute knowledge or reasonable notice of the predicate to liability, namely a “violation of [the ECOA or Regulation B] committed by another creditor” (*i.e.*, Global Auto Mall or Classic Chrysler Center, Inc.). For this reason, the holding in *Coleman v. General Motors Acceptance Corp.*, 196 F.R.D. 315, 324 (M.D. Tenn. 2000) is unavailing. Pl. Opp. at 19-20. Moreover, the court in *Coleman* was incorrect in implying that the defendant has the burden of showing a lack of knowledge, rather than the plaintiff being required to establish knowledge by the defendant of the discriminatory act.

for purposes of ECOA and cannot be liable for any discriminatory acts allegedly committed by a dealer.

Equally irrelevant is Plaintiffs' allegation that "Chrysler Financial has a non-delegable duty to ensure that its motor vehicle financing structure and policies do not have a disparate impact on legally protected classes, such as blacks." (Compl. ¶ 23.) There is no such duty under ECOA with respect to the acts of dealers.

In support of their claim of a "non-delegable duty", Plaintiffs cite to an amicus curiae brief filed by the Housing Section in connection with a different action. The cases cited by the Housing Section in support of this alleged "non-delegable duty" are inapposite. (Exhibit "A" to Pl. Opp. at 6-10 & n.2.) All of those cases addressed claims under the Fair Housing Act (the "FHA")¹⁴ involving alleged discriminatory acts by *agents or employees*

¹⁴ Indeed, the Housing Section's exhortation to consider FHA cases in interpreting ECOA is misleading. While courts may *generally* "look to case law developed under the Fair Housing Act to interpret ECOA", Exhibit "A" to Pl. Opp. at 6-7, none of the ECOA cases cited in the Housing Section's amicus brief to support this proposition involved a non-delegable duty imposed in derogation of the express language of the Regulation B vicarious liability provision. *See Shuman v. Standard Oil Co. of Cal.*, 453 F. Supp. 1150, 1153 (N.D. Cal. 1978); *U.S. v. Beneficial Corp.*, 492 F. Supp. 682, 686-87 (D.N.J. 1980), *aff'd*, 673 F.2d 1302 (3d Cir. 1981); *Emigrant Savings Bank v. Elan Management Corp.*, 668 F.2d 671, 673 & n.3 (2d Cir. 1982).

of the defendant.¹⁵ Thus, these cases stand merely for the unremarkable proposition that employers are responsible for their employees and principals are responsible for their agents. However, this is not the case under the ECOA in multiple creditor situations, where the issue of vicarious liability has been addressed expressly in Section 202.2(l) of Regulation B. Accordingly, even if Plaintiffs could establish that the dealer is the agent of Chrysler Financial (which it is not),¹⁶ such an agency relationship is legally

¹⁵ See *Marr v. Rife*, 503 F.2d 735, 741-42 (6th Cir. 1974) (finding real estate agency owner liable because he “had at least the power to control the acts of his salesmen” who committed the violation); *Walker v. Crigler*, 976 F.2d 900, 904-05 (4th Cir. 1992) (imposing liability on owner of property “whose agent acted contrary to instruction” in violating FHA); *Sanders v. Dorris*, 873 F.2d 938, 944 (6th Cir. 1989) (finding owner of real estate agency liable for conduct of his agents); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir. 1980) (holding that “[d]iscriminatory conduct on the part of a rental agent is, however, attributable to the owner of a motel, apartment complex, or other public housing facility”); *Alexander v. Riga*, 208 F.3d 419, 432-33 (3d Cir. 2000) (finding that landlord may be liable under FHA for acts of its employee), *cert. denied*, 121 S. Ct. 757 (2001); *Fair Housing Congress v. Weber*, 993 F. Supp. 1286, 1294 (C.D. Cal. 1997) (imposing FHA liability on owner of apartment complex for the discriminatory acts of his managing agent employees); *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1059 (E.D. Va. 1987) (finding president of apartment management company liable under FHA for the acts of employee managers).

¹⁶ Numerous courts have held that dealers are not the agents of sales finance companies. See, e.g., *King v. Hailey Chevrolet Co.*, 462 F.2d 63, 65 (6th Cir. 1972); *Mardis v. Ford Motor Credit Co.*, 642 S.2d 701, 704-05 (Ala. 1994); *Chrysler Credit Corp. v. Barnes*, 191 S.E.2d 121, 128

irrelevant because Chrysler Financial is not subject to liability as alleged in the Complaint because of Section 202.2(l).¹⁷ Unlike the ECOA, the FHA does not contain a provision that explicitly provides that a creditor that lacks

(Ga. Ct. App. 1972). In addition, both the New Jersey and Massachusetts statutes regarding retail installment sales treat the automobile dealer as a retail installment seller and, thus, are conceptually inconsistent with the existence of an agency relationship. *See, e.g.*, N.J.S.A. § 17:16C-1(h); Mass. Gen. Laws Ann. ch. 255B, § 1.

¹⁷ A statutory limitation on liability controls with respect to claims arising under that statute. In directly analogous circumstances involving the Truth in Lending Act, the appellate courts that have considered the question have held uniformly that the TILA Section 131 assignee liability provision controls with respect to assignee liability for a TILA violation over the more general provisions of the FTC Trade Regulation Rule Concerning the Preservation of Consumers' Claims and Defenses. *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 200-01 (3d Cir. 2000); *Green v. Levis Motors, Inc.*, 179 F.3d 286, 294-95 (5th Cir.), *cert. denied*, 528 U.S. 1020 (1999) ; *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 708-09 (11th Cir. 1998); *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689, 692-94 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999) (interpreting 15 U.S.C. § 1641 and 16 C.F.R. § 433.2). Similarly, other courts have rejected attempts to use general principles of vicarious liability to override the reasonable notice defense under the federal securities laws, *see Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1019 (2d Cir. 1989) (“[t]he general principles of vicarious liability do not preempt [the] ‘reasonable care’ defense” under the Securities Exchange Act of 1934), or to imply or superimpose civil liability under those laws for allegedly aiding and abetting a violation. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176-77 (1994) (the “issue . . . is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute”).

knowledge or reasonable notice of another creditor's violation is not vicariously liable.

IV. Discretionary Pricing Promotes Competition and Serves Consumers

A. Competition Among Purchasers of Retail Installment Contracts Helps to Keep Buy Rates Lower

The relationship between a dealer and a purchaser of retail installment contracts in dealer-originated financing is analogous to that of a wholesaler and a retailer of goods. It is the norm in our free market economy that a retailer has discretion to set the price to be paid by the consumer. Price setting flexibility is essential to the operation of a free marketplace, and such flexibility serves the interests of consumers. A wholesaler, however, is not responsible for what the retailer does, whether the retailer fixes prices with other retailers or illegally discriminates in setting the prices for its goods or services.

Most consumers choose dealer-originated financing over readily available alternatives when purchasing a car. The ability of the dealer to earn the differential produces downward pressure on buy rates because purchasers of retail contracts know that: (1) the consumer will seek alternative financing sources if the APR is too high; and (2) the dealer will seek to maximize his earnings by seeking a greater margin. The dealer's

profit motive in this regard ensures that it will establish business relationships with numerous prospective purchasers of retail contracts. If the dealer had only one sales finance company to which it sold its retail contracts, that company would have far less incentive to keep its buy rate at a competitive level. Competing purchasers of retail installment contracts create downward buy rate pressure which, even with the added margin, inures to the ultimate economic benefit of consumers.

B. The Dealer's Ability to Earn a Profit Creates Economic Efficiencies that Ultimately Benefit Consumers

It would be a gross oversimplification to conclude that any differential added by the dealer to the buy rate increases consumer cost without justification. A buy rate reflects the sales finance company's price without the expense of staffed brick and mortar sales operations in or near thousands of automobile dealerships throughout the country. Dealers make such expenditures unnecessary and are entitled to be compensated accordingly.

If the dealer were not able to profit from credit, the incentives to establish relationships with multiple competitors also would be diminished. Because different purchasers of dealer-originated retail contracts have varying preferences with respect to the terms of retail

contracts they wish to buy (*e.g.*, variations in duration, amount of down payment, maximum amounts financed, etc.) and have different appetites for risk, the dealer generally is able to provide credit to the vast majority of its customers, notwithstanding differences in consumers' creditworthiness, desired financing terms, and the preferred structure of the overall transaction.

Plaintiffs effectively propose that purchasers of retail installment contracts should act to restrain the dealer's ability to negotiate and establish the price of credit. This is not good policy, even if it were possible to do so. Competition among dealers would be reduced, as would competition among purchasers of retail installment contracts. Reduced competition would drive up costs for retail buyers, limit financing options, and reduce credit availability. Moreover, any individual purchaser of dealer-originated retail contracts that alone was limited in its ability to buy contracts where there is a differential would cease to be attractive to dealers and would be driven out of business.

V. Prohibiting Dealers from Setting Rates on Retail Installment Contracts May Result in Antitrust Claims Alleging Vertical Agreements

Even if purchasers of retail installment contracts had sufficient economic leverage to set the dealer differential, the price of dealer-

originated credit may be subjected to antitrust scrutiny with respect to such action. Under certain circumstances, antitrust law prohibits a manufacturer or wholesaler from agreeing with a retailer to set the price that the retailer charges.¹⁸

In *U.S. v. General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941), the defendants were held criminally liable for policies designed, among other things, to “restrain and interfere with the right of General Motors’ dealers to finance cars sold by them in whatever manner they see fit.” 121 F.2d at 383. The court found that when such interference occurs, “retail purchasers of General Motors cars are deprived from free competition, and certain members of the public are even deprived of the opportunity to purchase a General Motors car, when they are

¹⁸ See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-05 (1911) (agreement between manufacturer, wholesaler and retailer to maintain standard prices is an unlawful restraint on trade); see also *State Oil Co. v. Khan*, 522 U.S. 3 (1997). The Supreme Court has held that credit terms may be considered part of price. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); see also *Pennsylvania Dental Assoc. v. Medical Service Assoc. of Penn.*, 745 F.2d 248, 256 (3d Cir. 1984) (citing *Catalano* for proposition that a horizontal agreement among competitors to fix credit costs is a *per se* violation of § 1 of the Sherman Act), *cert. denied*, 471 U.S. 1016 (1985).

prevented from financing these cars except on terms dictated by the appellants.” *Id.* at 403.

Eleven years later, General Motors Corporation and GMAC entered into a final judgment in settlement of a government civil antitrust suit. That judgment mandated that “General Motors Corporation shall not enter into any retail contract or agreement with any dealer . . . which requires the dealer to observe any General Motors Acceptance Corporation plan or rate of financing for the purchase and sale of automobiles.” *U.S. v. General Motors Corp.*, Civil No. 2177, 1952 Trade Cas. (CCH) ¶ 67,324, 1952 U.S. Dist. LEXIS 1932, at *6 (N.D. Ill. July 28, 1952), *judgment terminated*, 1983-2 Trade Cas. (CCH) ¶ 65,614, 1983 WL 1870 (N.D. Ill. Aug. 15, 1983).

Long after these enforcement actions, General Motors Corporation and GMAC were again sued, this time in a private civil suit alleging price fixing in connection with the pricing of automobiles and financing. *Levicoff v. General Motors Corp.*, 551 F. Supp. 98 (W.D. Pa. 1982). The case was dismissed. As to the automobile price-fixing claim, the court concluded that “[t]here is no suggestion in the pleadings that [the dealer] was prevented from making deals with customers on an individual basis or otherwise precluded from charging prices different than the

manufacturer's suggested price." 551 F. Supp. at 104. The court found that the price-fixing claim as it applied to the rate of finance charge was insufficiently pleaded. *Id.* at 104 n.12.

The lesson from these cases for the indirect automobile financing industry as a whole is clear: an agreement between purchasers of retail contracts and the dealers who enter into them to set uniform prices for the credit the dealer extends to the consumer invites antitrust concerns.

CONCLUSION

For the foregoing reasons, amici curiae American Bankers Association, American Financial Services Association, Consumer Bankers Association and Financial Services Roundtable respectfully request that the Court grant Defendant's Motion to Dismiss.

Respectfully submitted,

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