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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff

v.

GOLDEN EMPIRE MORTGAGE, INC., et al.,

Defendants.

Case No. CV09-03227 CAS (SHx)

PLAINTIFF FTC'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

Assigned to Judge Christina A. Snyder
Date: September 14, 2009
Time: 10:00 a.m.

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I. INTRODUCTION

The Federal Trade Commission ("FTC") brings this action under the Federal Trade Commission Act (FTC Act), 15 U.S.C §§ 45(a), 53(b), and 57b, the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq.*, and ECOA's implementing Federal Reserve Board Regulation B ("Regulation B"), 12 C.F.R. pt. 202, to remedy Defendants' alleged discriminatory mortgage lending practices. As alleged in the FTC's Complaint, Golden Empire Mortgage, Inc. ("GEM") and its principal, Howard D. Kootstra, implemented a discretionary pricing policy that resulted in Hispanic borrowers paying higher prices for mortgages than non-Hispanic white borrowers. The Complaint alleges that these practices violate Section 701(a) of the ECOA, which makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . national origin." 15 U.S.C. § 1691(a)(1). Because Section 704(c) deems a violation of the ECOA to be a violation of the FTC Act, the Complaint alleges a violation of the FTC Act as well. The FTC seeks permanent injunctive relief pursuant to its powers under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 704(c) of the ECOA, 15 U.S.C. § 1691c(c), to stop these alleged discriminatory practices, as well as equitable monetary relief to redress Hispanic borrowers allegedly victimized by Defendants' policies. Defendants have filed a motion to dismiss asserting that this action is barred by the ECOA's two-year statute of limitations set forth in Section 706(f), 15 U.S.C. § 1691e(f), and that the FTC has failed to state a claim against Mr. Kootstra. The law and the cases, however, do not support Defendants' contentions.

First, the FTC faces no statute of limitations when seeking equitable relief in federal court pursuant to the ECOA. *United States v. Blake*, 751 F. Supp. 951,

952 (W.D. Okla. 1990); *FTC v. Green Tree Acceptance, Inc.*, No. 86-0469, 1987 U.S. Dist. LEXIS 16750, at *12 (N.D. Tex. Sept. 30, 1987). The FTC has filed suit in this Court under Section 704(c), making the two-year statute of limitations in Section 706(f), which addresses only actions by private litigants and the Attorney General, inapplicable. Notwithstanding Defendants' misguided focus on the title of Section 704(c), the actual words of that section empower the FTC to enforce the ECOA using "*[a]ll of the functions and powers*" afforded the agency pursuant to the FTC Act. 15 U.S.C. § 1691c(c) (emphasis added). The phrase "all of the functions and powers" includes the FTC's authority under Section 13(b) of the FTC Act to proceed in federal court. *Blake*, 751 F. Supp. at 952; *United States v. Landmark Fin. Servs., Inc.*, 612 F. Supp. 623, 627 (D. Md. 1985). Section 13(b) specifically authorizes the FTC to seek, and the district courts to grant, preliminary and permanent injunctions against practices that violate *any of the laws enforced by the Commission.* 15 U.S.C. § 53(b); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982). Section 704(c) itself has no statute of limitations, and in an action seeking equitable relief, Section 13(b) contains no statute of limitations. Nonetheless, Defendants argue that Section 706(f) of the ECOA applies to the case at bar. The federal courts that have addressed the applicability of the Section 706(f) statute of limitations to FTC actions, however, have specifically rejected Defendants' argument. *Blake*, 751 F. Supp. at 952; *Green Tree*, 1987 U.S. Dist. LEXIS 16750, at *8-9. In sum, the FTC's action against Defendants for injunctive and equitable monetary relief under Section 704(c) of the ECOA is authorized by Section 13(b) of the FTC Act and is not subject to any statute of limitations, in Section 706 of the ECOA or otherwise.

Second, the FTC has stated a claim for individual liability against Mr. Kootstra. As the sole shareholder, owner, president and CEO of GEM, Defendant

Kootstra has formulated, directed, controlled, or had the authority to control, the acts and practices of the corporation, including the implementation of policies that unlawfully discriminated against Hispanic applicants. Compl. ¶¶ 5, 12, 17, 20, 24, 25. Corporate officers are personally liable under the ECOA when they meet the ECOA and Regulation B definition of a "creditor," *i.e.*, when they regularly participated in the decision-making processes of the corporation. *FTC v. Cap. City Mortgage, Corp.*, No. 98-237, 1998 WL 1469619, at *6 (D.D.C. July 13, 1998); *United States v. Am. Future Sys., Inc.*, 571 F. Supp. 551, 560-61 (E.D. Pa. 1982), *aff'd*, 743 F.2d 169, 182 (3d Cir. 1984). Moreover, as a control person of GEM, Kootstra independently may be enjoined pursuant to Section 13(b) of the FTC Act for GEM's ECOA and FTC Act violations. An individual is liable for violations of the FTC Act when he or she either participated directly in or had authority to control the corporation's violative practices. *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). Defendants' passing argument that Mr. Kootstra cannot be held liable for the disparate impact of GEM's discretionary pricing policy is undermined by controlling Ninth Circuit precedent. *See Miller v. Am. Express Co.*, 688 F.2d 1235, 1239-40 (9th Cir. 1982) (a plaintiff can establish an ECOA claim under either a theory of disparate treatment or disparate impact). Because the FTC has sufficiently alleged that Mr. Kootstra is both a "creditor" under the ECOA and a control person under the FTC Act, he is personally liable.

II. BACKGROUND

In its Complaint, the FTC alleges that Defendants GEM and its sole shareholder, owner, president, and CEO—Howard Kootstra—are in the business of originating and financing mortgage loans. Compl. ¶¶ 5, 8-10. As owner, president, and CEO, Defendant Kootstra has formulated, directed, or had the

authority to control the acts and practices of GEM. *Id.* ¶ 5. Both GEM and Mr. Kootstra are creditors as defined by the ECOA and Regulation B. *Id.* ¶ 6.

The ECOA prohibits "any creditor [from] discriminat[ing] against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . national origin." 15 U.S.C. § 1691(a)(1). In the exercise of the FTC's authority, the ECOA deems any violation of the ECOA to be a violation of the FTC Act. 15 U.S.C. § 1691c(c). The FTC alleges that GEM and Mr. Kootstra violated the ECOA and, as a result, the FTC Act, by charging Hispanic applicants higher prices for mortgage loans than non-Hispanic white applicants. Compl. ¶¶ 20, 24-25. Specifically, the Complaint asserts that GEM and Mr. Kootstra authorized the company's discretionary pricing policy, which has allowed loan officers and branch managers wide discretion to charge higher interest rates and up-front fees (*i.e.*, "overages") to certain borrowers. *Id.* ¶¶ 11-12, 17. The overages were in addition to the risk-based price of the loan, which is determined by the underwriting risk and credit characteristics of applicants. *Id.* ¶¶ 11-12. Although Defendants capped the overage amount at three percent of an applicant's loan amount, Defendants allowed a branch manager or a member of Defendants' senior management team to grant exceptions to the cap, resulting in overages that exceeded the three-percent cap. *Id.* ¶ 17.

Pursuant to the discretionary pricing policy and their contracts with GEM and Mr. Kootstra, Defendants' loan officers and branch managers are compensated based on a portion of the overages they charge applicants, *i.e.*, the higher the overage, the greater the compensation. *Id.* ¶¶ 13-16. Defendants did not review, monitor, examine, or analyze the overages, or the exceptions to the cap on overages, imposed on Hispanic applicants as compared to non-Hispanic white applicants to ensure that loan officers and branch managers were not unjustifiably

charging higher overages to Hispanic applicants. *Id.* ¶ 18.

The FTC alleges both that Defendants' discretionary pricing policy caused Hispanic borrowers to be charged overages that were substantially higher than similarly qualified non-Hispanic white borrowers, and that Defendants intentionally made these pricing disparities on the basis of national origin. *Id.* ¶¶ 20, 24-25. The FTC further alleges that Defendants exceeded the cap on overages substantially more frequently on loans originated to Hispanic borrowers than to non-Hispanic white borrowers. *Id.* ¶ 19. To this day, Defendants employ a discretionary pricing policy, allow exceptions to the cap on overages, and do not monitor the effects of these policies. *Id.* ¶¶ 12, 17-18.

Because "[c]onsumers have suffered, and will continue to suffer, substantial injury as a result of Defendants' violations," *id.* ¶ 26, the FTC seeks permanent injunctive relief to prevent future violations as well as redress for all injured consumers. *Id.* ¶ 27.

III. ARGUMENT

A. The FTC's Action Is Not Time-Barred.

In this case, the FTC has alleged that Defendants' conduct violated Section 701 of the ECOA and, in turn, the FTC Act, by unlawfully discriminating against Hispanic applicants when pricing mortgage loans. Defendants argue that the FTC's action against GEM and Mr. Kootstra is time-barred by Section 706(f) of the ECOA, which sets forth a two-year statute of limitations to those suits brought under Section 706 of the ECOA, namely private rights of action, agency referrals and Attorney General initiated civil actions. Mot. 10-11. To make this argument, however, Defendants first ignore the plain language of Section 704(c) of the ECOA, which independently authorizes the FTC to bring this suit. Next, disregarding federal court precedent, Defendants argue that Section 706(f) governs

"judicial ECOA actions"—including FTC federal court actions for equitable relief—while Section 704(c) merely applies to administrative proceedings. Mot. 10-11. Unable to point to a single case that supports their interpretation of the ECOA, Defendants contend that the district court decisions finding Section 706(f)'s two-year statute of limitations inapplicable to FTC judicial actions are "wrong." Mot. 10. Defendants' arguments should be rejected.

1. The FTC Brings its Case Under ECOA Section 704, which Authorizes the FTC to Invoke "All of the Functions and Powers" Afforded the Agency Pursuant to the FTC Act.

Section 704(c) expressly permits the FTC to bring judicial enforcement actions such as the present case. When interpreting the language of a statute, courts begin with the plain language employed by Congress. *Park 'n' Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 661, 83 L. Ed. 2d 582, 587 (1985). If a statute speaks with clarity to a particular issue, then "judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S. Ct. 2589, 2594, 120 L. Ed. 2d 379, 388 (1992); *see Howe v. Smith*, 452 U.S. 473, 483, 101 S. Ct. 2468, 2475, 69 L. Ed. 2d 171, 180 (1981). Section 704(c) provides:

> [A] violation of any requirement imposed under [the ECOA] shall be deemed a violation of a requirement imposed under [the Federal Trade Commission Act]. ***All the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under [the ECOA]***, . . . including the power to enforce any Federal Reserve Board regulation . . . as if the violation had

been a violation of a Federal Trade Commission trade regulation rule. 15 U.S.C. § 1691c(c) (emphasis added). By its explicit terms, the plain language of the ECOA grants the FTC the use of all of its powers when bringing enforcement actions under the statute.

"All the functions and powers" of the FTC include the broad authority to proceed in federal court for injunctive and equitable monetary relief pursuant to Section 13(b) of the FTC Act. *See United States v. Blake*, 751 F. Supp. 951, 952 (W.D. Okla. 1990); *FTC v. Green Tree Acceptance, Inc.*, No. 86-0469, 1987 U.S. Dist. LEXIS 16750, at *9-11 (N.D. Tex. Sept. 30, 1987); *United States v. Landmark Fin. Servs., Inc.*, 612 F. Supp. 623, 627 (D. Md. 1985). Pursuant to Section 13(b), the FTC may seek, and the district courts may grant, preliminary and permanent injunctions against practices that violate *any of the laws enforced by the Commission.* 15 U.S.C. § 53(b); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).[1] The authority to grant permanent injunctive relief also includes the power to grant any ancillary relief, including equitable monetary relief, necessary to accomplish complete justice. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *H.N. Singer*, 668 F.2d at 1112-13; *FTC v. Amy Travel*

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[1] Defendants incorrectly state that "Section 13(b) merely grants the FTC the authority to seek temporary injunctions." Mot. 21. By its plain terms, the statute clearly grants the FTC authority to seek permanent injunctions: "[I]n proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b)(2). A "proper case" is one in which the Defendant has violated any law that the FTC enforces. *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985) ("Congress . . . gave the district court authority to grant a permanent injunction against violations of *any provisions of law enforced by the Commission* . . . .") (quoting *H.N. Singer*, 668 F.2d at 1113).

Serv., Inc., 875 F.2d 564, 571 (7th Cir. 1989); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432-35 (11th Cir. 1984) (per curiam). Therefore, Section 704(c) of the ECOA authorizes the FTC "to bring a civil action in a United States district court to seek penalties, consumer redress and injunctive relief." *Landmark Fin. Serv.*, 612 F. Supp. at 627. Nothing in the language of the statute or the case law interpreting it suggests that Section 704(c) only authorizes administrative actions, as Defendants argue.

2. Neither the FTC Act nor Section 704(c) of the ECOA Contains Any Statute of Limitations for FTC Enforcement Actions Seeking Equitable Relief.

Defendants do not dispute that Section 13(b) of the FTC Act contains no statute of limitations for equitable relief. *See United States v. Prochnow*, No. 02-0917, 2006 U.S. Dist. LEXIS 92895, at *24 (N.D. Ga. Dec. 21, 2006) (citing to previous slip opinion dated August 21, 2003 at pp. 5-7, attached as Ex. 1, holding that three-year statute of limitations applicable to certain types of actions brought under Section 19 does not limit the FTC when seeking equitable relief under Section 13(b)); *FTC v. Capital City Mortgage Corp.*, No. 98-237, slip op. 23-24 (D.D.C. Oct. 10, 2000) (attached as Ex. 2); *FTC v. Minuteman Press,* 53 F. Supp. 2d 248, 263 (E.D.N.Y. 1998); *United States v. Building Inspector of Am., Inc.*, 894 F. Supp. 507, 513-14 (D. Mass. 1995). Because Section 704(c) incorporates all the functions and powers of Section 13(b), the FTC faces no statute of limitations when bringing an ECOA action for injunctive and equitable monetary relief in federal court. *See Blake*, 751 F. Supp. at 952 (the only limitation on the FTC's authority to proceed in federal court is the five-year statute of limitations when seeking civil penalties); *Green Tree*, 1987 U.S. Dist. LEXIS 16750, at *9-11 (FTC faces no statute of limitations for injunctive relief). Although both courts rejected

application of the two-year statute of limitations in Section 706(f) to FTC-initiated judicial actions, Defendants attempt to distinguish *Blake* and *Green Tree* by arguing that in those cases the FTC was seeking civil monetary penalties. However, the courts' reasoning applies equally to the case at bar, even though the FTC seeks injunctive and equitable monetary relief. Indeed, while noting that "all the functions and powers" of the FTC included the agency's authority to seek civil penalties, which carried with it a five-year statute of limitations, 15 U.S.C. § 45(m), *Green Tree* also referenced the FTC's authority to seek equitable relief, for which there is no statute of limitations. 1987 U.S. Dist. LEXIS 16750, at *10; 15 U.S.C. § 53(b). Regardless of the relief or penalties sought by the FTC, 706(f) does not apply to FTC judicial actions.

3. The FTC's Authority to Enforce the ECOA Does Not Depend on the Type of Proceeding.

Defendants assert that this action is properly brought under Section 706 of the ECOA, rather than Section 704(c), and thus the statute of limitations in the former section applies. Defendants primarily rely on the titles of the two provisions—"Civil Liability" for Section 706 versus "Administrative Enforcement" for Section 704—in asserting that the present action is one for civil liability and thus falls under Section 706. When analyzing statutory language, however, the title of a section "cannot limit the plain meaning of the text." *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215, 221 (1998); *Deutsch v. Turner Corp.*, 324 F.3d 692, 707-08 (9th Cir. 2003). The text of Section 706(f) on its face applies only to actions brought by private litigants and the Attorney General.[2] The courts have consistently found

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[2] Section 706(f) provides only that there is a two-year statute of limitations when the Attorney General or a private litigant brings an action

that the FTC has authority to bring federal court ECOA actions under Section 704(c). *See Landmark*, 612 F. Supp. at 627. To accept Defendants' argument that Section 704(c) does not permit an FTC federal court action would fly in the face of the plain language of that section and would emasculate the FTC's express authority to use all of its powers to enforce the ECOA. *See Blake*, 751 F. Supp. at 952-53; *Green Tree*, 1987 U.S. Dist. LEXIS 16750, at *8-9; *see also Landmark*, 612 F. Supp. at 626-27.

Defendants also argue that the FTC's position does not make "statutory sense," *i.e.*, that there is no logical reason why actions brought by the Attorney General under Section 706 should be bound by that section's two-year statute of limitations, whereas a comparable action by the FTC is not. Mot. 13. When a statute is unambiguous, however, the plain language controls unless it leads to "absurd" results. *United States v. Jackson*, 480 F.3d 1014, 1021 (9th Cir. 2007). Here, the statutory text unambiguously draws the distinction Defendants challenge, *Landmark*, 612 F. Supp. at 627, and there is nothing absurd about Congress wanting to impose different statutes of limitations for enforcement actions brought by different governmental bodies in different fora against different entities seeking different remedies.

As the *Landmark* court noted, "enforcement of the ECOA depends in part on the offenders and the corresponding jurisdiction of the agency charged with enforcement." *Landmark*, 612 F. Supp. at 629. Specifically, ECOA is enforced by numerous agencies, each of which has jurisdiction over different entities, including national banks, credit unions, savings banks, savings and loan associations, and non-bank entities. The ECOA "rests on the rational basis that compliance could best be achieved by subjecting each business to the enforcement

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pursuant to "this section" (*i.e.*, Section 706), not "this title." 15 U.S.C. § 1691e(f).

mechanisms to which it was already subject through the regulatory control [of] its primary regulatory agency." *Id.* at 630.

Nor does Section 706(f) support Defendants' position. *See* Mot. 14-15. Section 706(f) provides that whenever a proceeding under Section 704 or an action by the Attorney General under Section 706 is brought within two years of an ECOA violation, a victim may bring suit within one year of the government proceeding. 15 U.S.C. § 1691e(f). By its plain terms this section limits the time in which a victim may bring suit; it is silent as to when a Section 704 proceeding must be brought.

A review of the other consumer credit statutes enforced by the FTC further supports the conclusion that Section 704(c), not 706(f), applies to the case at bar. In addition to the ECOA, the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692*l*(a), the Truth in Lending Act, 15 U.S.C. § 1607(c), the Credit Repair Organizations Act, 15 U.S.C. § 1679h(b), and the Electronic Fund Transfer Act, 15 U.S.C. § 1693o(c), all have language authorizing the FTC to use "all of [its] functions and powers" to enforce compliance. In the context of the FDCPA, courts have rejected arguments similar to those made by Defendants here. For example, debt collectors have argued that the "Administrative Enforcement" provision of the FDCPA, Section 814, is constrained by the "Civil Liability" provision, Section 813, which contains a one-year statute of limitations. Section 814 provides, just like the ECOA, that "*[a]ll of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with [the FDCPA]*." 15 U.S.C. § 1692*l*(a) (emphasis added). All the courts that have examined this provision have ruled that the FTC has all of its Section 13(b) authority to enforce the FDCPA under Section 814 and is not limited by the statute of limitations

contained in the "Civil Liability" section. *See FTC v. CompuCredit Corp.*, No. 08-1976, Magistrate Judge's Non-Final Report & Recommendation 23–25 (N.D. Ga. Oct. 8, 2008) (attached as Ex. 3); *United States v. Payco Am. Corp.*, No. 93-801, slip op. 1-2 (E.D. Wis. Jan. 14, 1994) (attached as Ex. 4); *United States v. Payco Am. Corp.*, No. 93-801, slip op. 1-5 (E.D. Wis. Feb. 23, 1994) (attached as Ex. 5); *United States v. Cent. Adjustment Bureau, Inc.*, No. 80-1671, slip op. 1 (N.D. Tex. Oct. 22, 1981) (attached as Ex. 6).

In sum, Defendants' dissatisfaction with the plain terms of the ECOA does not justify ignoring them. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459-61, 122 S. Ct. 941, 954-56, 151 L. Ed. 2d 908, 925-27 (2002) (refusing to circumvent statute's plain language where there was neither ambiguity nor conflicting language).[3]

B. The FTC Has Stated a Claim for Individual Liability Against Mr. Kootstra.

In their motion to dismiss, Defendants have not asserted that the acts and practices alleged in the Complaint fail to give rise to a claim of illegal discrimination as to GEM. Rather, Defendants have moved to dismiss Howard Kootstra as a defendant, asserting that the Complaint does not allege that Mr. Kootstra participated personally in any unlawful conduct, that he was aware of it,

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[3] Even if the Section 706 statute of limitations applied, this action would not be barred because the Complaint alleges behavior that continued past 2006 to the present. Compl. ¶ 24 ("From at least January 1, 2006 to *at least* December 31, 2006, Defendants charged Hispanic applicants higher prices for mortgage loans than non-Hispanic white applicants. These pricing disparities cannot be explained by any legitimate underwriting risk factors or credit characteristics of the applicants.") (emphasis added); *see also id.* ¶¶ 12, 18-20.

or that he condoned it. Mot. 18. As a result, Defendants argue that the FTC has failed to state a claim for individual liability under the ECOA.

Defendants misread the Complaint. In multiple places, the Complaint alleges that Mr. Kootstra was significantly involved in GEM's mortgage lending operation and played an integral part in the creation and implementation of company policies that resulted in discrimination. Compl. ¶¶ 5, 8-10, 12, 20, 24-25. These allegations are sufficient to establish that Mr. Kootstra was individually liable as a "creditor" under the ECOA, and more than satisfy the notice-pleading standard of Federal Rule of Civil Procedure 8(a)(2) which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief" so that the defendant has fair notice of the claim. *William O. Gilley Enters., Inc. v. Atl. Richfield, Co.*, 561 F.3d 1004, 1009 (9th Cir. 2009). Separately, under the FTC Act, Mr. Kootstra, as a control person for the corporate defendant, is liable for injunctive relief for GEM's alleged ECOA and FTC Act violations regardless of his state of knowledge.

1. The Complaint States a Claim Against Mr. Kootstra as a Creditor under the ECOA.

Defendants argue that Mr. Kootstra cannot be held liable as a creditor under the ECOA for the acts of GEM because he did not know of the unlawful discrimination alleged in the Complaint. Mot. 20. However, Mr. Kootstra's own conduct, independent of GEM, meets the definition of "creditor" under the ECOA and Regulation B. Under the ECOA, "creditor" is defined as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit." 15 U.S.C. § 1691a(e). Regulation B, the ECOA's implementing regulation, defines "creditor" as including any "person who, in the ordinary course of business, regularly

participates in a credit decision, including setting the terms of credit." 12 C.F.R. § 202.2(*l*).

Individual corporate officers may be held directly liable under the ECOA and Regulation B as creditors. *See FTC v. Capital City Mortgage Corp.*, No. 98-237, 1998 WL 1469619, at *6 (D.D.C. July 13, 1998); *United States v. Am. Future Sys., Inc.*, 571 F. Supp. 551, 561 (E.D. Pa. 1982), *aff'd*, 743 F.2d 169, 174 n.3 (3d Cir. 1984). In *Capital City*, the FTC alleged, as here, that the individual defendant formulated and controlled the acts and practices of the corporate defendant alleged in the complaint. 1998 WL 1469619, at *6. The district court held that the individual defendant, as sole owner and president of the company, participated in the decision to extend credit and that a reasonable fact-finder could conclude that he was a creditor as defined by the ECOA. *Id.* In *American Future Systems*, the individual defendant argued that he was not a creditor as defined by the ECOA and Regulation B. In rejecting that argument, the district court reasoned, "[a]s the chief operating officer and 97% stockholder of AFS, Satell regularly participates in determining policy for the extension of credit to all classifications of customers." 571 F. Supp. at 561.

Like the defendants in *Capital City Mortgage* and *American Future Systems*, Mr. Kootstra regularly participated in determining policy, and he was also personally involved in extending credit. Notably absent from Defendants' brief is any acknowledgment that *all* of the FTC's allegations regarding the Defendants' discriminatory practices are attributed to *both* Defendants—GEM and Mr. Kootstra. According to the Complaint, as the sole shareholder, president and CEO of GEM, Mr. Kootstra originated loans, authorized the discretionary pricing policy, authorized the policy allowing exceptions to the overage cap, negotiated loan officer and branch manager contracts that tied their compensation to the

amount of overages charged consumers, and failed to monitor whether his employees were charging applicants higher prices for mortgage loans on a prohibited basis. Compl. ¶¶ 5, 8-10, 12, 20, 24-25. Thus, the Complaint states a claim against Mr. Kootstra as a "creditor" under the ECOA.

2. The Complaint States a Claim Against Mr. Kootstra as a Control Person Pursuant to the ECOA and the FTC Act.

As a control person of GEM, Mr. Kootstra may be enjoined pursuant to Section 13(b) of the FTC Act for GEM's violations of the ECOA and the FTC Act. Section 704(c) of the ECOA provides that a violation of the ECOA is also a violation of the FTC Act and that all of the functions and powers of the FTC under the FTC Act are available to the Commission to enforce compliance by any individual. 15 U.S.C. § 1691c(c). A corporate individual violates the FTC Act if he or she either participated directly in or had the authority to control the corporation's acts or practices that violated the FTC Act, which entitles the FTC to an injunction against that individual. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1089 (C.D. Cal. 1994); *FTC v. Arlington Press*, No. 98-CV-9260, 1999 WL 33562452, at *12 (C.D. Cal. Jan. 18, 1999); *see also FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 119, 58 S. Ct. 113, 116-17, 82 L. Ed. 141, 146 (1937). Mr. Kootstra participated actively in the management of GEM, the sole business of which is to evaluate and act on mortgage credit applications. Most significantly, the FTC has alleged that he authorized the discretionary pricing policy—applicable to all of GEM's loans—that is responsible for the alleged unlawful pricing disparities. This is sufficient to allege Mr. Kootstra's violation of the FTC Act.

Defendants incorrectly contend that the FTC must plead knowledge when

seeking injunctive relief. As an initial matter, Defendants confuse the standard for finding an individual liable for purposes of an injunction with the standard for finding an individual liable for equitable monetary relief. To obtain injunctive relief, no pleading or showing of knowledge or reckless indifference is required. *See Am. Standard Credit Sys., Inc.*, 874 F. Supp. at 1089; *Publ'g Clearing House*, 104 F. 3d at 1170; *Arlington Press*, 1999 WL 33562452, at *12. Therefore, the FTC's allegations involving Mr. Kootstra's authority and control over GEM are enough to warrant injunctive relief under the FTC Act.

With respect to equitable monetary relief, Defendants further confuse the FTC's burden of pleading with its burden of proof. All of the cases cited by Defendants address the FTC's burden of proof at trial or on summary judgment. *See Publ'g Clearing House*, 104 F. 3d 1168; *FTC v. Gem Merch. Corp*., 87 F.3d 466 (11th Cir. 1996); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989); *Capital City*, 1998 WL 146919. For purposes of obtaining monetary relief, the FTC must *show*, not *plead*, knowledge or reckless indifference.[4] *See Publ'g Clearing House*, 104 F. 3d at 1171; *Am. Standard Credit Sys., Inc.*, 874 F. Supp. at 1089. Thus, in its prayer for relief, the FTC seeks equitable monetary relief, including consumer redress, and therefore, *at trial* the FTC must show that Mr.

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[4] Although not relevant for purposes of this motion, Defendants further confuse the knowledge standard for equitable monetary relief that the FTC will need to meet at trial. The FTC need only show actual knowledge of discriminatory pricing practices, reckless indifference to the possible existence of discriminatory pricing practices, or an awareness of a high probability of discrimination coupled with an intentional avoidance of the truth. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994) (citing *Amy Travel*, 875 F.2d at 574).

Kootstra knew or should have known that the discretionary pricing policy could result in Hispanic applicants paying higher prices for mortgages than non-Hispanic white applicants to hold him liable for monetary relief for GEM's violations. *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 636 (7th Cir. 2005) (affirming a judgment against individual corporate defendants because they knew or should have known about the unlawful practices of the corporation). The Complaint, accordingly, properly alleges facts that state a claim against Mr. Kootstra for equitable monetary relief as a control person.

3. *Meyer v. Holley* Is Inapplicable

Defendants rely on the interpretation of the Fair Housing Act ("FHA") in *Meyer v. Holley*, 537 U.S. 280, 123 S. Ct. 824, 154 L. Ed. 2d 753 (2003), for the proposition that Mr. Kootstra cannot be held vicariously liable for actions of other corporate employees. Mot. 15-18. However, the FTC has not alleged, and need not allege, that Mr. Kootstra is vicariously liable for GEM's conduct or the conduct of the company's employees. The respective pleading standards for individual liability pursuant to the ECOA and Section 13(b) of the FTC Act are whether Mr. Kootstra is a "creditor" as defined by the ECOA and Regulation B or a control person under the FTC Act. *Publ'g Clearing House*, 104 F. 3d at 1171; *Am. Future Sys.*, 571 F. Supp. at 561.

Defendants' argument that the FHA does not allow for individual liability for corporate officers is irrelevant. The FHA, and any case law interpreting individual liability under that statute, have no relevance here. Although courts may look to case law developed under the FHA to interpret the ECOA when the substantive provisions of the acts are similar, *Emigrant Sav. Bank v. Elan Mgmt. Corp.*, 668 F.2d 671, 673 n.3 (2d Cir. 1982) ("[Plaintiff's] claim under the [ECOA] does not require separate consideration [because] the substantive

provisions of the [ECOA] do not go further than those of the Fair Housing Act."), the FHA does not contain any provisions similar to those relevant to individual liability in this case. First, the FHA does not include a provision making "creditors" liable for violations. Second, the FHA does not include any provision granting the FTC authority to enforce the FHA, and the FHA does not incorporate the FTC's authority pursuant to Section 13(b) of the FTC Act. Therefore, Defendants' reliance on *Meyer v. Holley* is misplaced. As discussed, pursuant to the pleading standards set forth in the ECOA, Regulation B, and the FTC Act, the FTC has met its burden for stating a claim of individual liability.

4. The FTC Has Properly Stated a Claim that Defendants' Discretionary Pricing Policy Violates the ECOA.

Defendants argue in passing and without elaboration that the FTC has not, and cannot, allege that Defendants' discretionary pricing policy is prohibited by the ECOA. Mot. 16 & n.7. Defendants are wrong as a matter of law and fact. Although Defendants' discretionary pricing policy—which by its terms is neutral as to race and national origin—does not violate the ECOA *on its face*, the FTC properly alleges that it has *discriminatory effects* in violation of the ECOA.

Relying solely on the Supreme Court's description of Title VII in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), Defendants contend that there is no disparate impact liability under the ECOA. Mot. 16 n.7. *Ricci* is not on point and does not overturn the well-established principle that disparate impact gives rise to cognizable ECOA liability, including in the Ninth Circuit. *See Miller v. Am. Express Co.*, 688 F.2d 1235, 1239-40 (9th Cir. 1982). Moreover, the Ninth Circuit has consistently held that the Fair Housing Act, which Defendants concede should be read in conjunction with the ECOA (Mot. 19), permits a claim of disparate impact liability. *E.g.*, *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir.

1997). The case law is supported by the ECOA's legislative history, implementing regulations, and interagency policy guidance, all of which interpret the ECOA to include disparate impact liability.[5]

Ricci is not in conflict with this strong Ninth Circuit precedent. Defendants note that *Ricci* interpreted Section 703(a)(1) of Title VII, which makes it unlawful to discriminate "because of . . . national origin," to encompass only disparate treatment, and not disparate impact, liability. 129 S. Ct. at 2672; Mot. 16 n.7. But *Ricci*'s analysis is not new; the Supreme Court similarly described Section 4(a)(1) of the Age Discrimination in Employment Act (ADEA) four years ago in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228, 236 n.6, 125 S. Ct. 1536, 1542 n.6, 161 L. Ed. 2d 410, 419 n.6 (2005). Yet courts have consistently rejected that *Smith* precludes disparate impact liability under the ECOA.[6] These courts reason that

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[5] The Senate Report to the bill that expanded the ECOA to prohibit discrimination on the basis of race and national origin provides that "courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions." S. Rep. No. 94-589, 1976 U.S.C.C.A.N. 403, 407 (1976). Similarly, the implementing regulations expressly state that disparate impact liability is available under the ECOA. 12 C.F.R. § 202.6 n.2 ("The legislative history of the Act indicates that the Congress intended an 'effects test' concept . . . to be applicable to a creditor's determination of creditworthiness."); 12 C.F.R. pt. 202, Supp. I, § 202.6, ¶ 6(a)-2; *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,266, 18,268-69 (1994).

[6] *E.g.*, *NAACP v. Ameriquest Mortgage Co.*, --- F. Supp. 2d ---, No. 07-0794, 2009 WL 2031671, at *6-7 (C.D. Cal. Jan. 12, 2009) (Guilford, J.); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1067 (S.D. Cal. 2008); *Payares v. JP Morgan Chase & Co.*, No. 07-05540, slip op. 4 (C.D. Cal. May 15,

Smith "did not hold that a statute must contain . . . 'effects' language in order to authorize disparate impact claims . . . ; nor does it set forth a new test for determining whether a statute supports disparate-impact claims." *Ramirez v. GreenPoint Mortgage Funding, Inc.*, --- F. Supp. 2d ---, No. 08-0369, 2008 WL 2051018, at *4 (N.D. Cal. May 13, 2008) (internal quotation marks omitted). In fact, *Smith* looked to not only the statutory text, but also the purpose and history of the ADEA. *Smith*, 544 U.S. at 235, 240, 125 S. Ct. at 1542, 1544, 161 L. Ed. 2d at 418, 421; *see also Garcia v. Country Wide Fin. Corp.*, No. 07-1161, 2008 U.S. Dist. LEXIS 106675, at *10 (C.D. Cal. Jan. 17, 2008) (Phillips, J.). These factors clearly demonstrate that disparate impact liability exists under the ECOA. *Supra* note 5. Moreover, since *Smith*, the Ninth Circuit has repeatedly noted that the FHA gives rise to disparate impact liability. *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175, 1185 (9th Cir. 2009); *McDonald v. Coldwell Banker*, 543 F.3d 498, 505 n.7 (9th Cir. 2008); *Budnick v. Town of Carefree*, 518 F.3d 1109, 1118 (9th Cir. 2008). Because *Ricci* is not "clearly irreconcilable" with controlling Ninth Circuit precedent, this Court is bound by controlling Ninth Circuit precedent. *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003).

Factually, the FTC also properly alleged that Defendants' discretionary pricing policy violates the ECOA. The Complaint alleges that: (1) Defendants'

2008) (Collins, J.) (attached as Ex. 7); *Ramirez v. GreenPoint Mortgage Funding, Inc.*, --- F. Supp. 2d ---, No. 08-0369, 2008 WL 2051018, at *3-4 (N.D. Cal. May 13, 2008); *Garcia v. Country Wide Fin. Corp.*, No. 07-1161, 2008 U.S. Dist. LEXIS 106675, at *9-12 (C.D. Cal. Jan. 17, 2008) (Phillips, J.); *see also Payares v. JP Morgan Chase & Co.*, No. 07-05540, 2008 WL 2485592, at *1 (C.D. Cal. June 17, 2008) (Collins, J.) ("Ninth Circuit law is clear" that "disparate impact claims are permissible" under ECOA).

have a discretionary pricing policy that permits their loan officers to charge applicants overages in addition to a risk-based price, Compl. ¶ 12; and (2) Defendants' discretionary pricing policy caused Defendants to charge Hispanic applicants substantially and statistically significantly higher prices for their mortgage loans than non-Hispanic white applicants, and these higher prices cannot be explained by underwriting risk or credit characteristics of the applicants. *Id.* ¶¶ 20, 24. The FTC's allegations are sufficient to state a claim that Defendants' discretionary pricing policy has a disparate impact in violation of the ECOA. *See, e.g.*, *Ramirez*, 2008 WL 2051018, at *4-5; *Garcia*, 2008 U.S. Dist. LEXIS 106675, at *12-20; *Hoffman v. Option One Mortgage Corp.*, 589 F. Supp. 2d 1009, 1011-12 (N.D. Ill. 2008); *Taylor*, 580 F. Supp. 2d at 1067-69; *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 255-59 (D. Mass. 2008).

IV. CONCLUSION

For the foregoing reasons, the FTC respectfully requests this Court deny Defendants' motion to dismiss.

Dated this 31st day of August, 2009.

Respectfully submitted,

FEDERAL TRADE COMMISSION

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/s

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