No. 00-6483

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees

v.

NISSAN MOTOR ACCEPTANCE CORPORATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE* AND THE SOURCE OF THE AUTHORITY TO FILE

The United States files this brief pursuant to Fed. R. App. P. 29(a). This case involves claims under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691-1691f, which prohibits race (and other forms of) discrimination in credit transactions. 15 U.S.C. 1691(a). The United States Department of Justice has authority to bring suit in federal court to enforce ECOA, either upon referral of a complaint by another federal agency or when the Attorney General has reason to believe that a creditor is engaged in a pattern or practice of discrimination. 15 U.S.C. 1691e(g) & (h). Because of the inherent limitations on administrative

enforcement mechanisms and on the litigation resources of the Department of Justice, the United States has a strong interest in ensuring that individuals will act as "private attorneys general" to enforce ECOA in federal court. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

Effective enforcement of ECOA through private litigation depends on the ability of plaintiffs to proceed through class actions. Many ECOA lawsuits are complex and expensive to litigate, and individual monetary claims are often relatively small. Therefore, many discrimination victims will have no incentive to seek redress for ECOA violations in individual lawsuits.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in certifying a plaintiff class in this lawsuit challenging alleged racial discrimination under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691-1691f.

STATEMENT OF THE CASE

The Casons filed suit under ECOA against the Nissan Motor Acceptance Corporation (NMAC), alleging racial discrimination. Specifically, they alleged that NMAC created, implemented, and profited from a nationwide lending policy that had a significant disparate impact on African Americans and could not be justified by business necessity (R. 135, Complaint ¶¶ 131-132).[1] The district court denied NMAC's motion for summary judgment, concluding that there are genuine

[1] "R. __" indicates the record entry number on the district court docket sheet. "Br. __" refers to the page number of NMAC's opening brief.

factual disputes as to whether the Casons have established a *prima facie* case of discrimination and whether their claims are time-barred (R. 191, Order; R. 194, 8/22/00 Tr. at 119-122).

At the request of the Casons, the district court "conditionally" certified a plaintiff class that included African-American car buyers who allegedly were adversely affected by NMAC's financing policy (R. 194, 8/22/00 Tr. at 152; R. 191, Order at 1). The court found certification appropriate under Fed. R. Civ. P. 23(b)(2) because plaintiffs sought injunctive relief, and under Rule 23(b)(3) because questions of law and fact common to the class members predominate over issues affecting only individual members (R. 194, 8/22/00 Tr. at 152-153). But the court expressed concern that the Casons' proposed class definition was unworkable and instructed them to suggest a more refined definition and to draft a proposed notice to class members (*id.* at 122-123, 152-153). The district court also issued an order bifurcating the case into liability and remedial phases (R. 192, Order at 1).

The district court has not yet decided the proper scope of the class (R. 254, Order at 4; R. 236, Order at 1). Unresolved issues include the effect of ECOA's 2-year statute of limitations on the time period covered by the class (*id.* at 2; R. 238, Order at 2 & n.2). The court has postponed resolution of these issues while this appeal is pending (*id.* at 3; R. 254, Order at 1-2).

The Casons have filed a motion to amend their complaint to clarify that they are seeking only equitable relief (R. 266, Motion to Amend at 2). On January 22, 2001, the district court issued an order concluding that it had no jurisdiction to

grant the motion while this case is on appeal (R. 280, Order at 1). Nonetheless, the court stated in its order that, upon remand of the case from this Court, it intends to permit the filing of the amended complaint, to vacate its class certification order, and to reconsider the class issue in light of the allegations in the amended complaint (R. 280, Order at 1-2).[2]

STATEMENT OF FACTS

The parties present dramatically different versions of NMAC's lending practices. The United States takes no position in this brief as to the accuracy of either parties' factual allegations. The following statement is based on the Casons' allegations, which the Court must accept as true in deciding the class certification issue (see p. 9, *infra*):

NMAC lends money to individuals to purchase automobiles from local Nissan dealers throughout the United States (R. 135, Complaint ¶ 8). Those dealers effectively serve as loan arrangers by referring customers to NMAC and by submitting credit applications to NMAC on the borrowers' behalf (*id.* ¶¶ 8, 27-28). Approval of these loan applications takes place at NMAC's centralized loan processing center in Texas (*id.* ¶ 11; R. 84, Memorandum at 11).

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[2] In light of the district court's intent to vacate the class certification order, this Court should consider remanding the case without addressing the certification issues. Otherwise, this Court may end up issuing a decision that, at least in practical effect, is nothing but an advisory opinion. A remand under these circumstances is consistent with the procedure this Court established in *First National Bank v. Hirsch*, 535 F.2d 343, 346 (1976) (*per curiam*), to allow a district court to reconsider an order that is the subject of an appeal.

As part of its lending program, NMAC has adopted a "Finance Charge Markup Policy" which it applies uniformly throughout the United States (R. 84, Memorandum at 1, 8, 10, 36; R. 135, Complaint ¶¶ 13-15; R. 150, Response at 2). That policy affects the interest rate that borrowers pay on their NMAC loans. In setting the interest rate, NMAC first assigns applicants to credit risk tiers using a scoring system that takes into account several objective factors related to creditworthiness (R. 135, Complaint ¶¶ 43-46). For each risk tier, NMAC establishes a "buy rate," the lowest interest rate at which it will approve the loan (*id.* ¶¶ 7c, 59, 67). For most types of loans, NMAC's Finance Charge Markup Policy expressly authorizes Nissan dealers to set a borrower's interest rate at a level higher than the risk-based buy rate (*id.* ¶¶ 7d, 48, 51; R. 147, Reply at 2 n.1). This increase is referred to as the "mark-up" (R. 135, Complaint ¶ 7f). The mark-up does not reflect the customer's credit risk because creditworthiness is already accounted for in the calculation of the buy rate (*id.* ¶¶ 36, 67b). NMAC imposes limits on the range of the permissible mark-up for different categories of loans, up to a maximum of 5 percentage points; for some types of loans, NMAC forbids dealers to impose any mark-up (*id.* ¶¶ 7d, 7g). NMAC approves only those loans that comply with its Finance Charge Markup Policy (R. 150, Response at 45).

Because a borrower's loan is with NMAC (and not the dealer), all payments – including the amount attributable to the mark-up in the interest rate – are made directly to NMAC (R. 135, Complaint ¶¶ 7a, 42, 67e). NMAC keeps a portion of the money attributable to the mark-up and pays the rest to the dealer (*id.* ¶¶ 7h, 7i).

NMAC thus provides an economic incentive for local dealers to impose mark-ups and directly profits if they decide to do so (*id.* ¶¶ 48-52, 67).

The named plaintiffs – Betty and Robert Cason – are African Americans who bought a car from a Nissan dealer in Tennessee and obtained a loan from NMAC to finance the purchase of the vehicle (*id.* ¶¶ 68-82). The loan included a substantial mark-up in the interest rate. The Casons qualified for NMAC financing at a buy rate of 16.49%, but the dealer exercised its authority under NMAC's Finance Charge Markup Policy to increase the interest rate to 19.49% (*id.* ¶¶ 71-73, 79). The 3-point mark-up required the Casons to pay an additional $3,504 in finance charges to NMAC over the life of the loan (*id.* ¶ 79d). The Casons made the loan payments, including the portion attributable to the mark-up, directly to NMAC (*id.* ¶ 67e; R. 84, Memorandum at 1-2).

The Casons allege that NMAC's Finance Charge Markup Policy has a significant disparate impact on African Americans (R. 135, Complaint ¶¶ 131-132). Plaintiffs assert, based on a sample of NMAC accounts in Tennessee, that African Americans, on average, are charged higher mark-ups than similarly-situated white customers (*id.* ¶¶ 82, 92-105; R. 148, Exh. 7 (Cohen Report)).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in certifying a plaintiff class. The Casons base their ECOA claim on the disparate impact theory of discrimination. Disparate impact claims are particularly appropriate for class certification because, by definition, they focus on the *class-wide* effect of a policy or practice on a protected group. NMAC's sweeping arguments against class certification in this case could threaten the viability of class actions in disparate impact lawsuits and thereby impede effective enforcement of numerous civil rights statutes. We take no position in this brief on the merits of the Casons' disparate impact claim because the merits are not before the Court. For purposes of the class certification question, this Court must accept the Casons' allegations as true.

Rule 23(b)(2) certification is appropriate because this lawsuit seeks a declaratory judgment and an injunction against a policy that allegedly has injured each member of the plaintiff class. Civil rights lawsuits seeking declaratory or injunctive relief against alleged discrimination are prime examples of proper 23(b)(2) class actions. Certification under Rule 23(b)(2) is proper even though the Casons also seek monetary relief because the remedy they request is equitable restitution, and it is well-settled that restitutionary relief is appropriate in 23(b)(2) class actions.

Class certification is also appropriate under Rule 23(b)(3). At this preliminary stage of the litigation, it appears that common questions predominate over individual issues. The Casons propose to establish a *prima facie* case of

discrimination using statistical analyses based on data derived either from NMAC's business records or from public sources. The district court should be able to decide the validity of the Casons' statistical proof without conducting individualized hearings for each class member. If the Casons were to succeed in establishing a *prima facie* case, NMAC could try to avoid liability by showing that its policy is justified by business necessity. That determination would focus on NMAC's needs, rather than on the particular circumstances of each class member. Finally, there are several reasons why a class action is superior to individual litigation in adjudicating the sort of disparate impact claim presented here: the enormous complexity and expense of proving such a claim; the financial disincentive for claimants to pursue individual actions; and the likelihood that most class members will never know about their alleged injury unless notified in connection with the class action.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING A PLAINTIFF CLASS

To obtain class certification, a plaintiff must satisfy the requirements of Rule 23(a) and then must show that a class action is appropriate under one of the subsections of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-614 (1997). A trial court has broad discretion to certify a class under Rule 23, and its decision will not be overturned absent an abuse of discretion. *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997). The district court did not abuse its discretion in certifying a plaintiff class in this case. As explained below,

this case satisfies the threshold requirements of Rule 23(a) and is appropriate for class certification under both Rule 23(b)(2) and (b)(3).

A. *The Merits Of Plaintiffs' Claim Are Not At Issue In This Appeal*

At the outset, it is important to clarify the scope of this interlocutory appeal. Although NMAC uses much of its brief to attack the merits of the Casons' ECOA claim, those liability issues are not properly before this Court. "[T]he relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action." *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984), cert. denied, 471 U.S. 1125 (1985); accord *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Consequently, in deciding this appeal, the Court "must take the allegations of plaintiffs as true." *Eddleman v. Jefferson County*, 96 F.3d 1448 (Table), No. 95-5394, 1996 WL 495013, at *3 (6th Cir. Aug. 29, 1996) (unpublished opinion); accord *J.B. v. Valdez*, 186 F.3d 1280, 1284, 1290 n.7 (10th Cir. 1999).

Because the merits are not properly at issue in this appeal, the United States takes no position in this brief on the validity of the Casons' disparate impact claim. We note, however, that in an appropriate case, a plaintiff may establish a violation of ECOA under a disparate impact theory. 12 C.F.R. 202.6(a) n.2; *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,269 (1994) (issued jointly by several federal agencies). A disparate impact claim challenges the adverse effect of a facially neutral policy or practice on a protected group. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-336 n.15 (1977); *Griggs v.*

Duke Power Co., 401 U.S. 424, 430-432 (1971); *Huguley v. General Motors Corp.*, 52 F.3d 1364, 1370 (6th Cir. 1995). The disparate impact theory does not require a showing of discriminatory intent, *ibid.*, and "usually focuses on statistical disparities, rather than specific incidents." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).[3] If a plaintiff establishes a *prima facie* case by demonstrating that a particular policy has a disparate impact on a protected group, the inquiry then shifts to whether the challenged policy is justified by business necessity, and if so, whether other less discriminatory alternatives would adequately serve the lender's business needs. See *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,269 (1994) (discussing elements of disparate impact claim under ECOA).

B. *This Case Satisfies The Requirements Of Rule 23(a)*

A class action is permissible "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Courts commonly refer to these requirements as "numerosity," "commonality,"

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[3] By contrast, "disparate treatment" – the other common type of race discrimination claim – requires the plaintiff to prove discriminatory intent. *Huguley*, 52 F.3d at 1371. The Casons have made clear that their claims do not rest on a disparate treatment theory (R. 194, 8/22/00 Tr. at 73-75).

"typicality," and "adequacy of representation." *Amchem*, 521 U.S. at 613. This case meets each of these requirements.

1. The proposed class easily satisfies the numerosity requirement. The parties estimate that the class would exceed 125,000 people (Br. 25; R. 135, Complaint ¶ 134a), and there is no dispute that joinder of so many individuals would be impracticable. See *Bittinger*, 123 F.3d at 884 n.1 (joinder of 1,100 persons impracticable).

2. Commonality exists as long as there is at least "one question common to the class" whose resolution will advance the litigation. *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir.) (*en banc*), cert. denied, 524 U.S. 923 (1998). That requirement is satisfied here because every class member's claim hinges on a common question: whether NMAC has adopted a specific lending policy that has an unlawful disparate impact on African Americans.

3. A plaintiff's claim "is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996). "Factual identity between the plaintiff's claims and those of the class he seeks to represent is not necessary." *Senter v. General Motors Corp.*, 532 F.2d 511, 524 (6th Cir.), cert. denied, 429 U.S. 870 (1976).

The typicality requirement is satisfied here. The Casons allege that they, like all class members, suffered injury as a result of defendant's Finance Charge

Markup Policy. And they propose to prove their own claim, and the claims of all the other class members, using the same disparate impact theory.

NMAC argues, however, that the Casons' claims are time-barred and thus are atypical of those of the class as a whole (Br. 26, 57-59). But, as the district court found, this issue has to be resolved at trial because of factual disputes about (1) when the Casons knew or should have known that the interest rate had been marked up, and (2) whether NMAC fraudulently concealed the mark-up from the Casons (R. 194, 8/22/00 Tr. at 120-121). In light of this factual dispute, the district judge correctly declined to resolve, at the class certification stage, the merits of NMAC's statute-of-limitations defense. See *Eisen*, 417 U.S. at 177-178 (court must not decide merits in ruling on class certification).

Alternatively, NMAC contends (Br. 58-59) that class certification is inappropriate because, even if the Casons' claims are found to be timely, the district judge must conduct individualized hearings into whether the other class members' claims are time-barred. This statute-of-limitations issue does not preclude class certification. This Court has held that the possibility that different class members' claims will be subject to different defenses will not foreclose certification under Rule 23. *Bittinger*, 123 F.3d at 884. Consistent with this holding, numerous courts have concluded that class certification can be appropriate even where individual class members are affected differently by a statute of limitations. See *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 & n.4 (1st Cir. 2000); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 924 (3d Cir. 1992); *Kennedy v. Tallant*,

710 F.2d 711, 718 (11th Cir. 1983); *Cameron v. E.M. Adams & Co.*, 547 F.2d 473, 478 (9th Cir. 1976); accord 1 Newberg & Conte, *Newberg on Class Actions* § 4.26 at 4-104 (3d ed. 1992).[4]

At any rate, it is merely hypothetical at this point whether individualized hearings on statute-of-limitations questions would be needed for most class members. The district court has not yet decided the appropriate temporal scope of the class, and has emphasized that one of the unresolved issues is whether ECOA's statute of limitations requires an adjustment of the proposed class period (R. 194, 8/22/00 Tr. at 152; R. 236, Order at 1-2; R. 238, Order at 2-3 & n.2). But even if the district court were to designate 1989 as the beginning of the class period (as the Casons have proposed), the need for individualized hearings on the limitations question may be unnecessary because of NMAC's concession below that "[d]uring the pretrial portion of this case, it seems unlikely that any customer – African-American or white – will know the 'markup' involved in his finance contract" (R. 113, Memorandum at 8). This concession seems consistent with the Casons' allegations (which must be accepted as true for purposes of the class certification

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[4] NMAC relies (Br. 58) on *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999), and *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). Although both decisions cited the statute-of-limitations issue in rejecting class certification, those cases are distinguishable from the Casons' suit. The courts in *Barnes* and *Broussard* concluded that individualized hearings would be necessary on several issues relating to liability, not just the statute-of-limitations defenses. See *Barnes*, 161 F.3d at 143; *Broussard*, 155 F.3d at 340-341. As explained below, the district court should be able to resolve liability questions in the present case without individualized hearings. See pp. 19-20, *infra*.

decision) that NMAC has a standard policy of concealing from borrowers that their interest rates include non-risk-based mark-ups (R. 135, Complaint ¶¶ 54-57; R. 150, Response at 42; R. 84, Memorandum at 11). If the district court ultimately finds that NMAC had such a non-disclosure policy, the court may be able to conclude without individualized hearings that virtually no class members could have reasonably discovered their injury until they learned about the Finance Charge Markup Policy in connection with this lawsuit.

4. The Casons are adequate class representatives and thus satisfy the final requirement of Rule 23(a). Adequacy of representation depends on the competency of class counsel, the likelihood that the named plaintiffs will vigorously pursue the litigation, and the absence of conflicts with the other class members. *American Med. Sys.*, 75 F.3d at 1083. We know of no conflict of interest between the Casons and the other class members. Moreover, from all indications, the Casons' attorneys are well-qualified and have vigorously pursued this litigation, as evidenced by their success thus far in compiling a massive database and retaining experts to perform complicated statistical analyses.

C. *Class Certification Is Appropriate Under Rule 23(b)(2)*

Rule 23(b)(2) permits class certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The claims asserted here fit squarely within Rule 23(b)(2) because the Casons are seeking injunctive and

declaratory relief against NMAC, including an order prohibiting use of the Finance Charge Markup Policy that allegedly injured each of the class members (R. 135, Complaint ¶¶ 136-139).

Civil rights cases alleging racial discrimination are "prime examples" of appropriate Rule 23(b)(2) class actions, *Amchem*, 521 U.S. at 614, because "[r]ace discrimination is peculiarly class discrimination." *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir. 1977) (citation omitted), cert. denied, 436 U.S. 946 (1978). Indeed, the Advisory Committee Notes to Rule 23(b)(2) cite discrimination cases as "[i]llustrative" examples of (b)(2) class actions. Class certification is proper in civil rights cases "even though 'the discrimination may have been manifested in a variety of practices affecting different members of the class in different ways and at different times.'" *Alexander*, 565 F.2d at 1372.

Rule 23(b)(2) certification is particularly appropriate where the discrimination claims are based on a disparate-impact theory. Disparate impact cases focus on the *class-wide* effect of a policy or practice on a protected group (pp. 9-10, *supra*), and thus "by their very nature implicate class-based claims." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998).

NMAC nonetheless argues (Br. 53-56) that Rule 23(b)(2) certification is inappropriate here because the Casons are seeking monetary relief. In support of this argument, NMAC cites the Advisory Committee Notes to Rule 23, which state that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."

The restriction cited in the Advisory Committee Notes is inapplicable here because the only monetary relief the Casons seek is equitable restitution, not compensatory or punitive damages. Although their complaint requested "money damages" and "damages allowed by law" (R. 135, Complaint at 2, 38), the Casons have clarified that their monetary claims are limited to restitution[5] – *i.e.*, a refund of the amounts that NMAC overcharged as a result of the alleged discrimination (R. 217, Brief at 4-5; R. 266, Motion to Amend at 2). Restitution is an equitable remedy and is not equivalent to money "damages." See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (equitable relief includes "restitution, but not compensatory damages"). "When monetary relief is properly sought as equitable restitution, such cases qualify as Rule 23(b)(2) classes," even where such monetary relief is "as predominant as the injunctive and other equitable relief sought." 1 *Newberg on Class Actions*, *supra*, § 4.14 at 4-48; see also *Allison*, 151 F.3d at 415-416 & n.10, 422, 425.[6] It is well-settled, for example, that 23(b)(2) certification is appropriate in civil rights actions seeking back pay, which is a form of equitable

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[5] The Casons' appellate brief describes the requested monetary relief as "disgorgement and/or restitution" (Cason Br. 3, 36). We use the term "restitution" to include the equitable remedy of disgorgement, which courts often characterize as "restitutionary." *Chauffeurs, Teamsters & Helpers v. Terry*, 494 U.S. 558, 570 (1990).

[6] This rule is consistent with the unpublished decision in *Butler v. Sterling, Inc.*, No. 98-3223, 2000 WL 353502 (6th Cir. Mar. 31, 2000), on which NMAC relies (Br. 53-54). The plaintiffs in *Butler* sought compensatory damages for emotional distress, not simply restitution. 2000 WL 353502, at *8-*9.

relief. See *Alexander*, 565 F.2d at 1372; *Senter*, 532 F.2d at 525; *Allison*, 151 F.3d at 415, 422.

Restitution claims are especially well-suited for class certification in disparate-impact cases because a court often can calculate appropriate relief for each class member without individualized hearings, by using a standard formula derived from the same statistical analyses that the plaintiffs use to establish liability. In the present case, the Casons propose to prove the disparate impact of the Finance Charge Markup Policy using multiple regression analyses, which are designed to isolate the effect, if any, that race had on a borrower's mark-up by controlling for various legitimate variables that might have affected the level of the mark-up (see, *e.g.*, R. 148, Exh. 7 (Cohen Report at 4-9)). The variables that the Casons propose to include in these statistical analyses are in NMAC's business records or otherwise available through public sources (*ibid.*; R. 135, Complaint ¶¶ 83-105).

Even if individualized hearings were required at the remedial stage of this bifurcated case, Rule 23(b)(2) certification would still be appropriate. As previously noted, (b)(2) certification is authorized in discrimination cases involving back pay claims. Yet back pay calculations often require an individualized inquiry into whether a discrimination victim made reasonable attempts to mitigate his or her monetary losses. In determining appropriate back pay, courts offset the monetary award by the amount of replacement earnings that the victim actually received (or could have earned with reasonable efforts) from an employer other

than the defendant. See *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 623-626 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984). In light of this duty of mitigation, determinations of appropriate back pay in employment discrimination suits are far more likely to require individualized hearings (see *ibid.*) than would the calculation of the overcharges that the Casons seek as restitution.

For these reasons, the Casons' suit is appropriate for class certification under Rule 23(b)(2). Although we believe that certification is also warranted under Rule 23(b)(3) (see pp. 19-25, *infra*), this Court can affirm the district court's order without addressing the (b)(3) issue. The judge in the present case has indicated that he would be inclined to require notice even if certification occurred only under 23(b)(2) (see R. 194, 8/22/00 Tr. at 137-140, 153). Although notice and opt-out rights are not mandatory under Rule 23(b)(2) – as they are in (b)(3) class actions, see Fed. R. Civ. P. 23(c)(3) – the district court nonetheless has discretion to order such protections for members of a (b)(2) class. See *Penland v. Warren County Jail*, 759 F.2d 524, 531 (6th Cir. 1985) (*en banc*); Fed. R. Civ. P. 23(d)(2). By providing class members with these procedural safeguards, a court "can permit civil rights class actions to proceed under 23(b)(2) without requiring that such actions meet the stiffer substantive requirements of 23(b)(3), yet still ensure that the class representatives adequately represent the interests of unnamed class members." *Allison*, 151 F.3d at 418 n.13; accord *Lemon v. International Union of Operating Eng'rs*, 216 F.3d 577, 582 (7th Cir. 2000).

Notice in a case such as this is advisable because of the possibility that the interests of individual class members may diverge at the remedial stage, even though the monetary relief is purely equitable in nature and can be calculated using a standard formula. There may be more than one acceptable formula for calculating restitution, and individual class members may have an interest in objecting to the formula chosen by the named plaintiffs. But this divergence of interests is unlikely to arise until the remedial phase of the litigation. Therefore, the district court may properly delay notice in a (b)(2) class action "until a more advanced stage of the litigation; for example, until after class-wide liability is proven." *King v. South Cent. Bell Tel. & Tel.*, 790 F.2d 524, 529 (6th Cir.1986) (quoting *Johnson v. General Motors Corp.*, 598 F.2d 432, 438 (5th Cir. 1979)).

D. *Class Certification Is Also Appropriate Under Rule 23(b)(3)*

Class certification is proper where (1) "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). This case satisfies both requirements, and thus the district court did not abuse its discretion in certifying this action under (b)(3).

1. At this preliminary stage of the litigation, it appears that common issues will predominate over those affecting only individual members. Liability in this case will depend on the following issues: (1) whether there is a statistically significant disparity in the level of the mark-up paid by African Americans as

compared to other borrowers; (2) whether a specific lending policy or practice of NMAC caused that disparity; (3) whether that policy or practice is justified by business necessity; and (4) if so, whether other less discriminatory alternatives would adequately serve NMAC's business needs. See *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,269 (1994) (elements of disparate impact claim under ECOA).

The court should be able to answer these questions without conducting individualized hearings into the circumstances surrounding each class member's loan. As previously explained (p. 17, *supra*), the Casons propose to prove a *prima facie* violation by using statistical models, including regression analyses, which control for various legitimate variables that might affect a borrower's mark-up. The variables the Casons have included in their statistical models are either in NMAC's business records or available from public sources. If the Casons establish a *prima facie* case, the remaining liability questions – whether NMAC's policy is justified by business necessity and whether a less discriminatory, acceptable alternative exists – will focus on NMAC's needs, rather than on individual transactions involving class members.

NMAC argues, however, that common issues do not predominate because thousands of local dealers had input in setting the finance charge mark-ups on the class members' loans (Br. 35-41, 50-51, 54-55). But the Casons allege that NMAC's *own* "nationwide, uniform mark-up policy" (R. 147, Reply at 19) was the cause of the disparate impact. At this stage of the litigation, the Court must accept

this allegation as true. Specifically, the Casons allege that NMAC has adopted a Finance Charge Markup Policy that it administers uniformly throughout the United States from a centralized loan processing center, that the policy expressly authorizes local dealers to impose non-risk-based mark-ups in borrowers' interest rates, that the policy gives dealers an economic incentive to do so, that NMAC imposes limits on the permissible mark-ups, that NMAC approves loans that contain these mark-ups, and that NMAC profits directly from the dealers' decisions to mark-up the interest rates. See pp. 4-6, *supra*. Although it is uncertain whether the Casons ultimately can prove the existence of a specific nationwide policy or show that it caused the alleged disparate impact, their allegations are sufficient at this preliminary stage of the litigation to justify class certification. If it later appears that the Casons will be unable to prove that a specific NMAC policy or practice caused the alleged disparate impact, the district court can revisit the class certification issue at that point. See *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 (6th Cir. 1997).

The Casons' allegations of a "nationwide, uniform" policy (R. 147, Reply at 19) distinguish their case from this Court's decisions in *Sprague*, *supra*, and *American Medical Systems*, *supra*. The claims in *Sprague* were not based on a common policy, but rather depended on the terms of individual "side deal[s]" that the defendant had made separately with each of the 50,000 class members and on specific oral and written representations that were made to each of those individuals. 133 F.3d at 395, 398. *American Medical Systems* was a products

liability case involving several different product models and several types of complaints about defects in those models, 75 F.3d at 1080-1082, 1085 – not an allegation that a single, nationwide policy caused injury to all class members.

NMAC also contends that 23(b)(3) certification is impermissible because a multitude of non-discriminatory factors may affect the amount of each car buyer's mark-up (Br. 34-41, 45-49). At bottom, this argument is simply an attack on the merits of the Casons' claim – essentially an assertion that plaintiffs cannot prove disparate impact because their statistical analyses allegedly do not account for non-racial factors that might vary among the thousands of borrowers who have loans with NMAC. Contrary to NMAC's suggestion, denying class certification will not resolve this merits issue. The Casons have made clear that if their case proceeds as an individual lawsuit, they will base their disparate impact claim on the same statistical proof that they propose to use in the class action (R. 253, Response at 3). Either way, the Casons will try to prove disparate impact using statistical analyses that include thousands of NMAC customers. Therefore, as the district court correctly recognized, "[n]o matter how the Sixth Circuit rules on the class certification issue, the opinion of the Court of Appeals will not change the evidence necessary to prove or defend against disparate impact liability" (R. 254, Order at 3).

At any rate, NMAC cannot avoid class certification merely by speculating that disparities in the mark-up are attributable to borrower-specific variables that are not included in the plaintiffs' statistical models. Rather, NMAC has the burden

of producing specific evidence that those variables do, in fact, undermine plaintiffs' statistical analyses. See *Bazemore v. Friday*, 478 U.S. 385, 399-400, 403-404 n.14 (1986); *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 908-909 (6th Cir. 1991). If NMAC were able to produce such evidence in the future, the district court could determine at that point whether obtaining information about those variables for each class member would require cumbersome, individualized hearings. If so, the court could then consider decertifying the class due to changed circumstances. See *Barney*, 110 F.3d at 1214. But the court might find, instead, that all relevant variables can be obtained either from NMAC's own business records or from public sources without individual hearings.

NMAC also erroneously contends (Br. 41-48) that possible variations in monetary relief among the class members preclude certification under Rule 23(b)(3). This Court has recognized that "[n]o matter how individualized the issue of damages may be," a judge may properly deal with the question by certifying the case as a (b)(3) class action for purposes of liability and deferring resolution of monetary issues until later remedial proceedings. *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (1988); accord Advisory Committee Notes, Rule 23(b)(3) (certification may be appropriate "despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class"). At any rate, if the Casons were to prove an ECOA violation under a disparate impact theory, the district court should be able to calculate the equitable restitution for each class member without individualized hearings. See pp. 16-17, *supra*.

2. Finally, a class action is superior to other available methods of resolving the controversy. Proving a disparate impact claim of this sort requires an expensive and time-consuming compilation of a massive database, as well as the performance of sophisticated statistical analyses. Repeating this process hundreds or thousands of times in separate lawsuits would be a tremendous waste of judicial resources.

Moreover, as a practical matter, a class action may be the only realistic chance that discrimination victims have to obtain redress for their injuries. Absent certification, many class members may never know they have been subjected to discrimination because, according to the Casons' allegations, NMAC takes affirmative steps to conceal the existence of the mark-ups from borrowers. See pp. 13-14, *supra*.

Even if borrowers believe they have suffered discrimination, they probably will have no economic incentive to bring individual actions under ECOA. Individual monetary losses in ECOA cases are often relatively modest (in this case, only a few hundred or a few thousand dollars) and thus are unlikely to justify the potentially enormous litigation expenses inherent in complicated disparate impact cases of this sort. This disincentive to pursue small claims is the core reason for permitting class actions. *Amchem*, 521 U.S. at 617. It is true, as NMAC points out (Br. 51-52), that ECOA authorizes recovery of punitive damages (up to $10,000), compensatory damages, attorney's fees, and costs in appropriate circumstances. See 15 U.S.C. 1691e. But the potential for such relief in an individual case will

often be insufficient to attract attorneys willing to invest the enormous amount of time and resources necessary to develop and successfully prove a complex disparate impact case under ECOA.

For all of these reasons, the district court did not abuse its discretion in certifying a plaintiff class under both Rule 23(b)(2) and (b)(3). This Court can properly affirm the class certification order under either provision of Rule 23.

CONCLUSION

The district court's class certification order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 6,450 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2001, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE were served by Federal Express, next business day delivery, on each of the following attorneys for the Appellant:

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