IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Case No. 3:14-cv-00008-RJC-DSC

UNITED STATES OF AMERICA and the STATE OF NORTH CAROLINA ex rel. ROY COOPER, Attorney General, Plaintiffs, v. AUTO FARE, INC.; SOUTHEASTERN AUTO CORP.; and ZUHDI A. SAADEH, Defendants.	)	**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

Defendants have filed a motion to dismiss Plaintiffs' claim under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f ("ECOA"). In this pattern-or-practice, reverse-redlining claim, Plaintiffs have pleaded sufficient facts to give Defendants fair notice and state plausible claims for relief, which is all that is required at the pleading stage.[1] Defendants' claims that Plaintiffs have failed to allege facts that could establish a plausible claim are grounded in Defendants' misunderstanding of the legal standards applicable to this claim. Because the United States has satisfied the pleading standard imposed by Federal Rule of Civil Procedure 8(a), as interpreted by the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court should deny Defendants' motion.

[1] Because Defendants concede that Plaintiffs have met the pleading requirements to assert a violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat §§ 75-1–75-16.2 ("UDTPA"), *see* Defs.' Br. Supp. Mot. Dismiss 16, ECF No. 9, Plaintiffs do not address the UDTPA claims in detail in this Response.

II. BACKGROUND

Plaintiffs filed their Complaint on January 13, 2014, alleging, among other things, that Defendants engaged in a pattern or practice of violations of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f ("ECOA"). Compl. ¶¶ 1, 24–27, ECF No. 1. The Complaint states that Defendants owned and operated two "buy here, pay here" used-car dealerships in Charlotte, North Carolina (Auto Fare and United Car Sales) that provided financing to customers for used-car purchases. *Id.* at ¶¶ 5–7, 9, 11. Defendant Saadeh determines the pertinent terms of sales and financing deals at the Dealerships, including the sale price of vehicles, the required down payment, and the interest rate, and gives final approval for loan deals and repossessions. *Id.* at ¶ 7. The Complaint alleges that, in operating these dealerships, from at least 2006 through at least 2011, Defendants violated ECOA by intentionally targeting African Americans for the extension and servicing of credit on unfair and predatory terms. *Id.* at ¶ 10. The Complaint explains that, without meaningfully assessing the customers' creditworthiness or ability to repay, Defendants entered into installment sale contracts with customers, and then serviced those credit accounts, on unfair and predatory terms including, but not limited to: sale prices in excess of industry standard suggested retail prices and far in excess of wholesale prices paid for the vehicles by Defendants; disproportionately high down payments and annual percentage rates (APRs) as compared to other subprime used-car dealers; disproportionately high rates of default and repossession as compared to other subprime used-car dealers; and repossessions when customers were not in default. *Id.* at ¶¶ 13–18. Plaintiffs allege that Defendants profited from these practices. *Id.* at ¶ 19.

The Complaint also describes how Defendants intentionally targeted African-Americans for these installment sale contracts with unfair and predatory terms. *Id.* at ¶¶ 11, 15, 19.

Specifically, the Complaint states that the Dealerships are located in an area of Charlotte that is majority African American. *Id.* at ¶ 11. A significant majority of the customers have been African American. *Id.* at ¶ 12. Defendant Saadeh made statements indicating that he was particularly interested in African-American customers because he perceived them to be of inferior intellect and have fewer credit options, and thus be more likely to accept the terms of the installment sale contracts offered by Defendants. *Id.* at ¶ 11. He used racial slurs and epithets and has spoken in a derogatory manner about the Dealerships' African-American customers and African Americans in general, including, referring to them as "niggers" and "monkeys." *Id.* And, he made a statement indicating that he employed a particular sales agent because the agent was especially adept at getting African Americans to buy cars. *Id.* The Complaint also provides an example of an African-American customer who entered into an installment sale contract with Defendants and experienced some of the alleged unfair and predatory terms. *Id.* at ¶ 18.

Defendants filed a Motion to Dismiss the ECOA claim on March 7, 2014. Mot. Dismiss, ECF No. 8; Defs.' Br. Supp. Mot. Dismiss, ECF No. 9.[2] In their motion, they contend that the Complaint does not allege sufficient facts to show that: (1) Defendants intentionally targeted African-American customers for unfair and predatory lending terms; (2) Defendants treated African-American customers less favorably than non-African-American customers; and (3) Defendants maintained a policy or practice that disadvantaged African-American customers.

[2] Although the first paragraph of Defendants' motion asks the Court to dismiss the entire Complaint on the grounds that Plaintiffs have failed to state a claim under ECOA or UDTPA, the rest of Defendants' motion and their brief in support of the motion make it clear that they do not challenge the UDTPA claims. *Compare* Mot. Dismiss 1, *with* Mot. Dismiss 1–3, *and* Defs.' Br. Supp. Mot. Dismiss 16. The Court should not consider a motion to dismiss the UDTPA claim, because Defendants have to failed to "state with particularity the grounds" of a motion to dismiss the claim, and they have not filed a brief contemporaneously with the motion that argues and provides support for dismissing this claim. Fed. R. Civ. P. 7(b)(1); LCvR 7.1(A), (C); *see Montgomery v. Maryland*, 72 F. App'x 17, 20 (4th Cir. 2003) ("[The party] failed to make a written motion . . . ; her sentence at the end of a memorandum opposing a motion to dismiss does not satisfy the requirements of Fed. R. Civ. P. 7(b), governing the form of motions.").

Defs.' Br. Supp. Mot. Dismiss at 10–16. As explained in detail below, Defendants' arguments are meritless, and thus the Court should deny their motion to dismiss.

III. STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(6), a court "must accept as true all of the factual allegations contained in the complaint," *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)), *aff'd*, 132 S. Ct. 1327 (2012), and "construe the factual allegations of the complaint in the light most favorable to the plaintiff." *Schweikert v. Bank of America, N.A.*, 521 F.3d 285, 288 (4th Cir. 2008) (citations omitted) (internal quotation marks omitted). The court is limited to determining only whether a claim is stated; it "'does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Oates v. Trs. of Gaston College*, No. 3:12-CV-853-RJC-DCK, 2013 WL 3466955, at *2 (W.D.N.C. Jul. 10, 2013) (quoting *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992), *abrogated on other grounds*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). The court's inquiry on a Rule 12(b)(6) motion to dismiss is "context-specific," and the complaint must be evaluated in its entirety. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Nemet Chevrolet, Ltd.*, 591 F.3d 250, 256 (4th Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

A complaint properly states a claim that can overcome a Rule 12(b)(6) motion when it gives the defendant "fair notice" of the claim and the grounds upon which it rests, and when the complaint's factual allegations, taken as true, state a "plausible" claim for relief. *See Coleman*, 626 F.3d at 190; *see also Twombly*, 550 U.S. at 555, 570. Although the factual allegations must support a reasonable inference that defendants are liable for the alleged violations, "detailed factual allegations" are not required. *Nemet Chevrolet, Ltd.*, 591 F.3d at 256 (citing *Iqbal*, 556

U.S. at 678). More specifically, the plaintiff need not plead facts constituting a prima facie case to survive a motion to dismiss. *Coleman*, 626 F.3d at 190 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–15 (2002)). The complaint's factual allegations need only "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

IV. ARGUMENT

Plaintiffs' Complaint satisfies the pleading standard of Federal Rule of Civil Procedure 8(a), as interpreted by the Supreme Court's decisions in *Twombly*, 550 U.S. 544 and *Iqbal*, 556 U.S. 662. The factual allegations give Defendants fair notice of the contours of Plaintiffs' pattern-or-practice claim under ECOA, and they state claims to relief that are facially plausible. *See Coleman*, 626 F.3d at 190; *Nemet Chevrolet, Ltd.*, 591 F.3d at 255–56. Defendants' arguments to the contrary misconstrue the relevant legal standards for a pattern-or-practice claim of reverse redlining under ECOA. Viewed as a whole, Plaintiffs' allegations support a reasonable inference that Defendants are liable for the alleged violations. *See Nemet Chevrolet, Ltd.*, 591 F.3d at 256.

A. The Complaint Gives Fair Notice and States Plausible Claims for Relief

1. The Complaint Gives Fair Notice of Plaintiffs' Claims for Relief Under the Pattern-or-Practice Provisions of ECOA

Plaintiffs' Complaint alleges that Defendants engaged in a pattern or practice of discrimination under ECOA. Compl. ¶¶ 1, 24–27. The United States Attorney General is authorized to initiate an enforcement action when he has reason to believe that a creditor is engaged in a pattern or practice that violates ECOA. *See* 15 U.S.C. § 1691e(h). The legal standard, and therefore what plaintiffs must plead under pattern-or-practice cases, differs from individual-discrimination cases. *See Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125, 1127 (10th Cir. 2009); *see also United States v. Union Auto Sales, Inc.*, 490 F. App'x 847, 848–49 (9th Cir.

2012). In this matter, Plaintiffs have alleged sufficient facts to demonstrate that Defendants have violated the pattern-or-practice provisions of ECOA.

a. Pattern or Practice Legal Standard

To establish a pattern or practice of discrimination, the United States must ultimately prove that Defendants either (1) maintained a discriminatory policy, or (2) engaged in acts of discrimination as a matter of "regular procedure." *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977) (Title VII); *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006) (ECOA); *United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992) (Fair Housing Act); *EEOC v. W. Elec. Co.*, 713 F.2d 1011, 1016 (4th Cir. 1983) (ADEA). The United States must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. . . . [R]acial discrimination [must be] the company's standard operating procedure[—]the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. The "focus often will not be on individual [acts], but on a pattern of discriminatory decisionmaking." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (quoting *Teamsters*, 431 U.S. at 360 n.46). Under the *Teamsters* framework, "[i]n contrast to cases alleging solely individual discrimination," the key question is whether the evidence as a whole, both direct and circumstantial, establishes a regular discriminatory practice. *Thompson*, 582 F.3d at 1127.

Where a discriminatory policy is openly declared, such a policy alone is sufficient to meet the pattern-or-practice requirement, and it is unnecessary for the United States to prove numerous specific occasions on which the discriminatory policy was carried out to establish liability. *See United States v. Gregory*, 871 F.2d 1239, 1243 (4th Cir. 1989) ("[I]f the admissions [of a policy of discrimination] are credited, the . . . violation has been proven."); *United States v.*

Hughes Mem'l Home, 396 F. Supp. 544, 551 (W.D. Va. 1975) ("The demonstrated existence of a policy of discrimination is sufficient to constitute the pattern and practice . . . .").

b. Sufficiency of Complaint Under Pattern-or-Practice Claim

An ECOA pattern-or-practice complaint is sufficient if it generally describes the discriminatory practices without detailing any individual instance of discrimination. *See, e.g.*, *Union Auto Sales, Inc.*, 490 F. App'x at 848–49; *E.E.O.C. v. Stroh Brewery Co.*, 83 F.R.D. 17, 31–32 (E.D. Mich. 1979) (noting that, as compared to complaints alleging specific incidents of discrimination, a pattern-or-practice claim is a "broader allegation" that can be "properly plead with greater generality"); *cf. Graniteville Co. v. E.E.O.C.*, 438 F.2d 32, 39 n.7 (4th Cir. 1971), (assessing the sufficiency of an EEOC charge and approvingly citing *United States v. Gustin-Bacon Div., Certainteed Products Corp.*, 426 F.2d 539, 542–43 (10th Cir. 1970)), *distinguished on other grounds by E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54 n.11 (1984); *Gustin-Bacon Div.*, 426 F.2d at 542–43 (vacating order for a more definite statement and subsequent dismissal in a Title VII pattern-or-practice case, rejecting a requirement of detailed pleading setting forth evidentiary matters such as names, dates, and places of discriminatory practices or patterns, and holding instead that a pattern or practice of discrimination is sufficiently pled by stating the "fundamental facts of the character herein alleged").

Plaintiffs' concise allegations here are plainly sufficient to give Defendants "fair notice" of the claims against them and the specific grounds upon which they rest, and to state "plausible" claims for relief. *See Coleman*, 626 F.3d at 190. The Complaint describes Defendants' discriminatory policies or practices in all their relevant particulars, including by identifying the actors (owners and operators of two "buy here, pay here" used-car dealerships, Auto Fare and United Car Sales), the time period (at least from 2006 through 2011), the location (Defendants'

"buy here, pay here" used-car dealerships in Charlotte, North Carolina), and the alleged bases for the discrimination (the race or color of African-American customers), Compl. ¶¶ 5–7, 10, 11, 19, 24. *See Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010) (holding that allegations of the type of discrimination, by whom, and when are all that a plaintiff needs to put in the complaint to survive a Rule 12(b)(6) motion).

The Complaint details the specific discriminatory behaviors by Defendants alleged to constitute the pattern or practice—targeting African-American customers, on the basis of their race or color, for installment sale contracts and servicing of those contracts on unfair and predatory terms, including: disproportionately high sale prices, down payments, and annual percentage rates (APRs); disproportionately high rates of default and repossession as compared to other subprime used-car dealers; and repossessions when customers were not in default. Compl. ¶¶ 13–19. These allegations are sufficient to put Defendants on notice of the issues in the lawsuit and the grounds upon which they rest. *See Coleman*, 626 F.3d at 190.

Plaintiffs' factual allegations here, when considered in their entirety and assumed to be true, state "plausible" claims for relief. Plaintiffs' allegations support a reasonable inference that Defendants engaged in regular discriminatory practices. *See Teamsters*, 431 U.S. at 336; *Nemet Chevrolet, Ltd.*, 591 F.3d at 255–56. Taken as true, Plaintiffs' allegations that Defendant Saadeh declared that he was especially interested in African-American customers because he perceived them to have inferior intellect and fewer credit options (and thus to be more likely to accept the terms of their contracts), and that he employed a sales agent because of the agent's ability to get African Americans to buy cars, would establish a discriminatory policy in violation of the pattern-or-practice provision of ECOA. *See Gregory*, 871 F.2d at 1241–43 (finding a pattern or practice of sex discrimination under Title VII where there were admissions by the Sherriff's

department that it did not hire women); *Hughes Mem'l Home*, 396 F. Supp. at 551 (finding a pattern or practice of race discrimination under the Fair Housing Act where there was a policy of refusing to allow African-American children to live in a children's home). In addition, the Complaint alleges that Defendants engaged in the alleged discriminatory acts as a matter of standard practice across a period of at least five years. Thus, even in the absence of a stated discriminatory policy, the Complaint's allegations adequately describe a pattern or practice of discrimination under ECOA based on the number of instances.

2. Plaintiffs' Allegations State Facially Plausible Claims For Relief Under ECOA

Plaintiffs' Complaint states plausible claims for relief under ECOA. Defendants cite an incorrect legal standard for assessing a prima facie case of reverse redlining under ECOA. Under the correct legal standard, Plaintiffs' Complaint includes allegations that establish a violation under ECOA, for which Plaintiffs are entitled to relief.

a. ECOA Reverse-Redlining Legal Standard

Although Defendants correctly note that Plaintiffs have brought a claim of reverse redlining, Defs.' Br. Supp. Mot. Dismiss at 10, Defendants cite the incorrect legal standard to assess reverse-redlining claims. ECOA makes it unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race [or] color." 15 U.S.C. § 1691(a). Many plaintiffs bring claims under ECOA alleging that creditors are denying credit to applicants because the applicants are members of a class that is protected by the statute. *See Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20, 23 (D.D.C. 2000), *partial reconsideration on other grounds by* 147 F. Supp. 2d 1 (D.D.C. 2001). In contrast, reverse-redlining claims allege that creditors are targeting applicants for the extension and servicing of credit on unfair and predatory terms because the applicants are members of a

class that is protected by the statute. *See id.* at 20. Notwithstanding this difference, reverse-redlining claims also violate ECOA. *See id.* at 20, 23 (recognizing that reverse-redlining theory violates ECOA); *see also M & T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 574–75 (E.D.N.Y. 2010) (same); *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874, 887–88 (S.D. Ohio 2002) (denying motion to dismiss ECOA reverse-redlining claim).

Because reverse-redlining claims differ from claims alleging a denial of credit, courts have noted that the elements to demonstrate a prima facie case of reverse redlining also differ. *See Barkley v. Olympia Mortg. Co.*, No. 04 CV 875 (RJD)(KAM), 2007 WL 2437810, *13–15 (E.D.N.Y Aug. 22, 2007). To establish a prima facie case of reverse redlining, plaintiffs must prove: (1) unfair and predatory loan terms; and (2) either they were intentionally targeted by Defendants on the basis of race or Defendants' practices have a disparate impact on the basis of race. *Hargraves*, 140 F. Supp. 2d at 20; *see Barkley*, 2007 WL 2437810, at *13–15. Requiring plaintiffs alleging reverse redlining to establish a prima facie case only through demonstrating that similarly situated comparators were treated better would lead to the illogical result that creditors could engage in predatory lending schemes as long as they lend solely to one racial group. *Barkley*, 2007 WL 2437810, at *14; *see Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 216 (N.D. Ill. 1969). Therefore, Plaintiffs can establish this claim by demonstrating that Defendants intentionally targeted African-American customers on the basis of race. *See Hargraves*, 140 F. Supp. 2d at 20.

b. Plaintiffs' Allegations Demonstrate that the Terms and Conditions of Defendants' Installment Sale Contracts Are Unfair and Predatory

Plaintiffs have alleged sufficient facts to demonstrate that the terms in Defendants' installment sale contracts are unfair and predatory. Unfair and predatory practices include loans made on "grossly unfavorable terms." *Matthews*, 185 F. Supp. 2d at 886. In *Hargraves*, the

court found that predatory practices include exorbitant interest rates; loans that are designed to fail by basing the terms on the value of the asset, rather than on the borrower's ability to repay the loan; repeated foreclosures; profiting by acquiring property securing the loan, rather than by receiving loan payments; and loan-servicing procedures with excess fees. *See* 140 F. Supp. 2d at 20–21; *see also Steed v. EverHome Mortg. Co.*, 308 F. App'x 364, 368–69 (11th Cir. 2009). Similar practices exist here. Plaintiffs have alleged that Defendants have charged disproportionately high interest rates, sale prices, and down payments, and have failed to base these terms on customers' ability to pay. Compl. ¶¶ 13–18. These practices have led to disproportionately high default and repossession rates. *Id.* at ¶ 17. The allegations also indicate that Defendants have profited from its unfair and predatory practices, which include high rates of repossession. *Id.* at ¶¶ 17, 19. Given the similarity of Defendants' practices to practices that courts have found are unfair and predatory, Plaintiffs have alleged sufficient facts to meet this element of a prima facie case of reverse redlining. *See, e.g.*, *Hargraves*, 140 F. Supp. 2d at 20–21, 23.

c. Plaintiffs' Allegations Show that Defendants Targeted African Americans For Unfair and Predatory Installment Sale Contracts

Plaintiffs can prove that Defendants targeted African Americans through direct or circumstantial evidence. *See Hargraves*, 140 F. Supp. 2d at 21–22; *see also Moore v. U.S. Dep't of Agric.*, 55 F. 3d 991, 995 (5th Cir. 1995), *overruling* 857 F. Supp. 507 (W.D. La. 1994); *Matthews*, 185 F. Supp. 2d at 886–88. Defendants' racially charged statements provide direct evidence demonstrating discriminatory intent. *See Moore*, 55 F.3d at 995 (finding that a statement that "[n]o whites" could qualify for a specific loan constitutes direct evidence of discrimination). Defendants argue that these comments are only "stray" or "isolated" remarks and not direct evidence of Defendants' discriminatory intent. In the cases cited by Defendants,

the courts concluded that statements are "stray remarks" and not direct evidence of discrimination if they are not made by a decision maker, where there were no derogatory comments, or where there was no connection between the comments and the adverse action. *See O'Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 548–50 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 308 (1996); *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936, 941–43 (4th Cir. 1992); *Cooley v. Sterling Bank*, 280 F. Supp. 2d 1331, 1338–39, 1342 (M.D. Ala. 2003), *aff'd*, 116 F. App'x 242 (11th Cir. 2004). These cases are inapposite, as all three conditions are alleged to exist here.

Here, Defendant Saadeh is a decision maker for Defendants on the terms of sales and financing deals, Compl. ¶ 7. *See Faulkner v. Glickman*, 172 F. Supp. 2d 732, 737, 739 (D. Md. 2001) (finding that statements by decision makers can constitute direct evidence of discrimination); *cf. Cooley*, 280 F. Supp. 2d at 1342 (holding that remarks by non-decision makers are not direct evidence of discrimination). Unlike the cases Defendant cites, Defendant Saadeh has made derogatory comments about African Americans, including referring to them as "niggers" and "monkeys." *Cf. L & F Homes & Dev., LLC v. City of Gulfport*, 538 F. App'x 395, 401 (5th Cir. 2013) (finding that statements that do not mention race or support an inference that the City acted with racial motivations are not direct evidence of discrimination); *Cooley*, 280 F. Supp. 2d at 1338–39, 1342 (finding no evidence of discriminatory intent absent racially derogatory comments or jokes, but noting that blatant remarks with no intent other than to discriminate constitute direct evidence of discrimination) (citing *Busby v. City of Orlando*, 931 F.2d 764, 781–82 (11th Cir. 1991)). In addition to his use of racial epithets, Defendant Saadeh has stated that he was particularly interested in African-American customers because he perceived them to have inferior intellect and fewer credit options, and thus to be more likely to

accept the terms of Defendants' contracts. Compl. ¶ 11. He has also indicated that he employed a particular sales agent, because the agent was especially adept at getting African Americans to buy cars. *Id.* Through these statements, Defendant Saadeh has clearly indicated his intent to target African Americans for these unfair and predatory installment sale contracts and noted how his resources have permitted him to actually engage in that pattern or practice. *See Faulkner*, 172 F. Supp. 2d at 737, 739 (finding that statements can constitute direct evidence of discrimination when they are made around the same time as the adverse action); *cf. O'Connor*, 56 F.3d at 548–50 (stating, in an ADEA case, that where the context of the comments is not related to the business and are instead jokes, the comments are not direct evidence of discrimination); *Clay*, 955 F.2d at 940, 941–43 (finding that statements about age were not evidence of age discrimination where they were not related to a pattern of decision making). Thus, these statements cannot be considered stray or isolated remarks; they are direct evidence of a decision maker's intent to target African Americans for unfair and predatory installment sale contracts. *See Faulkner*, 172 F. Supp. 2d at 737, 739.

Regardless, whether these remarks were stray or isolated, or whether they have a sufficient nexus to the adverse action, are inappropriate to determine at the motion-to-dismiss stage. It is "for the jury to determine whether the statements in question were more than stray or isolated remarks and whether a sufficient nexus exist[s] between the remarks . . . and the adverse actions taken by [Defendants]." *Id.* at 739.

The circumstantial evidence alleged here also supports that Defendants targeted African Americans for unfair and predatory terms of installment sale contracts. Courts have found that the location of the lender in a predominantly African-American community, a lender advertising to African Americans or in African-American communities, and the use of loan brokers who

operate in predominantly African-American communities can provide evidence of intentional targeting. *See Hargraves*, 140 F. Supp. 2d at 21–22; *M & T Mortg. Corp.*, 736 F. Supp. 2d at 575–76; *Barkley*, 2007 WL 2437810, at *11–12. Plaintiffs' Complaint alleges similar facts. It states that Defendants' Dealerships are located in an area of Charlotte that is predominantly African American. Compl. at ¶ 11. The Complaint also states that Defendant Saadeh employed an agent because the agent is adept at getting African Americans to purchase cars. *Id.* And, as alleged in Plaintiffs' Complaint, most of Defendants' customers are African American. *Id.* at ¶ 12. Therefore, Plaintiffs have alleged sufficient information to demonstrate that Defendants targeted African Americans for unfair and predatory terms. *See Hargraves*, 140 F. Supp. 2d at 21–22.

d. Plaintiffs' Allegations Do Not Need to Include Comparator Evidence

Defendants incorrectly claim that Plaintiffs must allege that Defendants treated non-African Americans differently than African Americans. *See Matthews*, 185 F. Supp. 2d at 886–87 ("[I]f the plaintiff presents direct evidence that the lender intentionally targeted her for unfair loans on the basis of [membership in a protected class], the plaintiff need not also show that the lender makes loans on more favorable terms to others."). Plaintiffs are not required to identify a comparator to prove a claim of intentional discrimination, especially where, as here, they have direct evidence of intent. *See Laing v. Fed. Express Corp.*, 703 F.3d 713, 720 (4th Cir. 2013); s*ee also Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013) ("Our cases clearly establish that plaintiffs who allege disparate treatment under statutory anti-discrimination laws need not demonstrate the existence of a similarly situated entity who or which was treated better than the plaintiffs in order to prevail. Proving the existence of a similarly situated entity is only *one* way to survive summary judgment on a disparate treatment

claim.") (emphasis in original) (citations omitted). As discussed *supra*, especially where, as here, Plaintiffs allege direct evidence of discrimination, Plaintiffs need not resort to comparator evidence to establish a claim under ECOA. *See Laing*, 703 F.3d at 720.

Plaintiffs bringing reverse-redlining claims, specifically, do not need to provide comparator evidence. *Hargraves*, 140 F. Supp. 2d at 20. As discussed previously, because of the nature of a reverse-redlining claim, requiring comparator evidence would lead to illogical results. *See Barkley*, 2007 WL 2437810, at *14; *see also Contract Buyers League*, 300 F. Supp. at 216. In *Hargraves*, the court stated that, because the plaintiffs sufficiently alleged that the terms of the loans were unfair and predatory, they did not need to also show that the defendants made loans on more favorable terms to anyone other than the targeted class. *Id.* at 20. Similarly, here, because Plaintiffs have sufficiently alleged that the terms of the installment sale contracts are unfair and predatory, Plaintiffs do not have to allege that Defendants treated non-African Americans more favorably than African Americans. Therefore, Plaintiffs have alleged sufficient facts to establish a prima facie case under ECOA. *See id.* at 20–21, 23.

Defendants rely upon cases where there was no direct evidence of discrimination and/or where plaintiffs did not assert a reverse-redlining claim for their contention that Plaintiffs must assert comparator evidence. *See Coleman*, 626 F. 3d at 190 (stating, in a Title VII employment discrimination case, that "[*a*]*bsent direct evidence*," a plaintiff can demonstrate treatment different from similarly situated employees outside the protected class) (emphasis added); *Thompson v. Marine Midland Bank*, No. 99-7051, 198 F.3d 235, at *2–3 (2d Cir. 1999) (unpublished) (declining to determine whether plaintiff had established a prima facie case of discrimination, but noting that, in a denial-of-credit ECOA claim, plaintiff must demonstrate a preference for someone outside the protected class); *Lora v. Bd. Of Educ. of N.Y.*, 623 F. 2d 248,

250 (2d Cir. 1980) (finding that, for a plaintiff in a Title VI discrimination claim, evidence of disparate impact alone is not enough to prove intentional discrimination); *Grant v. Vilsack*, No. 5:10-CV-201-BO, 2011 WL 308418, at *3 (E.D.N.C. 2011) (granting a motion to dismiss a denial-of-credit ECOA claim where there was no direct evidence of discrimination and no comparator evidence); *Cooley*, 280 F. Supp. 2d at 1337, 1338–41, 1344 (granting summary judgment in favor of defendant on denial-of-credit ECOA claim where there was no direct evidence of discriminatory intent or indirect or circumstantial evidence raising an inference of discrimination).[3] Because none of these cases apply to the situation here, in which courts have stated that plaintiffs do not need to provide comparator evidence, Defendants' argument that Plaintiffs must allege comparator evidence is unavailing. *See, e.g.*, *Laing*, 703 F.3d at 720; *Hargraves*, 140 F. Supp. 2d at 20.

3. Whether Disparate Impact Claims Are Actionable Under ECOA Is Irrelevant And Need Not Be Decided by the Court

Defendants argue that disparate impact claims under ECOA are not actionable, and that Plaintiffs have not alleged facts that support that (1) Defendants maintained a policy or practice that disadvantaged African-American customers on the basis of their race or color, or (2) that a disparity exists between African-American and non-African-American customers. Defs.' Br. Supp. Mot. Dismiss at 13–16. These arguments are irrelevant, because Plaintiffs' ECOA claim is for intentional discrimination only.[4] Therefore, the Court need not decide whether disparate impact claims are actionable.

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[3] Defendants cite an additional case for the proposition that Plaintiffs must provide comparator evidence to establish a prima facie case of discrimination under ECOA. However, this case does not stand for the proposition that comparator evidence is required. *See Faulkner*, 172 F. Supp. 2d at 737 ("As applied in an ECOA case, the *McDonnell Douglas* formulation requires that the plaintiff make out a *prima facie* case of discrimination by offering evidence indicating: (1) that the plaintiff belongs to a class protected by the statute; (2) that he applied for credit for which he was qualified; and (3) that he was rejected despite his qualifications.").

[4] Although Plaintiffs do not allege a disparate-impact claim here, numerous courts have held that disparate-impact claims are actionable under ECOA. *See, e.g.*, *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 539 (7th Cir.

B. Should the Court Grant the Motion to Dismiss, It Should Do So Without Prejudice and Grant Plaintiffs Leave to Amend

Should the Court ultimately decide to grant Defendants' motion to dismiss, it should dismiss the Complaint without prejudice and grant Plaintiffs an opportunity to amend their pleading to add any additional factual support the Court might deem necessary to withstand a Rule 12(b)(6) motion. *See Harman v. Unisys Corp.*, 356 F. App'x 638, 641 (4th Cir. 2009) (holding that the district court should have allowed a civil rights plaintiff to amend her complaint to refine her claims by adding more specific details) (citing *Ostrzenski v. Seigel*, 177 F.3d 245, 252–53 (4th Cir. 1999)). Notably, Defendants themselves do not specifically request dismissal with prejudice.

V. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

2011); *Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1100, 1101 (5th Cir. 1987), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *Miller v. Am. Express Co.*, 688 F.2d 1235, 1239–40 (9th Cir. 1982); *Steed*, 308 F. App'x at 368–69; *M & T Mortg. Corp.*, 736 F. Supp. 2d at 574–75; *Faulkner*, 172 F. Supp. 2d at 737; *Hargraves*, 140 F. Supp. 2d at 20, 21, 23; *A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chicago*, 962 F. Supp. 1056, 1060 (N.D. Ill. 1997).

Respectfully submitted,

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Dated: March 24, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filings to the following:

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