

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

FIFTH THIRD BANK,

Defendant.

CIVIL ACTION NO. 1:15-CV-626

COMPLAINT

Plaintiff, United States of America, alleges:

1. The United States of America brings this action against Fifth Third Bank (“Fifth Third” or “Defendant”) for discriminating against thousands of African-American and Hispanic borrowers across the United States who obtained loans from Fifth Third to finance automobiles. The discrimination is caused by Fifth Third’s policy and practice that allows dealers to include markups in the interest rates on automobile loans in a hidden manner not based on the borrower’s creditworthiness or other objective criteria related to borrower risk. The United States brings this action to enforce provisions of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f, and its implementing regulation, Regulation B, 12 C.F.R. Part 1002.

2. Between at least January 1, 2010, and the present (“the Relevant Period”), Fifth Third did not provide adequate constraints or monitoring across its portfolio of loans to prevent discrimination. Fifth Third knew or had reason to know that its policy and practice of allowing dealers to mark up consumers’ interest rates created a substantial risk of discrimination.

3. As a result of Fifth Third's dealer markup and compensation policy and practice and its lack of compliance monitoring, thousands of African-American and Hispanic borrowers paid higher interest rates for their automobile loans than white borrowers, not based on creditworthiness or other objective criteria related to borrower risk, but because of their race and national origin. Between January 1, 2010, and March 31, 2014, the average African-American victim was obligated to pay over \$200 more during the term of the loan because of discrimination, and the average Hispanic victim was obligated to pay over \$200 more during the term of the loan because of discrimination.

4. This Court has jurisdiction pursuant to 15 U.S.C. § 1391e(h) and 28 U.S.C. § 1345. Venue is proper in this District under 28 U.S.C. § 1391.

PARTIES

5. The United States is authorized to initiate a civil action in federal district court whenever a matter is referred to the Attorney General pursuant to 15 U.S.C. § 1691e(g) and when the Attorney General has reasonable cause to believe that a pattern or practice in violation of ECOA has occurred. 15 U.S.C. § 1691e(h).

6. Fifth Third is a depository institution owned by Fifth Third Bancorp. Fifth Third is incorporated in the state of Ohio with its principal place of business in Cincinnati, Ohio. As of June 30, 2015, Fifth Third had over \$139 billion in total assets.

7. As of the second quarter of 2015, Fifth Third was the ninth largest depository auto loan lender in the United States. Fifth Third held a 1.3 percent share of the overall auto loan market based on originations, making it the 17th largest auto lender overall.

8. Automobile dealers submit applications to Fifth Third on behalf of consumers. To determine whether it will fund a loan, and on what terms, Fifth

Third conducts an underwriting process on each loan application submitted by its dealers on behalf of a consumer. For those applications that Fifth Third approves, Fifth Third sets a specified “buy rate.” Fifth Third determines the buy rate using a proprietary underwriting and pricing model that takes into account individual borrowers’ creditworthiness and other objective criteria related to borrower risk. Fifth Third then communicates that buy rate to the dealer that submitted the application to Fifth Third. Fifth Third’s buy rate reflects the minimum interest rate, absent additional discounts or reductions, at which Fifth Third will finance or purchase a retail installment contract from a dealer.

9. Fifth Third maintains a specific policy and practice that provides dealers discretion to mark up a consumer’s interest rate above Fifth Third’s established risk-based buy rate. The difference between the buy rate and the consumer’s interest rate on the retail installment contract (contract rate) is known as the “dealer markup.” Fifth Third compensates dealers from the increased interest revenue to be derived from the dealer markup.

10. During the Relevant Period, Fifth Third limited the dealer markup to 175-250 basis points with the variation based on term, geography, and time period.

11. Fifth Third regularly participates in the decision to extend credit by taking responsibility for underwriting, setting the terms of credit by establishing the risk-based buy rate on each application, and communicating those terms to automobile dealers. Fifth Third influences the credit decision by indicating to automobile dealers whether or not Fifth Third will purchase retail installment contracts on the terms specified by Fifth Third.

12. Fifth Third’s agreements with automobile dealers require that all loan applications they submit to Fifth Third must comply with the policies, conditions, and requirements that Fifth Third sets for dealers.

13. Fifth Third is a creditor within the meaning of ECOA, 15 U.S.C. § 1691a(e), and Regulation B, 12 C.F.R. § 1002.2(l).

INVESTIGATION

14. The United States and the Consumer Financial Protection Bureau (“Bureau”) initiated a joint investigation under ECOA of Fifth Third’s pricing of automobile loans or retail installment contracts.

15. The Bureau determined it had reason to believe that Fifth Third had engaged in a pattern or practice of lending discrimination on the basis of race and national origin in violation of ECOA, 15 U.S.C. § 1691(a)(1). On March 6, 2014, the Bureau referred Fifth Third to the United States Department of Justice pursuant to ECOA, 15 U.S.C. § 1691e(g), and the December 6, 2012 Memorandum of Understanding between the United States Department of Justice and the Bureau.

16. The United States and the Bureau analyzed Fifth Third’s lending policies, procedures, and internal controls, including Fifth Third’s dealer markup and compensation policy and practice between January 1, 2010 and March 31, 2014 (“the time period covered by the analyses”). The United States and the Bureau also performed an analysis of Fifth Third’s loan-level data on the automobile loans Fifth Third funded during the time period covered by the analyses to test for lending discrimination.

FACTUAL ALLEGATIONS

17. The United States and the Bureau analyzed the dealer markup of the retail installment contracts that Fifth Third purchased between January 1, 2010 and March 31, 2014. During the time period covered by the analyses, Fifth Third purchased hundreds of thousands of retail installment contracts, and the United States and the Bureau determined that thousands of retail installment contracts that Fifth Third purchased had African-American and Hispanic borrowers.

18. The retail installment contracts analyzed by the United States and the Bureau did not contain information on the race or national origin of borrowers. To evaluate any differences in dealer markup, the United States and the Bureau assigned race and national origin probabilities to applicants. The United States and the Bureau employed a proxy methodology that combines geography-based and name-based probabilities, based on public data published by the United States Census Bureau, to form a joint probability using the Bayesian Improved Surname Geocoding (BISG) method. The joint race and national origin probabilities obtained through the BISG method were then used directly in the United States' and the Bureau's models to estimate any disparities in dealer markup on the basis of race or national origin.

19. The United States' and the Bureau's markup analyses focused on the interest rate difference between each borrower's contract rate and each borrower's buy rate set by Fifth Third. Fifth Third considers individual borrowers' creditworthiness and other objective criteria related to borrower risk in setting the buy rate as explained in Paragraph 8. The dealer markups charged by Fifth Third to consumers are based on dealer discretion and are separate from, and not controlled by, the adjustments for creditworthiness and other objective criteria related to borrower risk that are already reflected in the buy rate. Fifth Third's markup policy did not include consideration of these factors. Because the analysis focused on only the difference between each borrower's contract rate and buy rate, it did not make additional adjustments for creditworthiness or other objective criteria related to borrower risk.

20. During the time period covered by the analyses, on average, African-American borrowers were charged approximately thirty-five (35) basis points more in dealer markup than similarly-situated non-Hispanic whites for retail installment contracts. These disparities are statistically significant, and these differences are

based on race and not based on creditworthiness or other objective criteria related to borrower risk. These disparities mean that thousands of African-American borrowers paid higher markups than the average non-Hispanic white markup and were obligated to pay, on average, over \$200 more each in interest than similarly-situated non-Hispanic white borrowers assuming they held their loans for the full term of the contract. During the time period covered by the analyses, on average, Hispanic borrowers were charged approximately thirty-six (36) basis points more in dealer markup than similarly-situated non-Hispanic whites for retail installment contracts. These disparities are statistically significant, and these differences are based on national origin and not based on creditworthiness or other objective criteria related to borrower risk. These disparities mean that thousands of Hispanic borrowers paid higher markups than the average non-Hispanic white markup and were obligated to pay, on average, over \$200 more each in interest than similarly-situated non-Hispanic white borrowers assuming they held their loans for the full term of the contract.

21. The higher markups that Fifth Third charged to African-American and Hispanic borrowers are a result of Fifth Third's policy and practice of allowing dealers to mark up a consumer's interest rate above Fifth Third's established buy rate and then compensating dealers from that increased interest revenue.

22. Fifth Third's policy and practice of allowing dealers to mark up a consumer's interest rate above Fifth Third's established buy rate and then compensating dealers from that increased interest revenue continued throughout the entire Relevant Period. During most of the Relevant Period, Fifth Third failed to take timely and adequate action to address markup disparities that Fifth Third had identified across its portfolio of retail installment contracts. As a result, Fifth Third did not employ adequate controls to prevent discrimination. However, during the course of the United States' and the Bureau's investigation, Fifth Third

implemented some redress steps that provided relief to approximately 23,000 Affected Consumers.

23. During the Relevant Period, Fifth Third has not required dealers to document reasons for charging markups, has not at all times monitored whether discrimination occurred across its portfolio of loans through charging markups, and has not at all times provided detailed fair lending training to its dealers.

24. Fifth Third's policy and practice of allowing dealers to mark up a consumer's contract rate above Fifth Third's established buy rate and then compensating dealers from that increased interest revenue without adequate controls and monitoring is not justified by legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact on African-American and Hispanic borrowers. This policy and practice has been in effect during the Relevant Period.

25. Fifth Third knew or had reason to know that its policy and practice of allowing dealers to mark up consumers' interest rates created a substantial risk of discrimination.

EQUAL CREDIT OPPORTUNITY ACT VIOLATIONS

26. Fifth Third's policies and practices as alleged herein, coupled with the disparities described above, constitute discrimination against applicants with respect to credit transactions on the basis of race and national origin in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) and Regulation B, 12 C.F.R. §§ 1002.4(a), 1002.6(a), 1002.6(b)(9).

27. Fifth Third's policies and practices, as alleged herein, constitute a pattern or practice of resistance to the full enjoyment of rights secured by the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f and Regulation B, 12 C.F.R. §§ 1002.1 – 1002.16.

28. During the time period covered by the analyses, Fifth Third has charged minority borrowers nationwide discriminatory interest charges for automobile loans as a result of its pattern or practice of discrimination and denial of rights as alleged herein. There is reason to believe that these discriminatory interest charges continued throughout the Relevant Period. In addition to higher direct economic costs, some of the victims of discrimination suffered additional consequential economic damages resulting from having an excessively costly loan, including possible increased risk of credit problems, default, and repossession, and other damages, including emotional distress. They are aggrieved applicants as defined in the Equal Credit Opportunity Act, 15 U.S.C. § 1691e, and have suffered injury and damages as a result of Fifth Third's conduct.

29. Fifth Third's policies and practices, as alleged herein, were intentional, willful, or implemented with reckless disregard for the rights of African-American and Hispanic borrowers.

30. ECOA empowers this Court to grant such relief as may be appropriate, including actual and punitive damages and injunctive relief. 15 U.S.C. § 1691e(h).

PRAYER FOR RELIEF

WHEREFORE, the United States prays that the Court enter an ORDER that:

- (1) Declares that the policies and practices of the Defendant constitute violations of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f;
- (2) Enjoins the Defendant and its agents, employees, and successors, and all other persons in active concert or participation with it, from:
 - a) Discriminating on the basis of race or national origin against any person with respect to any aspect of their credit transactions;
 - b) Failing or refusing to take such affirmative steps as may be necessary to restore, as nearly as practicable, the victims of the Defendant's

unlawful conduct to the position they would have been in but for the discriminatory conduct; and

c) Failing or refusing to take such affirmative steps as may be necessary to prevent the recurrence of any such discriminatory conduct in the future; to eliminate, to the extent practicable, the effect of Fifth Third's unlawful practices; and to implement policies and procedures to ensure that all borrowers have an equal opportunity to seek and obtain loans on a non-discriminatory basis and with non-discriminatory terms and conditions; and

(3) Awards equitable relief and monetary damages to all the victims of the Defendant's discriminatory policies and practices for the injuries caused by the Defendant, including direct economic costs, consequential damages, and other damages, pursuant to 15 U.S.C. § 1691e(h).

The United States prays for such additional relief as the interests of justice may require.

Dated: September 28, 2015

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