

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	No.
v.)	
)	
EVERGREEN BANK GROUP,)	
)	
Defendant.)	
_____)	

COMPLAINT

1. The United States of America brings this action against Evergreen Bank Group (“Evergreen”) for discriminating against Hispanic and African-American borrowers across the United States who obtained loans from Evergreen to finance motorcycles. The discrimination was caused by Evergreen’s policy and practice, through March 9, 2014, that allowed dealers to include markups in the interest rates on motorcycle loans in a hidden manner and 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 January 1, 2011 and March 9, 2014, Evergreen’s discretionary dealer markup system caused approximately 1,500 Hispanic borrowers and 700 African-American borrowers to pay Evergreen higher interest rates for their motorcycle loans than non-Hispanic white (“white”) borrowers because of their national origin or race and not based on their creditworthiness or other objective criteria related to borrower risk. The average victim was obligated to pay over \$200 more during the term of the loan because of discrimination.

3. Evergreen sets an interest rate for each loan it approves based on the consumer’s creditworthiness and other objective criteria related to credit risk. From at least January 1, 2011 to March 9, 2014, Evergreen maintained a specific policy and practice that allowed motorcycle

dealers to then mark up that risk-based interest rate in ways that were not connected to the consumer's creditworthiness or other objective criteria related to borrower risk.

4. Evergreen typically retained a portion of the profits earned from this interest rate markup and paid the remainder to dealers. As a result, Evergreen's policy and practice created financial incentives for dealers to mark up borrowers' interest rates above those established based on the consumer's creditworthiness or other objective criteria related to borrower risk.

5. From at least January 1, 2011 to March 9, 2014, Evergreen did not provide adequate constraints, and conducted no monitoring of markup disparities, to prevent discrimination from occurring through charging markups.

6. As a result of Evergreen's dealer markup and compensation policy and practice and its lack of compliance monitoring, Hispanic and African-American borrowers paid higher interest rates for their motorcycle loans than white borrowers, not based on creditworthiness or other objective criteria related to borrower risk, but because of their national origin and race.

7. Evergreen eliminated its discretionary dealer markup system effective March 10, 2014. Since that date, Evergreen instructs dealers that "[n]o mark-up on rates allowed" and all dealers are compensated based on a percentage of the loan principal amount that does not vary based on the loan's interest rate. No discrimination was observed when the United States analyzed loans made under the new policy.

8. This Court has jurisdiction pursuant to 15 U.S.C. § 1691e(h) and 28 U.S.C. § 1345. Venue is proper in this District under 28 U.S.C. § 1391.

PARTIES

9. 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) or the Attorney General has reasonable cause to believe that a pattern or practice in violation of the ECOA has occurred. 15 U.S.C. § 1691e(h).

10. Evergreen is a bank chartered by the Illinois Department of Financial and Professional Regulation headquartered in Oak Brook, Illinois. As of December 31, 2014, Evergreen had assets of approximately \$606 million. Evergreen is subject to the regulatory authority of the Federal Deposit Insurance Corporation (“FDIC”).

11. Evergreen, around the start of 2007, expanded its focus beyond offering traditional services of a financial depository and lending institution through its two branches in suburban Chicago, by launching a niche specialty of motorcycle lending. Through its FreedomRoad Financial unit, based in Reno, Nevada, Evergreen makes motorcycle loans to buyers across the country by establishing relationships with motorcycle manufacturers and dealers. By 2012, its annual originations had grown to nearly 12,000 motorcycle loans made through a network of roughly 400 motorcycle dealers located in all 50 states, and it partners with several motorcycle manufacturers as their preferred lender. Evergreen’s outstanding loan portfolio has grown by a factor of 10 since the start of 2007, and motorcycle loans now represent approximately half the value of Evergreen’s outstanding loan portfolio.

12. Evergreen funds purchases of motorcycles through a model in which the motorcycle dealer submits the consumer’s loan application to Evergreen, which underwrites, sets the terms of, and funds the loan. FreedomRoad Financial generally appears as the named creditor on loans Evergreen makes through motorcycle dealers, although for some loans, Evergreen will underwrite loans that are initially originated in the name of the motorcycle dealer and then assigned to FreedomRoad Financial.

13. Although Evergreen has agreements to serve as the preferred lender of several motorcycle manufacturers in exchange for Evergreen offering reduced interest rates to consumers who buy those manufacturers’ brands of motorcycles, the majority of Evergreen’s loans are not subject to such promotions (“non-promotional loans”).

14. Evergreen enters into a written “Dealer Agreement” with the individual motorcycle dealers through which it makes loans. The Dealer Agreement establishes the terms

under which Evergreen will fund motorcycle loans for the dealers' consumers, including dealer compensation for arranging the loan. These agreements specify narrow circumstances in which Evergreen can require a dealer to reimburse Evergreen for loan default, prepayment, or fraud.

15. Evergreen's agreements with motorcycle dealers specify that Evergreen will maintain control over the underwriting and pricing decisions, as its standard contract with dealers specifies that "F[reedom]R[oad]F[inancial] may approve applications for credit made by Borrower and submitted by Dealer, if acceptable to F[reedom]R[oad]F[inancial], at a rate established from time to time by F[reedom]R[oad]F[inancial]." Evergreen provides a form application to dealers that notifies consumers that the application "will be submitted to FreedomRoad Financial . . . for consideration of whether it meets the credit requirements of FreedomRoad Financial," and that the application, in addition to the consumer's credit and employment history, "will be used . . . for credit approval by FreedomRoad Financial."

16. Evergreen's agreements with motorcycle dealers require that all loan applications they submit to Evergreen must comply with the policies, conditions, and requirements that Evergreen sets for dealers.

17. Evergreen is a creditor within the meaning of the ECOA, 15 U.S.C. § 1691a(e), and Regulation B, 12 C.F.R. § 1002.2(l). Evergreen regularly participates in the decision to extend credit through taking responsibility for underwriting, regularly participates in setting the terms of credit by establishing interest rates and communicating those rates to motorcycle dealers, and influences credit decisions by indicating to dealers whether or not it will fund the loan.

INVESTIGATION

18. In April 2012, the FDIC commenced a periodic examination of Evergreen's compliance with consumer-protection laws and for performance under the Community Reinvestment Act ("CRA"), 12 U.S.C. §§ 2901-2906. The examination included an evaluation of Evergreen's compliance with the ECOA for motorcycle loans made during 2011. Based on

the information gathered in its examination, the FDIC concluded that there was reason to believe that Evergreen engaged in a pattern or practice of discrimination by charging higher rates for motorcycle loans originated to Hispanic borrowers in violation of the Equal Credit Opportunity Act.

19. Based on its April 2012 examination finding substantive violations of Regulation B, the FDIC assigned Evergreen a “Substantial Noncompliance” rating under the CRA, the lowest possible CRA rating, and one that the FDIC assigns to less than one half of one percent (0.5%) of banks it examines. The FDIC’s publicly disclosed CRA Performance Evaluation noted, as of April 2012, Evergreen “does not have adequate policies, procedures, monitoring, training programs and oversight to prevent discriminatory lending practices.”

20. Pursuant to 15 U.S.C. § 1691e(g), the FDIC referred its discrimination findings to the Attorney General for appropriate enforcement action on March 12, 2013, following its determination as described in Paragraph 18.

21. Based on the FDIC referral, the Department of Justice has engaged in an investigation of Evergreen’s motorcycle lending policies, practices, and procedures, including reviewing Evergreen’s loan-level data on the motorcycle loans it funded between January 1, 2011 and March 9, 2014 to determine whether it discriminated against Hispanic borrowers, or borrowers of any racial group.

FACTUAL ALLEGATIONS

22. To determine whether it will fund a loan, and on what terms, Evergreen conducts an underwriting process on each loan application submitted by one of its dealers on behalf of a consumer. As part of the underwriting, Evergreen obtains each consumer’s credit score from at least one of the three major credit bureaus and, based on that score, assigns the consumer to one of five credit tiers.

23. From at least January 1, 2011 to March 9, 2014, Evergreen periodically set a specified “buy rate” for the loans it funds. Evergreen determined the buy rate for each non-

promotional loan based on its current cost of funds plus adjustments to reflect the borrower's creditworthiness and other objective criteria related to borrower risk. These adjustments accounted for the consumer's credit risk by considering the assigned credit tier, the length of the loan, the brand of motorcycle, and whether the motorcycle is new or used. The dealers, but not the consumers, learn the buy rate. The buy rate was the interest rate that Evergreen required to be included its loans, absent adjustments by the dealer.

24. From at least January 1, 2011 to March 9, 2014, Evergreen maintained a specific policy and practice, reflected in its agreements with individual dealers, that allowed dealers to mark up a consumer's interest rate for non-promotional loans above Evergreen's established buy rate, and that compensated dealers from the increased interest revenue to be derived from the markup. It was Evergreen's specific policy and practice to permit dealers to mark up the buy rate for reasons not related to the borrowers' creditworthiness or other objective criteria related to borrower risk. Evergreen capped the dealer markup on most non-promotional loans at 300 basis points. (Non-promotional loans for a small set of motorcycle brands were not subject to markup prior to January 2012, and were subject to a 200 basis point cap after January 2012. Markup was prohibited on non-promotional loans made to borrowers with credit scores below 605 after July 1, 2013.) A basis point is a percentage of the total amount of a loan, with one hundred basis points equaling one percent of the loan amount.

25. Evergreen allowed dealers to receive more compensation than one or more of its competitors. An Evergreen executive has reported receiving the following feedback from dealers: "Thank God you let us make some money on financing. [Competitor] never did."

26. The ECOA's implementing regulations limit the collection of self-identified ethnicity and race data for motorcycle loans. 12 C.F.R. § 1002.5(b) (prohibiting the collection of national origin or race data from a non-mortgage loan applicant, except in the case of a creditor's self-test for ECOA compliance). Information about the ethnicity and race of borrowers on motorcycle loans that Evergreen funded can be calculated based on public data published by the

United States Census Bureau for the ethnicity and race of individuals with the same surname and for the ethnicity and race of individuals living in the same neighborhood, using a process called the Bayesian Improved Surname Geocoding (BISG) method. The BISG method builds on the fact that many surnames in the United States are predominantly associated with a particular ethnicity or race—especially for Hispanic individuals—and that many neighborhoods are segregated by ethnicity and race—especially neighborhoods where African-American individuals live.

27. The BISG method is recognized by social scientists, statisticians, and economists as a tested and accurate way to determine differences in experiences based on ethnicity or race for large groups of individuals for whom self-identified ethnicity and race data is not available.

28. Between January 1, 2011 and March 9, 2014, Evergreen funded roughly 30,000 loans. The BISG method finds nearly 5,000 had Hispanic or African-American borrowers or co-borrowers.

29. Statistical analyses of non-promotional motorcycle loans Evergreen funded between January 1, 2011 and March 9, 2014, after using the BISG method to identify borrowers' national origin and race, demonstrate statistically significant discriminatory pricing disparities based on national origin and race. Statistical significance is a measure of probability that an observed outcome would not have occurred by chance. As used in this Complaint, an outcome is statistically significant if the probability that it could have occurred by chance is less than 5%.

30. During the time period covered by the analyses, on average, Evergreen charged Hispanic borrowers more than white borrowers in interest rate markups not based on creditworthiness or other objective criteria related to borrower risk. The disparity was approximately 40 basis points, and it is statistically significant.

31. These disparities mean that Hispanic borrowers affected by the discrimination were obligated to pay, on average, over \$250 more in interest than white borrowers over the life of their loans not based on creditworthiness or other objective criteria related to borrower risk.

32. During the time period covered by the analyses, on average, Evergreen charged African-American borrowers more than white borrowers in interest rate markups not based on creditworthiness or other objective criteria related to borrower risk. The disparity was approximately 29 basis points, and it is statistically significant.

33. These disparities mean that African-American borrowers affected by the discrimination were obligated to pay, on average, over \$200 more in interest than white borrowers over the life of their loans not based on creditworthiness or other objective criteria related to borrower risk.

34. From at least January 1, 2011 to March 9, 2014, in setting the terms and conditions for the motorcycle loans it funds, Evergreen accounted for individual borrowers' differences in creditworthiness and other objective criteria related to borrower risk by setting the buy rate as explained in Paragraph 23. The interest rate markups charged by Evergreen to consumers were separate from, and not controlled by, the adjustments for creditworthiness and other objective criteria related to borrower risk already reflected in the buy rate. No Evergreen policy directed dealers to consider creditworthiness or other objective criteria related to borrower risk for a second time, after they had already been considered in setting the buy rate, in determining interest rate markups. Accordingly, the ethnic and racial interest rate markup disparities described in Paragraphs 30-33 are not adjusted for creditworthiness and other objective criteria related to borrower risk.

35. For the reasons described in Paragraph 34, it is not proper to include factors measuring creditworthiness and other objective criteria related to borrower risk in the statistical analysis of interest rate markup disparities. Nevertheless, statistical analyses of Evergreen's interest rate markups during the time period covered by the analyses that control—both separately and in concert through regression—for creditworthiness and risk-related factors such as credit tier, new/used status, and loan length demonstrate a similar pattern of ethnic and racial interest rate markup disparities, with the magnitude only somewhat diminished from the

disparities described in Paragraphs 30-33. Thus, accounting for creditworthiness or other objective criteria related to borrower risk a second time does not explain the ethnic and racial interest rate markup disparities, even if those factors were relevant to the subjective pricing adjustments measured by interest rate markups.

36. Additionally, statistical regression analyses of Evergreen's lending data that control for multiple creditworthiness and risk-related factors such as credit tier, new/used status, and loan length, also demonstrate that the ethnic and racial disparities in interest rate markup described in Paragraphs 30-33 produced ethnic and racial disparities, compared to similarly situated white borrowers, in the annual percentage rate of interest Evergreen charged that cannot be explained by creditworthiness and risk-related factors. Thus, accounting for creditworthiness and risk-related factors does not explain the ethnic and racial disparities in the interest rate paid by the borrower, even if those factors were relevant to the subjective pricing adjustments measured by interest rate markup.

37. The higher markups that were charged to Hispanic and African-American borrowers for the subject loans are a result of Evergreen's specific policy and practice between at least January 1, 2011 and March 9, 2014 of allowing dealers to mark up a consumer's interest rate above Evergreen's established buy rate and compensating dealers from that increased interest revenue.

38. Evergreen's specific policy and practice were not justified by a legitimate business need that could not reasonably be achieved as well by means that were less disparate in their impact on Hispanic and African-American borrowers.

39. Evergreen's specific policy and practice of allowing dealers to mark up a consumer's interest rate above Evergreen's established buy rate and compensating dealers for those markups continued from at least January 1, 2011 to March 9, 2014. Analyses of the loans funded in the three months after Evergreen eliminated this policy and practice find no

statistically significant ethnic or racial disparities in the amount of compensation received by dealers under the new policy that prohibited markups.

40. Between at least January 1, 2011 and March 9, 2014, Evergreen lacked adequate systems to determine its compliance with lending discrimination laws, including by not requiring dealers to document reasons for charging markups, not monitoring whether discrimination occurred through charging markups, and not providing fair lending training to its dealers while allowing them to charge markups.

41. Evergreen 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. Through March 9, 2014, Evergreen did not take effective action to change the discriminatory policy and practice or to identify and compensate victims of the discrimination.

EQUAL CREDIT OPPORTUNITY ACT VIOLATIONS

42. Evergreen's policies and practices, as alleged herein, constitute discrimination against applicants with respect to credit transactions on the basis of national origin and race in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1).

43. Evergreen'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.

44. Between January 1, 2011 and March 9, 2014, Evergreen charged over 2,200 consumers nationwide discriminatory interest charges for motorcycle loans as a result of its pattern or practice of discrimination and denial of rights as alleged herein. 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 Evergreen's conduct.

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

46. The 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 them, from:

- a) Discriminating on the basis of national origin or race 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 Evergreen'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: May 7, 2015

Respectfully submitted,

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