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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLYDE HARGRAVES, et al.,	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 98-1021 (JHG/AK)
CAPITAL CITY MORTGAGE CORP., et al.,	)	
Defendants.	)	

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

WILMA A. LEWIS
United States Attorney
D.C. Bar No. 358637

BILL LANN LEE
Acting Assistant Attorney General

JOAN A. MAGAGNA
Chief
ALEXANDER C. ROSS
Special Litigation Counsel
MICHELLE ARONOWITZ
D.C. Bar No. 457753
Attorney
U.S. Department of Justice
Civil Rights Division
Housing and Civil
Enforcement Section
P.O. Box 65998
Washington, D.C. 20035-5998
(202) 305-1077

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I
INTEREST OF THE UNITED STATES

This case raises the novel question of whether the Fair Housing Act and the Equal Credit Opportunity Act (ECOA) prohibit certain racially targeted predatory lending practices, typically referred to as "reverse redlining." Congress enacted the Fair Housing Act "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. ECOA prohibits certain forms of discrimination with respect to all credit transactions. 15 U.S.C. § 1691(a).

Through various federal agencies, the United States has responsibility for enforcing both statutes. In particular, the United States Department of Justice has the authority to commence an action under either the Fair Housing Act or ECOA. 42 U.S.C. § 3614; 15 U.S.C. § 1691e(h). Accordingly, the United States has a substantial interest in resolution of the legal issue raised by Defendants, and an interpretation of the Fair Housing Act and

ECOA by the United States may assist this Court in applying those statutes to the facts of this case.

II
BACKGROUND

Plaintiffs filed a complaint in federal district court on April 24, 1998, later amended, alleging that Defendants have engaged in a pattern or practice of predatory lending targeting African American communities in the Washington, D.C. metropolitan area (Compl. 2).[1] Plaintiffs are six individuals, Greater Little Ark Baptist Church, and the Fair Housing Council of Greater Washington (Compl. 3-4). The two Defendants are Capital City Mortgage Corporation and its sole stockholder and president Thomas Nash, who are in the business of mortgage lending and real estate sales (Compl. 5). Plaintiffs allege that Defendants' discriminatory lending practices violate the Fair Housing Act and ECOA, as well as 42 U.S.C. §§ 1981 and 1982, the Racketeer Influenced and Corrupt Organizations Act (RICO), and local laws prohibiting unfair and deceptive lender practices, fraud, and breach of contract (Compl. 29-44).

The Federal Trade Commission has also filed a complaint against Capital City Mortgage and Nash alleging violations of ECOA's reporting requirements, as well as the Federal Trade Commission Act (FTCA), the Truth In Lending Act (TILA), and the Fair Debt Collection Practices Act (FDCPA). See FTC v. Capital City Mortgage Corp., No. 98-237 (JHG/AK) (D.D.C. filed Jan. 29,

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[1]/"Compl. __" refers to the page number of Plaintiffs' First Amended Complaint.

1998). The FTC does not have jurisdiction to enforce the Fair Housing Act and did not bring any discrimination claims under ECOA against Defendants. However, its ECOA, FTCA, TILA, and FDCPA claims are based on the same types of illegal lending practices that form the predicate for Plaintiffs' discrimination claims. The FTC alleges that Defendants deceived borrowers about various loan terms; about contrived charges based on inflated monthly payment amounts, overdue balances, arrears, service fees, and advances; and about amounts owed to pay off the loans. The FTC further alleges that Defendants withheld some loan proceeds while requiring monthly payments for the entire loan amount, foreclosed on borrowers who were in compliance with their loan terms, and failed to release liens on borrowers' homes after the loans were paid off.

A. Plaintiffs' Allegations

Plaintiffs allege the following facts in their First Amended Complaint:

The Defendants are engaged in a predatory lending scheme targeted specifically at African American neighborhoods and designed to facilitate default or foreclosure rather than repayment of the loans (Compl. 2-3). Defendants target African American communities because they believe them to be unsophisticated or financially desperate and therefore more susceptible to their fraudulent lending practices (Compl. 2-3).

Most (74.2%) African American residents of the Washington, D.C. Metropolitan Statistical Area (MSA) reside in the District

of Columbia or Prince George's County, Maryland (Compl. 25). The District is 65.3% African American and Prince George's County is 50.2% African American (Compl. 25). Both are highly segregated, with 90.3% of African Americans in the District and 76.7% in Prince George's County residing in majority African American census tracts (Compl. 25-26).

Since its inception in 1979, Capital City and Nash have intentionally directed their marketing and loan solicitation efforts almost exclusively toward borrowers and properties in African American neighborhoods in these two jurisdictions (Compl. 26, 28). Defendants made few, if any, loans outside of those areas, even though they are licensed to do so (Compl. 27). Between 1983 and 1996, 94% of Defendants' loans in the District were on properties located in majority African American census tracts, as were 74% of their loans in Prince George's County between 1986 and 1996 (Compl. 26-27). The vast majority of these borrowers were African American (Compl. 26-27). Between 1983 and 1996, 97% of the properties Defendants foreclosed on in the District were in majority African American census tracts (Compl. 27-28).

Defendants' marketing efforts targeting African American borrowers include the dissemination of flyers and advertisements to residents of African American neighborhoods offering fast cash and quick loan approvals on residential and commercial properties (Compl. 28). Many of those flyers and advertisements are sent to or through a specially cultivated cadre of real estate agents,

loan brokers, and other persons ("runners") with ties to the African American community (Compl. 3, 28). Defendants ask their runners to steer borrowers to Defendants in return for lucrative commissions that often exceeded eight percent of the borrower's loan (Compl. 28).

Defendants are "subprime lenders," specializing in making loans to borrowers with blemished credit histories or other credit impairments (Compl. 26). Not all subprime lenders operating in the Washington, D.C. area target or otherwise concentrate their lending in majority African American census tracts (Compl. 26). Indeed, other subprime lenders originate as many or more loans in majority white census tracts as they originate in majority African American census tracts (Compl. 26).

Defendants' predatory lending scheme works by targeting owners with substantial equity in their property and/or the ability to make a substantial payment at closing; failing or refusing to explain the terms, fees, or penalties of the loan; establishing repayment terms (through fraud or misrepresentation) which Defendants know or should know borrowers will be unable to repay; failing to satisfy their obligations under the loan agreement; charging undisclosed and/or improper fees; and foreclosing on the loans to obtain the properties at a discount (Compl. 2-3). The foreclosure sales are rigged and the properties resold for a substantial profit (Compl. 2). At many of the foreclosure sales, Defendants or an entity owned, directed, or controlled by Defendants obtain the properties with

bids that are substantially below the fair market value of the properties and without competition from other bidders (Compl. 28). Defendants' 20% foreclosure rate in the District of Columbia far exceeds those of virtually all other mortgage lenders in the District (Compl. 27-28). Defendants have realized gains in excess of $3.3 million from those foreclosures (Compl. 28).

Plaintiffs' case involves four separate loan transactions:

1. Greater Little Ark Baptist Church

Greater Little Ark Baptist Church has a predominantly African American congregation and its church was located in a predominantly African American area in the District of Columbia (Compl. 5). Little Ark received an unsolicited call from a loan broker (Defendants' agent) saying that he had heard that the church was in financial difficulty and in need of a loan (Compl. 6). The pastor of Little Ark, Reverend Clyde Hargraves, ended up pledging the church property to secure a $160,000 loan from Defendants (Compl. 5-7). The loan still left Little Ark "equity rich," since the property was worth $400,000 with only $14,000 due on the original mortgage (Compl. 5-6).

Although Little Ark needed only $70,000 to pay off its debts and Hargraves expressed discomfort with the size of the loan being offered, the broker convinced Hargraves that the church might have difficulty getting a smaller loan (Compl. 6). The broker assured Hargraves that after a limited time, the loan -- offered at 18% interest -- would be refinanced at a lower

interest rate thereby reducing the church's $3,000 monthly payments (Compl. 6). The broker also falsely told Hargraves that the payments were for principal and interest without a final balloon payment (Compl. 8).

Hargraves initially signed a note and deed of trust with many of the key loan terms left blank, such as interest rate, monthly payments, and duration of the loan (Compl. 7). Defendants refused to give Hargraves a copy of these documents (Compl. 7). Defendants did not explain the documents or ask about the church's financial condition, income, debts, or other matters related to Little Ark's ability to repay the loan (Compl. 7).

At settlement the following week, at which only a notary public and the Little Ark representatives were present, the loan terms were completed (Compl. 7). For the first time, Hargraves discovered that the loan had a $26,000 origination fee (16% of the loan), $12,800 of which went to the loan broker; that for the first four years it had an interest rate of 25% and monthly payments of $3,200; and that in the fifth and final year the interest rate and monthly payments escalated to $4,000 with a 30% interest rate (Compl. 7, 8). Also, although the first page of the note stated that the payments were for "principal and interest," Defendants deemed the entire monthly payments to cover interest only (Compl. 8). As the Church's gross monthly income at the time was less than $4,000, Defendants knew or should have known that it was impossible for Little Ark to pay off the loan,

including the final balloon payment (Compl. 7-8).

At settlement, the notary refused to give Hargraves either a check for the loan proceeds or a copy of the loan documents (Compl. 9). When Hargraves called Defendants the next day to complain, he was told that the documents and check would be mailed within five days (Compl. 9). Hargraves was still not satisfied, but was told "if you want the loan you either wait or else," after which the telephone was abruptly hung up (Compl. 9). Shortly thereafter, Hargraves unsuccessfully attempted to reach the loan broker to complain about his undisclosed fee, eventually discovering that the broker's phone was disconnected (Compl. 9).

Little Ark never received a coupon book from Defendants as promised (Compl. 9). Little Ark nonetheless began making regular payments, but as time went on, Defendants arbitrarily and fraudulently demanded higher payments (Compl. 9). After two years, struggling under the weight of Defendants' improper payment demands, Hargraves requested that the loan be extended beyond five years to lower the monthly payments (Compl. 10). He also offered to pay off some of the fees and other demands (Compl. 10). Defendants refused, instead forcing Little Ark into bankruptcy with its exorbitant and unconscionable payoff demands (Compl. 10). Defendants foreclosed on the church property, its' subsidiary obtained the property through auction for $235,000, Little Ark was evicted, and Defendants resold the church to another African American congregation for $450,000 (Compl. 10).

2. *Walter Jamison, Sr.*

Walter Jamison is an African American who owns an apartment building in a predominantly African American area of the District of Columbia (Compl. 11). In order to finance needed repairs to the building, he borrowed $40,000 from Defendants (Compl. 11, 12). The loan left Jamison "equity rich," as the combined mortgages on the building accounted for only approximately 45% of the property's fair market value (Compl. 12). The estimated cost of the repairs, which included lead paint remediation, was $100,000 (Compl. 11). Although the loan broker (Defendants' agent) characterized the $40,000 loan as a "60-day start-up" loan, promising within 60 days to secure a loan for the remainder at a much lower interest rate, the second loan never came through (Compl. 6, 11, 13). After Jamison began inquiring about the status of the second loan, he discovered that the broker's phone had been disconnected (Compl. 13). Because he could not get a second loan as promised, Jamison was forced to abandon the repairs and the apartments have remained uninhabitable (Compl. 11, 13).

Not until settlement was Jamison informed of the loan's interest rate and terms, or that the loan broker was being paid a $1,600 "referral fee" (Compl. 12). The loan was a ten-year, interest-only balloon payment loan at 24% interest with monthly payments $1,014 (Compl. 12). Jamison's gross monthly income was $3,379, although 76% of this was owed for debt payments, before taking into account income taxes and living expenses (Compl. 12).

Defendants thus knew or should have known that the loan would eventually go into default, which it did (Compl. 12, 13).

Throughout the term of the loan, Defendants charged Jamison with false and erroneous late fees and other penalties (Compl. 13). After the loan went into default, Jamison attempted to renegotiate the terms of the loan, but Defendants refused, instead offering Jamison $1,000 for title to his property (Compl. 13). Subsequently, Defendants issued another foreclosure notice even though the loan had been made current (Compl. 13-14). Jamison again attempted to renegotiate the loan and Defendants again refused, forcing Jamison into bankruptcy (Compl. 14). Jamison is still making payments on the loan according to a bankruptcy reorganization plan (Compl. 14).

3. Nancy Hilliard and Angela Birth

Nancy Hilliard and her daughter Angela Birth borrowed $317,769 from Defendants to purchase a church in a majority African American area of Prince George's County, Maryland (Compl. 14, 16). The church was owned by Defendants, who had recently foreclosed on the property and evicted the previous owner, another predominantly African American congregation (Compl. 14). Defendants had purchased the property at auction for $240,000 (Compl. 14).

Hilliard decided to purchase the church following her husband's death, to carry on his ministry in his name (Compl. 14). She is 54 years old and has a tenth grade education, three children, and no business experience (Compl. 14). Initially,

Hilliard informed the listing agent that she did not believe the church could afford the property since it had only 35 members and brought in monthly contributions of less than $500 (Compl. 15). Moreover, Hilliard informed the agent that she herself was unemployed and living on $447 per month in social security; her daughter lived with her and received $800 per month in public assistance (Compl. 15). The listing agent nonetheless assured her that with the $35,000 proceeds from her husband's life insurance policy, she would have "no problem" qualifying for a loan and encouraged her to buy the property for $330,000 -- list price (Compl. 15).

The listing agent came to Hilliard's home a few days later with papers for her and her daughter to sign regarding the purchase of the church property (Compl. 15). He did not identify the lender, nor did he explain what was in the papers (Compl. 15). He took $2,000 to "hold" the property and told Hilliard to call him when she received the insurance proceeds (Compl. 15-16).

Only the Hilliard family, the listing agent, and a notary attended the settlement (Compl. 16). Although Hilliard and Birth could barely read the documents and did not understand them, the listing agent never suggested that they get advice or assistance with the transaction (Compl. 16). Even so, the loan note contains a false representation that Hilliard and Birth had participated in drafting their note and deed of trust and had access to counsel prior to executing the documents (Compl. 17). In fact, Hilliard and Birth were led to believe that they were

signing for one loan with a $794 monthly payment, when in fact they signed for three notes each with a separate $794 monthly payment, for a combined monthly payment of $2,383 (Compl. 16). As the combined monthly income of Hilliard, Birth, and the church was only $1,247, Defendants knew or should have known that their income was inadequate to meet the monthly payments (Compl. 16-17). Moreover, for the first time at settlement, the listing agent demanded that Hilliard and Birth pledge their $82,000 home in Landover, Maryland to secure the loan, in addition to the $35,000 from the insurance policy (Compl. 16). The agent falsely assured them that Defendants only intended to place a six-month lien on the house (Compl. 16).

As intended by Defendants, the loan went into default shortly after the first few payments (Compl. 17). After only eight months, Defendants demanded $387,199 as the payoff amount, approximately $70,000 higher than the original $317,199 loan (Compl. 17). The loan forced Hilliard and Birth into bankruptcy, and although Defendants have attempted to foreclose on the church and their home, on February 18, 1999, this Court granted a preliminary injunction preventing foreclosure pending resolution of this case (Compl. 17; Order filed Feb. 18, 1999).

4. *Sylvia Robinson*

Sylvia Robinson bought and financed from Defendants a house located in Southeast D.C. (Compl. 17, 19). She bought the house for $39,000 and agreed to take out a $10,000 construction loan from Defendants (Compl. 18-19). She paid a $3,000 down payment,

and signed a $47,500 promissary note with a balloon payment (Compl. 19). As part of the deal, Defendants agreed to replace the roof (Compl. 18-19). Following two and one-half years of extraneous, unexplained, unwarranted or unfair charges and arrearages, misapplied payments, erroneous tax assessments, delayed mailings of monthly statements, unwarranted foreclosure warnings, refusal to disburse construction funds or replace the roof, and intimidation by Defendants, Robinson paid $11,556 herself to have the roof replaced and refinanced the loan to pay off the Defendants (Compl. 19-25).

B. Defendants' Motion

On February 4, 2000, Defendants filed a Motion for Judgment on the Pleadings or in the Alternative Summary Judgment. Plaintiffs filed their opposition to Defendants' Motion on February 28, 2000.[2] The motion should be treated as motion for summary judgment since throughout the motion, Defendants present matters outside the pleadings. See Fed. R. Civ. P. 12(c).

This amicus brief addresses only the following legal arguments made by Defendants in their motion:

Defendants contend that Plaintiffs' allegations of predatory lending practices targeted at African American communities do not state a claim under the Fair Housing Act or ECOA (Mem.[3] 1-15, 43-

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[2]/Defendants also filed a Motion for Judgment on the Pleadings or in the Alternative Summary Judgment against the FTC. The FTC filed its opposition on February 11, 2000.

[3]/"Mem. __" refers to the page number of the Memorandum of Points and Authorities in Support of Motion of Defendants for Judgment on the Pleadings or, in the Alternative, for Summary Judgment.

44, 46-47). Defendants argue that because they have made loans to African Americans, they cannot have made housing unavailable because of race in violation of Section 804(a) of the Fair Housing Act, or discriminated within the meaning of ECOA (Mem. 8, 47). Defendants further argue that since they have provided credit to African American borrowers on the same terms as to non-African Americans, they cannot have violated the Fair Housing Act by discriminating in the provision of services in connection with the sale of a dwelling (42 U.S.C. § 3604(b)) or in the making of real-estate related financial transactions (42 U.S.C. § 3605) (Mem. 8). Defendants also argue that as a matter of law, their marketing practices do not intentionally target African Americans (Mem. 15-20) or have a disparate impact on African Americans (Mem. 20-28).

Generally, Defendants argue that the Fair Housing Act should not be read to prohibit reverse redlining because "predatory lending" is a "vacuous" concept with little value as a legal term (Mem. 8-10); that prohibiting reverse redlining is contrary to the fundamentally mercantile goals of the Fair Housing Act (Mem. 11-12); and that prohibiting reverse redlining will "chill" good faith lenders from marketing their products in minority communities and will provide a safe harbor for lenders seeking to redline (Mem. 12-15).

In addition, Defendants argue that a discriminatory home equity loan cannot violate Section 804 of the Fair Housing Act because it does not involve the "sale or rental" of housing (Mem.

43); and that a property is not a covered "dwelling" under Section 802(b) of the Fair Housing Act unless the plaintiff intends to live in the home himself (Mem. 41-43).

III
DISCUSSION

A. Reverse Redlining Violates the Fair Housing Act and ECOA.

The practice of targeting minority communities for predatory lending is called "reverse redlining." It is the United States' view that "reverse redlining" can violate the Fair Housing Act and the Equal Credit Protection Act.

1. Prohibiting Reverse Redlining is Consistent with the Purpose of the Fair Housing Act to eradicate racial segregation.

As used by Congress and district courts, "reverse redlining" refers to "the practice of targeting residents in certain geographic areas for credit on unfair terms." Newton v. United Companies Fin. Corp., 24 F. Supp.2d 444, 455 (E.D. Pa. 1998); accord Williams v. Gelt Fin. Corp., 237 B.R. 590, 594 (E.D. Penn. 1999) ("reverse redlining" is the practice of "targeting of persons for 'credit on unfair terms' based on their income, race, or ethnicity") (quoting S. Rep. No. 103-169, at 21 (1993)). In contrast to "redlining," which "is the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents," "[r]everse redlining is the practice of extending credit on unfair terms to those same communities." United Companies Lending Corp. v. Sargeant, 20 F. Supp.2d 192, 203 n.5 (D. Mass. 1998) (citing S.

Rep. No. 103-169, at 21 (1993)).

Following a series of hearings documenting the abuses of reverse redlining,[4] Congress passed the "Home Ownership and Equity Protection Act" (HOEPA), 15 U.S.C. § 1639, an amendment to TILA, to provide borrowers some protection from predatory lenders. Congress again held hearings on predatory lending in 1998.[5] As Senator John Breaux explained at the later hearings, "[p]redatory lenders use deceptive and intimidating practices to coerce homeowners into accepting loans that will ultimately prove detrimental to their financial situation." Hearings: Equity Predators, note 4, supra, at 4. The Senate Report accompanying HOEPA provides a typical portrait of such "home equity scams":

> The lenders "hustle" their targets into taking out mortgages with extremely high interest rates, fees, or both. The homeowner often says they were misled about the payment schedule or were even unaware that they signed a mortgage agreement.

S. Rep. No. 103-169, at 22. Some of the worst and most common abuses include equity stripping, packing, flipping, home construction scams, and abusive loan servicing. Described at

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[4]/Reverse Redlining: Problems in Home Equity Lending: Hearings Before the Senate Comm. on Banking, Hous., and Urban Affairs, 103d Cong. 243-471 (Feb. 17, 1993) [hereinafter Hearings: Reverse Redlining]; To Protect Home Ownership and Equity through Enhanced Disclosure of the Risks Assoc. with Certain Mortgages: Hearings on The Home Ownership and Equity Protection Act of 1993, S. 924, Before the Senate Comm. on Banking, Fin. and Urban Affairs, 103d Cong. (May 19, 1993); Hearings on H.R. 3153, The Home Equity Protection Act of 1993, Before the Subcomm. on Consumer Credit and Ins. of the House Comm. on Banking, Fin. and Urban Affairs, 103d Cong. (Mar. 22, 1994).

[5]/Equity Predators: Stripping, Flipping and Packing Their Way to Profits: Hearings Before the Senate Special Comm. on Aging, 105th Cong. (1998) [hereinafter Hearings: Equity Predators].

Section III.A.4, infra.

Redlining creates the market conditions in which reverse redlining thrives. It should come as no surprise that the United States recently settled a case charging Chevy Chase Federal Savings Bank with redlining the exact areas that Defendants are now accused of targeting for predatory lending. See United States v. Chevy Chase Fed. Sav. Bank, No. 94-1824 (JG) (D.D.C., consent decree filed Aug. 22, 1994). Where entire communities are abandoned by mainstream financial institutions, they become attractive prey to unscrupulous lenders. Sargeant, 20 F. Supp.2d at 202; S. Rep. No. 103-169, at 21 (1993) ("communities lacking access to traditional lending institutions are being victimized" by predatory lenders); Hearings: Reverse Redlining, note 4, supra, at 285, 312 (Statement of Sen. Paul Sarbanes; Special Report of the Mass. Attorney Gen.). As the court in Sargeant explained, reverse redlining, like redlining, is an example of market failure:

> Redlining and reverse redlining by banks, savings and loans, finance companies, and second mortgage companies impede the self-correcting elements of the market, rendering it unable to prevent consumer injury. This market failure prevents the borrower from taking action reasonably to avoid the financial pitfalls created by predatory lending.

20 F. Supp.2d at 203. Together, these practices lead to the formation and maintenance of racial ghettos, see H.R. Rep. 104-193, at 177 (1995) (urban decay blamed, in part, on redlining), which the Fair Housing Act was enacted to combat. See, e.g., 114 Cong. Rec. 2275, 2278 (FHA is designed to curb "racially segregated housing patterns"); H.R. 3504, 95 Cong., 1st

Sess. § 804 (1977) (FHA seeks "to eliminate the discriminatory business practices which might prevent a person economically able to do so from purchasing a house regardless of his race.")[5]. As one district court explained,

> Little imagination is required to understand that the imposition of barriers to occupancy in the form of higher mortgage-interest rates or refusals to make loans in connection with housing in changing neighborhoods works to discourage families, white or black, which could afford to purchase homes in such neighborhoods. The practical effect is to discourage whites -- who may freely move elsewhere -- from moving into vacancies in "changing" neighborhoods, thereby inducing "massive transition" and, ultimately, "white flight."

Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 496-497 (S.D. Ohio 1976); see also Clark v. Universal Builders, Inc., 501 F.2d 324, 328, 335-336 (7th Cir. 1973), cert. denied, 419 U.S. 1070 (1974) (Section 1982) ("[t]hrough the medium of exorbitant prices and severe, long-term land contract terms blacks are tied to housing in the ghetto and segregated inner-city neighborhoods."). Indeed, reverse redlining is little different from redlining. In both, a neighborhood is delineated for negative treatment on the basis of its racial demographics. In one, credit is denied altogether; in the other, credit is offered on illegal or unfair terms.

Courts have held that redlining violates the Fair Housing Act. See, e.g., Nationwide Mut. Ins. v. Cisneros, 52 F.3d 1351 (6th Cir. 1995) (insurance redlining), cert. denied, 516 U.S. 1140 (1996); NAACP v. American Family Mut. Ins., 978 F.2d 287

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[5]/Quoted in Dunn v. Midwestern Indemnity Mid-Am. Fire & Cas. Co., 472 F. Supp. 1106, 1109 (S.D. Ohio 1979).

(7th Cir. 1992) (same), cert. denied, 508 U.S. 907 (1993); Ring v. First Interstate Mortgage, Inc., 984 F.2d 924 (8th Cir. 1993) (mortgage redlining); Laufman, 408 F. Supp. 489 (mortgage redlining); see also Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266 (1994) (FHA and ECOA); 24 C.F.R. 100.110 to 100.135 (FHA).

Reverse redlining can also violate the Fair Housing Act, as well as ECOA and other civil rights laws. See Clark, 501 F.2d at 328, 335-336 (Section 1982); Contract Buyers League v. F&F Inv., 300 F. Supp. 210, 216 (N.D. Ill. 1969) (same), aff'd on other grounds, Baker v. F&F Inv., 420 F.2d 1191 (7th Cir.), cert. denied, 400 U.S. 821 (1970); Booker v. United Cos. Lending Corp., No. 94-RCCV-17 (Ga. Nov. 17, 1997) (state fair housing law); Alexander v. Kaye-Co., No. 91-RCCV-681 (same); Fairman v. Schaumburg Toyota, Inc., No. 94-C 5745, 1996 WL 392224 (N.D. Ill. July 10, 1996) (Section 1981); Hearings: Equity Predators, note 4, supra, at 70 ("if a lender targets borrowers for abusive practices based on age, race and/or sex, such targeting, depending on the facts, also could violate the ECOA.") (Prepared Statement of the FTC). By prohibiting reverse redlining, the Fair Housing Act "prevents lenders from exploiting the financial vacuum created by redlining." Sargeant, 20 F. Supp.2d at 203.

2. *Targeting African American neighborhoods for home loans designed to fail makes housing unavailable within the meaning of Section 804(a) of the Fair Housing Act.*

Section 804(a) of the Fair Housing Act provides, in relevant

part, that it shall be unlawful

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race * * *

42 U.S.C. § 3604(a). At a minimum, to establish a violation of Section 804(a), plaintiffs must prove that defendants made (1) a dwelling; (2) unavailable; (3) because of race. This Section addresses the second element, the standard for make housing unavailable. The first element is addressed at Section III.C., infra; the third at Section III.A.5., infra.

Defendants contend that they cannot have violated this provision of the Act because they make home loans in African American neighborhoods, suggesting that in the lending context, a defendant can only violate Section 804(a) by directly denying a home loan. Defendants' cramped reading of the Fair Housing Act should be rejected since under certain conditions, providing a home loan can have the opposite of its usual effect of making housing available. Defendants' alleged practice of making loans that are designed to fail makes housing unavailable under the meaning of Section 804(a).

The Supreme Court has held that the Fair Housing Act is to be given a "generous construction." City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995); accord Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972). In particular, the phrase, "otherwise make unavailable or deny" has been broadly construed, with several courts concluding that this language is "as broad as

Congress could have made it." E.g., United States v. Youritan Constr. Co., 370 F. Supp. 643, 648 (N.D. Cal. 1973), aff'd in relevant part, 509 F.2d 623 (9th Cir. 1975); Woods v. Foster, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995); Dunn v. Midwestern Indemnity Mid-Am. Fire & Cas. Co., 472 F. Supp. 1106, 1108 (S.D. Ohio 1979).

Section 804(a) reaches "discrimination that adversely affects the availability of housing." Clifton Terrace Assocs., v. United Tech. Corp., 929 F.2d 714, 719 (D.C. Cir. 1991). Under the broad language of the Act, a direct refusal to rent or sell housing is not required. Courts have found that Section 804(a) is violated by a wide variety of practices which have the indirect effect of denying dwellings, including racial steering, United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978); insurance redlining, American Family Mut. Ins. Co., 978 F.2d at 301; mortgage redlining, Laufman, 408 F. Supp. 489; discriminatory appraisals, Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); exclusionary zoning, United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988); and racial and sexual harassment, Byrd v. Brandeburg, 922 F. Supp. 60, 62-65 (N.D. Ohio 1996) (racially motivated firebombing); Williams v. Poretsky Mgm't, 955 F. Supp. 490, 498 (D. Md. 1996) (sexual harassment leading to constructive eviction).

Making loans that are designed to fail also makes housing unavailable. As the FTC explained before a Senate Committee,

> [a]s a general rule, loans made to individuals who do not have the income to repay such loans usually are designed to fail; they frequently result in the lender acquiring the borrower's home equity. The borrower is likely to default, and then ultimately lose her home through foreclosure or by signing over the deed to the lender in lieu of foreclosure.

Hearings: Equity Predators, at note 4, supra, at 66 (Prepared Statement of the FTC). Where Defendants' practice is to make loans that are designed to fail, they are not in the business of providing housing, but of taking it away. Such a practice is akin to discriminatory evictions. See 24 C.F.R. 100.60(5) (evicting tenants because of their race would violate Section 804(a)). It makes no difference that the evicting landlord initially provided the housing; the same is true in the lending context.

Moreover, making a loan that is designed to fail makes housing unavailable even if foreclosure has not yet occurred. This is because an "aggrieved person" under the act includes any person who claims to have been injured or "believes that [he] will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i) (emphasis added). The HUD regulations explain:

> The phrase "is about to occur" applies to a number of situations in which it is clear to a person that, if he or she takes an action, he or she will be subjected to a discriminatory act which will result in an injury. In such cases, the Fair Housing Act does not require these persons to expose themselves to the injury involved with the actual act of discrimination before filing a complaint.

24 C.F.R., ch. 1, subch. A, app. 1, subpart A.[7] As this Court

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[7]/HUD's interpretations of the Fair Housing Act are entitled to considerable deference. Trafficante, 409 U.S. at 210; Gladstone

has held, "[n]othing in the FHA requires that before filing suit plaintiffs must * * * lose their homes * * *. Such a requirement would directly contravene the purposes of the FHA." Wai v. Allstate Ins. Co., 75 F. Supp.2d 1, 6 (D.D.C. 1999) (discriminatory refusal to provide liability insurance to landlord violates Section 804(f) because it creates a disincentive to rent to disabled persons).

3. *Targeting African American neighborhoods for predatory home loans can discriminate within the meaning of Sections 804(b) and 805 of the Fair Housing Act, even without comparative evidence.*

Section 804(b) of the Fair Housing Act states that it shall be unlawful

> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race * * *

42 U.S.C. § 3604(b) (emphasis added). To establish a violation of Section 804(b), plaintiffs must prove that (1) with respect to a dwelling; (2) defendants have discriminated against any person; (3) in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith; (4) because of race.

Section 805 makes it unlawful

> for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race.

Realtors v. Village of Bellwood, 441 U.S. 91, 106 (1979).

42 U.S.C. § 3605(a) (emphasis added). To establish a violation of Section 805, plaintiffs must prove that (1) defendants' business includes engaging in residential real estate-related transactions; (2) defendants have discriminated against any person; (3) in making available a residential real estate-related transaction or in the terms or conditions of such a transaction; (4) because of race. This Section addresses the second element of Sections 804(b) and 805: the standard for proving whether defendants have discriminated against any person. The first element of Section 804(b) is addressed at Section III.C, infra; the third element of Sections 804(b) and 805 at Section III.B., infra; and the fourth element of Sections 804(b) and 805 at Section III.A.5., infra. The first and third elements of Section 805 are undisputed in this case.

Defendants argue that since they provide credit to African American borrowers on the same terms as to non-African Americans, they do not "discriminate" within the meaning of Sections 804(b) or 805. This argument mistakes a challenge of proof for a statement of legal principle and should be rejected. Comparative evidence is one, but by no means the sole, method of establishing discrimination.

Defendants allegedly target African American, and not white, neighborhoods for their predatory lending. Indeed, most of Defendants' loans are made to African Americans in majority African American census tracts. For this reason, there will be few, if any, similarly situated whites for comparison. But

whether a similarly situated person was treated differently is an evidentiary matter, not an element of proof. The Supreme Court recently decided the issue in the employment discrimination context. In Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998), which involved an all-male work site, the Court held that same-sex sexual harassment can violate Title VII. In so doing, the Court rejected the employer's argument that an employee can never state a claim for sexual harassment in an all-male work place because there are no similarly situated female employees with whom to compare the male's treatment. The Court explained that an inference of discrimination can be derived from a number of evidentiary sources, not limited to comparable evidence of how an alleged harasser treats both sexes in a mixed-sex work place. The Court allowed that an inference of discrimination could also be made from evidence that the victim was harassed "in such sex-specific and derogatory terms * * * as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." Id.; accord Washington v. Davis, 426 U.S. 229, 242 (1976) (discriminatory purpose can be inferred from "the totality of the circumstances, including the fact, if it is true, that the law bears more heavily on one race than another.") (emphasis added).

Indeed, any other outcome would belie the very notion of discrimination and the purpose of anti-discrimination laws. As the Supreme Court once pointed out, Congress could not have intended to insulate from Title VII redress a situation in which

"an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male." County of Washington v. Gunther, 452 U.S. 161, 179 (1981). The same is true in the fair housing context. In Contract Buyers League, 300 F. Supp. at 216, defendants argued that there could be no discrimination under Section 1982 for selling property to African Americans at high prices because "there can be no discrimination unless the same seller actually sells to whites at a lower price." The court considered this argument "obnoxious" and "ridiculous," explaining,

> It would mean that the 1866 Civil Rights Act, which was created to be an instrument for the abolition of discrimination, allows an injustice so long as it is visited exclusively on negroes.

Id. Similarly, a landlord who delays maintenance on his building because most of his tenants are minority would clearly violate the Act, even if he owned no other building with a majority of white tenants with which to compare. See 24 C.F.R. 100.65(b)(2) (failing or delaying repairs to a dwelling because of race would violate Section 804(b)). Similarly, a landlord who sexually harasses his female tenants is not insulated from liability just because all his tenants are female. See 24 C.F.R. 100.65(b)(5) (quid pro quo sexual harassment violates Section 804(b)). Clearly, then, successfully targeting all of one's lending to minorities or minority areas, while providing equally unfair or illegal loan terms to all borrowers, does not provide a safe harbor under the Fair Housing Act.

To uphold Defendants' position would be to ratify the dual

lending market that has developed from racial segregation, discriminatory appraisals, and mortgage and insurance redlining. It would allow one class of lenders to market a high quality loan product to white areas, while another markets a predatory product to minorities. See Contract Buyers League, 300 F. Supp. at 215 ("It was the [Supreme] Court's conclusion [in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)] that the existence of a black market distinct from a white market was the de facto vestige of what the Congress in 1866 intended to abolish as a critical means of making the black man a free man."); id. at 216 ("under 1982 as interpreted in Jones v. Alfred H. Mayer Co. there cannot in this country be markets or profits based on the color of a man's skin."); accord Clark, 501 F.2d at 328, 335-336.

4. *The term "predatory lending" provides an adequate benchmark of discrimination.*

Defendants contend that reverse redlining does not state a claim under the Fair Housing Act because "predatory lending" is a "vacuous" concept. They argue that courts will not be able to distinguish "predatory" from unconventional lending, and as a result lenders will be chilled from lending in minority areas because of fears that a court might consider their novel loan product "predatory." In essence, Defendants rehash their earlier argument that racially targeted predatory lending cannot constitute discrimination under the Act where there are no white comparators. They claim that without the direct comparison within a single defendants' portfolio, it will be impossible to

distinguish abusive from high-risk loans.

In our view, however, "predatory lending" is sufficiently identifiable such that, when its victims are selected based on race, it constitutes discrimination. See Hearings: Reverse Redlining, note 4, supra, at 246 ("so-called reverse redlining is among the most pernicious forms of racial and ethnic discrimination and consumer fraud.") (Statement of Sen. Alfonse M. D'Amato). Of course, the benchmark of discrimination will be more readily apparent where the defendant does business in majority as well as minority markets. But as discussed above, the fact that a defendant does business only in minority areas cannot insulate his business practices from scrutiny under the nation's fair housing laws. Where a lender uses race to decide where to conduct the type of mortgage lending business that has variously been described as "predatory," "consumer fraud," "loan sharking," "mortgage scams" or simply theft,[8] that lender discriminates within the meaning of the Fair Housing Act. See also Hearings: Equity Predators, note 4, supra, at 2 (describing "equity predators," as "con artists" "in the cheating and swindling business") (Statement of Sen. Charles Grassley). To suggest that courts will not be able to distinguish these practices from good faith but high-risk mortgage lending calls into question the ability of governments ever to regulate the

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[8]/Hearings: Equity Predators, note 4, supra, at 65 (Prepared Statement of FTC); Hearings: Reverse Redlining, note 4, supra, at 246 (Statement of Sen. Alfonse M. D'Amato); id. at 307 (Report of Mass. Attorney Gen.); id. at 254 (Statement of Mass. Attorney Gen.).

lending industry to protect consumers against unfair or deceptive practices. See Chedick v. Nash, 151 F.3d 1077 (D.C. Cir. 1998) (upholding jury verdict against Capital City and Nash for fraudulent lending).

Contrary to Defendants' suggestion, predatory lending is not a novel or ill-defined concept. In 1993, Congress held a series of hearings on predatory lending, and the following year it amended the Truth in Lending Act to begin to address the problem. See note 4 and accompanying text, supra. Massachusetts did the same by establishing a commission to study the problem of predatory lending and then enacting regulations to address it. See Sargeant, 20 F. Supp.2d 192. Congress held further hearings on the topic in 1998.

These legislative and administrative processes have identified some of the more prevalent and harmful practices. Foremost among them is "equity-stripping":

> This often begins with a loan that is based on equity in a property rather than on a borrower's ability to repay the loan — a practice known as "asset-based lending." As a general rule, loans made to individuals who do not have the income to repay such loans usually are designed to fail; they frequently result in the lender acquiring the borrower's home equity. The borrower is likely to default, and then ultimately lose her home through foreclosure or by signing over the deed to the lender in lieu of foreclosure.

Hearings: Equity Predators, note 4, supra, at 66 (Prepared Statement of FTC). Others include "packing," that is, taking on credit insurance or other "extras" to increase the lender's profit on a loan; "flipping," the practice of inducing a consumer to refinance a loan, repeatedly, often within a short time frame,

charging high points and fees each time; and home improvement scams. Id. at 69. Predatory lending practices also often involve loan servicing practices that extract monies not owed under the loan terms or inhibit refinancing options with another lender:

> A lender may provide inaccurate monthly-payment demands, adding fees and charges that are not owed. Because of the complexities of loan terms, it is difficult for the borrower to know whether the lender's payment demands are accurate. A lender also may fail to provide full or accurate pay-off information. Consequently, the borrower becomes tied to a lender without a means of escape.

Id. at 69; see also Hearings: Equity Predators, note 4, supra, at 4 ("What makes these bad apples different from the good guys in the [subprime] industry is the use of deception, forged documents, and intimidating borrowers into borrowing money based not on their ability to repay the loan, but rather on the equity that exists in their home.") (Statement of Sen. John Breaux).

Plaintiffs allege that Defendants have engaged in a number of the more common predatory lending practices. In particular, they are alleged to use deceptive practices to make loans without regard to repayment ability, tack on unnecessary insurance charges, and engage in a number of abusive servicing practices. Indeed, the FTC has filed a 24-page complaint alleging that Defendants' lending practices violate four federal banking laws, Plaintiffs' discrimination claims notwithstanding. If these allegations are proven, we believe a clear case of predatory lending will have been established.

Courts are often called upon to draw difficult lines on the

asis of seemingly vague concepts, even in the area of finance. See, e.g., Sargeant, 20 F. Supp.2d at 204-205 (state regulation prohibiting mortgage lenders from negotiating or procuring terms which "are otherwise unconscionable" is not unconstitutionally vague). That future cases may pose difficult challenges to discern "predatory" practices should not deter the court from deciding this case, in which Defendants' practices are alleged to violate a number of consumer protection laws in addition to civil rights laws.

5. *Targeting African American neighborhoods for predatory loans is an activity that is "based on race" within the meaning of Sections 804(a), (b), and 805 of the Fair Housing Act.*

Under the Fair Housing Act, that an action was taken "because of race" can be established by proving either that a defendant acted with a racially discriminatory intent, or by proving that the defendant's action had a racially discriminatory effect.[9]

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[9]/Every circuit that has examined the issue agrees that the Fair Housing Act prohibits "'not only direct discrimination but practices with racially discouraging effects.'" Jackson v. Okaloosa County, 21 F.3d 1531, 1543 (11th Cir. 1994); accord Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 933-40 (2d Cir.), aff'd per curiam, 488 U.S. 15 (1988); Resident Advisory Bd. v. Rizzo, 564 F.2d. 126, 149-50 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); Smith v. Town of Clarkton, 682 F.2d 1055, 1065-66 (4th Cir. 1982); Mitchell, 580 F.2d at 791 (5th Cir. 1978); Arthur v. City of Toledo, 782 F.2d 565, 574-575 (6th Cir. 1986); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1287-1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1184-1185 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); Keith v. Volpe, 858 F.2d 467, 482-484 (9th Cir. 1988), cert. denied, 493 U.S. 813 (1989); Mountain Side Mobile Estates v. HUD, 56 F.3d 1243, 1250-1251 (10th Cir.

Determining whether an entity has acted with a discriminatory intent "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (equal protection). The plaintiff need not show that the decision-maker was motivated solely by racial concerns. Id. at 265.

For a reverse redlining claim, intentional discrimination can be proven with evidence that defendants deliberately targeted African Americans for their predatory loans. Cf. Fairman, 1996 WL 392224, at *6 (targeting African American and Hispanics for loans with inflated interest rates states a claim under Section 1981: "the alleged actions of targeting minorities are intentional acts, thus fulfilling the intent element"); United States v. Avery, 137 F.3d 343, 355 (6th Cir. 1997) (intentionally targeting individuals for police investigation because of their race violates equal protection). It is no defense that the Defendants may have been motivated by economics rather than race where it can be shown that they deliberately used race as an instrument to achieve their underlying goal. Intentional discrimination does not require that a defendant act with discriminatory motive. Palmore v. Sidoti, 466 U.S. 429, 433-434 (1984); Cooper v. Aaron, 358 U.S. 1, 14-16 (1958); Gautreaux v. Romney, 448 F.2d 731, 737-738 (7th Cir. 1971). As Judge Posner so aptly put it, "[d]iscrimination may be instrumental to a goal

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not itself discriminatory, just as murder may be instrumental to a goal not itself murderous (such as money); it is not any the less--it is, indeed, more clearly--discriminatory on that account." Village of Bellwood v. Dwivendi, 895 F.2d 1521, 1531 (7th Cir. 1990).

Statistical evidence of targeting can be sufficient to raise a factual dispute of intentional discrimination. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-308 (1977) (when "gross statistical disparities can be shown, they alone may in a proper case constitute a prima facie proof of a pattern or practice of discrimination."); International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) ("In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination.").

A reverse redlining claim can also be proven under a disparate impact theory, even where the marketing practices alleged to have a discriminatory effect are subjective or discretionary practices. Cf. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (under Title VII, disparate impact theory can be used to analyze subjective and discretionary criteria); Steptoe v. Savings of America, 800 F. Supp. 1542, 1546-1547 (N.D. Ohio 1992) (plaintiffs' made out prima facie case of discriminatory appraisal methods under FHA using disparate impact theory). A prima facie case of disparate impact discrimination can be established by showing that the defendant's actions have an adverse impact on a particular minority group, or by showing

that defendant's actions perpetuate residential segregation. Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 937 (2d Cir.), aff'd per curiam, 488 U.S. 15 (1988); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978). Once adverse impact or segregative effect is established, the burden shifts to the defendant to prove that there is a "bona fide and legitimate justification" for the action and that there are "no less discriminatory alternatives" which can serve that end. Huntington Branch, NAACP, 844 F.2d. at 935-937, 939; accord Resident Advisory Bd. v. Rizzo, 564 F.2d. 126, 149 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978). The justification must actually be reflected in the record; "[p]ost hoc rationalizations" cannot establish a bona fide and legitimate justification for a discriminatory effect. Huntington Branch, NAACP, 844 F.2d. at 939, 940.

Like intentional discrimination, a prima facie case of disparate impact discrimination can be established with statistical evidence alone. See, e.g., Huntington Branch, N.A.A.C.P., 844 F.2d at 937. Defendants challenge Plaintiffs' prima facie case, arguing that they have erred by comparing the "the number of African Americans who obtain subprime loans from Capital City against the entire population of D.C. and P.G. County -- rather than against the population of subprime loan candidates" (Mem. 22). Defendants have set up a straw man, however. Plaintiffs have properly relied on a market analysis to

establish their prima facie case of disparate impact discrimination, that is, they have compared the racial demographics of Defendants' loans with that of the subprime market as a whole (Compl. 26; Pl. Mem. 28[11]).

6. *Targeting African American communities for predatory lending violates ECOA* even though credit was not denied.

In one paragraph and citing no case law, Defendants assert that Plaintiffs have not stated a claim for an ECOA violation because "credit was in fact granted" (Mem. at 47).[12] ECOA provides, in relevant part:

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction -- (1) on the basis of race.

15 U.S.C. § 1691(a) (emphasis added). Defendants' argument that ECOA applies only to discriminatory denials of credit is simply wrong. ECOA covers all kinds of treatment beyond merely loan approval and denial.

ECOA covers "any aspect of a credit transaction." 15 U.S.C. § 1691(a). The Federal Reserve System's regulations define a "credit transaction" to mean

> every aspect of an * * * application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures;

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[11]/"Pl. Mem. __" refers the page number of "Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings, or in the Alternative, Summary Judgment."

[12]/Defendants made the same argument in their motion for summary judgment in FTC v. Capital City Mortgage Corp., No. 98-237. The position in this brief is the same argument made by the FTC in its Memorandum in Opposition.

> standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures).

12 C.F.R. 202.2(m); accord 12 C.F.R. 202, App. D, Supp. I, § 202.4-1 (Official Staff Interpretations). Courts have held that persons who have been granted credit can nonetheless state a claim of discrimination under ECOA. See, e.g., Anderson v. United Fin. Co., 666 F.2d 1274, 1276-1277 (9th Cir. 1982); Newton, 24 F. Supp.2d at 461-462.

7. *Affirmative marketing that expands housing choice does not discriminate in violation of the Fair Housing Act or ECOA.*

Defendants contend that if the Fair Housing Act is read to prohibit reverse redlining, it will "chill" the marketing of unconventional loan products in minority neighborhoods (Mem. 12-15). Defendants' concern in misplaced. They again rely on the incorrect notion that there is no difference between predatory and good faith lending. As discussed at Section III.A.4., supra, courts will be able to identify predatory practice. Because lenders can do the same, prohibiting reverse redlining will not chill good faith lending in minority communities.

The regulations of the Department of Housing and Urban Development interpreting the Fair Housing Act state that an affirmative marketing program "designed to make available information which broadens housing choices" does not violate the Act, and in fact furthers its goals. 24 C.F.R. ch. 1, subch. A., app. I, 54 Fed. Reg. 3235 (Jan. 23, 1989). Similarly, ECOA and Regulation B allow for "special purpose credit program[s]," 15

U.S.C. § 1691(c), "established and administered to extend credit to a class of persons who, under the organization's customary standards of credit-worthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit." 12 C.F.R. 202.8(a). The participant class may be defined by race, as long as the program was not established or administered to evade ECOA or its regulations. 12 C.F.R. 202(b).

The Seventh Circuit, as the only court of appeals to rule on the issue, has set the standard under the Fair Housing Act for affirmative marketing plans. See South-Suburban Hous. Ctr. v. Greater South Suburban Bd. of Realtors, 935 F.2d 868, 882 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992). In that case, defendants challenged an affirmative marketing plan (AMP) that required the solicitation of white home seekers to view particular houses in minority neighborhoods, with the goal of maintaining integration. Acknowledging that there may be times when the Act's twin goals of nondiscrimination and integration are in tension, the court ruled that the AMP at issue presented no such conflict. The court held that the AMP, which "merely provided additional information to white home buyers concerning properties they might not ordinarily know about, and involved no lessening of efforts to attract black home buyers," served both goals:

> In addition to furthering the Fair Housing Act's goal of integration, * * * the AMP also advances the purpose of the

> Act through making housing equally available to all by stimulating interest among a broader range of buyers.

Id. at 884. The AMP in South Suburban created "precisely the type of robust multi-racial market activity which the Fair Housing Act intends to stimulate." Id.

Defendants argue that they, too, are increasing housing opportunities by providing "invaluable access to credit" to minorities (Mem. 13). "Access that is based on deceptive mortgage lending, however, is false access." Hearings: Equity Predators, at 65 (Prepared Statement of FTC). In contrast to the AMP upheld in South-Suburban, which set out to market a benign product (a house) to whites because the market was already majority minority, Defendants allegedly market a harmful product (e.g., mortgages designed to fail) only to minorities. We are confident that lenders, like courts, will be able to distinguish the two.

B. Race-based predatory pricing and servicing of home-equity loans discriminates in the terms or conditions of housing or housing finance within the meaning of Sections 804(b) and 805 of the Fair Housing Act.

Defendants argue that the Jamison loan, a home-equity loan, does not violate Section 804(b) of the Fair Housing Act because that provision of the Act covers only purchase money loans. We believe Section 804(b) does cover home-equity loans, although there is no need to address the question in this case because the loan clearly falls within the language of Section 805 -- a point that Defendants do not contest.

In brief, the Jamison home-equity loan falls within the

scope of Section 805 because, like purchase money loans, it is a "residential real estate-related transaction," 42 U.S.C. § 3605(b)[12], and allegations of race-based predatory pricing and servicing clearly implicate the "terms or conditions" of the transaction. 42 U.S.C. § 3605(a); accord 24 C.F.R. 100.130(2) (Section 805 prohibits "[d]etermining the type of loan or other financial assistance to be provided with respect to a dwelling, or fixing the amount, interest rate, duration, or other terms for a loan or financial assistance for a dwelling or which is secured by residential real estate, because of race").

Discriminatory purchase-money loans, such as the Hilliard/Birth and Robinson loans, violate Section 804(b) (in addition to Section 805) because a purchase-money loan clearly involves the "terms, conditions, or privileges of sale * * * of a dwelling," or a "service * * * in connection therewith." 42 U.S.C. § 3604(b). But a home-equity loan, like the Jamison loan, is not a term or condition of sale. Whether it is a service in connection with the sale of a dwelling is a purely academic question in this case since, as discussed above, home equity

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[12]/Section 805(b) defines "residential real estate-related transaction" to means any of the following:

> (1) The making or purchasing of loans or providing other financial assistance --
>
> (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or
>
> (B) secured by residential real estate.
>
> (2) The selling, brokering, or appraising of residential real property.

loans are clearly covered by Section 805.

But to the extent that the Court does reach the issue, we believe that discriminatory home-equity loans are covered by Section 804(b). Under that provision, the discriminatory service must be related to the dwelling, either rented or owned. To narrowly confine the provision to the actual point of sale would require rejecting HUD regulations that interpret Section 804(b) to prohibit "[l]imiting the use of privileges, services or facilities associated with a dwelling because of race," 24 C.F.R. 100.65(b)(4) (emphasis added); and "[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race," 24 C.F.R. 100.65(b)(2) (emphasis added).

As a number of courts, including this Court, have held, Section 804(a) addresses availability, while Section 804(b) addresses habitability. See Clifton Terrace, 929 F.2d at 719-720 ("the pertinent clauses in subsections (b) * * * which do address habitability, are limited to services and facilities provided in connection with the sale or rental of housing"); Wai, 75 F. Supp.2d at 7. The "services and facilities" clause of Section 804(b) is "directed at those who provide housing and then discriminate in the provision of attendant services or facilities, or those who otherwise control the provision of housing services and facilities." Clifton Terrace, 929 F.2d at 719-720. In the case of rental units, the provision of services falls primarily on the landlord. Id. But in the case of home ownership, a service provider may include a home-equity lender.

Cf. Wai, 75 F. Supp.2d at 2-3, 7-8, & n.5 (held that insurance on already-owned property fits in the category of "those who otherwise control the provision of housing services"); Lindsey v. Allstate Ins. Co., 34 F. Supp.2d 636, 642 (W.D. Tenn. 1999) (Section 804(b) prohibits discriminatory terms of property insurance renewal: "[m]aintaining possession of a home is as important to a homeowner as obtaining possession of a home"); but see Thomas v. First Fed. Sav. Bank, 653 F. Supp. 1330, 1337 (N.D. Ind. 1987); Laufman, 408 F. Supp. at 493 (dicta).

Defendants construction of Section 804(b) as limited to the actual point of sale or leasing conflicts not only with HUD regulations, but with case law holding that hostile environment sexual harassment states a claims under that provision. See, e.g., DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996); Poretsky Mgmt., 955 F. Supp. 490. Like hostile environment sexual harassment, discriminatory terms, conditions, or servicing of either a purchase money or home equity loan can "unreasonably interfere[] with the use and enjoyment of the premises." DiCenso, 96 F.3d at 1008. This is likely where higher interest rates or fees are charged, foreclosure is threatened, or the plaintiff is forced into bankruptcy because of the loan. See Clark, 501 F.3d at 331 ("By demanding prices in excess of the fair market value of a house and in excess of what whites pay for comparable housing, defendants extract from blacks resources much needed for other necessities of life, thereby reducing their standard of living and lessening their chances of escaping the

vestiges of a system of slavery and oppression.").

C. Residential Investment Property is a "Dwelling" within the Meaning of the Fair Housing Act.

Defendants argue that the Jamison, Hilliard/Birth and Robinson[13] transactions involve investment property, and so cannot be considered "dwellings" within the meaning of the Fair Housing Act; they argue that Plaintiffs must personally live in the building to press a claim under the Act. One unpublished district court opinion notwithstanding, this position is clearly wrong. It is illogical and inconsistent with the language and purposes of the Act.

Section 802(a) defines a "dwelling" as

> any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

42 U.S.C. § 3602(a). An "aggrieved person" includes any person who "(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i). It is the "aggrieved person" who can commence an action in district court under Section 813 of the Act. Defendants seem to have conflated these provisions, deciding that the plaintiff, or "aggrieved person," must live or intend to live

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[13]/Plaintiffs do not press a Fair Housing Act claim with respect to the Little Ark transaction. That transaction is covered by ECOA, which applies to all types of credit. See Section III.A.6., supra.

in the dwelling to commence an action. In direct support of this theory, Defendants offer but one unpublished district court opinion.

Of course, the Act does not specify who must live or intend to live in a building for it to be considered a "dwelling." Indeed, one of the cases cited by Defendants contradicts the proposition it was cited to support. In Hovsons, Inc. v. Township of Brick, 89 F.3d 1096 (3d Cir. 1996), the court held that a nursing home is a dwelling because handicapped elder persons would reside there. One of the plaintiffs in that case was the nursing home developer, who, it can fairly be assumed, had no intention of living on the premises. Accord Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1281-1282 (3d Cir.1993) (corporation that provides community living arrangements has standing under FHA based on its own injury). The fallacy of Defendants' argument is further evidenced by the line of cases finding standing or upholding Fair Housing Act claims by municipalities, fair housing organizations, testers, housing developers, real estate brokers, and housing providers, none of whom necessarily live or intend to live in the properties giving rise to the violation. See, e.g., Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109-111 (1979) (village has standing); Havens Realty Corp., 455 U.S. 363 (fair housing organization and testers have standing); Huntington Branch, NAACP, 844 F.2d 926 (upholding housing developer's claim); Crumble v. Blumthal, 549 F.2d 462, 468-469 (7th Cir. 1977)

broker has right to intervene"; Wai, 75 F. Supp.2d 1 (upholding landlord's claim).

IV
CONCLUSION

For the foregoing reasons, Defendants' Motion for Judgment on the Pleadings or in the Alternative Summary Judgment should be denied.

WILMA A. LEWIS
United States Attorney
D.C. Bar No. 358637

BILL LANN LEE
Acting Assistant Attorney General

JOAN A. MAGAGNA
Chief
ALEXANDER C. ROSS
Special Litigation Counsel
MICHELLE ARONOWITZ
D.C. Bar No. 457753
Attorney
U.S. Department of Justice
Civil Rights Division
Housing and Civil
Enforcement Section
P.O. Box 65998
Washington, D.C. 20035-5998
(202) 305-1077

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLYDE HARGRAVES, et al., Plaintiffs, v. CAPITAL CITY MORTGAGES CORP., et al., Defendants.	Civ. Action No. 98-1021 (JHG/AK)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE, ORDER, and BRIEF OF THE UNITED STATES AS AMICUS CURIAE was sent by First Class U.S. Mail, postage prepaid, to counsel of record at the following addresses:

John P. Relman, Esq.
RELMAN & ASSOCIATES
1350 Connecticut Ave., NW, Ste. 304
Washington, DC 20036

Jeffrey D. Robinson, Esq.
Elizabeth Sheldon, Esq.
BAACH, ROBINSON & LEWIS
One Thomas Circle, NW
Washington, DC 20005

Lars Waldorf, Esq.
Richard J. Ritter, Esq.
WASHINGTON LAWYERS' COMMITTEE FOR
CIVIL RIGHTS AND URBAN AFFAIRS
11 Dupont Circle NW, Ste. 400
Washington, DC 20036

David D. DiBari, Esq.
CLIFFORD, CHANCE, ROGERS & WELLS
607 14th Street, NW
Washington, DC 20005

Philip M. Musolino, Esq.
Rena Schild
MUSOLINO & DESSEL
1615 L Street, NW, Ste. 440
Washington, DC 20036

Mark Foster, Esq.
Hillary Davidson, Esq.
ZUCKERMAN, SPAEDER, GOLDSTEIN,
TAYLOR & KOLKER, LLP
1201 Connecticut Ave., NW
Washington, DC 20036

Dennis Quinn, Esq.
CARR, GOODSON WARNER
1301 K Street, NW, Ste. 400
Washington, DC 20005

James R. Bucher, Esq.
SASSCER, CLAGETT & BUCHER
5407 Water Street, #101
Upper Marlboro, MD 20772

Mathew W. Lee, Esq.
ECCLESTON & WOLF, PC
1750 K Street, NW, Ste. 450
Washington, DC 20006

Leticia M. Watson, Esq.
1223 11th Street, NW
Washington, DC 20001

Christopher L. Schwartz, Esq.
HOLLAND & KNIGHT, LLP
2100 Pennsylvania Ave., Ste. 400
Washington, DC 20037

Bradley H. Blower, Esq.
Sandra M. Wilmore, Esq.
FEDERAL TRADE COMMISSION
6th & Pennsylvania Ave., NW, Rm. 288
Washington, DC 20580

This 10th day of March, 2000.

Michelle Arnowitz

MICHELLE M. ARNOWITZ
Attorney