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

UNITED STATES OF AMERICA and the STATE OF NORTH CAROLINA ex rel. ROY COOPER, Attorney General, Plaintiffs, v. AUTO FARE, INC.; SOUTHEASTERN AUTO CORP.; and ZUHDI A. SAADEH, Defendants.	PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

I. INTRODCUTION

In a thorough Memorandum and Recommendation, Magistrate Judge Cayer examined Defendants' arguments for dismissing the Plaintiffs' claim that Defendants violated the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"), by engaging in a pattern or practice of reverse redlining that discriminates against African Americans.[1] The Complaint alleges that Defendants discriminated in the extension and servicing of credit on unfair and predatory terms for used cars purchased from two "buy here, pay here" dealerships in Charlotte. Magistrate Judge Cayer rejected all of Defendants' arguments for dismissal and recommended that Defendants' motion be denied.

[1] Defendants have not moved to dismiss the North Carolina Unfair and Deceptive Trade Practices Act claim. *See* Defs.' Br. Supp. Mot. Dismiss 16, ECF No. 9; Defs.' Objections 2, ECF No. 15; *see also* Mem. & Recommendation 3 n.1.

Defendants have filed a set of five general objections to the Memorandum and Recommendation. These objections simply repeat arguments found in Defendants' initial briefing on the motion to dismiss, and they are insufficient to require this Court to engage in de novo review of the Memorandum and Recommendation. Regardless whether the Memorandum and Recommendation is subject to de novo review or review for clear error, this Court should adopt the Memorandum and Recommendation in full.

II. ARGUMENT

A. Defendants Have Forfeited De Novo Review

Under the Federal Rules of Civil Procedure, a "district judge must determine de novo any part of the magistrate judge's disposition [of a motion to dismiss] that has been properly objected to." Fed. R. Civ. P. 72(b)(3). However, "de novo review is not required by the statute when a party makes general or conclusory objections that do not direct the court to a specific error in the magistrate judge's proposed findings and recommendations." *T.W.T. Distrib., Inc. v. Johnson Prods. Co.*, 966 F. Supp. 2d 576, 578 (W.D.N.C. 2013) (Conrad, J.) (internal quotation marks omitted). "General objections include those that merely restate or reformulate arguments a party has made previously to a magistrate judge. Examining anew arguments already assessed in the M & R would waste judicial resources; parties must explain *why* the M & R is erroneous, rather than simply rehashing their prior filings." *Wiggins v. Colvin*, No. 1:12-cv-196, 2014 WL 184414, at *1 (W.D.N.C. Jan. 15, 2014) (Mullen, J.) (citations, alterations and internal quotation marks omitted).

Defendants' filing lists five grounds for their objections: 1) Plaintiffs' failure to sufficiently allege that Defendants had a policy or regular procedure of discriminating; 2) Plaintiffs' failure to sufficiently allege that Defendants offered unfair and predatory loan terms to

African Americans; 3) Plaintiffs' failure to sufficiently allege details about Defendant Saadeh's discriminatory statements; 4) Plaintiffs' failure to sufficiently allege details related to the location of Defendants' dealerships; and 5) the Memorandum and Recommendation's failure to address Defendants' argument that the Complaint does not state a claim under the ECOA "even if all of Plaintiffs' allegations are taken as true." Defs.' Objection 1-2.

The first four objections are plainly insufficient under Rule 72, which requires de novo review of "any part of the magistrate judge's disposition that has been properly objected to," because they object to Plaintiffs' pleading rather than any portion of the Memorandum and Recommendation. Fed. R. Civ. P. 72(b)(3). Indeed, Defendants' own statement of their first four objections does not even refer to the Memorandum and Recommendation. By not referencing the Memorandum and Recommendation, Defendants have necessarily failed to reference any "specific errors" in the Memorandum and Recommendation, as is required to obtain de novo review. *See T.W.T. Distrib.*, 966 F. Supp. 2d at 578.

The first four objections are also insufficient to warrant de novo review because they merely summarize arguments Defendants made in their initial briefing on the motion to dismiss, which the Memorandum and Recommendation rejected. *See Wiggins*, 2014 WL 184414, at *1. Defendants' first objection repeats the argument under the heading of their reply brief titled "Plaintiffs' [sic] fail to sufficiently allege a pattern or practice of discrimination." *See* Defs.' Reply 5-7, ECF No. 12. Defendants' second objection repeats the argument found in their reply brief claiming that Plaintiffs did not allege sufficient predatory lending practices. *See* Defs.' Reply 4-5 ("Plaintiffs have not alleged Defendants charged 'unreasonably high' interest rates, nor have they alleged 'excessive fees', deception or fraud."). Defendants' third and fourth objections repeat arguments under the heading of their reply brief titled "Plaintiffs fail to allege

sufficient direct evidence of discriminatory intent." *See* Defs.' Reply 7-8. The arguments under that heading, like their present objections, specifically argued that "[s]tray remarks . . . or statement by decision makers unrelated to the decisional process are insufficient to set forth a prima facie case using direct evidence," Defs.' Reply 7, and that "Plaintiffs do not allege the residents of this 'area of Charlotte' make up the majority of Defendants' customers . . . [n]or do they allege Defendants chose their locations based on the area's racial constitution," Defs.' Reply 8.

Defendants' fifth ground for objecting, while directed at the Memorandum and Recommendation, fails to require de novo review because it is impermissibly cursory. Although Defendants claim the Memorandum and Recommendation misapplied the motion to dismiss standard, the objection does not specify any portion of the Memorandum and Recommendation where this misapplication occurred.[2] Without such specificity, Defendants cannot obtain de novo review. *See Joe Hand Promotions, Inc. v. Mehovic*, No. 1:12-cv-267, 2013 WL 3155355, at *1 (W.D.N.C. June 20, 2013) (Reidinger, J.) ("[A] party's objection to a magistrate judge's report [must] be specific and particularized, as the statute directs the district court to review only *those portions* of the report or *specified* proposed findings or recommendations *to which objection is made*." (quoting *United States v. Midgette*, 478 F.3d 616, 621 (4th Cir. 2007))).

[2] Defendants' objection might warrant de novo review if it is read to argue that the Memorandum and Recommendation adopted an incorrect legal standard in ruling on the motion to dismiss, rather than broadly misapplying the standard. But such an argument fails on de novo review. The Memorandum and Recommendation correctly set out the standard of review applicable to a motion to dismiss as one that "accept[s] as true all well-pleaded allegations and . . . view[s] the complaint in the light most favorable to the plaintiff," but that also requires "factual allegations . . . [to] be enough to raise a right to relief above the speculative level." Mem. & Recommendation 4.

B. The Memorandum and Recommendation Correctly Recommends Denial of the Motion to Dismiss

In the absence of a proper objection, the Court "must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *T.W.T. Distrib.*, 966 F. Supp. 2d at 578 (internal quotation marks omitted). Regardless whether the Memorandum and Recommendation is subject to de novo review or review for clear error, this Court should adopt it as legally correct.

The Memorandum and Recommendation correctly determined, based on a review of decisions of other federal district courts, the elements of a reverse-redlining claim: "To establish a prima facie case of 'reverse redlining,' Plaintiffs must prove: (1) unfair and predatory loan terms; and (2) that [African Americans] were intentionally targeted by Defendants on the basis of race or that Defendants' practices have a disparate impact on the basis of race. . . . [P]laintiffs need not show that the defendant made loans to non-African Americans on more favorable terms." Mem. & Recommendation 6-7 (citing *M&T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 574-75 (E.D.N.Y. 2010); *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874, 887-88 (S.D. Ohio 2002); and *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000)). Moreover, Plaintiffs sufficiently pled allegations, if proven at trial, that would satisfy these elements and the ECOA's other applicable requirements. *See* Mem. & Recommendation 5-8.

Defendants' four objections concerning Plaintiffs' allegations do not cast doubt on the Memorandum and Recommendation's legal correctness. First, the Memorandum and Recommendation correctly determined that Plaintiffs alleged a pattern or practice of discrimination by Defendants that satisfies the standard of 15 U.S.C. § 1691e(h) for ECOA claims brought by the United States Attorney General. Contrary to Defendants' objection that

"Plaintiffs have not alleged sufficient facts to show Defendants maintained a discriminatory policy or that they engaged in acts of discrimination as a matter of regular procedure," Defs.' Objection 1, "[t]he Complaint describes Defendants' discriminatory policies and practices in all their relevant particulars, and identifies the actors . . ., the time period . . ., the location, and the alleged basis of discrimination," Mem. & Recommendation 7. Such allegations, when accepted as true, satisfy the established case law on conduct that constitutes a pattern or practice of discrimination under federal antidiscrimination laws. *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977); *EEOC v. W. Elec. Co.*, 713 F.2d 1011, 1016 (4th Cir. 1983).

Second, the Memorandum and Recommendation correctly determined that Plaintiffs sufficiently alleged that Defendants offered unfair and predatory loan terms to its customers, including its African-American customers: "Plaintiffs allege the prevalence of disproportionately high sales prices, down payments, and annual percentage rate (APRs); disproportionately high rates of default and repossession compared to other subprime used-car dealers; and repossessions when customers were not in default." Mem. & Recommendation 7. These are the type of loan terms other courts have found to constitute unfair and predatory lending for the purposes of a reverse-redlining claim. *See*, *e.g.*, *Hargraves*, 140 F. Supp. 2d at 20-21, 23. Plaintiffs' specific factual allegations concerning these terms far exceed the kind of conclusory or threadbare allegations deemed insufficient by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), or *Ashcroft v. Iqbal*, 566 U.S. 662 (2009). *See Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010).

Third, the Memorandum and Recommendation correctly determined that Plaintiffs' allegations concerning Defendant Saadeh's use of racial epithets "are sufficient to plead direct evidence of discriminatory intent." Mem. & Recommendation 7 (citing *Faulkner v. Glickman*,

172 F. Supp. 2d 732, 737-39 (D. Md. 2001)); *see also Freeman v. Dal-Tile Corp.*, __ F.3d __, 2014 WL 1678422, at *6 (4th Cir. Apr. 29, 2014) (reversing grant of summary judgment to defendant on race discrimination claim when evidence included similar use of racial epithets).

Finally, the Memorandum and Recommendation correctly determined that Plaintiffs sufficiently alleged that Defendants targeted African Americans. A reverse-redlining claim can be proven through evidence that customers "were intentionally targeted by Defendants on the basis of race." Mem. & Recommendation 6-7 (citing *Hargraves*, 140 F. Supp. 2d at 20). Plaintiffs' "Complaint details the specific discriminatory acts constituting a pattern or practice of targeting African-American purchasers," and "Plaintiffs have sufficiently alleged that Defendant Saadeh intended to target African Americans for these unfair and predatory" loans. Mem. & Recommendation 7-8. Contrary to Defendants' objection concerning "Plaintiffs' use of Defendants' [dealership] location," Defs.' Objection 2, the Complaint plainly alleges targeting based on "Defendant Saadeh establish[ing] the Dealerships in close proximity to one another in an area of Charlotte in which the majority of residents are African American," Complaint ¶ 11; *see Hargraves*, 140 F. Supp. 2d at 21-22 (citing the location of a lender's offices in predominately African-American neighborhoods as circumstantial evidence of targeting). Moreover, Defendants' objection is legally irrelevant because the Memorandum and Recommendation held that Plaintiffs sufficiently pled the targeting element based on allegations not involving geography: 1) Defendant Saadeh's use of racial epithets; 2) his belief that African Americans were more likely to accept the predatory terms at issue; and 3) his decision to employ

a particular sales agent who he believed was especially adept at soliciting African-American customers. *See* Mem. & Recommendation 7-8.[3]

Defendants' final, conclusory objection that the Memorandum and Recommendation failed to correctly determine that the Complaint does not state a claim for discrimination "even if all of Plaintiffs' allegations are taken as true," Defs.' Objection 2, fails in light of the above explanations of how the Memorandum and Recommendation correctly identified the elements of a reverse-redlining claim, and correctly determined that Plaintiffs' allegations satisfied all of those elements and the ECOA's other applicable requirements.

III. CONCLUSION

For the foregoing reasons, Defendants' objections should be rejected and the Memorandum and Recommendation should be adopted in full.

[3] Defendants' objection that Plaintiffs fail to allege "that residents, African-American or otherwise, of the area [near the dealerships' locations] make up the majority of the Dealerships' customer base," Defs.' Objection 2, is a red herring. Plaintiffs specifically alleged that "[a]t all times relevant to this Complaint, a significant majority of the Dealerships' customers have been African American." Complaint ¶ 12.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

Dated: May 9, 2014

ANNE M. TOMPKINS
United States Attorney
Western District of North Carolina

PAUL B. TAYLOR
Assistant United States Attorney
Chief, Civil Division
State Bar No. 10067
Room 233, U.S. Courthouse
100 Otis Street
Asheville, North Carolina 28801
Phone: (828) 271-4661
paul.taylor@usdoj.gov

JOCELYN SAMUELS
Acting Assistant Attorney General
Civil Rights Division

/s/ Daniel P. Mosteller
TAMICA H. DANIEL
DANIEL P. MOSTELLER
Attorneys
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Northwestern Building
Washington, D.C. 20530
Phone: (202) 305-0053
Fax: (202) 514-1116
Daniel.Mosteller@usdoj.gov
N.C. Bar No. 36958
Attorneys for Plaintiff

FOR THE STATE OF NORTH CAROLINA:

Dated: May 9, 2014

STATE OF NORTH CAROLINA
ex rel. ROY COOPER,
ATTORNEY GENERAL

/s/ Torrey D. Dixon
TORREY D. DIXON
Assistant Attorney General
Consumer Protection Division
114 West Edenton St.
Raleigh, NC 27602
(919) 716-6030
tdixon@ncdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filings to the following:

Kathleen K. Lucchesi
Johnston, Allison & Hord, P.A.
P.O. Box 36469
Charlotte, North Carolina 28236

Brian S. Cromwell
Parker Poe Adams & Bernstein, LLP
401 S. Tryon Street, Suite 3000
Charlotte, North Carolina 28202

Counsel for Defendants

Respectfully submitted,

/s/ Daniel P. Mosteller

Attorney for Plaintiff
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Northwestern Building
Washington, D.C. 20530
Phone: (202) 305-0053
Fax: (202) 514-1116
Daniel.Mosteller@usdoj.gov
N.C. Bar No. 36958