No. 22-3094

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Jean Robert Saint-Jean, Edith Saint-Jean, Felex Saintil, Yanick Saintil, Linda Commodore, Beverley Small, Jeanette Small, and Felipe Howell, Jr., as Administrator of the Estate of Felipe R. Howell

Plaintiffs-Appellees,

v.

Emigrant Mortgage Company, Emigrant Bank,

Defendants-Appellants

Emigrant Savings Bank-Manhattan, Emigrant Bancorp, Inc.,

Defendants.

On Appeal from the United States District Court for the Eastern District of New York, Case No. 11-cv-2122, Hon. Margo K. Brodie

BRIEF OF AMICUS CURIAE CONSUMER FINANCIAL PROTECTION BUREAU IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF AMICUS

Congress passed the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 et seq., to prohibit creditors from discriminating against applicants with respect to all aspects of credit transactions on a prohibited basis, including race, color, and national origin. The Consumer Financial Protection Bureau ("Bureau" or "CFPB") has authority to enforce ECOA and to interpret and issue rules under the statute. *See* 15 U.S.C. §§ 1691b(a), 1691c(a)(9), 1691e(e). The Bureau's rules implementing ECOA are known as Regulation B. *See* 12 C.F.R. pt. 1002.

Plaintiffs-Appellees alleged, and a jury found, that Defendants-Appellants violated ECOA by targeting Black and Latino borrowers and neighborhoods with predatory mortgage products. On appeal, Defendants argue that Plaintiffs' ECOA claims are untimely and that the district court's jury instructions relieved Plaintiffs of their burden of proof under ECOA. Defendants also argue that two Plaintiffs should be bound to a loan modification agreement that waived any and all claims against Emigrant. As the agency primarily responsible for interpreting, implementing, and enforcing ECOA, the Bureau has an interest in safeguarding private litigants' ability to exercise their statutory right to enforce ECOA and in advancing a proper understanding of ECOA's legal standards. The Bureau also has an interest, as the primary consumer protection agency with jurisdiction over a

wide swath of the mortgage market, in promoting federal public policy that protects consumers from predatory and discriminatory mortgage products.

STATEMENT

I. Historical Background of Discriminatory and Predatory Mortgage Lending

For many American families, homeownership is the principal means of building wealth. Yet credit discrimination has long plagued the housing market, contributing to persistent racial disparities in homeownership rates and net worth.

In the last century, discrimination often occurred in the denial of credit. A common practice was "redlining," which arose out of a New-Deal homeownership program that created color-coded maps to rank the loan worthiness of neighborhoods, with red signifying the riskiest. These maps made it difficult for people in those red areas—which were predominantly Black neighborhoods—to obtain loans, in effect "redlining" them from credit. Although redlining has been illegal for decades, it still goes on today. *See DOJ Order Trident Mortgage Company to Pay More Than $22 Million for Deliberate Discrimination Against Minority Families*, CFPB (July 27, 2022), https://tinyurl.com/4rt8b4uc; *Consumer Financial Protection Bureau and Department of Justice Action Requires Bancorpsouth to Pay $10.6 Million to Address Discriminatory Mortgage Lending Practice*, CFPB (June 29, 2016), https://tinyurl.com/bdcmstcz.

More recently, discrimination evolved from outright denials of credit into the subtler practice of targeting predatory credit products and practices. This is in part because redlining creates "a credit-vacuum filled by predatory lenders" who know "that the residents are a captive market with no access to reasonably-priced credit." *Equity Predators: Stripping, Flipping and Packing Their Way to Profits, Hearing Before Special Comm. on Aging*, 105th Cong. 86 (1998) (statement of William J. Brennan, Jr., Atlanta Legal Aid Society, Inc.). One such predatory practice is "equity stripping," which is "extending a loan based on the equity accrued in a home and not the ability to repay the loan, or making a loan that is intended to fail." *Id.* at 4 (statement of Sen. John Breaux). The pattern of equity-stripping typically unfolds when homeowners "have limited incomes but have developed equity in their home," which provides "security for sizeable second mortgage loans." S. Rep. No. 103-169, at 22 (1993). Creditors then "'hustle[]' them into taking out non-purchase money mortgages with extremely high interest rates, fees, or both." *Id.* Often, homeowners are "misled about the payment schedule or were even unaware that they signed a mortgage agreement." *Id.* And while creditors "'skim[]' equity from the neighborhoods through high-rate, high fee loans," these homeowners "struggle to meet overwhelming mortgage payments," until finally "the struggle culminates in the borrower's loss of his or her home through foreclosure." *Id.*

The targeting of these predatory products perpetuated racial disparities. Often "mortgage originators targeted minorities for subprime mortgages even when these borrowers might have qualified for lower cost prime mortgages." S. Rep. No. 111-176, at 14 (2010). Studies showed that "low-to moderate-income African Americans were at least twice as likely as low-to moderate-income whites to receive high-cost loans." *Predatory Lending and Reverse Redlining: Are Low-Income, Minority and Senior Borrowers Targets for Higher-Cost Loans?, Hearing Before the Joint Econ. Comm.*, 111th Cong. 4 (2009) (statement of Rep. Elijah E. Cummings). And when the 2007-08 financial crisis hit, "minority homeownership rates [fell] at a much faster pace than for non-minority homeowners." *Id.* at 1 (statement of Rep. Carolyn B. Maloney, Chair). In other words, those same communities once deprived of credit through redlining were now targeted with predatory products and lending practices, in what has been called "reverse redlining," or more generally "discriminatory targeting" or "predatory targeting."

II. Statutory Background

a. ECOA. Congress enacted ECOA in 1974 because it recognized "a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status." Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, § 502, 88 Stat.

1500, 1521 (1974). Further, Congress found that "[e]conomic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination." *Id.* So the purpose of ECOA was to "require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status." *Id.* While ECOA originally applied only to discrimination on the basis of sex and marital status, Congress later expanded the prohibited bases to "establish[] as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness." S. Rep. 94-589, at 3 (1976). Thus, under ECOA, it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction … on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a).[1]

After ECOA was enacted, the Board of Governors of the Federal Reserve System issued regulations to carry out the purposes of ECOA, collectively known as Regulation B. 40 Fed. Reg. 49,298 (Oct. 22, 1975). The Board later amended

[1] Other federal laws prohibit discrimination in the housing market, such as the Fair Housing Act ("FHA") and its implementing regulations. This brief, however, addresses only those statutes for which the Bureau has authority to interpret and enforce.

Regulation B, and as relevant here, specified that ECOA's legislative history demonstrated that Congress intended an "effects test" to apply to a creditor's determination of creditworthiness. 50 Fed. Reg. 48,018, 48,030 (Nov. 20, 1985). Additionally, the Board added official staff commentary and interpretations to Regulation B, where the Board elaborated on the legislative history and standard for the effects test under ECOA. *Id.* at 48,050. In 2010, after Congress transferred primary rulemaking responsibility under ECOA to the Bureau, the Bureau republished the Board's Regulation B as its own and without material change. 76 Fed. Reg. 79,442 (Dec. 21, 2011) (promulgating 12 C.F.R. pt. 1002).

b. Dodd-Frank Act. As part of its response to the financial crisis, Congress sought to rein in predatory practices and products by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Specifically, Congress recognized that many loans "were made with little or no regard for a borrower's understanding of the terms of, or their ability to repay, the loans." S. Rep. No. 111-176, at 12 (2010); *see also Hearing Joint Econ. Comm.*, 111th Cong. 3 (statement of Rep. Kevin Brady) ("[L]enders took advantage of unsophisticated families by placing them in subprime mortgage loans they didn't understand.").

Thus, Congress set new "minimum standards for residential mortgage loans," such as requiring mortgage lenders to reasonably assess borrowers' ability

to repay and prohibiting lenders from compelling borrowers to agree to arbitrate or waive their right to pursue certain claims in court, among other things. 124 Stat. at 2142 (codified at 15 U.S.C. § 1639c(a), (e)). In doing so, Congress sought "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive." *Id.* at 2139 (codified at 15 U.S.C. § 1639b(a)(2)). Congress also established the Bureau and authorized it to ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination." *Id.* at 1980 (codified at 12 U.S.C. § 5511(b)(2)).

III. Factual and Procedural Background

a. Factual background. Plaintiffs are Black residents living in New York City who refinanced their mortgages with Emigrant's STAR NINA loans between 2004 and 2009.[2] NINA stands for no-income, no-assets, meaning Emigrant did not require proof of income or assets when determining whether borrowers were qualified. Tr. 69. While other lenders offered NINA loans to people with high credit scores (in the 800s or high 700s) who might have difficulty verifying their sources of income, such as those who are self-employed or whose assets are difficult to value, Emigrant directed these loans to individuals with low credit

[2] The description of facts herein is based on the district court's post-trial order, ECF No. 618, and the evidence produced in the 2016 trial, Trial Tr. 1-3205.

scores (600 and below) who were at a higher risk of default. Tr. 67-71, 2162. Emigrant's NINA loans had a default interest rate of 18 percent—a rare feature for mortgage loans—which activated once borrowers missed a single payment. Tr. 71. For borrowers already struggling to make monthly payments, that interest rate essentially guaranteed they would never catch up on payments. Tr. 84-85. Despite these risks to borrowers, Emigrant incentivized brokers to bring in more STAR NINA loans. Tr. 823, 930, 1608-09.

Predictably, Emigrant's default rate for NINA loans escalated, approaching 50 percent, well above industry standards of 3 to 6 percent. Tr. 86-87, 1966-67. And while the default interest rate was in effect, Emigrant collected more and more interest costs, effectively stripping more and more equity, before ultimately foreclosing on the loan. Tr. 80-81. In any given year, Emigrant's foreclosure rate was about 15 percent, well above the industry average of 3 or 4 percent. Tr. 201-02. Yet while these loans failed consumers, Emigrant continued to make money because it ensured that NINA borrowers had enough equity in their homes for Emigrant to recover the loan amount after default or foreclosure. Tr. 73, 528-30, 855-56, 1637-38.

Emigrant targeted its STAR NINA loans to Black and Latino borrowers and neighborhoods. The majority of Emigrant's advertising (82 percent) was in newspapers circulating in areas with a high Black or Latino population, and nearly

all of the human images in its advertisements (96 percent) were of Black or Latino individuals. Tr. 1222-23. Emigrant also recruited people of color to its sales force to establish business in minority communities. Tr. 566-68, 1630-31. The targeting worked: in census tracts where just 0 to 10 percent of the residents were Black or Latino, 23 percent of Emigrant's refinance loans were STAR NINA loans; but in census tracts that were 80 to 100 percent Black or Latino, 45 percent of the refinance loans were STAR NINA loans. Tr. 353-54. Further, Black borrowers were 1.4 times more likely than non-Hispanic white borrowers to get a predatory loan from Emigrant. Tr. 362.

Plaintiffs were in the dark about Emigrant's predatory products and practices. Often, Plaintiffs were not given loan documents prior to closing. Tr. 234, 1076-77. Yet on the day of closing, Plaintiffs were handed stacks of documents, told not to read anything, and rushed into signing. Tr. 237, 273, 313, 643-44, 1080-81, 1086, 1307-09. None of the loan terms were explained, not even the 18 percent default interest rate. Tr. 647, 1085-86, 1094, 1308. Though some Plaintiffs expressed concerns about the closing process, they continued along as they were offered assurances that attorneys were representing their interests (they weren't), Tr. 236, 642-43, 1482-83, or promises that loan terms would improve (they didn't), Tr. 1494, 1087-90. Some of the Plaintiffs' loan documents even included forged signatures. Tr. 738, 1762-64, 1369. After closing, Plaintiffs inevitably fell behind

on payments, triggering the 18 percent default interest rate. Plaintiffs tried to make timely payments, yet they could never catch up because their incomes were too low to manage the ballooning payments. Tr. 1091-92, 1309-12. Ultimately, several Plaintiffs lost their homes and all lost the equity they had spent years acquiring.

b. Procedural background. Plaintiffs filed suit in 2011, alleging violations of ECOA and other laws. Emigrant moved to dismiss and, as relevant here, argued that Plaintiffs' ECOA claims were not timely because the loan transactions took place outside the two-year statute of limitations period. ECF No. 4 at 12.[3] The district court denied the motion, finding that Plaintiffs' claims were subject to equitable tolling. ECF No. 258.

Emigrant later moved for summary judgment, renewing its timeliness argument. The district court denied the motion, finding a genuine dispute as to material facts. ECF No. 490. The case proceeded to trial, and the jury determined by a preponderance of the evidence that Emigrant had violated ECOA. ECF No. 518. The jury awarded compensatory damages to Plaintiffs, but the jury also found that two Plaintiffs were not entitled to any damages because they had released their claims against Emigrant in a loan modification agreement. *Id.*

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[3] At the time of filing the lawsuit, the statute of limitations for private actions brought under ECOA was two years, but with the passage of the Dodd-Frank Act, Congress extended the statute of limitations for private actions to five years. *See* 124 Stat. at 2085 (amending 15 USCA § 1691e(f)).

Following trial, both Plaintiffs and Emigrant filed post-trial motions. As relevant here, Emigrant challenged the jury instructions and again renewed its argument on timeliness, while Plaintiffs argued that the release provision in the loan modification agreement was unenforceable as a matter of public policy. In ruling on the motions, the district court rejected Emigrant's arguments about the jury instructions and timeliness, but the court ruled in favor of Plaintiffs that the loan modification was void as against public policy and ordered a new trial on damages. ECF No. 618. The jury subsequently awarded compensatory damages, ECF No. 732, and the court entered a final judgment, ECF No. 780.

SUMMARY OF ARGUMENT

ECOA prohibits creditors from engaging in discriminatory targeting—that is, creditors cannot target unfair or predatory loan products or practices to people on a prohibited basis. A jury found Emigrant had engaged in just this kind of unlawful conduct when it targeted Black and Latino borrowers with predatory loans that were designed to fail. This Court should reject Emigrant's efforts to escape the jury's verdict.

First, Plaintiffs' ECOA claims are timely under equitable tolling. Specifically, Emigrant concealed the existence of Plaintiffs' cause of action, preventing them from learning of their claim within the statutory period, by

engaging in a discriminatory-targeting scheme that is inherently self-concealing and by taking affirmative steps to prevent Plaintiffs' discovery of their claims.

Second, the district court's instructions adequately informed the jury of the legal standards for both intentional discrimination and disparate impact under ECOA. While Emigrant attempts to scrutinize the court's instructions line-by-line and word-by-word, the court's instructions, viewed as a whole, were not misleading or confusing.

Finally, a waiver of federal civil rights claims in a take-it-or-leave-it loan modification agreement violates federal public policy. There is a public policy against waivers of claims in mortgage-related loans and in loan modification agreements outside of settlement or litigation. And waivers of claims are especially damaging in light of ECOA's critical protections against discrimination. Enforcing such waivers undermines the public policies embodied in civil rights and consumer protection laws.

ARGUMENT

I. Plaintiffs' Discriminatory Targeting Claims Are Subject to Equitable Tolling

The district court correctly held that Plaintiffs' claims were timely under equitable tolling. Equitable tolling "permits a court to pause a statutory time limit when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Cal. Pub. Emps.' Ret.*

Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2050 (2017) (cleaned up). This Court has held that equitable tolling is appropriate "[w]here defendant is responsible for concealing the existence of plaintiff's cause of action," a doctrine sometimes referred to as "fraudulent concealment," though defendant's conduct "need not be actually fraudulent." *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 323 (2d Cir. 2004). The relevant question under this doctrine is "whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action." *Id.*

When a district court applies equitable tolling, this Court reviews legal conclusions de novo, factual findings for clear error, and the ultimate decision for an abuse of discretion. *Phillips v. Generations Fam. Health Ctr*., 723 F.3d 144, 149 (2d Cir. 2013). And in reviewing a district court's denial of a post-verdict motion for judgment as a matter of law, this Court will "consider the evidence in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences that the jury might have drawn in its favor." *Madeira v. Affordable Hous. Found., Inc*., 469 F.3d 219, 226-27 (2d Cir. 2006).

Emigrant does not challenge the district court's application of equitable tolling to ECOA. Nor could it. The Supreme Court has held that "time bars in suits between private parties are presumptively subject to equitable tolling." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630 (2015). Instead, Emigrant argues

that equitable tolling does not apply here because Plaintiffs cannot establish that Emigrant concealed the existence of the cause of action. Defendants-Appellants Br. at 32-33. But Plaintiffs have met this burden by showing that Emigrant engaged in conduct that "was of such a nature as to be self-concealing" and took "affirmative steps to prevent the plaintiff's discovery of his claim or injury." *See State of N.Y. v. Hendrickson Bros*., 840 F.2d 1065, 1083 (2d Cir. 1988).[4]

To start, discriminatory targeting is inherently self-concealing. In *Hendrickson Brothers*, this Court held that collusive bid-rigging is self-concealing because it is designed to endure over a period of time, and so must remain concealed from the victims of the collusive bids. *Id.* at 1084. Discriminatory targeting is akin to bid-rigging. The scheme is designed to endure so that creditors can capitalize on predatory loan terms and high foreclosure rates over a period of time. And to succeed, its predatory design must remain concealed from the victims of the targeting. Moreover, a victim of discriminatory targeting has no way of becoming aware, until meeting with counsel or other victims, of not only the predatory nature of the scheme but also its discriminatory nature. For these reasons, many district courts have found discriminatory targeting schemes to be self-concealing and subject to equitable tolling. *See M & T Mortg. Corp. v. White*,

[4] Emigrant also argues that Plaintiffs did not exhibit due diligence in pursuing their claims. The Bureau takes no position on this fact-based inquiry and limits its discussion to the legal principles of equitable tolling and ECOA.

736 F. Supp. 2d 538, 555-56 (E.D.N.Y. 2010); *Council v. Better Homes Depot, Inc*., No. 04–CV–5620, 2006 WL 2376381, at *9 (E.D.N.Y. Aug. 16, 2006); *Phillips v. Better Homes Depot Inc*., No. 02–CV–1168, 2003 WL 25867736, at *25 (E.D.N.Y. Nov. 12, 2003).

Nonetheless, Emigrant argues that its scheme is not self-concealing because all the credit terms were disclosed to Plaintiffs at the time of closing. Br. at 45. But just as a bid-rigging scheme is not revealed when only the bid is shared, neither is a discriminatory targeting scheme revealed when only the loan terms are shared. That's because this scheme is about more than loan terms; it is about Emigrant's entire equity-stripping business model behind the scenes—*i.e*., that Emigrant targeted people with low credit scores and high equity in their homes for loans that were designed to fail. Further, an inherent element of the scheme is taking advantage of unsuspecting consumers who are the least likely to understand the bad deal they are getting. *See* S. Rep. No. 111-176, at 12 (2010) (noting predatory loans "were made with little or no regard for a borrower's understanding of the terms"). By targeting these consumers, Emigrant sought to pass off a predatory product as a traditional credit option, which is an inherently self-concealing scheme, like passing off "a fake vase sold as a real antique" or "a collusive bid purporting to reflect genuine competition," *Hendrickson Bros*, 840 F.2d at 1083.

Even more, Emigrant engaged in affirmative acts that concealed the cause of action. An act of concealment can include a failure to disclose information, *see Veltri*, 393 F.3d at 324, or affirmative misrepresentations, *Hobson v. Wilson*, 737 F.2d 1, 37 n.113 (D.C. Cir. 1984). Emigrant argues that Plaintiffs did not provide "any evidence that Emigrant engaged in affirmative concealment." Br. at 42. Not so. A review of the trial record shows numerous affirmative acts, such as burying predatory terms within large stacks of papers, rushing Plaintiffs to sign documents without reading them, making false assurances that those present at closing would represent their interests, misrepresenting loan terms, and forging signatures on loan documents. That Emigrant provided the loan terms in a large stack of paperwork does not undermine Emigrant's acts to prevent Plaintiffs from learning about those terms before it was too late. Viewing the evidence in the light most favorable to Plaintiffs, any one of these acts constitutes an affirmative act of concealment.

Because a reasonable plaintiff under these circumstances would not have been aware of the existence of a cause of action due to Emigrant's self-concealing scheme and affirmative acts of concealment, the district court was within its discretion to equitably toll Plaintiffs' claims.

II. The Jury Instructions Adequately Informed the Jury of ECOA's Legal Standards

The district court instructed the jury that Plaintiffs could prove a violation of ECOA through one of two legal theories: intentional discrimination and/or

discriminatory effect.[5] The court then instructed the jury on the specific standards for these theories, and the jury returned a verdict finding Emigrant liable for violating ECOA. Emigrant now challenges the specific wording in the court's instructions to avoid that liability.

Jury instructions are reviewed de novo. *Hester v. BIC Corp.*, 225 F.3d 178, 186 (2d Cir. 2000). "A jury charge is erroneous if the instruction misled the jury as to the proper legal standard or did not adequately inform the jury of the law." *Id.* This Court examines a jury instruction "in its entirety, not scrutinized strand-by-strand," *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 154 (2d Cir. 2014), and will reverse "only if all of the instructions, taken as a whole, caused the defendant prejudice." *Hester*, 225 F.3d at 186. Here, the jury instructions adequately informed the jury on the standards for liability under ECOA.[6]

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[5] These standards of liability are well-established for discriminatory targeting claims. *See Hargraves v. Cap. City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000), *on reconsideration in part*, 147 F. Supp. 2d 1 (D.D.C. 2001) ("In order to show a claim based on reverse redlining, the plaintiffs must show that the defendants' lending practices and loan terms were 'unfair' and 'predatory,' and that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race."); *see also U.S. ex rel. Cooper v. Auto Fare, Inc.*, No. 3:14-CV-0008-RJC, 2014 WL 2889993, at *3 (W.D.N.C. June 25, 2014) (citing *Hargraves*); *Horne v. Harbour Portfolio VI, LP*, 304 F. Supp. 3d 1332, 1339 (N.D. Ga. 2018) (same); *Carroll v. Walden Univ.*, LLC, No. 1:22-CV-00051-JRR, 2022 WL 17252556, at *9 (D. Md. Nov. 28, 2022) (same).

[6] ECOA is one part of a coordinated framework of federal civil rights laws enacted to end discrimination, and thus interpretations of parallel laws are helpful to

a. Intentional Discrimination. It is black-letter law that discrimination is intentional if "race is even one of the motivating factors," and thus a plaintiff need not show that race is "the sole motivating factor." *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1042 (2d Cir. 1979); *see also Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 616 (2d Cir. 2016) ("[I]f one of the motivating factors for an act was unlawful, the act violated the FHA."). Further, when proving intentional discrimination, a plaintiff "need not show that the defendant acted with racial animus." *Weiss v. La Suisse*, 141 F. App'x 31, 33 (2d Cir. 2005); *see also Beal v. Lindsay*, 468 F.2d 287, 288 (2d Cir. 1972) (recognizing that discrimination "violates the equal protection clause, even without direct proof of bad faith, ill will or any evil motive" (cleaned up)); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (recognizing that defendant could be liable for intentional discrimination under Title VII and 42 U.S.C. § 1981 even though "there was no suggestion below that the [defendant] held any racial animus against or denigrated [B]lacks generally."), *superseded by statute on other grounds*, 28 U.S.C. § 1658.

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understanding the legal standards under ECOA. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2516-19 (2015) (relying on interpretations of Title VII to interpret the FHA); *Francis v. Kings Park Manor, Inc.*, 992 F.3d 67, 73 & n.17 (2d Cir. 2021) (noting the application of Title VII's McDonnell-Douglas standard to various antidiscrimination laws); *Rowe v. Union Planters Bank of Se. Missouri*, 289 F.3d 533, 535 (8th Cir. 2002) (using same prima facie case for FHA and ECOA claim).

Against this backdrop, Emigrant argues that the court's jury instructions on intentional discrimination were erroneous for two reasons: (1) the court said that Plaintiffs must show that race was a "motivating factor" rather than a "significant factor" for Defendants' conduct, and (2) the court said that Plaintiffs did not need to prove that Defendants acted with "racial animus."

On the first point, the court correctly instructed the jury that Plaintiffs must establish that Emigrant's conduct "was motivated, at least in part, by race, color, or national origin." ECF No. 522 at 33. The court further explained that Plaintiffs "are only required to show that race, color, or national origin was one motivating factor," meaning that "race, color, or national origin need only have played some role in Defendants' conduct." *Id.* This instruction is entirely consistent with this Court's elucidation of the standard that "a plaintiff bears the burden of proof in showing that the adverse action was *motivated, at least in part*, by an impermissible reason." *Mhany Mgmt.*, 819 F.3d at 613 (cleaned up) (emphasis added). And contrary to Defendants' argument otherwise, any difference in wording between "motivating" or "significant" is inconsequential. *See Luciano v. Olsten Corp.*, 110 F.3d 210, 219 (2d Cir. 1997) ("[A]ny divergence between the meaning of 'motivating' and 'determinative' as used by the district court in its jury charge was merely a distinction without a difference"); *Owen v. Thermatool Corp.*,

155 F.3d 137, 139 (2d Cir. 1998) ("The words 'substantial' and 'motivating' are reasonably interchangeable or at least have considerable overlap.").

On the second point, the court also correctly instructed the jury that Plaintiffs need not prove that Emigrant acted with racial animus, which the court said means "hatred or dislike for a particular racial or ethnic group." ECF No. 522 at 33. While Emigrant seizes on this Court's use of the word "animus" in *Mhany Management* to argue that plaintiffs *must* rely on animus to prove their claim, Emigrant neglects to include the entire quoted passage, which is that "a plaintiff *can* establish a prima facie case of disparate impact by showing that animus against the protected group was a significant factor" in the decision, *Mhany Mgmt.*, 819 F.3d at 611 (emphasis added) (cleaned up). What's more, while this court has used the word "animus" interchangeably with other words expressing discriminatory intent, s*ee Mhany Mngmt.* 819 F.3d at 606, 615 (describing plaintiffs' burden as proving "animus against the protected group," "discriminatory intent," or "discriminatory motive"); *Francis*, 992 F.3d at 73 (describing plaintiffs' burden as proving "discriminatory intent" or "racial animus"), this Court has never suggested that a plaintiff must prove animus as the district court below used it—meaning hatred or dislike for a particular racial or ethnic group. Indeed, other courts have consistently rejected the notion that plaintiffs in discrimination claims must prove such animus. *See, e.g.*, *Hassan v. New York*, 804 F.3d 277, 298 (3d Cir. 2015), *as*

amended (Feb. 2, 2016) ("'[I]ntentional discrimination' need not be motivated by 'ill will, enmity, or hostility' to contravene the Equal Protection Clause."); *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 n.7 (11th Cir. 1999) ("[I]ll will, enmity, or hostility are not prerequisites of intentional discrimination."); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) ("[A] plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination …."); *Garza v. Cnty. of L.A.*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) ("[T]here can be intentional discrimination without an invidious motive.").

In short, the court's instructions on intentional discrimination, examined as a whole, adequately informed the jury of the law and properly focused the jury on its "ultimate task" for an intentional discrimination claim—"determin[ing] whether race was a motivating factor" for Defendants' actions. *See Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 154 (2d Cir. 2010).

ii. Disparate Impact. This Court uses a burden-shifting framework for analyzing disparate-impact claims. First, the plaintiff must establish a prima facie case by showing "a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." *Mhany Mgmt.*, 819 F.3d at 617. Next, the defendant "may rebut the prima facie case by proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant."

Id. (cleaned up). And finally, the burden "shifts back to the plaintiff to show that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." *Id.* (cleaned up). In enunciating this standard, this Court relied on its own precedent and showed deference to the agency's regulation interpreting disparate-impact liability under the FHA. *Id.*; *see also* 24 C.F.R. § 100.500(c). Under ECOA, a similar burden-shifting standard applies for assessing disparate-impact liability. *See* 12 C.F.R. pt. 1002, Supp. I, cmt. 1002.6(a)-2.

Here, the jury instructions closely mirrored this Court's iteration of the disparate-impact framework. Nonetheless, Defendants raise three issues with the instructions: (1) the absence of the word "disproportionate" in assessing the impact, (2) the absence of the word "available" in assessing the alternatives, and (3) the lack of instructions on causation.

First, Defendants argue that the absence of the word "disproportionate" materially altered the disparate-impact standard. Br. 4-5. To the contrary, this Court has repeatedly recognized that a plaintiff can make out a prima facie case by showing a "significantly adverse *or* disproportionate impact" on a protected class. *Mhany Mgmt.*, 819 F.3d at 617 (emphasis added) (citing *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 53 (2d Cir. 2002) *and Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003)). Thus, the

district court did not err in instructing the jury that Plaintiffs could prevail by establishing that Defendants' practices had a "substantial adverse impact on African American or Hispanic borrowers." ECF No. 522 at 35.

In any event, the instructions as a whole adequately captured disproportionality. To start, the court opened the jury instructions by stating that Plaintiffs allege that Emigrant made predatory loans "disproportionately to African American and Hispanic neighborhoods." ECF No. 522 at 4. And when the court later provided the legal standard, the court instructed the jury that Plaintiffs had to prove a "discriminatory effect"—in other words, an effect that is unequal, disparate, or disproportionate. Thus, the court adequately described disproportionately. Nevertheless, Emigrant argues that Plaintiffs could not have shown a disproportionate effect because the majority of STAR NINA loans were made to non-Hispanic white borrowers. Br. 46. Yet this Court has made clear that the relevant inquiry is not "the greater absolute number" or whether "a majority of the victims are white," but rather focuses on "proportional statistics." *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir.), *aff'd in part* 488 U.S. 15 (1988). Likewise, Emigrant is wrong to argue that there was no discriminatory effect because the STAR NINA loan was equally bad for everyone. Br. 46. It is settled that a disparate-impact claim stands if the challenged practice adversely affects a significantly higher proportion of protected class members than

non-protected class members, even if that practice is equally bad for all those affected. In *Huntington Branch*, for instance, this Court affirmed a disparate-impact claim based on comparative statistics showing that the proportion of low-income minority residents who would be impacted by a housing development policy was greater than the proportion of white residents who would be impacted by the same policy. *Id.* Here, too, Plaintiffs adduced similar comparative evidence showing, among other things, that the proportion of STAR NINA loans in predominantly minority neighborhoods was nearly double the proportion of such loans in white neighborhoods. Tr. 354. Plaintiffs thus satisfied the standard for a discriminatory effect.

Next, Emigrant argues that the absence of the word "available" in assessing alternatives was erroneous. But again, the jury instructions directly tracked this Court's precedent. In *Mhany Management*, this Court explained that the final step of the burden-shifting standard requires a plaintiff to show that a defendant's interests "could be served by another practice that has a less discriminatory effect." 819 F.3d at 617; *see id.* at 618 (noting the Supreme Court implicitly adopted this approach in *Inclusive Communities*, 576 U.S. at 528). Accordingly, in this case, the court properly instructed the jury that Plaintiffs had to prove that the Defendants' interests "could have been served by another practice that had a less discriminatory effect." ECF No. 522 at 35; *see also* 12 C.F.R. pt. 1002, Supp. I, cmt. 1002.6(a)-2

(noting effects test entails a "legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact"). Though Defendants argue that the jury instructions allowed Plaintiffs to "identify *any* less discriminatory alternative, including alternatives that were utterly impractical or theoretical," Br. at 47, the instructions required Plaintiffs to prove that Emigrant's interest "could have been served" by another practice, which ensures that the practice be plausible.

Third, Emigrant argues that the court did not separately instruct the jury on Plaintiffs' burden to establish a causal link between the challenged practice and the disparate impact. The instructions did, however, provide that Plaintiffs had to prove Emigrant's practice "had a discriminatory effect," meaning that Plaintiffs had to prove that Emigrant's practice "had a substantial adverse impact" and that Emigrant's interest could have been served by another practice that "had a less discriminatory effect." ECF No. 522 at 35. The words "had a discriminatory effect" satisfy the causation requirement. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (describing the "specific causation requirement" as demanding that plaintiffs "show[] that each challenged practice *has a significantly disparate impact*" (emphasis added)), *superseded by statute on other grounds*, 42 U.S.C. §§ 2000e–2(k); *Huntington Branch*, 844 F.2d at 934 (describing a prima facie case as "showing that the challenged practice of the defendant 'actually or

predictably results in racial discrimination; in other words that it *has a discriminatory effect*.'" (emphasis added)). Read as a whole, then, these instructions did not allow the jury to find liability without finding that Emigrant's practices caused the harm, and the absence of more specific instructions on causation "did not render the instructions inadequate or misleading." *See Dist. Council 37, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. N.Y.C. Dep't of Parks & Rec.*, 113 F.3d 347, 357 (2d Cir. 1997).

What's more, Defendants misunderstand the role of the causation requirement. Its purpose is to ensure that "[r]acial imbalance … does not, without more, establish a prima facie case of disparate impact," and thus protects defendants "if the plaintiff cannot point to a defendant's policy or policies causing that disparity." *Inclusive Cmtys.*, 576 U.S. at 542. Here, Plaintiffs do not rely solely on a racial imbalance among Emigrant's STAR NINA borrowers but also point to Emigrant's specific practices—of targeting these loans to individuals with low credit scores and targeting its marketing to Black and Latino neighborhoods and borrowers—as causing those disparities. Indeed, Emigrant does not appear to dispute that the effect of such practices is to cause Black borrowers to take out NINA loans at a higher rate than non-Hispanic white borrowers, and thus the causation requirement is satisfied.

In short, the court's jury instructions as a whole were consistent with ECOA and did not misstate the applicable law or confuse the jury.

III. Broad Waivers of Federal Civil Rights Claims in Take-It-Or-Leave-It Loan Modification Agreements Violate Federal Public Policy

Finally, the district court held that two Plaintiffs' release agreement was void as against public policy. This Court reviews de novo legal questions on contract enforceability. *See United States v. Twenty Miljam-350 IED Jammers*, 669 F.3d 78, 87 (2d Cir. 2011).

"Under both federal and state law, illegal agreements, as well as agreements contrary to public policy, have long been held to be unenforceable and void." *United States v. Bonanno Organized Crime Fam. of La Cosa Nostra*, 879 F.2d 20, 28 (2d Cir. 1989). "Federal 'public policy' is typically found in the Constitution, treaties, federal statutes and regulations, and court cases." *Thomas James Assocs., Inc. v. Jameson*, 102 F.3d 60, 66 (2d Cir. 1996). Recognizing that "courts must not be timid in voiding agreements which tend to injure the public good or contravene some established interest of society," this Court has previously voided an agreement that violates the "strong federal public policy against discrimination by reason of sex" enshrined in the Constitution, Title VII, and the Equal Pay Act. *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 73 (2d Cir. 1982) (cleaned up).

Here, two strong federal public policies are at play. First is the public policy against discrimination on the basis of race, color, and national origin in the housing market, which is codified specifically in ECOA. Indeed, Congress has recognized a "clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness." S. Rep. 94-589, at 3 (1976). Second, there is a public policy against requiring consumers to waive claims as a condition of loan modification agreements related to mortgages. Federal law prohibits waivers of federal causes of action in mortgage-related loans, *see* 15 U.S.C. § 1639c(e)(1), and also prohibits unfair or deceptive acts or practices such as requiring consumers to waive their legal rights in a take-it-or-leave-it fashion or as a condition of receiving loss mitigation unrelated to litigation or settlement, *see* Consent Order, *In re Residential Credit Solutions, Inc.*, 2015-CFPB-0019 (2015); CFPB, Supervisory Highlights 27-28 (June 2021), https://bit.ly/3pNLKzT.[7]

The policies embodied in ECOA and federal consumer financial protection laws would be undermined by upholding a waiver of civil rights claims in a loan modification agreement related to mortgages. The public policy goals of ECOA are

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[7] The public policies underlying these laws were established when Congress passed the Dodd-Frank Act in 2010, and the laws themselves were in effect at the time that Emigrant sought to enforce the agreement in this litigation. *See Baker v. F & F Inv.*, 339 F. Supp. 942, 944 (S.D.N.Y.), *aff'd*, 470 F.2d 778 (2d Cir. 1972).

to prevent discrimination in credit transactions and to compensate victims of discrimination. *See RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 388 (6th Cir. 2014) (private right of enforcement reflects ECOA's "broad remedial goals"). Upholding the Plaintiffs' waiver would "work against both of these policies" of deterrence and compensation, *Stamford Bd. Educ.*, 697 F.2d at 73, especially where there is already "a factual finding of discriminatory conduct," *Gibbs-Alfano v. Burton*, 281 F.3d 12, 22 (2d Cir. 2002). While Emigrant points to a public policy interest in settling disputes, Br. 53, the loan modification was hardly the type of voluntary settlement reached by compromise that courts hold in high regard. Instead, it was part and parcel of Emigrant's discriminatory scheme, allowing Emigrant to continue collecting payments on the loan before finally instituting foreclosure proceedings. Requiring consumers, who are at the brink of foreclosure as a result of being discriminatorily targeted with a designed-to-fail loan, to waive any and all civil rights claims as a condition of staying in their home in another designed-to-fail agreement, does not further the public interest in settlements; it undermines it.

CONCLUSION

For the reasons set forth above, the judgment should be affirmed.

Dated: June 23, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Local Rule 29.1(c) because it contains 6,885 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) and Local Rule 32.1(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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