

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CONSUMER FINANCIAL PROTECTION
BUREAU and THE PEOPLE OF THE STATE
OF NEW YORK, by LETITIA JAMES,
Attorney General of the State of New York,

Plaintiffs,

v.

CREDIT ACCEPTANCE CORPORATION,

Defendant.

Case No.: 1:23-cv-000038 (JHR)

**MOTION OF CONSUMER FEDERATION OF AMERICA, NATIONAL CONSUMER
LAW CENTER, CONSUMER REPORTS, AND EMPIRE JUSTICE CENTER FOR
LEAVE TO FILE *AMICUS* BRIEF IN SUPPORT OF PLAINTIFFS’ OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS**

PLEASE TAKE NOTICE that Consumer Federation of America, the National Consumer Law Center, Consumer Reports, and Empire Justice Center respectfully move for leave to file the accompanying amicus brief, attached hereto as Exhibit A, in support of Plaintiffs’ Opposition to Defendant’s Motion to Dismiss. The basis for amici’s motion and the interest of amici are both set forth in the proposed brief.

Dated: May 22, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May 2023, a true and correct copy of the foregoing was filed with the Clerk of the United States District Court for the Southern District of New York via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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EXHIBIT A

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NATIONAL CONSUMER LAW CENTER, CONSUMER REPORTS, AND
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DEFENDANT'S MOTION TO DISMISS**

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

This brief is submitted by Consumer Federation of America, the National Consumer Law Center on behalf of its low-income clients, Consumer Reports, and Empire Justice Center. Each party advocates for consumer protections in auto- and credit-related issues, particularly for low-income consumers and consumers of color, and has extensive knowledge and expertise regarding the consumer experience of purchasing and financing a motor vehicle.

Consumer Federation of America (CFA) is a national association of over 250 nonprofit organizations that advances the consumer interest through research, advocacy, education, and service. CFA investigates consumer issues and publishes research that assists policymakers and individuals, and it advances pro-consumer legislation at the national and state levels. CFA has worked with federal and state enforcement agencies to provide research and perspective about the need for additional consumer protections in the purchase and financing of motor vehicles.

The National Consumer Law Center (NCLC) is a national nonprofit research and advocacy organization that works for consumer justice and economic security for low-income and other disadvantaged people, including consumers who have purchased and financed motor vehicles. NCLC provides information, legal research, and policy analysis to Congress, state legislatures, administrative agencies, and courts, and has long been a leading advocate for consumers in the auto finance space, striving to protect them against unfair practices. NCLC has a particular interest in this case because it has important implications for low-income people buying cars. NCLC publishes a 21-volume Consumer Credit and Sales Legal Practice Series, including *Unfair and Deceptive Acts and Practices* (10th ed. 2021) and *Automobile Fraud* (7th ed. 2022). NCLC frequently appears as *amicus curiae* in consumer law cases before trial and appellate courts throughout the country. NCLC seeks to bring transparency and fairness to the

markets for cars and car finance. Through its Working Cars for Working Families project, NCLC seeks to ensure that the lack of a car does not stand in the way of families' ability to become economically successful and to promote solutions to help car-ownership efforts for struggling families to get and keep a car.

Consumer Reports (CR) is an independent, nonprofit, and nonpartisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, CR also advocates for laws and corporate practices that are beneficial for consumers. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities facing today's consumers, and provides ad-free content and tools to six million members across the United States. As a core part of its work, Consumer Reports engages in extensive research, testing, and reporting to help consumers make informed choices regarding cars and auto financing, and advocates for strong consumer financial protections in the car-buying process.

Empire Justice Center advocates for consumer protections to advance economic justice. In 1993, Empire Justice Center launched the Greater Rochester Community Reinvestment Coalition to promote access to safe and affordable credit and fair lending patterns in Rochester. Empire Justice Center met with numerous banks and with state and federal regulators during Community Reinvestment Act exams and mergers and submitted dozens of data-driven comments to the regulators responsible for overseeing the banks. Empire Justice Center documented Credit Acceptance Corporation's pattern of abusive subprime auto lending by identifying borrowers with loans designed to fail. Empire Justice Center shared this information

on numerous occasions in testimony and meetings with the New York Attorney General's office, the New York Department of Financial Services, and the Consumer Financial Protection Bureau.

INTRODUCTION AND SUMMARY OF ARGUMENT

As leading advocates for low-income consumers generally, and for those purchasing and financing motor vehicles, *Amici* write to explain three points. First, that even as cars are essential to economic well-being in the United States, escalating costs have made acquiring them an increasingly opaque and risky process, exacerbated when dealers engage in deceptive activities, as the Complaint alleges about Credit Acceptance Corporation (CAC or Defendant). Low-income consumers, such as those the Complaint describes as CAC's typical consumers, are particularly vulnerable because of their relatively low rates of financial literacy and limited understanding of complex financial transactions. Second, that creditor behaviors such as those alleged in the Complaint have been found by numerous courts to be unfair, deceptive, or unconscionable. Finally, contrary to the hyperbolic statements made in the *Amicus* brief provided in support of the Defendant, that if this case were to result in a ruling that the alleged behaviors are illegal, that financing of used cars for low-income borrowers will still be available from the many other creditors currently doing business without engaging in the behaviors alleged in the Complaint.

ARGUMENT

The heart of the factual allegations and claims made in the Complaint filed by the Consumer Financial Protection Bureau (CFPB) and the New York Attorney General is that CAC created a business model to finance the purchase of used vehicles with blatant disregard for

whether the consumer-borrowers could successfully complete these transactions.¹ Indeed, the Complaint alleges that CAC developed an algorithm to determine the percentage CAC could expect to collect from each consumer that would dictate the terms of the transaction with that consumer, including the price for the car, to ensure that CAC profited from each financing transaction.² The result, the Complaint alleges, is that for 39% of the financing made nationwide, and 25% of the financing made in New York State, CAC *expected the borrowers to fail*.

Plaintiffs also allege that CAC's borrowers were typically low-income, with limited credit options,³ and that CAC took unreasonable advantage of these consumers' lack of understanding about the secretly inflated cost of the loans.⁴ Defendant responds by stating that its consumers were capable of understanding the contracts and their own financial situations, and had the ability to compare the price of vehicles offered with CAC to a comparable "Blue Book" value to deduce the disproportionately high price, concluding that consumers therefore had "free and informed choice" to seek a vehicle or financing elsewhere.⁵ However, CAC's arguments are contrary to decades of well-established research about the economic realities of purchasing and financing a vehicle. The effect of CAC's behavior, as alleged by the Plaintiffs, on low-income consumers, for whom access to private transportation is essential yet increasingly out-of-reach, is to compound the difficulties faced by CAC's consumers.

¹ See, e.g., Complaint, *Consumer Fin. Prot. Bureau v. Credit Acceptance Corp.*, Case No. 1:23-cv-00038, at ¶¶ 8, 9 (S.D.N.Y. Jan. 4, 2023) [hereinafter Complaint].

² See *id.* at ¶¶ 25, 26, 27.

³ *Id.* at ¶ 25.

⁴ *Id.* at ¶¶ 183-185.

⁵ Memorandum of Law in Support of Credit Acceptance Corporation's Motion to Dismiss, *Consumer Fin. Prot. Bureau v. Credit Acceptance Corp.*, Case No. 1:23-cv-00038, at 31-32 (S.D.N.Y. Mar. 14, 2023) [hereinafter CAC Motion to Dismiss].

I. The Complaint alleges that CAC exploits the needlessly complex and opaque auto sale and financing process to the detriment of highly vulnerable consumers.

A. Cars are essential but exorbitantly expensive for low-income consumers.

Plaintiffs describe CAC's consumers as highly financially vulnerable, having a median credit score of 546, and a median income of \$35,000.⁶ This median consumer credit score is considered deep subprime by most metrics, and the income level is only approximately \$10,000 higher than the federal poverty line for a family of three.⁷ It is a well-established fact that people rely on cars for economic mobility; but for CAC's highly vulnerable consumers, cars are a means to survival and often the key to escaping poverty.⁸ Cars provide access to work, decrease reliance on public transportation,⁹ contribute to higher household incomes,¹⁰ and they provide access to health care, food security,¹¹ and educational opportunities. Cars are critical for economic mobility, and they facilitate survival for the typical low-income, credit-stressed CAC consumer, such as Ms. B. cited in the Complaint, who earned \$9 per hour while supporting two minor children.¹²

For these lower-income consumers who financed their car through CAC, the purchase of a vehicle is often their most significant financial transaction. For most Americans, only buying a

⁶ Complaint, *supra* note 1, at ¶ 20.

⁷ *Id.*

⁸ Raj Chetty & Nathaniel Hendren, Harvard University and NBER, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* 70 (May 2015), available at https://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf.

⁹ The Chetty & Hendren study showed that shorter commute times, which are often possible only with a car, are one of the strongest factors in helping families escape poverty. *Id.*

¹⁰ See David A. King, Michael J. Smart, & Michael Manville, *The Poverty of the Carless: Toward Universal Auto Access*, 42(3) *Journal of Planning Education and Research* 464–481 (Feb. 2019), available at <https://journals.sagepub.com/doi/abs/10.1177/0739456X18823252>.

¹¹ See Jonathan C. Martinez, Jeanne M. Clark, & Kimberly A. Gudzone, *Preventive Medicine Reports, Association of Personal Vehicle Access With Lifestyle Habits and Food Insecurity Among Public Housing Residents* (Mar. 2019), available at <https://www.sciencedirect.com/science/article/pii/S221133551830158X###>.

¹² Complaint, *supra* note 1, at ¶ 31.

house is more expensive. The cost of vehicles is also steadily increasing, particularly for used vehicles, which CAC primarily finances.¹³ The average price of used cars is now over \$26,000, up approximately 29% in just the past five years, which is only \$9,000 less than the median annual gross income of CAC’s consumers.¹⁴ Even very old cars with substantial mileage have increased significantly in price, and the supply of these vehicles is particularly limited.¹⁵ The negative impact on CAC’s consumers caused by the steady increases in used vehicle prices is exacerbated by the alleged behavior of CAC that further inflates prices.

These increased costs create higher levels of risk for CAC’s borrowers. The average amount financed for car purchases by consumers with very low credit scores (necessitating what is described as “subprime” or even “deep subprime” transactions) has grown to between \$20,325 and \$23,636; and monthly payments for used cars now average over \$500 (a substantial proportion of the income of a consumer such as Ms. B described in the Complaint, who earned \$9 an hour). The average term for these transactions is now over sixty months.¹⁶ Longer payment terms may lower the monthly payments to an amount these consumers can afford, but this also increases their risks. These longer terms on older used cars enlarge the risk that the cars will

¹³ *Id.* at ¶ 1.

¹⁴ Cox Automotive, Data Point, *Spring Selling Season Kicks off Early with Used-Vehicle Supply Low*, (Mar. 17, 2023), available at <https://www.coxautoinc.com/market-insights/used-vehicle-inventory-february-2023/>. See also Nathan Bomey, *Used Car Payments Hit Record \$400 per Month as Prices top \$20,000*, USA Today, Nov. 8, 2018, available at <https://www.usatoday.com/story/money/cars/2018/11/08/used-car-prices/1928840002/>.

In 2023, this average used car sale price of \$26,000 represents 104% of the annual income for a family of three living at the federal poverty line (\$24,860), and well over a third of the annual median income for a family living in the U.S. See Jessica Samega & Melissa Kollar, United States Census Bureau, *Income in the United States 2021*, at Fig. 1 (Sept. 13, 2022), available at <https://www.census.gov/library/publications/2022/demo/p60-276.html>.

¹⁵ See Cox Automotive Data Point, *supra* note 14 (stating that the lower the price the tighter the inventory with vehicles priced under \$10,000 having just a 31-day supply while vehicles priced above \$35,000 had a 49-day supply).

¹⁶ Melinda Zabritski, Experian, *State of the Automotive Finance Market: Q4 2022*, at 37-41 (Apr. 2023), available at <https://www.experian.com/content/dam/noindex/na/us/automotive/finance-trends/2022/q4-2022-experian-auto-finance-trends.pdf>.

mechanically fail before the loans have been repaid, and generally means that, for most of the loan term, consumers will owe more for their cars than they are worth (a situation described as being “underwater”). These factors exacerbate the risk of default, repossession, judgment, and garnishment of income and wages to pay off deficiency balances.¹⁷

The Complaint alleges the high rates of default and the financial harms consumers suffered when they were not able to pay their loan contracts, including the loss of their vehicle and a cycle of remaining debt obligations.¹⁸ For CAC consumers, losing a car also means losing access to jobs, and other facets of economic mobility, contributing to the very cycle of financial distress that Plaintiffs allege brought consumers to CAC at the outset.¹⁹ Plaintiffs allege that CAC has structured a business model to target consumers who are the most likely to need a vehicle²⁰ and the least likely to be able to afford the exorbitantly high prices charged.²¹

B. The existing complexity in the vehicle purchase and financing process is exacerbated by deceptive and abusive practices.

In response to the Plaintiffs’ claims that Defendant’s algorithm that secretly inflated vehicle prices was deceptive and abusive to consumers, Defendant takes the position that its consumers were capable of ascertaining and declining to pay a disproportionately high sales

¹⁷ Zhengfeng Guo, Yan Zhang, & Xinlei Zhao, Office of the Comptroller of the Currency, A Puzzle in the Relation Between Risk and Pricing of Long-Term Auto Loans 2, 4-5, 20 (June 2020), available at <https://www.occ.gov/publications-and-resources/publications/economics/working-papers-banking-perf-reg/pub-econ-working-paper-puzzle-long-term-auto-loans.pdf> (finding motor vehicle financing with six-plus-year terms have higher default rates than shorter-term financing during each year of their lifetimes, after controlling for borrower and loan-level risk factors).

¹⁸ Complaint, *supra* note 1, at ¶ 10.

¹⁹ *Id.* at ¶¶ 88-93.

²⁰ See Adam Hardy, Money, *Who Gets the Option to Work From Home? There’s a Huge Disparity Tied to Income* (June 27, 2022), available at <https://www.nasdaq.com/articles/who-gets-the-option-to-work-from-home-theres-a-huge-disparity-tied-to-income> (noting that while 75% of workers making \$150,000 or more have the option to work from home, only 47% of people earning between \$25,000 and \$49,999 have this option).

²¹ See Complaint, *supra* note 1, at ¶ 25 (alleging that the median CAC borrower had an annual gross income of \$35,000).

price on their own. But the Complaint alleges that CAC hid from them the components that went into the pricing.²² Regardless, CAC’s argument is contradicted by the Federal Trade Commission’s (FTC) extensive research and analysis about how low-income consumers purchase and finance a vehicle.²³ In a 2022 rulemaking proceeding, the FTC described the arduous process involved in purchasing a car:

Buying or leasing a vehicle is not only an expensive endeavor, but the transaction itself is time-consuming and arduous. Consumers who purchase vehicles at a dealership may spend five hours or more—or even days—doing so. And that does not include the time spent visiting dealerships when consumers do not make purchases, or the hours it can take to travel to the dealerships themselves. Consumers may need to take time off work and arrange daycare or take young children to the dealership, and the process can be especially taxing for one-vehicle families who also need their vehicle for commuting and day-to-day tasks like buying groceries and attending medical appointments.²⁴

In this case, Plaintiffs allege that Defendant CAC’s software generates vehicle pricing information based on each consumer’s personal information²⁵ -- information that is not shared with the consumer. CAC’s position that consumers had “free and informed choice” to simply obtain and review a comparable “Blue Book” value to avoid paying CAC’s secretly inflated vehicle prices²⁶ is unrealistic, given the time-consuming, expensive, and confusing array of information currently endemic in the process. It further belies reality to expect that a low-income, credit-stressed consumer is on equal footing with a dealership and one of the largest subprime creditors in the country to simply negotiate a better price. Essentially, CAC is alleged

²² See, e.g., Complaint, *supra* note 1, at ¶¶ 2, 5, 7, 60, 62-64, 67, 69, 76, 87, 131, 175.

²³ Federal Trade Comm’n, Motor Vehicle Dealers Trade Regulation Rule, Notice of Proposed Rulemaking, 87 Fed. Reg. 42,012, 42,012-42,013 (July 13, 2022) [hereinafter FTC NPRM].

²⁴ *Id.* at 42,012-42,013.

²⁵ Complaint, *supra* note 1, at ¶ 48.

²⁶ See CAC Motion to Dismiss, *supra* note 5, at 33-34.

to have deliberately exploited this informational and situational imbalance in ways that are very damaging to its consumers.

However, determining the purchase price charged for the car is only the first part of the transaction. The financing process presents numerous additional opportunities to capitalize on consumers' confusion and lack of bargaining power. Credit transactions by their very nature are complicated and beyond most consumers' ability to understand.²⁷ The overwhelming majority of the population in the United States does not understand how to calculate how much interest will be charged on a simple loan with a specific number of payments.²⁸ Yet the process of financing a vehicle involves multiple separate decisions, each of which impacts the monthly cost and total cost of the transaction. These include the basic purchase price of the car, the interest rate charged, the duration of the financing, the amount of the down payment (and how it will be paid), whether more is owed on a trade-in than it is worth, and if add-ons will be added to the transaction and, if so, at what price.²⁹ Each of these multiple pricing variables is relatively complex, subject to

²⁷ See *Till v. SCS Credit Corp.*, 541 U.S. 465, 481-482, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004) (recognizing that the subprime auto finance market is not “perfectly” competitive and that creditors have much more information about the market than do consumers).

²⁸ National Ctr. for Educ. Statistics, *Adult Literacy in America 100* (Sept. 1993) (the advertisement included all the information necessary to make the calculation: number and amount of monthly payments, and loan principal). Cf. Annamaria Lusardi & Olivia S. Mitchell, *Baby Boomer Retirement Security: The Roles of Planning, Financial Literacy, and Housing Wealth*, 54 J. Monetary Econ. 205, 207, 216 (2007) (fewer than 18% of surveyed adults between the ages of 51 and 56 could calculate compound interest at 10% on \$200 over two years); Macro Int'l Inc., *Design and Testing of Effective Truth in Lending Disclosures 52* (2007), available at <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20081218a8.pdf>; Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Planning: Implications for Retirement Wellbeing*, Pension Research Council, Working Paper No. 1, at 4, 7 (2006) (noting that only 67% of surveyed adults, many over fifty, could correctly determine whether, after five years of interest at 2% on \$100, they would have less than, more than, or exactly \$102), available at <https://pensionresearchcouncil.wharton.upenn.edu/wp-content/uploads/2015/09/PRC-WP-2006-1.pdf>; Danna Moore, Wash. State Univ., Soc. & Econ. Sci. Research Ctr., Tech. Rep. No. 03-39, *Survey of Financial Literacy in Washington State: Knowledge, Behavior, Attitudes, and Experiences* (2003) (finding approximately 30% of respondents do not understand that if interest compounds, it builds on itself), available at <https://www.sesrc.wsu.edu/sesrcsite/papers/files/dfi-techreport-FINAL2-16-04.pdf>.

²⁹ See Consumer Fin. Prot. Bureau, *Consumer Voices on Automobile Financing 3* (June 2016), available at https://files.consumerfinance.gov/f/documents/201606_cfpb_consumer-voices-on-automobile-financing.pdf [hereinafter CFPB Consumer Voices study].

negotiation, yet impacts the costs to consumers.³⁰ These transactions perplex even sophisticated consumers.

Both the FTC and the CFPB have recognized the complexities of auto financing. The FTC's pending rulemaking proposes ways to bring clarity to the auto financing process, because that federal agency has determined that "[p]roviding consumers with accurate and timely pricing and financing information is critical, especially in the context of motor vehicle sales and leasing, where such information has proved singularly confusing to consumers."³¹ Similarly, a CFPB study about the consumer experience of auto financing found that many consumers are baffled by the vehicle financing process.³² The CFPB study explains how each of the single, interrelated pieces of an auto financing transaction (like the interest rate or a longer financing term) can impact multiple parts of the financing arrangement.³³ Notably, even during standard (as opposed to subprime) negotiations about auto financing, the interest rate may change several times.

Defendant CAC is in a powerful position to take unfair advantage of these complexities because lower-income consumers who are desperate to finance the purchase of a vehicle are more likely to take on riskier, expensive credit products without fully understanding the transaction than are more sophisticated consumers. Multiple analyses show that consumers with lower levels of financial literacy are more susceptible to financial abuse and are also the most likely to use the most expensive forms of credit.³⁴ Consumers with less education are also more

³⁰ *Id.* at 4.

³¹ FTC NPRM, *supra* note 23, at 42,022.

³² [CFPB Consumer Voices study](#), *supra* note 29, at 9, 14, 23.

³³ *See id.* at 7-9.

³⁴ This relationship has been studied extensively in the mortgage context. *See, e.g.*, Brian Bucks & Karen Pence, Fed. Reserve Board, Do Homeowners Know Their House Values and Mortgage Terms? 18–22 (2006) (borrowers, particularly low-income borrowers, underestimate caps on life time interest rates in adjustable rate mortgages), available at <http://www.federalreserve.gov/pubs/FEDS/2006/200603/200603pap.pdf>; Consumer Fed'n of Am., Lower-Income and Minority Consumers Most Likely to Prefer and Underestimate Risks of Adjustable Mortgages 3

likely than those with more education not to shop for credit,³⁵ often because they are not aware that credit shopping is possible, or they do not know how to do it. Also, a significant number of consumers who use alternative financial services (such as high-cost credit products) assume that those are their only option. *Amici* know from experience and research that consumers often are not aware of available credit choices and are simply responding to the best-advertised product.

The Complaint alleges that Defendant CAC takes unreasonable advantage of these consumers and implements a marketing strategy designed to capitalize on the insecurity of highly vulnerable consumers who have even less ability to comparison shop.³⁶ The Complaint points to Defendant’s use of advertisements such as “10 Dealerships. 10 Denials. 1 Easy Solution.”³⁷ Plaintiffs allege that consumers respond to CAC’s solicitations believing that their precarious financial situation limits their options for the purchase and financing of a vehicle, and CAC seizes on this business opportunity by training its dealers to emphasize “that CAC is the consumer’s only opportunity to secure financing.”³⁸ The findings by federal agencies and other researchers underscore how these statements impact consumers.

(July 26, 2004) (consumers cannot calculate the increase in the payment in an adjustable rate mortgage, and they minimize the interest rate risk by understating the increase in the payment; problem is present for all categories, but particularly pronounced for younger, poorer, less educated, and non-white consumers), *available at* http://www.consumerfed.org/elements/www.consumerfed.org/file/housing/072604_ARM_Survey_Release.pdf.

³⁵ Finra Investor Educ. Found., *Financial Capability in the United States—2012 Report of National Findings* 22 (May 2013), *available at* <https://finrafoundation.org/sites/finrafoundation/files/NFCS-2012-Report-Natl-Findings.pdf>.

³⁶ Patricia A. McCoy, *Rethinking Disclosure in a World of Risk-Based Pricing*, 44 *Harv. J. on Legis.* 123, 139–149 (2007) (noting that subprime consumers are subject to “risk-based pricing,” whereby they do not receive financing terms until much later in the negotiation process, limiting their ability to effectively comparison shop).

³⁷ Complaint, *supra* note 1, at ¶ 92.

³⁸ *Id.* at ¶ 93.

II. The Complaint has sufficiently alleged that CAC’s conduct is unfair, abusive, and unconscionable.

A. Courts have repeatedly found activities like CAC’s to be illegal.

A critical feature of the wrongdoing alleged in the Complaint is that CAC financed the purchase of motor vehicles without considering consumers’ ability to repay the financing.³⁹ Plaintiffs do not allege that CAC caused this harm by merely *ignoring* the question of whether the consumers could repay. *Rather, the Complaint is centered on how CAC is alleged to have created a lending model that maximizes its own income from the credit extended even when it predicted that a substantial proportion of its consumers would not be able to pay their financing in full.*⁴⁰

Defendant relies heavily on the Truth in Lending Act in response to these allegations, arguing that TILA does not require consideration of consumers’ ability to repay in the context of an auto finance agreement. Defendant contrasts this to mortgage lending, where there is a statutory requirement that lenders affirmatively consider the consumer’s ability to repay.⁴¹ However, the Complaint does not allege that CAC is liable for violations of TILA, and Plaintiffs’ claims are grounded in unfairness, deception, and abuse. Moreover, the CFPB has made it abundantly clear to lenders like CAC that technical compliance with TILA does not insulate them from liability for UDAAP violations.⁴²

³⁹ See, e.g., *id.* at ¶¶ 3 (“CAC’s lending model is indifferent as to a consumers’ [sic] ability to repay loans . . .”) and 28 (“CAC does not use the information it collects from potential borrowers, the score, or the projected net collections to assess the consumer’s ability to repay loans in full.”).

⁴⁰ See *id.* at ¶¶ 26 (“Rather than assess its borrowers’ reasonable ability to repay, CAC uses the personal and financial data that it gathers from them to predict the net expected collections on each transaction.”) and 27 (“The score represents CAC’s best estimate, at origination, of the percentage of total amounts owed that CAC expects to collect.”).

⁴¹ See CAC Motion to Dismiss, *supra* note 5, at section II.

⁴² See CFPB Consumer Laws and Regulations 10, available at https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf (“[A] transaction that is in technical compliance with other federal or state laws may nevertheless violate the

The Complaint explains that CAC uses the information about consumers, derived from the dealers before the credit is extended, to establish an amount that CAC will incentivize the dealer to charge a particular consumer for the car.⁴³ CAC’s analysis of the amount they can expect the consumer to pay to CAC throughout the life of the transaction is thus used to determine the price of the car, rather than its Blue Book value, its condition, or any other objective criteria.⁴⁴

The result, according to data included in the Complaint, is that 39% of CAC’s extensions of credit made nationally and 25% of CAC’s financings made in New York State are expected to fail,⁴⁵ and this projected failure rate is borne out by actual defaults.⁴⁶

There is a name for these transactions: *improvident extensions of credit*. The first obvious question is “Why would a lender do this?” The answer is that the lenders find it profitable to do so, as was evident in the nationwide explosion of irresponsible lending that led to the subprime mortgage meltdown in the early years of the twenty-first century.⁴⁷

CAC argues that the Complaint should be dismissed for failure to state a claim because, *inter alia*, the Complaint asserts “unprecedented theories of deceptive acts and practices under

prohibition against UDAAPs. For example, an advertisement may comply with TILA’s requirements, but contain additional statements that are untrue or misleading, and compliance with TILA’s disclosure requirements does not insulate the rest of the advertisement from the possibility of being deceptive.”).

⁴³ Complaint, *supra* note 1, at ¶¶ 33, 34, 35.

⁴⁴ *Id.* at ¶¶ 46–55.

⁴⁵ *Id.* at ¶ 8.

⁴⁶ *Id.* at ¶¶ 44, 109.

⁴⁷ See, e.g., United States Dep’t of Justice, Press Release, Deutsche Bank Agrees to Pay \$7.2 Billion for Misleading Investors in its Sale of Residential Mortgage-Backed Securities (Jan. 17, 2017), available at <https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed> (“[T]he Bank’s conduct encouraged shoddy mortgage underwriting and improvident lending that caused borrowers to lose their homes because they couldn’t pay their loans.”); Amy Loftsgordon, Nolo, Understanding the Foreclosure Crisis, available at <https://www.nolo.com/legal-encyclopedia/understanding-the-foreclosure-crisis.html> (“In fact, between 2007 and 2012, more than 12 million homes went into foreclosure. What led to this wave of foreclosures? Many factors contributed. But, mainly, the sheer number of abusive, predatory, and unaffordable subprime mortgage loans made in the early 2000s led to the crisis.”).

the Consumer Financial Protection Act of 2010 (“CFPA”), New York General Business Law (“GBL”) § 349 and New York Executive Law (“EL”) § 63(12),”⁴⁸ and that “no statute or regulation requires auto finance companies to consider consumers’ ability to repay.”⁴⁹

These statements are misleading at best. As explained *infra*, many courts have found that improvident extensions of credit violate statutes prohibiting unfair and deceptive trade practices acts (UDAPs), and that deliberately extending credit without considering the borrower’s ability to repay is also illegal.

The CFPB’s authority, articulated in 12 U.S.C. § 5531, to bring enforcement actions concerning unfair, deceptive, or abusive acts or practices (UDAAP) does exclude the sale, servicing, and leasing of motor vehicles (12 U.S.C. § 5519), but it specifically includes Defendant CAC as a covered person that purchased, acquired, and serviced extensions of credit and collected debt related to a consumer financial product (12 U.S.C. § 5481(6), 15(A)(I), 15(A)(x)).

The CFPB’s authorizing statute defines “unfair” by incorporating the definition found in the FTC Act.⁵⁰ The statute provides that the CFPB may consider established public policies in determining whether an act or practice is unfair, but public policy cannot be the primary basis for a determination.⁵¹ The authorizing statute does not include a definition of “deception,” but the Court has applied the longstanding interpretation of the FTC in such instances.⁵² As a result,

⁴⁸ CAC Motion to Dismiss, *supra* note 5, at 3.

⁴⁹ *Id.* at 5.

⁵⁰ 12 U.S.C. § 5531(c)(1).

⁵¹ 12 U.S.C. § 5531(c)(2).

⁵² See *Consumer Fin. Prot. Bureau v. RD Legal Funding, L.L.C.*, 332 F. Supp. 3d 729, 772–73 (S.D.N.Y. 2018) (relying on *CFPB v. NDG Fin. Corp.*, 2016 WL 7188792, at *14 (S.D.N.Y. Dec. 2, 2016), which quotes the elements of deception in *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 303 (S.D.N.Y. 2008)), *aff’d in*

interpretations of state statutes prohibiting UDAPs are relevant to the application of the CFPB's UDAAP authority.

The general prohibitions against unfairness and deception have been used on multiple occasions to declare improvident extension of credit to be illegal.⁵³ Often, the courts have determined that a creditor violated a statutory UDAP prohibition because the creditor “knew or should have known” that the debt would not be repaid.⁵⁴ For example, the Eastern District of New York held that consumers stated a claim by alleging that the defendants induced them to enter into a home mortgage loan by submitting an inflated appraisal and misrepresenting that the

part on other grounds, rev'd in part on other grounds, 828 Fed. Appx. 68 (2d Cir. 2020), *on remand*, 592 F. Supp. 3d 258 (S.D.N.Y. Mar. 16, 2022).

⁵³ *Frappier v. Countrywide Home Loans, Inc.*, 645 F.3d 51 (1st Cir. 2011) (Mass. law); *Young v. Bank of N.Y. Mellon*, 848 F. Supp. 2d 1182, 1192–1194 (D. Haw. Jan. 30, 2012) (allowing consumer to go to trial on claim that lender violated UDAP statute by making unaffordable mortgage loan to older disabled woman); *Solomon v. Falcone*, 791 F. Supp. 2d 184, 190–191 (D.D.C. 2011) (denying motion to dismiss); *Haymer v. Countrywide Bank*, 2011 WL 2790172, at *4 (N.D. Ill. July 15, 2011) (denying motion to dismiss claim that lender and broker violated UDAP statute by giving consumer unaffordable mortgage loan); *Schwartzbaum v. Emigrant Mortgage Co.*, 2010 WL 2484181 (S.D.N.Y. Apr. 22, 2010) (Mag.) (refusing to dismiss UDAP claim; citing allegation that lender offered loan without regard to consumer's inability to repay it), *adopted in relevant part, rejected in part on other grounds*, 2010 WL 2484116 (S.D.N.Y. June 16, 2010); *Johnson v. NovaStar Mortg., Inc.*, 698 F. Supp. 2d 463 (D.N.J. Mar. 15, 2010) (lender may have violated UDAP unconscionability prohibition by funding foreclosure rescue transaction, manipulating appraisal, concealing costs, and issuing mortgage without regard to homeowner's repayment ability); *Gilroy v. Kasper*, 2008 WL 591049 (D.N.H. Mar. 3, 2008) (denying motion to dismiss claim that lender violated prohibition against unfair and deceptive practices by, *inter alia*, making mortgage loan while knowing consumer could not repay it); *Orcilla v. Big Sur, Inc.*, 198 Cal. Rptr. 3d 715 (Cal. App. Ct. 2016) (reversing dismissal of complaint alleging that mortgage loan for which payments exceeded borrowers' income was unconscionable, and its enforcement was UDAP violation); *Drakopoulos v. U.S. Bank*, 991 N.E.2d 1086 (Mass. 2013) (origination of a home mortgage loan that the lender should recognize at the outset that the borrower is not likely to be able to repay violates UDAP statute); *Moronta v. Nationstar Mortg., L.L.C.*, 41 N.E.3d 311 (Mass. App. Ct. 2015) (citing balloon payment, among other things, as indication of unaffordability).

⁵⁴ *Williams v. First Gov't Mortg. & Investors Corp.*, 225 F.3d 738 (D.C. Cir. 2000). *See also Findlay v. Cardwell*, 2013 WL 12343710 (D.D.C. May 16, 2013) (fact question whether loan broker knew that homeowner had no reasonable ability to repay loan); *Carroll v. Fremont Inv. & Loan*, 636 F. Supp. 2d 41 (D.D.C. 2009) (denying motion to dismiss UDAP claim that lender knew or should have known of inflated appraisal and falsified income, imposed numerous unreasonable costs that it knew the borrowers could not afford, and took advantage of consumers' age and disability); *Hughes v. Abell*, 634 F. Supp. 2d 110 (D.D.C. 2009) (denying motion to dismiss claim that creditor violated UDAP statute by making loan that would consume almost half of borrower's income and could adjust upward after two years), *lender's motion for summary judgment denied on same grounds*, 867 F. Supp. 2d 76 (D.D.C. 2012).

payments would be affordable.⁵⁵ Courts have held that making a loan that is doomed to fail is an unfair practice.⁵⁶ A decision from Washington State, *Opportunity Management Co. v. Frost*,⁵⁷ provides in some detail an analysis of a claim for improvident extension of credit. There, a Washington intermediate appellate court upheld a jury’s verdict that a lender committed a UDAP violation by lending money to a borrower it knew did not have the income to repay. Instead, the lender relied on the loan-to-value ratio, *i.e.*, the fact that the value of the property securing the loan was sufficient to repay it. The court applied the FTC definition of unfairness: whether the practice offends public policy; whether it is immoral, unethical, oppressive, or unscrupulous; and whether it causes substantial injury to consumers. The court held that the jury could reasonably conclude that making the loan based on the value of the collateral was unethical or unscrupulous and caused substantial consumer injury. More recently, courts have repeatedly applied unconscionability standards to find loan terms illegal, even when state lending law did not expressly prohibit the charges or terms.⁵⁸

B. Taking advantage of disparate knowledge is also considered unfair.

As described in section I, *supra*, the Complaint alleges that most of CAC’s consumers are low-income “with limited credit options.” As we have explained, consumers with these

⁵⁵ *Vaughn v. Consumer Home Mortg., Inc.*, 2003 WL 21241669 (E.D.N.Y. Mar. 23, 2003). *See also Coveal v. Consumer Home Mortg., Inc.*, 2005 WL 704835 (E.D.N.Y. Mar. 29, 2005) (denying motion to dismiss on similar allegations).

⁵⁶ *Kaur v. World Business Lenders, L.L.C.*, 440 F. Supp. 3d 111 (D. Mass. 2020); *Commonwealth v. Fremont Investment & Loan*, 897 N.E.2d 548 (Mass. 2008).

⁵⁷ 1999 WL 96001 (Feb. 16, 1999).

⁵⁸ *See In re Donohue*, 2020 WL 419727, at *3 (Bankr. N.D. Cal. Jan. 27, 2020) (finding procedural and substantive unconscionability where lender charged 240% interest on a \$4,000 line of credit; loan’s “240% interest rate shocks the conscience”); *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1009–1010 (Cal. 2018) (interest rate is a contract term subject to the unconscionability doctrine even in the absence of a usury ceiling); *Forsythe Fin., L.L.C. v. Yothment*, 2022 WL 3330471 (Ohio Ct. App. Aug. 12, 2022) (reversing dismissal of UDAP claim against credit services organization that arranged a small-dollar loan for a fee of double the loan proceeds; noting that unaffordable lending and excessive price are factors in determining unconscionability under UDAP statute).

characteristics are generally less financially literate and less able to shop for credit. Unfairness can be based not only on disproportionate bargaining power, but also on imbalances of knowledge, such as described in the Complaint. In other words, it is unfair for one party to make claims to induce another into a transaction when there is no reasonable substantiation for those claims.

[W]ith the development and proliferation of highly complex and technical products, there is often no practical way for consumers to ascertain the truthfulness of affirmative product claims prior to buying and using the product. . . . Given the imbalance of knowledge and resources between a business enterprise and each of its customers, economically it is more rational and imposes far less cost on society, to require a manufacturer to confirm his affirmative product claims rather than impose a burden upon each individual consumer to test, investigate, or experiment for himself.⁵⁹

The FTC has also found unfair certain non-deceptive “pure omissions.” That is, even where a seller’s *nondisclosure* is not deceptive, the *nondisclosure* itself can be considered to be unfair.⁶⁰ It is particularly easy to satisfy this unfairness test in the case of *nondisclosures* because the cost to businesses of disclosure is so slight, and because it is difficult for consumers to reasonably avoid the unfairness where the essence of their complaint is that they have not been informed of the problem. Applying this analysis to the instant case, the facts alleged by Plaintiffs are certainly sufficient to support the claim that it was an unfair “omission” for CAC to fail to tell consumers that it believed there was a substantial likelihood that the transaction would end in default, repossession, reduction in credit score, and garnishment of future wages to pay for a car the consumer would no longer possess.

⁵⁹ *In re Pfizer Inc.*, 81 F.T.C. 23, 28-29 (1972) (dismissing complaint).

⁶⁰ *See In re Int’l Harvester Co.*, 104 F.T.C. 949, 1032–33 (1984) (“It is, therefore, found that such acts and practices, in failing to adequately disclose material facts have had the capacity and tendency to mislead members of the public, particularly those [who most need to know of the dangers], and that such acts and practices are to the prejudice and injury of the public and constitute unfair or deceptive acts or practices or unfair methods of competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.”)

Further, an abusive practice—as included in the bases upon which a CFPB action can rely—can include a company taking unreasonable advantage of a consumer’s lack of understanding based on the complexity of applicable laws. For example, a federal court found that the CFPB adequately pleaded this abusive standard where it alleged that borrowers lacked an understanding of the law applicable to the loans in question and how those laws affected repayment obligations.⁶¹ This conclusion was based on the fact that the loans were void under state law and that the creditor sought to collect on these loans, which the consumers did not understand that they did not owe. This was actionable even when the creditor did not interfere with the borrower’s understanding and did not fail to disclose material loan terms, because the court found that the creditor was taking advantage of the consumers’ lack of understanding.

C. Taking advantage of a vulnerable group is illegal.

A 1933 United States Supreme Court case, interpreting “unfair methods of competition,” (the FTC Act was subsequently amended to prohibit “unfair practices”) found unfair the sale of candy involving games of chance because the practice exploits a *category of consumers*—in that case, children—who are unable to protect themselves and because the amount of candy received for the purchase price depends on chance or a lottery, long deemed contrary to public policy.⁶²

⁶¹ See *Consumer Fin. Prot. Bureau v. Think Fin., L.L.C.*, 2018 WL 3707911 (D. Mont. Aug. 3, 2018). See also Proposed Stipulated Final Judgment & Order, *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 1:15-cv-05211-CM (S.D.N.Y. Feb. 1, 2019), available at <https://files.consumerfinance.gov>; Complaint, *Consumer Fin. Prot. Bureau v. Golden Valley Lending, Inc.*, No. 1:17-cv-03155 (N.D. Ill. Apr. 27, 2017), available at <https://files.consumerfinance.gov>; Complaint, *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 1:15-cv-05211-CM (S.D.N.Y. July 31, 2015), available at www.nclc.org/unreported; Consent Order, *Consumer Protection Bureau v. Colfax Capital Corp.*, CFPB No. 2014-CFPB-0009 (July 29, 2014), available at <https://files.consumerfinance.gov>; Complaint, *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. 1:13-cv-13167-GAO (D. Mass. Mar. 21, 2014), available at www.nclc.org/unreported. Cf. *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, 2016 WL 7188792 (S.D.N.Y. Dec. 2, 2016) (finding that practice could be abusive because it materially interferes with consumers’ ability to understand; court did not reach question of whether it takes unreasonable advantage of a consumer’s ability to understand); *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (finding practice deceptive, so not having to reach whether practice was also unfair or abusive).

⁶² *Fed. Trade Comm’n v. Keppel & Bros.*, 291 U.S. 304, 54 S. Ct. 423, 78 L. Ed. 814 (1933). See also *Colgate v. Juul Labs, Inc.*, 402 F. Supp. 3d 728 (N.D. Cal. 2019) (denying motion to dismiss unfairness claim against electronic

Thus, in determining unfairness, precedent dictates that this Court should consider not only public policy, but also the vulnerability of the consumers involved,⁶³ such as the low-income, credit-challenged consumers targeted by CAC.

III. Auto creditors do not need to resort to abusive and deceptive conduct to extend credit to credit-challenged, low-income consumers.

A. Many auto creditors make loans to consumers like CAC’s customers without engaging in the alleged misconduct.

Defendant CAC’s *Amici* argue that the Plaintiffs’ enforcement of the consumer protection regulations as plead in the Complaint would “significantly restrict the availability of credit to consumers, particularly those in the subprime market.”⁶⁴ This argument is simply wrong, as it is rooted in an incorrect characterization of the allegations in the Complaint. Rather than hurting consumers, denying the motion to dismiss and finding that the facts in the Complaint form the basis for claims that Defendant’s conduct was deceptive and abusive will significantly improve the fairness and transparency in the auto credit market for consumers in subprime credit transactions.

The deceptive and abusive conduct pleaded in the Complaint is *not* standard across the industry, and it is certainly not a necessary business model to extend credit for the successful purchase of vehicles by credit-stressed consumers. Banks, credit unions, finance affiliates of large auto manufacturers, and buy-here-pay-here dealers also finance the purchase of cars for these consumers; recent data shows that finance companies as a whole represent only about 12%

cigarette manufacturer for targeting minors by luring them into addiction before they are mature enough to make informed decisions).

⁶³ See, e.g., *Aquilina v. Certain Underwriters at Lloyd’s*, 465 F. Supp. 3d 1088, 1100–1102 (D. Haw. 2020) (refusing to dismiss unfairness complaint; insurers should have been aware of homeowners’ unique vulnerabilities and concerns and should not have provided insurance that excluded lava damage without searching for insurance that provided this coverage).

⁶⁴ *Amicus Curiae* Brief of American Fin. Servs. Ass’n et al., *Consumer Fin. Prot. Bureau v. Credit Acceptance Corp.*, Case No. 1:23-cv-00038, at 19 (S.D.N.Y. Mar. 21, 2023).

of motor vehicle financing in the U.S., while credit unions provide the largest share of auto financing.⁶⁵ Even for consumers with subprime credit scores, large finance companies like CAC provide about 19% of the financing, roughly the same as banks.⁶⁶

Many other lenders that specialize in providing vehicle financing for subprime consumers do so without the need to inflate vehicle prices deceptively and abusively as the Complaint alleges CAC does. Community development financial institution (CDFI) credit unions⁶⁷ also work directly with lower-income, credit stressed consumers to provide access to affordable vehicle financing. For example, the Genesee Co-op Federal Credit Union, a CDFI located in Rochester, New York, recently testified to the New York Department of Financial Services about the success of its auto lending program, which refinances abusive auto loans and makes new loans to credit-challenged consumers with affordable, success-driven terms:

You may hear from other lenders that it is impossible to lend to people at rates similar to ours because of the risk. We have demonstrated over many years, that we are able to have a loan portfolio of auto loans to these exact same people at substantially lower rates that perform exceptionally well. We believe lenders and dealers are not only stripping wealth from low-income New Yorkers but are discriminating specifically against people of color.⁶⁸

⁶⁵ Experian, One in 4 Vehicles Financed by Credit Unions in Q4 2022, as Consumers Search for Lower Interest Rates (Mar. 2, 2023), available at <https://www.experianplc.com/media/latest-news/2023/one-in-4-vehicles-financed-by-credit-unions-in-q4-2022-as-consumers-search-for-lower-interest-rates/> (citing Experian's State of the Automotive Market Report: Q4 2022).

⁶⁶ Jasper Clarkberg, Jack Gardner, & David Low, Consumer Fin. Prot. Bureau, Data Point: Subprime Auto, Loan Outcomes by Lender Type, Data Point No. 2021-10 (Sept. 2021) available at https://files.consumerfinance.gov/f/documents/cfpb_subprime-auto_data-point_2021-09.pdf.

⁶⁷ Community development financial institutions are private sector financial intermediaries that focus on providing financial services to economically disadvantaged communities. They are funded through the U.S. Department of the Treasury by the CDFI Fund, which was created in 1994 to promote "economic revitalization and community development through investment in and assistance to Community Development Financial Institutions (CDFIs)." United States Dep't of the Treasury, Community Development Financial Institutions Fund, available at <https://www.cdfifund.gov/>.

⁶⁸ See New York State Dep't of Fin. Servs. Hearing on Consumer Protection (Feb. 2020) (testimony of Daniel Apfel, Chief Operating Officer of Genesee Co-op Federal Credit Union), attached as EXHIBIT 1.

One Detroit credit union, a Michigan CDFI, also specializes in refinancing predatory auto loans through a program called “Refi My Ride.”⁶⁹ This program has helped over 1,000 consumers save \$4.7 million by refinancing their auto loans to a lower rate (sometimes even reducing the rate by 50%) and structuring the terms of the loan to facilitate consumer success instead of failure.

High-cost creditors, like those whose interests are represented by Defendant’s *Amici*, frequently claim, as a way to justify their high-cost credit, that providing financing to subprime consumers is more expensive and riskier. However, the Plaintiffs allege in this Complaint that Defendant CAC goes a step further, predicting that its consumers would experience significant rates of failure, and using that information about particular consumers to encourage dealers to set car prices that include that risk, thus ensuring its profits regardless of the outcome to consumers. This additional level of planned disregard for its consumers is what separates CAC’s conduct from that of most other creditors who extend subprime credit to consumers.

B. The loan failure rates pleaded in the Complaint are much higher than available data for other auto creditors.

To the extent that the Court considers the potential impact of this ruling on other auto creditors, some of whose interests are represented by Defendant’s *Amici*, it is notable that CAC’s

⁶⁹ See Inclusiv, CDFI Credit Unions Build Inclusive Economies 9 (Spring 2021), available at <https://www.inclusiv.org/wp-content/uploads/2021/06/CDFI-CUs-Build-Inclusive-Economies-2021.pdf>.

delinquency, default and repossession rates are significantly higher than those of other auto creditors.⁷⁰ Plaintiffs allege that for consumers with a CAC score of 70 or lower:⁷¹

- Approximately 20% had experienced at least one repossession,
- 60% experienced a 30-day delinquency within the first year, and
- 39% experienced a 60-day delinquency within the first year.⁷²

Contrast this with data about other auto lenders. The Federal Reserve Bank of New York's quarterly data reflects that from 2015 to 2021 (the relevant period in the Complaint), no more than 5% of all auto financing contracts were ninety-plus days delinquent.⁷³ This is the point at which many creditors will repossess the vehicle. Data from Experian's automotive finance market reports indicate that between 2016 and 2020, only 3.5 to 5.2% of financing transactions from finance companies (like CAC) were in a 30-day delinquency, and 1.4 to 2.0% were in a sixty-day delinquency.⁷⁴ Even data about subprime auto borrowers reflects that thirty-day delinquency rates have not been higher than 9.3% since 2010 for this population of consumers.⁷⁵ While the data comparisons are not perfectly aligned, it is clear that CAC's rate of delinquencies

⁷⁰ Unfortunately, unlike student loans or mortgages, there is a dearth of robust, publicly available data about auto lending. Therefore, although the comparisons here are not perfect, they merit attention by the Court simply because of the size of the gap in the delinquency rates between CAC's lending contracts and other auto lending contracts. This is the subject of an ongoing initiative by the CFPB to enhance publicly available auto lending data. *See* Ryan Kelly, Chris Kukla, Ben Litwin, & Ashwin Vasani, Consumer Fin. Prot. Bureau Blog, Enhancing Public Data on Auto Lending (Nov. 17, 2022), available at <https://www.consumerfinance.gov/about-us/blog/enhancing-public-data-on-auto-lending/>.

⁷¹ Complaint, *supra* note 1, at ¶¶ 25-26 (describing the CAC borrower "score").

⁷² *Id.* at ¶¶ 103-104.

⁷³ Federal Reserve Bank of N.Y., Research & Statistics Group, Quarterly Report on Household Debt and Credit 2023: Q1, at 12 (May 2023), available at https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2023Q1.

⁷⁴ Melinda Zabritsky, Experian, Automotive Industry Insights: Finance Market Report Q4 2020, at 17 (Mar. 2021), available at <https://www.autofinancenews.net/wp-content/uploads/2021/03/2020-Q4-Auto-Finance-News-Industry-Pulse.pdf>; Melinda Zabritsky, State of the Automotive Finance Market Q4 2017, at 6, 8 (Mar. 2018), available at <https://www.experian.com/assets/automotive/quarterly-webinars/2017-q4-safm.pdf>.

⁷⁵ Ben Eisen & Gina Heeb, *More Auto Payments Are Late, Exposing Cracks in Consumer Credit*, *The Wall St. J.*, Feb. 18, 2023, available at <https://www.wsj.com/articles/more-auto-payments-are-late-exposing-cracks-in-consumer-credit-3cbc2382>.

is much higher than other auto creditors, *even than those lending to the same type of credit-challenged consumers*.⁷⁶ These statistics show that Defendant's *Amici* clearly do not represent all auto creditors.

Even worse, Plaintiffs allege that while consumers suffered the disastrous consequences of these disproportionately high rates of delinquency, default, repossession, auction, judgments and garnishments, CAC managed to predictably earn a profit.⁷⁷ Publicly available data indicates that between December 2009 and December 2021 CAC's market value increased dramatically from less than \$1.3 billion to over \$10 billion.⁷⁸

CONCLUSION

The Court should deny Defendant's motion to dismiss. The Plaintiffs' enforcement of the consumer protection laws as plead in the Complaint will improve the fairness and transparency in the auto credit market by addressing the problematic practices of CAC. Allowing this matter to proceed to discovery and a determination on the merits will ensure that the abusive and deceptive conduct at issue in the Complaint is no longer permitted to plague the auto credit marketplace and punish lower income car buyers.

⁷⁶ Most available data points to delinquency and default percentages at a single moment in time rather than the percentage of consumers who had experienced a delinquency or default during their contract term, as alleged by the Plaintiffs. Regardless, the differences in the statistics for other auto creditors are significant.

⁷⁷ Complaint, *supra* note 1, at. ¶ 111.

⁷⁸ MacroTrends, Credit Acceptance Market Cap 2010-2023/CACC, *available at* <https://www.macrotrends.net/stocks/charts/CACC/credit-acceptance/market-cap>.

DATED: May 22, 2023

Respectfully submitted,

NATIONAL CONSUMER LAW CENTER

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income clients, Consumer Reports, and
Empire Justice Center*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May 2023, a true and correct copy of the foregoing was filed with the Clerk of the United States District Court for the Southern District of New York via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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EXHIBIT 1



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**TESTIMONY OF DANIEL APFEL, CHIEF OPERATING OFFICER OF
GENESEE CO-OP FEDERAL CREDIT UNION at
NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES HEARING**

Date: Thursday, February 20

Time: 5:30 -7:30 p.m.

Location: M. Dolores Denman Courthouse
50 East Avenue, Rochester, NY 14604

Thank you for having me here. My name is Daniel Apfel and I am the Chief Operating Officer at Genesee Co-op Federal Credit Union. Genesee Co-op FCU is a community development credit union with almost 4,000 members based here in Rochester, serving people from across the entire community. We especially focus on serving the low-income community, including people of color and refugees. I am here tonight to raise awareness of the disparities based on race we see in auto-lending. We hold a portfolio of 262 used car loans and made 95 loans in 2019. Approximately 40% of those loans were refinances.

The vast majority of these refinanced auto loans are made to people who received their car loan at a dealership, often at high interest and loaded with service contracts or mechanical car repair coverage. Although borrowers of all kinds come in with these high-priced loans, a consistent pattern of discrimination has emerged. We see that while white members receive subprime loans of 12, 13, or 14 percent, Black and Latinx members with a similar credit profile usually are paying higher rates of 18, 19 or 20%, often up to the auto loan cap of 24.99%.

As an example, I want to share the stories of two members whose financial profiles were similar when they came to us, one white, one a person of color. The first member, who I will call Jennifer, is the person of color. She had a credit score of 650. Her loan rate was 16.59 percent. Another member, who I will call Jane, was white and had a credit score of 633. Jane's rate from the dealer was 12—4.59 % less even though she had worse credit. We refinanced their loans at 6.24% and 8.24% respectively.

This is a common occurrence. The credit profile of the borrower and the loan have similar attributes, even when the loan-to-value of the car and the debt-to-income ratio of the borrower are virtually identical. We believe the primary, or even only difference is the race/ethnicity of the borrower. So, for low, moderate- and middle-income borrowers, being Black or Latinx results in a 5-10% markup. We believe that this is almost certainly discrimination based on race. We see enough of these to believe this practice is widespread and not limited to a few dealers who are bad actors.



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Abusive auto loan rates are increasingly being identified as an issue that needs the attention of regulators. The mainstream press, as well as research, has identified the increased prevalence of auto loans with very high LTVs. These cars stop running before the loan is paid. When the consumer then buys another car, dealers refinance the unpaid balance into the new loan. That leads to higher and higher loan to values ratios and higher payments for low-income borrowers. Dealers also add products like the maintenance contracts that I discussed earlier to the price of the car, thus inflating the loans and making them even more unaffordable.

Such practices trap consumers in a cycle of subprime credit that is almost impossible to break. These lenders are stripping wealth from the communities that most need them. This practice makes it impossible for families to take the first step to develop savings, build assets and wealth, and eventually become homeowners.

You may hear from other lenders that it is impossible to lend to people at rates similar to ours because of the risk. We have demonstrated over many years, that we are able to have a loan portfolio of auto loans to these exact same people at substantially lower rates that perform exceptionally well. We believe lenders and dealers are not only stripping wealth from low-income New Yorkers but are discriminating specifically against people of color.

On behalf our Board and Membership, thank you for your visit to Rochester and your attention to this important issue.