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1 I. INTRODUCTION

2 The Federal Trade Commission ("FTC") brings this action under the Federal  
3 Trade Commission Act (FTC Act), 15 U.S.C §§ 45(a), 53(b), and 57b, the Equal  
4 Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 et seq., and ECOA's  
5 implementing Federal Reserve Board Regulation B (Regulation B"), 12 C.F.R.  
6 pt. 202, to remedy Defendants' alleged discriminatory mortgage lending practices.  
7 As alleged in the FTC's Complaint, Golden Empire Mortgage, Inc. ("GEM") and  
8 its principal, Howard D. Kootstra, implemented a discretionary pricing policy that  
9 resulted in Hispanic borrowers paying higher prices for mortgages than non-  
10 Hispanic white borrowers. The Complaint alleges that these practices violate  
11 Section 701(a) of the ECOA, which makes it "unlawful for any creditor to  
12 discriminate against any applicant, with respect to any aspect of a credit  
13 transaction . . . on the basis of . . . national origin." 15 U.S.C. § 1691(a)(1).  
14 Because Section 704(c) deems a violation of the ECOA to be a violation of the  
15 FTC Act, the Complaint alleges a violation of the FTC Act as well. The FTC  
16 seeks permanent injunctive relief pursuant to its powers under Section 13(b) of the  
17 FTC Act, 15 U.S.C. § 53(b), and Section 704(c) of the ECOA, 15 U.S.C.  
18 § 1691(c), to stop these alleged discriminatory practices, as well as equitable  
19 monetary relief to redress Hispanic borrowers allegedly victimized by Defendants'  
20 policies. Defendants have filed a motion to dismiss asserting that this action is  
21 barred by the ECOA's two-year statute of limitations set forth in Section 706(f),  
22 15 U.S.C. § 1691e(f), and that the FTC has failed to state a claim against Mr.  
23 Kootstra. The law and the cases, however, do not support Defendants'  
24 contentions.

25 First, the FTC faces no statute of limitations when seeking equitable relief  
26 in federal court pursuant to the ECOA. *United States v. Blake*, 751 F. Supp. 951,



1 952 (W.D. Okla. 1990); *FTC v. Green Tree Acceptance, Inc.*, No. 86-0469, 1987  
2 U.S. Dist. LEXIS 16750 at \*12 (N.D. Tex. Sept. 30, 1987). The FTC has filed  
3 suit in this Court under Section 704(c), making the two-year statute of limitations  
4 in Section 706(f), which addresses only actions by private litigants and the  
5 Attorney General, inapplicable. Notwithstanding Defendants' misguided focus on  
6 the title of Section 704(c), the actual words of that section empower the FTC to  
7 enforce the ECOA using "[a]ll of the functions and powers" afforded the agency  
8 pursuant to the FTC Act. 15 U.S.C. § 1691d(c) (emphasis added). The phrase "all  
9 of the functions and powers" includes the FTC's authority under Section 13(b) of  
10 the FTC Act to proceed in federal court. *Blake*, 751 F. Supp. at 952; *United States*  
11 *v. Landmark Fin. Servs. Inc.*, 612 F. Supp. 623, 627 (D. Md. 1985). Section 13(b)  
12 specifically authorizes the FTC to seek and the district courts to grant, preliminary  
13 and permanent injunctions against practices that violate any of the laws enforced  
14 by the Commission. 15 U.S.C. § 53(b); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107,  
15 1113 (9th Cir. 1982). Section 704(c) itself has no statute of limitations, and in an  
16 action seeking equitable relief, Section 13(b) contains no statute of limitations.  
17 Nonetheless, Defendants argue that Section 706(f) of the ECOA applies to the  
18 case at bar. The federal courts that have addressed the applicability of the Section  
19 706(f) statute of limitations to FTC actions, however, have specifically rejected  
20 Defendants' argument. *Blake*, 751 F. Supp. at 952; *Green Tree*, 1987 U.S. Dist.  
21 LEXIS 16750, at \*8-9. In sum, the FTC's action against Defendants for injunctive  
22 and equitable monetary relief under Section 704(c) of the ECOA is authorized by  
23 Section 13(b) of the FTC Act and is not subject to any statute of limitations, in  
24 Section 706 of the ECOA or otherwise.

25 Second, the FTC has stated a *prima facie* case for individual liability against Mr.  
26 Kootstra. As the sole shareholder, owner, president and CEO of GEM, Defendant

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1 Kootstra has formulated, directed, controlled, or had the authority to control, the  
2 acts and practices of the corporation, including the implementation of policies that  
3 unlawfully discriminated against Hispanic applicants. Compl. ¶¶ 5, 12, 17, 20,  
4 24, 25. Corporate officers are personally liable under the EOA when they meet  
5 the ECOA and Regulation B definition of a “creditor,” i.e., when they regularly  
6 participated in the decision-making processes of the corporation. *FTC v. Cap.*  
7 *City Mortgage Corp.*, No. 98-237, 1998 WL 1469619 at \*6 (D.D.C. July 13,  
8 1998); *United States v. A. Future Sys. Inc.*, 571 F.Supp. 551, 560-61 (E. Pa.  
9 1982), *aff’d*, 743 F.2d 169, 182 (3d Cir. 1984). Moreover, as a control person of  
10 GEM, Kootstra independently may be enjoined pursuant to Section 13(b) of the  
11 FTC Act for GEM’s ECOA and FTC Act violations. An individual is liable for  
12 violations of the FTC Act when he or she either participated directly or had  
13 authority to control the corporation’s violative practices. *FTC v. Publ’g Clearing*  
14 *House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Amy Travel Serv. Inc.*,  
15 875 F.2d 564

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1 authority to control the acts and practices of GEM. Id. ¶ 5. Both GEM and Mr.  
2 Kootstra are creditors as defined by the ECOA and Regulation B. Id. ¶ 17

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1 “judicial ECOA actions”—including FTC federal court actions for equitable  
2 relief—while Section 704(c) merely applies to administrative proceedings. Mot.  
3 10-11. Unable to point to a single case that supports their interpretation of the  
4 ECOA, Defendants contend that the district court decisions finding Section  
5 706(f)’s two-year statute of limitations inapplicable to FTC judicial actions are  
6 “wrong.” Mot. 10. Defendants’ arguments should be rejected.

7 1. The FTC Brings its Case Under ECOA Section 704, which  
8 Authorizes the FTC to Invoke “All of the Functions and  
9 Powers” Afforded the Agency Pursuant to the FTC Act.

10 Section 704(c) expressly permits the FTC to bring judicial enforcement  
11 actions such as the present case. When interpreting the language of a statute,  
12 courts begin with the plain language employed by Congress. *Park ‘n’ Fly, Inc. v.*  
13 *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 661, 83 L. Ed. 2d 582,  
14 587 (1985). If a statute speaks with clarity to a particular issue, then “judicial  
15 inquiry into the statute’s meaning, in all but the most extraordinary circumstance,  
16 is finished.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S.  
17 Ct. 2589, 2594, 120 L. Ed. 2d 379, 388 (1992), see also *Howe v. Smith*, 452 U.S. 473,  
18 483, 101 S. Ct. 2468, 2475, 69 L. ed. 2d 466.

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<sup>1</sup> Defendants incorrectly state that “Section 13(b) merely grants the FTC the authority to seek temporary injunctions” Mot. 21. By its plain terms, the statute clearly grants the FTC authority to seek permanent injunctions: “[i]n proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15 U.S.C. § 53(b)(2). A “proper case” is one in which the Defendant has violated any law that the FTC enforces *FTC v. Evans Prods. Co.*, 775 F.2d 1083, 1086 (9th Cir. 1985) Congress . . . gave the district court authority to grant a permanent injunction against violations of any provisions of 2001-2009

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1 application of the two-year statute of limitations in Section 706(f) to FTC-initiated  
 2 judicial actions, Defendants attempt to distinguish Blake and Green Tree by  
 3 arguing that in those cases the FTC was seeking civil monetary penalties.  
 4 However, the courts' reasoning applies equally to the case at bar, even though the  
 5 FTC seeks injunctive and equitable monetary relief. Indeed, while noting that "all  
 6 the functions and powers" of the FTC included the agency's authority to seek civil  
 7 penalties, which carried with it a five-year statute of limitations, 15 U.S.C.  
 8 § 45(m), Green Tree also referenced the FTC's authority to seek equitable relief,  
 9 for which there is no statute of limitations. 1987 U.S. Dist. LEXIS 16750, at \*10;  
 10 15 U.S.C. § 53(b). Regardless of the relief or penalties sought by the FTC, 706(f)  
 11 does not apply to FTC judicial actions.

### 12 3. The FTC's Authority to Enforce the ECOA Does Not 13 Depend on the Type of Proceeding.

14 Defendants assert that this action is properly brought under Section 706 of  
 15 the ECOA, rather than Section 704(c), and thus the statute of limitations in the  
 16 former section applies. Defendants primarily rely on the titles of the two  
 17 provisions—"Civil Liability" for Section 706 versus "Administrative  
 18 Enforcement" for Section 704—in asserting that the present action is one for civil  
 19 liability and thus falls under Section 706. When analyzing statutory language,  
 20 however, the title of a section cannot limit the plain meaning of the text." Pa.  
 21 Dep't of Corrections v. Yeskey 524 U.S. 206, 212, 118 S. Ct. 1952, 1956, 141 L.  
 22 Ed. 2d 215, 221 (1998); Deutsch v. Turner Corp., 324 F.3d 692, 707-08 (9th Cir.  
 23 2003). The text of Section 706(f) on its face applies only to actions brought by  
 24 private litigants and the Attorney General.<sup>2</sup> The courts have consistently found  
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26 <sup>2</sup> Section 706(f) provides only that there is a two-year statute of  
 27 limitations when the Attorney General or a private litigant brings an action  
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1 amount of overages charged consumers, and failed to monitor whether his  
2 employees were charging applicants higher prices for mortgage loans on a on

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1 seeking injunctive relief. As an initial matter, Defendants confuse the standard for  
2 finding an individual liable for purposes of an injunction with the standard for  
3 finding an individual liable for equitable monetary relief. To obtain injunctive  
4 relief, no pleading or showing of knowledge or reckless indifference is required.

5 See *Am. Standard Credit Sys., Inc.*, 874 F. Supp. at 1089; *Ps. Pantry, Inc.*, 2000 WL 10000  
6 (E.D. Pa. 1999) (citing *Am. Standard Credit Sys., Inc.*, 874 F. Supp. at 1089).

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8 With respect to the monetary relief, Defendants further confuse the

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14 *Ps. Pantry, Inc.*, 2000 WL 10000 (E.D. Pa. 1999) (citing *Am. Standard Credit Sys., Inc.*, 874 F. Supp. at 1089).

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20 <sup>4</sup> Although not relevant for purposes of this motion, Defendants further  
21 confuse the knowledge standard for equitable monetary relief that the FTC will  
22 need to meet at trial. The FTC need only show actual knowledge of  
23 discriminatory pricing practices, reckless indifference to the possible existence of  
24 discriminatory pricing practices, or an awareness of a high probability of  
25 discrimination coupled with an intentional avoidance of the truth. See *FTC v.*  
26 *Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994) (citing *Amy Travel*, 875 F.2d  
27 at 574).

28 <sup>4</sup> *Id.* (citing *Am. Standard Credit Sys., Inc.*, 874 F. Supp. at 1089).

1 Kootstra knew or should have known that the discretionary pricing policy could  
2 result in Hispanic applicants paying higher prices for mortgages than non-  
3 Hispanic white applicants to hold him liable for monetary relief for GEM's  
4 violations. *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 636 (7th Cir. 2005)  
5 (affirming a judgment against individual corporate defendants because they knew  
6 or should have known about the unlawful practices of the corporation). The  
7 Complaint, accordingly, properly alleges facts that state a claim against Mr.  
8 Kootstra for equitable monetary relief as a control person.

9 3. Meyer v. Holley Is Inapplicable

10 Defendants rely on the interpretation of the Fair Housing Act ("FHA") in  
11 *Meyer v. Holley*, 537 U.S. 280, 123 S. Ct. 824, 154 L. Ed. 2d 753 (2003), for the  
12 proposition that Mr. Kootstra cannot be held vicariously liable for actions of other  
13 corporate employees. Mot. 15-18. However, the FTC has not alleged, and need  
14 not allege, that Mr. Kootstra is vicariously liable for GEM's conduct or the  
15 conduct of the company's employees. The respective pleading standards for  
16 individual liability pursuant to the ECOA and Section 13(b) of the ETC Act are  
17 whether Mr. Kootstra is a "creditor" as defined by the ECOA and Regulation B or  
18 a control person under the FTC Act. *Publ'g Clearing House*, 104 F. 3d at 1171;  
19 *Am. Future Sys.*, 571 F. Supp. at 561.

20 Defendants' argument that the FHA does not allow for individual liability  
21 for corporate ( <sup>at 561</sup> ) <sub>at 561</sub> . 23.8800 0.0000 TD p.



1 provisions of the [E~~C~~A] do not go further than those of the Fair Housing Act.”),  
2 the FHA does not contain any provisions similar to those relevant to individual  
3 liability in this case. First, the FHA does not include a provision making  
4 “creditors” liable for violations.

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<sup>5</sup> The Senate Report to the bill that expanded the ECOA to prohibit discrimination on the basis of race and national origin provides that “courts or agencies are free to look at the effects of a creditor’s practices as well as the creditor’s motives or conduct in individual transactions.” S. Rep. No. 94-589, 1976 U.S.C.C.A.N. 403, 407 (1976). Similarly, the implementing regulations expressly state that disparate impact liability is available under the ECOA. 12 C.F.R. § 202.6 n2 (“The legislative history of the Act indicat

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(see also Payares)Tj ET 1.00000 0.00000 0.00000 1.00000 0.0000 0.0000 cm 1.00000 0.00000

2008) (Collins, J.) (attached as Ex. 7); Ramirez v. GreenPoint Mortgage Funding, Inc., --- F. Supp. 2d ---, No. 08-0369 2008 WL 2051018 at \*3-4 (N.D. Cal. May 13, 2008); Garcia v. Country Wide Fin. Corp., No. 07-1161, 2008 U.S. Dist. LEXIS 106675, at \*9-12 (C.D. Cal. Jan. 17, 2008) (Phillips, J.); see also Payares v. JP Morgan Chase & Co., No. 07-05540, 2008 WL 2485592 at \*1 (C.D. Cal. June 17, 2008) (Collins, J.) (“Ninth Circuit law is clear” that “disparate impact claims are permissible” under ECOA).

1 have a discretionary pricing policy that permits their loan officers to charge  
2 applicants overages in addition to a risk-based price, Compl. ¶ 12; and (2)  
3 Defendants' discretionary pricing policy caused Defendants to charge Hispanic  
4 applicants substantially and statistically significantly higher prices for their  
5 mortgage loans than non-Hispanic white applicants, and these higher prices cannot  
6 be explained by underwriting risk or credit characteristics of the applicants. Id. ¶¶  
7 20, 24. The FTC's allegations are sufficient to establish that

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1 Dated this 31st day of August, 2009.

2 Respectfully submitted,

3 FEDERAL TRADE COMMISSION

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5 General Counsel

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