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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Case No. 2011-CP-10-07166

Court of Appeals Case No. 2021-001443
Order Dismissing Appeal (S.C. Ct. App. filed March 10, 2022)

Supreme Court Case No. 2022-000838

Otha Delaney,
Individually and on behalf of all others similarly situated,

Respondent,

v.

First Financial of Charleston, Inc.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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PROLOGUE

> [T]he primary purpose of the judiciary . . . is to serve the citizens and the business community of this state by settling disputes and promoting justice. . . . [B]ehind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests.
>
> —Chief Justice Jean Hoefer Toal[1]

FFC[2] looks to the court system for protection, Mr. Delaney[3] (and most of all his counsel) for profit; FFC is mired in this dispute and wants it to end, Mr. Delaney instigated the dispute but really only cares about its subject matter (alleged technical failures of statutory compliance with respect to the content of certain notices concerning the sale of repossessed collateral—alleged technical failures that even he himself admits were, at worst, honest mistakes and that, in truth, did not really cause him any problem anyway, hence his prayer for solely statutory, as opposed to actual, damages) as a means to an end; FFC earnestly asks the judiciary to promote true justice, a transparent attempt at jackpot justice will fail if it does.

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[1] *Atl. Coast Builders & Contactors, LLC v. Lewis*, 396 S.C. 479, 491, 722 S.E.2d 213, 219 (2011) (Toal, C.J., dissenting).

[2] "FFC" is Defendant/Appellant, First Financial of Charleston, Inc.

[3] "Mr. Delaney" is Plaintiff/Respondent, Otha Delaney.

CERTIFICATION OF COUNSEL

By and through its undersigned counsel, pursuant to Rule 242(d)(1), SCACR, FFC certifies that the Court of Appeals filed its order dismissing this appeal on March 10, 2022 (the "Order of Dismissal"); that FFC timely petitioned for reinstatement and/or rehearing; and that the Court of Appeals has finally ruled on that petition, which it denied by order filed May 17, 2022.

INTRODUCTION

The trial court orders that FFC challenges in this interlocutory appeal (collectively, the "Appealed Orders"[4]) are immediately appealable pursuant to S.C. Code Ann. § 14-3-330 because they are orders "involving the merits" under subsection (1) and/or orders that deprive FFC of "a mode of trial to which it is entitled as a matter of right"[5] and/or "strike[] out an answer or any part thereof" under subsection (2). Most respectfully, the Court of Appeals erred in dismissing FFC's appeal, and this Court should correct that error.

[4] Specifically, the Appealed Orders are the Order Denying Defendant's Motion to Dismiss Amended Class Action Complaint, filed August 19, 2021 (the "Primary Order"), and the Order filed November 8, 2021, denying FFC's motion to alter, amend, and/or reconsider the Primary Order (the "Secondary Order").

[5] *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) ("Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable.").

QUESTION PRESENTED

I. Did the Court of Appeals err in finding that the Appealed Orders are not immediately appealable under § 14-3-330 and dismissing FFC's appeal? More specifically, did the Court of Appeals err in not finding that the Appealed Orders are immediately appealable under subsection (1) as orders "involving the merits" and/or under subsection (2) as orders that deprive FFC of "a mode of trial to which it is entitled as a matter of right"[6] and/or "strike[] out an answer or any part thereof"?

STATEMENT OF THE CASE

In October of 2007, Mr. Delaney borrowed money (about $8,500) from FFC pursuant to a retail installment contract for the purchase of a truck, promising to pay FFC back over a 36-month term and granting it a security interest in the truck as collateral, thus making FFC a secured party under Chapter 9 of South Carolina's Commercial Code, i.e., the chapter on secured transactions, codified at S.C. Code Ann. §§ 36-9-101 to -809 ("Chapter 9"[7]). (*See* App.[8] pp. 8–9, 15–16, 37.)

Within about six months, however, Mr. Delaney defaulted on the loan (i.e., he stopped paying it back),[9] prompting FFC to repossess the truck (i.e., the collateral) and "dispose of" it by sale. (*See* App. pp. 11, 15–16, 38, 63, 66.) But even so, FFC was still left with an unpaid deficiency balance (i.e., a loss) of about $4,200. (App. p. 66.)

In § 36-9-609, Chapter 9 authorizes a secured party to repossess collateral after default[10] and, provided "it proceeds without breach of the peace," to do so without judicial process. § 36-9-609(b)(2). Here, Mr. Delaney does not challenge either the existence of FFC's right to repossession or the manner in which it was exercised. (*See* App. pp. 1–7, 12–13, 35–46.)

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[6] *Flagstar*, 341 S.C. at 72, 533 S.E.2d at 333.

[7] Chapter 9 is South Carolina's enactment of Article 9 of the Uniform Commercial Code.

[8] "App." refers to the appendix of documentary material that accompanied the memo on appealability that FFC filed in the Court of Appeals.

[9] Mr. Delaney admits that he breached the loan contract by failing to repay FFC as promised and that he was in default when FFC repossessed the truck. (App. pp. 15–16.)

[10] § 36-9-609(a)(1).

In Chapter 9 parlance, FFC's sale of the repossessed truck is known as a "disposition of collateral." *See generally* § 36-9-610. In § 36-9-610, Chapter 9 authorizes a secured creditor to "dispose of" collateral in a number of ways, including by sale,[11] and mandates that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." § 36-9-610(b). Here, "[Mr. Delaney] is not alleging that [FFC] injured him 'by disposing of collateral in a commercially unreasonable manner' in violation of § 36-9-610." (App. p. 118; *see also* App. pp. 1–7, 12–13, 35–46.) In fact, he makes no claim for recovery of any *actual* damages. (*See* App. pp. 1–7, 12–14, 35–46.)

In § 36-9-611, Chapter 9 requires a secured party who disposes of collateral under § 36-9-610 to send the debtor "a reasonable authenticated notification of disposition" before disposing of the collateral ("Pre-Sale Notice"). § 36-9-611(b). Where, as here, the transaction involves consumer goods, the required contents of Pre-Sale Notice (the "Pre-Sale Notice Content Requirements") are set forth in §§ 36-9-613 and -614.

On or about May 2, 2008, FFC sent Mr. Delaney Pre-Sale Notice comprised of two pages that looked like this (for formatting reasons, beginning on the next page):

[11] § 36-9-610(a).

EXHIBIT

1-A

RE: Account # 68289

Dear Mr. Delaney,

It is important for you to know that the return of the collateral does not cancel your obligation. If we are required to sell the collateral, we cannot guarantee that we will be able to obtain a price equal to the unpaid balance on your account. You will still owe the amount remaining unpaid balance on your account. You will owe the amount remaining unpaid after application of sale proceeds, less recovery and selling expenses.

Your immediate action on any one of the following alternatives will be to your advantage and may save you further expenses in the settlement of your account.

1. Contact our office and endeavor to redeem the collateral on a basis that would be mutually satisfactory.

2. Refinance your account through your bank, credit union, or another finance company.

3. Find someone who would be acceptable and interested in taking over your obligation and contract.

4. Assist us in finding a buyer to obtain the best possible price.

If acceptable arrangements cannot be made on this matter within the time specified in the attached notice of sale, we will proceed with the sale of this collateral.

Please help yourself by helping us to arrive at a satisfactory solution now.

Very truly yours,

Bob Lewis

ATTACHED: Notice form specifying the date collateral will be sold.

20110934 00018

NOTICE OF PRIVATE SALE OF COLLATERAL

(CERTIFIED MAIL, RETURN RECEIPT REQUESTED May 2, 2008

Otha Delaney
828 Hitching Post Road
Charleston, SC 29414

Re: Account # 68289

Dear Mr. Delaney,

This is to notify you that due to default under the terms of the above referenced account, the collateral described below, which secures your account, can be sold, at our option by private sale after the close of business on the tenth (10^{th}) day from the date of this notice. If such a date falls on a Sunday or legal holiday, then the collateral will be sold after the first business day following the tenth (10^{th}) day.

You have the right to have the collateral returned to you upon payment of the account balance plus any repossession expenses, attorney's fees and other costs we have incurred, as may be applicable and permitted by law.

Description of Collateral: 2003 Chevrolet 1500 Vin# 1GCEC14X23Z296522

5025 Dorchester Road
Street Address

Charleston, SC 29418
City State Zip

Bob Lewis
By

20110934 00019

(App. pp. 63–64.)

The preceding Pre-Sale Notice is Exhibit A to Mr. Delaney's operative complaint,[12] and it is said to "look like" the Pre-Sale Notice that FFC sent Mr. Delaney because it is not an exact copy. Unlike Exhibit A, the Pre-Sale Notice that FFC actually sent Mr. Delaney (and indeed all of the notices complained about in this case) were printed on FFC letterhead, such that the following appeared atop each page:

(*See, e.g.,* App. pp. 11, 25–28.) Apart from the missing letterhead, however, Exhibit A is the same as the Pre-Sale Notice that FFC sent Mr. Delaney, and as each of Exhibit A's two pages is a form document, with only the particulars (name, address, account number, description of collateral, date of mailing) changing from notice to notice, all of the Pre-Sale Notices that FFC sent from the time it sent Pre-Sale Notice to Mr. Delaney in or about May 2, 2008, to October of 2011 (when it was served with this lawsuit and stopped using the form) are in the same form as Exhibit A. Accordingly, together with the above letterhead, which, again, appeared atop each page, Exhibit A accurately depicts the form of the Pre-Sale Notice that FFC sent all alleged class members up to October of 2011. For ease of reference, this form of Pre-Sale Notice is hereinafter referred to as the "Original Pre-Sale Notice Form."[13]

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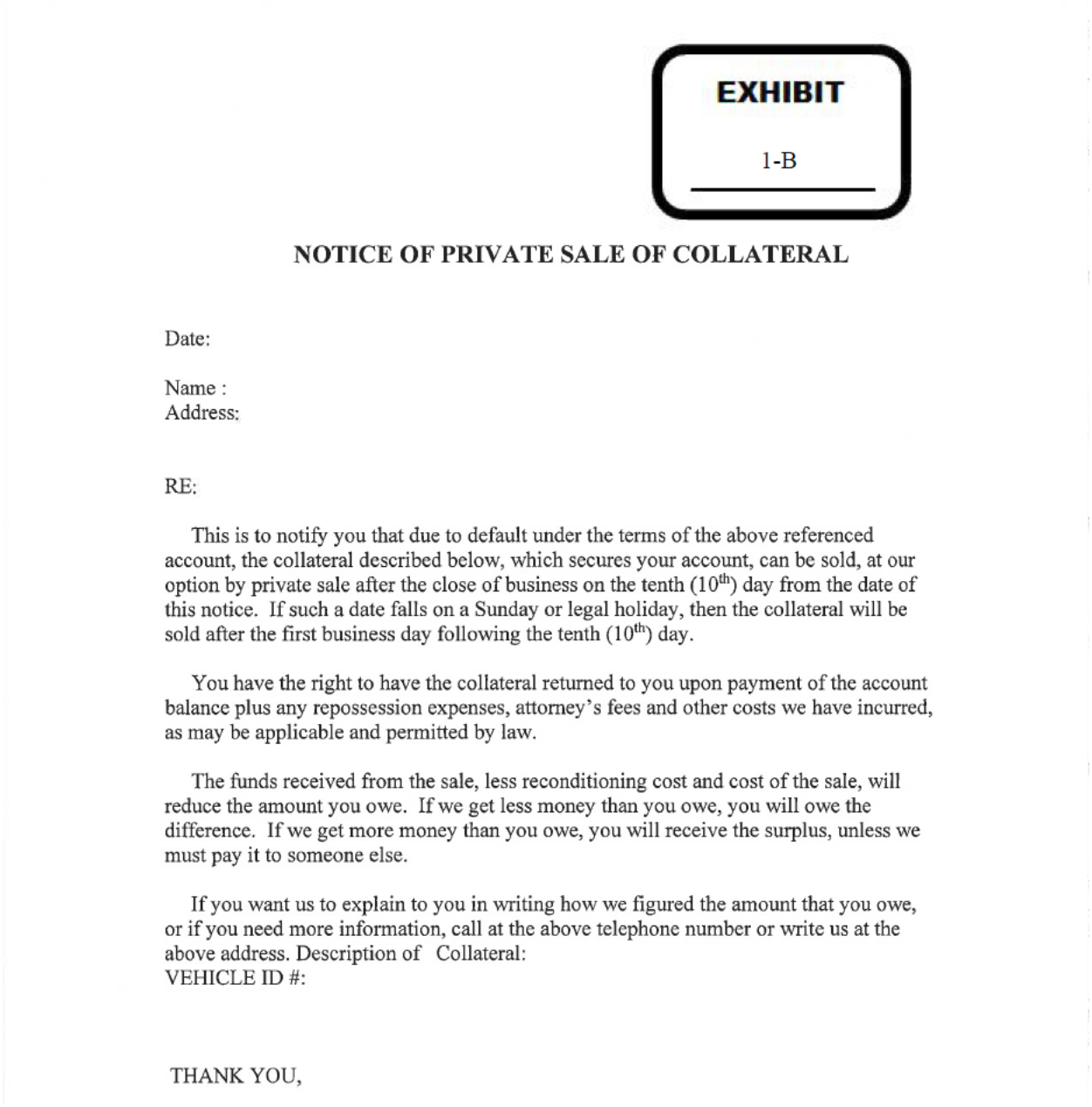
[12] This Pre-Sale Notice is labeled "Exhibit 1-A," rather than merely "Exhibit A," because Mr. Delaney's operative complaint refers to a number of attached exhibits (namely, Exhibits A–E) that, through inadvertence, were not actually attached to it. (*See* App. pp. 35–46.) Agreeing they should be treated as attached to the operative complaint, Mr. Delaney's counsel emailed these exhibits to FFC's counsel (App. pp. 58–62), who filed them as Exhibits 1-A through 1-E, respectively, to FFC's motion to dismiss the operative complaint. (App. pp. 63–67.)

[13] Please Note: While it stopped using the Original Pre-Sale Notice Form, FFC does not con(cede that it fails to comply with the Pre-Sale Notice Content Requirements—nor, to be

Since October of 2011, FFC has sent Pre-Sale Notice that looks like this:



EXHIBIT

1-B

NOTICE OF PRIVATE SALE OF COLLATERAL

Date:

Name :
Address:

RE:

This is to notify you that due to default under the terms of the above referenced account, the collateral described below, which secures your account, can be sold, at our option by private sale after the close of business on the tenth (10^{th}) day from the date of this notice. If such a date falls on a Sunday or legal holiday, then the collateral will be sold after the first business day following the tenth (10^{th}) day.

You have the right to have the collateral returned to you upon payment of the account balance plus any repossession expenses, attorney's fees and other costs we have incurred, as may be applicable and permitted by law.

The funds received from the sale, less reconditioning cost and cost of the sale, will reduce the amount you owe. If we get less money than you owe, you will owe the difference. If we get more money than you owe, you will receive the surplus, unless we must pay it to someone else.

If you want us to explain to you in writing how we figured the amount that you owe, or if you need more information, call at the above telephone number or write us at the above address. Description of Collateral:
VEHICLE ID #:

THANK YOU,

(App. p. 65.)

clear, does it concede that any notice about which Mr. Delaney complains in this case fails to comply with Chapter 9.

The preceding Pre-Sale Notice is Exhibit B to Mr. Delaney's operative complaint,[14] and it is said to "look like" the Pre-Sale Notice that FFC has sent since October of 2011 because it is not an exact copy. Here again, the Pre-Sale Notice that FFC has actually sent since October of 2011 has been printed on FFC letterhead, but together with FFC's letterhead (displayed above) atop the page, Exhibit B accurately depicts the form of the Pre-Sale Notice that FFC has sent all alleged class members since October of 2011. For ease of reference, this form of Pre-Sale Notice is hereinafter referred to as the "Revised Pre-Sale Notice Form."

In § 36-9-616, Chapter 9 requires a secured party who disposes of collateral under § 36-9-610 to send the debtor a written explanation of the calculation of surplus or deficiency ("Post-Sale Notice"). Section 36-9-616 also sets forth the required contents of such notice (the "Post-Sale Notice Content Requirements").

The Post-Sale Notice FFC sent Mr. Delaney is Exhibit C to Mr. Delaney's operative complaint, which is reproduced herein below (for formatting reasons, on the next page):

[14] This Pre-Sale Notice is labeled "Exhibit 1-B," rather than merely "Exhibit B," for the same reason as explained above in regard to Exhibit A.

First Financial Of Charleston, Inc.

5025 DORCHESTER ROAD • P.O. BOX 60429 • CHARLESTON, SC 29419-0429 •(843) 767-0050

January 10, 2009

Otha M. Delaney
828 Hitching Post Rd.
Charleston, SC 29414

EXHIBIT

1-C

RE: Account #68289
2003 Chevrolet

Dear Mr. Delaney:

This letter is to let you know that the return of the collateral does not cancel your obligation. If we are required to sell the collateral, we cannot guarantee that we will be able to obtain a price equal to the unpaid balance on your account. You will still owe the amount remaining unpaid balance on your account. You will owe the amount remaining unpaid after application of sale proceeds, less recovery and selling expenses.

The breakdown on your account is as follows:

(1)	The original amount of contract:	$ 12.904.92
(2)	The payments made on contract:	1,158.47
(3)	Late Charges & Insurance Added:	155.00
(4)	Interest Refund:	5,007.00
(5)	Gap Insurance Refund:	173.15
(6)	Repossession Bills Added:	2,961.27
(7)	The Sale of Collateral:	5,495.00
(8)	The Remaining Deficiency Balance:	$4,187.57

Please contact our office make arrangements to handle this remaining balance.

If we do not hear from you concerning this matter, we will have no choice but to take legal action.

Thank you.

Sincerely,

Cindy Kuck
Office Mgr.

20110934 00020

(App. p. 66.)[15]

Mr. Delaney filed this class action against FFC on October 4, 2011. (*See* App. pp. 1–11.) Mr. Delaney's original complaint (the "Original Complaint"), which was the operative complaint in the lawsuit for about ten years, asserted a *single* cause of action—based solely on the *Original* Pre-Sale Notice Form—against FFC for allegedly sending Pre-Sale Notice that did not comply with the Pre-Sale Notice Content Requirements, thus rendering FFC liable to him—even in the absence of any *actual* damages—for *statutory* damages under § 36-9-625(c)(2) in "an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price," which amount, he says, in his individual case, works out to about $5,500, comprised of some $4,500 corresponding to the total finance charge (i.e., the interest he *theoretically* would have paid over the life of the loan had he not defaulted—in reality, of course, he did not even pay back the principal as required by the loan contract, much less the interest[16]) and about another $1,000 corresponding to ten percent of the cash price for the truck. (*See* App. pp. 5, 20.) And Mr. Delaney sought to establish such statutory damages liability against FFC not only for himself but also on behalf of the hundreds of alleged class members to whom FFC sent the Original Pre-Sale Notice Form.

FFC responded to the Original Complaint with a motion to dismiss based on the statute of limitations, which was granted by order filed April 30, 2013, and which Mr. Delaney appealed. A number of years then passed as the appeal proceeded, first through the Court of Appeals, which

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[15] This Post-Sale Notice is labeled "Exhibit 1-C," rather than merely "Exhibit C," for the same reason as explained above in regard to Exhibit A.

[16] To be clear, the cash price of the truck was $9,399.50; Mr. Delaney borrowed $8,499 of that amount from FFC to finance his purchase of it; Mr. Delaney only ended up paying FFC a total of $1,158.47; and even after the sale of the truck, FFC was left with an unpaid deficiency balance of $4,187.57, the calculation of which expressly included an interest refund credit to Mr. Delaney in the amount of $5,007. (*See* App. pp. 8–9, 20, 66.)

affirmed the dismissal in an opinion filed September 28, 2016, then, on writ of certiorari, to this Court, which ultimately reversed the dismissal in an opinion filed May 8, 2019, and remitted the case to the trial court for further proceedings.

Mr. Delaney filed what is now the operative complaint in the case (the "Amended Complaint") on March 30, 2021. (*See* App. pp. 35–46.) Unlike the Original Complaint, the Amended Complaint asserts *two* causes of action, not just one. The first (Count 1) is the same cause of action asserted in the Original Complaint, for FFC allegedly giving Pre-Sale Notice that failed to comply with the Pre-Sale Notice Content Requirements, except this time Mr. Delaney not only seeks to establish FFC's liability for thousands of dollars of statutory damages under § 36-9-625(c)(2) to himself and the hundreds of alleged class members to whom FFC sent the *Original* Pre-Sale Notice Form but also to the hundreds more alleged class members to whom FFC sent the *Revised* Pre-Sale Notice Form. (*See* App. pp. 44–45.)

The other cause of action (Count 2) is a completely new. Despite having made no mention of it in the Original Complaint he filed nearly a decade prior,[17] Mr. Delaney now alleges that FFC sent him (and likewise hundreds of others claimed to be similarly situated) Post-Sale Notice using a form notice that failed to comply with the Post-Sale Notice Content Requirements, and therefore, pursuant to § 36-9-625(e)(5), he seeks to tag FFC with more *statutory* liability (not liability for any alleged *actual* damages) to himself and to all those on behalf of whom he wishes to proceed at the flat rate of $500 apiece. (*See* App. pp. 44–45.)

And Mr. Delaney makes these claims (the unabashed goal of which is to feast on the financial calamity they are designed to try to cause FFC) while at the same time acknowledging (literally, at the very same time, right in the express averments of the Amended Complaint) that at

[17] (*See* App. pp. 1–11; *see also* App. pp. 12–13.)

most, i.e., even if FFC did mistakenly send Pre-Sale Notice and Post-Sale Notice that did not technically comply with the respective content requirements, it did so honestly and in good faith, "not intend[ing] to violate [Chapter 9]," "not intend[ing] injury" to anyone, but in fact "believ[ing] its notices were accurate, lawful and contained no misrepresentations." (App. p. 40.)

FFC responded to the Amended Complaint with a motion to dismiss,[18] arguing, among other things, that Count 1 (the original claim about Pre-Sale Notice, which, notwithstanding the recent addition of the Post-Sale Notice claim in Count 2, is still by far the largest part of the case) is not amenable to class treatment.

FFC maintains this is so because, pursuant to § 36-9-628(e), "[a] secured party is not liable under Section 36-9-625(c)(2) [(which is, again, the sole basis of liability in Count 1)] more than once with respect to any one secured obligation." As the Official Comments explain, this "ensures that a secured party will incur statutory damages only once *in connection with* any one secured obligation." § 36-9-628 cmt. 4 (emphasis added).

As Mr. Delaney himself pointed out to FFC in objecting to one of its discovery requests, "a class action is a *representative* action brought by a named plaintiff or plaintiffs," and the class is "a legally distinct entity." (App. p. 17.) Mr. Delaney is the only named plaintiff here. He is the only one suing FFC, the only one who is actually before the court trying to establish FFC's supposed liability for statutory damages under § 36-6-925(c)(2). Mr. Delaney is literally the only connection between FFC and the hundreds of absent alleged class members—none of whom have themselves sued FFC—Mr. Delaney having taken it upon himself to try to establish FFC's liability to them for statutory damages under § 36-9-625(c)(2) anyway. What Mr. Delaney is attempting to do here is what § 36-9-628(e) does not allow: to impose multiple liability against FFC under §

[18] (*See* App. pp. 58–267.)

36-9-625(c)(2)—liability hundreds and hundreds of times over—in connection with just one loan, his.

Chapter 9 is intended for far better things than what Mr. Delaney would like to do with it. The consumer protections it provides are intended to serve the ends of justice, not as a means of profiteering; nor could they in good conscience possibly be intended as some sort of doomsday device to annihilate the secured party who, like FFC here, neither meant, nor is even alleged to be liable for, any actual harm. By its very nature, the form of liability that § 36-9-625(c)(2) creates (a form of liability that is not merely liability without fault but liability without damages) requires safeguards against injustice. Indeed, the very absurdity that Mr. Delaney seeks to accomplish in this case is at once a perfect example of the threat of such injustice and why § 36-9-628(e) guards against it. Even aside from the plain language addressed above (about § 36-9-628(e) ensuring that statutory damages liability is incurred no more than once in connection with any one secured obligation), to construe the statutory scheme otherwise, i.e., to construe it as blessing the sort of plainly ill-gotten gains sought to be obtained here, is untenable. *See Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) (courts do not accept statutory interpretations that, if accepted, would lead to absurd results).

All that said, the trial court disagreed with FFC's argument in this regard, denying its motion to dismiss in all respects[19] and thereafter denying its motion to reconsider,[20] prompting FFC's immediate appeal, which the Court of Appeals dismissed via the Order of Dismissal, which reads as follows:

> Because the order on appeal is not immediately appealable, this appeal is dismissed. *See* S.C. Code Ann. § 14-3-330 (2017) (providing our appellate courts may review an interlocutory order

[19] (App. pp. 298–312.)
[20] (App. pp. 313–326.)

> that involves the merits of the case or affects a substantial right); *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994) (holding a motion to dismiss is not immediately appealable under section 14-3-330); *id.* at 526 n.2, 443 S.E.2d 539, 540 n.2 ("Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings."); *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994) (holding denial of summary judgment motion was not immediately appealable despite language in the order appearing to strike a defense); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) ("Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order."). The remittitur will be sent as required by Rule 221 (b), SCACR.

As certified above, this petition follows the Court of Appeals' denial of FFC's petition for reinstatement and/or rehearing.

STANDARD OF REVIEW

This appeal is an appeal about appealability, and it centers on the interpretation of § 14-3-330, which is a question of law that is subject to de novo review. *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012) (citing *Muci v. State Farm Mut. Auto. Ins. Co.*, 478 Mich. 178, 732 N.W.2d 88, 93 (2007) ("The interpretation of court rules and statutes presents an issue of law that is reviewed de novo.")).

ARGUMENT

I. The Court of Appeals erred in finding that the Appealed Orders are not immediately appealable under § 14-3-330 and dismissing FFC's appeal. The Appealed Orders are immediately appealable under subsection (1) as orders "involving the merits" and/or under subsection (2) as orders that deprive FFC of "a mode of trial to which it is entitled as a matter of right"[21] and/or "strike[] out an answer or any part thereof." The Order of Dismissal reflects that the Court of Appeals overlooked or misapprehended the substance and effect of the Appealed Orders and the scope of its appellate jurisdiction and, in turn, deprived FFC of its appellate rights under § 14-3-330.

FFC, of course, concedes that the Appealed Orders are interlocutory, that "[t]he right of appeal arises from and is controlled by statutory law," and that a party may appeal an interlocutory order *only* where the right to do so is granted by statute. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006); *id.* ("The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by . . . § 14-3-330 . . . . Absent a specialized statute, an order must fall into one of several categories set forth in Section 14-3-330 in order to be immediately appealable.").

But contrary to the view reflected in the Order of Dismissal, the Appealed Orders *do* fall within the certain class of interlocutory or intermediate orders with respect to which § 14-3-330 provides this Court with appellate jurisdiction and FFC the right to appeal. They are immediately appealable under § 14-3-330(1) as orders "involving the merits" and/or under § 14-3-330(2) as orders that deprive FFC of "a mode of trial to which it is entitled as a matter of right"[22] and/or "strike[] out an answer or any part thereof." *See U-Drive-It*, 369 S.C. at 7, 630 S.E.2d at 467 (addressing subsection (1)'s allowance of immediate appeals of orders involving the merits: "An order 'involves the merits,' as that term is used in Section 14-3-330(1) . . . and is immediately

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[21] *Flagstar*, 341 S.C. at 72, 533 S.E.2d at 333.

[22] *Flagstar*, 341 S.C. at 72, 533 S.E.2d at 333.

appealable when it finally determines some substantial matter forming the whole *or part* of some cause of action or defense.") (emphasis added) (footnote omitted)); *see also Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146, (2015) (holding that, under the circumstances, a bifurcation order was immediately appealable because it "*effectively* grant[ed] the [defendants] *potential* summary judgment on [certain] issues") (emphasis added); *id.*, 773 S.E.2d at 147 n.2 (noting that the order *sub judice* "implicated a substantial right . . . [and] [j]ust because *part* of the prejudice stemming from the order may be cured at a later date does not remove it from the purview of section 14-3-330(2)(a)") (emphasis in original).); *see also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 452–53, 661 S.E.2d 81, 87 (2008) ("'[Pursuant to§ 14-3-330(2), this Court has held on numerous occasions that when a trial courts order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable.'") (quoting *Flagstar*, 341 S.C. at 72, 533 S.E.2d at 333); *see, e.g., Nauful v. Milligan*, 258 S.C. 139, 143, 187 S.E.2d 511, 513 (1972) ("The interlocutory adjudication in this case determines that the defenses interposed by defendant are without merit and that he is liable to the plaintiff on the claim asserted in the complaint, leaving only the amount of the damages at issue. It thus finally decides the merits of every issue in the case, except that of damages. We think that such a determination involves the merits and comes within the class of interlocutory or intermediate orders from which an immediate appeal is allowed under [§ 14-3-330's predecessor in the 1962 Code].").

At bottom, the Order of Dismissal rests on the proposition that the denial of a motion to dismiss is not immediately appealable under § 14-3-330 because it "does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." (Order of Dismissal (quoting *McLendon*, 313 S.C. at 526, 443 S.E.2d at 540 n.2).) Most

respectfully, the question of appealability here is just not that simple, and in dismissing this appeal, the Court of Appeals overlooked or misapprehended a number of material points.

To begin with, the proposition that the denial of a motion to dismiss does not establish the law of the case proceeds from the premise that, like a motion for summary judgment that is denied because of the existence of a genuine issue of material *fact*, the denial is because of the existence of a *factual* dispute that must be adjudicated at a later stage of the litigation. *See Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380 (stating that the denial of a motion for summary judgment "simply decides the case should proceed to trial"); *McLendon*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 n.2 (explaining that the denial of a motion to dismiss is not immediately appealable for the same reasons given in *Ballenger* that the denial of a motion for summary judgment is not immediately appealable); *cf. Evening Post Pub. Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011) ("Summary judgment is not appropriate where *further inquiry into the facts of the case is desirable* to clarify the application of the law.") (emphasis added); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) ("In determining whether any *triable* issues of *fact* exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.") (emphasis added).

But that is *not* what we have here in FFC's § 36-9-628(e) defense to the class-wide liability Mr. Delaney seeks to establish against it for statutory damages under § 36-9-625(c)(2). Rather, FFC's § 36-9-628(e) defense is a pure, dispositive question of *law* that is wholly disconnected from any *factual* dispute and neither in need of nor even in any way capable of benefitting from any further *factual* inquiry or development.

FFC's § 36-9-628(e) *defense* is just that: an affirmative defense, which it properly raised in a motion to dismiss under Rule 12(b) because the allegations of the operative complaint itself

demonstrate the existence of the defense. *Spence v. Spence*, 368 S.C. 106, 123–24, 628 S.E.2d 869, 878–79 (2006) ("[B]ecause the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial. . . . *[T]he general prohibition against pleading an affirmative defense in a motion to dismiss has been relaxed in modern practice. Most courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense* . . . . This view is in keeping with the pleading and discovery system established by the Rules of Civil Procedure, which allow a party to raise Rule 12(b) defenses in a pre-answer motion. Owner 4 in this instance properly asserted the affirmative defense of bona fide purchaser for value in a Rule 12(b)(6) motion. The defense did not raise a disputed issue of fact and the relevant facts were completely disclosed in the complaint. Owner 2 has not shown that further facts could be developed by pretrial discovery or a trial on the defense of bona fide purchaser for value. The circuit court properly dismissed the complaint against Owner 4.") (internal citations and quotation marks omitted).

Unlike where a motion for summary judgment or a motion to dismiss is denied because of the existence of a factual dispute that must be adjudicated at a later stage of the litigation, with respect to FFC's § 36-9-628(e) defense, all facts in any way bearing on the defense are completely disclosed and confirmed on the face of the operative complaint such that, realistically, nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense and the essential premise underlying the reasoning of the *McLendon* and *Ballenger* decisions (cited in the Order of Dismissal) simply does not exist.

The Court of Appeals also overlooked or misapprehended the point that, "[b]y it's nature, the question of whether an order is immediately appealable is determined on a case-by-case basis,"[23] and the "review of trial court orders is not constrained by how the order is styled" but rather turns on the order's effect. *Id.* at 539, 773 S.E.2d at 147 (citing *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability.")).

In pertinent part, the Primary Order reads as follows:

> **CONCLUSIONS OF LAW**
>
> FFC asserts many grounds for dismissal in its Motion to Dismiss Amended Class Action Complaint. The Court finds none have merit.
>
> ***
>
> **4. The Amended Complaint does not seek multiple recoveries for any single UCC violation and class actions are permitted under the UCC.**
>
> FFC's fourth argument asserts § 36-9-628(e) precludes Delaney from seeking to recover for the class. See Memorandum in Support at 22–23. The Court rejects FFC's argument about Delaney seeking multiple recoveries per secured obligation.
>
> The plain language of § 36-9-628(e) says, "[a] secured party is not liable under Section 36-9-625(c)(2) more than once with respect to ***any one secured obligation***." *See* § 36-9-628(e) (emphasis added)). Delaney and the Class only seek damages under § 36-9-625(c)(2) ***once per secured obligation***—meaning co-debtors or co-obligors (i.e., consumers part of the same "secured obligation") would split § 36-9-625(c)(2) damages awarded for their joint transaction. Delaney seeks damages on behalf of the class in connection with ***multiple*** secured obligations, one for each class member. FFC['s] argument implies § 36-9-628(e) bars class actions requesting recovery under § 36-9-625(c)(2) altogether. But the plain language of the UCC does not prevent class actions or the damages sought by the Class. Presumably, the General Assembly would have

[23] *Morrow*, 412 S.C. at 538, 773 S.E.2d at 146.

> made a non-uniform amendment to the Official Text of the UCC when it enacted § 36-9-625 if it intended to bar such class actions altogether, "especially when it has chosen to expressly bar class action litigation in other areas." *Grazia*, 390 S.C. at 576 (collecting statutes); *cf.* § 810 ILCS 5/9-625 (Illinois's adoption of UCC § 9-625(c)(2) and non-uniform amendment providing a consumer-debtor may recover the statutory minimum "in any ***individual*** action") (emphasis added).
>
> Section 36-9-628(e) was enacted to prevent secured parties from being liable to multiple debtors for § 36-9-625(c)(2) damages when they were part of the same transaction giving rise to the claim. *Singleton*, 358 S.C. at 377 (explaining § 36-9-628(e) "effectively overrules the *Crane* holding with respect to recovery of statutory minimum damages," as "*Crane* stands for the proposition that multiple guarantors to ***one*** secured transaction are entitled to recover").

(App. pp. 299, 306–07 (emphasis in original as stated therein).)

Thus, the trial court expressly sets forth "Conclusions of Law" and rules against FFC on the merits of its § 36-9-628(e) defense to the class liability Mr. Delaney seeks to establish against it for statutory damages under § 36-9-625(c)(2). Note how, unlike its treatment of other arguments (for instance those addressed in sections 5 and 6 of the order, both of which conclude with language reading, "Delaney's Amended Complaint *sufficiently states a cause of action* for his and the class members' [presale notice/post-sale notice] claims"),[24] the plain language of the trial court's ruling on FFC's § 36-9-628(e) defense is not to the effect that the defense is merely staved off for the time being but rather that it is gone for good. Indeed, while it was prompted by FFC's motion to dismiss, the substance of the trial court's ruling on § 36-9-628(e) reads as a judgment for Mr. Delaney on the issue.

[24] (App. pp. 309, 311 (emphasis added).)

The Court of Appeals also overlooked or misapprehended the point that the trial court's unequivocal answer to the pure question of law posed by FFC's § 36-9-628(e) defense[25] places the issue beyond the reach of any other trial judge going forward, as "one circuit court judge may not overrule another." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008) ("Although Salmonsen is correct that one circuit court judge may not overrule another, we find this rule was not violated in the instant case.").

Thus, on a substantial matter that, all by itself, is a defense to the vast majority of the liability Mr. Delaney seeks to impose against FFC, a matter presenting a pure question of law (statutory interpretation), a matter solely within the province of the court to decide, a matter that neither was nor ever will be affected by any question of fact, the trial court has said to FFC: you lose. Looking beyond how it is styled and to its substance and effect, the Primary Order (and, in turn, the Secondary Order) is immediately appealable under subsection (1) of § 14-3-330 as an order "involving the merits" and/or under subsection (2)(c) as an order "strik[ing] out an answer or any part thereof," because the Primary Order does not merely deny FFC's motion to dismiss but rather dooms its § 36-9-628(e) defense entirely, effectively granting judgment to Mr. Delaney on the issue or otherwise scrubbing it from the trial court proceedings going forward.

The Court of Appeals also overlooked or misapprehended the point that if FFC's § 36-9-628(e) defense is meritorious, it means that FFC has a *right* not to face a class action with respect to alleged § 36-9-625(c)(2) liability. By forcing FFC to do so anyway, the Appealed Orders have denied FFC of a mode of trial to which it is entitled to as a matter of right, and are therefore immediately appealable under § 14-3-330(2).

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[25] *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007) ("The issue of interpretation of a statute is a question of law for the court.")

In the Order of Dismissal, the Court of Appeals cites *Shields*, 303 S.C. at 470, 402 S.E.2d at 483 for the proposition that "[a]voidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order." But this proposition is not relevant here. *Shields* was an appeal from an order restoring cases to the active docket. *Shields* had nothing to do with any issue regarding the *mode of trial*. FFC's § 36-9-628(e) defense does not aim to avoid trial with Mr. Delaney with respect to its alleged § 36-9-625(c)(2) liability to him but rather to enforce FFC's statutory *right* to a trial with Mr. Delaney that does not include his prosecution of claims for its alleged § 36-9-625(c)(2) liability to others (themselves absent from and avoiding direct litigation with FFC) in a representative capacity.

CONCLUSION

For the foregoing reasons, FFC asks the Court to grant the instant petition, reverse the Order of Dismissal, and reinstate FFC's appeal to proceed in due course to be decided on the merits.

Respectfully submitted,

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