STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2011-CP-10-07166
OTHA DELANEY, Individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	**ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**
vs.	)	
FIRST FINANCIAL OF CHARLESTON, INC.,	)	
Defendant.	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorney:	J. Ashley Twombley, Esq.
Defendant's Attorney:	Russell G. Hines, Esq.
Date of Hearing:	June 14, 2021
Court Reporter:	N/A

This matter came before the Court on June 14, 2021 on Plaintiff's Motion for Class Certification, filed March 11, 2021. Representing the Plaintiff was J. Ashley Twombley, Esq. Representing the Defendant was Russell G. Hines, Esq. This Motion is disposed of without the necessity of a hearing pursuant to the Chief Justice's April 3, 2020 Order, As Amended June 15, 2021, Section (c)(4). This Motion is listed on the June 14, 2021 Charleston County Motions Roster published May 14, 2021. The Plaintiff filed his Memorandum in Support on June 11, 2021. The Defendant filed its Memorandum in Opposition on June 15, 2021. For the following reasons, Plaintiff's Motion for Class Certification is heard and respectfully Granted.

BACKGROUND

In October of 2007, Mr. Delaney borrowed money from Defendant, First Financial of Charleston, Inc. ("FFC" or "Defendant"), to buy a truck, and FFC took a security interest in the

truck as collateral. Amended Complaint at Paragraphs 13–19. After Plaintiff defaulted on his obligation to repay FFC, FFC repossessed the collateral and sold it. Id. at Paragraphs 20–27.

The Plaintiff alleges that FCC makes loans to underprivileged South Carolina residents at high interest rates, takes a security interest in the residents' collateral, sells the collateral when the residents cannot repay the loan, and FCC retains the proceeds and seeks deficiency judgments from the residents. See Plaintiff's Memorandum in Support at 1. The Plaintiff alleges specifically that he and similarly situated consumers financed purchases of motor vehicles through FCC, and that upon their default, the post-repossession, predisposition notices sent by FCC to the Plaintiff and those similarly situated, did not comply with S.C. Code Ann. § 36-9-611 and § 36-9-614.

The putative class proposed by the Plaintiff and for which they are seeking certification by the Court is defined as follows:

> A class of consumers who (1) are named as borrowers, buyers, and/or obligors on a loan agreement or retail installment contract executed by FFC, assigned to FFC, or otherwise held by FFC; (2) were mailed a presale notice in substantially the same form as the Delaney Presale Notice or Revised Presale Notice[1]; and (3) whose collateral was disposed of by FFC or its agent.[2]

See Plaintiff's Motion for Class Certification at 2.

For the following reasons, the Court finds that the Plaintiff has met his burden in establishing the required elements of Rule 23(a), SCRCP, and Plaintiff's Motion for Class Certification is Granted.

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[1] The parties concede that the "Delaney Presale Notice" is the notice form that the Plaintiff actually received, and the notice form that other consumers received on or before October 4, 2011. The parties further concede that the "Revised Presale Notice" is the notice form that consumers received after October 4, 2011.

[2] Excluded from the Class are any individuals (1) whom FFC obtained a deficiency judgment against; (2) who had their debt discharged in bankruptcy after their collateral was sold; (3) whose collateral was sold on or before October 3, 2008; (4) whose collateral was sold after the date of an order granting class certification; and/or (5) who signed a "novation" or release agreement in which they released FFC from liability. Memorandum in Support at 11.

CONCLUSIONS OF LAW

Rule 23, SCRCP governs class actions. Rule 23, SCRCP provides that one or more members of a class may sue or be sued as representative parties on behalf of all of the class members if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP.

The party seeking certification of the class bears the burden of providing each of these five elements to the Court. See Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003). While a traditional burden of proof has not been specified by the Supreme Court of South Carolina, the Supreme Court has held that the court should apply a "rigorous analysis" to assure the prerequisites of Rule 23(a).[3] Id. It is within the trial court's discretion to determine whether to certify a class. See King v. Am. Gen. Fin., Inc., 386 S.C. 82, 88, 687 S.E.2d 321, 324 (2009) (citing Tilley v. Pacesetter Corp., 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998). In making this determination, the court may not look to the merits of the case. Tilley, 333 S.C. at 43, 508 S.E.2d at 21. The sole question for the Court is whether the requirements of Rule 23, SCRCP are met. Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178, 94 S.Ct. 2140, 2153 (1974)).

[3] While a "rigorous analysis" has not been specifically defined by our South Carolina Courts, the United States Supreme Court has found that a rigorous analysis requires a court to find: (1) the satisfaction of Rule 23 prerequisites, and (2) that satisfaction of the Rule 23 prerequisites is actual, as opposed to presumed. See General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 157-58 (1982); see also Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351-52 (2011).

"[T]he failure to satisfy even one prerequisite is fatal to class certification." Gardner, 353 S.C. at 20, 577 S.E.2d at 200. "The Court must apply a rigorous analysis to determine [whether] each prerequisite is satisfied." Id. at 21, 200. However, the South Carolina Supreme Court "has expressed the viewpoint that class actions are favored in this state[.]" Grazia v. S.C. State Plastering LLC, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). Moreover, the Supreme Court has held that:

> Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure. By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability.

Id. (quoting Littlefield v. S.C. Forestry Comm'n, 337 S.C. 348, 354, 523 S.E.2d 781, 784 (1999)). The Supreme Court has also noted that public policy favors class actions as they "save the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." Id. at 576, 204 (citing Califano v. Yamasaki, 442 U.S. 682, 701, 99 S.Ct. 2545, 2557 (1979)).

I. The Plaintiff's Motion for Class Certification is Granted.

A. Numerosity

To satisfy the requirements of Rule 23(a)(1), the Plaintiffs must demonstrate "the class is so numerous that joinder of all members is impracticable." Rule 23(a)(1), SCRCP. Numerosity is "not dependent on a specific number of class members," and "[t]here is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied." Brady v. Thurston Motor Lines, 726 F.2d 136, 145 (4th Cir. 1984).

The Plaintiff asserts that the putative class includes "hundreds of consumers who were mailed deficient presale notices." Memorandum in Support at 17. The Plaintiff further asserts

that while discovery is ongoing, discovery responses supplied by FCC show that in 2021, FCC has repossessed 575 vehicles associated with loan agreements executed on or after January 5, 2012. Id. The Court finds that the Plaintiff has met his burden in establishing the numerosity requirement of Rule 23(a), SCRCP, as joinder of hundreds of persons who received either the Delaney Presale Notice or the Revised Presale Notice would be impracticable. See Brady, 726 F.2d 136, 145 (upholding the lower court's confirmation of a class of seventy-four (74) class members) (quoting Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967)). Accordingly, the Court finds that the numerosity element of Rule 23, SCRCP is satisfied.

B. Commonality

Rule 23, SCRCP requires that there be "questions of law or fact common to the class." Rule 23(a)(2), SCRCP. "This means [that] the party [seeking certification] must articulate the existence of "significant common, legal, or factual issues which bind the proposed class together." Gardner, 353 S.C. at 20, 577 S.E.2d at 200 (internal citations omitted). "Commonality is met only where the class shares a determinative issue." Id. at 21, 577 S.E.2d at 201.

However, it is not required that every issue in the case be common amongst all class members. Pope v. Heritage Cmty., Inc., 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011). "[Rule 23] does not demand that all questions of law and fact be common, only that there be common issues among the class." McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986). "In fact, a single common issue will suffice if it is important enough." Id. "[C]ommonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be

litigated in any event." Id. at 568, 340 S.E.2d at 158 (citing H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 171, 198 (2d ed. 1985)).

The Court finds that the Plaintiff has met his burden in establishing that the putative class meets the commonality requirement of Rule 23, SCRCP, and that the common determinative issues are "sufficient[ly] central to justify the class certification." See Hensley v. South Carolina Department of Social Services, 429 S.C. 144, 153, 838 S.E.2d 510, 514 (2020). The putative class shares the common determinative issue of whether the Delaney Presale Notice and the Revised Presale Notice complied with the requirements of S.C. Code Ann. § 36-9-611 and § 36-9-614. A determination of whether the Delaney Presale Notice and the Revised Presale Notice complied with the requirements of S.C. Code Ann. § 36-9-611 and § 36-9-614 will resolve all claims of the putative class. See Plaintiff's Memorandum in Support at 19-21. Accordingly, the Court finds that the commonality element of Rule 23, SCRCP is satisfied.

C. Typicality

Typicality is satisfied if "the claims or defenses of the [class representative] are typical of the claims or defenses of the class." Rule 23(a)(3), SCRCP. The Plaintiff, Otha Delaney, is the purported class representative for the putative class. The Plaintiff claims that FCC repossessed and sold his vehicle without statutorily compliant presale notices. These are the same claims asserted by the putative class.

As discussed, supra, Plaintiff's claims are typical of the putative class. Each member of the putative class' legal claim is tied to the central issue of whether the Delaney Presale Notice and the Revised Presale Notice complied with the requirements of S.C. Code Ann. § 36-9-611 and § 36-9-614. Accordingly, the Court finds that the typicality element of Rule 23, SCRCP is satisfied.

D. Adequacy of the Class Representative

Rule 23, SCRCP further requires the representative party to "fairly and adequately protect the interests of the class." Rule 23(a)(4), SCRCP. In determining whether a named plaintiff is an adequate representative for the proposed class, South Carolina courts have considered "whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class." See, e.g., Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). If the Court considers the named plaintiff to be antagonistic, that plaintiff will not be considered an adequate representative of the class. Id., 300 S.C. at 468, 388 S.E.2d at 801. "The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim that conflicts with the economic interests of the class." Id. "The issue of whether a named plaintiff will adequately protect the class members is a question of fact which depends upon the circumstances of each case." Id.

Here, the Plaintiff, as purported class representative, can adequately protect the interests of the class and meets the two required criteria. As discussed, supra, the Plaintiff claims that FCC repossessed and sold his vehicle without statutorily compliant presale notices. The putative class members are persons who had collateral repossessed by FCC without statutorily compliant presale notices. Therefore, as discussed, supra, the claims of the Plaintiff are typical and representative of those of the putative class. Further, the Court cannot discern any material conflict that may exist between the proposed class representative and the putative class members he seeks to represent. Accordingly, the Court finds that the typicality element of Rule 23, SCRCP is satisfied.

E. Amount in Controversy

"In cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class." Rule 23(a)(5), SCRCP. This rule provides three separate ways in which this element can be satisfied, as follows: (1) the relief primarily sought is injunctive, (2) the relief primarily sought is declaratory, or (3) the amount in controversy exceeds $100.00 dollars per class member.

Here, the Plaintiff seeks statutory damages as provided by S.C. Code Ann. §36-9-635(c)(2), injunctive relief enjoining FCC from engaging in alleged statutorily noncompliant actions, and a declaration that the presale notices sent by FCC failed to comply with S.C. Code Ann. § 36-9-611 and § 36-9-614. S.C. Code Ann. §36-9-625(c)(2) provides a formula for damages for noncompliance with S.C. Code Ann. § 36-9-611 and § 36-9-614.[4] The Plaintiff asserts that, under the formula set forth by S.C. Code Ann. §36-9-625(c)(2), each putative class members' damages would exceed $100.00. See Memorandum in Support at 23.

Moreover, conceivably, even if the putative class members did not meet the $100.00 amount in controversy, the relief sought by the Plaintiff is primarily injunctive and declaratory, as the Plaintiff seeks injunctive relief enjoining FCC from engaging in alleged statutorily noncompliant actions, and a declaration that the presale notices sent by FCC failed to comply with S.C. Code Ann. § 36-9-611 and § 36-9-614. S.C. Code Ann.

Accordingly, the Court finds that the Plaintiff has met his burden in establishing that amount in controversy requirement of Rule 23, SCRCP.

[4] S.C. Code Ann. §36-9-625(c)(2) provides, "if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event 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."

CONCLUSION

After careful consideration of the record, the Court finds that the Plaintiff has satisfied his burden in proving the required elements of Rule 23, SCRCP. Accordingly, Plaintiff's Motion for Class Certification is heard and respectfully Granted.

AND IT IS SO ORDERED.

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Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

July _____, 2021
Charleston, South Carolina

Charleston Common Pleas

Case Caption: Otha Delaney VS First Financial Of Charleston Inc

Case Number: 2011CP1007166

Type: Order/Class Certification

IT IS SO ORDERED.

s/D.L. Jefferson Ninth Judicial Circuit Judge 2128