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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-07-7166

OTHA DELANEY

Appellant,

-vs-

FIRST FINANCIAL OF CHARLESTON, INC.

Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
OTHA DELANEY,)	CASE NO. 2011-CP-10-7166
)	
)	
PLAINTIFF,)	
)	
vs.)	ORDER GRANTING MOTION TO
)	DISMISS
FIRST FINANCIAL OF CHARLESTON,)	
INC.,)	
)	
DEFENDANT.)	

FILED
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 CLERK OF COURT
 J. ARMSTRONG

This matter comes before the Court upon Defendant's Motion to Dismiss Plaintiff's Complaint. Defendant contends that the Plaintiff's claim, and thus all putative class claims, are time barred by the applicable statute of limitations. Having fully considered the allegations of the Complaint in the light most favorable to the Plaintiff, the Court finds that Defendant's Motion should be GRANTED.

FACTUAL & PROCEDURAL BACKGROUND

On October 12, 2007, Plaintiff entered into a Retail Installment Sales Contract (hereinafter referred to as "RISC") with Coliseum Motors for the purchase of a 2003 Chevrolet pick-up truck, intended for Plaintiff's own personal use. (Compl. ¶ 9) This RISC was then assigned to Defendant First Financial by Coliseum Motors, thus making First Financial a secured party in the consumer goods transaction. (Compl. ¶ 10) After Plaintiff failed to make payments, First Financial lawfully repossessed the vehicle. (Compl. ¶ 11) First Financial then sent the Plaintiff a "NOTICE OF PRIVATE SALE OF COLLATERAL" (hereinafter "Notice of Sale") and accompanying letter on May 2, 2008 to advise Plaintiff of its intention to sell the repossessed

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collateral. (Compl. ¶ 14) Plaintiff claims this Notice of Sale failed to comply with South Carolina law. (Compl. ¶ 13) Over seven months later, on December 15, 2008, First Financial sold the collateral. (Compl. ¶ 12) Plaintiff filed the above-captioned lawsuit on October 3, 2011, alleging that 1) the Notice of Sale of collateral that First Financial sent to the Plaintiff was insufficient under South Carolina law, specifically S.C. Code Ann. § 36-9-613 and 614, and that 2) as a result, Plaintiff is entitled to a statutory relief pursuant to S.C. Code Ann. § 36-9-625(c)(2). (Compl. ¶ 14, 22, and 25) Plaintiff, as a representative of the putative class, seeks this recovery on behalf of putative class members. (Compl. ¶ 18).

Defendant First Financial moved to dismiss Plaintiff's Complaint asserting that the Plaintiff's claims are subject to a one year statute of limitations set forth in S.C. Code Ann. § 15-3-570 which would render Plaintiff's Complaint untimely as matter of law. The basis for this argument rests on two grounds: 1) The relief sought by the Plaintiff is in the nature of a "statutory penalty" and the action is therefore governed by the provisions of S.C. Code Ann. § 15-3-570; and 2) that Plaintiff's sole cause of action accrued upon receipt of the "NOTICE OF PRIVATE SALE OF COLLATERAL." In the alternative, Defendant asserts that because this action accrued upon Plaintiff's receipt of the Notice of Sale, a three year statute of limitations, if applied, still renders the Plaintiff's action untimely as a matter of law.

STANDARD OF REVIEW

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). While the allegations must be viewed in the light most favorable to the non-moving party, the motion must be granted if facts and inferences reasonably deducible from them show that Plaintiff could not

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prevail on any theory of the case. *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997). Where the facts plead in the Complaint demonstrate that the Plaintiff's sole cause of action is time-barred, judgment as a matter of law is proper at the 12(b)(6) stage. *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003).

LAW & ANALYSIS

I. The Remedy Sought By The Plaintiff Is A Statutory Penalty

This Court finds that the Plaintiff's sole cause of action requests an award which should be deemed a statutory penalty. A statutory penalty is defined as "a penalty imposing automatic liability on a wrongdoer for a violation of a statute's terms without reference to any actual damages suffered." *Black's Law Dictionary* 1181 (8th ed. 2005) Plaintiff seeks relief "for each class member pursuant to UCC 36-9-625(c)(2) in the amount of the finance charge plus ten percent of the principal amount of the obligation applicable to that class member's contract." (Compl. ¶ 25(c)). This statutory provision is cited as the only basis for recovery in this matter. As the legislative comments to § 36-9-625(c)(2) note, this relief is to be awarded "in any event" and "regardless of any injury that may have resulted." S.C. Code Ann. § 36-9-625(c)(2) cmt 4. Based on this language, I find that this fixed formula is not remedial in nature but rather serves the purpose of imposing automatic liability for "every noncompliance." *Id.*

While the proposed award is based on each class member's respective contractual obligations, this fact alone does not demonstrate that the award is remedial in nature. Conversely, this fact exhibits only that the severity of the penalty fluctuates depending on the finance charge in an effort deter noncompliance. Notably, Plaintiff has not sought any actual damages nor is there any evidence on the face of Plaintiff's Complaint to show that cognizable

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actual damages have been suffered. Rather, Plaintiff alleges only that a statute has been violated and he is a consumer entitled to relief pursuant to that statute.

Additionally, I find that classifying the Plaintiff's desired recovery as a statutory penalty is consistent with South Carolina law. On no less than three occasions, the South Carolina Supreme Court has identified this exact provision as awarding a "statutory penalty." See *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461 (2004)("[Plaintiffs] claimed that they were entitled to collect the minimum statutory penalty"¹); *Crane v. Citicorp Nat'l Serv., Inc.*, 313 S.C. 70, 437 S.E.2d 50 (1993)("the statutory penalty is evidence of the legislature's recognition that the small amount of compensatory damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code's provisions."²); *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)("a debtor may seek to recover the statutory penalty"). Indeed, in *Crane*, the Supreme Court not only identified Plaintiff's desired relief as a statutory penalty but also articulated the underlying legislative purpose in creating the penalty provision: the minimal amount of actual, compensatory damages available in scenarios similar to the instant matter would make enforcement less desirable. *Id.* Thus, the penalty provision incentivizes compliance with South Carolina law by providing a larger recovery otherwise not available.

Furthermore, because S.C. Code Ann. § 36-9-625(c)(2) is based on a uniform UCC model statute, other courts have also examined the appropriate classification of this statutory award. In *Beard v. Vanderbilt Mortg. & Fin., Inc.* 2008 WL 2323235 (M.D.T. June 2, 2008), the Middle District of Tennessee analyzed the precise scenario now before this Court. In granting the defendant's motion to dismiss, the court found that the putative class action, requesting relief

¹ Although the Court in *Singleton* was analyzing the provisions of former Section 9-507(1), current § 36-9-625(c)(2) embodies nearly identical language for its provisions on recovery related to improper notice of sale.

² Please See Footnote 1.

under the identical 47-9-625(c)(2) of the Tennessee Code of Laws, was seeking a statutory penalty that subjected the plaintiff to a one year statute of limitations. In ruling on this issue, the court found that any holding which defined 47-9-625(c)(2) as remedial would be contrary to established Tennessee case law. *Id.* at 4 (“The Court cannot agree with the Plaintiff that §47-9-625(c)(2) is primarily remedial in light of the Tennessee Court of Appeals cases describing that section as a statutory penalty.....”). As previously noted, South Carolina case law is equally supportive in defining the provisions of S.C. Code Ann. § 36-9-625(c)(2) as a statutory penalty. Based on the foregoing, I find that S.C. Code Ann. 36-9-625(c)(2) provides for a statutory penalty and the controlling limitations period should be either S.C Code Ann. § 15-3-570 or § 15-3-540(2), respectively one or three years.

II. S.C. Code Ann. § 36-2-725(1) Is Not Applicable To Plaintiff's Claims.

Although Plaintiff contends that the timeliness of this matter should be dictated by the six year statute of limitations found in S.C. Code Ann. § 36-2-725, the Court finds this argument unavailing for a variety of reasons. First and foremost, the explicit language of that statute limits its application to cases where a breach of contract for the sale of goods is at issue. Plaintiff has not plead a breach of contract cause of action nor does he allege any contract having ever been breached. This Court finds that the Plaintiff may not now invoke the benefits and protections of cause of action that has not been plead.

Secondly, the instant matter concerns the sufficiency of a notice of sale prior to the disposition of collateral. Therefore, this case deals entirely with Article 9's provisions concerning secured transactions. Article 2's provisions pertaining to the sale of goods are wholly irrelevant to any allegation set forth in Plaintiff's Complaint.

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Lastly, to the extent § 36-2-725 could otherwise be applied, this Court finds that general rules of statutory construction prevent the application of the six year statute of limitations. One of the universal maxims of statutory construction is that a specific statute prevails over a more general one. *Mims v. Alston*, 312 S.C. 311, 440 S.E.2d 357 (1994). Having found the Plaintiff's desired recovery is in fact a statutory penalty, both S.C. Code Ann. § 15-3-570 and S.C. Code Ann. § 15-3-540(2) speak more directly to the actual allegations in this lawsuit. Wherefore, the Court finds § 36-2-725 to be inapplicable to the instant case.

III. Plaintiff's Complaint Is Time-Barred Under Either a One Year or Three Year Statute of Limitations

Having found that the recovery which Plaintiff seeks is a statutory penalty, the sole question remaining before this Court is whether the provisions of S.C. Code Ann. § 15-3-570 or S.C. Code Ann. § 15-3-540 controls the limitations period in this matter. Both statutes pertain to actions seeking a penalty and provide a one and three year statute of limitations respectively. §'s 15-3-570 and 15-3-540 provide as follows:

S.C. Code Ann. § 15-3-570

"An action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense."

S.C. Code Ann. § 15-3-540

"Within three years"

"(2) An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation."

While either statute might be reasonably applied to this matter, the Court need not decide this inquiry as Plaintiff's cause of action accrued upon receipt of the alleged noncompliant

Notice of Sale and either statute would therefore serve as a bar to Plaintiff's recovery. As demonstrated by Plaintiff's Complaint, Plaintiff received the alleged unlawful Notice of Sale on or around May 2, 2008, and did not file suit under October of 2011, more than five months after the longer statute had run.

For purposes of § 15-3-570, the statute specifically informs that the commission of the offense serves as the date of accrual. Undoubtedly, since Plaintiff alleges that the Notice of Sale failed to comply with South Carolina law, the offense in this case occurred upon delivery and receipt of that Notice of Sale, and under § 15-3-570, the statute would begin to run in May of 2008 and expire in May of 2009. Plaintiff's Complaint does not allege that the sale of the repossessed vehicle violated any provision of South Carolina law and no offense was alleged to have occurred upon disposition in December of 2008. Without question, the only offense which Plaintiff alleges concerns the adequacy of the notice provided prior to sale.

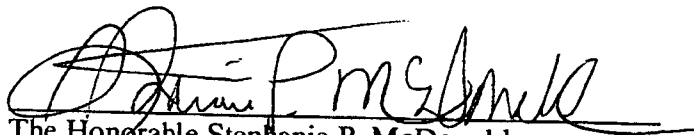
While § 15-3-540(2) does not specifically delineate a date of accrual, I find that the alleged commission of the offense should similarly serve as the commencement of ^{the} three year statute of limitations found in § 15-3-540. Unlike an action for actual or compensatory damages, Plaintiff's action for a penalty focuses on a specific act of non-compliance by the Defendant that awards automatic relief. The right to bring the action and thus the proper date of accrual should be determined by the date on which that alleged noncompliance occurred. However, this date of accrual would also coincide with the date on which the Plaintiff either knew or should have known that a violation had occurred.

Furthermore, I find that the legislature intended §'s 15-3-570 and 15-3-540 to have similar dates of accrual. Both govern actions for a statutory penalty and are nearly identical in language but for the length of the limitations period. Given that the legislature specifically

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enumerated the date of accrual for penalty actions under § 15-3-570 to be the date of the commission of the offense, this Court sees no logical purpose in creating an alternative date of accrual for penalty actions under § 15-3-540(2).

For the foregoing reasons, I find and hold that the Plaintiff's claims, and thus all putative class claims, are time-barred and Defendant's MOTION IS HEREBY GRANTED.


The Honorable Stephanie P. McDonald
Circuit Judge

Charleston, South Carolina

April 29, 2013

First Financial a secured party in the consumer goods transaction. (Compl. ¶ 10) After Plaintiff failed to make payments, First Financial lawfully repossessed the vehicle. (Compl. ¶ 11) First Financial then sent the Plaintiff a “NOTICE OF PRIVATE SALE OF COLLATERAL” (hereinafter “Notice of Sale”) and accompanying letter on May 2, 2008, to advise Plaintiff of its intention to sell the repossessed collateral. (Compl. ¶ 14) Plaintiff claims this Notice of Sale failed to comply with South Carolina law. (Compl. ¶ 13) Over seven months later, on December 15, 2008, First Financial sold the collateral. (Compl. ¶ 12) Plaintiff filed the above-captioned lawsuit on October 3, 2011, alleging that 1) the Notice of Sale of collateral that First Financial sent to the Plaintiff was insufficient under South Carolina law, specifically S.C. Code Ann. § 36-9-613 and 614, and that 2) as a result, Plaintiff is entitled to a statutory relief pursuant to S.C. Code Ann. § 36-9-625(c)(2). (Compl. ¶ 14, 22, and 25). This statutory provision constitutes the *sole alleged remedy* sought by the Plaintiff. Plaintiff, as a representative of the putative class, seeks this recovery on behalf of putative class members. (Compl. ¶ 18).

Defendant First Financial moved to dismiss Plaintiff’s Complaint asserting that the Plaintiff’s claims are subject to a one-year statute of limitations set forth in S.C. Code Ann. § 15-3-570, which would render Plaintiff’s Complaint untimely as matter of law. The basis for this argument rests on two grounds: 1) that the relief sought by the Plaintiff is in the nature of a “statutory penalty” and the action is therefore governed by the provisions of S.C. Code Ann. § 15-3-570; and 2) that Plaintiff’s sole cause of action accrued upon receipt of the “NOTICE OF PRIVATE SALE OF COLLATERAL.” In the alternative, Defendant asserts that because this action accrued upon Plaintiff’s receipt of

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the Notice of Sale, the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-540, if applied, still renders the Plaintiff's action untimely as a matter of law.

This Court granted First Financial's Motion to Dismiss, finding that Plaintiff's claims seek recovery which is in the nature of a penalty, and that because the Plaintiff's action accrued upon receipt of the alleged unlawful Notice of Sale, both the one-year statute of limitations found in § 15-3-570 and the three-year statute of limitations found in § 15-3-540 would render Plaintiff's Complaint untimely as a matter of law.

Plaintiff moved to reconsider this Court's Order contesting both findings: that § 36-9-625(c)(2) is a penalty provision and that the action accrued upon receipt of the alleged defective Notice of Sale. For the reasons set forth below, the Court reaffirms its finding that the Plaintiff's Complaint is untimely as a matter of law.

LAW & ANALYSIS

I. The Remedy Sought by Plaintiff is a Statutory Penalty

Although conceding that the statutory award he seeks is to be given to a plaintiff "even in cases where [that] consumer can demonstrate no loss," Plaintiff nonetheless argues that § 36-9-625(c)(2) is intended to be remedial and compensatory in nature. (See Plaintiff's Motion to Reconsider at p. 2). I concluded that § 36-9-625(c)(2) awards a statutory penalty because 1) our Supreme Court has depicted it as precisely such on no less than three occasions and 2) the Legislative comments to this exact subsection specifically inform that plaintiffs are entitled to this formulaic award "regardless of any

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injury that may have resulted.” *Crane v. Citicorp Nat’l Serv.*, 313 S.C. 70, 437 S.E.2d 50 (1993); *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000); *Stokes v. Singleton*, 358 S.C. 369, 595 S.E.2d 461 (2004); S.C. Code Ann. § 36-9-625(c)(2) *cmt.* 4. In light of this Legislative commentary on the nature of the statute, I find that § 36-9-625(c)(2)’s award squarely satisfies the definition of a “statutory penalty.” *Black’s Law Dictionary* 1181 (8th ed. 2005)(a “statutory penalty” is defined as “a penalty imposing automatic liability on a wrongdoer for violation of a statute’s terms without reference to any actual damages suffered.”) This direct and controlling authority resolves any ambiguity which might otherwise be derived from the statutory language itself.

Plaintiff argues that our Supreme Court has imprecisely chosen its words in categorizing 36-9-625(c)(2) as a penalty provision, citing an Ohio federal district court opinion in support of his argument. *See Jenkins v. Hyundai Motor Financing Co.*, 389 F.Supp.2d 961 (S.D. Ohio 2005). A careful examination of *Jenkins*, however, demonstrates that the court’s analysis fails to support Plaintiff’s current argument. In *Jenkins*, the district court spoke not only to Ohio’s §9.625(C), the companion statute to S.C. Code Ann. § 36-9-625(c), but also to Ohio’s §9-625(B), whose contents are also found in the South Carolina consumer code statutory scheme at S.C. Code Ann. § 36-9-625(b). As the Plaintiff’s quotations from *Jenkins* reveal, the court’s commentary concerning actual or compensatory damages being recoverable by a consumer/plaintiff in these type of actions refers to § 9-625(B), a statute which has no bearing on Plaintiff’s allegations and was never cited as a basis for relief in this case. Rather, Plaintiff seeks an

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award under § 36-9-625(c)(2) only. The *Jenkins* court merely identified that Ohio companion statute as a “minimum statutory amount,” and not as a provision awarding actual damages.

While plaintiffs alleging inadequate notice of the disposition of collateral might choose to pursue relief under both subsections, they must be first be able to demonstrate the existence of actual damages, a prerequisite which Plaintiff’s Complaint does not meet. Wherefore, in accordance with South Carolina case law, the Court finds Plaintiff’s desired relief to be a statutory penalty.

In furtherance of Plaintiff’s novel position, he also cites to case law outside the scope of the issues before this Court. *See e.g., Smith v. Eagle Const. Co., Inc.* 282 S.C. 140, 318 S.E.2d 8 (1984); *Edwards v. State Law Enforcement Div.* 395 S.C. 571, 720 S.E.2d 462 (2011) These opinions do not address, concern, or even reference § 36-9-625(c)(2) or any UCC provision, nor do they discuss statutory penalties.

The first case cited, *Smith v. Eagle Const. Co.*, addresses a Worker’s Compensation claimant’s right to lifetime benefits under a post-injury enacted statutory amendment. The question before the Court was whether the amendment could be applied retroactively or prospectively only. In determining that issue, the Court discussed the “remedial” nature of the amendment only so as to asses if it were proper for retroactive application. Quite clearly, the Court was speaking of “remedial” only in the sense of a *change in the law* related to an individual’s existing legal rights. The second case cited, *Edwards*, is a criminal matter concerning the application of an amended sex offender registration law to

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a pardoned but convicted sex offender. Again, the Court discussed the “remedial” nature of a statutory amendment in the context of a *change in existing law* affecting vested rights. Neither opinion discusses the nature of civil damages being awarded by a statute, the principal question before this Court.

In essence, Plaintiff asserts that because § 36-9-625(c)(2) provides a private cause of action for plaintiffs, it creates a “new remedy for an existing right” and is therefore a compensatory statute. Under this theory, however, any and all statutes which grant a private cause of action would have to be deemed “remedial” simply by virtue of creating a basis for a lawsuit. I find that, to the extent such a generic definition could be applied, it would render both S.C. Code Ann. § 15-3-540(2) or § S.C. Code Ann. § 15-3-570 meaningless because no cause of action could ever qualify as arising “under a statute for a penalty.”

S.C. Code Ann. § 36-9-625(c)(2), is “remedial” only in the broad sense that it allows a Plaintiff to recover an award due a defendant’s noncompliance with S.C. Code Ann. §§ 36-9-613 and 614. However, its Legislative purpose, as noted by *Brockbank*, is “to ensure creditor compliance” under a fixed calculation of recovery even where no injury or damages exist; thus, it provides for a statutory penalty. *Brockbank*, 341 S.C. at 385, 534 S.E.2d at 695. Therefore, the limitations period in either S.C. Code Ann. § 15-3-570 or S.C. Code Ann. § 15-3-540(2) must apply to Plaintiff’s claims as he seeks a penalty award in this matter.

II. Plaintiff's Sole Cause of Action Accrued upon Receipt of the Notice of Sale and is therefore Time-Barred under Either S.C. Code Ann. § 15-3-570 or S.C. Code Ann. § 15-3-540(2)

The two statutes which might arguably establish the time limitations period for Plaintiff's claims set forth the following:

S.C. Code Ann. § 15-3-570

"An action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense."

S.C. Code Ann. § 15-3-540(2)

"Within three years"

"An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation."

This Court finds that because Plaintiff's only allegation of noncompliance relates to the adequacy of the "Notice of Sale," the "commission of the offense" under § 15-3-570 took place in May of 2008 upon receipt. Indeed, Plaintiff's Complaint alleges that because Defendant's Notice of Sale was insufficient under South Carolina law, Plaintiff is entitled to relief. Based on the allegations pled, I find that the "offense" alleged in this matter is in fact the inadequacy of the "Notice of Sale." A review of Plaintiff's Complaint demonstrates that Plaintiff does not challenge the manner or method of the sale of collateral except for the fact that proper notification of that sale is alleged to have not occurred.

I also find the date of accrual under § 15-3-540(2), if applicable, to be May of 2008 as well. Thus, Plaintiff's Complaint is time-barred under either statute. This Court

finds that the commission of the offense is the operative date of accrual under § 15-3-540(2) for several reasons. First, the striking similarities in the § 15-3-570 and § 15-3540(2) evidence a Legislative intent for an action under either section to accrue at the time of the commission of the offense; and 2) because Plaintiff's action is based on a specific act of noncompliance and Plaintiff's entitlement to relief is based on that act of noncompliance (not on actual damages), Plaintiff's action accrues as soon as the statute's provisions are allegedly violated *i.e.* when the insufficient "Notice of Sale" is received.

Additionally, this Court finds the Eighth Circuit Court of Appeals' holding in *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012) to be persuasive. In *Rashaw*, the Court found that receipt of the Notice of Sale should in fact serve as the date of accrual in consumer actions regarding the sufficiency of notice of disposition of collateral. In affirming the lower court's dismissal of the plaintiff's claims, the Court noted the following:

We therefore affirm the district court's dismissal of the Mo UCC claims because we agree *that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.*

(emphasis added). The Court was interpreting a Missouri statute that is nearly verbatim to S.C. Code Ann. § 15-3-540(2), which Plaintiff claims is the more appropriate statute if this Court finds § 36-9-625(c)(2) to award a statutory penalty.


I find Plaintiff's argument that the date of accrual should be the date of the sale of collateral to be unpersuasive. Plaintiff argues that while the sufficiency of the Notice of Sale is controlled by § 36-9-613 and 614, the requirement of notice itself is mandated by § 36-9-611. Plaintiff contends that this subsection, entitled "Notice before disposition of

collateral,” mandates “reasonable notification,” has been violated in this action, and contemplates only scenarios where a sale takes place. Plaintiff therefore claims that a sale is a “necessary antecedent event” which triggers the right to recovery.

First and foremost, S.C. Code Ann. § 36-9-610 outlines the various requirements for proper disposition and sale of collateral. In his Complaint, Plaintiff does not contend that this subsection was violated nor even make reference to it. Therefore, the sale itself cannot be the “offense” that is alleged to have occurred based on the allegations pled. Instead, Plaintiff’s Complaint takes issue with the contents of this Defendant’s Notice of Sale. The only provisions which control the contents of that Notice are found in § 36-9-613 and § 36-9-614, and these subsections are violated when an inadequate Notice of Sale is provided.

For the foregoing reasons, the Court finds that the Plaintiff’s claims, and thus all putative class claims, are time-barred. Plaintiff’s MOTION TO RECONSIDER IS HEREBY DENIED.

IT IS SO ORDERED.


The Honorable Stephanie P. McDonald
Presiding Judge, 9th Judicial Circuit

Charleston, South Carolina

March 13, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Case Number: 2011-CP-10- 7166

OTHA DELANEY, Individually and on)
behalf of all others similarly situated,)

Plaintiff,)

vs.)

FIRST FINANCIAL OF CHARLESTON,)
INC.,)

Defendant.)

SUMMONS

BY _____

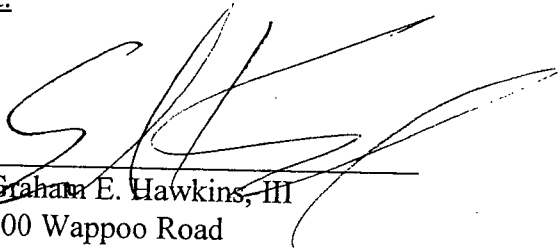
JULIE J. ARMSTRONG
CLERK OF COURT

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FILED

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the plaintiff or his undersigned attorney at 1214 King Street, Beaufort, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint with the time aforesaid, judgment by default will be rendered against you for the relief demanded in said Complaint.


Graham E. Hawkins, III
800 Wappoo Road
Charleston, SC 29407
843-225-7565
hawkinslawfirm@aol.com

Beaufort, South Carolina

October 3 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Case Number: 2011-CP-10-7166

OTHA DELANEY, Individually and on)
behalf of all others similarly situated,)

Plaintiff,)

CLASS ACTION COMPLAINT

vs.)

FIRST FINANCIAL OF CHARLESTON,)
INC.,)

Defendant.)

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Plaintiff OTHA DELANEY (“Delaney”) brings this Class Action Complaint against FIRST FINANCIAL OF CHARLESTON, INC. (“First Financial”) on his own behalf and that of all others similarly situated, seeking declaratory, injunctive and monetary relief to remedy First Financial’s unlawful noncompliance with the notice requirements of the South Carolina Uniform Commercial Code.

INTRODUCTION

1. Provisions of the South Carolina Commercial Code, §§36-9-600 through 9-635 (hereinafter referred to by section number only, or as the “UCC”) form a comprehensive scheme governing, *inter alia*, the disposition by a repossessing secured creditor of a consumer’s repossessed collateral.

2. These provisions require a creditor, prior to disposition of repossessed collateral, to send a notice which provides a consumer with specific information about the proposed disposition.

3. When First Financial repossessed its borrowers’ cars, it sent them form notices which failed to provide required information.

4. First Financial failed to send plaintiff and similarly situated South Carolina consumers a disposition Notice that complied with the requirements of the law.

PARTIES

5. Defendant First Financial is a South Carolina corporation with its principal place of business in Charleston, South Carolina. At all times material hereto, First Financial was engaged in the business of providing financing to purchasers of automobiles in South Carolina.

6. Plaintiff Otha Delaney is an adult residing at 112 Mill Road in Jacksonville, North Carolina.

JURISDICTION AND VENUE

7. This court has jurisdiction over the parties and the subject matter of this action.

8. Venue lies in this county pursuant to §15-7-30(E)(1), South Carolina Code of Laws, 1976 as amended, in that defendant's principal place of business at the time the cause of action arose was Charleston County.

FACTUAL ALLEGATIONS AS TO DELANEY

9. On or about October 12, 2007, plaintiff entered into a Retail Installment Sales Contract ("RISC") for the purchase of a 2003 Chevrolet pick-up truck for personal, family or household use. The cash price for the vehicle was \$9,399.50. The finance charge (credit service or time/price differential) was \$4,405.92.

10. The RISC was simultaneously assigned to First Financial by the seller of the vehicle, Coliseum Motors, making First Financial the secured party within the definition of that term in the UCC, §36-9-102(a)(72). A true and correct copy of the RISC is attached as **Exhibit A**.

11. Subsequently First Financial caused the vehicle to be repossessed.

12. Upon information and belief, on or about December 15, 2008, First Financial entered into a contract for the sale of the vehicle, thereby terminating any right on the part of plaintiff to redeem the vehicle, i.e., "disposing" of the vehicle. A true and correct copy of the Affidavit for Repossessed Vehicle (DMV Form 4034) is attached as **Exhibit B**.

13. Prior to First Financial's disposition of the collateral, no notice of disposition complying with the requirement of §§36-9-613 and 614 had been sent to plaintiff.

14. Prior to disposition of the vehicle on or about May 2, 2008, First Financial sent a document titled "NOTICE OF PRIVATE SALE OF COLLATERAL" to plaintiff in an apparent attempt to comply with §§36-9-613 and 614 of the UCC. The notice is attached as **Exhibit C**.

15. Plaintiff is informed and believes that **Exhibit C** is a form notice utilized by First Financial which was sent to numerous residents of South Carolina in an attempt to comply with §§36-9-613 and 614 of the UCC.

CLASS ALLEGATIONS

16. All previous allegations are hereby realleged as fully as if restated in their entirety.

17. Upon information and belief, First Financial had disposed of motor vehicles serving as collateral after sending the above form notice to consumers in the State of South Carolina in other transactions, with only the names, the dates of the RISC, and the particulars of the vehicle involved varying from form to form, with the identities and number of such consumers being known only to First Financial.

18. Plaintiff seeks to represent a class of similarly situated consumers. The class is composed of all South Carolina residents:

- a. who were parties to a RISC in which First Financial was the secured party;
- b. who had their motor vehicle repossessed in South Carolina by First Financial or its agents;

- c. who were sent a notice of disposition of collateral prior to disposition by First Financial in substantially the same form as **Exhibit C**;
- d. whose collateral was “disposed of” ;
- e. against whom First Financial has not obtained a deficiency judgment as to such RISC;
- f. who have not provided First Financial with a written waiver of the right to notice of disposition following default;
- g. who have not filed an action against First Financial based on a violation of the notice requirements of the UCC;
- h. whose statutory damages calculated according to §36-9-625 exceed \$100; and
- i. who have neither filed a Chapter 7 bankruptcy nor obtained a discharge in bankruptcy applicable to any obligation owed to First Financial arising out of the RISC.

19. Plaintiff is informed and believes that **Exhibit C** is a pre-printed form notice of disposition used by First Financial in an unsuccessful attempt to comply with the requirements of §§36-9-613 and 614, in numerous transactions involving its repossession of motor vehicle collateral in South Carolina.¹ Accordingly, the members of the proposed class are so numerous that joinder of all members is impracticable.

20. There are questions of law and fact common to the class which predominate over any questions affecting only individual class members. The principal common issues with respect to the

¹ Since 2001, First Financial has been a creditor in almost 200 bankruptcy cases in the Federal District of South Carolina according to records available on the Public Access to Court Electronic Records website. Based on the experience of plaintiff’s counsel in over a decade of litigating similar UCC notice cases, these numbers suggest accounts significantly in excess of that necessary to establish numerosity (50-100 accounts). Inasmuch as defendant is uniquely situated to address this issue, plaintiff submits that, at a minimum, discovery on the issue ought to be permitted. See, *Griffin v. Harley Davidson Credit Corp.*, Slip Copy, 2010 WL 233764 (D.S.C. 2010) (“[D]istrict courts in this circuit have concluded that plaintiffs are generally entitled to pre-certification discovery to establish the record the court needs to determine whether the requirements for a class action suit have been met.”) (Internal citations omitted.)

class are whether **Exhibit C** complies with the UCC; whether the failure to send compliant notices entitle class members to statutory damages as provided for by §36-9-625; whether the transactions involving First Financial and class members were “consumer transactions” within the meaning of the UCC; whether failure to provide compliant notice of disposition of collateral deprives First Financial of its right to deficiency claims against class members, and others.

21. Plaintiff is a member of, and his claims are typical of those of, the class he seeks to represent, and he will fairly and adequately protect and represent the interests of the class. To that end, he has engaged the services of counsel with extensive experience in the issues involved in this litigation – both the substantive UCC issues and the Rule 23 class action procedural issues. Finally, there are no conflicts or adversary interests between the claims of plaintiff as class representative and the claims of the proposed class, nor do class counsel have any interests in conflict with the interests of the class.

22. Plaintiff is informed and believes that his RISC is typical of the RISCs of class members. As noted above, the cash price for his vehicle was \$9,399.50, and the finance charge was \$4,405.93. According to §36-9-625, his statutory damage award would be not less than \$5,345.00. Plaintiff submits that the claims of class members will exceed \$100.00 each.

INDIVIDUAL AND CLASS CAUSES OF ACTION

23. All previous allegations are hereby realleged as fully as if restated in their entirety.

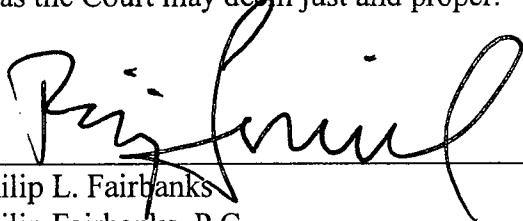
24. Before a creditor may sell, enter a contract for sale, or otherwise dispose of a repossessed vehicle, the UCC requires that it send the borrower “a reasonable authenticated notification of disposition.” UCC §36-9-611(a)(1).

25. First Financial disposed of plaintiff's and class members' motor vehicle collateral without first having provided notice of its proposed disposition, in compliance with applicable sections of the South Carolina UCC.

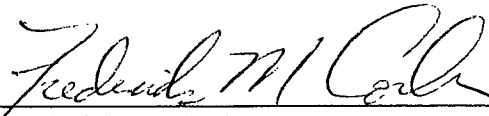
PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays for relief as follows:

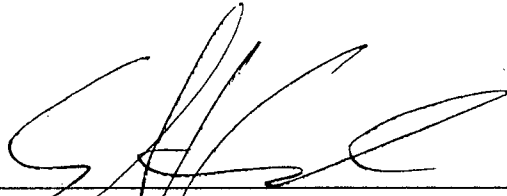
- A. For an Order certifying this case as a class action pursuant to Rule 23 of the South Carolina Rules of Civil Procedure;
- B. For an order preliminarily and permanently enjoining First Financial from engaging in the practices challenged herein;
- C. For statutory damages for each class member pursuant to UCC §36-9-625(c)(2) in the amount of the finance charge plus ten percent of the principal amount of the obligation applicable to that class member's contract;
- D. For a declaration that First Financial is barred from collecting a deficiency against class members;
- E. For pre-judgment interest to the extent permitted by law; and
- F. For such other and further relief as the Court may deem just and proper.



Philip L. Fairbanks
Philip Fairbanks, P.C.
1214 King Street
Beaufort, SC 29902
843-521-1580
843-521-1590 fax
philip.fairbanks@gmail.com



Frederick M. Corley
Law Office of Frederick M. Corley, Esq., P.A.
P.O. Box 2265
Beaufort, SC 29901
843-524-3232
843-525-9442 fax
rcorley@islc.net



Graham E. Hawkins, III
800 Wappoo Road
Charleston, SC 29407
843-225-7565
hawkinslawfirm@aol.com

Beaufort, South Carolina

October 3, 2011

RETAIL INSTALMENT CONTRACT

I have today purchased from Seller, on a total sale price basis, under the terms and provisions of this agreement, the following property which is accepted in its present condition and receipt of which is acknowledged:

ACCOUNT NO. _____

DATE OCTOBER 12, 1967

BUYER Name	<u>OTIS MARVIN DELANEY</u>	CREDITOR (SELLER) Name	<u>COR. TELUM MOTORS</u>
Number and Street	<u>828 MITCHING POST RD</u>	Number and Street	<u>4951 MANCHESTER ROAD</u>
City, State and Zip Code	<u>CHARLESTON, SC 29414</u>	City, State and Zip Code	<u>N. CHARLESTON, SC 29418</u>

PROPERTY	NEW OR USED	YEAR AND MAKE	NO. CYL.	SERIES NAME (Also "No." if applicable)	MOTOR VEH - Body Type (If truck, ton capacity) REG. VEH. - Length - Width - Color	IDENTIFICATION NO. (Serial or Motor No.)
	<u>USED</u>	<u>2W03 CHEV</u>		<u>1500</u>	<u>MPD --</u>	<u>1G0EC14X232296502</u>

EQUIPMENT INCLUDED					
MOTOR VEHICLE			RECREATIONAL VEHICLE		
<input type="checkbox"/> Radio	<input type="checkbox"/> Vinyl Top	<input type="checkbox"/> Air Cond.	<input type="checkbox"/> Air Cond. Unit(s)	<input type="checkbox"/> Range	<input type="checkbox"/> Refrigerator
<input type="checkbox"/> Auto Trans.	<input type="checkbox"/> 3 Speed Trans.	<input type="checkbox"/> 4 Speed Trans.	<input type="checkbox"/> Furniture (As per Mfg. floor plan)	<input type="checkbox"/> Awnings	
<input type="checkbox"/> 5 Speed Trans.	<input type="checkbox"/> Power Brakes	<input type="checkbox"/> Power Steering	<input type="checkbox"/> Other		

Trade-in: (Year and Model) 65 CHEVROLET SILVERADO The allowance for the trade-in is as follows: Gross \$ 5,000.00
 Amount owing \$ 4,424.75 Net \$ 575.25 Amount owing on trade-in to be paid by Seller Buyer.

Property to be kept in County of CHARLESTON at my above address unless a different address inserted here

DESIGNATION OF PARTIES: As used in the document, the words "I", "Me", and "My" refer to Buyers, jointly and severally, and the words "You" and "Your" refer to Seller or Holder if this contract is assigned.

INSURANCE

I understand that the purchase of Credit Life or Credit Life and Credit Accident and Health Insurance is not required. I understand further that only the following forms of credit insurance are offered and that the seller and/or assignee of this contract may profit from its sale. I consent to this and having first examined the cost of said insurance, as indicated herein, freely and voluntarily elect to purchase the following coverages:

Single Life Credit Life Insurance for term of contract on First Buyer signing below at a Cost of \$ N/A

Joint Life Credit Life Insurance for term of contract at a Cost of \$ N/A

Credit Accident and Health Insurance for term of contract on First Buyer signing at a Cost of \$ N/A

Credit life and Credit Accident and Health Insurance (if elected) to be issued by:

Name of Insurer

Home Office Address of Insurer

Dated _____ (to be completed by Buyer)

Signature of Buyer to be insured under either form of Credit Life Insurance and Credit Accident and Health Insurance (if elected)

Signature of non-insured Buyer (if single life authorized) or co-insured under Joint Life Credit Life Insurance (but only if joint life authorized)

ITEMIZATION OF AMOUNT FINANCED

1. Cash Price of Motor Vehicle (including Sales Tax) \$ 9399.50

2. Less Downpayment
 (Cash 849.25) (Trade-in 575.25) \$ 1424.50

3. Unpaid Balance of Cash Price (1 minus 2) \$ 7975.00

4. Amounts Paid to Others on My Behalf

a.) Premium to Credit Life Ins. Co. \$ N/A

b.) Premium to Credit Accident & Health Ins. Co. \$ N/A

c.) ~~Physical Damage Insurance~~ 849 \$ 499.00

d.) To Public Officials for Certificate of Title fees \$ 25.00

e.) To Public Officials for Recording & Releasing Fees \$ N/A

f.) To Public Officials for Documentary Stamps \$ N/A

g.) To _____

For _____ \$ N/A

Total Items 4 (a) + (b) + (c) + (d) + (e) + (f) + (g) \$ 524.00

5. Amount Financed (3 plus 4) \$ 8499.00

I understand that I am required to have Physical Damage Insurance on the property; however I have the right to choose the agent or company through which Physical Damage Insurance is to be obtained. The total cost of such insurance, if obtained through You, is \$ N/A for a term of _____ months from the date hereof, for the following coverages:

Comprehensive Coverage Fire & Broad Form Theft

_____ Ded. Collision Combined Additional Coverage

Towing & Labor Costs Vendor's Single Interest

Other _____

IF PHYSICAL DAMAGE INSURANCE NOT INCLUDED HEREIN, I HAVE PURCHASED SAME FROM:

Agent's Name _____

Agent's Address _____

Name of Insurance Company _____

(NOTE: If insurance elected, all Buyers are to authorize



insurance.
CANCELLATION: I may within 30 days of this date cancel all insurance elected above by returning all certificates to the Assignee named below. The cost of cancelled insurance will be refunded or credited to my account.

INSURANCE AGAINST LIABILITY FOR BODILY INJURY OR PROPERTY DAMAGE TO OTHERS IS NOT INCLUDED IN THIS TRANSACTION.

OPTIONAL MECHANICAL BREAKDOWN INSURANCE/EXTENDED SERVICE CONTRACT

I have the option of electing the following:
 Mechanical Breakdown Insurance Extended Service Contract at a cost of \$ N/A
 furnished through _____ for a term of _____ months.
(NAME OF COMPANY)
 I hereby elect the above insurance/contract.

BUYER

BUYER

DISCLOSURES REQUIRED BY FEDERAL LAW

ANNUAL PERCENTAGE RATE The cost of my credit or a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost me.	Amount Financed The amount of credit provided to me or on my behalf.	Total of Payments The amount I will have paid after I have made all payments as scheduled.	Total Sale Price The total cost of my purchase on credit, including my down payment of \$ <u>1,629.50</u>
29.50 %	\$ 4,485.92	\$ 8,499.08	\$ 12,984.92	\$ 14,324.42

My Payment Schedule Will Be: 36 monthly payments as follows:
 (Check one block only)
 A first payment of _____ or
 A final payment of _____ with
 36 payments of \$ 358.47 each, all payments payable the like date (or if no like date, then on last day of the month) of each successive month beginning NOVEMBER 11, 2007, or if no date is specified, one month after the date of this contract.
Late Charge: If a payment is not paid in full within 10 days after it is due, I will be charged 5% of the unpaid portion of the payment, with a minimum of \$6.20 but not to exceed \$15.50.
Prepayment: If I pay off early, I may be entitled to a refund of part of the Finance Charge.
Security: I am giving a security interest in the vehicle(s) being purchased.
 See the remainder of both sides of this document for additional information about nonpayment, default, any repayment in full before the scheduled date and prepayment refunds.

PROMISE TO PAY: I promise to pay you, at your address, the Total of Payments shown above in consecutive monthly payments in the number, amounts and at the times shown above, plus any late charges, if applicable, subject to the provisions on the reverse side of this contract relating to prepayment. If I fail to make any payment when scheduled or if I am in default of anything I have promised to do in this agreement, you may, subject to any required notice or notice of right to cure, and after any required cure period has expired, require me to pay you at once the unpaid balance I owe you less any required rebates of unearned finance charges or insurance premiums or other rebates. My right to notice of default and right to cure is explained in the paragraph of this agreement entitled "Notice of Default and Right to Cure." You may also collect reasonable expenses incurred by you in obtaining and selling the property and, unless prohibited by law, reasonable attorney fees (not in excess of 15% of the unpaid balance) if referred to an attorney not a salaried employee of yours for collection. If I owe you anything after the maturity date of this contract, I promise to pay you interest on that amount at the Annual Percentage Rate shown above.

The following applies to the sale of all used motor vehicles, except motorcycles, with a gross vehicle weight rating of less than 8,500 pounds, a curb weight less than 6,000 pounds and a frontal area of less than 46 square feet, or unless seller is a financial institution:

NOTICE
THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

NOTE: Additional provisions of this contract are found on the reverse side of this document. Those provisions are incorporated by reference herein.

NOTICE TO THE BUYER: 1. DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. 2. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN. 3. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND TO OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE.
 Accepted: The foregoing contract is accepted by Seller and is hereby assigned under the terms of the assignment on the reverse side to the following Creditor:

FIRST FINANCIAL OF CHARLESTON
NAME OF CREDITOR
10 BOX 60429
ADDRESS
CHARLESTON SC 29419
CITY STATE ZIP CODE
CHARLESTON MOTORS
NAME OF SELLER
 BY _____ TITLE _____
CO-SIGNER

I ACKNOWLEDGE RECEIPT OF A COPY OF THIS CONTRACT WHICH WAS COMPLETELY FILLED IN PRIOR TO MY EXECUTION HEREOF, AND I FURTHER ACKNOWLEDGE THAT I HAVE READ BOTH SIDES OF THIS CONTRACT.

[Signature]
 BUYER

CO-SIGNERS ACKNOWLEDGE RECEIPT OF A COPY OF "NOTICE TO CO-SIGNER" PRIOR TO THE EXECUTION HEREOF.

Form No. S.C. (M.V.) 7/06
 (Motor Vehicle - Recreational Vehicle)

SEE REVERSE SIDE FOR ADDITIONAL INFORMATION

FILE COPY



South Carolina Department of Public Safety
AFFIDAVIT FOR REPOSSESSED MOTOR VEHICLE

4034
(Rev. 7/96)

(Entire Form to be Typed or Printed)

Under penalties of perjury, I Tracy Murray certify that all facts set forth herein are true and correct and further certifies that the holders of other unsatisfied liens recorded against this vehicle on the records Division of Motor Vehicles, Department of Public Safety, Columbia, S.C., have been duly notified to protect their interest in the vehicle, if any, and this is to certify that the undersigned has repossessed the motor vehicle described below because of the failure of the former owner to meet this obligation for settlement of a lien or mortgage on said vehicle.

Orta Marina Delaney
 Name of Owner from Whom Vehicle Repossessed
828 Hitching Post Rd Ches SC 29414
 Street City State Zip Code
Chew 1GCEC14X232296522 770850188748667B
 Make Vehicle Identification Number (Serial) Title Number
03 1500 PK
 Year Model Current License Number License Year Body Style

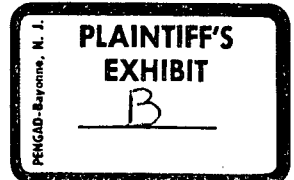
Method Of Repossession Voluntary Terms of Lien or Mortgage Public Sale

(IF BY PUBLIC SALE ATTACH BILL OF SALE OF SHERIFF, OR AUTHORIZED SELLER)

Amount of Original Lien \$ 12,904.92 Date of Lien 10.13.07
 Lienholder's Name First Financial of Ches
 Street, City, State, Zip Code P.O. Box 60429 Ches SC 29419
 Date of Repossession 5.2.08
 Signature of Lienholder Tracy Murray Title Title Clerk

Furthermore, this is to certify that for the value received \$ _____ the above vehicle has been assigned to: COOK motor ce 9933 Hwy 78 Ladsen SC 29456
 NAME STREET CITY STATE ZIP CODE
 for disposition or sale.

By: Tracy Murray
 Date: 12.15.08
 Sales Tax No.: _____



NOTICE: This form must accompany the Certificate of Title, which must be properly assigned over to the new owner on the back of the title.

(See Instructions on reverse side)

First Financial Of Charleston, Inc.

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

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 (10th) 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 (10th) day.

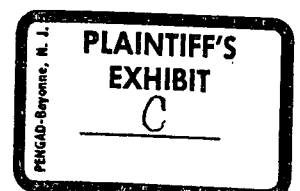
You have the right to have the collateral returned to you upon payment of the account balance plus any repossession expenses, attorney's fees and other costs we have incurred, as may be applicable and permitted by law.

Description of Collateral: 2003 Chevrolet 1500 Vin# 1GCEC14X23Z296522

5025 Dorchester Road
Street Address

Charleston, SC 29418
City State Zip

Bob Lewis
By



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
OTHA DELANEY, individually and on)
behalf of others similarly situated,)
))
PLAINTIFF,)
))
vs.)
))
FIRST FINANCIAL OF CHARLESTON,)
INC.,)
))
DEFENDANT.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP-10-7166

FILED
2011 NOV 30 PM 4:23
JULIE J. ARMSTRONG
CLERK OF COURT

**DEFENDANT FIRST FINANCIAL OF
CHARLESTON, INC.'S
MOTION TO DISMISS**

TO: PHILIP L. FAIRBANKS, FREDERICK M. CORLEY, AND GRAHAM E. HAWKINS,
III, ATTORNEYS FOR THE PLAINTIFF:

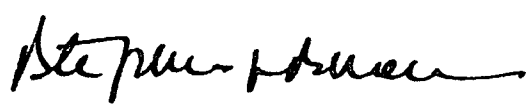
Defendant, First Financial of Charleston, Inc., hereby moves pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for an order from this Honorable Court dismissing all claims asserted against Defendant in this matter. This motion is based upon the following:

1. Plaintiff's claim is time-barred by the one-year statute of limitations for claims for statutory penalties set forth in S.C. Code Ann. § 15-3-570. As a result, the putative class claims are likewise barred.

This Motion is based on the applicable rules, case law and contents of the Complaint, as well as the memorandum to be filed with this matter.

SIGNATURE BLOCK ON FOLLOWING PAGE

YOUNG CLEMENT RIVERS, LLP



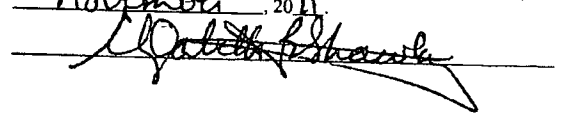
By: _____
Stephen L. Brown
Perry M. Buckner, IV
P.O. Box 993, Charleston, SC 29402
Telephone: (843) 720-5488
Facsimile: (843) 579-2936
E-mail: sbrown@ycrlaw.com
pbuckner@ycrlaw.com
Attorneys for the Defendant
First Financial of Charleston, Inc.

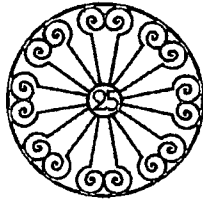
Charleston, South Carolina

Dated: Nov. 30, 2011

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 30 day of November, 2011.





YCR LAW
Young Clement Rivers, LLP

Elizabeth R. O'Neil
Paralegal

Direct Dial: (843) 724-6658
Direct Fax: (843) 579-2936
E-mail: oneil@ycrlaw.com

November 30, 2011

VIA HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court's Office
100 Broad Street, Suite 106
Charleston, SC 29401

Re: *Otha Delaney v. First Financial of Charleston*
Case No.: 2011-CP-10-7166
YCR File: 14768-20110934

Dear Julie:

Enclosed for filing in the above referenced matter are the original and one copy of Defendant First Financial of Charleston, Inc.'s Motion to Dismiss. Also enclosed is our firm check in the amount of \$25.00 to cover the cost of filing same. Kindly return one clocked copy to us via our courier.

Thank you, in advance, for your assistance with this.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

ERO/ero
Enclosures

cc: Graham E. Hawkins, III
Frederick M. Corley
Philip L. Fairbanks

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 OTHA DELANEY, Individually and)
 on behalf of all others similarly situated,)
)
 Plaintiff,)
)
 -vs-)
)
 FIRST FINANCIAL OF CHARLESTON,)
)
 Defendant.)
)

IN THE COURT OF COMMON PLEAS
 CASE NO.: 2011-CP-10-7166

PLAINTIFF'S RESPONSE TO
 DEFENDANT'S MOTION TO DISMISS

FILED
 2012 APR -5 AM 9:36
 JULIE J. ARBSTRONG
 CLERK OF COURT
 BY

COMES NOW, Otha Delaney, plaintiff above-named, and in response to the motion by the defendant, First Financial of Charleston, would show:

Defendant asserts that plaintiff's action is barred by the one-year statute of limitations imposed by S.C. Code Ann. §15-3-570 on actions for a "penalty or forfeiture given, in whole or in part, to any person who will prosecute [it]...."

As will be demonstrated below, neither that section, nor the superficially more applicable section dealing with penalties "given to the party aggrieved" (§15-3-540) provide the limitations period for plaintiff's cause of action.

Instead, because plaintiff's claim arises out of a contract for the purchase of a motor vehicle, the applicable statute of limitations is provided by the Uniform Commercial Code

I. SECTION 36-9-625 PROVIDES COMPENSATION FOR A CONSUMER'S LOSS AND IS THEREFORE REMEDIAL RATHER THAN PENAL

Article 9 of the Uniform Commercial Code, *Secured Transactions*, requires a secured party, following repossession of collateral securing a debt but prior to its disposition, to provide written notice to the debtor of the intended disposition. *S.C. Code Ann. Sections 36-9-611 through 614.*¹ The

¹ Further references to the Uniform Commercial Code shall be by reference to either the S.C. Code section (e.g., § 36-9-101, etc., or to the U.C.C. section, e.g., § 9-101, etc). South Carolina's version of the Uniform Commercial Code, as enacted in 2001, is virtually identical to the Uniform Code Commissioners version enacted with only minor variations in all fifty states.

failure of a secured creditor to do so has the potential to deprive the debtor of important rights related to the redemption of the collateral, as well as the ability to affect the size of a deficiency claim. *See Crane v. Citicorp Nat'l Services, Inc.*, 313 S.C. 70, 437 S.E.2d 50, 52 (1993) (Construing the pre-revision version of Article Nine – whose notice provisions were essentially the same as post-revision provisions).

A creditor's failure to comply with the notice requirements entitles a consumer debtor to recover as compensation "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." *Section 36-9-625(c)(2)*. *See, Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 378, 595 S.E.2d 461, 466 ((2004) (Noting that revised Article Nine restricted recovery under the damages provision to a *single recovery per account*, rather than *per debtor*, but otherwise remained the same.) Furthermore, the court in *Crane*, citing a leading treatise, White and Summers, *Uniform Commercial Code* § 27-18 at 623, noted that the automatic recovery provision "...is the legislature's recognition that the small amount of *compensatory* damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code's provisions."

The language of the remedial damages section is significant.

SECTION 36-9-625. Remedies for secured party's failure to comply with chapter.

(a) If it is established that a secured party is not proceeding in accordance with this chapter, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) Subject to subsections (c), (d), and (f), a person is liable for *damages in the amount of any loss caused by a failure to comply with this chapter*. *Loss caused by a failure to comply* may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) Except as otherwise provided in Section 36-9-628:

(1) a person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover *damages* under subsection (b) *for its loss*; and

(2) 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.

(d) A debtor whose deficiency is eliminated under Section 36-9-626 may recover *damages for the loss of any surplus*. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under Section 36-9-626 may not otherwise recover under subsection (b) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(e) In addition to any *damages* recoverable under subsection (b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover five hundred dollars in each case from a person that:

(1) fails to comply with Section 36-9-208;

(2) fails to comply with Section 36-9-209;

(3) files a record that the person is not entitled to file under Section 36-9-509(a);

(4) fails to cause the secured party of record to file or send a termination statement as required by Section 36-9-513(a) or (c);

(5) fails to comply with Section 36-9-616(b)(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) fails to comply with Section 36-9-616(b)(2).

(f) A debtor or consumer obligor may recover *damages* under subsection (b) and, in addition, five hundred dollars in each case from a person that, without reasonable cause, fails to comply with a request under Section 36-9-210. A recipient of a request under Section 36-9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(g) If a secured party fails to comply with a request regarding a list of collateral or a statement of account under Section 36-9-210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure.

HISTORY: 2001 Act No. 67, Section 12.

S.C. Code Ann. § 36-9-625 (2001) (Emphasis added). The statute clearly speaks in terms of *remedies, damages* and *loss* rather than *penalties*, the latter term being nowhere mentioned.

The Official Comment to § 36-9-625, paragraph 4, reads as follows:

4. Minimum Damages in Consumer-Goods Transactions. Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former Section 9-507(1) and is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted. Subsection (c)(2) leaves the treatment of statutory damages as it was under former Article 9. A secured party is not liable for statutory damages under this subsection more than once with respect to any one secured obligation (see Section 9-628(e)), nor is a secured party liable under this subsection for failure to comply with Section 9-616 (see Section 9-628(d)).

Section 36-9-625, Official Comment ¶ 4. Again, as the very title makes manifest, (“*Minimum Damages*”) the Uniform Commercial Code Commissioners and the General Assembly clearly had in mind *compensation* for violations of Article Nine’s notice requirements, as opposed to *penalties*.

Likewise, Paragraph 3 of the Official Comments to § 9-625, titled “Damages for Noncompliance with This Article,” speaks in terms exclusively of *damages*. The remedial provisions of the section “set[] forth the basic remedy for failure to comply with the requirements of this Article: *a damage recovery in the amount of loss caused by the noncompliance.*” *Id.* (Emphasis added).

Similarly, the South Carolina Reporter to the U.C.C. states with respect to § 9-625,

Subsection (c)(2) provides that if the collateral is consumer goods *the minimum damages* a debtor or secondary obligor can recover for a secured party's failure to comply with part 6 is an amount equal to 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.

Section 36-9-625, South Carolina Reporter's Comment ¶ 2.

The General Assembly must be presumed to comprehend the difference between a “statutory damage” and a “statutory penalty.” *See, e.g., SCDHEC v. Kennedy*, 289 S.C. 73, 344 S.E.2d 859 (S.C. App. 1986) (“Penalty for Failure to Complete Contract” §§ 59-111-530, *et seq.*; “[T]he legislature has the authority to provide civil penalties to enforce observance of a legislative policy.”) *Kennedy* presents an example of the General Assembly’s intent to impose a *penalty*.

While the language used by the General Assembly is not necessarily dispositive on the question of the purpose of legislation, it is entitled to substantial defence.

The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in language used construed in light of intended purpose. The legislature's intent should be ascertained primarily from the plain language of the statute. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation, and the court has no right to look for or impose another meaning.

Rorrer v. P.J. Club, Inc., 347 S.C. 560, 566, 556 S.E.2d 726, 729 (S.C.App. 2001), *quoting S.C. Dept. of Revenue v. Collins Ent. Corp.*, 340 S.C. 77, 79, 530 S.E.2d 635, 636 (2000). By analogy to the statute in question, the statutes involved in *Rorrer* provide a compelling example of the distinction between a remedial and penal statute – an example which is instructive here.

Sections 32-1-10, *et seq.*, regulate illegal “gambling contracts” and, the first two sections, §§ 32-1-10 and 32-1-20 provide for the recovery of gambling losses.

Section 32-1-10 permits recovery *by the person who lost money*. It reads as follows:

Any person who shall at any time or sitting, by playing at cards, dice table or any other game whatsoever or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any person or persons so playing or betting, in the whole, the sum or value of fifty dollars and shall pay or deliver such sum or value or any part thereof shall be at liberty, within three months then next ensuing, to sue for and recover the money or goods so lost and paid or delivered or any part thereof from the respective winner or winners thereof, with costs of suit, by action to be prosecuted in any court of competent jurisdiction.

Id.

Section 32-1-20 permits recovery by a person *other than the person who lost money*. It reads as follows:

In case any person who shall lose such money or other thing as aforesaid shall not, within the time aforesaid, really and bona fide and without covin or collusion sue and with effect prosecute for the money or other things so by him or them lost and paid and delivered as aforesaid, it shall be lawful for any other person, by any such action or suit as aforesaid, to sue for and recover the same and treble the value thereof, with costs of suit, against such winner or winners as aforesaid, the one moiety thereof to the use of the person that will sue for the same and the other moiety to the use of the county in which the offense shall have been committed.

Id. (Emphasis added).

In the *Rorrer* case, *supra*, the Court of Appeals noted that the Supreme Court held in the case of *Francis v. Mauldin*, 215 S.C. 374, 55 S.E.2d 337 (1949), that in enacting §§ 32-1-10, *et seq.*, the General Assembly had intended *both* remedial (§ 32-1-10 – recovery by the “injured” party) and punitive relief (§ 32-1-20 – recovery by a third party to punish the illicit gambler).

The Court of Appeals wrote:

While our supreme court has determined that § 32-1-10 is remedial in nature, it has reaffirmed that § 32-1-20 is penal in nature and must be strictly construed. *See Francis v. Mauldin*, 215 S.C. 374, 381, 55 S.E.2d 337, 340 (1949). In first construing § 32-1-20, our supreme court noted that “[t]he object of the statute was manifestly to punish excessive gaming.” Consequently, the statutory scheme is part remedial and part penal.

Rorrer, supra.

Section 36-9-625 is plainly intended to compensate debtors for creditors' failure to provide them notice of the type of sale the creditors intend to conduct. Both the Uniform Code Commissioners and the 50 state legislatures which have for over a half a century enacted the notice requirements and the damages section for non-compliance believe that non-compliance with the notice requirements are the cause, or potential cause, of serious injury to debtors. Defendant would have this Court "overrule" that determination. The defendant asks the Court to rule, in effect, that the General Assembly's determination that an award of damages to compensate for that injury, and in the case of "consumer transactions" the provision of an award alternatively of actual damages or a formula for the calculation of reasonable "liquidated damages", is a matter for judicial, rather than legislative, decision-making.

But defendant's plea must be rejected. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *E.g., Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.C.2d 598, 606 (2006). Here, the terms of the statute are clear and should be enforced as drafted by the legislature, unless and until the legislature sees fit to amend them.

II. THE APPLICABLE STATUTE OF LIMITATIONS IS PROVIDED BY SECTION 36-2-725(1) "STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE"

Plaintiff's claim arises out of a contract for the sale of an automobile. That contract contains a security agreement which was the basis for defendant's repossession and disposition of that automobile following plaintiff's alleged default under the terms of the contract. Compliance with the notice requirements of Article Nine of the U.C.C. are incumbent on a secured creditor enforcing its rights under a contract which contains a security agreement. Failure to comply with the requirements of Article Nine is a breach of the contract.

Section 36-2-725(1), "Statute of limitations in contracts for sale," provides as follows: "An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued."

Discussing pre-revision, but virtually identical sections of Article Nine of the U.C.C. in the context of the application of Alabama's statute of limitations for breach of contract, the Supreme Court of Alabama observed that:

The requirements of § 7-9-504(3) are imposed by law upon every secured transaction covered by Article 9 of the U.C.C. Ala. Code (1983 Supp.) § 7-9-504(3). By statute, they become terms of the security agreement. Breach of the notice requirement is breach of the contract. Therefore, the action under § 7-9-507(1) for damages for violation of these requirements is, in essence, a suit for breach of contract.

Weaver v. American National Bank, 452 So.2d 469 (Ala. 1984). See also, *In re Coleman*, 2007 WL 1526651 (Bankr. N.D. Ala. May 24, 2007) where the United States Bankruptcy Court for the Northern District of Alabama, following the *Weaver* court, recognized the applicability of its holding to the revised Code:

Section 7-9A-614 is a relatively new UCC section that replaced the former *Ala. Code* § 7-9-504(3) when the new article took effect January 1, 2002. As yet, there is no published Alabama appellate court case law interpreting Sections 7-9A-614 and/or 7-9A-625. However, state courts previously interpreted suits arising under Section 7-9-504, along with other UCC complaints, as being contract actions.

Id. Moreover, claims are part of the same cause of action when they arise out of the same transaction or series of transactions. See *Restatement (Second) Judgments* § 24 (1982).

Because plaintiff's claim "arises out of" the "Retail Installment Contract" (R.I.S.C.) which gave rise to defendant's rights and duties under Article Nine, it is fitting that a violation of those duties be regarded for limitations purposes a breach of that contract. Additionally, the R.I.S.C. at issue in this case appears to lack the "Holder In Due Course" notice mandated by 16 C.F.R. §§ 433.1 and 433.2 to be included in every consumer sale transaction.²

The "H.D.C." notice is required to be placed on the face of every consumer contract and by federal law, becomes a contractual term of every such contract. The Rule provides that any and all claims and defenses available to a consumer against the originator of commercial paper (*e.g.*, a R.I.S.C.) is available to the consumer against any subsequent "holder" of the "paper." The

² "The Federal Trade Comm's Rule on Preservation of Consumer's Claims and Defenses." 16 C.F.R. §§ 433.1 and 433.2 (May 14, 1976). See also, S.C. C.P.C. §§ 37-2-402 & -404 and 37- 3-410 & -411 and Official Comments.

Rule thus effectively abrogates the ancient “Holder In Due Course Rule” - which serves in commercial transactions to indemnify down-stream holders of commercial paper from actions and defenses to actions arising against the original holders of negotiable instruments arising out of sales transactions – in consumer goods transactions such as this.

Its relevance here is that because the H.D.C. rule is required by law to be placed in every consumer goods transaction contract and is again, by law (even in its absence) made a contractual term of every such transaction, it renders the holder of consumer goods paper liable to the consumer debtor as if the holder were the original contracting party. Given this “seamless” transition from originator of the R.I.S.C., to enforcer of the security agreement it contains, to defendant in an action for violation of the requirements attached to the lawful enforcement of those rights, the logic in imposing an *ex contractu* statute of limitations on the consumer debtor’s Article Nine cause of action is apparent.

III. IF THE COURT CONCLUDES THAT THE RECOVERY UNDER SECTION 36-9-625 IS A PENALTY RATHER THAN COMPENSATORY DAMAGES, WHICH PLAINTIFF DOES NOT CONCEDE, THEN THE THREE YEAR STATUTE OF LIMITATIONS UNDER SECTION 15-3-540 APPLIES

The one-year statute of limitations period provided by S.C. Code Ann. § 15-3-570 is not, under any circumstances, the statute of limitations applicable to plaintiff’s claim. Instead, assuming *arguendo* that the remedy provided by S.C. Code Ann. § 36-9-625 is a *penalty*, which plaintiff disputes, the appropriate period is three years, as provided by S.C. Code Ann. § 15-3-540.

As noted above, § 15-3-540’s three (3) year limitations period clearly, on its face, applies to an action upon a statute for penalties *when the action is given to the party aggrieved*. Section 15-3-540(2) imposes a three year limitations period on:

An action upon a statute for a penalty or forfeiture when the action is *given to the party aggrieved* or to such party and the State, except when the statute imposing it prescribes a different limitation.

Id. (Emphasis added).

By contrast, Section 15-3-570, cited by defendant, imposes a one year limitations period on:

An action upon a statute for a penalty or forfeiture given, in whole or in part, *to any person who will prosecute [it]....*

Id. (Emphasis added).

The South Carolina Supreme Court, while not directly addressing the distinction between §§ 15-3-540 & 570, in the context of § 36-9-625, has applied the three year statute of limitations in a manner making clear that it, too, ought to be regarded as compensatory rather than penal.

In *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998) the Court held that the three year statute of limitations of § 15-3-540 applied to a class action in which the plaintiffs sought penalties under a consumer protection statute for the defendant's failure to ascertain plaintiffs' own preferences for the closing attorney and insurance agent in mortgage closings. *Id.*, 508 S.E.2d at 20. The statute at issue here, if not *ex contractu*, is clearly of the sort contemplated by § 15-3-540, *i.e.*, a cause of action given to the party aggrieved as opposed to a cause of action given to any person who will prosecute it. No third party not potentially injured by failure to provide the notice required by Article Nine, may bring an action, as a private attorney general, to recover the statutory damages provided for by § 36-9-625.

Section 15-3-570's one-year limitations period has been properly applied in just such situations, to wit: where a "private attorney general" seeks to recover a penalty provided by statute for a wrong done not to the plaintiff, but to another. *See, e.g., Rorrer v. P.J. Club, Inc.*, 347 S.C. 560, 566, 556 S.E.2d 726, 729 (S.C.App. 2001), *quoting S.C. Dept. of Revenue v. Collins Ent. Corp.*, 340 S.C. 77, 79, 530 S.E.2d 635, 636 (2000), *supra*. *See also, Montjoy v. One Stop of Abbeville, Inc.*, 325 S.C. 17, 478 S.E.2d 683, 684 (1996) (same); *Ardis v. Ward*, 321 S.C. 65, 467 S.E.2d 742, 744 (1996) (same).

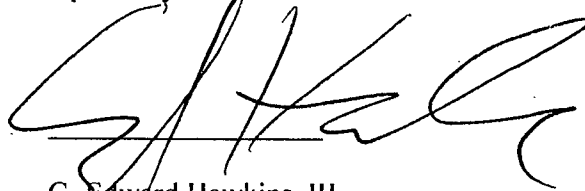
Section 36-9-625 would appear to fall precisely into the language of § 15-3-540(2) providing that it does not apply where "the statute imposing [the action] prescribes a different limitation." The statute providing for the damages available to a consumer debtor for a creditor's failure to provide

compliant notice, to wit: the U.C.C., *does* provide a different limitation, namely the six year limitation contained in § 36-2-725.

Nevertheless, should the Court conclude that § 36-2-725 is not applicable to § 36-9-625, § 15-3-540(2), and not § 15-3-570, is the appropriate statute of limitations.³

For the foregoing reasons, plaintiff respectfully requests that defendant's motion be denied, and that the Court declare that the statute of limitations applicable to plaintiff's claim under § 36-9-625 is that provided by § 36-2-725, namely six years from the date of mailing the defective notices.

Respectfully Submitted,



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³ It is worth noting that in *Tilley*, the defendant also argued that the attorney preference provision was a "penal" statute deserving strict construction. The Supreme Court, agreeing with the trial judge, disagreed, noting that, strict construction of penal statutes may be modified by affirmative legislative action. 2B Singer, *Sutherland Statutory Construction*, section 59.06. Additionally, the Court noted that rules of statutory construction must give way to the cardinal rule of legislative intent. *Gardner v. Biggart*, 308 S.C. 331, 417 S.E.2d 858 (1992). See also *Bell Finance Co. v. S.C. Dept. of Cons. Affairs*, 297 S.C. 111, 374 S.E.2d 918 (S.C. App. 1988) (penal statutes should not be subjected to strained interpretation in order to exclude from their operation cases which would otherwise be encompassed). In light of requirement of liberal construction of the CPC, a strict construction is unwarranted. Section 36-1-201 similarly requires a "liberal construction" of the Uniform Commercial Code.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 OTHA DELANEY, individually and on)
 behalf of other similarly situated,)
)
 PLAINTIFF,)
)
 vs.)
)
 FIRST FINANCIAL OF CHARLESTON,)
 INC.,)
)
 DEFENDANT.)
)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO. 2011-CP-10-7166

FILED
 2012 APR 20 PM 4:15
 JUDIE J. ARMSTRONG
 CLERK OF COURT

**MEMORANDUM IN SUPPORT OF
 DEFENDANT'S MOTION TO DISMISS**

TO: PHILIP L. FAIRBANKS, FREDERICK M. CORLEY, AND GRAHAM E. HAWKINS, III,
 ATTORNEYS FOR THE PLAINTIFF:

Defendant, First Financial of Charleston, Inc.(hereinafter referred to as "First Financial"),
 by and through its undersigned counsel, hereby submits this memorandum in support of its
 motion to dismiss Plaintiff's Complaint in this action for a failure to state a claim upon which
 relief can be granted pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.
 Because Plaintiff and the putative class seek only statutory penalties as an award in this matter,
 they are subject to the one year statute of limitations set forth in S.C. Code Ann. § 15-3-570.
 Having failed to file the above-captioned lawsuit within one year since the action accrued,
 Plaintiff's claim and all putative class claims are time-barred and therefore should be dismissed
 as a matter of law.

BRIEF STATEMENT OF THE FACTS

On October 12, 2007, Plaintiff entered into a Retail Installment Sales
 Contract(hereinafter referred to as "RISC") with Coliseum Motors for the purchase of a 2003
 Chevrolet pick-up truck, intended for Plaintiff's own personal use. (Compl. ¶ 9) This RISC

was then assigned to First Financial by Coliseum Motors, thus making First Financial a secured party in the consumer goods transaction. (Compl. ¶ 10) After Plaintiff failed to make payments, First Financial lawfully repossessed the vehicle. (Compl. ¶ 11) First Financial then sent the Plaintiff a “NOTICE OF PRIVATE SALE OF COLLATERAL” and accompanying letter on May 2, 2008 to advise Plaintiff of its intention to sell the repossessed collateral. (Compl. ¶ 14) Plaintiff claims this notice of disposition failed to comply with South Carolina law. (Compl. ¶ 13) Over seven months later, on December 15, 2008, First Financial sold the collateral. (Compl. ¶ 12) Plaintiff filed the above-captioned lawsuit on October 3, 2011, alleging that 1) the notice of private sale of collateral that First Financial sent to the Plaintiff was insufficient under South Carolina law, specifically S.C. Code Ann. § 36-9-613 and 614, and that 2) as a result, Plaintiff is entitled to a statutory penalty pursuant to S.C. Code Ann. § 36-9-625(c)(2). (Compl. ¶ 14, 22, and 25) Plaintiff, as a representative plaintiff, seeks these penalties on behalf of putative class members. (Compl. ¶ 18)¹

STANDARD OF REVIEW

First Financial acknowledges that the Court is required to accept the allegations contained in the Complaint as true for purposes of a Motion to Dismiss. Nonetheless, if the facts alleged and the inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, do not entitle the plaintiff to relief, then dismissal under Rule 12(b)(6) is proper. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602-03 (1995). Where a claim is time barred based on the facts plead on the face of the complaint, dismissal as a matter of law is proper.

¹ Although Plaintiff seeks these class penalties on behalf of consumers of “South Carolina”, the Plaintiff’s Complaint acknowledges that he is a resident of North Carolina. (Compl. ¶ 6 & 17).

ARGUMENT AND CITATION OF AUTHORITY

Plaintiff seeks a statutory remedy “for each class member pursuant to UCC 36-9-625(c)(2) in the amount of the finance charge plus ten percent of the principal amount of the obligation applicable to that class member’s contract.” (Compl. ¶ 25 (C)) As explained more fully below, this award is properly classified as a “statutory penalty,” and any action seeking this award is governed by the provisions of S.C. Code Ann. § 15-3-570. (“Any action upon a statute for a penalty.....must be commenced within one year after the commission of the offense.”) Because the alleged offense occurred upon the receipt of the May 2, 2008 notice of private sale, which date Plaintiff acknowledges in her Complaint, the statute ran in May of 2009. As a result, Plaintiff’s lawsuit was filed nearly two and half years after the running of the statute, and thus fails as a matter of law.

I. Plaintiff’s Claim Is Barred By The Statute Of Limitations Because § 36-9-625(c)(2) Provides For A Statutory Penalty And S.C. Code Ann. § 15-3-570 Mandates That Such Action Be Brought Brought Within One Year.

A. Plaintiff’s Proposed Relief Is A Penalty and South Carolina Courts Have Ruled Accordingly.

S.C. Code Ann. § 15-3-570 requires all civil actions seeking recovery under a “statute for a penalty” to be filed within one year “after the commission of the offense.” While the statute itself does not expressly note which statutory actions fall within its governance, a “statutory penalty” is defined as “a penalty imposing automatic liability on a wrongdoer for violation of a statute’s terms without reference to any actual damages suffered.” *Black’s Law Dictionary* 1181 (8th ed. 2005). The relief sought by Plaintiff in this lawsuit is in the nature of a penalty as it clearly seeks the imposition of liability without regard to any actual damages incurred. Plaintiff claims that First Financial violated provisions of Article 9 of South Carolina’s Commercial

Code, thus entitling Plaintiff to relief under S.C. Code Ann. § 36-9-625(c)(2). Plaintiff cites this statute as his sole basis for a remedy. This statute provides a fixed formula intended to penalize noncompliance “*in any event,*” and “*regardless of any injury that may have resulted.*” See S.C. Code Ann. § 36-9-625(c)(2) cmt. 4.(emphasis added) Furthermore, these penalties are established and set as a percentage of the debtor’s principal obligation for “every noncompliance.” *Id;* see also § S.C. Code Ann. § 36-9-625(c)(2). Thus, Plaintiff and the putative class members are seeking a pre-determined award from the transaction without regard to any monetary loss that was caused by First Financial, and the action is accurately categorized as “under a statute for a penalty.”

As the explicit provisions of the Plaintiff’s Complaint demonstrate, Plaintiff is not (and is incapable of) alleging or seeking any form of actual, compensatory damages. Clearly, this is because the Plaintiff has not suffered a monetary or injurious loss or any form of particularized harm from the transaction lying at the crux of this dispute. Plaintiff merely alleges non-compliance with an Article 9 statute in hopes of obtaining mechanical, formulaic relief. Plaintiff has not *plead any alternative causes of action,* such as the breach of any duty or of a contract. But for the existence of this statute and the penalties provided, no cognizable right of action could exist.

While South Carolina Courts have not addressed the applicability of the one year period set forth in §15-3-370 to a claim under § 36-9-625, the South Carolina Supreme Court has identified the *exact recovery* that Plaintiff is seeking in this case as a “statutory penalty.” In *Stokes v. Singleton*, 358 S.C. 369, 595 S.E.2d 461 (2004), the Court repeatedly referred to the statute as providing for a “minimum statutory penalty.”² In analyzing the nature of what it

² Although the Court in *Singleton* was analyzing the provisions of Section 9-507(1) of Former Article 9, current § 36-9-625(c)(2) embodies nearly identical language for its provisions on damages related to improper notice of sale

considered to be a “penalty provision,” the Court went on to discuss the purpose and need for the formulaic, fixed award in § 36-9-625. *Id.* at 377, 595 S.E.2d at 465. Citing *Crane v. Citicorp Nat’l Serv.*, 313 S.C. 70, 437 S.E.2d 50 (1993), the Court noted in pertinent part:

“the statutory penalty is evidence of the legislature’s recognition that the small amount of compensatory damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code’s provisions.”

Id.(emphasis added). Therefore, not applying the one year statute of limitations set forth in § 15-3-570 would be inconsistent with South Carolina law. *See also, Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)(“a debtor may seek to recover the statutory penalty.”)³

Ironically, Plaintiff cites to both *Stokes* and *Crane* in support of his position that the § 36-9-625(c)(2) awards damages rather than a statutory penalty. As noted above, these opinions directly contradict such a position as each explicitly references the statute as providing for a penalty. In fact, Plaintiff’s own words provide direct support for First Financial’s argument herein as he identifies § 36-9-625(c)(2) as an “automatic recovery provision.” (See Plaintiff’s Response to Defendant’s Motion to Dismiss at p. 2) Furthermore, Plaintiff’s citation to a multitude of subsections in § 36-9-625 that use the word “damages” is similarly unresponsive. *Id.* The subsections he cites which use the term “damages” are (b), (c)(1), (d), (e), and (f). Plaintiff does seek relief under any of these subsections nor reference any of them in his Complaint. The only statutory provision under which relief has been sought is § 36-9-625(c)(2). The language of this subsection does not use the term “damages” or reference any form of actual loss arising therefrom. Clearly, the award being sought is a penalty and Defendants ask this Honorable Court to rule accordingly.

to a debtor The Official Comments acknowledge that subsection (c)(2) “was patterned on former Section 9-507(1).”

B. Other Courts Have Found Have Found This Exact Relief to Be A Penalty and Thus Subject to A One Year Statute of Limitations

Because the provisions of § 36-9-625(c)(2) are based on a uniform model UCC statute, other courts have ruled on this precise issue. In *Beard v. Vanderbilt Mortg. & Fin., Inc.*, 2008 U.S. Dist. LEXIS 43519 (M.D.T. June 2, 2008), the Middle District of Tennessee addressed the identical issue presented herein. In granting the Defendants' 12(b)(6) motion, the Court found that the putative class action was time barred under a one year statute of limitations because § 47-9-625(c)(2) of the Tennessee Code of Laws was in the nature of penalty and did not provide remedial damages that would subject the claim to a longer statute of limitations.⁴ *See Beard* at 6. In reaching this conclusion, the district court noted that because Tennessee state courts had previously acknowledged that the statute was a "statutory penalty," the one year statute of limitations should apply. *See Beard* at 7. Like the Tennessee appellate opinions referenced in *Beard*, South Carolina courts have acknowledged that the relief which Plaintiff seeks is a statutory penalty. This South Carolina precedent is dispositive on the issues presented before this Honorable Court.

Based on the facts as alleged by Plaintiff in the Complaint, Plaintiff's claim and all class claims for recovery under § 36-9-625(c)(2) should be barred by the one year statute of limitations in § 15-3-570. Plaintiff's own assertions demonstrate that he is the type of plaintiff bound by the penalty statute because he "prosecute[s]" this award as a representative of others. S.C. Code Ann. § 15-3-570(statute applies to "person who will prosecute). As previously noted, Plaintiff alleges that the improper Notice of Sale of Collateral was sent on May 2, 2008 and that the sale of collateral took place on December 15, 2008. Because § 15-3-570 declares the date of accrual for this action as the time of the alleged "commission of the offense," the Plaintiff's

³ The *Brockbank* Court was also addressing former § 9-507-1 also. See footnote 1 above

cause of action arose when the Notice of Sale of Collateral was sent, and the statute ran in May of 2009. Even if the action arose at the date of sale, the claim was still not brought within the applicable period. Moreover, assuming arguendo that a three year time period was somehow applicable, the Plaintiff still failed to file by May of 2011, three years after the alleged violation of South Carolina law. As a result, the October 3, 2011 Complaint is untimely, and this matter should be dismissed with prejudice.

II. S.C. Code Ann. § 36-2-725(1) Is Not Applicable To Plaintiff's Claims.

Plaintiff takes the position that § 36-2-725(1) applies to instant case and thus calls for a six year statute of limitations. Such a position is without merit for a variety of reasons. First and foremost, as Plaintiff concedes, § 36-2-725(1) applies to actions for breach of contract under Article 2 of the South Carolina Commercial Code. In this case, Plaintiff has not plead a cause of action for breach of contract and does not seek contract damages. Rather, as the face of Plaintiff's Complaint demonstrates, this is a lawsuit arising under Article 9 alleging violations of notice provisions found in § 36-9-613 and § 36-9-614. Indeed, Plaintiff does not even allege or reference any contract having ever been breached in the entire Complaint. Plaintiff is simply attempting to paint this lawsuit in a new light and mischaracterize the nature of this litigation for the sole purpose of reviving an otherwise time-barred claim. Plaintiff is the master of the Complaint and may choose any desired form of relief in prosecuting his case. The Plaintiff has expressly chosen not to sue for breach of contract or seek contractual damages (because no such damages exist). Thus, he may not now invoke the benefit of a breach of contract limitations period.

Secondly, no South Carolina Court has ever applied the provisions of § 36-2-725(1) to a claim arising under § 36-9-625(c)(2). § 36-2-725(1) is found within Article 2 of the Commercial

⁴ The Tennessee version of the UCC statute is identical to the South Carolina statute at issue in this lawsuit.

Code, which governs actions for the sale of goods. Plaintiff's claim does not arise under any provision of Article 2 and the Complaint makes no reference to any Article 2 statutory provision whatsoever. To be certain, the instant action holds no relevance to Article 2 in any manner. Again, Plaintiff seeks to ignore his own allegations and expand the scope and nature of this lawsuit. Under Plaintiff's interpretation, § 36-2-725(1) would appear to be applicable to each and every action that bears any relevance to the Uniform Commercial Code despite the statute's own language.

Thirdly, in a last ditch effort to liken this action to a breach of contract claim arising under Article 2, Plaintiff cites to federal regulations which concern holder in due course requirements and for the very first time, alleges these regulations have been violated by these Defendants. These allegations are procedurally improper, untimely, and invalid. It is well established that the "factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint," and thus a Plaintiff may not simply create new factual allegations in a response to a motion to dismiss. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). Therefore, these allegations are of no effect. For the reasons set forth above, § 36-2-725(1) is undoubtedly inapplicable.

III. Plaintiff's Reliance On S.C. Code Ann. § 15-3-540 Is Misplaced

As previously noted, these Defendants would show that § 15-3-570 is clearly the limitations period properly prescribed to the Plaintiff's cause of action. Plaintiff argues that if the award he seeks is classified as a penalty, the three year limitations period found in § 15-3-540(2) is proper. However, assuming arguendo that the three year statute of limitations for certain statutory penalties set forth in § 15-3-540(2) is applicable, it is of no avail to Plaintiff's

untimely Complaint as Plaintiff filed this action over five months after that three year statute of limitations ran.

In support of the application of this statute, Plaintiff cites to one and only case: *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998). In *Tilley*, the plaintiffs filed suit against a Nebraska Cooperation for failing to comply with the attorney and insurance agent preference provisions found in the South Carolina Consumer Protection Code. It does not appear that the application of § 15-3-570 was raised by either party. Rather, the Court singularly focused on § 15-3-540(2) and another limitations period found within the consumer protection code. In analyzing § 15-3-540(2), the South Carolina Supreme Court expressly held that the limitations period in § 15-3-540(2) accrues upon a distinct triggering event, in that instance when payments pursuant to the consumer credit sale were made. *Tilley*, 333 S.C. at 42, 508 S.E.2d at 20 (“the limitations period set forth in section § 15-3-540(2) begins to run each time a payment is made.”) In doing so, the Court was finding that a violation of the attorney and insurance agent preference statute was occurring when each payment was made. *Id.* Thus, the date of accrual is triggered when a violation of the statute which provides for a penalty occurs.

In this case, there is only one date when any alleged violation of § 36-9-625(c)(2) could have occurred. As Plaintiff concedes, that day was May 2, 2008 when the notice of sale which is alleged to have been improper was sent. (See Plaintiff's Complaint at ¶ 14.) There is no other allegation of any form of wrongdoing or violation of any statute against First Financial. Thus, even if § 15-3-540(2) is found to be applicable, the statute of limitations began to run when this notice that was sent (or shortly thereafter when Plaintiff received this notice). Plaintiff has made no allegation that this notice was received well after it was sent, and this lawsuit was filed on October 3, 2011, well over five months after the limitations period would have run under § 15-3-

540(2), in May of 2011. Thus, Plaintiff's claim is time barred and should be dismissed with prejudice.

CONCLUSION

Based on the foregoing, Defendant First Financial of Charleston, Inc. respectfully requests that this Court enter an Order dismissing Plaintiff's Complaint because it, and thus all putative class claims, fails to state a claim upon which relief can be granted.

Respectfully submitted,

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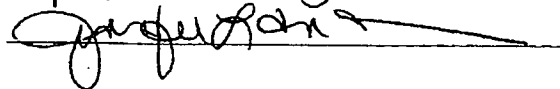
Attorneys for the Defendant First Financial of Charleston, Inc.

Charleston, South Carolina

Dated: 4/20/12

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 20th day of April, 2012



STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 OTHA DELANEY, Individually and)
 on behalf of all others similarly situated,)
)
 Plaintiff,)
)
 -vs-)
)
 FIRST FINANCIAL OF CHARLESTON,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
 CASE NO.: 2011-CP-10-7166

MOTION TO RECONSIDER RULING
 ON MOTION TO DISMISS COMPLAINT

FILED
 2013 MAY -7 PM 1:53
 JULIE J. ARMSTRONG
 CLERK OF COURT

COMES NOW the Plaintiff, Otha Delaney, by and through his undersigned attorneys and respectfully moves the Court for an Order, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure (hereafter the "SCRCP"), setting aside the Order dated April 29, 2013, granting the Motion to Dismiss the Complaint filed by Defendant First Financial of Charleston. The grounds for Plaintiff's motion are to correct, clear error, and/or to prevent manifest injustice which would occur by dismissal of the case.

In support of said motion, Plaintiff would show the Court as follows:

INTRODUCTION

Rule 59(e) SCRCP, provides the Court with the authority to alter or amend a final order or judgment.

In discussing the need for a Rule 59(e) motion, we explained that [t]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments....

On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court “alter or amend the judgment,” but also as a vehicle to seek “reconsideration” of issues and arguments. A motion under Rule 59(e) long has been viewed as “motion for reconsideration” despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

A motion for reconsideration should indicate matters counsel believes were overlooked which had they been considered might reasonably have altered the result reached by the court.

I. SECTION 36-9-625(c)(2) IS PART OF AN OVERALL REMEDIAL COMPENSATORY STATUTORY SCHEME AND IS NOT PRIMARILY A PENAL STATUTORY PROVISION

With due respect, Plaintiff submits that the Court incorrectly ruled that the remedy provided by § 36-9-625(c)(2) is a “penalty.”

It is true that courts, including our own appellate courts, often imprecisely and confusingly refer to the minimum statutory damages remedy of § 36-9-625(c)(2), which provides consumers with an alternative to the conventional “actual” damages standard, as a “penalty.” The remedy does in fact share certain characteristics with a typical penalty – it is intended to “compel creditor compliance,” it is not based on a consumer’s actual “loss,” and is awarded even in cases where a consumer can demonstrate *no* loss. As defendant points out, and as our Supreme Court has recognized, the § 625(c)(2) automatic minimum damages provision “...is the legislature’s recognition that the small amount of *compensatory* damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code’s provisions.” *Crane v. Citicorp Nat’l Services, Inc.*, 313 S.C. 70, 437 S.E.2d 50, 52 (1993) (Emphasis added). This language does suggest an *enforcement* rationale.

However, as the court in *Jenkins v. Hyundai Motor Financing Co.*, 389 F.Supp.2d 961 (S.D.Ohio 2005) cogently observed, nearly every consumer protection statute “has a dual purpose of remedying harm to the individual and deterring socially inimical business practices....

Therefore, the Court must determine whether *the primary purpose* of the Act is more like a penalty or a remedial action....” *Id.* In considering the “primary purpose” of the automatic minimum damage provision, the district judge reasoned that:

An aggrieved consumer, however, is not *limited* to the pecuniary damages available under [§9.625(C)(2)]. The consumer has the option of recovering actual damages and minimum statutory damages amount under [§9.625(B)] and [§9.625(C)]. Both types of damages are available to consumer debtors. [§9.625(B)] provides for actual damages in the amount caused by the secured party’s failure to comply with disposition pursuant to [Article 9]. In the case of consumer debtors, [§9.625(C)(2)] provides for a minimum statutory amount to be awarded to them.

Id. Further, [UCC §1.06] provides:

The remedies provided by [Article 9]...of the Revised Code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but neither consequential or special nor penal damages may be had except as specifically provided in those chapters or by other rule of law.

In other words, the UCC itself (1) requires a liberal interpretation with the goal of putting the aggrieved party (here, the *consumer*) in the position she would be in absent creditor non-compliance (a *contractual* damage concept) and (2) generally prohibits the imposition of penalties. As a result, the *Jenkins* court held that “the remedy provisions of the Ohio UCC set forth at [§9.625(c)(2)] include both remedial and penal/forfeiture aspects. As such, the six-year statute of limitations” for general contract actions, rather than the shorter statute of limitations for penalties and forfeitures, applies, and the claim is not time barred. *Id.*

In construing the purpose of a statutory provision, a court ought to consider it in the context of the entire statutory scheme of which it is a part. “In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.” *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998)).

The automatic minimum damage provision of §36-9-625(c)(2) is an *alternative* remedy, available to consumer debtors who are free to avail themselves of the statutory formula for determining compensation *or* the traditional measure of compensation, to wit: by proving up their actual damages. Whichever measure of damages the consumer chooses, the remedy is *primarily* intended to compensate the consumer, and only secondarily to compel creditor compliance. *E.g., Jenkins, supra. See also, S.C. Code § 36-1-106.* Only by giving a liberal construction to §36-9-625(c)(2), which recognizes that its primary purpose is to provide a remedy for every wrong, and that the more general purpose of compelling general creditor compliance is a secondary goal, will the Court adhere to the plain legislative purpose expressed in §36-1-106.¹

There is an additional reason to conclude that §36-9-625, and each of the remedies it provides, is a remedial, rather than a penal, statute. The South Carolina Supreme Court has defined a “remedial” statute as one which:

create[s] new remedies for existing rights ... enlarge[s] the rights of persons under disability, and the like, unless [it] ... violate[s] some contract obligation.... Statutes directed to the enforcement of contracts, or merely providing an additional remedy, or enlarging or making more efficient an existing remedy, for their enforcement, do not impair the obligation of the contracts.

Smith v. Eagle Const. Co., Inc., 282 S.C. 140, 318 S.E.2d 8 (1984). See also, Edwards v. State Law Enforcement Div., 395 S.C. 571, 720 S.E.2d 462 (2011) (A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability.)

¹ While it may not be due *significant* weight, it is noteworthy that in Chapter 9 - Secured Transactions, Part 6 – Default, Subpart 2 - Noncompliance with Chapter, including “Remedies for secured party’s failure to comply with chapter”, in both the statutory language itself and in the Official Comments, the term “damages” appears thirty-five (35) times. By contrast, the term “penalty” appears not at all.

Section 36-9-625, including §36-9-625(c)(2), creates new remedies. Indeed, the Uniform Commercial Code is a creation of the Uniform Law Commissioners. The South Carolina Uniform Commercial Code was enacted into law on May 5, 1966, *See McMaster v. S.C. Retirement System*, 362 S.C. 362, 370, 608 S.E.2d 843, 847 (2005) (holding penal statutes “impose punishment and forfeiture” and are prosecuted by the state as contrasted with civil statutes that “affect private rights” and are litigated by private parties). In *McMaster*, the Supreme Court reversed a decision by a trial court regarding a statute imposing criminal penalties on public employees convicted of embezzlement of public funds, which also authorized the Attorney General to seek the placement of liens on the employee’s state pension. The trial court had ruled that because the statute imposed both criminal penalties (imprisonment) and restitution secured by the lien, it was a “penal” statute.

Reversing, the Supreme Court held that a statute can have both penal and remedial aspects. *Id.* at 369. The statute at issue in *McMaster* was challenged, *inter alia*, on constitutional double jeopardy grounds. Citing U.S. Supreme Court precedent, The S.C. Supreme Court noted that civil forfeitures were not “punitive” in the sense of a criminal sanction. Rather, they “have traditionally been viewed as civil proceedings; [because] civil forfeitures serve important nonpunitive goals... [and] as with civil forfeitures, the lien here serves an important nonpunitive goal: the recovery of public funds. *Id.*

To an even greater extent, § 36-9-625, including § 36-9-625(c)(2), simply creates a private cause of action for prosecution by private parties in order to serve a purely nonpunitive goal: ensuring that every consumer receives a “minimum statutory” recovery for violation of a purely civil statute. Thus, it is not a penal statute. To read the statute otherwise would require that every remedial statute be construed to be a penal one, a result clearly not intended by the

legislature. Furthermore, because it is remedial, it must be read liberally in order to effectuate its salutary goals.

Additionally, it is unlikely that the General Assembly, without clearly saying so, intended to cut off the right of a consumer debtor to one of several alternative remedies included in the same statute, several years earlier than the other remedies made available. *Cf.*, *Trammell v. Victor Mfg. Co.*, 102 S.C. 483, 86 S.E. 1057 (1915):

No reason has been suggested why the Legislature would have penalized the failure to pay discharged laborers whose wages are paid weekly and monthly, and not penalize the failure to pay those whose wages are paid at intermediate periods of time, while every reason which calls for the remedy in the former cases applies with equal force to the latter.... Any other construction would be strained and unnatural, and lead to absurd consequences.

Id. at 1058.

For each of the foregoing reasons, Plaintiff respectfully asks that the Court reconsider its ruling that the remedy provided by Section 36-9-625(c)(2) is a penalty, and, issue a new order holding that the automatic statutory damage provision is remedial, and subject to the six year statute of limitations provided by the Uniform Commercial Code, in S.C. Code Ann. § 36-2-725.

II. THE APPLICABLE STATUTE OF LIMITATIONS RUNS FROM THE SALE OF THE COLLATERAL, NOT FROM THE DATE THE NOTICE IS SENT OR THE DATE THE NOTICE IS RECEIVED.

It is settled law that statutes of limitations run from the time a cause of action first accrues. *E.g.*, *Walsh v. Woods*, 358 S.C. 259, 594 S.E.2d 548 (S.C. App. 2004). In analyzing a limitations defense, “[t]he fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it.” *Harvey v. S.C. Dept. of Corrections*, 338 S.C. 500, 508 S.E.2d 765, 769 (S.C. App. 2000) (quoting *Matthews v. City of Greenwood*, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (S.C. App. 1991)).

Thus, a particular cause of action accrues “at the moment when the plaintiff has a legal right to sue on it.” *Id. Accord, King v. James*, 388 S.C. 16, 694 S.E.2d 35 (S.C. App. 2010).

The statute of limitations is inert and inoperative until a right of action arises. “Both in courts of equity as well as in courts of law, a cause of action or suit arises when and as soon as the party has the right to apply to the proper tribunals for relief.” *Suber v. Chandler*, 18 S.C. 526, 1883 WL 4838 (1883).

Plaintiff’s cause of action for violation of the “notice requirements” following repossession but *prior to* sale of collateral, imposed on secured creditors, including defendant, cannot arise *prior to* sale of the collateral. Until the collateral has been sold, there can be no violation – because the requisite notice regarding the “intended” sale cannot yet be “noncompliant” with the commands of the U.C.C., in particular §§ 36-9-613 & 614. Or if the error is one of omission, it may yet be corrected. Accordingly, *Plaintiff could not state a cause of action pursuant to §36-9-625 prior to sale of the collateral.*

Here, the sale of Plaintiff’s vehicle took place on December 15, 2008. This action was commenced on October 4, 2011, within the three (3) year limitations period of §32-1-10 (Code of Laws of S.C. 1976, as amended).

It is clear that - *if* the statutory damages remedy provided by §36-9-625(c)(2) is indeed a “penalty” - the three (3) year period established by §32-1-10 is the applicable statute of limitations. As argued in open Court at the hearing on Defendant’s motion and in Plaintiff’s memorandum in opposition to Defendant’s motion to dismiss, the one year period established by § 32-1-20 applies to an action granted *to a party other than the injured party*, to collect a penalty *for another person*. Section § 32-1-10 establishes the limitations period for an action granted *to a party to recover a penalty for herself*, rather than for another person.

If § 36-9-625(c)(2) creates a cause of action for a penalty, it is provided solely to the injured consumer himself. No right is provided a third party to bring the action on his behalf. Defendant may be expected to respond with the “red herring” argument that Plaintiff seeks to bring this action in a “representative” capacity, to wit: as the representative of a class of similarly situated consumers, thus bringing the claim within the ambit of § 32-1-20. Plaintiff would point out that the authority to represent a class is provided not by § 36-9-625, or by the Uniform Commercial Code in general, but by Rule 23 of the South Carolina Rules of Civil Procedure.

For the foregoing reasons, Plaintiff respectfully asks that the Court reconsider its ruling that the statute of limitations applicable to Section 36-9-625(c)(2), if it is a penalty, is § 32-1-10, and cannot be §32-1-20, and, issue a new order holding that Plaintiff’s cause of action is not time-barred.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court reconsider the Order entered on April 29, 2013, and issue an amended Order denying Defendant’s motion to dismiss.

By: 

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Charleston, South Carolina

May 7, 2013

to advise Plaintiff of its intention to sell the repossessed collateral. (Compl. ¶ 14) Plaintiff claims this notice of disposition failed to comply with South Carolina law. (Compl. ¶ 13) Plaintiff filed the above-captioned lawsuit well over three years later, on October 3, 2011, alleging that 1) the notice of private sale of collateral that First Financial sent to the Plaintiff was insufficient under South Carolina law, specifically S.C. Code Ann. § 36-9-613 and 614, and that 2) as a result, Plaintiff is entitled to a statutory penalty pursuant to S.C. Code Ann. § 36-9-625(c)(2). (Compl. ¶ 14, 22, and 25) *Plaintiff cites to this specific subsection as his only basis for an award in this matter. Id.* Plaintiff, as a representative plaintiff, also seeks these penalties on behalf of putative class members. (Compl. ¶ 18)¹

BRIEF PROCEDURAL BACKGROUND

On November 20, 2011, First Financial moved to dismiss Plaintiff's claims, and thus all putative class claims, on the grounds that Plaintiff's Complaint was time-barred under either a one year statute of limitations set forth in S.C. Code Ann. § 15-3-570 or a three statute of limitations set forth in S.C. Code Ann. § 15-3-540(2). Both of these statutes govern the timeliness of actions seeking recovery of a statutory penalty, and both might reasonably be applied to this matter. However, because Plaintiff's sole cause of action seeking a penalty would have accrued upon receipt of the alleged noncompliant "Notice of Sale," both statutes render Plaintiff's Complaint untimely as a matter of law.

On April 5, 2012, the Plaintiff filed his opposition to First Financial's Motion to Dismiss contending that S.C. Code Ann. § 36-9-625(c)(2) does not provide for a statutory penalty and that the six year statute of limitations set forth in S.C. Code Ann. § 36-2-725(1) could be applied to this matter. Further, Plaintiff suggested that even if a three year statute of limitations is

¹ Although Plaintiff seeks these class penalties on behalf of consumers of "South Carolina", the Plaintiff's Complaint acknowledges that he is a resident of North Carolina. (Compl. ¶ 6 & 17).

applied, this action did not accrue until the collateral was sold rather than when the alleged noncompliant "Notice of Sale" was received.

On April 29, 2013, the Court granted the Defendant's Motion to Dismiss finding that S.C. Code Ann. § 36-9-625(c)(2) qualifies as a penalty provision and that Plaintiff's sole cause of action accrued upon receipt of the alleged noncompliant "Notice of Sale." As a result, Plaintiff's Complaint was held to be untimely under either a one year or three year statute of limitations. On May 7, 2013, Plaintiff filed the instant Motion to Reconsider.

ARGUMENT AND CITATION OF AUTHORITY

Plaintiff now argues that this Court "overlooked" two specific issues which might reasonably have altered its ruling. First, he asserts that the Court incorrectly found S.C. Code Ann. § 36-9-625(c)(2) to be a penal statute and secondarily, that even if a penal statute, his cause of action did not accrue until the sale of the collateral and therefore is timely under the three year statute of limitations. Contrary to Plaintiff's assertions, both of these issues have been extensively briefed, raised to the Court at the hearing on this matter, and the Court's findings on these subjects were thoroughly supported and addressed in its Order.

I. THIS COURT CORRECTLY RULED THAT S.C CODE ANN. § 36-9-625(C)(2) PROVIDES FOR A STATUTORY PENALTY

The Court's Order appropriately concluded that § 36-9-625(c)(2) awards a statutory penalty because 1) our Supreme Court has held precisely that on no less than three occasions and 2) because the legislative comments to this exact subsection specifically inform that plaintiffs are entitled to this formulaic award "regardless of any injury that may have resulted." *Crane v. Citicorp Nat'l Serv.*, 313 S.C. 70, 437 S.E.2d 50 (1993); *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000); *Stokes v. Singleton*, 358 S.C. 369, 595 S.E.2d 461 (2004); S.C. Code Ann. § 36-9-625(c)(2) *cmt.* 4. In light of this legislative commentary on the nature of the

companion statute to S.C. Code Ann. § 36-9-625(c), but also to Ohio's §9-625(B), whose contents are also found in the South Carolina consumer code statutory scheme at S.C. Code Ann. § 36-9-625(b). As the Plaintiff's quotations from *Jenkins* quickly reveal, the court's commentary concerning actual or compensatory damages being recoverable by a consumer/plaintiff in these type of actions refers to § 9-625(B), a statute which has no bearing on Plaintiff's allegations and was never cited as a basis for relief in this case. Rather, Plaintiff seeks an award under § 36-9-625(c)(2) only. The *Jenkins* court merely identified that Ohio companion statute as a "minimum statutory amount," and not as a provision awarding actual damages.

Ignoring the distinction made by *Jenkins*, Plaintiff seeks to infuse and join these two distinct, separate provisions to revive his time-barred claim. While plaintiffs alleging inadequate notice of disposition of collateral might choose to pursue relief under both subsections, **they must be first be able to demonstrate the existence of actual damages, a prerequisite which Plaintiff's Complaint does not meet.** As a result, Plaintiff's depiction of § 36-9-625(c)(2) as some sort of "alternative" or "optional" remedy is nonsensical in the context of this case as it is the sole award being sought. Wherefore, in accordance with binding South Carolina case law, the Court properly found Plaintiff's desired relief to be a statutory penalty.

B. The Plaintiff Also Relies On Case Law Which Has No Relevance To This Matter

In furtherance of Plaintiff's novel position, he also cites to case law outside the scope of the issues before this Court. *See e.g., Smith v. Eagle Const. Co., Inc.* 282 S.C. 140, 318 S.E.2d 8 (1984); *Edwards v. State Law Enforcement Div.* 395 S.C. 571, 720 S.E.2d 462 (2011) These opinions do not address, concern, or even reference § 36-9-625(c)(2) or any UCC provision, nor do they discuss statutory penalties.

The first case cited, *Smith v. Eagle Const. Co.*, addresses a Worker's Compensation claimant's right to lifetime benefits under a post-injury enacted statutory amendment. The question before the Court was whether the amendment could be applied retroactively or prospectively only. In determining that issue, the Court discussed the "remedial" nature of the amendment only so as to assess if it were proper for retroactive application. Quite clearly, the Court was speaking of "remedial" only in the sense of a *change in the law* related to an individual's existing legal rights. The second case cited, *Edwards*, is a criminal matter concerning the application of an amended sex offender registration law to a pardoned but convicted sex offender. Again, the Court discussed the "remedial" nature of a statutory amendment in the context of a *change in existing law* affecting vested rights. Neither opinion discusses the nature of civil damages being awarded by a statute, the principal question before this Court.

In essence, Plaintiff asserts that because § 36-9-625(c)(2) provides a private cause of action for plaintiffs, it creates a "new remedy for an existing right" and is therefore a compensatory statute. Under this theory, however, any and all statutes which grant a private cause of action would have to be deemed "remedial" simply by virtue of creating a basis for a lawsuit. To the extent such a generic definition could be applied, it would render both S.C. Code Ann. § 15-3-540(2) or § S.C. Code Ann. § 15-3-570 meaningless because no cause of action could ever qualify as arising "under a statute for a penalty." The cited cases regarding a statutory change in law are simply inapplicable and irrelevant.

Admittedly, S.C. Code Ann. § 36-9-625(c)(2) is "remedial" in the broad sense that it allows a Plaintiff to recover an award due a defendant's noncompliance with S.C. Code Ann. § 36-9-613 and 614. However, its legislative purpose, as noted by *Brockbank*, is "to ensure

creditor compliance” under a fixed calculation of recovery even where no injury or damages exist, and thus this Court properly found that it provides for a statutory penalty. *Brockbank*, 341 S.C. at 385, 534 S.E.2d at 695

II. THIS COURT CORRECTLY RULED THAT PLAINTIFF’S SOLE CAUSE OF ACTION ACCRUED UPON RECEIPT OF THE NOTICE OF SALE AND WAS THEREFORE TIME-BARRED UNDER EITHER S.C. CODE ANN. § 15-3-570 OR S.C. CODE ANN. § 15-3-540(2)

The two statutes which might arguably establish the time limitations period for Plaintiff’s claims set forth the following:

S.C. Code Ann. § 15-3-570

“An action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense.”

S.C. Code Ann. § 15-3-540

“Within three years”

“(2) An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation.”

This Court appropriately reasoned that because Plaintiff’s only allegation of noncompliance relates to the adequacy of the “Notice of Sale,” the “commission of the offense” under § 15-3-570 took place in May of 2008 upon receipt. Plaintiff’s Complaint makes no allegations regarding the propriety or legality of the sale of collateral. Also, the Court found the date of accrual under § 15-3-540(2), if applicable, to be May of 2008 as well. The Court’s rationale was twofold: 1) The striking similarities in the two statutes evidence a legislative intent for an action under either to accrue at the time of the commission of the offense; and 2) because Plaintiff’s action is based on a specific act of noncompliance and Plaintiff’s entitlement to relief

is based on that act of noncompliance (not on actual damages), Plaintiffs action accrues as soon as the statute's provisions are allegedly violated i.e. when the "Notice of Sale" is received.

Plaintiff claims that his cause of action accrued in December of 2008 when the collateral sold and is thus timely under a three year statute of limitations. As an initial matter, Plaintiff's Motion to Reconsider now strangely argues that S.C. Code Ann. § 32-1-10 provides the controlling three year limitations period. This statute pertains to "suit[s] by loser at cards or other game[s] for recovery of losses." *Id.* Undoubtedly, this statute is inapplicable and Plaintiff's argument is without merit. To the extent Plaintiff inadvertently cites to this subsection rather than § 15-3-540(2), Plaintiff's argument is similarly unavailing as he presents no ground that has not been previously briefed and argued to this Court as to why the sale of collateral should serve as the date on which this action accrued.

During the pendency of First Financial's Motion to Dismiss, the Eighth Circuit Court of Appeals addressed this precise issue: the date of accrual for an action regarding inadequate notice of the disposition of collateral. In *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012), the Eighth Circuit deemed the underlying plaintiff's claims untimely and stated:

"We therefore affirm the district court's dismissal of the Mo UCC claims because we agree *that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.*"


(emphasis added). Furthermore, the Court was interpreting a Missouri statute that is nearly verbatim to S.C. Code Ann. § 15-3-540(2), which Plaintiff claims is the more appropriate statute if this Court finds § 36-9-625(c)(2) to award a statutory penalty. Like this Court, the Eighth Circuit correctly found no statutory support or logical purpose for finding that the sale of

collateral is the date at which the action accrues. Wherefore, this Court properly found Plaintiff's Complaint to be untimely as a matter of law.

CONCLUSION

For the reasons set forth above, First Financial respectfully requests that this Court DENY Plaintiff's Motion to Reconsider and hold that the Plaintiff's claims, and thus all putative class claims, are time-barred.

YOUNG CLEMENT RIVERS, LLP

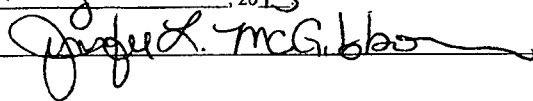
By: 
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Dated: 5/13/13

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 13 day of May, 2013



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-10-7166

OTHA DELANEY, Individually and)
on behalf of all others similarly situated,)

Plaintiff,)

vs.)

FIRST FINANCIAL OF CHARLESTON,)

Defendant.)
_____)

PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION TO RECONSIDER

FILED
MAY 15 AM 11:46
JULIE J. ARMSTRONG
CLERK OF COURT

INTRODUCTION

On April 29, 2013 this Court issued its Order granting Defendant's Motion to Dismiss on grounds that Plaintiff's Complaint was not timely. Two issues raised in Plaintiff's Motion for Reconsideration pursuant to Rule 59(e), *SCRCP*, following this Court's Order are: (1) what is the correct statute of limitations to apply to Plaintiff's single cause of action seeking alternative minimum statutory damages under the Uniform Commercial Code ("UCC") § 36-9-625(c)(2); and, (2) for statute of limitations purposes, at what point in time did her UCC cause of action begin to run.

I. PLAINTIFF'S CLAIM RUNS FROM THE DATE OF SALE, NOT DATE OF NOTICE.

Relevant Facts:

On May 2, 2008, Defendant sent Plaintiff its "Notice of Private Sale of Collateral", giving notice of its intention to sell her repossessed collateral (a 2003 Chevrolet Pick-up Truck) at a private sale. (Complaint ¶11.) Over seven months later on December 15, 2008, Defendant entered into a contract of sale of the Truck. (Complaint ¶12.)

Without abandoning her assertion that a six year statute of limitations may apply, Plaintiff alternatively asserts that in a worse-case scenario, her cause of action is controlled by a three year statute of limitations as discussed more fully herein below. If a three year statute is applicable, her Complaint, which was filed on October 3, 2011, would be *untimely if* the three years began to run from the date the Notice was sent. However, **it is timely if it runs from the date of the sale.** Therefore, one question raised by Defendant's Motion, and which Plaintiff asserts bears reconsideration, is: when does Plaintiff's UCC cause of action arise or become actionable – from the date the Notice was sent or date of the subsequent sale.

The Court ruled that the Complaint alleges that Defendant sent non-compliant notice of the intended sale of repossessed collateral in that the contents of its Notice were deficient under UCC § 36-9-613 (generally applicable to sales of all repossessed collateral) and 614 (applicable to sales of consumer goods only). Therefore the cause of action, at best for the Plaintiff, was controlled by the three year statute of limitations for a statutory penalty pursuant to § 15-3-540(2) (*Order*, p. 5), which accrues from the date the Plaintiff received the Notice. (*Id.* p. 6-7.) The Court reasoned that because § 36-9-625(c)(2) was in the nature of a statutory penalty, the “offense ... occurred upon delivery and receipt of the [May 2, 2008] Notice of Sale”[.] (*Order*, p. 7) The Court further found that because the three year statute of limitations for a statutory penalty “does not delineate a date of accrual, I find that the alleged commission of the offense should similarly serve as the commencement of the three year statute of limitations found in § 15-3-540”, which was determined to be the date the Notice was delivered and received by Plaintiff. (*Id.*) Finally, the Court noted that “the only offense which Plaintiff alleges concerns the adequacy of the notice provided prior to sale.” (*Id.*)

In Plaintiff's Response to Defendant's Motion to Dismiss he notes § 36-9-611 as the source of the Defendant's statutory obligation to send “reasonable authenticated notification” of intended sale

in connection with a “commercially reasonable sale” of his collateral. (*Plaintiff's Response to Defendant's Motion to Dismiss*, p. 1.) He alleges in his Complaint that the contents of this notification are controlled by § § 36-9-613 and 614, and that Defendant's Notice was non-compliant under the terms of those statutes (Complaint ¶13.) He also alleges that a sale of his Truck did in fact take place, and that it was not redeemed. (Complaint, ¶12.).

As Plaintiff has argued, a cause of action does not accrue until it becomes actionable. “[T]he fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it.” *Plaintiff's Motion to Reconsider*, p. 6., citing *Harvey v. S.C. Dept. of Corrections*, 338 S.C. 500, 508 S.E.2d 548 (S.C.App. 2000). An examination of the plain language of the UCC, as well as the logic of the relevant statutory scheme, shows *that not until the sale actually occurs will the secured party's failure to provide compliant, pre-sale notice under § 36-9-613 and 614 become actionable under §36-9-611, and thus not until that time will an action lie for statutory damages pursuant to 36-9-625(c)(2)*. Therefore, Plaintiff submits the Court erred in ruling that the statute of limitations for alleged § § 36-9-613 and 614 defects run from the date of Notice, and *not* from the date of sale.

Legal Analysis:

Part 6 (“Default”) of Article 9 (“Secured Transaction”) of the UCC sets forth a highly regulated and integrated statutory scheme, controlling the secured party's rights and obligations in conducting its sale of the repossessed collateral. Section 36-9-610, entitled “Disposition after default”, provides the foundational cornerstone of a secured party's obligations concerning its resale of repossessed collateral; it permits the secured party to sell or otherwise dispose of the collateral, but requires that every aspect of that sale be “commercially reasonable”:

(a) After default, a secured party may sell, lease of license, or otherwise dispose of any or all of the collateral[.]

(b) ...[E]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable[.]”

§ 36-9-610(a) and (b). (Emphasis added.)

A secured party’s obligation to send the debtor “reasonable notification” in connection with a § 36-9-610 sale is imposed by § 36-9-611, entitled “Notification *before disposition* of collateral”. Section 36-9-611 provides: “a secured party *that disposes of collateral under Section 36-9-610* shall send [to the debtor] reasonable authenticated notification of disposition.” (Emphasis added.) The information that must be contained within a § 36-9-611 “reasonable notification” is controlled by §§ 36-9-613 and 614, whereas the timing for sending it is controlled by § 36-9-612.

There are thus three important aspects of Defendant’s § 36-9-611-notice obligation as it pertains to Plaintiff’s statute of limitations:

First, as the title indicates, the provision pertains to “notification before disposition”, and there is no indication that § 36-9-611 applies in every case of repossession, or in those cases where no disposition occurs.¹

¹ This is not merely an academic point as the debtor has an absolute right to redeem his collateral at any time *before* the sale occurs, or a contract for sale is entered. § 36-9-623. Therefore, a redemption may occur even after the secured party sends non-compliant notice. Under the Court’s reasoning – that the statute of limitations for sending defective § 36-9-611 notice runs from the date of delivery and receipt because the cause of action was fully actionable at that time – the debtor would be allowed to recover minimum statutory damages absent an actual disposition by the secured party. In that case, he could pay off his accelerated balance to redeem his collateral, and still sue and recover under § 36-9-611 for his statutory damages in an amount that is *more* than the accelerated balance (statutory damages are based upon the entire finance charge plus 10% of the cash price. § 36-9-625(c)(2).)

While the debtor has a right to redeem the collateral at any time before sale by paying the full accelerated balance (§ 36-9-623), nothing in the UCC prevents the parties from voluntarily entering into an post-repossession agreement more like a “cure” wherein the secured party forgoes its right to sell the collateral and allows the debtor to pay less than the full accelerated balance and to resume payments under the terms of the contract. This is another real world example where a defective notice could be sent, but a disposition is never held. If the Court’s reasoning is correct that a cause of action accrues upon delivery and receipt, the debtor in this case would be able to recover his collateral, resume payments of his debt *and* recover statutory damages based upon an action for defective notice.

Second, § 36-9-611 cites § 610, such that its plain language ties the secured party's obligation to send "reasonable notification" under § 36-9-611 to those instances where a "commercially reasonable disposition" pursuant to § 36-9-610 takes place.

Finally, and perhaps most importantly, the plain language of § 611 *limits* the creditor's obligation to send "reasonable notification" of the disposition to the "secured creditor *that disposes of collateral*". Thus the occurrence of a sale, or other "commercially reasonable disposition" of the collateral, is clearly an element of the Plaintiff's cause of action under § 36-9-611, and is a necessary antecedent event triggering his right to recovery for the Defendant's failure to comply with § 36-9-611.

In summary, the secured party that chooses to protect its interest in the collateral by disposing of the collateral *may* do so, but if it chooses to dispose of the collateral it must do so in a "commercially reasonable" disposition. § 36-9-610(a) and (b). When a secured party "disposes of collateral" under § 36-9-610, however, is required to first send "reasonable notification". § 36-9-611(b), the wording of which is controlled by § § 36-99-613 and 614. But no statutory pre-sale notification obligation whatsoever is conversely imposed upon the secured party that does *not* dispose of the collateral.

It is apparent that § 36-9-613, entitled "Contents and form of notification *before disposition of collateral: general*", and § 36-9-614, entitled "Contents and form of notification *before disposition of collateral: consumer goods transactions*", apply to a "reasonable notification" sent in compliance with § 36-9-611 "*before disposition*". (Emphasis added.) It is equally apparent, consistent with their titles and their placement in the statutory scheme, that § § 36-9-613 and 614 are further limited *vis a vis* § 36-9-611 to a secured party (such as Defendant) "that disposes of collateral". As such, a cause of action pursuant to § 36-9-611 for failure to send "reasonable notification" – whether because the

wording of that notice does not comply § § 36-9-613 and 614 or otherwise – would neither “accrue” nor become “actionable” *until and unless* the sale or other disposition takes place. It logically follows that Plaintiff’s cause of action for statutory damages runs from the date of sale, and not the date of the Notice.

II. IF PLAINTIFF’S CAUSE OF ACTION IS NOT CONTROLLED BY THE SIX YEAR LIMITATIONS PERIOD OF § 36-2-725(1), A THREE YEAR LIMITATIONS APPLIES.

The Court ruled that the six year statute of limitations found within § 36-9-725(1) is not applicable. (*Order*, p. 5-6). However, Plaintiff asserts that the Court failed to adequately consider – or to rule – whether an alternative three year limitations period applies.² Section 15-3-530(2) applies to “an action upon a liability created by statute *other than a penalty or forfeiture*”. Alternatively, § 15-3-540(2) imposes a three year limitations period on “[an] action upon a statute for a penalty or forfeiture *when the action is given to the party aggrieved or to such party and the State*, except when the statute imposing it prescribes a different limitation.”

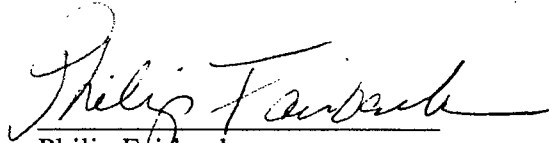
Plaintiff argues that his cause of action permits recovery of remedial damages (*e.g.*, alternative, minimum statutory damages as set forth in § 36-9-625(c)(2)) for Defendant’s failure to provide “reasonable notification” prior to the sale of his Truck pursuant to § 36-9-611, which is not an action for a “statutory penalty” within the contemplation of the one year limitations period of § 15-3-570. Accordingly, the three year limitations period found within § 15-3-530(2) applies, if the six year period pursuant to § 36-2-725(1) is not available to him, running from the date of sale. In the alternative, if the Court concluded that his cause of action is for a “statutory penalty” and is not “an action upon a liability created by statute other than a penalty or forfeiture”, the Court erred in failing

² The Court specifically ruled that “the Court need not decide” whether a three year statute applies. *Order*, p. 6.

to consider, and to rule, that the three year limitations period of § 15-3-540(2), running from the date of sale, applies.

Respectfully submitted,

Philip Fairbanks, Esq., P.C.

A handwritten signature in cursive script that reads "Philip Fairbanks". The signature is written in black ink and is positioned above the typed name and contact information.

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May 13, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-10-7166

OTHA DELANEY, Individually and)
on behalf of all others similarly situated,)

Plaintiff,)

vs.)

FIRST FINANCIAL OF CHARLESTON,)

Defendant.)
_____)

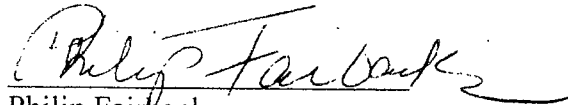
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of Plaintiff's Memorandum in Support of Motion to Reconsider with Certificate of Service attached, by depositing the same this date into the United States Mail, with adequate First Class Postage affixed, and addressed to:

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Attorney for Defendant

And,

Perry M. Buckner, IV, Esq.
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FILED
2013 MAY 15 AM 11:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

May 13, 2013

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

NINTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-10-7166

OTHA DELANEY, Individually and)
on behalf of all others similarly situated,)

PLAINTIFF'S REPLY TO DEFENDANT'S
RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO RECONSIDER

Plaintiff)

vs.)

FIRST FINANCIAL OF CHARLESTON,)

Defendant.)

FILED
2013 MAY 21 PM 1:24
JULIE J. ARMSTRONG
CLERK OF COURTS
BY _____

INTRODUCTION

While a Reply may not ordinarily be required, it should be allowed and duly considered when *the opposing party has made a material mis-characterization*, in its Response in Opposition to Plaintiff's Motion to Reconsider pursuant to Rule 59(e), *SCRCP*, of the allegations set forth in Plaintiff's Complaint.

In its Response, dated May 13, 2013, Defendant asserts that Plaintiff's cause of action for statutory damages (for Defendant's alleged failure to send notice compliant with the UCC prior to the sale of his collateral) begins to run from the date of receipt of defective notice, not the date of sale. In connection with this argument Defendant states: **"Plaintiff's Complaint makes no allegations regarding the propriety or legality of the sale of collateral."** *Response*, p.7. (Emphasis added.)

This statement is completely and patently inaccurate, and it is logically and statutorily inconsistent with the issues that *were* directly raised in Plaintiff's Complaint.¹ When a Complaint

¹ Plaintiff alleges in his Complaint that Defendant sent him a notice of pending sale of his collateral (Complaint, ¶ 14), *in connection with a sale* that subsequently took place (*id.* ¶12); and that prior to sale no notice compliant with §§ 36-9-613 and 614 was ever sent to him (*id.* ¶ 13). Plaintiff further specifically alleged that a *sale* which is not preceded by "reasonable authenticated notification of disposition" violates § 36-9-611. (*Id.* ¶ 24). Accordingly, he is entitled to minimum statutory damages under § 36-9-625(c)(2) for defendant's failure to send compliant notice in connection with that sale. (*Id.* ¶ ¶ 20, 22, Prayer for Relief).

alleges that the secured party conducted a sale of collateral, but failed to provide “reasonable authenticated notification” of the sale prior to disposition, *it follows that the issue of the “commercial reasonableness” of the resulting sale is also called into question under §§ 36-9-610 and 611.*²

ANALYSIS

While § 36-9-610(a) permits a secured party to sell repossessed collateral after default, subsection (b) requires that “[e]very aspect of a disposition, including the method, manner, time, place and other terms, must be commercially reasonable.” § 36-9-610(b). (Emphasis added.) Logic dictates that adequate, antecedent notice to the debtor (who may be liable for a deficiency following the sale) is as much an “aspect” of the “commercially reasonable” sale as any other “aspect”, “term” or “manner” of sale. In case there could be any doubt, however, the next UCC section, which is cited in Plaintiff’s Complaint at ¶ 24, disabuses one of such doubt. Section § 36-9-611 provides that: “a secured party **that disposes of collateral under Section 36-9-610** [e.g., in a “commercially reasonable” sale] shall send to the debtor reasonable authenticated notification of disposition.” §36-9-611. (Emphasis added.)³

Therefore the secured party’s obligation to provide the debtor with a “commercially reasonable sale” under § 36-9-610 includes, but is not limited to, sending the debtor “reasonable notification” notice of the pending sale first. § 36-9-611. In order to further clarify what “information

² *E.g., American General Fin. Serv., Inc. v. Woods-Witcher*, 294 Ga. App. 685, 669 S.E.2d 709 (2008) (applying Virginia law in case where secured party failed to send accurate notice of disposition of consumer-goods collateral pursuant to UCC § 9-614, Georgia court noted that “[t]he Supreme Court of Virginia held that ‘the failure to give the required notice of sale of collateral made the sale commercially unreasonable[.]’ *Woodward v. Resource Bank*, 246 Va. 481, 487-488, 436 S.E.2d 613 (1993).” (Emphasis added.)

³ The Official Comment to § 9-611 provides:

Reasonable notification. This section requires a secured party who wishes to dispose of collateral under Section 9-610 to send “a reasonable authenticated notification of disposition” to specified interested persons. The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content. See, Section 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions).

Official Comment to the Uniform Commercial Code, § 9-611, Comment 2. (Emphasis added.)

and form” the § 36-9-611 “reasonable notification” must take, § § 36-9-613 and 614 were enacted and apply. (“In a consumer goods transaction, the following rules apply: (1) [a] *notification of disposition must provide* the following information...[.]” § 36-9-614.) (Emphasis added.)

Because “reasonable notification” to the debtor is a necessary component of the “commercially reasonable” sale, imposed by statute upon the “secured party that disposes of collateral”, it follows that a Complaint alleging a secured party’s *failure* to send such notification followed by a sale, has raised the issue that the sale itself was tainted, or, more accurately stated, that the secured party failed to conduct a “commercially reasonable” sale. *See, American General Fin. Serv., Inc. v. Woods-Witcher, supra.* ⁴

Defendant’s position that Plaintiff’s Complaint raises no defect with the sale of his collateral is also a mischaracterization of his Complaint wherein he seeks § 36-9-625(c)(2) statutory damages . These damages apply to persons who were consumer obligors “*at the time a secured party failed to comply with this part*”. § 36-9-625(c)(2). (Emphasis added.) “At the time the secured party failed to comply” would necessarily encompass obligors “at the time” the secured party failed to conduct a “commercially reasonable sale”.

⁴ Because the Complaint raises the issue of Defendant’s failure to provide a “commercially reasonable” sale, it follows that the statute of limitations runs from the time of the defective sale. This is consistent with § 36-9-611 inasmuch as the secured party’s failure to provide “reasonable notification” can be “fixed” up until the time of sale. Per the Official Comments, the secured party has the *right* under § 36-9-611 to “revise” its notice before the sale if it chooses to do so, and a continuing *duty* if the first notice is either facially defective or no longer is accurate due to changed circumstances: “Nor does this Article prevent a secured party from electing to send a revised notification... This assumes, however, that the secured party acts in good faith, the revised notification is reasonable, and the revised plan for disposition and any attendant delay are commercially reasonable.” Official Comment to the UCC, § 9-611, Comment 8.

While it may be true that the Plaintiff complained of no *other* defective “aspect” of the sale of his Truck in his Complaint, he has clearly placed the issue that the Notice he received was defective, that a sale occurred following Defendant’s failure to provide the requisite notice, and that this failure now raises § 36-9-611 consequences. It is the Defendant, not the Complaint, which characterizes those allegations as “mak[ing] no allegations regarding the propriety or legality of the sale”, giving no due regard either to its obligation as a “secured party that disposes of collateral” to provide a “commercially reasonable” sale in “every aspect”, or to the underlying statutory scheme at issue.

DEFENDANT’S RELIANCE UPON THE RASHAW CASE IS MISPLACED.

Defendants argue in its Response that “[t]he Eighth Circuit Court of Appeals [in *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012)] *addressed this precise issue*: the date of accrual for an action regarding inadequate notice of the disposition of collateral.” Response, p. 8. (Emphasis added.) An examination of that case, however, indicates that the issue of whether a UCC notice cause of action accrues at the date of sale, as opposed to the date of receipt of defective notice, was never raised by the parties or at issue in the case.

In *Rashaw* the question was whether under Missouri law (1) a 6 year statute for actions for penalties or forfeitures against “moneyed corporations” applied to the UCC notice claim at issue which was commenced nearly 6 years after receipt of notice; or (2) a 5 year statute for a an action “upon a liability created by statute *other than* a penalty or forfeiture”⁵; or (3) a 3 year statute for an action “upon a statute for a penalty or forfeiture where the action is given to the party aggrieved”. *Id.* at 741. The parties apparently agreed that the 5 years statute for actions “upon a liability created by statute other than penalty or forfeiture” would apply, which would render the claim as untimely. *Id.* However, the plaintiff also alleged that the longer 6 year applied.

⁵ This statute is comparable to § 15-3-530(2).

In ruling against the plaintiff that the longer 6-year “moneyed corporation” statute was not applicable because it applied only to penal and not civil actions, the Court held that plaintiffs claims were time barred whether they were actions upon statutory liabilities (the 5 year statute), or upon a action “for penalty or forfeiture where the cause of action is given to the aggrieved party” (the 3 year statute). *Id*, at 744-745. “Given these conclusions we do not decide and do not consider whether the remedies in §§400.9-625(c)(2) and .9-625(b) include ‘penalties or forfeitures’. *Id*, at 745.

Inasmuch as the plaintiff’s cause of action was filed almost 6 years after receipt of notice, the plaintiff’s damages claims were untimely under *either* a 3 or 5 year statute, and the question of whether the cause of action accrued at the time of sale, as opposed to the time of receipt of notice, *was not even raised* or ruled upon in the case. It is axiomatic that an appellate court’s affirmance of a lower court’s ruling on an issue that is neither raised by the party, nor at issue in the case, does not “decide” that issue as Defendants claim. “It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling...Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal.” Toal, et al, Appellate Practice in South Carolina, 2d ed, p. 80. Accordingly, any dicta to the contrary, this matter has not been “decided” by the Eighth Circuit.

Respectfully submitted,



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Attorneys for Plaintiff

Beaufort, South Carolina

May 20, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CASE NO. 2011-CP-10-7166

OTHA DELANEY, Individually and)
on behalf of all others similarly situated,)

Plaintiff,)

-vs-

FIRST FINANCIAL OF)
CHARLESTON,)

Defendant.)

CERTIFICATE OF MAILING

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2013 MAY 21 PM 1:24

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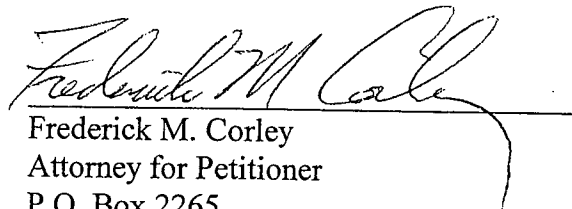
The undersigned hereby certifies that s/he has served the document indicated below to the person hereinafter named at the place and address stated below, by placing said document(s) in a post-paid envelope and depositing said envelope in the United States Mail on this 20 day of May, 2013.

DOCUMENT: Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion to Reconsider

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Perry M. Buckner, IV, Esquire
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OCT 30 2014
SC Court of Appeals


Frederick M. Corley
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-07-7166

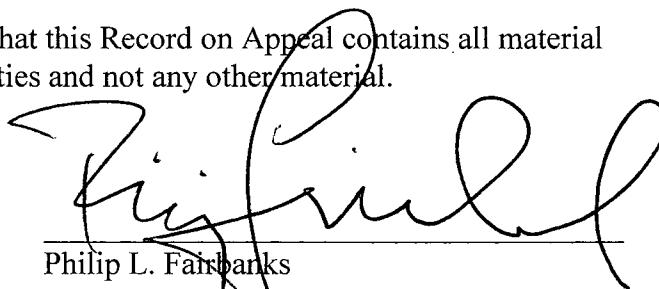
OTHA DELANEY Appellant,

-vs-

FIRST FINANCIAL OF CHARLESTON, INC. Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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OCT 30 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-07-7166

RECEIVED

OCT 30 2014

SC Court of Appeals

OTHA DELANEY

Appellant,

-vs-

FIRST FINANCIAL OF CHARLESTON, INC.

Respondent.

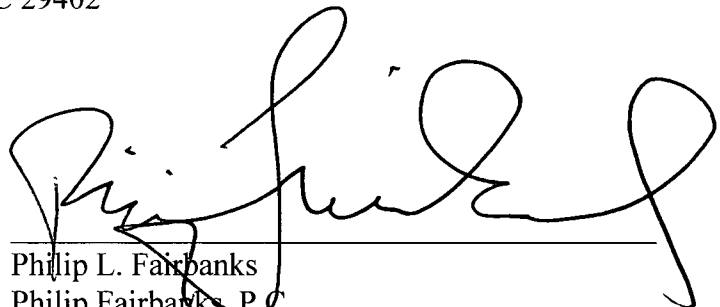
PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, s/he served counsel for Respondent with a copy of the RECORD ON APPEAL by mailing copies of same by United States Mail with first class postage prepaid to the following address:

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