THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Circuit Court Case No. 2011-CP-10-07166

Opinion No. 5442 (S.C. Ct. App. filed Sept. 28, 2016)
Court of Appeals Case No. 2014-000824

Supreme Court Case No. 2017-000683

Otha Delaney, Petitioner,

v.

First Financial of Charleston, Inc. Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. **Where Petitioner's claim against Respondent is for statutory damages under S.C. Code Ann. § 36-9-625(c)(2) based on Petitioner's allegation that Respondent sent him a notification of disposition of collateral that did not comply with S.C. Code Ann. § 36-9-611(b), did the Court of Appeals err in rejecting Petitioner's argument that his claim did not accrue until the disposition of the collateral (less than three years before he filed this suit), holding instead that Petitioner's claim accrued when he received the subject notification (more than three years before he filed this suit), and affirming the trial court's dismissal of his suit as time barred?**

II. **Are there additional reasons why the Court of Appeals' affirmance of the trial court's dismissal of Petitioner's suit should be sustained?**

   A. **If the Court of Appeals lost appellate jurisdiction as of October 19, 2016, having *properly* remitted this case to the trial court on that date, and thus *improperly* recalling the remittitur thereafter, (1) can this Court now upset the Court of Appeals' final decision via issuance of a writ of certiorari to that court after it has already lost appellate jurisdiction over this case, and (2) does this Court's doing so violate Respondent's constitutional rights to equal protection and/or due process?**[1]

   B. **Assuming, *arguendo*, that Petitioner's claim under § 36-9-625(c)(2) did not accrue until the disposition of his collateral, it is nonetheless barred by the one-year statute of limitations in S.C. Code Ann. § 15-3-570.**

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[1] To be clear, the other issues/arguments Respondent presents in this brief are made subject to and without waiving its challenge in this regard. In other words, Respondent's other issues/arguments assume *arguendo*, that this challenge is not dispositive, though, of course, Respondent contends that it is.

COUNTERSTATEMENT OF THE CASE[2]

Consumer debtor Mr. Delaney[3] filed this putative class action against secured creditor First Financial on October 4, 2011, alleging a claim under § 36-9-625(c)(2) for noncompliance with Part 6 (Default) in South Carolina's enactment of Article 9[4] (Secured Transactions) of the Uniform Commercial Code (the "UCC"). (*See generally* App. pp. 20-27.) Specifically, Mr. Delaney alleged that in May of 2008 First Financial had sent him a notification of disposition of his collateral (a truck First Financial had earlier repossessed after he defaulted under a certain Retail Installment Sales Contract) that did not contain all of the information required to be provided in a notification of disposition of collateral in a consumer-goods transaction under S.C. Code Ann. §§ 36-9-613 and -614. (*See generally* App. pp. 21-27.)[5]

Citing Mr. Delaney's averment that he was sent the allegedly deficient notification of disposition in May of 2008,[6] First Financial moved to dismiss his

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[2] In accordance with the Rule 12(b)(6), SCRCP, standard, for the purpose of this brief, the allegations of Mr. Delaney's complaint are taken as true and viewed in the light most favorable to him.

[3] Of course, "Mr. Delaney" is Plaintiff/Petitioner Otha Delaney; "First Financial" is Defendant/Respondent First Financial of Charleston, Inc.

[4] The South Carolina Code refers to this as "Chapter" 9.

[5] To be clear, the notification of disposition requirement is in § 36-9-611; the contents of the notification are addressed in §§ 36-9-613 and -614.

[6] (App. p. 23 at ¶ 14.)

claim as time barred. (App. pp. 32-33.) After briefing and a hearing, the trial court granted First Financial's motion and dismissed Mr. Delaney's complaint, holding his § 36-9-625(c)(2) claim had accrued when the subject notification was sent in May of 2008 and was time barred by the time he filed the instant suit more than three years later in October of 2011. (App. pp. 3-10, 35-54, 89-104.) After more briefing and another hearing, the trial court denied Mr. Delaney's motion to reconsider, reaffirming its dismissal in a detailed order. (App. pp. 11-19, 55-83, 88-89, 106-28.)

The Court of Appeals affirmed the trial court's dismissal of Mr. Delaney's claim in a 2-1 decision filed September 28, 2016. (App. pp. 184-99.) Having not received a petition for rehearing from Mr. Delaney, the Court of Appeals remitted the case to the trial court on October 19, 2016. (App p. 203.) On November 2, 2016, however, the court filed an order recalling the remittitur, which it followed with an order filed the next day extending the time for Mr. Delaney to petition for rehearing until November 18, 2016, on which date Mr. Delaney did indeed submit a petition for rehearing. (App. pp. 203, 207-22.) First Financial opposed the petition, arguing, among other things, that the appeal had already been decided with finality (in accordance with the majority opinion filed September 28, 2016, affirming the trial court), the Court of Appeals having already properly sent down the remittitur to the trial court on October 19, 2016, and thus erroneously issued its

orders recalling the remittitur and extending the deadline for Mr. Delaney's petition. (App. pp. 225-32.) Without addressing First Financial's jurisdictional argument, the Court of Appeals denied rehearing, its February 16, 2017, order signed by all three panel members. (App. p. 235.)

Mr. Delaney then petitioned this Court for review of the Court of Appeals' decision via writ of certiorari. In response, First Financial contemporaneously filed both a return and a motion to dismiss, arguing in its motion that this appeal had already been decided with finality, the Court of Appeals having properly sent down the remittitur and improperly recalled it. (First Financial's motion, Mr. Delaney's return, and First Financial's reply are all, of course, already part of the Court's record. In the interest of brevity, First Financial simply incorporates herein the substance of its argument in support of the motion, including its legal/factual basis, into this brief by reference to its motion and reply on file.) By order filed March 28, 2018, the Court granted Mr. Delaney's petition for a writ of certiorari and denied First Financial's motion to dismiss as moot without further comment.

ARGUMENT

I. The Court of Appeals did not err in rejecting Mr. Delaney's argument that his claim did not accrue until the disposition of his collateral (less than three years before he filed this suit), holding instead that Mr. Delaney's claim accrued when he received the subject notification (more than three years before he filed this suit), and affirming the trial court's dismissal of his suit as time barred.

Essentially, Mr. Delaney argues that his claim did not accrue until—and, indeed, could not have accrued in the absence of—the disposition (sale) of his collateral, which occurred in December of 2008, less than three years before he commenced this action in October of 2011; accordingly, the essential premise of the trial court's dismissal—that the statute of limitations for the claim began to run when he was sent the allegedly insufficient notification of disposition in May of 2008—is flawed, and the Court of Appeals erred in affirming the dismissal.

According to Mr. Delaney, the Court of Appeals erred in concluding that a disposition is *not* a prerequisite for a legal claim of noncompliance with § 36-9-611. (*See* Br. of Pet'r p. 9.) Which is to say, a disposition *is* a prerequisite for a legal claim of noncompliance with § 36-9-611, according to Mr. Delaney. Most respectfully, Mr. Delaney is mistaken.

While § 36-9-611 (in conjunction with §§ 36-9-613 and -614) provides the requirement with which Mr. Delaney alleges First Financial failed to comply, it is § 36-9-625 that provides his remedies for the alleged noncompliance, and per its plain language, a claim for relief is triggered merely by a failure—*any* failure—to

comply "with this chapter [(i.e., Chapter 9 of the UCC)]." *See* Section 36-9-625(a) ("If it is established that a secured party is *not proceeding in accordance with this chapter* . . . .") (emphasis added); § 36-9-625(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*.") (emphasis added). Further, Official Comment 2 to § 36-9-625 explains that "[s]ubsections (a) and (b) provide the basic remedies afforded to those aggrieved by a secured party's *failure to comply* with this [Chapter]. . . . Unlike former Section 9-507, . . . subsections (a) and (b) are not limited to noncompliance with provisions of this Part of Article 9. Rather, *they apply to noncompliance with any provision of this [Chapter]*.") (emphasis added).

Not only does Mr. Delaney's position—that a disposition was a prerequisite for his claim—find no support in the language of § 36-9-625, it is inconsistent with it. Again, the Official Comments to § 36-9-625 make expressly clear that "[s]ubsections (a) and (b) provide the basic remedies afforded to those aggrieved by a secured party's *failure to comply* with [Chapter 9]" and "they apply to noncompliance with *any* provision of th[e] [Chapter]." (emphasis added). Thus, it is plain that if, for instance, a secured party was to send an insufficient notification of disposition, a debtor could, even before disposition, bring a claim not only for injunctive relief under subsection (a) to "restrain . . . disposition of [the] collateral" on account of the secured party "not proceeding in accordance with this chapter"

but also under subsection for "any loss caused by [the] failure to comply with this chapter."

Indeed, given the relief a debtor is clearly allowed to seek under subsections (a) and (b) before disposition of the collateral, it would defy the rule against claim splitting—which is not displaced by the UCC[7]—for the same act of pre-disposition noncompliance (e.g., sending a noncompliant notice of disposition) giving rise to a debtor's claim for relief under subsections (a), (b), *and (c)(2)* to be to broken up and sued upon in different ways before and after disposition of the collateral. *See Ayers v. Guess*, 217 S.C. 233, 241, 60 S.E.2d 315, 318 (1950) (Taylor, J., dissenting) ("The entire claim arising out of a civil transaction, whether in nature of contract or tort, cannot be divided into separate and distinct claims, and each form basis of an action.").[8]

While not so broad as to cover any noncompliance with *Chapter 9* like

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[7] *See* S.C. Code Ann. § 36-1-103 ("Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.").

[8] In this regard, First Financial notes that, as a practical matter, neither the basis for Mr. Delaney's claim nor the relief he seeks to obtain are impacted by the disposition of the collateral or any other event after the notification of disposition was sent in May of 2008. As Mr. Delaney concedes, he "is not alleging that First Financial injured him 'by disposing of collateral in a commercially unreasonable manner' in violation of § 36-9-610.'" (Cert. Pet. p. 19.) In other words, the disposition of his collateral did not actually injure him at all.

subsections (a) and (b), but rather tailored to *Part 6 (Default)* within Chapter 9, § 36-9-625(c)(2) (i.e., the subsection providing for Mr. Delaney's claim) is triggered by *any* noncompliance with the whole of Part 6—not merely the particular failure of compliance that Mr. Delaney alleges in this case—and it contains no language requiring disposition of the collateral as a prerequisite to the liability it establishes. Notably, such language of prerequisite *was* a part of § 36-9-625(c)(2)'s predecessor (former S.C. Code § 36-9-507(1)), but it was amended out of existence by the legislature. *See Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 375-76, 595 S.E.2d 461, 464-65 (2004) ("'*If the disposition has occurred the debtor* . . . has a right to recover from the secured party . . . ." (quoting § 36-9-507(1) (Supp. 2000)) (emphasis added) (emphasis in original omitted). Whether the legislature's intent was to change the former law to do away with a disposition prerequisite or to clarify its original intent not to have such a prerequisite, the legislature's action to amend this language out of Chapter 9 supports the circuit court's ruling. *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) ("When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the existing law. Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent.") (citations omitted).

First Financial also notes that the timing *of the failure to comply* with Part 6

of Chapter 9 is expressly addressed in § 36-9-625(c)(2) and, indeed, material to its operation. In plain language, recovery under § 36-9-625(c)(2) may only be had by "a person that was a debtor or a secondary obligor *at the time a secured party failed to comply* with this part . . . ." (emphasis added). But it does *not* state or otherwise suggest that this time must be at/after disposition.

The sole basis of Mr. Delaney's claim under § 36-9-625(c)(2), i.e., the only allegation of noncompliance with Part 6 of Chapter 9, is that First Financial's notification of disposition, which it was required to send to him under § 36-9-611, and which it did send to him in May of 2008, did not contain the contents required by §§ 36-9-613 and -614. (App. pp. 23 at ¶¶ 13-15, 25-26 at ¶¶ 24-25; *see generally* App. pp. 3-19.) To be clear, the essential premise of Mr. Delaney's claim is that *the* notification of disposition that was actually sent to him by First Financial in May of 2008 was insufficient, not that First Financial did not send him a notification of disposition.

Mr. Delaney makes much of the language in § 36-9-611 referring to "a secured party that disposes of collateral," as if it confirms that the notification requirement does not exist unless/until disposition. But the official commentary to § 36-9-611 makes clear that this is not so, and that sufficient notification is required *before* disposition (a proposition with which, in regard to any conceivable sort of meaningful *prior* notification, logic itself must necessarily concur): "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, subject to certain exceptions." Official Comment 2, § 36-9-611 (emphasis added). And § 36-9-614, which addresses the contents and form of a notification of disposition in a consumer-goods transaction, expressly provides that "[a] notice of disposition *must* provide . . ." certain information. (emphasis added). Indeed, the official commentary to this section explains that "[a] notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law." Thus, logic and the plain language of § 36-9-625(c)(2) support the view that the alleged failure of compliance (and along with it Mr. Delaney's claim) occurred (and the corresponding claim accrued) in May of 2008.

The trial court properly rejected Mr. Delaney's argument that the allegedly noncompliant notification of disposition sent in May of 2008, the only alleged noncompliance in this case, was not actually a noncompliance in May of 2008—i.e., that while it was (allegedly) noncompliant with the statute, it was still not yet a noncompliance—and did not become a noncompliance until the later disposition of the collateral. As explained above, a notification of disposition lacking the required information is "insufficient as a matter of law," and, therefore, a noncompliance, such a noncompliance being the only prerequisite to recovery under § 36-9-625(c)(2) and, indeed, the express legislative design of § 36-9-

625(c)(2) being "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." Official Comment 4, § 36-9-625 (emphasis added). In the face of this clearly-expressed intent, the legislative design should not be judicially undone. *See Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."); *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) ("We do not sit as a super legislature to second guess the wisdom or folly of decisions of the General Assembly.").

The trial court's determination that Mr. Delaney's cause of action under § 36-9-625(c)(2) accrued in May of 2008 is consistent with the plain statutory language (cited above) making the time of the alleged violation material to its operation in terms of determining if a person may recover thereunder and also with the fact (as noted above) that liability is intended by the legislature to be imposed thereunder for "every noncompliance . . . regardless of any injury that may have resulted."

The Court of Appeals did not err in rejecting Mr. Delaney's argument that his claim did not accrue until the disposition of his collateral (less than three years

before he filed this suit), holding instead that Mr. Delaney's claim accrued when he received the subject notification (more than three years before he filed this suit), and affirming the trial court's dismissal of his suit as time barred.

II. There are additional reasons why the Court of Appeals' affirmance of the trial court's dismissal of Mr. Delaney's suit should be sustained.

A. Because the Court of Appeals lost appellate jurisdiction as of October 19, 2016, having *properly* remitted this case to the trial court on that date, and thus *improperly* recalling the remittitur thereafter, (1) this Court cannot now upset the Court of Appeals' final decision via issuance of a writ of certiorari to that court after it has already lost appellate jurisdiction over this case, and (2) the Court's doing so violates Respondent's constitutional rights to equal protection and/or due process?

Respondent certainly understands that this Court has the power to issue extraordinary writs, including, of course, writs of certiorari. Most respectfully, however, Respondent contends that this power does not extend to and/or may not be properly exercised in these circumstances.

As noted above, Respondent's motion to dismiss and reply (collectively, "Respondents' Incorporated Argument") are already on file with the Court and incorporated into this brief by reference, so Respondent will not rehash their substance here and instead get straight to this point: If, indeed, as set forth in Respondent's Incorporated Argument, the Court of Appeals lost appellate jurisdiction when it *properly* remitted this case on October 19, 2016, and never had appellate jurisdiction thereafter, Respondent submits that this Court cannot upset

the Court of Appeals' final decision via issuance of a writ of certiorari to that court after it (the Court of Appeals) has already lost appellate jurisdiction over the case.

Indeed, in *Wise v. South Carolina Department of Corrections*, a case cited in Respondent's Incorporated Argument, even though the Court expressly stated that it "construed [Wise's post-remittitur filing] as a *petition for a writ of certiorari*[,]"[9] it nonetheless concluded that it "d[id] not have jurisdiction to act in th[e] matter" and dismissed "[t]he documents filed by [Wise]" because "[t]he remittitur . . . [had] not [been] sent down by mistake, error or inadvertence of the Court of Appeals[,]" but was "[i]nstead . . . correctly sent after fifteen days had elapsed from the date of the order dismissing the appeal without the *proper* filing of a petition for reinstatement." *Id.* (emphasis in original).

Additionally, Rule 242(a), SCACR (Authority of the Supreme Court), states, "on motion of any party to the case *or on its own motion*, issue a writ of certiorari to review a *final decision* of the Court of Appeals,"[10] and Rule 242(c) (Time for Petitioning and Filing Fee) states, "A decision of the Court of Appeals *is not final for the purpose of review by the Supreme Court* until the petition for rehearing or reinstatement has been acted on by the Court of Appeals." (emphasis added). According to this plain language—even on the Court's own motion—for the Court

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[9] 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) (emphasis added).

[10] (emphasis added).

to review "a final decision" of the Court of Appeals via writ of certiorari there must first be a "*proper*" (as the *Wise* Court emphasized) "petition for rehearing or reinstatement [that] has been acted on by the Court of Appeals," and here, if Respondent is indeed correct that the Court of Appeals lost appellate jurisdiction when it properly remitted this case on October 19, 2016, and never properly had appellate jurisdiction thereafter, there can be no such proper petition.

And while Respondent is aware of *Ray v. State*, 330 S.C. 184, 498 S.E.2d 640 n. 1 (1998) (a death penalty case the Court reviewed "pursuant to a common law writ of certiorari[,]" such "extraordinary relief" being necessary because the "[p]etitioner's trial attorneys neglected to file a timely appeal"), the situation in *Ray* was materially different from the present, because, among other things, *Ray* Court issued a writ of certiorari to the circuit court, no appeal having been timely taken at all. Unlike the Court of the Appeals in the instant case, the circuit court still had jurisdiction over the case when *Ray* Court issued its writ.[11]

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[11] Here Respondent is compelled to underscore that *Ray* was a death penalty case, whereas the instant case is a civil matter wherein, as noted above, Mr. Delaney acknowledges that he was not in fact actually injured by First Financial in the first place. (Cert. Pet. p. 19 ("[Mr. Delaney] is not alleging that First Financial injured him 'by disposing of collateral in a commercially unreasonable manner' in violation of § 36-9-610.'") Indeed, while Respondent's argument is certainly technical, the same could fairly be said of Mr. Delaney's whole case against it. And, of course, to say that Respondent's argument is technical is not at all to say that is trivial; it is, of course, dispositive—which is, of course, why, though taking no pleasure in doing so, Respondent's counsel is compelled to make it.

As the Court of Appeals' September 28, 2016, decision stands (i.e., with the trial court's dismissal affirmed), Respondent has won this case. If that decision is upset, however, Respondent will again be the target of a putative class action—even the successful defense of which stands to come at substantial cost—and Respondent maintains that its rights to equal protection (*see* U.S. Const. amend. XIV; S.C. Const. art. I, § 3) and/or due process (*see* U.S. Const. amend. V; S.C. Const. art. I, § 3) prohibit that decision from being upset in any way other than by judicial action which is taken with competent jurisdiction and otherwise in accordance with established substantive and procedural law, applied in the same manner as to other similarly situated litigants (for instance, the respondent in *Wise*).

Thus, and again respectfully, for this Court to upset the Court of Appeals' final decision under the present circumstances—where indeed, thus far, Respondent has not actually been able obtain a ruling on its challenge to so fundamental a matter as jurisdiction—violates its federal and state constitutional rights to equal protection and/or due process. *See, e.g., Weaver v. S.C. Coastal Council*, 309 S.C. 368, 375, 423 S.E.2d 340, 344 (1992) ("While the three permits issued during the period immediately preceding respondent's application may have been granted in error, absent a showing in the record that Council had taken appropriate remedial action and given due notice thereof, the respondent was

entitled to be treated in the same manner as other applicants. We conclude that Council violated the equal protection and due process provisions of the state and federal constitutions in treating the respondent in a manner different from Beckmann, Cope and Crowley, thereby denying her a benefit granted to others similarly situated."); *see also Thomas v. Lynch*, 87 S.C. 44, 68 S.E. 817 (1910) ("It is to be regretted in any case when a party loses the opportunity afforded by the law and the rules prescribed for the administration thereof to present his cause on the merits. But it must always be remembered that the other party to the cause has the right to the orderly disposition thereof, and that his rights must be respected, and that it is essential to the due and orderly administration of the law that the methods of procedure prescribed by the statutes and rules of court be complied with. Otherwise, there would be no end to litigation. It has frequently been decided that, when the remittitur has been properly sent to the court below, the Supreme Court loses jurisdiction, and thereafter neither the court nor any justice thereof can make any order in the case. *Carpenter v. Lewis*, 65 S. C. 400, 43 S. E. 881; *State v. Adams*, 83 S. C. 149, 65 S. E. 220, and cases cited therein. *See, also, State v. Keels*, 39 S. C. 553, 17 S. E. 802, a case very much like the one under consideration.").

B. Assuming, *arguendo*, that Mr. Delaney's claim under § 36-9-625(c)(2) did not accrue until the disposition of his collateral, his claim is nonetheless barred by the one-year statute of limitations in § 15-3-570.

If the Court does as Mr. Delaney asks and decides whether the one-year statute of limitations in § 15-3-570 applies (and therefore bars) his claim, the Court should decide that it does.

Titled "Action for penalty," § 15-3-570 reads as follows:

> 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. If the action be not commenced within the year by a private party it may be commenced within two years thereafter in behalf of the State by the Attorney General or the solicitor of the circuit where the offense was committed, unless a different limitation be prescribed in the statute under which the action is brought.

As it did in regard to the statute that this Court addressed in *Ardis v. Ward*, § 15-3-570 provides the applicable statute of limitations for Mr. Delaney's claim because his claim "is in the nature of a penalty." 321 S.C. 65, 69, 467 S.E.2d 742, 744 (1996). Indeed, *Crane v. Citicorp National Services, Inc.*, the Court, while analyzing § 36-9-625(c)'s predecessor (former S.C. Code § 36-9-507(1)), repeatedly referred to it as a "penalty." 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) (heading its analysis of the "*Uniform Commercial Code Statutory Penalty*") (italics in original) (underline added)); *id.* at 74–75, 437 S.E.2d at 53 ("The question

remains whether debtors for the purpose of notice also are debtors for the purpose of the statutory *penalty* related to consumer goods collateral. . . . If the notice provision relates to the obligation, then it would seem logical that the *penalty* provision for breach of the notice requirements must also be related to the obligation, and therefore, applicable to co-obligators of consumer goods security agreements. Additionally, 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.") (emphasis added). And further reflecting that claim under § 36-9-625(c)(2) is in the nature of a penalty is the fact that, even though there may be multiple potential § 36-9-625(c)(2) claimants with respect to a single secured obligation, *only one* of them (whoever acts the fastest, essentially) may successfully make the claim because, as S.C. Code Ann. § 36-9-628(e) expressly states, "A secured party is not liable under Section 36-9-625(c)(2) more than once with respect to any one secured obligation." If the claim were not in the nature of penalty being imposed upon the secured party, it would make no sense for a potential claimant to lose his/her/its claim just because another claimant beat them to it.

CONCLUSION

For the foregoing reasons, as well as any other reasons supporting this conclusion set forth in the decisions of the trial court and Court of Appeals themselves or otherwise appearing in the record (all of which are incorporated herein by reference), First Financial asks this Honorable Court to affirm or otherwise leave the Court of Appeals' affirmance of the trial court's dismissal of Mr. Delaney's suit in tact.

Respectfully submitted,
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Dated: 6/22/18

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Stephanie P. McDonald, Circuit Court Judge

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Attorneys for Respondent

I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Respondent, hereby certify that the foregoing **BRIEF OF RESPONDENT** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on June 7, 2018, properly posted for delivery to the following addressees:

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Dated: 6/7/18