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

Presiding Judge:	Hon. R. Kirk Griffin
Plaintiff's Attorney:	J. Ashley Twombley, Esq.
Defendant's Attorney:	Russell G. Hines, Esq.
Date of Hearing:	July 29, 2021
Court Reporter:	N/A

This matter came before the Court via WebEx on July 29, 2021, on Defendant's Motion to Dismiss Amended Class Action Complaint, filed April 29, 2021. Representing the Plaintiff was J. Ashley Twombley, Esq. Representing the Defendant was Russell G. Hines, Esq. Plaintiff filed his Memorandum in Opposition on July 16, 2021. Defendant filed its Memorandum in Support on July 21, 2021. For the following reasons, Defendant's Motion to Dismiss Amended Class Action Complaint is respectfully Denied.

BACKGROUND

"In October of 2007, Delaney borrowed money from Defendant, First Financial of Charleston, Inc. ('FFC' or 'Defendant'), to buy a truck, and FFC took a security interest in the truck as collateral." See Order Granting Plaintiff's Motion for Class Certification at 1–2. "After

Plaintiff defaulted on his obligation to repay FFC, FFC repossessed the collateral and sold it. *Id.* at 2.

On October 3, 2011, Delaney filed suit against FFC seeking to represent a class of individuals who were mailed notices "that allegedly failed to comply with certain requirements in Article 9" of the Uniform Commercial Code (UCC). *Delaney v. First Financial of Charleston*, 426 S.C. 607, 610 (2019). "Accordingly, Delaney asserted he was entitled to the statutory penalty under section 36-9-625(c)(2) of the South Carolina Code (2003)." *Id.* FFC "moved to dismiss pursuant to Rule 12(b)(6), SCRCP, asserting the statute of limitations had expired." *Id.* The Court dismissed, finding Delaney's "claim was time-barred as his action accrued upon receipt of the allegedly deficient notice." *Id.* On May 8, 2018, the Supreme Court of South Carolina reversed the dismissal of Delaney's original complaint and remanded for further proceedings. *Id.* at 614.

The parties proceeded on Delaney's original complaint until Delaney sought leave to amend, which was granted on March 23, 2021, in this Court's Consent Order Granting Delaney's Motion to Amend the Complaint. After FFC consented to Delaney amending his complaint, FFC moved to dismiss the Amended Class Action Complaint. While FFC's motion to dismiss was pending, the Court granted Delaney's Motion for Class Certification on July 27, 2021.

CONCLUSIONS OF LAW

FFC asserts many grounds for dismissal in its Motion to Dismiss Amended Class Action Complaint. The Court finds none have merit.[1]

[1] To extent any of FFC's arguments are not specifically addressed below, the Court has carefully considered them and rejects them.

1. **The Court possesses subject matter jurisdiction over this case.**

FFC's first argument asks this Court to declare it lacks subject matter jurisdiction, and in doing so, to also find the Supreme Court of South Carolina had no jurisdiction to issue its opinion in *Delaney v. First Financial of Charleston*, 426 S.C. 607 (2019). See Memorandum in Support at 26–29. The Court rejects FFC's argument regarding subject matter jurisdiction.

FFC believes the Court of Appeals erroneously allowed Delaney to file an untimely Motion for Rehearing, claiming the Court lost jurisdiction over the case after it remitted the matter to this Court. See Memorandum in Support at 26–27. FFC told the Court of Appeals it lost jurisdiction over the case and the Court could not entertain Delaney's petition for rehearing. *Id*. Despite FFC's request, the Court of Appeals rejected FCC's argument and denied Delaney's petition for rehearing. *Id*. Delaney then petitioned the Supreme Court for a writ of certiorari to review the Court of Appeals' decision, which the Supreme Court granted. FFC moved the Supreme Court to dismiss the case for lack of jurisdiction. *Id*. at 27. The Court denied the motion. See Exhibit D to FFC's Memorandum in Support.

FFC asserts it has raised the jurisdictional issue to both the Court of Appeals and Supreme Court but neither explicitly rejected the argument. Memorandum in Support at 27. But courts are tasked with the constitutional duty to determine whether they possess subject matter jurisdiction. Subject matter jurisdiction "may not be waived, even by consent of the parties, and should be taken notice of by this Court," which is why courts will even raise the issue *sua sponte*. *Badeaux v. Davis*, 337 S.C. 195, 205, 522 S.E.2d 835 (Ct. App. 1999). This Court views the Supreme Court's and Court of Appeals' silence as a rejection of FFC's jurisdictional argument. Further, this Court has neither the authority nor inclination to

declare the Supreme Court lacked subject matter jurisdiction over this case and refuse to proceed in a manner consistent with its mandate. The Court has subject matter jurisdiction over Delaney's and the Class's claims.

2. Delaney has standing to pursue UCC claims for himself and the certified Class.

FFC's second argument asserts Delaney lacks standing. See Memorandum in Support at 14–15. The Court rejects FFC's standing argument.

Each class member was mailed presale notices created with one of two different templates. See Order Granting Plaintiff's Motion for Class Certification at 5–6. Likewise, the post-sale notices mailed to Delaney and each class member came from one of two post-sale notice templates. Both presale notice templates were substantially similar, as were the two post-sale notice templates. See Exhibits A, B, C, and E to Delaney's Amended Complaint.

"In its most basic sense, standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 219, 845 S.E.2d 481 (2020) (internal quotes and brackets omitted). "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party…. The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Id.* at 210. Here, Delaney has statutory standing because section 36-9-625 confers a right to sue FFC whenever it "failed to comply" with Article 9 of the UCC. *Delaney*, 426 S.C. at 612; *see also Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 375, 595 S.E.2d 461 (2004) ("If no such notice is given, the debtor has a statutory right to recover."); *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 385, 534 S.E.2d 688 (2000) ("If a secured party fails to give the required notice, a debtor may seek to recover the statutory

penalty under Article 9.").[2] This is true "regardless of any injury that may have resulted." *Delaney*, 426 S.C. at 613 n.2 (quoting § 36-9-625(c)(2), cmt. 4).

FFC asserts Delaney has no standing to represent anyone who received the slightly modified presale or post-sale notices. To support its argument, FFC cites *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014), noting the alleged violation or harm "must affect the plaintiff in a personal and individual way." See Memorandum in Support at 14. However, *Carnival Corp*. did not address standing in the class-action context. Moreover, the Supreme Court of South Carolina has explained class actions could not exist if the class representative had to show each class member's claim affected the class representative in a personal and individual way:

> this is nothing more than a generalized argument against class action litigation, as the named plaintiff in a class action will never have specific standing for each individualized claim that comprises the class. See *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (1979) (providing that class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only).

Grazia v. SC State Plastering, LLC, 390 S.C. 562, 575, 703 S.E.2d 197 (2010). Delaney has standing to bring his claims for himself and other class members because he satisfied Rule 23, SCRCP's class certification requirements. See Order Granting Plaintiff's Motion for Class Certification.

FFC's notice-related complaints about standing are arguments mislabeled as arguments against class certification. FFC argues the notices mailed to Delaney are

[2] *Singleton* and *Brockbank* dealt with former UCC law and cited § 36-9-504(3) (which is § 36-9-611(b) under the revised UCC) and § 36-9-507(1) (which is § 36-9-625 under the revised UCC). *See* §§ 36-9-611, cmt. 1 and 36-9-625, cmt. 1.

"materially different" than the notices created with modified templates. See Memorandum in Support at 14. These same arguments were raised against class certification. See FFC Memorandum in Opposition to Class Certification at 12–14. The Court has already determined Delaney satisfied Rule 23, SCRCP's prerequisites because the presale and post-sale notices mailed to class members contain substantively identical information Delaney alleges gives rise to his UCC claims. See Order Granting Class Certification. Further, FFC has cited no authority suggesting an individual whose claim is based on a form document has no standing to represent anyone who received a non-identical form document. Contrary authority has rejected FFC's argument. *See McKeage v. TMBC, LLC*, 847 F. 3d 992, 999 (8th. Cir. 2017) ("Although the documents TMBC prepared for individual customers varied at times, the district court correctly determined that the variety of services and the differences between contracts were not distinct enough to decertify the case as a class action."); *Hopkins v. Kansas Tchrs. Cmty. Credit Union*, 265 F.R.D. 483, 488 (W.D. Mo. 2010) ("To prove this claim, Hopkins must enter evidence of the pre-sale notice that he received, which the Court may use to determine whether the notice complies with the MoUCC. While it is clear not all Plaintiffs received the exact same pre-sale notice Hopkins received, all Plaintiffs will rely on the same basic evidence to prove their case (i.e., whatever version of pre-sale notice they might of received). Resolution of the issue of whether the pre-sale notices were deficient will resolve all class members' claims."). Delaney has standing to bring his and the class members' claims.

3. The Class Members' claims are not barred by the statute of limitations.

FFC's third argument asserts certain claims are barred by the statute of limitations. See Memorandum in Support at 22, 24–26. The Court disagrees. The class members' claims are timely.

There can be no dispute over the applicable statute of limitations (three years) nor the time of a claim's accrual (at the time of sale for presale notice claims) because the Supreme Court resolved these issues. *Delaney*, 426 S.C. at 614. This is the law of the case and binding precedent. Delaney filed his original complaint in October of 2011. With consent from FFC, he moved to amend his Complaint in 2021. FFC alleges the Court should dismiss any claims that occurred "more than three (3) years before the Complaint was filed on March 30, 2021" because no claims asserted in the Original Complaint were tolled once the trial court dismissed Delaney's UCC claim. This is a merits-based affirmative defense, and this Court cannot dismiss any Class members' claims without violating due process. Further, if FFC's assertion that the Court must dismiss any claims that accrued more than three years before the Amended Complaint was filed, Delaney's UCC claims would need to be dismissed too—even though he prevailed on appeal, the Supreme Court reversed and remanded this case "for further proceedings," and Delaney has yet to have the opportunity to pursue his claim on behalf of himself or the Class.

Regarding Delaney and the Class's presale notice claims (i.e., Count I), FFC did not mention the relation-back doctrine in its motion or memorandum in support. Instead, FFC focuses on equitable tolling under "the United States Supreme Court's *American Pipe* tolling doctrine." See Memorandum in Support at 25 (citing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)). FFC's reliance on *American Pipe* is misplaced. Under *American Pipe*, "the commencement of a class action suspends the applicable statute of limitations as

to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U. S. at 554. "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class ***until class certification is denied***." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (emphasis added). Class certification was never denied, in fact, it was granted, so the statute of limitations remained tolled for all putative class members. Even if the erroneous dismissal order constituted a denial of certification (it doesn't), reversal of that order by the Supreme Court would "relate back to the time of the original motion … for the purposes of tolling the statute of limitations on the claims of the class members." *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 359 n.3 (1980).

FFC also asks the Court to dismiss Count II of Delaney's Amended Complaint (UCC post-sale notice claim) because Delaney asserted no post-sale notice allegations in his original complaint, and thus, "the Amended Complaint does not relate back to the date of the Original Complaint." See Memorandum in Support at 22. The Court disagrees. The post-sale notice claims asserted in the Amended Complaint relate back to the original complaint because the addition of the post-sale notice claims arose out of the same loan agreements as the presale notice claims and FFC's standard repossession practices and compliance with the UCC. *See Patton v. Miller*, 420 S.C. 471, 496, 804 S.E.2d 252 (2017) ("The test ... under Rule 15(c) ... is ... whether the claim ... asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading[.]").

FFC cannot reasonably claim prejudice when it consented to Delaney's request for leave to amend the complaint and add the post-sale notice claims. Thus, like the presale

notice claims in the Amended Complaint, the post-sale notice claims relate back to the original complaint and are not barred by the statute of limitations.

4. The Amended Complaint does not seek multiple recoveries for any single UCC violation and class actions are permitted under the UCC.

FFC's fourth argument asserts § 36-9-628(e) precludes Delaney from seeking to recover for the class. See Memorandum in Support at 22–23. The Court rejects FFC's argument about Delaney seeking multiple recoveries per secured obligation.

The plain language of § 36-9-628(e) says, "[a] secured party is not liable under Section 36-9-625(c)(2) more than once with respect to ***any one secured obligation***." *See* § 36-9-628(e) (emphasis added)). Delaney and the Class only seek damages under § 36-9-625(c)(2) ***once per secured obligation***—meaning co-debtors or co-obligors (i.e., consumers part of the same "secured obligation") would split § 36-9-625(c)(2) damages awarded for their joint transaction. Delaney seeks damages on behalf of the class in connection with ***multiple*** secured obligations, one for each class member. FFC argument implies § 36-9-628(e) bars class actions requesting recovery under § 36-9-625(c)(2) altogether. But the plain language of the UCC does not prevent class actions or the damages sought by the Class. Presumably, the General Assembly would have made a non-uniform amendment to the Official Text of the UCC when it enacted § 36-9-625 if it intended to bar such class actions altogether, "especially when it has chosen to expressly bar class action litigation in other areas." *Grazia*, 390 S.C. at 576 (collecting statutes); *cf.* § 810 ILCS 5/9-625 (Illinois's adoption of UCC § 9-625(c)(2) and non-uniform amendment providing a consumer-debtor may recover the statutory minimum "in any ***individual*** action") (emphasis added).

Section 36-9-628(e) was enacted to prevent secured parties from being liable to multiple debtors for § 36-9-625(c)(2) damages when they were part of the same transaction

giving rise to the claim. *Singleton*, 358 S.C. at 377 (explaining § 36-9-628(e) "effectively overrules the *Crane* holding with respect to recovery of statutory minimum damages," as "*Crane* stands for the proposition that multiple guarantors to ***one*** secured transaction are entitled to recover").

5. Delaney's Amended Complaint states a claim for relief based on FFC's noncompliance with the UCC's presale notice requirements.

FFC's fifth argument asserts Delaney has failed to state a cause of action for the presale notices. See Memorandum in Support at 7–14. The Court rejects FFC's arguments that its presale notices comply with the UCC.

Delaney alleges the presale notices mailed to him and class members have at least two of these three deficiencies:

(1) The Delaney Presale Notice "failed to 'state[] the method of intended disposition' as required by § 36-9-613(1)(C) and § 36-9-614(1)(A)." *See* Amended Complaint ¶ 50(a).

(2) The Delaney Presale Notice "inaccurately stated (or at least failed to unambiguously state) when it would sell the Class members vehicles' if Defendant decided to sell them." *See* Amended Complaint ¶50(b).

(3) The Delaney Presale Notice "did not state 'that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting,' as required by § 36-9-613(1)(D) and § 36-9-614(1)(A)." *See* Amended Complaint ¶ 54.

Delaney pleaded facts to support all three deficiencies. In addition to specifically pleading sufficient facts in the Amended Complaint itself, Delaney attached the presale notice FFC mailed him as Exhibit A and the template of the form presale notice FFC mailed to class

members after October 4, 2011 as Exhibit B. *Brazell v. Windsor*, 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009) (citing Rule 10(c), SCRCP). ("A copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading.").

FFC "was required to scrupulously adhere to procedures contained in Article 9." *Brockbank*, 341 S.C. at 383. Exhibit A shows the presale notice mailed to Delaney bears all three deficiencies alleged by Delaney:

(1) The presale notice does not state FFC "will" sell the vehicle at a private sale. It merely states FFC has an option to do so if it wishes. A presale notice that "does not convey the message that the property is to be or will be sold" is deficient under the UCC. *GMAC v. Carter*, 290 S.C. 216, 349 S.E.2d 342 (1986) (vacated as a condition of settlement).

(2) The presale notice does not correctly state the date after which the vehicle would be sold (in the event FFC decided to sell the vehicle). The presale notice, dated May 2, 2008, states the vehicle will be sold privately "***on*** the tenth (10th) day from the date of this notice." See Ex. A to Amended Complaint (emphasis added). The plain meaning of "on" is an "occurrence within the limits of a specified day." *Webster's New Collegiate Dictionary* (1981) at 794. FFC didn't sell the vehicle on the 10th day from the date of the notice (May 12, 2008); rather, it sold the vehicle 8 months later on January 10, 2009. See Ex. C to Amended Complaint. "The notice must be correct in all the required information." 4 J.J. White & R.S. Summers, UNIFORM COMMERCIAL CODE § 34-12, at 489 (6th ed.2010). Here, it was not. At a minimum, the notice was ambiguous. A notice would be ambiguous if it is "reasonably susceptible of more than

one interpretation." *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875 (Ct. App.1997). It is reasonable to interpret FFC's presale notice as providing it would sell the vehicle "on" the 10th day from the date of the presale notice rather than ***sometime*** after that date. This is the only reasonable way to read FFC's presale notice, which is why the drafters of the UCC, given "their learning, skill and experience," recommended using language showing the sale will occur "sometime after (date)," § 36-9-614(3), and "speaks volumes against the correctness of [FFC's] position." *Wilmington Trust Co. v. Conner,* 415 A.2d 773, 780 (Del. 1980).

(3) Under the UCC, the presale notice must state "the debtor is entitled to an accounting of the unpaid indebtedness" and state "the charge, if any, for an accounting." § 36-9-613(1)(D) and § 36-9-614(1)(A). The presale notice mailed to Delaney is completely silent on Delaney's right to an accounting. The omission of this information, which is required by the UCC, renders the presale notice "insufficient as a matter of law." § 36-9-614, cmt. 2.

Delaney's Amended Complaint sufficiently states a cause of action for his and the class members' presale notice claims.

6. Delaney's Amended Complaint states a claim for relief based on FFC's noncompliance with the UCC's post-sale notice requirements.

FFC's sixth argument asserts Delaney has failed to state a cause of action for the post-sale notices. See Memorandum in Support at 14, 20–21. The Court rejects FFC's arguments that its post-sale notices comply with the UCC.

FFC argues Delaney failed to state a post-sale notice claim under § 36-9-616 because its post-sale notice was not "seriously misleading" and Delaney admitted FFC did not

intentionally violate the UCC, and therefore, he cannot show FFC had a pattern or practice of noncompliance with § 36-9-616. The Court disagrees with both assertions.

Section 36-9-616(d) provides, "[a]n explanation complying substantially with the requirements of subsection (a) is sufficient, even if it includes minor errors that are not seriously misleading." The "seriously misleading" language presupposes the post-sale notice substantially complies with § 36-9-616. *See* § 36-9-616(d). Delaney sufficiently alleges FFC's post-sale notice fails to substantially comply with § 36-9-616(a) by omitting information required by the statute, mis-ordering the information included in the notice, and omitting language informing the intended recipient the deficiency balance could be affected by future events (like interest or refunds).

FFC also claims Delaney's post-sale notice claim must fail because he needed to allege FFC's post-sale notice violations were a pattern, or consistent with a practice, of noncompliance" and Delaney admitted FFC's noncompliance was likely caused by FFC's "honest mistake." FFC's "intent" is irrelevant to the question of FFC's compliance with § 36-9-616. Delaney alleges FFC had a pattern of violating § 36-9-616 by sending substantially similar form post-sale notices to consumers for over a decade. Thus, whether intentional or not, Delaney sufficiently alleged FFC's failure to comply with § 36-9-616(b)(1) "is part of a pattern, or consistent with a practice, of noncompliance." Section 36-9-616 does not require a showing that the secured party acted in bad faith.

Exhibit C and E to Delaney's Amended Complaint show FFC did not substantially comply with § 36-9-616 as to any class member's post-sale notice because the notice did not provide the information required by § 36-9-616(c)(3), and the information included in the

post-sale notice was not organized in the manner prescribed by § 36-9-616(c).[3] The post-sale notices in Exhibits C and E are also missing language informing the intended recipients that the alleged deficiency balance identified on the notice was subject to change by "future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency," which is required by § 36-9-616(a)(1)(C).

Delaney's Amended Complaint sufficiently states a cause of action for his and the class members' post-sale notice claims.

CONCLUSION

After careful consideration of the record, Defendant's Motion to Dismiss Amended Class Action Complaint is denied in all respects.

IT IS SO ORDERED.

[3] "To comply with" § 36-9-616(a), FFC's post-sale notice "must provide the ***following information in the following order***: (1) the aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date… (2) the amount of proceeds of the disposition; (3) the aggregate amount of the obligations after deducting the amount of proceeds; (4) the amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition; (5) the amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in item (1); and (6) the amount of the surplus or deficiency." § 36-9-616(c). FFC cannot "substantially comply" with §36-9-616 because § 36-9-616(c) mandates it failed to "comply with subsection (a)(1)(b)."

Charleston Common Pleas

Case Caption: Otha Delaney VS First Financial Of Charleston Inc

Case Number: 2011CP1007166

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768