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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Case No. 2011-CP-10-07166
Appellate Case No. 2021-001443

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

Respondent,

v.

First Financial of Charleston, Inc.,

Appellant.

**APPENDIX TO
APPELLANT'S MEMORANDUM
ON APPEALABILITY**

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¹ Please Note: Mr. Delaney’s Petition for a Writ of Certiorari in the Prior Appeal was not itself an exhibit to the Memo in Support of FFC’s Motion to Dismiss the Amended Complaint, but this would seem to be the logical place for it to appear in this appendix.

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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.)

CLASS ACTION COMPLAINT

2011 OCT -4 AM 11:19
JULIE ARMSTRONG
CLERK OF COURT
BY

FILED

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.

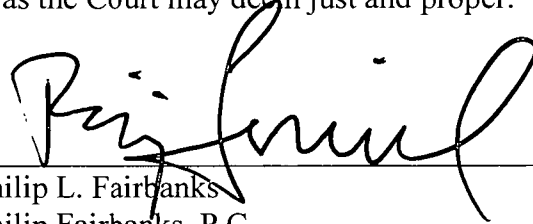
24. Before a creditor may sell, enter a contract for sale, or otherwise dispose of a repossessed vehicle, the UCC requires that it send the borrower “a reasonable authenticated notification of disposition.” UCC §36-9-611(a)(1).

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.



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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, 2007

BUYER Name	<u>WILL MARVIN DELANEY</u>		CREDITOR (SELLER) Name	<u>LOU BELM MOTORS</u>	
Number and Street	<u>828 HITCHING POST RD</u>		Number and Street	<u>4951 INXHESTER 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) REC VEN — Length, Width, Color	IDENTIFICATION NO. (Serial or Motor No.)
	<u>USED</u>	<u>2003 CHEV</u>		<u>1500</u>	<u>MPD --</u>	<u>1GDEC14X232296422</u>

EQUIPMENT INCLUDED					
MOTOR VEHICLE			RECREATIONAL VEHICLE		
☐ Radio	☐ Vinyl Top	☐ Air Cond.	☐ Air Cond. Unit(s)	☐ Range	☐ Refrigerator
☐ Auto Trans.	☐ 3 Speed Trans.	☐ 4 Speed Trans.	☐ Furniture (As per Mfg. floor plan)	☐ Awnings	
☐ 5 Speed Trans.	☐ Power Brakes	☐ Power Steering	☐ Other _____		

Trade-in: (Year and Model) 95 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)

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

ITEMIZATION OF AMOUNT FINANCED

- Cash Price of Motor Vehicle (including Sales Tax) \$ 4399.50
- Less Downpayment
(Cash 849.25 (Trade-in 575.25) \$ 1424.50
- Unpaid Balance of Cash Price (1 minus 2) \$ 2975.00
- Amounts Paid to Others on My Behalf
 - Premium to Credit Life Ins. Co. \$ N/A
 - Premium to Credit Accident & Health Ins. Co. \$ N/A
 - ~~PHYSICAL DAMAGE INSURANCE~~ \$ 499.00
 - To Public Officials for Certificate of Title Fees \$ 25.00
 - To Public Officials for Recording & Releasing Fees \$ N/A
 - To Public Officials for Documentary Stamps \$ N/A
 - To _____ \$ N/A
- Total Items 4 (a) + (b) + (c) + (d) + (e) + (f) + (g) \$ 524.00
- Amount Financed (3 plus 4) \$ 3499.00

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 _____



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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 _____ (NAME OF COMPANY) for a term of _____ months.

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.

29.50 %

FINANCE CHARGE

The dollar amount the credit will cost me

\$ 4,485.92

Amount Financed

The amount of credit provided to me or on my behalf.

\$ 8,499.00

Total of Payments

The amount I will have paid after I have made all payments as scheduled

\$ 12,984.92

Total Sale Price

The total cost of my purchase on credit, including my down payment of \$ 1,624.50

\$ 14,384.42

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, 202007, 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 or 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

PO BOX 60429

ADDRESS

CHARLESTON

CITY

SC 29419

STATE

ZIP CODE

COLISEUM MOTORS

NAME OF SELLER

BY

TITLE

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.

BUYER

BUYER

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

CO-SIGNER

SEE REVERSE SIDE FOR ADDITIONAL INFORMATION

CO-SIGNER

Form No. S C. (M V) 7/06

(Motor Vehicle - Recreational Vehicle)

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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.

Otta Marion Delaney
Name of Owner from Whom Vehicle Repossessed
828 Hitching Post Rd Char 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)

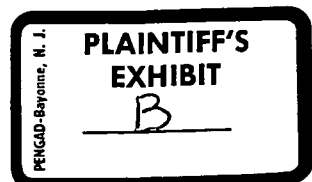
Amount of Original Lien \$ 12,904.92 Date of Lien 10.13.07
Lienholder's Name First Six months of Chew
Street, City, State, Zip Code P.O. Box 60429 Char SC 29419
Date of Repossession 5.2.08
Signature of Lienholder Tracy Murray Title Title Clerk

Furthermore, this is to certify that for the value received \$ _____ the above vehicle has been assigned

to: Cook motor co 9933 Hwy 78 Locks 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)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP-10-07166

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

Plaintiff,)

vs.)

FIRST FINANCIAL OF)
CHARLESTON, INC.,)

Defendant.)
—)

**PLAINTIFF'S RESPONSES TO
REQUESTS FOR ADMISSION**

TO: Defendant, First Financial of Charleston, Inc., and its attorneys, STEPHEN L. BROWN and RUSSELL G. HINES of YOUNG CLEMENT RIVERS, LLP.

Otha Delaney ("Plaintiff" or "Delaney"), by and through his undersigned counsel, reserving all rights to amend and/or supplement his responses as may be appropriate¹, responds to Defendant's Requests for Admissions included in Defendant's Discovery Request to Plaintiff dated October 6, 2020 as follows:

RESPONSES TO REQUESTS FOR ADMISSION

19. **RFA:** (a) Admit that the only wrongdoing you allege against FFC in your complaint is its alleged failure to comply with one or more of the requirements contained within the pre-sale notification of disposition requirements (in other words, admit that the only wrongdoing you allege against FFC in your complaint is its alleged failure to comply with one or more of the requirements contained within UCC §§ 36-9-611 to -614).

RESPONSE to Paragraph 19(a): Admit.

¹ All responses herein are made to the best of Delaney's knowledge at this time.

19. **RFA:** (b) Admit that your complaint does not allege that FFC failed to comply with any requirement of the UCC that is not contained within the pre-sale notification of disposition requirements (in other words, admit that your complaint does not allege that FFC failed to comply with any requirement of the UCC that is set forth in a section of the UCC *other than* UCC §§ 36-9-611 to -614).

RESPONSE to Paragraph 19(b): Admit.

19. **RFA:** (c) Admit that, aside from any interest or costs, the only monetary recovery your complaint seeks against FFC is statutory damages under UCC § 36- 9-625(c)(2).

RESPONSE to Paragraph 19(c): Admit.

19. **RFA:** (d) In pertinent part, UCC § 36-9-625(b) states that “a person is liable for damages in the amount of any loss caused by a failure to comply with this chapter” and that “[l]oss caused by a failure to comply may include loss resulting from the debtor’s inability to obtain, or increased costs of, alternative financing.” And UCC § 36-9-625(c)(1) provides: “(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[.]”

(1) Admit that FFC did not cause you any loss for which it is liable to you for damages

(2) Admit that your complaint does not allege that FFC is liable for any damages under § 36-9-625(b) or 625(c)(1).

RESPONSE to Paragraph 19(d)(1): Deny.

RESPONSE to Paragraph 19(d)(2): Delaney admits the Complaint does not request damages under § 36-9-625(b) or 625(c)(1).

26. **RFA:** If you do not state any actual injuries or losses in your responses to Requests No. 24(b)(2)(i) and 24(c)(2)(i) above, admit that FFC's use of the Subject Pre-Sale Notification did not cause you to actually personally suffer or sustain any injuries or losses of any kind or nature whatsoever.

RESPONSE: Plaintiff objects to this Request for Admission on the grounds it is compound, ambiguous and unintelligible. Plaintiff is seeking non-discretionary statutory damages on behalf of himself and a class of similarly situated individuals.

27. **RFA:** If you do not state any actual injuries or losses in your responses to Requests No. 24(b)(2)(i) and 24(c)(2)(i) above *and* you do not state any other problems in your responses to Requests No. 24(b)(2)(ii) and 24(c)(2)(ii) above, admit that FFC's use of the Subject Pre-Sale Notification did not cause you to actually personally suffer or sustain any injury, loss, difficulty, hardship, prejudice, or problem of any kind or nature whatsoever.

RESPONSE: Plaintiff objects to this Request for Admission on the grounds it is compound, ambiguous and unintelligible. He seeks non-discretionary statutory damages on behalf of himself and a class of similarly situated individuals.

28. **RFA:** *Black's Law Dictionary* (11th ed. 2019) defines "actual damages" as "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses."

- (a) Admit that your complaint does not seek an award of "actual damages" (as defined above) against FFC.
- (b) Admit that FFC has not caused you any injury or loss for which you could seek an award against it for "actual damages" (as defined above).

RESPONSE to Paragraph 28(a): Deny.

RESPONSE to Paragraph 28(b): Deny.

31. **RFA:** In pertinent part, your complaint reads as follows: “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. . . .” (Compl. ¶ 14.) Admit that, regardless of whether or not it actually succeeded in doing so, FFC did in fact attempt to comply with the pre-sale notification of disposition requirements.

RESPONSE: Delaney admits only that this statement is contained in the Complaint. Plaintiff objects to responding to the remaining portion of the request on the grounds FFC’s attempts are not within his knowledge and as such the remaining request is denied.

34. **RFA:** In pertinent part, Plaintiff’s Memorandum Supporting His Motion to Compel Discovery, filed June 16, 2020, reads as follows: “Delaney does not seek any information from FFC ‘to prove negligence or culpable conduct’; neither ‘negligence’ nor ‘culpable conduct’ are relevant to Delaney’s presale notice claims for non-discretionary statutory damages under § 36-9-625(c)(2).” (Pl.’s Mem. in Supp. of Mot. to Compel p. 6.) Admit that your complaint does not allege negligence or culpable conduct on the part of FFC.

RESPONSE: Plaintiff admits the complaint does not allege negligence. Plaintiff denies the remainder as stated.

37. **RFA:** In pertinent part, your complaint reads as follows:

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). . . .

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

- (a) Admit that, by entering into the RISC, you promised to pay back the money you borrowed to purchase the Subject Vehicle/Collateral in accordance with the terms of the RISC.
- (b) Admit that you breached the RISC by breaking your promise to pay back the money you borrowed to purchase the Subject Vehicle/Collateral in accordance with the terms of the RISC.
- (c) Admit that, at the time the Subject Vehicle/Collateral was repossessed, you were in default for failing to pay FFC money you owed it pursuant to the RISC.
- (d) Admit that, at the time the Subject Vehicle/Collateral was repossessed, FFC was not in breach of any duty owed to you.

RESPONSE to Paragraph 37(a): Admit.

RESPONSE to Paragraph 37(b): Admit.

RESPONSE to Paragraph 37(c): Admit.

RESPONSE to Paragraph 37(d): Plaintiff objects on the grounds the request is capable of multiple interpretations and is denied as stated.

42. RFA: Admit that the only secured obligation about which you personally have standing to complain is the secured obligation referenced in your complaint involving the RISC and your purchase of the Subject Vehicle/Collateral.

RESPONSE: Plaintiff objects to this request on the grounds that as stated it is ambiguous, and susceptible to multiple interpretations. Plaintiff also objects because there is no dispute that he has standing to bring his own UCC claim against Defendant, and that is all that is required for a class representative to have standing: “the named plaintiff in a class action will never have specific standing for each individualized claim that comprises the class.” *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010).

***Neale v. Volvo Cars of North America, LLC*, 794 F.3d 353 (3d Cir.2015) illustrates why the request seeks irrelevant information:**

Herein lies the key: a class action is a *representative* action brought by a named plaintiff or plaintiffs. Named plaintiffs are the individuals who seek to invoke the court's jurisdiction and they are held accountable for satisfying jurisdiction. *See Ortiz*, 527 U.S. at 832, 119 S.Ct. 2295. Thus, a class action is permissible so long as at least one named plaintiff has standing . . . Requiring individual standing of all class members would eviscerate the representative nature of the class action. It would also fail to recognize that the certified class is treated as a legally distinct entity even though the outcome of such an action is binding on the class

(emphasis in original).

45. **RFA:** Attached to these Requests as **Exhibit 3** is a copy of the document bearing Bates No. 20110934 00019, which is a letter from FFC to Plaintiff dated January 10, 2009, showing a remaining deficiency balance on Plaintiff's account in the amount of \$4,187.57.

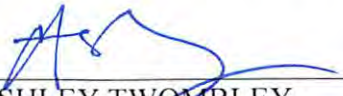
- (a) Admit that Plaintiff's breach of the RISC caused FFC to lose money.
- (b) Admit that, after disposition of the Subject Vehicle/Collateral and proper application of the proceeds, there is a deficiency (in *some* amount) on Plaintiff's account with FFC.
- (c) *Putting aside the question of the particular amount of the deficiency*, admit that Plaintiff is liable to FFC for a deficiency (in *some* amount).
- (d) Admit that the remaining deficiency balance shown on **Exhibit 3** is correct.

RESPONSE:

- a. Plaintiff has insufficient information to admit or deny whether his default caused Defendant any monetary damages, and therefore, denies same.
- b. Deny.
- c. Deny.
- d. Deny.

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Beaufort, South Carolina

December 7, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP-10-07166

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

Plaintiff,)

vs.)

FIRST FINANCIAL OF)
CHARLESTON, INC.,)

Defendant.)
)

**RESPONSES TO DEFENDANT’S
INTERROGATORIES AND
REQUESTS FOR PRODUCTION**

TO: STEPHEN L. BROWN, ESQUIRE AND RUSSELL G. HINES, ESQUIRE,
ATTORNEYS FOR DEFENDANT:

Otha Delaney, Individually and on behalf of all others similarly situated, hereinafter
“Plaintiff,” responding to the Interrogatories and Requests for Production propounded by First
Financial of Charleston, Inc., hereinafter “Defendant,” would allege and state the following:

**RESPONSES TO INTERROGATORIES
AND REQUESTS FOR PRODUCTION**

1. *INT:* Identify (by current full legal name, together with any aliases, assumed names,
or former names, or as much of the foregoing as you/your representatives know) every witness
concerning the facts of this case that you/your representatives know of, providing for each such
witness as many of the following items of contact information as you/your representatives know:
home address, home telephone number, personal email address, name of employer or place of
business, job title, work address, work telephone number, work email address, and mobile
telephone number.

RESPONSE: Other than Plaintiff and other potential class members, possibly a corporate representative (or corporate representatives) from First Financial of Charleston. No specific person(s) have been identified at this time. Plaintiff may also call representatives from the South Carolina department of motor vehicles and other state agencies responsible for the car title registration process. Discovery is ongoing and is not complete and Plaintiff reserves the right supplement this response.

2. **INT:** For each witness identified in your response to Request No. 1 above, provide a summary sufficient to inform FFC of the important facts known to or observed by the witness.

RESPONSE: See response to interrogatory # 1.

3. **RFP:** Produce all written or recorded statements taken from witnesses concerning the facts of this case that are in your/your representatives' possession, custody, or control.

RESPONSE: Not applicable.

4. **INT:** Set forth an itemized statement of all damages claimed to have been sustained by Plaintiff.

RESPONSE: Plaintiff and all potential class members seeks statutory damages under § 36-9-625(c)(2), which is equal to the finance charge plus 10% of the amount financed. Plaintiff's finance charge was \$4,405.92 and the cash price was \$9,399.50.

Finance charge:	\$4,405.93 +
<u>10% of the Cash Price (\$9,399.50):</u>	<u>\$ 939.95</u>

Total Damages Under § 36-9-625(c)(2): \$5,345.88

5. **RFP:** Produce all documentary material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 4 above that is in your/your representatives' possession, custody, or control.

RESPONSE: See Retail Instalment Contract attached as Exhibit A to the Complaint ("RIC") and the presale documents attached to Defendant's Discovery Requests as Exhibits 1 & 2.

6. **RFP:** Produce all discovery material concerning the subject matter of this case that is in your/your representatives' possession, custody, or control.

RESPONSE: Plaintiff objects to this interrogatory as vague and ambiguous and capable of more

than one interpretation. To the extent Defendant seeks to have this interrogatory supplant her duty to identify documents “by individual item or by category, and describe each item and category with reasonable particularity” that she would like produced as required by SCRCP 34(b)(2), Plaintiff objects to the same and contests any assertion that this “standard interrogatory” accomplishes the same. Defendant is required to identify documents by individual item or by category, and describe each item and category with reasonable particularity, and this interrogatory is not a substitute.

7. **INT:** Identify all witnesses you propose to use as expert witnesses at the trial of this case, providing for each such witness their full name, occupation, employer or place of business, job title, any professional designations, work address, and the primary mailing address, email address, and the best telephone number for contacting them concerning this case.

RESPONSE: None at this time.

8. **INT:** Identify all witnesses you propose to use as expert witnesses at the trial of this case, providing for each such witness their full name, occupation, employer or place of business, job title, any professional designations, work address, and the primary mailing address, email address, and the best telephone number for contacting them concerning this case.

- (a) Provide a complete statement of every opinion the witness will express and the basis and reasons for the same.
- (b) State the facts or data considered by the witness in forming each opinion the witness will express.
- (c) Identify any exhibits that will be used to summarize or support each opinion the witness will express.
- (d) State the witness’ qualifications, including a list of all publications authored in the previous ten (10) years.
- (e) List all other cases in which the witness testified as an expert at trial or by deposition during the previous four (4) years.

- (f) State the compensation paid or to be paid the witness for study, testimony, or other involvement concerning this case.

RESPONSE: Not applicable.

9. ***RFP:*** For every witness identified in your response to Request No. 7 above, produce all discovery material that you/your representatives have provided (or, going forward, provide) to the witness or that the witness has provided (or, going forward, provides) to you/your representatives, including, without limitation, all reports or other expressions of opinion or analysis by the witness concerning the subject matter of this case.

RESPONSE: Not applicable.

10. ***RFP:*** *Aside from* discovery material produced in your response to Request No. 9 above, produce any *other* discovery material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 8 above that is in your/your representatives' possession, custody, or control.

RESPONSE: Not applicable.

11. ***RFP:*** For every witness identified in your response to Request No. 7 above, produce a copy of their current curriculum vitae or resume.

RESPONSE: Not applicable.

12. ***INT:*** For the period from October 12, 2007, to February 1, 2009, state all addresses where Plaintiff lived, specifying the dates that Plaintiff lived at each address.

RESPONSE: 828 Hitching Post Road, Charleston, SC 29414.

13. ***INT:*** For the period from October 12, 2007, to February 1, 2009, state Plaintiff's employment/work history, specifying all jobs Plaintiff held (whether as an employee or as an independent contractor) and any other occupation or work in which Plaintiff was involved, including

the dates during which Plaintiff held each job or was involved in each occupation or work, and also specifying any periods during which Plaintiff was unemployed or out of work and the reason therefor.

RESPONSE: Plaintiff owned and operated a small painting company where he remodeled and painted homes.

14. ***RFP:*** Produce copies of Plaintiff's federal and state income tax returns for tax years 2007, 2008, and 2009.

RESPONSE: Plaintiff objects to this interrogatory on the grounds that the documents requested are not relevant and not likely to lead to the admissibility of evidence.

15. ***INT:*** State whether Plaintiff was incarcerated (whether jailed, imprisoned, or otherwise confined by any governmental authority) at any time during the period from October 12, 2007, to February 1, 2009, and, if so, state when, where, and why Plaintiff was incarcerated.

RESPONSE: Not applicable.

16. ***INT:*** For the period from October 12, 2007, to February 1, 2009, state whether Plaintiff was absent from the address 828 Hitching Post Road, Charleston, SC, for any period of more than ten (10) consecutive days and, if so, state the dates of all such periods of absence and where Plaintiff was during those periods.

RESPONSE: Plaintiff does not believe he was absent from the location for more than a ten-day period but cannot be sure. If Defendant is concerned about a specific time period, please send a supplemental interrogatory.

17. ***INT:*** State whether Plaintiff has ever been arrested or otherwise formally accused of a crime and, if so, state the date of the arrest; the name of the jurisdiction conducting the arrest; the nature of all charges; and the disposition of all charges, including any guilty pleas or convictions, any sentences or other punishments Plaintiff received, and, to the extent Plaintiff was incarcerated, the actual dates of Plaintiff's confinement.

RESPONSE: Plaintiff objects to this interrogatory as overbroad in scope and time.

18. **INT:** After first correctly identifying Defendant by its full legal name (“First Financial of Charleston, Inc.”), your complaint uses the shorthand reference “First Financial” to refer to Defendant. Footnote 1 on page 4 of your complaint asserts, “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.” State whether, in making this assertion, you/your representatives confused “First Financial of Charleston, Inc.” with a different legal entity whose full legal name also includes the words “First Financial”.

RESPONSE: Plaintiff cannot recall how he concluded Defendant was a creditor in almost 200 bankruptcy cases. That said, upon review, Plaintiff believes he may arrived at that number by including entities beginning with “First Financial” other than Defendant/ “First Financial of Charleston.”

20. **INT:** If your response to Request No. 19(a) or (b) above is anything other than an unequivocal admission:

- (a) State specifically all wrongdoing you allege against FFC *other than* its alleged failure to comply with one or more of the requirements contained within the pre-sale notification of disposition requirements (i.e., all wrongdoing you allege against FFC *other than* its alleged failure to comply with one or more of the requirements contained within UCC §§ 36-9-611 to -614) and your evidentiary basis and legal basis for the same.
- (b) For each distinct allegation of wrongdoing that you state in your response to Request No. 20(a) above, state specifically where such wrongdoing is alleged in your complaint.
- (c) For each distinct allegation of wrongdoing that you state in your response to Request No. 20(a) above, state specifically all of the following that you contend you were caused thereby and your evidentiary basis and legal basis for the same:

- (1) Actual Injuries or Losses (*not* statutory damages under UCC § 36-9-625(c)(2), but any injuries or losses of any kind or nature whatsoever that *you actually personally suffered or sustained*).
- (2) Other Problems (not statutory damages under UCC § 36-9- 625(c)(2), and not including any injuries or losses already covered in your response to Request No. 20(c)(1) above, but any other difficulty, hardship, prejudice, or problem of any kind or nature whatsoever that you actually personally suffered or sustained).

RESPONSE: Not applicable (on all subparts).

21. **RFP:** Produce any/all documentary material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 20 above that is in your/your representatives' possession, custody, or control.

RESPONSE: Not applicable.

22. **INT:** If your response to Request No. 19(c), (d)(1), or (d)(2) above is anything other than an unequivocal admission, fully explain why your response is not an unequivocal admission, providing your evidentiary basis and legal basis for the same.

RESPONSE: Not applicable.

23. **RFP:** Produce any/all documentary material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 22 above that is in your/your representatives' possession, custody, or control.

RESPONSE: None.

24. **INT:** As noted in the Definitions section above, *according to your complaint*, the Subject Pre-Sale Notification consists of only the *one (1)* document attached to your complaint as Exhibit C, *while according to FFC*, the Subject Pre-Sale Notification consists of

both the document attached to your complaint as Exhibit C *and* a document on FFC letterhead (i.e., the same letterhead as on Exhibit C) with the same text as Bates No. 20110934 00018.

(a) State whether you continue to stand by the allegation in your complaint that the Subject Pre-Sale Notification consists of *only* the *one (1)* document attached to your complaint as Exhibit C *or* if you agree with FFC that the Subject Pre-Sale Notification consists of *both* the document attached to your complaint as Exhibit C *and* a document on FFC letterhead (i.e., the same letterhead as on Exhibit C) with the same text as Bates No. 20110934 00018, and if you stand by the allegation in your complaint that the Subject Pre-Sale Notification consists of *only* the *one (1)* document attached to your complaint as Exhibit C, state your evidentiary basis and legal basis for the same.

(b) Assuming the Subject Pre-Sale Notification consists of *only* the *one (1)* document attached to your complaint as Exhibit C:

(1) State specifically every way in which you contend the Subject Pre-Sale Notification does not comply with the pre-sale notification of disposition requirements and your evidentiary basis and legal basis for the same.

(2) For each distinct way in which you contend the Subject Pre-Sale Notification does not comply with the pre-sale notification of disposition requirements, state specifically all of the following that you contend you were caused thereby and your evidentiary basis and legal basis for the same:

(i) Actual Injuries or Losses (*not* statutory damages under UCC § 36-9-625(c)(2), but any injuries or losses of any kind or nature whatsoever that *you actually personally suffered or sustained*).

- (ii) Other Problems (*not* statutory damages under UCC § 36-9-625(c)(2), and *not including any injuries or losses already covered in your response to Request No. 24(b)(2)(i) above*, but any *other* difficulty, hardship, prejudice, or problem of any kind or nature whatsoever that *you actually personally suffered or sustained*).
- (c) Assuming the Subject Pre-Sale Notification consists of *both* the document attached to your complaint as Exhibit C *and* a document on FFC letterhead (i.e., the same letterhead as on Exhibit C) with the same text as Bates No. 20110934 00018:
 - (1) State specifically every way in which you contend the Subject Pre-Sale Notification does not comply with the pre-sale notification of disposition requirements and your evidentiary basis and legal basis for the same.
 - (2) For each distinct way in which you contend the Subject Pre-Sale Notification does not comply with the pre-sale notification of disposition requirements, state specifically all of the following that you contend you were caused thereby and your evidentiary basis and legal basis for the same:
 - (i) Actual Injuries or Losses (*not* statutory damages under UCC § 36-9-625(c)(2), but any injuries or losses of any kind or nature whatsoever that *you actually personally suffered or sustained*).
 - (ii) Other Problems (*not* statutory damages under UCC § 36-

9- 625(c)(2), and *not including any injuries or losses already covered in your response to Request No. 24(b)(2)(i) above*, but any *other* difficulty, hardship, prejudice, or problem of any kind or nature whatsoever that *you actually personally suffered or sustained*).

RESPONSE to Paragraph 24(a): Plaintiff agrees the Subject Pre-Sale Notification consists of the two documents referenced in Interrogatory No. 23.

RESPONSE to Paragraph 24(b): Not applicable.

RESPONSE to Paragraph 24(c)(1): The notice did not state Defendant's intended method of disposition as required by §§ 36-9-613(1)(C) and 36-9-614(1)(A). The Subject Pre-Sale Notification stated Defendant could be sold by private sale but Defendant retained the unilateral right to forego a private disposition.

Further, the Subject Pre-Sale Notification inaccurately stated if the collateral would be sold by private sale, Defendant would do so "after the close of business on the tenth (10th day from the date of this notice)." Defendant did not sell the collateral on the 10th day from the date of the notice, however. Accordingly, the notice misrepresented Plaintiff's redemption rights.

Further the Subject Pre-Sale Notification did not state Plaintiff had the right to an "accounting" or written explanation of indebtedness as required by §§ 36-9-613 and 36-9-614.

RESPONSE to Paragraph 24(c)(2)(i): Plaintiff objects to the interrogatory as irrelevant. He seeks non-discretionary statutory damages on behalf of himself and a class of similarly situated individuals.

RESPONSE to Paragraph 24(c)(2)(ii): See Response to Interrogatory No. 24(c)(2)(i).

25. **RFP:** Produce all documentary material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 24 above that is in your/your representatives' possession, custody, or control.

RESPONSE: See Exhibits 1 & 2 (i.e., the "Subject Pre-Sale Notification") attached to Defendant's Discovery Requests.

29. **INT:** If your response to Request No. 28(a) or (b) above is anything other than an unequivocal admission, fully explain why your response is not an unequivocal admission, providing your evidentiary basis and legal basis for the same.

RESPONSE: See Response to Interrogatory No. 24(c)(2)(i).

30. **RFP:** Produce any/all documentary material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 29 above that is in your/your representatives' possession, custody, or control.

RESPONSE: Paragraphs 9, 20, 22, and Prayer for Relief in Delaney's Complaint.

32. **INT:** If your response to Request No. 31 above is anything other than an unequivocal admission, fully explain why your response is not an unequivocal admission, providing your evidentiary basis and legal basis for the same.

RESPONSE: Plaintiff possesses no knowledge as to whether Defendant "attempt[ed] to comply with the presale notification of disposition requirements."

33. **RFP:** Produce any/all documentary material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 32 above that is in your/your representatives' possession, custody, or control.

RESPONSE: Not applicable.

35. **INT:** If your response to Request No. 34 above is anything other than an unequivocal admission, fully explain why your response is not an unequivocal admission,

providing your evidentiary basis and legal basis for the same.

RESPONSE: Not applicable.

36. **RFP:** Produce any/all documentary material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 35 above that is in your/your representatives' possession, custody, or control.

RESPONSE: Not applicable.

38. **INT:** If your response to Request No. 37 above is anything other than an unequivocal admission, fully explain why your response is not an unequivocal admission, providing your evidentiary basis and legal basis for the same.

RESPONSE: Not applicable.

39. **RFP:** Produce any/all documentary material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 38 above that is in your/your representatives' possession, custody, or control.

RESPONSE: Not applicable.

40. **INT:** Regarding the document attached to your complaint as Exhibit C:

(a) State whether it was in fact received via mail at 828 Hitching Post Road, Charleston, SC, and, if so, when.

(b) State when and how *you personally* first became aware of the document.
(Please Note: Request No. 40(a) above asks whether and, if so, when the document was received by *anyone* at the referenced address. This Request (40(b)) specifically asks about when and how the document actually made its way into *your* hands. For instance, did you actually receive the correspondence with the document directly from a postal worker or

retrieve it from a mailbox? Or did, for instance, someone else living at the referenced address first receive the correspondence with the document from a postal worker or retrieve it from a mailbox and then bring it to, or leave it somewhere for, you?)

- (c) Your complaint alleges FFC disposed of the Subject Vehicle/Collateral on or about December 15, 2008 (Compl. ¶ 12). State whether you actually read, in full, the document at any time before FFC disposed of the Subject Vehicle/Collateral.

RESPONSE: Plaintiff objects to this interrogatory as irrelevant. As observed by the Court in the Order Granting Plaintiff's Motion to Compel Discovery, "The documents used by [FFC] to repossess and dispose of vehicle either comply with South Carolina law or they do not." *See* Order Granting Motion to Compel p. 4.

Delaney alleges FFC sold the car without providing the notice required by the Uniform Commercial Code. (*See* Complaint ¶¶ 24-25). The Uniform Commercial Code only requires secured parties to "send" a reasonable authenticated notice before disposing of the consumer-debtors' vehicles. Whether the notice is ultimately received has no bearing on FFC's compliance with the Uniform Commercial Code:

Section 36-9-611 of the South Carolina Code, entitled, 'Notification before disposition of collateral,' requires a secured party to provide notice of its plans to dispose of the collateral. Specifically, subsection (b) states, 'Except as otherwise provided in subsection (d), a secured party that disposes of collateral under Section 36-9-610 shall send...a reasonable authenticated notification of disposition.'

***Delaney v. First Financial of Charleston*, 426 S.C. 607, 612, 829 S.E.2d 249 (2019) (emphasis added).**

41. **INT:** Regarding the document FFC contends it sent on FFC letterhead (i.e., the same letterhead as on Exhibit C to your complaint) with the same text as Bates No. 20110934 00018:

- (a) State whether it was in fact received via mail at 828 Hitching Post Road, Charleston, SC and, if so, when.
- (b) State if and, if so, when and how *you personally* first became aware of the document. (Please Note: Request No. 41(a) above asks whether and, if so, when the document was received by *anyone* at the referenced address. This Request (41(b)) specifically asks about if and, if so, when and how the document actually made it into *your* hands. For instance, did you actually receive the correspondence with the document directly from a postal worker or retrieve it from a mailbox? Or did, for instance, someone else living at the referenced address first receive the correspondence with the document from a postal worker or retrieve it from a mailbox and then bring it to, or leave it somewhere for, you?)
- (c) Your complaint alleges FFC disposed of the Subject Vehicle/Collateral on or about December 15, 2008 (Compl. ¶ 12). State whether you actually read, in full, the document at any time before FFC disposed of the Subject Vehicle/Collateral.

RESPONSE: *See Response to Interrogatory No. 40.*

43. ***INT:*** If your response to Request No. 42 above is anything other than an unequivocal admission, fully explain why your response is not an unequivocal admission, providing your evidentiary basis and legal basis for the same.

RESPONSE: *See Response to Interrogatory 42.*

44. ***RFP:*** Produce any/all documentary material referenced in, relied on in preparing, or otherwise supporting or substantiating your response to Request No. 43 above that is in your/your representatives' possession, custody, or control.

RESPONSE: Not applicable.

46. **INT:** If your response to Request No. 45(a), (b), (c), or (d) above is anything other than an unequivocal admission, fully explain why your response is not an unequivocal admission, providing your evidentiary basis and legal basis for the same.

RESPONSE: Defendant's failure to provide proper notice absolutely bars it from recovering a deficiency from Plaintiff. Effectively, the absolute bar rule "impose[s] an irrebuttable presumption that the value of the collateral equals the value of the debt or judgment obtained." *Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 880 (Iowa 1997).

Further the RIC states Defendant could only require Plaintiff to pay the unpaid balance of the loan "subject to any required notice[.]" Defendant failed to provide the "required notice."

47. **RFP:** Produce any/all documentary material supporting your response to Request No. 46 above.

RESPONSE: See Retail Instalment Contract attached as Exhibit A to the Complaint ("RIC") and the presale documents attached to Defendant's Discovery Requests as Exhibits 1 & 2.

48. **INT:** Has Plaintiff been offered any form of incentive or other inducement to serve representative of the putative class? If so, what?

RESPONSE: No.

49. **INT:** Plaintiff brought this case as a putative class action, with Plaintiff serving as the putative class representative. As of the date of these Requests the case has not been certified as a class action, and FFC opposes class certification. Assuming, *arguendo*, the case is certified as a class action, as compared to the absent class members, does Plaintiff stand to receive any additional recovery or other bonus because he is the representative of the putative class? If so, what?

RESPONSE: Plaintiff lacks sufficient information to answer this interrogatory. However, he knows there is no guarantee that serving as the class representative will lead to any additional recovery or bonus, regardless of whether the class ultimately prevails.

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January 8, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2011-CP-10-07166
	)	
OTHA DELANEY, Individually and on behalf	)	
of all others similarly situated	)	
	)	
Plaintiff,	)	AMENDED CLASS ACTION
	)	COMPLAINT
	)	
vs.	)	
	)	
FIRST FINANCIAL OF CHARLESTON, INC.,	)	
	)	
Defendant.	)	
	)	
	)	

TO: THE DEFENDANT ABOVE NAMED:

Otha Delaney (“Plaintiff”) brings this Class Action Complaint against First Financial of Charleston, Inc. (“Defendant” and/or “First Financial”) on his own behalf and that of all others similarly situated, seeking declaratory, injunctive and monetary relief to remedy First Financial of Charleston, Inc.’s unlawful noncompliance with the notice requirements of the South Carolina Uniform Commercial Code.

Nature of Case

1. This is a consumer class action against Defendant, and its predecessors or successors, seeking relief to redress an unlawful pattern of wrongdoing followed by Defendant regarding collection, enforcement, repossession and disposition of collateral, and collection of alleged deficiencies.

2. Provisions of the SC UCC, §§ 36-9-601 through 9-635, form a comprehensive scheme governing a secured creditor’s repossession and disposition of a consumer-debtor’s collateral.

3. Section 36-9-611(b) of the SC UCC requires a secured creditor, before disposition of a consumer's repossessed collateral, to send the consumer-debtor a "reasonable authenticated officiation of disposition," which provides the consumer-debtor with specific information about the intended disposition and the consumer-debtor's redemption rights.

4. Sections 36-9-613 and 9-614 of the SC UCC set forth the mandatory information that the secured party must include in the written notice of intended sale of the collateral (hereinafter the "presale notice"), and Official Comment to U.C.C. § 9-614 instructs that a written notice to a consumer debtor or obligor which is not in compliance with the above-referenced sections is insufficient as a matter of law.

5. After Defendant repossesses a consumer-debtor's collateral, but before it disposes of the collateral, it has employed a long-standing standard practice of mailing the consumer-debtor a form presale notice substantially similar to the notices attached hereto as **Exhibit A or Exhibit B**, with only identifying information such as the debtor's name, address, account number, the date, and collateral varying from debtor to debtor.

6. Upon information and belief, after Defendant disposes of consumer-debtor's collateral, it has a standard practice of mailing consumer-debtor's a standard-form post-sale notice in the same or a substantially similar form as the document attached as **Exhibit C**.

7. Plaintiff sues for himself and all other similarly situated consumers in the "Class," which is defined below.

8. Plaintiff and the Class seek damages equal to the statutory minimum provided for under § 36-9-625(c)(2) of the SC UCC, \$500 for each violation of § 36-9-616, and for such other further relief as this Court may deem appropriate.

Parties

9. Plaintiff is a resident of North Carolina.

10. Defendant is a 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.

Jurisdiction and Venue

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

12. 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 Defendants

13. 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 (Delaney's "Vehicle") for personal, family or household use with Coliseum Motors.

14. The cash price for the vehicle was \$9,399.50.

15. The finance charge (credit service or time/price differential) was \$4,405.92.

16. A true and correct copy of the RISC is attached as **Exhibit D**.

17. Coliseum Motors immediately assigned the RISC to Defendant, giving them a security interest in the Vehicle. (See Exhibit D).

18. Plaintiff purchased the Vehicle primarily for personal, family, or household purposes.

19. Defendant remained a secured party until disposition.

20. The RISC was a consumer credit contract for the sale of a motor vehicle by a retail seller to a retail buyer on time under a retail installment contract for a time sale price payable in one or more deferred installments.

21. Defendant or its agent repossessed the Vehicle on or around May 1, 2008.

22. After repossessing the Vehicle, Defendant mailed a presale notice to Plaintiff advising him of Defendant's intent to dispose of the Vehicle in purported compliance with the SC UCC.

23. A true and accurate copy of the presale notice Defendant mailed Delaney is attached as **Exhibit A**.

24. The presale notice mailed to Plaintiff was not a "reasonable authenticated notification of disposition" as required by § 36-9-611(b) because, among other reasons, it failed to "state[] the method of intended disposition" as required by §§ 36-9-613(1)(C) and 9-614(1)(A).

25. The presale notice mailed to Plaintiff did not mention he had the right to obtain an explanation of indebtedness in writing.

26. After disposing of the Vehicle, Defendant mailed Plaintiff a notice in purported compliance with the SC UCC (hereinafter a "post-sale notice"), supposedly explaining how Defendant calculated Plaintiff's post-sale deficiency balance.

27. A true and accurate copy of the post-sale notice mailed to Plaintiff is attached as **Exhibit C**.

28. The post-sale notice Defendant sent to Delaney did not substantially comply with § 36-9-616 because it:

- a. Did not provide all the information, in the requisite order, as required by § 36a-9-616(c)(3); and

- b. Did not state future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency, as required by § 9-616(a)(1)(C).

29. Future debits, credits, charges including additional credit services charges or interest, rebates, and expenses affected the amount of the surplus or deficiency for Plaintiff and the Class.

30. Defendant's failure to provide a statutorily compliant post-sale notice is part of a pattern, or consistent with a practice, of noncompliance.

31. The defective presale and post-sale notices, and the reporting of false or inaccurate derogatory information on the class members' credit reports harmed the class members' credit worthiness, credit standing, credit capacity, character, and general reputation.

32. The defective presale and post-sale notices, and the reporting of false or inaccurate derogatory information on the class members' credit reports were oral or written publication of material that defames, slanders or libels the class members.

33. The defective presale and post-sale notices, and the reporting of false or inaccurate derogatory information on the class members' credit reports were oral or written publication of material that invaded the Class's privacy rights.

34. The defective presale and post-sale notices were not mailed with knowledge of their falsity.

35. The reporting of false or inaccurate derogatory information on the class members' credit reports was not done with knowledge of its falsity.

36. Defendant's acts that violated the SC UCC do not involve or arise out of professional services the company provides to its customers.

37. Defendant's acts that violated the SC UCC required no professional skill.

38. Defendant's acts that violated the SC UCC required no specialized knowledge, labor, or skill.

39. Defendant's acts that violated the SC UCC do not arise out of the operation or control of repossessed property.

40. Defendant did not intend to violate the SC UCC and did not intend injury to the class because it believed its notices were accurate, lawful and contained no misrepresentations.

41. Defendant did not know the presale and post-sale notices, and its reporting of information on the class members' credit reports would violate the rights of the class members or inflict injury upon them.

42. Defendant made negligent misrepresentations in its presale and post-sale notices.

Class Allegations

43. Plaintiff repeats the allegations set forth above as if restated in their entirety.

44. Plaintiff sues for himself and a class of similarly situated consumers under South Carolina Rule 23(a).

45. The "Class" comprises all consumers who Defendant (a) mailed a presale notice in a form substantially similar to the presale notice documents attached as Exhibit A or Exhibit B and (2) whose collateral was disposed by Defendant or its agent after October 3, 2008.

46. Excluded from the "Class" are individuals who filed for Chapter 7 bankruptcy after the date of their vehicle's disposition whose bankruptcy ended in discharge rather than dismissal, as well as individuals who filed for Chapter 13 bankruptcy after the date of their vehicle's disposition and whose bankruptcy is still pending or ended in discharge rather than dismissal.

47. Every class member is a consumer who obtained financing for the purchase of collateral in which Defendant obtained a security interest.

48. Every class member obtained financing for the purchase of personal property primarily for personal, family, or household purposes.

49. Defendant took possession of every class member's vehicle after Defendant declared they had defaulted on their loans.

50. After repossessing the Vehicle, Defendant mailed presale notices to Plaintiff and the Class, advising them of Defendant's intent to dispose of their property in purported compliance with the SC UCC.

51. The presale notices mailed to Plaintiff and all class members were not "reasonable authenticated notifications of disposition" as required by § 36-9-611(b) because, among other reasons:

- a. they failed to "state[] the method of intended disposition" as required by § 36-9-613(1)(C) and § 36-9-614(1)(A); and
- b. they inaccurately stated (or at least failed to unambiguously state) when it would sell the Class members vehicles' if Defendant decided to sell them.

52. The presale notices mailed to Plaintiff and the Class informed them Defendant would sell their vehicles at the close of business on "the tenth (10th) day from the date of [the] notice" or, if that date fell "on a Sunday or legal holiday," Defendant would sell the vehicles at the close of "the first business day following the tenth (10th) day. (See Exhibit A & Exhibit B).

53. Defendant did not sell the Class members' collateral on the tenth day after the date of the notice.

54. Defendant did not sell the Class members' collateral on the first business day after the tenth day from the date of the notice.

55. The presale notices mailed to Plaintiff and class members who were mailed a presale notice in a form substantially similar to Exhibit A also violated the SC UCC because it 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).

56. Plaintiff has mailed more than 40 presale notices in substantially the same form as Exhibit A to consumers who had their vehicles repossessed and sold by Plaintiff or its agent.

57. Plaintiff has mailed more than 100 presale notices in substantially the same form as Exhibit B to consumers who had their vehicle repossessed and sold by Plaintiff or its agent.

58. The presale notices' failure to include the information required by § 36-9-613(1)(C) and § 36-9-614(1)(A) render the notices insufficient as a matter of law.

59. After disposing of the Vehicle, Defendant mailed Plaintiff notices in purported compliance with the SC UCC (hereinafter "post-sale notices"), purportedly explaining how Defendant calculated Plaintiff's post-sale deficiency balance.

60. A redacted copy of a post-sale notice mailed by Defendant in 2019 is attached as **Exhibit E**.¹

61. Upon information and belief, Defendant mailed Plaintiff and the Class post-sale notices that failed to substantially comply with § 36-9-616 because they:

¹ Exhibit E is nearly identical in the terminology and language used for the post-sale notice. Though not based of a word-for-word template as the one used to create Plaintiff's post-sale notice (Exhibit C), the 2019 Redacted Post-Sale Notice is functionally equivalent for purposes of Plaintiff's post-sale notice allegations, namely (1) the information provided in the notices are not in the order required by § 36-9-616 and (2) certain information required by § 36-9-616 is omitted from both post-sale notices.

- a. Did not provide all the information, in the requisite order, as required by § 36a-9-616(c)(3); and/or
 - b. Did not state future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency, as required by § 9-616(a)(1)(C).
62. Members of the Class are so numerous their individual joinder is impracticable.
63. There are significant questions of law and fact common to the Class.
64. The principal legal question common to Plaintiff and each class member is whether the form presale and post-sale notices mailed by Defendant, or someone at its direction, complied with the SC UCC.
65. Claims involving the interpretation of form documents present a classic case for treatment as a class action.
66. “[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23,” so class actions “are favored in this state” of South Carolina. *Grazia v. SC State Plastering*, 390 S.C. 562, 576, 703 S.E.2d 197 (2010).
67. Plaintiff is a member of the Class.
68. Plaintiff’s claims are typical of the class members’ claims.
69. Plaintiff and the Class’s claims are based on the same factual and legal theories.
70. Plaintiff and each class member is entitled to statutory damages equal to the minimum provided by § 36-9-625(c)(2) due to Defendant’s failure to send proper presale notices.
71. Plaintiff and each class member who was mailed a post-sale notice in violation of § 36-9-616 is entitled to an additional \$500 under § 36-9-625(e)(5).

72. Plaintiff's claims and the class members' claims involve an amount in controversy that exceeds \$100.

73. Plaintiff's counsel is competent and experienced in consumer and class litigation.

74. Neither Plaintiff nor Plaintiff's counsel have any interests antagonistic to the Class.

75. Plaintiff has met the requirements of South Carolina Rule 23(a) and Plaintiff may sue as a representative party on behalf of the Class.

COUNT 1 – SC UCC Presale Notice Violations

76. Plaintiff repeats the allegations set forth above as if fully restated in their entirety.

77. Defendant violated § 36-9-611 and § 9-614 by failing to send Plaintiff and each class member a presale notice that complied with the SC UCC.

78. As a direct and proximate result of failure to comply with the requirements of Subchapter 6 of Article 9 of the UCC, Plaintiff and the Class suffered actual damages not less than the minimum damages provided by §36-9-625(c)(2), including:

- a. loss of use of tangible property and cost of alternative transportation;
- b. loss resulting from the inability to obtain, or increased costs of, alternative financing;
- c. harm to credit worthiness, credit standing, credit capacity, character, and general reputation;
- d. harm caused by defamation, slander and libel;
- e. harm caused by invasion of privacy; and
- f. other uncertain and hard-to-quantify actual damages.

COUNT II – SC UCC Post-sale Notice Violations

79. Plaintiff repeats the allegations set forth above as if fully restated in their entirety.

80. From October 4, 2008, through January 1, 2020 (or later), all post-sale notices mailed by Defendant to consumers were in a form substantially similar to the post-sale notices attached as Exhibit C or Exhibit E.

81. Defendant violated § 36-9-616 by failing to send Plaintiff and the Class post-sale notices that substantially complied with the SC UCC.

82. Defendant's failure to send statutorily compliant post-sale notices is part of a pattern or consistent practice of noncompliance with the SC UCC.

WHEREFORE, Plaintiff prays this Court certify the Class, appoint Plaintiff's undersigned attorneys as Class Counsel, and enter a judgment for Plaintiff and the Class against Defendant awarding:

- a. Damages equal to the minimum damages provided by §36-9-625(c)(2) for Defendant's presale notice violations;
- b. statutory damages of \$500 for each defective post-sale notice sent or that Defendant failed to send;
- c. prejudgment and post-judgment interest to the extent permitted by law;
- d. a preliminary and permanent injunction enjoining Defendant from engaging in the practices, including without limitation, enjoining Defendant from collecting deficiency balances, time price differential, and delinquency and collection charges from Plaintiff and the Class;

- e. a mandatory injunction compelling Defendant to remove any adverse credit information wrongfully reported on Plaintiff and the Class's consumer credit reports;
- f. a declaration that the presale and post-sale notices sent by Defendant to Plaintiff and the Class fail to comport with the SC UCC; and
- g. for such other and further relief as this Court deems just and proper.

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March 30, 2021

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,	)	<u>DEFENDANT’S MOTION TO DISMISS</u>
	)	<u>AMENDED CLASS ACTION</u>
vs.	)	<u>COMPLAINT</u>
	)	
FIRST FINANCIAL OF CHARLESTON, INC.,	)	***Hearing Requested***
	)	
Defendant.	)	
_____	)	

NOW COMES Defendant, First Financial of Charleston, Inc. (“FFC”), by and through its undersigned counsel, pursuant to Rules 12(b)(1), (2), and (6), SCRC¹, as well as any other applicable procedural or substantive law, and, on the grounds set forth below, moves this Honorable Court to dismiss, in whole or, alternatively, in part, the Amended Class Action Complaint (the “Complaint”) of Plaintiff, Otha Delaney (“Mr. Delaney”), individually and on behalf of all others similarly situated, as follows.

BRIEF CASE BACKGROUND

In October of 2007, Mr. Delaney borrowed money from FFC to buy a truck (the “Subject Vehicle”), and FFC took a security interest in the Subject Vehicle as collateral. (See Am. Compl. ¶¶ 13–19.) After Mr. Delaney defaulted on his obligation to repay FFC, FFC repossessed the Subject Vehicle (i.e., the collateral) and sold it. (See Am. Compl. ¶¶ 20–27.)

¹ Rules 12(b)(1), (2) and (6) enable a party to move to dismiss a complaint, or any claim asserted therein, for “lack of jurisdiction over the subject matter,” for “lack of jurisdiction over the person,” and for “failure to state facts sufficient to constitute a cause of action,” respectively. Rule 12(b)(6) may also be used to assert legal defenses, such as the expiration of an applicable statute of limitations. See *Clearwater Trust v. Bunting*, 367 S.C. 340, 353, 626 S.E.2d 334, 340 (2006) (“The circuit court properly dismissed the Breach of Fiduciary Duty and

For himself and on behalf of a putative class of others he alleges to be similarly situated,² Mr. Delaney asserts two causes of action against FFC, both of them based on FFC's alleged noncompliance with requirements of the chapter of South Carolina's Commercial Code on secured transactions, S.C. Code Ann. §§ 36-9-101 to -809 ("Chapter 9").

Under Chapter 9, "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." § 36-9-610(a). As stated above, FFC disposed of the collateral (i.e., the Subject Vehicle) by selling it. (*See* Am. Compl. ¶¶ 20–27.)

Chapter 9 requires "a secured party that disposes of collateral under Section 36-9-610 [to] send . . . a reasonable authenticated notification of disposition" before disposition of the collateral. § 36-9-611(b). In the Complaint, Plaintiff refers to this as the "pre-sale notice." (*See, e.g.,* Am. Compl. ¶¶ 24–25.) The required contents of the pre-sale notice are addressed in § 36-9-613 (titled, "Contents and form of notification before disposition of collateral: general.") and, because this case involves a consumer-goods transaction, in § 36-9-614 (titled, "Contents and form of notification before disposition of collateral: consumer-goods transaction.").³ Chapter 9 also requires that, after disposition, the secured party send an explanation of the calculation of any surplus or deficiency. § 36-9-616. In the Complaint, Plaintiff refers to this as the "post-sale notice." (*See, e.g.,* Am. Compl. ¶ 26.)

Negligent Misrepresentation claims under Rule 12(b)(6) as they were brought after the expiration of the statute of limitations.").

² The putative class is yet to be certified. To be clear, FFC objects to class certification.

³ A "'Consumer-goods transaction' means a consumer transaction in which: (A) an individual incurs an obligation primarily for personal, family, or household purposes; and (B) a security interest in consumer goods secures the obligation." § 36-9-102(24).

For his first cause of action, Plaintiff asserts that the pre-sale notice FFC sent him (and the putative class of others alleged to be similarly situated to him) did not comply with the requirements of Chapter 9 and, therefore, FFC is liable (to him and, should the case be certified to proceed as a class action, each class member) for statutory minimum damages under § 36-9-625(c)(2). (*See* Am. Comp. ¶¶ 76–78, Prayer for Relief at item (a).) For his second cause of action, Plaintiff asserts that the post-sale notice FFC sent him (and the putative class of others alleged to be similarly situated to him) did not comply with the requirements of Chapter 9 and, therefore, FFC is liable (to him and, should the case be certified to proceed as a class action, each class member) for statutory damages of \$500. (*See* Am. Compl. ¶¶ 79–82, Prayer for Relief at item (b).) To be clear, Mr. Delaney does not claim that FFC did not send him a pre-sale notice or a post-sale notice but that the content of the notices it sent him (pre-sale and post-sale) were deficient.

MOTION GROUNDS

Without limitation, the Complaint should be dismissed, in whole or, alternatively, in pertinent part (to include, without limitation, as to some or all class allegations/putative class members even if not as to Mr. Delaney), because:

1. FFC raises Rules 12(b)(1) (lack of subject matter jurisdiction) and (2) (lack of personal jurisdiction) because it believes an unresolved jurisdictional issue continues to hang over this case and that it is entitled to continue to raise the issue and, at a minimum, obtain an express and reasonably detailed explanatory ruling thereon, no such ruling having yet been made on the issue, which, FFC contends, is dispositive in its favor.

As the records of this proceeding in this Court, the Court of Appeals, and the Supreme Court show, FFC responded to Mr. Delaney’s original complaint in this action with a motion to

dismiss, which the trial court (i.e., this Court) granted by order filed April 30, 2013, which, following an unsuccessful motion for reconsideration, Mr. Delaney appealed.

By opinion filed September 28, 2016, the Court of Appeals affirmed the dismissal. Having received no petition by Mr. Delaney for rehearing, the Court of Appeals properly remitted the case to this Court on October 19, 2016, at which point all appellate jurisdiction over the case ceased to exist and the case should have ended with the Court of Appeals' affirmance of the dismissal. *See Wise v. S.C. Dep't of Corrections*, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The *only* exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the *Court*.") (emphasis added) (internal citations omitted).

Contrary to the unequivocal and controlling rule of law expressed in *Wise*, however, over FFC's objection, the Court of Appeals erroneously recalled the remittitur by order filed November 2, 2016, and allowed Mr. Delaney to petition for rehearing. Although the Court of Appeals ultimately denied rehearing, it never addressed FFC's objections/arguments about the jurisdictional consequences of its proper issuance of the remittitur and the improper recall thereof.

Following the Court of Appeals' denial of his petition for rehearing, Mr. Delaney successfully petitioned the Supreme Court for a writ of certiorari to review the Court of Appeals' decision, and ultimately, the Supreme Court decided the case in Mr. Delaney's favor, reversing the dismissal and remanding the case to this Court for further proceedings.

At every stage of the proceedings before the Supreme Court (in response to Mr. Delaney's petition for a writ of certiorari, in its brief after certiorari was granted, and in its

petition for rehearing), FFC's raised its objections/arguments about the jurisdictional consequences of the Court of Appeals' proper issuance of the remittitur and the improper recall thereof. The only time the Supreme Court ever addressed FFC's objections/arguments in this regard was in its order, filed May 28, 2018, granting Mr. Delaney's petition for a writ of certiorari, which order also denied FFC's motion to dismiss Mr. Delaney's petition based on the jurisdictional consequences of the Court of Appeals' proper issuance of the remittitur and the improper recall thereof.

In its entirety, the body of the Supreme Court's May 28, 2018, order reads as follows: "Based on the vote of the Court, the petition for a writ of certiorari is granted and the motion to dismiss is denied as moot. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR." Otherwise, the Supreme Court was completely silent about the matter, despite FFC's repeated protestations that its objections/arguments in this regard could not possibly be moot and that to ignore them was to violate the South Carolina Appellate Court Rules, to act without jurisdiction, and indeed to deny FFC its constitutional rights to equal protection and/or due process. See Rule 220(b), SCACR ("In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and *must, with the reason for the court's decision*, be preserved in the record of the case.") (emphasis added); Rule 242(a), SCACR ("The Supreme Court, or any two (2) justices thereof, may in its discretion, 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.") (emphasis added); Rule 242(c) ("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); Rule

242(d)(1) (“The petition for writ of certiorari shall contain . . . [c]ertification by counsel for petitioner *that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.*”) (emphasis added); Rule 242(d)(2) (“*Only* those questions raised in the Court of Appeals *and in the petition for rehearing* shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”) (emphasis added); *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.*”) (emphasis added); *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.”) (emphasis added).

FFC contends that the jurisdictional consequences of the Court of Appeals’ proper issuance of the remittitur and the improper recall thereof still exist and still require that the prior dismissal, as duly and, indeed, as a jurisdictional matter, irrevocably affirmed by the Court of Appeals as of its proper issuance of the remittitur, stands as the final judgment in this case—and thus FFC again raises this in defense of this case. *Cf. Simmons v. Simmons*, 370 S.C. 109, 116, 634 S.E.2d 1, 4 (Ct. App. 2006) (“It is axiomatic that an order entered by a court without subject matter jurisdiction is utterly void. Moreover, a lack of subject matter jurisdiction may be raised at any time. Additionally, a court lacking subject-matter jurisdiction cannot enforce its own decrees.”) (citations omitted)); *Ex parte Carson*, 5 S.C. 117, 117–18 (1874) (“All the powers of the Supreme Court are primarily derived from the Constitution. These may be supplied or extended by the Legislature, so far as they do not effect the authority conferred by that instrument upon it, both as a Court of appellate and original jurisdiction. If within the rules which should govern a Court in the construction of the Constitution, where its own jurisdiction is involved, and by its own determination is to be either limited or enlarged, it should be seen that the proposed power is not clearly granted, it would be inconsistent with all the precedents which we find to assume it. This conclusion is so conformable to all just reason and sense of right, that it is not necessary to refer to the many authorities which might be cited to sustain it.”).

2. In Paragraph 23 of the Complaint, Mr. Delaney avers that Exhibit A to the Complaint is a true and accurate copy of the allegedly deficient pre-sale notice FFC mailed him.⁴ Yet, Mr. Delaney also attempts to assert liability against FFC based on alleged deficiencies in

another pre-sale notice attached to his Complaint as Exhibit B, which is different from Exhibit A and was not sent to him. Mr. Delany has no standing to complain about any alleged deficiency in Exhibit B, and the Complaint should be dismissed in all respects in which it is based on Exhibit B, to include, without limitation, as to any and all putative class members based on Exhibit B.

3. Assuming, *arguendo*, the Complaint should not be dismissed in all respects in which it is based on Exhibit B on ground No. 2 above, it should be dismissed in all respect in which it is based on Exhibit B because, even construing the allegations of the Complaint in the light most favorable to Mr. Delaney, Exhibit B still complies with the pre-sale notice requirements of Chapter 9.

4. In Paragraph 27 of the Complaint, Mr. Delaney avers that Exhibit C to the Complaint is a true and accurate copy of the allegedly deficient post-sale notice FFC mailed him. Yet, Mr. Delaney also attempts to assert liability against FFC based on alleged deficiencies in another post-sale notice attached to his Complaint as Exhibit E, which is different from Exhibit C and was not sent to him. Mr. Delany has no standing to complain about any alleged deficiency in Exhibit E, and the Complaint should be dismissed in all respects in which it is based on Exhibit E, to include, without limitation, as to any and all putative class members based on Exhibit E.

5. Assuming, *arguendo*, the Complaint should not be dismissed in all respects in which it is based on Exhibit E on ground No. 4 above, it should be dismissed in all respect in which it is based on Exhibit E because, even construing the allegations of the Complaint in the

⁴ All of the exhibits to the Complaint are attached hereto in Exhibit 1. Specifically, Exhibits A, B, C, D, and E of the Complaint are Exhibits 1-A, 1-B, 1-C, 1-D, and 1-E hereto.

light most favorable to Mr. Delaney, Exhibit E still complies with the post-sale notice requirements of Chapter 9.

6. All class claims that accrued more than three (3) years before the Complaint was filed on March 30, 2021, should be dismissed as barred by the applicable statute of limitations, which is not more than three (3) years. Again, the putative class is yet to be certified, and to be clear, FFC objects to class certification. No putative class member has asserted any claim against FFC. While Mr. Delaney may contend that his filing of this action as a putative class action tolls the statute of limitations as to the putative class members, FFC denies and disputes such a contention, especially in this circumstance, where, as noted above, this case was dismissed April 30, 2013. Thereafter, between Mr. Delaney's motion for reconsideration and the conclusion of the appellate process in July of 2019, more than six (6) years passed, during which time no claim was asserted against FFC by any putative class member. FFC contends the statute of limitations was not tolled as to any putative class member after the case was dismissed on April 30, 2013.

7. Count 1 of the Complaint (SC UCC Presale Notice Violations) should be dismissed as to all class allegations/putative class members because Count 1 seeks to recover under § 36-9-625(c)(2), but pursuant to § 36-9-628(e), "[a] secured party is not liable under Section 36-9-625(c)(2) more than once with respect to any one secured obligation." Mr. Delaney's attempt to assert Count 1 on behalf of the putative class members violates and is disallowed by § 36-9-628(e).

8. Count 2 of the Complaint (SC UCC Post-Sale Notice Violations) should be dismissed because it is barred by the applicable statute of limitations, which is no more than three (3) years. The Complaint alleges FFC repossessed the Subject Vehicle on or around May

1, 2008, and thereafter sold it and then sent Mr. Delaney the allegedly deficient post-sale notice (Exhibit 1-C, dated January 10, 2009). (See Am. Compl. ¶¶ 21–27, Ex. C.) Mr. Delaney’s original complaint, filed October 4, 2011, asserted a single cause of action for the alleged violation of the *pre*-sale notice requirements of Chapter 9. It neither expressly alleged a cause of action for the alleged violation of the *post*-sale notice requirements of Chapter 9 nor set forth facts sufficient to constitute such a cause of action. The first time Mr. Delaney asserted a claim against FFC for the alleged violation of the post-sale notice requirements of Chapter 9 was when he asserted Count 2 in the Complaint filed March 30, 2021, more than 12 years after FFC sent him the allegedly deficient post-sale notice in January of 2009. Count 2 does not “ar[i]se out of the conduct, transaction or occurrence set forth or attempted to be set forth in” Mr. Delaney’s original complaint and, thus, the Complaint filed March 30, 2021, does not relate back to the date of his original complaint, and Count 2 is barred by the statute of limitations.

9. As FFC understands Mr. Delaney’s theory of its alleged liability to himself and the putative class, assuming, *arguendo*, it is otherwise viable, which, to be clear, FFC denies, the liability Mr. Delaney is attempting to establish against FFC, especially, but without limitation, as to the putative class members, which liability is neither founded on any actual damage to Mr. Delaney or the putative class members nor any malintent by FFC, and which liability, plainly calls for Mr. Delaney and the putative class members to be awarded a patently undeserved windfall despite their having first defaulted on their obligations and caused actual damage to FFC, violates FFC’s rights to equal protection and/or due process under the federal and/or state constitutions.

WHEREFORE, on the foregoing grounds, as well as any other or further grounds that may be advanced via briefing or oral argument, FFC asks that the Court enter an order dismissing the Complaint, in whole or, alternatively, in part.

PLEASE NOTE: FFC reserves all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

FFC RESPECTFULLY REQUESTS A HEARING ON THIS MOTION

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Stephen L. Brown
Stephen L. Brown
Russell G. Hines
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
843-720-5488
sbrown@ycrlaw.com
rhines@ycrlaw.com
Attorneys for Defendant

Charleston, South Carolina

April 29, 2021

Hines, Russell

From: Andrea Smith <andrea@twlawfirm.com>
Sent: Thursday, April 29, 2021 3:09 PM
To: Hines, Russell; Ashley Twombly; Lee Walters
Cc: Brown, Stephen L.
Subject: RE: Delaney v. FFC -- Exhibits to Amended Complaint
Attachments: 4.5 - Exhibit E - 2019 Redacted Post-Sale Notice.pdf; 4.1 - Exhibit A - Delaney's Presale Notice.pdf; 4.2 - Exhibit B - FFC Presale Notice.pdf; 4.3 - Exhibit C - Delaney's Post-Sale Notice.pdf; 4.4 - Exhibit D - Delaney's RISC.pdf

Mr. Hines, I apologize but I am working remotely this week and just saw this email exchange. Please find attached the exhibits referenced in the Amended Complaint.

Andrea

Andrea Smith
Paralegal to J. Ashley Twombly
Twenge + Twombly Law Firm
311 Carteret Street
Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
andrea@twlawfirm.com
www.twlawfirm.com



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From: Hines, Russell <RHines@ycrlaw.com>
Sent: Thursday, April 29, 2021 2:18 PM
To: Ashley Twombly <twombly@twlawfirm.com>; Lee Walters <lwalters@twlawfirm.com>
Cc: Brown, Stephen L. <sbrown@ycrlaw.com>; Andrea Smith <andrea@twlawfirm.com>
Subject: RE: Delaney v. FFC -- Exhibits to Amended Complaint

Ashley,

Are y'all going to email me the exhibits?

Russ

Russell G. Hines
 CLEMENT RIVERS, LLP
www.ycrlaw.com
 25 Calhoun Street, Suite 400
 Charleston, South Carolina 29401
 P.O. Box 993 (29402)
 Phone: (843) 720-5488
 Fax: (843) 579-1327
 Email: rhines@ycrlaw.com



CLEMENT RIVERS, LLP

25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com

From: Hines, Russell
Sent: Thursday, April 29, 2021 11:18 AM
To: 'Ashley Twombly' <twombly@twlawfirm.com>; Lee Walters <lwalters@twlawfirm.com>
Cc: Brown, Stephen L. <sbrown@ycrlaw.com>; Andrea Smith <andrea@twlawfirm.com>
Subject: RE: Delaney v. FFC -- Exhibits to Amended Complaint

Ashley,

The idea of y'all just emailing me the exhibits referenced in the amended complaint and all of us just agreeing that the exhibits should be treated as if they had been filed as attachments to the amended complaint works for me. If it works for you, please just email me the exhibits and we'll go forward on the basis that they should be deemed attached to the amended complaint.

As for Credex, my understanding is that Mr. VanHook has been in contact with Credex to see what is available. So far, I do not believe that this has been met with much success. I will follow up on this.

That said, and please forgive me if I've missed it, but I thought you intended to subpoena Credex, and that you were going to be sending me your proposed subpoena for review, the idea being that I could go ahead and confirm to you that we had no problem with the subpoena and also go ahead provide our consent to any order of commission that might be necessary for issuance of an out-of-state subpoena.

Also, during the 30(b)(6) deposition the other day, you expressed some concern about time and us potentially needing to ask for another amendment to the scheduling order. I'm, of course, happy to work with you on time in any event, and if another amendment to the scheduling order is necessary, that will not be a problem on this end. But in the meantime, given the way that the present scheduling order works, you might consider withdrawing your pending motion to certify the class. It would be without prejudice, of course.

The current scheduling order (the Consent Second Amended Scheduling Order, filed March 16, 2021) does not require you to file a motion to certify the class until June 11, 2021. Then, the order bases all of its other deadlines on the date of filing of the order deciding the motion for class certification (or, in the event of a timely Rule 59(e) motion, the date the last order disposing of such a motion is filed). So simply withdrawing your pending motion for class certification, which was filed before the filing of the amended complaint anyway, without prejudice to re-filing it, and then re-filing the motion on or closer to June 11th would seem to be an easy (and guaranteed) way to build more time into the existing schedule without even needing to ask for another amendment of the scheduling order.

Russ

Russell G. Hines
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 25 Calhoun Street, Suite 400
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 Fax: (843) 579-1327
 Email: rhines@ycrlaw.com



CLEMENT RIVERS, LLP
 25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com

From: Ashley Twombly <twombly@twlawfirm.com>
Sent: Thursday, April 29, 2021 10:23 AM
To: Hines, Russell <RHines@ycrlaw.com>; Lee Walters <lwalters@twlawfirm.com>
Cc: Brown, Stephen L. <sbrown@ycrlaw.com>; Andrea Smith <andrea@twlawfirm.com>
Subject: RE: Delaney v. FFC -- Exhibits to Amended Complaint

Can't we just email you the exhibits if they were not included in what was actually filed? I don't want to delay your response. Andrea, can you find out the answer to this and let me know?

Also, again, where are we on the Credex data?

J. Ashley Twombly
Twenge + Twombly Law Firm
 311 Carteret Street
 Beaufort, SC 29902
 Telephone: (843) 982-0100
 Facsimile: (843) 982-0103
twombly@twlawfirm.com
www.twlawfirm.com

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From: Hines, Russell <RHines@ycrlaw.com>
Sent: Wednesday, April 28, 2021 2:46 PM
To: Ashley Twombly <twombly@twlawfirm.com>; Lee Walters <lwalters@twlawfirm.com>
Cc: Brown, Stephen L. <sbrown@ycrlaw.com>
Subject: Delaney v. FFC -- Exhibits to Amended Complaint

Ashely and Lee,

The Amended Complaint refers to a number of attached exhibits, but I'm not able to see where they were actually filed.

If I'm mistaken, and the exhibits were filed, will you please email me copies.

On the other hand, if I'm not mistaken, and the exhibits were inadvertently left off the filing, I figure the issue can be fixed by y'all just re-filing the "Amended" complaint as a "Second Amended" complaint and filing the Exhibits along with it. I think this is something we can accomplish just via consent, i.e., without needing to get the Court's permission. Please let me know how you want to handle.

Russ

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Clement Rivers, LLP
<http://www.ycrlaw.com>
 Charleston: (843) 577-4000

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Clement Rivers, LLP

<http://www.ycrlaw.com>

Charleston: (843) 577-4000

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ELECTRONICALLY FILED - 2021 Apr 29 5:41 PM - CHARLESTON - COMMON PLEAS - CASE#2011CP1007166

EXHIBIT

1-A

RE: Account # 68289

Dear Mr. Delaney,

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

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

1. Contact our office and endeavor to redeem the collateral on a basis that would be mutually satisfactory.
2. Refinance your account through your bank, credit union, or another finance company.
3. Find someone who would be acceptable and interested in taking over your obligation and contract.
4. Assist us in finding a buyer to obtain the best possible price.

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

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

Very truly yours,

Bob Lewis

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

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

EXHIBIT

1-B

NOTICE OF PRIVATE SALE OF COLLATERAL

Date:

Name :

Address:

RE:

This is to notify you that due to default under the terms of the above referenced account, the collateral described below, which secures your account, can be sold, at our option by private sale after the close of business on the tenth (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.

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

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

VEHICLE ID #:

THANK YOU,

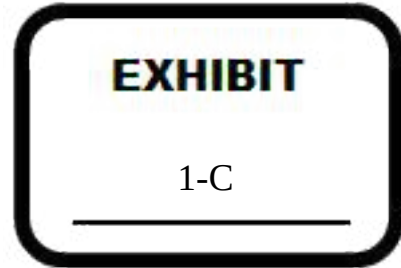
First Financial Of Charleston, Inc.

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

January 10, 2009

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

RE: Account #68289
2003 Chevrolet



Dear Mr. Delaney:

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

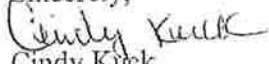
The breakdown on your account is as follows:

- (1) The original amount of contract: \$ 12,904.92
- (2) The payments made on contract: 1,158.47
- (3) Late Charges & Insurance Added: 155.00
- (4) Interest Refund: 5,007.00
- (5) Gap Insurance Refund: 173.15
- (6) Repossession Bills Added: 2,961.27
- (7) The Sale of Collateral: 5,495.00
- (8) The Remaining Deficiency Balance: \$4,187.57

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

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

Thank you.

Sincerely,

Cindy Kuck
Office Mgr.

First Financial of Charleston, Inc.

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

Date: March 27, 2019

[REDACTED]
[REDACTED]
[REDACTED]

RE: Account [REDACTED]
Collateral : 2014 Ford Focus

EXHIBIT

1-E

Dear [REDACTED]:

This letter is to inform you that the return of your collateral may not cancel your obligation with First Financial of Charleston, Inc.

The collateral has been sold and the proceeds from the sale applied as noted below. You are still obligated to any deficiency balance unpaid after the application of sale proceeds, less recovery and selling expenses, if shown below.

The breakdown of your account is as follows:

(1) Original amount of contract	\$ 14,893.92
(2) Payments received	\$ 961.09
(3) Late charge & Insurance added	\$ 124.08
(4) Interest refund	\$ 4,496.76
(5) Life Insurance Refund	\$ 251.60
(6) A&H Refund	\$.00
(7) Repossession expenses added	\$ 1,423.00
(8) Sale proceeds	\$ 3,640.00
(9) Remaining deficiency balance	\$ 7,091.55

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

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

Regards,

Cindy Kuck

Cindy Kuck
Office Manager

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,	)	
	)	<u>DEFENDANT'S MEMO</u>
Plaintiff,	)	(1) In Support of Defendant's Motion to
	)	Dismiss Amended Class Action
vs.	)	Complaint
	)	-and-
FIRST FINANCIAL OF CHARLESTON, INC.,	)	(2) In Opposition to Plaintiff's Motion
	)	for Sanctions
Defendant.	)	

TO: THE HONORABLE R. KIRK GRIFFIN, Presiding Judge, and PLAINTIFF'S COUNSEL OF RECORD

There are two (2) motions before the Court: (1) the motion of Defendant, First Financial of Charleston, Inc. ("FFC"), filed April 29, 2021, to dismiss the operative complaint in this action¹ (the "Motion to Dismiss") and (2) the motion of Plaintiff, Otha Delaney, individually and on behalf of all others similarly situated ("Mr. Delaney"), filed June 4, 2021, for sanctions against FFC for its alleged failure to comply with discovery (the "Motion for Sanctions").² FFC submits this memo in support of the Motion to Dismiss and in opposition to the Motion for Sanctions.

¹ The operative complaint is Mr. Delaney's Amended Class Action Complaint, filed March 30, 2021 (the "Amended Complaint").

² FFC hopes the Motion for Sanctions has been resolved in accordance with the email exchange between the parties' counsel attached hereto as Exhibit A. If, however, a dispute remains in this regard, most respectfully, Mr. Delaney's motion does not provide enough information for FFC to formulate a full and fair response. (*See generally* Motion for Sanctions (seeking "an order imposing sanctions against [FFC] for its failure to comply with discovery" without actually identifying and explaining FFC's alleged failure).) Indeed, it would be improper to grant the Motion for Sanctions because it does not "state with particularity the grounds therefor," as required by Rule 7(b)(1), SCRCp. Still, to the extent Mr. Delaney intends to continue to pursue the matter, FFC reserves all rights to respond further, and in any event, to be clear, FFC most respectfully denies any basis exists against it (or its counsel) for sanctions.

I.

BACKGROUND

In October of 2007, Mr. Delaney borrowed money (\$8,499, to be exact) from FFC to buy a truck, promising to repay the loan plus interest over a period of 36 months, and FFC took a security interest in the truck as collateral. (See Am. Compl. ¶¶ 13–20; Ex. D to Am. Compl. [Retail Installment Contract]³.) Some six (6) months into the life of the loan, Mr. Delaney defaulted (i.e., he stopped paying FFC back), prompting FFC to repossess the truck (i.e., the collateral) and sell it. (See Am. Compl. ¶¶ 21–27; Ex. A to Am. Compl. [PRE-Sale Notice Sent to Mr. Delaney]; Ex. C to Am. Compl. [POST-Sale Notice Sent to Mr. Delaney].) To be clear, there is no dispute as to whether Mr. Delaney defaulted on the loan or as to whether FFC properly repossessed the truck—without question, Mr. Delaney defaulted on the loan and FFC properly repossessed the truck.

Mr. Delaney filed his *original* complaint in this action on October 4, 2011 (the “Original Complaint”), asserting, for himself and on behalf of a putative class of others alleged to be similarly situated,⁴ a *single* cause of action for FFC’s alleged noncompliance with the chapter of South Carolina’s Commercial Code on secured transactions, S.C. Code Ann. §§ 36-9-101 to -809 (“Chapter 9”). (See *generally* Orig. Compl.) In particular, Mr. Delaney alleged that the notice

³ As explained in Exhibit 1 to the Motion to Dismiss (see Ex. 1 to Motion to Dismiss), the exhibits to the Amended Complaint (namely, Exhibits A, B, C, D, and E) are attached to the Motion to Dismiss as Exhibits 1-A, 1-B, 1-C, 1-D, and 1-E, respectively. (*Compare* Am. Compl. ¶¶ 5, 23, 45, 52, 55, 56 *with* Ex. 1-A to Motion to Dismiss; *compare* Am. Compl. ¶¶ 5, 45, 52, 57 *with* Ex. 1-B to Motion to Dismiss; *compare* Am. Compl. ¶¶ 6, 27, 60 n.1, 80 *with* Ex. 1-C to Motion to Dismiss; *compare* Am. Compl. ¶¶ 16, 17 *with* Ex. 1-D to Motion to Dismiss; *compare* Am. Compl. ¶¶ 60, 60 n.1, 80 *with* Ex. 1-E to Motion to Dismiss.)

⁴ The putative class is yet to be certified, and of course, FFC objects to class certification. Mr. Delaney’s motion for class certification was on the Charleston County motions roster for June 14, 2021, the Honorable Deadra L. Jefferson presiding. Both sides have

FFC sent him (and the putative class) *before* selling the truck (the “PRE-Sale Notice”), did not comply with the requirements of Chapter 9 (the “PRE-Sale Notice Requirements”),⁵ and consequently, FFC is liable to him (and, should the case be certified to proceed as a class action, to each class member) for so-called *statutory minimum* damages under § 36-9-625(c)(2)—even in the absence of any *actual* damages for the alleged non-compliance. (See Orig. Compl. ¶¶ 22–25 and p. 6 at Prayer for Relief ¶ C; Ex. A to Am. Compl. [PRE-Sale Notice Sent to Mr. Delaney⁶]; Ex. B to Am. Compl. [Exemplar PRE-Sale Notice Form Sent to *Some* Other Debtors *But Not* Mr. Delaney⁷].)

To be clear, the Original Complaint does *not* seek recovery of any *actual* damages, only so-called *statutory minimum* damages as calculated under § 36-9-625(c)(2), which provides for a recovery of “an amount not less than the credit service charge plus ten percent of the principal

submitted briefs and proposed orders to Judge Jefferson, who, as of the submission of this memo, has the matter under advisement.

⁵ In Chapter 9 parlance, FFC’s sale of the truck is what is known as a “disposition of collateral.” See § 36-9-610 (titled, “Disposition of collateral after default.”); *id.* at (a) (“After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.”). Chapter 9 requires “a secured party that disposes of collateral under Section 36-9-610 [to] send . . . a reasonable authenticated notification of disposition” before disposition of the collateral. § 36-9-611(b). The required contents of this PRE-Sale Notice, i.e., the PRE-Sale Notice Requirements, are addressed in § 36-9-613 (titled, “Contents and form of notification before disposition of collateral: general.”) and, because this case involves a consumer-goods transaction, in § 36-9-614 (titled, “Contents and form of notification before disposition of collateral: consumer-goods transaction.”). To be clear, Mr. Delaney does not claim that FFC did not send him a PRE-Sale Notice but that the content of the notice it sent him was deficient.

⁶ Exhibit A to the Amended Complaint is a form that FFC used to give PRE-Sale Notice to Mr. Delaney and *some*, but *not all*, of the putative class members. Around the time FFC was served with this lawsuit in October of 2011, FFC stopped using this form. Mr. Delaney attached the second page of this form as Exhibit C to the Original Complaint. (See Ex. C to Orig. Compl.)

⁷ Exhibit B to the Amended Complaint is a form that FFC did *not* use to give PRE-Sale Notice to Mr. Delaney but did use to give such notice to *some*, but *not all*, of the putative class members. FFC began using this form around the time it was served with this lawsuit in October of 2011.

amount of the obligation or the time-price differential plus ten percent of the cash price.” (See Orig. Compl. p. 6 at Prayer for Relief ¶ 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[.]”).) According to Mr. Delaney, this means that—even though, without question, it was FFC who loaned him money and him who did not pay FFC back—FFC owes him a statutory damage award of not less than \$5,345.00, comprised of the total \$4,405.92 finance charge (i.e., interest) he *theoretically would have paid* had he paid repaid the loan as promised, which, of course, he did not,⁸ plus ten percent of the \$9,399.50 cash price for the truck. (See Orig. Compl. ¶ 22; Ex. A to Am. Compl [Retail Installment Contract]⁹.)

FFC responded to the Original Complaint with a motion to dismiss based on the statute of limitations. FFC’s motion was granted by order filed April 30, 2013, and Mr. Delaney appealed. A number of years then passed as the appeal proceeded, first through the South Carolina Court of Appeals, wherein the dismissal was affirmed by opinion filed September 28, 2016, and then, on writ of certiorari, to the Supreme Court of South Carolina, which ultimately reversed the dismissal in an opinion filed May 8, 2019, remitting the case to this Court, i.e., the trial court, on July 15, 2019, for further proceedings on remand.

⁸ To be clear, Mr. Delaney did not pay FFC \$4,405.92 in interest. Again, some 6 months into the life of the loan Mr. Delaney had already stopped paying FFC back. (See Am. Compl. ¶¶ 20–27; Ex. A to Am. Compl. [PRE-Sale Notice Sent to Mr. Delaney].) Ultimately, having borrowed \$8,499 from FFC, Mr. Delaney paid FFC only a total of \$1,158.47 and, even after the sale of the truck, left it with an unpaid deficiency of \$4,187.57, the calculation of which included FFC’s \$5,007 credit to Mr. Delaney for an interest refund. (See Ex. C to Am. Compl. [POST-Sale Notice Sent to Mr. Delaney].)

⁹ Mr. Delaney attached the Retail Installment Contract as Exhibit A to the Original Complaint. (See Ex. A to Orig. Compl.)

Mr. Delaney filed the Amended Complaint on March 30, 2021. Unlike the Original Complaint, the Amended Complaint asserts *two* causes of action, not just one. The first is the cause of action asserted in the Original Complaint for FFC’s alleged violation of the PRE-Sale Notice Requirements, seeking only *statutory minimum* damages under § 36-9-625(c)(2)—again, no *actual* damages. (See Am. Comp. ¶¶ 76–78 and p. 13 at Prayer for Relief ¶ (a).) The second cause of action is a completely new: Mr. Delaney alleges—for the very first time, having said nothing of the sort in the Original Complaint—that the notice FFC sent him (and the putative class) *after* selling the truck (the “POST-Sale Notice”), did not comply with the requirements of Chapter 9 (the “POST-Sale Notice Requirements”),¹⁰ and consequently, FFC is liable to him (and, should the case be certified to proceed as a class action, to each class member) for the flat *statutory* amount of \$500 under § 36-9-625(e)(5)—here too, even in the absence of any *actual* damages for the alleged non-compliance. (See Am. Compl. ¶¶ 71, 79–82 and p. 13 at Prayer for Relief ¶ (b); Ex. C to Am. Compl. [POST-Sale Notice Sent to Mr. Delaney]; Ex. E to Am. Compl. [Exemplar POST-Sale Notice Form Sent to *Some Other Debtors But Not* Mr. Delaney].)

II.

RULE 12(b)(6) STANDARD

Under Rule 12(b)(6), SCRCp, a party may move to dismiss a complaint against it based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling on the allegations of the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). “If the facts alleged and inferences reasonably

¹⁰ The required contents of this POST-Sale Notice, i.e., the POST-Sale Notice Requirements, are addressed in § 36-9-616 (titled, “Explanation of calculation of surplus or

deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.” *Id.*

Please note, however, that it is only the “*facts*” and the “*reasonable inferences*” capable of being drawn therefrom to which the plaintiff is entitled to have viewed in the light most favorable to him. *Id.* (emphasis added). The Rule 12(b)(6) standard does not accept the validity of the plaintiff’s *legal* conclusions or favor him in answering questions of *law*;¹¹ nor does it give the plaintiff the benefit of surmise, conjecture, or speculation. *See Doe*, 373 S.C. at 395, 645 S.E.2d at 247; *cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”)

III.

ARGUMENT

For and in accordance with the reasons set forth below, the Amended Complaint should be dismissed—in whole, or, alternatively, in pertinent part, to include especially, but without

deficiency.”). To be clear, Mr. Delaney does not claim that FFC did not send him a POST-Sale Notice but that the content of the notice it sent him was deficient.

¹¹ *See Id.*; *cf. Mut. Savs. & Loan Ass’n v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980) (“A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein. It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error.”); *Gadsden v. Home Fertilizer & Chem. Co.*, 89 S.C. 483, 72 S.E.15, 17 (1911) (“The authorities, with practical unanimity, agree that a default admits only what has been well pleaded, and that it does not forfeit or affect the rights of a defendant, except as to matters necessarily admitted by the default. Therefore, if the complaint fails to state facts sufficient to constitute a cause of action, any judgment thereon, except one of dismissal, goes beyond the allegations of the complaint”); *id.* (“[D]efault does not admit that the facts pleaded are sufficient to constitute a cause of action, as the effect of the confession is limited to the material issuable facts well pleaded in the declaration or complaint. Nor does it admit an allegation which constitutes a mere conclusion of law. The facts pleaded must accordingly be sufficient to form a legal basis for the judgment taken by default, or it will be reversed on appeal

limitation, as to some or all class allegations/putative class members, even if not as to Mr. Delaney individually:

- A. Count I of the Amended Complaint (for violation of the PRE-Sale Notice Requirements) is based on the alleged noncompliance of Exhibit A (i.e., the PRE-Sale Notice Sent to Mr. Delaney) and Exhibit B (i.e., the Exemplar PRE-Sale Notice Form Sent to *Some Other Debtors But Not Mr. Delaney*). Mr. Delaney alleges that Exhibit A and Exhibit B both fail to comply with the PRE-Sale Notice Requirements in the same two (2) respects.¹² Even construing the allegations of the Amended Complaint in the light most favorable to Mr. Delaney, the two (2) respects in which Mr. Delaney alleges that Exhibit A and Exhibit B are noncompliant are without merit and fail to state a cause of action for noncompliance with the PRE-Sale Notice Requirements. Consequently, Count I of the Amended Complaint should be dismissed in all respects except for that of the one (1) allegation of noncompliance that applies exclusively to Exhibit A.**

For ease of reference, Exhibit A to the Amended Complaint, which consists of two (2) pages, is reproduced herein below (beginning on the next page¹³):

or set aside on proper application.”) (quoting *Gillian v. Gillian*, 65 S. C. 129, 43 S. E. 386, 387 (1903)).

¹² Mr. Delaney further alleges that Exhibit A (but not Exhibit B) fails to comply in one (1) additional respect. (See Am. Compl. ¶ 55 (“The presale notices mailed to Plaintiff and class members who were mailed a presale notice in a form substantially similar to Exhibit A also violated the SC UCC because it 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).”).) While, to be clear, FFC denies liability in this respect, too, for the instant purposes, its focus is on showing that the two (2) allegations of noncompliance Mr. Delaney directs toward both Exhibit A and Exhibit B are without merit and fail to state a claim.

¹³ FFC would note that, although not shown on Exhibit A, the PRE-Sale Notice actually sent to Mr. Delaney was on FFC letterhead (as was every PRE-Sale Notice FFC sent to every putative class member, regardless of whether such notice was in the form of Exhibit A or Exhibit B), which included FFC’s address and telephone number, and which, for ease of reference, is reproduced herein below from Exhibit C to the Original Complaint:

First Financial Of Charleston, Inc.
5025 DORCHESTER ROAD • P.O. BOX 60429 • CHARLESTON, SC 29419-0429 • (843) 767-0030

Exhibit A – Page 1



RE: Account # 68289

Dear Mr. Delaney,

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

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

1. Contact our office and endeavor to redeem the collateral on a basis that would be mutually satisfactory.
2. Refinance your account through your bank, credit union, or another finance company.
3. Find someone who would be acceptable and interested in taking over your obligation and contract.
4. Assist us in finding a buyer to obtain the best possible price.

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

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

Very truly yours,

Bob Lewis

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

20110934 00018

Exhibit A – Page 2

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# 1GCFC14X23Z296522

5025 Dorchester Road
Street Address

Charleston, SC 29418
City State Zip

Bob Lewis
By

20110934 00019

Exhibit B to the Amended Complaint is a different “**NOTICE OF PRIVATE SALE OF COLLATERAL**” form than that in Exhibit A. It, too, is reproduced below for ease of reference:



NOTICE OF PRIVATE SALE OF COLLATERAL

Date:

Name :
Address:

RE:

This is to notify you that due to default under the terms of the above referenced account, the collateral described below, which secures your account, can be sold, at our option by private sale after the close of business on the tenth (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.

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

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

THANK YOU,

20110934 00077

According to Mr. Delaney, both Exhibit A and Exhibit B fail to comply with the PRE-Sale Notice Requirements in the same two (2) respects:

1. **They fail to “state[] the method of intended disposition’ as required by § 36-9-613(1)(C) and § 36-9-614(1)(A).”¹⁴**

In this regard, Mr. Delaney’s claim is without merit and the Amended Complaint fails to state a cause of action against FFC because, as both Exhibit A and Exhibit B expressly state, the method of intended disposition is by “**PRIVATE SALE.**” Mr. Delaney’s allegation here relies on an objectively unreasonable—indeed, absurd—and disingenuous reading of Exhibit A and Exhibit B that is contrary to his own obligation of good faith and fair dealing and should not be accepted by the Court. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995) (there is an implied covenant of good faith and fair dealing in every contract); *cf. Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (“An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.”); *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (“[A] court will reject the ordinary meaning of words used in a statute when, to accept the ordinary meaning, will lead to a result so plainly absurd that it can not possibly have been intended by the legislature.”) (quoting *S.C. Board of Dental Examiners v. Breeland*, 208 S.C. 469, 480, 38 S.E.2d 644, 650 (1946)). At a minimum, the Amended Complaint should be dismissed in all respects relative to this false charge.

¹⁴ (Am. Compl. ¶ 51.a; *see also id.* at ¶ 24.)

2. They inaccurately “state[] (or at least fail[] to unambiguously state) when [FFC] would sell the Class members vehicles’ [sic] if [FFC] decided to sell them.”¹⁵

In support of this allegation, Mr. Delaney further alleges that, in both Exhibit A and Exhibit B, FFC advised it “would sell the[] vehicles at the close of business on ‘the tenth (10th) day from the date of [the] notice’ or, if that date fell ‘on a Sunday or legal holiday,’ [FFC] would sell the vehicles at the close of ‘the first business day following the tenth (10th) day[,]’”¹⁶ but FFC neither sold the collateral on the tenth day after the date of the notice¹⁷ nor on the first business day thereafter. (Am. Compl. ¶ 54.)

In this regard, too, Mr. Delaney’s claim is without merit and the Amended Complaint fails to state a cause of action against FFC. Mr. Delaney misstates the language of both Exhibit A and Exhibit B when he alleges that they state that the collateral will be sold “at the close of business”¹⁸ on the tenth day (or the first business day thereafter); rather, both Exhibit A and Exhibit B expressly state—on forms the top of which expressly state “**NOTICE OF PRIVATE SALE OF COLLATERAL**”—that the collateral “will be sold *after*” close of business on the tenth day (or the first business day thereafter). Here again, Mr. Delaney’s relies on an objectively unreasonable—indeed, absurd—and disingenuous reading of Exhibit A and Exhibit B that is contrary to his own obligation of good faith and fair dealing and should not be accepted by the Court. *See Adams*, 320 S.C. at 277, 465 S.E.2d at 86; *cf. Koon*, 379 S.C. at 155, 666 S.E.2d at 233; *Hodges*, 341 S.C. at 87, 533 S.E.2d at 582. At a minimum, the Amended Complaint should be dismissed in all respects relative to this false charge.

¹⁵ (Am. Compl. ¶ 51.b.)

¹⁶ (Am. Compl. ¶ 52.)

¹⁷ (Am. Compl. ¶ 53.)

¹⁸ (Am. Compl. ¶ 52 (emphasis added).)

- B. As for the only part of Count I (for violation of the PRE-Sale Notice Requirements) not addressed in A. above, i.e., as for the one (1) allegation of noncompliance that Mr. Delaney makes exclusively as to Exhibit A, even construing the Amended Complaint in the light most favorable to Mr. Delaney, this allegation is without merit and fails to state a cause of action for noncompliance with the PRE-Sale Notice Requirements. Consequently, Count I of the Amended Complaint should be dismissed in its entirety.**

As explained above, Mr. Delaney alleges that Exhibit A (but not Exhibit B) fails to comply in one (1) additional respect, namely, it does 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 Am. Compl. ¶ 55.) As Mr. Delaney states in the Amended Complaint, § 36-9-613(1)(D)¹⁹ provides that a PRE-Sale Notice must “state[] that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting.” And as shown above, the first page of Exhibit A, which plainly—and politely—invites and encourages Mr. Delaney to work with FFC to resolve the situation regarding his delinquent account, leaves no reasonable question as to whether Mr. Delaney is entitled to obtain an accounting of his unpaid indebtedness to FFC. Indeed, § 36-9-614(2) expressly states that “[a] particular phrasing of the notification is not required.” And as for the requirement that the PRE-Sale Notice “state[] the charge, *if any*, for an accounting,”²⁰ there being no such charge, no such charge was stated. Here again, Mr. Delaney’s relies on an objectively unreasonable—indeed, absurd—and disingenuous reading of Exhibit A and Exhibit B that is contrary to his own obligation of good faith and fair dealing and should not be accepted by the Court. See *Adams*, 320 S.C. at 277, 465 S.E.2d at 86; cf. *Koon*, 379 S.C. at 155, 666

¹⁹ Section 36-9-613(1)(D) is incorporated into § 36-9-614 via its subsection (1)(A), which states that, in a consumer-goods transaction, a PRE-Sale Notice must provide, among other things, “the information specified in Section 36-9-613(1).”

²⁰ § 36-9-613(1)(D) (emphasis added).

S.E.2d at 233; *Hodges*, 341 S.C. at 87, 533 S.E.2d at 582. The Amended Complaint should be dismissed in all respects relative to this false charge, too.

- C. Mr. Delany has no standing to complain about any alleged deficiency in Exhibit B to the Amended Complaint (i.e., in the Exemplar PRE-Sale Notice Form Sent to Some Other Debtors But Not Mr. Delaney), and the Amended Complaint should be dismissed in all respects in which it is based on Exhibit B, to include, without limitation, as to any and all putative class members based on Exhibit B.**

In Paragraph 23 of the Amended Complaint, Mr. Delaney avers that Exhibit A to the Amended Complaint is a true and accurate copy of the allegedly deficient PRE-Sale Notice FFC sent him. Yet, Mr. Delaney also attempts to assert liability against FFC based on alleged deficiencies in another PRE-Sale Notice attached to the Amended Complaint as Exhibit B, which is materially different from Exhibit A and was *not* sent to him. “For a plaintiff to possess standing three elements must be satisfied. First, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. Second, a causal connection must exist between the injury and the challenged conduct. Third, it must be likely that a favorable decision will redress the injury.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (internal citations omitted); *see also id.* (“In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way.”). There is no causal connection between Exhibit B, which was not sent to Mr. Delaney and is materially different from the notice that was sent to him (i.e., Exhibit A), and the claimed invasion of *his* rights, Exhibit B having no personal and individual affect upon Mr. Delaney. Mr. Delaney has no standing to complain about any alleged deficiency in Exhibit B. He could not bring a suit in his individual capacity about a notice he did not receive, and he cannot represent a class as to such a notice either. And due process prevents the imposition of liability against FFC on such a basis.

- D. Mr. Delany has no standing to complain about any alleged deficiency in Exhibit E to the Amended Complaint (i.e., in the Exemplar POST-Sale Notice Form Sent to *Some Other Debtors But Not Mr. Delaney*), and the Amended Complaint should be dismissed in all respects in which it is based on Exhibit E, to include, without limitation, as to any and all putative class members based on Exhibit E.**

In Paragraph 27 of the Amended Complaint, Mr. Delaney avers that Exhibit C to the Amended Complaint is a true and accurate copy of the allegedly deficient POST-Sale Notice FFC sent him. Yet, Mr. Delaney also attempts to assert liability against FFC based on alleged deficiencies in another POST-Sale Notice attached to the Amended Complaint as Exhibit E, which is different from Exhibit C and was not sent to him. Mr. Delany has no standing to complain about any alleged deficiency in Exhibit E. *See Carnival Corp.*, 407 S.C. at 75, 753 S.E.2d at 850. He could not bring a suit in his individual capacity about a notice he did not receive, and he cannot represent a class as to such a notice either. And due process prevents the imposition of liability against FFC on such a basis.

- E. Count 2 of the Amended Complaint (for violation of the POST-Sale Notice Requirements) should be dismissed because, even viewing the allegations of the Amended Complaint in the light most favorable to Mr. Delaney, both Exhibit C and Exhibit E comply with the POST-Sale Notice Requirements.**

Count 2 of the Amended Complaint (for violation of the POST-Sale Notice Requirements) is based on Exhibit C and Exhibit E's alleged noncompliance with the requirements of § 36-9-616 regarding explanation of calculation of surplus or deficiency following the disposition of collateral. For ease of reference, Exhibit C and Exhibit E to the Amended Complaint, are reproduced herein below (beginning on the next page):

Exhibit C*First Financial Of Charleston, Inc.*

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

January 10, 2009

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

RE: Account #68289
2003 Chevrolet

Dear Mr. Delaney:

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

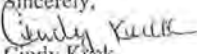
The breakdown on your account is as follows:

(1) The original amount of contract:	\$ 12,904.92
(2) The payments made on contract:	1,158.47
(3) Late Charges & Insurance Added:	155.00
(4) Interest Refund:	5,007.00
(5) Gap Insurance Refund:	173.15
(6) Repossession Bills Added:	2,961.27
(7) The Sale of Collateral:	5,495.00
(8) The Remaining Deficiency Balance:	\$4,187.57

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

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

Thank you.

Sincerely,

Cindy Kuck
Office Mgr.



20110934 00020

Exhibit E*First Financial of Charleston, Inc.*

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

Date: March 27, 2019

[REDACTED]
[REDACTED]
[REDACTED]RE: Account [REDACTED]
Collateral : 2014 Ford Focus

Dear [REDACTED]:

This letter is to inform you that the return of your collateral may not cancel your obligation with First Financial of Charleston, Inc.

The collateral has been sold and the proceeds from the sale applied as noted below. You are still obligated to any deficiency balance unpaid after the application of sale proceeds, less recovery and selling expenses, if shown below.

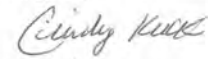
The breakdown of your account is as follows:

(1) Original amount of contract	\$ 14,893.92
(2) Payments received	\$ 961.09
(3) Late charge & Insurance added	\$ 124.08
(4) Interest refund	\$ 4,496.76
(5) Life Insurance Refund	\$ 251.60
(6) A&H Refund	\$.00
(7) Repossession expenses added	\$ 1,423.00
(8) Sale proceeds	\$ 3,640.00
(9) Remaining deficiency balance	\$ 7,091.55

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

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

Regards,



Cindy Kuck
Office Manager

EXHIBIT

1-E

According to Mr. Delaney, Exhibit C and Exhibit E did not comply with the POST-Sale Notice Requirements for the same two (2) reasons:

- (1) They “[d]id not provide all the information, in the requisite order, as required by § 36a-9-616(c)(3) [sic].” (Am. Compl. ¶ 28.a; *see also id.* at ¶ 61.a.)
- (2) They “[d]id not state future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency, as required by § 9-616(a)(1)(C).” (Am. Compl. ¶ 28.b; *see also id.* at ¶ 61.b.)

The two subsections of § 36-9-616 that Mr. Delaney cites (namely, subsections (a) and (c)) provide as follows:

§ 36-9-616(a)

(a) In this section:

- (1) “Explanation” means a writing that:
 - (A) states the amount of the surplus or deficiency;
 - (B) provides an explanation in accordance with subsection (c) of how the secured party calculated the surplus or deficiency;
 - (C) states, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and
 - (D) provides a telephone number or mailing address from which additional information concerning the transaction is available.
- (2) “Request” means a record:
 - (A) authenticated by a debtor or consumer obligor;
 - (B) requesting that the recipient provide an explanation; and

- (C) sent after disposition of the collateral under Section 36-9-610.

§ 36-9-616(c)

- (c) To comply with subsection (a)(1)(B), a writing 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:
 - (A) if the secured party takes or receives possession of the collateral after default, not more than thirty-five days before the secured party takes or receives possession; or
 - (B) if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than thirty-five days before the disposition;
 - (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.

As an initial matter, Mr. Delaney misstates § 36-9-616(a)(1)(C) when he alleges that it required the POST-Sale Notices to “state future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency, as required by § 9-616(a)(1)(C).” (Am. Compl. ¶ 28.b; *see also id.* at ¶ 61.b.) As quoted above, the actual statutory language is that “future debits” etc. must only be stated “*if applicable.*” § 36-9-616(a)(1)(C) (emphasis added).

Moreover, and in any event, § 36-9-616(d) expressly states, “A particular phrasing of the explanation [(i.e., of the POST-Sale Notice)] is not required. An explanation complying substantially with the requirements of subsection (a) is sufficient, even if it includes minor errors *that are not seriously misleading.*” (emphasis added). Thus, the plain statutory language makes clear that the touchstone for compliance here is whether or not an explanation is “seriously misleading.” The Amended Complaint does not in fact even allege that the explanations at issue are “misleading” (or words to that effect), and in any event, under no reasonable view can the notices been deemed seriously misleading or otherwise to have failed to substantially comply with the POST-Sale Notice Requirements. Mr. Delaney’s relies on an objectively unreasonable—indeed, absurd—and disingenuous reading of Exhibit C and Exhibit E that is contrary to his own obligation of good faith and fair dealing and should not be accepted by the Court. *See Adams*, 320 S.C. at 277, 465 S.E.2d at 86; *cf. Koon*, 379 S.C. at 155, 666 S.E.2d at 233; *Hodges*, 341 S.C. at 87, 533 S.E.2d at 582.

Further still, to recover the \$500 statutory amount Mr. Delaney seeks for this alleged failure to comply with the POST-Sale Notice Requirements, the alleged noncompliance—even if it indeed occurred—must “be pattern, or consistent with a practice, of noncompliance.” § 36-9-625(e)(5) (“[T]he 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 . . . (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.”). And according to Mr. Delaney’s own, judicially binding averments,²¹ FFC was not engaged in a pattern or consistent practice of noncompliance within the contemplation of § 36-9-625(e)(5); rather; at worst, FFC is guilty of no more than an honest mistake—made while acting in good faith, without intending to harm or violate anyone’s rights, “believ[ing] its notices were accurate, lawful and contained no misrepresentations:”

34. The defective presale and post-sale notices were not mailed with knowledge of their falsity.

40. [FFC] did *not* intend to violate the SC UCC and did *not* intend injury to the class because *it believed its notices were accurate, lawful and contained no misrepresentations.*

41. [FFC] did *not* know the presale and post-sale notices, and its reporting of information on the class members’ credit reports would violate the rights of the class members or inflict injury upon them.

(Am. Compl. ¶¶ 34, 40–41.) Under the circumstances, to find that FFC is liable under § 36-9-625(e)(5) would be so plainly absurd that it cannot possibly have been intended by the legislature. *Hodges*, 341 S.C. at 87, 533 S.E.2d at 582.

²¹ See *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020) (“However, ‘[i]t is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.’”) (quoting *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)); see also *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) (“Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.”); *Postal*, 308 S.C. at 387, 418 S.E.2d at 323 (“The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.”).

F. Count 2 of the Amended Complaint (for violation of the POST-Sale Notice Requirements) should be dismissed because it is barred by the applicable statute of limitations, which is no more than three (3) years.

The Original Complaint, filed October 4, 2011, asserted a single cause of action for the alleged violation of the PRE-Sale Notice Requirements. It neither expressly alleged a cause of action for the alleged violation of the POST-Sale Notice Requirements nor set forth facts sufficient to constitute such a cause of action. The first time Mr. Delaney asserted a claim against FFC for the alleged noncompliance with the POST-Sale Notice Requirements was when he asserted Count 2 in the Amended Complaint, filed March 30, 2021, more than 12 years after FFC sent him the allegedly noncompliant POST-Sale Notice Requirements in January of 2009. (See Ex. C to Am. Compl. [POST-Sale Notice Sent to Mr. Delaney].) Count 2 does not “ar[i]se out of the conduct, transaction or occurrence set forth or attempted to be set forth in” the Original Complaint and, thus, the Amended Complaint does not relate back to the date of the Original Complaint, and Count 2 is barred by the statute of limitations. See Rule 15(c), SCRCP (“Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.”).

G. Count 1 of the Amended Complaint (for violation of the PRE-Sale Notice Requirements) should be dismissed as to all class allegations/putative class members because Count 1 seeks to recover under § 36-9-625(c)(2), but pursuant to § 36-9-628(e), “[a] secured party is not liable under Section 36-9-625(c)(2) more than once with respect to any one secured obligation.” Thus, Mr. Delaney’s attempt to assert Count 1 on behalf of the putative class members violates and is disallowed by § 36-9-628(e).

Count 1 of the Amended Complaint (for violation of the PRE-Sale Notice Requirements) is not amenable to class treatment because it seeks recovery under § 36-9-625(c)(2), and pursuant to § 36-9-628(e), “[a] secured party is not liable under Section 36-9-625(c)(2) more

than once with respect to any one secured obligation.” Mr. Delaney is the only plaintiff actually before the Court, his one loan is the only secured obligation actually before the Court, and his attempt to establish multiple liability against FFC under § 36-9-625(c)(2) in connection with his one loan is plainly disallowed by § 36-9-628(e). *See* Official Comment to § 36-9-628(e) (“Single Liability for Statutory Minimum Damages. *Subsection (e) ensures that a secured party will incur statutory damages only once in connection with any one secured obligation.*”) (emphasis added). Mr. Delaney seeks to establish class-wide liability against FFC § 36-9-625(c)(2) in connection with his one loan. Section 36-9-628 is entitled “Nonliability and limitation on liability of secured party; liability of secondary obligor.” Clearly, in recognition of the fact that § 36-9-625(c)(2) provides for liability even in the absence of any actual damage to the debtor, the aim of § 36-9-628(e) is to prevent the absurdly harsh result that Mr. Delaney seeks here, which is to take this liability—which already amounts to a windfall in favor of a defaulting debtor who, in fact, suffered no actual damages and to salt in the wounds of the unwary creditor caught in its crosshairs, who ends up (under Mr. Delaney’s theory) owing thousands of dollars to the very same debtor that did, in fact, cause it actual damages by failing to repay the loan—and increase exponentially. *See Hodges*, 341 S.C. at 87, 533 S.E.2d at 582. Indeed, this conclusion is all the more compelling here, where, as even Mr. Delaney admits, in the judicially binding averments of the Amended Complaint,²² at worst, FFC is guilty of no more than an honest mistake—made while acting in good faith, without intent to harm or violate anyone’s rights, “believ[ing] its notices were accurate, lawful and contained no misrepresentations:”

²² *See Kitchen Planners*, 432 S.C. 267, 851 S.E.2d 724; *see also Johnson*, 413 S.C. at 202, 775 S.E.2d at 700; *Postal*, 308 S.C. at 387, 418 S.E.2d at 323.

34. The defective presale and post-sale notices were not mailed with knowledge of their falsity.

40. [FFC] did *not* intend to violate the SC UCC and did *not* intend injury to the class because *it believed its notices were accurate, lawful and contained no misrepresentations.*

41. [FFC] did *not* know the presale and post-sale notices, and its reporting of information on the class members' credit reports would violate the rights of the class members or inflict injury upon them.

(Am. Compl. ¶¶ 34, 40–41.)

H. All class claims that accrued more than three (3) years before the Amended Complaint was filed on March 30, 2021, should be dismissed as barred by the applicable statute of limitations, which is no more than three (3) years.

Again, the putative class is yet to be certified, and to be clear, FFC objects to class certification. No putative class member has asserted any claim against FFC. While Mr. Delaney may contend that his filing of this action as a putative class action tolls the statute of limitations as to the putative class members, FFC denies and disputes such a contention, especially in this circumstance, where, as noted above, this case was dismissed April 30, 2013. Thereafter, between Mr. Delaney's motion for reconsideration and the Supreme Court's reversal of the dismissal on May 8, 2019, more than six (6) years passed, during which time no claim was asserted against FFC by any putative class member. FFC contends the statute of limitations was not tolled as to any putative class member after the case was dismissed on April 30, 2013, and FFC is unaware of any South Carolina to the effect that putative class members are covered by a stay even when they are on constructive notice in the public record that the case in which they are a putative class member has been dismissed, notwithstanding the pendency of any appeal from the dismissal. *Cf. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687

S.E.2d 29, 33 (2009) (cautioning that the equitable power of the court to toll the statute of limitations “should be used sparingly and only when the interests of justice compel its use.”). And tolling under the United States Supreme Court’s *American Pipe* tolling doctrine,²³ pursuant to which 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, ends upon denial of class certification in the first instance by the trial court. *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 107 (2013) (“[W]e join every other circuit court to have addressed the issue and conclude that the tolling rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), extends only through the denial of class status in the first instance by the district court.”).

Here, the entire case, and, of course, along with it the class allegations, was dismissed in the first instance by the trial court on April 30, 2013. As the *Giovanniello* Court explained, tolling under the *American Pipe* tolling doctrine is based on the idea that under Rule 23 of the Federal Rules of Civil Procedure (like under South Carolina’s Rule 23), potential class members are protected by the commencement of a putative class action, even if they are unaware of the action, because individual class members, and even unaware class members, may rely on the *existence* of the putative class action suit to protect their rights and need not file an action or move to intervene during the pendency of class certification. 726 F.3d at 117. But “[t]his objectively reasonable reliance rationale breaks down once the district court disallows class status.” *Id.* “[E]ven where the plaintiffs seek reconsideration or appeal, ostensibly representing the rights of non-named plaintiffs, reliance is not objectively reasonable.” *Id.* This same reasoning applies here. It is objectively unreasonable for putative class members to rely on the

²³ See *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

existence of this case as a putative class action once the case is dismissed in the first instance by the trial court, notwithstanding the appeal that ultimately revived the case more than 6 years later.

I. Lack of jurisdiction

FFC raises Rules 12(b)(1) (lack of subject matter jurisdiction) and (2) (lack of personal jurisdiction) because it believes an unresolved jurisdictional issue continues to hang over this case and that it is entitled to continue to raise the issue and, at a minimum, obtain an express and reasonably detailed explanatory ruling thereon, no such ruling having yet been made on the issue, which, FFC contends, is dispositive in its favor.

As the records of this proceeding in this Court, the Court of Appeals, and the Supreme Court show, FFC responded to Mr. Delaney's original complaint in this action with a motion to dismiss, which the trial court (i.e., this Court) granted by order filed April 30, 2013, which, following an unsuccessful motion for reconsideration, Mr. Delaney appealed.

By opinion filed September 28, 2016, the Court of Appeals affirmed the dismissal. Having received no petition by Mr. Delaney for rehearing, the Court of Appeals properly remitted the case to this Court on October 19, 2016, at which point all appellate jurisdiction over the case ceased to exist and the case should have ended with the Court of Appeals' affirmance of the dismissal. *See Wise v. S.C. Dep't of Corrections*, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The *only* exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the *Court*.") (emphasis added) (internal citations omitted).

Contrary to the unequivocal and controlling rule of law expressed in *Wise*, however, over FFC's objection, the Court of Appeals erroneously recalled the remittitur by order filed November 2, 2016, and allowed Mr. Delaney to petition for rehearing. Although the Court of Appeals thereafter denied rehearing, it never addressed FFC's objections/arguments about the jurisdictional consequences of its proper issuance of the remittitur and the improper recall thereof.

Following the Court of Appeals' denial of his petition for rehearing, Mr. Delaney successfully petitioned the Supreme Court for a writ of certiorari to review the Court of Appeals' decision, and ultimately, the Supreme Court decided the case in Mr. Delaney's favor, reversing the dismissal and remanding the case to this Court for further proceedings.

Having already duly raised the issue when it arose in the Court of Appeals, thereafter, at every stage of the proceedings before the Supreme Court (in response to Mr. Delaney's petition for a writ of certiorari, in its brief after certiorari was granted, and in its petition for rehearing), FFC's raised its objections/arguments about the jurisdictional consequences of the Court of Appeals' proper issuance of the remittitur and the improper recall thereof. (See Exhibits B [Motion to Dismiss Petition for a Writ of Certiorari and Respondent's Reply to Petitioner's Response in Opposition to Respondent's Motion to Dismiss Petition for a Writ of Certiorari]; C [Return to Petition for a Writ of Certiorari]; D [Order Granting Petition for a Writ of Certiorari and Denying Motion to Dismiss as Moot]; E [Brief of Respondent]; F [Supreme Court Opinion]; G [Petition for Rehearing]; H [Order Denying Petition for Rehearing and Remittitur], all of which are attached hereto and incorporated herein by reference.)

The only time the Supreme Court ever addressed FFC's objections/arguments in this regard was in its order, filed May 28, 2018, granting Mr. Delaney's petition for a writ of

certiorari, which order also summarily denied FFC's motion to dismiss Mr. Delaney's petition as *moot*—never addressing FFC's motion to dismiss on the merits; nor for that matter in any way explaining the legal basis for its summary conclusion that the motion was moot. In its entirety, the body of the Supreme Court's May 28, 2018, order reads as follows: "Based on the vote of the Court, the petition for a writ of certiorari is granted and the motion to dismiss is denied as moot. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR." (Exhibit D.) Otherwise, the Supreme Court was completely silent about the matter,²⁴ despite FFC's repeated protestations that its objections/arguments in this regard could not possibly be moot and that to ignore them was to violate the South Carolina Appellate Court Rules, to act without jurisdiction, and indeed to deny FFC its constitutional rights to equal protection and/or due process. See Rule 220(b), SCACR ("In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and *must, with the reason for the court's decision*, be preserved in the record of the case.") (emphasis added); Rule 242(a), SCACR ("The Supreme Court, or any two (2) justices thereof, may in its discretion, 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.") (emphasis added); Rule 242(c) ("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); Rule 242(d)(1) ("The petition for writ of certiorari shall contain . . . [c]ertification by counsel for petitioner *that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.*") (emphasis added); Rule 242(d)(2) ("*Only* those questions raised in the Court

²⁴ (See generally Exhibits D, E, and H.)

of Appeals *and in the petition for rehearing* shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”) (emphasis added); *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.*”) (emphasis added); *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.”) (emphasis added).

FFC contends that the jurisdictional consequences of the Court of Appeals’ proper issuance of the remittitur and the improper recall thereof still exist and still require that the prior

dismissal, as duly and, indeed, as a jurisdictional matter, irrevocably affirmed by the Court of Appeals as of its proper issuance of the remittitur, stands as the final judgment in this case—and thus FFC again raises this in defense of this case. *Cf. Simmons v. Simmons*, 370 S.C. 109, 116, 634 S.E.2d 1, 4 (Ct. App. 2006) (“It is axiomatic that an order entered by a court without subject matter jurisdiction is utterly void. Moreover, a lack of subject matter jurisdiction may be raised at any time. Additionally, a court lacking subject-matter jurisdiction cannot enforce its own decrees.”) (citations omitted)); *Ex parte Carson*, 5 S.C. 117, 117–18 (1874) (“All the powers of the Supreme Court are primarily derived from the Constitution. These may be supplied or extended by the Legislature, so far as they do not effect the authority conferred by that instrument upon it, both as a Court of appellate and original jurisdiction. If within the rules which should govern a Court in the construction of the Constitution, where its own jurisdiction is involved, and by its own determination is to be either limited or enlarged, it should be seen that the proposed power is not clearly granted, it would be inconsistent with all the precedents which we find to assume it. This conclusion is so conformable to all just reason and sense of right, that it is not necessary to refer to the many authorities which might be cited to sustain it.”).

WHEREFORE, on the foregoing grounds, as well as any other or further grounds that may be advanced via briefing or oral argument, FFC asks that the Court enter an order dismissing the Amended Complaint, in whole or, alternatively, in part.

PLEASE NOTE: FFC reserves all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
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July 21, 2021

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

Stephanie P. McDonald, Circuit Court Judge

**On Certiorari to the Court of Appeals of South Carolina
Opinion No. 5442 (S.C. Ct. App. filed September 28, 2016)**

OTHA DELANEY, ...PETITIONER

v.

FIRST FINANCIAL OF CHARLESTON, INC., ... RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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inasmuch as that notification failed to comply with § § 36-9-613 and 614, which mandate specific contents for § 36-9-611(b) notifications in consumer-goods transactions. App. at 23, Compt. ¶ 13.

On April 29, 2013, the trial court granted First Financial's Motion to Dismiss on grounds that Delaney's claim was untimely. App. at 8-9. The trial court ruled that for limitations purposes, his claim arose or accrued at the time First Financial sent him an allegedly non-reasonable notification of disposition of collateral, not seven months later when it sold the truck. App. at 9-10. That decision was timely appealed.

In a divided panel decision filed September 28, 2016, the Court of Appeals affirmed the trial court's ruling, agreeing that a § 36-9-611(b) cause of action accrues at the time the secured party sends the debtor the notification of disposition of collateral, not the date of its subsequent disposition. ("We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral.") App. at 193. The Court of Appeals ruled that notification is the appropriate accrual event because it did "not believe that disposition of collateral is a prerequisite [for the secured party] to be penalized for failing to give [the] reasonable notice" required by § 36-9-611. App. at 194.

Because the accrual event (the date of notification) occurred more than three years before Delaney filed suit, the Court of Appeals also ruled that it need not decide whether his claim is controlled by a one-year or a three-year statute of limitations – the claim is time-barred under both statutes – and, it affirmed dismissal on these grounds. App. at 192, 195. If, on the other hand, Delaney's claim did not accrue until disposition as Delaney and the dissent maintain, the Court of Appeals recognized the claim would still be timely under a three-year statute. ("[W]hether the action is barred depends upon when the action accrued.") App. at 192.

Following the Court of Appeals' decision Delaney filed his Petition for Reconsideration (App at 209) which was denied on February 16, 2017. App. at 235. This timely Petition for a Writ of Certiorari to the Court of Appeals follows. Delaney submits that Certiorari is appropriate under two of the five criteria governing consideration of such writs. First, the Court of Appeals' decision includes an extensive and lengthy dissent. App. at 195-199. *See*, SCARC 242(b)(2). Second, both the majority decision and the dissent involve a novel question of law and statutory construction, to wit: when does the limitations period begin to run for a debtor's cause of action against a secured party under § 36-9-611(b). *See*, SCARC 242(b)(1). This is also a novel question in that the Court of Appeals did not rely upon any on-point appellate authority from a sister State in support of its interpretation of this uniform statute.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN RULING THAT THE LIMITATIONS PERIOD FOR DELANEY'S CAUSE OF ACTION UNDER § 36-9-611 BEGINS TO RUN AT THE TIME OF NOTIFICATION RATHER THAN AT DISPOSITION.

A. Delaney's Cause of Action Under § 36-9-611(b) Requires a "Secured Party that Disposes of Collateral Under Section 36-9-610" to be Actionable.

The facts in this case are not disputed. Delaney alleged that First Financial was required to comply with § 36-9-611 in sending a debtor such as himself a "reasonable authenticated notification of disposition[.]" App. at 24, Compt. ¶ 24, quoting § 36-9-611(b). He further alleged that First Financial sold his truck without "providing notice of its proposed disposition in compliance with applicable sections of the South Carolina UCC." App. at 26, Comp. ¶ 25.

The Court of Appeals ruled in considering Delaney's claim under § 36-9-611: "we do not believe that disposition of collateral is a prerequisite [for the secured party] to be penalized for failing to give reasonable notice." App. at 194. He respectfully submits that the Court of Appeals

erred because § 36-9-611(b) plainly, clearly and unambiguously requires a “secured party that disposes of collateral under Section 36-9-610” in order for the claim to be actionable, and thus to accrue for limitations purposes.

Interpretation of a statutory cause of action begins with an examination of the plain wording of the statute at issue, to include the statutory scheme where applicable. *Gay v. Ariel*, 673 S.E.2d 418, 420 (SC 2010) (Where a statute’s language is plain and unambiguous, the rules of statutory interpretation are not needed and the court may not impose another meaning.) South Carolina’s UCC, Article 9, Part 6 (“Default”) includes several interlocking statutes relevant to Delaney’s case.

Section 36-9-610(a) (“*Disposition of collateral after default*”) permits, but does not require, a secured party to sell a debtor-in-default’s collateral to protect its interest in the collateral: “After default, a secured party *may* sell, lease or otherwise dispose of any or all of the collateral[.]” § 36-9-610(a) (emphasis added.) When the secured party chooses disposition, it is required to see that every “aspect” of its disposition is “commercially reasonable.”¹

The following section – § 36-9-611 (“*Notification before disposition of collateral*”), Delaney’s cause of action against First Financial – provides:

(b) [A] secured party *that disposes of collateral under Section 36-9-610* shall send to the persons specified in subsection (c) [*i.e.*, “the debtor” and “any secondary obligor”] *a reasonable authenticated notification of disposition*.

§ 36-9-611(b) (emphasis added.)

Reading the two sections together, the unambiguous wording of § 36-9-611(b)’s controlling phrase, “a secured party *that disposes of collateral under Section 36-9-610*,” is an express limitation or restriction upon the universe of secured parties under § 9-610 who are

¹ “Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms must be commercially reasonable.” § 36-9-610(b).

authorized, but not required, to dispose of collateral upon debtor default. While all secured parties have the right of disposition upon default, it is *only* those which actually exercise their rights – to become “a secured party *that disposes of collateral under Section 36-9-610*” – who are expressly required by § 9-611(b) to “send” the “debtor” “a reasonable notification of disposition.”

Conversely, when a secured party does *not* dispose of the collateral, it has no duty under the plain wording of the text to send “reasonable notification of disposition” to anyone. Therefore, under the latter circumstances of no “disposition,” a secured party that does *not* send the debtor a reasonable notification cannot be in violation of, or noncompliance with, § 36-9-611(b), because it is not “a secured party *that disposes of collateral under Section 36-9-610*.”

This in turn establishes that relevant to accrual, the “disposition” is an essential element of a debtor’s § 36-9-611(b) cause of action. Prior to disposition – regardless whether the secured party sends the debtor a “reasonable notification,” or sends a notification that is not “reasonable,” or sends no notification at all – it could only be a secured party that plans, intends, wishes, or that *may* dispose of collateral in the future. But, plainly, it would not be “a secured party *that disposes of collateral under Section 36-9-610*” at the time of notification. Until the subsequent “disposition” actually occurs, there is no “secured party that disposes of collateral under Section 36-9-610” yet in existence. And, there are many instances where a noticed disposition never occurs, such as when the debtor timely redeems or is allowed to cure the default.

The legislature’s use of the present tense in the text (“a secured party that *disposes* of collateral under Section 36-9-610 shall send...reasonable...notification of disposition”), and not the use of the conditional (such as, “any secured party that *may dispose* of collateral under Section 36-9-610 shall send...reasonable...notification of disposition”) is unambiguous. The

caption to § 36-9-611 is similarly clear and unambiguous: “Notification before *disposition* of collateral,” not, for example, “Notification before *intended (or anticipated or desired) disposition* of collateral,” and is consistent with the section text requiring disposition.

While generally, section captions are aids to South Carolina courts in statutory interpretation, this is not true for UCC section captions which are part of the enacted text, and therefore, cannot be ignored or read out of the statute. (“Section captions are a part of the text of the Uniform Commercial Code[.]”) (§ 36-1-109.) Here, it would be odd for the General Assembly to enact a section caption (“Notification before *disposition*”) that expressly conforms to the restriction found within the body of the text (“a secured party *that disposes of collateral* under Section 36-9-610”), if “disposition” is not material to the cause of action. Finally, the South Carolina Reporter’s Comments are also consistent: “Section 36-9-611 imposes a notification requirement upon secured parties *that dispose of collateral under Section 36-9-610.*” S.C. Reporter’s Cmt. to § 36-9-611. (emphasis added.)

Also relevant to this case, § 36-9-611(b) does not define a “reasonable notification” or include any rules for determining whether a notification is “reasonable” under that statute. Instead, the Official Comment directs the reader to the next three sections, all addressing various “aspects” of a “reasonable notification” under § 36-9-611(b):

2. Reasonable Notification... 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 Sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer goods transactions.)

Cmt. 2, Official Comments § 9-611 (emphasis added.)

As the Official Comment makes clear, these three statutes (§ § 36-9-612, 613, 614) are not “stand alone” or independent causes of action. They merely set forth the applicable rules with

which a § 36-9-611(b) notification must comply in order to be “reasonable.” For example, the Official Comment to UCC § 9-612 provides the rules for timeliness: “*Section 9-611(b)* requires the secured party to send a ‘reasonable authenticated notification....[O]ne *aspect* of a reasonable notification is its timeliness.” Cmt. 2, Official Comment to UCC § 9-612. (emphasis added.) Similarly, the Official Comment to UCC § 9-613, for “contents of notifications generally,” provides: “To comply with the ‘reasonable authenticated notification’ requirement of *Section 9-611(b)*, the contents of a notification must be reasonable.” Cmt. 2, Official Comment to § 9-613. (emphasis added.) Consistent with these Comments, § 36-9-614 then lists the content rules for § 9-611(b) notifications in consumer-goods transactions: “In a consumer-goods transaction, the following rules apply: (1) A notification of disposition must provide the following information [then lists all required information, to also include all information listed in § 9-613].” § 36-9-614(1). The Official Comment instructs that UCC § 9-614 “sets forth the information required for a *reasonable notification*,” again, tying UCC § 9-614 notification contents in a consumer-goods transaction to UCC § 9-611(b). Cmt. 2, Official Comment to UCC § 9-614 (emphasis added.) Section 36-9-614 is captioned: “Contents and form of notification before *disposition* of collateral,” (not, for example, “Contents and form of notification before *intended disposition*.”)

Therefore, the texts, captions and Comments are all consistent that compliant notification contents, as mandated by §§ 36-9-613 and 614, are required for a “reasonable notification” under § 9-611(b), which in turn requires a “secured party that disposes of collateral under Section 36-9-610” to be actionable. It is further apparent that sections §§ 36-9-613 and 614 cannot be read to create causes of action separate from § 9-611(b), because neither mentions the secured party, and therefore, standing alone, they do not impose any obligation upon the secured party to send §§ 9-613 and 614 compliant notification in the first place. Sections 36-9-613 and

614 also do not name any person to whom that notification must be sent, such as “the debtor” or “any secondary obligor,” as found within § 9-611(b). Thus *unless* read in context with § 36-9-611(b), Delaney’s claim alleging that the notification First Financial sent him was not “reasonable notification,” due to noncompliant contents under §§ 36-9-613 or 614, would not be actionable. (Where no disposition had occurred, the court ruled that the secured party’s failure to send reasonable notification to a consumer debtor as required by UCC §§ 9-613 and 614 was not actionable, because such sections must be read “in context” of the “requirements” of UCC § 9-611(b), which applies when collateral is disposed of by the secured party.) (*Vasquez v. Karjanis & Sons Motors, LLC.*, 2012 WL 6965392, at * 3 (Conn. Sup. Ct. Conn, New Haven Dist., Dec. 21, 2012).

Accordingly, the Court of Appeals erred in ruling that § 36-9-611 does *not* require a “secured party that disposes of collateral under Section 36-9-610” for the debtor’s cause of action to fully accrue against a secured party, and therefore, in concluding that a “disposition” is not a “prerequisite” for a legal claim of noncompliance under that statute. App. 194.

B. Delaney’s Cause of Action Under § 36-9-611(b) Is Not “Complete and Present” Until Disposition.

South Carolina follows what the Supreme Court calls “the standard rule” for determining when a cause of action accrues:

The most helpful canon in this context is ‘the standard rule’ for limitations periods... Ordinarily, a limitations period commences *when the plaintiff has a complete and present cause of action.*’ “[A] cause of action does not become ‘complete and present for limitations purposes until the plaintiff can obtain relief[.]’”

Green v. Brennan, ___ U.S. ___, 136 S.Ct. 1796, 1776 (2016) (internal citations omitted) (emphasis added.) *Stephens v. Draffin*, 488 S.E.2d 307, 309 (SC 1997) (Cause of action accrues at the moment when a plaintiff has a legal right to sue on it; the law presumes damages at that

point; and, the fact that substantial damages did not occur until later is immaterial to determining when the cause of action accrued or arose.) *Walsh v. Woods*, 594 S.E. 548, 551 (SC App. 2004) (“In analyzing a limitations defense, the fundamental test for determining when a cause of action has accrued is whether the party asserting the claim can maintain a legal action to enforce it. Thus a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it.”)

As discussed in Argument I. A., *infra*, a debtor alleging a violation of § 36-9-611(b) would *not* have a “complete and present” cause of action until “a secured party that disposes of collateral under Section 36-9-610” is in existence. On the other hand, if the claim were to accrue at the time of the secured party’s notification, it follows that the debtor has a “complete and present” claim at that time – such that the occurrence or non-occurrence of any subsequent events, including “disposition,” cannot destroy his right to obtain relief.

In addition to being contrary to the language of the statute, as a practical matter this ruling means that the decision has re-written § 36-9-611(b) to greatly expand a secured party’s exposure in the consumer-goods context. If a secured party is liable to the consumer debtor for damages at the time of sending notification, even if no disposition ever occurs, then any secured party that sends a notification to a consumer is at risk. If the consumer redeems his collateral prior to disposition by paying off the debt, the secured party may still be liable for statutory damages if the consumer has a colorable claim that the notification was not “reasonable.” The same would apply when a secured party sends notification but where the consumer debtor is allowed to cure his default before disposition – by paying less than the full contract balance and continuing to pay off the debt over time.

For these reasons Delaney submits the Court of Appeals erred in ruling that his cause of action under § 36-9-611(b) was complete and present at the time the secured party notifies a debtor of its plan for disposition, and therefore, that the limitations period begins to run at notification.

C. Comment 2 to § 36-9-611(b) Does Not Eliminate the “Disposition” Requirement of That Statute.

Argument I.C-E turns to the three, specific places in the UCC texts and Official Comments upon which the Court of Appeals relied in reaching its conclusions contrary to Delaney’s and the dissent’s position. The Court of Appeals stated that it was relying upon the emphasized sentence below, found within Comment 2 of the Official Comments to UCC § 9-611, in ruling that a debtor’s claim under § 36-9-611(b) arises at the time of notification. App. at 194. This Comment provides:

2. 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, subject to certain exceptions.* The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before disposition), and its contents. See Section 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions.)

Cmt. 2, Official Comment to UCC § 9-611. (emphasis added.)

The Court of Appeals interpreted this sentence in Comment 2 as an instruction to disregard the statutory text requiring “a secured party *that disposes of collateral under Section 36-9-610,*” and instead, to rule that the secured party’s failure to send reasonable notification was actionable at notification based upon the secured party’s intent: “Comment two does not state that the secured party *must actually dispose of the collateral* to be required to send reasonable notification; *it simply requires that the secured party ‘wish’ to dispose of collateral.*” App. at 194. (emphasis added.) And, “if the secured party initially wishes to dispose of the property, the

secured party must provide the appropriate notice. Therefore, we do not believe that disposition is a prerequisite to [the secured party's] being penalized for failing to give reasonable notice." *Id.* (emphasis added.)

Delaney respectfully disagrees that this interpretation of Comment 2 to UCC § 9611 is correct. As discussed at Argument I.A, *infra*, and as the heading to Comment 2 ("*Reasonable Notification*") implies, this Comment is describing the various "aspects" of a "reasonable notification" under UCC § 9-611, including timeliness. In considering such "aspects," it is accurate to say that "if the secured party initially wishes to dispose of the property, the secured party must provide the appropriate notice." If the secured party does *not* send a reasonable notification when it "wishes" to sell the collateral, it will plainly miss its opportunity to do so. If it waits until the disposition occurs to send it – at which time it becomes a "secured party that disposes of collateral under § 36-9-610" – that notification would never be "timely" ("*i.e.*, a reasonable time before the disposition"), and thus, it would not be "reasonable." The emphasized sentence is a correct description of what the secured party is required to do for its notification to be timely, and thus "reasonable." However, *it does not follow that sending notification by a secured party that merely "wishes" to dispose of the collateral, absent subsequent disposition, is sufficient to support a noncompliance claim against the secured party under § 36-9-611(b).*

First, the Court of Appeals' interpretation of the Comment as writing the disposition out of the statute when notification is sent by a secured party that merely "wishes" to dispose of collateral, cannot be squared with the South Carolina Reporter's Comment to the same section: "Section 36-9-611 imposes a notification requirement upon secured parties *who dispose of collateral under Section 36-9-610.*" S.C. Reporter's Cmt. to § 36-0-611 (emphasis added.) Moreover, interpreting Comment 2 as writing the disposition out permits a Comment to override

the express language of the enacted text. An Official Comment is an authoritative interpretive aid in construing the UCC, but it cannot rewrite the plain, unambiguous language of the enacted text.² There is no UCC authority provided in the decision which permits a court to rewrite the black letter text of § 36-9-611(b) based upon this sentence lifted from Comment 2, or generally, for reliance upon any Official Comment to rewrite unambiguous, UCC text.

Delaney respectfully submits that the Court Appeals' interpretation of Comment 2 is also wrong because it conflicts with Comment 8 to the same statute:

8. Failure to Conduct Notified Disposition... *Nor does this Article prevent a secured party from electing to send a revised notification* if its plans for disposition change. 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.

Cmt 8, Official Comment to UCC § 9-611. (emphasis added.)

Comment 8 makes no sense if the cause of action accrues at the time the non-reasonable notification was sent, and thus, the claim is "complete and present" at notification. Comment 8 explains the conditions when a secured party's "do-over" notification allows it to escape liability for sending a non-reasonable notification. Since it is the "disposition" that cuts off the secured party's right to send "revised notification" under Comment 8, this Comment makes clear that disposition is the essential event when the cause of action accrues. Accordingly, Delaney submits that the Court of Appeals erred in relying upon Comment 2 to rewrite the unambiguous language of the statutory text of § 36-9-611(b), as well as to interpret the statute to conflict with Comment 8.

² "The official comments to the UCC are not part of the UCC, in the sense that they are not enacted by the state legislatures adopting the UCC." (1 Anderson on the Uniform Commercial Code § 1-102:33 (3d. ed.) (Dec. 2016 update.) In applying Virginia UCC law, the Fourth Circuit noted that the Official Comments "are not binding authority upon the court;" rather they are "instructive" and provide "valuable guidance." *Buettner v. R.W Martin & Sons, Inc.*, 47 F.3d 116, 118 (4th Cir. 1995)

D. The Availability of a Debtor's Injunctive Remedy Under § 36-9-625(a) Does Not Require His Claim for Monetary Damages To Accrue at Notification.

The Court of Appeals also relied upon the equitable remedy provision of § 36-9-625(a) to support its ruling that no disposition is required for a legal claim under § 36-9-611(b) to arise, and therefore, that the limitations period runs from notification App. 193-194. Statutes such as § 36-9-610 and 611(b) do not provide any remedy within the bodies of those sections. Instead, all remedies are found at § 36-9-625 (“*Remedies for Secured Party's Failure to Comply with this Chapter.*”)

Section 36-9-625 is divided into three different remedies: First, § 36-9-625(a) provides the debtor with an equitable, *prospective*, injunctive remedy against the secured party when it “is not proceeding” in compliance with Article 9, and which permits a court to restrain the sale or collection of collateral. Second, subsections (b)-(c)(1), when combined, permit recovery of actual damages for a debtor’s “loss” that is caused by the secured party’s “failure to comply” with Article 9. Third, § 36-9-625(c)(2), the provision under which Delaney seeks to recover, authorizes monetary damages by permitting, under certain circumstances, his election of an alternative, “minimum statutory damages recovery” “by a person that was a debtor...at the time the secured party failed to comply with this part” – instead of requiring him prove up any actual damages or “loss.”³

Section 36-9-625(a) provides: “If it is established that a secured party *is not proceeding* in accordance with this chapter [*i.e.*, Article 9], a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.” § 36-9-625(a). (emphasis added.) The Court of Appeals interpreted subsection (a) as follows:

³ These circumstances are that the secured party’s failure to comply involves a consumer-goods transaction, and it must be for a noncompliance with “this part” (*i.e.*, Part 6 (“Default”), § 36-9-601- 635) – whereas actual damages will apply to the secured party’s noncompliance with any section found in Article 9.

It is clear that a party *must be able to state a cause of action in order to request a court restrain disposition of the collateral*. Therefore, if Delaney could have asked for a court to restrain disposition of his collateral, his cause of action [under § 36-9-611(b)] must have arisen upon his receipt of the noncompliant notice.

App at 194 (emphasis added.) However, the Court of Appeals provided no UCC authority for its ruling that a debtor “must be able to state a cause of action to request a restraint of disposition.”

Delaney respectfully disagrees. Section 36-9-625(a) provides *prospective*, equitable relief in order to *prevent* the harm or loss that will occur if the secured party fails to comply with Article 9, whereas he may seek a monetary recovery only upon proof that statutory noncompliance has already occurred.⁴ Subsection (a) applies when the debtor does not yet have a cause of action for monetary damages under Article 9: “If the secured part *has not yet acted in noncompliance but is about to do so*, or if the secured party *is presently acting in noncompliance*, [subsection (a)] provides for injunctive relief.” *Fjellin ex rel. Leonard Van Liew Living Trust v.*

⁴ For example, § 36-9-609(a) provides: “After default, a secured party may take possession of the collateral[.]” If the debtor learns the secured party plans to repossess on grounds of default, he has an equitable remedy under § 36-9-625(a) if he is *not* in default. If he meets his burden of proof, a court may “order restrain[t of] collection...of collateral.” W. Lawrence, et al., *Understanding Secured Transactions*, 5th Ed. § 19.01. However, if the wrongful repossession has already occurred, he may seek to restrain further “collection” under § 36-9-625(a) by a replevin, but he may also recover money damages for the deprivation of collateral that has been caused by the secured party’s noncompliant repossession. (“In such an action, the debtor may recover possession of the collateral, as well as damages for any harm done to the collateral and for loss of its use[.]”) (*Id.*)

Similarly, § 36-9-610 requires that upon default a secured party may dispose of the collateral, provided “every aspect” of the sale is “commercially reasonable.” If the debtor learns, for example, that the secured party plans to sell his collateral at public auction, but with no advertising of the auction to ensure a competitive price, he may seek restraint of the pending sale under § 36-9-625(a) until the secured party provides “commercially reasonable” advertising. *Id.* If the sale has already occurred, however, he can no longer equitably “restrain” or set the sale aside, but he may recover money damages for the noncompliant sale that has already occurred.

Likewise, if a debtor receives notification of disposition that the planned disposition is set for the next day, he may seek restraint of that sale under § 36-9-625(a) on grounds that the notice does not allow sufficient time to redeem or to try to find other buyers, and thus, is not “reasonable” under § 36-9-611(b). (“If the secured party has failed to give proper notice prior to anticipated disposition, a court can issue a temporary restraining order prohibiting disposition for a time that is sufficient to allow an aggrieved party...to redeem[.]”) (*Id.*) If the sale has already occurred, however, his remedy would be limited to the money damages provisions of § 36-9-625(b)-(c)(1) in a commercial transaction, or he may elect to recover under subsection (c)(2) in a consumer transaction.

Penning, 41 F.Supp 3d 775, 780 (D. Neb. 2014), relying upon 9 Hawklund UCC § 9-507:1 (2014), interpreting former UCC § 9-507(1), “the prior version of § 9-625” (emphasis added.)

Other courts agree with this interpretation of UCC § 9-625(a). In considering a claim that the secured party disposed of collateral, after failing to send reasonable notification of disposition in violation of UCC § 9-611(b) in a commercial transaction, the court in *In re Enron, Corp.*, 2005 WL 3873890, at *9-10, (U.S.B.R. S.D.N.Y. June 16, 2005) ruled:

[S]ection (a) would not appear to be applicable here. Under a plain meaning of the statute, that section would be applicable in circumstances where the secured party *is proceeding* to dispose of collateral and *not in a situation where the disposition has already occurred*. Therefore, since the First Sale has already occurred, Stonehill’s remedy, if it were shown that BNP did not comply with the requisite provisions of Article 9 [concerning notification under UCC § 9-611(b)], would be an action for damages[.]

In re Enron (emphasis added.) Accord, *Commercial Sav. Bank v. Fronks Serv. Ctr.*, 2008 WL 2230067 (3d Ct. of Ohio App., June 2, 2008). In considering a claim that the secured party failed to send reasonable notification under UCC § 9-611(b), the *Commercial Sav. Bank* court of appeals ruled:

[W]e note the plain language of [UCC § 9-625(a)] addresses remedies that can be obtained when the secured party is not proceeding in accordance with this chapter... *In our opinion, this statute governs actions presently or currently occurring*, thus causing the party to seek the court’s intervention *prior to the collateral actually being collected, enforced or disposed of* by the secured party. In contrast, the filing of [secured party’s] complaint [for a deficiency] as well as all court proceedings in the present case occurred after [secured party] had already taken possession of [debtor’s] collateral and subsequently sold [it.]

Commercial Sav. Bank, id., at *7 (emphasis added.)

Accordingly, these cases indicate that a debtor’s *pre-sale*, equitable remedy under § 36-9-625(a) permitting restraint of disposition of collateral – which may arise at any time prior to disposition including at the time of notification – does not require that a debtor also be able to state a consummated cause of action for a monetary recovery, as the Court of Appeals ruled.

E. When the Consumer Debtor Has Proved his Claim under § 36-9-611(b), He Does Not Have to Prove Any “Loss” or “Injury” To Be Awarded the Minimum, Statutory Damages Recovery Under § 36-9-625(c)(2).

Section 36-9-625(c)(2), Delaney’s damages provision, provides: “if the collateral is consumer goods, a person that was a debtor at the time *the secured party failed to comply with this part* may recover for that failure *in any event* in the amount of [the statutory damages formula.]” (emphasis added.) Comment 4 of the Official Comments to UCC § 9-625 instructs as follows:

4. *Minimum Damages in Consumer Goods.* Subsection (c)(2) provides a minimum, statutory damages recovery for a debtor and a secondary obligor in a consumer goods transaction. It... is designed to ensure *that every noncompliance with the requirements of Part 6* in a consumer-goods transaction results in liability, *regardless of the injury that may have resulted.*

Cmt. 4, Official Comment to UCC § 9-625. (emphasis added.)

Addressing this emphasized sentence from Comment 4, the Court of Appeal ruled: “Because an injury is not required for a secured party to be liable for failing to comply with the notice requirement, *the statute of limitations can begin to run before the secure party injures the debtor by disposing of the collateral in a commercially unreasonable manner.*” App. at 194. (emphasis added.)

Delaney respectfully disagrees. First, he is not alleging that First Financial injured him “by disposing of collateral in a commercially unreasonable manner” in violation of § 36-9-610. He is alleging that First Financial violated § 36-9-611(b), as “a secured party that disposed of collateral under Section 36-9-610,” without providing “reasonable notification of disposition.” Second, permitting the debtor to recover under this subsection, even when he has no injury or loss, does not mean that the statute of limitations begins to run *before* the cause of action under § 36-9-611(b) is complete and present.

He interprets Comment 4 to mean this: when the consumer debtor proves “the secured party’s failure to comply” with any section in Part 6 (such as § 36-9-611(b)), and therefore, when he proves all elements of his statutory cause of action, he is relieved of any additional burden of proving an injury or loss caused by the secured party’s failure to comply with the section. Under such circumstances, he is entitled to the “minimum, statutory damages recovery” “*in any event.*” Therefore, under § 36-9-625(c)(2), he is *not* required to prove at least *some* minimal loss. The “minimum statutory damages recovery” thus contrasts with the debtor’s recovery of actual damages under subsections (b)-(c)(1), where his recovery is for any “*loss* caused by a [secured party’s] failure to comply.”

However, there is nothing in the Comment which relieves the consumer debtor from fully proving the secured party’s noncompliance with the applicable Part 6 section upon which his claim rests, *i.e.*, with “any noncompliance with this part.” In other words, while § 36-9-625(c)(2) provides an alternative “*recovery*” provision, it does not truncate the elements or lighten the consumer debtor’s burden of proof in connection with any section in Part 6, other than permitting him to recover without proving damages.⁵ The Court of Appeals provided no UCC authority that a damages recovery under § 36-9-625(c)(2) also mandates an earlier accrual of any limitations period for the underlying section within Part 6 upon which that recovery rests.

F. The Court of Appeals Provided No On-Point, Appellate Authority to Support its Ruling that the Limitations Period Runs from Notification.

The Court of Appeals did not provide any on-point authority in ruling that the limitations period for § 36-9-611(b), a provision of a uniform code, begins to run at notification rather than

⁵ If it had been the legislative intent to lessen this burden with respect to consumer debtors under § 36-9-611(b), the General Assembly could have rewritten the statute to provide: “*In a consumer-goods transaction, a secured party that is authorized to dispose of collateral under Section 36-9-610 shall send the debtor a reasonable notification of disposition of collateral*” – thus omitting the restrictive language of “a secured party that disposes of collateral under Section 36-9-610.”

disposition. Instead, it cited “see generally *Rashaw v. United Consumers Credit Union*, 684 F.3d 739 (8th Cir. 2012). ([W]e agree that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.)” App. at 194.

In *Rashaw*, the court of appeals, applying Missouri law, ruled that it need not decide whether a UCC notification claim was controlled by a five-year limitations statute for “statutory liabilities,” or a three-year limitations statute for “actions upon a statute for penalty or forfeiture where the action is given to the aggrieved party.” *Rashaw*, 684 F.3d at 744. This was because the claims were untimely under both statutes, as all events, such as notification, had occurred more than six year before suit was filed. *Id.* Therefore, the *Rashaw* court was *not* called to decide the issue in the instant case – whether the claim accrued at the time of disposition instead, inasmuch as a later accrual event would make the claim timely filed under at least one of the two potential limitations statutes. Accordingly, the *Rashaw* court of appeals did not mention UCC § 9-611(b); it did not discuss or interpret the phrase “a secured party that disposes of collateral under UCC Section 9-610;” and, it did not alternatively consider whether the cause of action accrues at disposition.

The Court of Appeals also said it was relying upon *Erdman v. Rants*, 332 N.W.2d 441 (Sup. Ct. N.D. 1989), which the Court cites as “explaining the penalty available for failure to comply with the notice of sale requirements exists *regardless whether a commercially reasonable sale is held*, and regardless whether the debtor sustained a loss.” App. at 195. (emphasis added.) In *Erdman*, the question was whether the consumer debtor could recover statutory damages, even if the resulting disposition was commercially reasonable such that he had no actual loss, for a notice violation. *Erdman* at 422. The court ruled that it did not matter whether that sale was commercially reasonable, because the debtor was permitted to recover

without proof of loss. *Id.* However, the court did *not* rule that statutory damages could be recovered when there was *no sale at all*. In fact, the court specifically provided that a disposition was a prerequisite for a statutory damages recovery, in contrast to the Court of Appeals position:

Under the plain language of [the predecessor statute to UCC § 36-9-625(c)(2)] if a secured party does not proceed in accordance with part 5 of Article 9 [now Part 6]...*and disposition has occurred*...and...if the collateral is consumer goods, the debtor is entitled to a minimum recovery, which is not less than the credit service charge plus ten percent of the principal amount of the debt[.]

Erdman, 332 N.W.2d at 443 (emphasis added.) Thus *Erdman* cannot not support the ruling that a violation of noncompliance with UCC § 9-611(b) accrues at the time of notification when the debtor seeks the “minimum, statutory damages recovery.”

II. DELANEY’S CAUSE OF ACTION IS NOT CONTROLLED BY A ONE-YEAR STATUTE OF LIMITATIONS.

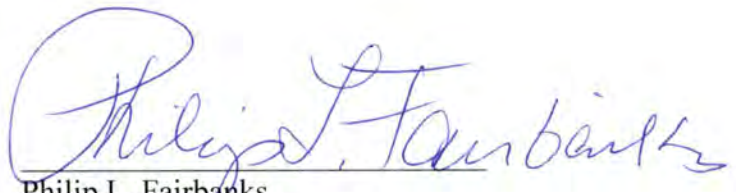
Provided Delaney’s claim under § 36-9-611(b) accrues at disposition, the next question is whether the claim is controlled by a three-year limitations statute or a one-year statute, since no statute of limitations period is provided under Article 9 of the UCC. Here, the Court of Appeals did not decide which statute of limitations applied after ruling it was untimely under both. App. at 192. Similarly, this Court need not decide which statute actually applies to his claim, it needs only to eliminate any potential candidate that is shorter than three years, such as § 15-3-570.

For example, UCC rights and obligations are imposed *ex contractu*, whenever the secured party and the debtor have a contractual relationship creating a security interest under Article 9 in the collateral. *See, e.g., Coastal Fed. Credit Union v. Brown*, 790 S.E2d 417, 430-421 (SC App. 2016) (limitations period for secured party’s suit for deficiency, after exercising Part 6, Article 9 rights of repossession and sale of consumer collateral, controlled by both Article 2 and Article 9.) Under this reasoning, Delaney’s claim would be timely under § 15-3-530(1) for three years for “an action upon a contract, obligation or liability, express or implied[.]” South Carolina also

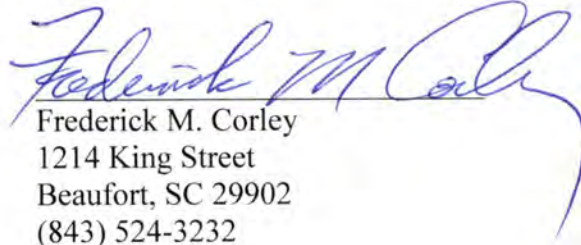
applies a three-year statute for “an action upon a liability created by statute *other than a penalty* or forfeiture.” § 15-3-520(2). (emphasis added.) Finally, South Carolina applies a three-year statute for “an action upon a statute or penalty or forfeiture when the action is given *to the party aggrieved* or to such party and the State, except where the statute imposing it prescribes a different limitation.” § 15-3-540(2). (emphasis added.)

CONCLUSION

Respectfully submitted,



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March 20, 2017
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S.C. SUPREME COURT

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MAY 15 2017

S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442 (S.C. Ct. App. filed Sept. 28, 2016)

Otha Delaney,

Petitioner,

v.

First Financial of Charleston, Inc.,

Respondent.

MOTION TO DISMISS PETITION FOR A WRIT OF CERTIORARI

YOUNG CLEMENT RIVERS, LLP

Stephen L. Brown (SC Bar No. 66468)

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Counsel for Respondent

NOW COMES Respondent, First Financial of Charleston, Inc., by and through its undersigned counsel, and, on the following grounds, moves this Honorable Court to dismiss the petition for a writ of certiorari in this matter:

1. The Court of Appeals decided this appeal by opinion filed Wednesday, September 28, 2016, affirming the trial court's dismissal of the complaint of Petitioner, Otha Delaney. (A copy of the opinion is attached hereto as Exhibit 1.)

2. Under Rule 221(a), SCACR, "Petitions for rehearing must be *actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court[;]"¹ therefore, the initial deadline for the Court of Appeals to "actually receive[]"² a petition for rehearing from Mr. Delaney was Thursday, October 13, 2016, i.e., the 15th day after the opinion was filed, as computed under Rule 263(a), SCACR.³

¹ (emphasis added).

² Generally, under Rule 262(a)(2), SCACR, documents may be filed with the appellate court by mail, with the date of filing deemed to be the date of mailing; however, Rule 262(a) makes two express exceptions to this rule: petitions for rehearing and motions for reinstatement.

³ Rule 263(a) states,

In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be

3. The initial deadline was, however, altered by this Court's order of October 10, 2016 (Order No. 2016-10-10-01) regarding Hurricane Matthew (the "Hurricane Matthew Order"), which provided as follows:

On October 4, 2016, the Governor of South Carolina directed the closure of State, County and Municipal Government Offices in twenty-six counties in South Carolina from October 5 through October 7, 2016. This action was taken to facilitate the planned evacuations necessary due to Hurricane Matthew. As the administrative head of the Unified Judicial System in South Carolina, the Chief Justice directed all levels of the Judicial System to comply with this closure.

Subsequently, the Governor issued Executive Orders providing for evacuations in Jasper, Beaufort, Colleton, Charleston, Dorchester, Berkeley, Georgetown and Horry Counties. Several hundred thousand South Carolina citizens evacuated these areas, and the impacts of these evacuations were felt in counties which were not subject to any closure or evacuation. Further, Hurricane Matthew caused significant damage in South Carolina, and this will adversely affect the ability of many lawyers and litigants to comply with deadlines in court proceedings through the end of this week.

Accordingly, this Court finds it appropriate to declare the days of Wednesday, October 5, 2016, though Friday, October 14, 2016, to be statewide "holidays" for the purposes of computing time under Rule 263 of the South Carolina Appellate Court Rules, Rule 6 of the South Carolina Rules Civil Procedure, Rule 35 of the South

included, unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

Carolina Rules of Criminal Procedure, and Rule 3 of the
South Carolina Rules of Magistrates Court.

(footnotes omitted.) (A copy of the Hurricane Matthew Order is attached hereto as Exhibit 2.)

4. What had been the initial deadline for Mr. Delaney's petition for rehearing (Thursday, October 13, 2016) was thus declared "to be [a] statewide 'holiday[]' for the purpose[] of computing time under Rule 263 of the South Carolina Appellate Court Rules . . . [,]" as was the next day, Friday, October 14, 2016. (Ex. 2.) And October 15th and 16th, 2016, were a Saturday and Sunday, respectively.

5. Accordingly, computing time in accordance with Rule 263 and the Hurricane Matthew Order, the time period in which any petition for rehearing by Mr. Delaney had to be "actually received" by the Court of Appeals ran until the end of Monday, October 17, 2016, i.e., "the end of the next day which [wa]s neither a Saturday, Sunday nor [a] holiday."

6. Having not received a petition for rehearing from Mr. Delaney, the Court of Appeals remitted the case to the trial court on Wednesday, October 19, 2016. (A copy of the remittitur is attached hereto as Exhibit 3.)

7. Mailed October 18, 2016, Mr. Delaney's Motion for Extension of Time to File Motion for Rehearing was received by the Court of Appeals on October 20, 2016. (A copy of the motion is attached hereto as Exhibit 4.)

8. In response to Mr. Delaney's motion, Respondent's counsel wrote the Court of Appeals on October 28, 2016, advising that it was Respondent's position that the appeal had been concluded with finality and that Respondent did not consent to Mr. Delaney's motion for an extension of time to petition for rehearing; nor would it consent to recall of the remittitur. (A copy of the letter is attached hereto as Exhibit 5.)

9. On November 2, 2016, the Court of Appeals filed an order recalling the remittitur; it read as follows:

This Court's remittitur was sent to the Clerk of Charleston County on October 19, 2016. It is now necessary for this Court to recall the remittitur. The Clerk of Charleston County is directed to return the remittitur to the Clerk of the South Carolina Court of Appeals within ten days of the date of this order.

(A copy of the order recalling the remittitur is attached hereto as Exhibit 6.)

10. On November 3, 2016, the Court of Appeals filed an order extending the time for Mr. Delaney to petition for rehearing until November 18, 2016. (A copy of the order extending the time for Mr. Delaney to petition for rehearing is attached hereto as Exhibit 7.)

11. Mailed by the clerk of the trial court on November 9, 2016, the remittitur was received by the Court of Appeals on November 14, 2016. (A copy of the trial court's mailing to the Court of Appeals with the remittitur is attached hereto as Exhibit 8.)

12. The Court of Appeals received Mr. Delaney's petition for rehearing on November 18, 2016. (A copy of the petition is attached hereto as Exhibit 9.)

13. Respondent made a return to Mr. Delaney's petition and, in addition to addressing the merits, argued that the Court of Appeals had properly sent the remittitur to the trial court on October 19, 2016, at which point the appeal was finally decided; that there was no longer appellate jurisdiction; and that the Court of Appeals improperly recalled the remittitur and extended the time for Mr. Delaney to petition for rehearing. (A copy of the return is attached hereto as Exhibit 10.)

14. The Court of Appeals denied the petition for rehearing by order filed February 16, 2017. (A copy of the order denying rehearing is attached hereto as Exhibit 11.)

15. Mr. Delaney's petition to this Court for a writ of certiorari to review the Court of Appeals' September 28, 2016, decision is now pending.

16. "When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. *The only exception* to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court." *Wise v. S.C. Dep't of Corrections*, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) (emphasis added) (internal citations omitted).

17. Here, there was no error “of the Court” in sending down the remittitur on October 19, 2016; nor, indeed, was any such error cited in the Court of Appeals’ order recalling the remittitur. (*See Ex. 6.*)

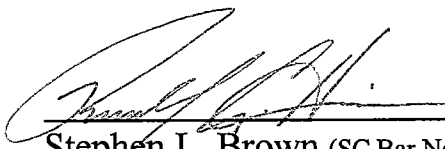
18. Accordingly, the Court of Appeals’ orders recalling the remittitur and extending the deadline for Mr. Delaney to petition for rehearing were erroneous.

19. When the Court of Appeals properly sent the remittitur to the trial court on October 19, 2016, appellate jurisdiction ended, and the appeal was decided with finality (in accordance with the September 28, 2016, opinion affirming the trial court’s dismissal of Mr. Delaney’s complaint as time barred); the remittitur having been properly sent down, it could not thereafter be properly recalled; and in consequence, appellate jurisdiction—having been properly ended and never properly reacquired—is lacking over this matter, which, most respectfully, must be dismissed. *See Wise*, 372 S.C. at 174, 642 S.E.2d at 551 (“The remittitur in this case was not sent down by mistake, error or inadvertence of the Court of Appeals. Instead, it was 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. Accordingly, this Court does not have jurisdiction to act in this matter. The documents filed by appellant are hereby dismissed.”) (internal citation omitted).

WHEREFORE, Respondent moves this Honorable Court to dismiss Mr. Delaney's petition for a writ of certiorari and, in conjunction with the dismissal, to grant it whatever relief may be required for the record to properly show that this appeal was decided with finality in accordance with the majority opinion of the Court of Appeals filed September 28, 2016, affirming the dismissal of Mr. Delaney's complaint against Respondent.

Respectfully submitted,

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Dated: 5/11/17

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442
Submitted March 1, 2016 – Filed September 28, 2016

AFFIRMED

Philip L. Fairbanks, of Beaufort, for Appellant.

Stephen L. Brown, Russell G. Hines, and Perry M.
Buckner, IV, all of Young Clement Rivers, of
Charleston, for Respondent.

SHORT, J.: Otha Delaney appeals the trial court's grant of First Financial of Charleston, Inc.'s motion to dismiss his class action complaint for damages and equitable relief under the Uniform Commercial Code (UCC), alleging the court erred in (1) dismissing the complaint as time-barred by applying the incorrect

statute of limitations,¹ and (2) determining the date the statute of limitations began to run. We affirm.

On October 12, 2007, Delaney entered into a Retail Installment Contract (the Contract) to purchase a truck from Coliseum Motors. The Contract was assigned to First Financial, making it a secured party under the UCC. After Delaney failed to make payments, First Financial repossessed the vehicle. On May 2, 2008, First Financial sent Delaney a "Notice of Private Sale of Collateral" (notice of sale) advising Delaney of its intention to sell the vehicle. On December 15, 2008, First Financial sold the vehicle.

On October 4, 2011, Delaney, as a putative member of a class, filed this class action, alleging (1) the notice of sale was insufficient under the UCC, and (2) he was entitled to relief under section 36-9-625 of the South Carolina Code (2003) (providing remedies for a secured party's failure to comply with the UCC). Delaney sought recovery on behalf of the class members.

First Financial moved to dismiss, arguing Delaney's claim was barred under the one-year statute of limitations applicable for statutory penalties set forth in South Carolina Code § 15-3-570 (2005) (providing a one-year statute of limitations for actions based on a statute for a penalty). Delaney filed a response to the motion to dismiss, arguing the claim was not a statutory penalty, but it was a remedial claim for damages under section 36-9-625. Delaney argued that because the claim is remedial, the UCC's six-year statute of limitations in section 36-2-725(1) (2003) of the South Carolina Code governing breaches of contract for the sale of goods applied. In the alternative, Delaney argued if the recovery is a penalty rather than a compensable remedy, the action is governed by the three-year statute of limitations provided in South Carolina Code section 15-3-540(2) (2005) (applying to "[a]n 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").

At a hearing on its motion to dismiss, First Financial argued the action was for a penalty because no contract was alleged to have been breached; there was no plea for compensatory damages; the complaint did not allege a tort; and the plea for

¹ We combine Delaney's second and third issues and address them as the first issue.

relief consisted of the finance charge and ten percent of the principal amount under the Contract. According to First Financial, such a plea was governed by the one-year statute of limitations provided for in section 15-3-570, which would be triggered by the "commission of the offense." First Financial also argued Delaney's claim was time-barred under the three-year statute of limitations, which was triggered by the issuance of the notice of sale.

Delaney argued neither the one-year nor the three-year statute of limitations applied, and even if the three-year statute of limitations in section 15-3-540(2) applied, the time had not expired at the time of the filing because the statute would have been triggered "not when the letter [was] received[, but] . . . only when the collateral was disposed of." Delaney maintained that setting minimum statutory damages of ten percent of the contract plus finance charges ensures compliance by creditors and "that[,] in and of itself doesn't turn it into a penalty because it is clearly a substitute for actual damages."

In an order filed April 30, 2013, the trial court granted the motion to dismiss. The court found Delaney's sole cause of action was a statutory penalty because it requested the finance charge and ten percent of the principal amount of the obligation, which is the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2). Noting the Official Comment 4 to section 36-9-625(c)(2), which provides the specific relief is to be awarded "regardless of any injury that may have resulted[,]" the court found "this fixed formula is not remedial in nature but rather serves the purpose of imposing automatic liability for 'every noncompliance.'" The trial court noted our supreme court has interpreted the same provision as a statutory penalty in several cases, and it further noted other courts have similarly classified the statutory award based on the uniform UCC model statute, upon which South Carolina based its code.

The court next rejected Delaney's argument that section 36-2-725(1) applied, which provides a six-year limitations period for a breach of contract for the sale of goods under the UCC. The court noted Delaney did not plead breach of contract; thus, section 36-2-725(1) did not apply. The court found the case concerned the sufficiency of notice prior to the disposition of collateral; thus, the case dealt "entirely with Article 9's provisions concerning secured transactions. Article 2's provisions pertaining to the sale of goods [were] wholly irrelevant." The court also found general rules of statutory construction prevented the application of the six-year limitations period. The court found the "controlling limitations period should be either S.C. Code Ann. § 15-3-570 or § 15-3-540(2), respectively one or three

years." The court noted general rules of statutory construction require a specific statute to prevail over a more general statute, and because Delaney's desired recovery was a statutory penalty, sections 15-3-570 and 15-3-540(2) spoke "more directly to the actual allegations in this lawsuit."

Finally, the court found Delaney's complaint was time-barred under either section 15-3-570 or 15-3-540(2). The court found "[w]hile either statute might be reasonably applied to this matter, the Court need not decide this inquiry as [Delaney's] cause of action accrued upon receipt of the alleged noncompliant Notice of Sale and either statute would therefore serve as a bar to . . . recovery." As to section 15-3-570,² the statute specifically states the commission of the offense serves as the date of accrual. The court found the statute began to run in May 2008 and expired in May 2009.

As to section 15-3-540(2),³ the court noted the statute did not specifically delineate a date of accrual, and it found "the alleged commission of the offense should similarly serve as the commencement of the three year statute of limitations." The court continued,

Unlike an action for actual or compensatory damages, [Delaney's] action for a penalty focuses on a specific act of non-compliance . . . 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 [Delaney] either knew or should have known that a violation had occurred.

² "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. § 15-3-570 (2005).

³ "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." S.C. Code Ann. § 15-3-540(2).

Furthermore, I find that the legislature intended [§§] 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 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).

The court granted First Financial's motion to dismiss. After a hearing, the court denied Delaney's motion for reconsideration. This appeal followed.

ISSUES

- I. Did the trial court err in applying the statute of limitations?
- II. Did the trial court err in finding the action accrued at the time the notice of sale was received rather than at the time First Financial disposed of the collateral?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The appellate court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and reasonably deducible inferences in the complaint would entitle the plaintiff to relief on any theory of the case. *Id.* The court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

LAW/ANALYSIS

- I. Applicable Statutes of Limitations

Delaney argues the trial court erred in finding the six-year statute of limitations in section 36-2-725 did not apply and in finding Delaney's action barred by either the limitations period provided by section 15-3-540(2) or by section 15-3-570. We disagree.

In this case, Delaney alleged he was entitled to the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2) due to First Financial's insufficient notice of sale. Section 36-9-625, found in Article 9 of the UCC, establishes remedies for a secured party's failure to comply with Article 9, providing the following:

(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.

* * *

[c](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.

S.C. Code Ann. § 36-9-625 (2003). "Article 9 of the U.C.C. does not now nor has it ever included a statute of limitations." Richard H. Nowka, *The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks-Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*, 7 Fla. St. U. Bus. Rev. 1, 2 n.4 (2008). Thus, Delaney argues the statute of limitations in Article 2 of the UCC, section 36-2-725(1) applies, providing six years. We disagree.

First, Delaney did not allege a breach of contract. Rather, Delaney alleged the violation of the notice of sale requirements, and his prayer for relief requested the statutory penalty of the finance charge and ten percent of the principal amount of the obligation under section 36-9-625(c)(2). Thus, section 36-2-725(1) did not apply because it 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." S.C.

Code Ann. § 36-2-725(1) (2003). Because Delaney did not allege a breach of contract, we agree section 36-2-725(1) did not apply. Instead, we look to Title 15 governing civil remedies.

Sections 15-3-540 and -570 provide statutes of limitations for actions upon statutes for a penalty. *See* S.C. Code Ann. § 15-3-540(2) (2005) (providing a three-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture"); S.C. Code Ann. § 15-3-570 (2005) (establishing a one-year statute of limitations for "[a]n 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"). Like the trial court, we find the controlling limitations period is either section 15-3-570 or section 15-3-540(2), respectively one or three years, because Delaney sought a statutory penalty.

"As a general principle, the legislature has the authority to provide civil penalties to enforce observance of a legislative policy." *S.C. Dep't of Health & Envtl. Control v. Kennedy*, 289 S.C. 73, 76, 344 S.E.2d 859, 861 (Ct. App. 1986). A statutory penalty is defined as a penalty "an individual is allowed to recover against a wrongdoer as satisfaction for wrong or injury suffered, without reference to actual damage sustained." *Black's Law Dictionary* 1412 (6th ed. 1990). Although not addressing the statute of limitations issue, at least three South Carolina Supreme Court cases have identified the "damages" in section 36-9-625(c)(2) as a statutory penalty.

Citing the former version of section 36-9-625(c)(2), the supreme court in *Crane v. Citicorp National Services, Inc.*, 313 S.C. 70, 72, 437 S.E.2d 50, 51-52 (1993) (superseded by statute on other grounds), addressed whether co-obligors, who did not have title or right to possession of a mobile home, could recover under the penalty provision of the UCC for the creditor's failure to comply with the notice requirements. The court found the Cranes were entitled to notice. *Id.* at 74, 437 S.E.2d at 53. The court continued as follows:

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.

Id. at 74-75, 437 S.E.2d at 53.

In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 375, 534 S.E.2d 688, 690 (2000), Brockbank sued Best Capital Corp. after the repossession and sale of his mobile home, alleging, among other things, a violation of Article 9's notice provision. Best Capital admitted it had not sent notice of the sale, but it argued Article 9 did not apply to the parties' agreement because there was not a security interest. *Id.* at 377, 534 S.E.2d at 691. The court found notice was required, and stated "[i]f a secured party fails to give the required notice, a debtor may seek to recover the statutory penalty under Article 9." *Id.* at 385, 534 S.E.2d at 695 (noting the former version of section 36-9-625(c)(2), section 36-9-507(1), which embodies nearly identical language as the current version); *id.* at 384, 534 S.E.2d at 694 (concluding "the outcome in this case is largely dictated by *Crane*").

More recently, in *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 373, 595 S.E.2d 461, 463 (2004), Mr. and Mrs. Singleton filed an action based in part on the UCC, claiming Stokes Motors, Inc. failed to notify them of its intent to sell the Singletons' repossessed vehicle. Citing the former version of section 36-9-625(c)(2), the court in *Singleton* referred to the statute's "penalty" provision in finding both Singletons were entitled to recover because both were entitled to notice. *Id.* at 378, 595 S.E.2d at 466.⁴

We find no merit to Delaney's argument that our supreme court's references to the statutory penalty in these cases is the result of "loose language" and "unconsidered dictum (sic)" and the court interchangeably used the terms "compensatory damages" and "penalty" in its opinions. Based on the definition of a penalty and the cases referring to the mandatory, pre-determined amount of "damages" for failure to comply with the notice of sale requirements, we find the remedy Delaney sought in section 36-9-625(c)(2) was a penalty, and either section 15-3-570 or section 15-3-540(2) applied.

⁴ The court noted that under the revision of 2001, a secured party's liability under section 36-9-625(c)(2) is limited to one penalty "with respect to any one secured transaction." *Id.*

First Financial sent the notice of sale on May 2, 2008, and sold the vehicle on December 15, 2008. Delaney filed this action in October 2011. Under section 15-3-570, providing a one-year statute of limitations, Delaney's action is clearly barred. Under section 15-3-540(2), providing a three-year statute of limitations, whether the action is barred depends on when the action accrued.

II. Date of Accrual

Delaney argues the trial court erred in finding the cause of action accrued when the notice of sale was received rather than on the date of the sale of the collateral. We disagree.

Under the three-year statute of limitations, Delaney's complaint was untimely filed unless the accrual date is the date First Financial sold the vehicle rather than the date of the notice of sale. However, like the trial court, we need not decide whether section 15-3-570 or section 15-3-540(2) applied because we find the accrual date is the date the notice of sale was received, and Delaney failed to timely serve and file his complaint under either statute of limitations.

As to section 15-3-570, the statute specifically provides the action "must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005). The offense alleged in this case is insufficient notice of sale. As noted by the trial court, "this date . . . coincide[s] with the date on which [Delaney] either knew or should have known that a violation had occurred."

Regarding section 15-3-540(2), the statute is silent as to a date of accrual. To interpret this section for the present case, we must apply the rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # JM2UF1132N0294812)*, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Corbin v. Carlin*, 366 S.C. 187, 193, 620 S.E.2d 745, 749 (Ct. App.

2005) (quoting *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)).

Delaney's complaint alleges violations of the notice required prior to the disposition of goods in a consumer goods transaction. *See* S.C. Code Ann. § 36-9-611(b) (2003) (requiring notification prior to disposition of collateral); S.C. Code Ann. § 36-9-614 (2003) (providing specific requirements for a notification). His right to recovery for a violation of the required notice arises under section 36-9-625(c)(2). The cause of action depends on a specific act of non-compliance by the creditor. Even under the discovery rule, the date of the notice of sale would be the date of discovery of the cause of action for a failure to comply with the UCC regarding the notice. We find the legislature did not intend to impose a different date for the statute of limitation to accrue. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

The dissent maintains section 15-3-540(2)'s three-year statute of limitations did not begin to run until First Financial disposed of the collateral in December 2008 because a secured party must provide reasonable notice of sale only if it disposes of the collateral. According to the dissent, "the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral." Further, the dissent maintains if the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b), and if a secured party sends unreasonable notice to a debtor but subsequently fails to dispose of the collateral, it has not failed to comply with section 36-9-611(b). In support of its position that a secured party must provide reasonable notice only if it disposes of the collateral, the dissent cites Official Comment eight to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." We respectfully disagree with the dissent's interpretation of section 36-9-611(b) and determination of the date the three-year statute of limitations began to run.

We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral. Initially, we note section 36-9-625 provides several remedies for noncompliance with the notice requirement. Among them, the statute provides, "[i]f it is established that a secured party is not proceeding in accordance with this

chapter, a court may order or restrain . . . disposition of collateral on appropriate terms and conditions." §36-9-625(a). It is clear a party must be able to state a cause of action in order to request a court restrain disposition of the collateral. Therefore, if Delaney could have asked a court to restrain disposition of his collateral, his cause of action must have arisen upon his receipt of the noncompliant notice. *See Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000) ("Statutes should be construed in light of their intended purposes, and in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.").

Further, we believe the Official Comments to section 36-9-611 and 36-9-625(c)(2) supports our conclusions. First, Comment two to section 36-9-611 provides, "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." (emphasis added). Comment two does not state that the secured party must actually dispose of the collateral to be required to send reasonable notification; it simply requires that the secured party "wish" to dispose of the collateral. Based on our reading of Comments two and eight to section 36-9-611, we believe after the secured party gives notice, the secured party can elect not to dispose of the property; however, if the secured party initially wishes to dispose of the property, the secured party must provide appropriate notice. Therefore, we do not believe that disposition of the collateral is a prerequisite to being penalized for failing to give reasonable notice.

In addition, Official Comment four to the penalty provision, section 36-9-625(c)(2), states the penalty "is designed to ensure that every noncompliance with the requirements of Part 6 [§§ 36-9-601 to -629 (2003 & Supp. 2015)] in a consumer-goods transaction results in liability, regardless of any injury that may have resulted." Because an injury is not required for a secured party to be liable for failing to comply with the notice requirement, the statute of limitations can begin to run before the secured party injures the debtor by disposing of the collateral in a commercially unreasonable manner.

Accordingly, we believe section 15-3-540(2)'s three-year statute of limitations began to run in May 2008 when Respondent received the notice of sale from First Financial. *See generally Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 744 (8th Cir. 2012) ("[W]e agree that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.");

Erdmann v. Rants, 442 N.W.2d 441, 444 (N.D. 1989) (explaining the penalty available for failure to comply with the notice of sale requirements exists regardless of whether a commercially reasonable sale is held and regardless of whether the debtor sustained a loss).

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.⁵

LOCKEMY, C.J., concurs.

THOMAS, J., concurring in part, dissenting in part: I concur with the majority's conclusion that the statute of limitations found in section 36-2-725(1) of the South Carolina Code (2003) does not apply to Appellant's claims. However, I respectfully dissent and would reverse because a three-year statute of limitations applies to Appellant's claims and Appellant filed this action within three years of the date Respondent disposed of the collateral, which, I believe, is when the statute of limitations began to run.

Under section 15-3-540(2), the statute of limitations is three years for "[a]n 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." By its plain language, this section's three-year statute of limitations applies to actions seeking recovery of a statutory penalty when only the aggrieved party can bring the action for the penalty.

In this case, Appellant brought his action to recover the statutory penalty found in section 36-9-625(c)(2) of the South Carolina Code (2003). This section allows only the "debtor or a secondary obligor at the time a secured party failed to comply" to recover the statutory penalty. Thus, Appellant was the only person who could have brought an action to recover the statutory penalty because he was the debtor at the time Respondent allegedly failed to provide reasonable notice of disposition of the collateral. Because Appellant, as the aggrieved party, was the only person who could have brought the action, section 15-3-540(2) provided the

⁵ We decide this case without oral argument pursuant to Rule 215, SCACR.

applicable statute of limitations. Accordingly, the statute of limitations for Appellant's action was three years.

Finding the applicable statute of limitations was three years, we must next consider when the statute began to run. I respectfully disagree with the majority's finding that the statute of limitations began to run when Respondent sent the allegedly unreasonable notice in May 2008.

Section 36-9-625(c)(2) provides "a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover" a statutory penalty for the failure to comply. The debtor can recover this penalty only if the secured party fails to comply. Under section 36-9-611(b) of the South Carolina Code (2003), "a secured party that disposes of collateral under [s]ection 36-9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition." Appellant's claim is that Respondent failed to comply with the notice requirement and, thus, Appellant is entitled to recover the statutory penalty found in section 36-9-625(c)(2) because of that failure to comply.

In my view, based on the plain language of section 36-9-611(b), the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral. Section 36-9-611(b) requires "a secured party *that disposes of collateral*" to provide reasonable notice. (emphasis added). Based on this plain language, a secured party must provide reasonable notice only if it disposes of the collateral. If the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b). Thus, if a secured party sends an unreasonable notice to a debtor but subsequently fails, for whatever reason, to dispose of the collateral, it has not failed to comply with section 36-9-611(b). And the debtor who receives an unreasonable notice cannot bring an action to recover the statutory penalty if the secured party never disposed of the collateral because the statutory penalty is authorized only if the secured party failed to comply with section 36-9-611(b). As noted above, the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

This conclusion is supported by the official comments to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." Thus, this comment contemplates that a secured party may send a revised notification in order to comply with the notice

requirement in section 36-9-611(b). If a secured party sent an unreasonable notice to a debtor and subsequently, but prior to disposition, sent a reasonable second notice, the secured party would be in compliance with section 36-9-611, and the debtor would not have an action to recover the statutory penalty based on a failure to comply. Additionally, comment eight contemplates that a secured party may send a notification and later decide not to dispose of the collateral in which case the secured party would not have failed to comply with section 36-9-611(b), and the debtor could not recover the statutory penalty under section 36-9-625(c)(2).

This conclusion is further supported by examination of the purpose underlying the notice requirement, which is, in part, to allow the debtor to see that the sale is conducted in a commercially reasonable manner. *See Brockbank v. Best Capital Corp.*, 341 S.C. 372, 384, 534 S.E.2d 688, 695 (2000) ("The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner."). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, the purpose of the notice requirement is accomplished because the debtor received a reasonable notice and can see the sale is conducted in a commercially reasonable manner. Therefore, the purpose underlying the notice requirement supports the conclusion that the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

Furthermore, this conclusion is supported by examination of the purpose underlying the statutory penalty. The penalty is necessary to motivate secured parties to comply with the code's provisions. *See id.* at 385, 534 S.E.2d at 695 ("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 [c]ode's provisions." (brackets removed)). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, imposing the statutory penalty based on the initial unreasonable notice would not serve the penalty's purpose because the secured party would have ultimately complied with the notice requirement.

The majority contends Appellant's cause of action "must have arisen upon his receipt" of the unreasonable notice because section 36-9-625(a) allows a party to request the circuit court to restrain disposition of the collateral, presumably through an injunction, if the "secured party is not proceeding in accordance with this chapter." Because section 36-9-625(c)(2) is a statutory penalty, it is available

only in the specific circumstances prescribed by the statute. *See State ex rel. Callison v. Nat'l Linen Serv. Corp.*, 225 S.C. 232, 234, 81 S.E.2d 342, 343 (1954) ("The prime rule requires strict construction of a statutory provision which would work a forfeiture or inflict a penalty."); *King v. Atl. Coast Line R.R. Co.*, 86 S.C. 510, 513, 68 S.E. 769, 770 (1910) (noting a statutory penalty "is the creature of the statute, and comes into existence when all statutory conditions exist, and not otherwise"). As discussed above, the penalty in section 36-9-625(c)(2) is available only when a secured party fails to comply. Alternatively, the statute providing for the possibility of an injunction does not require a failure to comply; rather an injunction is available at any time a secured party is not proceeding in accordance with Article Nine. Because the legislature used different language in sections 36-9-625(a) and 36-9-625(c)(2) to express when each remedy is available to a debtor, we must assume the legislature intended to draw a distinction between the two remedies. *See Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

Thus, the monetary penalty in section 36-9-625(c)(2) and the injunction in section 36-9-625(a) have different thresholds for applicability, and they are not necessarily available to a debtor at the same time. As a result, even if we assume, due to the possibility of an injunction, a cause of action or right arises when a secured party sends an unreasonable notice, such an assumption does not lead automatically to the conclusion, as found by the majority, that the monetary penalty is also available when a secured party sends an unreasonable notice.

Accordingly, I would find a debtor does not have a cause of action to recover the statutory penalty based on a secured party failing to provide reasonable notice as required by section 36-9-611(b) until the secured party disposes of the collateral. As a result, the statute of limitations would not begin to run until the secured party disposes of the collateral. *See Walsh v. Woods*, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("In analyzing a limitations defense, the 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. Thus, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it." (citations and internal quotation marks omitted) (brackets removed)).

Here, Respondent could not have failed to comply with section 36-9-611(b) until it disposed of the collateral without providing reasonable notice, and Appellant could not have brought an action to recover the statutory penalty based on a failure to comply until Respondent disposed of the collateral. Thus, the statute of limitations

began to run in December 2008 when Respondent disposed of the collateral. Appellant filed this action in October 2011, which was within the applicable three-year statute of limitations, and I would find the circuit court erred by dismissing Appellant's complaint.

The Supreme Court of South Carolina

Re: Hurricane Matthew

ORDER

On October 4, 2016, the Governor of South Carolina directed the closure of State, County and Municipal Government Offices in twenty-six counties in South Carolina from October 5 through October 7, 2016.¹ This action was taken to facilitate the planned evacuations necessary due to Hurricane Matthew. As the administrative head of the Unified Judicial System in South Carolina, the Chief Justice directed all levels of the Judicial System to comply with this closure.

Subsequently, the Governor issued Executive Orders providing for evacuations in Jasper, Beaufort, Colleton, Charleston, Dorchester, Berkeley, Georgetown and Horry Counties.² Several hundred thousand South Carolina citizens evacuated these areas, and the impacts of these evacuations were felt in counties which were not subject to any closure or evacuation. Further, Hurricane Matthew caused significant damage in South Carolina, and this will adversely affect the ability of many lawyers and litigants to comply with deadlines in court proceedings through the end of this week.

Accordingly, this Court finds it appropriate to declare the days of Wednesday, October 5, 2016, though Friday, October 14, 2016, to be statewide "holidays" for the purposes of computing time under Rule 263 of the South Carolina Appellate Court Rules, Rule 6 of the South Carolina Rules Civil Procedure, Rule 35 of the South Carolina Rules of Criminal Procedure, and Rule 3 of the South Carolina Rules of Magistrates Court.³

s/Costa M. Pleicones C.J.

s/Donald W. Beatty J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

s/John Cannon Few J.

Columbia, South Carolina
October 10, 2016

¹ Executive Order 2016-29.

² Executive Orders 2016-31, - 32 and -33.

³ Monday, October 10, 2016, is already a holiday under these rules since it is a federal holiday.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 19, 2016

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Otha Delaney v. First Financial
Lower Court Case No. 2011CP0707166
Appellate Case No. 2014-000824

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Otha Delaney, ... Appellant,

v.

First Financial of Charleston, Inc., ... Respondent.

RECEIVED

OCT 20 2016

SC Court of Appeals

Appellate Case No. 2014-000824

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442

Submitted March 1, 2016 – Filed September 28, 2016

MOTION FOR EXTENSION OF TIME
TO FILE MOTION FOR REHEARING

The appellant, Otha Delaney, pursuant to Rule 263(b), SCACR, moves the court to extend the time for filing a motion for rehearing by appellant by fifteen (15) days. In support of the motion, the appellant shows the following to the Court:

1. Due to Hurricane Matthew, appellant's counsel requires additional time to draft an adequate motion for rehearing and supporting memorandum.
2. Although the Court's decision was apparently received in counsel's office on the afternoon of Friday, September 30, 2016, counsel was out of the state and did not personally receive a copy of the decision until the following Monday, October 3, 2016, as the hurricane bore down on Beaufort County, causing delays and interruptions in counsel's travel plans to return to the state.
3. Prior to his return home, Counsel and his wife (as well as his staff) were subject to mandatory evacuation orders effective on October 5, 2016, for Beaufort County. Reentry to Beaufort County was prohibited until October 11, 2016, at the earliest. Much of Beaufort County remained inaccessible for several more days.

4. Members of counsel's staff were without electrical power and/or water, or both, until the end of the week of October 10, 2016, at the earliest. Counsel's office lacked electrical power until approximately October 12, 2016, and, because of the necessity of replacing technology equipment, lacked reliable internet service until approximately October 14, 2016.

5. Counsel's home, and the homes of members of counsel's staff, needed repairs, mud and water removal, and clean-up, which required substantial personal time and effort up to and including this past weekend, in some cases despite the lack of power, water, and other necessities.

6. Although Appellant's counsel has endeavored to complete Appellant's motion for rehearing in a timely fashion, the lack of basic resources has made doing so impossible. As a result, counsel seeks a fifteen (15) day extension to file and serve the motion.

7. Counsel does not believe that the requested extension will prejudice the Appellee.

WHEREFORE, the appellant, by counsel, respectfully submits that good cause exists for the Court to extend the time for filing the Appellant's motion for rehearing by fifteen (15) days, which, with the extension, would allow the Appellant through and including November 1, 2016, to file and serve the motion.

Respectfully Submitted,

PHILIP FAIRBANKS, ESQ., P.C.

Philip Fairbanks SC Bar # 1943

1214 King Street

Beaufort, South Carolina 29902

Telephone: (843) 521-1580

Telefax: (843) 521-1590

E-mail: chris@lowcountrybankruptcy.com

Beaufort, South Carolina

October 18, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Otha Delaney, ... Appellant,

v.

First Financial of Charleston, Inc., ... Respondent.

RECEIVED

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Appellate Case No. 2014-000824

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442

Submitted March 1, 2016 - Filed September 28, 2016

PROOF OF SERVICE

I certify that I have served the foregoing Motion for Extension of Time to File Motion for Rehearing on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2016, addressed to:

Stephen L. Brown, Esq.
Russell G. Hines, Esq.
Perry M. Buckner, IV, Esq.
YOUNG CLEMENT RIVERS, LLP
25 Calhoun St, Suite 400
Charleston, SC 29401

its attorneys of record.

PHILIP FAIRBANKS, ESQ., P.C.

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Telephone: (843) 521-1580
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Attorney for the Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appellate Case No. 2014-000824

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442
Submitted March 1, 2016 – Filed September 28, 2016

**MOTION FOR EXTENSION OF TIME
TO FILE MOTION FOR REHEARING**

The appellant, Otha Delaney, pursuant to Rule 263(b), SCACR, moves the court to extend the time for filing a motion for rehearing by appellant by fifteen (15) days. In support of the motion, the appellant shows the following to the Court:

1. Due to Hurricane Matthew, appellant's counsel requires additional time to draft an adequate motion for rehearing and supporting memorandum.
2. Although the Court's decision was apparently received in counsel's office on the afternoon of Friday, September 30, 2016, counsel was out of the state and did not personally receive a copy of the decision until the following Monday, October 3, 2016, as the hurricane bore down on Beaufort County, causing delays and interruptions in counsel's travel plans to return to the state.
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4. Members of counsel's staff were without electrical power and/or water, or both, until the end of the week of October 10, 2016, at the earliest. Counsel's office lacked electrical power until approximately October 12, 2016, and, because of the necessity of replacing technology equipment, lacked reliable internet service until approximately October 14, 2016.

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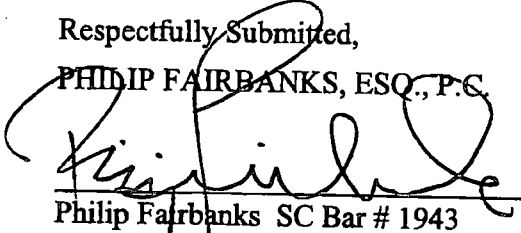
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7. Counsel does not believe that the requested extension will prejudice the Appellee.

WHEREFORE, the appellant, by counsel, respectfully submits that good cause exists for the Court to extend the time for filing the Appellant's motion for rehearing by fifteen (15) days, which, with the extension, would allow the Appellant through and including November 1, 2016, to file and serve the motion.

Respectfully Submitted,

PHILIP FAIRBANKS, ESQ., P.C.


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Beaufort, South Carolina

October 18, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Otha Delaney, ... Appellant,

v.

First Financial of Charleston, Inc., ... Respondent.

Appellate Case No. 2014-000824

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442
Submitted March 1, 2016 – Filed September 28, 2016

PROOF OF SERVICE

I certify that I have served the foregoing Motion for Extension of Time to File Motion for Rehearing on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2016, addressed to:

Stephen L. Brown, Esq.
Russell G. Hines, Esq.
Perry M. Buckner, IV, Esq.
YOUNG CLEMENT RIVERS, LLP
25 Calhoun St, Suite 400
Charleston, SC 29401

its attorneys of record.

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OCT 20 2016
SC Court of Appeals

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October 18, 2016

Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
OCT 20 2016
SC Court of Appeals

Re: *Otha Delaney v. First Financial of Charleston, Inc.*, App. Case No.: 2014-000824
Opinion No.: 5442 September 28, 2016

Dear Ms. Kitchings:

Enclosed for filing with the Court, please find the original and six copies of:

1. Appellant's Motion for Extension of Time to File Motion for Rehearing on behalf of Otha Delaney; and,
2. Proof of Service on counsel for First Financial of Charleston, Inc.,

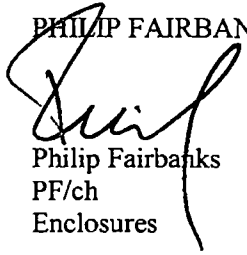
along with six (6) copies of each, in compliance with Rules 224 and 263 of the S.C. Appellate Court Rules. Also enclosed is my law firm's check for the filing fee in the amount of \$25.00.

I would be grateful for your acknowledgement of receipt by your office of these documents, either by mail or e-mail, at the addresses provided above.

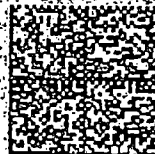
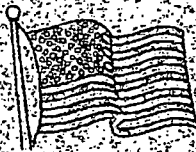
With warm regards, I am,

Sincerely,

PHILIP FAIRBANKS, ESQ., P.C.


Philip Fairbanks
PF/ch
Enclosures

FIRM



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Jenny Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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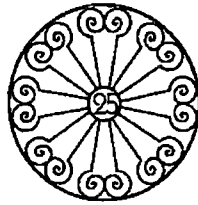
OCT 20 2016

SC Court of Appeals

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YCR LAW
Young Clement Rivers, LLP

Russell G. Hines
Partner

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Direct Fax: (843) 579-1327
E-mail: RHines@ycrlaw.com

October 28, 2016

VIA U.S. MAIL & FACSIMILE

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Otha Delaney v. First Financial of Charleston, Inc.
Appellate Case No.: 2014-000824
Trial Court Case No.: 2011-CP-10-7166
YCR File No.: 14768-20110934

Dear Ms. Kitchings:

Our law firm represents Respondent First Financial of Charleston, Inc., in the above-referenced matter, which the Court decided by opinion filed September 28, 2016, affirming the trial court's dismissal of Appellant's suit against Respondent. We are in receipt of Appellant's Motion for Extension of Time to File Motion for Rehearing (the "Motion"), dated October 18, 2016, which, it appears, the Court received on October 20, 2016;¹ however, because the Court remitted the case to the trial court on October 19, 2016, it is our understanding that this appeal has been finally disposed of, there is no longer appellate jurisdiction over the matter, and the Motion cannot be heard. Wise v. S.C. Dep't of Corrections, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court.") (internal citations omitted). To the extent that our understanding is incorrect and this Matter can be heard, please let us know, and Respondent will submit a formal return to the Motion; moreover, in light of Respondent's obvious interest in the conclusion of this matter in its favor, we are compelled to make clear that Respondent does not consent to the Motion or to recall of the remittitur and reserves all rights in furtherance of its position that this matter has been concluded with finality.

¹ The deadline for the Court to have received a petition for rehearing was Monday, October 17, 2016. See Opinion No. 5442 (filed September 28, 2016); Rule 221(a) and (b), SCACR; Rule 263(a) and (b), SCACR; S.C. Sup. Ct. Order No. 2016-10-10-01 ("Re: Hurricane Matthew").

VIA U.S. MAIL & FACSIMILE
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
October 28, 2016
Page 2 of 2

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP



Russell G. Hines
Partner

RGH/kbb

cc: Graham E. Hawkins, III, Esquire (via U.S. Mail and email)
Philip L. Fairbanks, Esquire (via U.S. Mail and email)

The South Carolina Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2011CP0707166

ORDER

This Court's remittitur was sent to the Clerk of Charleston County on October 19, 2016. It is now necessary for this Court to recall the remittitur. The Clerk of Charleston County is directed to return the remittitur to the Clerk of the South Carolina Court of Appeals within ten days of the date of this order.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire
Julie J. Armstrong

FILED

Nov. 2, 2016 AS

The South Carolina Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

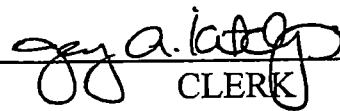
The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2011CP0707166

ORDER

The time for serving and filing the appellant's petition for rehearing is hereby extended until November 18, 2016, the date on which the petition for rehearing must be received by the Court.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire

FILED

11/3/16 As



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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FAX: (803) 734-1839
www.sccourts.org

October 19, 2016

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Otha Delaney v. First Financial ¹⁰
Lower Court Case No. 2011CP0707166
Appellate Case No. 2014-000824

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire

FILED
2016 OCT 21 AM 11:54
JULIE J. ARMSTRONG
CLERK OF COURT

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2/18/16
on 11/8/16

2011-CP-10-7166

ELECTRONICALLY FILED - 2021 Jul 21 2:02 AM - CHARLESTON - COMMON PLEAS - CASE#2011CP1007166

The South Carolina Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2011CP0707166

RECEIVED

NOV 14 2016

SC Court of Appeals

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CLERK OF COURT

ORDER

This Court's remittitur was sent to the Clerk of Charleston County on October 19, 2016. It is now necessary for this Court to recall the remittitur. The Clerk of Charleston County is directed to return the remittitur to the Clerk of the South Carolina Court of Appeals within ten days of the date of this order.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:
Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire
Julie J. Armstrong

FILED

Nov. 2, 2016 AS

2011-CP-10-7166

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 14 2016

SC Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442

Submitted March 1, 2016 – Filed September 28, 2016

AFFIRMED

Philip L. Fairbanks, of Beaufort, for Appellant.

Stephen L. Brown, Russell G. Hines, and Perry M.
Buckner, IV, all of Young Clement Rivers, of
Charleston, for Respondent.

SHORT, J.: Otha Delaney appeals the trial court's grant of First Financial of Charleston, Inc.'s motion to dismiss his class action complaint for damages and equitable relief under the Uniform Commercial Code (UCC), alleging the court erred in (1) dismissing the complaint as time-barred by applying the incorrect

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JULIE J. ARMSTRONG
CLERK OF COURT

statute of limitations,¹ and (2) determining the date the statute of limitations began to run. We affirm.

On October 12, 2007, Delaney entered into a Retail Installment Contract (the Contract) to purchase a truck from Coliseum Motors. The Contract was assigned to First Financial, making it a secured party under the UCC. After Delaney failed to make payments, First Financial repossessed the vehicle. On May 2, 2008, First Financial sent Delaney a "Notice of Private Sale of Collateral" (notice of sale) advising Delaney of its intention to sell the vehicle. On December 15, 2008, First Financial sold the vehicle.

On October 4, 2011, Delaney, as a putative member of a class, filed this class action, alleging (1) the notice of sale was insufficient under the UCC, and (2) he was entitled to relief under section 36-9-625 of the South Carolina Code (2003) (providing remedies for a secured party's failure to comply with the UCC). Delaney sought recovery on behalf of the class members.

First Financial moved to dismiss, arguing Delaney's claim was barred under the one-year statute of limitations applicable for statutory penalties set forth in South Carolina Code § 15-3-570 (2005) (providing a one-year statute of limitations for actions based on a statute for a penalty). Delaney filed a response to the motion to dismiss, arguing the claim was not a statutory penalty, but it was a remedial claim for damages under section 36-9-625. Delaney argued that because the claim is remedial, the UCC's six-year statute of limitations in section 36-2-725(1) (2003) of the South Carolina Code governing breaches of contract for the sale of goods applied. In the alternative, Delaney argued if the recovery is a penalty rather than a compensable remedy, the action is governed by the three-year statute of limitations provided in South Carolina Code section 15-3-540(2) (2005) (applying to "[a]n 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").

At a hearing on its motion to dismiss, First Financial argued the action was for a penalty because no contract was alleged to have been breached; there was no plea for compensatory damages; the complaint did not allege a tort; and the plea for

¹ We combine Delaney's second and third issues and address them as the first issue.

relief consisted of the finance charge and ten percent of the principal amount under the Contract. According to First Financial, such a plea was governed by the one-year statute of limitations provided for in section 15-3-570, which would be triggered by the "commission of the offense." First Financial also argued Delaney's claim was time-barred under the three-year statute of limitations, which was triggered by the issuance of the notice of sale.

Delaney argued neither the one-year nor the three-year statute of limitations applied, and even if the three-year statute of limitations in section 15-3-540(2) applied, the time had not expired at the time of the filing because the statute would have been triggered "not when the letter [was] received[, but] . . . only when the collateral was disposed of." Delaney maintained that setting minimum statutory damages of ten percent of the contract plus finance charges ensures compliance by creditors and "that[,] in and of itself doesn't turn it into a penalty because it is clearly a substitute for actual damages."

In an order filed April 30, 2013, the trial court granted the motion to dismiss. The court found Delaney's sole cause of action was a statutory penalty because it requested the finance charge and ten percent of the principal amount of the obligation, which is the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2). Noting the Official Comment 4 to section 36-9-625(c)(2), which provides the specific relief is to be awarded "regardless of any injury that may have resulted[.]" the court found "this fixed formula is not remedial in nature but rather serves the purpose of imposing automatic liability for 'every noncompliance.'" The trial court noted our supreme court has interpreted the same provision as a statutory penalty in several cases, and it further noted other courts have similarly classified the statutory award based on the uniform UCC model statute, upon which South Carolina based its code.

The court next rejected Delaney's argument that section 36-2-725(1) applied, which provides a six-year limitations period for a breach of contract for the sale of goods under the UCC. The court noted Delaney did not plead breach of contract; thus, section 36-2-725(1) did not apply. The court found the case concerned the sufficiency of notice prior to the disposition of collateral; thus, the case dealt "entirely with Article 9's provisions concerning secured transactions. Article 2's provisions pertaining to the sale of goods [were] wholly irrelevant." The court also found general rules of statutory construction prevented the application of the six-year limitations period. The court found the "controlling limitations period should be either S.C. Code Ann. § 15-3-570 or § 15-3-540(2), respectively one or three

years." The court noted general rules of statutory construction require a specific statute to prevail over a more general statute, and because Delaney's desired recovery was a statutory penalty, sections 15-3-570 and 15-3-540(2) spoke "more directly to the actual allegations in this lawsuit."

Finally, the court found Delaney's complaint was time-barred under either section 15-3-570 or 15-3-540(2). The court found "[w]hile either statute might be reasonably applied to this matter, the Court need not decide this inquiry as [Delaney's] cause of action accrued upon receipt of the alleged noncompliant Notice of Sale and either statute would therefore serve as a bar to . . . recovery." As to section 15-3-570,² the statute specifically states the commission of the offense serves as the date of accrual. The court found the statute began to run in May 2008 and expired in May 2009.

As to section 15-3-540(2),³ the court noted the statute did not specifically delineate a date of accrual, and it found "the alleged commission of the offense should similarly serve as the commencement of the three year statute of limitations." The court continued,

Unlike an action for actual or compensatory damages, [Delaney's] action for a penalty focuses on a specific act of non-compliance . . . 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 [Delaney] either knew or should have known that a violation had occurred.

² "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. § 15-3-570 (2005).

³ "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." S.C. Code Ann. § 15-3-540(2).

Furthermore, I find that the legislature intended [§§] 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 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).

The court granted First Financial's motion to dismiss. After a hearing, the court denied Delaney's motion for reconsideration. This appeal followed.

ISSUES

- I. Did the trial court err in applying the statute of limitations?
- II. Did the trial court err in finding the action accrued at the time the notice of sale was received rather than at the time First Financial disposed of the collateral?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The appellate court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and reasonably deducible inferences in the complaint would entitle the plaintiff to relief on any theory of the case. *Id.* The court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

LAW/ANALYSIS

- I. Applicable Statutes of Limitations

Delaney argues the trial court erred in finding the six-year statute of limitations in section 36-2-725 did not apply and in finding Delaney's action barred by either the limitations period provided by section 15-3-540(2) or by section 15-3-570. We disagree.

In this case, Delaney alleged he was entitled to the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2) due to First Financial's insufficient notice of sale. Section 36-9-625, found in Article 9 of the UCC, establishes remedies for a secured party's failure to comply with Article 9, providing the following:

(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.

* * *

[c](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.

S.C. Code Ann. § 36-9-625 (2003). "Article 9 of the U.C.C. does not now nor has it ever included a statute of limitations." Richard H. Nowka, *The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks-Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*, 7 Fla. St. U. Bus. Rev. 1, 2 n.4 (2008). Thus, Delaney argues the statute of limitations in Article 2 of the UCC, section 36-2-725(1) applies, providing six years. We disagree.

First, Delaney did not allege a breach of contract. Rather, Delaney alleged the violation of the notice of sale requirements, and his prayer for relief requested the statutory penalty of the finance charge and ten percent of the principal amount of the obligation under section 36-9-625(c)(2). Thus, section 36-2-725(1) did not apply because it 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." S.C.

Code Ann. § 36-2-725(1) (2003). Because Delaney did not allege a breach of contract, we agree section 36-2-725(1) did not apply. Instead, we look to Title 15 governing civil remedies.

Sections 15-3-540 and -570 provide statutes of limitations for actions upon statutes for a penalty. See S.C. Code Ann. § 15-3-540(2) (2005) (providing a three-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture"); S.C. Code Ann. § 15-3-570 (2005) (establishing a one-year statute of limitations for "[a]n 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"). Like the trial court, we find the controlling limitations period is either section 15-3-570 or section 15-3-540(2), respectively one or three years, because Delaney sought a statutory penalty.

"As a general principle, the legislature has the authority to provide civil penalties to enforce observance of a legislative policy." *S.C. Dep't of Health & Envtl. Control v. Kennedy*, 289 S.C. 73, 76, 344 S.E.2d 859, 861 (Ct. App. 1986). A statutory penalty is defined as a penalty "an individual is allowed to recover against a wrongdoer as satisfaction for wrong or injury suffered, without reference to actual damage sustained." *Black's Law Dictionary* 1412 (6th ed. 1990). Although not addressing the statute of limitations issue, at least three South Carolina Supreme Court cases have identified the "damages" in section 36-9-625(c)(2) as a statutory penalty.

Citing the former version of section 36-9-625(c)(2), the supreme court in *Crane v. Citicorp National Services, Inc.*, 313 S.C. 70, 72, 437 S.E.2d 50, 51-52 (1993) (superseded by statute on other grounds), addressed whether co-obligors, who did not have title or right to possession of a mobile home, could recover under the penalty provision of the UCC for the creditor's failure to comply with the notice requirements. The court found the Cranes were entitled to notice. *Id.* at 74, 437 S.E.2d at 53. The court continued as follows:

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.

Id. at 74-75, 437 S.E.2d at 53.

In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 375, 534 S.E.2d 688, 690 (2000), Brockbank sued Best Capital Corp. after the repossession and sale of his mobile home, alleging, among other things, a violation of Article 9's notice provision. Best Capital admitted it had not sent notice of the sale, but it argued Article 9 did not apply to the parties' agreement because there was not a security interest. *Id.* at 377, 534 S.E.2d at 691. The court found notice was required, and stated "[i]f a secured party fails to give the required notice, a debtor may seek to recover the statutory penalty under Article 9." *Id.* at 385, 534 S.E.2d at 695 (noting the former version of section 36-9-625(c)(2), section 36-9-507(1), which embodies nearly identical language as the current version); *id.* at 384, 534 S.E.2d at 694 (concluding "the outcome in this case is largely dictated by *Crane*").

More recently, in *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 373, 595 S.E.2d 461, 463 (2004), Mr. and Mrs. Singleton filed an action based in part on the UCC, claiming Stokes Motors, Inc. failed to notify them of its intent to sell the Singletons' repossessed vehicle. Citing the former version of section 36-9-625(c)(2), the court in *Singleton* referred to the statute's "penalty" provision in finding both Singletons were entitled to recover because both were entitled to notice. *Id.* at 378, 595 S.E.2d at 466.⁴

We find no merit to Delaney's argument that our supreme court's references to the statutory penalty in these cases is the result of "loose language" and "unconsidered dictum (sic)" and the court interchangeably used the terms "compensatory damages" and "penalty" in its opinions. Based on the definition of a penalty and the cases referring to the mandatory, pre-determined amount of "damages" for failure to comply with the notice of sale requirements, we find the remedy Delaney sought in section 36-9-625(c)(2) was a penalty, and either section 15-3-570 or section 15-3-540(2) applied.

⁴ The court noted that under the revision of 2001, a secured party's liability under section 36-9-625(c)(2) is limited to one penalty "with respect to any one secured transaction." *Id.*

First Financial sent the notice of sale on May 2, 2008, and sold the vehicle on December 15, 2008. Delaney filed this action in October 2011. Under section 15-3-570, providing a one-year statute of limitations, Delaney's action is clearly barred. Under section 15-3-540(2), providing a three-year statute of limitations, whether the action is barred depends on when the action accrued.

II. Date of Accrual

Delaney argues the trial court erred in finding the cause of action accrued when the notice of sale was received rather than on the date of the sale of the collateral. We disagree.

Under the three-year statute of limitations, Delaney's complaint was untimely filed unless the accrual date is the date First Financial sold the vehicle rather than the date of the notice of sale. However, like the trial court, we need not decide whether section 15-3-570 or section 15-3-540(2) applied because we find the accrual date is the date the notice of sale was received, and Delaney failed to timely serve and file his complaint under either statute of limitations.

As to section 15-3-570, the statute specifically provides the action "must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005). The offense alleged in this case is insufficient notice of sale. As noted by the trial court, "this date . . . coincide[s] with the date on which [Delaney] either knew or should have known that a violation had occurred."

Regarding section 15-3-540(2), the statute is silent as to a date of accrual. To interpret this section for the present case, we must apply the rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # JM2UF1132N0294812)*, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Corbin v. Carlin*, 366 S.C. 187, 193, 620 S.E.2d 745, 749 (Ct. App.

2005) (quoting *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)).

Delaney's complaint alleges violations of the notice required prior to the disposition of goods in a consumer goods transaction. See S.C. Code Ann. § 36-9-611(b) (2003) (requiring notification prior to disposition of collateral); S.C. Code Ann. § 36-9-614 (2003) (providing specific requirements for a notification). His right to recovery for a violation of the required notice arises under section 36-9-625(c)(2). The cause of action depends on a specific act of non-compliance by the creditor. Even under the discovery rule, the date of the notice of sale would be the date of discovery of the cause of action for a failure to comply with the UCC regarding the notice. We find the legislature did not intend to impose a different date for the statute of limitation to accrue. See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

The dissent maintains section 15-3-540(2)'s three-year statute of limitations did not begin to run until First Financial disposed of the collateral in December 2008 because a secured party must provide reasonable notice of sale only if it disposes of the collateral. According to the dissent, "the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral." Further, the dissent maintains if the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b), and if a secured party sends unreasonable notice to a debtor but subsequently fails to dispose of the collateral, it has not failed to comply with section 36-9-611(b). In support of its position that a secured party must provide reasonable notice only if it disposes of the collateral, the dissent cites Official Comment eight to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." We respectfully disagree with the dissent's interpretation of section 36-9-611(b) and determination of the date the three-year statute of limitations began to run.

We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral. Initially, we note section 36-9-625 provides several remedies for noncompliance with the notice requirement. Among them, the statute provides, "[i]f it is established that a secured party is not proceeding in accordance with this

chapter, a court may order or restrain . . . disposition of collateral on appropriate terms and conditions." §36-9-625(a). It is clear a party must be able to state a cause of action in order to request a court restrain disposition of the collateral. Therefore, if Delaney could have asked a court to restrain disposition of his collateral, his cause of action must have arisen upon his receipt of the noncompliant notice. *See Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000) ("Statutes should be construed in light of their intended purposes, and in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.").

Further, we believe the Official Comments to section 36-9-611 and 36-9-625(c)(2) supports our conclusions. First, Comment two to section 36-9-611 provides, "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." (emphasis added). Comment two does not state that the secured party must actually dispose of the collateral to be required to send reasonable notification; it simply requires that the secured party "wish" to dispose of the collateral. Based on our reading of Comments two and eight to section 36-9-611, we believe after the secured party gives notice, the secured party can elect not to dispose of the property; however, if the secured party initially wishes to dispose of the property, the secured party must provide appropriate notice. Therefore, we do not believe that disposition of the collateral is a prerequisite to being penalized for failing to give reasonable notice.

In addition, Official Comment four to the penalty provision, section 36-9-625(c)(2), states the penalty "is designed to ensure that every noncompliance with the requirements of Part 6 [§§ 36-9-601 to -629 (2003 & Supp. 2015)] in a consumer-goods transaction results in liability, regardless of any injury that may have resulted." Because an injury is not required for a secured party to be liable for failing to comply with the notice requirement, the statute of limitations can begin to run before the secured party injures the debtor by disposing of the collateral in a commercially unreasonable manner.

Accordingly, we believe section 15-3-540(2)'s three-year statute of limitations began to run in May 2008 when Respondent received the notice of sale from First Financial. *See generally Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 744 (8th Cir. 2012) ("[W]e agree that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.");

Erdmann v. Rants, 442 N.W.2d 441, 444 (N.D. 1989) (explaining the penalty available for failure to comply with the notice of sale requirements exists regardless of whether a commercially reasonable sale is held and regardless of whether the debtor sustained a loss).

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.⁵

LOCKEMY, C.J., concurs.

THOMAS, J., concurring in part, dissenting in part: I concur with the majority's conclusion that the statute of limitations found in section 36-2-725(1) of the South Carolina Code (2003) does not apply to Appellant's claims. However, I respectfully dissent and would reverse because a three-year statute of limitations applies to Appellant's claims and Appellant filed this action within three years of the date Respondent disposed of the collateral, which, I believe, is when the statute of limitations began to run.

Under section 15-3-540(2), the statute of limitations is three years for "[a]n 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." By its plain language, this section's three-year statute of limitations applies to actions seeking recovery of a statutory penalty when only the aggrieved party can bring the action for the penalty.

In this case, Appellant brought his action to recover the statutory penalty found in section 36-9-625(c)(2) of the South Carolina Code (2003). This section allows only the "debtor or a secondary obligor at the time a secured party failed to comply" to recover the statutory penalty. Thus, Appellant was the only person who could have brought an action to recover the statutory penalty because he was the debtor at the time Respondent allegedly failed to provide reasonable notice of disposition of the collateral. Because Appellant, as the aggrieved party, was the only person who could have brought the action, section 15-3-540(2) provided the

⁵ We decide this case without oral argument pursuant to Rule 215, SCACR.

applicable statute of limitations. Accordingly, the statute of limitations for Appellant's action was three years.

Finding the applicable statute of limitations was three years, we must next consider when the statute began to run. I respectfully disagree with the majority's finding that the statute of limitations began to run when Respondent sent the allegedly unreasonable notice in May 2008.

Section 36-9-625(c)(2) provides "a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover" a statutory penalty for the failure to comply. The debtor can recover this penalty only if the secured party fails to comply. Under section 36-9-611(b) of the South Carolina Code (2003), "a secured party that disposes of collateral under [s]ection 36-9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition." Appellant's claim is that Respondent failed to comply with the notice requirement and, thus, Appellant is entitled to recover the statutory penalty found in section 36-9-625(c)(2) because of that failure to comply.

In my view, based on the plain language of section 36-9-611(b), the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral. Section 36-9-611(b) requires "a secured party *that disposes of collateral*" to provide reasonable notice. (emphasis added). Based on this plain language, a secured party must provide reasonable notice only if it disposes of the collateral. If the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b). Thus, if a secured party sends an unreasonable notice to a debtor but subsequently fails, for whatever reason, to dispose of the collateral, it has not failed to comply with section 36-9-611(b). And the debtor who receives an unreasonable notice cannot bring an action to recover the statutory penalty if the secured party never disposed of the collateral because the statutory penalty is authorized only if the secured party failed to comply with section 36-9-611(b). As noted above, the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

This conclusion is supported by the official comments to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." Thus, this comment contemplates that a secured party may send a revised notification in order to comply with the notice

requirement in section 36-9-611(b). If a secured party sent an unreasonable notice to a debtor and subsequently, but prior to disposition, sent a reasonable second notice, the secured party would be in compliance with section 36-9-611, and the debtor would not have an action to recover the statutory penalty based on a failure to comply. Additionally, comment eight contemplates that a secured party may send a notification and later decide not to dispose of the collateral in which case the secured party would not have failed to comply with section 36-9-611(b), and the debtor could not recover the statutory penalty under section 36-9-625(c)(2).

This conclusion is further supported by examination of the purpose underlying the notice requirement, which is, in part, to allow the debtor to see that the sale is conducted in a commercially reasonable manner. *See Brockbank v. Best Capital Corp.*, 341 S.C. 372, 384, 534 S.E.2d 688, 695 (2000) ("The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner."). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, the purpose of the notice requirement is accomplished because the debtor received a reasonable notice and can see the sale is conducted in a commercially reasonable manner. Therefore, the purpose underlying the notice requirement supports the conclusion that the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

Furthermore, this conclusion is supported by examination of the purpose underlying the statutory penalty. The penalty is necessary to motivate secured parties to comply with the code's provisions. *See id.* at 385, 534 S.E.2d at 695 ("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 [c]ode's provisions." (brackets removed)). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, imposing the statutory penalty based on the initial unreasonable notice would not serve the penalty's purpose because the secured party would have ultimately complied with the notice requirement.

The majority contends Appellant's cause of action "must have arisen upon his receipt" of the unreasonable notice because section 36-9-625(a) allows a party to request the circuit court to restrain disposition of the collateral, presumably through an injunction, if the "secured party is not proceeding in accordance with this chapter." Because section 36-9-625(c)(2) is a statutory penalty, it is available

only in the specific circumstances prescribed by the statute. *See State ex rel. Callison v. Nat'l Linen Serv. Corp.*, 225 S.C. 232, 234, 81 S.E.2d 342, 343 (1954) ("The prime rule requires strict construction of a statutory provision which would work a forfeiture or inflict a penalty."); *King v. Atl. Coast Line R.R. Co.*, 86 S.C. 510, 513, 68 S.E. 769, 770 (1910) (noting a statutory penalty "is the creature of the statute, and comes into existence when all statutory conditions exist, and not otherwise"). As discussed above, the penalty in section 36-9-625(c)(2) is available only when a secured party fails to comply. Alternatively, the statute providing for the possibility of an injunction does not require a failure to comply; rather an injunction is available at any time a secured party is not proceeding in accordance with Article Nine. Because the legislature used different language in sections 36-9-625(a) and 36-9-625(c)(2) to express when each remedy is available to a debtor, we must assume the legislature intended to draw a distinction between the two remedies. *See Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

Thus, the monetary penalty in section 36-9-625(c)(2) and the injunction in section 36-9-625(a) have different thresholds for applicability, and they are not necessarily available to a debtor at the same time. As a result, even if we assume, due to the possibility of an injunction, a cause of action or right arises when a secured party sends an unreasonable notice, such an assumption does not lead automatically to the conclusion, as found by the majority, that the monetary penalty is also available when a secured party sends an unreasonable notice.

Accordingly, I would find a debtor does not have a cause of action to recover the statutory penalty based on a secured party failing to provide reasonable notice as required by section 36-9-611(b) until the secured party disposes of the collateral. As a result, the statute of limitations would not begin to run until the secured party disposes of the collateral. *See Walsh v. Woods*, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("In analyzing a limitations defense, the 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. Thus, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it." (citations and internal quotation marks omitted) (brackets removed)).

Here, Respondent could not have failed to comply with section 36-9-611(b) until it disposed of the collateral without providing reasonable notice, and Appellant could not have brought an action to recover the statutory penalty based on a failure to comply until Respondent disposed of the collateral. Thus, the statute of limitations

began to run in December 2008 when Respondent disposed of the collateral. Appellant filed this action in October 2011, which was within the applicable three-year statute of limitations, and I would find the circuit court erred by dismissing Appellant's complaint.

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**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

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SC Court of Appeals

Otha Delaney, Appellant

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

**Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge**

APPELLANT'S PETITION FOR REHEARING

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November 18, 2016

PETITION FOR REHEARING

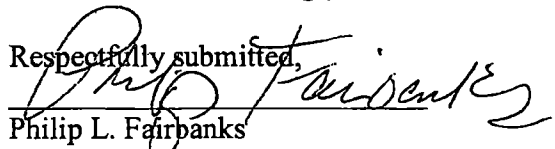
Pursuant to Rule 221, SCACR, and this Court's Order of November 3, 2016,¹ Appellant Otha Delaney ("Delaney") hereby Petitions this Court for Rehearing and modification of its Opinion No. 5442, dated September 18, 2016.

In support of this Petition Delaney respectfully submits that this Court erroneously construed or misapplied controlling provisions of law in one or more of the following respects and submits the following points and authorities:

1. This Court overlooked a cardinal rule of statutory construction that unambiguous words of limitation or restriction found within a statutory cause of action must be given their plain and ordinary meaning.
2. The Court of Appeals' construction of § 9-611(b) leads to an "absurd result" that is not supported by any controlling authority.
3. The Court overlooked controlling authority that a civil "penalty" must be strictly and narrowly construed against the penalized party.

WHEREFORE, for these reasons and other reasons more fully set forth in Appellant Otha Delaney's prior briefings, Appellant submits his Petition for Rehearing and requests this Court to modify its Opinion of September 18, 2016, accordingly.

Respectfully submitted,


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November 18, 2016

¹ This Order granted Appellant Delaney permission to file his Petition for Rehearing no later than November 18, 2016.

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Otha Delaney, Appellant

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

**Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge**

**APPELLANT'S MEMORANDUM IN SUPPORT
OF PETITION FOR REHEARING**

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November 18, 2016

APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

1. This Court overlooked a cardinal rule of statutory construction that *unambiguous words of limitation or restriction found within a statutory cause of action must be given their plain and ordinary meaning.*

The issue in this appeal is what is the appropriate accrual event for Appellant Otha Delaney's ("Delaney's") single cause of action under the Uniform Commercial Code, § 36-9-611(b), SC Code Ann. (2003), "Notification before disposition of collateral," ("9-611(b)"). As this Court correctly noted, Slip op. at 10, Delaney has alleged that the secured party, First Financial of Charleston, Inc. ("First Financial"), violated § 9-611(b) which provides:

[A] *secured party that disposes of collateral* under Section 36-9-610¹ shall send to the persons specified in subsection (a) [i.e., 'the debtor' and 'any secondary obligor'] reasonable authenticated notification of disposition.

§ 36-9-611(b) (emphasis added.)

Delaney submits that a statutory cause of action accrues for statute of limitations purposes only when the plaintiff has a "complete and present" cause of action:

The most helpful canon in this context is 'the standard rule' for limitations periods... Ordinarily, a 'limitations period commences *when the plaintiff has a complete and present cause of action.*'... "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can obtain relief... Although the standard rule can be displaced such that the limitations period begins to run *before* the plaintiff can file suit, we "will not infer such an *odd result* in the absence of any such indication" in the text of the limitations period.

Green v. Brennan, __ U.S. __, 136 S.Ct. 1769, 1776 (2016) (internal citations omitted) (emphasis added); *Stephens v. Draffin*, 488 S.E.2d 307, 309 (SC 1997) (Cause of action accrues at the moment when a plaintiff has a legal right to sue on it, and the law presumes nominal damages at that point such that substantial damages did not occur until later is immaterial to determining

¹ Section 36-9-610(a) provides: "After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral[.]"

when action accrued or arose.); *Walsh v. Woods*, 594 S.E.2d 548, 551 (SC App. 2004) (“In analyzing a limitations defense, the fundamental test for determining when a cause of action has accrued is whether the party asserting the claim can maintain a legal action to enforce it. Thus a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it.”)

Determining when a statutory cause of action is “complete and present” – such that a plaintiff may obtain relief and the limitations period begins to run against him – starts with an examination of the plain wording of the statute at issue. *Gay v. Arial*, 673 S.E.2d 418, 420 (SC 2010) (Where a statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.)

Here, the cause of action provides that “a secured party *that disposes of collateral* in [a commercially reasonable disposition] shall send [to the ‘debtor’ and any ‘secondary obligor’] reasonable authenticated notification of disposition.” (emphasis added.) Delaney’s statutory cause of action thus incorporate three separate components or elements: (1) it establishes the exact duty that is being imposed (to send “a reasonable notification of disposition”); (2) it establishes upon whom that duty is imposed (upon a “secured party *that disposes of collateral*”); and, (3) it establishes to whom the duty is owed (to any “debtor” or “secondary obligor.”) Simply put, a secured party that does *not* dispose of collateral has no obligation to any “debtor” or “secondary obligor” with respect to notification under § 9-611(b) – as the phrase “*that disposes of collateral*” is an express restriction or limitation upon the universe of all secured parties who have taken possession of collateral following the debtor’s default.

Conversely, the legislature could have used words of inclusion if it had meant to include within § 9-611(b)’s statutory obligations a secured party that merely “*plans* to dispose of

collateral” or “that *intends* to dispose of collateral.” The use of the present tense (“a secured party that *disposes* of collateral shall send reasonable notification”) – and not the use of the conditional (such as, “any secured party that *may* dispose of collateral shall send reasonable notification”) – is also clear in its meaning and conforms to this interpretation. Finally, this interpretation is the only one consistent with the statutory caption, *i.e.*, “Notification before *disposition*,” not “Notification before *intended disposition*.”

Because the duty to send reasonable notification is expressly limited to those secured parties “that dispose[] of collateral,” the “disposition” is an essential element of the cause of action at hand, and there can be no violation of § 9-611(b) upon which the limitations period begins to run until and unless a “disposition” takes place.² *Berkebile v. Outen*, 426 S.E.2d 760 (SC 1993) (Where statutory language is clear and unambiguous, it must be limited to its terms and applied according to its literal meaning.) As in the statute at issue in *Green v. Brennan*, *supra*, there is no indication that the legislature intended such an “odd result” for a cause of action under § 9-611(b) to accrue, and to run *against* the consumer debtor, before he has a “complete and present” cause of action.

Delaney submits that the Court overlooked controlling authority providing that only when a statute’s language is ambiguous is the court permitted to construe the statutory text. *Town of Mt. Pleasant v. Roberts*, 713 S.E.2d 278, 283 (SC 2011), citing *Lester v. S.C. Workers’ Comp. Comm’n.*, 514 S.E.2d 751, 752 (SC 1999). Moreover, to the extent he is wrong and § 9-611(b) is indeed ambiguous, it is well settled that any ambiguity should be resolved in favor of a just, equitable and beneficial operation of the law. *Bennett v. Sullivan’s Island Bd. of Adjustment*, 438 S.E.2 273, 274 (SC App. 1993). Therefore, even if it were appropriate to construe § 9-611(b) on

² This is not to say there can be no violation with respect to a secured party that fails or refuses to conduct a timely disposition of repossessed collateral, as § 36-9-610 requires that all aspects of the disposition shall be commercially reasonable.

grounds of ambiguity, it must be construed “in favor of” and not *against* the consumer debtor, the express beneficiary of the statutory notification requirement, so that the clock does not start running against him before he loses his collateral to a disposition.

2. The Court of Appeals’ construction of § 9-611(b) leads to an “absurd result” that is not supported by any controlling authority.

A goal of any court in construing an ambiguous statute is “to prevent an interpretation that would lead to a result that is plainly absurd.” *Florence County v. Moore*, 545 S.E.2d 507, 510 (SC 2001). Here, the Court effectively ruled that a violation under § 9-611 is “complete and present” at the time of the notification. (“We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral.”) (Slip op. at 10). Because the statute of limitations will run from the time of notification under this ruling, it follows that the consumer debtor may sue for a § 9-611(b) violation at the time of notification – regardless of whether a disposition ever occurs.

There are any number of reasons an intended, noticed disposition might never occur. There are also several reasons that a debtor may allege the notification is not “reasonable” under § 9-611(b). The comments instruct that a notification must be reasonable as to its timeliness and its contents. Cmt. 2, Official Comments to UCC § 9-611. Section 9-612 provides that whether a notification is timely is a question of fact. Therefore, under the Court’s ruling, for example, a jury could find that a debtor who was sent a notification a day or so before the sale was not sent “reasonable notice” under § 9-611(b) due to the shortened redemption period, *and* this finding would require the imposition of mandatory statutory damages under § 36-9-625(c)(2), even if the debtor is able to redeem prior to sale despite the shortened redemption period.

Another scenario would arise when the debtor redeems by paying off the contract balance prior to sale after being sent a notification that is not “reasonable” due to its insufficient contents. He may nevertheless redeem the collateral after receipt of that notification *and* still collect his statutory damages, if his cause of action is determined to be “complete and present” at the time of the notification. Similarly, the intended disposition may never occur under a more common scenario – when the parties voluntarily enter into a cure arrangement whereby the debtor cures his default prior to sale by paying less than the contractual balance, his collateral is returned, and the payment terms of the contract are continued. Again, under the Court’s reasoning that a § 9-611(b) violation is fully actionable at the time of the notification, this debtor may cure his default by agreement *and* he would still be able to recover full statutory damages for the secured party’s purported violation of § 9-611(b), if the notification contents are subsequently determined not be “reasonable.” Finally, the same result would be reached if the secured party sent a non-reasonable notification, but subsequently sent a second or revised, reasonable notification. Under the Court’s ruling that the statutory violation was complete and present at the time of the first notification, he could recover statutory damages even when any resulting disposition was conducted in conformity with the second, compliant notice.³

The result is that this Court has greatly expanded the secured party’s exposure under § 9-611(b) to many common scenarios where it is *neither* a secured party “that disposes of collateral,” nor where it has disposed of collateral following a noncompliant first notification. Moreover, in all of the former scenarios the notification’s purpose was fully met – timely

³ This result would be directly contrary to Comment 8 of the Official Comments to UCC § 9-611, which specifically permits the secured party to send a second “revised notification” and by doing so to escape liability: “Nor does this Article prevent a secured party from electing to send a revised notification if its plan for disposition changes. 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.” Cmt. 8, Official Comment to UCC § 9-611 (emphasis added.)

redemption of the collateral by the debtor and prevention of an unwanted foreclosure sale of his collateral. Under the latter scenario, the disposition has occurred, but only after the debtor has received the exact notification by way of a corrected notice that he was statutorily entitled to receive. By expanding the statutory cause of action in this way, the Court's interpretation requires a result that is not only divorced from the express, statutory limiting language, it requires one that is divorced from its recognized purpose as well. *Brockbank v. Best Capital*, 534 S.E.2d 688, 695 (SC 2000) ("The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral[.]") *South Carolina Ins. Reserve Fund v. East Richland County Public Service Dist.* 789 S.E.2d 63, 67-68 (SC Ct. App. 2016) (Courts will generally "reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intent.")

In *Vasquez v. Karjanis & Sons Motors, LLC.*, 2012 WL 6965392 at *1 (Conn. Sup. Ct. Dec. 21 2012), the secured party failed to send a UCC notification to the consumer debtor after repossession, and the debtor sued the secured party for statutory damages under UCC § 9-625(c)(2). However, the collateral was never disposed of and was in the secured party's possession at the time the complaint was heard. A question arose whether the debtor had any cause of action under UCC § 9-611 when the collateral had not been sold. *Vasquez* at * 3. The court noted that the notification provision of UCC "must be read in the context of § 42a-9-611 of the UCC, which sets forth the requirement of notification. In subsection (b) it states... 'a secured party that disposes of collateral under section 42a-9-610 shall send to ['the debtor' and the 'secondary obligor'] a reasonable notification of disposition.'" *Id.*

The *Vasquez* court reasoned that the UCC notification statutes "become relevant in a case where collateral *has in fact been disposed of by the secured party.*" *Id.* (emphasis added.)

However, prior decisions giving the debtor a right to recover for a notification violation following the secured party's sale of collateral cannot be read "as giving some affirmative right of action in a situation where *no sale has ever occurred (as here)* because of the failure to comply with notice provisions that would apply to a *hypothetical sale[.]*" *Id.* (emphasis added.)

In reaching its contrary result, this Court did not rely upon a single, on-point decision interpreting or construing UCC § 9-611(b), a provision of a uniform code. Instead, it relied upon two decisions, one of which was *Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 744 (8th Cir. 2012) ("We agree that these claims clearly accrued when plaintiffs received the allegedly deficient collateral disposition notices.") (Slip op. at 11.) In *Rashaw* the Court of Appeals, applying Missouri law, determined that it need not decide whether a five year statute of limitations for "statutory liabilities" applied, versus a three year statute for "actions upon a statute for a penalty or forfeiture where the action is given to the aggrieved party," because the plaintiff's notification claim was filed six years after notification. *Rashaw*, 685 F.3 at 744. Unlike the present appeal, no question of a later accrual event was raised, and thus the *Rashaw* court never mentioned UCC § 9-611(b), did not address the effect of the phrase "a secured party that disposes of collateral," and did not alternatively consider whether the cause of action arose at the time of disposition – all questions that were not before the *Rashaw* court but which were squarely raised and decided adversely to Delaney in this appeal.

The Court also relied upon *Erdmann v. Rants*, 442 N.W.2d 441 (Sup. Ct. N.D. 1989), Slip op. at 12, which the Court cites as "explaining the penalty available for failure to comply with the notice of sale requirements exists *regardless whether a commercially reasonable sale is held* and regardless whether the debtor sustained a loss." (emphasis added.) Respectfully, this overstates *Erdmann* as it relates to this case. In *Erdmann*, decided under the pre-2001 revision of

the UCC, the question was whether the debtor could still recover his “statutory damages” under the predecessor statute to § 36-9-625(c), based upon the secured party’s failure to provide any notification, but where the resulting disposition was otherwise commercially reasonable such that he had no actual damages. *Erdmann* at 442. However, there clearly *was* a disposition in *Erdmann*: “Under the plain language of NDCC § 41-09-53(1) [UCC 9-507]⁴ if a secured party does not proceed in accordance with part 5⁵ of Article 9...*and disposition has occurred*, ...and... if the collateral is consumer goods, the debtor is entitled to a minimum recovery, which is not less than the credit service charge plus ten percent of the principal amount of the debt[.]” *Erdmann* at 443. (emphasis added.) Thus *Erdmann* did not address the issue of what UCC violations had occurred, if any, in connection with a notification that is *not* followed by a disposition, or whether a notification claim was complete and present prior to disposition.

It appears that the Court was persuaded to interpret the statute broadly and contrary to Delaney’s position in reliance upon the emphasized language below in Comment 2 of the Official Comments to § 9-611:

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, subject to certain exceptions. The notification must be reasonable as to the manner in which it was it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content.

Slip op. at 11. (emphasis added.)

The subsequent Comments are entitled “Notification to Debtors and Secondary Obligors.” (Cmt. 3); “Notification to Other Secured Parties.” (Cmt. 4); “Authentication Requirement.” (Cmt. 5); “Second Try.” (Cmt. 6); “Recognized Market.” (Cmt. 7); and, “Failure

⁴ Now UCC § 9-625(c)(2).

⁵ Part 5 (Default) is now Part 6 (Default).

to Conduct Notified Disposition.” (Cmt. 8.) Therefore, in context, Delaney submits that as the heading implies, Comment 2 is addressing the matter of what constitutes “a reasonable notification,” and it does not imply that the cause of action fully accrues at the time of notification by a secured party that merely “wishes to dispose of collateral.” To construe the Comment as this Court has done is to construe it directly contrary to the express statutory language limiting a secured party’s notification obligations with respect to “a secured party *that disposes of collateral*.” The only Comment that addresses a notification that is *not* followed by a disposition is Comment 8, “Failure to Conduct Notified Disposition,” which expressly provides that “nothing in this Article prevents a secured party from electing *not* to conduct a disposition after sending a notification.” (emphasis added.) Comment 8 thus sanctions the parties’ resolution of the default by cure or redemption *after* notification of disposition is sent, resulting in no liability for the secured party. Moreover, this Court’s interpretation of Comment 2 is directly contra to the South Carolina Reporter’s Comment to the same statute: “Section 36-9-611 imposes a notification requirement upon secured parties *who dispose of collateral* under Section 36-9-610.” (emphasis added.)

3. The Court overlooked controlling authority that a civil “penalty” must be strictly and narrowly construed against the penalized party.

Delaney’s position is that § 36-9-625(c)(2) provides a “statutory damages” “remedy for a secured party’s failure to comply with this chapter” in a consumer transaction, including the secured party’s violation of § 9-611(b) with respect to the consumer debtor. Therefore, it functions more as a liquidated damages provision, not a statutory penalty.⁶

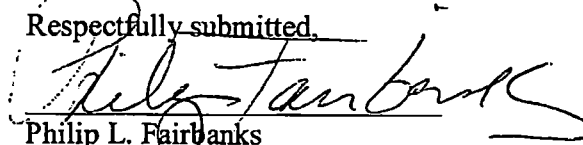
⁶ Article 9 contains a provision that is sometimes called the “consumer penalty.” If a secured party fails to comply with Article 9 in disposing of consumer goods, the Code permits the debtor or secondary obligor to recover an amount not less than the credit service charge plus 10 percent of the cash price[.]” U.C.C. § 9-625(c)(2)... Because this provision is appended onto Article 9’s

This Court disagreed. If, however, the damages provision at issue is indeed a “penalty” as this Court has determined, this categorization provides another reason *not* to expand the secured party’s violation of § 9-611(b) beyond its express and limited terms applicable only to secured parties “that dispose of collateral” – because any violation of § 9-611(b) subjects that secured party to a mandatory “statutory penalty.” A statutory penalty, even if based upon an ambiguous statute, should not be construed broadly with respect to a party whose conduct does not strictly fit within the express terms of the statute. *See, e.g., Town of Mt. Pleasant v. Roberts*, 713 S.E.2d 278 at 283, (“When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant,” and applying this rule to a civil statutory penalty); *Bostic v. American Home Mortg. Servicing, Inc.*, 650 S.C.2d 479, 482 (SC App. 2007) (“South Carolina has long recognized the principle that penal statutes are to be strictly construed.”) Accordingly, the *Bostic* court found no violation where plaintiff failed to prove a violation under the exact, express terms of the civil penal statute at issue. *Bostic* at 486.

CONCLUSION

For these reasons and other reasons more fully set forth in Appellant Otha Delaney’s prior briefings, Appellant submits his Petition for Rehearing and requests this Court to modify its Opinion of September 18, 2016, accordingly.

Respectfully submitted,


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basic damages provision and establishes an amount recoverable “in any event,” one should read the consumer penalty *as a substitute for ordinary monetary damages*... In other words, the section functions to a certain extent *as a liquidated damages provision*[.] fn. (Fn. Indeed the provision appears to serve both a punitive *and a liquidated damages function, concepts that are antithetical in normal contract law. The term “consumer penalty” is thus something of a misnomer.*)

Understanding Secured Transaction, 5th Ed., William H. Lawrence, et al., § 9-625(c), p. 469. (emphasis added.)

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November 18, 2016

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2014-000824
Trial Court Case No. 2011-CP-10-7166

Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

**RESPONDENT'S RETURN
TO APPELLANT'S PETITION FOR REHEARING**

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*Counsel for Respondent
First Financial of Charleston, Inc.*

By and through its undersigned counsel, Respondent First Financial of Charleston, Inc. ("First Financial"), makes this return to the petition for rehearing submitted by Appellant Otha Delaney ("Mr. Delaney").

1. **Assuming, *arguendo*, it is proper to consider the petition on the merits, the petition should be denied because the majority did not overlook or misapprehend any material point and correctly affirmed the trial court's dismissal of Mr. Delaney's complaint as time barred.**

As the Court is, of course, aware, a return to a petition for rehearing is not required unless requested by the Court. Rule 240(e), SCACR. The Court did not request this return, and indeed, in the absence of the jurisdictional issue addressed below, it would not be submitted.

The majority did not overlook or misapprehend any material point in affirming the trial court's dismissal of Mr. Delaney's complaint as time barred; rather, as its opinion reflects, its holding was the product of careful—and correct—legal analysis. In this regard, First Financial would note especially the support for its decision that the majority rightfully found in the Official Comments to S.C. Code Ann. §§ 36-9-611 and 36-9-625(c)(2). All of the points Mr. Delaney raises in his petition about legislative intent are belied by the express legislative commentary that § 36-9-611 "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 . . . ,"¹ and that § 36-9-625(c)(2) "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." Comment 4.

Accordingly, assuming, *arguendo*, it is proper to consider the petition on the merits, there is no cause to grant it; the majority did not overlook or misapprehend any material point and correctly affirmed the trial court's dismissal of Mr. Delaney's complaint as time barred.²

¹ Comment 2 (emphasis added).

² Further regarding the merits, in the interest of brevity, First Financial simply incorporates herein by reference the analysis already presented in its brief. Of course, in considering Mr. Delaney's petition, if the Court wishes to hear more from First Financial in this regard, it will gladly submit a return or such other additional substantive briefing directed to the merits as the Court may direct.

2. **Most respectfully, the Court properly sent the remittitur to the trial court on October 19, 2016, at which point the appeal was decided with finality (in accordance with the majority's September 28, 2016, decision affirming the trial court's dismissal of Mr. Delaney's complaint as time barred) and the Court no longer had appellate jurisdiction; it was error for the Court to issue its orders recalling the remittitur and extending the time for Mr. Delaney to petition for rehearing; and the Court should now confirm that the remittitur was not properly recalled or re-emit the case to the trial court or take such other procedurally appropriate step(s) as may be required to reflect that this appeal has been decided with finality in accordance with the majority's September 28th decision and that there is no longer appellate jurisdiction to alter the trial court's dismissal of Mr. Delaney's complaint.**

The Court finally decided this appeal by opinion filed Wednesday, September 28, 2016. Under Rule 221(a), SCACR, "Petitions for rehearing must be *actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." (emphasis added). Therefore, the initial deadline for the Court to "actually receive[]" ³ a petition for rehearing from Mr. Delaney was Thursday, October 13, 2016, i.e., the 15th day after the opinion was filed, as computed under Rule 263(a), SCACR.⁴

³ Generally, under Rule 262(a)(2), SCACR, documents may be filed with the appellate court by mail, with the date of filing deemed to be the date of mailing; however, Rule 262(a) makes two express exceptions to this rule: petitions for rehearing and motions for reinstatement.

⁴ Rule 263(a) states,

In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be

This initial deadline was, however, altered by order of our state Supreme Court; specifically, Order No. 2016-10-10-01 (“Re: Hurricane Matthew”), filed October 10, 2016 (the “Hurricane Matthew Order”). The Hurricane Matthew Order provided as follows:

On October 4, 2016, the Governor of South Carolina directed the closure of State, County and Municipal Government Offices in twenty-six counties in South Carolina from October 5 through October 7, 2016. This action was taken to facilitate the planned evacuations necessary due to Hurricane Matthew. As the administrative head of the Unified Judicial System in South Carolina, the Chief Justice directed all levels of the Judicial System to comply with this closure.

Subsequently, the Governor issued Executive Orders providing for evacuations in Jasper, Beaufort, Colleton, Charleston, Dorchester, Berkeley, Georgetown and Horry Counties. Several hundred thousand South Carolina citizens evacuated these areas, and the impacts of these evacuations were felt in counties which were not subject to any closure or evacuation. Further, Hurricane Matthew caused significant damage in South Carolina, and this will adversely affect the ability of many lawyers and litigants to comply with deadlines in court proceedings through the end of this week.

Accordingly, this Court finds it appropriate to declare the days of Wednesday, October 5, 2016, though Friday, October 14, 2016, to be statewide “holidays” for the purposes of computing time under Rule 263 of the South Carolina Appellate Court Rules, Rule 6 of the South

included, unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

Carolina Rules Civil Procedure, Rule 35 of the South Carolina Rules of Criminal Procedure, and Rule 3 of the South Carolina Rules of Magistrates Court.

(footnotes omitted.) The initial deadline for Mr. Delaney's petition for rehearing, Thursday, October 13, 2016, was thus declared "to be [a] statewide 'holiday[]' for the purpose[] of computing time under Rule 263 of the South Carolina Appellate Court Rules" For that matter, so was Friday, October 14, 2016, and the two days thereafter, the 15th and the 16th, were Saturday and Sunday, respectively. Accordingly, computing time in accordance with Rule 263 and the Hurricane Matthew Order, the time period in which any petition for rehearing by Mr. Delaney had to be "actually received" ran until the end Monday, October 17, 2016, i.e., the end of the next day which is neither a Saturday, Sunday nor holiday.

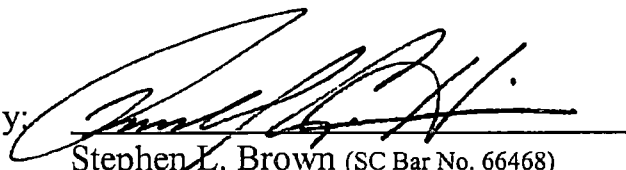
Having not "actually received" a petition for rehearing by Mr. Delaney, the Court remitted the case to the trial court on Wednesday, October 19, 2016. On October 20, 2016, the Court received from Mr. Delaney a Motion for Extension of Time to File Motion for Rehearing, which had been mailed on October 18, 2016. On November 2, 2016, the Court filed an order directing the trial court to return the remittitur. On November 3, 2016, the Court filed an order extending the time for Mr. Delaney to petition for rehearing until November 18, 2016. Thereafter, the Court received Mr. Delaney's petition for rehearing on November 18, 2016.

“When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. *The only exception* to this rule is when the remittitur is sent down by mistake, error or inadvertence *of the Court.*” Wise v. S.C. Dep’t of Corrections, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) (emphasis added) (internal citations omitted). There was no error “of the Court” in sending down the remittitur on October 19, 2016, and no such error was cited in the Court’s November 2, 2016, order recalling the remittitur, which order, like the Court’s November 3, 2016, order extending the deadline for Mr. Delaney to petition for rehearing until November 18, 2016, was erroneously issued without jurisdiction.

Accordingly, and certainly most respectfully, the Court properly sent the remittitur to the trial court on October 19, 2016, at which point the appeal was decided with finality (in accordance with the majority’s September 28, 2016, decision affirming the trial court’s dismissal of Mr. Delaney’s complaint as time barred), and the Court no longer had appellate jurisdiction; it was error for the Court to issue its orders recalling the remittitur and extending the time for Mr. Delaney to petition for rehearing; and the Court should now confirm that the remittitur was not properly recalled or re-remit the case to the trial court or take such other procedurally appropriate step(s) as may be required to reflect that this appeal has been decided with finality in accordance with the majority’s September

28th decision and that there is no longer appellate jurisdiction to alter the trial court's dismissal of Mr. Delaney's complaint.

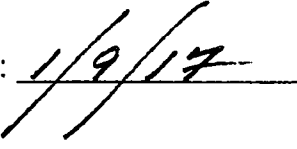
Respectfully submitted,
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First Financial of Charleston, Inc.

Charleston, South Carolina

Dated: 

The South Carolina Court of Appeals

Otha Delaney, Appellant,

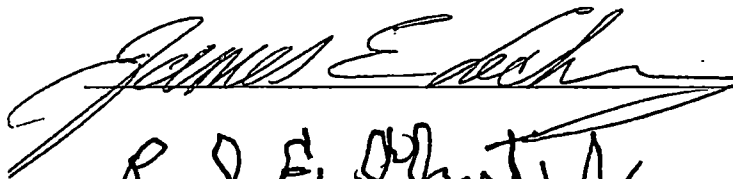
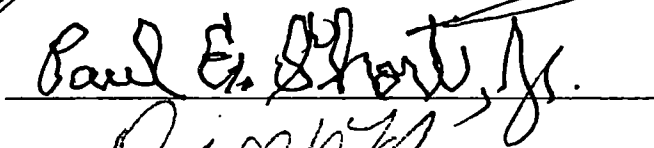
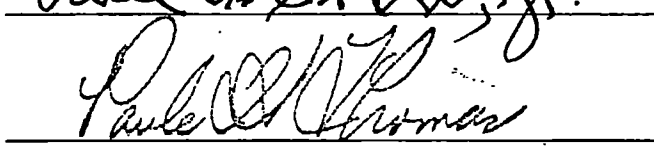
v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
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Russell Grainger Hines, Esquire

FILED

February 16, 2017

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442 (S.C. Ct. App. filed Sept. 28, 2016)

Otha Delaney,

Petitioner,

v.

First Financial of Charleston, Inc.,

Respondent.

**RESPONDENT'S REPLY TO
PETITIONER'S RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS
PETITION FOR A WRIT OF CERTIORARI**

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Counsel for Respondent

In further support of its motion to dismiss the petition for a writ of certiorari in this matter, Respondent makes the following points in reply to Mr. Delaney's response in opposition to the motion:

ARGUMENT IN REPLY

1. Mr. Delaney misplaces his focus on the fact that his Motion for Extension of Time to File Motion for Rehearing (the "Motion for Extension") was mailed—and therefore "filed" and "served," pursuant to Rule 262, SCACR—on *October 18, 2016*, i.e., the day *before* the Court of Appeals remitted the case on *October 19, 2016*.¹ As explained in Respondent's motion²—and not disputed, or otherwise addressed, by Mr. Delaney³—the deadline for Mr. Delaney's petition for rehearing to have been "actually received"⁴ by the Court of Appeals was *October 17, 2016*, and it had *already passed* by the time of the Motion for Extension on *October 18th*.

¹ (See Resp. in Opp'n to Mot. to Dismiss Pet. for Writ of Cert. pp. 4-5.)

² (See Mot. to Dismiss Pet. for Writ of Cert. ¶¶ 1-5.)

³ (See *generally* Resp. in Opp'n to Mot. to Dismiss Pet. for Writ of Cert.)

⁴ Rule 221(a), SCACR ("Petitions for rehearing *must be actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court.") (emphasis added)); *see also* 16 S.C. Jur. *Appeal and Error* § 148 (West 2017) ("A petition for rehearing *must be received in fact* by the appellate court no later than 15 days after the filing of the opinion, order, judgment or decree.") (citing Rule 221(a)) (emphasis added).

2. Aside from the Motion for Extension having not been mailed until after the deadline to petition for rehearing had already passed, the mere filing/service of the Motion for Extension by mail on October 18th did *not* stay issuance of the remittitur. It is the appellate court's *actual receipt* of a petition for rehearing *before the remittitur is sent* that requires the remittitur to be held. Rule 221(b) ("If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court."); *see also* Rule 240(b), SCACR ("Unless otherwise provided by these Rules, or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition.").

3. Contrary to Mr. Delaney's assertion, Respondent's reliance on *Wise v. S.C. Department of Corrections*, 372 S.C. 173, 642 S.E.2d 551 (2007), is not misplaced. (*See* Resp. in Opp'n to Mot. to Dismiss p. 5.) As stated in the motion to dismiss, Respondent cites *Wise* for the following proposition, which is a correct statement of the applicable law: "When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The *only* exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of *the Court*." *Id.* at 174, 642 S.E.2d at 551; *see also* Jean Hoefer Toal et al., Appellate Practice in South Carolina at 122 ("Remittitur is the process by which the appellate court releases jurisdiction over a

case after the court resolves the appeal, permitting the return of full jurisdiction to the lower tribunal. . . . The appellate court sends the remittitur to the circuit court . . . fifteen after the filing of the opinion . . . disposing of the appeal, not including the day of filing.” (citing Rule 221(b)); *id.* (“Upon sending the remittitur, the appellate court no longer has jurisdiction and cannot hear any further motions concerning the matter. The only exception to this rule is when the remittitur is sent down by mistake, error, or inadvertence of the appellate court.”) (citing *Wise*, 323 S.C. 173, 642 S.E.2d 551); *id.* at 374 (“To justify the unusual power of recalling the remittitur, ‘a very strong showing’ is required that the remittitur was sent down through some mistake or inadvertence on the part of the appellate court.”) (citing *State v. Barnes*, 413 S.C. 1, 4, 774 S.E.2d 454, 456 (2015)); *see, e.g., Barnes*, 413 S.C. at 4, 774 S.E.2d at 456 (“The State cites no authority, and we are aware of none, that permits the remittitur to be recalled, not because of an error or inadvertence on the part of the Supreme Court, but rather because of post-remittitur conduct by a party. Accordingly, we do not believe that even if we were to find merit to the State’s position, that we would be empowered to grant the relief it seeks.”).

4. There is no question that the Court of Appeals sent down the remittitur on October 19, 2016; the question is whether it was sent down by mistake, error or inadvertence the court: because the answer to this question is *no*,

i.e., because the Court of Appeals *properly* sent down the remittitur, without any mistake, error or inadvertence on its part, the Court of Appeals simply could not, and did not, properly recall the remittitur.

5. According to Mr. Delaney, although the Court of Appeals' November 2, 2016, order recalling the remittitur "does not provide any findings or analysis why the remittitur was recalled . . . [t]he only logical explanation . . . [i]s that [the Court of Appeals] indeed considered the remittitur to have been sent down by error, mistake or inadvertence while the Motion for Extension of time was in fact filed and pending and which [the court] *was not aware of on October 19, 2016;*"⁵ however, by conceding the point that the Court of Appeals, when it remitted the case on October 19, 2016, "was not aware of" his motion for extension—which, although mailed on October 18th, was not actually received by the court until October 20th—*Mr. Delaney's has effectively conceded that the Court of Appeals could not possibly have erred in remitting the case on October 19th.* Again, under Rule 221(a), "Petitions for rehearing must be *actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court,"⁶ and under Rule 221(b),

⁵ (Resp. in Opp'n to Mot. to Dismiss Pet. for Writ of Cert. p. 5 (emphasis added).)

⁶ (emphasis added).

The remittitur shall contain a copy of the judgment of the appellate court, shall be sealed with the seal and signed by the clerk of the court, and unless otherwise ordered by the court *shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the remittitur is sent*, the remittitur shall not be sent pending disposition of the petition by the court.

(emphasis added). In this case, the Court of Appeals properly held the remittitur for the period of time required under Rule 221(b)—which, on account of the Hurricane Matthew Order, ran through October 17, 2016. Indeed, the Court of Appeals could have remitted the case a day earlier than it did, i.e., it could have remitted the case on October 18th instead of waiting until the 19th. Moreover, Rule 221(b) only requires that the Court of Appeals hold the remittitur “*if a petition for rehearing is received before the remittitur is sent . . . ,*”⁷ and neither a petition nor, for that matter, the Motion for Extension was received by the court before the remittitur was timely sent—the rule did not require the Court of Appeals to hold the remittitur on account of the mere mailing of a motion (which, again, was itself after the expiration of the October 17th deadline) that it did not know about, and could not have known about, until after it had already remitted the case on October 19th.

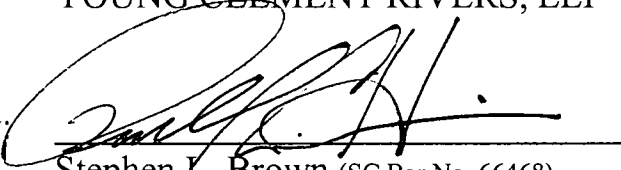
⁷ (emphasis added).

CONCLUSION

For the foregoing reasons, along with those previously set forth in the motion itself, Respondent maintains that this Honorable Court should dismiss Mr. Delaney's petition for a writ of certiorari and, in conjunction with the dismissal, grant Respondent whatever relief may be required for the record to properly show that this appeal was decided with finality in accordance with the majority opinion of the Court of Appeals filed September 28, 2016, affirming the dismissal of Mr. Delaney's complaint against Respondent.

Respectfully submitted,

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Dated: 5/30/17

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

RECEIVED

Opinion No. 5442 (S.C. Ct. App. filed Sept. 28, 2016) MAY 15 2017

Otha Delaney,

Petitioner, **S.C. SUPREME COURT**

v.

First Financial of Charleston, Inc.,

Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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CONCLUSION 11

Respondent, First Financial of Charleston, Inc. (“First Financial”), makes this return in opposition to Otha Delaney’s petition for this Supreme Court to issue a writ of certiorari to review the Court of Appeals’ decision in this matter.¹

COUNTERSTATEMENT OF QUESTIONS PRESENTED

- I. In *October of 2011*, borrower/debtor Mr. Delaney (whose truck had been repossessed and sold after he had defaulted on an auto loan) commenced this action against secured creditor First Financial claiming it had unlawfully failed to comply with S.C. Code Ann. § 36-9-611(b) (which is in Chapter 9 of the state’s commercial code, dealing with secured transactions) by sending him—in *May of 2008*—an insufficient notification of disposition of his collateral. The trial court dismissed Mr. Delaney’s complaint holding that the statute of limitations for his claim was at most three years; that his claim had accrued and its limitations period had started to run when First Financial sent the subject notification in May of 2008; and accordingly, that his claim had become time barred by the time he brought this suit in October of 2011. Consequently, this question is presented: Did the Court of Appeals err in affirming the trial court’s dismissal of Mr. Delaney’s complaint as time barred?**

- II. In light of a discrepancy between Mr. Delaney’s prior petition to the Court of Appeals for rehearing and his instant petition to this Court for a writ of certiorari, this question is also presented: Is Question/Argument II in Mr. Delaney’s cert petition—regarding the Court of Appeals’ alleged failure to rule that his claim is governed by a three-year, and not a one-year, statute of limitations—properly before the Court now where it was not included in his prior petition for rehearing?**

¹ To be clear, this return is subject to and without waiving First Financial’s motion (of even date herewith) seeking dismissal of Mr. Delaney’s petition for lack of appellate jurisdiction.

COUNTERSTATEMENT OF THE CASE²

Mr. Delaney, as the putative representative of a class of others similarly situated, commenced this action against First Financial on October 4, 2011, alleging a claim under S.C. Code Ann. § 36-9-625(c)(2) for noncompliance with Part 6 (addressing default) in South Carolina’s enactment of Article 9³ (addressing secured transactions) of the Uniform Commercial Code (the “UCC”). (*See generally* App. pp. 20-27.) Specifically, he 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 from him after he had 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.)⁴

Citing Mr. Delaney’s averment that the allegedly insufficient notification of disposition was sent in May of 2008,⁵ First Financial moved to dismiss the

² In accordance with the Rule 12(b)(6), SCRCPP, standard, for the purpose of this return, the allegations of the complaint are taken as true and viewed in the light most favorable to Mr. Delaney.

³ The South Carolina Code addresses secured transactions in “Chapter” 9 of its commercial code.

⁴ 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.

⁵ (App. p. 23 at ¶ 14.)

complaint 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 that his claim had accrued when the allegedly insufficient notification of disposition was sent in May of 2008 and that, to avoid the claim being barred by the statute of limitations, his suit had to have been commenced no later than three years thereafter, but it was not, having been commenced October 4, 2011. (App. pp. 3-10, pp. 35-54, pp. 89-104.) Subsequently, 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, pp. 55-83, pp. 88-89, pp. 106-28.)

The Court of Appeals affirmed the trial court in a 2-1 decision filed September 28, 2016. (App. pp. 184-99.) It thereafter denied Mr. Delaney's petition for rehearing in February 16, 2017, order signed by all three members of the panel. (App. p. 235.)

The instant petition to the Court for a writ of certiorari follows.

ARGUMENT

I. The Court of Appeals did not err in affirming the trial court's dismissal of Mr. Delaney's complaint 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 (i.e., 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 the allegedly insufficient notification of disposition was sent 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 under [§ 36-9-611].” (Pet. p. 11.) Stated differently, according to Mr. Delaney, a disposition is a prerequisite for a legal claim of noncompliance with § 36-9-611. Most respectfully, this is just not so.

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 by a mere failure—*any* failure—to comply “with this chapter [(i.e., Chapter 9 on secured transactions)].” *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 Article. . . . 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).

Thus, it cannot reasonably be disputed that, for instance, were a secured party to send an insufficient notification of disposition, a debtor could, even before disposition, bring a claim for injunctive relief under subsection (a) to “restrain . . . disposition of [their] collateral” on account of the secured party “not proceeding in accordance with this chapter” and also, under subsection (b), bring a claim for “any loss caused by [the] failure to comply with this chapter.” 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 flatly inconsistent with it. Moreover, 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 UCC⁶—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 broken up

⁶ 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.”).

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.”).⁷

While not so broad as to cover any noncompliance with Chapter 9 like subsections (a) and (b), but rather tailored to Part 6 of the chapter, § 36-9-625(c)(2) (i.e., the subsection providing for Mr. Delaney’s claim) is triggered by *any* noncompliance with that part—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))

⁷ 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. (*See* 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.”))

(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).

Also, 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).

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. p. 23 at ¶¶ 13-15, pp. 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.

The official commentary to § 36-9-611 explains that “[t]his 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.” 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.” This is further consistent with this Court’s recognition “that every violation of a legal right imports damage and authorizes the maintenance of an action and the recovery of at least nominal damages, regardless of whether any actual damage has been sustained.” *Stevens v. Allen*, 342 S.C. 47, 53, 536 S.E.2d 663, 665, n. 5 (2000).

The Court of Appeals did not err in affirming the trial court’s dismissal of Mr. Delaney’s complaint as time barred.

II. Question/Argument II in Mr. Delaney’s petition for a writ of certiorari—regarding the Court of Appeals’ alleged failure to rule that his claim is governed by a three-year, and not a one-year, statute of limitations—is not properly before the Court because it was not included in his petition to the Court of Appeals for rehearing.

“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d)(2), SCACR. Question/Argument II in Mr. Delaney’s instant petition for a writ of certiorari—regarding the Court of Appeals’ alleged failure to rule that his claim is governed by a three-year, and not a one-year, statute of limitations—was not included in his petition for rehearing in the Court of Appeals. (*See generally* App. pp. 209-222.) It is not properly before this Court now.

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 deny Mr. Delaney's petition for a writ of certiorari.

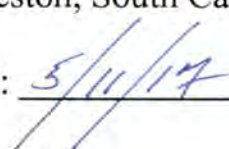
Respectfully submitted,
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Dated: 

The Supreme Court of South Carolina

Otha Delaney, Petitioner,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2017-000683

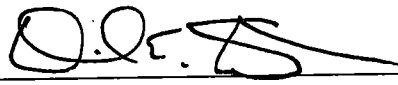
Lower Court Case No. 2011-CP-07-07166

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted and the motion to dismiss is denied as moot. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

March 28, 2018

cc: Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire
Frederick M. Corley, Esquire
The Honorable Julie J. Armstrong
The Honorable Jenny Abbott Kitchings

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

JUN 08 2018

Appeal from Charleston County
Court of Common Pleas

S.C. SUPREME COURT

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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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.

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 CASE²

Consumer debtor Mr. Delaney³ 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 9⁴ (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

² In accordance with the Rule 12(b)(6), SCRCF, 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 UCC⁷—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 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

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

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

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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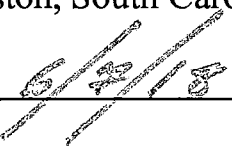
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Dated: 

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Otha Delaney, Petitioner,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2017-000683

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 27884
Heard November 8, 2018 – Filed May 8, 2019

REVERSED

Philip L. Fairbanks, of The Law Offices of Philip Fairbanks, PC, Kathy D. Lindsay, of Kathy D. Lindsay, PA, and Frederick M. Corley, all of Beaufort, for Petitioner.

Stephen Lynwood Brown, Russell Grainger Hines, and Perry McPherson Buckner IV, all of Young Clement Rivers, LLP, of Charleston, for Respondent.

JUSTICE HEARN: This case concerns when a claim for deficient notice of disposition of collateral under Article 9 of the Uniform Commercial Code accrues

for statute of limitation purposes. The circuit court held the limitations period began upon receipt of the allegedly deficient notice, and the court of appeals affirmed in a split decision. *Delaney v. First Fin. of Charleston, Inc.*, 418 S.C. 209, 791 S.E.2d 546 (Ct. App. 2016). We hold the limitations period begins only upon disposition; accordingly, we reverse.

FACTS/PROCEDURAL BACKGROUND

In October of 2007, Petitioner Otha Delaney bought a 2003 Chevrolet pick-up truck from Coliseum Motors pursuant to a retail installment sales contract. The dealership subsequently assigned the contract to Respondent First Financial of Charleston, Inc., which acquired a security interest under the UCC. After Delaney failed to make payments, First Financial lawfully repossessed the truck, and on May 2, 2008, it sent Delaney a letter entitled, "Notice of Private Sale of Collateral." Over seven months later, on December 15, 2008, First Financial sold the truck.

On October 3, 2011, more than three years after sending notice but less than three years from the sale of the truck, Delaney filed suit against First Financial, seeking to represent a class of individuals who had received notice that allegedly failed to comply with certain requirements in Article 9. Accordingly, Delaney asserted he was entitled to the statutory penalty under section 36-9-625(c)(2) of the South Carolina Code (2003). First Financial moved to dismiss pursuant to Rule 12(b)(6), SCRCP, asserting the statute of limitations had expired. Before the trial court, the parties disputed whether the appropriate limitations period was one, three, or six years.¹

After a hearing, the trial court found: (1) the remedy Delaney sought pursuant to section 36-9-625(c)(2) was a statutory penalty; (2) the six-year Article 2 limitations period did not apply because Delaney failed to plead breach of contract, the claim solely concerned deficient notice under Article 9, and even if Article 2 applied, the more specific limitations period on penalties governed; and finally, (3) under either limitation period, Delaney's claim was time-barred as his action accrued upon receipt of the allegedly deficient notice.

¹ Delaney abandoned his assertion that the six-year limitations period under Article 2 governed, as he only addressed the one and three-year provisions in his brief before this Court. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (failing to provide arguments or supporting authority renders the issue abandoned). Additionally, at oral argument, counsel for First Financial conceded the three-year statute of limitations prescribed in section 15-3-540(2) (2005) applied.

The court of appeals affirmed in a split decision, holding that because the claim concerned deficient notice, it accrued upon receipt of the notice. *Delaney*, 418 S.C. at 222, 791 S.E.2d at 552. Concluding Delaney's claim was untimely under either the one or three-year limitations period for an action upon a statutory penalty, the court affirmed. *Id.* at 222, 791 S.E.2d at 552. Judge Thomas concurred in the majority's decision that Article 2's six-year limitations period did not apply, but dissented on the issue as to when Delaney's cause of action accrued, finding that it accrued upon disposition of the collateral. *Id.* at 222, 791 S.E.2d at 552–53 (Thomas, J., dissenting). Delaney sought a writ of certiorari, which we granted.

ISSUES

Does the statute of limitations for an Article 9 deficient notice of disposition of collateral claim begin to when notice is provided or upon the disposition of the collateral?

STANDARD OF REVIEW

An appellate court reviews dismissal from a Rule 12(b)(6), SCRCP motion under the same standard employed by the trial court. *Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014). The facts are construed in the light most favorable to the nonmoving party, and all well-pled allegations are considered true. *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). However, questions of law are decided *de novo*. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

DISCUSSION

I. Accrual Date

Delaney asserts the court of appeals erred in holding his claim accrued upon receipt of the notice instead of when First Financial disposed of the collateral, contending section 36-9-611(b) only requires a secured party "that disposes of collateral" to provide notice. Because in Delaney's view the notice is not final until disposition, the statute of limitations does not begin to run until that point in time. Conversely, First Financial argues the limitations period began when the noncompliant notice was sent, without regard to the date of disposition. We agree with Delaney.

Section 36-9-611 of the South Carolina Code, entitled, "Notification before disposition of collateral," requires a secured party to provide notice of its plans to

dispose of the collateral. Specifically, subsection (b) states, "Except as otherwise provided in subsection (d), a secured party that disposes of collateral under Section 36-9-610 shall send...a reasonable authenticated notification of disposition." While the contents and form of the notice are governed by sections 36-9-613 and 614, the statutory penalty pursuant to section 36-9-625(c)(2) for failing to comply with those provisions is triggered only when all the elements of section 36-9-611(b) are present. We agree with Judge Thomas that a claim for failing to comply with section 36-9-611(b) does not accrue "unless and until [the secured party] disposes of the collateral." *Delaney*, 418 S.C. at 223–24, 791 S.E.2d at 553 (Thomas, J., dissenting).

In addition to section 36-9-611(b), the corresponding Official Comments provide, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification." S.C. Code Ann. § 36-9-611(b) cmt.8. Moreover, the comment notes that a secured party may send a revised notice if "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." *Id.* Thus, while a secured party is required to send notification when it plans to dispose of collateral, it is also permitted to send a revised notification up until a reasonable time before disposition. We believe that by allowing such revisions, the drafters intended the sufficiency of notice to be assessed as of the date of disposition.

We reject the notion that the availability of an injunction under section 36-9-625(a) compels a contrary result. This provision enables the circuit court to restrain disposition when the "secured party is not proceeding in accordance with this chapter." First Financial contends if a party can seek an injunction before the collateral is disposed of, then it can recover the penalty at the same time. However, the General Assembly used different terms for these two remedies, and we cannot impose the broader "not proceeding in accordance" language into section 36-9-625(c)(2)'s requirement that a secured party "failed to comply." *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing."). To do so otherwise is contrary to our principle of construing statutory penalties narrowly. *Wallace v. Wannamaker*, 231 S.C. 158, 163, 97 S.E.2d 502, 505 (1957) ("The prime rule requires strict construction of a statutory provision which would work a forfeiture or inflict a penalty."). Accordingly, *Delaney*'s claim did not accrue until First Financial disposed of the collateral.² Having concluded the

² We note that comment four to section 36-9-625(c)(2) states this provision "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

limitations period did not begin until December 15, 2008, we next turn to which statute of limitations governs.

II. Applicable Statute of Limitations

Before the trial court and the court of appeals, the parties disputed whether the one or three-year limitations period applied to an action upon a statutory penalty. At oral argument before this Court, counsel for First Financial conceded the three-year limitations period applied, and we agree.

Section 15-3-540(2) sets forth a three-year limitations period for "[a]n 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." (emphasis added). Conversely, section 15-3-570 provides in part, "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." (emphasis added). We are persuaded by this reasoning by the Fourth Circuit:

Section 15-3-570, however, was clearly intended to encompass more persons than only "the party aggrieved" (if it was meant to encompass "the party aggrieved" at all). To apply the more general section 15-3-570, and not the more specific section 15-3-540...would contravene the "basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision."

Pressley v. Tupperware Long Term Disability Plan, 553 F.3d 334, 339 (4th Cir. 2009) (internal citation omitted). Moreover, as the Fourth Circuit noted, we have applied the three-year limitations period when the claim is brought by the aggrieved party and the one-year provision when filed by a third party. *Compare Tilley v. Pacesetter Corp.*, 333 S.C. 33, 41, 508 S.E.2d 16, 20 (1998) (applying the three-year statute in a class action lawsuit brought by buyers who alleged the seller failed to comply with the South Carolina Consumer Protection Code), *with Montjoy v. One Stop of Abbeville, Inc.*, 325 S.C. 17, 19, 478 S.E.2d 683, 684 (1996) (holding the

have resulted." However, pursuant to comment eight to section 36-9-611, a secured party prior to disposition may amend a noncompliant notice to remove the defect. While the sufficiency of the notice would still be assessed as of the date of disposition, the efficacy of an amended notice as to whether the secured party would remain liable for the statutory penalty is not before us.

one-year statute of limitations governed an action by a third party to recover gambling losses). Accordingly, because Delaney is an aggrieved party, the three-year limitations period under section 15-3-540(2) applies.

CONCLUSION

Delaney's claim for deficient notice of disposition of collateral did not accrue until First Financial disposed of the collateral. Accordingly, because Delaney filed this action within three years from that date, we reverse and remand for further proceedings.

REVERSED.

BEATTY, C.J., FEW and JAMES, JJ., concur. KITTREDGE, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE KITTREDGE: I concur with the majority insofar as the applicability of the three-year statute of limitations. I respectfully dissent on the date of accrual issue. Petitioner's claim is based entirely on an alleged noncompliant notice. The law makes clear that a debtor is entitled to bring an action prior to disposition of the collateral. Because the law provides for the commencement of an action prior to disposition, I do not agree with the majority of this Court that the action accrues only upon the disposition of the collateral. I adopt the well-reasoned court of appeals' majority opinion holding that the cause of action accrued when the allegedly deficient notice of sale was received. Accordingly, I would affirm the court of appeals as modified.

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

JUN 19 2019

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge S.C. SUPREME COURT

Case No. 2011-CP-10-07166

On Writ of Certiorari to the Court of Appeals

Appellate Case No. 2017-000683
Opinion No. 27884 (S.C. Sup. Ct. filed May 8, 2019)

Otha Delaney,

Petitioner,

v.

First Financial of Charleston, Inc.

Respondent.

PETITION FOR REHEARING

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Attorneys for Respondent

NOW COMES First Financial,¹ by and through its undersigned counsel, pursuant to Rule 263(b), SCACR, and hereby petitions this Honorable Court to rehear this matter and reconsider its decision herein, i.e., the 4-1 majority decision in *Delaney v. First Financial of Charleston, Inc.*, Op. No. 27884 (S.C. Sup. Ct. filed May 8, 2019) (Shearouse Adv. Sh. No. 19 at 31) (the “Subject Decision”).

GROUND FOR REHEARING

The Subject Decision reverses the court of appeals’ prior affirmance of the trial court’s dismissal of this action as barred by the statute of limitations. The Court should rehear this matter because, most respectfully, it has misapprehended or overlooked the following material points.

- 1. The Subject Decision does not address First Financial’s jurisdictional issue/argument (Issue/Argument II.A. in its brief) about the consequences of the court of appeals having *properly* remitted this case to the trial court and *improperly* recalled the remittitur thereafter. The answer to this question is necessary to the decision of this appeal (indeed it is dispositive in favor of First Financial), and most respectfully, First Financial is entitled to that answer under not only Rule 220, SCACR, but also by virtue of its constitutional rights of due process and/or equal protection.**

As explained in First Financial’s motion to dismiss Mr. Delaney’s petition for a writ of certiorari filed May 11, 2017 (which is already of record in this Court and, for the sake of brevity, is incorporated by reference herein, along with First

¹ The shorthand references already defined in First Financial’s brief (e.g., “First Financial” refers Respondent, First Financial of Charleston, Inc.) are followed in this petition.

Financial's reply in support of the motion, which is likewise of record, filed May 30, 2017), the deadline for Mr. Delaney to petition the court of appeals for rehearing was October 17, 2016. Having not "actually received" a petition for rehearing from Mr. Delaney, the court of appeals *properly* remitted this case to the trial court on October 19, 2016. The court of appeals then *improperly* recalled the remittitur on November 2, 2016.

What prompted the court of appeals to recall the remittitur was a motion by Mr. Delaney for an extension of time to petition for rehearing. That motion was not even *mailed* until October 18, 2016, i.e., after the deadline for Mr. Delaney to petition for rehearing had already passed, and the court of appeals did not *receive* it until October 20, 2016, i.e., after it had already properly remitted the case on October 19th.

Upon receipt of Mr. Delaney's motion, First Financial wrote the court of appeals on October 28, 2016, advising of its position that the appeal had been duly concluded with finality by virtue of the court's issuance of the remittitur on October 19th and objecting to recall of the remittitur—there having been no mistake, error, or inadvertence of the court in sending down the remittitur. *Wise v. S.C. Dep't of Corrections*, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. *The only exception* to this rule is

when the remittitur is sent down by mistake, error or inadvertence *of the Court.*”) (emphasis added) (internal citations omitted). When the court of appeals thereafter recalled the remittitur and allowed Mr. Delaney to petition for rehearing, First Financial filed a return wherein it argued that the court had properly sent the remittitur to the trial court on October 19th, at which point the appeal was finally decided; that there was no longer appellate jurisdiction; and that the court had improperly recalled the remittitur.

After the court of appeals denied Mr. Delaney’s petition for rehearing and he petitioned this Court for a writ of certiorari, First Financial filed the aforementioned motion to dismiss on May 11, 2017. By order filed March 28, 2018, the Court granted Mr. Delaney’s petition for a writ of certiorari and summarily denied First Financial’s motion to dismiss as “moot,” but providing no explanation as to why. Thereafter, in its brief to this Court, First Financial again raised this issue/argument about appellate jurisdiction having been lost as a result of the court of appeals’ proper remittitur of the case to the trial court on October 19, 2016. (*See* Brief of Respondent at pp. 1, 3–4, 12–16.)²

As argued in First Financial’s brief (*see* Issue/Argument II.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*

² First Financial’s brief is, of course, already of record in this Court and, for the sake of brevity, is incorporated by reference herein.

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 [First Financial's] constitutional rights to equal protection and/or due process.

(Brief of Respondent pp. 12–16.) This issue/argument is dispositive in First Financial's favor, but the Subject Decision does not address it at all.

First Financial has duly raised this issue/argument at every turn since it arose. It implicates a foundational principle of our system of justice: jurisdiction. All this Court has said about it thus far is that it was somehow “moot[ed]” by the Court's grant of Mr. Delaney's petition for a writ of certiorari. Respectfully, this is not so—but even if it were, surely some reasonably detailed explanation as to why is warranted under the circumstances. To say that the point is “moot” because of this Court's grant of cert is to say that even if First Financial is right—that indeed the court of appeals did properly remit the case on October 19, 2016, and indeed the court did improperly recall it thereafter—it does not matter. Again respectfully, First Financial is not able to understand how this could possibly be so—but even assuming, *arguendo*, First Financial is mistaken, surely the point is not so obvious as to be wholly underserving of any substantive explanation. Surely, on such a point—a point both foundational to the justice system itself and potentially dispositive in favor of the party who stands accused—First Financial

should not be left to wonder whether it has even been meaningfully considered.

Again most respectfully, First Financial is entitled to have this question ruled upon in reasonably substantive detail. Under Rule 220(a), the Court is required to “make its decisions in writing by published opinions or memorandum opinions, with any concurring or dissenting opinions attached.” Further, “[i]n *every* decision rendered by [the] [C]ourt, *every* point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the [C]ourt must be stated in writing and must, with the reason for the [C]ourt’s decision, be preserved in the record of the case.” Rule 220(b) (emphasis added).³ Again, this question is jurisdictional and dispositive. It has been duly raised and an answer to it is absolutely nececcassry to the decision of this appeal—and indeed First Financial contends the correct answer to it ends this case in its favor. To deny First Financial such an answer violates not only Rule 220 but also its constitutional rights to equal protection and/or due process. (*See* U.S. Const. amend. XIV; S.C. Const. art. I, § 3; U.S. Const. amend. V; S.C. Const. art. I, § 3; *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

³ Certain exceptions to this requirement are provided in Rule 220(b)(1) and (2), but they are not applicable here. Rule 220(b)(1) applies only to “memorandum” opinions that are “unanimous.” The Subject Decision has been identified for publication; moreover, it is a split decision. Rule 220(b)(2) applies only to decisions of “[t]he Court of Appeals.”

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.”); *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.”).

2. Even assuming, *arguendo*, there is appellate jurisdiction, the Court should reconsider the entirety of First Financial's argument on the merits, the majority opinion of the court of appeals, and Justice Kittredge's dissenting opinion.

The court of appeals' majority decided this case correctly on the merits. This Court should rehear this matter and give new consideration to that decision, along with Justice Kittredge's dissent, which endorses the decision, and First Financial's brief, and decide this matter anew in favor of First Financial.

CONCLUSION

For the foregoing reasons, First Financial asks this Honorable Court to grant rehearing and vacate the Subject Decision in favor of an order that recognizes the appeal to have been concluded with finality as of the court of appeals' proper remittitur of the case on October 19, 2016, or, alternatively, in favor of a new or revised decision that that affirms the court of appeals on the merits, and thus affirms the trial court.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown (SC Bar No. 66468)

Russell G. Hines (SC Bar No. 72100)

Perry M. Buckner, IV (SC Bar No. 100031)

25 Calhoun Street, Suite 400

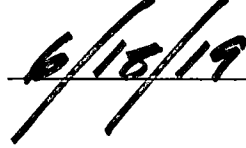
Charleston, South Carolina 29401

P.O. Box 993 (29402)

(843) 720-5488

Attorneys for Respondent

Charleston, South Carolina

Dated: 

The Supreme Court of South Carolina

Otha Delaney, Petitioner,

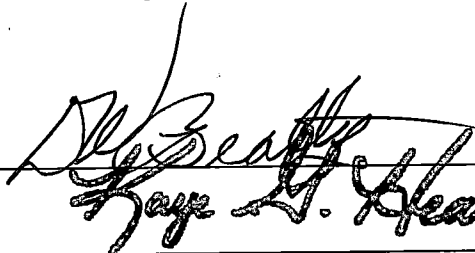
v.

First Financial of Charleston, Inc., Respondent.

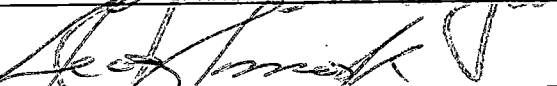
Appellate Case No. 2017-000683

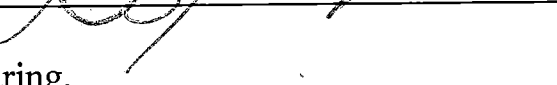
ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

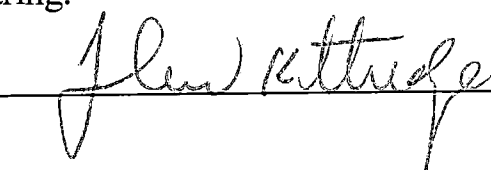
 C.J.

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 J.

 J.

I would grant the petition for rehearing.

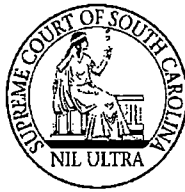
 J.

Columbia, South Carolina

July 15, 2019

cc:

Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire
Frederick M. Corley, Esquire
Kathy D. Lindsay, Esquire
Julie J. Armstrong



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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July 15, 2019

The Honorable Julie J. Armstrong
100 Broad St. Ste. 106
Charleston, SC 29401-2210

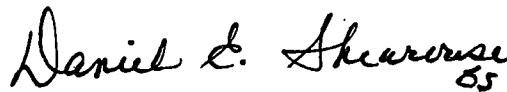
REMITTITUR

Re: Otha Delaney v. First Financial
Lower Court Case No. 2011-CP-07-07166
Appellate Case No. 2017-000683

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,



85

CLERK



cc: Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire
Frederick M. Corley, Esquire
Kathy D. Lindsay, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO: 2011-CP-10-07166
	)	
OTHA DELANEY, Individually and on behalf	)	
of all others similarly situated,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM
	)	IN SUPPORT OF CLASS
vs.	)	CERTIFICATION
	)	
FIRST FINANCIAL OF CHARLESTON, INC.,	)	
	)	
Defendant.	)	
	)	

TO: STEPHEN L. BROWN, ESQUIRE AND RUSSELL G. HINES, ESQUIRE, ATTORNEYS
FOR DEFENDANT:

Plaintiff Otha Delaney ("Delaney") submits his memorandum in support of his motion for class certification under Rule 23, SCRCP.

I. INTRODUCTION

This case involves the illegal conduct of First Financial of Charleston, Inc. ("FFC"), a sub-prime auto lender, who Delaney alleges uses a scheme to take advantage of underprivileged South Carolina citizens. FCC's scheme works as follows: 1) FCC makes automobile loans to underprivileged South Carolina residents at outrageous (29.5 percent) interest rates, 2) as a condition of the loan, FCC takes a security interest in the vehicle purchased with the loan proceeds, 3) when the borrower cannot re-pay the loan, FCC repossess the automobile and sells it, and 4) FCC then pockets the proceeds and holds the borrower liable for the deficiency.

While FCC's overall business model is technically legal under Article 9 of South Carolina's Uniform Commercial Code (UCC), it is beyond dispute that arming sub-prime lenders with rights of this nature are fraught with the danger of being abused: "Article 9 [of the Uniform Commercial

Code] provides creditors with an extraordinary remedy: without the intervention of a court or supervision of a regulatory agency, creditors can declare a note in default, seize the consumer's property, sell it without supervision, and recover the deficiency.”¹ Meaning, after default, secured parties like FCC can unilaterally decide to take possession of and sell a consumers' vehicles, and then distribute the proceeds from the sell, without any judicial oversight.

As a safeguard against the extraordinary powers give to secured parties under Article 9 of the UCC, which can clearly result in abusive auto lending and repossession practices, the UCC imposes ***strict requirements*** upon creditors who chose to repossess and sell consumer automobiles. Consumer protection is crucial when it comes to automobiles because losing your vehicle has crushing adverse effects:

Although some people choose to live without a car, most car-free Americans go without an automobile not by choice but because they cannot afford a car. Over 85% of Americans drive to work and over 95% of American households report having access to at least one automobile. The effect of not having access to an automobile is pronounced. Car-less people in America have lower incomes, work fewer hours, and are more likely to live in poverty.²

In South Carolina, the legislature has established a ***strict statutory scheme that must be followed*** by sub-prime lenders like FCC who decide to repossess and sell consumer automobiles under Article 9 of the UCC. For example, FCC is required to send borrowers a legally sufficient “presale” notice before it sells a borrower's vehicle, and a legally sufficient “post-sale” notice after a borrower's vehicle is sold. Both the pre and post-sale notice are required to include certain information in a certain manner, which is designed to clearly explain a borrower's rights during the repossession and disposition process. The safeguards against unsavory repossession

¹ National Consumer Law Center, Repossessions § 13.2.4.6 (9th ed. 2017).

² Pamela Foohey, *Consumers' Declining Power In The Fintech Auto Loan Market*, 15 BROOK. J. CORP. FIN. & COM. L. __, 2 (forthcoming 2021).

practices—and enforcing compliance with those safeguards—is needed now more than ever before: “In 2017, a total of 1.7 million motor vehicles were projected to be repossessed, rivaling vehicle repossession figures during the Great Recession,” and “[e]ven before the COVID-19 crisis, the auto industry projected that repossessions would rise in coming years, particularly for vehicles financed with subprime loans.”³

Delaney alleges that FCC failed to comply with the strict and mandatory procedures under the UCC when FCC repossessed his vehicle, sold it, and distributed the sales proceeds. Specifically, FCC sent Delaney a presale notice and a post-sale notice that do not comply with South Carolina law. Moreover, because the pre and post-sale notices used by FCC with respect to Delaney are “form documents” or “template documents” systematically used by FCC (FCC simply changes the name of the borrower and other information specific to each borrower), all South Carolina residents who had their vehicles repossessed and sold by FCC using these form notices have the exact same claim against FCC. In other words, if FCC’s pre and post-sale notices violate the law for Delaney, they violate the law for all other class members. Accordingly, class certification is warranted here, which is the only reasonable and practical way to resolve hundreds of identical claims against FCC, all which involve the same claims, the same law, the same documents, and the same issues.

Under Rule 23, SCRCP, Delaney seeks class certification for himself and similarly situated consumers who financed purchases of vehicles (or other personal property) through FCC, and subsequently had their property repossessed⁴ and sold by FCC. Delaney and the Class’s claims

³ *Id.* at 25.

⁴ Delaney uses the term “repossess” broadly for simplicity and clarity. The term “repossession” includes involuntary repossessions, voluntary repossessions, and voluntary surrenders. Voluntary repossessions or voluntary surrenders are entitled to the same SC UCC protections as involuntary repossessions: “Abandonment or voluntary surrender of the collateral by the debtor to the creditor

derive from FFC's failure to send statutorily-compliant notices as mandated by §§ 36-9-611, 36-9-613, 36-9-614, and § 36-9-616 of the Uniform Commercial Code, as adopted by South Carolina (the "SC UCC").⁵

Delaney's and the Class's claims arise from the deficiencies in FFC's form notices. SC UCC notice claims present a "classic case" for class action treatment, because they are based on substantively identical documents that must comply with a uniform statutory scheme. *McKeage v. TMBC, LLC*, 847 F.3d 992, 999 (8th Cir. 2017) ("Claims arising from interpretations of form contracts appear to present the classic case for treatment as a class action."). Accordingly, the Court can resolve each class member's claims by adjudicating Delaney's claims. Universally, courts have found most claims arising from the content of standardized documents are textbook examples for class treatment. And more specifically, courts routinely find class certification is appropriate when the class's claims are based on deficient presale and post-sale notices violating the UCC—in both federal court and state courts.⁶

does not waive the debtor's right to notice of resale of the collateral, and the statutory notice provision may not be waived or varied except in writing after default." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 375, 534 S.E.2d 688, 690 (2000).

⁵ The SC UCC is codified as S.C. Code Ann. § 36-9-101 *et seq.*

⁶ See *Middleton v. SunStar Acceptance Corp.*, 2000 WL 33385388 (S.C.Com.Pl. 2000); *Hopkins v. Kansas Teachers Cmty. Credit Union*, 265 F.R.D. 483 (W.D. Mo. 2010); see also *Chisolm v. Trans South Fin. Corp.*, 194 F.R.D. 538, 557-69 (E.D. Va. 2000) (affirming class certification of UCC notice class); *Walczak v. Onyx Acceptance Corp.*, 850 N.E. 2d 357, 366-72 (Ill. App. 2d Dist. 2006) (affirming class certification of UCC notice class); *Fielder v. Credit Acceptance Corp.*, 175 F.R.D. 313 (W.D. Mo. 1997); *Smith v. Centrix Fin., LLC*, No. 0516-CV05165 (Mo. Cir. June 13, 2006), attached as **Exhibit D**; *Yazzie v. Gurley Motor Co.*, No. CIV 14-555 JAP/SCY, 2015 WL 10818834 (D.N.M. Oct. 30, 2015), attached as **Exhibit E**; *Landrum v. Meadows Credit Union*, No. 08-441-CV-W-DW, 2010 WL 11509206 (W.D. Mo. 2010), attached as **Exhibit F**; *Read v Capital Fin. Loans, LLC*, No. 1416-CV04086 (Mo. Cir. Jun. 21, 2016), attached as **Exhibit G**; *Hart v Flagship Credit Corp.*, No. 10-CV-00822(NS) (E.D. Pa. Jan. 31, 2011), attached as **Exhibit H**; *Motormax Fin. Servs. Corp. v. Knight*, No. 1322-AC12550-01 (Mo. Cir. Aug 1, 2016), attached as **Exhibit I**; *Cosgrove v. Citizens Auto. Fin., Inc.*, No. CIV.A. 09-1095, 2011 WL 3740809 (E.D. Pa. Aug. 25, 2011), attached as **Exhibit J**; *Lou Budke v. Kyles*, Case No. 15SL-AC29334-01 (Mo. Cir. Nov. 5, 2019), attached as **Exhibit K**; *CSAC v. Crawford*, Case No. 1522-AC03346-02 (Mo. Cir. Jan. 31, 2020), attached as **Exhibit L**; *The Bankruptcy Estate of Jerome*

Two form presale notices are relevant here:

1. The “Delaney Presale Notice,” refers to the form notice FFC mailed to Delaney and to all consumers mailed a presale notice before October 4, 2011. (A copy of the Delaney Presale Notice is attached as **Exhibit A**); and
2. The “Revised Presale Notice,” refers to the form notice FFC mailed to consumers after October 4, 2011. (A copy of the Revised Presale Notice template is attached as **Exhibit B**).

Delaney respectfully asks the Court to grant his motion for class certification, appoint him as Class representative, and appoint Delaney’s attorneys as counsel for the Class. Significantly, for purposes of this motion, the Court is not required to decide the merits of Delaney’s claim. Rather, the Court is only required to determine that Delaney’s claims are sufficiently similar to the claims of other class members. Because Delaney’s claims (including the law and facts related to resolving them) are identical to the claims of the other proposed class members, class treatment is warranted.

II. FACTUAL BACKGROUND

Delaney purchased a 2003 Chevrolet pick-up truck (the “Vehicle”) from Coliseum Motor Cars, LLC in North Charleston, South Carolina, and signed a retail installment contract (the “RISC”) agreeing to make payments at an interest rate of 29.50%. (See Delaney’s RISC, attached as **Exhibit C**). The vehicle had a cash price of \$9,399.50. (*Id.*). After tacking on service contracts, the RISC called for Delaney to pay \$14,329.42 over three years. (*Id.*). Coliseum Motor Cars, LLC assigned the RISC to FFC. (*Id.*).

Talamante v. 1st Financial Federal Credit Union, Case No. 1922-CC10792 (Mo. Cir. Jun. 9, 2021), attached as **Exhibit M**.

Eventually, Delaney fell behind on his loan payments, and FFC, or an agent acting for FFC, repossessed his vehicle. Then, FFC sent a presale notice explaining it may (or may not) sell the vehicle if Delaney failed to redeem his pick-up (the “Vehicle”) by tendering the full balance of the loan (plus other expenses) by the date of sale. (See Ex. A). The presale notice sent to Delaney is a form document systematically used by FFC after it repossesses vehicles. Significantly, FCC does not challenge this critical assertion and admits it used form documents for presale and post-sale notices.

After taking possession of the Vehicle and mailing Delaney a deficient presale notice, FFC sold the Vehicle. After the sale, FFC mailed Delaney a post-sale notice saying he owed the remainder of his deficiency balance (i.e., the amount that was not covered by the proceeds from the sale). (See **Exhibit N**). Remarkably, FFC claimed Delaney owed \$2,961.27 for “repossession fees” and added the amount to his alleged deficiency balance. (See *id*).

On October 4, 2011, Delaney sued FFC on behalf of himself and a class of similarly situated class of consumers. After the Court granted FFC’s Motion to Dismiss by finding the claim was time-barred and the ruling was overturned by the Supreme Court in 2019, this case returned to this Court. On March 23, 2021, with consent from FFC to amend his Complaint, Delaney filed his Amended Complaint (the operative pleading here). In the Amended Complaint, Delaney alleged FFC violated the SC UCC by selling his and many other consumers’ vehicles without providing them a proper post-repossession, pre-disposition notice (a “presale notice”) as required by § 36-9-611, or a post-disposition explanation of deficiency (a “post-sale notice”) as required by § 36-9-616.

III. EXPLANATION OF RELEVANT SC UCC PROVISIONS

a. The SC UCC's Presale Notice Requirements

The statutory scheme at issue is based on revised Article 9 of the Uniform Commercial Code, which every state in the country has adopted,⁷ and has been well-settled law here since the South Carolina legislature passed it in 2001. *Singleton v. Stokes Motors, Inc.*, 358 S.C. 378, 595 S.E.2d 461 (2004).

Sections 36-9-611, 36-9-613, and 36-9-614 govern the SC UCC's presale notice requirements. Section 36-9-611 requires secured creditors to send a "reasonable authenticated notice of disposition" (i.e., a "presale notice") before it disposes of repossessed collateral. *See* § 36-9-611(b)). The presale notice **must provide** the consumer-debtor with ***certain specific information about his or her rights and how the creditor intends to sell the collateral.***

"Section 36-9-614 lists the information that must be provided in a notification of a disposition of collateral in a consumer-goods transaction." South Carolina Reporter's Comment to § 36-9-614. The provision requires the presale notice to accurately provide ***eight separate pieces of information*** (§ 36-9-614(1)(A) incorporates by reference § 36-9-613(1)'s five requirements and identifies three more). The failure to include any of these eight pieces of information renders the presale notice "insufficient ***as a matter of law.***" Official Text of UCC § 9-614, UCC Comment 2 (emphasis added); *Am. Gen. Fin. Servs., Inc. v. Woods-Witcher*, 669 S.E.2d 709, 711 (Ga. Ct. App. 2008).

To make compliance for lenders trouble free, the statute includes a "safe harbor" form (§ 36-9-614(5)) that—if properly completed—ensures compliance when properly completed. Official

⁷ "[Revised] Article 9 of the UCC has now been adopted by all fifty states, the District of Columbia, and the Virgin Islands." *See* 68A Am. Jur.2d Secured Transactions § 1 (2006).

Text of UCC § 9-614, Comment 3.⁸ FFC chose not to use the safe harbor form and instead chose to send illegal presale notices to Delaney and all other class members.

b. The SC UCC’s Post-Sale Notice Requirements

Section 36-9-616 requires secured creditors to send an “[e]xplanation of calculation of surplus or deficiency” (i.e., a “post-sale notice”) and describes the specific information the notice must include and the order in which it must be presented. The post-sale notice must accurately disclose three things: (1) the deficiency balance (§36-9-616(a)(1)(A)); (2) an explanation of how the deficiency was calculated ((§ 36-9-616(a)(1)(B)); and (3) a disclosure that the deficiency might be affected by future debits, credits, interest, rebates and expenses (§ 36-9-616(a)(1)(C)).

c. Damages for SC UCC Article 9 Violations

Section 36-9-625 provides, “[r]emedies [available to the consumer-debtor] for a secured party’s failure to comply with [Article 9 of the SC UCC].” Two subdivisions of the statute are particularly relevant here: § 36-9-625(c)(2) (for FFC’s presale notice violations) and § 36-9-625(e)(5) (for FFC’s post-sale notice violations).

Section 36-9-625(c)(2) allows for consumer-debtors to recover “*in any event* an amount not less than the credit service charge plus ten per cent of the principal amount of the obligation or the time-price differential plus ten per cent of the cash price” whenever “a secured party failed to comply with [Article 9, Part 6 of the SC UCC].” (emphasis added). If a secured party, such as FFC, does not comply with the SC UCC’s presale notice provisions, it triggers a consumer-debtor’s right to statutory damages under § 36-9-625(c)(2); proof of “reliance” or “actual damages” is not required.

⁸ See also James J. White & Robert S. Summers, Uniform Commercial Code § 34-10 (4th ed.1995 and Supp.2001) (“[t]he [presale] notice requirement is easy to understand and to apply.”)

As the official comments explain, a notice of disposition lacking the required information is “insufficient as a matter of law,” and the minimum statutory damages are “***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.***” Official Comment 4 to S.C. Code Ann. § 36-9-625 (emphasis added). *See also Mancuso v. Long Beach Acceptance Corp.*, 254 S.W.3d 88, 92 (Mo. App. Ct. 2008) (explaining § 36-9-625(c)(2) “provides a minimum, statutory, damage recovery for a debtor independent of a showing of damage”); *Coxall v. Clover Commercial*, 4 Misc. 3d 654, 667 (City Civ. Ct. 2004) (explaining consumer-debtors are “entitled to damages under § 36-9-625(c)(2) even if [the consumer-debtor] sustained no actual loss from [the secured party’s] failure to comply with [A]rticle 9”).

Another provision, Section 36-9-625(e)(5) permits consumer-debtors to “recover five hundred dollars in each case from a person that ... [f]ails to comply with subsection (b) of section 36-9-616.”

IV. THE CLASS DEFINITION AND CLASS CLAIMS

a. Delaney’s Proposed Class Definition and the Court’s Authority to Modify It

Although Delaney believes the class definition he proposes below satisfies Rule 23, SCRCP, this Court possesses the ultimate authority to determine whether the class proposed by the class proponent—or even a smaller class—satisfies Rule 23, SCRCP and may proceed as a class action.

⁹ *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) *cert. denied sub nom* ([Trial] “courts are permitted to limit or modify class definitions to provide the necessary precision”). *See* Rule 23(d), SCRCP (explaining the Court has a duty to protect the interest of absent class

⁹ For example, in another deficient UCC notice case, *Middleton*, 2000 WL 33385388 at *8, the Common Pleas Court of South Carolina entered an order certifying a class “conditioned on the redefinition of the proposed class” as suggested by the court.

members). Delaney also notes that, if the Court grants his Motion for Class Certification, it “may be altered or amended before the decision on the merits” (Rule 23(d), SCRCPP). Consequently, “courts should err in close cases in favor of certification because the class can be modified as the case progresses.” *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597 600 (Mo. App. 2012).

Because FFC has not filed an answer to Delaney’s Amended Complaint (which FFC consented to Delaney filing)¹⁰, Delaney cannot reasonably predict what arguments FFC may raise as to the scope of the Class. And because both parties’ class certification briefing is due at the same time, Delaney will not have an opportunity to respond to FFC’s arguments unless the Court grants Delaney’s request for a hearing on his Motion. In light of these circumstances, Delaney reemphasizes this Court is not left with a binary decision to either grant or deny certification of the class of individuals proposed by Delaney; rather, trial “courts are permitted to limit or modify class definitions to provide the necessary precision.” *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004). This Court is afforded great discretion in deciding class certification. However, the facts establish a class of consumers easily meet Rule 23, SCRCPP’s prerequisites and warrants certification.

b. The “Class” definition

Delaney seeks to certify a class of consumers (the “Class”) who:

- i. are named as borrowers, buyers, and/or obligors on a loan agreement or retail installment contract executed in South Carolina by FFC, assigned to FFC, or otherwise held by FFC;
- ii. were mailed a presale notice in the same or a substantially similar form as the Delaney Presale Notice or Revised Presale Notice; and

¹⁰ See docket entry on March 23, 2021.

iii. whose collateral¹¹ was disposed of by FFC or its agent.

Excluded from the Class are any individuals (1) whom FFC obtained a deficiency judgment against; (2) who had their debt discharged in bankruptcy after their collateral was sold; (3) whose collateral was sold on or before October 3, 2008¹²; (4) whose collateral was sold after the date of an order granting class certification; and/or (5) who signed a “novation” or release agreement in which they released FFC from liability.¹³

c. The Class’s Claims and SC UCC Violations Alleged

i. FFC’s Presale Notice Violations

FFC admits it used the same presale notice template (the “Delaney Presale Notice” template) “in all consumer-goods transactions in which it disposed of collateral during the three-year period from October 4, 2008, to October 4, 2011[.]” See FFC’s Amended Responses to Delaney’s Third Set of Interrogatories Response Nos. 1, 3 (attached as **Exhibit O**). After Delaney sued FFC on October 4, 2011, FFC began using a slightly modified version of the presale notice template used to create Delaney’s notice (the “Revised Presale Notice” template). ***As of July 28, 2020, FFC was still using the Revised Presale Notice template.***¹⁴ (See *id.*, Response No. 11) (explaining “since October 11, 2011 [FFC] has used the form of the ‘Revised Notification’” (i.e., the Revised Presale Notice)).

¹¹ Most of the class members’ repossessed “collateral” were motor vehicles. However, the UCC applies to all secured personal property, such as recreational vehicles, boats, and watercrafts.

¹² Delaney filed his Complaint with class action allegations on October 4, 2011, and a three-year statute of limitations apply to his UCC presale notice claim and accrues upon disposition. See *Delaney v. First Fin. of Charleston*, 426 S.C. 607, 829 S.E.2d 249 (2019).

¹³ As noted, the Court ultimately has authority to craft the class definition as it sees fit. Delaney notes, however, the Class as defined in this Memorandum is slightly modified to be narrower in scope than the Class defined in the Complaint or Motion (for example, the class definition excludes also provides a definitive end date for the class period, and excludes individuals who have contracted with FFC to release FFC from any claims).

¹⁴ FFC served these Amended Responses to the Third Set of Interrogatories on July 28, 2020.

Delaney alleged the Delaney Presale Notice was deficient for three reasons:

- (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); and
- (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.

FFC fixed the Delaney Presale Notice’s third deficiency in the Revised Presale Notice by adding the language stating the recipient could obtain a written explanation describing how FFC calculated the recipient’s alleged outstanding balance (and therefore, the cost for the recipient to redeem the vehicle and avoid FFC selling it).¹⁵ But the Revised Presale Notice still includes the first two deficiencies, which arise from **identical** language used in both the Delaney Presale Notice and Revised Presale Notice:

This [presale notice] 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.

(*See* Exs. A & B). Ultimately, Delaney alleges the presale notice FFC used from October 4, 2008, through October 11, 2011, was deficient for three reasons (Amended Complaint ¶¶ 50 & 54) and

¹⁵ SC UCC § 36-9-613(1)(D) and § 36-9-614(1)(A) require the presale notice to “state[] that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting[.]” An “accounting” under the SC UCC means a **written** explanation “identifying the components of the obligations in reasonable detail.”

the Revised Notice used after October 11, 2011, until July 28, 2020 (or later) share two identical deficiencies (*id.* at ¶50). These alleged deficiencies prevent FFC's compliance with the SC UCC's presale notice provisions:

GMAC's notice in this case does not convey the message that the property is to be or will be sold; ***the notice simply says that the automobile may be sold*** and the balance of the letter deals with what will happen if there is a sale. The tenor of the letter is not that there is an intended sale but that ***there may be a sale*** and if there is a sale GMAC has certain rights. The notice falls short of complying with Section 36-9-504(3)¹⁶ in that it fails to indicate an intent to sell. And we so hold.

GMAC v. Carter, 290 S.C. 216, 220, 349 S.E.2d 342 (Ct. App. 1986). FFC's presale notice does not clearly "indicate an intent to sell," and FFC concedes it wants to reserve the right to retain the vehicle instead of selling it when it mails the presale notice. (See Van Hook Deposition Transcript, p. 85:2–4). (answering in the affirmative when asked if FFC "still retain[ed] the option to sell [Delaney's vehicle] or not ") (an excerpt from the Van Hook Deposition Transcript is attached as **Exhibit Q**).

FFC mailed the same, or substantially similar, presale notices to Delaney and each class member; each presale notice FFC mailed to a class member violated § 36-9-611, § 36-9-613, and § 36-9-614 of the SC UCC as a matter of law (for at least two identical, independent reasons). The presale notices created with the Revised Presale Notice template included the first two deficiencies in the Delaney Presale Notice. If the Court agrees that at least one of the two alleged deficiencies violated the SC UCC, each class member mailed the Revised Presale Notice will be entitled to § 36-9-625(c)(2) damages and the injunctive relief sought by Delaney in his Amended Complaint.

¹⁶ *GMAC* was decided under "Former Article 9" of the UCC. Section 36-9-504(3) under Former Article 9 governed the UCC's presale notice requirements. The provision was transferred to § 36-9-611(b) under Revised Article 9, which applies here. See *Mancuso*, 254 S.W.3d at 94 ("In July 2001, a comprehensive revision of Article 9 went into effect. Prior to that, [§ 9-611(b)] was located in section 9-504(3).")

ii. Post-sale Notice Violations Under SC UCC § 36-9-616.

Failure to mail a proper post-sale notice violates § 36-9-616(b)(1) and triggers an additional penalty of \$500 per violation. *See* § 36-9-625(e)(5). Each class member was mailed a post-sale notice that did not substantially comply with § 36-9-616(b)(1).

A post-sale notice “must provide the following information in the following order”:

- i. The aggregate amount of obligations secured by the security interest;
- ii. The amount of proceeds after disposition of the collateral;
- iii. The aggregate amount of the obligations after deducting the proceeds from the sale of the collateral;
- iv. The amount and types of expenses;
- v. The amount and types of credits; and
- vi. The total amount of surplus or deficiency.

See § 36-9-616(a)(1)(B), (c). “Subsection (c) [of § 36-9-616] contains the **requirements** for how a calculation of a surplus or deficiency ***must be explained in order to satisfy subsection (a)(1)(B).***”

See Official Comment 3 to S.C. Code Ann. § 36-9-616. Delaney and each class member share identical post-sale notice claims because the post-sale notice mailed to Delaney “is a form document, and a document in this form would have been sent to all other debtors in consumer-goods transactions in which FFC disposed of collateral on or after October 4, 2008.” (*See* FFC’s Amended Responses to Second Set of Requests for Production, Response No. 2) (attached as **Exhibit P**).

FFC’s form post-sale notice does not identify three of the six components required by § 36-9-616: (1) the aggregate amount of obligations, (2) the gross proceeds of sale (i.e., the amount of

proceeds after disposition of the collateral)¹⁷, (3) the aggregate amount of the obligations after deducting the [gross] proceeds from the sale of the collateral (i.e., the net proceeds).

Delaney and the Class members' post-sale notice claims are factually and legally identical.

d. The Class Seeks Identical Relief

The Class seeks the following relief:

- (1) Statutory damages pursuant to § 36-9-625(c)(2) of the SC UCC¹⁸ based on FFC's deficient presale notices that violated §§ 36-9-611(b), 36-9-613, and 36-9-614;
- (2) Five hundred dollars (\$500), pursuant to § 36-9-625(e)(5), for each failure to comply with § 36-9-616(b), which requires a statutorily-compliant post-sale notice after the disposition of the class members' vehicles that explains how FFC calculated the class members' alleged deficiency;
- (3) Based on the absolute bar rule, which applies based on FFC's noncompliance with SC UCC and Consumer Protection Code, an order stating no deficiency is owed on their loans;
- (4) An order that FFC shall request that Equifax, Experian, and TransUnion delete from the class members' credit reports the tradelines associated with the loans implicated by this litigation.

¹⁷ FFC confirmed Delaney's vehicle sold for more than the "\$5,495" identified for "The Sale of Collateral" price in the post-sale notice. (*See* Ex. K); (*See also* Ex. Q, p. 81:1–22) (explaining the vehicle sold for more than \$5,495 because FFC "generally" has a "verbal contract for 500 or a thousand [dollars], depending on the amount of the vehicle, how long it's been there, that type of thing...." This shows why the SC UCC requires secured creditors to identify the "gross proceeds" (i.e., the sale price). The post-sale notice makes no mention of a fee paid to the auction company, so there is no way to tell whether the fee paid was reasonable.

¹⁸ Section 36-9-625(c)(2) provides a statutory formula for calculating statutory damages: (1) "the credit service charge" (i.e., the "Finance Charge" provided in the RISC's TILA box) plus (2) "ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price" (i.e., the "Amount Financed" provided in the RISC's TILA box).

V. THE STANDARD FOR CLASS CERTIFICATION UNDER RULE 23, SCRCP

“The class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.” *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197 (2010) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (1979)). Rule 23, SCRCP governs class actions in South Carolina. Although similar to Federal Rule 23, “Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.” *Id.* at 576–77 (quoting *Littlefield v. South Carolina Forestry Comm’n*, 337 S.C. 348, 354–55 (1999)). Accordingly, South Carolina policy encourages class actions and applies a less stringent test than federal courts use. *Id.*

Class certification is proper where the class proponent proves five prerequisites are satisfied:

The prerequisites [for class certification under Rule 23, SCRCP] are: 1) the class must be so numerous that joinder of all members is impracticable; 2) there must be questions of law or fact common to the class; 3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; 4) the representative parties must fairly and adequately protect the interests of the class; and 5) the amount in controversy must exceed one hundred dollars for each member of the class.

Id. Although the deficiencies in FFC’s UCC notices are apparent, “[a] court may not look to the merits when determining whether to certify a class.” *King v. American General Finance, Inc.*, 386 S.C. 82, 88 (2009) (quoting *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42 (1998)). Instead, the Court primarily relies on the allegations included in the Complaint. *Tilley*, 333 S.C. at 43 (citing *Curley v. Cumberland Farms Dairy*, 728 F. Supp. 1123 (D.N.J. 1990)).

The five prerequisites for class certification are (1) numerosity, (2) commonality, (3) typicality, (4) adequacy of representation, and (5) minimum amount in controversy. *See* Rule 23(a), SCRCP. “These requirements all flow from the same considerations of fairness and efficiency, that is,

fairness to the unnamed class members and efficiency in the management and resolution of large numbers of claims.” *Middleton v. SunStar Acceptance Corp.*, 2000 WL 33385388 at *2 (S.C.Com.Pl. 2000).

VI. ARGUMENT

a. The five requirements for class certification are satisfied.

i. **Numerosity: The class of consumers is sufficiently numerous to make joinder impracticable.**

Rule 23(a)(1), SCRCF, requires that “the class is so numerous that joinder of all members is impracticable.” South Carolina case law has not examined this requirement in great depth. However, other courts have observed numerosity is typically presumed when 40 or more class members comprise the class. *Marcus v. BMW of N.A., LLC*, 687 F.3d 583, 590 (2012) (“There is no minimum number of members needed for a suit to proceed as a class action ... We have observed, however, that ‘generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of [Federal] Rule 23(a) has been met.’”).

The Class includes hundreds of consumers who were mailed deficient presale notices bearing at least one of the same defects in Delaney’s presale notice. (See Ex. O, Responses Nos. 10, 13) (estimating FFC repossesses “3-4 [vehicles] per month”). Further, the data FFC produced to Delaney on June 10, 2021, shows FFC has repossessed 575 vehicles associated with loans agreements signed on or after January 5, 2012.¹⁹ (See Credex Query Results, attached as **Exhibit R**). Meaning, this data does not capture FFC’s repossessions for loans executed prior to January 5, 2012 (but still within the class period).

¹⁹ The 575 repossessions should be considered the minimum number of FFC repossessions over the period. Delaney does not concede the accounts identified represent the total number of repossessions over the specified period, as FFC has not explained how it filtered the “query” to produce the “Credex Query Results.”

Joining every class member who has had his or her vehicle repossessed and sold by FFC over the last 13 years is impracticable (if not impossible) here. *See Middleton*, 2000 WL 33385388 at *5 (finding “joinder of [345] individual class members is impracticable and would unduly and unnecessarily strain judicial resources” in a UCC notice case). Although some of the consumers mailed deficient presale notices will ultimately be excluded from the class (by judgment, bankruptcy, or novation agreements), the Class will certainly include hundreds of consumers.²⁰ Numerosity is satisfied.

ii. Commonality: Delaney and each class member share multiple common questions crucial to resolving their claims.

Standard for Commonality

Class proponents satisfy the commonality prong of Rule 23, SCRCF, by showing “questions of law or fact common to the class” and the class members share at least one “determinative issue.” *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 422, 717 S.E.2d 765 (Ct. App. 2011). However, “it is not necessary that all questions of law and fact be common, only that common issues exist among the class.” *Id.* There’s no bright-line test for commonality. Instead, the Court determines whether “the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.” *Hensley v. South Carolina DSS*, 429 S.C. 144, 153 (2020).

The Class’s claims involve the interpretation of standard form documents.

Universally, courts find most claims arising from the content of standardized documents are textbook examples for class treatment—even cases in federal court where “predominance” must

²⁰ Delaney would be able to provide the Court with an exact number if FFC had preserved its business records that it knew were relevant to this case.

be shown.²¹ *McKeage*, 847 F.3d at 999 (“Claims arising from interpretations of form contracts appear to present the classic case for treatment as a class action.”). *Sacred Heart Health Sys. v. Humana Military Healthcare Servs.*, 601 F.3d 1159, 1171 (11th Cir. 2010) (“It is the form contract, executed under like conditions by all class members, that best facilitates class treatment.”). Unsurprisingly, courts routinely find class certification is appropriate when the class’s claims arise from deficient presale and post-sale notices violating the UCC.²²

***Commonality is easily satisfied when
claims are based on insufficient UCC notices.***

A Missouri court faced with the same issue before this Court (whether presale notices complied with the Missouri UCC) concisely explained why commonality (and even predominance) is satisfied in cases like this:

The only legal issue is whether [the] defendants’ presale notices fall short of UCC requirements. Resolution of this issue will simultaneously resolve all class members’ claims. Accordingly, common issues of law and fact predominate.

Smith v. Centrix Fin., LLC, No. 0516-CV05165 (Mo. Cir. June 13, 2006) at *13–14 (attached as Ex. D). Similarly, a United States District Court in Missouri found “[c]ommon questions of law and fact do predominate the claims [involving the sufficiency of presale notices] under the MoUCC,” explaining:

²¹ See *Cruson v. Jackson Nat. Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020); *Red Barn Motors, Inc. v. Nextgear Capital, Inc.*, 915 F. 3d 1098, 1102 (7th Cir. 2019) (finding the district court abused its discretion in decertifying a class because the claims were based on the interpretation of form contracts); *In Re: TD Bank, N.A. Debit Card Overdraft Fee Litigation*, 325 F.R.D. 136, 164 (D.S.C. 2018) (explaining that because the defendant used standardized contracts of adhesion ... all of the requirements for certification of the [] claims have been satisfied”); 2 NEWBERG § 3.24 (explaining that claims arising out of “form contracts” are often “particularly appropriate for class action treatment”); *Butto v. Collecto, Inc.* 290 F.R.D. 372 (E.D.N.Y) (2013) (finding class action treatment was appropriate because “challenging the content of a standard form letter is the type of suit that is more efficiently brought as a class action than as a series of individual actions, with the inefficiency, high costs, and the risk of inconsistent outcomes posed by that method”).

²² See Footnote 6.

All of Plaintiffs’ claims under the MoUCC raise the same legal question: Do the presale notices Defendant sent to Plaintiffs fall short of the MoUCC requirements? ... [t]o prove this claim, Hopkins must enter evidence of the presale notice that he received, which the Court may use to determine whether the notice complies with the MoUCC. While it is clear not all [class members] received the exact same presale notice Hopkins received, all [class members] will rely on the same basic evidence to prove their case (i.e., whatever version of the presale notice they might [have] received).”

Hopkins v. Kansas Teachers Community SCFCU, 265 F.R.D. 483 (W.D. Mo. 2010) (finding the UCC notice claims satisfied the “far more demanding” “predominance” test).

FFC confirmed the Class’s claims are based on form documents (See Section IV(c) above). For Delaney’s presale notice claim, he asks the Court to determine whether FFC violated the SC UCC for three independent reasons. The Court’s resolution of the three alleged deficiencies in the Delaney Presale Notice will necessarily resolve every class member’s presale notice claim because every presale notice FFC mailed to class members before October 4, 2011 (the date Delaney filed his complaint) used the same Delaney Presale Notice template and every class member mailed a Revised Presale Notice only alleges two deficiencies based on identical language used in the Delaney Presale Notice. (See Exs. A & B).

All putative class members FFC mailed a post-sale notice share identical claims: the substantively identical post-sale notices used by FFC violate § 36-9-616—and do not substantially comply with that provision—because the information listed in the post-sale notices omits information required by § 36-9-616(c), and the disparate pieces of required information included in the post-sale notices are not listed in the proper order. Delaney’s and the Class members’ post-sale notice allegations attack FFC’s flawed post-sale notice templates and do not rely on transaction-specific problems that may require individualized inquiries. If the Court finds the post-sale notice mailed to Delaney violates § 36-9-616, then FFC violated § 36-9-616 with respect to every class member it mailed a post-sale notice.

Whether commonality is met hinges on efficiency: “[commonality] requires the court to balance the efficiency to be gained from one trial on common issues versus the difficulty to be suffered by having to conduct individual trials or hearings on issues that are not common.” *Hensley*, 429 S.C. at 152. There can be no doubt the procedural class-action device can resolve the class members’ claims much more efficiently than individual litigation. This Court only needs to review three templates of notices and their contents and determine which notices comply with South Carolina law and which ones do not. Like in *Centrix* and *Hopkins*, adjudicating Delaney’s claims would also resolve the other class members’ SC UCC notices claims.

The Court will be able to resolve hundreds of claims that have been accruing for more than a decade by assessing these three documents. Commonality is satisfied.

iii. *Typicality*: Delaney is typical of the Class because the issues he raises are also essential to resolving the Class’s claims.

“To establish the typicality requirement, the ‘claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.’” *Pope*, 395 S.C. at 422 (quoting Rule 23(a)(3), SCRCPP). In *King*, the Supreme Court of South Carolina found the trial court abused its discretion in decertifying a class based on lack of typicality. *King*, 386 S.C. at 88. The class proponent argued he was typical of the class he sought to represent because all class members’ claims also involved a lender’s failure “to provide the necessary attorney preference disclosure at the time of their credit applications.” *Id.* at 85. The Supreme Court agreed: “The typicality requirement of Rule 23, SCRCPP, is found in the common feature of the lender failing to timely provide the attorney preference disclosure.” *Id.* at 91. Delaney’s case for typicality is stronger than the class proponent’s in *King*. The *King* Class’s claims inevitably involved some individualized inquiries based on the timing of disclosures. *Id.* No individualized inquiries exist here. The only

relevant evidence is the content of FFCs two presale notices and one post-sale notice. (See Ex. P, Response Nos. 1–4).

Typicality is satisfied when “each class member’s claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant’s liability[.]” *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)). Delaney claims FFC repossessed his vehicle and sold it without mailing him statutorily-compliant presale or post-sale notices. These are the same claims made by the Class. And naturally, the same legal arguments raised by Delaney apply to the class members’ claims. Typicality is satisfied.

iv. Adequacy: Delaney and undersigned counsel would adequately represent the Class they share common interests in this litigation.

Rule 23(a)(4), SCRCP requires the Court to find the class representatives are adequate before a class may be certified. “The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class.” *Waller v. Seabrook Island Prop. Owners Ass’n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). Essentially, “[t]he adequacy of representation ‘rule requires courts to ask whether [a representative] plaintiff’s interests are antagonistic to the interest of other members of the class.’” *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000).

The Supreme Court of the United States has observed the “typicality and adequacy inquiries often ‘tend[] to merge’ because both look to potential conflicts and to ‘whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence[.]’” *Beck v. Maximus*, 457 F.3d 291, 296 (3d Cir. 2006) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). As discussed

in more depth under Delaney’s “Typicality” analysis, Delaney’s interests are not remotely antagonistic to the Class; their claims are aligned. Plus, impressively, Delaney has continued to pursue claims on behalf of the Class for ***a decade***, even challenging the court’s dismissal of the case in the court of appeals and Supreme Court of South Carolina. Delaney is a more-than-adequate class representative.

The Class would also be represented by experienced and well-respected South Carolina attorneys who are experienced in class action litigation, familiar with the court’s procedural rules, and familiar with the applicable substantive law. If Delaney’s motion for certification is granted, every class member will have his or her interests fairly and adequately protected by Delaney and his attorneys.

Delaney and undersigned counsel will adequately represent the Class.

v. *Amount in Controversy:* Each class member seeks damages exceeding \$100.

Rule 23, SCRC(a)(5) requires that “the amount in controversy exceeds one hundred dollars for each member of the class.” Each class member’s claim passes the \$100 threshold. Recovery for each post-sale notice violation imposes a flat penalty of \$500. See § 36-9-625(e). Each member’s presale notice damages would exceed \$100 as well, which is equal to the “Finance Charge” plus 10% of the “Amount Financed” identified in the loans’ TILA boxes. See § 36-9-625(c)(2); (*see also* Ex. C, p. 1).

VII. ANTICIPATED FFC ARGUMENTS

a. Relation Back Issues

With the consent of FFC, Delaney amended his Complaint on March 23, 2021. FFC has previously suggested Delaney’s Post-Sale Notice claim is time-barred because it does not relate back to the Original Complaint filed in 2011. (*See* FFC’s Motion to Dismiss Amended Complaint

p. 10). Whether Delaney would be barred from recovering on his post-sale notice claim and whether Delaney's post-sale notice claim "relates back" to his 2011 Complaint is an issue common to the majority of the Class given the three-year statute of limitations. FFC's statute of limitations argument does not weigh against class certification.

Although the statute of limitations argument is a merits-based inquiry, FFC's argument will clearly fail. Delaney's amendment and addition of the post-sale notice claims arose out of the same loan agreement as his presale notice claims, as well as FFC's standard repossession practices and compliance with the SC UCC. *See Patton v. Miller*, 420 S.C. 471, 496, 804 S.E.2d 252 ("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[.]") (ellipses in original). Plus, finding the post-sale notice claim relates back to the Original Complaint is consistent with the primary purpose of the relation back doctrine because ***FFC consented to Delaney adding the post-sale notice claim***. "Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend." *Id.* at 491. FFC cannot claim to have been prejudiced or use the protection of the statute of limitations because it consented to Delaney adding a post-sale notice claim.

b. FFC's Use of Two Different Presale Notice Templates.

At other points in this litigation (mainly FFC's discovery objections and opposition to Delaney's Motion to Compel Discovery) FFC has insisted Delaney should not be able to represent any consumers unless they were mailed a Delaney Presale Notice (meaning anyone mailed a notice after October 4, 2011, could not be part of the Class). But as explained above, the Delaney Presale Notice and the Revised Presale Notice—though formatted somewhat differently—both include identical language bearing two dispositive deficiencies. Delaney need not limit the Class to

consumers mailed the Delaney Presale Notice. The relevant question is whether Delaney can satisfy Rule 23, SCRCP by including consumers who received the Delaney Presale Notice and consumers who received the Revised Presale Notice. The answer is “yes.” “Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.” *Custom Hair Designs by Sandy v. Cent. Payment Co., LLC*, 984 F.3d 595, 604 (8th Cir. 2020).

Delaney and the Class’s presale notice claims primarily turn on identical language and identical alleged deficiencies. Thus, the same relevant facts and analysis of Delaney’s legal claims apply to consumers who were mailed a Delaney Presale Notice and consumers mailed a Revised Presale Notice.

c. Evidence-related arguments.

To the extent FFC claims there is insufficient evidence to certify the Class (FFC would be wrong) Delaney notes FFC has refused to provide him evidence it has in its possession or could easily obtain. Further, any relevant evidence not accessible to FFC is a result of its own spoliation. Delaney filed this class action in October of 2011. But FFC told Delaney it only maintains business records for “approximately the most recent twenty-six (26) months.” (See Ex. O, Response Nos. 3, 4, 8, and 9). Meaning, FFC cannot produce—or at least claimed it could not produce—nearly a decade worth of relevant class member information (2008 through 2018). FFC knew about this lawsuit and even admits it knew it had a duty to preserve relevant evidence. (See Ex. N, p. 21:7–17) (conceding parties holding relevant evidence should “hold [the] evidence and not dispose of it”).

FFC’s claim that it could not produce any relevant information outside of the latest twenty-six months is dubious too, despite this Court’s order compelling “full and complete responses to

[Delaney’s] discovery.” (See Order Granting Motion to Compel Discovery). The majority stockholder in FFC testified that FFC uses a data storage system through the company Credex—and that Credex may have information on all of FFC’s repossessions going back to “around 2012.” (See Ex. Q, p. 21:7–17). Mr. Van Hook assured Delaney he “could get in contact with Credex and find out [what relevant information they have]” at his April 14, 2021, deposition. (See *id.*, p. 102:7–17). On June 10, 2021, FFC produced the first and only relevant document it acquired from Credex. (See Ex. R – Credex Query Results).

Any evidentiary issues FFC could possibly complain about were self-created; FFC should not be rewarded for ignoring its duty to preserve evidence (or even consciously disregarding it).²³

d. Affirmative Defenses

Class opponents often claim they intend to raise many affirmative defenses that will create individualized inquiries that defeat commonality. FFC has not pleaded any affirmative defenses (or filed a responsive pleading), which should make any affirmative defense arguments too speculative to weigh against class certification. Regardless, alleged individualized inquires related to affirmative defenses rarely defeat commonality (or even the more stringent “predominance” standard in federal cases):

When ‘one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.’

²³ “A party has a duty to preserve evidence during litigation and at any time before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Nucor Corp. v. Bell*, 251 F.R.D. 191, 194 (D.S.C. 2008).

See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045, 194 L.Ed.2d 124 (2016) (quoting 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure*, § 1778, pp. 123–24 (3d ed. 2005)).²⁴

e. Individualized Damages

Like alleged individualized “affirmative defense” inquiries, “[t]he individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3).” *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F. 3d 32, 38 (1st Cir. 2003); see also *Klay v. Humana, Inc.*, 382 F. 3d 1241, 1259 (“[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate.”). Most of the relief sought by the class members is wholly uniform: statutory damages of \$500 for each post-sale notice violation, injunctive relief (enjoining FFC from collecting deficiency balances, time price differential, and delinquency and collection charges and compelling FFC to have any adverse credit information it wrongfully reported removed from Class members’ credit reports), and declarations that FFC’s presale and post-sale notices violated the law.

The only relief sought by Delaney and the Class that is not strictly uniform is statutory damages under § 36-9-625(c)(2). But calculating these damages is a mechanical task that merely requires the parties to plug information from the Class members’ loan agreements into the statutory formula provided in § 36-9-625(c)(2): the “finance charge” plus ten percent of the “amount financed” (as shown on the face of every Class member’s loan agreement).

²⁴ See also *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 938 (9th Cir. 2019) (quoting 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778 (3d ed. 2005) (“A proposed [Federal Rule 23] class may be certified as long as ‘one or more of the central issues in the action are common to the class and can be said to predominate ... even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.’”).

The relief sought by Delaney and the Class supports commonality and weighs in favor of class certification.

f. The Class's Claims are Not Based on Mere Technicalities (Although Alleged Technicalities are Sufficient for the Class's UCC Claims).

FFC has complained it should prevail in this case (a premature merits-based argument) because, in FFC's mind, its violations are technical and it would be unfair to hold FFC accountable for violating South Carolina law because Delaney and the Class have not proven to have suffered actual injuries.²⁵ (See FFC's Opposition to Delaney's Motion to Compel Discovery pp. 4–6). FFC is wrong. Complying with the SC UCC's presale notice requirements is a prerequisite to selling debtors' repossessed collateral. Delaney and the Class members have been harmed because FFC sold their vehicles without having the right to do so. Further, the Class members were prejudiced by inaccurate credit reporting and collection attempts of deficiencies that did not exist. *See GMAC*, 290 S.C. at 220 (vacated as condition of settlement) (finding the secured creditor had no right to a deficiency because it violated the SC UCC's presale notice requirements).

But more importantly, FFC's alleged equitable arguments are immaterial in light of the Legislature's clear statutory mandates. As the South Carolina Court of Appeals observed, "[S]ection 36-9-625(c)(2), states the penalty 'is designed to ensure that every noncompliance with the requirements of Part 6 [§§ 36-9-601 to -629 (2003 & Supp. 2015)] in a consumer-goods transaction results in liability, **regardless of any injury** that may have resulted' **an injury is**

²⁵ Delaney notes defendants often argue UCC notice claimants lack standing because they have not pleaded an actual injury. Delaney pleaded actual injury in this case. *See* Amended Complaint ¶¶ 30–32. Moreover, "actual harm" is not required for standing in South Carolina. Delaney and the Class clearly have statutory standing for their UCC claims. *See Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2020) (explaining "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party" and the Article III injury requirement applied in federal court does not apply in South Carolina because "[t]he concept of Article III standing as applied in the federal courts does not limit a state's ability to statutorily formulate standing criteria.").

not required for a secured party to be liable for failing to comply with the notice requirement.” *Delaney v. First Fin. of Charleston, Inc.*, 418 S.C. 209, 221–22, 791 S.E.2d 546 (Ct. App. 2016) (overruled on other grounds by *Delaney v. First Fin. of Charleston*, 426 S.C. 607, 829 S.E.2d 249, 612 (2019)).

General equitable principles or common law rules are irrelevant to Delaney’s and the Class’s claims, which is why this case is perfectly suited for class action treatment. The Court need not make individual determinations on how each class member was impacted by FFC’s violations. The SC UCC claims depend solely on the secured creditor’s compliance (or noncompliance) with its statutory provisions. See South Carolina Reporter’s Comment to § 36-9-625 (“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.”).

VIII. CONCLUSION

Cases involving form documents are “particularly appropriate for class action treatment.” William B. Rubenstein, *Newberg on Class Actions* § 3.24 (5th ed. 2012). Consistent with this general principle, courts routinely find claims based on deficient UCC notices satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure (and therefore, would necessarily satisfy South Carolina’s more class action-friendly Rule 23 prerequisites).²⁶

This Court’s examination of Delaney’s presale and post-sale notices will allow it to efficiently adjudicate a substantial number of claims (at least 300). Delaney’s and each class member’s claims

²⁶ See Footnote 6.

are based on the same type of conduct and legal theories. The Class also seeks the same relief as Delaney. Delaney has satisfied every requirement in Rule 23, SCRCP.

Delaney prays the Court certify the “Class” as defined above on pages 11 and 12 of this Memorandum, or as modified by the Court. Delaney further prays the Court appoints Delaney as the representatives of the Class, appoints undersigned counsel as counsel for the Class, and for such other and further relief as the Court deems appropriate under the circumstances.

Respectfully Submitted,

TWENGE + TWOMBLEY LAW FIRM

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June 11, 2021

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

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO. 2011-CP-10-07166

**ORDER DENYING DEFENDANT'S
 MOTION TO DISMISS AMENDED
 CLASS ACTION COMPLAINT**

Presiding Judge:
 Plaintiff's Attorney:
 Defendant's Attorney:
 Date of Hearing:
 Court Reporter:

Hon. R. Kirk Griffin
 J. Ashley Twombly, Esq.
 Russell G. Hines, Esq.
 July 29, 2021
 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 Twombly, 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), SCRCPP, 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, SCRCF’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), SCRPC). (“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

Electronically signed on 2021-08-19 11:51:39 page 15 of 15

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,	)	
	)	DEFENDANT’S MOTION TO ALTER,
Plaintiff,	)	AMEND, AND/OR RECONSIDER
	)	ORDER DENYING DEFENDANT’S
vs.	)	MOTION TO DISMISS AMENDED
	)	CLASS ACTION COMPLAINT
FIRST FINANCIAL OF CHARLESTON, INC.,	)	
	)	
Defendant.	)	***Hearing Requested***
	)	

TO: THE HONORABLE R. KIRK GRIFFIN, Presiding Judge, and PLAINTIFF’S COUNSEL OF RECORD

NOW COMES Defendant, First Financial of Charleston, Inc. (“Defendant” or “FFC”), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order Denying Defendant’s Motion to Dismiss Amended Class Action Complaint, filed August 19, 2021 (the “Subject Order”).¹

¹ Without waiving the request for relief made via the instant motion, by Defendant’s calculations, with the filing of the Subject Order on August 19, 2021, the deadline for Defendant to answer the Amended Class Action Complaint is the 15th day thereafter, i.e., Friday, September 3, 2021, *see* Rule 15(a), SCRCP, and Defendant will file/serve a formal answer to the said complaint on or before such date. However, out of an abundance of caution, and only to the extent that an answer to the Amended Class Action Complaint is somehow now required, the instant filing should be construed to constitute Defendant’s answer thereto, which answer denies all wrongdoing/liability alleged against Defendant and re-raises the affirmative defenses set forth in its answer to Plaintiff’s original complaint, incorporating the same by reference.

1. **Most respectfully, Defendant asks the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Motion to Dismiss², i.e., each and every distinct issue/argument raised in/via the Motion to Dismiss, the Memo in Support³, and oral argument, all of which is/are hereby incorporated herein by reference.**

See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original).

2. **Without limiting the comprehensive nature of the foregoing request (i.e., 1 above), Defendant most respectfully asks the Court to reconsider the Subject Order in respect of the following:**
 - a. **The Subject Order should not cite to the Order Granting Plaintiff’s Motion for Class Certification (the “Certification Order”) or the Supreme Court’s decision in *Delaney v. First Financial of Charleston, Inc.*, 426 S.C. 607 (2019) (the “Supreme Court Opinion”), in support of factual propositions.**

The Subject Order cites to the Certification Order and the Supreme Court Opinion in support of factual propositions. (Subject Order pp. 1, 2, 4.) In the context of Motion to Dismiss, but for certain narrow exceptions involving procedural matters (e.g., Defendant’s jurisdictional argument, the need to compare Plaintiff’s original complaint to the operative complaint for the purpose of considering whether Count II (the POST-Sale Notice claim) in Plaintiff’s amended complaint relates back under Rule 15(c), SCRCP), the facts are to be drawn from the complaint

² The “Motion to Dismiss” refers to Defendant’s Motion to Dismiss Amended Class Action Complaint, filed April 29, 2021.

to which the motion is directed, i.e., Plaintiff’s operative complaint, the Amended Class Action Complaint, filed March 30, 2021 (the “Amended Complaint”). *See Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) (Under Rule 12(b)(6), SCRCp, a party may move to dismiss a complaint against it based on a failure to state facts sufficient to constitute a cause of action.); *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling on the allegations of the complaint.).

b. The Subject Order erroneously “views the Supreme Court’s and Court of Appeals’ silence as a rejection of FFC’s jurisdictional argument.” (Subject Order p. 3.)

Regarding Defendant’s argument about the jurisdictional consequences of Plaintiff not timely petitioning for rehearing and the Court of Appeals properly remitting the case to the trial court, the Subject Order correctly recognizes that neither the Court of Appeals nor the Supreme Court expressly addressed and explained the supposed error of Defendant’s position. The Subject Order, however, erroneously “views the Supreme Court’s and Court of Appeals’ silence as a rejection of FFC’s jurisdictional argument.” (Subject Order p. 3.) Their silence is not substance, but rather the absence of it, and does not constitute a controlling ruling on the issue. Conceptually, this is no different from the issue of appealability, where, on the one hand, our appellate courts have an independent obligation to dismiss the appeal of an order that is not properly appealable (i.e., to do so even when appealability is not raised by the parties themselves),⁴ while, on the other hand, the fact that an appellate court decided an appeal of a particular type of order on the merits in a prior case does not constitute precedent to the effect

³ The “Memo in Support” refers to Defendant’s Memo, filed July 21, 2021, in support of the Motion to Dismiss.

that such an order is appealable when the issue of appealability was not actually determined. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 95, 529 S.E.2d 11, 14 (2000) (notwithstanding numerous prior opinions entertaining appeals on merits of change of venue orders, such orders are not immediately appealable).

- c. **The Subject Order erroneously “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.” (Subject Order pp. 3–4.)**

This statement in the Subject Order is disproved by other language from just a few sentences earlier: “But courts are tasked with the constitutional duty to determine whether they possess subject matter jurisdiction.” (Subject Order p. 3.) Here the Court expressly declares not only its authority to determine its own jurisdiction but indeed its duty (which it must necessarily be inclined to carry out) to do so. And to be clear, while it is certainly true that Defendant contends that both the Court of Appeals and the Supreme Court acted without jurisdiction after the Court of Appeals had properly remitted the case, the jurisdictional defect is continuing in nature and has now flowed all the way to and directly confronts this Court with respect to its own jurisdiction. In other words, while the jurisdictional defect is not limited to this Court, it is nonetheless an issue that is squarely presented to this Court and as to which, as the Subject Order expressly recognizes, this Court has its own “duty” to determine for itself—and this duty is all the more pressing and unable to be bypassed in the name of deference to the Court of Appeals or Supreme Court because those courts have thus far been “silent” on the matter.

- d. **The Subject Order erroneously characterizes the differences in the different pre-sale notices as “slight.” (Subject Order p. 5.)**

⁴ *Levi v. Northern Anderson County EMS*, 409 S.C. 374, 378–80, 762 S.E.2d 44, 47 (Ct. App. 2014).

As explained previously, Mr. Delaney avers that Exhibit A to the Amended Complaint is a true and accurate copy of the allegedly deficient PRE-Sale Notice FFC sent him, but Mr. Delaney also attempts to assert liability against FFC based on alleged deficiencies in another PRE-Sale Notice attached to the Amended Complaint as Exhibit B, and the differences between these notices are *material*, such that Exhibit A is alleged to be deficient in three (3) respects while Exhibit B is alleged to be deficient in only two (2) of these respects; thus, the circumstances are such that Mr. Delaney could potentially win the claim for himself while at the same time losing it for all class members for whom the claim is based on Exhibit B. (See Memo in Supp. pp. 7–14.)

- e. **The Subject Order erroneously states, “The Court has already determined Delaney satisfied Rule 23, SCRCF’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.” (Subject Order p. 6.)**

As an initial matter, Defendant’s timely motion for reconsideration of the Certification Order is pending. Moreover, and in any event, review of the Certification Order shows that it does not in fact address Plaintiff’s claim regarding the post-sale notice. (See Certification Order.)

- f. **The Subject Order’s statute of limitations analysis is erroneous.**

As an initial matter, a statute of limitations defense is properly raised under Rule 12(b)(6). See, e.g., *Clearwater Trust v. Bunting*, 367 S.C. 340, 353, 626 S.E.2d 334, 340 (2006) (“The circuit court properly dismissed the Breach of Fiduciary Duty and Negligent Misrepresentation claims under Rule 12(b)(6) as they were brought after the expiration of the statute of limitations.”).

Moreover, the Subject Order erroneously states, “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.” (Subject Order p. 7.) First off, the fact that the Supreme Court Opinion remanded the case “for further proceedings” does not insult Plaintiff’s complaint from other challenges not addressed in the prior appellate proceedings. And as for Mr. Delaney himself, Defendant only argues that Count II (the POST-Sale Notice claim) should be dismissed as barred by the statute of limitations. In short, this argument is that the allegedly deficient POST-Sale Notice was sent to Mr. Delaney in January of 2009, more than 12 years before he first complained about that POST-Sale Notice in the newly added Count II in the Amended Complaint, filed March 30, 2021, which does not arise “out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original [complaint]” and, thus, does not related back to the date of the original complaint under Rule 15(c). As explained previously, the Original Complaint, filed October 4, 2011, asserted a single cause of action for the alleged violation of the PRE-Sale Notice Requirements, neither expressly alleging a cause of action for the alleged violation of the POST-Sale Notice Requirements nor set forth facts sufficient to constitute such a cause of action. (Memo in Support p. 22.) And the Subject Order’s reference to the absence of prejudice as a result of Defendant having consented to Plaintiff filing/serving the Amended Complaint is beside the point. (Subject Order p. 8 (“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.”).) Neither prejudice nor consent has anything to do with the relation back question. All Defendant consented to was the proposed amended

pleading, it did not agree that the pleading, once filed and served was not subject to dismissal: it did not agree that the new claim (Count II) asserted in the amended pleading related back to the date of the original pleading. And under the plain language of the Rule 15(c) test, the new claim (Count II) does not relate back, because it simply does not arise “out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading[.]” The lone authority cited (*see* Subject Order p. 8 (citing *Patton v. Miller*, 420 S.C. 471, 496, 804 S.E.2d 252 (2017))) does not support the Subject Order’s expansive view that, for Count II to relate back, it is sufficient that the claim—while unmentioned in any way, shape, or form in the original pleading—arose out of the same loan agreements as the separate and distinct PRE-Sale Notice claim (which is founded on separate and distinct UCC provisions) that was the sole subject of that pleading.

Defendant does not argue that Count I (the PRE-Sale Notice claim) is barred by the statute of limitations as to Mr. Delaney himself. Defendant’s argument about Count I pertains to class claims that accrued more than three years before the filing of the Amended Complaint. And the Court’s analysis of this argument misapprehends Defendant’s point, especially, but not limited to, the parallel between the instant situation, where the trial court dismissed the entire putative class action, and the recognized limits of tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). As explained, under the United States Supreme Court’s *American Pipe* tolling doctrine, pursuant to which 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, tolling ends upon denial of class certification in the first instance by the trial court. (Memo in Support p. 25 (citing *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 107 (2d Cir. 2013) (“[W]e join every other circuit court to

have addressed the issue and conclude that the tolling rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), extends only through the denial of class status in the first instance by the district court.”.) And tolling under the *American Pipe* tolling doctrine is based on the idea that under Rule 23 of the Federal Rules of Civil Procedure (like under South Carolina’s Rule 23), potential class members are protected by the commencement of a putative class action, even if they are unaware of the action, because individual class members, and even unaware class members, may rely on the *existence* of the putative class action suit to protect their rights and need not file an action or move to intervene during the pendency of class certification. 726 F.3d at 117. But “[t]his objectively reasonable reliance rationale breaks down once the district court disallows class status.” *Id.* “[E]ven where the plaintiffs seek reconsideration or appeal, ostensibly representing the rights of non-named plaintiffs, reliance is not objectively reasonable.” *Id.* The Subject Order never addresses the fact that this same rationale, which compels ending *American Pipe* tolling when the trial court denied class certification (even where that decision is subject to reversal on appeal), applies here, where the trial court has dismissed the putative class action outright. Just as it is when the trial court denies class certification, it is objectively unreasonable for putative class members to rely on the existence of this case as a putative class action once the case is dismissed in the first instance by the trial court, notwithstanding the appeal that ultimately revived the case more than 6 years later.

Further still, the Subject Order erroneously states, “Even if the erroneous dismissal order constituted a denial of certification . . . , 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.” (Subject Order p. 8 (citing *Deposit Guaranty*

Nat. Bank v. Roper, 445 U.S. 326, 359 n.3 (1980)) (emphasis added).) The full quote from the *Deposit Guaranty* Court is not that it “would” related back but only that it “may” do so: “Reversal of the District Court’s denial of certification by the Court of Appeals may relate back to the time of the original motion for certification for the purposes of tolling the statute of limitations on the claims of the class members.” *Id.* at 359 n.3. Even further, this footnoted language from the 1980 *Deposit Guaranty* decision does not have the import the Subject Order appears to ascribe to it. Again, as explained, as of 2013, the *Giovanniello* Court, along with “every other circuit court to have addressed the issue,” concluded that the tolling rule announced in *American Pipe* extends only through the denial of class status in the first instance by the district court. If the rule were that the appellate court’s reversal of the trial court’s denial of class certification simply related back to the time of the trial court’s denial, there would have been no reason for the Circuit Court’s to have even considered the question of whether *American Pipe* tolling ends when the trial court denies certification, as a rule of relating back would operate as if the trial court had never denied certification in the first place.

g. The Subject Order’s analysis of S.C. Code Ann. § 36-9-628(e) is erroneous.

To the extent the Subject Order reads *Singleton* as saying that all § 36-9-628(e) did was to “effectively overrule[] 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,” it is erroneous. (Subject Order p. 10.) The *Singleton* Court was not asked to consider the issue of statutory construction Defendant has raised, and it did not do so.

Mr. Delaney is the only plaintiff actually before the Court, his one loan is the only secured obligation actually before the Court, and his attempt to establish multiple liability against

FFC under § 36-9-625(c)(2) in connection with his one loan is plainly disallowed by § 36-9-628(e). *See* Official Comment to § 36-9-628(e) (“Single Liability for Statutory Minimum Damages. *Subsection (e) ensures that a secured party will incur statutory damages only once in connection with any one secured obligation.*”) (emphasis added). Mr. Delaney seeks to establish class-wide liability against FFC § 36-9-625(c)(2) in connection with his one loan. Section 36-9-628 is entitled “Nonliability and limitation on liability of secured party; liability of secondary obligor.” Clearly, in recognition of the fact that § 36-9-625(c)(2) provides for liability even in the absence of any actual damage to the debtor, the aim of § 36-9-628(e) is to prevent the absurdly harsh result that Mr. Delaney seeks here, which is to take this liability—which already amounts to a windfall in favor of a defaulting debtor who, in fact, suffered no actual damages and to salt in the wounds of the unwary creditor caught in its crosshairs, who ends up (under Mr. Delaney’s theory) owing thousands of dollars to the very same debtor that did, in fact, cause it actual damages by failing to repay the loan—and increase exponentially. *See Hodges*, 341 S.C. at 87, 533 S.E.2d at 582. Indeed, this conclusion is all the more compelling here, where, as even Mr. Delaney admits, in the judicially binding averments of the Amended Complaint,⁵ at worst, FFC is guilty of no more than an honest mistake—made while acting in good faith, without intent to harm or violate anyone’s rights, “believ[ing] its notices were accurate, lawful and contained no misrepresentations:”

34. The defective presale and post-sale notices were not mailed with knowledge of their falsity.

⁵ *See Kitchen Planners*, 432 S.C. 267, 851 S.E.2d 724; *see also Johnson*, 413 S.C. at 202, 775 S.E.2d at 700; *Postal*, 308 S.C. at 387, 418 S.E.2d at 323.

40. [FFC] did *not* intend to violate the SC UCC and did *not* intend injury to the class because *it believed its notices were accurate, lawful and contained no misrepresentations.*

41. [FFC] did *not* know the presale and post-sale notices, and its reporting of information on the class members' credit reports would violate the rights of the class members or inflict injury upon them.

(Am. Compl. ¶¶ 34, 40–41.)

- h. For the reasons already explained/argued, all of which Defendant again incorporates herein by reference and again asks the Court to fully, fairly, and completely address, the Subject Order's interpretation of the subject documents and the governing law is absurd and unjust.**

WHEREFORE, for the foregoing reasons, Defendant asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Dismiss.

PLEASE NOTE: Defendant reserves all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
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August 30, 2021

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Otha Delaney, individually and on behalf
of all others similarly situated
Plaintiff,

V.

First Financial of Charleston, Inc.

ORDER
C/A NO. 2011-CP-10-07166

This matter is before the Court pursuant to Rule 59 (e) SCRPC. The Defendant seeks an Order of this Court amending or altering its Order of August 19, 2021.

Pursuant to Rule 59 (f) SCRCP, this Court determines that the motion to alter or amend may be decided on briefs filed by the parties and without oral argument.

Having duly considered the motion to alter or amend of the Defendant, this Court has determined that its original Order dated August 19, 2021, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion to alter or amend the earlier Order is therefore DENIED.

AND IT IS SO ORDERED.

Sumter, South Carolina

Dated:

R. Kirk Griffin
Judge, Ninth Judicial Circuit



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

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