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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.

RESPONDENT'S MEMORANDUM REGARDING APPEALABILITY

TWENGE + TWOMBLEY LAW FIRM
J. Ashley Twombley, Esquire (SC Bar #72916)
Lee Anne Walters, Esquire (SC Bar #74984)
311 Carteret Street
Beaufort, SC 29902
(843) 982-0100
twombley@twlawfirm.com
lwalters@twlawfirm.com

Attorneys for Respondent

INTRODUCTION

Respondent Otha Delaney ("Delaney") submits this memorandum on appealability as requested by the Court. This appeal of an interlocutory ruling by the circuit court should be dismissed.

Appellant First Financial of Charleston ("FCC") seeks immediate appellate review of the order denying FCC's Motion to Dismiss entered on August 19, 2021 (the "Order Denying Defendant's Motion to Dismiss") and the order denying FCC's motion for reconsideration of the Order Denying Motion to Dismiss entered on November 8, 2021 (jointly with the Order Denying Motion to Dismiss, the "Appealed Orders"). Although the Appealed Orders are interlocutory, FFC claims they are immediately appealable under S.C. Code Ann. § 14-3-330 because they a) involve the merits, b) deprive FFC of "a mode of trial," and c) in effect "strike[] out an answer or part thereof." The Court should dismiss the appeal because the Orders merely deny FCC's Rule 12(b)(6) motion and are not directly appealable. *See Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (Ct. App. 2014) ("[T]he denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable . . . ." (*quoting McLendon v. S.C. Dep't of Highways & Pub. Transp.,* 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994))). FCC may still argue its "defense" at a later stage and any alleged error is correctable upon appeal after trial. Further, the Orders have no impact on the mode of trial. *See Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (noting the

"mode of trial" exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury.) Finally, to the extent the Court chooses to examine the issues FFC seeks to appeal, they have no merit, and even if they did, FFC still faces numerous class claims.

Accordingly, this appeal should be dismissed.

RELEVANT BACKGROUND

On October 4, **2011**, Plaintiff Delaney filed a putative class action on behalf of himself and similarly situated consumers alleging FFC violated South Carolina's adoption of the Uniform Commercial Code (the "SC UCC") by taking possession of and selling their vehicles without providing appropriate, statutorily mandated notices under Chapter 9 of the SC UCC.[1] Because FFC is alleged to have engaged in this conduct using "form" documents that it sends to all South Carolina residents whose vehicles it repossesses and sells, Delaney sought class treatment on behalf of himself and others who experienced the exact same wrongful conduct from FFC.

After the Supreme Court of South Carolina vacated the trial court's order dismissing Delaney's Original Complaint, FFC *consented* to Delaney filing an Amended Complaint. *See* FFC's App. p. 35.[2] In response to Delaney's Amended Class Action Complaint, FCC filed a motion to dismiss.

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[1] The SC UCC is codified as S.C. Code Ann. §§ 36-1-101 et seq. The SC UCC statutes most relevant to this case can be found in Part 6 of Chapter 9 (i.e., §§ 36-9-601 et seq.).

[2] Contrary to FFC's assertion, Delaney alleges that he suffered actual damages, *See* FFC's App. p. 45, but Delaney is choosing to seek damages equal to the statutory minimum provided in § 36-9-625(c)(2) because quantifying actual damages is difficult and likely would require litigation expenses that would exceed any potential recovery. See *Cubler v. TruMark Fin. Credit Union*, 83

Delaney filed a Motion for Class Certification on March 11, 2021, which was heard on June 14, 2021. The trial court certified a class of consumers on July 27, 2021.[3] *See* Delaney's App. p. 1. FCC filed a motion to reconsider the Order Granting Class Certification, which is pending.

FCC's Motion to Dismiss Amended Class Action Complaint was argued on July 29, 2021. An Order denying the motion was entered on August 19, 2021. *See* FFC's App. p. 298. On September 23, 2021, counsel for FFC's insurance carrier (for the first time since suit was filed in 2011) filed a notice of appearance. *See* Delaney's App. p. 11. An order denying FFC's motion to reconsider the order of dismissal was entered November 8, 2021. *See* FFC's App. p. 325.

FFC filed a Notice of Appeal on December 8, 2021. On December 17, 2021, the Court of Appeals requested a memorandum on the appealability of the Appealed Orders.

ARGUMENT

I. The Order denying FFC's Motion to Dismiss is not immediately appealable.

Orders denying motions to dismiss under Rules 12(b) are not appealable prior to entry of final judgment. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529

A.3d 235, 241 (Pa. Super. Ct. 2013) (explaining § 9-625(c)(2) permits statutory damages because the drafters of the UCC recognized "the inherent difficulty for a claimant to quantify and prove actual damages."). As a result, "proving" actual damages is irrelevant to Delaney's and the class's presale notice claims.

[3] Throughout its 19-page brief, FFC never mentioned that the trial court certified a class of consumers on July 27, 2021. *See* Delaney's App. p. 1. That piece of information is important. The class certification order is FFC's true target; FFC's request for interlocutory appeal aims to decertify the class as to some (but only some) of the class relief sought by Delaney.

S.E.2d 11, 13 (2000) ("Currently, this Court does not allow immediate appellate review of the denial of *any* Rule 12(b), SCRCP.") (emphasis added). The basic "policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." *Id*. "A party who is denied a dismissal under Rule 12 has forfeited nothing, they must simply continue to trial." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334–35, 426 S.E.2d 777, 780 (1993) "[T]he denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable . . . ." *See Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (Ct. App. 2014) *quoting McLendon v. S.C. Dep't of Highways & Pub. Transp.,* 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994).

II. Exceptions found in S.C. Code 14-3-330 do not apply.

Recognizing that the orders are not immediately appealable as a final judgment, FFC argues that the orders are immediately appealable because they are orders a) involving the merits, b) deprive FFC of "a mode of trial," and c) in effect "strike[] out an answer or part thereof." None of these exceptions apply.

a) The Appealed Orders do not involve the merits.

The South Carolina Supreme Court has determined that for an interlocutory order to "involve[] the merits" it must "finally determine some substantial matter forming the whole or a part of some cause of action or defense . . . ." *Mid-State Distributors, Inc.,* 310 S.C. 330, 334, 426 S.E.2d 777, 780. Here, the trial court simply

denied FFC's motion to dismiss under Rule 12. "[T]he denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable . . . . " *See Levi*, at 409 S.C. 382 (Ct. App. 2014)

FFC argues that language used by the trial court in explaining the basis for its decision to deny the motion to dismiss sets forth conclusions of law and reads as if certain issues have been finally determined. However, language chosen for inclusion in an order denying the motion to dismiss cannot override the well-established principal that the "denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." *Id*.

FFC cites *Ex parte Cap. U-Drive-It, Inc.,* 369 S.C. 1, 630 S.E.2d 464, (2006) and *Morrow v. Fundamental Long-Term Care Holdings, LLC,* 412 S.C. 534, 773 S.E.2d 144 (2015) in support of its argument that the orders involve the merits, but both cases are easily distinguishable. *U-Drive-It* involved an action by *U-Drive-It* against a divorced man. After filing suit against the husband for embezzlement related claims, *U-Drive-It* filed a petition in family court to unseal the husband's family court divorce records. When the family court judge ruled that the records could be unsealed, the husband filed an appeal. In finding that the order unsealing the records was immediately appealable, the Court stated that the order "determined a substantial matter forming the whole or part of the family court proceeding" and that no "further action is required in the family court to determine the parties' rights . . . ." The Supreme court further noted that once the records were unsealed, the aggrieved parties (husband) could

not obtain review of the otherwise interlocutory order. None of these factors are present here, as the denial of a motion to dismiss is not a final order, FFC can continue to raise the defenses at issue at other stages in these proceedings, and FFC can ultimately obtain review related to these issues after trial.

Morrow is also inapposite. In *Morrow*, plaintiff alleged that numerous corporate defendants were liable for personal injuries that occurred in a nursing home. In the complaint, plaintiff brought vicarious liability claims and direct liability claims against several defendants. In granting a motion to bifurcate the claims for trial, the trial court concluded that bifurcation was proper because the claims to be tried during the second trial were necessarily contingent upon the success of the claims to be tried in the initial trial. This meant that, if plaintiff lost the first phase of the trial, then there would be no second trial phase, as those claims would fail as a matter of law. In finding that the bifurcation order was immediately appealable, the Supreme Court found that the trial court "effectively granted" summary judgment by finding that certain claims (claims at issue in the second trial) were necessarily dependent on the success of other claims (claims from the first trial).

Here, the Appealed Orders FFC attempts to appeal merely deny a motion to dismiss. They do not decide any issue with finality. Because the denial of FFC's motion to dismiss has no real finality, and further defense can still be maintained at trial, the orders do not and cannot involve the merits.

b) The Orders do not deprive FFC of a mode of trial.

FFC argues that "if [a certain defense] is meritorious," it would not have to face a class action, and therefore, the orders "denied FFC of a mode of trial to which it is entitled to as a matter of right, and are therefore immediately appealable under §14-3-330(2)" FFC's Brief p. 18. This argument is misplaced.

First, the exception to the general rule that only final orders are appealable, which exception is for orders that impact the mode of trial, is confined to orders which abridge a party's constitutional right to trial by jury. *Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) ("the 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury."). The order in question does not abridge FFC's right to a trial by jury, it gets FFC closer to arguing its defenses to a jury.

Second, even if FFC were correct, and it could avoid a trial had its motion to dismiss been decided differently, "avoidance of a trial is not a sufficient reason to justify immediate appellate review." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 14 (2000). Otherwise, the denial of every motion to dismiss would be immediately appealable because – if decided differently – a litigant might avoid a trial altogether.

The orders do not affect FFC's entitlement to any mode of trial, much less its right to a trial by jury.

c. The Orders do not strike a defense.

FFC next argues that the "plain language" of the trial court's order suggests a final decision on its § 36-9-628(e) defense, and that this defense is "gone for good." *See* FFC's Brief p. 17. FFC further argues that "the trial court's unequivocal answer to the pure question of law posed by FFC's § 36-9-628(e) defense places the issue beyond the reach of any other trial judge going forward, as one circuit judge may not overrule another." *See* FFC's Brief p. 17. FFC misreads the order and is wrong about its effect.

First, there is nothing unique about the language used by the trial court in describing its rejection of FFC's § 36-9-628(e) defense argument. The trial court was necessarily required to comment on the arguments made by the parties and has the right to explain its rationale for rejecting FFC's argument related to § 36-9-628(e).

Second, despite FFC's bald assertion that the order "reads as a judgment," the law in South Carolina regarding the order's effect (or lack thereof) is clear. "[T]he denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable . . . . " *Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (Ct. App. 2014) (quoting *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994).

The Court should end its analysis here and dismiss this appeal. Delaney is not required to show that FFC's arguments related to the merits are invalid. Nevertheless, Delaney can show just that.

III. There are other practical reasons to dismiss the appeal.

a) FFC's interpretation of § 36-9-628(e) is nonsensical.

FFC argues that it is not liable under Section 36-9-625(c)(2) more than once with respect to any one secured obligation," *See* FFC's Brief p. 13 (citing § 36-9-628(e), suggesting that the trial court allowing Delaney to procced as a class may result in a contrary result).

But it is clear that Delaney and the class only seek damages under § 36-9-625(c)(2) once per secured obligation—meaning other potential 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. Here, Delaney and the class members seek damages in connection with each one of their individual loans, not in connection with the same loan.

The purpose and effect of the Section 36-9-628(e) is clear. Section 36-9-628(e) was enacted when the Legislature adopted "Revised Article 9" of the UCC which became effective on July 1, 2001. *See Singleton v. Stokes Motors, Inc*., 358 S.C. 369, 377–78, 595 S.E.2d 461 (2004). Before July 1, 2001, "there [was] no limit to the number of co-obligors liable on a contract," and therefore, a secured party's "liability could be great in cases with multiple guarantors." *See Crane v. Citicorp Nat. Services, Inc*., 313 S.C. 70, 437 S.E.2d 50, 53 (1993). For example, if Persons A, B, and C were co-debtors on a vehicle loan that resulted in the repossession and sale of their vehicle without proper presale notices, without the enactment of § 36-9-628(e), the secured party would need to pay the damages yielded from § 36-9-625(c)(2)'s statutory formula

to ***each*** of the three co-debtors. But § 36-9-628(e) now simply requires A, B, and C to share/split the damages provided by § 36-9-625(c)(2)'s formula. *See Singleton*, 358 S.C. at 377–78 (explaining both co-debtors were entitled to recover minimum statutory damages under § 36-9-625(c)(2)'s predecessor (§ 36-9-507(1) of Former Article 9) while acknowledging "the outcome in this case would be different if the underlying action were brought [after § 36-9-628(e)'s effective date]."

Section 36-9-628(e) was designed 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. *See Singleton*, 358 S.C. at 377 (citing *Crane*, 313 S.C. 70) (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").[4] Section 36-9-628(e) puts a cap on the amount of statutory damages that can

[4] *See also* South Carolina Reporter's Comment to § 36-9-628:

> Under Section 36-9-628(e) a secured party is not liable for the minimum statutory damages under Section 36-9-625(c)(2) more than once with respect to any one secured obligation. For example, assume that Debtor granted Secured Party a security interest in consumer goods to secure a loan and Guarantor guaranteed Debtor's obligation to pay the loan. Following Debtor's default, Secured Party repossessed the consumer goods and sold them without providing notification to either Debtor or Guarantor as required under Section 36-9-611(c)(1) and (2). Under Section 36-9-625(c)(2) both Debtor and Guarantor, as a secondary obligor, have claims for minimum damages. Section 36-9-628(e), however, limits Secured Party's aggregate liability to a single recovery under Section 36-9-625(c)(2).
>
> Section 36-9-328(e) overrules one of the holdings in *Crane v. Citicorp National Services, Inc.*, 313 S.C. 70, 437 S.E.2d 945 (1993). In *Crane* the

be collected under § 36-9-625(c)(2) for each secured transaction; it does not bar consumer-debtors from aggregating their individual claims based on separate secured transactions into one legal proceeding. The trial court did not error by properly interpreting § 36-9-628(e).

b) UCC Article 9 does not prevent class actions.

FFC implies § 36-9-628(e) bars any class actions from requesting damages under § 36-9-625(c)(2). But the plain language of the SC UCC does not prevent class actions; the Legislature 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. *Cf.* § 810 ILCS 5/9-625 (Illinois's adoption of UCC § 9-625(c)(2) and non-uniform amendment) (stating a consumer-debtor may recover the statutory minimum "in any ***individual*** action") (emphasis added); *see also* North Dakota Code § 41-09-120(3)(b) (adopting a variation of the Official Text of UCC §9-625(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 in an ***individual action*** 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."). Notably, despite amending their versions of the Official Text of UCC § 9-625(c)(2) to prohibit minimum statutory damages in class actions, Illinois and North

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Court asserted that a debtor and a guarantor could both recover statutory minimum damages under former Section 36-9-507(1) for a secured party's misconduct with respect to a single secured obligation.

Dakota retained the ***identical*** relevant statutory language FFC relies on here: "A secured party is not liable under [the State's version of UCC § 9-625(c)(2)] more than once with respect to any one secured obligation." *See* S.C. Code Ann. § 36-9-628; *see* Official Text of the UCC § 9-628(e); *see* North Dakota Code § 41-09-123(4); *see* § 810 ILCS 5/9-628(e).

c) Assuming FFC is correct, Delaney sill has class claims that FFC does not challenge in this attempted appeal.

FFC's attempt to appeal certain class claims is odd as Delaney has other class claims that FFC does not even attempt to appeal.

In his complaint, Delaney seeks class damage in addition to those at issue in FFC's attempted appeal. Section 36-9-628(e) provides that "[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). But Delaney and the Class also seek other statutory class wide damages of a) $500 per post-sale notice (i.e. per each violation of § 36-9-616) under § 36-9-625(e)(5)); b) declarations that both FFC's presale and post-sale notices are deficient and bar FFC from recovering on alleged deficiencies[5]; and c) injunctive relief based on FFC's inaccurate credit reporting. *See* FFC's App. pp. 45–46. None of these forms of relief are mentioned in § 36-9-628(e)), and FCC does not seek to appeal the portions of the trial court's order allowing these class claims to proceed. In other words, even if FFC's appeal were allowed and decided

[5] A secured party's failure to send a proper presale notice before selling a consumer-debtor's collateral is barred from recovering an alleged deficiency. *See GMAC v. Carter*, 290 S.C. 216, 349 S.E.2d 342 (1986) (vacated as a condition of settlement).

in FFC's favor, FFC has other class damages claims that FFC does not even attempt to challenge. FFC merely claims, "if FFC's § 36-9-628(e) defense is meritorious, it means that FFC has a right not to face a class action ***with respect to alleged § 36-9-625(c)(2) liability***." *See* FFC's Brief p. 18 (emphasis added).

Thus, even if the Court agreed with FFC on its appealability and merits argument, the effect would be to prevent Delaney from seeking ***part of*** the class relief—that is, relief based on the statutory penalty provided in § 36-9-625(c)(2), and the case would be remanded for Delaney to pursue his other class claims. This is precisely the type of piecemeal appeals the rules were designed to prevent, particularly in a caser that is 11 years old.

CONCLUSION

For the above reasons, the Court should dismiss the appeal.

TWENGE + TWOMBLEY LAW FIRM

BY: s/J. Ashley Twombley

J. Ashley Twombley, Esquire (SC Bar #72916)
Lee Anne Walters, Esquire (SC Bar #74984)
311 Carteret Street
Beaufort, SC 29902
(843) 982-0100
twombley@twlawfirm.com
lwalters@twlawfirm.com
Attorneys for Respondent

Beaufort, South Carolina

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J. Ashley Twombley, Esquire (SC Bar #72916)
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311 Carteret Street
Beaufort, SC 29902
(843) 982-0100
twombley@twlawfirm.com
lwalters@twlawfirm.com

Attorneys for Respondent

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

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

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

BACKGROUND

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

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

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

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

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

See Plaintiff's Motion for Class Certification at 2.

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

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

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

CONCLUSIONS OF LAW

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

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

Rule 23(a), SCRCP.

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

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

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

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

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

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

A. Numerosity

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

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

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

B. Commonality

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

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

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

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

C. Typicality

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

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

D. Adequacy of the Class Representative

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

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

E. Amount in Controversy

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

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

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

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

[4] S.C. Code Ann. §36-9-625(c)(2) provides, "if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price."

CONCLUSION

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

AND IT IS SO ORDERED.

_____
Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

July _____, 2021
Charleston, South Carolina

Charleston Common Pleas

Case Caption: Otha Delaney VS First Financial Of Charleston Inc

Case Number: 2011CP1007166

Type: Order/Class Certification

IT IS SO ORDERED.

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

Andrea Smith

From: efiledonotreply@sccourts.org
Sent: Thursday, September 23, 2021 9:11 AM
To: Ashley Twombley
Cc: Andrea Smith
Subject: Courtesy NEF RE: 2011CP1007166

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2011CP1007166

Official File Stamp:	09-23-2021 09:10:58 AM
Court:	CIRCUIT COURT
	Common Pleas
	Charleston
Case Caption:	Otha Delaney VS First Financial Of Charleston Inc
Event(s):	
	Notice/Notice of Appearance
Filed by or on behalf of:	Tiffany Ann Palmer Elling

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

James Ashley Twombley for Otha Delaney
Russell Grainger Hines for First Financial Of Charleston Inc
Stephen Lynwood Brown for First Financial Of Charleston Inc
Philip L. Fairbanks for Otha Delaney
Lee Anne Walters for Otha Delaney

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Frederick M. Corley for Otha Delaney
Graham Edward Hawkins, III for Otha Delaney

TWENGE + TWOMBLEY LAWFIRM, LLC
311 Carteret Street
Beaufort, South Carolina 29902
Ph:: 843.982.0100 Fax:: 843.982.0103
Web:: Twlawfirm.com

J. Ashley Twombley*
Karl D. Twenge
Lee Anne Walters+ (Of Counsel)

*Licensed in SC + GA
+SC Circuit Court Mediator

February 14, 2022

Via Electronic Mail

The Honorable Jenny Abbott Kitchings
Court of Appeals Clerk of Court
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: Otha Delaney v. First Financial of Charleston, Inc.
Appellate Case No. 2021-001443

Dear Ms. Kitchings:

Please find attached Respondent's Memorandum addressing the issue of appealability of the order(s) challenged on appeal, and the Appendix to Respondent's Memorandum on Appealability.

By copy of this letter, I am serving a copy of the same upon all counsel of record.

Please let us know if you need anything further or if you have any questions related to the enclosed Memorandum.

With kindest regards, I remain

Cordially,

J. Ashley Twombley

cc: Russell L. Hines, Esquire
Stephen L. Brown, Esquire
Tiffany Ann Palmer Elling, Esquire