

CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

Ally Financial Inc.,)
Plaintiff,) Case No. 16JE-AC01713-01
v.) Division: 3
Alberta Haskins and,)
David Duncan,)
Defendants.)

ORDER

On February 8, 2018, this matter came before the Court on Counterclaimants' Motion for Class Certification, filed May 11, 2017. After considering the parties' briefing and oral argument, the Court **GRANTS** Counterclaimants' Motion for Class Certification is **GRANTED**.

BACKGROUND

Alberta Haskins and David Duncan (Counterclaimants) Motion for Class Certification (the "Motion") seeks class treatment of a claim against Ally Financial Inc. (Ally) for alleged unlawful and deceptive pattern of wrongdoing regarding collection, enforcement, repossession and disposition of collateral, and collection of alleged deficiencies.

Counterclaimants allege Ally's form presale and post-sale notices violated the Uniform Commercial Code (UCC).

Counterclaimants seek to represent all similarly situation consumers for Ally's alleged violations of the UCC and Missouri Chapter 408.



Counterclaimants allege because of Ally's deficient notices, they and all class members suffered harm to their credit worthiness, credit standing, credit capacity, character, and general reputation.

Counterclaimant seek actual damages not less than the minimum damages provided by the UCC due to Ally's failure to provide proper presale and post-sale notices.

Counterclaimants also seek a declaration that the form right to cure, presale, and post-sale notices used by Ally violate Missouri or other applicable law.

CONCLUSIONS OF LAW

Rule 52.08 "creates a categorical rule entitling a [party] whose suit meets the specified criteria to pursue [her] claim as a class action." *Shady Grove Orthopedic Associates v. Allstate Ins.*, 130 S. Ct. 1431, 1438 (2010) (discussing the federal counterpart to Rule 52.08). The criteria under Rule 52.08 are numerosity, commonality, typicality, adequacy, predominance, and superiority. *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 74 (Mo. App. 2011). "At this preliminary stage of the litigation, courts favor certification as the class may be refined as the case progresses." *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 601 (Mo. banc 2012).

Rule 52.08(a)(1): Numerosity.

Rule 52.08(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." Mo. R. Civ. P. 52.08(a)(1). The record shows the classes consist of thousands (perhaps tens of thousands) of members, which is a sufficiently numerous

class. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 168 (Mo. App. 2006). Ally suggests numerosity cannot be satisfied because res judicata, judicial estoppel from prior bankruptcies, and offset would extinguish many class members claims. Ally provides no evidence suggesting how many, if any, class members would be subject to these alleged defenses. Regardless, defenses that go to the merits are not properly considered as part of the numerosity analysis. *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 716 (Mo. App. 2009) (“defenses that go to the merits of the case are not properly considered in class certification”).

Counterclaimants’ allegations and the testimony from an Ally employee show the class is sufficiently numerous.

Counterclaimants have met this requirement

Rule 52.08(a)(2): Commonality.

Rule 52.08(a)(2) requires “there are questions of law or fact common to the class.” A single common issue may satisfy this requirement. *Dale*, 204 S.W.3d at 175. The common issue “need not be dispositive of the controversy or even be determinative of the liability issues involved.” *Id.*

Ally suggests Counterclaimants’ assertion that the notices are misleading “bespeaks a lack of commonality” because whether a notice misleads a borrower, assuming they acknowledge receiving it, is unique to the borrower.

However, the common issue identified by Counterclaimants are based on form documents generated by Ally, which do not vary in any material way (each presale

notice restricts redemption payments to certain methods outlined in the presale notice despite the contract containing no such restriction).

Counterclaimants have met this requirement

Rule 52.08(a)(3): Typicality.

Rule 52.08(a)(3) requires “the claims … of the representative parties are typical of the claims … of the class.” “The commonality and typicality requirements often merge, because each serve as a guidepost for judging whether a class action is economical and 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.” *Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116, 130 (Mo. App. Apr. 25, 2017). Just as form documents support commonality, they likewise support typicality. Counterclaimants’ claims are typical of the claims they assert on behalf of the class. The claims arise out of form documents typically employed by Ally in its transactions with Counterclaimants and the class members.

Counterclaimants have met this requirement

Rule 52.08(a)(4): Adequacy.

Rule 52.08(a)(4) requires a finding that “the representative parties will fairly and adequately protect the interests of the class.” Mo. R. Civ. P. 52.08(a)(4).

Counterclaimants have no interests in this matter that would be antagonistic to the interests of the class and they have retained competent counsel with experience in class action litigation.

Counterclaimants have met this requirement

Rule 52.08(b)(3): Predominance.

Rule 52.08(b)(3) requires the Court to find “questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” The common questions of law and fact that stem from language in form documents predominate over any individual issues, fancied or real. Even if there were state law variations regarding the UCC’s presale notice provisions, “the mere existence of state law variations is not alone sufficient to preclude class certification.” *McKeage*, 357 S.W.3d at 601. Predominance is qualitative, not quantitative. Ally’s liability may be established by its form documents, and if as alleged by Counterclaimants, the presale and post-sale notices contain at least one of the same deficiencies as in their notices, this common issue would be the overriding one in the litigation even if many individual issues remained as alleged by Ally regarding burden of proof, choice-of-law, statute of limitation defenses, the consumer nature of the purchase, res judicata, compulsory counterclaims, offset, equitable recoupment, judicial estoppel, or other affirmative defenses. *Elsea v. US Engineering Co.*, 463 S.W.3d 409, 419 (Mo. App. 2015) (“A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.”); *Craft v. Philip Morris Cos.*,

Inc., 190 S.W.3d 368, 383 (Mo. App. 2005) (“Differences in the application of the statute of limitations to individual class members do not preclude certification.”); *McKeage*, 357 S.W.3d at 600 (“predominance is not precluded when there needs to be an inquiry as to individual damages”); Newberg on Class Actions § 4:57 (5th ed.) (affirmative defenses “rarely defeat” predominance).

Counterclaimants have met this requirement

Rule 52.08(b)(3): Superiority.

Rule 52.08(b)(3) also requires the Court to find “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Rule 52.08(b)(3) lists four superiority factors:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.

The Court finds these factors all support class certification. A class action is superior to thousands and possibly hundreds of thousands of individual actions involving the same form documents. Absent a class action, there is little likelihood class members will know they have any claims against Ally like the claims being advanced. The class action device provides an effective procedural tool for advancing and enforcing the important

public policy considerations underlying the consumer protection statutes. Counterclaimants seek to invoke, both for themselves and for the classes.

Counterclaimants have met this requirement

IT IS THEREFORE ORDERED THAT:

1. The Motion for Class Certification is granted.
2. Counterclaimants are appointed as the class representatives.
3. Jesse Rochman, Martin L. Daesch, and James Onder are appointed as class counsel.
4. The parties shall send notice to all members who can be identified through reasonable effort and submit a proposed notice complying with Rule 52.08(c)(3) to the Court for approval.
5. Ally must furnish Counterclaimants with the names, last known addresses, telephone numbers, social security numbers for each class member within 30 days after this Order. This must be done in both hard copy and in a computer spreadsheet format accessible by Counterclaimants. Ally must also furnish Counterclaimants with copies of the installment contract, notice of lien application, and right to cure, presale, and post-sale notices for each class member in within the same time.
6. Ally must inform Counterclaimants of its proposed statutes of limitations it used to generate the list for Class 1. If the Counterclaimants disagree with the proposed statutes of limitations, either party may file a motion with the Court for

determination of that issue.

7. These classes are certified:

Class 1:

All persons within the applicable statute of limitations:

- a. who are named as borrowers or buyers on a loan or financing agreement with Ally, assigned to Ally or owned by Ally;
- b. whose loan or financing agreement was secured by collateral;
- c. whose collateral was repossessed, voluntarily or involuntarily; and
- a. whose collateral was disposed.

Class 2:

All persons:

- a. who obtained a Missouri Certificate of Title for a motor vehicle identifying Ally as the lienholder, or who are named as borrowers or buyers with a Missouri address on a loan or financing agreement with Ally, assigned to Ally or owned by Ally;
- b. whose loan or financing agreement was secured by a motor vehicle or other collateral;
- c. whose motor vehicle or other collateral was repossessed, involuntarily or voluntarily; and
- d. whose motor vehicle or other collateral was disposed from June 17, 2010, through the present.

SO ORDERED:

D^bBartels
May 09, 2018, 4:47 pm **J3**

Judge Dianna Bartels

Date