COURT OF COMMON PLEAS
JEFFERSON COUNTY, PENNSYLVANIA

MICHAEL DUDO, DANIELLE DUDO, GWENDOLYN TERRELL, SCOTT CLARK, INDIVIDUALLY AND AS ADMIN. OF THE ESTATE OF LISA CLARK, ROBERT ACQUILLO, CONSTANCE WAGNER, ANTHONY WAGNER, and JAMES DWYER,	)	Civil Action
Plaintiffs,	)	No. 296-2020-CD
v.	)	
CAPITAL ONE, N.A., d/b/a CAPITAL ONE AUTO FINANCE,	)	
Defendant.	)	

FINAL APPROVAL ORDER

The matter coming before the Court on the request for final approval of the class action settlement by Plaintiffs, Michael Dudo, Danielle Dudo, Gwendolyn Terrell, Scott Clark, the Estate of Lisa Clark, Robert Acquillo, and James Dwyer ("Plaintiffs"), final approval of the settlement and dismissal being unopposed by Defendant, Capital One Auto Finance, a Division of Capital One, N.A. ("Defendant"), with due notice given to Class Members and all parties, the parties appearing through counsel, with many Representative Plaintiffs also appearing themselves,[1] and the Court being fully advised, **IT IS HEREBY ORDERED**:

1. This Court has jurisdiction over the parties, the Class[2], and the claims asserted in this lawsuit.

2. Pursuant to the Pennsylvania Rules of Civil Procedure, the settlement of this action, as embodied in the terms of the Settlement Agreement, is hereby finally approved as a fair,

[1] The Court has conducted this hearing telephonically in light of the Covid-19 pandemic.
[2] Capitalized terms in this Order have the same meaning as defined in the Settlement Agreement.

reasonable, and adequate settlement, in the best interests of the Settlement Class, in light of the factual, legal, practical and procedural considerations raised by this case.

3. The Class, as defined as in paragraph 2.12 of the Settlement Agreement, is hereby certified for settlement purposes.

4. This class definition is sufficient to render the class ascertainable.

5. The Class meets all certification requirements set forth in Pa.R.C.P. 1702.

6. The Class is sufficiently numerous that joinder is impracticable.

7. The questions of fact and law are common to the class. Here, the issues are common across the Class and relate to the same course of conduct and include whether Defendant's Post-Repossession Disclosure Notice (here, a "Notice of Repossession") failed to comply with certain strict content requirements of the UCC and, consequently, were commercially unreasonable – issues to be determined as a matter of law.

> Common issues of law and fact ... predominate over potential individual issues, including whether Defendant complied with certain content requirements of the MVSFA independently, and the UCC and MVSFA in *pari materia* regarding forms Defendant used when issuing post-repossession consumer disclosure notices sent to all class members --- such that Defendant's failure to comply is *per se* commercially unreasonable as a matter of law.
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> *Ryan v. Tidewater Finance Co.*, 03529-2017 (Phila. Co., July 23, 2018).

Claims that a Notice of Repossession is commercially unreasonable have been routinely found to satisfy the commonality and predominance requirements of certification. Pennsylvania and the federal courts sitting in Pennsylvania routinely certify UCC Post-Repossession Disclosure Notice class actions. *Maszgay v. First Comm. Bank*, 686-2015 (Jefferson Co. Pa., July 23, 2018); *Antonik, et al., v. First National Community Bancorp, et al.*, 13-4438 (Lackawanna County 2017); *Cooley, et al., v. F.N.B. Corporation, et al.*, 10010 (Lawrence County 2003); *Langer, et al., v. Capital One, N.A.*, 2:16-CV-06130-HB, ECF Doc. 109 (E.D. Pa. 2019); *McCall v. Drive Fin. Services,*

L.P., 236 F.R.D. 246 (E.D. Pa. 2006); *Cosgrove v. Citizens Auto. Finance, Inc.*, 2011 WL 3740809 (E.D. Pa. 2011); *Haggerty v. Citadel Fed. Credit Union*, No. 11003725 (Phila. Court Common Pleas 2011); *Hartt v. Flagship Credit Corp.*, 10-CV-0822-NS (E.D. Pa. 2010); *Simonson v. American Heritage Fed. Credit Union*, No. 11003762 (Phila. Court Common Pleas 2011); *Spry v. Police & Fire Fed. Credit Union*, No. 110900007 (Phila. Court Common Pleas 2011); *Zawislak v. Beneficial Savings Bank*, No. 110303622 (Phila. Court Common Pleas 2011). Cases involving the use of form documents (such as a Notice of Repossession or Post-Sale Notice) are particularly appropriate for class treatment. *Orloff v. Syndicated Office Systems, Inc.*, 2004 WL 870691 at *3-4 (E.D. Pa. Apr. 22, 2004). Because the alleged notice deficiencies are the same, the question of extinguishment of the Disputed Deficiency Balances will be the same among all Class Members. The commonality requirement is readily satisfied as the issues of law and fact are the same, class-wide. Class certification as to issues of commercial reasonableness are certainly appropriate and easily adjudicated, as a matter of law, when reviewing form documents and/or standardized, uniform policies and practices in the context of clear statutory requirements.

8. Plaintiffs' claims are typical of the Class Members' Claims. All of the core claims of the Plaintiffs and the Class Members arise from Defendant's alleged statutorily deficient Notices of Repossession. There is no evidence that Plaintiffs' claims are atypical or antagonistic to any other Class Members.

9. The common questions of the class predominate over individual questions. Here, the predominant question of the Notice of Repossession claim is whether Defendant failed to provide Notices of Repossession that complied with the requirements of the UCC, rendering the notices per se commercially unreasonable as a matter of law. Here, where a form notice was sent to all class members, and liability for statutory damages is not contingent on *any* injury to the class member (*see* 13 Pa.C.S. 9625, Official Comment 4), these common questions predominate over

questions affecting only individual members. There are no individualized issues to prevent the common statutory compliance issues, commercial reasonableness issue, and damages from predominating. Further, there are no predominating individual issues regarding the Disputed Deficiency Balances, as the amounts would be extinguished if Defendant failed to rebut the presumption that follows from Plaintiff's averment that the notice is not commercially reasonable pursuant to 13 Pa. C.S. §9610 and/or violates 13 Pa. C.S. §9614.

The only variations in the Class Members' Claims is the *amount* of damages. However, variations in damages do not impair certification. *Samuel-Bassett v. Kia Motors Am., Inc.*, 613 Pa. 371, 34 A.3d 1 (2011). Statutory minimum damages are easily calculated using the formula set forth in 13 Pa.C.S.A. §9625(c)(2). Though actual damages would require alternative proofs and are similarly permissible in the class action context, a showing of a specific actual injury to each class member is not required.

A violation of the disclosure notice provisions constitutes *per se* commercial unreasonableness, as it is a defect in the disposition process that these notices are an integral part of. *Tidewater, supra*. The commercial reasonableness of form Notices of Repossession or Post-Sale Notices are not issues of fact when the disclosure notices do not comply with statutory requirements and where neither reliance or injury is required. Accordingly, the question of commercial unreasonableness is not an individualized issue predominating over common issues to the class, but rather, is a common issue. *Id.*

10. Plaintiffs' appointment as Class Representatives and Attorney Richard Shenkan and Shenkan Injury Lawyers, LLC.'s appointment as sole Class Counsel for the class is maintained.

11. Upon the Affidavit of William G. Atkinson, a partner in the Settlement Administrator BrownGreer, PLC, the Court finds that the notice provided to the Settlement Class Members was

the best notice practicable under the circumstances and it satisfied the requirements of due process and Pennsylvania Rules of Civil Procedure.

12. No Class Members objected to the Settlement or the equal division of the monetary relief (in instances of co-borrowers). Similarly, no class members have opted-out or excluded themselves. Therefore, no Class Members are excluded from, and all Class Members are bound by, the terms of the Settlement Agreement and this Order.

13. The Court hereby finds that the Settlement Agreement is the result of good faith, arm's-length negotiations by the parties thereto, and that it will further the interests of justice. The Settlement Agreement is hereby incorporated into and adopted as part of this Order; any conflicts controlled by the text of this Order.

14. After due consideration of, among other things, (a) the uncertainty about the likelihood of the Class' ultimate success on the merits, the range of possible recovery, and the expense and duration of the litigation; (b) the substance and amount of class members' opposition to the settlement (no objections); (c) the state of proceedings at which the settlement was achieved; (d) all written submissions, declarations and arguments of counsel; and (e) after notice and hearing, this Court finds that the settlement is fair, adequate and reasonable.

15. This Court also finds that the financial settlement terms fall within the range of settlement terms that are fair, adequate and reasonable. The Court has taken into account and concurs with the Affidavit of Judge Richard B. Klein (Ret.) that the terms of this Settlement are just, fair, reasonable, and particularly favorable to the class, and that the attorney fees sought are reasonable and justified. Therefore, the settlement of this matter is approved. All parties (including all Class Members, their heirs, assigns, and any person or entity claiming by or through him or her) are hereby bound by terms of and releases set forth in the Settlement Agreement.

16. A Settlement Fund has been created consisting of the $7.5M Settlement Amount and will be supplemented with approximately $78,000 relating to Post-Stay Payments. The Settlement Fund shall be used to pay Class Members (including Post-Stay Return Payments), the Settlement Administration Costs, Class Counsel Fees, Class Counsel Costs, and Incentive Awards as set forth in the Settlement Agreement. All unclaimed and excess monies in the Settlement Fund shall be distributed to the *Cy Pres* Recipients in accordance with the Settlement Agreement.

17. The Court approves Incentive Awards of $15,000 for each named Plaintiff for serving as the Class Representatives. This amount shall be paid from the Settlement Fund.

18. The Court has reviewed the application for Class Counsel fees and expenses. Consistent with the criteria set forth in Pa.R.Civ.P. 1717, and the established law providing for payment of reasonable counsel fees and expenses to class counsel from a common fund created for the benefit of the Class, the Court finds that the cash value of the Settlement along with the aggregate compromise of the disputed Deficiency Balances of approximately $22.6 million, which does not include the valuable equitable relief, pursuant to 13 Pa. C.S. §9625(a), including credit report tradeline expungement, the return by the Bank of amounts paid by Class Members towards any disputed Deficiency Balances on or after March 26, 2018 (the "Post-Stay Return Payments," as set forth in the Agreement), and the vacating of any deficiency judgments.

While not amenable to a precise measurement for all class members, the tradeline deletion provides a tangible benefit that will likely, *inter alia,* improve Class Members' credit ratings, potentially resulting in a lower and/or more favorable cost of credit in the future. As this Court held in *Maszgay, supra.*, the tradeline expungement benefit likely removes a significant negative influence on Class Members' potential loan, insurance, mortgage, housing, and employment decisions. *See* Lea Shepard, *Seeking Solutions to Financial History Discrimination,* 46 Conn. L. Rev. 993, (2014). In *Maszgay, supra.*, this Court followed the reasoning in *Ciccarone v. B.J.*

Marchese, Inc., 2004 WL 2966932 (E.D. Pa. Dec. 22, 2004), and maintains such in this case, that a reasonable estimation of the value of the removal of this blot on Class Members' credit is reasonably equal to the cash component of the settlement. *See also, Cosgrove v. Citizens Auto Fin., Inc.*, 2011 WL 3740809, at *7 (E.D. Pa. Aug. 25, 2011) ("additional obligation to correct negative entries on class members' credit reports is tangible and adds value to the settlement").

The request for an award of fees to Class Counsel in the sum of $3 million, to be paid to Shenkan Injury Lawyers, LLC., as sole counsel, is approved as fair and reasonable in light of all the relevant factors to be considered, based on the percentage-of-recovery method. Class Counsel costs incurred to date in the amount of $14,325.50 are also fair and reasonable. Those amounts shall be paid from the Settlement Fund to Richard Shenkan and Shenkan Injury Lawyers, LLC., as sole Class Counsel. Plaintiffs' counsel Richard Shenkan has considerable additional work to undertake relating to the orderly administration of this matter and, accordingly, may make a subsequent request(s) for additional reimbursement of costs.

19. Furthermore, the contingency fee agreement between counsel and each of the Representative Plaintiffs provides for a fee equal to 40% of the total conferred upon the class. Class Counsel's requested fee only asks for a 13.3% fee based on the cash payment and compromise by accord and satisfaction of the Deficiency Balances. One-third of the total benefit conferred on the class would be reasonable. *See, Maszgay, supra.*; *See also, Cullen v. Whitman Medical Corporation*, 197 F.R.D. 136 (E.D. Pa. 2000)(a fee for the forgiveness of debt is compensable and can be included in a common fund recovery).

20. The Court expressly adopts and incorporates herein all the terms of the Settlement Agreement. The Parties shall carry out their respective obligations under that Agreement with dispatch.

21. The terms of the Settlement Agreement and of this Order shall be forever binding on the Class, and those terms shall have *res judicata* and other preclusive effect in all pending and future claims, lawsuits or other proceedings maintained by or on behalf of any such persons, to the extent those claims, lawsuits, or other proceedings involve Released Claims.

22. The Court hereby specifically retains jurisdiction of this matter in order to resolve any disputes or any other matters which may arise in the implementation of the Settlement Agreement, the reasonable administration of this claim, and the allocation of the Settlement Fund. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

23. The Defendant is hereby dismissed with prejudice from this action. The prothonotary shall so mark the docket.

IT IS SO ORDERED.

BY THE COURT:

Dated: July 6, 2020

Judge John H. Foradora, P.J.

c: Atty Shenkan (2)