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2 IN THE SUPREME COURT OF THE STATE OF NEVADA
3

4 LUCIA CASTILLO, an individual,
5 and ERWIN PRATTS,
6 an individual,

Electronically Filed
Aug 26 2016 09:08 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

7 Appellants,

SUPREME COURT NO.: 70151

8 vs.

DISTRICT COURT CASE NO.: CV15-00421

9
10 UNITED FEDERAL CREDIT UNION,
11 a Federal Credit Union,

12 Respondent.
13 _____/

14 **APPELLANTS' EXCERPTS OF RECORD**

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1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 LUCIA CASTILLO, an individual, and Supreme Case No. 70151
3 EDWIN PRATTS, an individual, District Court Case No. CV1500421

4 Appellants,

5 vs.

6 UNITED FEDERAL CREDIT UNION, a
7 federal credit union

8 Respondent,
9 _____/

10 **APPELLANTS' EXCERPTS OF RECORDS**

11 Pursuant to NRAP 30, the following are submitted by Appellants', Lucia Castillo and
12 Edwin Pratts, as Excerpts of Record on appeal in this matter.

13	Exhibit	Dkt. #	Date:	Title:	Pg.
14					
15	1	61	3-15-15	Complaint	1-14
16	2	54	3-31-15	Motion to Dismiss	15-35
17	3	49	4-9-15	Amended Complaint	36-57
18	4	48	4-14-15	Plaintiff's Opposition to Motion to Dismiss	58-60
19					
20	5	46	4-28-15	Defendant's Motion to Dismiss 1 st Amended Complaint	61-84
21					
22	6	43	5-11-2015	Plaintiffs' Opposition to Motion to Dismiss 1 st Amended Complaint	85-94
23					
24					
25	7	42	5-26-15	Defendant's Reply to Opposition to Dismiss 1 st Amended Complaint	95-108
26					
27					
28					

1	Exhibit	Dkt. #	Date:	Title:	Pg.
2	8	27	8-17-15	Court minutes- Hearing	
3				on Motion to Dismiss	
4				1 st Amended Complaint	109
5	9	24	10-27-15	Order granting	
6				Motion to Dismiss	110-113
7	10	23	10-30-15	Notice of Entry of	
8				Order of Dismissal	114-122
9	11	21	11-5-15	Motion to Amend	
10				Order	123-129
11	12	19	11-23-15	Opposition to Motion	
12				to Amend Order	130-189
13	13	17	12-1-2015	Reply to Opposition to	
14				Motion to Amend Order	190-195
15	14	12	3-17-16	Order Denying Motion to	
16				Amend Order	196-200
17	15	11	4-11-16	Notice of Appeal	201-202

FILED

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

o0o

LUCIA CASTILLO, an individual, and
EDWIN PRATTS, an individual,

Case No.

CV15 00421

Dept. No.

10

Plaintiffs,

CLASS REPRESENTATION
(Arbitration Exempt)

vs.

UNITED FEDERAL CREDIT UNION, a
federal credit union

COMPLAINT FOR DAMAGES AND
INCIDENTAL RELIEF

Defendant.

Plaintiffs, Lucia Castillo, an individual ("Ms. Castillo") and Edwin Pratts, individual ("Mr. Pratts") (hereinafter collectively referred to as the "Class Representatives"), on behalf of themselves and all others similarly situated, files this their Complaint for Damages and Incidental Relief against Defendant, United Federal Credit Union, a federal credit union ("UFCU"), and allege the following:

INTRODUCTION

1. This class action seeks injunctive and monetary relief to redress an unlawful and deceptive pattern of wrongdoing followed by UFCU with respect to the repossession and repossession sales of the personal property of consumers in the State of Nevada.

2. As more particularly described below, UFCU sent to the Class Representatives and hundreds of other Nevada consumers a form post-repossession notice which failed to

0001

1 disclose consumer rights required by the Uniform Commercial Code ("UCC"), which mandates
2 disclosure of:

- 3 • the method of intended disposition;
- 4 • a description of the liability of a consumer for a deficiency;
- 5 • telephonic contact information for exercising the right of redemption;
- 6 • the consumer's entitlement to an accounting of any unpaid indebtedness,
7 and the charge, if any, for an accounting;
- 8 • the time and place of a public disposition or the time after which any other
disposition is to be made; and
- 9 • contact information for obtaining additional facts concerning the disposition
10 and the secured obligation.

11 3. In addition to not providing the statutorily mandated notice under the UCC,
12 UFCU failed to provide the required notice under NRS 482.156, which mandates that the
13 notice:

- 14 • must set forth that there is a right to redeem the vehicle and the total amount
required as of the date of the notice to redeem;
- 15 • may inform such persons of their privilege of reinstatement of the security
16 agreement, if the holder extends such a privilege;
- 17 • must give notice of the holder's intent to resell or again lease the vehicle at
the expiration of 10 days from the date of giving or mailing the notice;
- 18 • must disclose the place at which the vehicle will be returned to the buyer or
19 lessee upon redemption or reinstatement; and
- 20 • must designate the name and address of the person to whom payment must
be made.

21
22 4. After repossession of the vehicle of the Class Representatives and other similarly
23 situated consumers, UFCU informed the Class Representatives and other similarly situated
24 consumers that it intended to dispose of their vehicle without providing the statutorily mandated
25 notice with the specific disclosures as required under NRS 104.9613, 104.9614, and 482.516.

26 5. The Class Representatives bring this action on behalf of themselves and a class
27 of all other similarly situated consumers. The Class Representatives seek injunctive relief and an
28

1 award of statutory damages as provided for under Nevada law, and such other and further relief
2 as this Court may deem appropriate.

3 **PARTIES**

4 6. At all times material hereto, the Class Representatives were *sui juris* and
5 residents of Washoe County, Nevada.

6 7. At all times material hereto, UFCU, was a federal corporation doing business in
7 Washoe County, Nevada.

8 8. At all times material hereto, UFCU was engaged in the business of providing
9 financing to purchasers of new and used motor vehicles and other personal property in the State
10 of Nevada, including Washoe County, Nevada

11 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

12 **Details Concerning Repossession**

13 9. On or about March 11, 2014, the Plaintiffs entered into a retail installment sale
14 contract ("Castillo RISC").

15 10. Pursuant to the Castillo RISC, Plaintiffs financed the purchase of a 2012 Kia
16 Forte motor vehicle, VIN: KNAFU4A24C5593307 ("Castillo Vehicle").

17 11. On or about December 18, 2014, UFCU repossessed the Castillo Vehicle.

18 12. On or about December 19, 2014, UFCU sent or caused to be sent to Plaintiffs a
19 written notice advising Plaintiffs of its intent to dispose of the Castillo Vehicle in purported
20 compliance with the requirements of the UCC ("Notice of Sale").

21 13. A true and correct copy of the Notice of Sale is attached hereto and incorporated
22 herein by reference as Exhibit "A."

23 **Description of UCC Non-Compliance**

24 14. The Notice of Sale fails to comply with the UCC in that UFCU failed to state
25 that Plaintiffs as debtors were entitled to an accounting of the unpaid indebtedness and the
26 charge, if any, for said accounting, as required by NRS 104.9613 1(d) and 104.9614 1(a).

15. In the Notice of Sale, UFCU made the following representation concerning the obligation of Plaintiffs to pay a deficiency, if any:

If the proceeds from the sale, after deducting the expenses for repossession, repair, storage and selling, are not sufficient to pay the total amount due (including accrued interest), you are responsible for paying any deficiency balance within (5) five days or you must make contact with the Credit Union to arrange for payment.

(“Deficiency Payment Representation”)

16. Contrary to the Deficiency Payment Representation, NRS 104.9616 provides in pertinent part that in a consumer-goods transaction a secured creditor such as UFCU is required to provide an explanation of a deficiency in the manner contemplated under said section before or when the secured creditor first makes a written demand on the consumer after disposition for payment of the deficiency.

17. Under the UCC, with respect to consumer goods transactions, a notification that lacks any of the information required under NRS 104.9614 is insufficient as a matter of law. Uniform Commercial Code Comment, Note 1, NRS 104.9614.

18. Under the UCC, “every non-compliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted.” Uniform Commercial Code Comment, Note 4, NRS 104.9625.

Description of Non-Compliance With Nevada Law With Respect to
Repossession of Vehicles

19. In addition to the above deficiencies under the UCC, the Notice of Sale fails to comply with NRS 482.516 in the following respects:

- (a) Failure to Disclose Location of Vehicle - UFCU failed to disclose the place at which the Castillo Vehicle would be returned to Plaintiffs upon redemption and reinstatement in contravention of NRS 482.516 2.(d); and
- (b) Designation of Redemption/Reinstatement Payee - UFCU failed to designate the name and address of the person to whom payment must be

1 made for redemption or reinstatement in contravention of NRS 482.516

2 2.(c).

3 20. Pursuant to NRS 482.516 3, persons such as Plaintiffs are liable for deficiency
4 after sale or lease of a repossessed vehicle only if the notice prescribed by said section is given
5 within sixty (60) days after repossession and includes an itemization of the balance and any
6 costs or fees for delinquency, collection or repossession.

7 21. As a result of the failure of UFCU to comply with the requirements of NRS
8 482.516, UFCU may not recover a deficiency against Plaintiffs and any other persons similarly
9 situated.

10 **Post-Repossession Credit Reporting and Collection Activities of UFCU**

11 22. NRS 104.9625, and the previous NRS 104.9507, provide that when a secured
12 party fails to comply with NRS 104.9614's notice requirements, the proceeds of a disposition
13 of collateral are presumed to be equal with the sum of the indebtedness. Thus, it is statutorily
14 presumed that the secured party is due no deficiency after the disposition of the collateral.

15 23. NRS 482.516(3) provides that creditors such as UFCU are proscribed from
16 collecting a deficiency from debtors such as Plaintiffs and all other persons similarly if the
17 notice prescribed by NRS 482.516(2) is not provided.

18 24. The Class Representatives are informed and believe and on that basis allege that,
19 in the four (4) years preceding the filing of the Complaint herein, UFCU has unlawfully
20 collected or attempted to collect deficiency balances from consumers issued defective post-
21 repossession notices, without legal authority and without accounting for a set-off in the amount
22 of the statutory damages set forth under NRS 104.9625(3)(b).

23 25. In addition to the unlawful collection or attempt to collect deficiency balances
24 from consumers, UFCU has maintained a practice and policy of reporting to the three national
25 consumer reporting agencies, to wit: Equifax Credit Information Services, Inc., Experian, Inc.,
26 and TransUnion, LLC (hereinafter referred to collectively as the "CRAs") derogatory
27

1 information concerning the Class Representatives and the members of the class which failed to
2 account for the statutory presumption and/or the set-off for statutory damages described herein.

3 **CLASS REPRESENTATION ALLEGATIONS**

4 **Statement of Maintainable Class Claims**

5 26. Pursuant to Rule 23(a), Nevada Rules of Civil Procedure, this is a case
6 maintainable on a class-wide basis pursuant to Rule 23(b)(2) and (b)(3), Nevada Rules of Civil
7 Procedure, and the Class Representatives bring this action on behalf of themselves and of a
8 class of all other persons similarly situated, to remedy the ongoing unfair, unlawful, and/or
9 deceptive business practices alleged herein, and seek redress on behalf of all those persons who
10 have been harmed thereby.

11 **Identification of Common Questions of Law or Fact**

12 27. Pursuant to Rule 23(a)(2), Nevada Rules of Civil Procedure, there are questions
13 of law and fact common to the Class, which common issues predominate over any issues
14 involving owing individual class members.

15 28. The factual question common to the Class Representatives and to each class
16 member is that each was sent a post-repossession notice in the form of Exhibit "A" and has
17 been subjected or may be subjected to collection and credit reporting activities as described
18 above.

19 29. Pursuant to Rule 23(a)(2), Nevada Rules of Civil Procedure, the principal legal
20 question common to the Class Representatives and to each class member is whether the form
21 represented by the Notice of Sale complies with Nevada law with respect to providing the
22 disclosures set forth under NRS 104.9613, 104.9614, 104.9623, and 482.516.

23 **Allegations of Typicality**

24 30. Pursuant to Rule 23(a)(3), Nevada Rules of Civil Procedure, the claims of the
25 Class Representatives are typical of those of the classes they seek to represent in that the Class
26 Representatives were sent a form notice in the form of Exhibit "A" and has been subjected to
27

1 the collection and credit reporting activities as described above. As such, the claims of the Class
2 Representatives are identical to that of the class members.

3 Allegations of Numerosity

4 31. In the consumer finance industry in Nevada, similar finance companies
5 experience a default rate of 5% to 10% of their portfolios. See, generally, S. Agarwal and B.
6 Ambrose, *Household Credit Usage* (2007). Based on the best due diligence and the experience
7 of Class Counsel, the Class Representatives believe that UFCU repossessed approximately one
8 hundred fifty (150) vehicles and other personal property in a fiscal year in the State of Nevada.

9 32. Based on the foregoing, the prospective class numbers are at least in the
10 hundreds and are so numerous that joinder of all members would be impractical. The exact size
11 of the proposed class and the identity of the members thereof are readily ascertainable from
12 UFCU's business records.

13 Definition of Class

14 33. Pursuant to Rule 23, Nevada Rules of Civil Procedure, the class is composed of
15 all Nevada residents who, in the four (4) years preceding the filing of the instant action:

- 16 (a) have or had a finance agreement held by UFCU for which personal
17 property was pledged as collateral;
18 (b) had said personal property repossessed in Nevada by UFCU or its agents;
19 and
20 (c) were sent a post-repossession notice which failed to contain one or more of
21 the mandated statutory disclosures under NRS 104.9613, 104.9614,
22 104.9625, and 482.516.

23 Adequacy of Class Representatives

24 34. Pursuant to Rule 23(a)(4), Nevada Rules of Civil Procedure, the Class
25 Representatives will fairly and adequately protect and represent the interest of each class
26 member. The Class Representatives have retained counsel with substantial experience in
27 handling class actions in federal and state court.

1 35. The Class Representatives have no conflicts of interest which would interfere
2 with their ability to represent the interests of the class members.

3 *Appropriateness of Hybrid Class Treatment Under Rule 23(b)(2) and (3)*

4 36. A class action is superior to other methods for the fair and efficient adjudication
5 of this controversy. Because the damages suffered by the individual class members may be
6 relatively small compared to the expense and burden of litigation, it would be impractical and
7 economically unfeasible for class members to seek redress individually. The prosecution of
8 separate actions by the individual class members, even if possible, would create a risk of
9 inconsistent or varying adjudications with respect to the individual class members against
10 UFCU.

11 37. The Class Representatives are represented by counsel competent and experienced
12 in both consumer protection and class action litigation.

13 38. Members of the proposed class who have an interest in individually controlling
14 the prosecution of separate claims against UFCU will not be prejudiced by this action. Each
15 member of the proposed class will be identified through discovery from UFCU and will be
16 notified and given an opportunity to opt out of the class.

17 39. The Class Representatives do not presently know the nature and extent of any
18 pending litigation to which a member of the proposed classes is a party and in which any
19 question of law or fact controverted in the present action is to be adjudicated. The Class
20 Representatives will identify any such pending litigation by discovery from UFCU.

21 40. This Court is an appropriate forum for the present action in that the Class
22 Representatives are, and at all times herein mentioned have been, residents of this county; the
23 Class Representatives' Vehicle was purchased and repossessed in this county; and UFCU does
24 business in this county, including without limitation providing to residents of this county
25 financing of consumer goods.

26 41. Certification of a class under Rule 23(b)(2), Nevada Rules of Civil Procedure is
27 appropriate as UFCU has acted on grounds generally applicable to the Class with respect to the
28

1 collection and credit reporting activity as described above thereby making appropriate equitable
2 relief with respect to the Class as a whole. Unless restrained from such activities, UFCU will
3 continue to unlawfully harm the interests of the Class Representatives and the class for which
4 no adequate remedy at law exists.

5 42. Certification of a class under Rule 23, Nevada Rules of Civil Procedure is also
6 appropriate in that:

7 (a) The questions of law or fact common to the members of the class
8 predominate over any questions affecting an individual class member; and

9 (b) A class action is superior to other available methods for the fair and efficient
10 adjudication of the controversy.

11 43. The Class Representatives request certification of a "hybrid" class for monetary
12 damages under Rule 23(b)(3) and for equitable relief under Rule 23(b)(2), Nevada Rules of
13 Civil Procedure. See, *Penson v. Terminal Transport Co., Inc.*, 634 F.2d 989, 994 (5th Cir.
14 1981); *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692 (S.D. Fla. 2004).

15 44. There are no difficulties likely to be encountered by the Court in the management
16 of this proposed class action.

17 45. The Class Representatives' counsel are entitled to a reasonable fee from the class
18 members or from a common fund for the handling of this action.

19 **APPLICABLE LAW**

20 46. NRS 104.9610 through 104.9628, regulate the rights of secured parties to
21 dispose of collateral after an alleged default. NRS 104.9610 requires a secured party to conduct
22 every aspect of its disposition of financed vehicles, including the method, manner, time, place
23 and other terms of sale, in a commercially reasonable manner.

24 47. NRS 104.9611, Nevada Statute, requires a secured party to issue to the
25 borrower an appropriate notice prior to the disposition. NRS 104.9614 further requires that the
26 notice disclose the time and place of any public sale or the time after which any other intended
27 disposition is intended to be made.

1 48. To protect consumers' valuable property interests in financed vehicles, NRS
2 104.9614 further requires that the notice disclose:

- 3 • any liability of the borrower for a deficiency;
4 • that the debtor is entitled to an accounting of the unpaid indebtedness; and
5 the charge, if any for such an accounting; and
6 • the telephone number and address of contacts from where the debtor may
7 obtain further information concerning the disposition of collateral.

8 49. The form represented by the Notice of Sale that UFCU sent to the Class
9 Representative was materially defective, invalid and incomplete as described above.

10 50. The Class Representatives were informed and believe and on that basis allege
11 that UFCU sent the standard form represented by the Notice of Sale, or variants of it containing
12 one or more of the enumerated defects, to hundreds, if not thousands, of Nevada consumers
13 following the repossession of their vehicles.

14 51. NRS 104.9625 provides that if the secured party fails to comply with the
15 statutory requirements for disposition, the consumer borrower may recover "an amount not less
16 than the credit service charge plus 10 percent of the principal amount of the debt or the time-
17 price differential plus ten percent of the cash price."

18 **CAUSES OF ACTION**

19 **COUNT 1 - ACTION FOR VIOLATION OF NRS 104.9610, UNIFORM**
20 **COMMERCIAL CODE**

21 52. The Class Representatives reallege and reincorporate herein by reference the
22 allegations of paragraphs 1 through 51 as though fully set forth herein.

23 53. NRS 104.9610 provides that "every aspect of a disposition of collateral,
24 including the method, manner, time, place and other terms, must be commercially reasonable."

25 54. As is hereinabove alleged, UFCU has engaged and is continuing to engage in
26 material violations of Nevada law in that the form represented by the Notice of Sale fails to
27 comply with the governing provisions of the UCC.

1 55. UFCU has thus deprived the Class Representatives and class members of
2 substantial rights granted to them under Nevada law, including, but not limited to, the right to
3 obtain a Notice of Sale that fully and accurately discloses their rights upon repossession.

4 56. As a direct and proximate result of the acts hereinabove alleged and UFCU's on-
5 going unlawful conduct, the Class Representatives and class members have been damaged and
6 have suffered economic losses in an amount to be proven at trial.

7 57. The Class Representatives and class members are therefore entitled to damages,
8 pursuant to NRS 104.9625, as well as injunctive relief.

9 **COUNT II - ACTION FOR VIOLATION OF NRS 104.9611, UNIFORM**
10 **COMMERCIAL CODE**

11 58. The Class Representatives reallege and reincorporate herein by reference the
12 allegations of paragraphs 1 through 57 above as if set forth in full herein.

13 59. NRS 104.9611, requires secured parties such as UFCU send a "reasonable
14 authenticated notification" of disposition of collateral.

15 60. The standard form represented by the Notice of Sale violates NRS 104.9611 in
16 that UFCU failed to provide reasonable notice of disposition of collateral to the Class
17 Representatives and Class Members.

18 61. As a direct and proximate result of the acts hereinabove alleged and UFCU's
19 ongoing unlawful conduct, the Class Representatives and class members have been damaged
20 and have suffered economic losses in an amount to be proven at trial.

21 62. The Class Representatives and class members are therefore entitled to damages,
22 pursuant to NRS 104.9625, as well as to injunctive relief.

23 **COUNT III - ACTION FOR VIOLATION OF NRS 104.9614, UNIFORM**
24 **COMMERCIAL CODE**

25 63. The Class Representatives reallege and reincorporate herein by reference the
26 allegations of paragraphs 1 through 62 above as set forth in full herein.

1 64. NRS 104.9614 1(a) requires that a post-repossession notice include the
2 information provided in NRS 104.9613 1.

3 65. The standard form represented by the Notice of Sale violates NRS 104.9614 in
4 that UFCU failed to provide the statutorily mandated disclosures as described above.

5 66. As a direct and proximate result of the acts hereinabove alleged and UFCU's
6 ongoing unlawful conduct, the Class Representatives and class members have been damaged
7 and have suffered economic losses in an amount to be proven at trial.

8 67. The Class Representatives and class members are therefore entitled to damages,
9 pursuant to NRS 104.9625, as well as to injunctive relief.

10 **COUNT IV - ACTION FOR EQUITABLE RELIEF (COMMON LAW)**

11 68. The Class Representatives reallege and reincorporate herein by reference the
12 allegations contained in paragraphs 1 through 67 above as set forth in full herein.

13 69. As detailed above, since the repossession of the vehicles of the Class
14 Representatives and the class members, UFCU has wrongfully collected and/or reported credit
15 information to the CRAs with respect to the consumer reports of the Class Representatives and
16 the class members.

17 70. The Class Representatives and the class members do not have an adequate
18 remedy at law with respect to the continued collection and/or reporting of materially inaccurate
19 adverse credit information to the CRAs.

20 71. The Class Representatives and the class members will suffer irreparable injury if
21 UFCU is not enjoined from the future wrongful collection and reporting of adverse information
22 to the CRAs.

23 **COUNT V - ACTION FOR EQUITABLE RELIEF (UNIFORM COMMERCIAL**
24 **CODE)**

25 72. The Class Representatives reallege and reincorporate herein by reference the
26 allegations contained in paragraphs 1 through 71 above as if set forth in full herein.
27
28

73. As detailed above, since the repossession of the vehicle of the Class Representatives and the class members, UFCU has wrongfully collected and/or reported credit information to the CRAs with respect to the consumer reports of the Class Representatives and the class members.

74. Pursuant to NRS 104.9625, if it is established that a secured party is not proceeding in accordance with Article 9, Part VI of the UCC, a court may enter an order restraining collection, enforcement or disposition of collateral on appropriate terms and conditions.

75. The Class Representatives and the class members do not have an adequate remedy at law with respect to the continued collection and/or reporting of materially inaccurate adverse credit information to the CRAs.

76. The Class Representatives and the class members will suffer irreparable injury if UFCU is not enjoined from the future wrongful collection and reporting of adverse information to the CRAs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, Lucia Castillo, an individual, and Edwin Pratts, an individual, pray for relief on behalf of themselves and all others similarly situated as follows:

A. For an order certifying this claim as a class action:

B. For statutory damages under the Uniform Commercial Code for each class member in the amount of either 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, whichever is greater, according to proof, pursuant to NRS 104.9625;

C. For an order preliminarily and permanently enjoining UFCU from engaging in the practices alleged herein;

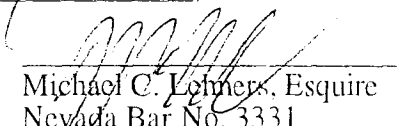
D. For an order of mandatory injunction directed to UFCU to remove any adverse credit information which may have been wrongfully reported on the consumer reports of the class members;

- 1 E. For pre-judgment interest to the extent permitted by law;
2 F. For an award of attorney's fees, costs and expenses incurred in the
3 investigation, filing and prosecution of this action to the extent permitted by law; and
4 G. For such other and further relief as the Court may deem just and proper.

5 **DEMAND FOR JURY TRIAL**

6 Plaintiffs, Lucia Castillo, an individual, and Edwin Pratts, an individual, pursuant to the
7 Nevada Rules of Civil Procedure, demand a trial by jury of all issues so triable.

8 Dated: This 3 day of May, 2015

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SECOND JUDICIAL DISTRICT COURT
WASHOE COUNTY, NEVADA

LUCIA CASTILLO, an Individual, and
EDWIN PRATTS, an individual,

Plaintiffs,

vs.

UNITED FEDERAL CREDIT UNION, a
federal credit union,

Defendant.

Case No. CV15-00421

Dept. No. 10

**DEFENDANT UNITED FEDERAL
CREDIT UNION'S MOTION TO
DISMISS**

Hearing Date: _____

Hearing Time: _____

Pursuant to Rules 12(b)(1) and 12(b)(5) of the Nevada Rules of Civil Procedure, Defendant United Federal Credit Union moves to dismiss Plaintiffs' claims. First, this Court lacks jurisdiction because neither Plaintiff's damages exceeds the \$10,000 jurisdictional threshold. Additionally, four of the five asserted causes of action fail to assert a claim upon which relief may be granted.

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1 This motion is based on the Points and Authorities attached hereto together with the
2 Papers and Pleadings on file herein and any oral argument received by the Court.

3 Respectfully submitted this 31st day of March, 2015.

4 HOWARD & HOWARD ATTORNEYS PLLC

5 By: /s/ James A. Kohl

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7 Robert Hernquist, Nevada Bar No. 101616
8 3800 Howard Hughes Parkway, Suite 1000
9 Las Vegas, NV 89169

10 *Attorneys for Defendant United Federal Credit*
11 *Union*

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 This matter arises out of Plaintiffs' failure to honor the promises that they made to
15 United Federal Credit Union ("United") to repay an automobile loan ("Loan") that was made to
16 Plaintiff, Lucia Castillo ("Castillo"), and guaranteed by Plaintiff, Edwin Pratts ("Pratts").
17 Despite her promise to repay the Loan, Castillo failed to do so. Similarly, Pratts failed to honor
18 his personal guaranty to repay the loan on Castillo's default. The Loan was for the purchase of
19 a vehicle and was secured by that same vehicle (the "Vehicle"). (Complaint at ¶ 9-10, filed
20 3/3/2015 and on file with the Court).

21 Due to Plaintiffs' failure to repay the Loan, United exercised its rights and repossessed
22 the Vehicle that was collateral for the Loan. (*Id.* at ¶ 11). Following repossession, United sent
23 Plaintiffs a Notice of Repossession and Private Sale ("Sale Notice"). (*Id.* at ¶¶ 12-13; Sale
24 Notice, attached as Exhibit 1). After United sold the Vehicle, United sent Defendant Castillo a

1 notice (the "Deficiency Notice" and, together with the Sale Notice, the "Notices") informing
2 Castillo what the Loan balance was post sale. (See Deficiency Notice, attached as Exhibit 2).

3 In their Complaint, Plaintiffs contend the Sale Notice does not comply with Nevada
4 statutes governing notice requirements to a debtor when collateral has been repossessed. (See
5 Complaint). The Complaint asserts the following claims against United: (1) Violation of NRS
6 104.9610 (*id.* at ¶¶ 52-57); (2) Violation of NRS 104.9611 (*id.* at ¶¶ 58-62); (3) Violation of
7 NRS 104.9614 (*id.* at ¶¶ 63-67); (4) Equitable Relief (Common Law) (*id.* at ¶¶ 68-71); and (5)
8 Equitable Relief (UCC) (*id.* at ¶¶ 72-76).

9 United moves this Court to dismiss this case because Plaintiffs have not met the
10 jurisdictional limits of Nevada's district courts. Plaintiffs have not alleged any facts that would
11 suggest their requested statutory damages will exceed \$10,000. The facts of the case prove
12 otherwise. Consequently, Plaintiffs cannot meet their burden of establishing subject matter
13 jurisdiction and therefore the Complaint should be dismissed. Based on the dollar amounts,
14 this case belongs in justice court.

15 Alternatively, four of the five asserted causes of actions should be dismissed pursuant to
16 Rule 12(b)(5). Plaintiffs' claims are duplicative, and based on the same set of facts. Plaintiffs
17 alleged that United violated three separate statutory provisions. But just one of those statutes
18 applies to these circumstances. The statute that governs the sufficiency of the Notice of Sale is
19 NRS 104.9614, and thus Plaintiffs' Third cause of action is consistent with the Complaint's
20 allegations. However, Plaintiffs' First and Second causes of action are superfluous,
21 unsupported by the allegations that have been asserted, and should be dismissed. Additionally,
22 Plaintiffs' Fourth and Fifth causes of action do not assert a proper claim for relief. Courts
23 universally hold that injunctive relief is a remedy, not a cause of action, and therefore routinely
24 dismiss such claims.
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II. LAW AND ARGUMENT

Plaintiffs' Complaint should be dismissed because it does not allege facts sufficient to invoke the jurisdiction of this Court. Based upon the dollar amounts at issue here, Plaintiffs' claim simply does not meet the \$10,000 jurisdictional threshold required by Nevada's district courts. Alternatively, the Complaint should be dismissed because it fails to allege causes of action that are recognized by Nevada law. In either case, the Complaint should be dismissed with prejudice.

A. Plaintiffs Failed to Invoke The Jurisdiction of This Court, Thus, the Complaint Must be Dismissed

Based on the Complaint's allegations and requested relief, neither Plaintiff's compensatory damages claim exceeds \$10,000. Consequently, a Nevada district court does not have subject matter over this dispute. NRS 4.370. This case belongs in justice court.

1. Legal Standard When Assessing Subject Matter Jurisdiction

Rule 12(b)(1) allows defendants to seek dismissal of a claim or action for a lack of subject matter jurisdiction. NEV. R. CIV. P. 12(b)(1). "[S]ubject matter jurisdiction cannot be waived and may be raised at any time, or *sua sponte* by a court of review." *Vaile v. Dist. Court*, 118 Nev. 262, 276, 44 P.3d 506, 516 (2002). Dismissal under Rule 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on its face that are sufficient to establish subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008) (assessing federal counterpart).¹

A defendant may attack the existence of subject matter jurisdiction not only on the face of the pleadings, but also with evidence extrinsic to the pleadings. *Mortenson v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (9th Cir. 1979). Although the defendant is the moving party in a motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the

¹ The cited federal cases dismiss the claims based on Fed. R. Civ. P. 12(b)(1), the federal counterpart to Nevada's Rule 12(b)(1). "[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules." *Foster v. Dingwall*, 126 Nev. Adv. Op. 5, 228 P.3d 453, 456 (2010) (quoting *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005)).

1 court's jurisdiction. As a result, the plaintiff bears the burden of proving that the court has
2 subject matter jurisdiction over the pending case. *McCauley v. Ford Motor Co.*, 264 F.3d 952,
3 957 (9th Cir. 2001).

4 Federal courts apply a "legal certainty" test to determine whether a complaint satisfies
5 the amount-in-controversy requirement of diversity jurisdiction. In order to dismiss a case
6 based upon lack of subject matter jurisdiction, it must appear to a legal certainty that the claim
7 is worth less than the jurisdictional amount. *St. Paul Indemnity Co. v. Cab Co.*, 303 U.S. 283,
8 288-89 (1938); *Budget Rent-A-Car Inc. v. Higashiguchi*, 109 F.3d 1471, 1473 (9th Cir. 1997).
9 The Nevada Supreme Court has adopted the federal legal certainty test for determining the
10 amount in controversy in Nevada district courts. *Morrison v. Beach City LLC*, 116 Nev. 34, 38,
11 991 P.2d 982, 984 (2000). The district court need not accept the allegations of the complaint as
12 true and may conduct a hearing to determine whether the potential damages in a case fall below
13 a jurisdictional threshold. *Id.* at 39, 991 P.2d at 985; *Thornhill Publ'g Co. v. Gen. Tel. Elec.*,
14 *Inc.*, 594 F.2d 730, 733 (9th Cir. 1979) ("No presumptive truthfulness attaches to plaintiff's
15 allegations, and the existence of disputed material facts will not preclude the trial court from
16 evaluating for itself the merits of jurisdictional claims.").

17 In a consolidated litigation or class action context, individual plaintiffs' damages claims
18 may not be aggregated to satisfy the jurisdictional amount requirement unless the individual
19 plaintiffs have a common and undivided interest in a claim for damages. *Snyder v. Harris*, 394
20 U.S. 332, 336-38 (1969) (applying the federal class action rule substantially the same as
21 Nevada's Rule 23 and holding that in the context of a class action, individual plaintiff's
22 damages claims may not be aggregated to satisfy a jurisdictional amount requirement). *See*
23 *also In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001).
24 "When two or more plaintiffs, having separate and distinct demands, unite for a convenience
25 and economy in a single suit, it is essential that the demand of each be of the requisite
26 jurisdictional amount." *Bank of Troy, Ind., v. G.A. Whitehead & Co.*, 222 U.S. 39, 40 (1911).
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28 Additionally, when determining the amount in controversy, this Court must ignore

1 amounts sought for attorneys' fees and costs. *Morrison*, 116 Nev. at 36, 991 P.2d at 983.
2 Moreover, the prohibition on aggregation to meet jurisdictional limits is also extended to any
3 claim for punitive damages. *See also In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264
4 F.3d 952, 957 (9th Cir. 2001) ("punitive damages asserted on behalf of a [putative] class may
5 not be aggregated for jurisdictional purposes where, as here, the underlying cause of action
6 asserted on behalf of the class is not based upon a title or right in which the plaintiffs share, and
7 as to which they claim, a common interest.").

8 **2. This Court Does Not Have Jurisdiction Because Neither Plaintiff's Purported**
9 **Damages Exceed \$10,000**

10 This Court lacks jurisdiction over each Plaintiff's claims. NRS 4.370(1) provides the
11 original jurisdiction of the Nevada Justice Court. It provides in relevant part:

12 1. Except as otherwise provided in subsection 2, justice courts have jurisdiction
13 of the following civil actions and proceedings and no others except as otherwise
provided by specific statute:

14 ***

15 (b) In actions for damages for injury to the person, or for taking, detaining or
16 injuring personal property, or for injury to real property where no issue is raised
by the verified answer of the defendant involving the title to or boundaries of the
real property, if the damage claimed does not exceed \$10,000.

17 NRS 4.370(1)(b). Pursuant to Article 6 of the Nevada Constitution, the district courts lack
18 jurisdiction over actions that fall within the justice courts' original jurisdiction. NEV. CONST. §
19 6. Thus, in actions for damages as claimed by Plaintiffs here, this District Court has
20 jurisdiction only if the Plaintiff claims more than \$10,000 in damages. *See, e.g., Morrison*, 116
21 Nev. at 38, 991 P.2d at 984.

22 In their Prayer for Relief, Plaintiffs seek statutory damages, attorneys' fees and costs (as
23 well as equitable relief). (Complaint at pp. 13-14). As to statutory damages, Plaintiffs request
24 "an amount of either the credit service charge plus 10 percent of the principal amount of the
25 obligation, or the time-price differential plus 10 percent of the cash price, whichever is
26 greater." (*Id.* at 13:19-22). Thus, Plaintiffs' Prayer for Relief tracks NRS 104.9625(3)(b),
27 which governs statutory damages governing violations of that part of the UCC. NRS
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104.9625(3)(b).

Based on the dollar amounts at issue, Plaintiffs cannot possibly meet the \$10,000 threshold. For instance, as the Court can see from both the Sale Notice and Deficiency Notice the principal amount of the obligation was \$16,421.39 and therefore 10% of the principal amount of the obligation is just \$1,642.14. (Exhibits 1 & 2). Plaintiffs have not alleged any facts that would suggest that any of the other damages components of NRS 104.9625(3)(b) could possibly result in damages that exceed \$10,000. The Complaint should therefore be dismissed because Plaintiffs' have not met their burden of establishing subject matter jurisdiction. *Morrison*, 116 Nev. at 38, 991 P.2d 982.

B. Four of Plaintiff's Five Asserted Causes of Action Should be Dismissed Pursuant to Rule 12(b)(5)

In the alternative, United is entitled to dismissal of Plaintiffs' claims pursuant to NRCP 12(b)(5) if it demonstrates that Plaintiffs' do not allege any set of facts for which relief could be granted. *Bergmann v. Boyce*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993); *Jacobs v. Adelson*, 130 Nev. Adv. Op. 44, 325 P.3d 1282, 1285 (2014); *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002). The test for determining whether the allegations are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested. *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984); *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220, 1223 (1992). When evaluating dismissal pursuant to Rule 12(b)(5), a court must generally accept the allegations contained in the underlying pleading as true. *See Hynds Plumbing & Heating Co. v. Clark County Sch. Dist.*, 94 Nev. 776, 777, 587 P.2 1331, 1332 (1978). Courts, however, do not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in a claim. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994); *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Indeed, "conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss." *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F. Supp. 2d

1 972, 984 (D. Nev. 2004). To survive a motion to dismiss, each claim must allege “enough
2 facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550
3 U.S. 544, 570 (2007).

4 When considering this motion, this Court may consider all of the following: (i) the
5 facts stated on the face of the Complaint; (ii) documents appended to the Complaint; (iii)
6 documents incorporated in the Complaint by reference; and (iv) matters of which judicial
7 notice may be taken. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258,
8 1261 (1993); *Carstarphen v. Milsner*, 594 F. Supp. 2d 1201, 1207 (D. Nev. 2009).²

9 Here the Court may consider the Sale Notice. The Complaint references the Sale
10 Notice and is based solely upon the content of the Sale Notice, and Plaintiffs have attached the
11 Sale Notice as an exhibit to the Complaint.³ (Complaint at ¶ 13). Thus, the Court’s
12 consideration of the contents of the Sale Notice would not convert this to a motion for
13 summary judgment. *Breliant*, 109 Nev. at 847, 858 P.2d at 1261.

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18 2 When a document is attached to or referenced in the Complaint, it forms part of the
19 pleading and hence may be considered in deciding a motion to dismiss for failure to state a
20 claim. *IBEW Local 15 v. Exelon Corp.*, 495 F.3d 779, 782 (7th Cir. 2007). A document is
21 incorporated by reference if the Complaint refers to it, the document is central to the claim, and
22 no party questions the document’s authenticity. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
23 2006); *Maritz Inc. v. Carlson Mktg. Group, Inc.*, 2009 WL 3561521 at *2 (N.D. Cal. 2009).
24 When the claimant fails to introduce such a document, the defendant “may introduce the
25 exhibit as part of his motion attacking the pleading.” *Branch v. Tunnell*, 14 F.3d 449, 453-54
26 (9th Cir. 1994) (overturned on alternative grounds). “[T]he court may treat such a document as
27 part of the [pleading], and thus may assume that its contents are true for purposes of a [Rule
28 12(b)(5)] motion.” *Marder*, 450 F.3d at 448. If the document contradicts the allegations in the
Counterclaim, it is the document that controls, not the bare allegations. *Forrest v. Universal
Savings Bank*, 507 F.3d 540, 542 (7th Cir. 2007). “A court is not bound by the party’s
characterization of an exhibit and may independently examine and form its own opinions about
the document.” *Id.*

³ Plaintiffs refer to the Notices throughout their Complaint and intended to attach the
Repossession Notice as Exhibit A (Complaint ¶ 13) but the copy served on United did not have
Exhibit A attached to it.

1. *Plaintiffs' First Cause of Action Fails As A Matter of Law To Set Forth A Claim For Violating NRS 104.9610*

In their First Cause of Action, Plaintiffs' allege that the Sale Notice does not comply with NRS 104.9610. Thus, Plaintiffs conclude that United is liable for unspecified damages. (Complaint at ¶¶ 54-55). However, NRS 104.9610 governs the sale of repossessed collateral and requires that such sales be conducted in a "commercially reasonable" manner. This statute does not address the UCC's separate provisions governing notices to the debtor(s). See NRS 104.9613 & 104.9614. However, a alleged violation of NRS 104.9614 does not create an *ipso facto* violation of NRS 104.9610, and Plaintiffs have not alleged any facts that would suggest that the sale of the Vehicle was not commercially reasonable. Instead, Plaintiffs allegations focus upon the Sale Notice to the debtors. As the Court can see by reviewing the document, the Sale Notice had nothing to do with whether or not the sale of the Vehicle was "commercially reasonable." (Exhibit 1). Consequently, the First Claim for Relief should be dismissed.

NRS 104.9610(1) states that 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." NRS 104.9610(2) states, "[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable." The balance of NRS 104.9610(3)-(6) addresses the legal rights of parties who sell or purchase repossessed collateral. NRS 104.9610 does not contain *any* provision that governs the contents of the Sale Notice. Further, NRS 104.9610 does not contain *any* reference to the separate statutory provisions governing the contents of a sale notice. See NRS 104.9613 & 104.9614 (setting forth the requirements for a notice of disposition to debtors and other secured parties).

"The construction of a statute is a question of law." *Del Papa v. Board of Regents*, 114 Nev. 388, 392, 956 P.2d 770, 773-774 (1998) (quoting *General Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995)). "[Q]uestions involving the existence interpretation, construction or meaning and effect of a statute are questions for the court." *Sobrio v. Caferata*,

1 72 Nev. 145, 150, 297 P.2d 828, 830 (1956); *see also, Sagebrush Ltd. v. Carson City*, 99 Nev.
2 204, 660 P.2d 1013 (1983) (same). It is well established that if the language of a statute is plain
3 and unambiguous, there is simply no room for construction of that statute by the Court. *Nevada*
4 *Power Co., v. Public Serv. Commission of Nevada*, 102 Nev. 1, 711 P.2d 867 (1986). NRS
5 104.9610 is drafted in plain and unambiguous language. The Court therefore cannot construe it
6 beyond its plain meaning.

7 “The maxim ‘*expressio Unis est exclusio alterius*’, the expression of one thing is the
8 exclusion of another, has been repeatedly confirmed in this State.” *Galloway v. Truesdall*, 83
9 Nev. 13, 26, 422 P.2d 237, 246 (1967). Stated another way, “[t]hat which is enumerated
10 excludes that which is not.” *O’Callaghan v. District Cort*, 89 Nev. 33, 35, 505 P.2d 1215, 1216
11 (1973). NRS 104.9610 is limited to the manner and effect of a sale of repossessed collateral.
12 Had the Nevada Legislature wanted NRS 104.9610 to apply to notices that are sent to debtors, it
13 would have included such language in it. By limiting NRS 104.9610 to the manner and effect of
14 the sale of collateral, as a matter of law, it does not apply to the Sale Notice. Thus, under no set
15 of circumstances could Plaintiffs plead any set of facts that the Sale Notice violated NRS
16 104.9610.

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18 Plaintiffs’ First Cause of Action also fails because NRS 104.9613 and NRS 104.9614
19 expressly state what language needs to be included in Sale Notice; NRS 104.9610 does not.
20 “This court has acknowledged the accepted rule of statutory construction ‘that a provision which
21 specifically applies to a given situation will take precedence over one that applies only
22 generally.’” *State, Dept. Of Motor Vehicles v. Bremmer*, 113 Nev Adv. Op. 89, 8, 942 P.2d 150,
23 149 (1997) (quoting *Sierra Life Ins. Co. v. Rottman*, 95 Nev. 654, 656, 601 P.2d 56, 57 (1979)).
24 Even if the Court were inclined to construe NRS 104.9610 beyond its plain and unambiguous
25 language, the fact that NRS 104.9613 and NRS 104.9614 expressly govern notices, they control.

26 Finally, the Complaint does not allege any facts that would support a finding that the
27 sale of the Vehicle was not commercially reasonable. A sale of collateral “is made in a
28 commercially reasonable manner if the disposition is made:

- 1 (a) In the usual manner on any recognized market;
2 (b) At the price current in any recognized market at the time of the disposition;
3 or
4 (c) Otherwise in conformity with reasonable commercial practices among
dealers in the type of property that was the subject of the disposition.

5 NRS 104.9627(2). The Complaint does not allege any facts regarding any of these elements.
6 For instance, Plaintiffs do not allege that the sale was unordinary or not conducted in a
7 recognized market or that the sale price was below market value. And because the Complaint
8 does not allege any facts that would suggest the sale of the Vehicle was not commercially
9 reasonable, the First Cause of Action does not state a claim for relief and should therefore be
10 dismissed with prejudice.

11 **2. Plaintiffs' Second Cause of Action Fails As a Matter of Law To Set Forth A**
12 **Claim For Violating NRS 104.9611**

13 Plaintiffs allege the Sale Notice violates NRS 104.9611 because it "failed to provide
14 reasonable notice of disposition of collateral." (Complaint at ¶ 60). For the sake of brevity, the
15 statutory rules of construction set forth above regarding NRS 104.9610 are incorporated by
16 reference. As above, NRS 104.9611 does not address what language must be included within
17 the Sale Notice. As such NRS 104.9611 does not apply to the contents of the Sale Notice.
18 Those requirements are set forth in NRS 104.9613 and 104.9614. This claim is duplicative of
19 Plaintiffs' Third Cause of Action, which asserts a violation of NRS 104.9614 and should
20 therefore be dismissed.

21 **3. The Court Should Dismiss Plaintiffs' Fourth and Fifth Causes of Action**
22 **Because Injunctive Relief is a Remedy, Not a Cause of Action**

23 Plaintiffs' Fourth and Fifth causes of action, for "Injunctive Relief," do not "state a
24 claim upon which relief can be granted" because injunctive relief is a remedy and not a cause of
25 action. Accordingly, the Court should dismiss them with prejudice.

26 It is fundamental that a cause of action is separate and distinct from available remedies.
27 *United States v. Smelser*, 87 F.2d 799, 800-801 (5th Cir. 1937) ("Causes of action should be
28 distinguished from remedies. One precedes and gives rise to the other, but they are separate and

1 distinct.”). Numerous courts throughout the country have held that attempts to allege a cause of
2 action for injunctive relief should be dismissed pursuant to Rule 12(b)(5). *Cox Communs. PCS,*
3 *L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1283 (S.D. Cal. 2002) (dismissing a claim for
4 injunctive relief because “injunctive relief, like damages, is a remedy requested by the parties,
5 not a separate cause of action”); *Torres v. Vill. of Sleepy Hollow*, 379 F. Supp. 2d 478, 482 n.2
6 (S.D.N.Y. 2005) (dismissing a cause of action captioned “Injunctive Relief” for failure to state a
7 claim because “there is no such cause of action” since injunctions are remedies); “Injunctive
8 relief is a remedy and not, in itself, a cause of action.” *Neu v. Terminix Int’l, Inc.*, 2008 WL
9 962096, at *3 (N.D. Cal. 2008) (quoting *McDowell v. Watson*, 59 Cal.App.4th 1155, 1159, 69
10 Cal.Rptr.2d 692 (1997)). “[A] claim for a specific type of remedy cannot be a separately plead,
11 free-standing cause of action.” *Id.*⁴

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13 This line of case law is supported by the Nevada Supreme Court’s rationalization in
14 *State Farm Mutual Auto. Ins. Co. v. Jafbro Inc.*, 109 Nev. 926, 860 P.2d 176 (1993) when it
15 explained that “it is axiomatic that a court cannot provide a remedy unless it has found a wrong.
16 The existence of a right violated is a prerequisite to the granting of an injunction.” *Id.* at 928,
17 860 P.2d at 178. Thus, *Jafbro* shows that Nevada recognizes that injunctions are remedies
18 rather than causes of action. Additionally, NRCP 65 contains the procedural rules and
19 guidelines for obtaining injunctive relief—the existence of this rule also indicates the
20 recognition that injunctive relief is a remedy rather than a valid independent cause of action.
21 NEV. R. CIV. P. 65. As there is no claim for relief based upon injunctive relief under Nevada

22
23 4 See also *Vedatech, Inc. v. St Paul Fire & Marine Ins. Co.*, 2005 U.S. Dist. LEXIS
24 45095 at *34-35 (N.D. Cal. 2005) (dismissing a cause of action titled “INJUNCTIVE
25 RELIEF” for failure to state a claim because “[i]njunctive relief is a remedy and not, in itself, a
26 cause of action”); *Spagnola v. Chubb Corp.*, 2007 U.S. Dist. LEXIS 21676 at *19 (S.D.N.Y.
27 2007) (granting a motion to dismiss a claim for “Injunctive Relief” because “an injunction is a
28 remedy and not a separate cause of action sustainable on its own.”); *Clarke v. Newell*, 2005
U.S. Dist. LEXIS 31053 at *11 (E.D. Va. 2005) (granting motion to dismiss a claim for
injunctive relief because the claim failed to state a claim upon which relief can be granted since
“injunctive relief is not a cause of action, but rather a remedy.”); *Saha v. Ohio State Univ.*,
2005 U.S. Dist. LEXIS 44661 at *10 (S.D. Ohio 2005) (same); *Smith v. New Line Cinema*, 2004
U.S. Dist. LEXIS 18382 at *13-14 (S.D.N.Y. 2004) (same)

1 law, Defendants' Fourth and Fifth Causes of Action must be dismissed with prejudice. *Jafbro*
2 *Inc.*, 109 Nev. 926, 860 P.2d 176 ("an injunction will not issue 'to restrain an act which does not
3 give rise to a cause of action'" (quoting 43 C.J.S. § 18 *Injunctions* (1978))).

4 Dismissal of the Fourth and Fifth Claims will result in minimal harm to Plaintiffs. The
5 prayer for relief within a complaint is the proper place to request a remedy. Plaintiffs' prayer
6 for relief contains a request for an injunction. (Complaint at p. 13). Thus, an order dismissing
7 the Fourth and Fifth Claims will not preclude Plaintiffs from anything—their prayer for relief
8 will still contain a request for an injunction, and that remedy will still be available to them if
9 warranted. Dismissal merely brings the Complaint within the requirements established by the
10 Rules of Civil Procedure. Under such circumstances, dismissal of the improper claims for relief
11 does not result in any prejudice because Plaintiffs have not lost their ability to achieve the
12 requested remedy. *Cox Communs. PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1283
13 (S.D. Cal. 2002) (noting that dismissal of claim for injunctive relief did not impose any harm,
14 because the request was also properly contained in the prayer of relief); *Torres v. Vill. of Sleepy*
15 *Hollow*, 379 F. Supp. 2d 478, 482 n.2 (S.D.N.Y. 2005) (same).
16

17 Plaintiffs should be required to follow the Rules of Civil Procedure, and only allege
18 proper causes of action within their Complaint. They have not. Accordingly, the Fourth and
19 Fifth Causes of Action in Plaintiffs' Complaint should be dismissed pursuant to NRCP 12(b)(5)
20 because injunctive relief is not "a claim upon which relief can be granted." NRCP 12(b)(5).
21 Further, Plaintiffs should not be allowed leave to amend because any amendment to alleged
22 injunctive relief as a separate cause of action would be futile.

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III. CONCLUSION

As set forth above, Plaintiffs' Complaint does not reach the jurisdictional limit of the Court and should therefore be dismissed pursuant to NRCP 12(b)(1). Even if the Court were to find that Plaintiffs have reached the threshold jurisdiction of the Court, the Court should still dismiss, with prejudice, Plaintiffs' First, Second, Fourth and Fifth claims for relief pursuant to NRCP 12(b)(5).

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ James A. Kohl

James A. Kohl, Nevada Bar No. 5692

Robert Hernquist, Nevada Bar No. 101616

3800 Howard Hughes Parkway, Suite 1000

Las Vegas, NV 89169

*Attorneys for Defendant United Federal Credit
Union*

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 31st day of March 2015.

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ James A. Kohl

James A. Kohl, Nevada Bar No. 5692
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that pursuant to NRCP 5(b), that on March 31, 2015, I served a copy of the foregoing *Defendant United Federal Credit Union's Motion to Dismiss* by using the EC/CMF system which served the following party electronically

Michael Lehnars, Esq.
Counsel for Plaintiff

I hereby certify that a true and correct copy of the foregoing *Defendant United Federal Credit Union's Motion to Dismiss* was placed in a sealed envelope on the 31st day of March, 2015, postage prepaid thereon, in the United States Mail, addressed to:

Nathan R. Zeltzer, Esq.
12 W. Taylor Street
Reno, NV 89509
Co- Counsel for Plaintiff

and

Robert W. Murphy, Esq.
1212 SE 2ND AVENUE
Fort Lauderdale, FL 33316
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EXHIBIT LIST

1. Notice of Repossession and Private Sale dated 12/19/14
2. Letter of deficiency balance due after Private Sale dated 1/21/15

EXHIBIT 1

EXHIBIT 1

12/19/14

Lucia Castillo
Pratts Edwin
2310 Paradise Dr #145
Reno NV 89512

Dear Lucia Castillo ,

RE: 0870099946; NOTICE OF REPOSSESSION AND PRIVATE SALE

Date:	12/19/14	Year:	2012
Account Number:	[REDACTED]	Make:	KIA
Principal Balance:	\$16,421.39	Model:	FORTE
Amount Past Due:	\$516.85	VIN:	KNAFU4A24C5593307

You are hereby notified pursuant to a default under the terms and provisions of a note and security agreement executed on 3/11/14 from Lucia Castillo to UNITED FEDERAL CREDIT UNION; the undersigned secured party, that your collateral was repossessed by our agent on 12/18/14.

Please make arrangements to pick up any personal property that may have been left in the collateral at the time of repossession. Personal property which is not claimed within (10) ten days will be disposed of at the Credit Union's option.

We will be selling the above collateral which secured your loan, at a private sale conducted through UNITED FEDERAL CREDIT UNION or our agent on or after 12/29/14.

You may redeem this collateral at any time prior to its sale by complying with the applicable laws regarding redemption or otherwise making satisfactory arrangements with United Federal Credit Union at 2807 South State St., St. Joseph, MI 49085 or by calling (800) 777-1619.

If the proceeds from the sale, after deducting the expenses for repossession, repair, storage and selling, are not sufficient to pay the total amount due (including accrued interest), you are responsible for paying any deficiency balance within (5) five days or you must make contact with the Credit Union to arrange for payment.

Sincerely,

Collections Department
United Federal Credit Union

EXHIBIT 2

EXHIBIT 2

01/21/2015

Lucia Castillo
2310 Paradise Dr #145

Reno NV 89512

Dear Lucia Castillo,

RE: 870099946

DATE:	01/21/2015	YEAR:	2012
ACCOUNT NUMBER:	[REDACTED]	MAKE:	KIA
VIN#:	KNAFU4A24C5593307	MODEL:	FORTE

IN ACCORDANCE WITH A NOTICE OF SALE MAILED TO YOU ON 12/19/2014 THE GOODS AND CHATTELS DESCRIBED IN THE NOTICE HAVE SOLD FOR THE SUM OF \$9,100.00.

LOAN BALANCE/PAY-OFF	\$15,073.55
COST OF REPOSSESSION & STORING	\$325.00
COST OF REPOSSESSION TITLE	\$0.00
EXPENSE OF SALE: ADVERTISEMENT, RECONDITIONING, REPAIR/ETC	\$543.00
TOTAL DUE	\$15,941.55
PROCEEDS FROM SALE	\$8,232.00
DEFICIENCY BALANCE DUE	\$6,841.55

AFTER DEDUCTING THE PROCEEDS OF THE SALE FROM THE TOTAL DUE AT THE TIME OF SALE, YOU ARE STILL INDEBTED TO US ON YOUR NOTE IN THE SUM OF \$6,841.55 PLUS INTEREST FROM THE DATE OF SALE.

PLEASE PROVIDE YOUR CHECK OR MONEY ORDER FOR \$6,841.55 FOR PAYMENT IN FULL OR CONTACT US WITHIN FIVE (5) DAYS TO ARRANGE PAYMENT ON THIS ACCOUNT.

Sincerely,

Collections Department
United Federal Credit Union

1 CODE 1090

2 Michael Lehnars, Esquire
3 Nevada Bar Number 003331
4 429 Marsh Ave.
5 Reno, Nevada 89509
6 Telephone: (775) 786-1695
7 Telecopier: (775) 786-0799

8 Nathan R. Zeltzer, Esquire
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10 12 W. Taylor Street
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12 Telephone: (775) 786-9993
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14 Robert W. Murphy, *Pro Hac Vice pending*
15 Florida Bar No. 717223
16 1212 SE 2nd Avenue
17 Fort Lauderdale, FL 33316
18 Telephone: (954) 763-8660
19 Telecopier: (954) 763-8607

20 Attorneys for Plaintiffs

21 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
22 IN AND FOR THE COUNTY OF WASHOE

23 o/o

24 LUCIA CASTILLO, an individual, and
25 EDWIN PRATTS, an individual,

Case No. CV15-00421

Dept. No. 10

Plaintiffs.

CLASS REPRESENTATION
(Arbitration Exempt)

vs.

UNITED FEDERAL CREDIT UNION, a
federal credit union

FIRST AMENDED COMPLAINT FOR
DAMAGES AND INCIDENTAL RELIEF

Defendant.

Plaintiffs, Lucia Castillo, an individual ("Ms. Castillo") and Edwin Pratts, individual ("Mr. Pratts") (hereinafter collectively referred to as the "Class Representatives"), on behalf of themselves and all others similarly situated, files this their First Amended Complaint for Damages and Incidental Relief against Defendant, United Federal Credit Union, a federal credit union ("UFCU"), and allege the following:

INTRODUCTION

1 1. This class action seeks injunctive and monetary relief to redress an unlawful and
2 deceptive pattern of wrongdoing followed by UFCU with respect to the repossession and
3 repossession sales of the personal property of consumers in the State of Nevada.

4 2. As more particularly described below, UFCU sent to the Class Representatives
5 and hundreds of other Nevada consumers a form post-repossession notice which failed to
6 disclose consumer rights required by the Uniform Commercial Code ("UCC"), which mandates
7 disclosure of:

- 8 • the method of intended disposition;
- 9 • a description of the liability of a consumer for a deficiency;
- 10 • telephonic contact information for exercising the right of redemption;
- 11 • the consumer's entitlement to an accounting of any unpaid indebtedness,
12 and the charge, if any, for an accounting;
- 13 • the time and place of a public disposition or the time after which any other
14 disposition is to be made; and
- 15 • contact information for obtaining additional facts concerning the disposition
 and the secured obligation.

16 3. In addition to not providing the statutorily mandated notice under the UCC,
17 UFCU failed to provide the required notice under NRS 482.156, which mandates that the
18 notice:

- 19 • must set forth that there is a right to redeem the vehicle and the total amount
20 required as of the date of the notice to redeem;
- 21 • may inform such persons of their privilege of reinstatement of the security
22 agreement, if the holder extends such a privilege;
- 23 • must give notice of the holder's intent to resell or again lease the vehicle at
24 the expiration of 10 days from the date of giving or mailing the notice;
- 25 • must disclose the place at which the vehicle will be returned to the buyer or
26 lessee upon redemption or reinstatement; and
- 27 • must designate the name and address of the person to whom payment must
28 be made.

29 4. After repossession of the vehicle of the Class Representatives and other similarly
30 situated consumers, UFCU informed the Class Representatives and other similarly situated

1 consumers that it intended to dispose of their vehicle without providing the statutorily mandated
2 notice with the specific disclosures as required under NRS 104.9613, 104.9614, and 482.516.

3 5. The Class Representatives bring this action on behalf of themselves and a class
4 of all other similarly situated consumers. The Class Representatives seek injunctive relief and an
5 award of statutory damages as provided for under Nevada law, and such other and further relief
6 as this Court may deem appropriate.

7 **JURISDICTION**

8 6. As more particularly described below, on or about March 11, 2014, the Class
9 Representatives executed a Simple Interest Vehicle Contract for Sale and Security Agreement to
10 finance a vehicle. The amount financed was \$16,096.77.

11 7. On or about January 21, 2015, subsequent to the repossession of the vehicle,
12 UFCU sent notice to the Class Representatives that their car had been sold and that \$6,841.55
13 was due and owing to UFCU.

14 8. As more particularly described below, UFCU informed the Class
15 Representatives and other similarly situated consumers that it intended to dispose of their vehicle
16 without providing the statutorily mandated notice with the specific disclosures as required under
17 NRS 104.9613, 104.9614, and 482.516 the Class Representatives and all other members
18 similarly situated are entitled to an amount not less than the credit service charge plus 10 percent
19 of the principal amount of the debt or the time-price differential plus ten percent of the cash
20 price.

21 9. Because UFCU informed the Class Representatives and other similarly situated
22 consumers that it intended to dispose of their vehicles without providing the statutorily
23 mandated notice with the specific disclosures as required under NRS 104.9613, 104.9614, and
24 482.516 the Class Representatives and all other members similarly situated are entitled to the
25 elimination of any deficiency balance owing.

26 10. As each Class Member is entitled to the elimination of the deficiency balance and
27 the statutory damages described herein, the amount in controversy exceeds \$10,000.00.

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PARTIES

11. At all times material hereto, the Class Representatives were *sui juris* and residents of Washoe County, Nevada.

12. At all times material hereto, UFCU, was a federal corporation doing business in Washoe County, Nevada.

13. At all times material hereto, UFCU was engaged in the business of providing financing to purchasers of new and used motor vehicles and other personal property in the State of Nevada, including Washoe County, Nevada.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

Details Concerning Repossession

14. On or about March 11, 2014, the Plaintiffs entered into a retail installment sale contract ("Castillo RISC"). A true and correct copy of said contract has been attached hereto as Exhibit "1".

15. Pursuant to the Castillo RISC, Plaintiffs financed the purchase of a 2012 Kia Forte motor vehicle, VIN: KNAFU4A24C5593307 ("Castillo Vehicle").

16. On or about December 18, 2014, UFCU repossessed the Castillo Vehicle.

17. On or about December 19, 2014, UFCU sent or caused to be sent to Plaintiffs a written notice advising Plaintiffs of its intent to dispose of the Castillo Vehicle in purported compliance with the requirements of the UCC ("Notice of Sale").

18. A true and correct copy of the Notice of Sale is attached hereto and incorporated herein by reference as Exhibit "1."

Description of UCC Non-Compliance

19. The Notice of Sale fails to comply with the UCC in that UFCU failed to state that Plaintiffs as debtors were entitled to an accounting of the unpaid indebtedness and the charge, if any, for said accounting, as required by NRS 104.9613 1(d) and 104.9614 1(a).

20. In the Notice of Sale, UFCU made the following representation concerning the obligation of Plaintiffs to pay a deficiency, if any:

1 If the proceeds from the sale, after deducting the expenses for repossession,
2 repair, storage and selling, are not sufficient to pay the total amount due
3 (including accrued interest), you are responsible for paying any deficiency
4 balance within (5) five days or you must make contact with the Credit Union to
5 arrange for payment.

6 ("Deficiency Payment Representation")

7 21. Contrary to the Deficiency Payment Representation, NRS 104.9616 provides in
8 pertinent part that in a consumer-goods transaction a secured creditor such as UFCU is required
9 to provide an explanation of a deficiency in the manner contemplated under said section before
10 or when the secured creditor first makes a written demand on the consumer after disposition for
11 payment of the deficiency.

12 22. Under the UCC, with respect to consumer goods transactions, a notification that
13 lacks any of the information required under NRS 104.9614 is insufficient as a matter of law.
14 Uniform Commercial Code Comment, Note 1, NRS 104.9614.

15 23. Under the UCC, "every non-compliance with the requirements of Part 6 in a
16 consumer-goods transaction results in liability, regardless of any injury that may have resulted."
17 Uniform Commercial Code Comment, Note 4, NRS 104.9625.

18 Description of Non-Compliance With Nevada Law With Respect to
19 Repossession of Vehicles

20 24. In addition to the above deficiencies under the UCC, the Notice of Sale fails to
21 comply with NRS 482.516 in the following respects:

- 22 (a) Failure to Disclose Location of Vehicle - UFCU failed to disclose the
23 place at which the Castillo Vehicle would be returned to Plaintiffs upon
24 redemption and reinstatement in contravention of NRS 482.516 2.(d); and
25 (b) Designation of Redemption/Reinstatement Payee - UFCU failed to
26 designate the name and address of the person to whom payment must be
27 made for redemption or reinstatement in contravention of NRS 482.516
28 2.(c).

29 25. Pursuant to NRS 482.516 3, persons such as Plaintiffs are liable for deficiency
30 after sale or lease of a repossessed vehicle only if the notice prescribed by said section is given

1 within sixty (60) days after repossession and includes an itemization of the balance and any
2 costs or fees for delinquency, collection or repossession.

3 26. As a result of the failure of UFCU to comply with the requirements of NRS
4 482.516, UFCU may not recover a deficiency against Plaintiffs and any other persons similarly
5 situated.

6 *Post-Repossession Credit Reporting and Collection Activities of UFCU*

7 27. NRS 104.9625, and the previous NRS 104.9507, provide that when a secured
8 party fails to comply with NRS 104.9614's notice requirements, the proceeds of a disposition
9 of collateral are presumed to be equal with the sum of the indebtedness. Thus, it is statutorily
10 presumed that the secured party is due no deficiency after the disposition of the collateral.

11 28. NRS 482.516(3) provides that creditors such as UFCU are proscribed from
12 collecting a deficiency from debtors such as Plaintiffs and all other persons similarly if the
13 notice prescribed by NRS 482.516(2) is not provided.

14 29. The Class Representatives are informed and believe and on that basis allege that,
15 in the four (4) years preceding the filing of the Complaint herein, UFCU has unlawfully
16 collected or attempted to collect deficiency balances from consumers issued defective post-
17 repossession notices, without legal authority and without accounting for a set-off in the amount
18 of the statutory damages set forth under NRS 104.9625(3)(b).

19 30. In addition to the unlawful collection or attempt to collect deficiency balances
20 from consumers, UFCU has maintained a practice and policy of reporting to the three national
21 consumer reporting agencies, to wit: Equifax Credit Information Services, Inc., Experian, Inc.,
22 and TransUnion, LLC (hereinafter referred to collectively as the "CRAs") derogatory
23 information concerning the Class Representatives and the members of the class which failed to
24 account for the statutory presumption and/or the set-off for statutory damages described herein.

25 31. Since the repossession of the vehicles of the Class Representatives and the class
26 members, UFCU has wrongfully collected and/or reported credit information to the CRAs with
27 respect to the consumer reports of the Class Representatives and the class members.
28

1 32. The Class Representatives and the class members do not have an adequate
2 remedy at law with respect to the continued collection and/or reporting of materially inaccurate
3 adverse credit information to the CRAs.

4 33. The Class Representatives and the class members will suffer irreparable injury if
5 UFCU is not enjoined from the future wrongful collection and reporting of adverse information
6 to the CRAs.

7 34. Since the repossession of the vehicle of the Class Representatives and the class
8 members, UFCU has wrongfully collected and/or reported credit information to the CRAs with
9 respect to the consumer reports of the Class Representatives and the class members.

10 35. Pursuant to NRS 104.9625, if it is established that a secured party is not
11 proceeding in accordance with Article 9, Part VI of the UCC, a court may enter an order
12 restraining collection, enforcement or disposition of collateral on appropriate terms and
13 conditions.

14 36. The Class Representatives and the class members do not have an adequate
15 remedy at law with respect to the continued collection and/or reporting of materially inaccurate
16 adverse credit information to the CRAs.

17 37. The Class Representatives and the class members will suffer irreparable injury if
18 UFCU is not enjoined from the future wrongful collection and reporting of adverse information
19 to the CRAs.

20 **CLASS REPRESENTATION ALLEGATIONS**

21 **Statement of Maintainable Class Claims**

22 38. Pursuant to Rule 23(a), Nevada Rules of Civil Procedure, this is a case
23 maintainable on a class-wide basis pursuant to Rule 23(b)(2) and (b)(3), Nevada Rules of Civil
24 Procedure, and the Class Representatives bring this action on behalf of themselves and of a
25 class of all other persons similarly situated, to remedy the ongoing unfair, unlawful, and/or
26 deceptive business practices alleged herein, and seek redress on behalf of all those persons who
27 have been harmed thereby.
28

Identification of Common Questions of Law or Fact

39. Pursuant to Rule 23(a)(2), Nevada Rules of Civil Procedure, there are questions of law and fact common to the Class, which common issues predominate over any issues involving owing individual class members.

40. The factual question common to the Class Representatives and to each class member is that each was sent a post-repossession notice in the form of Exhibit "A" and has been subjected or may be subjected to collection and credit reporting activities as described above.

41. Pursuant to Rule 23(a)(2), Nevada Rules of Civil Procedure, the principal legal question common to the Class Representatives and to each class member is whether the form represented by the Notice of Sale complies with Nevada law with respect to providing the disclosures set forth under NRS 104.9613, 104.9614, 104.9623, and 482.516.

Allegations of Typicality

42. Pursuant to Rule 23(a)(3), Nevada Rules of Civil Procedure, the claims of the Class Representatives are typical of those of the classes they seek to represent in that the Class Representatives were sent a form notice in the form of Exhibit "A" and has been subjected to the collection and credit reporting activities as described above. As such, the claims of the Class Representatives are identical to that of the class members.

Allegations of Numerosity

43. In the consumer finance industry in Nevada, similar finance companies experience a default rate of 5% to 10% of their portfolios. See, generally, S. Agarwal and B. Ambrose, *Household Credit Usage* (2007). Based on the best due diligence and the experience of Class Counsel, the Class Representatives believe that UFCU repossessed approximately one hundred fifty (150) vehicles and other personal property in a fiscal year in the State of Nevada.

44. Based on the foregoing, the prospective class numbers are at least in the hundreds and are so numerous that joinder of all members would be impractical. The exact size

1 of the proposed class and the identity of the members thereof are readily ascertainable from
2 UFCU's business records.

3 *Definition of Class*

4 45. Pursuant to Rule 23, Nevada Rules of Civil Procedure, the class is composed of
5 all Nevada residents who, in the four (4) years preceding the filing of the instant action:

- 6 (a) have or had a finance agreement held by UFCU for which personal
7 property was pledged as collateral;
8 (b) had said personal property repossessed in Nevada by UFCU or its agents;
9 and
10 (c) were sent a post-repossession notice which failed to contain one or more of
11 the mandated statutory disclosures under NRS 104.9613, 104.9614,
12 104.9625, and 482.516.

13 *Adequacy of Class Representatives*

14 46. Pursuant to Rule 23(a)(4), Nevada Rules of Civil Procedure, the Class
15 Representatives will fairly and adequately protect and represent the interest of each class
16 member. The Class Representatives have retained counsel with substantial experience in
17 handling class actions in federal and state court.

18 47. The Class Representatives have no conflicts of interest which would interfere
19 with their ability to represent the interests of the class members.

20 *Appropriateness of Hybrid Class Treatment Under Rule 23(b)(2) and (3)*

21 48. A class action is superior to other methods for the fair and efficient adjudication
22 of this controversy. Because the damages suffered by the individual class members may be
23 relatively small compared to the expense and burden of litigation, it would be impractical and
24 economically unfeasible for class members to seek redress individually. The prosecution of
25 separate actions by the individual class members, even if possible, would create a risk of
26 inconsistent or varying adjudications with respect to the individual class members against
27 UFCU.

1 49. The Class Representatives are represented by counsel competent and experienced
2 in both consumer protection and class action litigation.

3 50. Members of the proposed class who have an interest in individually controlling
4 the prosecution of separate claims against UFCU will not be prejudiced by this action. Each
5 member of the proposed class will be identified through discovery from UFCU and will be
6 notified and given an opportunity to opt out of the class.

7 51. The Class Representatives do not presently know the nature and extent of any
8 pending litigation to which a member of the proposed classes is a party and in which any
9 question of law or fact controverted in the present action is to be adjudicated. The Class
10 Representatives will identify any such pending litigation by discovery from UFCU.

11 52. This Court is an appropriate forum for the present action in that the Class
12 Representatives are, and at all times herein mentioned have been, residents of this county; the
13 Class Representatives' Vehicle was purchased and repossessed in this county; and UFCU does
14 business in this county, including without limitation providing to residents of this county
15 financing of consumer goods.

16 53. Certification of a class under Rule 23(b)(2), Nevada Rules of Civil Procedure is
17 appropriate as UFCU has acted on grounds generally applicable to the Class with respect to the
18 collection and credit reporting activity as described above thereby making appropriate equitable
19 relief with respect to the Class as a whole. Unless restrained from such activities, UFCU will
20 continue to unlawfully harm the interests of the Class Representatives and the class for which
21 no adequate remedy at law exists.

22 54. Certification of a class under Rule 23, Nevada Rules of Civil Procedure is also
23 appropriate in that:

24 (a) The questions of law or fact common to the members of the class
25 predominate over any questions affecting an individual class member; and

26 (b) A class action is superior to other available methods for the fair and efficient
27 adjudication of the controversy.

1 55. The Class Representatives request certification of a "hybrid" class for monetary
2 damages under Rule 23(b)(3) and for equitable relief under Rule 23(b)(2), Nevada Rules of
3 Civil Procedure. See, *Penson v. Terminal Transport Co., Inc.*, 634 F.2d 989, 994 (5th Cir.
4 1981); *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692 (S.D. Fla. 2004).

5 56. There are no difficulties likely to be encountered by the Court in the management
6 of this proposed class action.

7 57. The Class Representatives' counsel are entitled to a reasonable fee from the class
8 members or from a common fund for the handling of this action.

9 **APPLICABLE LAW**

10 58. NRS 104.9610 through 104.9628, regulate the rights of secured parties to
11 dispose of collateral after an alleged default. NRS 104.9610 requires a secured party to conduct
12 every aspect of its disposition of financed vehicles, including the method, manner, time, place
13 and other terms of sale, in a commercially reasonable manner.

14 59. NRS 104.9611, Nevada Statute, requires a secured party to issue to the
15 borrower an appropriate notice prior to the disposition. NRS 104.9614 further requires that the
16 notice disclose the time and place of any public sale or the time after which any other intended
17 disposition is intended to be made.

18 60. To protect consumers' valuable property interests in financed vehicles, NRS
19 104.9614 further requires that the notice disclose:

- 20 • any liability of the borrower for a deficiency;
- 21 • that the debtor is entitled to an accounting of the unpaid indebtedness; and
- 22 the charge, if any for such an accounting; and
- 23 • the telephone number and address of contacts from where the debtor may
- 24 obtain further information concerning the disposition of collateral.

25 61. The form represented by the Notice of Sale that UFCU sent to the Class
26 Representative was materially defective, invalid and incomplete as described above.

1 62. The Class Representatives were informed and believe and on that basis allege
2 that UFCU sent the standard form represented by the Notice of Sale, or variants of it containing
3 one or more of the enumerated defects, to hundreds, if not thousands, of Nevada consumers
4 following the repossession of their vehicles.

5 63. NRS 104.9625 provides that if the secured party fails to comply with the
6 statutory requirements for disposition, the consumer borrower may recover "an amount not less
7 than the credit service charge plus 10 percent of the principal amount of the debt or the time-
8 price differential plus ten percent of the cash price."

9 **CAUSES OF ACTION**

10 **COUNT I - ACTION FOR VIOLATION OF NRS 104.9610, UNIFORM**
11 **COMMERCIAL CODE**

12 64. The Class Representatives reallege and reincorporate herein by reference the
13 allegations of paragraphs 1 through 63 as though fully set forth herein.

14 65 NRS 104.9610 provides that "every aspect of a disposition of collateral,
15 including the method, manner, time, place and other terms, must be commercially reasonable."

16 66. As is hereinabove alleged, UFCU has engaged and is continuing to engage in
17 material violations of Nevada law in that the form represented by the Notice of Sale fails to
18 comply with the governing provisions of the UCC.

19 67. UFCU has thus deprived the Class Representatives and class members of
20 substantial rights granted to them under Nevada law, including, but not limited to, the right to
21 obtain a Notice of Sale that fully and accurately discloses their rights upon repossession.

22 68. As a direct and proximate result of the acts hereinabove alleged and UFCU's on-
23 going unlawful conduct, the Class Representatives and class members have been damaged and
24 have suffered economic losses in an amount to be proven at trial.

25 69. The Class Representatives and class members are therefore entitled to damages,
26 pursuant to NRS 104.9625, as well as injunctive relief.

27 **COUNT II - ACTION FOR VIOLATION OF NRS 104.9611, UNIFORM**
28 **COMMERCIAL CODE**

1 70. The Class Representatives reallege and reincorporate herein by reference the
2 allegations of paragraphs 1 through 69 above as if set forth in full herein.

3 71. NRS 104.9611, requires secured parties such as UFCU send a "reasonable
4 authenticated notification" of disposition of collateral.

5 72. The standard form represented by the Notice of Sale violates NRS 104.9611 in
6 that UFCU failed to provide reasonable notice of disposition of collateral to the Class
7 Representatives and Class Members.

8 73. As a direct and proximate result of the acts hereinabove alleged and UFCU's
9 ongoing unlawful conduct, the Class Representatives and class members have been damaged
10 and have suffered economic losses in an amount to be proven at trial.

11 74. The Class Representatives and class members are therefore entitled to damages,
12 pursuant to NRS 104.9625, as well as to injunctive relief.

13 **COUNT III - ACTION FOR VIOLATION OF NRS 104.9614, UNIFORM**
14 **COMMERCIAL CODE**

15 75. The Class Representatives reallege and reincorporate herein by reference the
16 allegations of paragraphs 1 through 74 above as set forth in full herein.

17 76. NRS 104.9614 1(a) requires that a post-repossession notice include the
18 information provided in NRS 104.9613 1.

19 77. The standard form represented by the Notice of Sale violates NRS 104.9614 in
20 that UFCU failed to provide the statutorily mandated disclosures as described above.

21 78. As a direct and proximate result of the acts hereinabove alleged and UFCU's
22 ongoing unlawful conduct, the Class Representatives and class members have been damaged
23 and have suffered economic losses in an amount to be proven at trial.

24 79. The Class Representatives and class members are therefore entitled to damages,
25 pursuant to NRS 104.9625, as well as to injunctive relief.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiffs, Lucia Castillo, an individual, and Edwin Pratts, an
28 individual, pray for relief on behalf of themselves and all others similarly situated as follows:

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A. For an order certifying this claim as a class action:

B. For statutory damages under the Uniform Commercial Code for each class member in the amount of either 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, whichever is greater, according to proof, pursuant to NRS 104.9625;

C. For an order preliminarily and permanently enjoining UFCU from engaging in the practices alleged herein;

D. For an order of mandatory injunction directed to UFCU to remove any adverse credit information which may have been wrongfully reported on the consumer reports of the class members;

E. For pre-judgment interest to the extent permitted by law;

F. For an award of attorney's fees, costs and expenses incurred in the investigation, filing and prosecution of this action to the extent permitted by law; and

G. For such other and further relief as the Court may deem just and proper.

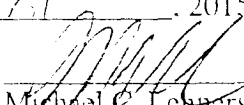
DEMAND FOR JURY TRIAL

Plaintiffs, Lucia Castillo, an individual, and Edwin Pratts, an individual, pursuant to the

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1 Nevada Rules of Civil Procedure, demand a trial by jury of all issues so triable.

2 Dated: This 9 day of April, 2015

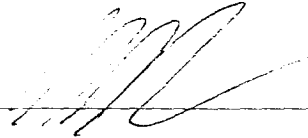
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4 
5 Michael E. Lemmers, Esquire
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8 Reno, Nevada 89509
9 Telephone: (775) 786-1695
10 Telecopier: (775) 786-0799
11 Counsel for Plaintiffs

12
13 Nathan R. Zeltzer, Esquire
14 Nevada Bar No. 5173
15 12 W. Taylor Street
16 Reno, Nevada 89509
17 Telephone: (775) 786-9993
18 Telecopier: (775) 329-7220
19 Co-Counsel for Plaintiffs

20
21 Robert W. Murphy, Esquire
22 Florida Bar No. 717223
23 1212 SE 2nd Avenue
24 Fort Lauderdale, FL 33316
25 Telephone: (954) 763-8660
26 Telecopier (954) 763-8607
27 Co-Counsel for Plaintiffs
28 (to be admitted Pro Hac Vice)


AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in case
herein does not contain the social security number of any person.


A handwritten signature in dark ink is written over a horizontal line. The signature is stylized, appearing to be the initials 'MM' followed by a flourish.

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Michael Lehnert, Esq., and that on the 7 day of April, 2015 I deposited for mailing with postage prepaid a true and correct copy of the foregoing First Amended Complaint for Damages and Incidental Relief addressed to James A. Kohl, Esq., Robert Hernquist, Esq., Howard & Howard Attorneys, PLLC, 3800 Howard Hughes Parkway, Las Vegas, Nevada 89169.



Employee

EXHIBIT "1"

EXHIBIT "1"

Exhibit List

Exhibit 1 March 11, 2014 Retail Installment Sale Contract

SIMPLE INTEREST VEHICLE CONTRACT FOR SALE AND SECURITY AGREEMENT

SECTION A:

Buyer's Name(s): **LUCIA CASTILLO**
Name: **EDWIN MARTIR PRATTS**

Address: **2310 PARADISE DR**

City: **RENO**

County: **WASHOE**

State: **NV**

Zip: **89512**

Bus. Phone: (775) 219-8031 Res. Phone: (775) 453-2958

Stock No.: **KE111**

Salesman: **JOSE M AISPURO**

Date: **03/11/2014**

CREDITOR: **TOM DOLANS RENO MAZDA KIA**

Address: **9475 SOUTH VIRGINIA ST.**

City: **RENO**

County: **WASHOE**

State: **NV**

Zip: **89511**

Phone: (775) 828-9666

SECTION B:

DISCLOSURE MADE IN COMPLIANCE WITH FEDERAL TRUTH IN LENDING ACT.

Your Payment Schedule will be:

(e) means an estimate

ANNUAL PERCENTAGE RATE

The cost of your credit as a yearly rate.

8.74 %

FINANCE CHARGE

The dollar amount the credit will cost you.

\$ 4720.59

Amount Financed

The amount of credit provided to you or on your behalf.

\$ 16096.77

Total of Payments

The amount you will have paid after you have made all payments as scheduled.

\$ 20817.36

Total Sales Price

The total cost of your purchase on credit, including your down payment of \$ **2077.25**

\$ 22894.61

Number of payments:	Amount of payments:	When payments are due:
N/A	N/A	N/A
72	289.13	MONTHLY BEGINNING 04/25/2014
N/A	N/A	N/A

INSURANCE AND DEBT CANCELLATION: Credit life insurance, credit disability insurance and debt cancellation coverage, which is also known as GAP coverage, are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

	Premium:	Term:	Signature(s):
Credit life:	\$ N/A	N/A	I want credit life insurance: X N/A Signature(s):
Joint credit life:	\$ N/A	N/A	We want joint credit life insurance: X N/A Signature(s):
Credit disability:	\$ N/A	N/A	I want credit disability insurance: X N/A Signature(s):
Credit life and disability:	\$ N/A	N/A	I want credit life and disability insurance: X N/A Signature(s):
Joint credit life and disability:	\$ N/A	N/A	We want joint credit life and single disability insurance: X N/A Signature(s):
Debt cancellation coverage (GAP coverage):	\$ 412.00	72	I want debt cancellation coverage (GAP coverage): XX Signature(s):

You may obtain property insurance from anyone you want that is acceptable to the Creditor on page 1 of 2. If you get the insurance from the Creditor, you will pay \$ **N/A** and the term of the insurance will be **N/A**.

SECURITY: You are giving a security interest in the goods or property being purchased.

☐ If checked, you are giving a security interest in **N/A**.

LATE CHARGE: If a payment is more than 10 days late, you will be charged \$15 or 8 percent of the payment, whichever is less.

PREPAYMENT: If you pay off early, you will not have to pay a penalty.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and penalties.

SECTION C: ITEMIZATION OF AMOUNT FINANCED.

- Vehicle Selling Price **\$ 14200.00**
Plus: Documentary Fee **\$ 449.50**
(This charge represents costs and profit to the dealer for items such as inspecting, cleaning, adjusting vehicles, and preparing documents related to the sale.)
Plus: Emissions Inspection Fee **\$ N/A**
Plus: Other (VTR) **\$ 189.00**
Plus: Other (N/A) **\$ N/A**
Plus: Other (N/A) **\$ N/A**
Total Taxable Selling Price **\$ 14838.50**
- Total Sales Tax **\$ 1146.27**
- Amounts Paid to Public Officials
a. Tinting Fee **\$ 20.00**
b. Registration Fee **\$ N/A**
c. Other: **\$ N/A**
Total Official Fees (Add 3a through 3c) **\$ 20.00**
- Optional, nontaxable, fees or charges
a. **N/A** **\$ N/A**
b. **DRY-AWAY FEE-DMV NV** **\$ 9.25**
c. **N/A** **\$ N/A**
d. **N/A** **\$ N/A**
e. **N/A** **\$ N/A**
f. **N/A** **\$ N/A**

SECTION D: VEHICLE RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT.

This contract is made the **11th** (day) of **MARCH** (month) of **2014** (year), between you, the Buyer(s) shown on page 1 of 2, and us, the Seller shown as Creditor on page 1 of 2. Having been quoted a cash price and a credit price and having chosen to pay the credit price (shown as the Total Sales Price in Section B on page 1 of 2), you agree to buy and we agree to sell, subject to all the terms of this contract, the following described vehicle, accessories and equipment (all of which are referred to in this contract as "Collateral"):

New or Used: **USED** Year and Make: **2012 KIA**

Series: **FORTE** Body Style: **4DR SDN EX AT** No. Cyl.: **4**

If truck, ton capacity: **N/A**

Manufacturer's Serial Number: **KNAE11A24C5593307**

Use for which purchased: ☐ Personal ☐ Business ☐ Agriculture

INCLUDING:

- | | | |
|--|---|---|
| <input type="checkbox"/> Sun/Moon Roof | <input type="checkbox"/> Air-Conditioning | <input type="checkbox"/> Automatic Transmission |
| <input type="checkbox"/> Power Steering | <input type="checkbox"/> Power Door Locks | <input type="checkbox"/> Power Seats |
| <input type="checkbox"/> Power Windows | <input type="checkbox"/> Tilt Wheel | <input type="checkbox"/> Vinyl Top |
| <input type="checkbox"/> Cassette | <input type="checkbox"/> Cruise Control | <input type="checkbox"/> AM/FM Stereo |
| <input type="checkbox"/> Compact Disc Player | | |

Total Optional, nontaxable, fees or charges

053 **RED** Color **Y** Tires **Y** Lic No

4. Total Optional, Non-refundable, Fees or Charges \$ 8.25
(Add 4a through 4f)
5. TOTAL CASH SALES PRICE \$ 16013.02
6. Gross Trade-In Allowance \$ 1000.00
2002 HYUNDAI SONATA KKHWF25S32A654529
Year Make Model VIN
Less Prior Credit or Lease Balance \$ N/A
Net Trade-In Allowance
(If negative, enter 0 and see line 11a) \$ 1000.00
7. Down Payment (Other Than Net Trade-In Allowance):
a. Trade-In Sales Tax Credit \$ 77.25
b. Cash \$ 1000.00
c. Manufacturer's Rebate \$ N/A
d. Deferred Down Payment \$ N/A
e. Other (N/A) \$ N/A
Down Payment (Add 7a through 7e) \$ 1077.25
8. TOTAL DOWN PAYMENT AND
NET TRADE-IN ALLOWANCE (Add 6 and 7) \$ 2077.25
9. UNPAID BALANCE OF CASH SALES PRICE
(Subtract 8 from 5) \$ 13935.77
10. Plus Optional Insurance and Debt Cancellation Charges*
a. Credit Life Insurance Premium
Paid to (N/A) Term (N/A) \$ N/A
b. Credit Disability Insurance Premium
Paid to (N/A) Term (N/A) \$ N/A
c. Debt Cancellation Coverage (GAP Coverage)
Paid to (THIC) Term (72) \$ 412.00
d. Other Insurance
Paid to (N/A) Term (N/A) \$ N/A
Total Optional Insurance and Debt Cancellation
Charges (Add 10a through 10d) \$ 412.00
11. Other Amounts Financed*
a. Prior Credit or Lease Balance
Paid to (N/A) \$ N/A
b. N/A
Paid to (N/A) \$ N/A
c. SERVICE CONTRACT
Paid to (PORTFOLIO) \$ 1749.00
Total Other Amounts Financed (Add 11a through 11c) \$ 1749.00
12. TOTAL AMOUNT FINANCED (Add 9, 10 and 11) \$ 16096.77
*Seller may retain or receive a portion of this amount.

STATE DISCLOSURE REQUIREMENTS: The provisions of Section B and Section C are incorporated into this agreement for purposes of state disclosure requirements.

Additional Terms and Conditions: The additional terms and conditions set forth in this contract are a part of this contract and are incorporated herein by reference.

OPTION: N/A You pay no Finance Charge if the Total Amount Financed, Item No. 12, Section C, is paid in full on or before the N/A (day) of N/A (month) of N/A (year).

SELLER'S INITIALS: N/A

SECTION E:

☐ If checked, you agree to use electronic records and electronic signatures to document this contract. Your electronic signatures on electronic records will have the same effect as signatures on paper documents. We may designate one authoritative copy of this contract. If we do, the authoritative copy will be the electronic copy in a document management system we designate for storing authoritative copies. We may convert the authoritative copy to a paper original. We will do so by printing one paper copy marked "Original." This paper original will have your electronic signature on it. It will have the same effect as if you had signed it originally on paper.

If you agree to use electronic records and electronic signatures, we will comply with all applicable federal, state and local law and regulations.

UPON ENTERING INTO THIS CONTRACT, YOU WILL RECEIVE A PAPER COPY OF THE ORIGINAL CONTRACT ELECTRONICALLY SIGNED AND COMPLETE WITH ALL TERMS, CONDITIONS AND DISCLOSURES TO TAKE WITH YOU.

NOTICE TO BUYER

Do not sign this agreement before you read it or if it contains any blank spaces. You are entitled to a completed copy of this agreement. If you pay the amount due before the scheduled date of maturity of the indebtedness and you are not in default in the terms of the contract for more than 2 months, you are entitled to a refund of the unearned portion of the finance charge. If you fail to perform your obligations under this agreement, the vehicle may be repossessed and you may be liable for the unpaid indebtedness evidenced by this agreement.

If you are buying a used vehicle with this contract, as indicated in the description of the vehicle on page 1 of 2, federal regulation may require a special buyer's guide to be displayed on the window.

THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON

You, severally and jointly, promise to pay us the Total of Payments (shown in Section B) according to the Payment Schedule (also shown in Section B), until paid in full, together with interest after maturity at the Annual Percentage Rate disclosed on page 1 of 2.

To secure such payment, you grant to us a purchase money security interest under the Uniform Commercial Code in the Collateral and in all accessions to and proceeds of the Collateral, Insurance in which we or our assignee are named as beneficiary or loss payee, including any proceeds of such insurance or refunds of unearned premiums, or both, are assigned as additional security for this obligation and any other obligation created in connection with this sale. We, our successors and assigns, hereby waive any other security interest or mortgage which would otherwise secure your obligations under this contract except for the security interests and assignments granted by you in this contract.

Address where Collateral will be located:

Street 2310 PARADISE DR City RENO

County WASHOE State NV 89512

Your address after receipt of possession of Collateral:

Street 2310 PARADISE DR City RENO

County WASHOE State NV 89512

Notice of Rescission Rights (Option to Cancel)

If the Buyer signs here, the notice of rescission rights on page 2 of 2 is applicable to this contract.

Buyer's signature X *[Signature]*

Co-Buyer's signature X *[Signature]*

Additional Terms and Conditions: The additional terms and conditions set forth in this contract are a part of the contract.

OPTION N/A You pay no Finance Charge if the Total Amount Financed, Item No. 12, Section C, is paid in full on or before the N/A (day) of N/A (month) of N/A (year).

SELLER'S INITIALS: N/A

SECTION E:

☐ If checked, you agree to use electronic records and electronic signatures to document this contract. Your electronic signatures on electronic records will have the same effect as signatures on paper documents. We may designate one authoritative copy of this contract. If we do, the authoritative copy will be the electronic copy in a document management system we designate for storing authoritative copies. We may convert the authoritative copy to a paper original. We will do so by printing one paper copy marked "Original." This paper original will have your electronic signature on it. It will have the same effect as if you had signed it originally on paper.

If you agree to use electronic records and electronic signatures, we will comply with all applicable federal, state and local law and regulations.

UPON ENTERING INTO THIS CONTRACT, YOU WILL RECEIVE A PAPER COPY OF THE ORIGINAL CONTRACT ELECTRONICALLY SIGNED AND COMPLETE WITH ALL TERMS, CONDITIONS AND DISCLOSURES TO TAKE WITH YOU.

NOTICE TO BUYER

Do not sign this agreement before you read it or if it contains any blank spaces. You are entitled to a completed copy of this agreement. If you pay the amount due before the scheduled date of maturity of the indebtedness and you are not in default in the terms of the contract for more than 2 months, you are entitled to a refund of the unearned portion of the finance charge. If you fail to perform your obligations under this agreement, the vehicle may be repossessed and you may be liable for the unpaid indebtedness evidenced by this agreement.

If you are buying a used vehicle with this contract, as indicated in the description of the vehicle on page 1 of 2, federal regulation may require a special buyer's guide to be displayed on the window.

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.

The text of the preceding two paragraphs is set forth below in Spanish:

Si usted está comprando un vehículo usado mediante este contrato según la descripción del vehículo en la pagina 1 de 2, la ley federal podrá exigir que la ventanilla demuestre una guía especial para el comprador.

LA INFORMACIÓN QUE USTED VE EN LA FORMA DE VENTANILLA PARA ESTE VEHÍCULO ES PARTE DE ESTE CONTRATO. LA INFORMACIÓN EN LA FORMA DE VENTANILLA DOMINA CUALESQUIER ESTIPULACIÓN CONTARIA EN EL CONTRATO DE VENTA.

BUYER AND CO-BUYER ACKNOWLEDGE RECEIPT OF A TRUE AND COMPLETELY FILLED-IN PAPER COPY OF THIS CONTRACT AND THE DISCLOSURE ON PAGE 1 OF 2 AT THE TIME OF SIGNING.

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED UNLESS OTHERWISE INDICATED IN SECTION C.

Buyer: X Juan Luis Date: 03/11/2014 Co-Buyer: X Eduardo Date: 03/11/2014
Creditor: TOM DOLANS-RENO MAZDA KIA Title: FIN

LAW FORM NO. 553-NV (REV 10/12)
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Page 1

CUSTOMER/TRUTH IN LENDING COPY

b. DRV-AWAY FEE-DMV NV	\$	8.25
c. N/A	\$	N/A
d. N/A	\$	N/A
e. N/A	\$	N/A
f. N/A	\$	N/A

<input type="checkbox"/> Power Steering	<input type="checkbox"/> Power Door Locks	<input type="checkbox"/> Power Seats
<input type="checkbox"/> Power Windows	<input type="checkbox"/> Tilt Wheel	<input type="checkbox"/> Vinyl Top
<input type="checkbox"/> Cassette	<input type="checkbox"/> Cruise Control	<input type="checkbox"/> AM/FM Stereo
<input type="checkbox"/> Compact Disc Player		

1 CODE 1090

2 Michael Lehnars, Esquire
3 Nevada Bar Number 003331
4 429 Marsh Ave.
5 Reno, Nevada 89509
6 Telephone: (775) 786-1695
7 Telecopier: (775) 786-0799

8 Nathan R. Zeltzer, Esquire
9 Nevada Bar No. 5173
10 12 W. Taylor Street
11 Reno, Nevada 89509
12 Telephone: (775) 786-9993
13 Telecopier: (775) 329-7220

14 Robert W. Murphy, *Pro Hac Vice* pending
15 Florida Bar No. 717223
16 1212 SE 2nd Avenue
17 Fort Lauderdale, FL 33316
18 Telephone: (954) 763-8660
19 Telecopier: (954) 763-8607

20 Attorneys for Plaintiffs

21
22 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
23 IN AND FOR THE COUNTY OF WASHOE

24 o/o

25 LUCIA CASTILLO, an individual, and
26 EDWIN PRATTS, an individual,

Case No. CV15-00421

Dept. No. 10

Plaintiffs,

CLASS REPRESENTATION

(Arbitration Exempt)

vs.

27 UNITED FEDERAL CREDIT UNION, a
28 federal credit union

OPPOSITION TO DEFENDANT
UNITED FEDERAL CREDIT UNION'S
MOTION TO DISMISS

Defendant.

_____/

Plaintiffs, Lucia Castillo, an individual ("Ms. Castillo") and Edwin Pratts, individual ("Mr. Pratts") (hereinafter collectively referred to as the "Class Representatives"), on behalf of themselves and all others similarly situated, file the following opposition to United Federal Credit Union's Motion to Dismiss on the ground that it is now moot.

1. Procedural History

On March 3, 2015 the Class Representatives filed the instant complaint. On March 31, 2015 United Federal Credit Union (UFCU) filed a motion to dismiss. On April 9, 2015 UFCU

1 filed its First Amended Complaint. The First Amended Complaint makes UFCU's motion
2 moot.

3 **2. Analysis**

4 Nev. R. Civ. Pro. 15(a) says a party may amend the party's pleading once as a matter of
5 course at any time before a responsive pleading is served. A motion to dismiss is not a
6 responsive pleading under Nev. R. Civ. Pro. 15. *Washoe Medical Center v. Second Judicial*
7 *Dist. Court of State of Nev. ex rel. County of Washoe*, 122 Nev. 1298, 148 P.3d 790, (Nev.
8 2006).

9 An amended complaint is a distinct pleading which supersedes the original complaint.
10 *Rondono v. Ballow*, 100 Nev. 142, 676 P.2d 807, (Nev. 1984).

11 **3. Conclusion**

12 The Class Representatives' First Amended Complaint addresses the issues raised in
13 UFCU's Motion to Dismiss making it moot. For that reason, UFCU's Motion should be
14 denied.

15 Dated: This 13 day of April, 2015

16
17
18 By: 

19 Michael Lehnert, Esq.
20 429 Marsh Ave.
21 Reno, Nevada 89509
22 Nevada Bar Number 003331
23
24
25
26
27
28

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Michael Lehnert, Esq., and that on the 17 day of April, 2015 I deposited for mailing with postage prepaid a true and correct copy of the foregoing Opposition to Motion to Dismiss addressed to James A. Kohl, Esq., Robert Hernquist, Howard & Howard Attorneys, PLLC 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, Nevada 89169.

Devin S.
Employee

Howard & Howard Attorneys, PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
(702) 257-1483

James A. Kohl, Nevada Bar No. 5692

jak@h2law.com

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HOWARD & HOWARD ATTORNEYS, PLLC

3800 Howard Hughes Pkwy., Suite 1000

Las Vegas, NV 89169

Telephone: (702) 257-1483

Facsimile: (702) 567-1568

Attorneys for Defendant United Federal Credit Union

SECOND JUDICIAL DISTRICT COURT

WASHOE COUNTY, NEVADA

LUCIA CASTILLO, an Individual, and
EDWIN PRATTS, an individual,

Plaintiffs,

vs.

UNITED FEDERAL CREDIT UNION, a
federal credit union,

Defendant.

Case No. CV15-00421

Dept. No. 10

**DEFENDANT UNITED FEDERAL CREDIT
UNION'S MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Hearing Date: _____

Hearing Time: _____

Pursuant to Rules 12(b)(1) and 12(b)(5) of the Nevada Rules of Civil Procedure, Defendant United Federal Credit Union moves to dismiss Plaintiffs' claims. First, this Court lacks jurisdiction because neither Plaintiff's damages exceeds the \$10,000 jurisdictional threshold of this Court. Additionally, two of the three asserted causes of action fail to assert a claim upon which relief may be granted.

///

///

///

This motion is based on the Points and Authorities attached hereto together with the Papers and Pleadings on file herein and any oral argument received by the Court.

Respectfully submitted this 27 day of April, 2015.

HOWARD & HOWARD ATTORNEYS PLLC

By: 

James A. Kohl, Nevada Bar No. 5692

Robert Hernquist, Nevada Bar No. 101616

3800 Howard Hughes Parkway, Suite 1000
Las Vegas, NV 89169

*Attorneys for Defendant United Federal Credit
Union*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This matter arises out of Plaintiffs' failure to honor the promises that they made to United Federal Credit Union ("United") to repay an automobile loan that was made to Plaintiff, Lucia Castillo ("Castillo"), and guaranteed by Plaintiff, Edwin Pratts ("Pratts"). The loan was memorialized in a Simple Interest Vehicle Contract for Sale and Security Agreement ("Contract").¹ First Amended Complaint ("FAC") at ¶ 14, filed April 9, 2015 and on file with the Court. The loan was for the purchase of a 2012 Kia automobile ("Vehicle"). Pursuant to the Contract, the loan was secured by the Vehicle. In the Contract, Plaintiff Castillo promised to repay the loan and Defendant Pratts personally guaranteed Castillo's repayment of the loan.

¹ "[T]he court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted. *Id.* at § 1357. *Brelant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (*quoting* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, Civil 2D § 1356 (2d ed. 1990)). "[M]aterial which is properly submitted as part of the complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted).

1 Despite her promise to repay the loan, Castillo failed to do so. *Id.* at ¶¶ 14-18. Similarly, Pratts
2 failed to honor his personal guaranty to repay the loan after Castillo defaulted on the loan.

3 Due to Plaintiffs' failure to repay the Loan, United exercised its rights and repossessed
4 the Vehicle that was collateral for the Loan. *Id.* at ¶ 16. Following repossession, United sent
5 Plaintiffs a Notice of Repossession and Private Sale ("Sale Notice"). (*Id.* at ¶¶ 17; Sale Notice,
6 attached hereto as Exhibit 1).² After United sold the Vehicle, United sent Defendant Castillo a
7 notice (the "Deficiency Notice" and, together with the Sale Notice, the "Notices") informing
8 Castillo what the Loan balance was, after crediting her with all sums received from the sale.
9

10 In their FAC, Plaintiffs contend that the Sale Notice does not comply with Nevada's
11 enactment of the UCC. The FAC asserts the following claims against United: (1) Violation of
12 NRS 104.9610 FAC at ¶¶ 64-69; (2) Violation of NRS 104.9611 *Id.* at ¶¶ 70-74; and (3)
13 Violation of NRS 104.9614. *Id.* at ¶¶ 75-79.
14

15 United moves this Court to dismiss this case because Plaintiffs have not met the
16 jurisdictional limits of Nevada's district courts. Accepting the factual allegations in the FAC as
17 true, Plaintiffs failed to demonstrate that they are entitled to greater than \$10,000 in damages,
18 exclusive of attorney's fees and costs. Plaintiffs cannot meet their burden of establishing that
19 this Court has subject matter jurisdiction over this dispute. Therefore the FAC should be
20 dismissed with prejudice from this Court.
21

22 Alternatively, two of the three asserted causes of actions should be dismissed pursuant
23 to Rule 12(b)(5). Plaintiffs alleged that United violated three separate statutory provisions.
24 Only one of those statutes applies to these circumstances. The statute that governs the
25

26
27 2 "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions,
28 but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
motion to dismiss" without converting the motion to dismiss into a motion for summary judgment.
Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994).

1 sufficiency of the Notice of Sale is NRS 104.9614, and thus Plaintiffs' Third cause of action is
2 consistent with the FAC's allegations. However, Plaintiffs' First and Second causes of action
3 are superfluous, unsupported by the allegations that have been asserted, and should be
4 dismissed with prejudice because under no set of circumstances can Plaintiffs plead facts that
5 would entitle them to relief.
6

7 **II. LAW AND ARGUMENT**

8 Plaintiffs' FAC should be dismissed because it does not allege facts sufficient to invoke
9 the jurisdiction of this Court. Based upon the dollar amounts at issue here, Plaintiffs' claim
10 simply does not meet the \$10,000 jurisdictional threshold required to file a case in Nevada's
11 district courts. Alternatively, the FAC should be dismissed because it fails to allege causes of
12 action that are recognized by Nevada law. In either case, the FAC should be dismissed with
13 prejudice.
14

15 **A. Plaintiffs Failed to Invoke The Jurisdiction of This Court, Thus, the FAC Must be** 16 **Dismissed**

17 Based on the FAC's allegations and requested relief, neither Plaintiff's compensatory
18 damages claim exceeds \$10,000. Consequently, a Nevada district court does not have subject
19 matter over this dispute. NRS 4.370. This case belongs in justice court.
20

21 **1. Legal Standard When Assessing Subject Matter Jurisdiction**

22 Rule 12(b)(1) of the Nevada Revised Statutes allows defendants to seek dismissal of a
23 claim or action for a lack of subject matter jurisdiction. NEV. R. CIV. P. 12(b)(1). "[S]ubject
24 matter jurisdiction cannot be waived and may be raised at any time, or *sua sponte* by a court of
25 review." *Vaile v. Dist. Court*, 118 Nev. 262, 276, 44 P.3d 506, 516 (2002). Dismissal under
26 Rule 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on
27 its face that are sufficient to establish subject matter jurisdiction. *In re Dynamic Random*
28

1 *Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984–85 (9th Cir. 2008) (assessing Fed.
2 R. Civ. Pro 12(b)(1)).³

3 A defendant may attack the existence of subject matter jurisdiction not only on the face
4 of the pleadings, but also with evidence extrinsic to the pleadings. *Mortenson v. First Fed. Sav.*
5 *& Loan Ass'n*, 549 F.2d 884, 891 (9th Cir. 1979). Although the defendant is the moving party
6 in a motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the
7 court's jurisdiction. As a result, the plaintiff bears the burden of proving that the court has
8 subject matter jurisdiction over the pending case. *McCauley v. Ford Motor Co.*, 264 F.3d 952,
9 957 (9th Cir. 2001).
10

11 Federal courts apply a “legal certainty” test to determine whether a complaint satisfies
12 the amount-in-controversy requirement of diversity jurisdiction. In order to dismiss a case
13 based upon lack of subject matter jurisdiction, it must appear to a legal certainty that the claim
14 is worth less than the jurisdictional amount. *St. Paul Indemnity Co. v. Cab Co.*, 303 U.S. 283,
15 288-89 (1938); *Budget Rent-A-Car Inc. v. Higashiguchi*, 109 F.3d 1471, 1473 (9th Cir. 1997).
16 The Nevada Supreme Court has adopted the federal legal certainty test for determining the
17 amount in controversy in Nevada district courts. *Morrison v. Beach City LLC*, 116 Nev. 34, 38,
18 991 P.2d 982, 984 (2000). The district court need not accept the allegations of the complaint as
19 true and may conduct a hearing to determine whether the potential damages in a case fall below
20 a jurisdictional threshold. *Id.* at 39, 991 P.2d at 985; *Thornhill Publ'g Co. v. Gen. Tel. Elec.*,
21 *Inc.*, 594 F.2d 730, 733 (9th Cir. 1979) (“No presumptive truthfulness attaches to plaintiff's
22 allegations, and the existence of disputed material facts will not preclude the trial court from
23
24
25

26
27
28 ³ The cited federal cases dismiss the claims based on Fed. R. Civ. P. 12(b)(1), the federal counterpart to Nevada's Rule 12(b)(1). “[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules.” *Foster v. Dingwall*, 126 Nev. Adv. Op. 5, 228 P.3d 453, 456 (2010) (quoting *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005)).

1 evaluating for itself the merits of jurisdictional claims.”).

2 In a consolidated litigation or class action context, individual plaintiffs’ damages claims
3 may not be aggregated to satisfy the jurisdictional amount requirement unless the individual
4 plaintiffs have a common and undivided interest in a claim for damages. *Snyder v. Harris*, 394
5 U.S. 332, 336-38 (1969) (applying the federal class action rule substantially the same as
6 Nevada’s Rule 23 and holding that in the context of a class action, individual plaintiff’s
7 damages claims may not be aggregated to satisfy a jurisdictional amount requirement). *See*
8 *also In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001).
9 “When two or more plaintiffs, having separate and distinct demands, unite for a convenience
10 and economy in a single suit, it is essential that the demand of each be of the requisite
11 jurisdictional amount.” *Bank of Troy, Ind., v. G.A. Whitehead & Co.*, 222 U.S. 39, 40 (1911).
12

13 Additionally, when determining the amount in controversy, this Court must ignore
14 amounts sought for attorneys’ fees and costs. *Morrison v. Beach City, LLC*, 116 Nev. 34, 36,
15 991 P.2d 982, 983 (2000). Moreover, the prohibition on aggregation to meet jurisdictional
16 limits is also extended to any claim for punitive damages. *See also In re Ford Motor*
17 *Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001) (“punitive damages
18 asserted on behalf of a [putative] class may not be aggregated for jurisdictional purposes where,
19 as here, the underlying cause of action asserted on behalf of the class is not based upon a title or
20 right in which the plaintiffs share, and as to which they claim, a common interest.”). Plaintiffs
21 may not aggregate their claims, include attorney’s fees, include punitive damages nor may they
22 include costs to establish the jurisdictional floor of this Court. Each Plaintiff must rely upon
23 their own claims.
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2. *This Court Does Not Have Jurisdiction Because Neither Plaintiff's Purported Damages Exceed \$10,000*

This Court lacks jurisdiction over each Plaintiff's claims. Pursuant to Article 6 § 8 of the Nevada Constitution, the jurisdictional limits of Nevada's courts are set by the Nevada Legislature. The Nevada Legislature enacted NRS 4.370 which establishes the original jurisdiction of the Nevada Justice Courts. NRS NRS 4.370(1) states:

1. Except as otherwise provided in subsection 2, justice courts have jurisdiction of the following civil actions and proceedings and no others except as otherwise provided by specific statute:

(b) In actions for damages for injury to the person, or for taking, detaining or injuring personal property, or for injury to real property where no issue is raised by the verified answer of the defendant involving the title to or boundaries of the real property, if the damage claimed does not exceed \$10,000.

NRS 4.370(1)(b). Pursuant to the Nevada Constitution, Nevada's District Courts lack jurisdiction over actions that fall within the Nevada Justice Courts' original jurisdiction. NEV. CONST. Art. 6 § 6. Thus, in actions for damages as claimed by Plaintiffs here, this District Court has jurisdiction only if the Plaintiff claims more that \$10,000 in damages. *See, e.g., Morrison*, 116 Nev. at 38, 991 P.2d at 984.

In their Prayer for Relief, Plaintiffs seek damages pursuant to NRS 104.9625, attorneys' fees and costs (as well as equitable relief). (FAC at pp. 13-14). Plaintiffs' Prayer for Relief tracks NRS 104.9625(3)(b), which governs damages for violations of that part of Nevada's version of the UCC, it states:

(b) 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 (1) an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or (2) the time-price differential plus 10 percent of the cash price. (Numbering added).

Assuming that the Plaintiffs prevail, regardless of which statutory penalty they chose, it

1 is impossible for the Plaintiffs to meet the \$10,000 damages to establish the jurisdiction of this
2 Court.

3 *a. The credit service charge plus 10 percent of the principal amount of the*
4 *obligation does not equal the Jurisdictional Requirement of this Court,*
5 *\$10,000*

6 Assuming that Plaintiffs prevail on their claims, and the Court grants them the credit
7 service charge plus 10% of the principal amount, Plaintiffs damages are not greater than
8 \$10,000. The credit service charge is defined as "the interest that accrues over the life of the
9 loan". *Knights of Columbus Credit Union v. Stock*, 814 S.W.2d 427, 432 (Tex. App. 1991),
10 writ denied (Dec. 4, 1991). (citing 9 W. Hawkland, R. Lord, & C. Lewis, Uniform Commercial
11 Code Series § 9-507:06, at 647-48 (1986); *Garza v. Brazos County Fed. Credit Union*, 603
12 S.W.2d 298, 300-01 (Tex. Civ. App. 1980)). The principal amount of the loan means "the
13 original debt without any additions for interest or deductions for payments made." *Id.* The two
14 sums do not equal \$10,000. The Plaintiffs attached the Contract to the FAC. A review of the
15 Contract lists the Amount Financed (Principal) as \$16,096.77⁴ and the Finance Charge (Credit
16 Service Charge) as \$4,720.59. NRS 104.9625(3)(b)(1) Plaintiffs' damages are calculated as
17 follows:
18
19

20 Credit Service Charge: \$4,720.59

21 Principal \$16,096.77 x 10% \$1,609.68

22 **Total Damages \$6,330.28**
23

24 Plaintiffs failure to meet the jurisdictional requirements of this Court mandates that this matter
25 be dismissed because under no set of facts could they establish the jurisdictional floor of this
26 court. *Morrison*, 116 Nev. at 38, 991 P.2d 982.

27 ⁴ For purposes of this Motion, United used the Amount Financed from the Contract for the
28 calculation of principal. United reserves the right to challenge that sum as the correct calculation
of principal.

b. *The time-price differential plus ten percent of the cash price does not equal the Jurisdictional Requirement of this Court, \$10,000*

Assuming that Plaintiffs prevail on their claims, and the Court grants them the time-price differential plus 10% of the cash price, Plaintiffs damages are still not greater than \$10,000. The term time price differential is defined as "the difference between the current cash price of an item and the total cost of purchasing it on credit." *Black's Law Dictionary, Eighth Ed.* 1521 (2004). The term 'time price differential' "refers to the increase in cost of the automobile to the buyer resulting from the fact that payment is to be made by installments under a conditional sale contract." *City Lincoln-Mercury Co. v. Lindsey*, 52 Cal. 2d 267, 271, 339 P.2d 851, 854 (1959) (quoting Cal. Civ. Code § 2981(h)). The term 'time-price differential' is synonymous with interest. *Leasing Serv. Corp. v. Graham*, 646 F. Supp. 1410, 1418 (S.D.N.Y. 1986). For the purposes of this motion United will use the figures contained in the Contract. The time price differential, or interest is \$4,720.59 plus 10% of the cash price is calculated as follows:

Time-Price Differential:	\$4,720.59
Cash Price \$14,200 x 10%	\$1,420.00
Total Damages	\$6,140.59

Plaintiffs failure to meet the jurisdictional requirements of this Court mandates that this matter be dismissed because under no set of facts could they establish the jurisdictional floor of this court. *Morrison*, 116 Nev. at 38, 991 P.2d 982.

B. Two of Plaintiffs' Causes of Action Should be Dismissed Pursuant to Rule 12(b)(5)

In the alternative, United is entitled to dismissal of Plaintiffs' claims pursuant to NRCP 12(b)(5) if it demonstrates that Plaintiffs' do not allege any set of facts for which relief could be granted. *Bergmann v. Boyce*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993); *Jacobs v.*

1 *Adelson*, 130 Nev. Adv. Op. 44, 325 P.3d 1282, 1285 (2014); *Hampe v. Foote*, 118 Nev. 405,
2 408, 47 P.3d 438, 439 (2002). The test for determining whether the allegations are sufficient to
3 assert a claim for relief is whether the allegations give fair notice of the nature and basis of a
4 legally sufficient claim and the relief requested. *Ravera v. City of Reno*, 100 Nev. 68, 70, 675
5 P.2d 407, 408 (1984); *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220, 1223
6 (1992). When evaluating dismissal pursuant to Rule 12(b)(5), a court must generally accept
7 the allegations contained in the underlying pleading as true. See *Hynds Plumbing & Heating*
8 *Co. v. Clark County Sch. Dist.*, 94 Nev. 776, 777, 587 P.2 1331, 1332 (1978). Courts,
9 however, do not necessarily assume the truth of legal conclusions merely because they are cast
10 in the form of factual allegations in a claim. *Clegg v. Cult Awareness Network*, 18 F.3d 752,
11 754-55 (9th Cir. 1994); *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Indeed, “conclusory
12 allegations and unwarranted inferences are insufficient to defeat a motion to dismiss.” *Comm.*
13 *for Reasonable Regulation of Lake Tahoe v. Tahoe Reg’l Planning Agency*, 311 F. Supp. 2d
14 972, 984 (D. Nev. 2004). To survive a motion to dismiss, each claim must allege “enough
15 facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550
16 U.S. 544, 570 (2007).

17
18
19
20 When considering this motion, this Court may consider all of the following: (i) the
21 facts stated on the face of the Complaint; (ii) documents appended to the Complaint; (iii)
22 documents incorporated in the Complaint by reference; and (iv) matters of which judicial
23 notice may be taken. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258,
24 1261 (1993); *Carstarphen v. Milsner*, 594 F. Supp. 2d 1201, 1207 (D. Nev. 2009).⁵

25
26
27 ⁵ When a document is attached to or referenced in the complaint, it forms part of the pleading and
28 hence may be considered in deciding a motion to dismiss for failure to state a claim. *IBEW Local 15 v. Exelon Corp.*, 495 F.3d 779, 782 (7th Cir. 2007). A document is incorporated by reference if the complaint refers to it, the document is central to the claim, and no party questions the document’s

Here the Court may consider the Sale Notice. The Complaint references the Sale Notice, the claims set forth therein are based solely upon the content of the Sale Notice, and Plaintiffs have attached the Sale Notice as an exhibit to the FAC.⁶ (FAC at ¶¶ 17-18). Thus, the Court's consideration of the contents of the Sale Notice would not convert this to a motion for summary judgment. *Breliant*, 109 Nev. at 847, 858 P.2d at 1261.

1. Plaintiffs' First Cause of Action Fails As A Matter of Law To Set Forth A Claim For Violating NRS 104.9610

a. NRS 104.9610 Does Not Apply to the Sale Notice

In their First Cause of Action, Plaintiffs' allege that the Sale Notice does not comply with NRS 104.9610. Thus, Plaintiffs conclude that United is liable for unspecified damages. (FAC at ¶¶ 64-69). However, NRS 104.9610 governs the sale of repossessed collateral and requires that such sales be conducted in a "commercially reasonable" manner. This statute does not address the UCC's separate provisions governing notices to the debtor(s). *See* NRS 104.9613 & 104.9614. However, an alleged violation of NRS 104.9614 does not create an *ipso facto* violation of NRS 104.9610, and Plaintiffs have not alleged any facts that would suggest that the sale of the Vehicle was not commercially reasonable. Instead, Plaintiffs allegations focus upon the Sale Notice to the debtors. As the Court can see by reviewing the document, the

authenticity. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Maritz Inc. v. Carlson Mktg. Group, Inc.*, 2009 WL 3561521 at *2 (N.D. Cal. 2009). When the claimant fails to introduce such a document, the defendant "may introduce the exhibit as part of his motion attacking the pleading." *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) (overturned on alternative grounds). "[T]he court may treat such a document as part of the [pleading], and thus may assume that its contents are true for purposes of a [Rule 12(b)(5)] motion." *Marder*, 450 F.3d at 448. If the document contradicts the allegations in the Counterclaim, it is the document that controls, not the bare allegations. *Forrest v. Universal Savings Bank*, 507 F.3d 540, 542 (7th Cir. 2007). "A court is not bound by the party's characterization of an exhibit and may independently examine and form its own opinions about the document." *Id.*

⁶ Plaintiffs refer to the Notices throughout their FAC and intended to attach the Repossession Notice as Exhibit A (FAC ¶ 13) but the copy served on United did not have Exhibit A attached to it.

1 Sale Notice had nothing to do with whether or not the sale of the Vehicle was “commercially
2 reasonable.” (Exhibit 1).

3 NRS 104.9610(1) states that a secured party may “sell, lease, license or otherwise
4 dispose of any or all of the collateral in its present condition or following any commercially
5 reasonable preparation or processing.” NRS 104.9610(2) states, “[e]very aspect of a disposition
6 of collateral, including the method, manner, time, place and other terms, must be commercially
7 reasonable.” The balance of NRS 104.9610(3)-(6) addresses the legal rights of parties who sell
8 or purchase repossessed collateral. NRS 104.9610 does not contain *any* provision that governs
9 the contents of the Sale Notice. Further, NRS 104.9610 does not contain *any* reference to the
10 separate statutory provisions governing the contents of a sale notice. *See* NRS 104.9613 &
11 104.9614 (setting forth the requirements for a notice of disposition to debtors and other secured
12 parties).
13
14

15 **b. The Failure of The Legislature To Include Contents of Notices In NRS**
16 **104.9610 Excludes It from Governing Such Notices**

17 “The construction of a statute is a question of law.” *Del Papa v. Board of Regents*, 114
18 Nev. 388, 392, 956 P.2d 770, 773-774 (1998) (quoting *General Motors v. Jackson*, 111 Nev.
19 1026, 1029, 900 P.2d 345, 348 (1995)). “[Q]uestions involving the existence interpretation,
20 construction or meaning and effect of a statute are questions for the court.” *Sobrio v. Caferata*,
21 72 Nev. 145, 150, 297 P.2d 828, 830 (1956); *see also, Sagebrush Ltd. v. Carson City*, 99 Nev.
22 204, 660 P.2d 1013 (1983) (same). It is well established that if the language of a statute is plain
23 and unambiguous, there is simply no room for construction of that statute by the Court. *Nevada*
24 *Power Co., v. Public Serv. Commission of Nevada*, 102 Nev. 1, 711 P.2d 867 (1986). NRS
25 104.9610 is drafted in plain and unambiguous language. The Court therefore cannot construe it
26 beyond its plain meaning.
27
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1 “The maxim ‘*expressio Unis est exclusio alterius*’, the expression of one thing is the
2 exclusion of another, has been repeatedly confirmed in this State.” *Galloway v. Truesdall*, 83
3 Nev. 13, 26, 422 P.2d 237, 246 (1967). Stated another way, “[t]hat which is enumerated
4 excludes that which is not.” *O’Callaghan v. District Cort*, 89 Nev. 33, 35, 505 P.2d 1215, 1216
5 (1973). NRS 104.9610 is limited to the manner and effect of a sale of repossessed collateral.
6 Had the Nevada Legislature wanted NRS 104.9610 to apply to notices that are sent to debtors, it
7 would have included such language in it. By limiting NRS 104.9610 to the manner and effect of
8 the sale of collateral, as a matter of law, it does not apply to the Sale Notice. Thus, under no set
9 of circumstances could Plaintiffs plead any set of facts that the Sale Notice violated NRS
10 104.9610.
11

12
13 **c. The Fact that Other Statutes Govern the Contents of Notices excludes NRS**
14 **104.9610 from Governing Such Notices**

15 Plaintiffs’ First Cause of Action also fails because NRS 104.9613 and NRS 104.9614
16 expressly state what language needs to be included in Sale Notice; NRS 104.9610 does not.
17 “This court has acknowledged the accepted rule of statutory construction ‘that a provision which
18 specifically applies to a given situation will take precedence over one that applies only
19 generally.’” *State, Dept. Of Motor Vehicles v. Bremmer*, 113 Nev Adv. Op. 89, 8, 942 P.2d 150,
20 149 (1997) (quoting *Sierra Life Ins. Co. v. Rottman*, 95 Nev. 654, 656, 601 P.2d 56, 57 (1979)).
21 Even if the Court were inclined to construe NRS 104.9610 beyond its plain and unambiguous
22 language, the fact that NRS 104.9613 and NRS 104.9614 expressly govern notices, they control.
23
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d. The Plaintiffs failed to Allege any Facts demonstrating that the Sale was Unreasonable

Finally, the FAC does not allege any facts that would support a finding that the sale of the Vehicle was not commercially reasonable. A sale of collateral "is made in a commercially reasonable manner if the disposition is made:

(a) In the usual manner on any recognized market;

(b) At the price current in any recognized market at the time of the disposition; or

(c) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

NRS 104.9627(2). The FAC does not allege any facts regarding any of these elements. For instance, Plaintiffs do not allege that the sale was unordinary or not conducted in a recognized market or that the sale price was below market value. Because the FAC does not allege any facts that would suggest the sale of the Vehicle was not commercially reasonable, the First Cause of Action does not state a claim for relief. It should therefore be dismissed with prejudice.

Finally, NRS 104.9610 does not provide for any civil remedy. Instead, the statutory framework for any violation of NRS 104.9610 and determination of whether a sale was commercially reasonable is set forth in NRS 104.9625 and NRS 104.9627. Indeed, the title of NRS 104.9625 is "Remedies for secured party's failure to comply with article"). The Nevada Supreme Court has repeatedly held that where the Legislature does not expressly provide civil remedies within a statutory framework, a party may not pursue a claim for an alleged violation of that statute absent an implied remedy. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958-60, 194 P.3d 96, 101-102 (2008); *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). Here, there is no implied right in NRS 104.9610 because the remedy is

expressly provided elsewhere within the statutory framework. NRS 104.9625 & NRS 104.9627. Consequently, courts have dismissed cases such as this when a plaintiff asserts improper UCC claims based upon the repossession and disposition of collateral. *See Bassett v. Barnes Used Cars, Inc.*, 2013 WL 4506788, *5 (Ill. App. Ct. 2013) (upholding dismissal of plaintiff's claim for alleged violation of section 9-609 of the UCC (adopted in Nevada as NRS 104.9609) because that provision does not provide a debtor with a cause of action, and instead the debtor must assert a violation under section 9-625 (adopted in Nevada as NRS 104.9625). If Plaintiffs truly want to pursue these claims, they must do so properly and state a proper cause of action. So far, they have failed to do so.

2. Plaintiffs' Second Cause of Action Fails As a Matter of Law To Set Forth A Claim For Violating NRS 104.9611

Plaintiffs allege the Sale Notice violates NRS 104.9611 because it "failed to provide reasonable notice of disposition of collateral." (FAC at ¶ 60). For the sake of brevity, the statutory rules of construction set forth above regarding NRS 104.9610 are incorporated by reference. As above, NRS 104.9611 does not address what language must be included within the Sale Notice. As such NRS 104.9611 does not apply to the contents of the Sale Notice. Those requirements are set forth in NRS 104.9613 and 104.9614. This claim is duplicative of Plaintiffs' Third Cause of Action, which asserts a violation of NRS 104.9614 and should therefore be dismissed. Additionally, NRS 104.9611 does not provide a private right of action—instead any violation must be pursued as set forth in NRS 104.9625 and NRS 104.9627. *See Baldonado, supra; Bassett, supra.* Accordingly, this claim must also be dismissed.

III. CONCLUSION

As set forth above, Plaintiffs' FAC does not reach the jurisdictional limit of the Court and should therefore be dismissed pursuant to NRCP 12(b)(1). Even if the Court were to find

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1 that Plaintiffs have reached the threshold jurisdiction of the Court, the Court should still dismiss,
2 with prejudice, Plaintiffs' First, Second, Fourth and Fifth claims for relief pursuant to NRC
3 12(b)(5).
4

5 HOWARD & HOWARD ATTORNEYS PLLC

6 By: 

7 James A. Kohl, Nevada Bar No. 5692
8 Robert Hernquist, Nevada Bar No. 101616
9 3800 Howard Hughes Parkway, Suite 1000
10 Las Vegas, NV 89169

11 *Attorneys for Defendant United Federal Credit*
12 *Union*

13 4840-0447-7731, v. 2
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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 27th day of April 2015.

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ James A. Kohl

James A. Kohl, Nevada Bar No. 5692
Robert Hernquist, Nevada Bar No. 101616
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, NV 89169

*Attorneys for Defendant United Federal Credit
Union*

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3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
(702) 257-1483

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that pursuant to NRCP 5(b), that on April 27, 2015, I served a copy of the foregoing *Defendant United Federal Credit Union's Motion to Dismiss First Amended Complaint* by using the EC/CMF system which served the following party electronically

Michael Lehnars, Esq.
Counsel for Plaintiff

I hereby certify that a true and correct copy of the foregoing *Defendant United Federal Credit Union's Motion to Dismiss First Amended Complaint* was placed in a sealed envelope on the 27th day of April, 2015, postage prepaid thereon, in the United States Mail, addressed to:

Nathan R. Zeltzer, Esq.
12 W. Taylor Street
Reno, NV 89509
Co- Counsel for Plaintiff

and

Robert W. Murphy, Esq.
1212 SE 2ND AVENUE
Fort Lauderdale, FL 33316
Co- Counsel for Plaintiff

Angela Westlake

An Employee of Howard & Howard Attorneys PLLC

Howard & Howard Attorneys, PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
(702) 257-1483

EXHIBIT 1

EXHIBIT 1

12/19/14

Lucia Castillo
Pratts Edwin
2310 Paradise Dr #145
Reno NV 89512

Dear Lucia Castillo ,

RE: 0870099946; NOTICE OF REPOSSESSION AND PRIVATE SALE

Date:	12/19/14	Year:	2012
Account Number:	510000313023	Make:	KIA
Principal Balance:	\$16,421.39	Model:	FORTE
Amount Past Due:	\$516.85	VIN:	KNAFU4A24C5593307

You are hereby notified pursuant to a default under the terms and provisions of a note and security agreement executed on 3/11/14 from Lucia Castillo to UNITED FEDERAL CREDIT UNION; the undersigned secured party, that your collateral was repossessed by our agent on 12/18/14.

Please make arrangements to pick up any personal property that may have been left in the collateral at the time of repossession. Personal property which is not claimed within (10) ten days will be disposed of at the Credit Union's option.

We will be selling the above collateral which secured your loan, at a private sale conducted through UNITED FEDERAL CREDIT UNION or our agent on or after 12/29/14.

You may redeem this collateral at any time prior to its sale by complying with the applicable laws regarding redemption or otherwise making satisfactory arrangements with United Federal Credit Union at 2807 South State St., St. Joseph, MI 49085 or by calling (800) 777-1619.

If the proceeds from the sale, after deducting the expenses for repossession, repair, storage and selling, are not sufficient to pay the total amount due (including accrued interest), you are responsible for paying any deficiency balance within (5) five days or you must make contact with the Credit Union to arrange for payment.

Sincerely,

Collections Department
United Federal Credit Union

EXHIBIT 2

EXHIBIT 2

SIMPLE INTEREST VEHICLE CONTRACT FOR SALE AND SECURITY AGREEMENT

SECTION A:

Buyer's Name(s): **LUCIA CASTILLO**
Name: **EDWIN MARTIR PRATTS**

Address: **2310 PARADISE DR**
City: **RENO** County: **WASHOE**
State: **NV** Zip: **89512**

Bus. Phone: (775) 219-8031 Res. Phone: (775) 453-2958

Stock No.: **KE111**

Salesman: **JOSE H AISPURO**

Date: **03/11/2014**

CREDITOR: **TOM DOLANS RENO MAZDA KIA**
Address: **9475 SOUTH VIRGINIA ST.**

City: **RENO** County: **WASHOE**
State: **NV** Zip: **89511**
Phone: (775) 1828-9666

SECTION B:

DISCLOSURE MADE IN COMPLIANCE WITH FEDERAL TRUTH IN LENDING ACT.

Your Payment Schedule will be:

(o) means an estimate

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.
8.74 %

FINANCE CHARGE The dollar amount the credit will cost you.
\$ 4720.59

Amount Financed The amount of credit provided to you or on your behalf.
\$ 16096.77

Total of Payments The amount you will have paid after you have made all payments as scheduled.
\$ 20817.36

Total Sales Price The total cost of your purchase on credit, including your down payment of \$ **2077.25**.
\$ 22894.61

Number of payments:	Amount of payments:	When payments are due:
N/A	N/A	N/A
72	289.13	MONTHLY BEGINNING 04/25/2014
N/A	N/A	N/A

INSURANCE AND DEBT CANCELLATION: Credit life insurance, credit disability insurance and debt cancellation coverage, which is also known as GAP coverage, are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

	Premium:	Term:	Signature(s):
Credit life:	\$ N/A	N/A	I want credit life insurance: X N/A Signature(s)
Joint credit life:	\$ N/A	N/A	We want joint credit life insurance: X N/A Signature(s)
Credit disability:	\$ N/A	N/A	I want credit disability insurance: X N/A Signature(s)
Credit life and disability:	\$ N/A	N/A	I want credit life and disability insurance: X N/A Signature(s)
Joint credit life and disability:	\$ N/A	N/A	We want joint credit life and single disability insurance: X N/A Signature(s)
Debt cancellation coverage (GAP coverage)	\$ 412.00	72	I want debt cancellation coverage (GAP coverage): XX <i>Lucia Castillo</i> Signature(s)

You may obtain property insurance from anyone you want that is acceptable to the Creditor on page 1 of 2. If you get the insurance from the Creditor, you will pay \$ **N/A** and the term of the insurance will be **N/A**.

SECURITY: You are giving a security interest in the goods or property being purchased.

☐ If checked, you are giving a security interest in **N/A**.

LATE CHARGE: If a payment is more than 10 days late, you will be charged \$15 or 8 percent of the payment, whichever is less.
PREPAYMENT: If you pay off early, you will not have to pay a penalty.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and penalties.

SECTION C: ITEMIZATION OF AMOUNT FINANCED.

- Vehicle Selling Price \$ **14200.00**
Plus: Documentary Fee \$ **449.50**
(This charge represents costs and profit to the dealer for items such as inspecting, cleaning, adjusting vehicles, and preparing documents related to the sale.)
Plus: Emissions Inspection Fee \$ **N/A**
Plus: Other (VTR) \$ **189.00**
Plus: Other (N/A) \$ **N/A**
Plus: Other (N/A) \$ **N/A**
Total Taxable Selling Price \$ **14838.50**
- Total Sales Tax \$ **1146.27**
- Amounts Paid to Public Officials
a. Tiling Fee \$ **20.00**
b. Registration Fee \$ **N/A**
c. Other \$ **N/A**
Total Official Fees (Add 3a through 3c) \$ **20.00**
- Optional, nontaxable, fees or charges
a. N/A \$ **N/A**
b. DRV-AWAY FEE-DMV NV \$ **9.25**
c. N/A \$ **N/A**
d. N/A \$ **N/A**
e. N/A \$ **N/A**
f. N/A \$ **N/A**
Total Optional, nontaxable, fees or charges

SECTION D: VEHICLE RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT.

This contract is made the **11th** (day) of **MARCH** (month) of **2014** (year), between you, the Buyer(s) shown on page 1 of 2, and us, the Seller shown as Creditor on page 1 of 2. Having been quoted a cash price and a credit price and having chosen to pay the credit price (shown as the Total Sales Price in Section B on page 1 of 2), you agree to buy and we agree to sell, subject to all the terms of this contract, the following described vehicle, accessories and equipment (all of which are referred to in this contract as "Collateral"):

New or Used: **USED** Year and Make: **2012 KIA**

Series: **FORTE** Body Style: **ADR SDN EX AT** No. Cyl.: **4**

If truck, ton capacity: **N/A**

Manufacturer's Serial Number: **KNAFU4A24C5593307**

Use for which purchased: ☐ Personal ☐ Business ☐ Agriculture

INCLUDING:

- | | | |
|--|---|---|
| <input type="checkbox"/> Sun/Moon Roof | <input type="checkbox"/> Air-Conditioning | <input type="checkbox"/> Automatic Transmission |
| <input type="checkbox"/> Power Steering | <input type="checkbox"/> Power Door Locks | <input type="checkbox"/> Power Seats |
| <input type="checkbox"/> Power Windows | <input type="checkbox"/> Tilt Wheel | <input type="checkbox"/> Vinyl Top |
| <input type="checkbox"/> Cassette | <input type="checkbox"/> Cruise Control | <input type="checkbox"/> AM/FM Stereo |
| <input type="checkbox"/> Compact Disc Player | | |

RED Color **Y** Tires **Y** Lic. No.

Total Optional Insurance, Finance Charge, Fees or Charges
(Add 4a through 4f) \$ 8.25

5. TOTAL CASH SALES PRICE \$ 16013.02

6. Gross Trade-In Allowance \$ 1000.00
2002 HYUNDAI SONATA KMHWF25S32A654529
 Year Make Model VIN

Less Prior Credit or Lease Balance \$ N/A
 Net Trade-In Allowance
 (If negative, enter 0 and see line 11a) \$ 1000.00

7. Down Payment (Other Than Net Trade-In Allowance):
 a. Trade-In Sales Tax Credit \$ 77.25
 b. Cash \$ 1000.00
 c. Manufacturer's Rebate \$ N/A
 d. Deferred Down Payment \$ N/A
 e. Other (N/A) \$ N/A
 Down Payment (Add 7a through 7e) \$ 1077.25

8. TOTAL DOWN PAYMENT AND
 NET TRADE-IN ALLOWANCE (Add 6 and 7) \$ 2077.25

9. UNPAID BALANCE OF CASH SALES PRICE
 (Subtract 8 from 5) \$ 13935.77

10. Plus Optional Insurance and Debt Cancellation Charges*
 a. Credit Life Insurance Premium
 Paid to (N/A) Term (N/A) \$ N/A
 b. Credit Disability Insurance Premium
 Paid to (N/A) Term (N/A) \$ N/A
 c. Debt Cancellation Coverage (GAP Coverage)
 Paid to (THIC) Term (72) \$ 412.00
 d. Other Insurance
 Paid to (N/A) Term (N/A) \$ N/A
 Total Optional Insurance and Debt Cancellation
 Charges (Add 10a through 10d) \$ 412.00

11. Other Amounts Financed*
 a. Prior Credit or Lease Balance
 Paid to (N/A) \$ N/A
 b. N/A
 Paid to (N/A) \$ N/A
 c. SERVICE CONTRACT
 Paid to (PORTFOLIO) \$ 1749.00
 Total Other Amounts Financed (Add 11a through 11c) \$ 1749.00

12. TOTAL AMOUNT FINANCED (Add 9, 10 and 11) \$ 16096.77
 *Seller may retain or receive a portion of this amount.

STATE DISCLOSURE REQUIREMENTS: The provisions of Section B and Section C are incorporated into this agreement for purposes of state disclosure requirements.

Additional Terms and Conditions: The additional terms and conditions set forth in this contract are a part of this contract and are incorporated herein by reference.

OPTION N/A You pay no Finance Charge if the Total Amount Financed, Item No. 12, Section C, is paid in full on or before the N/A (day) of N/A (month) of N/A (year).

SELLER'S INITIALS: N/A

SECTION E:

☐ If checked, you agree to use electronic records and electronic signatures to document this contract. Your electronic signatures on electronic records will have the same effect as signatures on paper documents. We may designate one authoritative copy of this contract. If we do, the authoritative copy will be the electronic copy in a document management system we designate for storing authoritative copies. We may convert the authoritative copy to a paper original. We will do so by printing one paper copy marked "Original." This paper original will have your electronic signature on it. It will have the same effect as if you had signed it originally on paper.

If you agree to use electronic records and electronic signatures, we will comply with all applicable federal, state and local law and regulations.

UPON ENTERING INTO THIS CONTRACT, YOU WILL RECEIVE A PAPER COPY OF THE ORIGINAL CONTRACT ELECTRONICALLY SIGNED AND COMPLETE WITH ALL TERMS, CONDITIONS AND DISCLOSURES TO TAKE WITH YOU.

NOTICE TO BUYER

Do not sign this agreement before you read it or if it contains any blank spaces. You are entitled to a completed copy of this agreement. If you pay the amount due before the scheduled date of maturity of the indebtedness and you are not in default in the terms of the contract for more than 2 months, you are entitled to a refund of the unearned portion of the finance charge. If you fail to perform your obligations under this agreement, the vehicle may be repossessed and you may be liable for the unpaid indebtedness evidenced by this agreement.

If you are buying a used vehicle with this contract, as indicated in the description of the vehicle on page 1 of 2, federal regulation may require a special buyer's guide to be displayed on the window.

THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON

You, severally and jointly, promise to pay us the Total of Payments (shown in Section B) according to the Payment Schedule (also shown in Section B), until paid in full, together with interest after maturity at the Annual Percentage Rate disclosed on page 1 of 2.

To secure such payment, you grant to us a purchase money security interest under the Uniform Commercial Code in the Collateral and in all accessions to and proceeds of the Collateral. Insurance in which we or our assignee are named as beneficiary or loss payee, including any proceeds of such insurance or refunds of unearned premiums, or both, are assigned as additional security for this obligation and any other obligation created in connection with this sale. We, our successors and assigns, hereby waive any other security interest or mortgage which would otherwise secure your obligations under this contract except for the security interests and assignments granted by you in this contract.

Address where Collateral will be located:

Street 2310 PARADISE DR City RENO

County WASHOE State NV 89512

Your address after receipt of possession of Collateral:

Street 2310 PARADISE DR City RENO

County WASHOE State NV 89512

Notice of Rescission Rights (Option to Cancel)

If the Buyer signs here, the notice of rescission rights on page 2 of 2 is applicable to this contract.

Buyer's signature X [Signature]

Co-Buyer's signature X [Signature]

Additional terms and conditions: The amount of the Total Amount Financed, Item No. 12, Section C, is paid in full on or before the 11/1 (day) of 11/1 (month) of 11/1 (year).

SELLER'S INITIALS: N/A

SECTION E:

☐ If checked, you agree to use electronic records and electronic signatures to document this contract. Your electronic signatures on electronic records will have the same effect as signatures on paper documents. We may designate one authoritative copy of this contract. If we do, the authoritative copy will be the electronic copy in a document management system we designate for storing authoritative copies. We may convert the authoritative copy to a paper original. We will do so by printing one paper copy marked "Original." This paper original will have your electronic signature on it. It will have the same effect as if you had signed it originally on paper.

If you agree to use electronic records and electronic signatures, we will comply with all applicable federal, state and local law and regulations.

UPON ENTERING INTO THIS CONTRACT, YOU WILL RECEIVE A PAPER COPY OF THE ORIGINAL CONTRACT ELECTRONICALLY SIGNED AND COMPLETE WITH ALL TERMS, CONDITIONS AND DISCLOSURES TO TAKE WITH YOU.

NOTICE TO BUYER

Do not sign this agreement before you read it or if it contains any blank spaces. You are entitled to a completed copy of this agreement. If you pay the amount due before the scheduled date of maturity of the indebtedness and you are not in default in the terms of the contract for more than 2 months, you are entitled to a refund of the unearned portion of the finance charge. If you fail to perform your obligations under this agreement, the vehicle may be repossessed and you may be liable for the unpaid indebtedness evidenced by this agreement.

If you are buying a used vehicle with this contract, as indicated in the description of the vehicle on page 1 of 2, federal regulation may require a special buyer's guide to be displayed on the window.

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.

The text of the preceding two paragraphs is set forth below in Spanish.

Si usted está comprando un vehículo usado mediante este contrato según la descripción del vehículo en la página 1 de 2, la ley federal podrá exigir que la ventanilla demuestre una guía especial para el comprador.

LA INFORMACIÓN QUE USTED VE EN LA FORMA DE VENTANILLA PARA ESTE VEHÍCULO ES PARTE DE ESTE CONTRATO. LA INFORMACIÓN EN LA FORMA DE VENTANILLA DOMINA CUALQUIER ESTIPULACIÓN CONTRARIA EN EL CONTRATO DE VENTA.

BUYER AND CO-BUYER ACKNOWLEDGE RECEIPT OF A TRUE AND COMPLETELY FILLED-IN PAPER COPY OF THIS CONTRACT AND THE DISCLOSURE ON PAGE 1 OF 2 AT THE TIME OF SIGNING.

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED UNLESS OTHERWISE INDICATED IN SECTION C.

Buyer: X X [Signature] Date: 03/11/2014 Co-Buyer: X X [Signature] Date: 03/11/2014
Creditor: OM BOLANS-RENO MAZDA KIA Title: TITULO

LAW FORM NO. 553-NY REV. 10-12
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Page 1

CUSTOMER/TRUTH IN LENDING COPY

b. DRY-AWAY FEE-DMV NY \$ 8.25
c. N/A \$ N/A
d. N/A \$ N/A
e. N/A \$ N/A
f. N/A \$ N/A

☐ Power Steering ☐ Power Door Locks ☐ Power Seats
☐ Power Windows ☐ Tire Wheel ☐ Vinyl Top
☐ Cassette ☐ Cruise Control ☐ AM/FM Stereo
☐ Compact Disc Player

1 CODE 2645

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14 Robert W. Murphy, *Pro Hac Vice* pending
15 Florida Bar No. 717223
16 1212 SE 2nd Avenue
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18 Telephone: (954) 763-8660
19 Telecopier: (954) 763-8607

20 Attorneys for Plaintiffs

21 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
22 IN AND FOR THE COUNTY OF WASHOE
23 o0o

24 LUCIA CASTILLO, an individual, and
25 EDWIN PRATTS, an individual,
26
27 Plaintiffs,

Case No. CV15-00421

Dept. No. 10

28 vs.

CLASS REPRESENTATION
(Arbitration Exempt)

29 UNITED FEDERAL CREDIT UNION, a
30 federal credit union
31
32 Defendant.

OPPOSITION TO DEFENDANT,
UNITED FEDERAL CREDIT UNION'S
MOTION TO DISMISS

33
34 Plaintiffs, Lucia Castillo, an individual ("Ms. Castillo") and Edwin Pratts, individual
35 ("Mr. Pratts") (hereinafter collectively referred to as the "Class Representatives"), on behalf of
36 themselves and all others similarly situated, file the following opposition to United Federal
37 Credit Union's Motion to Dismiss.

38 **I. INTRODUCTION**
39 **A. Procedural History**

1 The complaint was filed March 3, 2015. On March 31, 2015 United Federal Credit
2 Union (UFCU) filed its motion to dismiss. On April 9, 2015 the Plaintiff filed an amended
3 complaint. The amendments were as follows:

- 4 A. Paragraph 10 alleges that the amount in controversy exceeds \$10,000.00.
5 B. Claims IV and V (cause of action for equitable relief) were removed, and
6 the equitable relief requested was placed in the prayer for relief.
7 C. Claims I, II, and III remained.

8 On April 28, 2015 UFCU filed its motion to dismiss the amended complaint. It alleges
9 the Class Representatives have failed to meet the \$10,000.00 jurisdictional requirements of this
10 Court. It also alleges that the Class Representatives have failed to state a claim under NRS
11 104.9610 and NRS 104.9611.

12 **B. Factual Background**

13 In March of 2014 the Class Representatives financed the purchase of a 2012 Kia Forte.
14 The amount financed was \$16,096.77. The interest was 8.74%, yielding a finance charge of
15 \$4,720.59 over the life of the loan. United Federal Credit Union (UFCU) was assigned the
16 RISC by the dealership. A copy of the Class Representatives' Retail Installment Sales Contract
17 (RISC) has been attached to their First Amended Complaint that was filed April 9, 2015.

18 On December 18, 2014, UFCU repossessed the Class Representatives' Vehicle. On
19 December 19, 2014, UFCU sent or caused to be sent to the Class Representatives a written
20 notice advising them of its intent to dispose of the Vehicle in purported compliance with the
21 requirements of the UCC ("Notice of Sale").

22 The Class Representatives have alleged in their First Amended Complaint that the Notice
23 of Sale failed to comply with the UCC in two respects:

24 First, the Notice of Sale fails to comply with the UCC in that UFCU failed to state that
25 Plaintiffs as debtors were entitled to an accounting of the unpaid indebtedness and the charge, if
26 any, for said accounting, as required by NRS 104.9613(1)(d) and 104.9614(1)(a). Please see
27 ¶19 of Amended Complaint.
28

1 Second, UFCU represented to the Class Representatives that they were responsible for
2 paying any deficiency balance within (5) five days. Please see ¶20 of Amended Complaint.

3 The Class Representatives have also alleged in their First Amended Complaint that the
4 Notice of Sale failed to comply with NRS 482.516 in two respects:

5 First, UFCU failed to disclose the place at which the Castillo Vehicle would be returned
6 to Plaintiffs upon redemption and reinstatement in contravention of NRS 482.516(2)(d). Please
7 see ¶24(a) of Amended Complaint.

8 Second, UFCU failed to designate the name and address of the person to whom
9 payment must be made for redemption or reinstatement in contravention of NRS 482.516(2)(e).
10 Please see ¶24(b) of Amended Complaint.

11 II. LEGAL STANDARD

12 The standard of review for a dismissal under NRCP 12(b)(5) is rigorous as this court
13 "must construe the pleading liberally and draw every fair intendment in favor of the [non-
14 moving party]." *Squires v. Sierra Nev. Educational Found.*, 107 Nev. 902, 905, 823 P.2d
15 256, 257 (1991) (citations omitted). All factual allegations of the complaint must be accepted as
16 true. *Capital Mort. Holding v. Hahn*, 101 Nev. 314, 315, 705 P.2d 126, 126 (1985). A
17 complaint will not be dismissed for failure to state a claim "unless it appears beyond a doubt that
18 the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him
19 [or her] to relief." *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985) (citing
20 *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

21 III. LEGAL ARGUMENT

22 A. PLAINTIFFS HAVE PROPERLY INVOKED THE JURISDICTION OF THIS 23 COURT WITH RESPECT TO THE AGGREGATION OF PUTATIVE CLASS 24 MEMBER CLAIMS AS WELL AS THE INDIVIDUAL CLAIMS OF PLAINTIFFS.

25 *I. The enactment of the Class Action Fairness Act --- which allows for*
26 *aggregation in a class action to determine jurisdictional amount --- renders the*
caselaw authority cited by UFCU irrelevant.

27 In its brief, UFCU makes the bald argument that "in a consolidated litigation or class
28 action context, individual plaintiffs claims may not be aggregated to satisfy the jurisdictional

1 amount requirement unless the individual plaintiffs have a common undivided interest in a claim
2 for damages." (Motion to Dismiss – p.6). In support of this position, UFCU cites various
3 federal decisions all of which were decided before the enactment of the Class Action Fairness
4 Act ("CAFA"), 28 U.S.C. §1332. When CAFA became effective in 2005, the limits of federal
5 diversity jurisdiction, both for class actions filed by plaintiffs in federal court and for those
6 removed from state court by defendants, were greatly expanded.

7 Unlike ordinary diversity jurisdiction, the amount in controversy for class actions under
8 CAFA is now measured in the aggregate:

9 In any class action, the claims of the individual class members shall be
10 aggregated to determine whether the matter in controversy exceeds the sum or
value of \$5,000,000.00, exclusive of interest and costs.

11 28 U.S.C. §1332(d)(6)

12 The cases cited by UFCU all pre-date the enactment of CAFA. As such, "[t]here is no
13 requirement in a class action brought originally or on removal under CAFA that any individual
14 plaintiff's claim exceed \$75,000." *Cappuccitti v. Direct TV, Inc.*, 623 F.3d 1118, 1122 (11th
15 Cir.2010).

16 ***2. Compelling case law authority supports aggregation of claims for***
17 ***jurisdictional purposes.***

18 Nevada courts have long recognized the utility of allowing the aggregation of claims in
19 the context of a class action. As stated by the Supreme Court of Nevada:

20 Class action suits are designed to allow representatives of a numerous class of
21 similarly situated people to sue on behalf of that class in order to obtain a
22 judgment that will bind all. Thereby, class actions promote efficiency and
23 justice in the legal system by reducing the possibilities that courts will be asked
to adjudicate many separate suits arising from a single wrong and that the
individuals be unable to obtain any redress for "wrongs otherwise irremediable
because the individual claims are too small or the claimants too widely
dispersed."

24 *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 846, 124 P.3d 530,
25 537 (Nev.2005)

26 The Nevada Supreme Court has not addressed the issue of whether class member claims
27 can be aggregated to satisfy the jurisdictional requirement for District Court. The overwhelming
28 number of state appellate courts that have addressed the aggregation issue, however, have

1 allowed for aggregation. *Thomas v. Liberty Noel Life Ins.Co.*, 368 So.2d 254 (Ala.1979)
2 (aggregation permitted); *Judson School v. Wick*, 494 P.2d 698 (Ariz.1972) (aggregation
3 permitted); *Ackerman v. Int'l Bus. Mach. Corp.*, 337 N.W.2d 486 (Iowa 1983); *Fillmore v.*
4 *Leasecomm Corp.*, 18 Mass.L.Rptr. 560 (Mass.Super.2004); *Johnson v. Plantation*
5 *Gen.Hosp.*, 641 So.2d 58 (Fla.1994) (aggregation permitted).

6 In *Plantation Gen.Hosp.*, in recognizing the utility of aggregation, the Florida Supreme
7 Court stated:

8 The purpose of the class action is to provide litigants who share common
9 questions of law and fact with an economically viable means of addressing their
10 needs in court. We believe that purpose is served best if jurisdiction is conferred
11 on the circuit court when the aggregated claims of the class meet the monetary
12 jurisdictional requirements even though an individual claim of a class member
13 does not reach that threshold.

14 *Id.* at 60.

15 The aggregation of claims in the instant action will serve the interests of justice and
16 promote the efficiency of the class action process. This position is especially compelling in light
17 of the Supreme Court of Nevada's recognition of the utility of class actions.

18 **3. The individual claims of Plaintiffs satisfy the jurisdictional requirement of**
19 **District Court.**

20 With respect to the individual claims of the Plaintiffs, the sole basis of UFCU's
21 argument is the Class Representatives' statutory damages are \$6,330.28. UFCU further claims
22 that "under no set of facts can the Class Representatives establish the jurisdictional floor of this
23 court" (Motion to Dismiss – p. 8).

24 UFCU is wrong.

25 The Amended Complaint alleges that UFCU violated not one, but two, provisions of
26 Nevada law. Each violation gives rise to independent relief, and each contributes to the "value
27 of the object of the litigation".

28 By failing to send a notice of sale that complied with Article Nine, the Class Plaintiffs
are entitled to statutory damages of \$6,330.28.

1 By failing to send a notice of sale that complied with NRS 482.516 the Class Plaintiffs
2 are entitled to an injunction that prohibits UFCU from attempting to collect the \$6,841.55
3 deficiency¹.

4 The Amended Complaint specifically states that because UFCU informed the Class
5 Representatives and other similarly situated consumers that it intended to dispose of their
6 vehicles without providing the statutorily mandated notice with the specific disclosures as
7 required under NRS 104.9613, 104.9614, and 482.516 the Class Representatives and all other
8 members similarly situated are entitled to the elimination of any deficiency balance owing
9 (Amended Complaint - ¶9).

10 The amount in controversy is therefore \$13,171.83.

11 UFCU cites numerous federal cases that discuss how the amount in controversy is
12 calculated. The federal jurisprudence holds *inter alia* that it must appear to a legal certainty that
13 the claim is worth less than the jurisdictional amount and that the claims of multiple plaintiffs
14 may not be aggregated. UFCU has not told this Court how the amount in controversy is
15 calculated where injunctive relief is requested.

16 When determining federal jurisdiction, Courts hold that a plaintiff may aggregate smaller
17 claims in order to reach the jurisdictional threshold. See *JTH Tax vs. Frashier* 624 F.3d 635
18 (4th Cir. 2010) reversing lower court that failed to consider not only the amount of money
19 damages requested but also the injunctive relief the Plaintiff sought when determining
20 jurisdiction. For this reason, it is proper for the Class Representatives to aggregate their
21 statutory damages with the elimination of UFCU's claimed deficiency.

22 Where one of the claims is for injunctive relief, it is well established that the amount in
23 controversy is measured by the value of the object of the litigation. *Hunt v. Washington State*
24 *Apple Advertising Commission* 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). The
25 value of that right is measured by the losses that will follow from the statute's enforcement. Id

26
27 ¹ Paragraph Seven of the Amended Complaint alleges: "On or about January 21,
28 2015, subsequent to the repossession of the vehicle, UFCU sent notice to the Class
Representatives that their car had been sold and that \$6,841.55 was due and owing
to UFCU."

1 at 432 U.S. 347, citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct.
2 780, 80 L.Ed. 1135 (1936).

3 This right of the Class Representatives has two sides. First, they get \$6,330.28 in
4 statutory damages. Second, they seek the elimination of the \$6,841.55 deficiency to UFCU.
5 The value of this right objectively exceeds the \$10,000.00 jurisdictional floor of this Court.

6 ***4. The Jurisdictional Amount is not to be resolved in a Motion to Dismiss***
7 ***where the factual allegations are made in good faith.***

8 The Advisory Notes to Nev. R. Civ. Pro. 8 point out an important difference between it
9 and Fed. R. Civ. Pro. 8.

10 The federal requirement of a statement of the grounds upon which the court's
11 jurisdiction depends was deleted, as inapplicable to courts of general
12 jurisdiction. In 1971, a restriction was inserted to prohibit allegation of specific
13 amounts of damages in excess of \$10,000. This was principally to eliminate
14 adverse publicity that results from extravagant claims of damage, and does not
15 restrict counsel in the presentation of their case nor the court or jury on the
16 amount it may award. Inquiry as to damages sought may be made by
17 interrogatory and deposition.

18 (Emphasis supplied)

19 In other words, all that is required is that the Plaintiff include a simple statement that the
20 damages are in excess of \$10,000.00. This statement appears in paragraph 10 of the Amended
21 Complaint. The damage allegation must be made in good faith. Here it is. It is based upon the
22 Class Representatives' statutory damages and the elimination of UFCU's deficiency against
23 them.

24 Should UFCU disagree with how the Class Representatives calculated the amount in
25 excess of \$10,000.00, the Advisory Notes direct the inquiry take place in discovery, not in a
26 motion to dismiss.

27 **B. PLAINTIFFS HAVE PROPERLY ALLEGED ALTERNATIVE THEORIES**
28 **FOR RELIEF UNDER NRS 104.9610 AND NRS 104.9611.**

Count I of the Amended Complaint is an action for the violation of NRS 104.9610.
Count II is an action for the violation of NRS 104.9611. Count III is an action for the violation
of NRS 104.9614.

1 UFCU argues that the Class Representatives have failed to set forth claims under NRS
2 104.9610 and NRS 104.9611. UFCU is mistaken.

3 NRS 104.9610 provides that every aspect of a disposition of collateral, including the
4 method, manner, time, place and other terms, must be commercially reasonable.

5 NRS 104.9611, requires secured parties such as UFCU send a reasonable authenticated
6 notification of disposition of collateral.

7 NRS 104.9614(1)(a) requires that a post-repossession notice include the information
8 provided in NRS 104.9613(1).

9 Count I alleges that UFCU has engaged and is continuing to engage in material
10 violations of Nevada law in that the form represented by the Notice of Sale fails to comply with
11 the governing provisions of the UCC. These actions are a commercially unreasonable
12 disposition of the Class Representatives' collateral.

13 Count II alleges that the standard form represented by the Notice of Sale violates NRS
14 104.9611 in that UFCU failed to provide reasonable notice of disposition of collateral to the
15 Class Representatives and Class Members.

16 NRS 104.9625(2) says that subject to subsections 3, 4 and 6, a person is liable for
17 damages in the amount of any loss caused by a failure to comply with this article. In other
18 words, a violation of this article is needed to trigger the damage provisions of article nine. This
19 means that a violation of NRS 104.9610 will trigger the damage provisions. So will a violation
20 of NRS 104.9611. So will a violation of NRS 104.9614.

21 However, there can be only one recovery of statutory damages for multiple violations of
22 article nine. See NRS 104.9628(5) which says a secured party is not liable under paragraph (b)
23 of subsection 3 of NRS 104.9625 more than once with respect to any one secured obligation.

24 Nev. R. Civ. Pro. 8(a) provides that relief in the alternative or of several different types
25 may be demanded. Counts I through III are the triggering events for the right to damages. The
26 Class Representatives have every right to plead in the alternative under Rule 8(a).

27 **IV. CONCLUSION**

1 In light of the foregoing, the motion must be denied as the Class Representatives have
2 set forth facts showing damages in excess of \$10,000.00 and are entitled to plead alternative
3 theories of recovery.

4 **Affirmation**
5 **Pursuant to NRS 239B.030**

6 The Undersigned does hereby affirm that the preceding document filed in the case herein
7 does not contain the social security number of any person.

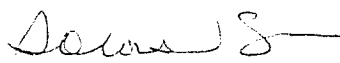
8 Dated: This 11 day of May, 2015

9
10 By: 

11 Michael Lehnors, Esq.
12 429 Marsh Ave.
13 Reno, Nevada 89509
14 Nevada Bar Number 003331
15
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28

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Michael Lehnert, Esq., and that on the 11 day of May, 2015 I deposited for mailing with postage prepaid a true and correct copy of the foregoing Opposition to Motion to Dismiss addressed to James A. Kohl, Esq., Robert Hernquist, Howard & Howard Attorneys, PLLC 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, Nevada 89169.


Employee

Howard & Howard Attorneys, PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
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Attorneys for Defendant United Federal Credit Union

SECOND JUDICIAL DISTRICT COURT

WASHOE COUNTY, NEVADA

LUCIA CASTILLO, an Individual, and
EDWIN PRATTS, an individual,

Plaintiffs,

vs.

UNITED FEDERAL CREDIT UNION, a
federal credit union,

Defendant.

Case No. CV15-00421

Dept. No. 10

**DEFENDANT UNITED FEDERAL CREDIT
UNION'S REPLY TO OPPOSITION TO
MOTION TO DISMISS FIRST AMENDED
COMPLAINT**

Pursuant to Rules 12(b)(1) and 12(b)(5) of the Nevada Rules of Civil Procedure, Defendant United Federal Credit Union moved to dismiss Plaintiffs' claims. Plaintiffs filed their Opposition arguing that their First Amended Complaint should not be dismissed. Defendants file this Reply and as set forth in greater detail below, ask that the Court dismiss this suit because it lacks subject matter jurisdiction. Additionally, and in the alternative, the Court should dismiss the claims because they fail to assert a claim upon which relief may be granted.

///

///

///

///

This Reply is based on the Points and Authorities attached hereto together with the Papers and Pleadings on file herein and any oral argument received by the Court.

Respectfully submitted this 26th day of May, 2015.

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ James A. Kohl

James A. Kohl, Nevada Bar No. 5692
Robert Hernquist, Nevada Bar No. 101616
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, NV 89169

*Attorneys for Defendant United Federal Credit
Union*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This matter arises out of Plaintiffs' failure to honor the promises that they made to United Federal Credit Union ("United") to repay an automobile loan that was made to Plaintiff, Lucia Castillo ("Castillo"), and guaranteed by Plaintiff, Edwin Pratts ("Pratts"). The loan was memorialized in a Simple Interest Vehicle Contract for Sale and Security Agreement ("Contract").¹ See First Amended Complaint ("FAC") at ¶ 14, filed April 9, 2015 and on file with the Court. The loan was for the purchase of a 2012 Kia automobile ("Vehicle"). Pursuant to the Contract, the loan was secured by the Vehicle. In the Contract, Plaintiff Castillo promised to repay the loan and Defendant Pratts personally guaranteed Castillo's repayment of

¹ "[T]he court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted. *Id.* at § 1357. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, Civil 2D § 1356 (2d ed. 1990)). "[M]aterial which is properly submitted as part of the complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted).

1 the loan. Despite her promise to repay the loan, Castillo failed to do so. *Id.* at ¶¶ 14-18.
2 Similarly, Pratts failed to honor his personal guaranty to repay the loan after Castillo defaulted
3 on the loan.

4 After United repossessed the Vehicle and sent notice of the repossession and sale to
5 Plaintiffs, the plaintiffs sued United claiming that United owes them for improperly notifying
6 them of the sale of the Vehicle. United filed its Motion to Dismiss due to the lack of subject
7 matter jurisdiction of this Court. Plaintiffs filed their Opposition and this Reply rebuts the
8 arguments advanced by Plaintiffs in their Opposition.
9

10 **II. LAW AND ARGUMENT**

11 **A. Plaintiffs Failed to Invoke The Jurisdiction of This Court, Thus, the FAC Must be**
12 **Dismissed**

13 The Nevada Constitution confers both original and appellate subject matter
14 jurisdiction upon the district courts. The constitution provides that district courts
15 do not have original jurisdiction over actions that fall within the original
16 jurisdiction of the justices' courts. Nev. Const. art. 6, § 6. NRS 4.370(1)(b)
17 confers original jurisdiction upon justices' courts over civil actions for damages
18 for personal injury, if the damages claimed do not exceed [\$10,00.00]. Thus, the
19 district court has original jurisdiction over such actions only if the plaintiff claims
20 more than [\$10,00.00] in damages.

21 *Morrison v. Beach City LLC*, 116 Nev. 34, 37, 991 P.2d 982, 983 (2000). As set forth below in
22 greater detail, Plaintiffs have not demonstrated to the Court that either of them has damages
23 that exceed \$10,000. This Court therefore does not have subject matter over this dispute. *Id.*

24 **A. Plaintiffs' Reliance on CAFA is Misplaced**

25 Plaintiffs argue that the federal court cases cited by United that prohibit stacking of
26 claims to meet the jurisdictional limits of the court were abrogated by the Class Action Fairness
27 Act 28 U.S.C. § 1332 ("CAFA") and therefor inapplicable to the case at bar. Plaintiffs filed
28 suit in the Second Judicial District of Nevada and are bound by Nevada law. CAFA does not

1 apply to cases filed in Nevada State Courts, it applies to cases filed in federal court *after* the
2 date that it was enacted. Plaintiffs' reliance on CAFA is wholly misplaced because it does not
3 grant plaintiffs who file suit in Nevada State Courts the right to stack their claims for damages.

4 The Nevada Legislature has met on multiple occasions since CAFA was enacted and it
5 has not amended the Nevada Revised Statutes ("NRS") to mirror the changes Congress made to
6 the jurisdictional statutes for federal courts as set forth in CAFA. Similarly, since CAFA was
7 enacted, the Supreme Court of Nevada made changes to the NRCP but it did not modify NRCP
8 23 so that it allows class action plaintiffs to aggregate their claims to satisfy the jurisdiction of
9 the Court. The issue of the jurisdictional limits of this Court and Nevada's Justice Courts is the
10 exclusive province of the Nevada Legislature. Under the Nevada Constitution and sound
11 public policy, this Court is not empowered to modify the Nevada Revised Statutes or the
12 Nevada Rules of Civil Procedure.

13 The refusal of the Nevada Legislature and the Nevada Supreme Court to make such
14 changes to the NRS or the NRCP makes the cases cited by United (the pre-CAFA Fed. Rule
15 Civ. Pro. 23 cases) applicable and persuasive to NRCP 23.² Similarly, any federal case
16 interpreting the ability of class action plaintiffs to aggregate their claims *after* CAFA was
17 enacted are not persuasive because there is no provision in the NRS or the NRCP that grants
18 class action plaintiffs the special jurisdictional rights CAFA gives such plaintiffs in federal
19 court. Plaintiffs' reliance on CAFA and *Cappuccitti v. Direct TV., Inc.*, 623 F.3d 1118 (11th
20 Cir. 2010) are wholly misplaced. It would be reversible error as an abuse of discretion³ for the
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26 2 "[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court
examines its rules." *Foster v. Dingwall*, 126 Nev. Adv. Op. 5, 228 P.3d 453, 456 (2010) (*quoting Nelson v. Heer*,
121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005)).

27
28 3 *In re Jenkins*, 428 B.R. 845, 848 (8th Cir.BAP 2010) (*citing Official Comm. of Unsecured Creditors v. Farmland
Indus., Inc.* (In re Farmland Indus., Inc.), 397 F.3d 647, 651 (8th Cir.2005)) (Courts abuse discretion when they do
not apply the correct legal standard); *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (*citing State*

1 Court to rely on either CAFA or *Cappuccitti*, 623 F.3d 1118 to allow Plaintiffs to stack their
2 claims to reach the jurisdictional limit of the Court. There is no statute, rule of civil procedure
3 or case that authorizing it. Nevada Courts are required to dismiss cases when the Plaintiffs fail
4 to demonstrate that the court has subject matter jurisdiction over them. This Court should
5 therefore dismiss the FAC as Plaintiffs have not satisfied the jurisdictional floor of this Court.

6
7 **B. Courts Do Not Allow Plaintiffs To Aggregate Their Claims to Create Subject**
8 **Matter Jurisdiction**

9 Courts that have considered this issue hold that Plaintiffs may not aggregate their claims
10 to reach the jurisdictional floors of the Court.

11 We are of the same opinion with respect to our CR 23. We specifically hold,
12 therefore, with respect to CR 23, that the sums of the individual claims of the
13 respective parties may not be aggregated in order to meet the jurisdictional
14 amount requirements for an action to be brought in the circuit court and be
maintained as a class action where none of the individual claims is equal to or
exceeds the statutory jurisdictional amount.

15 *Lamar v. Office of Sheriff of Daviess Cnty.*, 669 S.W.2d 27, 31 (Ky. Ct. App. 1984). *See also*
16 *Albion Elevator Co. v. Chicago & N.W. Transp. Co.*, 254 N.W.2d 6, 12 (Iowa 1977) (upholding
17 dismissal of class action plaintiffs who did not have claims that exceeded the jurisdictional floor
18 of the court); *Berberian v. New England Tel. & Tel. Co.*, 369 A.2d 1109, 1114 (R.I. 1977)
19 (affirming trial court's grant of motion to dismiss on the ground that no individual member of
20 the class had a claim in excess of the jurisdictional floor of the court.); *Bolling v. Old Dominion*
21 *Power Co.*, 181 Va. 368, 371, 25 S.E.2d 266, 268 (1943) (It has long been settled that claims
22 cannot be consolidated so as to give court jurisdiction). In *Pollokoff v. Maryland Nat. Bank*,
23 418 A.2d 1201, 1210 (Md. Ct. App. 1980) the court considered the attempt of numerous
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28 *Dep't Mtr. Veh. v. Root*, 113 Nev. 942, 947, 944 P.2d 784, 787 (1997)) (Courts abuse discretion when their decision
exceeds the bounds of law).

Plaintiffs to stack their claims in a class action against a defendant bank. The *Pollokoff Court* reviewed considered and rejected the cases cited by Plaintiffs⁴ in their opposition brief, holding:

We do not believe that the legislative allocation of original subject matter jurisdiction is to be disturbed because the joinder sought here may be permitted as a matter of pleading. We hold that multiple plaintiffs, named or unnamed, whose separate and distinct claims fall within the exclusive original jurisdiction of the District Court may not invoke the original jurisdiction of the circuit court by joining in an action and aggregating their claims.

Id. at 1210. Courts that have considered the question presented to the Court on similar facts to the case at bar have found that Plaintiffs are not permitted to aggregate their claims to create subject matter jurisdiction. This Court should follow the long standing rule that Plaintiffs may not stack their claims to achieve subject matter jurisdiction.

C. The Cases Cited by Plaintiffs Are Distinguishable from the Case at Bar

The case that Plaintiffs cited at length in their Opposition, *Johnson v. Plantation Gen. Hosp. Ltd. P'ship*, 641 So. 2d 58 (Fla. 1994) is easily distinguished as its holding rested on the Court's concern that "plaintiffs who are not permitted to aggregate their class action claims in circuit court have no alternative judicial forum in which they may seek effective relief." *Id.* at 60. Unlike Florida, Plaintiffs in Nevada have access to another court that is expressly empowered to handle Class Action suits. See Justice Court Rule of Civil Procedure Rule 23.

Plaintiffs also block quoted *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837 124 P.3d 530 (2005), relying on it to support the proposition that Nevada courts favor class action suit. Plaintiffs failed to inform the Court that the holding of *Shuette* was "we conclude that the district court abused its discretion in allowing the homeowners' case to proceed as a class action." *Id.* at 866, 124 P3d at 550. As set forth in *Shuette*, there are numerous hurdles that

⁴ *Thomas v. Liberty National Life Insurance Co.*, 368 So.2d 254 (Ala.1979); *Judson School v. Wick*, 494 P.2d 698 (1972)

1 Plaintiffs must clear prior to the proposed class being certified. To the extent Plaintiffs claim
2 that *Shuette* stands for the proposition that Class Actions are favored by Nevada courts, it does
3 not so hold. *Shuette* stands for the proposition the class action plaintiffs must satisfy all of the
4 requirements of Rule 23 prior to a court granting class status.

5 Plaintiffs cited *Thomas v. Liberty Nat. Life Ins. Co.*, 368 So. 2d 254, (Ala. 1979). In it
6 the court used ambiguity in the enabling statutes to allow class action plaintiffs to aggregate
7 their claims. The *Thomas Court* found that the enabling legislation that created the equivalent
8 of justice court in Alabama did not demonstrate that the legislature intended to "divest the
9 circuit court of subject matter jurisdiction in class actions." *Id.* at 257. The *Thomas Court*
10 relied on the District Court Committee Comments which stated:

13 The complexities of class actions and the jurisdictional limitations of the district
14 court make it necessary to withhold applicability of Rule 23 (to the district court).
15 Of course the circuit courts do not have jurisdiction for claims of less than
16 \$500.00 and the only sensible solution to this jurisdictional problem would be to
17 permit the aggregation of claims in the circuit court to exceed the \$500.00
18 limitation.

19 *Id.* The holding of the court in *Thomas, supra*, is that the enabling statutes for the competing
20 courts were in conflict, and the committee notes made it clear that they intended that class action
21 suits be maintained in the circuit courts as opposed to the district courts. Here, there is no such
22 legislative history. In fact, Justice Court Rule of Civil Procedure 23 conclusively demonstrates
23 that the Legislature and the Judiciary of the State of Nevada intended that Justice Courts are the
24 appropriate courts to maintain low dollar class action suits. If that is to change, the Nevada
25 Legislature is the appropriate body to change the Nevada Revised Statutes, not the Court. To
26 date, it is fair to interpret the Legislature and the Nevada Supreme Court's refusal to change the
27 rule as conclusive of this issue. Plaintiffs must dismiss and refile in Justice Court. Dismissal of
28 this suit will not leave Plaintiffs without a forum or remedy.

Plaintiffs have not demonstrated that aggregation of claims is permitted in Nevada, and the cases they rely on have been discredited, or are based on a lack of forum which is not the case in Nevada, the Court should therefore dismiss this matter.

D. Plaintiffs Must Elect Either a Waiver of the Deficiency, Or Damages Based on The Notices, They May Not Recover Both

In their Opposition, Plaintiffs argued that their damages total \$13,171.83. They calculated their damages by adding their claims for (1) the failure to send proper notice of the repossession and sale of the Vehicle \$6,330.28 with (2) their claim for a release of the deficiency \$6,841.55. Opposition p.5:16-6:10. When they added their claims for damages together with their claims for a release of the deficiency, Plaintiffs did not disclose to the Court that NRS 104.9625(4) prohibits them from stacking their damages as they did. NRS 104.9625(4) states:

4. A debtor whose deficiency is eliminated under NRS 104.9626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under that section may not otherwise recover under subsection 2 for noncompliance with the provisions of this part relating to collection, enforcement, disposition or acceptance.

Plaintiffs may not stack the deficiency together with their claim for damages for defective Notice. Thus, under no set of fact can they reach the jurisdictional floor of this Court. Accordingly Plaintiffs' FAC must be dismissed because the court does not have subject matter jurisdiction over this matter and "subject matter jurisdiction cannot be waived". *Vaile v. Eighth Judicial Dist. Court ex rel. County of Clark*, 118 Nev. 262, ___, 44 P.3d 506, 516 (2002); see also, *Salaiscooper v. Eighth Judicial Dist. Court ex rel. County of Clark*, 34 P.3d 509, 117 Nev. 892 (2001)(jurisdictional limits cannot be expanded by a stipulation amongst the parties). This Court has no other option but to dismiss the FAC as it does not have subject matter jurisdiction over the FAC.

E. Plaintiffs Cannot Use Rule 8 To Avoid Their Burden of Establishing Subject Matter Jurisdiction

In their Opposition, Plaintiffs argue that they have established their claims pursuant to Nevada Rule of Civil Procedure Rule 8. While it is true that NRCP Rule 8 only requires a complaint to place a defendant on notice of what the claim is, and that Plaintiffs are limited to filing claims "in excess of \$10,000", NRCP Rule 8 does not shield Plaintiffs from having to respond to United's motion to dismiss pursuant to NRCP Rule 12(b)(1). Rule 12(b)(1) allows defendants to seek dismissal of a claim or action for a lack of subject matter jurisdiction.

Although the defendant is the moving party in a motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the court's jurisdiction. As a result, the plaintiff bears the burden of proving that the court has subject matter jurisdiction over the pending case. *Morrison v. Beach City LLC*, 116 Nev. 34, 36-37, 991 P.2d 982, 983 (2000)(citing *Nelson v. Keefer*, 451 F.2d 289 (3d Cir.1971); 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.30 [5] (3d ed.1999) 15 *Moore's Federal Practice* § 102.107. When evaluating a plaintiff's claimed damages, there is no presumption that the claims are truthful and "the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill Publ'g Co. v. Gen. Tel. Elec., Inc.*, 594 F.2d 730, 733 (9th Cir. 1979). Indeed, the Court should "look beyond the damages claimed, and evaluate whether those damages were claimed in good faith." *Morrison*, 116 Nev. at 37-38, 991 P.2d at 984.

It is not enough to place a defendant on notice of a claim, the court must have subject matter jurisdiction over the claim to adjudicate the matter. Plaintiffs' attempts to stack their damages claims is expressly prohibited by the very statutes that they seek to invoke. Accordingly they admit that they have not satisfied the jurisdictional floor of the Court. NRCP

8 is not a shield to a challenge made under NRCP 12(b)(1). Plaintiffs have the burden to prove jurisdiction, they have not done so. Accordingly the FAC should be dismissed.

F. Plaintiffs Have Not Responded To or Distinguished The Cases Cited by United Regarding their Inability to File Claims under Any Statute other than NRS 104.9625

United asked in the alternative that the Court dismiss Plaintiffs' claims pursuant to NRCP 12(b)(5). The basis for the dismissal under NRCP12(b)(5) was that the statutory sections Plaintiff relies on do not create a separate causes of action. In the Motion, United demonstrated to the Court that there is no implied right in the statutes cited by Plaintiffs because the remedy for such alleged breaches is expressly provided elsewhere within the statutory framework, NRS 104.9625 & NRS 104.9627. Other Courts that have dismissed cases when, as here, a plaintiff asserts improper UCC claims based upon the repossession and disposition of collateral. *See Bassett v. Barnes Used Cars, Inc.*, 2013 WL 4506788, *5 (Ill. App. Ct. 2013) (upholding dismissal of plaintiff's claim for alleged violation of section 9-609 of the UCC (adopted in Nevada as NRS 104.9609) because that provision does not provide a debtor with a cause of action, and instead the debtor must assert a violation under section 9-625 (adopted in Nevada as NRS 104.9625). Plaintiffs have not addressed or distinguished *Basset*, accordingly they conceded that it is good law and on point. The Court should follow it and dismiss the complaint because it fails to state a claim upon which relief can be granted.

Moreover, the Nevada Supreme Court has repeatedly held that where the Legislature does not expressly provide civil remedies within a statutory framework, a party may not pursue a claim for an alleged violation of that statute absent an implied remedy. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958-60, 194 P.3d 96, 101-102 (2008); *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). Here, there is no implied right in NRS

1 104.9610 because the remedy is expressly provided elsewhere within the statutory framework.
2 NRS 104.9625 & NRS 104.9627. Consequently, dismissal is appropriate. *See Bassett, supra.*
3 If Plaintiffs truly want to pursue these claims, they must do so properly and state a proper cause
4 of action under NRS 104.9625 & NRS 104.9627. So far, they have failed to do so.

5 **II. CONCLUSION**

6
7 As set forth above, Plaintiffs' FAC does not reach the jurisdictional limit of the Court
8 and should therefore be dismissed pursuant to NRCP 12(b)(1). Even if the Court were to find
9 that Plaintiffs have reached the threshold jurisdiction of the Court, the Court should still dismiss,
10 with prejudice, Plaintiffs' First, Second, Fourth and Fifth claims for relief pursuant to NRCP
11 12(b)(5).

12 DATED this 26th day of May, 2015.

13
14
15 HOWARD & HOWARD ATTORNEYS PLLC

16 By: /s/ James A. Kohl

17 James A. Kohl, Nevada Bar No. 5692
18 Robert Hernquist, Nevada Bar No. 101616
19 3800 Howard Hughes Parkway, Suite 1000
20 Las Vegas, NV 89169

21 *Attorneys for Defendant United Federal Credit*
22 *Union*
23
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28

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 26th day of May 2015.

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ James A. Kohl

James A. Kohl, Nevada Bar No. 5692
Robert Hernquist, Nevada Bar No. 101616
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, NV 89169

*Attorneys for Defendant United Federal Credit
Union*

Howard & Howard Attorneys, PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
(702) 257-1483

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2015, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

Michael Lehnars, Esq.
Counsel for Plaintiff

I hereby certify that a true and correct copy of the foregoing was placed in a sealed envelope on the 26th day of May, 2015, postage prepaid thereon, in the United States Mail, addressed to:

Nathan R. Zeltzer, Esq.
12 W. Taylor Street
Reno, NV 89509
Co- Counsel for Plaintiff

and

Robert W. Murphy, Esq.
1212 SE 2ND AVENUE
Fort Lauderdale, FL 33316
Co- Counsel for Plaintiff

/s/ Terri D. Szostek
An Employee of Howard & Howard Attorneys PLLC

4822-4839-0692, v 1



Second Judicial District Court

State of Nevada

Washoe County

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CASE NO. CV15-00421

LUCIA CASTILLO ETAL VS. UNITED FEDERAL CREDIT UNION

DATE, JUDGE
OFFICERS OF
COURT PRESENT

APPEARANCES-HEARING

8/18/15

HONORABLE
ELLIOTT A.

SATTLER

DEPT. NO. 10

J. Martin

(Clerk)

M. Pava

(Reporter)

HEARING ON MOTION TO DISMISS

Robert Murphy, Esq. Michael Lehner, Esq. and Nathan Zeltzer, Esq. were present on behalf of the Plaintiffs. James Kohl, Esq. was present on behalf of the Defendant.

2:18 p.m. – Court convened.

COURT reviewed the procedural history of the case. Court would like the parties to address the suggestion that this is a class action, the Court has not declared that a class exists nor has there been any discussion of such.

Counsel Kohl further discussed the procedural history of the case. No parties have moved for certification of class plaintiffs.

Counsel Kohl discussed the certification of a class action further. Counsel Kohl argued in support of Defendant United Federal Credit Union's Motion to Dismiss First Amended Complaint filed April 28, 2015 (Motion) and stated that the damages in this matter do not amount to \$10,000.00 or more meaning District Court does not have jurisdiction.

Counsel Kohl discussed the Class Action Fairness Act.

Counsel Murphy replied and argued in opposition of the Motion. Counsel Murphy discussed the class identification in pleadings and the reply brief. He stated the Plaintiffs are unable to get complete relief at justice court level. Further discussed certification of class actions.

Counsel Kohl responded and further argued in support of the Motion. Counsel Kohl requested the case be dismissed and asked the Court to direct the Plaintiffs to proceed in Justice Court.

Parties indicated they are unaware of any other class action at this time.

COURT took Defendant United Federal Credit Union's Motion to Dismiss First Amended Complaint filed April 28, 2015 under advisement.

3:05 p.m. Court adjourned.

1 CODE 3370

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
7

8 LUCIA CASTILLO, an individual, and
9 EDWIN PRATTS, an individual,

10 Plaintiffs,

11 vs.

Case No. CV15-00421

Dept. No. 10

12 UNITED FEDERAL CREDIT UNION, a
13 federal credit union,

14 Defendants.
15 _____/

16 ORDER

17 Presently before the Court is a DEFENDANT UNITED FEDERAL CREDIT UNION'S
18 MOTION TO DISMISS FIRST AMENDED COMPLAINT ("the Motion") filed by Defendant
19 UNITED FEDERAL CREDIT UNION ("the Defendant") on April 28, 2015. Plaintiffs LUCIA
20 CASTILLO and EDWIN PRATTS (collectively "the Plaintiffs") filed an OPPOSITION TO
21 DEFENDANT UNITED FEDERAL CREDIT UNION'S MOTION TO DISMISS ("the
22 Opposition") on May 11, 2015. The Defendant filed a DEFENDANT UNITED FEDERAL
23 CREDIT UNION'S REPLY TO MOTION TO DISMISS FIRST AMENDED COMPLAINT ("the
24 Reply") on May 26, 2015. The Plaintiffs submitted the matter for the Court's consideration on June
25 9, 2015. The Court heard oral argument on August 17, 2015.

26 The Motion seeks dismissal of this case for lack of subject matter jurisdiction pursuant to
27 NRCP 12(b)(1). In the alternative, the Motion seeks dismissal for failure to state a claim upon
28 which relief may be granted pursuant to NRCP 12(b)(5).

1 The Motion contends the Plaintiffs fail to establish the jurisdictional amount of damages to
2 bring this action before the District Court. NRS 4.370(1)(b)¹ establishes original jurisdiction of the
3 Nevada Justice Courts to those actions where “the damage claimed does not exceed \$10,000.” The
4 District Courts “have original jurisdiction in all cases excluded by law from the original jurisdiction
5 of justices’ courts.” NEV. CONST. art. VI, § 6.

6 The Opposition avers the Plaintiffs satisfy the jurisdictional requirement because the amount
7 in controversy for class actions is measured in the aggregate. The Opposition relies of the Class
8 Action Fairness Act (CAFA), 28 U.S.C. §1332. The Opposition cites various federal cases to the
9 Court relying upon CAFA to support the argument that the Plaintiffs may aggregate their damages to
10 satisfy the jurisdictional amount. The Opposition further notes CAFA expanded limits of *federal*
11 diversity jurisdiction. The Opposition correctly notes the Supreme Court of the State of Nevada “has
12 not addressed the issue of whether class member claims can be aggregated to satisfy the jurisdiction
13 requirement for the District Court.” The Opposition 4:26-27. The Court finds a review of the record
14 does not reflect an order certifying a class action may be maintained. Accordingly, the Plaintiffs’
15 claim will be addressed as an independent cause of action.

16 The Motion contends dismissal is warranted because the Plaintiffs cannot recover damages in
17 excess of \$6,330.28. The Motion 8:5-24. The Opposition argues the proper amount in controversy
18 is \$13,171.83. The Opposition arrives at the higher value by adding damages pursuant to statutory
19 damages of \$6,330.28 to Plaintiffs’ calculated damages for failure to comply with NRS 482.516 of
20 \$6,841.55. The Opposition 5:25-27-6:1-3.

21 The Reply avers the Plaintiffs are precluded from combining the two calculations to satisfy
22 the jurisdictional requirement. The Reply contends the Plaintiffs must elect which recovery they are
23 seeking pursuant to NRS 104.9625. If a party seeks to have a deficiency eliminated under NRS
24 104.9626 he may “not otherwise recover under [NRS 104.9625(2)] for noncompliance with”
25 provisions relating to collection.” NRS 104.9625(4).

26 //

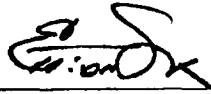
27 //

28 ¹ NRS 4.370 has been amended. The amendatory provisions will be effective January 1, 2017.

1 The Court finds the Plaintiffs are precluded from asserting the amount in controversy is
2 \$13,171.83. The Plaintiff will only be able to recover under one theory. Damages under either
3 theory of recovery does not exceed \$10,000.00.

4 IT IS HEREBY ORDERED DEFENDANT UNITED FEDERAL CREDIT UNION'S
5 MOTION TO DISMISS FIRST AMENDED COMPLAINT is GRANTED.

6 DATED this 27 day of October, 2015.

7 
8 ELLIOTT A. SATTLER
9 DISTRICT JUDGE
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1
2 CERTIFICATE OF MAILING

3 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
4 of the State of Nevada, County of Washoe; that on this 27 day of October, 2015, I deposited in
5 the County mailing system for postage and mailing with the United States Postal Service in Reno,
6 Nevada, a true copy of the attached document addressed to:

7 Nathan R. Zeltzer, Esq.
8 12 W. Taylor Street
9 Reno, NV 89509

10 Robert W. Murphy, Esq.
11 1212 SE 2nd Avenue
12 Fort Lauderdale, FL 33316

13 CERTIFICATE OF ELECTRONIC SERVICE

14 I hereby certify that I am an employee of the Second Judicial District Court of the State of
15 Nevada, in and for the County of Washoe; that on the 27 day of October, 2015, I electronically
16 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of
17 electronic filing to the following:

18 Michael C. Lehnars, Esq.
19 James A. Kohl, Esq.

20 
21 Sheila Mansfield
22 Administrative Assistant
23
24
25
26
27
28

James A. Kohl, Nevada Bar No. 5692

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Attorneys for Defendant United Federal Credit Union

SECOND JUDICIAL DISTRICT COURT

WASHOE COUNTY, NEVADA

LUCIA CASTILLO, an Individual, and
EDWIN PRATTS, an individual,

Plaintiffs,

vs.

UNITED FEDERAL CREDIT UNION, a
federal credit union,

Defendant.

Case No. CV15-00421

Dept. No. 10

NOTICE OF ENTRY OF ORDER

TO: ALL INTERESTED PARTIES

PLEASE TAKE NOTICE that an Order in the above captioned matter on the 27th day
of October, 2015, a copy of which is attached hereto as Exhibit 1.

Dated: October 30, 2015

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ James A. Kohl

James A. Kohl, Nevada Bar No. 5692

Robert Hernquist, Nevada Bar No. 101616

3800 Howard Hughes Parkway, Suite 1000

Las Vegas, NV 89169

*Attorneys for Defendant United Federal Credit
Union*

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated: October 30, 2015

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ James A. Kohl

James A. Kohl, Nevada Bar No. 5692
Robert Hernquist, Nevada Bar No. 101616
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Las Vegas, NV 89169

*Attorneys for Defendant United Federal Credit
Union*

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that pursuant to NRCP 5(b), that on October 30, 2015, I served a copy of the foregoing NOTICE OF ENTRY OF ORDER to all parties by using by regular mail postage pre-paid and/or via the EC/CMF system which served the following parties electronically:

Michael Lehnern, Esq.
Counsel for Plaintiff

I hereby certify that a true and correct copy of the foregoing was placed in a sealed envelope on the 30th day of October, 2015, postage prepaid thereon, in the United States Mail, addressed to:

Nathan R. Zeltzer, Esq.
12 W. Taylor Street
Reno, NV 89509
Co- Counsel for Plaintiff

and

Robert W. Murphy, Esq.
1212 SE 2ND AVENUE
Fort Lauderdale, FL 33316
Co- Counsel for Plaintiff

/s/ Stephanie T. George
An employee of Howard & Howard Attorneys PLLC

Howard & Howard Attorneys, PLLC
3800 Howard Hughes Pkwy., Suite 1000
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(702) 257-1483

EXHIBIT LIST

1. ORDER

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4822-4228-6634, v. 1

EXHIBIT 1

1 CODE 3370
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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
7

8 LUCIA CASTILLO, an individual, and
9 EDWIN PRATTS, an individual,

10 Plaintiffs,

11 vs.

Case No. CV15-00421

Dept. No. 10

12 UNITED FEDERAL CREDIT UNION, a
13 federal credit union,

14 Defendants.
15 _____/

16 ORDER

17 Presently before the Court is a DEFENDANT UNITED FEDERAL CREDIT UNION'S
18 MOTION TO DISMISS FIRST AMENDED COMPLAINT ("the Motion") filed by Defendant
19 UNITED FEDERAL CREDIT UNION ("the Defendant") on April 28, 2015. Plaintiffs LUCIA
20 CASTILLO and EDWIN PRATTS (collectively "the Plaintiffs") filed an OPPOSITION TO
21 DEFENDANT UNITED FEDERAL CREDIT UNION'S MOTION TO DISMISS ("the
22 Opposition") on May 11, 2015. The Defendant filed a DEFENDANT UNITED FEDERAL
23 CREDIT UNION'S REPLY TO MOTION TO DISMISS FIRST AMENDED COMPLAINT ("the
24 Reply") on May 26, 2015. The Plaintiffs submitted the matter for the Court's consideration on June
25 9, 2015. The Court heard oral argument on August 17, 2015.

26 The Motion seeks dismissal of this case for lack of subject matter jurisdiction pursuant to
27 NRCP 12(b)(1). In the alternative, the Motion seeks dismissal for failure to state a claim upon
28 which relief may be granted pursuant to NRCP 12(b)(5).

1 The Motion contends the Plaintiffs fail to establish the jurisdictional amount of damages to
2 bring this action before the District Court. NRS 4.370(1)(b)¹ establishes original jurisdiction of the
3 Nevada Justice Courts to those actions where “the damage claimed does not exceed \$10,000.” The
4 District Courts “have original jurisdiction in all cases excluded by law from the original jurisdiction
5 of justices’ courts.” NEV. CONST. art. VI, § 6.

6 The Opposition avers the Plaintiffs satisfy the jurisdictional requirement because the amount
7 in controversy for class actions is measured in the aggregate. The Opposition relies of the Class
8 Action Fairness Act (CAFA), 28 U.S.C. §1332. The Opposition cites various federal cases to the
9 Court relying upon CAFA to support the argument that the Plaintiffs may aggregate their damages to
10 satisfy the jurisdictional amount. The Opposition further notes CAFA expanded limits of *federal*
11 diversity jurisdiction. The Opposition correctly notes the Supreme Court of the State of Nevada “has
12 not addressed the issue of whether class member claims can be aggregated to satisfy the jurisdiction
13 requirement for the District Court.” The Opposition 4:26-27. The Court finds a review of the record
14 does not reflect an order certifying a class action may be maintained. Accordingly, the Plaintiffs’
15 claim will be addressed as an independent cause of action.

16 The Motion contends dismissal is warranted because the Plaintiffs cannot recover damages in
17 excess of \$6,330.28. The Motion 8:5-24. The Opposition argues the proper amount in controversy
18 is \$13,171.83. The Opposition arrives at the higher value by adding damages pursuant to statutory
19 damages of \$6,330.28 to Plaintiffs’ calculated damages for failure to comply with NRS 482.516 of
20 \$6,841.55. The Opposition 5:25-27-6:1-3.

21 The Reply avers the Plaintiffs are precluded from combining the two calculations to satisfy
22 the jurisdictional requirement. The Reply contends the Plaintiffs must elect which recovery they are
23 seeking pursuant to NRS 104.9625. If a party seeks to have a deficiency eliminated under NRS
24 104.9626 he may “not otherwise recover under [NRS 104.9625(2)] for noncompliance with”
25 provisions relating to collection.” NRS 104.9625(4).

26 //

27 //

28 ¹ NRS 4.370 has been amended. The amendatory provisions will be effective January 1, 2017.

1 The Court finds the Plaintiffs are precluded from asserting the amount in controversy is
2 \$13,171.83. The Plaintiff will only be able to recover under one theory. Damages under either
3 theory of recovery does not exceed \$10,000.00.

4 IT IS HEREBY ORDERED DEFENDANT UNITED FEDERAL CREDIT UNION'S
5 MOTION TO DISMISS FIRST AMENDED COMPLAINT is GRANTED.

6 DATED this 27 day of October, 2015.

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8 _____
9 ELLIOTT A. SATTLER
10 DISTRICT JUDGE
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 27 day of October, 2015, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

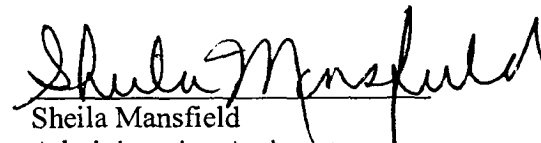
Nathan R. Zeltzer, Esq.
12 W. Taylor Street
Reno, NV 89509

Robert W. Murphy, Esq.
1212 SE 2nd Avenue
Fort Lauderdale, FL 33316

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 27 day of October, 2015, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Michael C. Lehnert, Esq.
James A. Kohl, Esq.


Sheila Mansfield
Administrative Assistant

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20 Attorneys for Plaintiffs

21 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
22 IN AND FOR THE COUNTY OF WASHOE

23 o0o

24 LUCIA CASTILLO, an individual, and
25 EDWIN PRATTS, an individual,

Case No. CV15-00421

Dept. No. 10

Plaintiffs,

CLASS REPRESENTATION
(Arbitration Exempt)

vs.

26 UNITED FEDERAL CREDIT UNION, a
27 federal credit union

MOTION TO AMEND ORDER

28 Defendant.
_____/

29 Plaintiffs, Lucia Castillo and Edwin Pratts, (herein Castillo), by and through
30 undersigned counsel file the following motion to Amend this Court's Order dismissing
31 Castillo's complaint pursuant to Nev. R. Civ. Pro. 59(e). This motion is made and based upon
32 the pleadings on file herein and the Memorandum of Points and Authorities attached hereto.

1 **1. Background**

2 On March 3, 2015 Castillo filed the instant class action against United Federal Credit
3 Union ("UFCU"). Castillo alleged claims for relief under Part VI of the Uniform Commercial
4 Code ("UCC"), NRS 104.9601, *et sequi*. Specifically, Castillo's complaint alleges:

- 5 A. On or about March 11, 2014, Castillo purchased a 2012 Kia Forte.
- 6 B. UFCU held the secured note in the 2012 Kia.
- 7 C. On December 18, 2014, UFCU repossessed the Kia.
- 8 D. After taking the Kia, UFCU sent Castillo a notice of sale that failed to
9 comply with the requirements of NRS 104.9610 et. seq.
- 10 E. Castillo's complaint alleged that UFCU's notice of sale was defective
11 under UCC 9 for the following reasons:
- 12 I. UFCU failed to state that the Plaintiffs as debtors were entitled to
13 an accounting of any unpaid indebtedness and the charge, if any,
14 for said accounting, as required by NRS 104.9613(1)(d) and
15 104.9614(1)(a).
- 16 II. UFCU failed to provide the proper disclosure to Plaintiffs of the
17 obligation of Plaintiffs to pay any deficiency arising from the sale
18 of the Castillo Vehicle in a manner contrary to NRS 104.9616.
- 19 F. Castillo's complaint alleged that UFCU's notice of sale was defective
20 under NRS 482.516 for the following reasons:
- 21 I. UFCU failed to disclose the place at which the Castillo Vehicle
22 would be returned to Plaintiffs upon redemption and reinstatement
23 in contravention of NRS 482.516(2)(d).
- 24 II. UFCU failed to designate the name and address of the person to
25 whom payment must be made for redemption or reinstatement in
26 contravention of NRS 482.516(2)(e).

1 Based upon these facts, Castillo alleged that they were entitled to statutory damages
2 pursuant to NRS 104.9625(3)(b)¹.

3 **2. Jurisdiction**

4 Castillo's complaint contained claims for monetary relief, a claim for injunctive relief to
5 discharge any deficiency that may be claimed by UFCU and a claim for injunctive relief
6 prohibiting the reporting of derogatory credit. Specifically, Castillo's statutory damages were
7 \$6,330.28.

8 However, in their prayer for relief, Castillo requested "[A]n order preliminarily and
9 permanently enjoining UFCU from engaging in the practices alleged herein". Castillo alleged in
10 paragraph seven that "On or about January 21, 2015, subsequent to the repossession of the
11 vehicle, UFCU sent notice to the Class Representatives that their car had been sold and that
12 \$6,841.55 was due and owing to UFCU." This claim for injunctive relief would bar UFCU
13 from attempting to collect its \$6,841.55 deficiency.

14 In paragraph 30 of the complaint, Castillo alleged in relevant part that "UFCU has
15 maintained a practice and policy of reporting to the three national consumer reporting agencies,
16 to wit: Equifax Credit Information Services, Inc., Experian, Inc., and TransUnion, LLC". In
17 paragraph 33 Castillo alleged "The Class Representatives and the class members will suffer
18 irreparable injury if UFCU is not enjoined from the future wrongful collection and reporting of
19 adverse information to the CRAs." In their prayer for relief, Castillo requested "[A]n order of
20 mandatory injunction directed to UFCU to remove any adverse credit information which may
21 have been wrongfully reported on the consumer reports of the class members."

22 *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 130 P.3d 1280, (Nev. 2006)
23 held that in cases seeking both injunctive relief and monetary damages under the TCPA, the
24 district court has jurisdiction over all portions of the complaint, even if the damages sought fail
25 to meet the district court's monetary jurisdictional threshold. 122 Nev. at 321. When the district

26
27 ¹ NRS 104.9625 gives two mutually exclusive options for damages. NRS 104.9625(2)
28 allows recovery of actual damages. In the alternative, one may recover statutory
damages under NRS 104.9625(3)(b) which is the credit service charge plus ten
percent of the purchase price.

1 court denied Edward's injunctive relief, it did not thereby lose its jurisdiction to consider
2 Edwards' claims for monetary damages. Id 122 Nev. at 325.

3 **3. UFCU's Motion to Dismiss**

4 This Court's October 27, 2015 Order states that the Plaintiffs are precluded from
5 asserting the amount in controversy is \$13,171.83. The Plaintiff will only be able to recover
6 under one theory¹.

7 This "double recovery" argument was first raised by UFCU in its reply. It was not part
8 of its motion. The motion to dismiss only referenced the statutory damages. It did not discuss
9 the deficiency.

10 In their opposition, the Plaintiffs did explain why their individual claim for \$6,330.28
11 in statutory damages can be added to the value of eliminating UFCU's deficiency of
12 \$6,841.55².

13 The Plaintiffs could not respond to the Reply's new double recovery argument. If they
14 had been able to, they would have parsed the applicable statute, which is NRS 104.9625.
15 Subsection 4 provides:

16 (4) A debtor whose deficiency is eliminated under NRS 104.9626 may
17 recover damages for the loss of any surplus. However, a debtor or secondary
18 obligor whose deficiency is eliminated or reduced under that section may not
19 otherwise recover under subsection 2 of this section for noncompliance with
the provisions of this part relating to collection, enforcement, disposition or
acceptance³.

20 Subsection 2, in turn provides:

21 (2) Subject to subsections 3, 4 and 6, a person is liable for damages in the
22 amount of any loss caused by a failure to comply with this article. Loss caused
23 by a failure to comply may include loss resulting from the debtor's inability to
24 obtain, or increased costs of, alternative financing.

25
26 ¹ Order Page 3.

27 ² See *JTH Tax vs. Frashier* 624 F.3d 635 (4th Cir. 2010) reversing lower court that
failed to consider not only the amount of money damages requested but also the
injunctive relief the Plaintiff sought when determining jurisdiction.

28 ³ Emphasis supplied

Subsection two, which is the focus of subsection four's election of remedies rule, pertains to actual damages. It is subsection three (b) of NRS 104.9625 that sets forth the statutory damages that were plead in the amended complaint:

(3)(b) 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 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price.

Not only was UFCU's election of remedies a false statement to this Court of the applicable law, it was also a new argument raised in a reply brief.

4. Relief Sought

Nev. R. Civ. Pro. 59(e) provides that a motion to alter or amend the judgment shall be filed no later than 10 days after service of written notice of entry of the judgment. The Plaintiffs are requesting a substantive alteration of the Order of Dismissal. The Plaintiffs are not requesting the mere correction of a clerical error, or relief of a type wholly collateral to the Order of Dismissal.

The Supreme Court has noted that Fed. R. Civ.P. 59(e) was adopted "to mak[e] clear that the district court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450, 102 S.Ct. 1162, 1166, 71 L.Ed.2d 325 (1982)

Plaintiffs bear a heavy burden in bringing this motion. A manifest error may not be demonstrated by the disappointment of the losing party. Rather, it is the wholesale disregard, misapplication, or failure to recognize controlling precedent. *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) citing *Sedrak v. Callahan*, 987 F.Supp. 1063, 1069 (N.D.Ill.1997).

While these decisions refer to the Federal Rules, Our Supreme Court, in *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005), recognized that federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules.

1 **5. Evidence that the Plaintiffs have met their burden**

2 The District Court has original jurisdiction over requests for injunctive relief. This is the
3 law so long as such claim was not improperly or fraudulently made solely to invoke state district
4 court's jurisdiction. *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 130 P.3d 1280,
5 (Nev. 2006).

6 UFCU has never alleged that the Plaintiffs' request for injunctive relief was fabricated to
7 invoke jurisdiction.

8 The October 27, 2015 Order references UFCU's double recovery argument that was
9 first raised in the reply. This argument is a false statement of law to this Court because the
10 double recovery, as specified in the statute, only applies to actual damages. It does not apply to
11 statutory damages.

12 **6. Conclusion**

13 Relief under Nev. R. Civ. Pro. 59(e) is warranted for two reasons. First, only the
14 District Court has original jurisdiction for injunctive relief. It can therefore hear cases where the
15 amount in controversy is less than \$10,000 where there is a good faith request for injunctive
16 relief. That is the case here.

17 Second, the Order of dismissal references UFCU's double recovery argument. That
18 argument misstates what NRS 104.9625 says, and it was never raised in its initial motion,
19 depriving the Plaintiff of parsing the statute in a responsive pleading.

20 For those reasons, the Order of Dismissal should be set aside.

21 **Affirmation**

22 **Pursuant to NRS 239B.030**

23 The Undersigned does hereby affirm that the preceding document filed in the case herein
24 does not contain the social security number of any person.

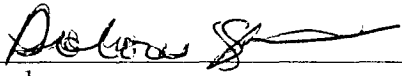
25 Dated: This 5 day of November, 2015

26 By: 

27 Michael Lehnert, Esq.
28 429 Marsh Ave.
 Reno, Nevada 89509
 Nevada Bar Number 003331

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Michael Lehnert, Esq., and that on the 5 day of Nov, 2015 I deposited for mailing with postage prepaid a true and correct copy of the foregoing Motion for Reconsideration to James A. Kohl, Esq., Robert Hernquist, Howard & Howard Attorneys, PLLC 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, Nevada 89169.



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*Attorneys for Defendant United Federal Credit Union***SECOND JUDICIAL DISTRICT COURT****WASHOE COUNTY, NEVADA**LUCIA CASTILLO, an Individual, and
EDWIN PRATTS, an individual,

Plaintiffs,

vs.

UNITED FEDERAL CREDIT UNION, a
federal credit union,

Defendant.

Case No. CV15-00421

Dept. No. 10

**DEFENDANT UNITED FEDERAL
CREDIT UNION'S OPPOSITION TO
PLAINTIFFS' MOTION TO AMEND
ORDER**

Defendant United Federal Credit Union ("United") submits the following Opposition to the Motion to Amend Order filed by Plaintiffs on November 5, 2015:

I. PRELIMINARY STATEMENT

Plaintiffs have not met their burden in establishing jurisdiction. This Court correctly granted United's Motion to Dismiss and properly dismissed Plaintiffs' First Amended Complaint (the "FAC"). This Court's October 27, 2015 ruling was procedurally proper and legally sound, and there is no valid basis to amend the Order. Consequently, Plaintiffs' Motion to Amend Order should be denied in its entirety.

II. PROCEDURAL HISTORY

Plaintiffs filed the initial Complaint on March 3, 2015. (Complaint filed 3/3/2015, on file with the Court). United filed a Motion to Dismiss on March 31, 2015, and in response Plaintiffs filed their First Amended Complaint ("FAC") on April 9, 2015. Plaintiffs' FAC asserts three claims for relief: (1) violation of NRS 104.9610; (2) violation of NRS 104.9611; and (3) violation of NRS 104.9614.

United then filed its Motion to Dismiss First Amended Complaint on April 28, 2015. Therein, United argued (1) that the FAC should be dismissed pursuant to NRCP 12(b)(1) on the grounds that Plaintiffs' potential damages recovery could not meet the monetary jurisdictional requirements of Nevada's district courts and (2) that the FAC should be dismissed pursuant to NRCP 12(b)(5) on the grounds that the FAC failed to state a claim upon which relief may be granted. Plaintiffs filed an Opposition on May 11, 2015 and United filed its Reply on May 26, 2015. This Court then conducted a hearing on August 17, 2015. (8/17/2015 Hearing Tr., attached as Exhibit 1).

On October 27, 2015, this Court issued an Order granting United's motion to dismiss the FAC. The Court determined Plaintiffs' potential damages do not exceed the jurisdictional threshold of \$10,000. The Court rejected Plaintiffs' argument that the jurisdictional amount in potential class actions is measured in the aggregate, and also ruled that Plaintiffs could not recover damages under both NRS 104.9625 and NRS 482.516. (Order at 2:14-15, 3:1-2). Instead, as long recognized by courts in Nevada, "Plaintiffs will only be able to recover under one theory." (*Id.* at 3:1-2). Plaintiffs' potential damages under either theory of recovery do not exceed \$10,000, and the FAC was therefore dismissed for lack of subject matter jurisdiction. (*Id.*).

On November 5, 2015, Plaintiffs filed their Motion to Amend Order.

III. LAW AND ARGUMENT

A. PLAINTIFFS WOULD NOT BE ENTITLED TO DOUBLE RECOVERY, AND THEREFORE THEIR CLAIMS DO NOT SATISFY THIS COURT'S JURISDICTIONAL REQUIREMENTS

Plaintiffs argue they are entitled to a double recovery in this case and may seek statutory damages as well as an order eliminating Plaintiffs' obligation to pay a deficiency to United. The law says otherwise. On numerous occasions, the Nevada Supreme Court has held that double recoveries are not permitted in Nevada. Likewise, the text and comments to Article 9 of the UCC also contain express language indicating an intent to limit debtors to only one recovery.

A plaintiff can recover only once for a single injury even if the plaintiff asserts multiple legal theories: "satisfaction of the plaintiff's damages for an injury bars further recovery for that injury." *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. Adv. Op. 43, 245 P.3d 547, 549 (2010). In *Elyousef*, the Nevada Supreme Court "expressly adopted" the double recovery doctrine, which has been recognized in Nevada for some time. *Id.* Pursuant to the double recovery doctrine, "there can be only one recovery of damages for one wrong or injury." *Id.* (internal citations omitted). Thus, "[a] plaintiff may not recover damages twice for the same injury simply because he or she has two legal theories." *Id.*, quoting 25 C.J.S. *Damages* § 5 and citing *Greenwood Ranches, Inc. v. Skie Const. Co.*, 629 F.2d 518 (8th Cir. 1980) and 47 AM. JUR. 2d *Judgments* § 808 (2006) (noting the principle that an injured party should not be able to recover more than once for the same wrong) and RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 25 (2000)). The double recovery doctrine prohibits a plaintiff's further recovery for the same injury. *Id.*, citing *Phelps v. State Farm Mut. Auto. Ins.*, 112 Nev. 675, 680, 917 P.2d 944, 948 (1996) (requiring

1 insurance carrier to pay for insured's already compensated damages would violate policy
2 against double recovery); *see also Grosjean v. Imperial Palace*, 125 Nev. 349, 370, 212 P.3d
3 1068, 1084 (2009) (holding the double recovery doctrine barred a plaintiff's state law tort
4 claim when the plaintiff had already recovered for the same injuries on a federal § 1983
5 claim, and noting that when a plaintiff asserts claims under different legal theories "she is not
6 entitled to a separate compensatory damage award under each legal theory" but instead "is
7 entitled to only one compensatory damage award on one or both theories of liability.").

9 Article 9 of the UCC also expresses an intent to limit debtors to one recovery in the
10 event of noncompliance or default. See NRS 104.9625, which governs remedies for a
11 secured party's failure to comply with Article 9. If a deficiency is eliminated pursuant to the
12 UCC the debtor may not also seek damages, because that would be a double recovery. NRS
13 104.9625, NRS 104.9626 & Comment 3 to UCC 9-625 ("The last sentence of [NRS
14 104.9625(4)] *eliminates the possibility of double recovery* or other over-compensation
15 arising out of a reduction or elimination of a deficiency under Section 9-626, based on
16 noncompliance with the provisions of this Part relating to collection, enforcement,
17 disposition, or acceptance") (emphasis added).
18
19

20 Here, Plaintiffs seek elimination of the deficiency pursuant to both Article 9 and NRS
21 482.516. (Opposition to Motion to Dismiss at 5:4-8; FAC at ¶ 9). However, both alleged
22 violations are based upon the same operative facts—the content of the notice provided to
23 Plaintiffs after they breached their contract and the vehicle was repossessed. The UCC is
24 very clear that if Plaintiffs were to eliminate the deficiency pursuant to NRS 104.9626, they
25 cannot seek additional damages. NRS 104.9625; NRS 104.9626; Comment 3 to UCC 9-625;
26
27 4 WHITE SUMMERS & HILLMAN, *Uniform Commercial Code*, § 34-14 (6th ed.) (explaining
28

1 that double recoveries should be denied in consumer cases too, and that a debtor should not
2 be permitted to obtain a reduction in her deficiency under 9-626 and still recover statutory
3 damages under 9-625(c)).

4 Likewise, allowing Plaintiffs to eliminate the deficiency based upon NRS 482.516
5 and then recover monetary damages based upon NRS 104.9625 would also constitute an
6 impermissible double recovery. *Elyousef*, 245 P.3d at 549. Plaintiffs should not be permitted
7 to recover more than what is allowed by the UCC, merely because they have a separate
8 statutory framework. *Id.* See also Comment 3 to UCC 9-625 (“to the extent that damages in
9 tort compensate the debtor for the same loss dealt with by this Article, the debtor should be
10 entitled to only one recovery”).
11

12 Plaintiffs’ effort to obtain double recovery also flouts the way damages are calculated
13 in commercial cases. The United States Bankruptcy Court for the District Court of Nevada
14 addressed this exact same argument, and held that a debtor cannot obtain double recovery. *In*
15 *re Schwalb*, 347 B.R. 726, 756-57 (Bankr. D. Nev. 2006) (assessing consumer penalty for
16 title pawn transaction of vehicles that were consumer goods, and permitting debtor to set off
17 amount of penalty against pawnbroker’s secured claim to vehicles). The court limited the
18 debtor to one recovery, which it granted as an offset to the deficiency owed to the creditor:
19

20
21 There are two possible outcomes of the conclusion that Ms. Schwalb is entitled
22 to a statutory remedy under NEV. REV. STAT. § 104.9625.3. The first is that the
23 violation leads to an independent damages claim, which in turn would not
24 affect the allowed amount of Pioneer’s claims. Instead, the violation would
25 give rise to the conclusion that Pioneer must pay damages to Ms. Schwalb’s
26 chapter 13 estate for distribution to her creditors. The second outcome would
27 be that the amount of the statutory penalty would be applied to reduce
28 Pioneer’s allowed claims. In other words, the second method would allow Ms.
Schwalb to recoup the amount of the statutory penalty against Pioneer’s claim,
reducing the amounts she would have to pay to Pioneer under the plan.

1 Here, recoupment is appropriate. The statutory penalty arises out of the same
2 transactions and occurrences that gave rise to Pioneer's claims for money lent.
3 As a result, an assertion that a penalty is appropriate under Section 9-625(b)
4 would have to be joined as a compulsory counterclaim in any litigation
5 regarding the repayment or collection of Pioneer's loan claims. . . .

6 A reduction of Pioneer's claims by the amount of the statutory penalty adjusts
7 and sets the amount owed by Ms. Schwalb.

8 *Id.* Importantly, the court in *Schwalb* expressly rejected the notion that a debtor had a
9 separate and independent damages claim arising from a violation of Article 9. Instead, the
10 statutory damages were used to offset the deficiency. The court noted that this is the
11 common approach taken in cases that have addressed this issue. *Id.*, citing *Stedman v. Webb*
12 (*In re Stedman*), 264 B.R. 298, 303 (Bankr. W.D.N.Y. 2001) (chapter 13 debtors allowed to
13 offset damages for violation of duty to act in a commercially reasonable manner against
14 secured creditor's claim); *Hartford-Carlisle Say. Bank v. Shivers*, 566 N.W.2d 877, 882-84
15 (Iowa 1997) (indicating that in cases of de minimis violations of Article 9, proper remedy is
16 to deduct debtor's damages against any deficiency left after foreclosure and sale); *Jones v.*
17 *Morgan*, 228 N.W.2d 419, 423 (Mich. Ct. App. 1975) (damages awarded to a debtor for a
18 creditor's commercially unreasonable conduct may be used to reduce amounts owed by the
19 debtor to the creditor).

20 The approach taken in *Schwalb* is instructive here, and reminds us that even if
21 Plaintiffs are right and they are entitled to a double recovery of both statutory damages and
22 elimination of the deficiency, the total value of this lawsuit is still well under the \$10,000
23 limit. Plaintiffs are mistakenly stacking the amount of their statutory damages claim and
24 adding it to the amount of United's counterclaim for a deficiency. Those values represent the
25 range of potential damages in favor of either party—not the total value of the case. The
26 *Schwalb* court noted that the various claims all arose from the same transaction—thus the
27
28

1 court simply assesses the value of each party's claims. Here, Plaintiffs contend they are
2 entitled to statutory damages in the amount of \$6,330.28. In turn, United claims that
3 Plaintiffs owe a deficiency in the amount of \$6,841.55. That is the total range of damages in
4 this case. In a best case scenario, Plaintiffs can win a judgment in the amount of \$6,330.28.
5 And in a best-case scenario for United, Plaintiffs' claims will be rejected and United will
6 obtain a deficiency judgment against Plaintiffs for \$6,841.55. Alternatively, a court could
7 rule in favor of both parties on some of their claims, offset their respective damages, and
8 award United \$511.27 (the deficiency of \$6,841.55 less Plaintiffs' statutory damages claim
9 of \$6,330.28). And so on. No party in this case could possibly recover more than \$10,000,
10 and Plaintiffs cannot satisfy the jurisdictional threshold by "stacking" the amount of their
11 claim with the amount of United's anticipated counterclaim for a deficiency. *See Snow v.*
12 *Ford Motor Co.*, 561 F2d 787, 789 (9th Cir. 1977) (the amount in controversy for purposes
13 of federal diversity jurisdiction is determined without regard to any setoff or counterclaim to
14 which defendant may be entitled); *Windsor Mount Joy Mut. Ins. Co. v. Johnson*, 264 F. Supp.
15 2d 158 (D.N.J. 2003) (compulsory counterclaims cannot be aggregated when it is not
16 possible that both parties will receive sums that they seek).

20 Double recoveries are not permitted in Nevada. And even if they were, the
21 jurisdictional threshold is not met here because Plaintiffs' argument is not based on the total
22 value of their own claims—instead it is based upon the total amount of each party's
23 respective claim against the other. However, no party can possibly recover more than
24 \$10,000. This Court does not have jurisdiction and therefore the Motion to Amend Order
25 should be denied.
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B. PLAINTIFFS HAVE NOT ASSERTED A PROPER CLAIM FOR INJUNCTIVE RELIEF, AND THEREFORE JURISDICTION CANNOT BE INVOKED ON THAT BASIS

Plaintiffs also argue dismissal was improper because the FAC includes two request for injunctive relief. However, Plaintiffs cannot invoke jurisdiction merely by claiming entitlement to injunctive relief—if that were the standard, any litigant could avoid justice court by engaging in the tactic of asserting vague and improper requests for injunctive relief. Plaintiffs could never obtain the injunctive relief described in their prayer for relief and therefore the Motion to Amend Order should be denied. (See FAC at p. 14).

In their Motion Plaintiffs state that the request “[f]or an order preliminarily and permanently enjoining United from engaging in the practices alleged herein” as set forth in the FAC entitles them to injunctive relief. (Motion to Amend Order at 3:8-9; FAC at p. 14). However, “obey the law” injunctions such as this are not allowed and could never be obtained by Plaintiffs. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1226 (C.D. Cal. 2007) (“blanket injunctions to obey the law are disfavored”); *Holland Furnace Co. v. Purcell*, 125 F. Supp. 74, 83 (W.D. Mich. 1954) (courts will not issue injunctions on mere apprehension that party will not do their duty or will not follow the law).

Plaintiffs also apparently seek injunctive relief as to whether or not Plaintiffs owe a deficiency to United. (See Motion to Amend Order at 3:10-13). But that is not injunctive relief—it is merely a judgment. Moreover, even if that were a proper claim for injunctive relief, it is not ripe as United has not yet plead a counterclaim for the deficiency. The relief described in Plaintiffs’ prayer for relief is better described as a declaratory judgment on United’s potential counterclaim for a deficiency. See NRS 33.010 & NRCP 57. Courts routinely make findings and enter judgments regarding the respective monetary positions

1 between litigants, including deficiencies. *See* NRCP 52 & NRCP 54. In other words, any
2 court can make findings at trial as to whether or not Plaintiffs owe a deficiency—those
3 findings do not constitute an injunction. *See* NRCP 65. Furthermore, Plaintiffs would not be
4 entitled to an injunction forcing United to comply with any such judgment until well after
5 entry of such judgment. United would of course be obligated to comply with the court’s
6 determination, but Plaintiffs could not obtain an injunction until after United failed to
7 comply accordingly. *See* NRS 22.010 *et seq.*

9 The FAC also requests, “an order of mandatory injunction directed to [United] to
10 remove any adverse credit information which may have been wrongfully reported on the
11 consumer reports of the class members.” (FAC at p. 14). First, this case is not a class action
12 and cannot be considered as such. Second, there has been no judicial determination that
13 anything wrongful has been reported by United—thus rather than seeking a true injunction,
14 what Plaintiffs are really asking for here is an order compelling United to fulfill its legal
15 obligations in the event judgment is ultimately entered in favor of Plaintiffs. Requests such
16 as this are routinely rejected. *MGM Studios, supra*. For instance, one court recently
17 dismissed a similar request for injunctive relief where a debtor sought an injunction that
18 would preclude the creditor from reporting adverse information to the credit reporting
19 bureaus in the event Plaintiff prevailed on its other claims—the court noted that parties have
20 an independent duty to comply with the law and a court’s ruling, and an injunctive
21 compelling future performance with some future court order is improper and premature.
22 *Banaszak v. CitiMortgage, Inc.*, 2014 WL 4489497 at *8 (E.D. Mich. 2014) (“courts have
23 repeatedly held that injunctions that simply require a defendant to ‘obey the law’—such as
24 the one requested by Banaszak—are impermissible.”).

1 In *Banaszak*, the court found that plaintiff was seeking an “impermissible injunction”
2 that improperly sought to have a party “obey the law” and comply with future orders of the
3 court. *Id.*, citing *Equal Emp’t Oppor. Comm’n v. Wooster Brush Co. Emps. Relief Ass’n*, 727
4 F.2d 566, 576 (6th Cir. 1984); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 240–41
5 (2d Cir. 2001); *Elend v. Basham*, 471 F.3d 1199, 1209–10 (11th Cir. 2006). Plaintiffs cannot
6 obtain an injunction based upon their speculation that United will not comply with a future
7 judicial order. *Guerrero v. Gates*, 110 F. Supp. 2d 1287, 1291 (C.D. Cal. 2000) (finding
8 injunctive relief is “unavailable where the plaintiff’s claim of future injury is merely
9 speculative”); *Aero Corp., SA v. United States*, 38 Fed. Cl. 237, 241 (Fed. Cl. 1997) (holding
10 that “plaintiff’s speculative claims are not sufficient to demonstrate irreparable harm,
11 especially in light of the tenet that contracting officials are presumed to act in good faith”);
12 *Goldie’s Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) (“Speculative
13 injury, however, does not constitute irreparable injury”).

14 Plaintiffs rely upon *Edwards*, but that case is distinguishable. In *Edwards*, the
15 plaintiff had asserted an affirmative statutory claim for injunctive relief pursuant to the
16 federal Telephone Consumer Protection Act. *Edwards v. Emperor’s Garden Rest.*, 122 Nev.
17 317, 130 P.3d 1280 (2006). Here, Plaintiffs have not asserted a similar independent statutory
18 claim for injunctive relief—instead; the FAC merely contains language in the prayer for
19 relief requesting the issuance of an impermissible injunction. (See FAC at p. 14).
20 Furthermore, the Plaintiffs could not assert a statutory claim for injunctive relief. Article 9
21 does not contain any language authorizing the “injunction” Plaintiffs apparently seek. See
22 NRS 104.9625. The vehicle repossessed from Plaintiffs has already been collected and
23 disposed of, and therefore Plaintiffs could not obtain an injunction as provided in NRS
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1 104.9625(1)—such an injunction would be moot because the alleged violation occurred long
2 ago.

3 Plaintiffs requested “injunctive relief” is not colorable and even if it were, it is not
4 ripe. A request for impermissible injunctive relief is not sufficient to impose jurisdiction.
5 Accordingly, the Motion to Amend Order should be denied.
6

7 **C. UNITED DID NOT PRESENT “NEW ARGUMENTS” IN ITS REPLY BRIEF**

8 On a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter
9 jurisdiction, the plaintiff bears the burden of proving that the court has subject matter
10 jurisdiction over the pending case even though the defendant is the moving party. *McCauley*
11 *v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001). In its Motion to Dismiss the FAC,
12 United presented arguments that the Plaintiffs could not possibly meet the \$10,000 threshold
13 based on the relief requested in the FAC’s prayer for relief. Importantly, the FAC’s prayer
14 for relief does not contain any language or requested relief seeking an elimination of the
15 deficiency under either NRS 104.9626 or NRS 481.516. (*See* FAC at p. 14). In their
16 Opposition, Plaintiffs argued that United’s analysis was flawed and that Plaintiffs could
17 meet the \$10,000 jurisdictional requirement by combining Plaintiffs’ statutory damages
18 claim with the value of United’s deficiency claim. United then filed its Reply, where it
19 argued that Plaintiffs could not recover damages as they proposed, because that would
20 amount to double recovery which is not authorized by Nevada law or the UCC.
21
22

23
24 This was not a “new argument”, as portrayed by Plaintiffs. Instead, it was a response
25 to Plaintiffs’ attempt to meet its burden of establishing jurisdiction. Plaintiffs did not meet
26 that burden in either the FAC or in their Opposition, and United was entitled to point out
27 both of those failures in its briefs.
28

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated: November 23, 2015

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ James A. Kohl

James A. Kohl, Nevada Bar No. 5692

Robert Hernquist, Nevada Bar No. 101616

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Howard & Howard Attorneys, PLLC

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that pursuant to NRCP 5(b), that on October 30, 2015, I served a copy of the foregoing DEFENDANT UNITED FEDERAL CREDIT UNION'S OPPOSITION TO PLAINTIFFS' MOTION TO AMEND ORDER to all parties by using by regular mail postage pre-paid and/or via the EC/CMF system which served the following parties electronically:

Michael Lehnars, Esq.
Counsel for Plaintiff

I hereby certify that a true and correct copy of the foregoing was placed in a sealed envelope on the 23rd day of November, 2015, postage prepaid thereon, in the United States

Mail, addressed to:

Nathan R. Zeltzer, Esq.
12 W. Taylor Street
Reno, NV 89509

Robert W. Murphy, Esq.
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/s/ Stephanie T. George
An employee of Howard & Howard Attorneys PLLC

Howard & Howard Attorneys, PLLC

EXHIBIT LIST

1. 8/17/2015 Hearing Transcript

Howard & Howard Attorneys, PLLC

4814-6489-4763

EXHIBIT 1

1 CODE: 4185
MARIAN S. BROWN PAVA, CCR #169
2 Hoogs Reporting Group
435 Marsh Avenue
3 Reno, Nevada 89509
(775) 327-4460
4 Court Reporter

5

6 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 THE HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE
--oOo--

9

10 LUCIA CASTILLO, et al., Case No. CV15-00421

11 Plaintiffs, Dept. No. 10

vs.

12

UNITED FEDERAL CREDIT UNION,

13

Defendant.

14

15

16 TRANSCRIPT OF PROCEEDINGS
HEARING

17

18 Monday, August 17, 2015
Reno, Nevada

19

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23

24

1 APPEARANCES:

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- 000 -

RENO, NEVADA, MONDAY, AUGUST 17, 2015, 2:17 P.M.

- o O o -

THE COURT: This is Castillo and Pratts versus United Federal Credit Union, CV15-00421. The plaintiffs are represented by Mr. Murphy, Mr. Lehnerns, and Mr. Zeltzer.

It's my understanding that Mr. Murphy is arguing the motion; correct?

MR. MURPHY: Yes, Your Honor.

THE COURT: Good afternoon to all of you gentlemen.

MR. LEHNERS: Good afternoon, Your Honor.

MR. MURPHY: Good afternoon, Judge.

THE COURT: Mr. Kohl, three against one. Mr. Kohl is here on behalf of United Federal Credit Union. Good afternoon, Mr. Kohl.

MR. KOHL: Good afternoon, Your Honor.

THE COURT: We are here on the April 28, 2015,
file-stamped Defendant United Federal Credit Union's Motion to
Dismiss First Amended Complaint.

The Court has received and reviewed that document.

Further, the Court has received and reviewed the May 11, 2015, file-stamped Opposition to Defendant United Federal Credit Union's Motion to Dismiss, and the May 26th, 2015, file-stamped Defendants -- Defendant United Federal Credit Union's Reply to

1 Opposition to Motion to Dismiss First Amended Complaint.

2 I do have the documents, the actual hard copies here.
3 I never print out exhibits. But if counsel ever wants to refer
4 to a specific exhibit, I do have them on my computer. And I
5 have reviewed them in anticipation of today's hearing. One
6 moment.

7 I just had to make sure I pulled up the correct file.
8 So we are ready to go.

9 The Court entered an order on July 29th of 2015,
10 regarding the motion to dismiss. And one of the issues that I
11 wanted the parties to address was the suggestion that this is a
12 class action. I know in the Plaintiff's Opposition to the
13 Motion to Dismiss they continually refer to themselves as
14 class -- the class representative.

15 But the Court, as I noted in my order, has not
16 declared that a class actually exists. And the Court hasn't
17 been asked to declare whether or not a class exists under
18 Nevada Rule of Civil Procedure 23, nor has there been any
19 discussion of that. So that was one of the reasons why it
20 struck me as somewhat odd, as I reviewed the pleadings, that
21 there would be a suggestion that we would be aggregating -- not
22 aggregating, that's the wrong word -- but we would be adding
23 all of the class members together.

24 This isn't a class action. All it is is one action,

1 with one party -- actually, two parties, but regarding one
2 contract. So I'm not quite sure where we're going to be
3 regarding the request to have it certified as a class.

4 Further, as I've reviewed the pleadings, I'm not quite
5 sure that I would certify this as a class action if I were
6 asked to do so. And so we have that NRCP 23 issue to discuss.
7 And then we will also discuss how that would shape the Court's
8 decision.

9 The Court would note that the defendants pointed the
10 Court to Justice Court Rule of Procedure 23. And in that
11 Justice Court Rule of Procedure, there is the possibility of
12 class actions at the Justice Court level, as well. And so I am
13 just simply waiting to hear from the parties.

14 Mr. Kohl, I know that you are the moving party, but as
15 you pointed out in your motion, the plaintiff bears the burden
16 of proving that the Court has subject matter jurisdiction. You
17 cite McCauley, M-c-C-a-u-l-e-y, versus Ford Motor Company,
18 264 F.3d 952, a Ninth Circuit case from 2001, for that
19 proposition. But I still think it's your motion, and so I will
20 allow you to argue the motion first.

21 Clearly the issues that the Court is primarily
22 concerned with deal more with the plaintiffs than the motion
23 practice itself. So with that, I will turn to you, Mr. Kohl.
24 Go ahead.

1 MR. KOHL: Yes, Your Honor. First, I would just like
2 to address the briefing of the motions, and then get to the
3 issue that you raised in your order.

4 As you correctly pointed out, the motion was filed.
5 And we filed it under both 12(b)(1) and 12(b)(5). The motion
6 relates to the First Amended Complaint that was filed by the
7 plaintiff.

8 The only thing that has occurred so far in this case
9 is we had a Complaint that was filed. We filed an initial
10 motion to dismiss, because we objected to the form of that
11 Complaint. The plaintiffs then filed their First Amended
12 Complaint, and this motion followed. So that is all that has
13 occurred procedurally in this case.

14 And you've correctly pointed out nobody has moved, at
15 this point, for certification of a Class C. Plaintiffs have
16 alleged it in their Complaint that they are class
17 representatives, but there has been no formal motion made to
18 the Court for approval of a class, or to have these particular
19 plaintiffs certified as class plaintiffs.

20 THE COURT: And as a practical matter, I'm not quite
21 sure how the Court would find that -- that these two plaintiffs
22 would be able to represent the class, the similarly situated
23 people. How they would go about notifying those people as they
24 would be required to do under Chapter -- or, excuse me,

1 NRCP 23, or any of their other responsibilities. And that
2 assumes that I decided there was a class that we needed to
3 notify, that they would be the class representatives. As it is
4 right now it's just a person who took out a loan, and a person
5 who guaranteed a loan, as far as I'm concerned.

6 MR. KOHL: That's correct, your Honor. That is what
7 is presently before the Court. And we agree with you
8 wholeheartedly that this is not a case that is ripe for -- to
9 be brought as a class, because of the disparate proofs that are
10 going to be put on to the Court. Each individual plaintiff
11 will have to come and demonstrate which type of damages they
12 would like to elect, and then prove up their individual
13 damages. So we don't think it's appropriate for class
14 certification.

15 But before you even get to that, Your Honor, is the
16 question of the jurisdiction of this Court to even entertain
17 this case. And under 12(b)(1) we've moved properly -- and we
18 have shown the Court that there is no jurisdiction here. There
19 is another court that they can go to. We're not kicking them
20 to the street without any remedy.

21 But this is, I think, a very important question. And
22 that's why 12(b)(1) is in place. And that's why our
23 case law -- and we cited to you the Morrison case and the
24 Thornhill case from the Ninth Circuit. But they talk about

1 what happens when you get a 12(b)(1) motion. The burden gets
2 flipped. The plaintiff has to demonstrate to the Court that
3 there is subject matter jurisdiction over this case.

4 And they haven't done that. They have come back to
5 you and alleged that under the comments -- not Rule 8 itself,
6 but the comments of Rule 8 -- they're entitled to go do
7 discovery after the fact. But that doesn't cure the defect of
8 jurisdiction. If there is no jurisdiction of this Court,
9 anything that happens, other than this motion, would be
10 defective.

11 THE COURT: Well, and it's not an issue where the
12 damages are undetermined at this point, where there may be pain
13 and suffering or something along those lines. As I've read the
14 motion practice, the defendants argue best-case scenario that
15 the plaintiffs are entitled -- and I'm not saying you're
16 suggesting they should get it, but it's basically give or take
17 62-, \$6300, up to about \$6400, if memory serves me correctly.

18 The plaintiffs counter that with an argument that
19 they're entitled to \$13,000. I know in your reply you point
20 out that that, in essence, would be double-dipping and was
21 precluded by statute, and that they could either elect one or
22 the other of the numbers that they want to aggregate in order
23 to come to their amount that's over \$10,000.

24 But in the big picture this isn't a situation where

1 there's questionable damages. It seems to me that either I
2 would find that it's the \$6,000 and, therefore, it goes down to
3 Justice Court, arguably, or I give them both the cancellation
4 of the debt and they add that as a damage. At least -- and I'm
5 paraphrasing, but that's basically one of their damages issue,
6 \$6,000, cancellation of the obligation, plus the other \$6,000
7 that's owed.

8 Accurate or inaccurate, Mr. Kohl?

9 MR. KOHL: That's accurate as to what they're arguing.

10 THE COURT: I understand. I'm not expecting you to
11 agree with it, Mr. Kohl.

12 MR. KOHL: Yes, that's the argument.

13 THE COURT: It would be a short hearing if you did.

14 MR. KOHL: Yeah. The problem with that argument is
15 that one of those remedies that is set forth under 104 at
16 965 -- and let me just back up. They've alleged three causes
17 of action. They're all under Article 9 of the UCC. They have
18 one for 104.9610 one for 104.9611, and one for 104.9614.
19 That's set forth in their First Amended Complaint.

20 So they are only suing under Article 9 of the UCC.
21 They have specific remedies under Article 9 of the UCC, and
22 that's 104.9625, which says "Remedies For Breach." That's
23 basically the title of that particular section.

24 So it gives you an either/or alternative. You can

1 take the damages or -- the two ways we set out in the brief for
2 the -- basically, the interest and the cost of the loan or the
3 interest and the cost of the replacement, however you calculate
4 that, somewhere in the \$6,000 range. I believe plaintiffs came
5 back with \$6800. But at any rate, looking at that as -- and
6 it's singular. Nobody has put it above \$7,000, which doesn't
7 get to the jurisdiction of this Court.

8 So under the remedy section of Article 9, you may
9 select those damages, or you may select not to have the
10 deficiency enforced against you, but you don't get both. So
11 there's no way you get to \$13,000. You get to 6,000, low 6,000
12 or high 6,000, depending how you calculate the damages. But
13 there is one recovery, and one recovery only. There's no
14 double dipping under Article 9 of the UCC.

15 THE COURT: Well, it seems to me that that's just
16 fair. Fair has never been the way that the Court has been
17 required to interpret statutes. It's not very often, but it's
18 either one or the other. That seems to be reasonable to me,
19 and a reasonable interpretation of what the drafters of the
20 Uniform Commercial Code, and the Nevada Legislature adopting
21 the Uniform Commercial Code, would have thought of. Why would
22 you get both damages and to have the debt wiped out? That's an
23 aside.

24 MR. KOHL: I completely agree with you, Your Honor.

1 THE COURT: I might be wrong, but --

2 MR. KOHL: I think when we hit upon the word, "it's
3 fair," then that's really the principle bedrock of the UCC, is
4 it is to control commercial transactions to be reasonable to
5 both sides, both the lenders and the debtors, and to set forth
6 rules that everybody understands on a going-forward basis. So
7 that brings us back, again, to jurisdiction.

8 And this Court's jurisdiction is limited by the Nevada
9 State Constitution. And it says that the legislature is going
10 to control jurisdiction. Our legislature says anything up to
11 \$10,000 is Justice Court, anything over is District Court. And
12 we are not at \$10,000 in this case, no matter how you cut it.
13 It's six-one, six-four, six-eight, not even \$7,000.

14 THE COURT: Thank you, Mr. Kohl. Is there something
15 else you wanted to say? I thought you were finished. Go
16 ahead. I wasn't trying to cut you off.

17 MR. KOHL: I appreciate that. I also wanted to bring
18 up their -- the reliance on 28 USC 1332, or otherwise known as
19 CAFA. We don't have CAFA.

20 They sued in Nevada State Court. We have Nevada
21 statutes that control this court. Nevada has set forth the
22 jurisdiction. CAFA has no applications in this courtroom. The
23 cases they rely on are all post-CAFA, where the legislature of
24 the United States, otherwise known as Congress, changed the

1 jurisdictional rules for federal court. We have our own
2 legislature. They've met multiple times. They have chosen not
3 to amend our jurisdictional rules. So there's no ability to
4 rely on a post-CAFA federal case or CAFA itself to create
5 jurisdiction for this Court.

6 We also discussed and gave you reason why the cases
7 that they cited were not applicable. The Alabama case was
8 based on the legislature of Alabama saying, "Our intention is
9 this court is the court that is supposed to have" -- when I say
10 "this court," I mean the Alabama court that was originally
11 looking at it. That was the Court where the legislature wanted
12 it to be.

13 In Florida they didn't have any other remedy. There
14 was no Justice Court Rule of Procedure to allow them to put
15 together a class in Justice Court. So their cases are easily
16 distinguished on that basis.

17 Even if you were to find that somehow you had
18 jurisdiction, you would then move to the 12(b)(5) portion of
19 our motion, which we have pointed out, again, they have sought
20 three particular causes of action. They sought remedies under
21 those. But they're improperly pled -- pled, Your Honor.
22 Excuse me. They should have filed under 9625. They filed
23 under all of the other ones.

24 That is a failure to create a cause of action. It

1 would be no different than if I had rear-ended your bailiff,
2 punctured his lungs, he had serious injuries. Ultimately,
3 three-and-a-half-years later he sues me. He can put together a
4 Complaint that says, "Yes, satisfies Rule 8." Puts a cause of
5 action together. But he doesn't have the legal right to bring
6 the claim. That's what 12(b)(5) is all about. Do you have a
7 legal right to bring a claim?

8 The cases we've cited from Nevada say, if it's not in
9 the statute, you don't have the right. They didn't cite the
10 statutes that have the right. They cited the wrong statute.
11 Therefore, the Complaint is completely improperly pled, no
12 matter how you slice it.

13 But the most important --

14 THE COURT: Would they have -- let's assume worst case
15 scenario, Mr. Kohl. At least at that point I do have the
16 discretion to allow them to amend their pleadings to conform,
17 at least to the statutes, or I could give them direction to
18 amend the pleadings. There's just one cause of action.

19 If I understand your argument, both in your pleadings
20 and today, worst-case scenario, your clients are exposed to one
21 cause -- one single cause of action. And you don't believe
22 that they are. But in the worst possible scenario, if I deny
23 all of your other arguments, but leave something left, it
24 should be one cause of action under Chapter 104 against your

1 client.

2 MR. KOHL: Your Honor, that's a fair summary of what's
3 in the pleadings, although -- again, I can't stress this
4 enough -- you don't have jurisdiction in this matter.

5 THE COURT: Like I said, Mr. Kohl, I know you're not
6 agreeing with that, but that's your worst-case scenario --
7 let's put it that way -- assuming that I find I do have
8 jurisdiction.

9 MR. KOHL: Yes, Your Honor.

10 THE COURT: And, Ms. Reporter, CAFA stands for the
11 Class Action Fairness Act. It is an acronym, I believe.

12 MR. KOHL: Thank you, Your Honor.

13 THE COURT: Thank you. Mr. Kohl -- or, excuse me,
14 Mr. Murphy.

15 MR. MURPHY: May it please the Court, Judge. Judge,
16 we have -- I think I want to -- Your Honor, if I could address,
17 I guess, the first thing you pointed out to counsel, and it was
18 in your order, about having the plaintiffs referred to as class
19 representatives in the papers we filed.

20 We have a punitive class, and it's been my practice to
21 refer to the plaintiffs in a punitive class as class
22 representatives. I didn't -- it's not something that I've been
23 questioned about before. I will change the pleadings from here
24 on out, Judge.

1 THE COURT: No, Mr. Murphy, I'm not suggesting you've
2 got to change your practice or change your pleadings. It's
3 just, this is just a unique, discrete kind of issue. It's not
4 that I've -- I would say all the time, you can't refer to your
5 clients as "class representatives."

6 But here, I just am struggling with the thought that
7 this is a class action. And, therefore, while I -- you know,
8 referring to them as "class representatives," it seems a little
9 bit more of a stretch, let's put it that way. That's not a
10 legal analysis, that's just an observation.

11 MR. MURPHY: No, I understand, Judge. And perhaps I
12 need to kind of present a little bit more of the groundwork on
13 those.

14 This is not a unique case. These Article 9 lawsuits
15 are commonplace. There's one previously in this District, in
16 front of --

17 MR. LEHNERS: Judge Stiglich.

18 MR. MURPHY: Judge Stiglich.

19 THE COURT: Stiglich.

20 MR. MURPHY: Stiglich granted final approval of class
21 settlement against Greater Nevada Credit Union in December of
22 2013. I was co-counsel together with Mr. Lehnerns in that case.

23 I litigate these cases throughout the country. I have
24 a hearing tomorrow in Las Vegas, an Article 9 class. And I'm

1 not telling you that to -- I'm just informing the Court this is
2 not a unique case.

3 The issue that I thought was unique -- and I credit
4 counsel for arguing the position about the jurisdictional
5 issue. And the reason why it's important to correct him is
6 that once we get through this motion to dismiss, we hope that
7 this case moves very fast and very quick to discovery.

8 It's very simple. It's typically just giving
9 numerosity disclosures. Because Nevada is an absolute bar
10 state with respect to the ability for the secured creditor to
11 recover a deficiency.

12 And typically motions for class certification are not
13 difficult because it's all based on forms. There are no mini
14 trials required, because we can determine by the class members'
15 finance agreements what the statutory damages are. So it's
16 essential for the credit union to come up with an argument
17 upfront.

18 Judge, we had five causes of action against the credit
19 union, two of which were in equity. Our three causes of action
20 with the UCC were with respect to the failure of the credit
21 union to provide -- to ensure that every aspect of disposition
22 and collateral was reasonable, under Section 104.9610, the
23 failure to send reasonable authenticated notification,
24 deficient collateral under 104.9611, and lastly, violation of

1 NRS 104.9614, with respect to failure to provide the
2 statutorily mandated notice of sale.

3 Specifically under 9-614 of the UCC, they're required
4 to disclose a right to accounting and the cost of any of same.
5 If they fail to provide that required information under the
6 comment section for 9-614, the notice is defective as a matter
7 of law.

8 Missing anything required notice under Article 9 makes
9 this a matter for summary judgment, both for the named
10 plaintiffs and any class members once we get to that point --
11 if we get to that point, obviously.

12 But we also have the application of another Nevada
13 Statute, which is NRS 482.516, where the secured creditor of
14 the credit union was supposed to disclose the location of the
15 vehicle. That's under 482.516(2)(d). And they're also to
16 designate the payee for the redemption for reinstatement under
17 NRS 482.516.3.

18 These two additional factors -- this other aspect of
19 the Nevada law is not part of the UCC. And if they fail to
20 provide that required information, bad things happen to a
21 secured creditor, like the credit union. They can't enforce
22 the deficiency.

23 Because those two required pieces of information were
24 not in the notice, the notice is unreasonable. So, therefore,

1 it fits within nine oh, 96110, and it's not a reasonable
2 authenticated notification, therefore, it's under 9611.

3 We're not asking for multiple damages under -- in this
4 lawsuit with respect to each of these violations. Our remedy
5 is under -- are under 9615, as counsel pointed out, but we have
6 the two other counts.

7 We have the count for common law equitable relief,
8 where we're trying to get the deficiencies wiped out, and we're
9 also under the UCC, the UCC under civil remedy section, an
10 injunctive relief or equity, I should say.

11 The Justice Court --

12 THE COURT: Wouldn't the Justice Court have the same
13 authority to grant the equitable relief --

14 MR. MURPHY: No, sir.

15 THE COURT: -- under the UCC?

16 MR. MURPHY: No, sir.

17 THE COURT: Why not?

18 MR. MURPHY: Review of NRS 4.370 does not give
19 equitable jurisdiction to Justice Courts, including injunctive
20 relief.

21 And it's also under the Constitution, under Article 6,
22 Section 6. And specifically, Justice Courts and actions arise
23 from the contract and recovery of money only. If the sum
24 claimed -- this of interest -- does not exceed \$10,000.

1 And, you know, the legislature did meet and they did
2 change the jurisdictional limit. We filed before the
3 jurisdictional limit was increased to 15,000. At the time we
4 filed the lawsuit, Judge, we had -- we were at the \$10,000
5 limit. But the Justice Court doesn't have equitable
6 jurisdiction.

7 Assume just for its argument that Justice Courts did
8 have jurisdiction -- which we don't believe they have equitable
9 jurisdiction for the two counts that we've alleged -- counsel
10 in the brief, and also to this Court, was arguing that we're
11 not entitled to double dip. I think that's what the reference
12 was.

13 Wiping out a deficiency is distinct and separate from
14 getting statutory damages. In the brief, counsel referenced
15 9625. And if you read that section very carefully, it says:
16 "A debtor whose deficiency is eliminated under NRS 104.926 may
17 recover damages for the loss of any surplus. However, a debtor
18 or secondary debtor whose deficiency is eliminated or reduced
19 under that section may not otherwise recover under subsection 2
20 of this section for noncompliance with the provisions of this
21 part."

22 And he cited that in his brief. Subsection 2 is
23 actual damages. We're into Subsection 3, statutory damages.
24 And it is a major difference between the two. The reason why

1 statutory damages is something that the class is entitled to is
2 because the class is not -- we're focusing on the actions of
3 the secured creditor. And under 96.5, in the Comments section,
4 which has been adopted by the Nevada legislature, it
5 specifically says, "Any noncompliance with the requirements of
6 Article 9 with respect to a consumer goods transaction results
7 in statutory damages regardless of the injury that has been
8 sustained."

9 And the reason is, is because the legislature
10 recognized, along with when Visa was adopted everywhere, that
11 because they have extraordinary powers to dispose of someone's
12 vehicle, their personal property -- in some instances a mobile
13 home -- they need to do things exactly right. And that's why
14 the case law -- and, Judge, the case law on this point goes
15 from a statutory violation for not having a telephone number on
16 a notice of sale, to failure to disclose the date and time and
17 location of a public sale, to what we have in this case, the
18 failure to disclose a right to an accounting. When we add up
19 the statutory damages and we add to that the claimed
20 deficiency, we are well in excess of the jurisdictional limit
21 for this Court. But we don't have to get there, because we
22 have the apple claims. And counsel is unaware of any authority
23 that allows the Justice Court to have jurisdiction of a claim
24 in equity.

1 In the brief we reference the Class Action Fairness
2 Act. And I am well aware the Class Action Fairness Act has
3 nothing to do with the state courts of this state. However,
4 every case that was cited by counsel in his initial brief that
5 were federal related -- and they were all federal cases --
6 about aggregating damages to get federal jurisdiction were
7 before the Class Action Fairness Act was enacted.

8 There were no federal cases after the Class Action
9 Fairness Act was enacted that is allowing plaintiffs -- excuse
10 me -- that deal with whether plaintiffs can aggregate claims.
11 They can. In the case law it's clear. You can aggregate
12 claims in federal court to get federal jurisdiction under Class
13 Action Fairness Act. There's no other cases --

14 THE COURT: But it goes without saying, we're not in
15 Federal court.

16 MR. MURPHY: Oh, I know that, Judge. But if you
17 don't --

18 THE COURT: The last I checked.

19 MR. MURPHY: No, we're not. We're not, Judge.

20 THE COURT: The last time I checked on who paid my
21 salary.

22 MR. MURPHY: But the reason why I raised it, Judge,
23 was not -- was just because the case law that was cited, the
24 Federal case law, was all pre-CAFA 2005. No longer really

1 relevant.

2 So we're having to deal with the issue of whether this
3 Court has jurisdiction, and whether or not this Court can
4 aggregate claims, and there is no case law on that point in
5 this state that I'm aware of.

6 However, in the brief -- and I'm going to reference
7 this part of the brief. This is important. This is going to
8 dovetail back to the equitable issue that I just brought up.

9 In the brief that was filed by the credit union --

10 THE COURT: The opening brief or the reply brief?

11 MR. MURPHY: The opening brief.

12 THE COURT: Okay.

13 MR. MURPHY: Excuse me. The reply brief, Judge. And
14 it's under C. The cases cited by plaintiffs are
15 distinguishable from the case at bar.

16 And I am going to repeat their argument, but not --
17 because I want to distinguish it.

18 The case that plaintiffs cite at length in their
19 opposition, Johnson versus Plantation Hospital, LTD -- blah,
20 blah, blah -- says, "Equally distinguishable as this holding
21 resident, the Court's concern that plaintiffs were not
22 permitted to aggregate their class action claim in circuit
23 court, had no alternative judicial forum in which they may seek
24 effective relief. Unlike Florida, plaintiffs in Nevada have

1 access to another court that's expressly empowered to handle
2 class action suits."

3 If we don't have the ability to bring a claim for
4 equitable relief in justice courts, do we have the ability to
5 get full relief for the named plaintiffs and the punitive class
6 which they represent? The answer is no.

7 But you don't even have to get to that point, because
8 we believe we properly presented a case. We've got
9 jurisdiction by virtue of the statutory damages and the claims
10 to wipe out the deficiency that is being claimed by the credit
11 union.

12 Judge, I know I've mispronounced the State of Nevada
13 repeatedly.

14 THE COURT: That's okay. You might have seen me
15 flinch once or twice, but that's okay.

16 MR. MURPHY: They've been kind enough to repeatedly
17 tell me I do it wrong.

18 THE COURT: Mr. Murphy, let me explain a couple of
19 things to you. Number one, my mother is from Long Island, New
20 York, and so I've heard "Nevada" mispronounced once or twice.

21 I've lived here pretty much my whole life, so I have
22 this odd reflexive reaction when people mispronounce the name
23 of my state. And many people who have lived here their whole
24 lives do, as well.

1 But I told someone recently in court -- it was a young
2 attorney from Las Vegas, and I corrected her on the that way
3 she pronounced "Nevada." And I thought about it after I had
4 done it. I had done it once or twice before. But I corrected
5 her. And at the conclusion of the proceedings, I apologized to
6 her, because I thought it was unjudicial of me to correct her
7 in the way she pronounced the name of this state. And I also
8 promised her that she would be the last person that I ever
9 corrected for doing that.

10 So you owe me no apology. And if I flinched a little
11 bit -- I have been --

12 MR. MURPHY: Judge, I didn't see you flinch, I just --

13 THE COURT: -- trying to control it. No, I've worked
14 on my poker face, but --

15 MR. MURPHY: I know that they're doing it behind me.

16 THE COURT: No. It's funny. It's one of those things
17 that -- Nevada and Oregon. I grew up in Nevada. I went to
18 college and law school in Oregon. And people from, I would
19 say, east of Wendover, Nevada say, "Ne-vah-da" and
20 "Or-ree-gon". And neither one of them are correct if you live
21 in those states.

22 So don't worry about it, Mr. Murphy. It has nothing
23 to do with my decision. And I thought I was being really good,
24 because I didn't say anything about it.

1 MR. MURPHY: So, Judge, if it makes any difference, at
2 the final approval hearing in December 2013, I purposely
3 avoided using the word. And I think the Judge caught on. If
4 I'm not mistaken, she caught on and she goes, "And what state
5 are we in?"

6 I'm paraphrasing what happened, but I'm working on it,
7 Judge.

8 THE COURT: It's okay. You know, it was funny one.
9 One of the attorneys that I did correct last year in a
10 foreclosure -- or a petition for judicial review on a
11 foreclosure mediation proceeding -- he was from New York
12 somewhere, somewhere in New York City. I can't remember where.
13 No, it was from New Jersey. And he kept saying, "Ne-vah-da,"
14 "Ne-vah-da," "Ne-vah-da." And I finally said something to him
15 about it. And then at some later point he actually said
16 "Ne-va-da."

17 And I looked at him and said, "See, you can say it
18 correctly."

19 And he said, "Yeah, but only if I don't think about
20 it." I didn't understand what that meant.

21 So don't worry, Mr. Murphy. I appreciate the effort.
22 Let's put it that way. You're from "Flar-i-dah."

23 MR. MURPHY: We're crackers.

24 THE COURT: Okay. Is there anything else you want to

1 add, Mr. Murphy?

2 MR. MURPHY: No, Your Honor.

3 THE COURT: I just want to make sure that when you say
4 that you are not able to get complete relief at the Justice
5 Court level, the argument there is, is that because Justices
6 Courts are creatures of statute, and only have the authority
7 granted to them by the Nevada legislature, and there is no
8 equitable relief available at Justice Court, you can't get full
9 relief. Is that what the argument is?

10 MR. MURPHY: I think that's an accurate --

11 THE COURT: To paraphrase.

12 MR. MURPHY: Yes, sir.

13 THE COURT: I'm a good paraphraser.

14 MR. MURPHY: Yes, sir.

15 THE COURT: I try and keep your arguments in my head
16 the best way possible for me. But you can't get equitable
17 relief and, therefore, Justice Court doesn't work for you.

18 MR. MURPHY: Nor can we get, theoretically, Judge --
19 let's say, for example, we have class members whose claims are
20 over \$10,000. How is their claim dealt with? I mean --

21 THE COURT: From a practical standpoint, how do we
22 find the -- your argument is, once we get over this hurdle the
23 next thing we do is we conduct discovery, we find all of our
24 class members, and begin the process there.

1 MR. MURPHY: It's like any other class action, Judge.
2 The thing that has kept us from doing that is, we can't do the
3 discovery conference until this is resolved. We've asked for
4 an opportunity to do that. And they said, "No." We want to
5 move the discovery forward.

6 We just asked -- the class is compiling their business
7 records. It's not difficult. They know who got the notice.
8 It's a form notice. It's generated, I believe, out of
9 Michigan, and the notices are all the same. Its commonality
10 and typicality are established. Numerosity, we've got to get
11 more than 60 or 70 people, and we're pretty confident we are
12 going to get that. We wouldn't be here today, arguing today,
13 if it was less than that. They would have told us.

14 And so compiling the classes actually would occur
15 after certification. Certification is just a function of, you
16 know: Did everyone get the same form? How many people you
17 got? Is this a superior way to do it? And the case law on
18 this is pretty well developed.

19 THE COURT: You know, you remind me, Mr. Kohl, of a --
20 of an attorney that I had in here yesterday, a very skilled
21 attorney on a product -- or a construction defect case. And
22 the plaintiff's attorney on the construction defect case just
23 kept telling me how easy the case was, how simple it was, and
24 how straightforward it was. And so I appreciate the argument

1 that you are making that from your standpoint creating a class
2 is easy. I'm guessing the defendants, as the defendants in the
3 construction defect case, thought it might be a little more
4 cumbersome, difficult, and unreasonable.

5 So the people who are pitching a certain proposition
6 generally think that it's easy and easily accomplished. And I
7 appreciate that the other side generally thinks that it's
8 cumbersome and burdensome, so --

9 MR. MURPHY: Well, I --

10 THE COURT: But that's the nature of litigation.

11 MR. MURPHY: Mr. Kohl doesn't get paid to lie down.
12 But when I say "easy," I meant in the sense this is not a case
13 of a bunch of moving parts. We've got discrete notices. The
14 class is easily identified, and it's just a respective notice.
15 It's just simply a mail-out notice.

16 And a striking number of these cases end up getting
17 resolved, Judge, for a lot of reasons.

18 THE COURT: I'm just checking something. Hold on.

19 I was just reviewing the Amended Complaint and the
20 Prayer For Relief, just so the parties know what I was looking
21 at. If you're sitting there wondering, "What's he staring at
22 on his computer?"

23 Okay. Mr. Kohl, go ahead.

24 MR. KOHL: A couple of points, Your Honor. First of

1 all, with respect to the ease and simplicity, they're alleging
2 that each sale was unreasonable under the UCC. So you are
3 going to have to dig down and look at every sale of every
4 vehicle to determine whether or not that's reasonable. That's
5 one of their causes of action as pled today.

6 So if you think that's going to be easy and that
7 they're going to be the same and everybody is going to be
8 aligned, is absolutely incorrect. Because there were, however
9 many potential class members, that many sales. Each one is its
10 own separate burden of proof.

11 But with respect to remedies, they've suggested that
12 they are unable to get adequate relief in Justice Court because
13 there's no ability to get injunctive relief in Justice Court.

14 One of their statutory remedies is a disallowance of
15 the deficiency. If you put that order in place, that is
16 effectively an injunction against my client from collecting
17 those fees. If the Court says, "You may not collect those
18 fees," and we go out and try to do it, we would have been in
19 violation of a court order subject to sanction motions,
20 contempt, et cetera.

21 So there clearly is a remedy they're looking for in
22 Justice Court, which is the cessation of collection activities,
23 and that's called out for in the UCC.

24 THE COURT: Well, are they arguing that future action

1 would also be enjoined?

2 MR. KOHL: If they sued us, and if they -- excuse me.
3 They did sue us. If they prevail one of the remedies that
4 they're asking for from this Court is to stop further
5 collection proceedings on the deficiency. That's a statutory
6 right that they have.

7 So Justice Court is empowered to enforce the statutes
8 of this jurisdiction. Justice Court could very easily put in
9 an order that says you may not go after the deficiency under
10 this statute. That's enforceable. That would stop any
11 collection proceeding on a going-forward basis. That's the
12 remedy they're asking you for right here right now. So to say
13 that they don't have that remedy in Justice Court is incorrect.
14 It's just, how is the cat skinned?

15 With respect to CAFA and the -- basically saying that
16 the pre-CAFA cases are no longer good law, that's not accurate.
17 As Your Honor is well aware, under Dingwall, our Rules of
18 Procedure mirror the Federal Rules of Procedure. We look to
19 the Federal Rules of Procedure for guidance when we don't have
20 it. We don't have much guidance under Rule 23. We have a
21 plethora of cases in federal court. We don't have CAFA --

22 THE COURT: Rule 23 or Rule 12?

23 MR. KOHL: Both.

24 THE COURT: Okay. No, but when you said under Rule

1 23 --

2 MR. KOHL: That's a class action.

3 THE COURT: No, I understand what it is. But we've
4 got -- we've got plenty of law in Nevada under NRCP 23.

5 MR. KOHL: But none that discuss the stacking of
6 cases, which is what they are trying to do here. The minute
7 they -- clearly, I mean, that's what they -- they know they're
8 under the jurisdiction of the Court. And that's their response
9 that, well, we can stick them all together and go.

10 And with respect to that, Your Honor, Kentucky also
11 follows the federal rules number for number, almost. The same
12 as ours. We have a few variations. And that issue has come up
13 in Kentucky, and in Lamar versus Office of the Sheriff, which
14 is 669 S.W.2d 27, the Court looked at, and they expressly found
15 that with respect to Rule 23, you may not aggregate cases. We
16 cited that in our brief and our reply brief.

17 It's the same situation we have here. A similar rule.
18 They looked to federal cases. They decided, "We're not going
19 to stack cases. Go to a different court."

20 These gentlemen can file at Justice Court. They have
21 the potential to get relief in Justice Court. There is no
22 jurisdiction, Your Honor. Without jurisdiction, there is no
23 power for this Court to even enforce an order in the first
24 place.

1 We strongly, strongly recommend that you dismiss this
2 case for lack of jurisdiction, direct them to go to Justice
3 Court, which is where it should have been filed in the first
4 place. They can proceed there under Justice Court Rule of
5 Procedure 23. They have a remedy. They have a forum. They
6 have an ability to recover if they prove what they say they can
7 prove.

8 THE COURT: Just out of curiosity, Mr. Murphy -- or
9 Mr. Kohl -- are there any pending class action suits of a
10 similar nature that either one of you know of -- this specific
11 issue -- and is it pending somewhere else?

12 MR. MURPHY: No, Judge. And the case law that was
13 cited in the reply brief, it's case law and it's older case law
14 and --

15 THE COURT: Yeah, but he gets the last word.

16 MR. MURPHY: I know. Sorry.

17 THE COURT: That's not the answer to my question.
18 You've moved on from the answer, "no."

19 MR. MURPHY: The answer, Judge, is: I'm not aware of
20 it, Judge.

21 THE COURT: Thank you.

22 MR. KOHL: I am also unaware of it, Your Honor.

23 THE COURT: Okay.

24 MR. MURPHY: But I did have it come up in Florida

1 earlier in the year, but I had the benefit of a Florida case
2 and it was quickly disposed of.

3 THE COURT: Interesting. Okay, gentlemen. Well,
4 thank you for the oral argument.

5 Mr. Kohl, is there anything else you want to say? You
6 get the last word. It is your motion.

7 MR. KOHL: No, Your Honor.

8 THE COURT: All right. Well, I appreciate your time
9 today. Some of you have come a long distance to be here. Some
10 of you not so much. So thank you for the argument. I will
11 take it under advisement and get you a written order as quickly
12 as I can.

13 Court is in recess.

14 (Proceedings concluded.)
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1 STATE OF NEVADA)
2) ss.
3 COUNTY OF WASHOE)

4 I, MARIAN S. BROWN PAVA, Certified Court Reporter in
5 and for the State of Nevada, do hereby certify:

6 That the foregoing proceedings were taken by me at the
7 time and place therein set forth; that the proceedings were
8 recorded stenographically by me and thereafter transcribed via
9 computer under my supervision; that the foregoing is a full,
10 true and correct transcription of the proceedings to the best
11 of my knowledge, skill and ability.

12 I further certify that I am not a relative nor an
13 employee of any attorney or any of the parties, nor am I
14 financially or otherwise interested in this action.

15 I declare under penalty of perjury under the laws of
16 the State of Nevada that the foregoing statements are true and
17 correct.

18 Dated 18th day of November, 2015.

19
20 /s/ Marian S. Brown Pava

21 _____
22 Marian S. Brown Pava, CCR #169
23
24

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20 Attorneys for Plaintiffs

21 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
22 IN AND FOR THE COUNTY OF WASHOE

23 o/o

24 LUCIA CASTILLO, an individual, and
25 EDWIN PRATTS, an individual,

26 Case No. CV 15-00421

27 Dept. No. 10

28 Plaintiffs,

CLASS REPRESENTATION

(Arbitration Exempt)

vs.

UNITED FEDERAL CREDIT UNION, a
federal credit union

REPLY TO OPPOSITION TO MOTION
TO AMEND ORDER

Defendant.

Plaintiffs, Lucia Castillo and Edwin Pratts, (herein collectively "Castillo"), by and through undersigned counsel file the following Reply to Opposition to Motion to Amend Order.

I. Summary of Plaintiffs' Argument

Castillo's complaint alleged they were entitled to the following relief from United Federal Credit Union ("UFCU"):

A. Statutory damages of \$6,330.28.

B. Injunctive relief prohibiting UFCU from collecting a claimed \$6,841.55 deficiency and

1 C. Injunctive relief prohibiting UFCU from reporting the deficiency as
2 derogatory credit on their credit report.

3 In their Motion to Amend, under the authority of *Edwards v. Emperor's Garden*
4 *Restaurant*, 122 Nev. 317, 130 P.3d 1280, (Nev. 2006), Castillo argued that the district court
5 has original jurisdiction over all portions of the complaint where injunctive relief is sought, even
6 if the damages sought fail to meet the district court's monetary jurisdictional threshold.

7 Castillo also argued that UFCU first raised its "double recovery" argument in its Reply
8 brief, depriving Castillo of the opportunity to adequately address the argument in its Opposition
9 to UFCU's motion to dismiss.

10 **II. UFCU's Arguments in Opposition**

11 A. Article Nine prohibits double recovery which limits the jurisdictional
12 amount.

13 In their Motion, Castillo reprinted and parsed the applicable Article Nine provision
14 dealing with double recovery. It is NRS 104.9625(4). When parsed, NRS 104.625 allows
15 recovery of two types of damage. Subsection (2) refers to actual damages, i.e., whatever
16 economic loss that can be proven by the plaintiff. Subsection (3)(b) refers to statutory
17 damages. These may be recovered even if there has been no actual damages. The measure of
18 subsection (3)(b)'s statutory damages is ten percent of the amount financed plus the credit
19 service charge.

20 Subsection (4) is the double recovery provision at issue. It provides in relevant part that
21 "*(a) debtor whose deficiency is eliminated under NRS 104.9626 may recover damages for the*
22 *loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or*
23 *reduced under that section may not otherwise recover under subsection 2 for noncompliance*
24 *with the provisions of this part relating to collection, enforcement, disposition or acceptance.*"
25 Emphasis supplied.

26 It is clear that the "double recovery" provision contains two statutory requirements.
27 First, the deficiency must be eliminated under NRS 104.9626 (rebuttable presumption rule).
28

1 Second, the damages must be the actual damages referenced in subsection (2). They cannot be
2 the statutory damages set forth in subsection (3)(b).

3 Our Supreme Court has consistently held that when there is no ambiguity in a statute,
4 there is no opportunity for judicial construction, and the law must be followed unless it yields
5 an absurd result. *SIIS v. Engel*, 114 Nev. 1372, 1376, 971 P.2d 793, 796 (1998).

6 Here there is no ambiguity. The basis for eliminating UFCU's deficiency is NRS
7 482.516, not NRS 104.9626. Moreover, Castillo has alleged statutory damages under
8 subsection (3)(b); not subsection (2).

9 Even if there were an ambiguity, the rules of statutory construction mandate that where
10 possible, a statute should be read to give plain meaning to all its parts. *Diamond v. Swick* 117
11 Nev. 671, 28 P.3d 1087 (Nev. 2001). Since subsection (4) references actual damages and NRS
12 104.9626's rebuttable presumption provisions, the only possible meaning is to exclude
13 statutory damages and NRS 482.516's absolute bar rule.

14 UFCU devotes five pages of its brief to caselaw discussing double recovery. **At no**
15 **point does UFCU address the parsed statute in Castillo's motion, nor does it**
16 **attempt to explain how NRS 104.9625(4) can possibly apply to subsection**
17 **(3)(b) or NRS 482.516.** The failure of UFCU to explain how its argument squares with
18 the plain and unambiguous language of the statute underscores the position of Castillo.

19 B. The Edwards decision is distinguishable with respect to injunctive relief.

20 UFCU argues Edwards dealt with injunctive relief under the TCPA. This is different
21 than the injunctive relief sought in this case. 47 U.S.C.A. § 227(g) is the subsection of the
22 TCPA that allows an injunction without bond¹.

23
24 ¹ That section provides: "The district courts of the United States, the United States
25 courts of any territory, and the District Court of the United States for the District of
26 Columbia shall have exclusive jurisdiction over all civil actions brought under this
27 subsection. Upon proper application, such courts shall also have jurisdiction to
28 issue writs of mandamus, or orders affording like relief, commanding the
defendant to comply with the provisions of this section or regulations prescribed
under this section, including the requirement that the defendant take such action
as is necessary to remove the danger of such violation. Upon a proper showing, a
permanent or temporary injunction or restraining order shall be granted without
bond."

1 Nevada has its own injunction statute. NRS 33.010 provides as follows:

2 An injunction may be granted in the following cases:

- 3 1. When it shall appear by the complaint that the plaintiff is entitled to the
4 relief demanded, and such relief or any part thereof consists in restraining
5 the commission or continuance of the act complained of, either for a limited
6 period or perpetually.
- 7 2. When it shall appear by the complaint or affidavit that the commission or
8 continuance of some act, during the litigation, would produce great or
9 irreparable injury to the plaintiff.
- 10 3. When it shall appear, during the litigation, that the defendant is doing or
11 threatens, or is about to do, or is procuring or suffering to be done, some
12 act in violation of the plaintiff's rights respecting the subject of the action,
13 and tending to render the judgment ineffectual.

14 In the case at bar, Castillo's complaint alleged that UFCU's notice of sale was defective
15 under NRS 482.516 for the following reasons:

- 16 I. UFCU failed to disclose the place at which the Castillo Vehicle would be
17 returned to Plaintiffs upon redemption and reinstatement in contravention
18 of NRS 482.516(2)(d).
- 19 II. UFCU failed to designate the name and address of the person to whom
20 payment must be made for redemption or reinstatement in contravention of
21 NRS 482.516(2)(c).

22 Castillo has alleged plausible facts that show (1) UFCU repossesses consumer goods;
23 (2) UFCU sends notices of sale that fail to comply with both the Uniform Commercial Code
24 and NRS 482.516 and (3) UFCU attempts to collect deficiency balances notwithstanding its
25 defective notices. This conduct may be enjoined under NRS 33.010 just as the TCPA authorizes
26 enjoining unwanted telephone calls.

27 There is no substantive difference between this case and *Edwards*. Both involve
28 instances of consumer abuse and the remedy of injunctive relief.

29 **III. Conclusion**

30 Relief under Nev. R. Civ. Pro. 59(e) is appropriate because Castillo alleged facts, when
31 taken as true, set forth a prima facie case for injunctive relief.

32 UFCU has not addressed Castillo's argument that (1) NRS 104.9625(4) addresses the
33 actual damage provision, not the statutory damage provision or (2) that NRS 104.9625(4)

1 addresses the rebuttable presumption provision NRS 104.9626 and not the deficiency bar
2 imposed by NRS 482.516.

3 UFCU has failed to draw a meaningful distinction between this case and *Edwards*. The
4 TCPA is not the only consumer protection statute that can warrant injunctive relief. Violations of
5 Article Nine can also warrant injunctive relief pursuant to NRS 33.010. In this action, Castillo
6 alleged claims for injunctive relief both under the common law and the UCC.

7 For those reasons, this Court has original jurisdiction and the Order of Dismissal should
8 be set aside.

9
10 **Affirmation**
Pursuant to NRS 239B.030

11 The Undersigned does hereby affirm that the preceding document filed in the case herein
12 does not contain the social security number of any person.

13 Dated: This _____ day of December, 2015

14 By: _____
15 Michael Lehnert, Esq.
16 429 Marsh Ave.
17 Reno, Nevada 89509
18 Nevada Bar Number 003331
19
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21
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27
28

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Michael Lehnert, Esq., and that on the ____ day of Dec, 2015 I deposited for mailing with postage prepaid a true and correct copy of the foregoing Reply to Opposition Motion for Reconsideration to James A. Kohl, Esq., Robert Hernquist, Howard & Howard Attorneys, PLLC 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, Nevada 89169.

Deer S
Employee

1 CODE 3370

2
3
4
5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
7

8 LUCIA CASTILLO, an individual, and
9 EDWIN PRATTS, an individual,

10 Plaintiffs,

11 vs.

Case No. CV15-00421

Dept. No. 10

12 UNITED FEDERAL CREDIT UNION, a
13 federal credit union,

14 Defendants.
15 _____/

16 ORDER

17 Presently before the Court is a MOTION TO AMEND ORDER ("the Motion") filed by
18 Plaintiffs LUCIA CASTILLO and EDWIN PRATTS (collectively "the Plaintiffs") on November 5,
19 2015. Defendant UNITED FEDERAL CREDIT UNION ("the Defendant") filed DEFENDANT
20 UNITED FEDERAL CREDIT UNION'S OPPOSITION TO PLAINTIFFS' MOTION TO AMEND
21 ORDER ("the Opposition") on November 23, 2015. The Plaintiff filed a REPLY TO OPPOSITION
22 TO MOTION TO AMEND ORDER ("the Reply") on December 1, 2015. The Plaintiffs submitted
23 the matter for the Court's consideration on February 12, 2016.

24 The Defendant filed DEFENDANT UNITED FEDERAL CREDIT UNION'S MOTION TO
25 DISMISS FIRST AMENDED COMPLAINT ("the Motion to Dismiss") on April 28, 2015. The
26 Plaintiffs filed an OPPOSITION TO DEFENDANT UNITED FEDERAL CREDIT UNION'S
27 MOTION TO DISMISS ("the Opposition to the Motion to Dismiss") on May 11, 2015. The
28 Defendant filed a DEFENDANT UNITED FEDERAL CREDIT UNION'S REPLY TO MOTION
TO DISMISS FIRST AMENDED COMPLAINT ("the Reply") on May 26, 2015. The Plaintiffs

1 submitted the matter for the Court's consideration on June 9, 2015. The Court heard oral argument
2 on August 17, 2015. The Court issued an ORDER ("the October Order") granting the Motion to
3 Dismiss on October 27, 2015.

4 The Motion seeks to amend the October Order pursuant to NRCP 59(e). The Court notes the
5 requested relief is not to amend the October Order, but to have the October Order set aside. The
6 requested relief is appropriately sought pursuant to D.C.R. 13(7) and WDCR 12(8). Accordingly,
7 the Court will treat the Motion as a motion for reconsideration.

8 Pursuant to D.C.R. 13(7) and WDCR 12(8) a court may grant leave to rehear a motion in
9 certain circumstances. "A district court may reconsider a previously decided issue if substantially
10 different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile*
11 *Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489
12 (1997). "Only in very rare instances in which new issues of fact or law are raised supporting a ruling
13 contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of*
14 *Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

15 The Motion contends the Court erred when it found it did not have jurisdiction over the
16 Plaintiffs' claims. The Motion argues the Court had jurisdiction due to the Plaintiffs' requested
17 injunctive relief. The Motion contends the inability of the Justice Court to grant equitable relief
18 requires this Court to exercise jurisdiction over the Plaintiffs' claims. The Plaintiffs request an order
19 enjoining the Defendant from seeking a deficiency. The Opposition contends such a request is
20 inappropriate for injunctive relief. The Opposition contends such relief can be granted via
21 declaratory judgment by the Justice Court. The Opposition further argues the requested injunctive
22 relief is an improper "obey the law" injunction. The Opposition 8:10-13.

23 The Court finds the Motion to be unpersuasive. NRS 104.9625 does not permit the
24 injunctive relief the Plaintiffs seek. NRS 104.9625 (1) provides "a court may order or restrain
25 collection, enforcement or disposition of collateral on appropriate terms and conditions." The
26 Defendants have already repossessed and disposed of the vehicle at issue in this case. The Amended
27 Complaint 4:11-22. The Reply cites to NRS 33.010 as authority for injunctive relief. As previously
28 noted, the Defendant has repossessed and disposed of the collateral. Therefore, any injunction to

1 prevent the repossession and sale of the vehicle is now moot. The Reply alleges and seeks an
2 injunction against the Defendant, preventing it from collecting a deficiency balance and a mandatory
3 injunction directing the Defendant to remove any adverse credit information from consumer reports
4 regarding the Plaintiffs. When an adequate remedy at law exists, "the harsh remedy of injunction
5 will not lie." *Czipott v. Fleigh*, 87 Nev. 496, 498, 489 P.2d 681, 682-83 (1971). The Court finds the
6 Plaintiffs have an adequate remedy at law. The Plaintiffs may seek and obtain a declaratory
7 judgment in Justice Court determining whether the Plaintiffs do in fact owe the Defendant a
8 deficiency. Should the Justice Court make such a determination and require any negative reporting
9 to be rescinded, the Defendant is expected to follow such an order.

10 The Motion further argues the Court erred in dismissing this case for failure to allege the
11 jurisdictional amount to bring this action before the District Court. The Motion argues NRS
12 104.9625 does not preclude double recovery. The Opposition asserts the Plaintiffs are only able to
13 recover under one legal theory. The Opposition argues Article 9 of the Uniform Commercial Code
14 ("the UCC") acknowledges the public policy of precluding double recovery. The Reply, while
15 acknowledging the Opposition's discussion regarding double recovery, does not respond to the
16 Opposition's arguments.

17 The Court finds the Motion has not presented substantially different evidence or persuasive
18 legal authority, nor has it demonstrated the October Order was clearly erroneous. Comment 3 to
19 UCC 9-625 provides "to the extent that damages in tort compensate the debtor for the same loss
20 dealt with by this Article, the debtor should be entitled to only one recovery." Comment 4 to UCC
21 9-625 notes a "secured party is not liable for statutory damages under this subsection more than
22 once with respect to any secured obligation." Reading NRS 104.9625 in conjunction with NRS
23 482.516 indicates the statutory framework did not intend to permit double recovery of monetary
24 damages. Further, even assuming such double recovery was permissible, the amount of damages

25 //

26 //

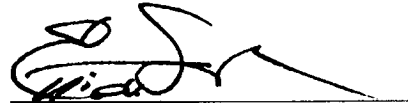
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1 still does not arise to the jurisdictional amount of the District Court. The Plaintiffs cannot recover
2 damages in excess of \$6,330.28. The Plaintiffs cannot merely add the statutory damages to the
3 value of the claimed deficiency by the Defendant in order to meet the jurisdictional amount.

4 IT IS HEREBY ORDERED MOTION TO AMEND ORDER is DENIED.

5 DATED this 17 day of March, 2016.



ELLIOTT A. SATTLER
DISTRICT JUDGE

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2 CERTIFICATE OF MAILING

3 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
4 of the State of Nevada, County of Washoe; that on this 17 day of March, 2016, I deposited in
5 the County mailing system for postage and mailing with the United States Postal Service in Reno,
6 Nevada, a true copy of the attached document addressed to:


7 Nathan R. Zeltzer, Esq.
8 12 W. Taylor Street
9 Reno, NV 89509

10 Robert W. Murphy, Esq.
11 1212 SE 2nd Avenue
12 Fort Lauderdale, FL 33316

13 CERTIFICATE OF ELECTRONIC SERVICE

14 I hereby certify that I am an employee of the Second Judicial District Court of the State of
15 Nevada, in and for the County of Washoe; that on the 17 day of March, 2016, I electronically
16 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of
17 electronic filing to the following:

18 Michael C. Lehnars, Esq.
19 James A. Kohl, Esq.

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21 Sheila Mansfield
22 Administrative Assistant
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ORIGINAL

FILED

Case No. CV15-00421

2015 APR 11 Dept. No. 10

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

o0o

LUCIA CASTILLO, an individual,)
and EDWIN PRATTS, an)
individual,)

Plaintiffs,)

vs.)

UNITED FEDERAL CREDIT UNION,)
a federal credit union)

Defendant.)

NOTICE OF APPEAL

Notice is hereby given that Lucia Castillo and Edwin Pratts, Plaintiffs above named, hereby appeal to the Supreme Court of Nevada from the Order Granting Defendant United Federal Credit Union's Motion to Dismiss First Amended Complaint entered in this action on the 27th day of October, 2015

Affirmation

Pursuant to NRS 239B.030

The Undersigned does hereby affirm that the preceding document filed in the case herein does not contain the social security number of any person.

Dated: This 11 day of April, 2016

By:

Michael Lehnners, Esq.

429 Marsh Ave.

Reno, Nevada 89509

Nevada Bar Number 003331

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CERTIFICATE OF SERVICE BY MAIL

Pursuant to Nevada Rule of Civil Procedure 5(b), I certify that on the
11 day of April, 2016, I deposited for mailing in the United States Post
Office in Reno, Nevada, with postage thereon fully prepaid, a true copy of the
within NOTICE OF APPEAL, addressed as follows:

James A. Kohl, Esq.
3800 Howard Hughes Parkway
Suite 1000
Las Vegas, NV 89169



Dolores Stigall