IN THE SUPREME COURT OF THE STATE OF NEVADA

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LUCIA CASTILLO, an individual and EDWIN PRATTS an individual Appellants, vs. UNITED FEDERAL CREDIT UNION, a federal credit union Respondent.	**SUPREME COURT CASE NO.: 70151** Appeal From Second Judicial District Court District Court Case No.: CV1500421 (Honorable Elliott Sattler, District Court Judge)
AND ALL RELATED CASES	

RESPONDENT'S ANSWERING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Identification of Appellant's Parent Corporations: Respondent United Federal Credit Union ("United") is a non-governmental party as addressed in NRAP 26.1. Furthermore United does not have a parent corporation or a publicly-held company that owns 10% or more of its stock.

Identification of Appellant's Attorneys: The following are names of all law firms whose partners or associates have appeared or who are expected to appear in this action on behalf of LVPC (including proceedings in the district court):

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to NRAP 3A(b)(1). The Order Granting Defendant United Federal Credit Union's Motion to Dismiss ("Order"), entered on October 27, 2015, resolved the issues between Lucia Castillo and Edwin Pratts and United Federal Credit Union.

II. ROUTING STATEMENT

Respondent agrees with Appellant's Routing Statement.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the District Court correctly ruled that individual plaintiffs may not aggregate their separate claims to satisfy the minimum jurisdictional limit of Nevada's District Courts.

B. Whether the exclusive right to determine the jurisdictional limits of Nevada's Justice and District Courts is solely vested in the Nevada Legislature.

C. Whether the District Court correctly ruled that the Appellants may not recover damages twice for one injury.

D. Whether Plaintiffs may argue the issue of "claimants under a common right" when they failed to do so in District Court.

E. Whether Plaintiffs remedies at law preclude injunctive relief.

IV. STATEMENT OF THE CASE

The Appellants' Statement of the Case is acceptable to Respondents with the exception that although Plaintiff filed a complaint on behalf of a suggested class of individuals, this is not a class action suit. The District Court never reached that issue.

V. STATEMENT OF RELEVANT FACTS

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, (Record p. 39). 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. Despite her promise to repay the loan, Castillo failed to do so. *Id.* Similarly, Pratts failed

[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*

to honor his personal guaranty to repay the loan after Castillo defaulted on the loan.

Due to Plaintiffs' failure to repay the Loan, United exercised its rights and repossessed the Vehicle that was collateral for the Loan. *Id*. Following repossession, United sent Plaintiffs a Notice of Repossession and Private Sale ("Sale Notice"). *Id.*; Sale Notice, *Id.* at 80.[2] After United sold the Vehicle, United sent Defendant Castillo a notice (the "Deficiency Notice" and, together with the Sale Notice, the "Notices") informing Castillo what the Loan balance was, after crediting her with all sums received from the sale.

In their FAC, Plaintiffs contend that the Sale Notice does not comply with Nevada's enactment of the UCC. The FAC asserts the following claims against United: (1) Violation of NRS 104.9610 Record at p. 47; (2) Violation of NRS 104.9611 (Record at 48); and (3) Violation of NRS 104.9614. *Id*.

United moved the District Court to dismiss this case because Plaintiffs do not met the jurisdictional limits of Nevada's district courts. United argued that accepting the factual allegations in the FAC as true, Plaintiffs failed to

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Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted).

2. "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, 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

demonstrate that they are entitled to greater than $10,000 in damages, exclusive of attorney's fees and costs. United asked that the District Court dismiss the FAC because it did not have jurisdiction over the case.

VI. SUMMARY OF THE ARGUMENT.

Appellants/Plaintiffs' ("Plaintiffs") First Amended Complaint fails to allege facts that demonstrate that the District Court had jurisdiction over the dispute. Even if the Plaintiffs prevail on all of their claims, their recovery from Respondent/Defendant United Federal Credit Union will be well below the current $10,000 jurisdictional limit of the District Court. The District Court correctly dismissed Plaintiffs First Amended Complaint because plaintiffs may not aggregate their individual claims to satisfy the minimum jurisdictional limits of Nevada's District Courts. Rule 23 of the Nevada Rules of Civil Procedure does not alter the means by which courts determine the amount in controversy.

Any change to the jurisdictional limits of Nevada's Justice and District Courts is reserved to the Nevada Legislature under the Nevada Constitution. The District Court and this Court are not the proper forums to change the minimum jurisdictional limits of the Nevada District Court. The Nevada Legislature's recent amendment of NRS 4.370 which does not allow class action plaintiffs to

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motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

aggregate claims is dispositive of the issue before the Court. Until the Legislature enacts legislation that enables class action plaintiffs to aggregate their claims, they may not do so.

State courts that have examined the issue of aggregation are split on the issue of allowing aggregation. Those that refused to permit aggregation followed well settled common law that plaintiffs may not ride on each other's coattails to satisfy the jurisdictional limits of the court; they must each stand on their own. The cases cited by Plaintiffs are result oriented decisions that are distinguishable from the case at bar. In some cases, the Plaintiffs would not have had a forum to address their grievances, so aggregation was permitted. One Court relied on the legislative comments that expressly stated that aggregation was to be permitted. One court chose to enact policy which would violate the separation of powers doctrine under Nevada law.

In an attempt to establish subject matter jurisdiction, Plaintiffs sought to combine two of their claims together. Each of the claims was under the threshold of the District Court. Under the double recovery rule, there can only be one award of damages for a plaintiff's injury. This is true even if a plaintiff asserts multiple causes of action that are plausible. The District Court correctly refused to stack two of Plaintiffs claims for damages together to meet the minimum subject matter jurisdiction.

Plaintiffs raise for the first time on appeal that they and the proposed class members are claimants under a common right. Their failure to raise that issue below can preclude them from asserting it in this Court. Even if this Court entertains that argument, they are not claimants under a common right. That status is reserved for individuals who have a joint interest in the *res* of the litigation, for example claims to a parcel of real estate. Plaintiffs and the class have distinct individual claims for alleged breaches of Article 9. They are not claimants under a common right.

Plaintiffs' final argument is that the District Court had jurisdiction over this matter because they claim they are entitled to injunctive relief. When reviewing complaints that are challenged under Nevada Rule of Civil Procedure Rule 21(b)(1), Nevada's courts look to see if the causes of action were alleged in good faith. They may disregard allegations that are merely presented to maintain jurisdiction. Although Plaintiff pled injunctive relief, they are not entitled to it because they have an adequate remedy at law. They are also not entitled to relief because all they seek is an "obey the law" injunction, which are not permitted.

The District Court correctly dismissed Plaintiffs First Amended Complaitn. This Court should affirm the District Court's dismissal of the First Amended Complaint because Plaintiffs do satisfy the minimum jurisdictional limits of the District court.

VII. ARGUMENT

Plaintiffs' First Amended Complaint ("FAC") fails to allege facts that demonstrate that the District Court had jurisdiction over the dispute. Even if the Plaintiffs prevail on all of their claims, their award will be well below the jurisdictional limit of the District Court. Any change to the jurisdictional limit of Nevada's District Courts is reserved to the Nevada Legislature. This Court is not the proper forum to effectuate such change. Additionally, Plaintiffs may not stack their claims together to meet the jurisdictional minimum of the District Court because they may not double recover damages. Moreover, Plaintiffs claims for injunctive relief fail because they seek monetary damages. This Court should therefore affirm the District Court's dismissal of the FAC.

A. Standard of Review for Motions to Dismiss.

The Nevada Supreme Court reviews a district court's order granting a motion to dismiss under "a rigorous, de novo standard of review." *Slade v. Caesars Entm't Corp.*, 132 Nev. Adv. Op. 36, 373 P.3d 74, 78 (2016). Nevada law holds that a complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle the plaintiff to relief." *Id*, 132 Nev. Adv. Op. 36, 373 P.3d at 78 (internal punctuation omitted).

1. A Challenge to Subject Matter Jurisdiction Shifts the Burden of Proof to the Plaintiff.

"[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). Rule 12(b)(1) of the Nevada Rules of Civil Procedure ("N.R.C.P.") allows defendants to file a motion to dismiss claims for a lack of subject matter jurisdiction. Although the defendant is the moving party, the plaintiff is the party invoking the court's jurisdiction. The plaintiff therefore 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);[3] 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.30 [5] (3d ed.1999) 15 *Moore's Federal Practice* § 102.107).

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). Dismissal under Rule 12(b)(1) is appropriate if the complaint, considered in its

[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)).

entirety, fails to allege sufficient facts to establish that the court has subject matter jurisdiction over the dispute. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984–85 (9th Cir. 2008).

2. <u>For Rule 12(b)(1) Motions, Nevada Uses the Legal Certainty Test</u>.

Nevada adopted the "legal certainty" test "for determining the jurisdictional amount in controversy in Nevada district courts." *Morrison*, 116 Nev. at 38, 991 P.2d at 984. In order to dismiss a case for lack of subject matter jurisdiction, it must appear to a legal certainty that the claim is worth less than the jurisdictional amount. *Id.* The district court need not accept the allegations of the complaint as true and may conduct a hearing to determine whether the potential damages in a case fall below a jurisdictional threshold. *Id*. at 39, 991 P.2d at 985. "No presumptive truthfulness attaches to plaintiff's allegations, 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). 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.

B. <u>The District Court Properly Refused to Aggregate the Claims of the Plaintiffs with the Potential Class Members to Satisfy its Jurisdictional Threshold</u>.

United filed its Motion to Dismiss the FAC because even if Plaintiffs prevailed, they would recover less than $10,000. Record pp. 61-85. Plaintiffs responded to United's jurisdictional challenged by seeking to aggregate their claims with the claims of the potential class members.[4] Record pp. 85-94. In *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969) *abrogated by* 28 U.S.C. § 1332, The Class Action Fairness Act ("CAFA") the United States Supreme Court considered whether, in light of the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure, class action plaintiffs could aggregate their claims to satisfy the minimum jurisdictional limits of the district courts. *Snyder* holds that plaintiffs and class members cannot aggregate their claims to satisfy the jurisdictional limits of the district courts. *Snyder*, 394 U.S. at 336-38 89 S. Ct. 1057-58*; see also In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001).[5]

> The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy.' The interpretation of this phrase as precluding aggregation

[4] Due to the procedural posture of the case, the Plaintiffs had not yet moved for class certification.

[5] Under CAFA which was enacted in 2005, class action plaintiffs are expressly permitted to aggregate their claims in federal court. To date, the Nevada Legislature has not enacted similar legislation for the Nevada courts.

> substantially predates the 1938 Federal Rules of Civil Procedure. In 1911 this Court said in *Troy bank v. G. A. Whitehead & Co.*:
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> > 'When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount * * *.'

Snyder, 394 U.S. 332, 336, 89 S. Ct. 1053, 1057, (*quoting Troy Bank*, 222 U.S. 39, 40, 32 S.Ct. 9, 56 L.Ed. 81 (1911)). The *Snyder Court* rejected the notion that the 1966 amendments to Rule 23 were intended to effect, or effected, any change in the meaning and application of the jurisdictional-amount requirement insofar as class actions are concerned. *Snyder* also holds that when Congress sets the jurisdictional limit of the courts, the Supreme Court of the United States may not interpret the Rules of Civil Procedure to expand jurisdiction by allowing aggregation of claims *Id.* at 338, 89 S. Ct. at 1057. *Snyder* reaffirmed the well established rule that to survive a motion to dismiss, *each plaintiff* must have claims that satisfy the minimum jurisdictional requirement of the court. *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300, 94 S. Ct. 505, 511, 38 L. Ed. 2d 511 (1973) *abrogated* by CAFA.

Nevada agrees with the concept of not allowing aggregation of claims to satisfy the minimum jurisdiction of Nevada Courts. This Court holds that when determining the "amount in controversy," courts must ignore amounts sought for attorneys' fees and costs. *Morrison*, 116 Nev. at 36, 991 P.2d at 983. It also holds

that when a court concludes to a legal certainty that a plaintiff cannot recover the amount of damages necessary to establish jurisdiction, dismissal for want of jurisdiction is appropriate. *Id.*, at 38, 991 P.2d at 984. Additionally, courts agree that plaintiffs may not aggregate punitive damage claims to meet the minimum jurisdictional limits of a court. *In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 963 (9th Cir. 2001) ("all of the circuits that have considered the question now have answered in the negative.").

This Court has not ruled whether proposed class plaintiffs can aggregate their individual claims with the class under N.R.C.P. 23. The United States Supreme Court has. It holds that "each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—one plaintiff may not ride in on another's coattails." *Zahn*, 414 U.S. at 301, 94 S. Ct. at 512 (internal punctuation omitted). "[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules." *Foster*, 126 Nev. Adv. Op. 5, 228 P.3d at 456.

The holdings of *Snyder* and *Zahn* were abrogated by CAFA. CAFA allows class action plaintiffs in federal court to aggregate their claims. Despite being in session for multiple times since CAFA was enacted, the Nevada Legislature has not enacted similar legislation. The holdings of *Snyder* and *Zahn* reaffirm the well

settled law of how "matters in controversy" are calculated. This Court follows the rule set forth in *Snyder* and *Zahn*. *See, Morrison*, 116 Nev. at 36, 991 P.2d at 983 (attorney's fees and costs cannot be aggregated with claims to increase the amount in controversy). Any change or interpretation of N.R.C.P. 23 that effects a change in the definition of 'matter in controversy' would clearly conflict with well settled law and with N.R.C.P. 82 which states: "(t)hese rules shall not be construed to extend or limit the jurisdiction of the district courts or the venue of the actions therein." This Court should affirm the District Court's dismissal of the complaint and hold, that N.R.C.P. 23 does not allow plaintiffs to aggregate claims to satisfy the minimum jurisdictional limit of Nevada's District Courts.

C. Under the Separation of Powers Doctrine, the Jurisdictional Threshold of Nevada Courts May Only be altered by the Nevada Legislature.

Pursuant to N.R.C.P. 82, the N.R.C.P. do not extend, limit or affect the jurisdiction of Nevada's District Courts. The structure of Nevada's courts are enumerated in Article 6 of the Nevada Constitution. The Nevada Constitution is the "supreme law of the state," which "control[s] over any conflicting statutory provisions." *Clean Water Coal v. The M Resort, LLC*, 127 Nev. 301, 309, 255 P.3d 247, 253 (2011) (*quoting Goldman v. Bryan*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990)).

Pursuant to Article 6 § 9 of the Nevada Constitution, the Nevada Legislature sets "the limits of the[] civil and criminal jurisdiction" of the Justice Courts. Pursuant to Article 6 § 6 of the Nevada Constitution, the jurisdictional limits of Nevada's District Courts include "all cases excluded by law from the original jurisdiction of justices' courts." *Id.* When it sets the jurisdictional limits of the Justice Courts, the Nevada Legislature also sets the jurisdictional limits of the District Courts.

"The separation of powers; the independence of one branch from the others; the requirement that on[e] department cannot exercise the powers of the other two is fundamental in our system of government." *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). Judicial power arises from the judicial powers and functions granted to Nevada's courts in the Nevada Constitution. *Galloway*, 83 Nev. at 20, 422 P.2d at 242–43. "[J]udicial power, and the exercise thereof by a judicial function, cannot include a power or function that must be derived from the basic Legislative or Executive powers." *Id*. at 21, 422 P.2d at 243. "The judicial department may not invade the legislative and executive province." *Dunphy v. Sheehan*, 92 Nev. 259, 265, 549 P.2d 332, 336 (1976) (*citing State v. District Court*, 85 Nev. 485, 457 P.2d 217 (1969)).

NRS 4.370 establishes the jurisdictional limits of Nevada's Justice Courts. The Nevada Legislature recently amended NRS 4.370. In 2017 the Justice Court's

jurisdictional limits will increase to $15,000 and the District Court's minimum jurisdiction will increase to $15,000. When it amended NRS 4.370, the Nevada Legislature did not include a provision that allows class action plaintiffs to aggregate their claims. "That which is enumerated excludes that which is not." *O'Callaghan v. District Court*, 89 Nev. 33, 35, 505 P.2d 1215, 1216 (1973); *see also Galloway*, 83 Nev. at 26, 422 P.2d at 246 ("The maxim '*expressio Unis est exclusio alterius',* the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State."). Aggregation of claims is not permitted under the common law or Nevada statutory law.

This Court is not empowered to alter the jurisdictional limits of the District or the Justice Courts as that is reserved to the Nevada Legislature. Article 6 § 9 of the Nevada Constitution; *Dunphy*, 92 Nev.at 265, 549 P.2d at 336; *Galloway*, 83 Nev. at 21, 422 P.2d at 243. A ruling of this Court that expands the jurisdictional limits of Nevada's District Courts violates the Nevada Constitution, the separation of powers doctrine, and N.R.C.P. 82. This Court should therefor affirm the District Court's dismissal of the FAC as any ruling reversing it necessarily invades the powers reserved to the Nevada Legislature.

D. Nevada's Sister Courts Do Not Allow Class Action Plaintiffs To Aggregate Their Claims to Create Subject Matter Jurisdiction

In their Opening Brief, Plaintiffs claim the overwhelming number of state courts that have considered aggregation ruled in favor of allowing it. Plaintiff cited cases from Alabama, Arizona, Florida, Massachusetts, and Michigan in support of that proposition. Iowa, Maryland, Kentucky and Rhode Island disagree with that proposition. United is not aware of any other state that has considered this issue. Five in favor, four opposed is not an overwhelming majority. Moreover as set forth below, courts that allowed aggregation of claims did so because it was expressly permitted in the enabling statutes (unlike Nevada) or the plaintiffs had no forum for redress of their injuries (also unlike Nevada).

In states where an alternate forum exists, Nevada's sister jurisdictions agree that *Snyder* and *Zhan* are persuasive authority when interpreting Rule 23. In *Pollokoff v. Maryland Nat. Bank*, 418 A.2d 1201, 1210 (Md. Ct. App.1980) the court considered the attempt of numerous Plaintiffs to aggregate their claims in a class action against a defendant bank. The plaintiffs filed a complaint "individually and on behalf of all others similarly situated" seeking $3,000,000 in damages from the defendant, Maryland National Bank. The trial court dismissed the complaint on the ground that the minimum monetary jurisdictional requirements of the court had not been met. Plaintiffs appealed, arguing that they

were entitled to aggregate their claims with the claims of the proposed class. The Maryland Supreme Court concluded that the "amount in controversy" was to be measured without aggregating separate and distinct claims of multiple plaintiffs and affirmed the dismissal of the trial court. The *Pollokoff Court* reviewed, considered and rejected the cases cited by Plaintiffs[6] 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. This case presents the Court with the same situation. The claims of the Plaintiffs fall within the exclusive original jurisdiction of Justice Court, not District Court. Aggregating their claims is not warranted as Plaintiffs have a forum for their claims, Justice Court.

The issue of aggregation of claims under Kentucky's analog of Fed. R. Civ. Pro. 23 was before the court in *Lamar v. Office of Sheriff of Daviess Cnty.*, 669 S.W.2d 27, 31 (Ky. Ct. App. 1984). The Kentucky Court of Appeals declined to allow aggregation, holding:

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[6] The *Pollokoff Court* reviewed and specifically rejected *Thomas v. Liberty National Life Insurance Co.*, 368 So.2d 254 (Ala.1979); *Judson School v. Wick*,

> We specifically hold, therefore, with respect to CR 23, that the sums of the individual claims of the respective parties may not be aggregated in order to meet the jurisdictional 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.

Id, 669 at 31. *See also Albion Elevator Co. v. Chicago & N.W. Transp. Co.*, 254 N.W.2d 6, 12 (Iowa 1977) (upholding dismissal of class action plaintiffs who did not have claims that exceeded the jurisdictional floor of the court); *Berberian v. New England Tel. & Tel. Co.*, 369 A.2d 1109, 1114 (R.I. 1977) (affirming trial court's grant of motion to dismiss on the ground that no individual member of the class had a claim in excess of the jurisdictional floor of the court.); *Bolling v. Old Dominion Power Co.*, 181 Va. 368, 371, 25 S.E.2d 266, 268 (1943) (It has long been settled that claims cannot be consolidated so as to give court jurisdiction).

Nevada's sister courts do not allow plaintiffs to aggregate their claims to satisfy the amount in controversy jurisdictional requirements. They require the plaintiffs to file suit in the court that has jurisdiction over their matter. Nevada has an alternate forum that has jurisdiction over this matter. *See* J.C.R.C.P. 23. Plaintiffs simply do not want to accept that fact. This Court should follow the long standing rule that individual Plaintiffs may not aggregate their claims under

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494 P.2d 698 (1972).

Rule 23 to achieve subject matter jurisdiction. Especially in light of the fact that Plaintiffs have an alternate forum in which to bring their claims.

E. <u>The Cases Cited by Plaintiffs Are Distinguishable from the Case at Bar</u>.

The cases that Plaintiffs cited in their Opening Brief are easily distinguished from the case at bar. Some allow aggregation because there is no alternate forum for the plaintiffs, one relied on the committee minutes of the enabling statutes which demonstrated the legislative intent to allow aggregation of claims and one considered its district court a court of general jurisdiction. Those concerns are not present in the case at bar.

The holding in *Johnson v. Plantation Gen. Hosp. Ltd. P'ship*, 641 So. 2d 58 (Fla. 1994) 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 (emphasis added). The decision in *Galen of Florida, Inc. v. Arscott*, 629 So. 2d 856, 857 (Fla. Ct. App.) relies on the holding of *Johnson, supra*. Michigan courts also allow aggregation based on that concern. *Dix v. Am. Bankers Life Assur. Co. of Florida*, 415 N.W.2d 206, 210 (Mich. 1987) ("litigants seeking to maintain a class action in a state court would have no further recourse if they are not allowed to bring a class

action somewhere in the state court system."). Plaintiffs have a court that can hear their claims. *See* J.C.R.C.P. 23. They simply refuse to file there.

Plaintiffs reliance on *Thomas v. Liberty Nat. Life Ins. Co.*, 368 So.2d 254 (Ala. 1979) is also misplaced. *Thomas* is distinguishable because Alabama's court rules were intended to prohibit class action suits in its equivalent of justice court. Alabama Rule of Civil Procedure 23(dc), as enacted in 1979, provides that Rule 23 does not apply in the district courts. Ala. R. Civ. Pro. 23(dc). The District Court Committee Comments for Rule 23 explain that because class actions may not be brought at the district court level, claims may be aggregated to exceed the $500.00 threshold required for circuit court cases. In fact, the *Thomas Court* relied on the District Court Committee Comments in reaching its holding:

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

Thomas, 368 So.2d at 257. The committee notes from the enabling statutes for the Alabama courts made it clear that class action suits were to be maintained in the circuit courts as opposed to the district courts. J.C.R.C.P. Rule 23 states otherwise. *Thomas,* is therefore distinguishable from the case at bar.

Plaintiff's reliance on *Judson School v. Wick*, 108 Ariz. 176, 494 P.2d 698 (1972) is also misplaced. In *Judson School*, the court noted that federal courts are courts of limited jurisdiction. On that basis it rejected the holdings of *Snyder* and *Zahn*. Plaintiffs advance the same argument in their Opening Brief. This Court recognizes that Nevada's District Courts are courts of limited jurisdiction. "[A] court which is the creation of statute has only the authority given to it by the statute." *Royal Ins. v. Eagle Valley Const., Inc.*, 110 Nev. 119, 120, 867 P.2d 1146, 1147 (1994) (*quoting McKay v. City of Las Vegas*, 106 Nev. 203, 205, 789 P.2d 584, 585 (1990)). "Thus, the district court has original jurisdiction over such actions *only* if the plaintiff claims more than [$10,00.00] in damages." *Morrison*, 116 Nev. at 37, 991 P.2d at 983 (emphasis added).

Nevada's District Courts are courts of limited jurisdiction. This Court requires plaintiffs to have claims that exceed the jurisdictional limits of the District Court and it affirms dismissal when the claim is less than the jurisdictional amount. *Royal Ins.*, 110 Nev. at 120, 867 P.2d at 1147; *Morrison*, 116 Nev. at 37, 991 P.2d at 983. This Court is aligned with *Snyder* and *Zhan* which require each plaintiff to have claims that meet the jurisdictional limit of the court. *Judson School* and Plaintiffs arguments that Nevada's District Courts are not courts of limited jurisdiction do not comport with the Nevada Constitution or Nevada's

jurisprudence. Both Judson School and Plaintiffs' argument that the District Courts are not courts of limited jurisdiction should be rejected.

Plaintiffs also rely on *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837 124 P.3d 530 (2005) 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 Plaintiffs must clear prior to the proposed class being certified. To the extent Plaintiffs claim that *Shuette* stands for the proposition that Class Actions are favored by Nevada courts, it does not so hold. *Shuette* stands for the proposition the class action plaintiffs must satisfy all of the requirements of Rule 23 prior to a court granting class status.

F. Plaintiffs May Not Recover Twice For One Injury; Plaintiffs Therefore cannot Double Count their Damages to Satisfy the Jurisdictional Limits of District Court..

In the alternative, Plaintiffs argue that their claims alone satisfy the jurisdictional limit of the District Court. The law says otherwise. Plaintiffs calculated their damages by adding two claims together as follows: (1) statutory damages for the failure to send proper notice of the repossession and sale of the Vehicle $6,330.28 plus (2) their claim for a release of the deficiency $6,841.55 for

a total of $13,171.83. Both claims flow from the same operative facts, the repossession and sale of Plaintiffs' vehicle.

In Nevada, "there can be only one recovery of damages for one wrong or injury" meaning "a plaintiff may not recover damages twice for the same injury simply because he or she has two legal theories." *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. Adv. Op. 43 245 P.3d 547, 549 (Nev.2010). The doctrine of double recovery prohibits the recovery of both rescission or restitution damages, while simultaneously recovering expectation damages for breach of contract. "[A plaintiff may] demand alternative remedies, [but is] not entitled to both forms of relief because obtaining both rescission and damages for breach of contract constitutes a double recovery." *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 578, 854 P.2d 860, 862 (1993); *see also* 11 Arthur L. Corbin, *Corbin on Contracts* § 55.6, at 21 (rev. ed. 2005) ("[A] plaintiff may not recover both restitution and damages for breach of contract.").

Plaintiffs claims arise from UCC Article 9. The drafters of the UCC also limited debtors to one recovery in the event of noncompliance or default. NRS 104.9625 governs a debtor's remedies for a secured party's failure to comply with Article 9. If a deficiency is eliminated pursuant to the UCC the debtor may <u>not</u> also seek damages, because that would be a double recovery. NRS 104.9625; NRS 104.9626; Comment 3 to NRS 104.9625 states:

> The last sentence of [NRS 104.9625(4)] *eliminates the possibility of double recovery* or other over-compensation arising out of a reduction or elimination of a deficiency under Section 9-626, based on noncompliance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance") (emphasis added).

Comment 3 continues on stating that "to the extent that damages in tort compensate the debtor for the same loss dealt with by this Article, the debtor should be entitled *to only one recovery*. *Id.* Plaintiffs seek statutory damages and elimination of the deficiency. The same operative facts support both claims—the repossession and sale of their vehicle. The UCC is very clear that if Plaintiffs were to eliminate the deficiency pursuant to NRS 104.9626, they cannot seek additional damages. NRS 104.9625; NRS 104.9626; Comment 3 to 104.9625; 4 WHITE SUMMERS & HILLMAN, *Uniform Commercial Code*, § 34–14 (6th ed.) (explaining that double recoveries should be denied in consumer cases too, and that a debtor should not be permitted to obtain a reduction in her deficiency under 9-626 and still recover statutory damages under 9-625(c)).

Allowing Plaintiffs to eliminate the deficiency *and* to recover monetary damages constitutes an impermissible double recovery under Nevada common law. *Elyousef*, 245 P.3d at 549. Plaintiffs cannot stack the two claims together to satisfy the jurisdictional limit of the District Court when they are prohibited by law from recovering both at trial. The District Court correctly refused to stack

Plaintiffs claims as a means of establishing the minimum jurisdiction of the court. This Court should affirm the District Court's dismissal of the suit. *Elyousef*, 245 P.3d at 549; NRS 104.9625; Comment 3 to NRS 104.9625.

G. Plaintiffs May Not Use United's Anticipated Counterclaim to Establish the Jurisdictional limit of the Court.

Further examination of Plaintiffs' position reveals that stacking the damages with the relief of the deficiency would not satisfy the jurisdictional limit of the District Court. Plaintiffs contend they are entitled to statutory damages in the amount of $6,330.28. United claims that Plaintiffs owe a deficiency in the amount of $6,841.55. That is the total range of damages in this case. Plaintiff's best case scenario is a judgment in the amount of $6,330.28 and rejection of United's claims. The best-case scenario for United, is a judgment against Plaintiff for $6,841.55 and a rejection of Plaintiffs' claims. Neither party can recover more than $10,000 from the other. Plaintiffs cannot satisfy the jurisdictional threshold by "stacking" the amount of their claim with the amount of United's anticipated counterclaim for a deficiency. *See Snow v. Ford Motor Co*., 561 F2d 787, 789 (9th Cir. 1977) (the amount in controversy for purposes of federal diversity jurisdiction is determined without regard to any setoff or counterclaim to which defendant may be entitled); *Windsor Mount Joy Mut. Ins. Co. v. Johnson*, 264 F.

Supp. 2d 158 (D.N.J. 2003) (compulsory counterclaims cannot be aggregated when it is not possible that both parties will receive sums that they seek).

Double recoveries are not permitted in Nevada. Moreover, even if they were, the jurisdictional threshold of the District Court is not met here because Plaintiffs' argument is not based on the total value of their own claims—instead it is based upon the total amount of each party's respective claim against the other. The District Court does not have jurisdiction and therefore its ruling should be affirmed.

H. The Plaintiffs Never Raised The Issue Of "Claimants Under A Common Right" Below; They Are Therefor Barred From Arguing It On Appeal.

Plaintiffs' opening argument is that they and the proposed class are claimants under a common right. It is well settled that "arguments raised for the first time on appeal need not be considered on appeal." *Pope v. Motel 6*, 121 Nev. 307, 319, 114 P.3d 277, 285 (2005) (citing *Dermody v. City of Reno*, 113 Nev. 207, 211, 931 P.2d 1354, 1357 (1997)). In their Opposition to Defendant United Federal Credit Union's Motion to Dismiss [sic] Plaintiffs did not raise the claimants under a common right argument. Record p. 85-94. At oral argument on the Motion, Plaintiffs did not argue that they were claimants under a common right. *Id.* at pp. 146-173. After the District Court entered its Order dismissing the Complaint (*Id.* at 110), Plaintiffs filed a Motion to Amend Order that did not raise

the issue of claimants under a common right. *Id.* at pp. 123-129. Plaintiffs never raised the issue of "claimants under a common right" with the District Court. They are barred from raising it on appeal. *Pope*, 121 Nev. at 319, 114 P.3d at 285.

I. Even If The Court Allows Plaintiffs To Argue The Point, Plaintiffs Are Not "Claimants Under A Common Right".

Without citation to any authority, Plaintiffs' argue that they and the members of the proposed class have a single claim, a common right that they jointly assert; therefore, aggregation is appropriate. Plaintiffs' argument is contrary to well settled law. Cases that allow aggregation of claims involve claims against a single indivisible *res*. Aggregation is allowed because such cases cannot be adjudicated without implicating the rights of everyone involved with the *res*. *Gilman v. BHC Sec.*, Inc., 104 F.3d 1418, 1423 (2d Cir. 1997) (*quoting Bishop v. General Motors Corp.*, 925 F.Supp. 294, 298 (D.N.J.1996)).

Plaintiffs' request for statutory damages (including the putative class members) do not implicate a "single indivisible *res.*" The claims of the Plaintiffs, and each of the proposed class members are separate and distinct claims against United that can be individually adjudicated without implicating or impinging on the rights of the other plaintiffs. Plaintiffs asked that United pay them (and each member of the proposed class) statutory damages for the repossession of the

automobiles and for a release of the deficiency owed by each plaintiff to United. If the class prevailed, damages would be calculated under NRS 104.9625 or NRS 104.96264. The damages would be awarded directly to each individual plaintiff to compensate for that plaintiff's discrete harm. The claims of individual account holders at a bank "are clearly separate and distinct." *Pollokoff*, 418 A.2d at 1206.

The putative class members do not possess joint ownership of, or an undivided interest in the claims of the other plaintiffs, their claims are separate and distinct. There is no common *res*; therefore, even if a class were certified, aggregation of the individual claims of the plaintiffs would not be warranted as the proposed class members are not "claimants under a common right." This Court should therefore affirm the District Court's dismissal of the FAC.

J. Plaintiffs Have Not Asserted A Proper Claim For Injunctive Relief, And Therefore Jurisdiction Cannot Be Invoked On That Basis

1. Plaintiffs have adequate remedies at law

When reviewing a party's claim that the Court has jurisdiction 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. While plaintiffs take pains to couch their request for money damages as equitable relief, merely changing the label attached to a remedy does not affect the District Court's jurisdiction. 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. *Snow*, 561 F.2d at 791 *cf. Snyder* 394 U.S. at 339-40, 89 S.Ct. at 1058-59 (any change in the doctrine of aggregation would allow aggregation of practically any claims of any parties undercutting the purpose of the jurisdictional amount requirement).

To establish irreparable harm, the movant must show that in the absence of an injunction, he has no adequate remedy at law, meaning money damages cannot possibly redress the harm. *Number One Rent-A-Car*, 94 Nev. at 781, 587 P.2d at 1331. In the United States Supreme Court's words:

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended...are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90, 94 S. Ct. 937, 953, 39 L. Ed. 2d 166 (1974) (quoting *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

Plaintiffs argue that they are entitled to injunctive relief to prevent United From: (a) attempting to collect the deficiency balance from Plaintiffs; and (b) reporting loan deficiencies to credit reporting agencies. Opening Brief p. 20.

Courts regularly award monetary damages for unlawful collection activities. Should United's conduct be found to be unlawful, Plaintiffs have remedies at law for the alleged injuries. There is no irreparable harm alleged nor could any be proved. Plaintiffs failed to plead claims for which injunctive relief can be granted. Thus, there was no basis for the District Court to assert jurisdiction over this matter as the claims for injunctive relief were not pled in good faith.

2. Obey the Law Injunctions Are Not Permitted

Plaintiffs' claims for injunctive relief also fail because they ask for the District Court to order United to follow the law (to refrain from collection activities on debts that are not due). "Obey the law" injunctions like the ones such as this are not allowed and could never be obtained by Plaintiffs.

Pursuant to N.R.C.P 65(d) injunctions may not reference other documents to describe the enjoined behavior. *Webster v. Steinberg*, 84 Nev. 426, 430, 442 P.2d 894, 896 (1968). For this reason, courts refuse to enforce obey the law injunctions. "This Circuit has held repeatedly that 'obey the law' injunctions are unenforceable." *S.E.C. v. Smyth*, 420 F.3d 1225, 1233 n. 14 (11th Cir. 2005); *see also Vallario v. Vandehey*, 554 F.3d 1259, 1268 (10th Cir. 2009) ("Injunctions simply requiring a defendant "to obey the law" are generally "too vague" to satisfy Rule 65(d)."); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 240 (2d Cir. 2001) ("Under Rule 65(d), an injunction must be more specific than a

simple command that the defendant obey the law."). Nevada agrees with the reason courts refuse to enforce obey the law injunctions. "[U]nder NRCP 65(d), a permanent injunction is void, not merely voidable, where…the injunction fails to describe the acts to be restrained with adequate specificity.") *Las Vegas Novelty, Inc. v. Fernandez,* 106 Nev. 113, 118, 787 P.2d 772, 775 (1990).

Additionally, there has been no judicial determination that United wrongfully reported any credit information. Plaintiffs are not seeking a true injunction, they seek an order compelling United to fulfill its legal obligations *in the event judgment is ultimately entered in favor of Plaintiffs*. Requests such as this are routinely rejected. *Smyth*, 420 F.3d at 1233 n. 14. Moreover, any damages sustained by Plaintiffs are monetarily quantifiable which precludes injunctive relief. *Number One Rent-A-Car*, 94 Nev. at 781, 587 P.2d at 1331; *Czipott v. Fleigh*, 87 Nev. 496, 498–99, 489 P.2d 681, 683 (1971).

For instance, one court recently dismissed a similar request for injunctive relief where a debtor sought an injunction that would preclude the creditor from reporting adverse information to the credit reporting bureaus in the event Plaintiff prevailed on its other claims—the court noted that parties have an independent duty to comply with the law and a court's ruling, and an injunctive compelling future performance with some future court order is improper and premature. *Banaszak v. CitiMortgage, Inc.*, 2014 WL 4489497 at *8 (E.D. Mich. 2014)

("courts have repeatedly held that injunctions that simply require a defendant to 'obey the law'—such as the one requested by Banaszak—are impermissible."). Plaintiffs cannot obtain an injunction based upon their speculation that United will not comply with a future judicial order. *Guerrero v. Gates*, 110 F. Supp. 2d 1287, 1291 (C.D. Cal. 2000) (finding injunctive relief is "unavailable where the plaintiff's claim of future injury is merely speculative"); *Aero Corp., SA v. United States*, 38 Fed. Cl. 237, 241 (Fed. Cl. 1997) (holding that "plaintiff's speculative claims are not sufficient to demonstrate irreparable harm, especially in light of the tenet that contracting officials are presumed to act in good faith"); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury, however, does not constitute irreparable injury").

The relief described in Plaintiffs' prayer for relief is a declaratory judgment on United's potential counterclaim for a deficiency. *See* NRS 33.010; N.R.C.P. 57. Courts routinely make findings and enter judgments regarding the respective monetary positions between litigants, including deficiencies. *See* N.R.C.P. 52 & N.R.C.P. 54. Any court can make findings at trial as to whether or not Plaintiffs owe a deficiency—those findings do not constitute an injunction. *See* N.R.C.P. 65(d)("Every order granting an injunction… shall describe in reasonable detail… the act or acts sought to be restrained). United would of course be obligated to

comply with the court's determination, but Plaintiffs could not obtain an injunction until after United failed to comply with the entry of a future judgment.

Plaintiffs also seek "injunctive relief" as to whether or not Plaintiffs owe a deficiency to United. Opening Brief p. 20. 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.

3. Plaintiffs' reliance of *Edwards* is Misplaced

Plaintiffs rely upon *Edwards*, but that case is distinguishable. In *Edwards*, the plaintiff asserted an affirmative statutory claim for injunctive relief pursuant to the federal Telephone Consumer Protection Act. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 130 P.3d 1280 (2006). Here, Plaintiffs have not asserted a similar independent statutory claim for injunctive relief—instead; the FAC merely contains language in the prayer for relief requesting the issuance of an impermissible injunction. (*See* FAC at p. 14). Moreover, *Edwards* recognizes the impropriety of including a claim for injunctive relief solely to invoke the district court's jurisdiction. *Id.* at 324, 130 P.3d at 1284. Furthermore, the Plaintiffs could not assert a statutory claim for injunctive relief.

Plaintiffs requested "injunctive relief" is not colorable and even if it were, it is not ripe. A request for impermissible injunctive relief is not sufficient to impose jurisdiction. Accordingly, the District Court's dismissal of the FAC

should be affirmed.

VIII. CONCLUSION

For the reasons set forth herein, Defendant United Federal Credit Union respectfully requests that this Court affirm the District Court. Any change to the jurisdictional limit of Nevada's Courts must come from the legislature. This Court should therefore follow the United States Supreme Court, and its Sister Courts and rule that Plaintiffs may not aggregate claims under Nevada Rule of Civil Procedure Rule 23. Plaintiffs' proper forum was and is District Court. They have a forum for relief. They simply refuse to use it.

Dated this 26th day of October 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word version 2007 in 14pt Times New Roman Font; or

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any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: October 26, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October 2016, the foregoing RESPONDENT UNITED FEDERAL CREDIT UNION'S ANSWERING BRIEF was served via this Court's electronic service to:

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