IN THE SUPREME COURT OF THE STATE OF NEVADA

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LUCIA CASTILLO[1], an individual,

Appellant,

vs.

UNITED FEDERAL CREDIT UNION, a federal credit union

Respondent.

Supreme Court No. 70151
District Court Case No. CV1500421

Appellant's Reply Brief

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[1] Mr. Pratts has passed away during the pendancy of this appeal.

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I. Summary of Appellant's Argument

As detailed in the initial brief, the lower court dismissed the Appellant's class action complaint for lack of subject matter jurisdiction as the Appellant's individual damages did not exceed $10,000. Appellants' Excerpts of Record (herein "EOR") 112. The Amended complaint plead multiple claims.

1. Statutory damages for themselves and all members of the class under the UCC pursuant to NRS 104.9625(3)(b).
2. For an order preliminarily and permanently enjoining UFCU from engaging in the practices set forth in the complaint.
3. For an order of a mandatory injunction directing UFCU to remove any adverse credit information that may have been wrongfully reported on the consumer reports of the class members.

EOR 049

Under the UCC, the statutory damages for violation of Article 9 are calculated by adding the finance charge and 10 % of the amount financed at the beginning of the transaction. In the instant case, the Appellant's statutory damages are $6,330.28.

The practices Appellant sought to enjoin were two fold. First, Appellant alleged that the Respondent's notice of sale failed to comply with Nevada's motor vehicle anti-deficiency law which is found at NRS 482.516. Amended Complaint, paragraphs 24-26 (EOR 040-041). The Respondent claimed a

$6,841.55 deficiency. Amended Complaint, paragraph 7 (EOR 38). See also Respondent's January 21, 2015 notice of deficiency. (EOR 035). The Appellant plead that the Respondent's attempts to collect and report this deficiency were one of the practices sought to be enjoined. Second, the Appellant sought to enjoin the Respondent from reporting any deficiency to the credit reporting agencies. The factual basis was the lack of an enforceable debt due to non-compliance with NRS 482.516.

The Appellant's statutory damages and elimination of Respondent's deficiency has an aggregate value of $13,171.83, which is within the subject matter jurisdiction of the district court. The jurisdictional amount is measured by the value of the object of the litigation. Here, it was the collection of damages and the elimination of the deficiency.

Even if the Appellant were below the jurisdictional amount, she sought injunctive relief to prevent collection and reporting of the deficiency. So long as the injunctive relief requested is in good faith, the district courts have original jurisdiction, regardless of the amount in controversy.

Even if there were no basis for injunctive relief and the deficiency were eliminated, the district court still had subject matter jurisdiction. Class member claims can be aggregated to satisfy the jurisdictional requirement for District

Court. The majority of state appellate courts that have addressed this issue issue have allowed for aggregation.

II. Summary of Respondent's Argument

1. The Appellant's request for injunctive relief is not in good faith because they have an adequate remedy at law. "Obey the law" injunctions are not permitted.

2. The Appellant is violating the double recovery rule. A party may allege multiple theories, but may recover only once for the injury. See NRS. 104.9625. An anticipated counterclaim for a deficiency may not be used to aggregate damages.

3. The Appellant is not entitled to aggregate the class claims since the jurisdictional issue is a function of the legislature, not the courts. The amendment to NRS 4.370, which increases the jurisdictional limit to $15,000, makes no mention of class aggregation.

III. Argument

1. APPELLANT'S REQUEST FOR INJUNCTIVE RELIEF WAS MADE IN GOOD FAITH IN ORDER TO PERMANENTLY END THE UNLAWFUL COLLECTION AND CREDIT REPORTING ACTIVITY OF UFCU.

Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 130 P.3d 1280 (Nev. 2006) is the controlling case. Emperor's Garden Restaurant allegedly

transmitted two unsolicited advertisements to Mr. Edwards' personal facsimile machine. Mr. Edwards filed suit in district court. He sought monetary damages and injunctive relief under the the federal Telephone Consumer Protection Act (TCPA). The district court dismissed the complaint, and Mr. Edwards appealed. This Court reversed in part and held that the trial court had subject matter jurisdiction, based on claim for statutory injunctive relief.

Emperor's Garden contended that injunctive relief was unavailable, in large part because injunctive relief is appropriate to halt ongoing violations, and Emperor's Garden had discontinued sending any facsimiles nearly four years before Edwards filed his complaint. 122 Nev. at 322. In finding that Mr. Edward's request for injunctive relief was proper, this Court said the following:

> "the record does not indicate that Edwards' request for statutory injunctive relief was improperly or fraudulently made solely to invoke the district court's jurisdiction. As one federal court has recognized, the TCPA's purpose in allowing injunctive relief is 'to protect the privacy interests of residential telephone subscribers" by preventing "calls that violate the statute.' Thus, as Edwards' requests for monetary damages and his request for injunctive relief arose out of the same two facsimile events, the district court properly acquired jurisdiction over the entirety of Edwards' complaint, regardless of whether the monetary threshold was met."
>
> 122 Nev. at 324

Edwards governs this case. The Appellant's requests for monetary damages and injunctive relief arise from one single event - the Respondent's defective notice of sale.

Appellant's request is not an "obey the law" injunction. In *Edwards*, Emperor's Garden had stopped sending facsimiles nearly four years before the complaint was filed. The District Court noted the alleged violations had occurred nearly three and one-half years earlier, and documents placed before the district court, respondents indicated that any offending conduct had been halted.

For that reason, this Court found that the District Court did not abuse its discretion when it determined that Edwards had not demonstrated that an injunction was warranted. Id 122 Nev. 326-327.

That is not the case here. On January 21, 2015 the Respondent made demand upon the Appellant for a $6,841.55 deficiency. Amended Complaint, paragraph 7 (EOR 38). Unlike Emperor's Garden, United Federal Credit Union has demonstrated no intent that it will or has ceased sending out defective notices of sale or notices of deficiency. Unlike Mr. Edwards, the Appellant has made a valid claim to enjoin the Respondent from collecting deficiencies or reporting adverse credit information since there is no evidence in the record to show it has abandoned these practices. Indeed, in prior UCC class actions

similar to the instant action, the courts have found such injunctive relief to be an important part of class settlements. See, *Whitaker v. Navy Federal Credit Union*, 2010 WL 3928616 *2 (Md. 2010) [final approval of class settlement involving inter alia credit amelioration and debt discharge].

Even though this Court held that Mr. Edwards was not entitled to injunctive relief, such a holding did not divest the district court of its jurisdiction:

> "When the district court denied injunctive relief, however, it did not thereby lose its jurisdiction to consider Edwards' claims for monetary damages. Accordingly, while we affirm the district court's order to the extent that it denied injunctive relief, we reverse that portion of the order dismissing Edwards' statutory and common-law claims for monetary damages and remand this matter for further proceedings."
>
> 122 Nev. at 326

The Appellant's claim for injunctive relief is meritorious because it is the only way to enjoin Respondent from attempting to collect and report deficiencies from class members and the Appellant herself. Indeed, UFCU completely glosses over the fact that Appellant and the other members of the class would have no recourse in enjoining UFCU if the District Court did not maintain jurisdiction to restrain UFCU from such activities. Even if Respondent

acknowledged that it corrected its defective notice of sale and ceased collection of deficiencies relating to the defective notice, the district court would not lose jurisdiction if injunctive relief were denied.

2. APPELLANT IS NOT SEEKING DOUBLE RECOVERY

The Appellant is not seeking double recovery. The statutory damages and elimination of a deficiency are two distinct forms of relief sought by Appellant.

Article Nine does contain a provision that prohibits double recovery. NRS 104.625(4) states:

> "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."

The Drafter's Comment No. 3 to that section states in relevant part that:*"The last sentence of subsection (d) 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."*

In order to qualify for NRS 104.625(4)'s double recovery prohibition, the deficiency must be eliminated under NRS 104.9626. Subsection (1) of that statute states: *"In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply . . ."* Emphasis supplied. The statute only applies to non-consumer transactions. The Appellant entered into a consumer transaction. Amended Complaint, paragraphs 1-2 (EOR 37).

NRS 104.9626 is inapplicable to the Appellant. The deficiency was eliminated under NRS 482.516, not Article 9, NRS 104.625. Rules of statutory construction require the courts to *"[C]onstrue statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation."* See *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 81 P.3d 532, (Nev. 2003).

When NRS 104.625; NRS 104.626 and NRS 482.516 are construed together, there can be no double recovery where the deficiency is eliminated by a statute other than NRS 104.626.

Where one of the claims is for injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation. *Hunt v. Washington State Apple Advertising Commission* 432 U.S.

333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). The value of that right is measured by the losses that will follow from the statute's enforcement. *Id.* at 432 U.S. 347, citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936).

The object of the Appellant's litigation was $6,330.28 in statutory damages plus the elimination of the $6,841.55 deficiency. When both are measured, the amount in controversy exceeds $10,000.

3. THE CLAIMS OF EACH CLASS MEMBER MAY BE AGGREGATED TOWARD THE JURISDICTIONAL AMOUNT

Whether aggregation is appropriate depends upon whether the plaintiffs have distinct and separate interests or whether the plaintiffs are "claimants under a common right". The Class Members in this action claim under a common right as each was subjected to a single institutionalized practice of the lender in using non-compliant repossession forms and attempting to collect and report an unlawful deficiency.

Respondent claims that Appellant raised the "common right" theory for the first time on appeal. The common right is that which provides the basis for class certification, common questions of law or fact, typicality and numerosity. Amended Complaint, paragraphs 39-44 (EOR 043-044).

Contrary to the assertion by UFCU, the Appellant's Opposition to Respondent's motion to dismiss, Appellant did raise aggregation of claims in a "common right" context in its arguments and filings below. This is evident by the following arguments contained in that Opposition:

> Class action suits are designed to allow representatives of a numerous class of similarly situated people to sue on behalf of that class in order to obtain a judgment that will bind all. Thereby, class actions promote efficiency and 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."
>
> *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 846, 124 P.3d 530, 537 (Nev.2005)
>
> (EOR 088)
>
> The purpose of the class action is to provide litigants who share common questions of law and fact with an economically viable means of addressing their needs in court. We believe that purpose is served best if jurisdiction is conferred on the circuit court when the aggregated claims of the class meet the monetary jurisdictional requirements even though an individual claim of a class member does not reach that threshold.

> The aggregation of claims in the instant action will serve the interests of justice and promote the efficiency of the class action process. This position is especially compelling in light of the Supreme Court of Nevada's recognition of the utility of class actions.
>
> EOR 088-089

These statements show that the class members' remedy arise out of a common right.

Respondent also argues that the amendment of NRS 4.370 indicates the Legislature did not include a provision allowing class plaintiffs to aggregate their claims. This is not accurate. NRS 4.370 as amended increased the jurisdictional threshold in justice court to $15,000. The statute is silent on aggregation of class claims. Respondent cites the statutory construction maxim "*That which is enumerated excludes that which is not.*" That is not the appropriate construction tool.

The plain meaning of the words in a statute should be respected unless doing so violates the spirit of the act. If more than one reasonable meaning can be understood from the statute's language, it is ambiguous, and the plain meaning rule does not apply. *City of Las Vegas v. Eighth Judicial Dist. Court ex rel County of Clark*, 188 P.3d 55, 124 Nev. 540, (Nev. 2008).

Because the statute is silent, it is ambiguous as to whether or not class plaintiffs may aggregate claims. This makes it a Court function to determine whether claims can be aggregated. It is not a legislative function due to the ambiguity of the statute.

This Court has not addressed the issue of whether class member claims can be aggregated. Other courts have and the majority conclude aggregation is permissible. The rationale is plain. Potentially multi-million dollar litigation should be brought in the "greaterÓ court". The district courts are better equipped to handle the large and more complicated matters, which would certainly include a class action, and that the justice courts are to handle smaller and less complicated disputes. *Galen of Florida, Inc. v. Arscott*, 629 So.2d 856, 857 (Fla. 5th DCA 1993); *see also, Hernando County v. Moran*, 979 So.2d 276 (Fla. 5th DCA 2008).

IV. Conclusion

Edwards v. Emperor's Garden Restaurant, supra, is controlling. Mr. Edwards did not get injunctive relief because Emperor's Garden stopped sending faxes years before he filed the complaint. This Court found he had plead injunctive relief in good faith, and that the loss of the remedy did not deprive the district court of jurisdiction. There is nothing in the record to

indicate the Appellant plead injunctive relief in bad faith. The record does show Respondent's demand for a deficiency and the defective notice that was used prior to the sale. Respondent has not indicated that it will cease sending defective notices or notices of deficiency following sale. Injunctive relief was warranted.

Appellant has not violated any double recovery rule by aggregating her statutory damages with enjoining Respondent's deficiency claim. Both are added in order to comprise the value of the object of the litigation.

Last, the only practical manner to interpret the jurisdictional statute is to allow aggregation of all class plaintiffs. Justice Courts cannot issue the injunctive relief that is needed in this case. Justice Courts are not designed to handle potential multi million dollar litigation, even if it is based upon thousands of small claims. The district court was always the proper court. Reversal is warranted.

Dated: This 26 day of November, 2016

By: _____

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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LUCIA CASTILLO, an individual, and EDWIN PRATTS, an individual,	)
Appellants,	)Supreme Court No. 70151)District Court Case No. CV1500421
vs.	)
UNITED FEDERAL CREDIT UNION, a federal credit union	)
Respondent.	)

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Corporate Affiliations	None
Counsel for Appellants	Michael Lehners, Esq. Nathan Zeltzer, Esq. Robert Murphy, Esq.
Pseudonyms:	None

Dated: This 26 day of November, 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 2002 in 14pt Times New Roman Font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for 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: This 28 day of November, 2016

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NRAP 28.2 ATTORNEY'S CERTIFICATE

1. I hereby certify that I, as the signing attorney, have read this brief;

2. To the best of knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

3. I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and

4. I certify that this brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7).

Dated: This 25 day of November, 2016

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