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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOY BRITT et. al	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 3:03-0422
	)	
	)	JURY DEMAND
PRIMUS AUTOMOTIVE FINANCIAL SERVS. ET AL	)	Judges: Haynes
	)	
Defendants.	)	

ORDER

In accordance with the Memorandum filed herewith, the Plaintiff's motion for class certification, (Docket Entry No. 50 is GRANTED. The Court certifies this action as a class of all consumers and customers of Mazda of Clarksville who purchased vehicles with trade-ins after the Defendants Primus Automotive Financial Services, Inc. and the Ford Motor Credit Company assumed control of the financial management of the Mazda Clarksville dealership, from on or about February 11, 2003 until the present.

A pretrial conference is set for August 30, 2004 at 1:30 p.m.

It is so ORDERED this the 5th day of August,2004.

WILLIAM J. HAYNES, JR.
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOY J. BRITT, Individually and on behalf of all similarly situated persons	)	
Plaintiffs,	)	
v.	)	**No. 3-03-0422**
PRIMUS AUTOMOTIVE FINANCIAL SERVICES, INC., d/b/a MAZDA AMERICAN CREDIT; FORD MOTOR CREDIT COMPANY	)	**JURY DEMAND**
	)	**Judges Haynes/Knowles**
Defendants.	)	

MEMORANDUM

Plaintiff, Joy J. Britt, a Kentucky citizen, filed this action on behalf of herself and others similarly situated , under 28 U.S.C.§1332 , the federal diversity statute, against the Defendants: Ford Motor Credit Company ("FMCC"), a Delaware corporation and Primus Automotive Financial Services, Inc.("Primus"), New York corporation doing business as Mazda American Credit Company ("MAC"). FMCC is the parent corporation of Primus. Plaintiff asserts claims for breach of contract, fraud, negligent misrepresentation, breach of fiduciary duty[1], breach of warranty, deceptive trade practices, intentional infliction of emotional distress, outrageous conduct[2] and unjust enrichment.

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[1]In an earlier Order, the Court dismissed the breach of fiduciary duty claim. (Docket Entry No. 93).

[2]The intentional infliction of emotional distress and outrageous conduct claims are the same claim. Bain v. Well, 936 S.W.2d 618, 622, n. 3 (Tenn. 1997).

Plaintiff's claims arise from her purchase of a vehicle from the former Mazda of Clarksville ("MOC") dealership with a trade-in vehicle that had an outstanding lien. The lien was to be paid off as part of the purchase. Plaintiff alleges that the Defendants exercised control of the MOC dealership beginning on or about February 11, 2003, and thereafter engaged in a combination, conspiracy, plan and agreement or through ratification to cause the liens on MOC's purchasers' trade-in vehicles not to be paid off. Plaintiff also avers an agency relationship existed between the Defendants and the MOC dealership.

Before the Court is the Plaintiff's motion for class certification under Fed. R.Civ. P. 23(b)(3) (Docket Entry No. 50). Plaintiffs argue initially to represent a class of MOC customers who purchased a vehicle with a trade- in vehicles with liens, but those liens were not paid off during the time period from February 11, 2003 until MOC's bankruptcy filing on April 4, 2004. The Plaintiff was given leave(Docket Entry No. 90) to amend her motion to represent a class of " all ...consumers and customer[s] of Mazda of Clarksville who purchased vehicles with trade-ins after the defendants assumed control of the financial management of Mazda Clarksville dealership (believed to be after February 11, 2003 until the present."(Docket Entry No. 80, quoting Docket Entry No. 8, First Amended Complaint at ¶ 20)

In their response, the Defendants assert, in sum, that the Plaintiff has not satisfied the numerosity requirement of Fed R. Civ. P 23(a) and that given the Plaintiff's legal claims, individual issues of fact among purported class members requires individual determinations and precludes common issues of fact or claims to satisfy Rule 23(b)(3). (Docket Entry No. 54). The Defendants also submit proof that some liens on the trade-in vehicles at the MOC dealership

have been paid. (Docket Entry No. 55, Stewart Affidavit).

REVIEW OF THE RECORD

In support of her motion,. Plaintiff submits the affidavits of Jessica Dager and Herbert Patrick who represents Rebecca Neely, Messamore, Lyla Darnell and David Hardin, to establish the Defendants' alleged practice of failing to pay off the outstanding liens on their trade-in vehicles that were used to purchase vehicles at the MOC dealership. (Docket Entry Nos. 26 through 31 and 60 through 78). Plaintiff also attached the documentary evidence to support the transactions of these persons with MOC. Id.

Plaintiff also submitted a chart of sixty similarly situated MOC purchasers who used their trade-in vehicles to finance their vehicles from MOC.\(Docket Entry No. 51 Exhibit A thereto). Ninety-four purchasers of MOC vehicles complained to Montgomery County and Clarksville law enforcement officials about the failure to pay off the liens on their trade-ins that were assigned to MOC. (Docket Entry No. 50, Attachment thereto at No. 94).

There is evidence of FMCC's awareness of MOC's financial woes, as reflected in FMCC's demand letter for the immediate payment of MOC's debt to FMCC. Id. at No. 49. MOC's president signed an "Authorization, Release and Indemnification" for FMCC and Primus that empowered FMCC and Primus to dispose of all MOC properties "as permitted by law". Id. at No. 88. FMCC also obtained the right to access MOC's "Deposit Balance Information" from MOC's bank. Id. at No. 72. FMCC also directed that all payments owed to MOC by Household Finance Company must be sent to MAC. Id. at No. 33. MAC audited all of MOC's sales of vehicles. Id. at No. 42

Plaintiff identifies as the common issues to all class members the following:

(1) Whether the Mazda of Clarksville dealership and Defendants engaged in joint venture and arrangement or conspiracy to take trade-in vehicles and fail to pay off liens or loans;

(2) Whether the Defendants Ford Motor Credit Company, *et al.* committed acts of conspiracy, agency, acts of principal control, domination and/or assumption of contract breached contractual agreement with members of the Plaintiff class;

* * *

(4) [Whether the Defendants] [i]ntentionally or recklessly fail[ed] to pay off lienholders;

(5) Whether Defendants engaged in reckless and negligent conduct by failing to pay off liens on trade-in vehicles, but yet expropriating or using the funds for the benefit of Defendants.

(6) Whether Defendants breached the warranty of title by knowingly selling and dealership in its own interests and in a manner detrimental to the interests of the class members. The delivering a vehicle whose title was encumbered and clouded without clear title and/or no title.

(7) Whether Defendants acted intentionally or negligently so as to inflict emotional distress;

(8) Whether Defendants conduct was so beyond the bounds of decency and acceptable behavior, essentially stealing or theft of cash and property for personal transportation that tort of outrage applies to these facts.

(Docket Entry No. 51, Plaintiff's Memorandum at pp. 8-9).

The Defendants contend that some of the purchasers requested and received payments or refunds or other adjustments for the liens on their trade-ins to moot the issue of the failure to pay the liens on trade-in vehicles at the former Mazda dealership. See Docket Entry No. 51 Attachment thereto and Docket Entry No.55, Stewart Affidavit. Defendants also cite an Order of the Bankruptcy Court that authorized purchasers to obtain titles to their MOC vehicles (Docket Entry No. 84, Exhibit B thereto.

These facts are cited to show that the Plaintiff's claims are not representative of the class Plaintiff purports to represent. Defendants also argue that those purchasers who did not avail themselves of the Bankruptcy Court's Order failed to mitigate their damages that will result in individual determinations. Yet, of those persons who liens were paid, not all have had their disputes resolved. See e.g., Docket Entry No. 86.

B. CONCLUSIONS OF LAW

To meet the requirements for class certification, Plaintiff must demonstrate her compliance with Fed. R. Civ. P. 23(a), applicable to all class actions, as well as Fed. R. Civ. P. 23(b) (3), the specific class designation sought by her. Plaintiffs must initially show that class certification advances "the efficiency and economy of litigation which is a principal purpose of the procedure." American Pipe & Construction Co. v. Utah, 414 U.S. 538, 553 (1974). Class actions "vindicat[e] the rights of individuals who otherwise ought not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." Gulf Oil Co. v. Bernard, 452 U. S. 892, 99-100, n.11 (1981) (quoting Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326, 338 (1980)). As to the Rule 23(b)(3) designation, the Sixth Circuit explained that "[t]he procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in vindication of small claims but, rather, to achieve the economies of time, effort, and expense." Sterlingv. Velsicol Chem. Corp., *855* F.2d

achieve the economies of time, effort, and expense." Sterlingv. Velsicol Chem. Corp., *855* F.2d 1188, 1196 (6th Cir. 1988) (citing cases).

"In determining the propriety of a class action, the question is not whether the plaintiff or the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Eisen v. Carlisle & Jaccuelin 417 U.S. 156, 178, (1974) (quoting Miller v. Mackey Int'l. Inc., 452 F.2d 424, 427 (6th Cir.1971). Accord Weathers v. Peters Realty Corn , 499 F.2d 1197, 1201 (6th Cir. 1974). I n evaluating plaintiffs' compliance with these rules, '[t]he Court must carefully scrutinize plaintiffs allegations to insure the requisites of Rule 23(a) and (b) have been met." Duncan v. State of Tennessee 84 F.R.D. 21,27 (M.D. Tenn. 1979). "It's the plaintiffs burden to show the Court that the requirements of Rule 23 are met." Id. at 27.

Plaintiffs bear the burden of persuasion that "[a]s a preliminary matter [the plaintiff can] satisfy all four of the prerequisites contained in Rule 23(a) and then demonstrate that the class he seeks to represent falls within one of the subcategories under Rule 23(b)." Steelman v. Strickland, 78 F.R.D. 187, 189 (E.D. Tenn. 1977) (Neese, D.J.) (quoting Senter v. General Motors Cow., 532 F.2d 511, 522 (6th Cir.) cert. denied, 429 U.S. 870 (1976) . This burden is not by a preponderance of the evidence, as that standard applies only to proving the existence of the class at the time of trial. See Paxton v.Union Nat. Bank 519 F. Supp. 136,137,171 (E.D. Ark. 1981), rev'd part other arounds. 688 F.2d 552(8th Cir. 1982), cert. denied, 460 U.S. 1083, (1983).

In reaching this determination, preliminary hearings on the merits were initially disfavored. Eisen, 417 U.S. at 177-78; Duncan, 84 F.R.D. at 28. The Supreme Court counseled that: 'sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiffs claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." General Telephone Co. of Southwest v. Falcon. 457 U.S. 147, 160, (1982) (emphasis added).

In determining the predominance issue, the Third Circuit observed that while not concerned with the merits of plaintiffs claim at this time, the inquiry involves, "at a minimum,the identification of the legal and

factual issues, common and diverse, and an identification of the class members to which those relate." Katz v. Carte Blanche Co., 496 F.2d 747, 756 (3d Cir 1974) (en banc).

a. Rule 23(a) Prerequisites

The threshold requirements for a class action are as follows:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ. P. 23(a)

(1) Numerosity and Joinder

Courts have certified classes that involved classes of one hundred members or less. Korn v.Franchand Corp, 456 F.2d 1206 (2d Cir. 1972) (class of 70 investors sufficient); Bypressv. Newport News General and Nonsectarian Hospital Association. 375 F.2d 648 (4th Cir.1967) (eighteen persons could comprise a class); Shankroffv. Advect. Inc 112 F.R.D. 190 (S.D. N.Y. 1986) (class of 100 held to satisfy the numerosity requirement). A purported class of 40 or more persons is usually deemed sufficient to satisfy the numerosity requirement. 5 Moore's Federal Practice §23.22 ao p.23-60 (Matthew Bender 3ded) and authorities cited therein.

Here, numerosity of the purported class of 60 purchasers sufficient. Although Defendants argue some members of the purported class have had the liens on their trade-ins paid-off, those facts, if true, do not preclude relief on the other claims at issue. In addition, some of those whose liens were paid off continue to experience problems. See e. g., Docket Entry No. 86

For a showing of the impracticality of joinder, this determination is based upon the circumstances surrounding each case. Nashv. Citv of Oakwood,94 F.R.D. 83, 87 (S.D.Ohio1982)(citing Senter, 532 F.2d at 523 n.24); see also Cashv. Swifton Land Corn.. 434 F.2d *569,571* (6th Cir. 1970). Joinder has been considered practical if the class size is between thirty to forty persons. Moreland v RuckerPharmaceutical Co.. Inc.. 63 F.R.D. 611, 614(E.D. N.Y. 1974)(citing Atwood v. National Bank of Lima, 115 F.2d 861 (6th Cir. 1940)).

Given that some of the class members of the class are in United States military and have since been transferred to other military bases or outside the country, and that other class

members, such as Plaintiff, are in other states, , the Court finds that this geographic dispersion of class members sufficient to render joinder of eligible class members in this action to be impractical.

(2) Typicality and Commonality

Rule 23(a)(2) and (3) require that the class representative's claims must be typical of all class members' claims and present common questions of law or fact for all members of the putative class. "Rule 23 a simply requires a common question of law or fact." Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 884(6" Cir. 1997). See also, Davis v. Avco Fin. Servs. Inc.,739 F.2d 1057, 1062(6" Cir. 1984). "The Rule does not require that all questions of law and fact be common but it only demands that a question of law or fact be presented which is shared in the grievances of the prospective class as defined." Abbey v. Burroughs Corn., 1982-83 Transfer Binder, Fed Sec. L. Rep. ¶99,123 (E.D. Mich 1983). As to typicality, this Court has stated in another context, plaintiff's claim "cannot be unique to him." Duncan 84 F.R.D. at 31.

As to commonality requirement , there is a substantial identity between the concepts of commonality under Rule 23(a)(2) and typicality under Rule 23(a)(3). Duncan 84 F.R.D. at 30-31. These concepts likewise are substantially interrelated to the Rule 23(b)(3) requirements that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members...." Thus, the Court defers a discussion of the Plaintiff's showing under Rule 23(a)(2) and (3) to the analysis of the Rule 23(b)(3) issues of

the predominance of common questions of law or fact.

(3) Adequacy of the Class Representatives

As to whether the Plaintiff is an adequate representative of the purported class, the Sixth Circuit has enunciated two criteria for the Court's determination: "(1) [t]he representative must have common interest with the unnamed members of the class and (2) it must appear that the representatives will vigorously prosecute the interest of the class through qualified counsel." Senter, 532 F.2d at 525.

In Falcon, the Supreme Court reiterated its core requirement that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." 457 U.S. at 156 (citations to cases omitted). Absolute identity of claims among class members, however, is not required. Like v. Carter. 448 F.2d 798, 802 (8th Cir. 1971), cert. denied, 405 U.S. 1045 (1972), particularly as to the amount of damages. Weathers, 499 F.2d at 1200-01. Plaintiff's counsel, as counsel to the class, must be "experienced and generally able to conduct the proposed litigation." Susman v Lincoln America Corp., 561 F.2d 86, 90 (8th Cir.1977).

The Court concludes that the Plaintiff's claims present the same core facts, and legal claims as the members of the purported class and that her counsel, based upon his prior appearances in this Court , is qualified to conduct this litigation.

a. Predominance of Common Questions Under Rule 23(b)(3)

Plaintiffs also seek certification of their class under Rule 23(b)(3). Professor Moore observes that Rule 23 (b)(3) " requires a pragmatic assessment of the entire action and all the issues involved." 3 Moore's, Federal Practice, §23.45 [1] at p. 23-210 (Matthew Bender 3d. ed.)The Court is also to consider:

> The substantive elements of class members' claims require the same proof of each class member.
>
> The proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interests.
>
> The resolution of an issue common to the class would significantly advance the litigation.
>
> One of more common issued constitute significant parts of each class member's individual cases.
>
> The common questions are central to all of the members' claims.
>
> The same theory of liability is asserted by or against all class members, and all defendants raise the same basic defenses.

Id.

As noted earlier, there is an overlap between Rule 23(b)(3) and Rule 23(a)(2) and (3), and the considerations of each of these rules will now be addressed. In this motion,

the factual bases of the Plaintiff's claims present predominant common questions of fact involving the defendants' conduct in the alleged non-payment of liens on their trade-in vehicles. The predominant question of law is whether these facts, would establish a breach of contract and/or warranty and/or an unlawful trade practice that unjustly enriched the Defendants at the expense of Plaintiff 's class. Another overriding issue in this case is whether FMCC and/or Primus was MOC's agent or dominated and controlled the MOC dealership by taking it over, and essentially running the former MOC dealership. The Court notes that a class was certified on similar claims involving failure to record satisfaction of mortgages in Piro v. National City Bank, 2004WL170335 * 5-6 (Ohio Ct. App. Jan. 29, 2004)

Here, class certification, also renders this action an efficient resolution of multiple controversies where the class members may lack the financial resources to proceed independently. There is a benefit to the parties, particularly the Defendants have all claims tried in a single forum that also reduces the likelihood of inconsistent findings of fact and legal conclusions by different courts, as well as the added expense to defend multiple actions.

As to the Defendants' contention that individual determinations are necessary on the issues of damages and reliance so as to preclude certification, the Sixth Circuit has noted that "[v]arying damages levels rarely prohibit a class action if the class members'claims possess factual and legal commonality." Eddelman v. Jefferson County, Kentucky, 96 F.3d 1448, 1996WL495013 *6 (6th Cir. Aug. 29,1996)(citing Mayer v.

Mylod, 988 F.2d 635, 640 (6th Cir. 1993). The Sixth Circuit has also noted that with the certification of a Rule 23(b)(3) class that "individual members of the class still will be required to submit evidence concerning their particularized damage claim in subsequent proceedings." Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6th Cir. 1988). The issue of reliance is limited at best to the negligent misrepresentation and fraud claims with their demand of reliance. Those claims will be excluded from the class certification.

Accordingly, the Court concludes that Plaintiff has satisfied the requirements of Fed.R.Civ.P. 23 (a) and (b)(3). The Court's certification, however, is limited as to liability on all claims except fraud and negligent misrepresentation as those claims each contain the element of reliance that requires an individual determination. In addition, the determination of damages will require individual submissions by class members, if necessary.

In sum, the Court concludes that Plaintiff's motion for class certification should be granted. Counsel shall consult on an appropriate notice to class members and the publication of said notice. If counsel for the parties are unable to agree, counsel shall submit their respective notices for Court approval. A status conference is set for August 30, 2004 at 1:30 p.m. to decide any notice issues and to determine the schedule for further pretrial proceedings.

An appropriate Order is filed herewith.

This the 5th day of August, 2004.

WILLIAM J. HAYNES, JR.
UNITED STATES DISTRICT JUDGE