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IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

Afni, Inc., assignee of State Farm Bank, Plaintiff/Counterclaim Defendant, v. Thuy Martinez, Defendant/Counterclaimant, v. EMVLP, LLC, Twenty-One Eighty-Five, LLC, State Farm Bank, F.S.B., and ROE Entities I–X, successors to State Farm Bank, F.S.B., Third-Party Counterclaim Defendants.	Case No. 23SL-AC00070-01

Amended Counterclaim

Counterclaimant Thuy Martinez ("Martinez"), through her undersigned attorneys, counterclaims for herself and a class of similarly situated consumers.

Nature of Case

1. This is a consumer class action against Afni, Inc. ("Afni") and State Farm Bank, F.S.B. ("Bank"), and their assignors, assignees, predecessors, or successors, seeking relief to redress an unlawful and deceptive pattern of wrongdoing followed by them and the other Third-Party Counterclaim Defendants regarding collection, enforcement, repossession and disposition of collateral, and collection of alleged deficiencies.[1]

[1] Martinez uses the term "repossess" or "repossession" broadly to include any taking, recovery or physical regaining of the collateral by Third-Party Defendants, their employees, assignors, assignees, predecessors, successors, agents or independent contractors, or by the dealer, as well as any of those entities regarding control after collateral was voluntarily surrendered or abandoned.

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2. Specifically, Martinez and the Class allege Afni and Third-Party Counterclaim Defendants use standard practices that violate the Uniform Commercial Code (the "UCC"), such as mailing deficient statutorily mandated post-repossession, pre-disposition notices ("presale notices").[2]

3. The UCC has been adopted by all 50 states without material variation.[3]

4. The primary difference between each state's version of Article 9 of the UCC is the use of different prefixes for their statutory scheme. Missouri's adoption of Revised Article 9 of the UCC is codified in §§ 400.9-101 et seq. Illinois' adoption of Revised Article 9 of the UCC is codified in §§ 810 ILCS 5/9-101 et seq.

5. For readability, and because the general UCC law applies to the class members' claims, Martinez cites the Official Text of the UCC for all class members.

6. The UCC requires secured parties to mail consumers presale notices to inform them of their rights after they repossess collateral.

7. After repossessing Martinez and many other consumers' vehicles in which one or more of the Counterclaim Defendants had a secured interest, but before disposing of the vehicles, one or more of the Counterclaim Defendants mailed Martinez and these consumers a post-repossession, pre-disposition document titled: "Notice of Our Plan to Sell Property" (the form "presale notice").

8. A copy of the form presale notice mailed to Martinez is attached as **Exhibit 1**.

9. Exhibit 1 purports to inform debtors of their rights to protect their interests in their repossessed or voluntarily surrendered vehicles.

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[2] Collectively, Afni and Third-Party Counterclaim Defendants are referred to as "Counterclaim Defendants."

[3] "[Revised] Article 9 of the UCC has now been adopted by all fifty states, the District of Columbia, and the Virgin Islands." *See* 68A Am. Jur.2d Secured Transactions § 1 (2006).

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10. The presale notices mailed to Martinez and numerous other consumers violated the UCC.

11. The post-sale explanations mailed to Martinez and the Class violated § 9-616.

12. A copy of the post-sale explanation mailed to Martinez is attached as **Exhibit 2**.

13. Martinez sues for herself and all other similarly situated consumers. They seek redress from Counterclaim Defendants (jointly, severally, or in the alternative) for actual damages in the amount provided by § 9-625(c)(2)'s statutory formula for Counterclaim Defendants' failure to comply with § 9-611 through § 9-614, $500 in damages under § 9-625(e)(5) for Counterclaim Defendants' post-sale explanation violations,[4] declaratory relief, injunctive relief, and for such other further relief as this Court considers appropriate.

Applicable Law and Relevant UCC Provisions

14. Provisions of Revised Article 9 of UCC § 9-601 through 9-628, which have been adopted with little variation in all 50 states, form a comprehensive scheme governing a secured creditor's repossession and disposition of a consumer-debtor's collateral.

15. Martinez and the class members were named as borrowers or buyers on retail installment contracts or financing agreements executed in multiple states, which were assigned to or executed by Counterclaim Defendants.

16. Martinez and the class members' claims are governed by the UCC.

17. Section 9-610 permits creditors to sell repossessed collateral, but only if "[e]very aspect of a disposition of collateral [is] commercially reasonable."

18. Section 9-611(b) requires that, before disposition of a consumer's repossessed collateral, the secured party sends the consumer-debtor a "reasonable authenticated notification of

[4] "Post-sale explanation" means a post-disposition explanation of the surplus or deficiency.

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disposition," which gives the consumer-debtor specific information about the intended disposition and the consumer-debtor's rights.

19. Sections 9-613 and 9-614 set forth the required information the secured party must include in the presale notices.

20. Section 9-616 requires the secured party to send consumer-debtors a post-sale explanation, which must include specific information in the order designated by the statute.

21. Section 9-625(c)(2) allows consumer-debtors to recover actual damages for the creditor's violations of Article 9, Part 6 of the UCC based on its statutory formula.

22. Section 9-625(e)(5) entitles consumer-debtors to additional statutory damages for each violation of § 9-616(b)(1) if the noncompliance is "part of a pattern, or consistent with a practice, of noncompliance."

Parties

23. Martinez is a resident of St. Louis County, Missouri.

24. Afni is a financial lender who regularly conducts business in Missouri.

25. Bank is a federal savings bank that regularly provides financing to purchasers of new and used motor vehicles in Missouri.

26. State Farm Mutual Automobile Insurance Company ("State Farm") has or had 100% ownership or other control of Bank.

27. According to the FDIC, Bank was closed on March 30, 2021, without government assistance.

28. According to State Farm, Bank transferred its loans to different State Farm entities before Bank closed, including EMVLP, LLC; EMVLP II, LLC; EMVLP, II PLLC; and SF ARLO, LLC.

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29. EMVLP, LLC is a foreign limited liability company registered to do business in Missouri.

30. EMVLP, LLC's principal business is vehicle loans, including regularly providing financing to purchasers of new and used motor vehicles in Missouri.

31. EMVLP, LLC has or had 100% ownership or other control of Twenty-One Eighty-Five, LLC.

32. State Farm has or had 100% ownership or other control of EMVLP, LLC.

33. Twenty-One Eighty-Five, LLC receives assignments of and purchases consumers vehicle loans from Bank and/or the other Third-Party Counterclaim Defendants.

34. According to Bank, Twenty-One Eighty-Five, LLC is a wholly owned subsidiary of State Farm.

35. ROE Entities I–X are the assignees, purchasers, or successors to Bank's consumer vehicle loans. The names and capacities of ROE Entities I–X are unknown to Martinez, so she sues them by fictitious names. When the true names and capacities of these third-party counterclaim defendants are ascertained, Martinez will seek leave to amend to identify them.

36. All allegations of acts or omissions by Counterclaim Defendants include, but are not limited to, acts and omissions of Counterclaim Defendants' assignors, assignees, predecessors, successors, officers, directors, operators, managers, supervisors, employees, affiliates, subsidiaries, vice-principals, partners, agents, servants, and owners; and that such acts and omissions were made with Counterclaim Defendants' express and/or implied authority, or were ratified or otherwise approved by Counterclaim Defendants; or that such acts or omissions were made in the routine normal course and scope of their agency and employment as Counterclaim

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Defendants' officers, directors, operators, managers, supervisors, employees, affiliates, subsidiaries, vice-principals, partners, agents, servants, and owners.

Jurisdiction and Venue

37. This is a civil case, so this Court has jurisdiction.

38. Class members may have damages over $25,000.

39. Venue is proper in St. Louis County, Missouri, where Martinez resides and where Afni sued her.

Allegations as to Martinez's UCC Claims

40. Martinez and Bank entered a consumer credit contract for the purchase of a 2015 Cadillac Escalade (the "Vehicle").

41. The Vehicle was bought for use primarily for personal, family, or household purposes.

42. Martinez's consumer credit contract was for the sale of a motor vehicle by a retail seller to a retail buyer on time under a retail installment contract for a time sale price payable in one or more deferred installments.

43. A copy of the form right-to-cure notice mailed to Martinez is attached to Afni's Petition as Exhibit B and attached here as **Exhibit 3**.

44. Exhibit 3 states Martinez's consumer credit contract was sold to Twenty-One Eighty-Five, LLC.

45. Afni's Petition alleged Bank assigned Martinez's consumer credit contract to Afni.

46. Martinez was a debtor in a consumer-goods transaction as those terms are defined under the UCC.

47. One of the Counterclaim Defendants (or an agent acting on its behalf) repossessed the Vehicle in October of 2019.

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48. After taking possession of the Vehicle, Bank or its assignee/successor allegedly mailed Martinez a presale notice that omitted or misstated information required by § 400.9-613 and § 400.9-614.

49. After repossessing the Vehicle, Bank and its assignees/successors did not send Martinez a reasonable presale notice as required by § 9-611(b) but sold the Vehicle anyway.

50. The presale notice mailed to Martinez after repossessing (but before selling) the Vehicle violated §§ 9-613 and 9-614 because, among other reasons: it did not properly state the method of intended disposition of the Vehicle; it did not describe the secured party; and improperly advised Martinez she had to redeem by November 5, 2019. *See* **Exhibit 1**.

51. After disposing the Vehicle, the post-sale explanation mailed to Martinez violated § 9-616 because it did not inform Martinez that the alleged deficiency was affected by future debits, credits, charges, interest, rebates, and expenses.

Allegations as to the Class

52. Martinez counterclaims individually and for the Class designated under Rules 52.08(a) and 52.08(b)(3) to remedy the ongoing, unlawful lending and repossession practices of Counterclaim Defendants (including their assignors, assignees, predecessors, and successors), and seeks redress for all similarly situated consumers.

53. The "Class" comprises all people: who were mailed a presale notice identifying Bank or whose collateral was sold by Counterclaim Defendants without mailing any presale notice.

54. Excluded from the Class are people from whom Counterclaim Defendants have obtained a final deficiency judgment or who filed for bankruptcy after the date on their presale notice and whose bankruptcy ended in discharge rather than dismissal.

55. The Class, as defined, is identifiable and unambiguous based on objective information and criteria. Martinez reserves the right to expand, limit, amend or otherwise change

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the class definition, or propose subclasses in response to facts learned through formal or informal discovery, her continuing investigation, legal arguments advanced by the parties, concerns of the Court, or otherwise.

56. Martinez's and the Class's rights derive from written, form documents and uniform statutes.

57. Each class member purchased the collateral for primarily personal, family, or household purposes.

58. Each class member was a debtor or obligor as defined in the UCC.

59. All presale notices mailed to the Class have at least one of the same deficiencies as the presale notice mailed to Martinez.

60. Every state's version of the UCC retains the Official Text of the UCC's requirements to accurately "describe[] the debtor and the secured party," "state[] the method of intended disposition," and "state[] that the debtor is entitled to an accounting of the [the debtor's alleged presale] unpaid indebtedness," as required by UCC §§ 9-613(1)(A), 9-613(1)(C), 9-613(1)(D), and 9-614(1).

61. Every state's version of the UCC retains the Official Text of the UCC's requirement to allow debtors to "redeem collateral" at any time before their vehicles are sold (*see* UCC § 9-623) and prohibition against waiving or varying those redemption rights (*see* UCC § 9-602(11)).

62. Every state's version of the UCC retains the Official Text of the UCC's requirements to provide "a description of any liability for a deficiency of the person to which the notification is sent" and "a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available[,]" as required by UCC § 9-614(1)(B)–(C).

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63. Failure to include the information in § 9-613(1) or § 9-614 (1) renders a presale notice "insufficient as a matter of law." *See* Official Text of UCC § 9-614, Comment 2.

64. The post-sale explanations mailed to Martinez and the class members violate § 9-616 because they did not inform them that the alleged deficiencies were affected by future debits, credits, charges, interest, rebates, and expenses.

65. Upon information and belief, the individuals comprising the Class are so numerous their individual joinder is impracticable. Martinez is informed and believes the proposed Class has over 40 individuals who were mailed a presale notice and/or a post-sale explanation in substantially the same form as the documents allegedly mailed to Martinez. However, the precise number of Class members is unknown.

66. There are questions of law and fact common to the Class, which predominate over any issues involving individual class members—namely whether Counterclaim Defendants or their assignees/successors mailed the Class members statutorily-compliant presale notices before selling their collateral.

67. Martinez's claims are typical of the claims of the class members.

68. Martinez's and the Class's claims are based on the same factual and legal theories.

69. Martinez and each class member were damaged and are entitled to recover actual damages equal to the minimum damages provided by the § 9-625(c)(2) due to Counterclaim Defendants' or their assignors'/predecessors' failure to provide proper presale notices.

70. Martinez and each Class member have the right to an additional $500 under § 9-625(e)(5) for each deficient post-sale explanation mailed to him or her.

71. Martinez will fairly and adequately represent and protect the interests of the Class.

72. Martinez has no interests antagonistic to the class members.

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73. Martinez's counsel is competent and experienced in consumer and class action litigation.

74. Martinez and all Class members have an interest in determining the adequacy of the presale notices and to recover damages due to the noncompliant presale notices.

75. Martinez and all Class members also have an interest in determining whether the post-sale explanations complied with § 9-616 and recovering damages due to the noncompliant post-sale explanations.

76. The questions of law or fact common to the Class predominate over questions affecting only individual members.

77. Martinez and each class member will rely on the same basic evidence (i.e., the form UCC notices).

78. Determining the sufficiency of the presale notices and post-sale explanations will resolve all class members' claims.

79. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

80. The class members are consumer debtors, who likely cannot locate or afford to hire lawyers.

81. Most class members are probably unaware their rights and the law were violated.

82. If each of the class members were forced to bring an individualized suit, the suits would burden judicial resources and would create the risk of multiple inconsistent results for similarly situated parties.

83. Concentrating the litigation of Martinez's and the class members' claims is also desirable and logical given the predominance of common questions of law and fact alleged above.

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84. The Class should be certified under Rule 52.08(b)(3), as the superior method for the fair and efficient adjudication of this controversy.

85. Martinez also seeks a declaration that the form presale notices and post-sale explanations used by Counterclaim Defendants and their assignors/predecessors violate the UCC.

Count I—the Class's Claims

86. Martinez repeats the allegations set forth above as if restated in their entirety in Count I.

87. The presale notices mailed to Martinez and the Class included additional language or content not authorized or allowed by law, rendering the presale notices incorrect, unspecific, ambiguous, vague, misleading, confusing, or unreasonable in violation of § 9-611(b) and § 9-614 of the UCC.

88. The presale notices mailed to Martinez and the Class did not describe the secured party.

89. The presale notices mailed to Martinez and the Class did not correctly and/or unambiguously inform them of the method of intended disposition of their collateral in violation of § 9-613(c) of the UCC.

90. Counterclaim Defendants and their assignors/predecessors impermissibly varied Martinez and the Class's redemption rights in violation of §§ 9-602 and 9-623 by stating they must redeem their vehicles at a date before the date the vehicle was sold.

91. In violation of § 9-611(b) of the UCC, Counterclaim Defendants did not provide "reasonable authenticated notice of disposition" to Martinez and the Class but sold their collateral anyway.

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92. Further, in violation of § 9-616 of the UCC, the post-sale explanations mailed to Martinez and the class members did not inform them that their alleged surpluses or deficiencies were affected by future debits, credits, charges, interest, rebates, and expenses.

93. Counterclaim Defendants' and their assignors'/predecessors' failure to provide a statutorily compliant post-sale explanation is part of a pattern, or consistent with a pattern, of noncompliance because the same noncompliant post-sale explanation was mailed to Martinez and the Class.

94. Upon information and belief, Counterclaim Defendants and their assignors/predecessors reported derogatory information about Martinez's and the class members' accounts that resulted from the repossession and sale of collateral.

95. As a direct and proximate result of Counterclaim Defendants' and their assignors'/predecessors' failure to comply with the requirements of Subchapter 6 of Article 9 of the UCC and its improper credit reporting, Martinez and the Class suffered actual damages, including:

a. loss of use of tangible property and cost of alternative transportation;

b. loss resulting from the inability to obtain, or increased costs of, alternative financing;

c. harm to credit worthiness, credit standing, credit capacity, character, and general reputation;

d. harm caused by defamation, slander and libel;

e. harm caused by invasion of privacy; and

f. other uncertain and hard-to-quantify actual damages.

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WHEREFORE, Martinez prays this Court certify the Class and enter a judgment for Martinez and the Class against Counterclaim Defendants (jointly, severally, or in the alternative):

a. awarding damages equal to the statutory minimum provided by § 9-625(c)(2);

b. statutory damages of $500 for each defective post-sale explanation mailed to each Class member;

c. prejudgment and post-judgment interest;

d. attorney's fees;

e. a preliminary and permanent injunction enjoining Counterclaim Defendants from engaging in the practices alleged, including without limitation, enjoining Counterclaim Defendants from collecting deficiency balances, time price differential, delinquency and collection charges from Martinez and the Class;

f. a mandatory injunction compelling Counterclaim Defendants to request the removal of any adverse credit information wrongfully reported on Martinez and the Class's consumer credit reports;

g. a declaration that the presale notices mailed to Martinez and the Class fail to comport with the statutory requirements;

h. a declaration that the post-sale explanations mailed to Martinez and the Class fail to comport with the statutory requirements; and

i. for such other and further relief as this Court deems just and proper.

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Certificate of Service

I certify on April 23, 2024, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all attorneys of record.

/s/ Martin L. Daesch