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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Darilyn Baker, Individually and on Behalf of all Persons Similarly Situated,	Supreme Court No: 20140033
Plaintiff and Appellant	Ward Civil No: 51-2011-CV-01576
-vs-	
Autos, Inc., a North Dakota Corporation d.b.a. "Global Auto"; RW Enterprises, Inc., a North Dakota Corporation, Robert Opperude, an Individual, Randy Westby, an Individual, and James Hendershot, an Individual,	
Defendants and Appellees.	

APPEAL FROM THE WARD COUNTY DISTRICT COURT'S
OPINION AND ORDER DENYING CLASS CERTIFICATION
ENTERED JANUARY 27, 2014
THE HONORABLE GARY H. LEE, DISTRICT JUDGE

BRIEF OF APPELLEES

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STATEMENT OF THE ISSUE

¶1. Whether the District Court abused its discretion in denying Plaintiff/Appellant Darilyn Baker's (hereafter "Baker") Motion for Class Certification?

STATEMENT OF THE CASE

¶2. Baker commenced this action via service of the Summons and Complaint on December 15, 2011. In her initial Complaint filed with this Court, Baker alleged violations of state usury laws, Unfair Trade Practices Act, and North Dakota RICO Act. Thereafter, on January 17, 2012, Defendants Autos, Inc., a North Dakota Corporation d.b.a. "Global Auto"; Robert Opperude, an individual, and James Hendershot, an individual, (hereafter "Global Auto") removed this case to Federal Court. While this matter was pending in Federal Court, Baker moved to amend her Complaint to eliminate claims under North Dakota's Unfair Trade Practices Act and North Dakota's RICO Act, and to add a claim for violation of North Dakota's Retail Installment Sales Act ("RISA"), which was granted. Baker thereafter moved for Class Certification for the Usury and RISA claims, which was opposed by all defendants. On June 14, 2013, while Baker's Motion for Class Action Certification was still pending, the Federal Court remanded the case back to this Court. Baker then again moved for Class Action Certification on August 22, 2013. (Baker App., pp. 44-48; Global Auto App., p. 4.) It should be noted, although Baker's Appendix does include the docket for this matter, the copy

received by Global Auto is missing a page. Therefore, Global Auto has reproduced the docket in its own Appendix.

¶3. A hearing was held on this matter on December 16, 2013, before the Honorable Gary Lee, Judge of the Ward County District Court. Judge Lee issued an Order dated January 27, 2014, ruling on the pending motions for summary judgment and the Baker's Motion for Class Certification. (Global Auto App., pp. 12-37). Again, it should be noted that although Baker's Appendix does include the January 27, 2013 Order, the copy received by Global Auto is out of order and is missing a page. Therefore, Global Auto has reproduced the Order in its own Appendix. On January 30, 2014, Baker's Notice of Appeal was filed with the Court. (Global Auto App., p. 4). Baker filed an Appellant Brief on March 10, 2014. (See Baker's Br.).

STATEMENT OF THE FACTS

¶4. On July 28, 2007, Baker entered into a retail installment contract with Global Auto for the purchase of a 2003 Pontiac Grand Am. (Global Auto App., p. 43- Baker Depo., p. 13, ll. 16-18). She had bad credit at the time she entered into the transaction, which is why she decided to purchase her vehicle through Global Auto. (Global Auto App., p. 43- Baker Depo. p., 14, ll. 6-8). When she purchased the Grand Am, Baker traded in a different vehicle she had previously purchased through Global Auto, and applied the trade in value toward her purchase of the Grand Am. (Global Auto App., p. 43- Baker Depo., p. 16, l. 22 – p. 17, l. 3). When she purchased the Grand Am, Baker looked over the figures

on her retail installment contract and security agreement, including the annual percentage rate, the finance charge, and the amount financed. (Global Auto App., p. 45- Baker Depo., p. 23, l. 19 – p. 24, l. 12). She believed that the interest rate was high, but felt that she was stuck due to her bad credit, and had to pay that rate. (Global Auto App., p. 45-46- Baker Depo., p. 24, l. 13 – p. 25, l. 1). Baker did not feel that the monthly installment amount was excessive or unreasonable. (Global Auto App. p. 46- Baker Depo., p. 25, ll. 2-9). After she purchased the vehicle, Baker sometimes was late on payments, although she does not remember how often. (Global Auto App., p. 46- Baker Depo., p. 25, ll. 15-25). Baker's vehicle was eventually repossessed. (Global Auto App., p. 46- Baker Depo., p. 28, ll. 18-19). After the vehicle was repossessed, Baker did not make the payments to get the vehicle back, but instead left it at Global Auto and ceased making monthly payments. (Global Auto App., p. 47- Baker Depo., p. 32, ll. 10-18).

¶5. Baker's Motion for Class Action Certification sought to certify a putative class of over 500 persons who, over the course of the last five years, purchased a vehicle from Global Auto. (Baker App., pp. 44-48). The Buyers Orders and Retail Installment Contracts, as well as the other documents included therewith, which are at the heart of the present motion, consist of nearly 3000 pages. Significantly, none of the 500 Buyers Orders or Retail Installment Contracts is identical. Each separate, individual transaction consists of different purchase amounts, different cash prices, different loan fee amounts, different document administration fees, different finance charges and different amounts

financed, along with other differences such as monthly payment amounts, annual percentage rates, etc., which would necessarily require separate, individualized scrutiny thereby rendering class certification inappropriate.

STANDARD OF REVIEW

¶6. Trial courts are given broad discretion in determining whether to certify a class action in accordance with Rule 23 of the North Dakota Rules of Civil Procedure. Klagues v. Maint. Eng'g, 2002 ND 59, ¶ 6, 643 N.W.2d 45. A trial court abuses its discretion only if it acts in an unreasonable, arbitrary, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned decision, or if it misinterprets or misapplies the law. Rose v. United Equitable Ins. Co., 2002 ND 148, ¶ 5, 651 N.W.2d 683, 689. As is shown more particularly hereinafter, the trial court did not act in an unreasonable, arbitrary or unconscionable manner, and its decision was the product of a well thought out, rational mental process leading to a reasoned decision. The trial court did not misinterpret or misapply the law.

ARGUMENT

I. CLASS CERTIFICATION REQUIREMENTS.

¶7. The trial court did not abuse its discretion in denying Baker's Motion for Class Action Certification. To certify a class action under N.D.R.Civ.P. 23, the trial court must find that four essential requirements are satisfied:

1. The class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable;
2. There is a question of law or fact common to the class;
3. A class action should be permitted for the fair and efficient adjudication of the controversy; and
4. The representative parties fairly and adequately will protect the interests of the class.

Klagues v. Maint. Eng'g, 2002 ND 59, ¶ 7, 643 N.W.2d 45, 50. Within the third requirement, that a class action should be permitted for the fair and efficient adjudication of the controversy, there are thirteen (13) factors that the trial court is to consider in determining whether the purported class satisfies the requirement. Id. ¶ 8. The trial court must weigh these factors, but no one factor predominates over the others. Id. As is clearly articulated in the trial court's Order, these factors were carefully weighed and analyzed in reaching the decision to deny class action certification. See also Saba v. Counties of Barnes, et al., 307 N.W.2d 590, 593 (N.D. 1981)("Rule 23(c)(1) lists several criteria to be considered by the trial court in determining if the class action should be permitted for the fair and efficient adjudication of the controversy. The trial court's memorandum opinion order reflects its consideration of these criteria.") Likewise, in this case, the trial court's memorandum decision and order clearly reflects the trial court's careful consideration of these criteria. The trial court did not abuse its discretion.

¶8. Rule 23 of the Federal Rules of Civil Procedure is similar to the North Dakota rule. Therefore case law interpreting Federal Rule 23 is persuasive in this case. To determine whether a class as proposed meets the requirements of

Fed.R.Civ.P. 23(a) and 23(b), the Court must conduct a "rigorous analysis" of the facts, claims, defenses, and circumstances. See Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1029 (8th Cir. 2010); see also Elizabeth M. v. Montenez, 458 F.3d 779, 786 (8th Cir. 2006). Baker has the burden of proof that certification is appropriate, and must establish that all elements of the class rule are satisfied, not just some. See Amchem Prods. v. Windsor, 521 U.S. 591, 614 (1997); Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). A district court has broad discretion in deciding whether to certify a class." Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981). The United States Supreme Court recently reiterated that "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2550 (2011).

¶9. While the court does not decide the merits of the claim in determining whether a class should be certified, "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims…. The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits." Coopers and Lyerand v. Livesny, 437 U.S. 463, 469, n.12 (1978); see also In re American Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996).

¶10. This is not the first class action motion brought by the same counsel for the same purported class. In Delorme v. Autos, Inc., 4:11-CV-039, 2012 WL 1606636 (D.N.D. May 8, 2012), plaintiff Bonnie Delorme brought a number of

claims, including the same claims Baker is seeking to certify in this motion (RISA violations, and usury), based on her purchase of a vehicle from Global Auto. Id. Delorme's motion to certify class action status was denied by the Honorable Daniel L. Hovland, U.S. District Court. Id. In his Order denying Delorme's motion to certify class action status Judge Hovland stated:

> Even a cursory review of the loan documents reveals that not all of the proposed class members were charged the same fees or interest rate as Delorme. Some were charged a document administration fee of $65, some were charged a fee of $195. Some were charged a loan fee of $200, some $300, and some no loan fee at all. Therefore, Delorme's assertion that "in every instance, the members of the class were charged loan fees" is not accurate."

Id. at 7. Likewise, Baker, in this case, is seeking to certify the same purported class, and relies on the exact same loan documents that the Court considered in Delorme. The very same issues that prevented Judge Hovland from granting class action certification in Delorme are still present in Baker's current motion. Further, as noted above, Baker herself brought this same motion for class certification in federal court which was not ruled on before the case was remanded. (See Baker v. Autos Inc. et al, Case 4:12-CV-00007). As is set forth more particularly hereinafter, the trial court did not abuse its discretion in denying class action certification.

II. BAKER'S CLASS DEFINITION IS FATALLY FLAWED BECAUSE THE CLASS MEMBERS CANNOT BE READILY DETERMINED TO HAVE STANDING WITHOUT AN INDIVIDUALIZED REVIEW.

¶11. "[C]ourts have applied two requisites to class certification that must be satisfied prior to addressing the requirements of Rule 23(a): (1) the class must be sufficiently defined so that the class is definable; and (2) the named representative must fall within the proposed class." Oshana v. Coca Cola Co., 225 F.R.D. 575, 580 (N.D. Ill. 2005), aff'd, 472 F.3d 506, 513-19 (7th Cir. 2006) cert. denied, 551 U.S. 1115 (2007). "[T]he requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible to determine whether a particular individual is a member." 7 Wright and Miller, Federal Practice Procedure § 1760 at 582. In other words, if the Court has to conduct individualized inquiries to determine whether the class members actually belong in the class, the proposed class must not be certified. Pasture v. State Farm Mut. Ins. Co., 2005 W.L. 2453900 * 2 (N.D. Ill. Set. 30, 2005), aff'd, 487 F.3d 1042. In this case, the trial court properly found that it would have to conduct an individualized inquiry into each the 500 purported class members "to determine what each class member's recovery would be." (Global Auto App., p. 26, ¶ 39).

¶12. Throughout her brief, Baker asserts that every member of the "putative class" was improperly charged a loan fee and a document preparation fee. (See e.g. Baker Br., ¶¶ 25, 31). This is simply incorrect. Many of the Retail

Installment Sale documents for vehicles purchased from Global Auto did not include any loan fee and did not include any document administration fee. (Global Auto App., pp. 78-90). Baker misrepresents the evidence in this case over and over and over. The trial court did not abuse its discretion in denying class action certification in this case.

¶13. Class certification was properly denied because the proposed class may "include members who have not suffered harm at the hands of the defendant and are not at risk to suffer such harm." Pilgrim v. Universal Health Card, LLC, No. 09-879 (2010 W.L. 1254849, * 2) (N.D. Ohio Mar. 25, 2010) (granting motion to strike class allegations). See also Oshana, supra, 472 F.3d at 514, upholding denial of class certification where various members of the class knew of, and accepted, the fact about which the plaintiff claimed she was deceived.

¶14. In this case, as recognized by the trial court, the putative class members cannot be readily identified without the Court engaging in an individualized review of over 500 Buyers Orders and Retail Installment Contracts, consisting of nearly 3000 pages. In other words, as the trial court properly found, it would be necessary for the court to review the individualized claims on a case-by-case basis to determine whether and to what extent the Buyers Orders and Retail Installment Contracts violated the usury statutes or the North Dakota retail installment sales statutes, as alleged by Baker. Baker provides this Court with an "expert report" in support of class certification. However, Baker's purported expert did not do this individualized review. He only looked at the documents of

Baker's single transaction. (See Baker App. pp. 16-17, stating, "The brief [provided by Attorney Baer] also indicates that there have been over 500 individual assignments of contracts to RW Enterprises with approximately 330 outstanding contracts at the time this lawsuit commenced. I have only reviewed the contract documents that were provided to Ms. Darilyn Baker."). Thus, Baker still fails to present any evidence that an individualized review would not be required in this case. In fact, Baker's entire "expert report" can only be used as evidence for her individual claim, because the expert did not analyze any documents for any other purported class member. Because the class members cannot be identified without a case-by-case and individualized review, the proposed class definition does not form a class that can be administratively determined without significant individual inquiries and is therefore flawed. See Pasture, supra.

¶15. Baker attempts to create more uniformity among her purported class members by making statements such as "Every contract now in evidence (Exhibits 03-63) claims a right to charge a $25.00 late fee." (Baker Br., ¶ 24). However, Baker can offer no evidence that these purported class members were ever actually charged a late charge. Further, Baker states, "in every instance, the members of the class were charged loan fees" Id. Again, this is simply not true. Clearly, as recognized by the trial court, were the court to grant class action certification in this case, each separate transaction with each separate purchaser of a vehicle would require an individualized review regarding the facts and circumstances

surrounding each particular transaction. Baker relies heavily on this Court's decision in Rogelstad v. Farmers Union Grain Terminal Association, Inc., 226 N.W.2d 370 (N.D. 1975) in support of her position that certification in this usury action is appropriate. Baker's reliance on Rogelstad is entirely misplaced. The Rule 23 interpreted by the Court in Rogelstad was different than the current Rule 23. See Saba v. Counties of Barnes, Benson, Burleigh, Eddy, Foster, Griggs, Kidder, Nelson & Wells, 307 N.W.2d 590, 593 (N.D. 1981). Specifically, the Court in Saba held:

> Although this court recognized the abuse-of-discretion standard in appeals of orders certifying or refusing to certify actions as class actions, the court has also indicated that it would not hesitate to overrule and reverse determinations denying class-action status in order to accomplish the remedial objectives of the class-action rule. Rogelstad v. Farmers Un. Grain Ter. Assn., 226 N.W.2d 370 (N.D.1975). In Rogelstad this court indicated that decisions as to whether or not class-action status should be allowed seem to rest on judicial philosophy rather than on precedent or statutory language. The court stated it would interpret Rule 23 "so as to provide an open and receptive attitude toward class actions." 226 N.W.2d at 376. The Rogelstad court was construing a rule identical to Rule 23 of the Federal Rules of Civil Procedure. Since that time we have revised Rule 23.

> We do not, however, determine that the philosophy of Rule 23 as it existed when it was identical to the Federal rule or as it exists now is different.

307 N.W.2d at 593. Moreover, in Rogelstad, the trial court had made the determination that Rule 23(a) had been satisfied. 226 N.W.2d 370, 375-76 (N.D. 1975). The trial court in this case did not make the same concession. As noted above, now Rule 23(c)(1) lists several criteria the trial court must consider in determining whether to certify a class action, which is precisely what the trial court did in this case as is clearly set forth in the trial court's memorandum and order. Saba, 307 N.W.2d at 593. The trial court did not abuse its discretion in denying plaintiff's motion to certify class action.

III. CLASS ACTION CERTIFICATION WOULD NOT BE A FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY.

¶16. As stated above, one of the four requirements that must be met for class action certification in North Dakota is that class action should be permitted for the fair and efficient adjudication of the controversy. Klagues v. Maint. Eng'g, 2002 ND 59, ¶ 7, 643 N.W.2d 45, 50.

The factors listed in Rule 23, N.D.R.Civ. P., are:

> **(c) Criteria Considered.**
>
> (1) In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under Rule 23(b)(3), the court must consider, and give appropriate weight to, the following and other relevant factors:

(A) Whether a joint or common interest exists among class members.

¶17. While Baker seemingly does not dispute that this first factor does not favor class certification, Baker claims the "the Trial Court's continued reliance on this remedy oriented analysis has corrupted subsequent factors." (Baker's Br., ¶17). However, Baker's belief that the trial court's decision was based on "remedy" is entirely misplaced. Under factor (A), a joint or common interest is not the same as the requirement above for a common question of fact or law. Klagues v. Maint. Eng'g, 2002 ND 59, ¶ 11, 643 N.W.2d 45, 50. It is not satisfied simply by showing a common interest in recovery. Id. ¶ 12. "Generally, a common interest exists if one class member's failure to collect would increase the recovery of the remaining members, or if the defendant's total liability does not depend on how the recovery of the claim is distributed among the class members." Id. at ¶ 11.

¶18. In this case, as in Klagues, the trial court properly found that the liability, if any, and damages, if any, depend on the facts and circumstances unique to each contract. Specifically, the trial court recognized that not all of the potential class members were charged the same usurious rates, and not all were charged the same excessive fees. (Global Auto App., p. 25, ¶38). One class member's failure to collect would clearly not have any impact on the recovery of the remaining

members. The trial court further found that "not all were victims of the same incomplete or inaccurate disclosures." Id. In finding that this factor does not favor class certification, the trial court held:

> Her recovery depends upon how much she owes, what the usurious interest rate was, and how many payments she made or whether the debt had been paid in full. There are reportedly 500 or more potential claimants. The recovery by each claimant will depend upon the same intensive fact analysis.

(Global Auto App., p. 26, ¶ 39). Contrary to Baker's claim that the trial court incorrectly used a remedy oriented approach to make its findings, the trial court's order couldn't be more clear that it utilized a very intensive fact analysis focusing on both potential liability to 500 claimants as well as their potential recovery, if any. As noted by the trial court, "[a]ssuming there have been 500 or more violations committed by the defendants, there would need to be an analysis of all contracts to determine how much is still owing on each contract as a finance charge, delinquency fee, or collection fee, and bar the defendants from collecting those amounts." (Global Auto App., p. 27, ¶ 40). "Further, total liability of the defendants will depend upon the individual recovery off each class member, and the distribution of the recovery among class members will be individualized according to the specific facts of each transaction." (Global Auto App., p. 27, ¶ 41).

The trial court held properly held that this factor weighed in favor of denying class certification. (Global Auto App., pp. 25-27, ¶¶ 37-41).

(B) Whether prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for a party opposing the class.

¶19. Because the applicable standards of conduct in this case are set by statute, the trial court held that this is not an issue in this case because the recovery of each individual will depend on the merits of that individual's claim. (Global Auto App., pp. 27-28, ¶ 42). Therefore, the trial court held that this factor does not favor class certification. Id. Baker argues that this factor actually favors class certification because different outcomes have been reached in two of the different cases her attorneys have brought regarding these claims. However, Baker ignores the fact that the other case addressing these very issues, Delorme, was voluntarily dismissed. Delorme had the same attorneys that Baker has. If Delorme felt the statute had been misapplied in her case, she could have fully adjudicated her case and raised the issue on appeal. She chose not to do so. Baker is incorrect in arguing that this factor weighs in favor of class certification, and the trial court did not abuse its discretion in holding that this factor does not, in fact, weigh in favor of class certification.

(C) Whether adjudications with respect to individual class members as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

¶20. Due to the individual analysis that must be done for each particular contract, the trial court held that this factor does not favor class certification. (Global Auto App., p. 28-29, ¶43). The trial court specifically found that "[e]ach potential class member's contract must be examined to determine if usurious interest had been charged, and if so, which of the three statutory remedies is available to that person." (Global Auto App. p., 28, ¶ 43). In support of Baker's argument regarding this factor, Baker states "every contract now in evidence (Exhibits 03-63) claims a right to charge a $25.00 late fee." (Baker's Br., ¶ 24). However, this is a misstatement of fact. Unless Baker has began selectively picking and choosing which contracts to have certified to have included in her purported class, not every contract claims a right to charge a $25.00 late fee. (Global Auto App., p. 93). Further, Baker has absolutely no evidence that a $25.00 late fee was actually ever charged to all of these individuals. Baker claims that a ruling regarding including "loan fees" and "document preparation fees" in the calculation of the annual percentage rate and finance charge as "noncompliant" would be dispositive of the interests of all members. (Baker Br., ¶ 25). Again, as the trial court properly recognized, not every contract was charged a loan fee or a document

administration fee. (Global Auto App., p. 78-91). The trial court properly determined that this factor does not favor class action certification.

(D) Whether a party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole.

¶21. Due to the individualized review required for each contract, the trial court found that this factor does not favor class certification. (Global Auto App., p. 29, ¶¶ 44-45). Baker's argument regarding this factor is that there is a need for the Court to instruct these defendants that they must cease such conduct. (Baker Br., ¶ 28). This argument is wholly improper. Baker has not succeeded on the merits of her claim. There is no judgment against defendants. Baker cannot say that there is a need for the Court to instruct defendants to cease conduct that Baker has at this time failed to demonstrate is improper. As recognized by the trial court, " the Court cannot issue declaratory relief which would find the defendants have violated the act for all class members. As noted above, each contract must be reviewed, and an individualized determination that the act was violated must be made for each contract." (Global Auto App., p. 29, ¶ 45). The trial court did not abuse its discretion in finding that this factor does not favor granting class certification.

(E) Whether common questions of law or fact predominate over any questions affecting only individual members.

¶22. Due to the specific facts and circumstances unique to each case, the trial court found that this factor does not favor class certification. (Global Auto App., p. 30, ¶ 46). Baker again alleges in this section that "each and every one of the members of the punitive class" was charged loan fees and document preparation fees not included within the disclosure of the finance charge. (Baker Br., ¶ 30). Again, this is not true. (Global Auto App., p. 78-91). The trial court aptly and succinctly reasoned:

> The questions of law applicable to all class members may indeed be identical: was usurious interest charged, did violations of the retail installment sales act occur? The questions of fact, however, vary for each individual proposed class member. Even Baker's counsel agreed that not all members were charged the same level of usurious interest. Obviously, each sales price of each individual automobile was different in transaction, making interest calculations and determinations of damages, if any, an individualized process for each transaction.

(Global Auto App., p. 30, ¶ 46). The trial court did not abuse its discretion in finding that this factor does not favor class certification.

(F) Whether other means of adjudicating the claims and defenses are impracticable or inefficient.

¶23. The trial court found that this factor does not favor class certification. (Global Auto App., p. 30-31, ¶¶ 47-49). Baker alleges that the trial court erred in this determination because there are no unique defenses to specific contracts. (Baker Br., ¶ 34). This is simply untrue. Baker has no support for this contention, and merely wants to allege that there are no unique defenses in any of these contracts to make her claim, which is not appropriate for class certification, appear more appropriate. This improper attempt should be disregarded by this Court. Many of these contracts may have specific defenses regarding oral agreements, facts and circumstances surrounding the written agreements, statutes of limitations concerns, and other defenses. As noted by the trial court, "it is not readily apparent that the Court can accomplish a complete resolution of all class claims without an independent analysis of all individual contracts." (Global Auto App., p. 31, ¶ 48). The trial court continued, "[i]f the recovery of each individual class member must depend on an examination of every single contract to determine first whether any violations of law occurred, and second, what are the damages, in any, or what other relief is available to the individual claimant, a class certification accomplishes nothing." (Global Auto App., p. 31, ¶ 49). Global Auto has the right to assert any and all defenses in regard to each specific contract. The trial court did not

abuse its discretion in finding that this factor does not favor class certification.

(G) Whether a class action offers the most appropriate means of adjudicating the claims and defenses.

¶24. The trial court held that this factor does not favor class certification. Baker argues that the Court improperly speculates and such speculation is not supported on the face of any of the contracts before the Court. (Baker Br., ¶ 39). Baker, however, directs the Court's attention to the contracts she feels favors her position and conveniently ignores other contracts. As noted by the trial court:

> It does not appear that the Court could issue a blanket finding that the defendants violated the usury law in all 500 contracts. It is possible to conceive that there are contracts wherein the usury laws were not violated, either because the fluctuating formula required for determining usury removes a contract from the ambit of the usury law, or the defendants properly disclosed everything required by the retail installment sales act, thereby setting themselves aside as regulated lenders insofar as that contract is concerned. In any event, it would be improper to deny the defendants of the opportunity of defending themselves as to all, or any of the claim made on each contract in question. Further, the remedy for usury depends upon which

rung a particular claimant stands on the payment ladder.

(Global Auto App., p. 31-32, ¶ 50).

¶25. Further, Baker states that this factor will not be an issue to business records possessed by defendants. (Baker Br., ¶ 41). Baker does not actually cite to these business records or attach them in her Appendix. Baker seems to forget the fact that she carries the burden of proof on her motion for class action certification. She cannot simply point to business records she believes exist but has not obtained nor supplied to this Court as support for her argument. The trial court did not abuse its discretion in finding that this factor does not favor class certification. (Global Auto App., p. 31-32, ¶ 50).

(H) Whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions.

¶26. The trial court held that this factor does not favor or disfavor class certification. (Global Auto App, pp. 32-33, ¶ 51). Baker improperly alleges that the trial court was wrong, but provides no justification or citation to any case law or other authority supporting her claim. In its finding, the trial court acknowledges the considerable amount of speculation required of the court. The trial court did not abuse its discretion in finding that this factor neither favors nor disfavors class certification.

(I) Whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding.

¶27. The trial court held that this factor does not favor class certification. Baker argues that "the statutory remedies do not grow larger or smaller with the degree of inaccuracy or noncompliance." (Baker Br., ¶ 46). Again, however, Baker seemingly omits certain contracts in an attempt to bolster her argument. Baker assumes that every contract is inaccurate or noncompliant and wholly ignores the fact that not every contract was charged a loan fee or a document administration fee, that these contracts may be found by the Court to be compliant under RISA and thus not subject to usury. In its finding, the trial court specifically cited to Judge Hovland's decision in Delorme v. Autos, Inc., civil no 4:11-cv-039 and, while finding that Judge Hovland's ruling does not have any preclusive effect on Baker's motion, "the Court does note that Judge Hovland noted many of the same problems that this Court has noted." (Global Auto App., p. 33, ¶ 52). As noted by the trial court, "Judge Hovland writes that even a cursory review of the documents filed with the motion reveals that not all members of the class were charged the same fees or interest. The Court would therefore need to engage in an examination of each particular transaction to determine whether the defendants violated any law." (Global Auto App., p. 33, ¶ 52). The trial court further noted, "[t]his is the second time these same defendants have been haled into Court for essentially the

same claims by an individual plaintiff, who then sought to have her individual claims transformed into a class action." (Global Auto App., p. 34, ¶ 53). The trial court did not abuse its discretion.

(J) Whether it is desirable to bring the class action in another forum.

¶28. The trial court found that this factor favors class certification. (Global Auto's App., p. 34, ¶ 54). Global Auto does not disagree with the trial court's reasoning with respect to this factor.

(K) Whether management of the class action poses unusual difficulties.

¶29. The trial court held that this factor does not favor granting class certification. (Global Auto App., p. 34, ¶ 55). Baker assumes in her argument regarding this factor that an alleged violation in one contact equals a violation in another contract. (Baker Br., ¶ 52). As previously discussed, not every contract was charged the same fees, or the same amount of fees. Further, it is unknown which contracts, if any, actually incurred late fees. As recognized by the trial court, it is entirely conceivable that some contracts comply with RISA while others do not and it would require an individualized review of each contract to make that decision. The trial court properly notes that "the difficulty in managing the proposed class is that every member of the proposed class has a different, individual claim." (Global Auto's App., p. 34, ¶ 55). The trial court did not

abuse its discretion in determining that this factor did not weigh in favor of granting class certification.

(L) Whether any conflict of laws issues involved pose unusual difficulties.

¶30. The trial court held that this factor would favor class certification.

(M) Whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the class members.

¶31. The trial court held that this factor favors granting class certification.

¶32. After thoroughly considering all of the factors of Rule 23, N.D.R.Civ.P., the trial court properly found that the majority of the factors weigh against the granting of class certification. As held by the trial court:

> Upon consideration of the criteria listed in Rule 23, NDRCivPro, and the four essential elements required for a class certification, as listed by Ritter, Laber and Associates v. Koch Oil, 2000 ND 15, 605 N.W.2d 153, the Court concludes that class certification is not appropriate in this case. While it may be impractical to require individual cases be filed, in is not impracticable to handle all of the proposed class members individually.
>
> While there may indeed be common question of law regarding

> usury and compliance with the retail installment sales act, common questions of fact are missing. Each individual contract will need to be reviewed to determine whether any violations occurred, and what an appropriate remedy would be.

(Global Auto App., p. 36, ¶¶ 60-61). The trial court did not abuse its discretion in denying the motion for class certification.

IV. BAKER AND HER COUNSEL WOULD NOT FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS.

¶33. In Haynes v. Planet Automall, Inc., 276 F.R.D. 65, 80-81 (E.D. N.Y 2011), one of the reasons the district court gave in denying plaintiff's motion for class certification was that the "plaintiff has failed to demonstrate that she is an adequate representative of the class." Specifically, the district court noted:

> In addition to this action, plaintiff has pursued a separate action concerning details of her purchase that is entirely separate from defendant's failure to properly report the finance charge and APR on her purchase, and which appear to have been traumatic for her. She alleges on that on the ride home from the dealership, her car began to shake violently due to a mechanical problem. When she returned to the dealership, they refused to take the car back and she left the dealership in tears. Plaintiff then engaged counsel to pursue a claim under Connecticut's Lemon Law against Toyota with regard to the car's mechanical problems.
>
> Because plaintiff may have an animus towards defendants concerning events that are entirely irrelevant to the instant action (which deals exclusively with manner in which fees were reported to her), she has not demonstrated that she would be an adequate class representative who could decide procedural and tactical questions on a wholly objective basis, independent of her own special relationship with defendants.

Id. at 80-81 (citing Matassarin v. Lynch, 174 F.3d 549 (5th Cir. 1999), cert.denied, 120 S.Ct. 934 (2000).

¶34. Similarly in this case, Baker is not an adequate representative of her class. Baker was late on her payments. She eventually handed over responsibility of the vehicle to her daughter. In fact, at the time that the vehicle was repossessed, her daughter could have been failing to make payments and Baker would not even have known about it. Baker had no idea how far behind on her payments she was when the vehicle was repossessed. Baker also was making payments in amounts greater than the minimum some months, which she mistakenly believed would be applied to the minimum payment of the following month. Baker did not remember how many times she was late on a payment. After the vehicle was repossessed, she made no attempt to get it back, and instead walked away from the vehicle. In fact, Baker does not know if she ever calculated how much, in total, she ended up paying for the vehicle she walked away from.

¶35. Several years later Baker decided to commence this lawsuit, partially "on principle" due to alleged comments made by representatives of Global Auto referring to her as "you people," which she assumed referred to the Native American race. Baker is also individually alleging, common law tort claims of negligent infliction of emotional distress and fraudulent inducement, which are separate from the claims in her motion for class certification. The trial court in its order dismissed plaintiff's claim for infliction of emotional distress. (Global Auto App., p. 7, ¶3). In her Complaint plaintiff also alleges, "Defendants have intentionally inflicted severe emotional distress upon the Plaintiffs which has interfered with peaceful enjoyment and quality of life and normal relationships

with friends and family." When asked about her claims of embarrassment and humiliation, she explains that her humiliation arose out of the incident when her vehicle was repossessed, and her embarrassment was due to both her late payments and the repossession. Obviously not every putative class member had their vehicle repossessed, and plaintiff herself admits that this would not be embarrassing for everyone.

¶36. Baker cannot adequately represent this purported class. She has an animus toward the defendants which lead her to bring personal allegations of both intentional infliction of emotional distress and negligent infliction of emotional distress and embarrassment. These claims are not common with other purported class members, and can foreseeably interfere with her adequate representation. Further, Baker made late payments and incurred late fees which other purported class members did not incur. Also unlike other purported class members, Baker mistakenly believed that a payment above the minimum would carry over and be applied to her loan payment the next month. In fact Baker does not know how much total she ended up paying toward the vehicle, or how far behind in payments she may have been when the vehicle was repossessed. All of these factors are specific to Baker, and are not shared by the purported class as a whole. These individualized concerns make Baker an inadequate representative of this purported class. Likewise, the trial court found that "Baker does not fairly and adequately represent the class." (Global Auto App., p. 30, ¶62). The trial court did not abuse its discretion.

CONCLUSION

¶37. Based upon the above and foregoing argument and authority, Defendants Global Auto, Robert Opperude and James Hendershot respectfully requests that this Court find that the trial court did not abuse it's discretion and affirm the trial court's denial of Baker's motion to certify class action status.

Respectfully submitted this 14th day of April, 2014.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Darilyn Baker, Individually and on Behalf of all Persons Similarly Situated,	)	Supreme Court No: 20140033
Plaintiff and Appellant	)	
-vs-	)	
Autos, Inc., a North Dakota Corporation d.b.a. "Global Auto"; RW Enterprises, Inc., a North Dakota Corporation, Robert Opperude, an Individual, Randy Westby, an Individual, and James Hendershot, an Individual,	)	
Defendants and Appellees.	)	

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss
COUNTY OF GRAND FORKS)

The undersigned, being first duly sworn, deposes and states that a copy of:

Brief of Appellee
Appendix of Appellee

were served on April 14, 2014, by uploading a true and correct copy thereof to-wit:

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To the best of affiant's knowledge, the address above given is the actual post office address of the party intended to be so served. The above documents are e-filed in accordance with the provisions of the North Dakota Rules of Civil Procedure

Stacey J. Hummel

SUBSCRIBED AND SWORN to before me this 14th day of April, 2014.

Toni Nicolson
Notary Public
My Commission Expires:

TONI NICOLSON
Notary Public
State of North Dakota
My Commission Expires Aug. 23, 2014

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STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA)
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COUNTY OF GRAND FORKS)

The undersigned, being first duly sworn, deposes and states that a copy of:

Brief of Appellee
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Notary Public
State of North Dakota
My Commission Expires Jan. 12, 2018

Notary Public
My Commission Expires: