

STATE OF MINNESOTA  
COUNTY OF PINE

TENTH JUDICIAL DISTRICT  
PINE CITY, MINNESOTA 55063-1693

In Re: NICHOLAS MALCHOW ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY  
SITUATED VS GMI ACQUISITION, INC DBA CAR TRUCK CITY  
Case Number: 58-C9-02-001334

THOMAS JOHN LYONS JR  
342 E COUNTY ROAD D  
LITTLE CANADA MN 55117

NOTICE OF FILING OF ORDER

You are hereby notified on December 23, 2003 a  
ORDER CERTIFYING CLASS

was filed in the above entitled matter.

A true and correct copy of this notice has been served by mail upon the  
parties named herein at the last known address of each, pursuant to the  
Minnesota Rules of Civil Procedure.

Lu Ann Blegen, Court Administrator

By \_\_\_\_\_  
dated: December 23, 2003

Deputy 

**STATE OF MINNESOTA**

**DISTRICT COURT**

**COUNTY OF PINE**

**TENTH JUDICIAL DISTRICT**

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Nicholas Malchow, on behalf  
of himself and all others  
similarly situated,

Plaintiff,

**ORDER CERTIFYING CLASS**

vs.

GMI Acquisition, Inc.,  
d/b/a Car/Truck City,

Defendant.

Court File No.: C9-02-1334

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The above-entitled matter came on before the Honorable Robert G. Rancourt, Judge of the District Court on October 21, 2003 on Plaintiff's Motion for Class Certification.

Thomas J. Lyons, Jr., Esq. appeared on behalf of the Plaintiff. Daniel Boivin, Esq. appeared on behalf of the Defendant.

Based upon all files, evidence and proceedings herein, the Court, having heard the arguments of counsel and reviewed the submissions of both parties, hereby makes the following:

**FINDINGS OF FACT**

1. That this matter was brought in federal court in September 2001. The federal district court dismissed with prejudice Plaintiff's claim for violations of the federal Truth in Lending Act, and dismissed without prejudice Plaintiff's pendant state law claims.
2. That on November 18, 2002, Plaintiff filed a four-count Class Action Complaint in Pine County District Court.
3. That on April 14, 2003, an Order and Memorandum signed by the Honorable James T. Reuter was filed in response to Defendant's Motion to Dismiss. Said Order dismissed Count III of the Complaint.
4. That on July 31, 2003, Plaintiff filed a four-count Amended Class Action Complaint for damage to redress misrepresentations and other statutory violations allegedly made by the Defendant during the consumer sale and financing of a motor vehicle and to redress the invasion of Plaintiff's privacy by GMI's agents in attempting to repossess the vehicle.

Filed 12-23-03

5. That on September 9, 2003, Plaintiff filed Plaintiff's Notice of Motion and Motion for Class Certification.
6. That on September 19, 2003, Plaintiff filed Plaintiff's Memorandum in Support of His Motion for Class Certification.
7. That on October 14, 2003, Defendant filed Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification.
8. That on October 17, 2003, Plaintiff filed Plaintiff's Memorandum of Law in Reply to Defendant's Opposition to Plaintiff's Motion for Class Certification.

**ORDER**

1. The attached Memorandum of Law is hereby incorporated into and made a part of this Order.
2. Plaintiff Nicholas Malchow 's motion for class certification is hereby **GRANTED**.

**BY THE COURT:**

Dated at Center City, Minnesota  
this the 19 day of December 2003.

  
\_\_\_\_\_  
Robert G. Rancourt  
Judge of the District Court

## MEMORANDUM OF LAW

This Order is made in response to Petitioner's motion to for class certification. In his Amended Class Action Complaint, the Petitioner alleges the following four counts: Count I – Invasion of Privacy – Intrusion Upon Seclusion; Count II – Violation of the Motor Vehicle Retail Installment Sales Act: Minn. Stat. §168.71(a)(1); Count III – Violation of the Minnesota Consumer Fraud Act Minn. Stat. §325F.69, Subd. 1; and Count IV – Violation of the Deceptive Trade Practices Act, Minn. Stat. §325D.44(13). Factually the Petitioner alleges that on or about March 26, 2001 he agreed to purchase a 2000 Chevrolet Extended Cab Z21 truck at Defendant dealership. Plaintiff agreed to finance the truck through the dealership and as a result Defendant prepared a retail installment contract. He alleges that Defendant's agents misrepresented to him that he had to purchase credit insurance and a service contract in order to obtain the financing, but that these products could be cancelled after 30 days. He alleges those misrepresentations violate Minn. Stat. §325F.69. He also alleges that the contract failed to include separate agreements having an impact on financing. One of these agreements was that the Plaintiff would pay \$5,000 of the total sale price in installments to Defendant dealership. When Defendant assigned the loan to Pine City Bank, it failed to disclose to the bank the agreement that Plaintiff would pay \$4,000 of the \$5,000 in future installments and subsequently renegotiated an installment payment plan and had Plaintiff sign a confession of judgment, in violation of Minn. Stat. §168.71(a)(2).

"A Minnesota court may not certify a class unless the class satisfies the requirements of Minnesota Rules of Civil Procedure 23. Class certification under rule 23 is a two-step process. First, the class must satisfy all four mandatory requirements of rule 23.01<sup>1</sup>: numerosity, commonality, typicality, and adequacy of representation. Minn. R. Civ. P. 23.01. Second, a class must also satisfy the requirements of one of the subdivisions of Rule 23.02<sup>2</sup>." *Lewy v.*

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<sup>1</sup> Rule 23.01 reads as follows: "One or more members of a class may sue or be sued as representative parties on behalf of all only if

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the class;
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (d) the representative parties will fairly and adequately protect the interests of the class."

<sup>2</sup> Rule 23.02 reads as follows: "An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:

- (a) the prosecution of separate actions by or against individual members of the class would create a risk of

- (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

*Investment Advisors, Inc.*, 650 N.W.2d 445, 451-452 (Minn. Ct. App. 2002). "Plaintiffs have the burden of establishing they have satisfied each of Rule 23's class certification requirements." *Lockwood Motors, Inc. v. General Motors Corporation*, 162 F. R. D. 569, 573 (D.Minn. 1995)<sup>3</sup>; *See DeGidio v. Perpich*, 612 F. Supp. 1383 (D.Minn. 1985). "In making the rule 23 analysis, the substantive allegations in the plaintiff's complaint are accepted as true." *Id.* "District courts ultimately retain broad discretion in determining whether or not to certify a class under Rule 23." *Id.*; *Kassover v. Computer Depot, Inc.*, 691 F. Supp. 1205 (D.Minn. 1987); *Streich v. American Family Mutual Ins. Co.*, 399 N.W.2d 210, 213 (Minn. Ct. App. 1987). "When exercising this discretion, this court is mindful that the class action device is a necessary vehicle for the vindication of small claims, especially when the nature of the claim involves complex litigation." *Kassover*, 691 F. Supp. at 1214.

A. Numerosity, Minn. R. Civ. P. 23.01 (a)

The first requirement of rule 23.01 requires the plaintiff to show the class of plaintiffs is so large that joining all members would be impracticable, but not impossible. *Lewy*, 650 N.W.2d at 452; *Lockwood Motors, Inc.*, 162 F.R.D. at 574. There is no specific number of class members necessary to sustain a class action. *Lewis v. Gross*, 663 F. Supp. 1164, 1169 (E.D.N.Y. 1986). "In determining impracticability, courts generally consider a number of factors, including the size of the putative class, the size of the class member's individual claim, the inconvenience of trying individual suits, and the nature of the action itself." *Lewy*, 650 N.W.2d at 452. The court may consider reasonable inferences drawn from the facts to determine whether the numerosity requirement is met. *Lewis*, 663 F.Supp. at 1169. "Reliance upon such inferences is particularly appropriate when the information about the exact numbers is within the defendant's control." *Id.*

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- (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and orders for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action."

<sup>3</sup> Federal precedent is instructive in interpreting Minnesota's class action rules because they are essentially parallel to the federal rules. *Lewy*, 650 N.W.2d at 452.

Typically mere speculation of the size of the class is insufficient to satisfy this requirement, *Lewy*, 650 N.W.2d at 452, however, in this case, as in *Lewis*, infra., the information regarding the class size is in the control of the defendants and is not readily available to the plaintiffs. Further, as in *Folsom v. Blum*, 87 F.R.D. 443 (S.D.N.Y. 1980), the Plaintiffs have made a discovery request upon the Defendant that includes a request for information that relates to the numerosity requirement, but the Defendant had failed to respond to the discovery request as of the time of this hearing. See *Affidavit of John H. Goolsby* dated October 17, 2003. As in *Folsom* the Defendant argued in his brief that the Plaintiff "has not discharged his burden as to numerosity," Defendant memo of law at 10, but at this point only the Defendant has the means to identify the number of possible plaintiffs.

It appears that the form or forms used by the Defendant during the transaction during which the Plaintiff purchased the truck were the forms typically used by the Defendant. As a result, it is likely that there is a large number of possible plaintiffs. The Court finds that the numerosity requirement has been met in that the Plaintiff has alleged in his complaint that the exact number of plaintiffs is unknown to the Plaintiff, but can be determined by the Defendant's records.

**B. Commonality, Minn. R. Civ. P. 23.01 (b)**

The second requirement of rule 23.01 is that there be some questions of law or fact that are common to the class. *Streich*, 399 N.W.2d at 214; *Lewy*, 650 N.W.2d at 453; *Lockwood Motors, Inc.*, 162 F.R.D. at 575. "The threshold for commonality is not high and requires only that the resolution of the common questions affect all or a substantial number of class members." *Streich*, 399 N.W. 2d at 214. "Not every question of law or fact need be common to the class to satisfy the requirements" of rule 23.01 (b). *Lockwood Motors Inc.*, 162 F.R.D. at 575. "The threshold for commonality requires that the resolution of the common questions affect all or a substantial number of class members." *Lewy*, 650 N.W.2d at 453. "For commonality to exist, behavior causing a common effect must be subject to some dispute." *Id.*

The basic dispute herein is whether the use of particular forms by the Defendant is contrary to law. The potential class members by definition will have this common question of law as their controversy. The Defendant raised the fact that Count I of the complaint alleges invasion of privacy, which will not be a common question of law or fact, however it is not necessary that all disputes be common to the class. The Court finds that the Plaintiff has satisfied this requirement.

**C. Typicality, Minn. R. Civ. P. 23.01 (c)**

The third requirement of rule 23.01 is that the "claims and defenses of the representative parties must be 'typical of the claims or defenses of the class.'" *Id.* (citation omitted). "Typicality requires that the representative parties 'have an interest compatible with that of the class sought to be represented.'" *Id.* (citing *Ario v. Metro. Airports Comm'n*, 367 N.W.2d 509, 513 (Minn. 1985)). Typicality "refers to the potential for rivalry and conflict which may jeopardize the interests of the class." *Streich*, 399 N.W.2d at 215. "The typicality requirement is met when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members." *Lewy*, 650 N.W.2d at 453. A strong similarity of legal theories will often satisfy this requirement despite "substantial factual differences." *Lockwood Motors Inc.*, 162 F.R.D. at 575.

In this case, while there may be minute factual differences, the legal theories will be essentially the same: Defendant illegally used certain forms in the financing and sale of vehicles to members of the plaintiff class. Any potential for rivalry or conflict would be mere speculation at this point. The Court finds that the typicality requirements have been met.

**D. Adequacy of Representation, Minn. R. Civ. P. 23.01 (d)**

The final prong of rule 23.01 requires that the representative parties fairly and adequately protect interests of the class. *Lewy*, 650 N.W.2d at 454. To satisfy this requirement, the Plaintiff must show that the representative parties' interests coincide with the interests of the other class members and that the parties and their attorneys will competently and vigorously prosecute the lawsuit. *Id.* "A plaintiff subject to unique defenses, especially as to his credibility and his demonstrated lack of familiarity with the suit is an inadequate class representative." *Kassover v. Computer Depot, Inc.*, 691 F.Supp. 1205, 1213 (D.Minn. 1987). In *Kassover* the court held that "Plaintiff's deposition in [that] case reveals that plaintiff is unfamiliar with several critical aspects of this litigation. Indeed, plaintiff admitted at several points he possess 'no facts' to support essential allegations in his complaint." *Id.* at 1213-1214.

Defendant argued in his brief that the Plaintiff is not a good representative of the class because Plaintiff was unable to articulate or identify any damage suffered by him relating to count III of the complaint, and that his interest in the case is not to see that justice is done but to insulate himself from Defendant seeking to recover the outstanding balance of \$1,500. "What is required with respect to adequacy of representation is that a named plaintiff have "a basic understanding of the allegations made in the case, and what law is alleged to have been violated, and be willing to contest an action by his attorneys with which he did not agree." *Lewy*, 650 N.W.2d at 454. On September 19, 2003 Plaintiff filed an affidavit dated September 9, 2003

entitled Declaration of Nicholas Malchow In Support of Plaintiff's Motion for Class Certification. In it he acknowledges a basic understanding of the allegations made, what laws are alleged to be violated, and that he is willing to be the representative of the class and is willing to contest any action by his attorneys with which he disagreed, Aff. Malchow, ¶¶4-6, 7-8,10-12. While the Plaintiff is certainly interested in protecting his own rights, he would not have brought this matter were he not, but there is nothing before the court to indicate that his affidavit is insincere when it indicates he will represent the interests of the class. Further, while the Plaintiff may have interests apart from those of other members of the class, he does have many coinciding interests in that both he and the class would be interested in prosecuting the Defendant under the same legal theories. Finally, while the Plaintiff may or may not understand what actual or statutory damages are being alleged is unclear. Defendant filed with the court excerpts from Plaintiff's deposition. The last page submitted contains information that Defendant was unclear on the damages, but at the bottom of the page is a question regarding actual damages, the answer to which question was not submitted as a part of the excerpt. Even if the answer was submitted and indicated that he did not understand or know what damages were being alleged, full knowledge of the legal answers is not required. See *Lewy, infra*.

Counsel for the Plaintiff is a member in good standing of several bars including Minnesota, has been involved in a great number of consumer cases, and has been counsel for a certified class in approximately six other cases. Defendant indicates that counsel does not state that he will prosecute this case vigorously, but that indication is implied by the fact that he is an officer of the court and ethically required to do so. The Court finds Thomas J. Lyons, Sr. to be proper counsel and able to represent a class should this court certify this matter as a class action.

The Court does find that the Plaintiff does make a satisfactory representative and that his counsel is proper to prosecute this proposed class action. The adequacy of representation requirement has been met.

E. Minn. R. Civ. P. 23.02

Once the court determines the Plaintiff has satisfied the requirements of rule 23.01, he must show that his proposed class satisfies one of the three requirements of rule 23.02. Plaintiff alleges that he has satisfied the third requirement of rule 23.02, or specifically that "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and odds for the fair and efficient adjudication of the controversy." Minn. R.Civ. P. 23.02(c). Rule 23.02(c) requires first that common questions must predominate over individual issues and second that the class action is superior to other



available methods for the fair and efficient adjudication of the controversy. *Lewy*, 650 N.W.2d at 455.

### 1. Predominance

"A court must consider whether the generalized evidence will prove or disprove an element on a simultaneous, class-wide basis that would not require examining each class member's individual position. Thus, a class action is appropriate when common questions representing a significant aspect of a case can be resolved in a single action." *Id.* "The common question need not be dispositive of the entire action because 'predominance' as used in the rule is not automatically equated with 'determinative.'" *Id.* In this case there are facts that are specific to the Plaintiff that are not specific to other potential class members. For example, Plaintiff gave Defendant a series of post-dated checks on which he stopped payment and left a balance owing of \$1,500. However, there are also facts that plaintiff believes to be true in that the Defendant has engaged in the practice of having consumers sign separate payment agreements and confessions of judgments related to but separate from and not referenced in the retail installment contracts. The essence of the legal arguments raised by the Plaintiff will be common to the class and will predominate in this action. "The mere fact that there are certain issues that may need to be determined on an individual basis does not necessarily preclude the satisfaction of the predominance requirement." *Id.* at 456. For example, "courts frequently grant class certification despite individual differences in class members' damages." *Id.*

The Court finds that the predominance requirement of rule 23.02(c) has been satisfied.

### 2. Superiority

In determining whether a class action is appropriate in a "superiority" analysis, the "factors to consider include manageability, fairness, efficiency, and available alternatives." *Streich*, 399 N.W.2d at 218. "The purpose of the class action has been to take 'care of the smaller guy.'" *Id.* "When collective adjudication promises substantial efficiency benefits or makes it possible for class members with small claims to bring suit and enforce the substantive law, a class action is superior to other available methods for the fair adjudication of the controversy." *Lewy*, 650 N.W.2d at 457.

The benefits to each individual possible plaintiff in this matter is admittedly small. It would be inefficient and unreasonable to assert that each individual plaintiff would bring a separate claim in this matter. Once the legal issues regarding the Defendant's use of the forms herein, the decision should be determinative of any other claims brought under the same or

similar theories, thus making the manageability of the claims much easier as a class action than as individual claims. Likewise, it is unfair to expect various plaintiffs to have to litigate the identical issues and bare the cost of multiple suits when they can be joined together and share the cost of one suit. In this case, at least at this point with the evidence this Court currently has before it, the Court does find that a class action is superior to multiple individual cases or to expect multiple plaintiffs to join in the case.

F. Conclusion

If the decision whether to certify a class is doubtful, any error "should be committed in favor of allowing the class action." *Esplin v. Hirschi*, 402 F.2d 94, 101 (10<sup>th</sup> Cir. 1968). "It appears that the burden might correctly be expressed as requiring that the party asserting the class nature of the action either (1) state, in the pleadings or elsewhere, sufficient facts and argument to make a prima facie showing of Rule 23's applicability, or (2) in the absence of such showing, demonstrate to the court that discovery measures are likely to produce the information necessary for making a class action determination. (Emphasis added). In either case, the suit could then proceed as a class action until the prima facie showing was effectively rebutted or discovery negated the class nature of the suit." *Hatfield v. Williams*, 64 F.R.D. 71, (N.D.Iowa 1974). In this case the determination of whether to certify the class is close; however the information that is necessary to determine how close is in the sole possession of the Defendant, who has failed to respond to discover. Defendant even raised as an argument that the attorneys for the Plaintiff were inappropriate due to their failure to take steps to compel the Defendant to respond to the Plaintiff's discovery request. Defendants will not be allowed to prevent the certification of this class based on their own inactions. At this time with the information before this Court, the Court does find that there is sufficient information to support the certification of a class action.

R.G.R.