IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI

[redacted]
Plaintiff,

vs.

[redacted]
Defendant

Case No . [redacted]
Division No · [redacted]

**ORDER**

On 29th day of June, this Court received argument and evidence upon Plaintiff's [redacted] Renewed Motion to Amend its Answer to Defendant's [redacted] Counter-Claims , received argument of counsel and took the matter under advisement The Court now being fully advised of the available facts and law, does find and order as follows

The following facts are not in dispute between the parties [redacted] purchased a vehicle utilizing a loan from [redacted] pursuant to a Retail Installment Contract and Security Agreement and Addendum ("RICSA" or "the security agreement") The purchased vehicle was pledged as collateral for the loan under the security agreement [redacted] repossessed the vehicle under an allegation of [redacted] default, sold the vehicle and credited the sale proceeds to the loan, leaving an alleged deficiency balance. [redacted] mailed a post-sale notice to [redacted] on March 18, 2015 regarding the sale of the vehicle. On September 21, 2015, [redacted] filed its "Petition for Deficiency Balance" against [redacted] and served a summons upon him on December 5, 2015 On April 14, 2016, [redacted] filed an answer and counterclaim against [redacted] alleging violations of the Missouri Uniform Commercial Code ("MUCC") alleging that upon repossessing [redacted] vehicle, [redacted] failed to properly issue pre-sale and post-sale notices to [redacted]

[redacted] renews its motion to amend its Answer and Affirmative defenses to include a defense that [redacted] cannot be liable to Defendant based on MUCC *§400 9-628 RSMo* because [redacted] did not know how to communicate" with [redacted] when [redacted] sent its post-sale notice to

him [redacted] relies on a recent deposition wherein [redacted] stated that the address to which [redacted] had sent its post-sale notice was not his address at that time [redacted] also stated that he had not notified [redacted] of his new address [redacted] argues that *§400 9-628 RSMo* is not applicable where, as here, the secured party is dealing with the original party to the loan or security agreement, rather than an unknown third party [redacted] further argues that [redacted] knew [redacted] identity, last address and how to communicate with him, from the time the parties entered into the security agreement through to the filing of [redacted] deficiency suit and that [redacted] waited over five years into this litigation to raise this defense without good reason.

Missouri Supreme Court Rule 55 33 permits leave to be granted for the amendment of pleadings upon motion stating that "leave should be freely given as justice requires " *Rule 55 33 MRCP* In order to determine when leave should be granted, a trial court should consider "(1) the hardship to the moving party if leave to amend is denied, (2) the reasons for the moving party's failure to include the matter in the original pleadings; and (3) the injustice to the nonmoving party should leave to amend be granted " *Wheeler ex rel Wheeler v Phenix*, 335 S.W.3d 504, 511 (Mo App. S D 2011) While the nature of Missouri's pleading rules "is to liberally permit amendments when justice so requires" *Wheeler* at 511, trial courts are "vested with broad discretion to grant or deny leave to amend pleadings." *Robinson v State Dep't of Econ Dev*, 469 S.W.3d 866, 870 (Mo. App, W D 2015)

In order to determine the potential hardship to [redacted] if leave is not granted, the Court examines the merit of the legal defense [redacted] seeks to raise. Missouri's UCC *§400 9-628 RSMo* states in its heading that statute is in reference to the **"Nonliability and limitation on liability of secured party – Liability of secondary obligor"**. The body of this statute states in pertinent part as follows:

(a) Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person

(1) The secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with this article, and

(2) The secured party's failure to comply with this article does not affect the liability of the person for a deficiency

(b) A secured party is not liable because of its status as secured party.

(1) To a person that is a debtor or obligor, unless the secured party knows·

(A) That the person is a debtor or obligor;

(B) The identity of the person; and

(C) How to communicate with the person, or

*§400 9-628(a-b) RSMo* (emphasis added)

[redacted] and [redacted] were identified as parties to the security agreement which created the original loan and financing for the vehicle purchase [redacted] does not dispute that it had knowledge of [redacted] identity as a debtor or his address as stated on the underlying security agreement between the parties The court notes that the legislature was very specific in adopting the condition precedent that "unless a secured party knows that a person is a debtor or obligor", there is no liability under the act. This language, when given its ordinary meaning, distinguishes between a debtor/obligor whose existence is known to the secured party from a debtor/obligor whose existence is unknown The statute's heading references nonliability or limitation of liability in relation to a "secondary obligor" Secondary obligor is defined as "an obligor to the extent that. (A) the obligor's obligation is secondary, or (B) the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either " *§400 9-102(71)(A-B) RSMo* A secondary obligor is distinguished from an "original

debtor". An "original debtor" is defined in *§400 9-102(60)* as "a person that, as debtor, entered into a security agreement to which a new debtor has become bound."

Commentators have agreed that *§9-628* of the UCC seeks to protect secured parties "where the original debtor transfers the property and obligation to pay the creditor to an unknown third party." *10 Hawkland UCC Series §9-628 2* The MUCC statute *§400 9-628* adopts the language as used in the Uniform Commercial Code ("UCC") for *§9-628* The Comments to the UCC state that these subsections "contain exculpatory provisions that should be read in conjunction with Section 9-605 [and] [w]ithout this group of provisions, a secured party could incur liability to unknown persons and under circumstances that would not allow the secured party to protect itself." *UCC Official Comment 2 by American Law Institute and national Conference of Commissioners on Uniform State Laws 2021*

UCC *§9-605* states as its heading that the section is related to an "**Unknown Debtor or Secondary Obligor**." Missouri adopted this same heading for *§400 9-605 RSMo* The body of the statute of *§400 9-605(1)* also mirrors that of UCC *§9-605(1)* and states in pertinent part as follows:

> A secured party does not owe a duty based on its status as secured party:
>
> (1) To a person that is a debtor or obligor, unless the secured party knows
>
> (A) That the person is a debtor or obligor,
>
> (B) The identity of the person, and
>
> (C) How to communicate with the person, ...
>
> *§400 9-605(1)*

The parties have not cited a Missouri case interpreting *§400 9-605(1)* or *§400 9-628(a-b)* When these statutes are read in conjunction with each other, as suggested by the Comments to the UCC, their headings indicate an intention to address a secured party's liability with regard to

"unknown debtors" and "secondary obligors" The language in the body of each statute focus upon whether the secured party has "knowledge" of the existence of the debtor or obligor, such person's identity, and "how to communicate." The term "knowledge" is not defined. The plain meaning of the term knowledge is "to know" or have actual knowledge These statutes do not state that an original debtor has a duty to notify a secured party of an address change Similarly, neither statute states that a secured party has a duty to investigate whether an "original debtor" has changed his or her address

When *§400 9-605(1)* and *§400 9-628(a-b)* are read together, the plain language indicates that these sections are intended to limit a secured party's liability only in cases where the claimant is an unknown debtor or secondary obligor and not the "original debtor" at the time of the original secured transaction [redacted] was the person who entered into the parties' security agreement therefore his argument that he is an "original debtor" is accurate The Court further notes that the security agreement herein specifically identified [redacted] as the assignee of, and thus [redacted] was a party to the security agreement on that date that [redacted] signed it

[redacted] cites no legal authority for the proposition that [redacted] was required to send a notice of address change The legislature did not adopt language expressly creating such an obligation, therefore, the legislature did not intend to create such a duty. The legislature did, however, expressly adopt language defining a secured party's duty to "send" notice to a debtor. Under MUCC, a secured party "shall send" certain information to a debtor within both a pre-sale and a post-sale notices regarding the sale of collateral *§400 9-611(c) and §400 9-616(b) RSMo* The term "send" when used in "connection with a record or notification" under the MUCC means "[t]o deposit in the mail, deliver transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address

reasonable under the circumstances" *§400 9-102(74)(A) RSMo* (emphasis added). Under this language, a secured party who does not have knowledge of a debtor's "current address", can still fulfill its notice obligations by using an address that is reasonable under the circumstances which may include a debtor's "last known address". This statutory language further supports the conclusion that an original debtor does not have a duty to notify the secured party of an address change because the secured party may use "any address" that is "reasonable under the circumstances", which may include a last known address. Therefore, a secured party who has knowledge of a last known address of an original or known debtor "knows how to communicate" with that debtor for purposes of meeting notification duties Conversely, if the identity, existence and contact information of a debtor or obligor is "unknown", the secured party would have no address information at all and thus would be unable to send notice. In that instance, the secured party is shielded from liability under *§400 9-605(1)* or *§400 9-628(a-b)*

The parties' agreement identified [redacted] as the debtor and [redacted] as the assignee of the security interest therein. Therefore, from the date the agreement was executed, [redacted] was the "secured party" and [redacted] was the "original debtor " It is not in dispute that [redacted] repossessed collateral vehicle from [redacted] Under these facts, the Court cannot find that [redacted] was an unknown debtor or secondary obligor, he was the original debtor There is no allegation that [redacted] transferred the vehicle to a third person or that another person became a debtor after the agreement was signed. [redacted] had knowledge of an address for [redacted] from the security agreement and utilized that address for repossession of the vehicle, filing its law suit against, and serving a summons upon, [redacted] cannot assert *§400 9-628(a-b)* to avoid potential liability for a failure to properly notify [redacted] proposed defense is meritless under the facts of this case When an amendment would be futile, the Court is permitted to deny leave to

amend a pleading *Suppes v Curators of Univ of Missouri*, 613 S W 3d 836, 857 (Mo. App W D. 2020).

Notwithstanding the inapplicability of *§400 9-628(a-b)* to this action, [redacted] argues that that [redacted] has failed to state a reasonable justification for its failure to raise this limitation of liability defense at a much earlier stage of this case [redacted] sserts that [redacted] had knowledge of [redacted] identity, residential addresses and had the ability to communicate with him, served summons upon him, and could easily have discovered or raised this defense at an earlier stage in this litigation The Court agrees.

Based on the statements of counsel and the pleadings of the parties, [redacted] had [redacted] identifying information, including his residential address, at the time of the transaction that resulted in the signing of the RICSA [redacted] was able to locate [redacted] vehicle and repossess the same for sale [redacted] notice of sale of collateral was presented to the Court. The Notice was dated March 18, 2015 and states the vehicle was sold on that same date. Thereafter, [redacted] was able to locate [redacted] for purposes of service of a summons in this lawsuit on December 5, 2015 Based on these facts, the Court concludes that [redacted] had sufficient contact information regarding [redacted] to have knowledge of how to communicate with [redacted] Moreover, pursuant to *§400 9-102(74)(A), supra* [redacted] was permitted to satisfy its notice obligations by sending notice to the last known address of [redacted] as it was reasonable under the circumstances where [redacted] had changed addresses without notice The address information that was previously available to [redacted] provided it with adequate "knowledge of how to communicate" with [redacted] for the purposes of liability under *§400 9-628(a-b)* Lastly, after issuing its post-sale notice in March 2015, Plaintiff successfully filed and served its law suit upon [redacted] This further indicates that Plaintiff had knowledge of how to locate and communicate with [redacted]

[redacted] blames [redacted] for failing to notify [redacted] of the address change until the date his deposition was taken This logic, however, just as naturally implies that [redacted] had an obligation to verify the accuracy of its known address for [redacted] before issuing its notices or filing suit. The parties have actively litigated this case for five years. If this defense were legally available to [redacted] at the time of its Answer, [redacted] has not explained why it waited five years to discover [redacted] address history Moreover, [redacted] had the ability to locate [redacted] for repossession of the vehicle and, despite the address change, was able to serve a summons on [redacted] for its deficiency claim This activity would have provided [redacted] opportunity to discover an address change. [redacted] s five-year delay before raising this potential defense is not excusable under the facts and circumstances.

[redacted] argues that [redacted] was well aware of this potential defense before [redacted] sought to amend its answer In support of this argument, [redacted] relies on *Rose v City of Riverside*, 827 S.W.2d 737, 739 (Mo App W.D. 1992). In *Rose*, the City passed an ordinance restricting construction upon a property in 1977 *Id* at 738. The property owner at that time was aware of the ordinance and later died in 1988 whereby the property title transferred to *Rose* *Id* After failed attempts to sell the property, *Rose* filed a claim for inverse condemnation due to the construction restrictions *Id*. The City filed a motion for summary judgment raising for the first time a statute of limitations defense. *Id* Based on the evidence, the Court of Appeals determined that the original land owner's damages claim did not pass to *Rose* as the grantee, and further held that *Rose* was well aware of the existence of the statute of limitations defense even though it was not raised in the City's answer because it was raised in a motion for summary judgment. *Id* at 738-739 The Court specifically noted that "Courts have applied statutes of

limitation with some strictness". *Id* at 739 The holding in *Rose* is distinguishable and does not control here

In *Rose,* the Court was asked to enforce a statute of limitation in a scenario where the date of the ordinance, the accrual of the claim, and the applicable law regarding the statute were all known to *Rose* before filing suit or receiving the City's pleadings. *Rose, supra,* at 738, 739 It was not merely the fact that Rose raised the defense in a summary judgment motion that prevented waiver of the defense, rather it was the nature of the above facts and the specific statute of limitation defense that guided the Court Here, [redacted] defense is a novel defense not supported by case law. [redacted] had contact with [redacted] had his last known address and located him for service of a law suit summons after the address change had occurred. [redacted] had no legal duty to notify [redacted] of an address change [1] Missouri law permitted [redacted] to send its pre and post-sale notices to "any address" that was "reasonable under the circumstances " *§400 9-102(74)(A), supra* [redacted] was not "well aware" under the facts or law that [redacted] would, five-years after serving a summons upon him, suddenly claim that it did not "know how to communicate" with him [redacted] cites no case law stating that the *§400 9-628(a-b)* should be applied with the same "strictness" as with a statute of limitation *Rose*, therefore, does not support [redacted] motion to amend and raise a defense under *§400 9-628(a-b)* at this late stage

Lastly, the Court considers the injustice to [redacted] as the non-moving party should [redacted] be granted leave to amend its pleading to raise *§400 9-628(a-b)* as a defense. Notwithstanding the Court's conclusion that this defense is not available to [redacted] the Court concludes that it would be an injustice to [redacted] to permit this defense to be asserted at such a late stage of this case. The parties have conducted a substantial amount of litigation and discovery in this action

[1] [redacted] did not argue that [redacted] had a contractual duty to notify of an address change

The matter has been taken to the Court of Appeals, records requests have been issued, discovery motions have been ruled upon and the parties have moved forward on all subjects including the adequacy of [redacted] sale notices. Based on the age of this litigation and the amount of work that the parties have already put forth on their respective claims and defenses, it would be unfair to permit [redacted] to raise a novel limited liability defense at this stage

For the reasons stated above, Plaintiffs' Renewed Motion to Amend its Answer to Defendant's Counter-Claim is **DENIED**

**SO ORDERED.**

DATE: 8-26-21

JUDGE