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VIA ELECTRONIC AND U.S. MAIL

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
FederalRegisterComments@cfpb.gov

Re: Comments to 12 CFR Part 1040 (Proposed)
Docket No. CFPB-2016-0020

Dear Bureau Members:

The Scali Law Firm respectfully submits the following comments for the record in connection with 12 CFR Part 1040, proposed by the Bureau with regards to pre-dispute arbitration agreements utilized by vehicle finance sources and lessors, particularly as such agreements pertain to class action lawsuits.

Our law firm's practice is devoted to representing the interests of individual automobile dealers, dealer groups, and dealer associations throughout the State of California. Our attorneys combined have several decades of experience representing these interests in all aspects of litigation, including consumer class action litigation. We are therefore uniquely positioned to understand the expense, difficulties and stress experienced by dealers in defending against class action lawsuits. It is against this backdrop of long experience that we offer our comments on behalf of California automobile dealers.

Concern of Dealers and Opposition to Proposed Regulation.

The major concern of California dealers as to the proposed regulation is its effective prohibition of class action waivers contained in the arbitration provisions of retail sale and lease

contracts originated by dealers. In particular, proposed §1040.4(a)(2) would require finance sources and lessors to insert a plain-language provision into pre-dispute arbitration agreements that neither they not anyone else will use the agreement to stop the consumer from being part of a class action case in court. In lieu of inserting such a provision, the finance service or lessor can send the consumer a written notice within 60 days with the same language as that provision. This will have the effect of eliminating or abrogating class action waivers now contained in the arbitration provisions of retail sale and lease contracts originated by California dealers and assigned to finance sources and lessors.

The opposition of California dealers to this proposed regulation arises from their troubling experience with frivolous and substantially expensive class action lawsuits in this state, which have served only the financial interests of the plaintiffs' bar, with no meaningful benefit realized by consumers. Although these suits have diminished in the last couple of years for reasons explained below, the adoption of the proposed regulation will embolden the plaintiffs' bar and inevitably lead to a resumption of these frivolous class action lawsuits.

Recent History of Frivolous Class Action Lawsuits in California.

Consumer class action lawsuits against dealers (and against finance sources and lessors who provide indirect financing) in California began proliferating 10 to 15 years ago. This proliferation was due to a very aggressive plaintiffs' class action bar in this state, and to a host of very consumer-friendly state statutes. These statutes include those which are specifically directed at motor vehicle sales and leasing, together with additional statutes governing consumer transactions in general and which the California courts have held to be of broad application. As a result, California dealers have been subject to a wide and disparate array of laws which tightly cover every aspect of a sale or lease transaction, including negotiations, the forms used by the dealers, allowable and prohibited terms and conditions, and mandatory detailed disclosures.

Unfortunately, the plaintiffs' bar in California used these laws in a heavy-handed and self-interested fashion. In the vast majority of class action suits, the plaintiffs alleged a violation of one of California's consumer protection statutes, typically involving a disclosure requirement. And since the relevant statute of limitations in California was four years, the class would include all motor vehicle purchasers and lessees for that four-year period, which, for many dealers, resulted in class sizes ranging from 2,000 members to 5,000 members or more. It is no exaggeration to say that in most of these cases, the alleged violation was hypertechnical in nature with no harm having been suffered by the consumer. Since there was no prospect of a damages award, the plaintiffs' bar would rather cynically seek the remedy of rescission and restitution, i.e., cancellation of the sale or lease contract and restitution to the consumer of the vehicle's total purchase price. By way of example, even assuming a small class size of 2,000 consumers and a relatively modest purchase price of $20,000 per vehicle, a dealer's total exposure in a class action suit would be no less than $4,000,000—and of course much higher for larger class sizes

and more expensive vehicles—plus substantial attorney's fees which would be awarded to the class attorney. The prospect of an award of this size was financially devastating and an existential threat to every dealer facing such a suit, especially in view of the fact that none of the liability carriers insuring automobile dealers provided insurance coverage for restitution payments. Dealers had no choice but to settle these suits, generally paying a six-figure sum to cover payments to the class and attorney's fees to the attorney. Unfortunately for the class, they would each receive only a small payment, typically less than the amount of a monthly car payment, and then again only if they timely filed a claim, whereas the lion's share of the payment would go to the attorney. And this in a situation where the individual consumers had suffered no harm to begin with.

Dealers' Response in Self-Defense.

The response of dealers to this smash and grab tactic of the plaintiffs' bar was to begin using modified sale and lease contract forms containing a class action waiver in the form's arbitration clause. Significantly, in the case of *AT&T Mobility LLC v. Vincent Concepcion* (2011) 563 U.S. 333, the U.S. Supreme Court reversed a Ninth Circuit decision that class action waivers in arbitration agreements were not enforceable, thus validating California dealers' use of the waiver in their sale and lease contracts. This began to have the intended effect of abating the proliferation of expensive and frivolous—and unnecessary—class action suits. We say unnecessary because, notwithstanding the new vitality of class action waivers, individual consumers still possessed and continued seeking, both in court and through arbitration, the individual remedies widely available to them under California law, including rescission and restitution as to the their individual contract, injunctive relief, and recovery of provable damage together with attorney's fees, demonstrating that individual consumers have legally-meaningful recourse without resorting to class actions.

California Consumers Fare Substantially Better in Individual Suits Than in Class Action Suits.

Class action waivers have done little or nothing to stem the tide of individual consumer lawsuits against dealers in California. Indeed, the rationale for the proposed regulation, viz., that class action attorneys must be rewarded or no one will bring small balance claims, has no application to auto-related claims. There is good reason for this. Almost without exception, individual suits under California's consumer protection statutes seek the remedy of rescission of the sale or lease contract and return of the vehicle's total purchase price—typically $20,000 to $50,000, or more—and thus are large balance disputes offering the consumer more than adequate financial incentive to proceed. Moreover, California's consumer protection statutes permit the consumer to recover attorney's fees, ensuring that such fees will not erode their large balance recovery. And experience has shown that recovery of these large balances plus attorney's fees is not only the verdict awarded in litigation, but is also the centerpiece of the cases which are

settled. This holds true whether a consumer brings his or her claim in court or in arbitration. In short, disputes in auto dealer matters are not disputes involving small amounts per customer where only class-wide remedies will work.

By contrast, consumer class actions against dealers offer class members, at most, pennies on the dollar. Indeed, the Bureau's own study confirms this fact. In the 18 auto-related class actions studied, the settlement payment to each class member averaged only $337[1]—less than a monthly car payment for most vehicle owners, and meager compared to the meaningful remedies and large balance settlements available to individual consumers. It is important to note that the consumers acting as lead plaintiffs and class representatives in these class actions also bring individual claims and are routinely awarded rescission and full restitution of the purchase price on their individual contracts—a remedy available to them in an individual suit without the added expense and complication of a class action. The only winners in the class setting therefore are the class attorneys, who demand and receive substantial fee awards—whether in litigation or court-approved settlements—far in excess of what they could receive for prosecuting an individual suit, while having accomplished little else for their endeavors.

Proposed Regulation Will Cause Immediate Resumption of Frivolous and Unnecessary Class Actions.

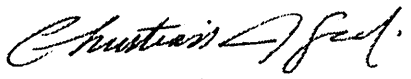
The proposed regulation prohibiting class action waivers will re-open the class action floodgates. Class action claims are typically filed against the dealer and the affected financing sources, but though the financing sources will no longer have the class action waiver as a defense, they typically do have a finance agreement with the dealer which obligates the dealer to defend and indemnify them—or even repurchase the contracts at issue in the suit. In other words, all liability for class action suits will fall entirely on the dealers, and they will again have to deal with the financial devastation and existential threat posed by these frivolous suits. And, it is equally important to point out that, although Congress explicitly exempted franchised and many independent dealers, this liability will have been indirectly imposed by the Bureau on dealers even though the Bureau has no jurisdiction over them.

Conclusion.

California consumers continue to be well-served with numerous consumer protection statutes containing attorney's fee recovery provisions, which give them full and meaningful legal recourse in the form of individual lawsuits. Resort to class action suits is not necessary and only serves to line the pockets of the plaintiffs' bar at the unfair expense of dealers. Yet the proposed regulation will return California dealers to that troubling era, with only the plaintiffs' bar, not consumers, standing to gain.

[1] CFPB's Arbitration Study, March 2015, Section 8, Tables 4 and 8.

We trust that you will find our comments useful in appreciating the serious financial jeopardy in which the dealers may again find themselves, and in understanding the depth of California dealers' opposition to the proposed regulation. In light of our comments, we would urge the Bureau to adopt a provision excepting out from the vehicle sale and lease contracts originated by dealers, who are exempt from the Bureau's jurisdiction to begin with.



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