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WHAT'S INSIDE

FRAUD

MoneyGram investors revise suit over $125 million DOJ, FTC forfeiture

By Katie Pasek

Two MoneyGram International Inc. shareholders have updated a securities fraud lawsuit, claiming the payment services company hid its noncompliance with federal agency regulations following alleged fraudulent money transfers.

Chew v. MoneyGram International Inc. et al., No. 18-cv-7537, amended complaint filed, 2019 WL 1511021 (N.D. Ill. Apr. 5, 2019).

MoneyGram's share price lost nearly half its value, dropping to $2.27 on Nov. 9 after its third-quarter earnings showed a 15 percent decrease in money transfer revenue from last year, according to the amended class-action complaint.

In a statement the Dallas-based company attributed the revenue decline to "the impact of

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REUTERS/Heinz-Peter Bader

EXPERT ANALYSIS

High court decision on nonjudicial foreclosures under FDCPA may have limited impact

Mark E. Rooney of The Rooney Firm discusses the U.S. Supreme Court's recent decision in *Obduskey v. McCarthy & Holthus,* which concerns nonjudicial foreclosure and the Fair Debt Collection Practices Act.

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EXPERT ANALYSIS

Limiting Florida's homestead exemption: Collecting on homestead property in excess of one-half acre

Charles B. Jimerson and Austin B. Calhoun of Jimerson Birr discuss how Florida's homestead exemption for real property exceeding one-half acre affects debtors and creditors.

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High court decision on nonjudicial foreclosures under FDCPA may have limited impact

By Mark E. Rooney, Esq.
The Rooney Firm

The Supreme Court recently held that entities pursuing nonjudicial foreclosures are not subject to the general provisions of the Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692. The court's unanimous decision in *Obduskey v. McCarthy & Holthus*[1] rests on a statutory distinction between security interest enforcement activity and the more general definition of debt collection under the law.

The ruling resolves a split among lower courts that left mortgage servicers and their law firm agents susceptible to FDCPA liability in connection with nonjudicial foreclosures in some parts of the country but not others.

The high court cabined its ruling somewhat by stressing that the communications from the foreclosure law firm to the consumer (which served as the basis for the consumer's FDCPA claims) all consisted of notices required under state law as part of the nonjudicial foreclosure process.

The court's decision leaves open the possibility that communications to a consumer made during a nonjudicial foreclosure proceeding — but not actually required under state law — could trigger FDCPA liability in future cases.

And while the decision helpfully clarifies the FDCPA's application to nonjudicial foreclosures, it may have the unintended consequence of muddying the meaning of a business's "principal purpose" under the statute, which could have broad implications for debt collectors and other businesses who regularly face FDCPA claims.

CASE BACKGROUND

The case began in 2015 in Colorado after Dennis Obduskey defaulted on the mortgage loan secured by his home. His mortgage servicer hired a law firm to begin the nonjudicial foreclosure process allowed under Colorado law. The law firm sent a series of letter notices to Obduskey conveying information about the loan and the foreclosure process.

In response to these notices, Obduskey disputed the debt with the law firm, invoking the FDCPA provision that gives consumers an opportunity to validate the debt. When the law firm did not respond and instead moved ahead with the nonjudicial foreclosure process, Obduskey sued under the FDCPA.

He alleged violations of a variety of FDCPA provisions, including those governing the debt validation process, communicating with third parties, harassing or abusive tactics, false or misleading representations, and unfair practices.[2]

The trial court dismissed Obduskey's complaint, holding that the enforcement of a security interest through a nonjudicial foreclosure process is not an attempt "to obtain payment on a debt" and therefore does not amount to debt collection under the act.[3]

The 10th U.S. Circuit Court of Appeals affirmed the lower court's dismissal.[4] In an opinion by Justice Stephen G. Breyer, the Supreme Court unanimously affirmed.

THE COURT'S DECISION

The court based its decision on a textual analysis of the statute. The FDCPA defines a "debt" as an "obligation of a consumer to pay money." The law applies to "debt collectors" — primarily defined as any business whose principal purpose is the collection of debts or that regularly collects, directly or indirectly, debts owed or due another. The act's main provisions — proscribing various misleading, unfair and deceptive practices — all apply to entities meeting the primary definition of a debt collector.

The court's decision leaves open the possibility that communications to a consumer made during a nonjudicial foreclosure proceeding — but not actually required under state law — could trigger FDCPA liability in future cases.

The law contains an additional, limited-purpose definition of a debt collector. For the purpose of Section 1692f(6) — a provision governing "any nonjudicial action to effect dispossession or disablement of property" in limited situations — the term debt collector also includes any business "the principal purpose of which is the enforcement of security interests."

At its core, the *Obduskey* case is about the interplay between the primary definition and the limited purpose definition of a debt collector. Obduskey argued that the foreclosing law firm falls within the primary definition of a debt collector and therefore is subject to the broad reach of the FDCPA,

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including the many provisions under which he sued.

Obduskey's suit depended entirely on this argument because he did not allege a violation of Section 1692f(6), the provision applying particularly to security interest enforcement. The law firm argued that if it (or any other entity pursuing nonjudicial foreclosure proceedings) is already covered under the primary definition of a debt collector, then the limited-purpose definition relating to the enforcement of security interests would serve no purpose.

> At its core, the *Obduskey* case is about the interplay between the primary definition and the limited purpose definition of a debt collector.

In siding with the law firm the court interpreted the two definitions of a debt collector as binary — that is, it reasoned that whoever falls within the limited-purpose definition must not be a debt collector for the more general purposes of the primary definition.

As the court explained, Congress' inclusion of the word "also" in the limited-purpose definition "strongly suggests that one who does no more than enforce security interests does not fall within the scope of the general definition. Otherwise why add this sentence at all?"

The court further observed that anyone meeting the general definition of a debt collector is already subject to the provisions of Section 1692f(6) (to which the limited-purpose definition applies specially). Accordingly, Obduskey's interpretation would merely "emphasize" that security interest enforcers are subject to Section 1692f(6) and render the limited-purpose definition superfluous.

Two other factors supported the court's conclusion. First, the court reasoned that Congress may very well have chosen to treat security interest enforcers differently under the FDCPA in an effort to avoid needless conflicts with state law.

For example, in the mortgage foreclosure context, state laws generally contain a variety of specific notice requirements that might conflict with the FDCPA's restrictions on communications with consumers or third parties.

Second, the court looked to the legislative history of the FDCPA. The history indicated that the limited-purpose definition was a creature of compromise between those who wanted to entirely exclude security enforcement activity and those who wanted it covered under the FDCPA.

IMPACT OF THE DECISION

The court's decision contains three nuanced, and important, restrictions on its potential application in future cases.

First, the court took a very broad view of the statute's primary definition of a debt collector. That definition by itself is, according to the court, "capacious" enough to encompass nonjudicial foreclosure activity, regardless of the fact that nonjudicial foreclosures involve the liquidation of real property and not any "obligation of a consumer to pay money" (as a debt is defined in the law).

The court observed that the primary definition of a debt collector speaks of the "collection of any debts" passively and does not require collection directly from the debtor. It also reasoned that nonjudicial foreclosures are encompassed by the law's application to indirect (and not just direct) attempts to collect a debt.

The court held that nonjudicial foreclosures are immune from general FDCPA liability only when the primary definition is considered alongside the limited-purpose definition relating specifically to security-interest enforcement.

This suggests that in close, future cases where the definition of a debt collector is at issue — and where the defendant's alleged wrongdoing does not involve the enforcement of a security interest — lower courts will read *Obduskey* to require a broad interpretation of the term debt collector.

Second, the court noted that the parties did not dispute that all the correspondence sent by the law firm to Obduskey was "required under state law." This is an important distinction in the context of the FDCPA.

Hundreds of FDCPA complaints are filed in federal courts each month, often alleging only minor or technical violations of the law. The court's observation implies that, even in the nonjudicial foreclosure context, any notice to a consumer not strictly required by a state's foreclosure laws could add more grist to the already-prolific FDCPA complaint mill.

Finally, while the decision focused on the limited-purpose definition of a debt collector (applicable to any business "the principal purpose of which is the enforcement of security interests") the court provided no insight or analysis on what amounts to a "principal purpose."

This is a noteworthy omission given the court's 2017 decision in *Henson v. Santander Consumer USA Inc*.[5] In *Henson*, the court drew attention to the dual prongs of the FDCPA's primary definition of a debt collector (as one who regularly collects debts or whose principal purpose is the collection of debts).

That distinction triggered renewed focus on what constitutes a "principal purpose" debt collector under the law, with some lower courts engaging in a careful, multi-pronged analysis of the issue.[6]

By contrast, the high court's *Obduskey* decision appears to take it for granted that the foreclosure law firm's principal purpose is the enforcement of security interests because it "engaged in" security interest enforcement. Because the issue was not litigated, *Obduskey* should not carry any precedential weight when it comes to interpreting "principal purpose" under the FDCPA.

But that likely will not stop future FDCPA plaintiffs from arguing that, under *Obduskey*, a defendant may meet the principal purpose definition of a debt collector by merely being engaged in debt collection at the time of the events allegedly giving rise to a claim. WJ

NOTES

1 139 S. Ct. 1029 (2019).

2 *See Obduskey v. Wells Fargo*, 879 F.3d 1216, 1219 n.2 (10th Cir. 2018).

3 *Obduskey v. Wells Fargo*, No. 15-cv-1734, 2016 WL 4091174, at *3 (D. Colo. July 19, 2016).

4 *Obduskey*, 879 F.3d 1216.

5 137 S. Ct. 1718 (2017).

6 *See, e.g., McAdory v. M.N.S. & Assocs. LLC*, No. 17-cv-777, 2017 WL 5071263, at *3-4 (D. Or. Nov. 3, 2017); *Barbato v. Greystone All. LLC*, 916 F.3d 260, 267 (3d Cir. 2019).

Limiting Florida's homestead exemption: Collecting on homestead property in excess of one-half acre

By Charles B. Jimerson, Esq., and Austin B. Calhoun, Esq.
Jimerson Birr

For well over a century, Florida's Constitution has exempted the homestead from claims of creditors. *Public Health Trust v. Lopez*, 531 So. 2d 946, 948 (Fla. 1988). Florida's constitution provides one of the most debtor-friendly homestead exemptions in the country. Debtors are permitted to divert substantial assets and sometimes purchase new and extravagant homes that are shielded from creditors.[1]

There are, however, exceptions to the rule. This blog post focuses on one important exception: the creditor's ability to collect on homestead property located in a municipality that exceeds one-half acre.

CONSTITUTIONAL AUTHORITY

Florida law provides for a homestead exemption as follows:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead, if located outside a municipality, to the extent of 160 acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or *if located within a municipality, to the extent of one-half acre of contiguous land*, upon which the exemption shall be limited to the residence of the owner or the owner's family.[2]

There are no limitations upon the cost, size, or construction of the residence. *Id.* n12. Whether the residence is within a municipality is of critical importance in determining the portion of the debtor's homestead that is protected because up to 160 acres of property outside of a municipality can be protected by homestead, as opposed to just one-half acre within a municipality. *Id.*

This determination is especially important considering that as of the 2010 census, 50.3% of Florida's population lives in incorporated municipalities.[3]

The Florida Constitution provides homestead exemption protection to real property which is located within a municipality only so long as the property is limited to one-half acre of contiguous land.

The Florida Constitution provides homestead exemption protection to real property which is located within a municipality only so long as the property is limited to one-half acre of contiguous land. *In re Englander*, 95 F.3d 1028, 1032 (11th Cir. Fla. 1996), *cert. denied*, 520 U.S. 1186 (1997).

Florida courts deny homestead protection to any portion of property that exceeds the allowed acreage limitation. As such, any portion of property located within a municipality beyond one-half acre may be levied.

When a debtor's property exceeds the one-half acre allowed for a municipal homestead, "he cannot declare as exempt his entire parcel, but may select his homestead in any contiguous shape from his qualifying lands." *In re Kellogg*, 197 F.3d 1116, 1120 (11th Cir. 1999). A debtor may reasonably designate her one-half acre portion of the property, so long as the remaining portion has a legal and practical use. *Id.*

RAISING THE HOMESTEAD EXEMPTION DEFENSE

The Florida Supreme Court explained in *Bessemer Props., Inc. v. Gamble*, that anyone with an "interest" in the land may assert the homestead exemption. 158 Fla. 38, 39 (1946).

Relying on this principle, the court in *Law v. Law* examined a situation where title

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to a divorcing couple's house was only held in the husband's name. 163 So. 3d 553, 554 (Fla. 3d DCA 2015).

While the issue was not central to deciding the case, the court noted that a spouse not holding title could likely raise the homestead exemption defense because of her "interest" in the land. *Id*. at 557 n.3. For creditors, this means that the homestead exemption can be raised by people without a documented right to a property.

> Florida courts deny homestead protection to any portion of property that exceeds the allowed acreage limitation.

LEVYING THE PROPERTY EXCEEDING THE ALLOWED ACREAGE OF ONE-HALF ACRE

There are two methods courts use in allowing creditors to collect on the portion of property exceeding the allowed acreage. First, if the property is divisible, courts partition the property and allow the non-exempt portion to be sold for payment of the owner's debts. *In re Englander*, 95 F.3d at 1031.

Second, if the property is not divisible, courts order a sale of the entire property and apportionment of the proceeds. *Id*.; *In re Kellogg*, 197 F.3d 1116 (11th Cir. Fla. 1999); *Siewak v. Amsouth Bank*, 2007 WL 141186 (M.D. Fla. Jan. 16, 2007) (quoting *In re Englander*, 95 F.3d at 1031) ("Florida courts have denied the exemption to property that exceeds the allowed limitations of residency by dividing the property, and allowing the non-exempt property to be sold for payment of the owner's debts."); *In re Baxt*, 188 Bankr. 322, 323-324 (Bankr. S.D. Fla.1995) (approving the sale of an urban indivisible 2.5-acre lot, and apportionment of the proceeds): *In re Wierschem*, 152 Bankr. 345, 347 (Bankr. M.D. Fla.1993) (holding that rural property that exceeded 160 acres was subject to sale and apportionment of proceeds).

THE DIVISIBILITY TEST

In determining whether the homestead property can be divided, Florida courts utilize a so-called "divisibility" test, which provides: "A unit which is both susceptible to division by perpendicular lines, horizontal lines, or both, and lawfully conveyable as an independent parcel under existing law should be the criteria for the divisibility." *In re Kuver*, 70 B.R. 190, 193 (Bankr. S.D. Fla. 1986).

The divisibility test considers whether the property is divisible and lawfully conveyable, pursuant to local zoning and building regulations. *In re Englander*, 95 F.3d at 1032; see also *Menard v. Univ. Radiation Oncology Assocs., LLP*, 976 So. 2d 69, 75 (Fla. 4th DCA 2008) ("[T]he trial court shall determine whether under local law the entire property may be partitioned or in some other way divided legally (e.g., submitted to condominium ownership). If it cannot be so divided legally, then the entire parcel may be sold at public sale and only debtor's pro rata share will be exempt.")

The court ordered the sale of the homestead property and an allocation of the proceeds, with the proceeds which exceeded those attributable to one-half acre being made available to creditors. *Id.* at 1118-19. The order was upheld on appeal because the township zoning regulations prohibited subdividing of the land. *Id*. at 1120.

The court justified the non-partition approach by stating that separating debtors' "land into an exempt and a nonexempt parcel is equivalent to subdividing it, since turning over excess land to the trustee for disposition exposes neighboring landowners to precisely the same evils the zoning laws are intended to prevent-namely, allowing double-building on a parcel of land." *Id*.

> If the property is divisible, courts partition the property and allow the non-exempt portion to be sold for payment of the owner's debts.

Cases applying the divisibility test

In the seminal case of *In re Englander*, debtors claimed their 1.05 acre lakefront residence as their homestead exemption. 95 F.3d 1028, 1029. The residence was located within an incorporated municipality and, therefore, subject to the one-half acre requirement. *Id.* However, local zoning and building regulations prevented the property from being subdivided. *Id.* The partition would have no legal use as its conveyance would violate local zoning law. *Id.* at 1032.

Thus, the Eleventh Circuit upheld a sale of the entire property and apportionment of the proceeds because debtors' claimed homestead property exceeded the acreage limitation and was indivisible. *Id.* The court reasoned that sale and apportionment of the proceeds was fair because it allowed for an appropriate recognition of the debtors' homestead exemption and afforded the creditors some satisfaction of their rightful claims. *Id*.

Similarly, in *In re Kellogg*, a judgment debtor claimed homestead exemption on his 1.3 acre oceanfront property in his bankruptcy petition. 197 F.3d 1116 (11th Cir. Fla. 1999). The Trustee and judgment creditor objected because the property exceeded one-half acre and was located within a municipality. *Id.* at 1118.

In sum, if the property passes the divisibility test it is subject to partition. On the other hand, if the property does not pass the divisibility test (that is, it cannot be divided into lawfully conveyable parcels), the property is subject to sale and apportionment of proceeds.

CALCULATING THE HOMESTEAD EXEMPTION

In *In re Quraeshi*, the court addressed whether, after a sale of a debtor's property in which only a portion can be claimed as homestead, the debtor's homestead-exempt funds should be calculated as a portion of the net proceeds of the sale (after certain other liens have been paid) or based upon the gross sales price of the entire property. 289 B.R. 240, 244 (S.D. Fla. 2002).

The court decided that:

> [I]t would seem that a debtor's homestead exemption would extend to a pro rata portion of the net proceeds of a sale of debtor's property, based on his acreage share of the property sold, rather than a pro rata portion of the gross sales price. As such, only the proceeds remaining after those specific debts are paid qualify as 'homestead.'

Id.

Creditors should be careful to accurately calculate the exemption in order to best protect their interests.

SPECIAL CONSIDERATIONS WITHIN A MUNICIPALITY FOR DUVAL COUNTY

This limitation to the homestead exemption is especially relevant in northeast Florida. All property in Duval County is "located within a municipality". However, when Jacksonville was chartered, it grandfathered in the old city limits for purposes of Article X, Section 4 of Florida's Constitution.

For creditors, this means that a further look should be taken into the homestead asset before simply writing it off as an exempt item. Therefore, any creditor conducting business in Duval County must consult the old city limits, available on the county property appraiser's website, when determining the homestead exemption. WJ

NOTES

[1] Florida's Unlimited Homestead Exemption Does Have Some Limits: Part I, 77 Fla. Bar J. 60 (2003), available at https://bit.ly/2UHdwxA.

[2] Fla. Const. art. X, § 4. (emphasis added).

[3] https://bit.ly/2UFrkbT

DATA BREACH

Banks lose class certification bid over retailer's data breach

By Dave Embree

An Alabama federal judge has refused to certify a proposed nationwide class of banks and other financial institutions that issued payment cards exposed in a 2015 data breach at retail chain Fred's Inc.

Southern Independent Bank v. Fred's Inc., No. 15-cv-799, 2019 WL 1179396 (M.D. Ala. Mar. 13, 2019).

U.S. District Judge W. Keith Watkins of the Middle District of Alabama on March 13 said class certification was inappropriate because different standards would apply to different proposed class members depending on the law in their respective jurisdictions.

The breach took place from March to April 2015 when hackers gained access to the payment processing system at Fred's, a Memphis-based retail chain with locations throughout the Southeast, according to complaint.

Visa and MasterCard issued security alerts for the incident that July, notifying the banks that had issued payment cards that were used at Fred's during the breach window, the complaint said.

Southern Independent Bank of Andalusia, Alabama, sued Fred's in October 2015 on behalf of a proposed nationwide class of about 2,500 banks in all 50 states plus the District of Columbia that had issued affected payment cards.

The suit accused Fred's of negligence for allegedly failing to implement industry-standard data security measures.

Southern Independent sought monetary damages to recoup the costs of reimbursing fraudulent transactions and replacing compromised payment cards.

CLASS CERTIFICATION DENIED

In December 2017 Southern Independent moved to certify the proposed nationwide class of banks involved.

Fred's opposed the motion, arguing that differing state laws would preclude the court from resolving the proposed class members' claims as a class.

Specifically, the retailer said states have adopted different versions of the economic-loss doctrine, which broadly prohibits or limits plaintiffs from recovering for purely economic losses for negligence claims.

Additionally, Fred's argued that class certification was inappropriate because the court would be required to individually determine each class m ember's damages.

Judge Watkins denied the motion for class certification March 13.

He detailed several variations on the economic-loss doctrine, some of which would seem to foreclose the banks from using negligence liability to recover their losses from the data breach.

"There are too many differences in state law to certify this case as a class action," Judge Watkins concluded.

The judge also said individualized questions regarding damages weighed against certifying the class. WJ

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Defendant: James Slater and Sam Camardo, Baker & Hostetler, Cleveland, OH; Richard. E. Smith, Christian & Small, Birmingham, AL

Related Filings:
Opinion: 2019 WL 1179396

See Document Section A (P. 15) for the opinion.

Bank stymies family farm's plan to avoid liquidation

By Conor O'Brien, Esq.

A father and son operating a Kansas farm have 21 days to submit a new plan to repay a secured bank more than $1.8 million after a bankruptcy judge concluded that their first proposal was not in the bank's best interests.

In re Graves Farms, No. 18-10893, 2019 WL 1422891 (Bankr. D. Kan. Mar. 28, 2019).

Dean Graves and his son Michael also failed to provide enough historical information about crop yields to persuade U.S. Bankruptcy Judge Robert E. Nugent of the District of Kansas that their debt repayment plan was feasible.

Judge Nugent further found that the repayment plan would not have ultimately provided RCB Bank — the farm's largest secured creditor and last holdout objecting to the plan's confirmation — with the value of its collateral as of the plan's effective date, in violation of the Bankruptcy Code.

RCB Bank raised many objections to the plan at a January confirmation hearing, including that the farm operators had valued the bank's collateral too low.

FAMILY FARM

The father and son, who run Graves Farms in Sumner County as a partnership, banked with CornerBank for 35 years, Judge Nugent's opinion said. RCB bought CornerBank in 2016.

The farm experienced a crop failure in 2018, and RCB urged the Graveses to sell the farms' assets. To preserve them, Graves Farms filed a Chapter 12 petition in May 2018, the opinion said.

Chapter 12 is a special provision of the Bankruptcy Code that allows family farmers and family fishermen to avoid liquidation by creating a court-approved debt-repayment plan.

The farmers submitted a plan proposing to sell some of the bank's collateral at a public auction and other property to Michael's daughter Kylee, who would operate the farm. The plan also proposed retaining some equipment and land and leasing it to Kylee.

The plan calls for the farm to repay the bank with the proceeds from the sales, leases and farming operations.

LOW VALUATION

RCB raised many objections to the plan at a January confirmation hearing, including that the Graveses had valued the bank's collateral too low.

For example, the debtor valued certain equipment at $393,000 but did not offer a valuation witness. The bank, on the other hand, provided a witness who supported RCB's argument that the property would sell at auction for $411,000, Judge Nugent's opinion said.

Because the Graveses proposed paying the bank only $393,000 for the equipment, the plan failed the best-interests-of-creditors test of Bankruptcy Code Section 1225(a)(4), 11 U.S.C.A. § 1225(a)(4). Under that section, a plan cannot be confirmed if a creditor opposing confirmation would receive less under the plan than the creditor would receive in a Chapter 7 liquidation.

The Graveses' low valuation of the equipment also caused the plan to run afoul of Bankruptcy Code Section 1225(a)(5), which requires that secured creditors receive the value of their collateral as of the plan's effective date, the judge said.

The farmers and the bank also disputed the value of certain real estate collateral, and although the judge sided with the Graveses' lower valuation, he said he could not confirm the interest rate that the debtor proposed to pay over the course of the plan.

FEASIBILITY

In addition, the plan violated Bankruptcy Code Section 1225(a)(6), which requires debtors to show that their proposed plans are feasible, meaning that compliance with them is "more likely than not," Judge Nugent said.

The plan indicated, for example, that the farm would have an operating margin adequate to service the farm's debt in large part because of a cotton harvest, which it projects would contribute more than 40% of the farm's gross income per year, the judge said.

The bank disputed the plan's cotton yield projections, however, saying Graves Farm had not produced the crop "for some time" and that Kylee Graves, who would grow the cotton, had never done so. The bank also said its understanding about cotton yields from other Sumner County farms required a decrease in the debtor's projected yields.

Judge Nugent concluded that although a debtor is not required to guarantee at the time of confirmation that the plan will succeed, Graves Farms did not provide enough evidence to show that its compliance with the plan would be more likely than not. WJ

Related Filings:
Opinion: 2019 WL 1422891

See Document Section B (P. 32) for the opinion.

Trustee can't claw back debtor's payment on $277,000 note

By Donna Higgins

A Chapter 7 debtor's payment, prior to his bankruptcy filing, of more than $277,000 to investors in a failed business venture was repayment of a valid debt and not a fraudulent or preferential transfer, a Texas bankruptcy judge has ruled.

In re Jones, No. 16-41283; Garner v. Sherwood et al., Adv. No. 18-4098, 2019 WL 1167812 (Bankr. N.D. Tex. Mar. 11, 2019).

There was no evidence debtor Gregory G. Jones intended to "hinder or delay" his creditors by making the payment, nor were the recipients "insiders" of the debtor, U.S. Bankruptcy Judge Edward L. Morris of the Northern District of Texas said, rejecting efforts by the Chapter 7 trustee for Jones' bankruptcy estate to recoup the money.

BUSINESS DEALINGS

Jones and the investors, Richard and Lesa Sherwood, met when they were neighbors living in Southlake, Texas, according to Judge Morris' opinion.

Jones, an attorney, agreed to represent Richard Sherman's business Sortium USA LLC in a copyright infringement suit, the opinion said.

Two years later, according to the opinion, the Sherwoods invested $250,000 in Jones' business venture, Aquaphex Total Water Solutions LLC. Jones claimed Aquaphex would use molecular filtration technology to remove contaminants from water used as part of the process for fracking, the opinion said.

Jones promised the Sherwoods they would receive a percentage of the net income from Aquaphex's first six plants, and that they were guaranteed a total return of no less than $500,000, the opinion said.

Jones later persuaded the Sherwoods to invest another $240,000 in the business, by purchasing four shares of Aquaphex, the opinion said. The share purchase agreement called for Jones to repay the Sherwoods their initial $250,000 investment in installments.

Jones failed to make required installment payments in June, July and August 2014, according to the opinion. At that point, the Sherwoods got Jones to execute a promissory note documenting the payment obligation, referred to as the "initial investment note."

At around the same time, according to the opinion, Jones executed a separate promissory note for just under $83,500 to resolve a billing dispute with Richard Sherwood stemming from Jones' work in the copyright litigation.

Both notes were later restructured, with the amount of the initial investment note set at $277,486 to account for accrued interest, the opinion said.

CLASS-ACTION PAYMENT

In July 2015, Jones received $1.58 million from a class-action settlement. He hired an attorney, Roger Yale, to take possession of the money and help him decide how it should be spent, the opinion said.

At that point the Sherwoods hired their own attorney to negotiate with Yale. Eventually, according to the opinion, Jones opted to pay the Sherwoods $277,486 on July 20, 2015, instructing that the money be used to fully satisfy the restructured investment note.

Jones filed for Chapter 11 bankruptcy April 1, 2016. The case was later converted to Chapter 7 and Marilyn Garner was appointed as the Chapter 7 trustee.

She filed an adversary action against the Sherwoods, seeking to claw back the payment from Jones as both constructive and actual fraudulent transfers under Section 548 of the Bankruptcy Code, 11 U.S.C.A. § 548, and as a preferential transfer under Section 547 of the code, 11 U.S.C.A. § 547.

The Sherwoods moved for summary judgment, which Judge Morris granted.

TRUSTEE'S CLAIMS REJECTED

The trustee's constructive-fraudulent transfer claim fails because she could not show that Jones received less than "reasonably equivalent value" in exchange for the note payment, the judge said.

The payment was "dollar for dollar" satisfaction of a valid antecedent debt Jones owed to the Sherwoods, which as a matter of law constitutes reasonably equivalent value, he said.

Nor was the payment an actual fraudulent transfer because there is no evidence to support the trustee's claim that Jones intended to "hinder or delay" his creditors, Judge Morris said.

Finally, he said the trustee could not show that the payment was a preferential transfer because she could not prove that the Sherwoods were "insiders" of Jones at the time of the transfer.

Section 547(b)(4)(B) states that transfers made more than 90 days, but less than one year, before a debtor files for bankruptcy can be avoided if the transfer was made to an "insider" of the debtor.

The trustee failed to provide any evidence that the transfer was the product of the parties' affinity for each other and was not conducted at arms' length, Judge Morris said.

By the time the disputed transfer occurred, he noted, the parties' relationship had deteriorated to the point where they communicated only through their lawyers. WJ

Attorneys:
Plaintiff: Lyndel A. Vargas, Cavazos Hendricks Poirot, Dallas, TX

Defendants: Mark J. Petrocchi, Griffith, Jay & Michel, Fort Worth, TX

Related Filings:
Opinion: 2019 WL 1167812

Baltimore alleges big banks colluded on municipal securities rates

(Reuters) – The city of Baltimore has filed suit against 10 major banks accusing them of colluding to manipulate interest rates for a certain type of municipal security, causing states and local governments to pay billions of dollars in extra interest.

REUTERS/Chris Wattie

REUTERS/Brendan McDermid

BMO Financial and Morgan Stanley are two of 10 major banks named as defendants in the suit.

Mayor of Baltimore v. Bank of America Corp. et al., No. 19-cv-2667, complaint filed, 2019 WL 1339726 (S.D.N.Y. Mar. 25, 2019).

Filed late March 25 in Manhattan federal court, the lawsuit accuses Bank of America, Citigroup, JPMorgan Chase and seven other banks of violating federal antitrust law by manipulating rates on so-called variable-rate demand obligations, or VRDOs, from at least 2007 through June 2016.

Also named as defendants were Barclays Bank, BMO Financial Group, Citigroup, Fifth Third Bancorp, Goldman Sachs, Morgan Stanley, Royal Bank of Canada and Wells Fargo.

Spokesmen for Citigroup, JPMorgan, Barclays, Goldman Sachs, Bank of America and Morgan Stanley declined to comment. Spokesmen for the other banks did not immediately respond to a request for comment.

The proposed class action is seeking damages for thousands of state and local governments and housing and health care authorities that issued VRDOs, whose interest rates resets periodically. Found in many municipal money market funds, VRDOs include a "put" feature that allows investors to sell or cash in their security when rates reset.

Municipalities sell VRDOs to raise revenue and had about $223 billion outstanding as of 2013, the lawsuit said. Municipalities hire banks as remarketing agents to reset rates and remarket any VRDOs that investors cash in.

The lawsuit said the banks conspired to fix the rates at high levels, reducing the likelihood that investors would sell the securities and require the banks to remarket them. The banks also reaped profits from high rates because they owned and managed money market funds holding VRDOs, Baltimore alleged.

The lawsuit accused the banks of unjust enrichment and violations of the Sherman Antitrust Act. It also accused them of breaching remarketing agreements with municipalities, which required them to set VRDOs' interest at the lowest rate possible.

A similar lawsuit was filed in Manhattan federal court in February by the city of Philadelphia against seven of the same defendants. The banks' answers to that lawsuit are due May 1. *City of Phila. v. Bank of Am. Corp.*, No. 19-cv-1608, *complaint filed*, 2019 WL 927171 (S.D.N.Y. Feb. 20, 2019).

Several whistleblower lawsuits have also been filed in state courts in Illinois, California and other states alleging that the banks made false claims about VRDOs.

The March 25 lawsuit, citing data unsealed in the Illinois whistleblower lawsuit, said VRDO rates from four of the defendant banks moved in near-perfect lock step over a 12-month period between October 2012 through October 2013. That data suggested that the banks were "collusively" and mechanically setting VRDO rates without any consideration of demand or other market conditions, Baltimore alleged.

Cook County Circuit Judge Diane Shelley in February rejected a joint motion by the banks to dismiss the Illinois whistleblower lawsuit, filed in 2017 by Edelweiss Fund. *State ex rel. Edelweiss Fund v. JPMorgan Chase & Co.*, No. 2017-L-000289, *order issued* (Ill. Cir. Ct., Cook Cty. Feb. 1, 2019).

In their motion to dismiss, the banks had argued that the whistleblower failed to support allegations that they made false claims about VRDOs.

The U.S. Securities and Exchange Commission has also been investigating VRDO remarketing practices, Baltimore's lawsuit said. A spokesman for the SEC declined to comment. WJ

(Reporting by Dena Aubin)

Related Filings:
Baltimore complaint: 2019 WL 1339726
Philadelphia complaint: 2019 WL 927171

Former REIT execs seek end to 2015 derivative suit

By Nicole Banas

American Realty Capital Properties Inc.'s former executives are urging a Manhattan federal judge to end a shareholder lawsuit seeking to hold them personally liable to the real estate investment trust for "intentional" accounting errors that led to a 2015 financial restatement.

Witchko v. Schorsch et al., No. 15-cv-6043, memo supporting motion for summary judgment filed, 2019 WL 1449559 (S.D.N.Y. Mar. 28, 2019).

In a memo filed March 28 in the U.S. District Court for the Southern District of New York, former ARCP Chairman and CEO Nicholas Schorsch, former President Edward Weil and former Chief Operating Officer William Kahane say the derivative suit fails to adequately plead a breach-of-fiduciary-duty claim under Maryland state law.

The executives are asking U.S. District Judge Alvin K. Hellerstein for summary judgment.

ARCP, which is now named Vereit Inc., is a publicly traded REIT organized under Maryland law. Vereit shares are listed on the New York Stock Exchange.

The court memo updates a Feb. 8 filing that was partially redacted due to pending motions to seal certain information in the derivative suit, a related securities class action and an individual shareholder suit.

Judge Hellerstein mostly denied the motions to seal March 25. *In re Am. Realty Capital Props. Inc. Litig.*, No. 15-mc-40, *order issued* (S.D.N.Y. Mar. 25, 2019).

Former ARCP President David Kay, former COO Lisa Beeson and former Chief Financial Officer Brian Block filed separate memos supporting summary judgment motions in February.

Block was convicted of securities fraud in 2017 for his preparation of ARCP's 2014 financial results and sentenced to serve 18 months in prison. He is currently appealing the denial of his motion for a new trial. *United States v. Block*, No. 19-682, *notice of criminal appeal filed* (2d Cir. Mar. 21, 2019).

ALLEGED SELF-DEALING

The derivative suit, filed in July 2015 by Joanne Witchko, says ARCP lost nearly $4 billion in market value in late 2014 after it announced the need to restate certain financial results because of accounting errors that were "intentionally not corrected."

Most of the REIT's top executives and directors resigned or were forced out in the following months on news that they had "hugely enriched themselves by plundering ARCP through fraud and self-dealing," according to an amended complaint filed in June 2016.

The alleged accounting fraud included an overstatement of ARCP's primary performance metric, "adjusted funds from operations," or AFFO, and various transactions that funneled $917 million to the REIT's manager and related entities, the suit says.

In a 2016 ruling, Judge Hellerstein determined that the plaintiff had derivative standing to sue after finding she had adequately alleged ARCP's board wrongfully rejected her pre-suit demand for legal action to redress the alleged misconduct. *Witchko v. Schorsch*, No. 15-cv-6043, 2016 WL 3887289 (S.D.N.Y. June 9, 2016).

The 2nd U.S. Circuit Court of Appeals denied the defendants' motions for interlocutory appeal of the order in December 2016. *Witchko v. Schorsch*, No. 16-2499, *order issued* (2d Cir. Dec. 7, 2016).

Discovery in the suit focused on ARCP's AFFO disclosures and six related-party transactions involving another Schorsch-owned entity, AR Capital LLC, which is the corporate parent of the REIT's external manager, according to the memo supporting summary judgment filed by Schorsch, Weil and Kahane.

'PLAIN LEGAL DEFICIENCY'

The memo says the amended complaint has a "plain legal deficiency" because Maryland state law does not recognize an independent cause of action for breach of fiduciary duty.

Witchko "cannot possibly" meet the state's standard for "clear and convincing evidence" of fraud because, as a derivative plaintiff suing on behalf of ARCP, she is barred from advancing a position contrary to the REIT, the memo says.

ARCP asserted in a Feb. 8 motion for summary judgment in the securities class-action suit that its AFFO disclosures were accurate and transparent, the memo says.

The defendants say discovery in the derivative suit did not produce evidence of deliberate dishonesty or improper benefits that is required to establish fraud.

Witchko has not presented a genuine factual dispute about the propriety of related-party transactions that were approved by ARCP shareholders and independent directors, the memo says. WJ

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Defendant Nicholas Schorsch: Theodore V. Wells Jr., Daniel J. Kramer, Lorin L. Reisner, Audra J. Soloway and Christopher L. Filburn, Paul Weiss Rifkind Wharton & Garrison, New York, NY

Defendants Edward Weil and William Kahane: Reid M. Figel, Andrew E. Goldsmith, Rebecca A. Beynon, Bradley Oppenheimer and Cody Herche, Kellogg Hansen Todd Figel & Frederick, Washington, DC

Related Filings:

Memo supporting summary judgment (Schorsh et al.): 2019 WL 1449559
Memo supporting summary judgment (Kay): 2019 WL 1209835
Memo supporting summary judgment (Beeson): 2019 WL 1209834

Advisory firm covered up bad loans in financials, SEC says

By Alex Rose

The Securities and Exchange Commission has charged a California investment advisory firm with falsifying data that led to $11 million in overcharges for management and performance fees to its private funds.

Securities and Exchange Commission v. Direct Lending Investments LLC, No. 19-cv-2188, complaint filed, 2019 WL 1339708 (C.D. Cal. Mar. 22, 2019).

The agency's civil complaint, filed March 22 in the U.S. District Court for the Central District of California, alleges Direct Lending Investments LLC secretly arranged to have online small-business lender QuarterSpot Inc. fraudulently report that loans were being satisfied when no payments had been made.

This caused DLI to overstate its QuarterSpot valuation by about $53 million between 2014 and 2017 and misrepresent the funds' performance by 2% to 3% annually, according to the complaint.

QUARTERSPOT DEAL

The complaint says DLI, a Glendale-based investment adviser registered with the SEC, advises a combination of private funds that invest in various lending platforms, including QuarterSpot, a private New York company.

DLI buys loans, participates in loans, and owns credit facilities where loans and other assets serve as collateral, the suit says.

QuarterSpot is one of DLI's "longest standing" fund investments, and its principals are close business associates of DLI owner Brendan Ross, who stepped down as CEO on March 18, according to the complaint.

The SEC says DLI entered into an agreement in August 2013 to purchase QuarterSpot's "unsecured payment dependent promissory notes," or spots.

Between August 2013 and June 2017, DLI's position in QuarterSpot grew from $427,300 to over $149 million, according to the complaint.

'SCARY AS HELL'

The complaint says Ross took steps to conceal known problems with the QuarterSpot portfolio between 2014 and February 2018.

Ross indicated in a March 2014 email to QuarterSpot's principals that their failure to write off a substantial number of late loans was "scary as hell," and he directed QuarterSpot to delay recognizing delinquent loans on monthly reports to DLI, according to the SEC.

Ross additionally directed QuarterSpot to report values for loans that had not received payments, in some cases for hundreds of loans in one month, according to the complaint. The SEC says the values of those falsified payments were between $20,000 and $100,000 per month.

The complaint says DLI used this false information to assess the credit of the underlying loans, which should have been valued at zero, and artificially inflate the funds' net asset value.

To offset the missing values, QuarterSpot did not take portions of its servicing fees for certain months and instead credited or paid those amounts to DLI disguised as loan borrower payments, the suit says.

The SEC alleges a senior DLI representative said every dollar paid or not paid on loans affected the company's financials, which are used to determine the fund's master values and management fees.

CHARGES FILED

The SEC charges DLI with violations of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

It also alleges DLI violated Section 17(a) of the Securities Act of 1933, 15 U.S.C.A. § 77q(a), and Sections 206 and 207 of the Investment Advisers Act, 15 U.S.C.A. §§ 80b-6 and 80b-7.

The complaint seeks disgorgement of allegedly ill-gotten gains along with interest, monetary penalties and permanent injunctions.

DLI has not admitted any violations but has agreed to a preliminary injunction and to the appointment of a receiver, subject to court approval, the SEC said in a March 25 statement. WJ

Related Filings:
Complaint: 2019 WL 1339708

MoneyGram

CONTINUED FROM PAGE 1

higher compliance standards and newly implemented corridor specific controls."

The news came a day after the U.S. Justice Department and Federal Trade Commission announced MoneyGram had agreed to forfeit $125 million after breaching a 2009 FTC order and a 2012 deferred prosecution agreement with the DOJ by not properly investigating, reporting and stopping fraudulent money transfers.

In settling with the FTC, MoneyGram neither admitted nor denied the commission's allegations. *FTC v. MoneyGram Int'l*, No. 09-cv-6576, *stipulated order issued* (N.D. Ill. Nov. 13, 2018).

MISLEADING INFORMATION?

In 2009 the FTC issued an order requiring MoneyGram to protect consumers from fraud in its money transfer business, the suit says.

In November 2012 MoneyGram entered a five-year deferred prosecution agreement with the DOJ, the amended complaint says. *U.S. v. MoneyGram Int'l*, No. 12-cr-291, *deferred prosecution agreement entered*, 2012 WL 5474918 (M.D. Pa. Nov. 9, 2012).

Under the agreement — in which MoneyGram admitted engaging in criminal misconduct — the company paid a $100 million forfeiture and agreed to implement remedial actions, the suit says.

Thereafter, MoneyGram falsely led investors to believe it was fully complying with both the 2009 order and the 2012 agreement, the amended complaint says.

> The suit seeks compensation for investors who allegedly lost money on MoneyGram shares purchased during a 57-week period ending Nov. 8.

The original shareholder complaint, filed Nov. 14 in the U.S. District Court for the Northern District of Illinois, named as defendants MoneyGram, Chairman and CEO W. Alexander Holmes, Chief Financial Officer Lawrence Angelilli, and ex-CEO Pamela H. Patsley.

The amended complaint, filed by lead plaintiffs Norfolk County Retirement System and Ozgur Karakurt April 5, adds four directors as defendants.

The suit seeks compensation for investors who allegedly lost money on MoneyGram shares purchased during a 57-week period ending Nov. 8.

In a February 2014 statement, MoneyGram said it had successfully prevented $135 million of fraud losses in 2013 and would continue to meet legal and regulatory anti-fraud requirements.

The company reiterated those sentiments in its 2013-2016 annual reports to the Securities and Exchange Commission, the suit says.

MoneyGram's stock reached a class-period high of $17.92 per share in late April 2017.

STOCK TUMBLES

The suit says the truth about the fraud levels in the company's money transfer system was revealed when the 2012 agreement was extended seven times between November 2017 and September 2018.

MoneyGram simultaneously announced it set aside an additional $85 million to resolve the agreement, later increasing that amount to $95 million, the amended complaint says.

According to the suit, the company's stock price began a downward spiral in response.

The largest decline occurred Nov. 9, 2018, after the DOJ and FTC announced MoneyGram would forfeit an additional $125 million for breaching the 2009 order and the 2012 agreement, the amended complaint says.

"Instead of taking the required remedial steps, MoneyGram implemented policies and procedures that allowed fraud to proliferate throughout its system," the suit says.

Patsley and Holmes reaped $5 million and $2 million, respectively, during the class period from insider sales of MoneyGram stock, it says.

According to the suit, the defendants failed to disclose known risks in violation of Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303.

The defendants violated the anti-fraud provisions of the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78j(b) and 78t(a), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, the amended complaint says. WJ

Attorneys:

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Related Filings:

Amended complaint: 2019 WL 1511021

CASE AND DOCUMENT INDEX

SOUTHERN

2019 WL 1179396
Only the Westlaw citation is currently available.
United States District Court, M.D. Alabama, Northern Division.

SOUTHERN INDEPENDENT BANK, Plaintiff,
v.
FRED'S, INC., Defendant.

CASE NO. 2:15-CV-799-WKW

Signed 03/13/2019

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

W. Keith Watkins, UNITED STATES DISTRICT JUDGE

***1** This putative class action is about a harm that is becoming all too common in modern technological society: a data-security breach. Defendant Fred's, Inc. ("Fred's" or "Defendant"), a retail chain selling general goods, found this out the hard way when hackers gained access to two servers carrying its customers' payment information, *potentially* resulting in thousands of cases of identity theft. Those customers are not the plaintiffs here, though. The plaintiffs are those customers' banks — the banks who issued the credit and debit cards the hackers pilfered ("issuing banks") — about 2,500 banks. Those banks, which Plaintiff Southern Independent Bank ("SIB" or "Plaintiff") seeks to represent as a nationwide class, claim damages in the form of actual fraud losses, card reissuance costs, lost revenue, and ancillary costs that they say stemmed from Fred's negligent failure to maintain adequate cybersecurity.

But this is no straightforward negligence claim. Four things make this negligence claim more complicated than normal. First, Alabama's choice-of-law rules mandate that the laws of each potential plaintiff's home state govern the negligence claim. With about 2,500 potential plaintiffs, the parties agree that the laws of all fifty-one United States jurisdictions (the fifty states plus the District of Columbia) are in play. Second, Plaintiffs do not claim any kind of property or personal injury damages, only economic losses, *i.e.*, lost money. This would lead some state courts to bar Plaintiffs' negligence claim entirely. Third, there is no *direct* contractual relationship between Plaintiffs and Defendant, although the parties are connected indirectly through the network of contracts that makes up the payment industry. This nuance would lead some state courts to evaluate Plaintiffs' negligence claim under a slightly different rubric. Fourth, proving damages for a nationwide class of banks is not easy. There are questions as to whether some of SIB's customers had their cards stolen elsewhere. There are questions as to whether SIB incurred unreasonable costs in response to the Fred's breach. These questions apply to most, if not all, other banks in the putative class. As explained more fully below, these four considerations counsel against class action treatment of this case.

Before the court are Plaintiff's motion for class certification (Doc. # 41) and two *Daubert* motions (Docs. # 44, 46) to exclude expert testimony regarding issues raised by the motion for class certification. Those *Daubert* motions are: (1) Defendant's motion to exclude Plaintiff's expert Ian Ratner's testimony on the issues of causation and reasonableness of damages (Doc. # 44); and (2) Plaintiff's motion to exclude Defendant's expert Tony Emrick's testimony on the issue of the reasonableness of Plaintiff's incurred costs in the wake of the data breach (Doc. # 46). Related to the class-certification motion are Defendant's motion for leave to file an *instanter* sur-reply brief opposing certification (Doc. # 50), and Plaintiff's objection to that motion (Doc. # 57). For the following reasons, both

Daubert motions will be denied; the motion for class certification will be denied; and Defendant's motion for leave to file a sur-reply will be granted. The court has considered both Defendant's sur-reply and Plaintiff's response in its review of the class-certification motion.

I. JURISDICTION AND VENUE

***2** Subject-matter jurisdiction is proper under the Class Action Fairness Act, 28 U.S.C. § 1332(d). The putative class consists of over 100 members, the amount in controversy is over $5,000,000, and there is minimal diversity between the parties. The parties do not contest personal jurisdiction or venue.

II. BACKGROUND

A. The Parties

Plaintiff Southern Independent Bank is a community bank located in south Alabama. SIB issues debit cards to its customers. Defendant Fred's is a retail chain selling discount general merchandise and is located primarily in the Southeast. Fred's accepts debit and credit cards, including cards issued by SIB, as payment at its stores. When a card is swiped, that card information is transmitted from the store to Fred's servers at its headquarters in Memphis, then routed to Fred's acquiring bank, Bank of America Merchant Services. (Doc. # 41-41, at 21.)

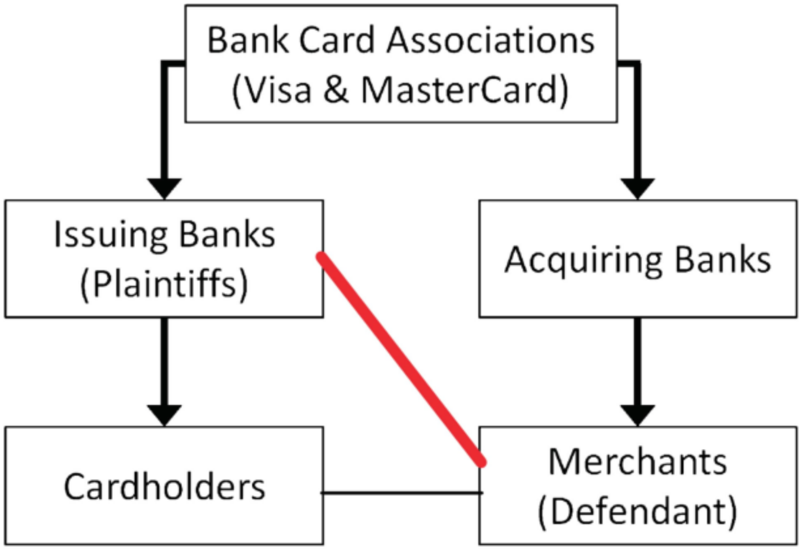
B. Overview of the Payment Card Industry

SIB and Fred's are part of "payment card networks," which Visa and MasterCard use to facilitate transactions between sellers and buyers. Financial institutions that make up these networks can be "issuing" or "acquiring" banks, or both. An issuing bank like SIB issues credit or debit cards to its customers with the Visa or MasterCard logo. The logo allows the holder to use the card at any merchant like Fred's where Visa or MasterCard is accepted. Acquiring banks are on the other side of the transaction. Acquiring banks get merchants into the payment networks. They contract with merchants so that the merchants may accept debit and credit cards as payment. Merchants do not have a direct relationship with Visa or MasterCard; they need an acquiring bank to sponsor them into the payment networks.

Both kinds of banks, issuing and acquiring, are bound by Visa and MasterCard's extensive rules by contract with the card brands. Among those rules is the payment card industry's data security standard ("PCI-DSS"). When a merchant like Fred's comes into the payment network through an acquiring bank, the contract between the merchant and the acquiring bank also binds the merchant to Visa and MasterCard's rules, including the PCI-DSS. (*See* Docs. # 45-1, 45-11, at 11–12.)

When a customer presents a card to make a purchase, the cashier swipes the card, and certain information is collected from the card and transmitted through the acquiring bank to the issuing bank. The issuing bank then approves or declines the transaction based on an automated series of rules, including whether the customer has enough money in his account or enough credit. If approved, the merchant is reimbursed for the charge by the acquiring bank. The acquiring bank receives a fee from the merchant for each transaction, called a "merchant discount." The issuing bank then reimburses the acquiring bank. In doing so, the issuing bank collects a portion of the merchant discount called an "interchange fee." Interchange fees are intended to compensate issuing banks for card processing costs and losses due to fraudulent charges. (*See* Doc. # 45-1, at 7, 9–10.)

***3** Thus, payment card networks are built on a web of contractual arrangements, containing incentives and allocations of risk. Below is an illustration of how the parties to these networks are related, based on diagrams the United States District Court for the District of Colorado and the Seventh Circuit used in similar cases[1]:



The vertical lines with arrows starting from Visa and MasterCard and moving downward represent the series of contractual relationships that parallel the two sides of the payment card networks. The horizontal line at the bottom connecting cardholders and merchants represents the connection between the two sides when cardholders transact with merchants. Finally, the diagonal line represents the relationship this lawsuit is about: the one between a merchant (Fred's) and an issuing bank (SIB). The Seventh Circuit explained that the theory of recovery represented by the diagonal line would be a "new form of liability … in addition to the remedies already provided by the contracts governing the card payment systems." *Cmty. Bank of Trenton*, 887 F.3d at 808.

C. The Fred's Breach and Aftermath

On March 23, 2015, hackers, using malware installed on Fred's servers, gained access to those servers and began harvesting payment data from the cards that were used at Fred's. (Doc. # 45-11, at 49.) Their malware captured only the card number, not the cardholder's name, expiration date, or printed security code. (*See* Docs. # 45-11, at 49, 45-2, at 8–9.) Hackers had access to the servers until April 24, 2015 — a breach window of about a month. (Doc. # 45-11, at 49.) But Fred's did not find out about the breach until May 29, 2015. (*See* Doc. # 41-18.) Whether Fred's was in compliance with the PCI-DSS when the breach occurred is a disputed issue, but is not relevant for class-certification purposes.

Fred's hired cybersecurity firm Mandiant to do a forensic investigation of the data breach and issue a report, which was given to Visa and MasterCard. (Doc. # 41-19.) The report confirmed that the malware could access payment data on Fred's servers from March 23 to April 24, 2015. (*See* Doc. # 41-19.) Accordingly, Visa and MasterCard issued what are known as compromised account management system (CAMS) alerts to any issuing bank whose customers used their cards at Fred's during that timeframe. (Doc. # 45-1, 12–13.) CAMS alerts do not say whether fraudulent activity occurred on a card; they merely give notice that payment data has been exposed. (Doc. # 45-1, 12–13.) About 2,500 banks received CAMS alerts related to the Fred's breach. (*See* Doc. # 45-13.)

SIB was one of those banks. CAMS identified 402 SIB-issued payment cards that were exposed by the Fred's breach. (Doc. # 41-40, at 15.) Fifty of those cards suffered fraudulent charges. (Doc. # 41-40, at 15.) SIB responded by contacting all those cardholders by phone and asking whether they would like to receive a new card. (Doc. # 41-40, at 15.) SIB eventually reissued just over half of the cards. (Doc. # 45-5, at 4.) Whether these actions were reasonable, and thus whether SIB's claimed damages are appropriate, is hotly disputed, and is relevant both at the class-certification stage and at trial.

D. This Lawsuit

***4** SIB filed this class-action complaint on October 30, 2015, asserting two theories of recovery against Fred's: (1) negligence for maintaining inadequate data security; and (2) negligent misrepresentation for saying that it had adequate data security when in fact it did not. (*See* Doc. # 1.) Fred's estimates, without dispute, that the putative class consists of approximately 2,500 issuing banks who issued about 1 million cards that were used at Fred's during the breach window. (Doc. # 45, at 23.) SIB summarizes damages for all these banks as consisting of actual fraud losses, card reissuance costs, lost revenue, and ancillary costs. (Doc. # 41, at 34.)

Fred's moved to dismiss both counts under Alabama law *only.* (*See* Doc. # 14.) The case was reassigned from a senior district judge of this court to a visiting judge assisting this district during a judicial emergency. (Doc. # 23.) That judge granted Fred's motion to dismiss as to the negligent misrepresentation claim but denied it as to the negligence claim, reasoning that SIB had made out a claim for negligence against Fred's under Alabama law. (*See* Doc. # 24.) Fred's sought reconsideration of the motion with respect to the surviving negligence claim or, in the alternative, for the court to certify the question to the Alabama Supreme Court. (*See* Doc. # 28.) That motion was denied after being fully briefed, (Doc. # 37), and the case proceeded to discovery in anticipation of the motion for class certification. After the parties briefed the pending motions, including the class-certification motion, the case was reassigned to the original senior district judge, (Doc. # 59), and then to the undersigned on August 17, 2018, (Doc. # 60).

III. STANDARD OF REVIEW

A. Rule 702 and *Daubert* Standard

The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1999), and its progeny. Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In *Daubert*, the Supreme Court emphasized that Rule 702 assigns the trial court a gatekeeping role to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589, 597; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) ("[T]he Federal Rules of Evidence 'assign to the trial judge the task of ensuring that an expert's testimony rests both on a reliable foundation and is relevant to the task at hand.' " (quoting *Daubert*, 509 U.S. at 596)). This gatekeeping responsibility is the same when the trial court is considering the admissibility of testimony based upon " 'technical' and 'other specialized knowledge.' " *Kumho Tire*, 526 U.S. at 141 (quoting Fed. R. Evid. 702).

In light of *Daubert*'s "gatekeeping requirement," the Eleventh Circuit requires district courts to engage in a "rigorous three-part inquiry" for assessing the admissibility of expert testimony under Rule 702:

> Trial courts must consider whether: "(1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue."

***5** *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1999)). These requirements are known as the "qualifications," "reliability," and "helpfulness" prongs. *See id.* "The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion," *id.*, and the proponent must meet its burden by a preponderance of the evidence. *Boca Raton Cmty. Hosp., Inc. v. Tenet Health Care Corp.*, 582 F.3d 1227, 1232 (11th Cir. 2009); *see also Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999) ("The burden of laying the proper foundation for the admission of expert testimony is on the party offering the expert, and the admissibility must be shown by a preponderance of the evidence." (citing *Daubert*, 509 U.S. at 592, n.10)).

As to qualifications, "experts may be qualified in various ways," including by scientific training, education, and experience. *Frazier*, 387 F.3d at 1260. "Whether a proposed expert's experience is sufficient to qualify the expert to offer an opinion on a particular subject depends on the nature and extent of that experience." *United States v. Cunningham*, 679 F.3d 335, 379 (6th Cir. 2012). "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion is reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee note (2000 amends.). Courts must also be mindful that "[e]xpertise in one field does not qualify a witness to testify about others." *Lebron v. Sec'y of Fla. Dept. of Children & Families*, 772 F.3d 1352, 1368 (11th Cir. 2014). But "so long as the expert is at least minimally qualified, gaps in his qualifications generally will not preclude admission of his testimony, as this relates more to witness credibility and thus the weight of the expert's testimony, than to its admissibility." *Henderson v. Goodyear Dunlop Tires N. Am., Ltd.*, Nos. 3:11-CV-295-WKW, 3:12-CV-510-WKW, 2013 WL 5729377, at *6 (M.D. Ala. Oct. 22, 2013) (quoting *Trilink Saw Chain, LLC v. Blount, Inc.*, 583 F. Supp. 2d 1293, 1304 (N.D. Ga. 2008)).

As to reliability, trial courts retain "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire*, 526 U.S. at 152. The focus of reliability "must be solely on principles and methodology, not on the conclusions they generate." *Daubert*, 509 U.S. at 595. After all, "*Daubert* does not require certainty; it requires only reliability." *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1198 n.10 (11th Cir. 2010). But district courts may reject expert testimony that is based on sound methodology when "there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Finally, whether the expert testimony will assist the trier of fact in understanding the evidence or a fact in issue "goes primarily to relevance." *Daubert*, 509 U.S. at 591. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* (citation and internal quotation marks omitted).

The court's gatekeeping role under *Daubert* "is not intended to supplant the adversary system or the role of the jury." *Allison v. McGhan*, 184 F.3d 1300, 1311 (11th Cir. 1999). "Once an expert opinion has satisfied *Daubert*, a court may not exclude the opinion simply because it believes that the opinion is not — in its view — particularly strong or persuasive. The weight to be given to admissible expert testimony is a matter for the jury." *Seamon v. Remington Arms Co., LLC*, 813 F.3d 983 (11th Cir. 2016). Where the basis of expert testimony satisfies Rule 702, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

B. Rule 23 Standard

***6** "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). To avail himself of this exception, a plaintiff seeking class certification bears the burden of proving that he has satisfied the four Rule 23(a) prerequisites — often shorthanded as numerosity, commonality, typicality, and adequacy — and that the class action will meet one of the three requirements of 23(b). Fed. R. Civ. P. 23(a), (b); *see Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016) ("All else being equal, the presumption is against class certification because class actions are an exception to our constitutional tradition of individual litigation."). The burden is one of proof, not pleading, *Brown*, 817 F.3d at 1233, and requires the district court to undertake a "rigorous analysis" to determine the propriety of certification, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Although this rigorous analysis frequently "entail[s] some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011), "the district court can consider the merits 'only' to the extent 'they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied,' " *Brown*, 817 F.3d at 1234 (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013)).

Plaintiff seeks certification of a damages class under Rule 23(b)(3). As a result, along with the Rule 23(a) prerequisites, it must also prove predominance and superiority — that is, "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The court must determine any facts supporting Rule 23 findings by a preponderance of the evidence.[2] *Stein v. Monterey Fin. Servs., Inc.*, No. 2:13-CV-1336-AKK, 2017 WL 412874, at *4 (N.D. Ala. Jan. 31, 2017); *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 317 F.R.D. 675, 679 (N.D. Ga. 2016).

IV. DISCUSSION

"[W]hen an expert's report or testimony is critical to class certification," the court must resolve any *Daubert* objections before ruling on the motion for class certification. *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) (quoting *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010)). The court finds that the challenged experts' testimony is critical to class certification.

As discussed more fully below, Plaintiff must show that causation and damages are provable on a classwide basis. Ian Ratner's expert testimony purports to do just that by utilizing the CAMS alert system. And Defendant argues that Plaintiff acted unreasonably in responding to the Fred's breach, making Plaintiff an atypical and inadequate class representative and creating individualized damages questions that affect predominance. Tony Emrick's testimony puts meat on the bones of that argument by explaining *how* Plaintiff used more resources dealing with the Fred's breach than it should have. The court therefore finds it necessary to resolve the *Daubert* objections to Ratner and Emrick's testimony before turning to the motion for class certification.

A. The *Daubert* Motions

***7** The parties filed cross *Daubert* motions to exclude the testimony of one of the other side's experts. For the reasons discussed below, each of those motions is denied, and the court has considered both experts' testimony in addressing the motion for class certification.

1. *Ian Ratner's Testimony Is an Admissible Expert Opinion.*

Defendant challenges the admissibility of Ratner's expert testimony as to the cause of the damages suffered by the financial institutions and the reasonableness of the steps taken by those institutions in response to the data breach on two grounds. First, it argues that Ratner is not qualified to opine on the impact of data breaches on financial institutions. Second, it argues that Ratner's methodology used to arrive at his opinions on those issues is unreliable. Each argument is discussed in turn.

a. Ratner Is Qualified under *Daubert* and Rule 702.

First, Defendant challenges Ian Ratner's qualifications to opine as an expert on the impact of data breaches on issuing banks. Defendant seeks to exclude Ian Ratner's testimony on this issue because, it argues, Ratner is a forensic accountant who has no experience working in the payment card industry. Thus, it contends, Ratner has no business testifying about "how issuing banks should act in response to a CAMS alert or how a CAMS alert can be used to prove causation of fraudulent damages." (Doc. # 44, at 4.)

In response, Plaintiff touts Ratner's experience in a case involving a data breach at Home Depot where he issued an "internal, confidential report of detailed findings leading up to mediation" regarding the steps taken by issuing banks in the event of a data breach and used similar methodologies as those used in this case. (Doc. # 48, at 2.) Plaintiff also points to Ratner's work on behalf of Goldman Sachs, where he "gained experience in credit card processing sales organizations in the payment processing industry." (Doc. # 48, at 2.) Defendant replies that: (1) with respect to the Home Depot litigation, Ratner was not deposed and did not actually prepare an expert report that was submitted to the court; and (2) his work for Goldman Sachs is irrelevant because it involved projects in which Goldman was doing due diligence prior to making a loan to an entity, not analyses of the impact of data breaches on issuing banks.

The court finds that Ratner is qualified under *Daubert* to testify about the impact of data breaches on issuing banks. In addition to his general experience investigating fraud with respect to payment cards, (Doc. # 45-9, at 5–6), Ratner was retained in an identical capacity in the Home Depot litigation as a damages expert on behalf of issuing banks in which he used similar methodologies — namely, interviewing financial institutions and analyzing their responses to data breaches — to determine what damages the banks suffered as a result of a data breach. (Doc. # 45-9, at 7.) And he testified that his work in that litigation was even more extensive than what he has done in the present lawsuit. (Doc. # 45-9, at 7.) That he did not testify or submit an expert report that was filed with the court in that case does not discount his experience in gathering and analyzing data related to the impact of data breaches on financial institutions. Moreover, Defendant has not explained why forensic accounting is so far removed from analyzing the financial impact data breaches have on banks that experience in the former is not relevant in the latter. And it is not apparent to the court why such experience would not be relevant here. Since Ratner meets *Daubert*'s requirement of being "minimally qualified" to testify in this regard, any deficiencies in his qualifications go only to the weight of his testimony and may be attacked at trial. *See Henderson*, 2012 WL 5729377, at *6.

b. Ratner's Testimony Is Reliable under *Daubert* and Rule 702.

***8** Defendant next seeks to exclude Ratner's testimony on the ground that the methodologies he utilizes in determining causation and reasonableness of damages are not reliable. Defendant's arguments as to causation and damages are discussed in turn.

i. Ratner's Testimony on Causation Is Reliable.

Ratner proposes to use the CAMS alert system to determine which cards experienced fraud as the result of the Fred's data breach. Specifically, he proposes to match the list of cards identified by the CAMS alert system as being exposed by the Fred's data breach with known fraudulent activity that occurred during the window of the breach. (Doc. # 41-40, at 15.) Matching compromised cards alerted by the CAMS system in the wake of the breach with known instances of fraud, he says, would allow a fact finder to determine, "with a high probability," that the Fred's breach was the source of the fraud. (Doc. # 41-40, at 15.)

The court finds Ratner's proposal reliable under *Daubert*. Ratner's proposal simply reflects the common-sense proposition that a payment card identified by the CAMS alert system in the wake of the Fred's breach is more likely than not to have been compromised by that breach. Defendant's objection is that analyzing the causal link between the CAMS alert system and later fraudulent transactions in the aggregate, rather than at the individual cardholder level, is unreliable because it ignores the many reasons, other than the Fred's data breach, that a particular card could experience fraud. (Doc. # 53, at 8.)

This objection misses the mark. It may very well be that the fraud incurred on some of the cards came from some other source. Plaintiff is not required to "eliminate entirely all possibility that [Defendant's] conduct was not a cause" of its damages. Restatement (Second) of Torts § 433B cmt. b on subsection (1). Rather, the question is whether it is reasonable to think that when a card identified as having been compromised by a data breach experiences fraudulent activity, there is a higher probability that the data breach caused the fraud. And the answer to that question is obviously yes. It is nothing more than common sense to say that when two unique events known to bear a causal relationship — a data breach and subsequent fraudulent transaction — occur in the same limited time frame, there is a higher probability that the former caused the latter. This will be true if one assesses the probability that any *single* card suffered fraud as a result of the breach or if one considers the overall "correlation and causation between exposed cards during the breach window" and the fraudulent transactions. (Doc. # 48, at 15 n.5.) That other causes for the fraud may exist does not render that principle unreliable, and therefore does not warrant exclusion.[3]

To be sure, a jury may find the probability that the breach caused the fraud is not high enough for Plaintiff to carry its burden in proving that Defendant's conduct caused its injury. *See id.* at § 433B cmt. a on subsection (1). But so long as *Daubert*'s requirements have been met, it is for the jury, not the court, to decide whether Ratner's testimony on causation is convincing. The court therefore finds that Ratner's testimony regarding causation is reliable under *Daubert*. This conclusion should not be read to foreclose Defendant's argument, in the class certification analysis, that individualized questions persist as to causation so that Ratner's CAMS alert-based method cannot prove causation on a classwide basis. The court's conclusion in the *Daubert* analysis is one of *reliability*, not of proof.

ii. Ratner's Testimony on Damages Is Reliable.

***9** Defendant also challenges Ratner's "indirect" testimony on the reasonableness of the financial institutions' responses to the breach. Defendant frames this challenge in two ways. First, it challenges Ratner's qualifications to opine on whether the financial institutions' responses to the data breach were reasonable. Second, it challenges the reliability of Ratner's use of surveys completed by financial institutions to assess the reasonableness of their responses to the breach. The objection to Ratner's qualifications on this point have been discussed above. The objection to the reliability of the survey results is also without merit.

Defendant argues that the survey results are unreliable because: (1) banks have a motive to maximize their alleged costs; and (2) banks of different sizes and sophistication levels respond to data breaches differently. As to the first point, some degree of self-interest in responding to a survey does not render the results unreliable. This alleged deficiency may be probed at trial. As to the second, the surveys simply average the cost for each issuing bank in responding to a data breach, giving a baseline of costs that banks incur. Defendant may very well be able to argue at trial that this survey evidence does not adequately show whether a particular bank's response was reasonable. But again, this goes to the weight of the evidence, not its admissibility under *Daubert*. In any event, Ratner's report makes clear that his model is preliminary and a more accurate damages assessment will require more research, including analyzing statistics on data breaches and interviewing bank representatives to obtain bank-specific information. (*See* Doc. 41-40, at 16–18.)

Because Ian Ratner is qualified under *Daubert* and the methodologies he employs to reach his conclusions are reliable, Defendant's motion to exclude his testimony will be denied.

2. *Tony Emrick's Testimony is an Admissible Expert Opinion.*

Plaintiff moves to exclude only two statements from Emrick's report: (1) his opinion that Plaintiff did not make effective use of the Fiserv call center;[4] and (2) his statement that chargeback requests for each fraudulent transaction cost Plaintiff $12.75 each, resulting in additional damages. Plaintiff does not question Emrick's qualifications; merely the reliability of his opinion.

The court finds that Emrick's testimony meets the requirements of *Daubert* and Rule 702. As to the first of Emrick's statements Plaintiff challenges, Emrick testified that he based his opinion that Plaintiff did not use the Fiserv call center effectively on deposition transcripts of Plaintiff's employees and his own experience. Plaintiff states that Emrick was "flat wrong" regarding his interpretation of the deposition transcripts, and cites the declaration of another expert to contradict him. (Doc. # 46, at 8.) But the presentation of contradictory expert testimony is hardly a ground for exclusion. If it were, expert testimony would have to be excluded in every case in which there were dueling experts. Instead, as long as the expert's opinion is reliable, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1193 (11th Cir. 2011) (quotation omitted). Plaintiff does not question Emrick's experience in the payment card industry, and it was reasonable for him to rely on the deposition transcripts of Plaintiff's employees to form his opinion. Any deficiencies in Emrick's opinion may be probed at trial. The court therefore does not find Emrick's opinion that Plaintiff used the Fiserv call center ineffectively unreliable.

***10** The court reaches the same conclusion with respect to the second statement: that chargeback requests for each fraudulent transaction cost Plaintiff $12.75 each and resulted in additional damages to Plaintiff. Plaintiff argues that Emrick's opinion regarding the chargebacks is unreliable because: (1) he did no study or analysis to determine the impact of the chargebacks; and (2) the chargeback requests were not actually included in Plaintiff's damage calculations. As to the first point, it is clear that Emrick used not only his knowledge of the industry, but reviewed documentation from Plaintiff and Fiserv that provided evidence of the fee Plaintiff was charged for the chargeback requests. As to the second point, Ian Ratner's report makes clear that his damages calculations are only preliminary and therefore subject to revision. The court sees no reason to exclude Emrick's testimony as to the cost of the chargeback requests while there remains the possibility that Plaintiff could seek to include them in its damages calculations at a later time. Moreover, Emrick's testimony is relevant on this point because Plaintiff does not deny that it seeks damages for the labor cost of submitting the chargebacks. Therefore, the court finds no basis under *Daubert* to exclude Emrick's testimony as to the chargeback requests.

For these reasons, the court finds Emrick's testimony reliable under *Daubert*, and will deny Plaintiff's motion to exclude his report.

B. The Class Certification Motion

Plaintiff moves for certification of a damages class defined as

> Financial institutions — including, but not limited to, banks and credit unions — in the United States (including its Territories and the District of Columbia) that issued payment cards or perform, facilitate, or support card issuing services, whose customers made purchases with those cards from Fred's stores from March 23 to April 14 of 2015 (the "FI Class").

Plaintiff and its counsel also move to be appointed class representative and class counsel under Rule 23(g). Because this case is not appropriate for class treatment, these motions will be denied.

1. *Rule 23(a) Prerequisites*

Rule 23(a) specifies four conditions that must be satisfied before the court certifies a class. Those four conditions are usually shorthanded as numerosity, commonality, typicality, and adequacy. These conditions are "necessary but not sufficient" for a class action. Fed. R. Civ. P. 23 advisory committee's note to subdivision (a). Each is discussed in turn.

a. Numerosity

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." The Eleventh Circuit has signaled that when the putative class consists of more than forty members, joinder is generally impracticable and the numerosity requirement satisfied. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266–67 (11th Cir. 2009) (quoting with approval district court's statement that "less than twenty-one is inadequate" but "more than forty is adequate"); *see* 1 Newberg on Class Actions § 3:12 (5th ed.) (noting that "a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone"). Although numerosity is uncontested here, "the court must nonetheless independently find that the plaintiff has satisfied" each prong of the Rule 23 analysis. 3 Newberg on Class Actions § 7:19 (5th ed.); *see Falcon*, 457 U.S. at 160 ("[A]ctual, not presumed, conformance with Rule 23(a) remains … indispensable.").

Numerosity poses no hurdle to certification here. There is undisputed evidence that about 2,500 financial institutions issued cards that were identified as having been used at Fred's during the breach window. It goes without saying that joinder of all these banks in this litigation would be impractical. Thus, Rule 23(a)(1)'s numerosity requirement is met.

b. Commonality

Rule 23(a)(2)'s commonality prong mandates that "there are questions of law or fact common to the class." This element sets a much lower bar than Rule 23(b)(3)'s requirement that common questions of law or fact *predominate* over individualized questions. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997) (stating that "the predominance criterion is far more demanding" than commonality). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' " *Dukes*, 564 U.S. at 349 (quoting *Falcon*, 457 U.S. at 157). The claims must be based on a "common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. "[I]t is only necessary to find at least one issue common to all class members." *Brown v. SCI Funeral Servs. of Fla., Inc.*, 212 F.R.D. 602, 604 (S.D. Fla. 2003).

***11** Defendant does not contest commonality, and the court finds this requirement has been met.[5] Common questions of fact include whether Defendant maintained inadequate security features in its payments-processing systems and whether the data breach could have been prevented if Defendant had used other security measures. These questions, resolution of which is central to the resolution of Plaintiff's negligence claim, carry Plaintiff past the low threshold of commonality.

c. Typicality

Rule 23(a)(3) mandates that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." "Typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Vega*, 564 F.3d at 1275 (quoting *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1322 (11th Cir. 2008)) (alteration omitted). "Although typicality and commonality are closely related, typicality focuses less on the class in its entirety and more on the relationship between the class and the representative plaintiffs." *Smith v. Triad of Ala., LLC*, No. 1:14-CV-324-WKW, 2015 WL 5793318, at *8 (M.D. Ala. Mar. 17, 2017). "[T]raditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Id.* (citing *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001)) (cleaned up). "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (citing *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000)). "The typicality requirement may be satisfied despite substantial factual differences, however, when there is a strong similarity of legal theories." *Id.* Typicality is met "if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984).

Defendant argues that Plaintiff is an atypical class representative because Defendant has unique causation and damages defenses to Plaintiff that threaten to become the focus of the litigation.[6] As explained more fully in the predominance analysis, Defendant's causation arguments are ultimately damages arguments. And "[d]ifferences in the amount of damages between the class representative and other class members do[ ] not affect typicality." *Kornberg*, 741 F.2d at 1337. The similarities between the legal theories of Plaintiff and the putative class, however, are strong. The single negligence claim arises out of the same event, pattern, or practice: the Fred's breach and surrounding events, including Defendant's actions leading up to, during, and after the incursion itself. That the breach affected some class members more than others does not change matters. Plaintiff's claims are typical of those of the class.

d. Adequacy

The final Rule 23(a) prerequisite — adequacy — seeks to ensure that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Courts have interpreted this requirement to include both adequacy of the representative parties *and* their counsel. Defendant does not quibble with the experience and abilities of Plaintiff's lawyers, and the court finds no reason to question them, either. As to adequacy of the parties themselves, Rule 23(a)(4) "encompasses two separate inquiries: (1)

whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (quoting *In re HealthSouth Corp. Sec. Litig.*, 213 F.R.D. 447, 460–61 (N.D. Ala. 2003)).

***12** Defendant argues that Plaintiff is an inadequate class representative for the same reasons it argues Plaintiff's claims atypical. It is unnecessary to repeat the court's response to those arguments. The court finds that Plaintiff is an adequate class representative for two reasons. First, there are no apparent conflicts between Plaintiff's interests and those of the class. Plaintiff has the same economic interest — recovery for damages incurred by the Fred's breach — as the absent class members. Second, Plaintiff's interest in succeeding in this litigation and recovering the damages it seeks is strong. Thus, Plaintiff has established that it is an adequate class representative.

2. *Rule 23(b)(3)'s Predominance and Superiority Requirements*

Plaintiff seeks certification of a class under 23(b)(3), which requires the court to find that "the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action *is superior* to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). Rule 23(b)(3) therefore contains two requirements, shorthanded as predominance and superiority. The rule lists several factors for courts to use in making predominance and superiority findings:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The predominance requirement, which is "far more demanding" than the commonality requirement, *Windsor*, 521 U.S. at 624, examines whether the class's interests are "sufficiently cohesive to warrant adjudication by representation," *id.* at 623. The superiority requirement "is meant to assist courts in identifying those cases in which the money damage class action lawsuit—a form of *representative* litigation—would be a better form of litigation than the available alternatives." 2 Newberg on Class Actions § 4:64 (5th ed.).

a. Predominance

Predominance contains an implicit two-step analysis. The court must first characterize the issues as common or individual then weigh which of those predominate. *See* 2 Newberg on Class Actions § 4:50 (5th ed.). "It is not necessary that all questions of fact or law be common, but only that some questions are common and they predominate over individual questions." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004) (quoting *In re Theragenics Corp. Secs. Litig.*, 205 F.R.D. 687, 697 (N.D. Ga. 2002)), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). The court must assess "the claims, defenses, relevant facts, and applicable substantive law," *id.* (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)), and determine whether common issues of fact and law "ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief," *id.* at 1255 (quoting *Ingram v. Coca–Cola Co.*, 200 F.R.D. 685, 699 (N.D. Ga. 2001)).

This question is one of proof. "Common questions are ones where 'the same evidence will suffice for each member,' and individual questions are ones where the evidence will '[v]ary from member to member.' " *Brown v. Electrolux Home Prods.*, 817 F.3d 1225, 1234 (11th Cir. 2016) (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)). The rule of thumb is that

> ***13** if the addition of more plaintiffs to a class requires the presentation of significant amounts of new evidence, that strongly suggests that individual issues (made relevant only through the inclusion of these new class members) are important. If, on the other hand, the addition of more plaintiffs leaves the quantum of evidence introduced by the plaintiffs as a whole relatively undisturbed, then common issues are likely to predominate.

Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1270 (11th Cir. 2009) (quoting *Klay*, 382 F.3d at 1255 (cleaned up)).

Predominance is a particularly difficult hurdle where, as here, the claim is for negligence. While all fifty states recognize the tort of negligence and its elements of duty, breach, causation, and damages, each jurisdiction "sing[s] negligence with a different pitch." *In* *the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1301 (7th Cir. 1995) (Posner, J.). And the court has a constitutional obligation to recognize, and not gloss over, variations in common-law tort rules across the fifty states.[7] *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–76 (1938).

Of the elements Plaintiff must prove to prevail on its negligence claim, breach is the one issue that is clearly common to the entire class. Evidence of Fred's data-security measures, industry standards, and Fred's response to the data breach will help resolve the issue of breach as to all putative class members. That issue, however, is quickly swamped by the individualized issues required to adjudicate the other elements of Plaintiff's negligence claim.

i. Variations in State Law Involve Individualized Questions.

Plaintiff seeks compensation in negligence for solely economic damages. To be more specific, Plaintiff seeks to recover the costs it incurred in responding to the Fred's breach, such as actual fraud losses and reissuance costs. As it turns out, whether a negligence claim provides a remedy for such financial damages is a hotly debated question across United States jurisdictions. The parties have not cited, and the court has not found, another case in which the negligence laws of all fifty-one jurisdictions were implicated by the claims of a putative class of issuing banks.

Defendant argues that two material variations in state negligence law prevent the court from certifying a class. First, it says the variations on the "economic loss rule" are too great for the court to proceed to trial with a damages class consisting of plaintiffs from all fifty states. Second, Defendant argues that the states apply materially different standards for determining whether Defendant owes each putative class member a duty of care.

***14** These two arguments ultimately pose a single question: Under the law of each jurisdiction, does Defendant owe Plaintiff a tort duty to avoid the unintentional infliction of economic loss? *See* Dan B. Dobbs et al., Dobbs' Law of Torts § 607 (2d ed.) ("Coherence and clarity may also be fostered by recognizing that the economic loss rules are no-duty rules, and sometimes stating them in that form leads to clearer application."). If there were one answer to that question, the issue of duty could easily be characterized as a common one. But the jurisdictions at issue do not sing the answer to that question in unison, and thus duty is best characterized as involving individualized questions.

"In a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Klay*, 382 F.3d at 1261 (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)). "[C]lass certification is impossible where the fifty states truly establish a large number of different legal standards governing a particular claim." *Id.* But if "a claim is based on a principle of law that is uniform among the states," or if "the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards," then certification is possible. *Id.* at 1262. The burden of "showing uniformity or the existence of only a small number of applicable standards (that is, 'groupability') among the laws of the fifty states rests squarely" with Plaintiff. *Id.* Plaintiff must prove through an "extensive analysis," not merely a cursory look, that there are "no material variations among the law of the states for which certification is sought." *Powers v. Gov't Emps. Ins. Co.*, 192 F.R.D. 313, 319 (S.D. Fla. 1998) (citing *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1001 (D.C. Cir. 1986)); *see Sacred Heart Health Sys., Inc. v. Humana Military Heathcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010) (stating that the party seeking certification must "provide an *extensive analysis* of state law variations to reveal whether these pose insuperable obstacles" (emphasis in original)).

Whether Defendant owes a tort duty to Plaintiff to avoid the unintentional infliction of economic loss is a matter of law determined by the court. *See* Restatement (Second) of Torts § 328B(b) & (f) (Am. Law Inst. 1965). In reviewing that legal question, the court finds significant variations in negligence law that require state-specific analysis.

The main variation boils down to the tort doctrine known as the "economic loss rule." This term does not apply a single rule, but several different doctrines working under the same alias. Whether the rule "serves as a formidable barrier to credit card data security breach cases" depends on "whether a state adopts the majority or minority position on the rule, as well as how it defines various exceptions thereto." Catherine M. Sharkey, *Can Data Breach Claims Survive the Economic Loss Rule?*, 66 DePaul L. Rev. 339, 342 (2017).

Here is the minority version of the economic loss rule, as formulated by the Restatement: "A minority of courts have stated an 'economic loss rule' to the effect that there is generally no liability in tort for causing pure economic loss to another." Restatement (Third) of Torts: Liability for Economic Harm § 1 cmt. b. (Am. Law Inst. Tentative Draft No. 1., April 4, 2012).[8] This version has been dubbed the "stranger rule," because its scope includes parties who are not in privity of contract. *See* Dan B. Dobbs et al., Dobbs' Law of Torts § 608 (2d ed.). "The first lesson to emerge from data security breach caes is that the extent to which the stranger economic loss rule will bar recovery is highly dependent on the governing state law, which varies considerably across the United States." Sharkey, *supra*, at 349.

***15** At least two states, Massachusetts and Pennsylvania, apply a stringent version of the stranger rule to bar tort recovery for pure economic loss in general. *See Aldrich v. ADD Inc.*, 770 N.E.2d 447, 454 (Mass. 2002); *Aikens v. Baltimore & Ohio R.R. Co.*, 501 A.2d 277, 278 (Pa. Super. Ct. 1985); Sharkey, *supra*, at 350–53. Two federal circuit courts have held, in virtually identical cases involving data-security breaches, that Massachusetts and Pennsylvania would bar a class of issuing banks' negligence claim against a retailer. *See In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 498–99 (1st Cir. 2009) (applying Massachusetts's stranger rule to bar issuing bank's negligence claim against retailer in data breach case);[9] *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 177 (3d Cir. 2008) (applying Pennsylvania's stranger rule to bar issuing bank's negligence claim against retailer in data breach case).[10]

The majority position is stated by the Restatement (Third). The Restatement disclaims the general, no-liability formulation of the stranger rule. It instead endorses the more limited principle that "duties of care with respect to economic loss are *not general in character.*" Restatement (Third) § 1(a) cmt. b (emphasis added). So instead of "implying a needless presumption against a duty on facts not yet considered," the Restatement (Third) merely provides that "duties to avoid causing economic loss require justification on *more particular grounds* than duties to avoid causing physical harm." *Id.* (emphasis added).

***16** Thus, § 1(a) states that "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another," but § 1(b) points to circumstances where courts *do* recognize a duty to avoid the unintentional infliction of economic loss. For example, a party may be liable for economic loss to another in cases of professional negligence and invited reliance. Restatement (Third) § 1 cmt. d. And the Restatement provides that a court, guided by several factors, may find a "residual" duty to avoid unintentional infliction of economic loss in circumstances not covered by the general rules. Restatement (Third) § 1 cmt. e. This is sometimes called the "special relationship" or "independent duty" exception to the stranger rule. *See* Sharkey, *supra*, at 354–55.

A "fairly significant number of states" apply this qualified version of the stranger rule. *Id.* Alaska and California are two of them. Alaska recognizes an independent-duty exception to the stranger rule. *See Mattingly v. Sheldon Jackson Coll.*, 743 P.2d 356, 360 (Alaska 1987). But it does so "only if the breach of duty created a risk of personal injury or property damage." *St. Denis v. Dep't of Hous. & Urban Dev.*, 900 F. Supp. 1194, 1203 (D. Alaska 1995). This rule was applied in *In re Target Corp.* to bar consumers' negligence claim against the retailer in the consumer track of the multidistrict litigation over the Target breach. *See In re Target Corp. Data Sec. Breach Litig.* ("*Target I*"), 66 F. Supp. 3d 1154, 1172 (D. Minn. 2014). Plaintiff cites no authority that would lead the court to a different conclusion with respect to Plaintiff's negligence claim.

California recognizes a special-relationship exception to the stranger rule, analyzing several factors to determine whether such a relationship exists between the parties. *See J'Aire Corp. v. Gregory*, 598 P.2d 60, 62–63 (Cal. 1979). But this special-relationship exception does not necessarily extend to these facts. In another data-breach case, a federal court held that, because the special-relationship exception did not apply, California's stranger rule barred consumers' negligence claim against a computer manufacturer over a network-security intrusion. *See In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 969 (S.D. Cal. 2014). Likewise, the *Target I* court held that no special relationship existed between the consumers and the retailer and thus California's stranger rule barred the consumers' negligence claims. *See Target I*, 66 F. Supp. 3d at 1154. Again, Plaintiff cites no authority that would lead the court to a different conclusion with respect to its negligence claim. Although the court recognizes that the relationship between consumers and a retailer is not the same as the relationship between issuing banks and a retailer, Plaintiff has not shown why, in view of these authorities, the facts here are sufficient to give rise to an independent-duty or special-relationship exception under Alaska or California law.

What the Restatement (Third) refers to as "the economic loss rule" is different because it only applies to parties in privity of contract. It says that "there is no liability in tort for economic loss caused by negligence *in the performance or negotiation of a contract* between the parties." Restatement (Third) § 3 (emphasis added). The rationale for this rule is that it is better to defer to the parties' allocation of risks in the "extensive and finely tuned apparatus" of their agreement instead of applying the blunt instrument of tort law. *See* Restatement (Third) § 3 cmt. b. This version of the rule serves as a form of "border control" that keeps tort and contract in their separate lanes. Sharkey, *supra*, at 345 (citing William Powers, Jr., *Border Wars*, 72 Tex. L. Rev. 1209, 1229 (1994)).[11]

***17** As the rule implies, it is "limited to parties who have contracts." Restatement (Third) § 3 cmt. a. Thus, Dobbs calls this version the "contracting parties" rule. *See* Dan B. Dobbs et al., Dobbs' Law of Torts § 608 (2d ed.). Plaintiff prefers this formulation of the economic loss rule, because all agree that there is no *direct* contractual privity between the putative class members and Defendant. Thus, Plaintiff says, what it dubs as the economic loss rule (which is really the contracting parties rule) does not bar its negligence claim.

But the story is not that simple. As discussed, two federal circuit courts have already held that Plaintiff's claims are barred by the *stranger rule* in Pennsylvania and Massachusetts. But some states would say that because Plaintiff and Defendant are integrated in the payment industry's network of contracts, the *contracting parties rule* applies here, too. "When parties enter into a chain of contracts," the Iowa Supreme Court explained, "even if the two parties at issue have not actually entered into an agreement with each other, courts have applied the 'contractual economic loss rule' to bar tort claims for economic loss, on the theory that tort law should not supplant a consensual network of contracts." *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 504 (Iowa 2011) (citations omitted); *see BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004) ("Contractual duties arise just as surely from networks of interrelated contracts as from two-party agreements."). Thus, Iowa and Colorado courts have indicated that the contracting parties rule is broad enough to cover parties related by a web of contracts but not in direct privity. For this reason, a district court applied Colorado's contracting parties rule to dismiss a issuing banks' negligence claim against a restaurant in a data-breach case.[12] *See SELCO Cmty. Credit Union v. Noodles & Co.*, 267 F. Supp. 3d 1288, 1297 (D. Colo. 2017) ("It makes no difference that Noodles & Company's contractual duties arise from a web of interrelated agreements coordinated by Visa and MasterCard rather than bilateral contracts between the merchants and plaintiffs.").

Likewise, the Seventh Circuit recently held that Illinois and Missouri courts would analyze negligence claims by an issuing bank against a retailer under the contracting parties paradigm. *See Cmty. Bank of Trenton v. Schnuck Markets, Inc.*, 887 F.3d 803, 814 (7th Cir. 2018). The court emphasized that "[a]ll parties in the card networks (including card-holding customers) expect everyone to comply with industry-standard data security policies *as a matter of contractual obligation.*" *Id.* at 817 (emphasis in original). *But see Lone Star Nat'l Bank, N.A., v. Heartland Payment Sys., Inc.*, 729 F.3d 421 (5th Cir. 2013) (holding, at the motion to dismiss stage, that there was not enough evidence in the record to conclude that the parties to the contracts *between issuing and acquiring banks* had a remedy or could have allocated risks differently under their agreement). And it concluded that the issuing banks' negligence claim would be barred in both states: in Illinois by common law, *id.* at 816–17 (citing *Cooney v. Chicago Pub. Schs.*, 943 N.E.2d 23 (2010)); *see also In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 530 (N.D. Ill. 2011) (holding that Illinois's economic loss rule barred customers' negligence claim against retailer in data-breach case), and in Missouri by statute, *Cmty. Bank of Trenton*, 887 F.3d at 817–18 (citing Mo. Ann. Stat. § 407.1500 (2017)).

***18** Plaintiff has not carried its burden to show, by an extensive analysis, that these variations "do not pose insuperable obstacles" to certification. *Sacred Heart*, 601 F.3d at 1180. Plaintiff's state-law analysis, contained in its trial plan, is merely a checklist of the elements of negligence showing that each jurisdiction recognizes the tort and its elements of duty, breach, causation, and damages. Nor does Plaintiff's fifty-state survey of the economic loss doctrine, contained in its reply brief, do much to redeem its arguments. That survey only gives one version of each state's economic loss rule — in most instances the contracting parties rule. But, as explained, the contracting parties paradigm is only part of the picture. Plaintiff is obligated to show that the stranger rule (in either its robust or qualified form) does not also bar its negligence claim, as it does in Pennsylvania, Massachusetts, Alaska, and California.

Moreover, Plaintiff's brief sketch of the duty of care analysis across the jurisdictions is of limited use. True enough, all jurisdictions name "foreseeability" and "public policy" as factors to use in deciding whether to impose a duty of care. But California courts do not view public policy the same way as Alabama courts, and what courts see as foreseeable in New York may not be the same as what courts see as foreseeable in Kansas. And this court is *Erie*-bound to accept the views of state courts as the final word.

It is true, of course, that there is no practical difference between states that would bar the negligence claim because there is no "common-law duty to safeguard information," *see Cooney*, 943 N.E.2d at 27 (Illinois), states that would bar the claim through application of a statute, *see Cmty. Bank of Trenton*, 887 F.3d at 817–18 (Missouri), states that would bar the claim through the contracting parties rule, *see Annett Holdings*, 801 N.W.2d at 504 (Iowa), or states that would bar the claim through the stranger rule, *see Aldrich*, 770 N.E.2d at 454 (Massachusetts). The result is the same, no matter how each state reaches it: the claim is barred. But were the court to take Plaintiff's cursory analysis at face value, these jurisdictions would all allow the negligence claim. Rule 23 requires Plaintiff to do more.

An extensive analysis would include an assessment of the precise question at stake: Whether, in view of the web of contracts connecting the parties, the law of each relevant jurisdiction would bar Plaintiff's negligence claim for pure economic loss. This is no small amount of work. But that is what is required for Plaintiff to meet its burden in certifying a nationwide damages class. Moreover, an extensive analysis, from the samples discussed above, is unlikely to yield a uniform result that would avoid predominance problems. Without an extensive analysis of the law of each jurisdiction discussing the viability of Plaintiff's negligence claim and pointing to a uniform application of the economic loss rule, the court cannot certify such a class.

An extensive analysis of state negligence law would, at a minimum, also require Plaintiff to acknowledge authorities stating that its claim is barred in several states. That is because of the unique procedural context of this class certification motion. Courts considering similar multi-state negligence claims have done so upon the defendant's motion to dismiss. *See In re TJX Cos.*, 564 F.3d at 500 ("After determining which claims survived, the district court then applied the customary tests to decide whether class action status could be sustained for the case … and provisionally concluded that certification was not justified."); *Target I*, 66 F. Supp. 3d at 1172–76 (deciding whether each jurisdiction barred consumers' negligence claim on a motion to dismiss); *In re Sony Gaming*, 996 F. Supp. 2d at 966–73 (same). But Defendant moved to dismiss Plaintiff's negligence claim only under Alabama law, not the law of any other jurisdiction. (*See* Doc. # 14-1.)

***19** It is unclear whether Defendant made a strategic decision to wait until the class certification stage to bring up the fact that some states would bar Plaintiff's negligence claim. But it is clear that the court may not certify a class without resolving dispositive issues of state law, *see Brown*, 817 F.3d at 1237, that Plaintiff bears the burden of proving an exception to the usual rule that litigation should be conducted on an individual basis, *see Comcast*, 442 U.S. at 700–01, and that Plaintiff's burden includes showing that there are no material variations in state negligence law, *see Sacred Heart*, 601 F.3d at 1180. Moreover, Defendant may raise the defense of failure to state a claim as late as trial. *See* Fed. R. Civ. P. 12(h)(2). That Defendant chose the class certification stage to point out differences in dispositive issues of state law cautions against ignoring these differences and certifying a nationwide class. It remains Plaintiff's burden to prove that it has a viable negligence claim in each jurisdiction.

To borrow Judge Posner's metaphor again, some jurisdictions sing the tune of tort liability for economic loss in C-sharp minor, while others sing it in E-flat major. Still others carry the tune not in any key at all, but in a Phrygian mode. Such a chorus might work for an *avant-garde* opera from the mid-twentieth century, but Rule 23 requires something closer to Beethoven's Ninth. There are too many differences in state law to certify this case as a class action.

ii. Damages Involve Individualized Questions.

Defendant argues that causation and damages involve individualized questions. Plaintiff responds that questions of causation effectively go to damages, not liability, and there is "well nigh universal" agreement that individualized damages questions do not defeat certification. *Comcast*, 569 U.S. at 42 (Ginsburg, J., dissenting). Thus, Plaintiff says, that there may be individualized damages questions here should not prevent certification.

At the outset, the court agrees with Plaintiff that Defendant's causation arguments are really damages arguments. Defendant does not seriously contend that the Fred's breach did not cause the putative class *any* damages; the big question is *how much* damages a jury can attribute to the breach. *See Smith*, 2017 WL 1044692, at * 14 ("The sort of proof necessary for causation is the sort of proof necessary for damages….").

But the court does not agree that recharacterizing causation issues as damages issues puts Plaintiff on a quick path to certification. There is "no support in the text of Rule 23 or interpretive case law," the Eleventh Circuit has said, for the court to make a "rigid distinction between liability and damages." *Sacred Heart*, 601 F.3d at 1178. That is, the court may not brush aside individualized damages questions in deciding predominance simply because they do not go to liability. *See id.* at 1179. Instead, the Eleventh Circuit has said that individualized damages questions *will* defeat predominance when computing damages "will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable," *Brown*, 817 F.3d at 1240 (quotation omitted), or "when they are accompanied by significant individualized questions going to liability," *id.* (quotation omitted). And if neither of those conditions hold, individualized damages questions are "still *relevant* to whether predominance is satisfied." *Id.* at 1239 (emphasis added).

Damages — and, implicitly, Defendant's damages-related defenses[13] of contributory negligence and failure to mitigate — involve individualized questions.[14] The response of each issuing bank to the Fred's breach, the amount of fraud incurred on each card, and lost revenue necessarily requires an inquiry into the circumstances of each card reissuance and reimbursement. And Plaintiff will have to prove that the amount of damages each issuing bank incurred came from the Fred's breach, not some other event. This is especially true for actual fraud losses. While Ian Ratner's CAMS alert-based model provides a rough estimate of damages, that estimate will quickly become swamped by individualized questions as Defendant presents evidence, as it already has,[15] to support alternate theories of fraud.

***20** A simple illustration makes the point. Most people who regularly use payment cards have, at some point, had a fraudulent transaction show up on their account statement. And just about everyone who has experienced fraud has asked himself where his payment information might have gotten pilfered. One might retrace his steps for the past week and check his account history to jog his memory about where his used his card. Several possibilities might occur to him. He might consider the gas station where he filled up and where cards are known to be skimmed. He might consider the restaurants he visited where the server took his card at the table. He might consider the purchases he made online. The point is this: When credit-card fraud occurs, it is rarely clear, in the immediate aftermath, how the card was compromised. More investigation is almost always needed. Thus, whether the full amount of the issuing banks' purported damages was caused by the Fred's breach is a question requiring individual resolution.

As discussed in the *Daubert* analysis, the temporal proximity between a CAMS alert and a fraudulent transaction makes it more likely the payment data was compromised by the event causing the CAMS alert (*i.e.*, the Fred's breach). But the CAMS alert system has its limits. CAMS alerts merely identify the card numbers that were processed during the time frame of the breach; they do not indicate whether they were actually captured by the malware, which only scanned for cards every twenty seconds and thus did not capture all cards used at Fred's at the time. Moreover, of the 720,299 Visa-affiliated accounts the CAMS system alerted in the wake of the Fred's breach, 74,386 were alerted for *other* known data breaches in the period before and after the Fred's breach. (*See* Doc. # 45-14, at 5.)

It is no surprise, then, that even at this early stage, there is evidence that some fraud incurred on cards identified by the CAMS alert system was caused by something other than the Fred's breach. Indeed, Defendant has presented evidence that fraudulent charges made on the internet could not have been caused by the Fred's breach because the malware did not acquire the printed security code on the back of each card — information typically required to make web purchases. (*See* Doc. # 41-11, at 8, 18.) There is more. One individual who submitted a charge dispute to Plaintiff said she thought her card was skimmed at a gas station. (Doc. # 45-4 at 20–21.) Another disputed a charge that occurred months after she asked Plaintiff to cancel her card because it had been stolen. (Doc. # 45-3 at 68.) And these are the stories of customers of just one independent bank in south Alabama. A nationwide class of issuing banks would make things that much more complicated.

This is therefore *not* one of those cases "where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods." *Klay*, 382 F.3d at 1259–60 (footnotes omitted). The CAMS alert-based model will not suffice to prove the full extent of damages for every class member, and so individualized damages questions persist. And Plaintiff does not question that fact. Plaintiff simply points out that the court could certify the class anyway, and, if need be, deal with damages later. That is what the court did in the financial institution track of the multidistrict litigation over Target's data breach in certifying a class of issuing banks. *See In re Target Corp. Consumer Data Sec. Breach Litig.* ("*Target II*"), 309 F.R.D. 482, 489–90 (D. Minn. 2015). This court made a similar move in *Smith v. Triad of Alabama, LLC*, another data-breach class action, allowing the class to be certified despite individualized damages issues. *See* 2017 WL 1044692, at *14.

This case is different for two reasons. First, the damages questions are much more complex than those in *Smith*, which consisted of a class of (potentially) several hundred *individuals. Smith*, 2017 WL 1044692, at *7. Determining the financial losses of each individual and the causal link between those losses and the alleged identity theft pales in comparison with doing a similar analysis for (potentially) 2,500 *financial institutions* and, by necessity, their affected customers, numbering in the thousands.

***21** Second, in addition to individualized damages questions, the key *legal* issue remains whether Defendant owed Plaintiff a duty to avoid the negligent infliction of economic loss in every applicable jurisdiction. This requires state-by-state analysis. Not so in *Target II* or *Smith*, where only one state's law applied. In *Smith*, the court found that the case revolved around two discrete questions: (1) whether, under Alabama law, the defendant owed a duty to the plaintiffs; and (2) whether it breached that duty. *Smith*, 2017 WL 1044692, at *13, 15. Because those key questions could be decided on a classwide basis, individualized damages questions did not defeat predominance. *Id.* In this case, the jury's answer as to breach will suffice for the whole class. But before reaching a jury, the court must answer the antecedent question of whether Defendant even owed a duty to Plaintiff, and it must answer that question *fifty-one times* — once for each jurisdiction. And Plaintiff's cursory analysis does little to help the court do that. Because individualized questions of law persist with respect to the key issue of duty, this is one of those cases where individualized damages questions work against predominance.

iii. Common Questions of Law and Fact Do Not Predominate.

Weighing the common and individualized questions together, the scale tips against certification. Persisting individualized questions involving duty, coupled with the individualized damages questions, outweigh the common questions presented by this action. Common questions of law or fact therefore do not predominate, and class certification would thus be improper under Rule 23(b)(3).

b. Superiority

Since common questions do not predominate, it follows *a fortiori* that a class action is not "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3); *see Powers*, 192 F.R.D. at 319 ("The various state laws that are implicated by certification of a class comprised of insureds from fifteen states militate against a finding that a class action is the superior method for adjudication of this controversy."). Plaintiff's negligence claim is not appropriate for class-action treatment.

Because Plaintiff has not carried its burden to prove that Rule 23(b)(3)'s requirements have been met, the court may not certify this action for class adjudication.

V. CONCLUSION

Although Rule 23 is not a numbers game, it is nonetheless appropriate for the court to quantify exactly what treating this case as a class action would involve: 2,500 banks, 1 million cards, and 51 different sets of laws. The difficulties in managing such a class would be highly impractical, if not impossible. What is missing is a "sound normative justification" for adjudicating this claim on a classwide basis. Sharkey, *supra*, at 344. The case will proceed as an individual action.

* * *

It is ORDERED as follows:
(1) Plaintiff's motion for class certification (Doc. # 41) is DENIED.
(2) Defendant's motion to exclude Plaintiff's expert Ian Ratner's testimony (Doc. # 44) is DENIED.
(3) Plaintiff's motion to exclude Defendant's expert Tony Emrick's testimony (Doc. # 46) is DENIED.
(4) Defendant's motion for leave to file *instanter* sur-reply brief (Doc. # 50) is GRANTED.
(5) A telephonic status conference will be held on **April 4, 2019, at 10:00 a.m. CDT**, at which time the parties should be prepared to discuss the next steps in the litigation, including scheduling, possibility of settlement, and unsealing the class action filings. Defendant is DIRECTED to set up the call. An amended scheduling order will be entered following this status conference.

DONE this 13th day of March, 2019.

All Citations

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Footnotes

1 *See SELCO Cmty. Credit Union v. Noodles & Co.*, 267 F. Supp. 3d 1288, 1293 (D. Colo. 2017); *Cmty. Bank of Trenton v. Schnuck Markets, Inc.*, 887 F.3d 803, 808 (7th Cir. 2018).

2 Neither the Supreme Court nor the Eleventh Circuit has set an explicit preponderance-of-the-evidence standard. Most of the circuits to have passed on the question have laid a preponderance burden on the class movant. *Brown v. Nucor Corp.*, 785 F.3d 895, 931 (4th Cir. 2015); *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 811 (7th Cir. 2012); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008); *Teamsters Local 445 v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). The minority view, championed by the Sixth Circuit, instead reads the "rigorous analysis" language in *Falcon* as setting an evidentiary standard unique to Rule 23. *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 418 n.8 (6th Cir. 2012).
The majority view has it right. Requiring a preponderance falls in line with the Supreme Court's apparent weighing of the evidence in *Wal-Mart*, 564 U.S. at 353–59. *See* Anthony F. Fata, *Doomsday Delayed: How the Court's Party-Neutral Clarification of Class Certification Standards in* Wal-Mart v. Dukes *Actually Helps Plaintiffs*, 62 DePaul L. Rev. 674, 681 (2013) (reading the *Wal-Mart* Court's analysis to implicitly apply a preponderance standard). Moreover, the preponderance standard offers well-worn, concrete guideposts to the trial court; a nebulous rigorous-analysis standard could lead to unpredictable decisions that vary from district to district. Accordingly, by performing a "rigorous analysis," *Falcon*, 457 U.S. at 161, the court determines whether Plaintiff has proved compliance with Rule 23 by a preponderance of the evidence.

3 Defendant asserts that articulating this common-sense principle renders Ratner's declaration a "lay opinion." (Doc. # 44, at 7.) Not so. To make this inference, one must have an understanding of the CAMS alert system, which requires specialized knowledge.

4 Fiserv processes debit card transactions for Plaintiff by performing several services, including card management, card production, card issuance, and fraud detection and management. (Emrick Rep. at ¶ 10.)

5 Defendant does contest predominance, which is a different, more stringent requirement than commonality. That requirement is discussed in Section III.B.2.a.

6 Tony Emrick's report addresses these damages-related defenses by speaking to the reasonableness of Plaintiff's damages.

7 No party disputes that the laws of all fifty-one jurisdictions are implicated by this class action through Alabama's choice-of-law rules. A federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Alabama follows the Restatement (First) of Conflict of Laws, which provides that the *lex loci delicti*, or law of the place of the wrong, governs tort claims. *Ex parte U.S. Bank Nat. Ass'n*, 148 So. 3d 1060, 1070 (Ala. 2014). In tort claims involving financial injury, the court applies the law of "the state in which the plaintiff suffered the economic impact." *Glass v. Southern Wrecker Sales*, 990 F. Supp. 1344, 1348 (M.D. Ala. 1998); *cf.* Restatement (First) of Conflict of Laws § 377 note 4 (Am. Law Inst. 1934) (stating that the place of the wrong in fraud causes is where the loss is sustained, not where the fraudulent representations were made). Thus, the home-state law of each putative class member applies to the negligence claim.

8 By economic loss, the Restatement "means a financial loss not arising from injury to the plaintiff's person or from physical harm to the plaintiff's property." Restatement (Third) § 1(c).

9 Plaintiff argues that *Wyman v. Ayer Properties, LLC*, 11 N.E.3d 1074 (Mass. 2014), decided after *In re TJX*, changed Massachusetts's stranger rule to allow the claims here. Not so. The question in *Wyman* was simply "whether the economic loss rule applies to damage caused by negligent design and construction of the common areas of a condominium building, whether or not such negligence caused damage to the other property." *Id.* at 1080. In holding that the economic loss rule did not apply, the *Wyman* court emphasized the unique difficulty of obtaining relief in this context: "[T]he party exclusively responsible for bringing litigation on behalf of the unit owners for the negligent construction of the common areas (here, the trustees) has no contract with the builder under which it could recover ... its economic losses." *Id.* at 1081. The court is unconvinced, without more authority, that the Supreme Judicial Court of Massachusetts intended to create an exception to its economic loss rule beyond those narrow circumstances, which are entirely distinct from the present case.

10 The state of Pennsylvania's economic loss rule is in doubt after the state's supreme court recently held in *Dittman v. UPMC*, a data-breach case, that an employer had a common-law duty to act with reasonable care in collecting and storing its employees' personal and financial information on its computer systems. 196 A.3d 1036, 1056 (Pa. 2018). The court held that because this was an *independent duty* based on the relationship between the parties (more on this below), the economic loss rule did not bar the employees' negligence claims. *See id.* at 1047, 1054. While *Dittman* provides evidence that Pennsylvania would allow Plaintiff's negligence claim, it is nonetheless noteworthy that an employment relationship in which the employer requires its employees to entrust the employer with sensitive personal and financial data as a condition of employment is different than the voluntary relationship between merchants and issuing banks. The court need not say definitively that Pennsylvania law does or does not recognize Plaintiff's negligence claim. But *Dittman* does show the enormity of the task in applying the tort duty rules of all fifty states.

11 In applying this version of the economic loss rule to data breach cases, state courts are not required to tread in no-man's land, but instead to resolve a boundary dispute.

12 The *Target I* court applied Iowa law to bar consumers' negligence claim against a retailer in a data-breach case, although on the ground that, under Iowa law, there was no independent-duty exception to the stranger rule. *See Target I*, 66 F. Supp. 3d at 1174.

13 Defendant adds that its liability defenses of assumption of risk and waiver require individualized assessment. It does not elaborate beyond saying that those defenses are "based on issuing banks' voluntary decisions to enter the payment card network, and to continue issuing payment cards despite the known risk of fraud." (Doc. # 45, at 64.) With little explanation of the elements of those defenses or what individualized proof will be necessary to decide them, the court will not consider these defenses as a serious barrier to certification.

14 Tony Emrick's testimony speaks to Defendant's failure to mitigate defense. The court, of course, has not assessed the merits of this defense; it has only considered Emrick's testimony to the extent that it raises individualized damages issues Plaintiff must overcome at trial.

15 More on this below.

End of Document

IN RE GRAVES

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United States Bankruptcy Court, D. Kansas.

IN RE: Graves FARMS, Debtor.

Case No. 18-10893

Signed March 28, 2019

Attorneys and Law Firms
William H. Zimmerman, Jr., Wichita, KS, for Debtor.

MEMORANDUM OPINION

Robert E. Nugent, United States Bankruptcy Judge

***1** Dean and Michael Graves operate Graves Farms as a Kansas general partnership. They are father and son and equal partners who have contributed capital and labor to the enterprise for several decades. They filed a chapter 12 case on behalf of Graves Farms to restructure their farm's debt and seek to accomplish that by a "partial liquidation" and a "partial lease" of the debtor's assets to Kylee Graves. Ms. Graves is Michael's daughter. The debtor's largest secured creditor is RCB Bank. The Bank has security interests in the debtor's real estate, machinery, and equipment. At the date of the confirmation hearing, January 16, 2019, the Bank claimed a total remaining indebtedness of $ 1.803 million, including accrued interest and late charges of nearly $ 342,000. All objections to confirmation of the debtor's plan except those of the Bank are effectively resolved by agreement or can be resolved by making changes to the plan in the confirmation order if the plan is confirmed. As discussed below, the amended plan[1] cannot be confirmed because it fails to meet several requirements of § 1225(a)(4), (a)(5) and (a)(6).[2]

Facts

1. Operations Past and Anticipated

Historically, Dean and Michael Graves have farmed together as partners. Dean, age 81, has retired. The Graves Farms operation included raising livestock and crops. The partnership leased 5,500 acres of land and farmed two tracts it owns, the Poovey land and the Price land, as well as property situated on Dean's homestead. The Graves family has banked with CornerBank, now RCB Bank, for over 35 years. When the Bank urged the Graves' to sell the partnership's assets, they filed this case to preserve them. They intend to allow Kylee Graves, Mike Graves's daughter, to lease or purchase these assets through her operation of the farm. Ms. Graves raised a soybean crop in 2018 on the Poovey land and will commit considerable acreage to growing cotton in 2019. She will cash rent Dean's homeplace ground and operate the other leased ground that Graves Farms holds. She will also run her personal cattle herd while running the farm. While the partners have discussed possible rents with Ms. Graves, no agreement has been reached.[3] Ms. Graves would take on responsibility for taxes and repairs. Though not clear from the plan itself, the Graves apparently contemplate that, someday, Ms. Graves will own some or all the farm assets. For this matter's purposes, and in the absence of any formal or informal agreements about her role and duties, I find that Ms. Graves's role is more that of a farm manager than a tenant or purchaser. Nothing in the plan indicates that she will assume any liability for the Bank's or any other creditors' claims. She has taken a loan from the Farm Service Agency (FSA) in her name to fund her purchase of some equipment from the partnership—effectively a refinancing of about $ 318,000 of the Bank's debt. Ms. Graves testified that she intends to conduct the partnership's business as has been done in the past, although she intends to introduce cotton as one of the crops.

***2** Dean Graves (a/k/a Harold Dean Graves) and his wife filed a joint Chapter 12 petition January 17, 2019, the day after the confirmation hearing in this case.[4] That filing stayed a foreclosure sale.

2. Asset Values and RCB Bank's Secured Claim

Graves Farms proposes to repay the RCB Bank's claim by selling some of the Bank's equipment collateral at public auction, by selling some of the equipment collateral to Ms. Graves, and by paying the Bank an amount equal to the value of the equipment it plans to retain over seven years' time.[5] It also proposes that the debtor will retain the Poovey land that is subject to the Bank's first mortgage and pay the Bank its current value over 30 years. The Bank also claims a second mortgage on the "Price" land, but all parties agree that there is no equity in the Price land to support the Bank's lien. The debtor proposes to repay the FSA, the first mortgage holder, pursuant to the present loan contract. The Bank objected to the debtor's proposed values for both the equipment and the land.

3. The Equipment

Exhibit A to the plan lists the equipment the debtor intends to auction using Purple Wave, an Internet auction platform.[6] The plan proposes that the net proceeds of that auction be paid to the Bank to reduce its claim.[7] No evidence about the value of this equipment was offered at the confirmation hearing. Exhibit B to the plan lists the equipment that Ms. Graves offered to purchase in her own right with the FSA loan and the values the debtor ascribes to it.[8] Again, there was no evidence or controversy about these values. The Bank and the debtor have apparently agreed on a price for Ms. Graves to pay.[9] The remaining equipment, listed on Exhibit C to the plan, is what the debtor will retain and pay for.[10] The debtor poses a value of $ 393,000 to be repaid at 5.75 % over seven years in semi-annual payments. The Bank counters that the equipment is worth $ 411,000.[11]

The debtor didn't offer a valuation witness.[12] The Bank offered the testimony of Lon Sturgeon, an auctioneer and appraiser from Enid, Oklahoma. Mr. Sturgeon testified that he viewed the equipment at various locations in and near Oxford, Kansas, and that he based his values on his recent experience with farm equipment auctions throughout the central Plains states.[13] Mr. Sturgeon testified that the value of the retained equipment as shown on Trial Exhibit 2, is $ 411,000.[14] Sturgeon noted that to sell that equipment at auction, it would need to be moved and serviced. The cost of doing that would reduce the net auction proceeds as would assessment of the commission of 3.75%. The equipment should be valued considering its proposed or intended disposition or use.[15] As debtor does not intend to liquidate it, a "foreclosure" value is not appropriate. In the absence of any contrary valuation evidence and because the debtor seeks to retain it, meaning that no liquidation-related expenses would be incurred, I find that the retained equipment is worth $ 411,000.

4. The Poovey Land

***3** The greatest value difference lies in the parties' positions on the value of the Poovey land. This tract of 114 acres (111 acres cultivated) of unimproved dryland is located about two miles north and west of the City of Oxford in Sumner County, Kansas. It has no river or creek access. The debtor valued this land in the plan at $ 280,000 or $ 2,523 per acre.[16] The Bank values it at $ 333,000, or $ 3,000 per acre. Unlike the dispute about the retained equipment values, this difference is material to the debtor's ability to perform its plan. Each party offered expert appraisal evidence. Both appraisers have extensive land sale and appraisal experience in South Central Kansas and Northern Oklahoma.

The debtor's appraiser, Gene Francis, valued the property at $ 2,050 per acre or $ 227,550.[17] He employed a comparative sales analysis that considered three other sales in the area ("comps"). Mr. Francis laid particular emphasis on soil quality in adjusting the three comparative sales' values to the Poovey land.[18] One of his comps, sale no. 2, is located 25-30 miles from the subject, but has a similar soil type. Both Francis and the Bank's witness, Jerry Munson, agreed that in Sumner County, land that lies west of the Arkansas River and north of the Ninnescah River generally commands higher prices than land south of that area. Both witnesses referred to the area within the confluence of the two rivers as "Paradise Valley." They also mentioned that Sumner County farmers generally believe that the western part of the county receives less rainfall than the eastern part, though neither witness knew of any empirical evidence supporting that. The Poovey land lies just across the Ninnescah about 1 to 1.5 miles from Paradise Valley and is bordered on three sides by gravel roads. Francis's comp no. 2 has only one road-side access and the road is dirt. Both witnesses agreed that passable road access is a strong factor in land prices. If I discount Francis's second comp, I am left with two, ranging from $ 1,992 per acre to $ 2,100 per acre. I also note that Mr. Francis and Mr. Munson both used Francis's comp no. 3, a sale in Section 33, Township 3, Range 2 East that yielded $ 2,230 per acre. Francis adjusted that value for soil content to $ 2,100.

Jerry Munson's appraisal included six different comps, all within about 10 miles of the subject property.[19] These comps had prices that ranged from $ 2,100 per acre to $ 6,000 per acre, a figure later reduced to $ 3,700. Mr. Munson's approach was to find recent comparative sales with proximity to the Poovey land. Because many of those sales involved tracts consisting of both farmland and pasture, he "extracted" the dryland values which were understandably higher than the average per acre yield of each sale. His high comp no. 2, however, is problematic. Mr. Munson initially derived the $ 6,000 per acre extracted value from an auction sale that yielded an overall value of $ 4,984 per acre. Mr. Munson testified that when the closing failed, the land was listed for private treaty sale and eventually sold for much less, an average of $ 3,152 per acre. He insisted that the second sale didn't affect his ultimate value conclusion because the comp 2 property lies in Paradise Valley. Further examination brought out his belief that the extracted value for the farmland in this comp should have been $ 3,700 per acre. Even so, he stuck by his $ 3,000 per acre value for the Poovey land, valuing the tract at $ 333,000.

***4** Munson's comps 2 and 6 include dryland that has riverfront acreage. Munson testified that riparian frontage has recreational value that often outstrips what the land would be worth solely as farm ground. I am inclined to discount comp 2 entirely because of its dissimilarity to the other tracts. Even leaving it in the mix, the median value of the six comparative tracts for dryland is $ 2,367.50 per acre.[20] This undercuts Munson's ultimate $ 3,000 per acre conclusion. Based on this record, I doubt that this land is worth $ 3,000 per acre, but note that the debtor has offered to repay $ 280,000 or $ 2,522 per acre, which is more than Francis's value. Just five years ago, the debtor paid $ 472,000 for this tract. While land values have certainly softened, I doubt that the Poovey land has lost so much of its value. Reviewing the five remaining Munson comps, I am convinced that the land is more likely worth $ 2,522 per acre than it is $ 2,052. I find as a fact that the land contributes $ 280,000 value to the Bank's allowed secured claim.

5. Cash flow

Graves Farms and the Bank offered competing cash flow projections that are more thoroughly discussed in the analysis below. The Bank's Trial Exhibit DD offers a comparison of what Ms. Graves projects the farm can do versus the Bank's more pessimistic view.[21] Both witnesses appear to have academic and practical expertise, though the Bank's witness, Gregg Conklin, has the benefit of more years' experience in the field. Ms. Graves holds an animal science degree from Oklahoma State University and has farmed in her own right. She runs her own cow-calf operation. She grew up on the farm and has participated in her father's and grandfather's work since she was a teenager. Mr. Conklin holds a degree in agriculture with a concentration in agricultural economics from Kansas State University. He has been involved in agricultural lending for over 30 years and farms in his own right. Both witnesses' testimony was credible and informative.

Ms. Graves's projections rely to a great degree on a successful cotton crop, something Mr. Conklin points out she has never raised. Graves Farms dabbled in cotton years ago but hasn't grown it recently and has no cotton equipment. If Ms. Graves turns out to be correct, the farm will have an operating margin of $ 298,268 before debt service on gross farm income of $ 1.022 million.[22] But if the Bank's prediction proves right, the pre-debt service operating margin could drop to $ 164,908 and would be insufficient to cover debt service.[23] It is difficult to analyze these comparative cash flows for two reasons. First, the debtor provided no meaningful historical performance information.[24] We know that Graves Farms suffered a recent crop failure that may have triggered its immediate financial distress, but we cannot tell anything about its prior years' performance with cotton or wheat, and only have the 2018 crop performance of milo, corn and single-cropped soybeans.[25] Second, the debtor's cash flow projection incorporates debt service that the plan doesn't contemplate, and the estate shouldn't bear. Specifically, it includes payments for "harvest equipment,"[26] the FSA equipment, and Ms. Graves's home loan totaling some $ 104,000. None of these appears in the body of the plan nor is any an allowed claim in this case.

***5** In addition, the debtor's cash flows do not anticipate the higher valuation I have found for the retained equipment. If the retained equipment is worth $ 411,000, a seven-year amortization of that at 5.75% amounts to a semi-annual payment of $ 36,075 or $ 72,150 a year, not the $ 61,000 the debtor projected.[27] The extra $ 11,000 of debt service is substantial, making the annual sum of the plan payments for debt the debtor is liable for about $ 109,613 plus a trustee's fee of $ 12,179, or an annual total of $ 121,792.[28] If we credit the debtor's projections, there is sufficient gross margin to make these payments.[29] But on the Bank's more pessimistic crop projections, the debtor's gross income would be $ 888,708 against expenses of $ 723,800, leaving a gross margin of $ 164,908 that would suffice to make the plan payments and trustee's fee, but not Ms. Graves's independently incurred obligations.[30]

Analysis

According to the pretrial order filed in this case, the Bank's objections are that the plan doesn't fulfill the best interest of the creditors test, doesn't comply with § 1225(a)(5)'s requirements for the treatment of secured claims, and isn't feasible. We consider these in light of the facts proven at trial. As the Chapter 12 debtor, Graves Farms has the burden of establishing all requirements necessary for confirmation.[31]

1. Best interests test failed, § 1225(a)(4):

Even at the higher asset values determined in this order, the Bank's claim is woefully undersecured. There is no possible chapter 7 dividend in this case. Not only is the estate's property underwater, but its partners are likely insolvent as well.[32] Even so, because I have concluded that the Bank's equipment lien should be valued at $ 411,000 rather than the debtor's proposed amount, the plan denies the Bank the value of its collateral, something that it would receive in a chapter 7 liquidation. The plan fails to meet the best interests test.

2. Secured claims treatment insufficient, § 1225(a)(5)(B):

Chapter 12 requires that each secured creditor's claims be paid the value of the creditor's collateral as of the plan's effective date. Absent the creditor's acceptance of the plan, that payment must come either as a stream of payments that has a present value equal to the collateral's value, surrender of the collateral, or its sale. The debtor must provide for the creditor to retain its liens. The Bank challenges the debtor's plan on multiple grounds.

First, the Bank challenges the debtor's proposed collateral values. As discussed above, I have found as a fact that the value of the "Poovey" tract is $ 280,000 and that the equipment line should be valued at $ 411,000. The debtor's amended plan proposes to pay $ 280,000 for the Poovey land, but doesn't provide for repayment of the equipment's value at Class 2(b).

Next, the Bank challenges the proposed terms of repayment. It urges that the 30-year Class 2(a) treatment of the land debt is too lengthy considering that the debtors borrowed the money to acquire the land in 2013. I note that the original note secured by the Poovey land provided for repayment in four years, to be completed in 2017. That loan has been renewed several additional times. The Bank asserts that the proposed 7-year payout on the equipment is too long. The Bank also questions the interest rate proposed—5.75% per annum. It also alleges that the plan doesn't call for it to retain its liens. The Court notes that on Trial Exhibit DD, the Bank adjusted the amount of its debt service on these two loans to what it contends are market price loans: 5 years at 7.5% on the equipment loan and 30 years at 6.5% on the real estate loan.[33]

***6** While some banks do not extend 30-year real estate loans to farmers, others do. The Bank offered no evidence concerning its usual terms for such loans. Real estate loans secured by farm land are made over long terms. Though farm land values have swooned lately, land of this quality has an intrinsic value. That value may vary over time, but it will never be zero. A thirty-year amortization in these circumstances is not inappropriate.

The equipment, on the other hand, is always depreciating. The most valuable item, the 2014 8360R Tractor, is only four seasons old. In the absence of any evidence concerning rates of usage and depreciation on this and the other, older, implements, a seven-year amortization is not unreasonably long. Though equipment depreciates in value, even old equipment retains intrinsic value if it is operational because there is nearly always a robust market for used farm equipment.

Turning to the debtor's proposed 5.75% interest rate, neither party offered evidence concerning current market rates, its cost of money, or other *Till* risk adjustment factors to the prime rate.[34] But for the filing of this case, the Bank's loans would be accruing interest at 18%, their default rate, a rate that is certainly much higher than the current loan market. My review of the notes shows that the highest contract rate being assessed on one of these notes was 5.25% and the lowest 3.89%. The Poovey purchase money note, Loan no. *9942, only drew interest at 4.96%. That said, I note that the chapter 13 trustee's rate reset at 7% in December of 2018, reflecting a 1.5% risk adjustment to the 5.5% prime rate. In the absence of any rate evidence, I cannot confirm the plan at the debtor's proposed discount rate of 5.75%.

Contrary to the Bank's contention, ¶ 11 of the plan does provide for all secured creditors to retain their liens.[35] Nevertheless, the debtor's proposed treatment of the Bank's real estate claim in Class 2(a) and its treatment of the Class 2(b) equipment claims fail to meet the other requirements of § 1225(a)(5). That is a sufficient basis for denying confirmation of this plan.

3. Feasibility; lack of historical data: § 1225(a)(6)

The plan must be feasible under § 1225(a)(6). That statute requires that the debtor—the partnership—"will be able to make all payments" and "comply with the plan."[36] "The feasibility process injects an element of pragmatism by 'prohibiting confirmation of overly optimistic plans clearly destined to fail and by not belaboring the inevitable demise of a hopelessly insolvent debtor.' "[37] As the Tenth Circuit has described feasibility in the context of confirming a Chapter 12 plan, it does not require that success be guaranteed; debtors must provide "reasonable assurance that the plan can be effectuated."[38] As written, this plan presents several questions.

First, what is the nature of the legal relationship between Kylee Graves and the debtor? Second, are the performance projections the debtor relied on "based upon realistic and objective facts (as opposed to visionary or overly optimistic projections)?"[39]

***7** Ms. Graves agreed to purchase some equipment from the debtor and she has secured a loan from FSA to do that. The plan provides for that to occur by a private treaty sale under § 363(f) that has yet to be duly noticed to the creditors. While it is possible that the Bank could credit-bid some of its substantial debt at the sale and place Ms. Graves in a contested bidding situation, the pretrial order states that the Bank has agreed to accept $ 318,725 for the equipment listed on Trial Exhibit 3 and if the Bank concurs, the sale can go forward.[40]

a. Kylee Graves's Relationship to the Debtor

Ms. Graves is described elsewhere in the plan and the pretrial order as "leasing" the farm operation. Not only is there no written lease, there is disagreement among the witnesses about what the terms of the lease might be. Michael Graves, Kylee's father, testified that Kylee would work the farm and pay off the Bank's claims on the Poovey land and equipment. She will be responsible for paying taxes and repairs on the farm. She will pay cash rent to Dean Graves for use of his home place land and be responsible for any farm leases the partnership has taken. Kylee testified that she had not "assumed" the duty to perform Graves Farms's obligations under leases and loan documents. Rather, she said, she'll run the farm as her "own performance." She has borrowed from FSA in her own name to buy some of the equipment and she runs her own cow herd. Presumably, she will pay some cash rent to the partnership for use of its equipment in her own right and for use of its land. The Bank is understandably uncomfortable because it believes this plan is an effort to substitute Kylee for the debtor as borrower, albeit on a non-recourse basis. Kylee, for her part, has not agreed (nor is she obliged) to take on personal liability for the Bank's claims.

The lack of a written lease or management agreement is troubling, but not grounds by itself to deny confirmation on feasibility grounds. While Kylee is not "under contract" to the debtor or the Bank, she showed a powerful filial attachment to her father and grandfather and a desire to preserve their operation that aligns with her own incentives to succeed. She brings new credit, refinanced equipment, and a cow herd to the operation. She also brings a lifetime of farming experience to go with her agricultural educational background. Nothing in Chapter 12 prevents a farm debtor from engaging or employing someone to operate a family farm.[41] If Kylee's operations yield enough free cash to service the debtor's obligations under the plan, the looseness of her arrangement is of no matter. If she cannot "work" the operation to a level that pays the plan payments, this case will fail. And if she can, the Bank and other creditors will be paid.

b. The Crop Projections

This conclusion shifts our focus to the reasonable likelihood of the plan's success. Courts examine the cash flow projections in light of the debtor's historical performance and experience as supplemented by current market data.[42] Are the projections offered in support of the plan "realistic and objective" in light of the operation's past historical performance? With the current proposed repayment terms and interest rate, it takes approximately $ 122,000 annually (including Trustee's fees) to pay the proposed plan payments.[43] Whether a Kylee-run Graves Farms can accomplish this seems to depend entirely on the performance of the anticipated cotton crop. The debtor's pro forma cash flows project a cotton crop that yields 1100 pounds per acre at $ 0.68 per pound for a gross income of $ 415,888.[44] This crop alone is projected to contribute over 40% of the farm's gross income per year. The Bank points out several flaws in this projection. First, it notes that Graves Farms hasn't grown cotton for some time and that Ms. Graves never has. The debtor's projected cotton yields lack any objective basis.[45] Second, the Bank downgrades anticipated yields from 1100 pounds per acre to 900 pounds per acre based upon its understanding of historical yields in Sumner County. That reduces gross income by $ 75,000. That would not only eliminate any anticipated operating margin but would make debt service under the plan more difficult. Third, Mr. Conklin noted that Graves Farms could not insure the cotton for more than 75% of the Sumner County average yield which is 468 pounds per acre, less than one-half of Ms. Graves' projected yield. Three-quarters of the county average is 351 pounds per acre. Thus, the possibility of crop failure resulting from insured risk makes it less likely that the debtor could meet its obligations. The insurance recovery wouldn't come close to replacing the anticipated crop yield—if the entire crop was insured and failed, the gross cotton income would be $ 132,706 (556 acres x 351 pounds per acre x $ 0.68 per pound) instead of the projected $ 415,888. That swing would leave the debtor unable to pay most of its plan obligations and drown the operation.

***8** Another feasibility concern the Bank raised related to Ms. Graves's estimate of the yield for double-crop soybeans. She anticipated planting 383 acres of beans after the wheat harvest and projects that it will make 35 bushels per acre while Mr. Conklin estimates that yield at something closer to 20 bushels. He noted that his estimate was closer to the county average and that Graves Farms had only one year's history (2018) of double-crop performance to back up the estimate.[46] If he is correct, that is an additional $ 40,000 hit to the total income debtor projects.

The lack of historical performance evidence is the real problem with feasibility. There is no way to know if the debtor's projections are reasonable. Apart from Trial Exhibit 7 containing the single year 2018 yields for milo, soybeans, and corn, the debtor didn't present any historical performance evidence by which to objectively evaluate its crop projections. If the 2018 figures on Trial Exhibit 7 are confined to Ms. Graves' crop yields, all the crop projections should be supported with Graves Farms' performance of those crops over the past 3-5 years. To the extent there is no historical data from Graves Farms to support the cotton yields, the county average of cotton yields may be used as supplemented or adjusted by any other valid assumptions or objective data. Without that data, the Court is hamstrung from making a pragmatic assessment of this debtor's chances post-confirmation because it cannot vet the projections against prior performance. While a debtor is not required to "guarantee" success at confirmation, it must carry its burden to show that it is more likely than not that it "will be able to make all payments and comply with the plan." Between the varying possible outcomes of the cotton and beans and the commingling of the debtor's obligations with those of Ms. Graves, I cannot conclude that this plan is feasible at this time. The Court doesn't doubt Ms. Graves's sincerity, honesty, ability, and willingness to work hard and undertake this farming endeavor, but those qualities aren't sufficient to make the plan feasible.[47] There needs to be more historical information about prior performance by this debtor.

c. Feasibility Conclusion

In short, having weighed the evidence and considered the testimony of Ms. Grave and Mr. Conklin, and giving due weight to Ms. Graves educational background along with Mr. Conklin's experience, I cannot find that the projections are based on reasoned, objective assumptions because of the lack of historical information.

Conclusion

Confirmation is denied for all the reasons set forth above, but the debtor is granted an additional 21 days from the date of this opinion, to submit a second amended plan, with historical performance data, for further consideration by the creditors and the Court.

All Citations

Slip Copy, 2019 WL 1422891

Footnotes

1 Doc. 58.

2 The debtor Graves Farms appeared by its attorney William H. Zimmerman, Jr. Creditor RCB Bank appeared by its attorney Edward J. Nazar. The chapter 12 trustee Carl Davis appeared at the confirmation hearing, as did Kylee Graves, an interested party.

3 Nor has any understanding been reached with the third-party landlords with respect to land that Ms. Graves is proposed to farm.

4 Case No. 19-10064-REN.

5 Trial Ex. 1, Doc. 58, Amended Plan, ¶ 12 at pp. 4-5.

6 Trial Ex. 1, p. 10.

7 The Purple Wave auction was to occur in the fall of 2018. When that didn't happen, the Bank sought enforcement of the stay relief order to conduct the sale. At trial, counsel for the Bank advised the proceeds from the auction sale had been applied to the Bank indebtedness. *See* Doc. 27, ¶ s 42-43; Doc. 99.

8 Trial Ex. 1, p. 11.

9 Doc. 108, pp. 6-7 providing for an agreed upon valuation of $ 318,725.

10 Trial Ex. 1, p. 12.

11 At the hearing, debtor's counsel submitted a revised plan exhibit C (Trial Ex. 2) that lists an additional implement, a John Deere 640 Header among the implements to be retained. The debtor values this at $ 50,000; the Bank at $ 45,000. The other retained items include a 2014 JD 8360 R Tractor, a 2014 JD 1890 Air Seeder, a 2008 JD 1770 16 Row Planter, a 2012 Landoll 7431 Cultivator, a 1994 Fruehauf Trailer, a 1996 Schaben 1000 Gallon Nurse Truck, a 1993 IH 8100 truck and hoist, and a 2007 Peterbuilt tractor. *Cf.* Trial Ex. 1, Ex. C, p. 12 and Trial Ex. 2.

12 Debtor based its equipment values on internet auction websites and Mike Graves' farming experience.

13 *See* Trial Ex. BB.

14 *Id.* items 1, 5, 6, 7, 12, 34, 51, 52, and 57.

15 See 11 U.S.C. § 506(a)(1).

16 Trial Ex. 1, p. 7.

17 111 acres x $ 2,050 = $ 227,550. This value is based upon the number of cultivated acres.

18 Francis indicated that Class 1 soils are the best quality, followed by Class 2 and Class 3. The higher the class number, the higher the alkalinity of the soil. He stated that the Poovey land was 90% Class 2 soils.

19 Trial Ex. AA at p. 000155.

20 The six comps' dryland prices per acre are, low to high: $ 2,100, $ 2,100, $ 2,230, $ 2,502, $ 3,250, and $ 3,700. I calculate the median to be between $ 2,230 and $ 2,505 or $ 2,367.50. If we drop comp 2, the median value is $ 2,230.

21 Trial Ex. DD, pp. 174-76 consists of Debtor's cash flow projections (prepared by Ms. Graves) submitted with the amended plan (p. 174), followed by the Bank's adjustment of those projections—lower crop yields and prices (p. 175), and further modification of the debt service for the Bank's market price loan terms resulting in higher debt service (p. 175). Debtor's initial cash flow projections on page 174 are taken from Trial Ex. 6.

22 Trial Ex. DD, p. 174.

23 *Id.* at pp. 175-76.

24 Trial Ex. 7, Debtor's modified cash flow projections contained actual operating results in 2018, including average crop yields that year, but no prior years' performance was shown.

25 *Id.* The debtor abandoned the 2018 growing wheat crop to the Bank during the bankruptcy case, leaving the Bank to harvest that crop. *See* Doc. 27, ¶ 38-39. It is unclear from the record the yield, if any, from the 2018 wheat crop.

26 Trial Ex. 6, p. 5 notes that the harvest equipment debt is for the lease of a combine for Ms. Graves to harvest the crops herself in lieu of incurring higher custom harvesting expense.

27 Trial Ex. DD, p. 174.

28 The correct trustee's fee is 11.111115%, Doc. 72. The trustee's fee on the debt service payments is .11111115 x $ 109,613 = $ 12,179.

29 See Trial Ex. DD, p. 174.

30 *Id.* at p. 175.

31 *In re Ames,* 973 F.2d 849, 851 (10th Cir. 1992).

32 As noted previously, Dean Graves has filed his own joint chapter 12 case since this confirmation hearing was held.

33 Trial Ex. DD, p. 176. The Graves Farms debt service calculated using these modified variables on the equipment valued at $ 411,000 and the real estate valued at $ 280,000 would yield annual debt service of $ 139,012, trustee's fees of $ 15,446, for a total of $ 154,458.

34 The so-called *Till* rate—the prime rate adjusted for risk—is the appropriate discount rate for secured claims in Chapter 13. *See Till v. SCS Credit Corp.,* 541 U.S. 465, 479 (2004). *See also In re Woods,* 465 B.R. 196, 206 (10th Cir. BAP 2012) (noting similarity of Chapter 12 to Chapter 13 and applying the *Till* discount rate in Chapter 12 case), *vacated on other grounds* 743 F.3d 689 (10th Cir. 2014); *In re Torelli,* 338 B.R. 390, 396 (Bankr. E.D. Ark. 2006) (applying *Till's* prime-plus approach for determining the appropriate interest rate).

35 Trial Ex. 1, p. 4.

36 11 U.S.C. § 1225(a)(6).

37 Bloomberg Law: Bankruptcy Treatise, Pt. VI, Ch. 212, § III.G.1 (Samir D. Parikh et al., Eds. 2018)(citing *In re Foertsch,* 167 B.R. 555, 565 (Bankr. D. N.D. 1994)).

38 *In re Ames,* 973 F.2d 849, 851 (quoting *In re Hopwood,* 124 B.R. 82, 86 (E.D. Mo. 1991)). *See also In re Jubilee Farms,* 595 B.R. 546, 550 (Bankr. E.D. Ky. 2018) (noting that reasonable assurance must rise above "bare agronomic feasibility"); *In re Lockard,* 234 B.R. 484,492 (Bankr. W.D. Mo. 1999) (basing feasibility on objective facts, not mere wishful thinking or pipe dreams); *In re Bright Harvesting, Inc.,* No. 15-11178 TR12, 2015 WL 7972717 at *3 (Bankr. D. N.M. Dec. 4, 2015) (noting cash flow projections must be based on valid assumptions)

39 Bloomberg Law, *supra* at § III.G.2.

40 *See* Doc. 108, pp. 6-7, § 7.1.

41 There is nothing inherently improper in funding a plan through debtor's lease of property to a third-party lessee, but debtor must show that lessee's operations are producing sufficient cash flow to enable debtor to make the plan payments. *See In re Newton,* 217 B.R. 1002, 1004 (Bankr. S.D. Ohio 1997) (Chapter 13 case).

42 *In re Chickosky,* 498 B.R. 4, 15 (Bankr. D. Conn. 2013); *In re Morris,* 590 B.R. 753, 756 (Bankr. N.D. Miss. 2018); *Cluck,* 101 B.R. 691, 694 (Bankr. E.D. Okla. 1989).

43 If the Bank's proposed market rate adjustments to the amortization of its equipment and real estate loans are used (Trial Ex. DD, p. 176), about $ 154,400 is required annually to pay the debt service.

44 Trial Ex. 6. Trial Ex. 7 modified downward this projection to a yield of 1000 pounds per acre at $ 0.68 per pound, or $ 378,080. The cotton crop would still contribute more than 36% of the farm's gross income under this modified projection.

45 *In re Ames,* 973 F.2d at 851 ("A plan's 'income projections must be based on concrete evidence and must not be speculative or conjectural.' "); *In re Lockard,* 234 B.R. 484, 492 (Bankr. W.D. Mo. 1999) (feasibility must be based on objective facts, not mere wishful thinking or pipe dreams).

46 Trial Ex. 7 shows that in 2018, no income was attributed to double-crop soybeans, yet that crop yielded an average of 36 bushels per acre in 2018.

47 *In re Keith's Tree Farms,* 519 B.R. 628, 637 (Bankr. W.D. Va. 2014) (The test is whether the things that are to be done after confirmation can be done as a practical matter under the facts.); *In re Lockard,* 234 B.R. 484, 492 (accord).

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