UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Civil No. 16-12756

v.

Honorable Thomas L. Ludington
Mag. Judge Patricia T. Morris

COPOCO COMMUNITY CREDIT UNION,

Defendant.

UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, the United States of America, through undersigned counsel, hereby respectfully submits its Opposition to Defendant's Motion to Dismiss. The United States' Complaint properly alleges, pursuant to 50 U.S.C. § 4041, that COPOCO Community Credit Union ("Defendant") has both (a) "engaged in a pattern or practice of violating" the Servicemembers Civil Relief Act ("SCRA"); and (b) "engaged in a violation of [the SCRA] that raises an issue of significant public importance." 50 U.S.C. § 4041(a). For these reasons, as discussed in greater depth in the accompanying brief, Defendant's Motion should be denied in its entirety.

Respectfully Submitted,

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Dated: September 19, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Civil No. 16-12756

v.

Honorable Thomas L. Ludington
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COPOCO COMMUNITY CREDIT UNION,

Defendant.

UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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STATEMENT OF ISSUES PRESENTED

1. Whether the United States has alleged facts sufficient to support its claim that Defendant has engaged in a "pattern or practice" of violations of the Servicemembers Civil Relief Act ("SCRA").

2. Whether the United States' allegation that Defendant's violation of Private First Class Christian Carriveau's rights under the SCRA raises an issue of "significant public importance" is subject to judicial review.

3. If the question of "significant public importance" is subject to judicial review, whether the United States has alleged facts sufficient to support its claim that Defendant's violation of PFC Carriveau's SCRA rights raises an issue of significant public importance.

MOST SIGNIFICANT AUTHORITIES

- 50 U.S.C. § 3902
- 50 U.S.C. § 3952
- 50 U.S.C. § 4041
- *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
- *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)
- *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977)
- *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd* 661 F.2d 562 (6th Cir. 1981)
- *United States v. Williams*, No. 12-CV-511, 2013 WL 596473 (E.D. Va. Feb. 14, 2013)

INTRODUCTION

COPOCO Community Credit Union ("Defendant"), in its Motion to Dismiss, does not dispute that the United States has adequately pleaded that Defendant violated the Servicemembers Civil Relief Act ("SCRA"). It concedes that it has, by illegally repossessing Private First Class Christian Carriveau's motor vehicle. Rather, Defendant asserts that, even so, it is entitled to dismissal. Defendant's argument is without merit.

The United States has adequately alleged both a "pattern or practice" of violating Section 3952 the SCRA and a violation of Section 3952 that raises an issue of "significant public importance." *See* 50 U.S.C. § 4041(a). As to pattern or practice, the Complaint alleges facts that (1) show the existence of a policy that necessarily results in SCRA violations, and (2) create an inference that Defendant has conducted illegal repossessions of additional servicemembers. Either of these allegations is enough to meet the United States' burden for pleading a pattern or practice. Further, the Attorney General's determination that the illegal repossession of PFC Carriveau's vehicle raises an issue of significant public importance is not reviewable by the courts and, even if it were, the facts alleged would allow the Court to conclude that that SCRA violation raises such an issue.

BACKGROUND

In April 2014, Alyssa and Christian Carriveau obtained a loan for a 2010 GMC Terrain from Defendant. Compl. ¶ 8. Shortly after making their first payment, the Carriveaus moved to Washington State, and Mr. Carriveau enlisted in the United States Army as a Private First Class ("PFC"), beginning full-time active duty in January 2015. *Id.* ¶ 9. Due to financial difficulties, the Carriveaus fell behind on car payments during the summer of 2015, but they were able to begin catching up in September 2015. *Id.* Nonetheless, in October, while PFC Carriveau was away for military training, Defendant repossessed the Carriveaus' car – along with their two-year-old daughter's car seat – from their driveway in Lacey, Washington, without a court order. *Id.* ¶ 10. Ms. Carriveau called the Department of Justice, and a Department of Justice attorney contacted Defendant and arranged to have the vehicle returned to the Carriveaus that evening. *Id.* ¶ 11.

Following an investigation, the United States filed its Complaint, which alleges that Defendant violated Section 3952 of the SCRA, 50 U.S.C. § 3952, by repossessing, without a court order, a motor vehicle owned by PFC Carriveau, who had made an installment payment to Defendant prior to entering military service (as defined by 50 U.S.C. § 3911(2)) and was in military service at the time of the repossession. *Id.* ¶ 17. The Complaint also alleges that Defendant's vehicle repossession procedures did not include any process to determine customers'

military status prior to conducting repossessions without court orders, and that Defendant had no written SCRA policies. *Id.* ¶¶ 15-16. Finally, the Complaint alleges, upon information and belief, that Defendant may have illegally repossessed the vehicles of other SCRA-protected servicemembers. *Id.* at ¶ 18.

STANDARD OF REVIEW

A complaint may be dismissed if it "fail[s] to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). A pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable legal theory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In considering a Rule 12(b)(6) motion, the Court must construe the pleading in the non-movant's favor and accept all allegations of fact as true. *See Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). "[D]etailed factual allegations" are not needed, but the "obligation to provide the 'grounds' of [plaintiff's] 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

ARGUMENT

A. The United States Has Alleged a Pattern or Practice of Violating the Servicemembers Civil Relief Act

The allegations in the United States' Complaint state a claim that Defendant engaged in a pattern or practice of violating the SCRA in two ways. First, the allegations indicate that Defendant's policies and practices were such that they would inevitably lead to a pattern of illegal conduct each and every time that Defendant sought to repossess the motor vehicle of a servicemember who was entitled to the protections of Section 3952 of the SCRA. *See* 50 U.S.C. § 3952. Second, the allegation that Defendant may have illegally repossessed vehicles of other SCRA-protected servicemembers, corroborated by other well-pleaded allegations, sufficiently alleges a pattern or practice of violating Section 3952 of the SCRA. *See id.*

1. The United States Has Alleged a Pattern or Practice Based on Defendant's Policies and Practices.

The United States may maintain its pattern or practice claim based on Defendant's policies and practices. Defendant acknowledges that the standard for the government to bring a "pattern or practice" claim under Title VII, established by *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), also provides the appropriate standard for the SCRA. Def.'s Mot. at 5. *Teamsters* supports the United States' position: "At the initial, 'liability' stage of a pattern-or-

practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the [challenged] discriminatory policy," but must only establish "that such a policy existed." 431 U.S. at 360; *see also United States v. City of Parma*, 494 F. Supp. 1049, 1095 (N.D. Ohio 1980), *aff'd* 661 F.2d 562 (6th Cir. 1981) (applying *Teamsters* to the government's "pattern or practice" authority under the Fair Housing Act and holding that "[t]he existence of a discriminatory policy, statute, or ordinance is itself a discriminatory pattern or practice"). That is exactly what the United States alleges here.

The plain language of Section 3952 of the SCRA establishes that it is a strict liability provision. *See* 50 U.S.C. § 3952(a).[1] In other words, if Defendant fails to obtain a court order before repossessing a vehicle of an SCRA-protected servicemember, it is liable, irrespective of intent. *See Roberts v. Chips Express, Inc.*, 2012 WL 4866495, at *2-5 (E.D. Wis. Oct. 12, 2012) (holding, in case involving a similar SCRA provision prohibiting enforcement of storage liens without a court order, that "on the plain terms of the statute's language…there is

[1] Section 3952 differs from Section 3937, which is not a strict liability provision. *See Banaszak v. Citimortgage, Inc.*, 2016 WL 4771327, at *7 (E.D. Mich. Sept. 14, 2016). Whereas Section 3937 requires a servicemember to submit orders evidencing active duty status in order to receive the benefits of that section, see 50 U.S.C. § 3937(b)(1), Section 3952 has no such requirement. See 50 U.S.C. § 3952. Additionally, in contrast to the plaintiff's proof at summary judgment in *Banaszak*, 2016 WL 4771327, at *7, the United States' Complaint alleges that Defendant's conduct caused damages. Compl. ¶¶ 11, 21.

liability regardless of *mens rea*: strict liability," and further discussing statutory intent and policy justifications for strict liability); *Gordon v. Pete's Auto Serv. of Denbigh, Inc.*, 837 F. Supp. 2d 581, 585 (E.D. Va. 2011) (storage lien); *United States v. B.C. Enters., Inc.*, 667 F. Supp. 2d 650, 662-64 (E.D. Va. 2009) (storage liens); *see also Hurley v. Deutsche Bank Trust Co. Americas*, 2009 WL 701006, at *5 (W.D. Mich. Mar. 13, 2009) (noting, in the context of determining a reservist's entitlement to SCRA protections, that "the operative event for the protections is the *servicemember's*, not the mortgagee's, receipt of the orders") (emphasis in original).[2]

It follows that Defendant's policy itself – of conducting repossessions without court orders[3] and without determining military status, Compl. ¶ 15 – is sufficient to support the United States' pattern or practice claim. This policy caused the violation of PFC Carriveau's rights, and this policy would necessarily

[2] The SCRA was re-codified on December 1, 2015 at 50 U.S.C. § 3901, *et seq.* Thus, court opinions prior to that date refer to its prior codification at 50 U.S.C. App. § 501, *et seq*. The re-codification did not result in any substantive changes.

[3] For borrowers whom the SCRA does not protect, all 50 states allow for lenders to take possession of secured collateral after default without first obtaining a court order, *see, e.g.*, MICH. COMP. LAW § 440.9609(2); WASH. REV. CODE § 62A.9A-609(b)(2); *see also* U.C.C. § 9-609(b)(2) (2000). This form of self-help repossession is the almost universal means by which car lenders conduct repossessions, and other methods are generally only used when self-help repossession is not possible. Michael W. Dunagan, *Vehicle Repossessions & Resales Under Revised UCC Article 9: The Requirements & the Consequences of Non-Compliance*, 54 CONSUMER FIN. L.Q. REP. 192, 193 (2000).

cause Defendant to violate the rights of any other protected servicemember whose car it repossessed. Accordingly, the United States need not identify servicemembers whose rights Defendant violated in order to show a pattern or practice of illegal behavior.

2. The United States Alleges Facts Supporting the Inference that Other Instances of Illegal Repossessions Occurred.

As noted above, the Complaint alleges, "upon information and belief," that Defendant "may have repossessed motor vehicles, without court orders, from other [SCRA-protected] servicemembers." Compl. ¶ 18. "[P]arties may plead on the basis of information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible[.]" *Dow v. Wood Chemical Co.*, 72 F. Supp. 3d 777, 783 (E.D. Mich. 2014) (Ludington, J.) (internal quotations and citations omitted). Both circumstances are present here.

Information about other repossessions is within the exclusive custody and control of Defendant. Therefore, unless other victims of illegal repossessions happen to report the conduct to the Department of Justice, the only way for the United States to know whether additional violations have occurred is by receiving that information – either voluntarily during the course of the investigation[4] or in

[4] Although the Department of Justice regularly obtains voluntary cooperation from the subjects of SCRA investigations, the SCRA does not provide the Department

response to discovery requests after litigation is commenced – from Defendant. The United States therefore needs discovery to obtain information about other SCRA-protected servicemembers who may have suffered the same fate as PFC Carriveau.

Moreover, the United States' allegations support the inference that Defendant has conducted other illegal repossessions in violation of Section 3952 of the SCRA. *See* 50 U.S.C. § 3952. Unless motor vehicle lenders, including Defendant, take steps to determine military status, such as checking the Defense Manpower Data Center database ("DMDC")[5] or asking the borrower directly, or unless they obtain a court order before conducting every repossession, it is *inevitable* that they will violate the SCRA *every single time* they conduct a repossession of an SCRA-protected servicemember's vehicle. The United States alleges that Defendant had *no* procedure to check military status prior to repossessing without court orders and, in fact, had no written SCRA policies at all. Compl. ¶¶ 15-16. These allegations provide exactly what Defendant asserts is required, an indication that "it is the company's regular procedure to repossess servicemembers' vehicles without a court order." Def.'s Mot. at 6. Further,

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with the power to compel the production of information prior to filing a lawsuit.

[5] Defendant makes much of the fact that the SCRA does not mention the DMDC. Def.'s Mot. at 7. The Complaint alleges, however, that Defendant did not employ *any* process to determine military status. Compl. ¶ 15.

Defendant's lack of any procedures operated in practice to violate PFC Carriveau's rights. Compl. ¶ 17. Thus, far from a "fishing expedition,"[6] the United States' allegations that Defendant lacked any procedures to verify military status before repossessing vehicles and had no SCRA policies support a reasonable inference that Defendant has conducted additional illegal repossessions.

Nor is dismissal appropriate because the United States alleged upon information and belief that Defendant "may have" conducted other illegal repossessions. Compl. ¶ 18. Given that all allegations are to be construed in the non-movant's favor for purposes of the present motion, the United States' allegation states a plausible claim that other illegal repossessions have occurred. "The plausibility standard is not akin to a 'probability requirement.'" *See Iqbal*, 556 U.S. at 678. It is assuredly not a certainty requirement.

B. This Case Raises an Issue of "Significant Public Importance"

The authority for the Attorney General to bring a claim regarding "a violation of [the SCRA] that raises an issue of significant public importance" was added to the SCRA in 2010. *See* Veterans Benefits Act of 2010, Pub. L. No. 111-

[6] *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), cited by Defendant, is inapposite. That case simply held that a district court acted within its discretion when it dismissed an EEOC lawsuit based on the EEOC's failure to fulfill its statutory pre-suit obligations. *Id.* at 676-77. The SCRA lacks any provisions related to actions that must precede the Attorney General's decision to bring an action under 50 U.S.C. § 4041.

275, § 303(a), 124 Stat. 2864, 2877.[7] Since then, only one court has decided a motion to dismiss arguing that the United States' SCRA allegations did not raise an issue of significant public importance, and it rejected the argument Defendant makes in this case. In *United States v. Williams*, defendants filed motions to dismiss, arguing that the United States' allegations – that defendants imposed an early termination charge on a single servicemember tenant when he terminated his lease after receiving permanent change of station (PCS) orders, in violation of 50 U.S.C. § 3955 – did not raise an issue of significant public importance. *Williams*, No. 12-CV-511 (E.D. Va. Oct. 26, 2012), Dkt. 9, at 2 (attached as Exhibit B). The court did not second-guess the Attorney General's determination of significant public importance and denied the motion. *United States v. Williams*, 2013 WL 596473, at *5 (E.D. Va. Feb. 14, 2013). The Court should reach the same result here.

1. The United States' Determination that an SCRA Violation Raises an Issue of "Significant Public Importance" is Not Reviewable

The SCRA does not define the term "significant public importance." Nonetheless, the case law establishes that the Attorney General's determination under the Fair Housing Act ("FHA") of whether a denial of rights "raises an issue of general public importance," 42 U.S.C. § 3614(a), is not reviewable by the

[7] Prior to 2010, the United States "possessed a non-statutory right to sue on behalf of servicemembers." *United States v. B.C. Enters. Inc.*, 447 F. App'x 468, 470 n.* (4th Cir. 2011) (unpublished).

courts. *City of Parma*, 494 F. Supp. at 1095 n.64, *aff'd* 661 F.2d 562; *United States v. Northside Realty Assocs*., 501 F.2d 181, 182 (5th Cir. 1974) ("what constitutes an issue of general public importance is, absent specific statutory standards, a question most appropriately answered by the executive branch"); *United States v. Bob Lawrence Realty, Inc*., 474 F.2d 115, 125 n.14 (5th Cir. 1973); *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1138-39 (D. Idaho 2003); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1291 n.9 (S.D.N.Y.1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987).[8] This same rule applies by analogy to the SCRA. *See Williams*, 2013 WL 596473, at *5 ("As there is no appropriate case law directly on point, this Court looks to cases under the analogous Fair Housing Act."); *see also Boone v. Lightner*, 319 U.S. 561, 575 (1943) (holding that the predecessor statute to the SCRA is "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."). Thus, the United States is entitled to pursue this case based on the Attorney General's determination of significant public importance.

[8] The Supreme Court's recent decision in *Mach Mining, LLC v. E.E.O.C.*, 135 S.Ct. 1645 (2015), is consistent with these holdings. In contrast to Title VII, which "provides certain concrete standards pertaining to what [the EEOC's pre-suit conciliation efforts] must entail," *id.* at 1652, the FHA and SCRA contain no concrete standards for courts to evaluate what constitutes "public importance." In this way, the structure of those statutes "demonstrates that Congress wanted [the Department of Justice] to police its own conduct," and the usual presumption favoring judicial review of administrative action does not obtain. *See id.* at 1651.

2. The Facts Alleged Confirm "Significant Public Importance"

Even if judicial review of the Attorney General's determination were appropriate, this case does raise an issue of significant public importance.

As an initial matter, Defendant's assertion that the Complaint "fails to provide any facts that establish why this case is significantly important to the public," Def.'s Mot. at 8, is incorrect. The entirety of the allegations surrounding Defendant's illegal repossession of PFC Carriveau's vehicle – including the specific facts of the violation, the fact that Defendant took no steps to determine his military status, and the fact that the conduct was by a state chartered, federally insured credit union – provides a factual basis for the conclusion that the violation raises an issue of significant public importance. Compl. ¶¶ 7-11, 15-17, 21. Federal Rule of Civil Procedure 8 does not require the United States to further plead an *explanation of why* those facts support the conclusion.

Allowing active-duty servicemembers such as PFC Carriveau review by a court prior to repossession, which also opens up other SCRA protections, such as mandatory stays and court-appointed attorneys, *see* 50 U.S.C. §§ 3931-3935, is important to the defense of the Nation, as it allows servicemembers to focus on their military service. *See* 50 U.S.C. § 3902(1). The particular facts of this case, including the sudden, unannounced disappearance of the vehicle with the servicemember's young daughter's car seat inside, leaving his wife and daughter

stranded for two days until the Department of Justice was able to negotiate the return of the vehicle, demonstrate acutely the sort of distraction that can harm the readiness of our armed forces, which Congress has sought to prevent.

Furthermore, while this case involves only one presently-known incident, the Attorney General has determined that it raises an issue of "significant public importance" because it will establish a precedent that the United States will not tolerate violations by credit unions of servicemembers' civil rights. Individual servicemembers frequently face these types of civil rights violations, often without knowing that their rights have been violated. The United States was able to identify this violation of the SCRA only because Alyssa Carriveau contacted the Department of Justice directly, which is a step taken by a small percentage of individuals harmed by SCRA violations. Given the further difficulties in identifying these cases when potential defendant financial institutions (including credit unions) have sole possession of the critical data necessary to determine whether multiple violations have occurred, the Department of Justice may have no choice but to litigate cases one victim at time in order to set a proper precedent. *See United States v. Hunter*, 459 F.2d 205, 218 (4th Cir. 1972) (FHA case relying on legislative history of the 1964 Civil Rights Act, which defined "general public importance" as including instances where "the particular decision will constitute a precedent for a large number of establishments") (internal citations and quotations

omitted).[9] Accordingly, the Attorney General has authority to bring this lawsuit, and it should not be dismissed.

C. Any Dismissal Should Be Without Prejudice

In the event that the Court decides to grant Defendant's motion to dismiss – which it should not – the dismissal should be without prejudice. The United States could amend its Complaint to allege the following: (1) additional facts related to the repossession of PFC Carriveau's motor vehicle; (2) the United States repeatedly asked Defendant to provide a list of motor vehicle repossessions conducted without court orders, but Defendant refused to do so; (3) the instant action is the first lawsuit the United States has brought against a credit union for a violation of the SCRA; and (4) Defendant's counsel acknowledged to the Department of Justice during its investigation that he represented numerous credit unions throughout Michigan, and he did not believe that any of them checked the DMDC.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court DENY Defendant's motion.

[9] Defendant relies on several cases that describe certain matters as having "significant public importance." Def.'s Mot. at 8-9. These cases do not attempt to define "significant public importance" and thus provide little guidance. Nor does Defendant explain why maintaining military readiness and setting precedent discouraging financial institutions from violating the rights of servicemembers are somehow in a lesser category of public importance.

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Dated: September 19, 2016

CERTIFICATION OF SERVICE

I hereby certify that on September 19, 2016, I electronically filed the foregoing motion and brief with the Clerk of the Court using the ECF system which will send notification of such filing to all parties to this action.

/s/ Alan A. Martinson
ALAN A. MARTINSON