

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY,
STATE OF MISSOURI**

Ally Financial Inc.,

Plaintiff,

v.

Alberta Haskins and David Duncan,

Defendant.

Case No. 16JE-AC01713-01

Defendants' Second Amended Answer and Counterclaim

Defendants, through their undersigned attorneys, answer Plaintiff's Petition and counterclaim against Plaintiff:

Answer

1. Defendants are without sufficient information or knowledge to admit or deny the allegations in Paragraph 1, and therefore deny same.

2. Defendants admit the allegations in Paragraph 2.

3. Defendants admit the allegations in Paragraph 3.

4. Defendants admit they executed the Retail Installment Contract to purchase the vehicle, but are without sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 4, and therefore deny same.

5. Defendants admit the allegations contained in Paragraph 5.

6. Defendants deny receiving a Notice of Right to Cure. The remaining balance of the allegation is a legal conclusion to which no response is required. If a response is required, Defendants deny the remaining allegations in Paragraph 6.

7. Defendants admit Plaintiff repossessed Defendants' vehicle, but deny the remaining allegations in Paragraph 7.



8. Defendants admit the allegations in Paragraph 8.

9. Defendants admit Plaintiff sold the vehicle, but deny Plaintiff complied with UCC Article 9.

10. Defendants deny the allegations in Paragraph 10.

11. Defendants deny the allegations in Paragraph 11.

WHEREFORE, having fully answered Plaintiff's Petition, Defendants pray for an order dismissing all claims against Defendants with prejudice and costs expended taxed to Plaintiff; and awarding all other relief as the Court deems just or necessary under the circumstances.

Affirmative Defenses

1. Plaintiff's Petition fails to state a claim upon which relief can be granted because Plaintiff has failed to plead facts sufficient to show compliance with sections 400.9-601 to 400.9-629, RSMo., as required by sections 408.556.1 and 408.557, RSMo.

2. Plaintiff's Petition is barred by the absolute bar rule because Plaintiff did not strictly comply with the Uniform Commercial Code, including sections 400.9-601 to 400.9-629, RSMo.

3. Plaintiff's Petition is barred as set forth in the counterclaim below, which is incorporated by this reference.

4. Collateral estoppel bars Plaintiff's Petition:

a. Defendant seeks to invoke collateral estoppel defensively.

b. The presale notice in *Ally Financial Inc. v. Marino*, No. 16WY-CV00069 (Mo. Cir. June 22, 2016) restricted the methods for redemption.

c. The *Marino* presale notice is attached as **Exhibit A**. Both presale notices to Defendants and the *Marino* presale notice restricted the methods by which a consumer could redeem the vehicle.

- d. The *Marino* court held language restricting the method of redemption was misleading and made the presale notice unreasonable under § 400.9-614. A copy of the *Marino* judgment and motion incorporated into the judgment are attached as **Exhibit B**.
 - e. The *Marino* suit resulted in a final judgment on the merits.
 - f. Ally participated as a party in the *Marino* adjudication.
 - g. Ally had a full and fair opportunity to litigate the issue of the sufficiency of its presale notice.
 - h. Ally is precluded from litigating the sufficiency of its presale notice in this litigation.
 - i. The insufficiency of Ally's presale notice destroys its right to pursue a deficiency judgment.
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Counterclaim

Nature of Case

1. This is a consumer class action against Ally, and its predecessors or successors, seeking relief to redress an unlawful and deceptive pattern of wrongdoing followed by Ally regarding collection, enforcement, repossession and disposition of collateral, and collection of alleged deficiencies.

2. Ally mailed Defendants and many other consumers a presale notice, which did not comply with the Uniform Commercial Code ("UCC") adopted by each state.¹

¹ Defendants cite to the sections of the official text of the UCC. All 50 states have adopted the sections of the UCC, cited by Defendants, with no material variation that would affect the claims of the putative class members, regardless of where the putative class member resides, the loan originated, or the repossession took place. Missouri adopted Article 9 of the UCC at § 400.9-101, *et seq.* Missouri's UCC adds the prefix of 400 to the statutory numbering scheme. For example, § 9-614 of the UCC is denominated § 400.9-614 in Missouri's statutes.

3. Ally's form presale notice is attached to its Petition as **Exhibit B2**.
4. Ally mailed Defendants and numerous other consumers a post-sale notice, which did not comply with the UCC.
5. Ally's form post-sale notice is attached to its Petition as **Exhibit 1 to Exhibit C**.
6. Defendants sue for themselves and all other similarly situated consumers. They seek actual damages not less than the statutory minimum provided for under the UCC, and such other further relief as this Court may deem appropriate.

Parties

1. Defendants are residents of Jefferson County, Missouri.
2. Ally is a Delaware corporation with its principal place of business in Michigan. Ally was previously known as GMAC Inc. Ally does substantial business in Missouri.
3. All allegations of acts or omissions by Ally include, but are not limited to, acts and omissions of Ally's officers, directors, operators, managers, supervisors, employees, affiliates, subsidiaries, vice-principals, partners, agents, servants, and owners; and that such acts and omissions were made with Ally's express and/or implied authority, or were ratified or otherwise approved by Ally; or that such acts or omissions were made in the routine normal course and scope of their agency and employment as Ally's officers, directors, operators, managers, supervisors, employees, affiliates, subsidiaries, vice-principals, partners, agents, servants, and owners.

Jurisdiction and Venue

4. This is a civil case, so this Court has jurisdiction.
5. Venue is proper in this Court under § 508.010 because Defendants are residents of Jefferson County, Missouri and Ally may be found in Jefferson County, Missouri. Venue is also

proper in this Court under Rule 55.32 because Defendants are counterclaiming on Ally's Petition originally brought in Jefferson County, Missouri.

General Allegations

6. Defendants signed a consumer credit contract for the purchase of a motor vehicle ("Property").

7. Defendants' loan documents indicated the primary use for the purchase of the Property was for personal, family or household purposes.

8. The Property was bought for use primarily for personal, family or household purposes.

9. The consumer credit contract was for the sale of a motor vehicle by a retail seller to a retail buyer on time under a retail installment contract for a time sale price payable in one or more deferred installments

10. Defendants and each class member were debtors or obligors in a consumer-goods transaction as those terms are defined under the UCC.

11. Ally never obtained Defendants' written consent to repossess the Property.

12. Ally never obtained the written consent from the members of the Missouri Subclass (defined below) to repossess their property.

13. Defendants did not waive their right to notice of the consumer credit contract obligation's acceleration.

14. No class member waived their right to notice of the consumer credit contract obligation's acceleration.

15. Ally never mailed Defendants notice of acceleration before repossessing the Property.

16. Ally never mailed members of the Class (defined below) notice of acceleration before repossessing their property.

17. After repossessing the Property, Ally mailed presale notices to Defendants and the Class, advising of Ally's intent to dispose of their property in purported compliance with the UCC.

18. The presale notices mailed to Defendants and the Class were not reasonable as required by § 9-611(b) because, among other reasons:

a. The presale notices were misleading because they state the redemption amount must be paid by certified funds, cashier's check, Western Union or MoneyGram, but neither the contract nor the law requires redemption to be paid only through these methods.

b. The presale notices were misleading because the debt had not been properly accelerated, so a consumer wishing to redeem need only pay the delinquent payments plus the creditor's expenses.

c. The presale notices are misleading because they indicate to the recipient no one else owes money on the agreement.

d. The information contained in the presale notices was inaccurate because the debt had not been properly accelerated.

19. The presale notices mailed to Defendants and the Missouri Subclass, were not reasonable as required by § 400.9-611(b) because, among other reasons:

a. The presale notices were unreasonable for all the reasons they were unreasonable as to the Class.

b. The presale notices stated a redemption balance including interest accruing after default but before a judgment was obtained, which violates § 408.553.

c. The presale notice stated the balance owed will increase each day from the date of the letter, which is contrary to § 408.553.

20. Ally failed to send Defendants and the classes reasonable authenticated notices of disposition as required by § 9-611.

21. Ally or someone at Ally's direction disposed of the Property ("Disposition") after mailing a presale notice.

22. After Disposition, Ally or someone at Ally's direction mailed post-sale notices to Defendants and each member of the Class explaining how it calculated their deficiency balances.

23. Ally's post-sale notices to Defendants and the Class failed to comply with § 9-616 because the notices, among other reasons:

a. Did not provide all the information, in the requisite order, as required by § 400.9-616(c)(3).

b. Misstated the aggregate amount of obligation (as required by § 9-616(c)(1)) and the amount of the deficiency (as required by §§ 9-616(a)(1)(A), (c)(6)) by including improperly accelerated amounts.

c. On information and belief, the information contained in the post-sale notices is otherwise inaccurate.

24. The post-sale notices mailed to Defendants and the Missouri Subclass failed to comply with § 400.9-616 for all the reasons they were unreasonable as to the Class and because they misstated the aggregate amount of obligation (as required by § 400.9-616(c)(1)) and the amount of the deficiency (as required by §§ 400.9-616(a)(1)(A), (c)(6)) by including unpaid balances or interest that had not become due.

25. Ally's failure to provide a statutorily compliant post-sale notice is part of a pattern, or consistent with a practice, of noncompliance.

26. Ally sued Defendants and the Missouri Subclass without giving proper notice required by § 408.557.

27. Ally or someone at Ally's direction unlawfully collected or attempted to collect unpaid balances and interest that had not become due.

28. Ally or someone at Ally's direction unlawfully collected or attempted to collect deficiency balances from Defendants and other consumers issued defective presale and post-sale notices.

29. Ally or someone at Ally's direction unlawfully collected or attempted to collect the time price differential, delinquency and collection charges from Defendants and other Missouri consumers issued defective presale and post-sale notices.

30. Ally has maintained a practice and policy of reporting derogatory information regarding the class members to local consumer reporting agencies and the three national consumer credit reporting agencies: Equifax Credit Information Services, Inc., Experian, Inc., and TransUnion, LLC (collectively, "CRAs"), despite its failure to comply with the presale and post-sale notice requirements.

31. The defective presale and post-sale notices, and the reporting of false or inaccurate derogatory information on the class members' credit reports harmed the class members' credit worthiness, credit standing, credit capacity, character, and general reputation.

32. The defective presale and post-sale notices, and the reporting of false or inaccurate derogatory information on the class members' credit reports were oral or written publication of material that defames, slanders or libels the class members.

33. The defective presale and post-sale notices, and the reporting of false or inaccurate derogatory information on the class members' credit reports were oral or written publication of material that invaded the class members' privacy rights.

Class Allegations

34. Defendants counterclaim for themselves and classes designated under Rules 52.08(a) and 52.08(b)(3) to remedy the ongoing unfair, unlawful, or deceptive business practices alleged, and seeks redress for all those persons harmed.

35. The Class comprises all persons ("Class") within the applicable statute of limitations:

- a. who are named as borrowers or buyers on a loan or financing agreement with Ally, assigned to Ally or owned by Ally;
- b. whose loan or financing agreement was secured by collateral;
- c. whose collateral was repossessed, voluntarily or involuntarily; and
- d. whose collateral was disposed.

36. Alternatively, the Class comprises all persons ("Class") within the applicable statute of limitations:

- a. who Ally failed to send a presale notice;
- b. who Ally mailed a presale notice that stated anywhere in the notice one or all of the following phrases: "certified funds," "cashier's check," "Western Union," or "Moneygram;"
- c. who Ally failed to send a post-sale notice; or
- d. who Ally mailed a post-sale notice after disposing the collateral or receiving insurance proceeds for the same.

37. The Missouri Subclass comprises all persons within the Class (“Missouri Subclass”):

- a. who obtained a Missouri Certificate of Title for a motor vehicle identifying Ally as the lienholder, or who are named as borrowers or buyers with a Missouri address on a loan or financing agreement with Ally, assigned to Ally or owned by Ally;
- b. whose loan or financing agreement was secured by a motor vehicle or other collateral;
- c. whose motor vehicle or other collateral was repossessed, involuntarily or voluntarily; and
- d. whose motor vehicle or other collateral was disposed.

38. Alternatively, the Missouri Subclass comprises all persons within the Class (“Missouri Subclass”) who obtained a Missouri Certificate of Title for a motor vehicle identifying Ally as the lienholder, or who are named as borrowers or buyers with a Missouri address on a loan or financing agreement with Ally, assigned to Ally or owned by Ally; and:

- a. who Ally failed to send a presale notice;
- b. who Ally mailed a presale notice that stated anywhere in the notice one or all the following phrases: “certified funds,” “cashier’s check,” “Western Union,” or “Moneygram;”
- c. who Ally failed to send a post-sale notice; or
- d. who Ally mailed a post-sale notice after disposing the collateral or receiving insurance proceeds for the same.

39. Members of the classes are so numerous their individual joinder is impracticable. Defendants are informed and believe the Class contains over 20,000 individuals who had their motor vehicles or other collateral repossessed, involuntarily or voluntarily, and disposed. Defendants are informed and believe the Missouri Subclass contains over 1,000 individuals who had their motor vehicles or other collateral repossessed, involuntarily or voluntarily, and disposed. The classes are sufficiently numerous to make joinder impracticable, if not impossible. The precise number of Class members is unknown.

40. Ally has a company policy of requiring redemption by certified funds after Ally has repossessed collateral. This policy is not in the class members' consumer credit contracts and is first communicated to the class members in the presale notice.

41. From at least 2009 through November 2012, Ally's form presale notice stated "You must pay the amount required in certified funds."

42. From at least February 2013 through the present, Ally's form presale notice stated "You must pay the amount required by cashier's check sent to Ally Financial at the address at the top of this letter by mail or overnight delivery service or use the services of Western Union or Moneygram."

43. None of the class members' consumer credit contracts required payment or redemption by certified funds, cashier's check, Western Union or Moneygram.

44. None of the class members' consumer credit contracts precluded payment or redemption by ACH, debit cards, or credit cards, which Ally invited consumers to use as methods of payment on its website, and in its account statements and summaries mailed to consumers before repossession and after disposition of the collateral.

45. Ally's presale notice mailed to Defendants stated "You must pay the amount required in certified funds."

46. Ally mailed over 1,000 presale notices to persons other than Defendants that stated "You must pay the amount required in certified funds."

47. There are questions of law and fact common to the classes, which predominate over any issues involving individual class members.

48. Ally mailed the same or substantially similar presale notice to each member of the classes that it mailed to Defendants. Each presale notice mailed to the class members restricts redemption payments to certain methods outlined in the presale notice. Each presale notice also contained language suggesting redemption required payment of the full accelerated balance when the debt had not been properly accelerated.

49. Ally mailed the same or substantially similar post-sale notice to each member of the classes that it mailed to Defendants.

50. The principal legal question common to Defendants and each class member is whether the presale and post-sale notices mailed by Ally, or someone at its direction, complied with the UCC.

51. The principal legal question common to Defendants and each Missouri Subclass member is whether § 408.553 precludes interest from accruing after default until a judgment is obtained, and if so, whether the presale and post-sale notices are defective by including or discussing interest Ally was precluded from charging.

52. Defendants' claims are typical of the claims of the class members.

53. Defendants' and the classes' claims are based on the same factual and legal theories.

54. Defendants' and the Class's rights derive from written, form contracts and a uniform statute adopted by all 50 states with no material variation for the claims asserted here.

55. All presale notices mailed to the Class stated somewhere in the notice one of the following phrases: "certified funds," "cashier's check," "Western Union," or "Moneygram."

56. The violations alleged by Defendants and the Class derive from written, form presale and post-sale notices that violate the UCC adopted by each state.

57. The violations alleged by Defendants and the Missouri Subclass derive from written, form presale and post-sale notices that violate § 408.553 and the UCC.

58. Defendants and each class member were damaged and may recover actual damages not less than the minimum damages provided by the UCC due to Ally's failure to provide proper presale notices and post-sale notices.

59. Defendants will fairly and adequately represent and protect the interests of the classes.

60. Defendants have no interests antagonistic to the class members.

61. Defendants' counsel is competent and experienced in consumer and class litigation.

62. Defendants and all class members have an interest in determining the adequacy of the presale notices and post-sale notices mailed by Ally and to recover damages due to the defective presale notices and post-sale notices.

63. The questions of law or fact common to the classes predominate over questions affecting only individual members.

64. Defendants and each class member will rely on the same basic evidence (i.e., the form notices).

65. Determining the deficiency of the presale notices and post-sale notices resolves all class members' claims because each notice mailed to the class members suffers from at least one of the same deficiencies as Defendants' notices.

66. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

67. The class members are consumer debtors, who likely cannot locate or afford to hire lawyers.

68. Most class members are probably unaware Ally violated their rights and the law.

69. If each of the class members were forced to bring an individualized suit, such suits would burden judicial resources and would create the risk of multiple inconsistent results for similarly situated parties.

70. Concentrating the litigation of Defendants' and the class members' claims is also desirable and logical given the predominance of common questions of law and fact alleged above.

71. The classes should be certified under Rule 52.08(b)(3), as the superior method for the fair and efficient adjudication of this controversy.

72. Defendants seek a declaration that the form presale notices and post-sale notices used by Ally violate Missouri or other applicable law.

Collateral Estoppel

73. Defendants and the classes seek to invoke collateral estoppel offensively.

74. The presale notice in *Ally Financial Inc. v. Marino*, No. 16WY-CV00069 (Mo. Cir. June 22, 2016) restricted redemption to certain methods not required by the contract.

75. The *Marino* presale notice is attached as **Exhibit A**. The presale notices to the class members and the *Marino* presale notice restricted the methods by which a consumer could redeem the vehicle.

76. The *Marino* court held such language was misleading and made the presale notice unreasonable under § 400.9-614. A copy of the *Marino* judgment and motion incorporated into the judgment are attached as **Exhibit B**.

77. The *Marino* suit resulted in a final judgment on the merits.

78. Ally participated as a party in the *Marino* adjudication.

79. Ally had a full and fair opportunity to litigate the issue of the sufficiency of its presale notice.

80. Ally is precluded from litigating the sufficiency of its presale notice in this litigation.

81. The insufficiency of Ally's presale notice destroys its right to pursue a deficiency judgment and makes Ally liable to the class members for actual damages not less than the statutory minimum provided by the UCC.

Count I – Class's Claim

82. Defendants repeat the allegations set forth above as if set forth in Count I.

83. Ally violated the UCC by failing to provide the presale notice in the form and manner required under the UCC before disposing of collateral secured by loans entered by, assigned to, or owned by Ally.

84. Ally did not use the form of notification provided in § 9-614(3) of the UCC when sending presale notices to Defendants and the Class.

85. Ally's presale notice to Defendants and the Class included additional language or content not authorized or allowed by law, rendering the presale notices misleading or unreasonable in violation of §§ 9-611 and 9-614 of the UCC.

86. As required under § 9-611 of the UCC, Ally failed to provide “reasonable authenticated notice of disposition” to Defendants and the Class.

87. Ally did not mail post-sale notices, or any other explanation or writing, to Defendants and the Class providing all the information, in the requisite order, as required by § 9-616 of the UCC.

88. Ally’s failure to provide a statutorily compliant post-sale notice is part of a pattern, or consistent with a practice, of noncompliance because Ally mailed the same noncompliant post-sale notice to Defendants and the Class.

89. As a direct and proximate result of failure to comply with the requirements of Subchapter 6 of Article 9 of the UCC, Defendants and the Class suffered actual damages not less than the minimum damages provided by § 9-625(c)(2), including:

- a. loss of use of tangible property and cost of alternative transportation;
- b. loss resulting from the inability to obtain, or increased costs of, alternative financing;
- c. harm to credit worthiness, credit standing, credit capacity, character, and general reputation;
- d. harm caused by defamation, slander and libel;
- e. harm caused by invasion of privacy; and
- f. other uncertain and hard-to-quantify actual damages.

WHEREFORE, Defendants pray this Court certify the Class and enter a judgment for Defendants and the Class against Ally:

- a. awarding actual damages not less than the minimum damages provided by § 9-625(c)(2);

- b. statutory damages of \$500 for each defective post-sale notice mailed or that Ally failed to send;
- c. prejudgment and post-judgment interest;
- d. a preliminary and permanent injunction enjoining Ally from engaging in the practices alleged, including without limitation, enjoining Ally from collecting deficiency judgments, time price differential, delinquency and collection charges from Defendants and the Class;
- e. a mandatory injunction compelling Ally to return any money collected for deficiency judgments, time price differential, delinquency and collection charges from Defendants and the Class;
- f. a mandatory injunction compelling Ally to remove any adverse credit information wrongfully reported on Defendants' and the Class' consumer credit reports;
- g. a declaration that the presale and post-sale notices mailed by Ally to Defendants and the Class fail to comport with the statutory requirements; and
- h. for such other and further relief as this Court deems just and proper.

Count II – Missouri Subclass' Claim

90. Defendants repeat the allegations set forth above as if set forth in Count II.

91. Ally wrongfully charged interest after default but before a final judgment in violation of § 408.553, which also violates § 365.145.

92. Ally's wrongful charge of interest renders the presale notices unreasonable and misleading in violation of §§ 400.9-611 and 400.9-614(5).

93. Ally's wrongful charge of interest renders the post-sale notices unreasonable and misleading in violation of § 400.9-616 because, among other reasons, it misstates the amount of

the obligation and the deficiency balances owed by including unpaid balances or interest that had not become due.

94. Ally did not mail post-sale notices, or any other explanation or writing, to Defendants and the Missouri Subclass providing all the information, in the requisite order, as required by § 400.9-616.

95. Ally's failure to provide a statutorily compliant post-sale notice is part of a pattern, or consistent with a practice, of noncompliance because Ally mailed the same noncompliant post-sale notice to Defendants and the Missouri Subclass.

96. Ally's failure to provide notices sufficient under §§ 400.9-611, 400.9-614 and 400.9-616 before commencing its claim for a deficiency judgment violates sections §§ 408.556, 408.557, and 365.145.

97. Under § 365.150.2, Ally's violation of § 365.145 requires it return any time price differential, delinquency or collection charge on the consumer credit contracts that it collected from Defendants and the Missouri Subclass.

98. As a direct and proximate result of Ally's wrongful acceleration and repossession, and failure to send the requisite notices, Defendants and the Missouri Subclass suffered actual damages not less than the minimum damages provided by § 400.9-625(c)(2), including:

- a. loss of use of tangible property and cost of alternative transportation;
- b. loss resulting from the inability to obtain, or increased costs of, alternative financing;
- c. the surplus after disposition of the collateral that would be equal to the proceeds of disposition less the unaccelerated balance due on the consumer loan contracts and less any wrongfully charged interest;

- d. all monies paid to Ally by Defendants and the Missouri Subclass for the time price differential and delinquency and collection charges on the consumer credit contracts;
 - e. harm to credit worthiness, credit standing, credit capacity, character, and general reputation;
 - f. harm caused by defamation, slander and libel;
 - g. harm caused by invasion of privacy; and
 - h. other uncertain and hard-to-quantify actual damages.
99. Defendants and the Missouri Subclass are entitled to attorney's fees under § 408.562.
100. Defendants and the Missouri Subclass are entitled to punitive damages under § 408.562.
101. Ally's actions were wanton, outrageous, and/or malicious because of its reckless indifference to or conscious disregard of the consumer rights of Defendants and the Missouri Subclass.

WHEREFORE, Defendants pray this Court certify the Missouri Subclass and enter a judgment for Defendants and the Missouri Subclass against Ally:

- a. awarding actual damages not less than the minimum damages provided by § 400.9-625(c)(2);
- b. statutory damages of \$500 for each defective post-sale notice mailed;
- c. prejudgment and post-judgment interest;
- d. attorney's fees;
- e. punitive damages;

- f. a preliminary and permanent injunction enjoining Ally from engaging in the practices alleged, including without limitation, enjoining Ally from collecting deficiency judgments, time price differential, delinquency and collection charges from Defendants and the Missouri Subclass;
- g. a mandatory injunction compelling Ally to return any money collected for deficiency judgments, time price differential, delinquency and collection charges from Defendants and the Missouri Subclass;
- h. a mandatory injunction compelling Ally to remove any adverse credit information wrongfully reported on Defendants' and the Missouri Subclass's consumer credit reports;
- i. a declaration that the right to cure, presale, and post-sale notices mailed by Ally to Defendants and the Missouri Subclass fail to comport with the statutory requirements; and
- j. for such other and further relief as this Court deems just and proper.

THE ONDER LAW FIRM

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Certificate of Service

I certify on March 29, 2017, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all attorneys of record.

/s/ Jesse B. Rochman _____