52,129

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARC OWENS, MARY REED, CAROLINE GRINSTON, MARSHA HESTER, and JODY MURPHY, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	CAUSE NO. IP 96-1272-C-G/T
vs.	)	
TRANEX CREDIT CORPORATION, VALCAR RENTAL CAR SALES, INC., GARY L. LEVINE, JEFFREY D. CONGDON, THOMAS STEVEN MOGLE, and TONY GULLET,	)	
Defendants.	)	

ENTRY DISCUSSING DEFENDANTS' MOTION TO DISMISS

Marc Owens ("Owens"), Mary Reed ("Reed"), Caroline Grinston ("Grinston"), Marsha Hester ("Hester") and Jody Murphy ("Murphy") commenced this action against Tranex Credit Corporation ("Tranex"), ValCar Rental Car Sales, Inc. ("ValCar"), Gary L. Levine ("Levine"), Jeffrey D. Congdon ("Congdon"), Thomas Steven Mogle ("Mogle"), and Tony Gullet ("Gullet"). In their Second Amended Complaint, the Plaintiffs allege that, in connection with financed automobile sales, the Defendants violated the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962 *et seq.*; the Magnuson-Moss Act, 15 U.S.C. § 2310; the Indiana Racketeer Influenced and Corrupt Organizations Act ("IN

RICO"), IND. CODE §§ 35-45-6-1 *et seq.*; the Indiana Uniform Consumer Credit Code ("UCCC"), IND. CODE §§ 24-5-0.5-1 *et seq.*; the Indiana Consumer Sales and Credit Deceptive Practices Statute, IND. CODE §§ 24-4.5-1-101 *et seq.*; and the implied warranty of merchantability. The Defendants now move to dismiss the Second Amended Complaint in its entirety pursuant to Rules 12(b)(1) and 12(b)(6) of the *Federal Rules of Civil Procedure*. For the reasons set forth below, the Defendants' Motion to Dismiss will be **GRANTED** with respect to Tranex in Counts I and II (TILA Counts), and Counts XII, XIV and XV (Magnuson-Moss Counts); and **DENIED** with respect to all other Defendants and all other Counts. The Plaintiffs will be **REQUIRED** to submit a **THIRD AMENDED COMPLAINT** within **ONE HUNDRED TWENTY (120) DAYS** from the date of this Entry, and discovery shall recommence immediately.

I. Background

The court takes the following facts from the Plaintiffs' Second Amended Complaint. In the latter half of 1995, each of the named Plaintiffs agreed to buy used cars on credit from ValCar, an auto dealership located in Indianapolis, Indiana. In each case, the Plaintiff paid at least twice as much as the value of the car, as listed in the *National Automobile Dealers Association Official Used Car Guide* ("Bluebook"), and signed a contract listing the annual percentage rate ("APR") as 21%. And in each case the contract was assigned to Tranex, a consumer finance company located in Indianapolis, Indiana. In the case of three of the named Plaintiffs, the vehicle sold was alleged to be defective.

As a representative example, on October 31, 1995, Ms. Grinston purchased a 1985 Buick Century from ValCar. (Second Am. Compl. ¶ 21.) She signed a Retail Installment Contract and Security Agreement ("RIC") which lists the "cash price" of the vehicle as $6,949.50. (*Id.* ¶ 21, Ex. G.) In a bold-outlined box in the middle of the RIC, the "Annual Percentage Rate" is listed as 21%; the "Finance Charge" is listed as $2033.70; the "Amount Financed" is listed as $6,995.00; the "Total of Payments" is listed as $9033.70; and the "Total Sale Price," including the $300 down payment, is listed as $9333.70. (*Id.*) The sales contract also states that ValCar assigns the contract to Tranex. (*Id.* ¶ 21, Ex. G.) According to the Bluebook, the retail value of such a car in October 1995 was $2,475, and the loan value was $1,200. (*Id.* ¶ 22, Ex. H.) Ms. Grinston had multiple mechanical problems with the vehicle, and ValCar eventually gave her another vehicle. (*Id.* ¶ 23.)

ValCar actively seeks out, and does extensive business with, "sub-prime" consumers.[1] (*Id.* ¶ 11.) Tranex is "a specialized indirect consumer finance company engaged primarily in financing the purchase of used automobiles through the acquisition of retail installment contracts from automobile dealerships with whom it has established formal business relationships." (*Id.* ¶ 8.) Mr. Levine is the president of both ValCar and Tranex, and Mr. Congdon is the secretary of both companies. (*Id.* ¶¶ 7 & 10.) Until late 1995, both Mr. Mogle and Mr. Gullet were managers at ValCar. (*Id.* ¶¶

[1] "Subprime" customers usually have poor or no credit or perceive themselves as difficult to finance. (Pls.' Mem. Op. Defs.' Mot. Dismiss at 5.)

13-14.) All the individual Defendants allegedly participated in the formulation of the policies and practices at issue. (*Id.* ¶¶ 12-15.)

The "standard policy and practice of ValCar and other dealers whose purchases are financed by Tranex [is] to charge hidden finance charges on vehicles sold on time to 'subprime' customers." (*Id.* ¶ 28.) The Defendants allegedly implement this practice as follows. Tranex pays only a portion (as little as 65%) of the amount financed to ValCar; the balance of the financed amount is kept by Tranex as a "discount." (*Id.* ¶ 29.) ValCar, knowing it is dealing with a "subprime" candidate and thus anticipating the discount, increases the price in order to obtain the desired money from the sale. (*Id.* ¶ 30.) "The magnitude of the discount is such as to make it impossible not to pass it on to the customer." (*Id.*) The result of this is that "a cost of credit is included in the purported cash price and amount financed rather than in the disclosed finance charge." (*Id.* ¶ 31.) The Plaintiffs also allege that "[t]he purported cash price of vehicles sold to 'subprime' borrowers substantially exceeds the value of the vehicle, and the price at which comparable vehicles are sold for cash and the prices at which Val[C]ar could sell the same vehicles to non 'subprime' customers for cash." (*Id.* ¶ 32.)

On September 6, 1996, the Plaintiffs[2] filed their Complaint against the Defendants. In December 1996, the Plaintiffs filed their Amended Complaint, and in

---

[2] Mr. Owens and Ms. Reed were the only original named Plaintiffs in the Complaint. Subsequently, the other three named Plaintiffs were added. In each version of the Complaint, the Plaintiffs purport to bring a class action. No motion for class certification has been filed.

February 1997, they filed their Second Amended Complaint. The Defendants filed their Motion to Dismiss before the filing of the Second Amended Complaint, but this court has ordered the motion and the briefing regarding the motion to be treated as directed toward the Second Amended Complaint.

In Counts I and II, Ms. Grinston, Ms. Hester and Mr. Murphy allege that all Defendants violated TILA's disclosure requirements because ValCar failed to disclose finance charges which were "hidden" in the vehicle purchase price. All Plaintiffs bring Counts III, IV and V, which allege RICO violations by Tranex, ValCar and the individual Defendants, respectively, in conjunction with their alleged scheme to inflate the price of cars to hide part of the finance charge. Counts VI, VII and VIII allege Indiana RICO violations that are similar to the federal RICO allegations. Based also upon the factual allegations outlined above, Count IX alleges an Indiana UCCC violation against ValCar and Tranex, and Count X alleges an Indiana Consumer Sales and Credit Deceptive Practices violation against all Defendants. Counts XI and XII allege breach of warranty and Magnuson-Moss claims on behalf of Mr. Owens; Counts XIII and XIV allege breach of warranty and Magnuson-Moss claims on behalf of Ms. Reed; and Count XV alleges a Magnuson-Moss claim on behalf of Ms. Grinston.

In their motion to dismiss, the Defendants seek dismissal of all the Plaintiffs' claims. Collectively, the Defendants assert, among other arguments, that (1) they did not violate TILA because the discounts are not hidden finance charges; (2) the RICO claims fail because there was no underlying illegal conduct and the RICO claims were

not adequately alleged; (3) the Magnuson-Moss claims fail due to lack of subject-matter jurisdiction and lack of applicability to Tranex; and (4) the court lacks jurisdiction over the Plaintiffs' state law claims because the Plaintiffs' federal claims are insufficient.

II. Analysis

The Defendants move to dismiss the Second Amended Complaint under Rules 12(b)(1) and 12(b)(6) of the *Federal Rules of Civil Procedure*. A motion to dismiss tests the sufficiency of the complaint, not the merits of the suit. *See Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). The only question is whether relief is possible under any set of facts that could be established consistent with the allegations. *See Northern Trust Co. v. Peters*, 69 F.3d 123, 129 (7th Cir. 1995). All well-pleaded facts are taken as true, all inferences are drawn in favor of the plaintiff and all ambiguities are resolved in favor of the plaintiff. *See id*; *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993).

A. TILA

The Plaintiffs[3] claim that TILA required the Defendants to disclose the "hidden finance charges" that ValCar embedded in the purchase prices of its vehicles. They allege that ValCar, knowing it is dealing with a "subprime" candidate and thus

[3] The two TILA Counts are brought by only three of the five named Plaintiffs, Ms. Grinston, Ms. Hester and Mr. Murphy. In the discussion of the TILA Counts, the court refers to this group of three as the "Plaintiffs."

anticipating the discount at which Tranex purchases the sales contracts, increases the price in order to obtain the desired profit from the sale. The result of this is that a cost of credit is included in the "cash price" and in the amount financed, rather than in the disclosed finance charge. The Plaintiffs contend that "TILA would be meaningless if creditors could increase the price of goods . . . sold in financed transactions, as compared with cash transactions, without treating the increase as part of the 'finance charge' and 'annual percentage rate.'" Pls.' Mem. Opp'n Defs.' Mot. Dismiss at 6. The Defendants counter that the discount at which ValCar sold the sales contract to Tranex was not a "finance charge" subject to the disclosure requirements of TILA.

TILA, and its implementing regulation ("Regulation Z"), seek to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). Among other things, TILA requires lenders to disclose any "finance charge" that the consumer will bear under the credit transaction. *See* 15 U.S.C. § 1638(a)(3). TILA defines a "finance charge" as the "sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction." 15 U.S.C. § 1605(a). This requirement attempts to prevent a lender from trying "to make the interest rate look lower than it really is by charging part of the interest in the form of fees for services rendered in connection with the closing of the

loan." *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 940 (7th Cir. 1995). Regulation Z says a "finance charge" includes "[c]harges imposed on a creditor by another person for purchasing or accepting a consumer's obligation, if the consumer is required to pay the charges in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation." 12 C.F.R. § 226.4(b)(6). The Official Staff Commentary to Regulation Z exempts some charges from TILA's disclosure requirements:

> 2. *Costs of doing business.* Charges absorbed by the creditor as a cost of doing business are not finance charges, even though the creditor may take such costs into consideration in determining the interest rate to be charged or the cash price of the property or services sold. However, if the creditor separately imposes a charge on the consumer to cover certain costs, the charge is a finance charge if it otherwise meets the definition. For example:
> • A discount imposed on a credit obligation when it is assigned by a seller-creditor to another party is not a finance charge as long as the discount is not separately imposed on the consumer. (See § 226.4(b)(6).)

12 C.F.R. Pt. 226, Supp. I § 226.4(a)-2 (emphasis in original). Both Regulation Z and its Commentary bind the court unless the court finds them "demonstrably irrational." *McGee v. Kerr-Hickman Chrysler Plymouth*, 93 F.3d 380, 383 (7th Cir.1996) (quoting *Ford Motor Credit v. Milhollin*, 444 U.S. 555, 565 (1980))

1. ValCar

In the present case, the Plaintiffs offer at least four arguments as to why ValCar violated TILA. Only one of these presents a cognizable TILA claim.

a. The purchase price includes the cost of the discount

First, the Plaintiffs contend that ValCar violates TILA simply because ValCar allegedly includes the cost of the discounts in the purchase prices of the vehicles, thus hiding a "finance charge." (Second Am. Compl. ¶ 31.) This allegation, standing alone, is not sufficient to state a claim under TILA, as is clear from the express language of the definition of "finance charge" under TILA: "[t]he finance charge does not include charges of a type payable in a comparable cash transaction." 15 U.S.C. § 1605(a). Further, the Commentary to Regulation Z states, "the creditor may take such costs into consideration in determining . . . the cash price of the property or services sold. . . . A discount imposed on a credit obligation when it is assigned by a seller-creditor to another party is not a finance charge as long as the discount is not separately imposed on the consumer." 12 C.F.R. Pt. 226, Supp. I § 226.4(a)-2. The Second Amended Complaint does not allege that ValCar imposed the cost of the discount *separately* from the purchase price of the vehicle and the contractually specified finance charges. Instead, as is apparent on the face of the Second Amended Complaint, the discount "is included in the purported cash price" and not in any separately imposed charge. (Second Am. Compl. ¶ 31.) Therefore, to the extent the "hidden finance charge"

alleged by the Plaintiffs is included in the *price charged in comparable cash transactions*, it is not a "finance charge" within the meaning of TILA, and instead is a "cost of doing business." *See* 15 U.S.C. § 1605(a); 12 C.F.R. Pt. 226, Supp. I § 226.4(a)-2. ValCar is permitted under TILA to take the discount "into consideration in determining the . . . cash price of the property . . . sold." *Id.*; *see, e.g.*, *Balderos v. City Chevrolet, Buick and Geo, Inc.*, No. 97 C 2084, 1998 WL 155912 (N.D. Ill. March 31, 1998) (because the discounts were included in the purchase price of the vehicle, under Regulation Z the "'hidden finance charge' . . . does not constitute a 'finance charge.'"); *Sampson v. Mercury Finance Co.*, No. 95-S-418-N, slip op. at 5-6 (M.D. Ala. Feb. 14, 1996) (because the "'discount' of which the plaintiffs complain was included in the purchase price of the vehicle," the "difference between the cash price of a vehicle and the price at which the contract is sold is not required to be disclosed").

b. The difference between the fair market value and the price

The Plaintiffs also fail to state a TILA claim when they simply state the vast difference between the "value," or the "fair market value," of ValCar's vehicles and the prices charged by ValCar. (Second Am. Compl. ¶ 32) ("The purported cash price of the vehicles sold to the 'subprime' borrowers substantially exceeds the value of the vehicle. . . ."). TILA is "not a general prohibition of fraud in consumer transactions or even in consumer credit transactions. Its limited office is to protect consumers from being misled about the cost of credit." *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283, 285 (7th Cir. 1997). Simply because the Plaintiffs in this case agreed to pay

much more than ValCar's vehicles were worth does not make the claim actionable under TILA. As another court said, "Any differential between the fair value of the car and its cash price is attributable to a bad bargain, or perhaps a violation of the bargain in the sale of the car, and not any hidden finance charges." *Frazee v. Seaview Toyota Pontiac, Inc.*, 695 F. Supp. 1406, 1408 (D. Conn. 1988).

c. Absorbing the discount

The Plaintiffs also fail to state a TILA claim when they argue that the "costs of doing business" exemption should not apply to ValCar because ValCar does not absorb the discount, but rather passes it on to the consumer. (Pls.' Mem. Opp'n Defs.' Mot. Dismiss at 11-12.) The "costs of doing business" exemption in the Commentary begins: "Charges *absorbed by the creditor* as a cost of doing business are not finance charges, even though the creditor may take such costs into consideration in determining . . . the cash price of the property . . . to be sold." 12 C.F.R. Pt. 226, Supp. I § 226.4(a)-2 (emphasis added). The Plaintiffs apparently advocate a reading of the Commentary by which any raising of the purchase price (for both cash and credit customers) due to a 'cost of doing business' indicates that the customer, rather than the seller, is absorbing the cost. This reading is far too crabbed and indeed is contradicted by the terms of the Commentary itself: "the creditor may take such costs into consideration in determining . . . the cash price of the property . . . to be sold." *Id.* Thus in the terms of the Commentary, ValCar is 'absorbing' the discount as a 'cost of doing business' when it takes the discount 'into consideration in determining the cash price of the property sold.'

d. Difference between the cash purchase price and the credit purchase price

The Plaintiffs do succeed in stating a TILA claim against ValCar with their final argument. If ValCar charged a different purchase price for cash buyers than it charged for credit buyers, then that would be a TILA violation, because the buyer would be misled about the cost of credit. The "costs of doing business" exemption only applies when the cost of the discount is taken into consideration in determining the true "cash price." *See* 12 C.F.R. Pt. 226, Supp. I § 226.4(a)-2. But if ValCar had one "cash price" for cash buyers, and a higher "cash price" for credit buyers, then ValCar would be "separately imposing" the discount on the credit consumer, *see* 12 C.F.R. Pt. 226, Supp. I § 226.4(a)-2, and ValCar would lose the protection of the "costs of doing business" exemption. Instead, the higher "cash price" for credit consumers would be a charge "imposed directly or indirectly by the creditor as an incident to the extension of credit," *see* 15 U.S.C. § 1604(a), and thus would be a finance charge that would be required to be disclosed under TILA. *Cf.* 12 C.F.R. Pt. 226, Supp. I § 226.4(b)(9) ("The seller of land offers individual tracts for $10,000 each. If the purchaser pays cash the price is $9,000, but if the purchaser finances the tract with the seller the price is $10,000. The $1,000 difference is a finance charge for those who buy the tracts on credit."). The recent decision in *Gibson v. Bob Watson Chevrolet- Geo. Inc.*, 112 F.3d 283 (7th Cir. 1997) is instructive, if not directly on point. In *Gibson*, the Seventh Circuit reversed three district court decisions that had dismissed claims that automobile dealers violated TILA by charging higher prices for warranties in credit transactions than

in cash transactions. The plaintiffs alleged that the difference between the price of the warranty in credit transactions and the price of the warranty in cash transactions constituted a finance charge that must be disclosed under TILA. The court agreed, stating that "[t]his is a type of fraud that goes to the heart of the concerns that actuate the Truth in Lending Act." *Id.* at 287.

Thus, this court holds that according to TILA, Regulation Z and its Commentary, it is permissible for an automobile dealer to assign contracts at a discount to a finance company, without disclosing the discount to consumers. It is also permissible to attempt to recoup the costs of the discount by charging *all* consumers a higher price. However, if the higher price is charged only to consumers who are buying on credit, then it is separately imposed and the difference between the higher price and the price for cash-paying customers is a finance charge that, under TILA, must be disclosed to the consumer.

The issue, then, is whether the Second Amended Complaint alleges that ValCar charged a different "cash price" for its credit purchasers than it charged for its cash purchases. The Plaintiffs first allege: "The dealer knows it is dealing with a candidate for "subprime" financing, anticipates the discount or acquisition fee, and increases the price. . . ." (Second Am. Compl. ¶ 30.) Then the Plaintiffs allege: "The purported cash price of vehicles sold to 'subprime' borrowers substantially exceeds the value of the vehicle, and the price at which comparable vehicles are sold for cash and the prices at

which Val[C]ar could sell the same vehicles to non 'subprime' customers for cash." (*Id.* ¶ 32.)

The Defendants claim that these paragraphs do not allege that ValCar charged one "cash price" for cash purchasers and a different "cash price" for credit purchasers. (Defs.' Reply Br. Supp. Mot. Dismiss at 3.) They note that the clause in paragraph 32 of the Second Amended Complaint, "the price at which comparable vehicles are sold for cash," does not specify *by whom* the "vehicles are sold for cash." (Defs.' Reply Br. Supp. Mot. Dismiss at 3.) Thus, the Defendants contend, the Plaintiffs have not alleged the "ValCar actually sold comparable vehicles for cash at one price and on credit at a higher price." (*Id.*)

The Defendants would be correct if the court adopted a strict interpretation of the Second Amended Complaint. Because if the Second Amended Complaint merely alleges that ValCar's purchase prices exceed the prices at which comparable vehicles are sold for cash *by other dealers*, then the claim is worthy of dismissal. However, on a motion to dismiss, the court should liberally construe the complaint. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993). All inferences should be drawn in favor of the Plaintiffs and all ambiguities should be resolved in their favor. *See Northern Trust Co. v. Peters*, 69 F.3d 123, 129 (7th Cir. 1995). Thus, while paragraph 32 of the Second Amended Complaint is ambiguous as to whether it alleges that ValCar actually did have a different cash purchase price and credit purchase price for comparable cars, this court resolves the ambiguity in the Plaintiffs' favor. The court infers that the

Plaintiffs allege that ValCar charged different purchase prices for comparable vehicles depending upon whether the consumer was paying with cash or on credit. And on this argument alone, the Plaintiffs do state a TILA claim on which relief could be granted.[4]

2. Tranex

Tranex argues that even if the Second Amended Complaint states a TILA claim against ValCar, it cannot be held liable because the alleged violations are not apparent on the face of the RICs. Under TILA, assignee liability is limited.

> [A]ny civil action for a violation of this subchapter or proceeding under section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter.

---

[4] The court notes that the Plaintiffs' TILA allegations may be difficult to prove, since the Plaintiffs will need to present evidence of "comparable cash transactions" that illustrates the higher purchase prices charged in credit transactions. However, such concerns have no bearing on the court's decision on a motion to dismiss.

The court also calls the parties' attention to the discussion at the end of section II.B.3., *infra*, in which the court requires the Plaintiffs to submit a third amended complaint within one hundred twenty days from the date of this Entry. The Plaintiffs should, within the bounds of Rule 11, focus their claims on the one viable TILA theory stated in the Second Amended Complaint, namely, that ValCar charged different purchase prices for comparable vehicles depending upon whether the customer paid with cash or on credit.

15 U.S.C. § 1641(a) (1998). Tranex argues that since the Plaintiffs' main theory is that some of the finance charges were hidden in the purchase price, then the violation could not have been "apparent on the face of the disclosure statement."

The Plaintiffs respond with three arguments: (1) it was obvious on the face of the disclosure statement that the purchase price was inflated, and thus the violation is apparent on the face of the document; (2) Tranex contractually accepted the liability of ValCar; and (3) ValCar and Tranex "acted in concert" to impose the hidden finance charges. (Pls.' Mem. Opp'n Defs.' Mot. Dismiss at 14-15.)

As this court stated above, simply because an automobile dealer charges a price higher than the "Bluebook" value of a vehicle does not alone constitute a TILA violation. From an objective standpoint, all that is apparent on the face of the disclosure statement is that ValCar charges a high purchase price, 21% APR, and over $2,000 in finance charges; there is nothing on the disclosure statement that indicates that ValCar charges a higher price on credit transactions than it does on comparable cash transactions. *See Hoffman v. Grossinger Motor Corp.*, No. 96 C 5362, 1997 WL 793316, at *10 (N.D. Ill. June 27, 1997) ("At issue here is whether the alleged practice of 'hiding' finance charges is 'apparent' on the face of the installment contracts. . . . Nothing in the RICs alerts [the assignee] to the fact that the finance charge and APR are (allegedly) inaccurate merely because the sale price appears high.").

The Plaintiffs further argue that Tranex is liable for ValCar's alleged TILA violation because of the "holder notice" included in the RICs between the Plaintiffs and ValCar that were assigned to Tranex. Federal Trade Commission ("FTC") regulations require sellers to include the following "holder notice" on all consumer credit contracts:

> NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2(a). The Plaintiffs argue, in effect, that the "holder notice" subjects assignees to liability for TILA violations that are not apparent on the face of the disclosure statement. This is an interesting argument, and at the time the parties briefed the issue, the district courts were divided and no court of appeals had decided the question. However, the Seventh Circuit recently changed that situation in *Taylor v. Quality Hyundai, Inc.*, Nos. 96-3658, 97-1208, 1998 WL 401494 (7th Cir. July 20, 1998). In *Taylor*, another case involving car dealerships and finance companies, the court affirmed two district courts that decided assignees could not be held liable for TILA violations that were not apparent on the face of the assigned documents, despite the presence of the "holder notice" in those documents. The Seventh Circuit stated that the "holder notice," which is required to be part of the contract by regulation, "must be read in light of other laws that modify its reach." *Id.* at *3 (citing *Robbins v. Bentsen*, 41

F.3d 1195, 1198 (7th Cir. 1994) ("Regulations cannot trump the plain language of statutes. . . .")). The court then held that 15 U.S.C. § 1641(a) controlled and the "holder notice" does not operate to subject assignees to liability for TILA violations that are not apparent on the face of the disclosure statement. *See id.* at *5 ("Only violations that a reasonable person can spot on the face of the disclosure statement or other assigned documents will make the assignee liable under the TILA."). This court follows *Taylor*, and finds that Tranex is not liable for ValCar's alleged TILA violations by virtue of the "holder notice."

The Plaintiffs' final argument consists of only one statement: "ValCar and Tranex acted in concert to impose the hidden finance charges." (Pls.' Mem. Opp'n Defs.' Mot. Dismiss at 14.) Thus, the Plaintiffs imply, Tranex is also liable for ValCar's alleged TILA violation. The Plaintiffs do not elaborate on this statement nor do they cite any authority in its support in their brief, and Tranex does not even respond to the statement in its reply. Thus, it is left to the court to determine precisely what it means. The Plaintiffs could be arguing that Tranex and ValCar acted in concert, and therefore, Tranex must have had knowledge of the TILA violations allegedly committed by ValCar. This argument fails. Prior to the 1980 amendment to 15 U.S.C. § 1641(a), which made assignees liable under TILA "only" for violations that are "apparent on the face of the disclosure statement," § 1641(a) also made it possible for the debtor to state a claim by alleging that the assignee had "knowledge" of the violation. *See* H.R. Conf. Rep. No. 96-842, at 80-81 (1980), *reprinted in* 1980 U.S.C.C.A.N. 298, 310-11; S. Rep. No. 96-

368, at 32-33 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 296; *see also Taylor*, 1998 WL 401494, at *3. The Seventh Circuit in *Taylor* stated that the 1980 amendment to § 1641(a), which eliminated the "knowledge" provision, "narrowed considerably the potential scope of assignee liability." *Id.* Thus, an allegation of knowledge of the scheme is no longer sufficient to state a TILA claim against an assignee.

A different interpretation of the argument that Tranex and ValCar were "acting in concert" is that Tranex had more than mere knowledge. The allegations in the Second Amended Complaint seem to confirm this. Mr. Levine is the president and the registered agent of both ValCar and Tranex. (Second Am. Compl. ¶ 12.) Mr. Congdon is the secretary of both ValCar and Tranex, and owns a controlling interest in Tranex. (*Id.* ¶ 13.) The Second Amended Complaint alleges that both men "formulated, approved and directed the policies and practices complained of herein." (*Id.* ¶¶ 12-13.) Also, ValCar employees are paid with checks drawn on a Tranex account, and Tranex supplies the forms and procedures for ValCar's credit transactions. (*Id.* ¶¶ 8, 10.) These specific allegations support the argument that Tranex actually participated in ValCar's alleged TILA violations.

However, this is a statutory claim, and common law notions like "acting in concert" must give way to specific statutory limitations, such as is contained in 15 U.S.C. § 1641(a). Tranex, despite its alleged participation in the TILA violations, still is only alleged to be "the assignee . . . with respect to the transaction." (Second Am. Compl. ¶¶ 8, 45.) Thus, even if Tranex, as an entity, "devised" the "scheme" for

implementing the TILA violations,[5] it has never been alleged to be anything other than an "assignee," and it certainly is never alleged to be a "creditor" within the meaning of TILA. Thus the limitation imposed by § 1641(a) would apply, and an "action . . . which may be brought against a creditor may be maintained against any assignee *only* if the violation . . . is apparent on the face of the disclosure statement." *Id.* (emphasis added). In *Taylor*, the Seventh Circuit applied an objective standard for assignee liability under TILA: "*Only* violations that a *reasonable person* can spot on the face of the disclosure statement or other assigned documents will make the assignee liable under the TILA." *Taylor*, 1998 WL 401494, at *5 (emphasis added). And as stated above, a reasonable person could not look at the disclosure statements at issue and determine that a lower purchase price exists for comparable cash transactions. *See Hoffman v. Grossinger Motor Corp.*, No. 96 C 5362, 1997 WL 793316, at *10 (N.D. Ill. June 27, 1997) (magistrate report and recommendation) ("Nothing in the RICs alerts [the finance company] to the fact that the finance charge and APR are (allegedly) inaccurate merely because the sale price appears high."). Thus, the Second Amended Complaint fails to state a TILA claim against Tranex.

---

[5] The court notes that the first time Tranex, as an entity, is alleged to have actually participated in the alleged scheme is in ¶ 70, which occurs after the two TILA Counts and is not incorporated by reference in either of the TILA Counts.

B. RICO

The Plaintiffs have filed federal RICO claims against all Defendants presumably premised under 18 U.S.C. § 1962(c).[6] "To state a claim under § 1962(c), a RICO plaintiff must show the (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) (citation omitted). In the present case, the Plaintiffs allege that the Defendants' racketeering activity is the use of the United States mails and interstate wire transmissions in furtherance of "a scheme of artifice to inflate the price of cars to hide part of the finance charge, which results in misrepresentation of the finance charge and the annual percentage rate." (Second Am. Compl. ¶¶ 71, 88, 105.) The Defendants have moved for the dismissal of the Plaintiffs' federal RICO claims because (1) without a TILA violation, the federal RICO claims must fail; (2) the Second Amended Complaint fails to adequately allege a RICO enterprise; and, (3) the Second Amended Complaint

---

[6] The Plaintiffs do not specify under which subsection of § 1962 that their RICO claims arise, although their allegations indicate that, at minimum, they are wishing to invoke § 1962(c).

§ 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The court calls the parties' attention to the discussion at the end of section II.B.3., *infra*, in which the court requires the Plaintiffs to submit a third amended complaint within one hundred twenty days from the date of this Entry. In that complaint, the Plaintiffs are admonished to clearly specify under which subsection(s) of § 1962 their federal RICO claims arise.

fails to plead fraud with the particularity required by Rule 9(b). (Defs.' Reply Br. Supp. Mot. Dismiss at 12-16.)

1. TILA Violation/Predicate Act

The Defendants first argue that because the Second Amended Complaint does not state an actionable claim under TILA, then the federal RICO claims, which are premised upon a TILA violation, must also be dismissed. (Br. Supp. Mot. Dismiss at 11-12.) As discussed above, the Second Amended Complaint does not state an actionable TILA claim against Tranex, but does against ValCar. Thus the court will address the Defendants' first argument only as it relates to Tranex.

While Tranex's motion and supporting briefs do not elaborate on the argument, the court assumes that Tranex contends that the federal RICO Counts against it must be dismissed because there is no wrongful or fraudulent predicate act that could support a RICO claim, as evidenced by this court's dismissal of the Plaintiffs' TILA claims against Tranex. The problem with this argument is that it assumes that because the TILA claims were dismissed against Tranex, the Second Amended Complaint does not allege that Tranex committed a wrongful or fraudulent act. This is not the case. The TILA claims were dismissed solely because of the limiting provision in 15 U.S.C. § 1641(a), and that provision does not affect Tranex's potential liability under RICO. *See Hoffman v. Grossinger Motor Corp.*, No. 96 C 5362, 1997 WL 793316, at *12 (N.D. Ill. June 27, 1997) (magistrate report and recommendation) ("The Truth in Lending Act

claim against [the assignee] was dismissed only because of the Act's technical provision regarding assignee liability, not because [the assignee] satisfied the Act's disclosure requirements. . . . This argument [that the dismissal of TILA claims means the RICO claims should also be dismissed,] is insufficient to warrant dismissal of the RICO Counts."); *cf. Emery v. American General Finance, Inc.*, 71 F.3d 1343, 1347-48 (7th Cir. 1995) (stating that merely because a lender could not be held liable under TILA for encouraging borrowers to refinance their loans by means of fraudulent nondisclosures or misrepresentations did not protect the lender from RICO liability based on predicate acts of mail fraud).

The Plaintiffs allege that the practice of including "hidden finance charges" in the purchase prices of ValCar's vehicles constitutes predicate racketeering activity of mail fraud and wire fraud under 18 U.S.C. §§ 1341, 1343.[7] (Second Am. Compl. ¶ 72.) The Second Amended Complaint is unclear as to under which RICO subsection it is seeking to hold Tranex liable: 1962(c) or 1962(d). Giving the Plaintiffs the benefit of the doubt, the court will consider the claim under both subsections. To state a claim under § 1962(c), the Plaintiffs must allege that Tranex "participated in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185

[7] The Second Amended Complaint alleges predicate acts involving only mailings and not wire transmissions, so the court focuses solely on the mail fraud statute.

(1993). Under § 1962(d),[8] the Plaintiffs must allege that Tranex agreed to violate 1962(c) (or any of RICO's substantive provisions). *See MCM Partners*, 62 F.3d at 979.

While the Second Amended Complaint is hardly a model of clarity, it does manage to state a federal RICO claim against Tranex under both § 1962(c) and (d). The Second Amended Complaint alleges that "Tranex *devised, approved and implemented* a scheme or artifice to inflate the price of cars to hide part of the finance charge, which results in misrepresentation of the finance charge and the annual percentage rate." (Second Am. Compl. ¶ 71) (emphasis added). This allegation seems to envision both 'participation in the operation and management of the enterprise' as well as 'agreement' that ValCar adopt a fraudulent pricing scheme on behalf of the enterprise. The next issue is whether there are any facts alleged which tend to support the conclusory allegation in Paragraph 71. *See Schiffels v. Kemper Financial Services*, 978 F.2d 344, 352 (7th Cir. 1992) ("Conclusory allegations of 'conspiracy' are not sufficient to state a claim under § 1962(d); rather, [plaintiff] must allege facts from which one can infer each defendant's agreement to violate § 1962(c)."). ValCar and Tranex are alleged to be very closely related. The founder, owner and secretary of Tranex is also the secretary of ValCar; and ValCar's president and registered agent is the president and registered agent of Tranex. (Second Am. Compl. ¶¶ 12-13.) ValCar

---

[8] Section 1962(d) makes it unlawful for "any person to conspire to violate" section 1962(a), (b), or (c). 18 U.S.C. § 1962(d). 1962(d) is not a substantive RICO offense; it simply makes it illegal to conspire, or agree, to violate any of the preceding sections of the statute. *See MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 979 (7th Cir. 1995).

employees are paid with checks drawn on a Tranex account, and Tranex supplies the forms and procedures for credit approval to ValCar. (*Id.* ¶¶ 8, 10.) Given the closeness between the two corporations, and the magnitude of the "discount" Tranex retains in its transactions with ValCar, the Second Amended Complaint "adequately invites" the court to assume that Tranex either agreed that ValCar would raise its purchase price for credit customers or actively participated in the management or operation of the alleged plan. *See Emery*, 71 F.3d at 1347.

2. RICO Enterprise

The Defendants also contend that the federal RICO claims fail because the Taylors have not alleged a valid RICO enterprise. A RICO complaint must identify the enterprise. *See Richmond*, 52 F.3d at 645. An enterprise may be a legal entity, such as a corporation, or an association in fact. *See* 18 U.S.C. § 1961(4). An "association in fact" enterprise is defined by statute as a "union or group of individuals associated in fact although not a legal entity." *Id.* The Supreme Court has described it as "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981). The Seventh Circuit has characterized an enterprise as "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." *Richmond*, 52 F.3d at 644. The enterprise must have "a structure and goals separate from the predicate acts themselves." *Id.* RICO plaintiffs must also allege that a "'person' associated with the enterprise conducted or

participated, 'directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.'" *Id.* at 646 (quoting 18 U.S.C. § 1962(c)). The "person" "must be separate and distinct from the enterprise." *Id.*

The Second Amended Complaint identifies four enterprises: "[a]n association in fact consisting of Tranex and ValCar"; "[a]n association in fact consisting of Tranex and the dealers with which it signed agreements providing for the acquisition of retail installment contracts"; ValCar; and Tranex. (Second Am. Compl. ¶¶ 69, 86, 103.)

The Defendants first claim that "the 'persons' who allegedly violated RICO comprise all or part of the alleged 'enterprises,' and thus the persons or enterprises are not separate and distinct." (Br. Supp. Mot. Dismiss at 14; *see also* Defs.' Reply Br. Supp. Mot. Dismiss at 14.) They cite as support for their argument *Shelton v. Bank One, Indianapolis, N.A.*, No. IP-95-0780-C-M/S (S.D. Ind. May 14, 1996).

The court in *Shelton* applied the "separateness test" established in *Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago*, 747 F.2d 384, 401-02 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). In *Haroco*, the court found that under § 1962(c), "the 'enterprise' and the 'person' must be distinct." *Id.* (holding that a corporate subsidiary that had conducted the affairs of its parent corporation could be found liable under § 1962(c)). The court also said: "[i]n the association in fact situation, each participant in the enterprise may be a 'person' liable under RICO." *Id.* at 401. A year after *Haroco*, the court stated: "[t]he only important thing is that [the enterprise] be

either formally (as when there is incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual." *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985).

More recently, the Seventh Circuit has further clarified and somewhat tightened its separateness requirement. In *Richmond*, the Court endorsed the analysis employed by the Third and Second Circuits in *Brittingham v. Mobil Corp.*, 943 F.2d 297, 302 (3rd Cir. 1991) (requiring that the enterprise be "more than an association of individuals or entities conducting the normal affairs of a defendant corporation," and holding that association in fact of Mobil Corporation, Mobil Chemical Company (a subsidiary of Mobil Corporation) and their advertising and marketing agencies was not separate enough from the persons, Mobil Corporation and Mobil Chemical Company), and *Riverwoods Chappaqua v. Marine Midland Bank*, 30 F.3d 339, 343-44 (2nd Cir. 1994) (stating that "where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation," and holding that the RICO claim failed because an association in fact made up of a bank and two loan officers employed by the bank (the "enterprise"), was not distinct from the bank itself (the "person")). The court in *Richmond* found that the plaintiff had not stated a § 1962(c) claim where there was no showing that the RICO persons, a group of affiliated companies who had allegedly engaged in a forced

insurance scheme, had conducted the affairs of the enterprise, rather than their own affairs. *See Richmond*, 52 F.3d at 647.

The separateness requirement was again addressed in *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997), and *Emery v. American General Finance, Inc.*, 134 F.3d 1321 (7th Cir. 1998). In *Fitzgerald*, the complaint alleged that the Chrysler Corporation had sold consumers of its motor vehicles extended warranties providing protection that Chrysler had secretly planned not to provide, so when a consumer would bring his car to a Chrysler dealer for repairs, and later sought reimbursement from Chrysler, Chrysler refused to pay. *See Fitzgerald*, 116 F.3d at 226. The Court held that the plaintiffs' RICO claim failed the separateness requirement when it alleged that Chrysler was the RICO person and the "Chrysler family," consisting of subsidiaries of Chrysler, plus its dealers, constituted the RICO enterprise. *See Id.* Similarly, in *Emery*, the plaintiffs' RICO complaint failed the separateness requirement when it named a corporation, a subsidiary, and several corporate officers and employees as defendants, and alleged that the enterprise was the corporate group, while the persons were the corporation and the individual defendants. *See Emery*, 134 F.3d at 1324.

In all of the above separateness cases, there was effectively no distinction between the enterprise and person, because in each case the corporate RICO "person" was acting through its affiliates, exercising power inherent in its status as parent. Thus the "enterprise" that consisted of the corporation and its affiliates was, for all practical purposes, indistinguishable from the single corporate "person."

But while these recent cases have arguably tightened the separateness test, in the present case, the Plaintiffs' stated "enterprises" still pass the test, at least to the extent challenged by a motion to dismiss. In Count III, the person is Tranex, and the alleged enterprises are "[a]n association in fact consisting of Tranex and ValCar" and "[a]n association in fact consisting of Tranex and the dealers with which it signed agreements providing for the acquisition of retail installment contracts." (Second Am. Compl. ¶¶ 68-69.) In Count IV, the person is ValCar and the two alleged enterprises are the same as in Count III.[9] (*Id.* ¶¶ 85-86.) The fact that ValCar and Tranex are alleged to be persons in different counts is acceptable under the reasoning of *Haroco*: "[i]n the association in fact situation, each participant in the enterprise may be a 'person' liable under RICO." 747 F.2d at 401. The key inquiry is whether the "person" in each Count is separate and distinct from the enterprise alleged in that Count: "The only important thing is that [the enterprise] be either formally . . . or practically . . . separable from the individual." *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985); *see also Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2nd Cir. 1995), *cert. denied* 516 U.S. 1114 (1996) ("While Schnabolk was an officer or agent of each corporation, each was an independent entity. . . . [T]he defendants together constitute

---

[9] Tranex and ValCar are listed as separate "enterprises" only in Count V. That Count lists the "persons" as the Mr. Levine, Mr. Congdon, Mr. Mogle, and Mr. Gullet. The Defendants do not make a separate attack on the sufficiency of Tranex and ValCar as enterprises in this Count. It is well established that when the enterprise is a corporation and the person is someone managing it, the entities can be separate and distinct. *See, e.g., United States v. Robinson*, 8 F.3d 398, 407 (7th Cir. 1993) (holding that president and controlling shareholder of the corporation-enterprise was a separate and distinct entity from that enterprise).

an enterprise that, while consisting of no more than those three RICO persons, is distinct from each of them.").

Tranex and ValCar are alleged to be closely linked, but not so much so that they could be considered essentially the same entity for RICO purposes. *Cf. Emery*, 134 F.3d at 1324; *Fitzgerald*, 116 F.3d at 226. The two entities are separately incorporated and perform very distinct functions in the automobile industry. ValCar acquires and sells the used cars while Tranex buys the contracts of ValCar customers who choose to buy on credit. Each also plays a separate and distinct role in the alleged enterprise. ValCar allegedly raises its prices for credit purchasers and Tranex collects the allegedly inflated payments. At least at the motion to dismiss stage, the Plaintiffs have adequately alleged that the two corporations are distinct enough to satisfy the separateness requirement.

As stated above, the Defendants cite *Shelton* for the proposition that anytime a RICO "person" is also a part of the RICO "enterprise," the claim fails the separateness test. (Br. Supp. Defs.' Mot. Dismiss at 14-15.) Thus, they argue, since the Defendants make up at least a part of the alleged enterprises, the RICO claims fail the separateness test. However, in the *Shelton* passage quoted in the Defendants' Brief, the *Shelton* court cites and relies upon only one case, *Haroco*, 747 F.2d at 401-02. *See Shelton*, No. IP-95-0780-C-M/S, slip op. at 15-16. To the extent the *Shelton* district court opinion diverges from the Seventh Circuit *Haroco* opinion, this court is bound to follow *Haroco*. Thus, while perhaps *Shelton* supports the Defendants' argument that no

"person" may be a part of an "enterprise," *Haroco* clearly refutes that proposition, and this court will follow *Haroco*. *See Haroco*, 747 F.2d at 401 ("In the association in fact situation, each participant in the enterprise may be a 'person' liable under RICO.").

The Defendants also contend that there are no "facts alleged to show 'an ongoing "structure" of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.'" (Br. Supp. Defs.' Mot. Dismiss at 14.) (quoting *Richmond*, 52 F.3d at 644). The Defendants also argue that there are no facts indicating "that a structure existed through which the [defendants] worked their purpose." *Id.* (quoting *Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. 1990)).

Despite the Defendants' assertions, from the Second Amended Complaint it is reasonable to infer a structured relationship in which ValCar supplies customers with cars, financed through Tranex. Tranex has formal relationships with ValCar and other automobile dealers, in which the dealers sell RICs to Tranex and Tranex supplies the dealers with the forms, credit approval criteria, and procedures for submitting transactions for approval. (Second Am. Compl. ¶ 8.) Tranex's financing relationship with the dealers provides an incentive for the dealers to commit the TILA violations alleged in the Second Amended Complaint. (*Id.* ¶¶ 29-30.) This type of ongoing relationship may provide the necessary structure for a RICO enterprise. *See Taylor v. Bob O'Connor Ford, Inc.*, No. 97 C 0720, 1998 WL 177689, at *17 (N.D. Ill., Apr. 13, 1998) (stating that a RICO enterprise was sufficiently structured when the complaint

alleged a "relationship in which Bob O'Connor Ford supplies customers with financing obtained from Pullman [Bank & Trust]"); *Hastings v. Fidelity Mortg. Decisions Corp.*, 984 F. Supp. 600, 610 (N.D. Ill., Oct. 15, 1997) (holding that the business relationship between a mortgage broker and a mortgage lender possessed the necessary structure for a RICO enterprise).

3. Rule 9(b)

The Defendants contend that the Second Amended Complaint fails to plead fraud with the particularity required by Rule 9(b). (Defs.' Reply Br. Supp. Mot. Dismiss at 15-16.) Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). In RICO claims based on mail or wire fraud, "the plaintiff must, within reason, describe the time, place, and content of the mail and wire communications, and it must identify the parties to these communications." *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994). The mailings "need not be fraudulent on its face in order to constitute an act of mail or wire fraud; even innocuous communications can qualify for this purpose so long as they are incident to an essential part of the scheme." *Id.* at 1330. However, the complaint must allege facts from which it reasonably may be inferred that the defendants engaged in the scheme with fraudulent intent. *See id.* at 1328. Also, the complaint must identify which defendant was responsible for the individual acts of fraud. *See id.*

The Defendants contend that the Plaintiffs do not "detail (a) the time, place and content of any acts of mail or wire fraud, (b) facts from which a fraudulent intent could be inferred, or (c) allegations distinguishing among the defendants to explain how each could be responsible for individual acts of fraud." (Defs.' Reply Br. Supp. Mot. Dismiss at 16.)

The Second Amended Complaint lists three different types of mailings that were allegedly made in furtherance of the scheme to defraud:

> a. Borrowers were invited to and did in fact make their unnecessarily expensive payments by mail. . . .
>
> b. Coupon books, which defendant Tranex requires borrowers to use in order to make their payments, were sent to borrowers by United States mail shortly after the dates of these installment contracts.
>
> c. Immediately after each sale to plaintiffs and class members, a title application and vehicle registration were mailed to the Indiana Bureau of Motor Vehicles. This was necessary to complete the sales transactions and obligate the consumer to pay the hidden finance charges.

(Second Am. Compl. ¶¶ 73, 90, 107.) These allegations are somewhat flawed, but not to such a degree as to require dismissal at this early stage in the proceedings. For example, the timing of the mailings is not specified by date, but by making reference to the specific dates each RIC was signed and the specific payment schedule listed in each RIC (alleged earlier in the Second Amended Complaint and incorporated by reference in the RICO Counts), the court and the Defendants can determine with a some degree of particularity when the mailings were sent. Likewise, the content of the mailings is either specified in the allegations or the content relates to the installment

payments, the amount of which can be determined by reference to the particular RICs attached to the Second Amended Complaint. With regard to allegations relating to the fraudulent purpose, this clearly is a situation where "innocuous communications can qualify for this purpose so long as they are incident to an essential part of the scheme." *Jepson*, 34 F.3d at 1330. Thus the fraudulent intent need not be inferred from the communications themselves, but instead may be inferred from the Plaintiffs' allegations concerning the TILA violations. And the factual allegations relating to the TILA violations (the alleged fraud) delineate with some particularity the role each Defendant played in the overall scheme. ValCar allegedly charged a higher purchase price in credit transactions than in comparable cash transactions. (Second Am. Compl. ¶ 32.) Tranex supplied the forms and the credit procedures that enabled ValCar to implement the scheme. (*Id.* ¶ 34.) Finally, key employees of both companies allegedly formulated the scheme. (Id. ¶¶ 12-15.) Thus, liberally construed, the Second Amended Complaint sufficiently alleges fraud, and the federal RICO claims survive a motion to dismiss.

However, the Second Amended Complaint does contain numerous weaknesses: some of the Plaintiffs' TILA theories are not sufficient to state a claim; the subsections of 18 U.S.C. § 1962 under which the RICO claims are brought are not specified; and the allegations of fraud only narrowly pass the Rule 9(b) standard. Cognizant of the fact that the Plaintiff may not be able to plead with greater particularity without conducting some discovery, the court will allow discovery to proceed from the date of

this Entry.[10] However, the Defendants and the court should not be placed in the position of having to guess at the precise nature of the Plaintiffs' allegations. Therefore, the court will require the Plaintiffs to submit a third amended complaint within one hundred twenty days from the date of this Entry. In that complaint, the Plaintiffs should, within the bounds of Rule 11 of the *Federal Rules of Civil Procedure*, focus their claims on the one viable TILA theory stated in the Second Amended Complaint, namely, that ValCar charged different purchase prices for comparable vehicles depending upon whether the customer paid with cash or on credit. And in light of that sole viable TILA theory, the allegations in the third amended complaint should clarify the federal RICO claims, specifying with particularity the allegations of fraudulent conduct performed by each Defendant, as well as stating under which subsection(s) of 18 U.S.C. § 1962 the claims are brought.

Of course, the filing of a third amended complaint may invite another motion to dismiss by some or all of the Defendants if the new complaint is not more specific than the present one. The court presumes, though, that the issues determined by this Entry (such as the dismissal of the TILA claims against Tranex) will not be revisited in the next amended complaint.

---

[10] Discovery has been stayed pending ruling on the Defendants' motion to dismiss.

C. Magnuson-Moss Claims

The Defendants first contend that because the Plaintiffs have failed to state a TILA or federal RICO claim, the court lacks jurisdiction over the Plaintiffs' Magnuson-Moss claims. The Court need not address this argument any further, since the court has found that the Plaintiffs do state TILA and federal RICO claims. The Plaintiffs' federal claims under those two statutes allow the court to exercise supplemental jurisdiction over the Plaintiffs' Magnuson-Moss claims.

Tranex also contends that the Magnuson-Moss Act does not apply to it because Tranex is not a "warrantor" within the meaning of the Act. The Magnuson-Moss Act allows for the maintenance of a civil action for damages by "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under [the Magnuson-Moss Act]." 15 U.S.C. § 2310(d)(1). The Magnuson-Moss Act further provides: "only the warrantor actually making a written affirmation of fact, promise or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced . . . only against such warrantor and no other person." 15 U.S.C. § 2310(f).

In the present case, Tranex contends that the Second Amended Complaint states no allegations which would suggest that Tranex, as an assignee, issued any written affirmation of fact, promise or undertaking so as to be deemed a warrantor subject to a civil action by the Plaintiffs under the Magnuson-Moss Act. Tranex's

contention is correct, and indeed, the Plaintiffs do not dispute it. Instead, the Plaintiffs respond that the "holder notice" in the RICs makes assignees liable for all claims that could be brought against the seller, and thus the Second Amended Complaint states Magnuson-Moss claims against Tranex.

The issue here is virtually identical to the issue discussed earlier of Tranex's liability for ValCar's alleged TILA violations. In that discussion, the controlling case was *Taylor v. Quality Hyundai, Inc.*, Nos. 96-3658, 97-1208, 1998 WL 401494 (7th Cir. July 20, 1998). In *Taylor*, the Seventh Circuit held that the statutory language of TILA limits the reach of the "holder notice" with respect to assignee liability. *Id.* at *3 (citing *Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir. 1994) ("Regulations cannot trump the plain language of statutes. . . .")). The same reasoning applies to this issue. The Magnuson-Moss Act very clearly and specifically limits who may be liable under the Act. *See* 15 U.S.C. § 2310(f). The "holder notice," which was required to be in the retail installment contracts pursuant to FTC regulations, should not be construed to trump the plain language of the Magnuson-Moss Act. *See Lindsey v. Ed Johnson Oldsmobile, Inc.*, No. 95-C-7306, 1996 WL 411336, at *2 (N.D. Ill. July 19, 1996), *aff'd on reconsideration*, 1996 WL 529417 (Sept. 13, 1996) ("We simply do not believe that the FTC Rule was intended to be . . . inflated to such a degree so as to render meaningless the desired scope of liability delineated by consumer statutes."). Therefore, Tranex is not subject to liability for the Plaintiffs' claims under the Magnuson-Moss Act, and Counts XII, XIV and XV should be dismissed with respect to Tranex only.

D. State Law Claims

The Defendants contend that because all of the Plaintiffs' federal law claims should be dismissed, their state law claims should also be dismissed. As discussed above, most of the Plaintiffs' federal claims still survive, and thus the court continues to exercise supplemental jurisdiction over the state law claims.

III. Conclusion

Because the Second Amended Complaint alleges that ValCar charges a higher purchase price in credit transactions than it charges in comparable cash transactions, the Plaintiffs do state a valid TILA claim against ValCar. But because TILA specifically excludes assignees from liability unless the violation is apparent on the face of the disclosure statement, the Second Amended Complaint fails to state a TILA claim against Tranex. Thus, with respect to Counts I and II (the TILA Counts), the Defendants' motion to dismiss will be **GRANTED** with respect to Tranex and **DENIED** with respect to all other Defendants.

The Plaintiffs' federal RICO claims allege an appropriate RICO enterprise and plead mail fraud against each Defendant with adequate particularity. Thus the Defendants' motion to dismiss is **DENIED** with respect to the federal RICO claim, Counts III, IV and V.

Because Tranex does not qualify as a "warrantor" under the Magnuson-Moss Act, the Plaintiffs fail to state a Magnuson-Moss claim against Tranex. Therefore the Defendants' motion to dismiss Counts XII, XIV and XV of the Second Amended Complaint will be **GRANTED** with respect to Tranex. With respect to all other Defendants, the motion to dismiss Counts XII, XIV and XV is **DENIED**.

Because the Plaintiffs state federal law claims against the Defendants, the motion to dismiss the state law claims, Counts VI, VII, VIII, IX, X, XI and XIII, is **DENIED**.

The Plaintiffs are **REQUIRED** to submit a **THIRD AMENDED COMPLAINT** within **ONE HUNDRED TWENTY (120) DAYS** from the date of this Entry, and the Defendants will be permitted to file a motion to dismiss the third amended complaint if they in good faith deem it warranted. Discovery shall recommence immediately.

No judgment or final order will be issued at this time because of the pendency of the remaining claims.

ALL OF WHICH IS ORDERED this 11th day of August 1998.

John Daniel Tinder, Judge
United States District Court

Copies to:

Daniel A. Edelman
Edelman & Combs
135 S. Lasalle Street, Suite 2040
Chicago, IL 60603

Steven R. Hofer
Consumer Law Office of Steven Hofer
4475 Allisonville Road, Suite 200
Indianapolis, IN 46205

David K. Herzog
Baker & Daniels
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204

Todd J. Kaiser
Locke Reynolds Boyd & Weisell
201 North Illinois Street
Suite 1000
Indianapolis, IN 46204

Donald G. Orzeske
McMains Goodin & Orzeske P.C.
20 North Meridian Street
Suite 7000
Indianapolis, IN 46204