

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

McFADDEN, LYON & ROUSE, L.L.C.

Plaintiff,

vs.

CASE NO. CV-03 002072
HYT

AVAYA FINANCIAL CORP.,

Defendant.

COMPLAINT

Plaintiff McFADDEN, LYON & ROUSE, L.L.C. individually and on behalf of all other persons and entities similarly situated, bring this Class Action Complaint against the Defendant and alleges as follows:

THE PARTIES

1. Plaintiff McFADDEN, LYON & ROUSE, L.L.C. is an Alabama limited liability company doing business in Mobile, County, Alabama. Plaintiff in its individual and representative capacity, brings this case against Defendant Avaya Financial Corp. to recover excessive insurance charges improperly and wrongfully imposed by the Defendant.

2. Defendant Avaya originates and/or receives an assignment of leases between office equipment dealers and their customers, and is responsible for the imposition of the insurance charges under said leases.

FACTUAL ALLEGATIONS

3. In the normal course and scope of its business, and pursuant to substantially uniform agreements with its customers, Avaya on its behalf, and/or on behalf of the lessors for

which it services leases, imposes insurance charges for a class of equipment lease customers. The leases uniformly allow Avaya to force place insurance if the lessee fails to provide proof of insurance. The insurance charges imposed on Plaintiff and the Class as a whole exceed the customary cost of insurance, and any cost associated with procuring the same as provided for under the contract of lease with the Plaintiff and the Class. The program by which the charges were imposed included a system which paid substantial fees back to Avaya.

4. In obtaining insurance for its customers, Defendant Avaya is under the duty to obtain on behalf of its customers the most appropriate and best rate and coverage available to them, having assumed the duty to insure said property. Further, the selection of insurance and the imposition of the insurance charge is governed by the covenant of good faith and fair dealing. Defendant Avaya breached its duty to Plaintiff, and to the Class as a whole, by failing to discharge its duty to provide only appropriate and applicable insurance coverage, and to obtain coverage at a good faith rate for its customers, and to otherwise select insurance coverage in good faith.

5. Defendants Avaya impose upon their customers unreasonable, unnecessary, improper and excessive charges. Defendant's uniform practice of charging excessive and unreasonable charges for the placement of insurance is intended to generate increased profits for the Defendant at the expense of its customers. This practice and course of conduct is not disclosed in or authorized by the terms of the leases with the Class, including the Plaintiff. Moreover, Defendant intentionally conceals and fails to disclose the insurance practices from the Class, including the Plaintiff.

6. Plaintiff entered into a lease agreement which is substantially the same agreement used by other customers of Avaya which does not disclose or authorize the insurance charge practices as described above. As such, the Plaintiff has been charged for insurance charges which they did not agree to, and acted upon by their detriment by executing the lease agreements and becoming obligated under the same.

CLASS ACTION ALLEGATIONS

7. Plaintiffs bring this action as a class action individually and on behalf of all other customers of Avaya who are similarly situated. The proposed class which Plaintiff seeks to represent is defined as follows:

All persons and entities who have or have had a lease agreement serviced by Avaya, and who incurred insurance charges within six years of the filing of this complaint (the "Class").

8. Excluded from the Class are the Defendants, any subsidiaries and any affiliated entities; any entity in which any of them has a controlling interest; any employees, officers, or directors of any of them, and any of their legal representatives, heirs, successors and assigns; and Plaintiffs' class counsel.

9. This action may properly be maintained as a class action pursuant to Rule 23 of the Alabama Rules of Civil Procedure.

10. The members of the Class are so numerous that joinder of the individual claims is impractical. There are thousands of Customers who have incurred these insurance charges. The precise number of Class members and their addresses are presently unknown to the Plaintiffs, but

can be easily obtained from Defendant Avaya's files, records and data bases. Class members can be notified of the pendency of this action by mailed notice.

11. Common questions of law and fact exist as to all members of the Class. These questions predominate over questions affecting only individual Class members. These common legal and factual questions include, but are not limited to:

- (a) whether Defendant Avaya failed to disclose and/or suppressed from its Customers the existence and nature of its practice of forcing excessive insurance charges to increase its revenues;
- (c) whether Defendant Avaya had a duty of good faith and fair dealing concerning this forced insurance practice to its customers and whether it breached that duty;
- (d) the nature and amount of compensatory and punitive damages;
- (e) whether Defendant Avaya should be required to disgorge the benefit it has obtained from its wrongful conduct.

12. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff and each member of the Class has incurred forced, improper, insurance charges, which practice was suppressed and concealed from Customers by Defendant Avaya. Plaintiff and each member of the Class has sustained monetary damages resulting from Defendant's forced insurance practices.

13. Plaintiff is an adequate representative of the Class because (a) its interests do not conflict with the interests of the individual members of the Class it seeks to represent; (b) it has retained counsel who are competent and experienced in complex class action litigation; and (c) it

intends to prosecute this action vigorously. The interests of the members of the Class will be fairly and adequately protected by Plaintiff and its counsel.

14. The class action device is superior to other available means for the fair and efficient adjudication of the claims of the Plaintiff and the Class. Absent a class action, most members of the Class would find the cost of litigating their claims to be prohibitive and would not have an effective remedy at law. Because of the size of the individual Class members' claims, few could afford to seek legal redress for the wrongs alleged herein. Without a class action, the Class members will continue to suffer losses and Defendant's violations of the law will have occurred and will continue without remedy. Hence, class treatment is the only method by which all of the Class members' common claims can be economically and expeditiously adjudicated in one proceeding, thus precluding the possibility of multiple trials and inconsistent judgments.

COUNT ONE

Breach of Contract

15. Plaintiff, individually and on behalf of all others similarly situated realleges each and every allegation above as if fully set forth in this cause of action.

16. Defendant Avaya has substantially uniform agreements or contracts with Class members, including Plaintiff, and has breached the contract with each and every Class member, including Plaintiff, by assessing excessive and improper insurance charges. Defendant is not authorized under the terms of its agreements with the Plaintiff and Class members to force and impose said excessive charges, and Defendants failed to disclose adequately its practice to the Plaintiff and Class members. The program by which the charges were placed was designed in

such a way that Defendant's obligation of good faith and fair dealing was violated to the detriment of the class.

17. As a proximate result of said breach by Defendant, the named Plaintiff and the Class members have suffered injuries consisting of improperly assessed insurance charges and other consequential damages.

WHEREFORE, Plaintiff individually and as a member of the Class and on behalf of all Class members, demands judgment against Defendant Avaya and seeks general compensatory damages in excess of the jurisdictional limits of this Court, plus interest and costs, but in all events less than \$75,000.00 per class member.

COUNT TWO

Fraudulent Suppression

18. Plaintiff, individually and on behalf of all others similarly situated, realleges each and every allegation above as if fully set forth in this cause of action.

19. Defendant fraudulently concealed from and/or failed to disclose to Plaintiff and the Class its practice of imposing additional and excessive insurance charges.

20. Defendant was under a duty to Plaintiff and the Class to disclose its practices because (a) Defendant was in a superior position to know the true state of the facts; (b) Defendant made uniform incomplete and misleading disclosures about its practices to Plaintiff and the Class; and (c) Defendant fraudulently and actively concealed its practices from Plaintiff and the Class.

21. The facts concealed and/or not disclosed by Defendant to Plaintiff and the Class are material facts in that a reasonable person would have considered each of these facts to be

Important in deciding whether to open or to maintain an account with Defendants and in accepting as justified and paying the imposed charges.

22. Defendant intentionally concealed and/or failed to disclose the true nature of its practices for the purpose of inducing Plaintiff and the Class members to open and maintain lease accounts with Defendant, and Plaintiff and the Class justifiably acted or relied upon to their detriment the concealed and/or nondisclosed facts as evidenced by their opening and maintaining of accounts with Defendant and their acceptance of insurance charges as justified and their payment of the same.

23. As a proximate result of Defendant's misconduct, Plaintiff and the Class have suffered actual damages in that they have incurred excessive insurance charges.

WHEREFORE, Plaintiff, individually and on behalf of all other Class members, demands judgment against Defendant and seeks general compensatory and punitive damages in excess of the jurisdictional limits of this Court, but in all events less than \$75,000.00 per class member.

OLEN, NICHOLAS & COPELAND P.C.
Attorneys for Plaintiff
Post Office Box 1826
Mobile, AL 36633
251-438-6957

STEVEN L. NICHOLAS
(NIC012)

STATE OF MOBILE CO.
CLERK OF DISTRICT COURT
2003 JUN 11 P 4:50
CLERK CIRCUIT COURT

PLAINTIFF RESPECTFULLY REQUEST
A TRIAL BY JURY.

STEVEN L. NICHOLAS