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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

WILL BALLEW, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

VW CREDIT, Inc.,

Defendant.

Case No. 9:15-cv-00133-M-DLC

**DEFENDANT VW CREDIT,
INC.'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING
ORDER AND/OR
PRELIMINARY INJUNCTION**

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I. INTRODUCTION

Over the last thirty days, more than 400 class actions have been filed against Volkswagen AG, Audi AG, Volkswagen Group of America (collectively the “Manufacturer”) and/or VW Credit, Inc. (“VCI”) arising from reports that the Manufacturer installed “defeat devices” in certain diesel light-duty vehicles from 2009 through 2015 (collectively, the “VW Class Actions”). These actions seek a wide range of relief, including damages, injunctions, rescission, restitution, and/or repair. Not surprisingly, this avalanche of litigation has given rise to a Multidistrict Litigation Proceeding, with the expectation that the VW Class Actions will be coordinated to ensure consistency of results.¹

Notwithstanding the foregoing, Plaintiff Will Ballew, on behalf of himself and an unknown number of absent class members, asks this Court to enjoin VCI from collecting monthly payments from its customers for the duration of this lawsuit. Plaintiff alleges no misconduct on the part of VCI. Nevertheless, Plaintiff seeks this relief against VCI alone under the mistaken assertion that without an injunction, Plaintiff and the putative class will be forced to choose between waiving their right to rescind their contracts and ratifying the Manufacturer’s

¹ There are three separate motions pending before the Multidistrict Litigation panel seeking centralization of over sixty actions in a single federal district for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re: Volkswagen “Clean” Diesel Liability Litig.*, MDL No. 2672 (J.P.M.L. Sept. 23, 2015) (Doc. 26). The motions are scheduled to be heard on December 3, 2015. *Id.*

alleged fraud if they make their payments, or facing derogatory marks on their credit if they do not. Plaintiff's proposed solution to this artificial quandary is to dramatically disrupt the status quo by preventing VCI from accepting payments from, and accurately reporting credit information as to, potentially thousands of consumers without regard for whether they desire this result.

As demonstrated below, Plaintiff simply cannot meet the burden necessary to certify a class nor can the Court issue an injunction as to putative class members. Injunctive relief is "particularly disfavored" by the courts and should not be granted unless extreme or very serious harm will result from the denial of the injunction. *Munaf v. Green*, 553 U.S. 674 (2008); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). Here, the Court must deny Plaintiff's Motion because he utterly fails to meet his burden to establish that the "extraordinary and drastic remedy" of injunctive relief is appropriate. *Id.*

Plaintiff cannot meet any of the elements necessary to warrant injunctive relief. Plaintiff cannot show irreparable harm because there is no risk he is waiving any rights by continuing to make payments. Indeed, VCI will represent to this Court that it will not assert that argument. Next, Plaintiff cannot show any likelihood of success on the merits of his claim. Simply stated, Plaintiff's rescission claim is entirely premised on a misapplication of the Federal Trade

Commission's ("FTC") "Holder Rule", which permits a consumer to hold the assignee of a financing contract liable for the acts of the *seller* of the goods or services that are the subject of that contract (the "Holder Rule"). Plaintiff seeks to hold VCI liable for the acts of the Manufacturer, not the seller from who he purchased the subject vehicle. Accordingly, Plaintiff's rescission claim must fail.

Likewise, Plaintiff cannot establish that the balance of hardships tip in his favor. Not only will VCI be harmed, but a substantial risk exists that absent class members, who have had no say in Plaintiff's choice of relief, would also experience great harm if an injunction issues. Just a few examples of the potential harm include the obvious financial harm to VCI if monthly loan payments are not made, and harm to putative class members who wish to continue to make payments for their own independent reasons, including retaining their car or maintaining credit history. Because of the drastic risk of harm to both VCI and absent class members, Plaintiff cannot show any hardships which warrant issuance of an injunction. Plaintiff is in no position to decide what is best for class members in this regard.

In short, Plaintiff fails to meet his high burden to demonstrate *his* entitlement to the extraordinary relief he seeks, much less demonstrate that this relief is warranted on a class-wide basis. In light of Plaintiff's categorical failure to meet his burden, the Court must deny the Motion.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Allegations And Motion For Preliminary Injunction

On August 26, 2015, Plaintiff purchased a new Volkswagen Golf Wagon TDI (the "Vehicle") from Missoula Volkswagen in Missoula, MT. Declaration of William Ballew ("Ballew Decl."), ¶ 2. To finance the purchase, Plaintiff executed a retail installment sale contract ("RISC") with Missoula Volkswagen, which provides the terms of the financing. Missoula Volkswagen subsequently assigned the RISC to VCI. Declaration of Hans Bremmer ("Bremmer Decl."), ¶ 5, Exh. A. By executing the RISC, Plaintiff agreed to make payments pursuant to the terms of the schedule outlined in the contract:

You, the Buyer (and Co-Buyer, if any) may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreement on the front and back of this contract. You agree to pay the Seller-Creditor (sometimes "we" or "us" in this contract) the Amount Financed and Finance Charge in U.S. funds according to the payment schedule below.

Id. The RISC defines the Seller-Creditor as "Missoula Volkswagen." *Id.* Plaintiff subsequently was obligated to pay VCI upon Missoula Volkswagen's assignment of the RISC.

On September 18, 2015, Plaintiff alleges that the U.S. Environmental Protection Agency (the "EPA") sent the Manufacturer a Notice of Violation informing the Manufacturer that the EPA had determined that the Manufacturer had developed and installed "defeat devices" in certain vehicles from 2009 through

2015 (hereinafter, “TDI Vehicles”). Compl. ¶ 4. Plaintiff further alleges that on September 24, 2015, he learned through various news sources that the Vehicle is included within the TDI Vehicles. Ballew Decl., ¶¶ 6-7.

Based on this information, Plaintiff filed this action against VCI, seeking (1) rescission of financing contracts for the purchase or lease of TDI Vehicles, (2) restitution of all amounts paid on such contracts, and (3) to enjoin VCI from furnishing any negative reports to the credit agencies for delinquent payments on said financing contracts. *See generally* Compl. Although Plaintiff’s class definition is inconsistent with the allegations in his Complaint, he apparently seeks to certify a class of “all consumers who purchased [a TDI Vehicle] and financed the purchase through [VCI],” including subclasses of consumers who have “paid off the full purchase price” and those who continue making payments. Motion for Class Certification (Doc. 8), at 3.

On the same day, Plaintiff filed a motion for a temporary restraining order.² ECF 3. Plaintiff seeks to “enjoin VW Credit from collecting or accepting monthly installment credit payments from Plaintiff and class members, who all seek rescission.” Motion, at 4-5. If the Court so enjoins VCI, Plaintiff also seeks “to

² On October 22, 2015, Plaintiff, without establishing any urgency, filed an ex parte motion for class certification requesting that it be heard on the same day as the preliminary injunction, November 19, 2015. ECF 7, 8. On October 30, 2015, VCI filed a Motion to extend the hearing and briefing schedule on Plaintiff’s motion for certification. ECF 14-15.

prohibit VW Credit from any negative credit reporting for class members” who do not make their payments. *Id.* In the alternative, Plaintiff seeks an order that “prohibits [VCI] from asserting any affirmative defense that Plaintiff and the class ratified [the Manufacturer’s] fraud or failed to act promptly when seeking rescission by virtue of continuing to make monthly installment payments.” *Id.* at 5.

B. The MDL And VCI’s Pending Motion To Stay

There are over 400 VW Class Actions seeking economic loss and/or seeking injunctive relief as a result of alleged manufacturing defects in TDI Vehicles. At least three actions, excluding this one, name VCI.³ The plaintiffs in many of the VW Class Actions have moved the Judicial Panel on Multidistrict Litigation (“JPML”) to consolidate all of the VW Class Actions and transfer them to a single United States District Court on grounds that consolidation will promote efficiency and consistency, and preserve the resources of the judiciary and the interested parties. On November 2, 2015, VCI filed a Notice of Related Action in the MDL which advised the JPML of VCI’s desire for inclusion in the MDL. VCI has also filed a Motion to Stay this action pending a decision on the MDL. Dkt. 17. On December 3, 2015, the JPML will decide where to transfer the consolidated VW Class Actions. *See In re: Volkswagen “Clean” Diesel Liability Litig.*, MDL No.

³ *Stone v. VW Credit Inc.*, 1:15-cv-00686 (S.D. Ohio Oct. 20, 2015); *Bond v. Volkswagen Group of Am., Inc.*, 2:15-cv-13818-GER-APP (E.D. Mich. Oct. 28, 2015); *Sims v. Volkswagen Group of Am., Inc.*, 3:15-cv-05692-RBL (W.D. Wash. Sept. 25, 2015).

2672 (Doc. 691) (J.P.M.L. Oct. 21, 2015). There is little doubt the Panel will establish an MDL for the VW Class Actions; the JPML has routinely established MDL proceedings in response to cases filed in the wake of automotive recalls or to address alleged misrepresentations by auto manufacturers.⁴ Also, in many VW Class Actions, courts have already granted stays pending the outcome of the JPML hearing on consolidation. *See, e.g., D'Angelo v. Volkswagen Group of Am., Inc.*, 2:15-cv-07390-DOC (C.D. Cal. Oct. 28, 2015); *see also* VCI's Motion to Stay, ECF 14-15.

III. LEGAL ARGUMENT

Plaintiff's effort to obtain an injunction fails for three primary reasons. First, Plaintiff is seeking injunctive relief on a class-wide basis. This premature request, however, is contrary to precedent and impermissible because this Court does not have jurisdiction over absent class members until a class is certified. Second, Plaintiff is seeking a class-wide injunction, yet Plaintiff has failed to meet his burden to establish that class treatment is warranted in this case. Finally, Plaintiff cannot meet the very high bar to obtain injunctive relief because he cannot establish any of the necessary elements.

⁴ *See, e.g., In re Ford Fusion & C-Max Fuel Econ. Litig.*, 949 F. Supp. 2d 1368 (J.P.M.L. 2013); *In re Hyundai & Kia Fuel Econ Litig.*, 923 F. Supp. 2d 1364 (J.P.M.L. 2013).

A. Plaintiff’s Motion Must Be Denied Because The Court Cannot Enter A Class-Wide Injunction Prior to Class Certification

As an initial matter, because a class has not yet been certified, class-wide injunctive relief is improper. *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) (before a class is certified “the injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs”). A federal court may not issue an injunction on behalf of individuals not before the court. *Id.* In relevant part, an injunction binds only “the parties to the action.” Fed. R. Civ. P. Rule 65(d)(2). The district court must, therefore, tailor the injunction to affect only those persons over which it has jurisdiction. *See Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 481 (1978); *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976) (dicta) (“The District Court treated the suit as a class action . . . but did not certify the action as a class action within the contemplation of [Rules] 23(c)(1) and 23(c)(3). Without such certification and identification of the class, the action is not properly a class action.”); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974) (injunctive relief inappropriate before court determined class treatment proper).

Here, the Court cannot grant injunctive relief as to putative class members because they are *not parties to this matter* unless the Court certifies a class. *See*

Davis, 490 F.2d at 1366. Accordingly, because the class issues have not been resolved, Plaintiff's Motion is premature and must be denied in its entirety.

B. Plaintiff Cannot Certify A Class Action

As explained further in VCI's forthcoming opposition to Plaintiff's Motion for Class Certification, Plaintiff faces numerous insurmountable defects that preclude certification. For starters, as this matter was filed less than a month ago, VCI has not even had an opportunity to respond to the Complaint. Notwithstanding the nascent stage of this litigation, Plaintiff has improperly attempted to fast-track this action thereby foreclosing an opportunity to conduct discovery as to Plaintiff's individual allegations or other class-wide issues that will affect the certification analysis.

Moreover, Plaintiff fails to establish the prerequisites for certification under Fed. R. Civ. P. Rule 23(a) or (b)(3). As an initial matter, Plaintiff cannot overcome the antagonism between himself and absent class members that is inherent in his claim for rescission. *See, e.g., Morris v. Wachovia Sec.*, 223 F.R.D. 284, 298-99 (E.D. Va. 2004) (finding potential conflict between plaintiff's interest in rescission, and class member's interest in continued relationship, to be fundamental and defeated adequacy); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 209 F.R.D. 134, 142 (W.D. Mich. 2002) (named plaintiffs' "claims for rescission are antagonistic to the interests of other putative class members."). Nor can Plaintiff

identify common questions susceptible to class-wide resolution or that such questions predominate. Plaintiff has proposed no commonality with regard to the crucial question common to the proposed putative class—whether every consumer wants, or is entitled to, rescission and restitution. Indeed, Plaintiff fails to explain how the Court can adjudicate a highly individualized claim like rescission on a class-wide basis. In an analogous context—claims for rescission sought pursuant to the Truth in Lending Act (“TILA”)—courts appear to have unanimously held that rescission under TILA is not available on a class-wide basis. *See, e.g., In re Community Bank of N. Va.*, 622 F.3d 275, 308 (3d Cir. 2010) (noting that “other circuit courts that have addressed the issue are unanimous that a claim for rescission under TILA cannot be maintained on a class-wide basis.”); *see also Amparan v. Plaza Home Mortg.*, 678 F. Supp. 2d 961, 979 (N.D. Cal. 2008) (“Courts are in uniform agreement that rescission may not be sought on a class-wide basis.”) (collecting cases). “The variations in the transactional ‘unwinding’ process that may arise from one rescission to the next make it an extremely poor fit for the class-action mechanism.” *Andrews v. Chevy Chase*, 545 F.3d 570, 574 (7th Cir. 2008); *see McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421, 423 (1st Cir. 2007) (reasoning that “[t]he rescission process is intended to be private, with the creditor and debtor working out the logistics of a given rescission,” and concluding that “Congress did not intend rescission suits to

receive class action treatment”). Similar to rescission under TILA, rescission in this context is highly individualized and incompatible with the sensible deployment of the class-action mechanism, such that an individual inquiry is necessary to determine which, if any, putative class members are entitled to, and desirous of, rescission. *Feske v. MHC Thousand Trails Ltd. P’ship*, 2013 WL 1120816, at *16 (N.D. Cal. Mar. 18, 2013) (“Determining which class members want rescission and which class members are entitled to rescission if they already have terminated their contracts are questions that must be dealt with on a class-member-by-class member basis...[T]he necessity of those inquiries [also] reveal that common questions do not “predominate” as required for certification under Rule 23(b)(3).”).

These defects, among others, addressed in full in VCI’s Opposition to Plaintiff’s Motion for Class Certification, preclude certification of Plaintiff’s class and further demonstrate that a class-wide injunction is inappropriate.

C. Plaintiff Has Not Established He Is Entitled to Injunctive Relief

A preliminary injunction preserves the status quo and prevents irreparable loss of rights before entry of judgment. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). It is an “extraordinary and drastic remedy” that “is never awarded as of right.” *Munaf*, 553 U.S. at 674.

A plaintiff seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to plaintiff in the absence of preliminary relief; (3) the balance of equities tips in plaintiff's favor; and (4) an injunction is in the public interest. *Winter v. Nat'l Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (reiterating four-factor test in *Winter*). In broad terms, this test requires the plaintiff to demonstrate "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Cottrell*, 632 F.3d at 1135.

Here, Plaintiff requests injunctive relief to (1) allow all persons who purchased TDI Vehicles to keep those vehicles and to stop making their loan payments to VCI, and (2) to enjoin VCI "from reporting any derogatory or negative credit information as a result of the payment stoppages." Motion for TRO (Doc. 3), at 2. Plaintiff's application must be held to the highest level of scrutiny, a burden which he cannot meet.

1. Plaintiff Has Not Established That He Is Likely To Succeed On The Merits Of His Claims

Plaintiff's rescission and restitution claim rests on the theory that the alleged fraud of the Manufacturer is a basis to rescind his contract with VCI, apparently pursuant to the Holder Rule codified at 16 C.F.R. § 433.2. Motion, at 6-12.

Specifically, Plaintiff argues that “under the common law, as well as pursuant to the Unfair and Deceptive Acts and Practices Act (UDAP), consumers have the right to rescind contracts induced by the fraudulent representations made by the seller and/or by the underlying illegal nature of the contracts.” Motion, at 7. He goes on to acknowledge that the remedy of rescission is generally available where one party to a contract materially breaches that contract. *Id.* at 7. Yet, Plaintiff is not alleging that VCI, the assignee of the RISC, materially breached the contract or is the “wrongdoer” trying to collect payments. Instead, Plaintiff relies exclusively on the Holder Rule to support his claim that the Manufacturer’s purported fraud subjects VCI to a rescission claim. *Id.* As explained below, he is incorrect.

a. Plaintiff Misapplies The Holder Rule

The Holder rule is intended to prevent the assignment of a sales contract from “cutting-off” the consumer’s claims and defenses against the **seller** and by permitting them to be asserted against the holder of the consumer credit contract. 16 C.F.R. § 433.2; Fed. Trade Comm’n, Statement of Basis and Purpose, Trade Regulation Rule Concerning the Preservation of Consumers’ Claims and Defenses (“FTC Statement of Purpose”), 40 Fed. Reg. 53 (Nov. 18, 1975). The FTC defines a “seller” as a person who, in the ordinary course of business, sells or leases goods or services to consumers. *See* 16 C.F.R. § 433.1. The statutory language of the Holder Rule **does not contemplate** application of the rule to a manufacturer.

Here, Plaintiff seeks to apply a claim he has against the Manufacturer of the Vehicle, who is **not the seller**, to VCI. There is no dispute that Plaintiff purchased the Vehicle from Missoula Volkswagen. *See* Ballew Decl. ¶ 2; Bremmer Decl. ¶ 5, Exh. A. Thus, Missoula Volkswagen is the seller, as the Holder Rule defines that term. Indeed, Plaintiff concedes in his Motion that the Holder Rule applies to the seller, and not the manufacturer,⁵ and points to no authority in which the Rule has been applied to permit a plaintiff to bring claims stemming from a manufacturer's alleged wrongdoing against the assignee of the contract. Moreover, Plaintiff does not allege any wrongdoing as to VCI,⁶ nor could he, as VCI had nothing to do with Plaintiff's purchase, the manufacturing of the Vehicle, or purported representations regarding the Vehicle's conformance with emissions standards. In fact, there is not a single allegation that VCI, itself, engaged in any actual misconduct. Contrary to Plaintiff's assertions, VCI does not "step into" the shoes of the Manufacturer simply because it is a subsidiary thereof, and Plaintiff identifies no viable legal basis under which liability can be imputed to VCI.

⁵ *See, e.g.*, Motion at 8 ("To accomplish rescission, upon discovery of fraud, consumers must return the product, and the **seller** must return the purchase price." (emph. added)), 9 ("consumers have the same rights and remedies against the credit company **as against the seller.**" (emph. added)), 10 ("The FTC Rule preserves the consumer's rights to assert against the creditor any legally sufficient claim or defense against the seller.").

⁶ VCI is not a lender and does not make loans. VCI provides financing for a consumer's collateral, as an indirect financial source. As such, VCI purchases retail installment contracts from dealers. Plaintiff entered into the retail installment contract with the dealer, which contract was subsequently assigned to VCI.

b. Plaintiff Is Unlikely To Prevail On His Complaint

Even if Plaintiff could apply the Holder Rule to VCI based on the actions of the Manufacturer, which he cannot, his rescission claim still fails. Plaintiff's Complaint appears to seek as remedies rescission and restitution based on the acts of the Manufacturer, but it is unclear under what legal basis Plaintiff asserts entitlement to such remedies. Although he argues that consumers have the right to seek rescission "under the common law, as well as pursuant to the Unfair and Deceptive Acts and Practices Act (UDAP)," he fails to specify which laws govern this action. Motion, at 7; Compl. ¶ 24. His reference to the common law and UDAP is vague and subject to multiple interpretations, leaving VCI to guess to what legal or factual theory Plaintiff intends to pursue.

The inherent ambiguity in Plaintiff's reliance on the "common law" is compounded by his attempt to seek rescission on behalf of a nationwide class, all of whom are subject to state's differing common laws. Thus, not only does Plaintiff fail to adequately allege under what law he seeks rescission himself, he provides absolutely no clarity as to how the Court could proceed in adjudicating a nation-wide class. This failure alone is fatal to Plaintiff's individual and class claim.

Under any common law analysis, however, rescission necessarily requires tender. "Tender is inherently part of rescission, not an occasional effect of it."

Iroanyah v. Bank of Am., 753 F.3d 686, 692 (7th Cir. 2014). Here, Plaintiff does not make a proper offer of tender because he seeks the benefits of rescission before he tenders—he seeks to indefinitely enjoin payment while continuing to use the Vehicle. To accomplish rescission, however, the rescinding party must “restore to the other party everything of value which he has received.”⁷ Mont. Code Ann. § 28-2-1713.

Plaintiff’s offer to “restore” to VCI everything which he has received under the contract is conditional in nature, and not a true tender offer. Specifically, the Complaint states that “[w]hen Plaintiff and the class members tender or surrender their Violating Vehicles back to VW, as may be required in order to preserve their rescission claims, they will be in need of substitute vehicles and credit to purchase or lease substitute vehicles.” Compl. ¶ 27. Plaintiff makes a similar assertion in the Motion: that he and the class “stand ready to surrender immediately their vehicles in exchange for the purchase price and restitution,” though he qualifies this assertion by stating that “this cannot be done until VW Credit agrees or is ordered to make Plaintiff and the class whole, as they need transportation.” Motion, at 13. In short, Plaintiff seeks to enjoin VCI from collecting his payments, while he continues to drive the Vehicle which serves as collateral for

⁷ VCI assumes here that Plaintiff intends to seek rescission under Mont. Code Ann. § 28-2-1711 to 1713, but the vague references to “the common law” in the Complaint make any such assumption imprecise to say the least. Compl. ¶ 24.

the loan. Plaintiff cites to no authority that suggests he can suspend his payments, yet keep and continue to use the Vehicle indefinitely. Plaintiff cannot have it both ways.

2. Plaintiff Will Not Suffer Any Irreparable Injury

“[A] party seeking injunctive relief must make ‘a clear showing’ that it is at risk of irreparable harm.” *Winter*, 55 U.S. at 22. A “possibility” of irreparable harm is not sufficient. *Id.* (issuing preliminary injunction based only on possibility of irreparable harm is inconsistent with characterization of injunctive relief as extraordinary remedy to be awarded only upon clear showing of entitlement). The harm also must be imminent. *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 674 (1988) (“plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief.”). “The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Id.* Plaintiff’s injunctive relief request falters in light of these principles.

Plaintiff’s entire theory rests on the argument that he and the class “must stop making their payments to preserve their remedy of rescission,” and that “[l]oss of the right of rescission by reason of making payment for fear of one’s credit record is irreparable.” *See* Motion, at 14, 16. This argument is quickly dispatched.

First, VCI is prepared to assure the Court that VCI will not assert the fact of continued payments under TDI financing contracts assigned to VCI, alone, as a defense to or waiver of any claims such VCI customers might have against VCI relating to the TDI Vehicles, in this action or any other action relating to alleged misconduct of the Manufacturer as to these TDI Vehicles. As such, Plaintiff will not lose the right of rescission by reason of making payments, as VCI agrees not to make that argument. Thus, no irreparable harm exists.

Second, Plaintiff and the class need not obtain injunctive relief to prevent waiver of their rescission claim because he has filed this lawsuit. A plaintiff preserves his right to assert rescission by “announcing his purpose” to rescind the contract, and initiating litigation is one such way to preserve a rescission claim. *See, e.g., Beebe v. James*, 91 Mont. 403 (1932). Other actions also have been deemed sufficient to preserve a rescission claim. For example, a plaintiff has acted diligently in preserving his claim by sending a letter to the creditor informing the creditor of his intention to rescind. *Ragen v. Weston*, 191 Mont. 546, 552 (1981) (rescission sufficiently prompt where plaintiff delivered written notice detailing grounds for rescission within three days of payment).

Although Plaintiff argues that the right to rescission may be waived if the injured party “retains the benefits of the contract or fails to promptly seek rescission,” the authority he cites for that proposition is contrary to that concern.

See Motion, at 13; e.g., *Berry v. Romain*, 194 Mont. 400, 405 (1981) (appellant did not take issue with diligence of respondent/rescinding party because “respondent took prompt and speedy action in filing his case”); *Carter v. People Answers, Inc.*, 312 S.W.3d 308, 312 (Tex. Ct. App. 2010) (filing suit sufficient to preserve right to rescind). Here, Plaintiff filed a class action suit *less than three weeks* after learning that VW allegedly installed “defeat devices” in certain diesel vehicles. See Ballew Decl. ¶ 6. VCI does not dispute that Plaintiff acted diligently in filing suit and putting VCI on notice of his claims.

Plaintiff’s allegations also do not entitle him to “unilaterally suspend” his performance based on alleged misrepresentations regarding the Vehicles’ emissions standards. Such misrepresentations are not a “material breach” of the RISC. More to the point, ongoing payments and retention of the car allows Plaintiff to avoid irreparable harm because he can be compensated for any potential loss. As a result, the question of unilateral rescission does nothing to further Plaintiff’s argument that he will suffer irreparable harm by continuing to make payments. Further, from a merits perspective, Plaintiff cannot show any likelihood of success on that argument. See *Norwood v. Serv. Distrib. Inc.*, 297 Mont. 473, ¶ 29; see also *R.C. Hobbs Enter. v. J.G.L. Distrib.*, 325 Mont. 277, 285 (“In determining remedies for breach of contract, Montana distinguishes between ‘material’ breaches, which entitle the non-breaching party to terminate the

contract, and ‘incidental’ breaches, which only entitle the non-breaching party to sue for damages”).

The party claiming a material breach must show the deficient performance on the part of the other party is, in fact, material to the contract. *Norwood*, 297 Mont. ¶ 33. Here, Plaintiff does not demonstrate that the fundamental purpose of the contract has been defeated. That inquiry is inherently fact intensive, requiring determination of the purpose of the contract and the purported materiality of the alleged breach. Therefore, the “unilateral rescission” argument misses the mark at this phase of the litigation.

Third, even if Plaintiff’s assertions were viable, he does not meet his burden of demonstrating that “adequate compensatory or other corrective relief” is not available to him “in the ordinary course of litigation.” *See Los Angeles Memorial Coliseum Commission v. Nat’l Football League*, 634 F.2d 1197, 1202 (1980). Stated differently, Plaintiff fails to explain how he and the putative class cannot obtain compensatory or corrective relief—here, rescission and restitution—by simply litigating his claims to conclusion. Without more, there is no basis for Plaintiff to seek injunctive relief.

Similarly, the assertion that “[r]uined or damaged credit is irreparable harm” also fails. As an initial matter, if Plaintiff elects to stop making payments absent permission to do so, the harm is self-created and could be avoided through by

continued payments throughout the litigation. Further, even if Plaintiff stopped making payments and incurred derogatory credit reporting, compensatory damages could be available to Plaintiff under the Fair Credit Reporting Act (“FCRA”). Indeed, the only damages available under the FCRA are monetary statutory damages because the FCRA **does not provide** for injunctive relief. 15 U.S.C. § 1681n; *Ramirez v. MGM Mirage, Inc.*, 524 F. Supp. 2d 1226, 1236 (D. Nev. 2007) (acknowledging accepted holding that “private litigant may not pursue injunctive relief under the FCRA.”). In short, a plaintiff may not pursue equitable relief against furnishers of credit related to their role in furnishing credit information. *See Yasin v. Equifax Info. Servs.*, 2008 WL 2782704, at *4 (N.D. Cal. July 16, 2008). Here, Plaintiff’s assertion that negative credit reporting is irreparable harm is expressly contradicted by the relief available under the FCRA and bars the equitable relief Plaintiff seeks here.

In sum, Plaintiff does not meet his burden of demonstrating that he will suffer “irreparable harm” if he continues to make his loan payments.

3. Neither The Balance Of Hardships, Nor The Public Interest, Favors Relief

“Before a preliminary injunction may issue, the court must identify the harm that a preliminary injunction might cause the defendant and weigh it against plaintiff’s threatened injury.” *See Hon. William Schwarzer, Calif. Practice Guide*

– *Federal Civil Procedure Before Trial* § 13:72 (The Rutter Group 2011). “[T]he real issue...is the degree of harm that will be suffered by the plaintiff or the defendant if the injunction is *improperly* granted or denied.” *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002). Where the harm likely to be suffered by defendant substantially outweighs any injury threatened by defendant’s conduct, plaintiff must make a *stronger showing of likely success* on the merits. *See Coffee Dan’s, Inc. v. Coffee Don’s Charcoal Broiler*, 305 F. Supp. 1210, 1216 (N.D. Cal. 1969).

Here, Plaintiff does not meet his burden of establishing the balance of harms tips in his favor, and in fact it is VCI (and potential members of the putative class) who will suffer significant, demonstrable harm if an injunction is entered. The fundamental purpose of a preliminary injunction is to “preserve[] the status quo and prevent[] irreparable loss of rights before entry of judgment. *Sierra On-Line, Inc.*, 739 F.2d at 1422. If the Court orders the relief Plaintiff seeks—authorizing tens of thousands of borrowers to immediately stop making their loan payments—it will only serve to drastically **disrupt** the status quo, not preserve it. Enjoining VCI from collecting these payments until this action is resolved would result in obvious harm to VCI’s business operations. *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54 (E.D. La. 1978) (recognizing risk mass-rescission of contracts could have on solvency of credit institution).

Moreover, enjoining VCI from any “negative” credit reporting in connection with missed payments could be tantamount to ordering VCI to inaccurately report in violation of the FCRA. The FCRA prohibits furnishers from reporting information to a consumer reporting agency if the furnisher “knows or has reasonable cause to believe that the information is inaccurate.” 15 U.S.C. §1681s-2(a)(1)(A). Like much of Plaintiff’s Motion and Complaint, it is unclear exactly how Plaintiff envisions VCI implementing the credit reporting relief he seeks. Plaintiff requests that VCI be enjoined from “negatively” reporting missed payments, but he does not explain how VCI could achieve that outcome, what VCI would report, and whether what is reported constitutes accurate reporting in compliance with the FCRA. These issues highlight the inherent difficulties in implementing a blanket injunction of this nature.

While the risk of harm to VCI is significant, Plaintiff cannot demonstrate that any actual harm will result from maintaining the status quo. As explained above, Plaintiff and the class are not required to stop making payments to preserve their claim, and thus there is no risk of negative credit reporting. Thus, Plaintiff cannot demonstrate that he or the class will suffer any hardship if the Court denies the Motion.

More importantly, the injunction also has the potential to significantly prejudice members of the putative class. Plaintiff presupposes that all class

members want to enjoin payments and halt credit reporting. However, there are numerous reasons why customers might want to keep paying and maintain corresponding credit reporting. For example, customers may want to continue building credit; they may not want to be a party to a lawsuit against, or rescind their contract with, VCI; or they may decide to avail themselves of potential remedies through the VW Class Actions. Whatever the case, Plaintiff's relief improperly strips other class members of the decision of how best to proceed.

The issue of tender adds an additional level of complexity to the proposed injunction. For instance, although Plaintiff contends he and the class will tender their vehicles, Plaintiff cannot actually make this assurance on behalf others. If payment is enjoined while the litigation is pending, that necessarily requires the Court to order the return of tens of thousands of vehicles. Again, Plaintiff cannot make this decision for the class.

Granting Plaintiff injunctive relief also does nothing to further the greater public good. *Winter*, 555 U.S. at 24 (court must “pay particular regard for the public consequences in employing the extraordinary remedy of injunction”). Plaintiff attempts to satisfy the public-interest requirement by referencing the policy rationale behind the Holder Rule. *See* Motion, at 18. But “[t]he public interest inquiry primarily addresses impact on non-parties rather than parties,” *Bernhardt v. L.A. County*, 339 F.3d 920, 931 (9th Cir. 2003), and Plaintiff has not

identified any harm at all to non-parties to the suit. Nor does Plaintiff's request for rescission "outweigh" the public interests on the other side.

In fact, the public interests against issuing an injunction in this case are considerable. As explained above, Plaintiff's injunctive relief creates a scenario where potentially tens of thousands of VCI customers will be driving vehicles without paying for them. This scenario establishes a harmful precedent that ultimately does not benefit either the borrowers or the auto finance industry. An injunction would also disrupt the outcome in the other pending matters and the process of aggregating the VW Class Actions in the pending MDL. The conduct that is the basis for the relief Plaintiff seeks here—the acts of the Manufacturer—is the identical conduct that is at issue in the other pending actions, and an order from the Court enjoining payments based on that conduct will affect the relief that may be provided in adjudicating those matters.

4. If An Injunction Issues, The Court Must Order That Plaintiffs And Every Putative Class Member Post A Bond

Plaintiff's injunctive request wholly fails to address the requirement that Plaintiff and the putative class members pay a bond if an injunction is issued. Fed. R. Civ. P. Rule 65(c) (court must require "movant give[] security in an amount... proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained"). Here, if an injunction issues, the Court must

require Plaintiff and putative class members to pay a bond that represents the potential costs and damages to VCI—an amount equal to the monthly payments owed by Plaintiff and the class under their respective RISCs, as well as any administrative costs and expenses incurred by VCI in complying with the Court’s order.

IV. CONCLUSION

For all of these reasons, VCI requests that the Court deny Plaintiff’s Motion for Preliminary Injunction.

DATED this 5th Day of November 2015.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: /s/ Mark D. Etchart

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DATED this 5th Day of November 2015

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief in support of a motion is 6,139 words, excluding the caption, signature blocks, and certificate of compliance.

/s/ Mark D. Etchart

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 5th day of November, 2015:

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