

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF SOUTH CAROLINA
 COLUMBIA DIVISION

Michael Virzi and Natasha A. Brenchak,)
 individually and on behalf of all others)
 similarly situated,)
)
 Plaintiffs,)
)
 -vs-)
)
 First Citizens Bank of South Carolina, a)
 wholly owned subsidiary of First Citizens)
 Bancshares, Inc.,)
)
 Defendant.)

**NOTICE OF REMOVAL TO THE
 UNITED STATES DISTRICT COURT**

C.A. No. 3:18-2902-TLW

PLEASE TAKE NOTICE that on this date Defendant First-Citizens Bank & Trust Company, a wholly owned subsidiary of First Citizens Bancshares, Inc. (incorrectly identified as First Citizens Bank of South Carolina, a wholly owned subsidiary of First Citizens Bancshares, Inc.) (“First Citizens”) hereby gives notice of the removal of this action from the Richland County Court of Common Pleas, pursuant to 28 U.S.C. §§ 1441 and 1446. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1332, and 1367. In support of its notice of removal, First Citizens states as follows:

PROCEDURAL BACKGROUND

1. On or about September 26, 2018, Plaintiffs Michael Virzi and Natasha A. Brenchak, individually and on behalf of all other similarly situated, filed this action in the South Carolina Court of Common Pleas, Richland County, Civil Action 2018-CP-40-05022 (the “State Action”) alleging claims for violations of 15 U.S.C. § 1681 (Compl. ¶ 45), 15 U.S. C. § 1691

(Compl. ¶ 53), 15 U.S.C. § 1601 (Compl. ¶ 60), and a claim for unjust enrichment (Compl. ¶ 65). All pleadings from the State Action are attached as **Exhibit A**.

2. First Citizens was served with the State Action on September 27, 2018.

3. Under 28 U.S.C. § 1446(b), this removal is timely because it is filed within thirty (30) days after First Citizens' receipt of the complaint, which was "the initial pleading setting forth the claim for relief upon which [the] action or proceeding is based...."

FEDERAL QUESTION

4. This Court has original jurisdiction over the subject matter of this action under the provisions of 28 U.S.C. § 1331, in that Plaintiffs have asserted claims under three (3) separate federal statutes.

5. This Court has supplemental jurisdiction over the remaining claim of Plaintiffs under the provisions of 28 U.S.C. § 1367, in that the cause of action asserting unjust enrichment is "so related to claims" within the original jurisdiction of this Court "that they form part of the same case or controversy...." Pursuant to 28 U.S.C. § 1441, First Citizens is entitled to remove the action to this Court.

DIVERSITY OF CITIZENSHIP

6. This Court has original jurisdiction over the subject matter of this action under the provisions of 28 U.S.C. § 1332, in that there is complete diversity between First Citizens and the named alleged class representative in this action, and there is more than \$75,000.00 in controversy, exclusive of interest and costs. Pursuant to 28 U.S.C. § 1441, First Citizens is entitled to remove the action to this Court.

7. The proper parties to this action are the named alleged class-action representatives, Michael Virzi and Natasha A. Brenchak, citizens of the State of South Carolina,

and Defendant First-Citizens Bank & Trust Company, a wholly owned subsidiary of First Citizens Bancshares, Inc.

8. Plaintiffs are citizens and residents of the State of South Carolina.

9. First Citizens is a wholly owned subsidiary of First Citizens Bancshares, Inc. a corporation organized under the Laws of North Carolina with its principal place of business in North Carolina.

10. Complete diversity exists between the parties because First Citizens is not a citizen of the State of South Carolina.

AMOUNT IN CONTROVERSY

11. The Plaintiffs' action is an action based on alleged violations of federal law and an equitable claim based on alleged unjust enrichment. Plaintiffs assert that they and members of an alleged class sustained actual and punitive damages based on the alleged actions of First Citizens, and Plaintiffs seek actual damages, statutory damages, punitive damages, interest, and attorney's fees and costs. (Pl. Compl.)

12. Plaintiffs allege to represent all persons "for whom Defendant opened one or more unwanted or unauthorized accounts in the State of South Carolina;" and "for whom Defendant created applications for without [sic] authorization and who were not 'approved' who a) had their credit accessed in violation of 1681b below, and/or b) did not receive an adverse action notice as required by ECOA, as described below." (Compl. ¶ 31).

- a. In the State Action, Plaintiffs seek punitive damages. For purposes of removal, punitive damages must be considered in determining the amount in controversy. *Thompson v. Victoria Fire & Cas. Co.*, 32 F. Supp. 2d 847, 849 (D.S.C. 1999) (holding amount in controversy exceeded \$75,000 when punitive damages were

considered in addition to the \$25,000 in actual damages sought by plaintiff) (citing *Bell v. Preferred Life Assurance Soc’y*, 320 U.S. 238, 240 (1943) (holding that punitive damages must be considered in determining the amount in controversy unless it can be said to a legal certainty that plaintiff cannot recover punitive damages)).

- b. In the State Action, Plaintiffs also seek to recover attorney’s fees citing specific federal statutes. For purposes of removal, attorney’s fees also should be considered to determine the amount in controversy. *Fidelity Nat’l Title Ins. Co. v. Hawkins*, 2016 WL 6962775, at *4 (D.S.C. Nov. 29, 2016) (“Attorneys’ fees are, however, to be considered when determining the jurisdictional amount when a plaintiff is entitled to recover them under a contract or statute.”).
- c. In the State Action, Plaintiffs seek to recover additional damages imposed by federal statute. (Compl. ¶¶ 53, 61).

13. Although the amount of Plaintiffs’ claims of actual damages are not specified in the Complaint, based on the allegations seeking actual damages, statutory damages, punitive damages, attorney’s fees for the named alleged class representatives, Defendant believes that for purposes of diversity jurisdiction, the amount in controversy exceeds \$75,000.00

OTHER REMOVAL REQUIREMENTS

14. Pursuant to 28 U.S.C. § 1446(d), a true and correct copy of this Notice of Removal will be filed with the Clerk of Court for the Fifth Judicial Circuit of the State of South Carolina, County of Richland, and will be served on Plaintiff.

15. Since being served with the State Action, First Citizens has not served an answer or other responsive pleading in, nor has it made an appearance before, the Court of Common Pleas for Richland County, South Carolina.

16. Based on the foregoing, First Citizens hereby removes this action now pending in the Fifth Judicial Circuit in the State of South Carolina, County of Richland, Case No. 2018-CP-40-05022.

WHEREFORE, First Citizens respectfully requests this Court accept this Notice, to cause this entire suit to be docketed in this Court, and that this Court proceed to the final determination of this suit.

s/ M. Kevin McCarrell
M. Kevin McCarrell (#10427)
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Attorneys for Defendant

October 26, 2018

Exhibit A

**NOTICE OF REMOVAL TO THE
UNITED STATES DISTRICT COURT**

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FIFTH JUDICIAL CIRCUIT

Michael Virzi and Natasha A. Brenchak,
individually and on behalf of all others
similarly situated,

Case No.

Plaintiff,

vs.

SUMMONS

First Citizens Bank of South Carolina, a
wholly owned subsidiary of First Citizens
Bancshares, Inc.,

Defendant.

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you and to serve a copy of your Answer to the said Complaint on the subscriber, David A. Maxfield, Esquire, at his office at P.O. Box 11865, Columbia, South Carolina 29211, within thirty (30) days after service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the court for the relief demanded in the Complaint. If you fail to appear and defend, judgment by default will be rendered against you for the relief demanded in the Complaint.

DAVE MAXFIELD, ATTORNEY, LLC

s/ Dave Maxfield

Dave Maxfield, Esq., SC Bar No. 7163
P.O. Box 11865
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(803) 509-6800
(855) 299-1656 (fax)
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DATED: September 26, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FIFTH JUDICIAL CIRCUIT

Michael Virzi and Natasha A. Brenchak, individually and on behalf of all other similarly situated,

Plaintiffs,

vs.

First Citizens Bank of South Carolina, a wholly owned subsidiary of First Citizens Bancshares, Inc.,

Defendant.

COMPLAINT – CLASS ACTION

(Jury Trial Requested)

Plaintiffs, complaining of the Defendant above-named, would show this Court :

JURISDICTION

1. Plaintiffs are citizens and residents of the County of Richland, State of South Carolina.
2. The Defendant First Citizens Bank of South Carolina is wholly-owned subsidiary of First Citizens Bancshares, Inc., organized under the laws of the State of North Carolina with its headquarters and “nerve center” in North Carolina.
3. Defendant transacts business and owns property in Richland County, South Carolina.
4. This Court has jurisdiction over the parties and subject matter of this action and venue is proper.

FACTUAL ALLEGATIONS

5. On or about April 24, 2018, Plaintiffs visited Defendants’ Forest Drive branch to obtain a mortgage pre-qualification letter and open a joint checking account.
6. While there, an employee of Defendant’s offered Plaintiffs (besides the accounts requested) an overdraft credit line. Plaintiffs rejected it.

7. Defendant's employee also attempted to get Plaintiffs to apply for credit cards. Again, Plaintiffs declined .
8. Defendant's employee then offered investments services. Plaintiffs rejected these as well.

Opening of Sham Accounts by First Citizens

9. Upon information and belief, on or about April 25, 2018 Defendant unlawfully accessed Plaintiffs' credit reports, and/or initiated a fraudulent credit application for some or all the declined financial products.
10. On or about April 30, 2018, Plaintiffs received letters in the mail from Defendant "confirming" the opening of:
 - a. a First Citizens Line of Credit in the amount of \$5,000;
 - b. a First Citizens credit card with a \$15,000 limit in the name of Virzi;
 - c. a First Citizens credit card with a \$15,000 limit in the name of Brenchak;
11. After discovering Defendant's initiation of \$35,000 in Sham Accounts, Plaintiffs returned to the branch to complain, and close their joint checking account to prevent further unauthorized activities by Defendant.
12. Defendant's employee (a different person than the one who previously "assisted" Plaintiffs) represented that the line of credit / overdraft account "was not fully opened yet," and stated that the credit cards would be canceled.
13. Defendant's employee further stated that none of the four unauthorized accounts would ever be reported on Plaintiffs' credit reports, and that they would receive a letter acknowledging that the accounts were opened without their authorization.
14. Defendant's employee further stated that no additional credit inquiries were made for the new accounts (and there was no "hard" credit pull apart from an April 24, 2018 inquiry for their mortgage pre-qualification).
15. All of these representations were misleading or false.

16. However, in a follow up call from the branch manager of the Forest Drive location, David Bernier, the same representations were repeated, as was the promise to provide Plaintiff's with letters stating that the account openings were unauthorized.
17. Being unable to trust Defendant, Plaintiffs also went elsewhere for a mortgage loan.

Defendant's False Credit Reporting and False Promises

18. Despite Defendant's assurances, the promised letters to the Plaintiffs never arrived.
19. After waiting nearly two months, Plaintiffs were contacted finally by Defendant's internal fraud investigator, Marie Breland.
20. Ms. Breland acknowledged that the accounts were not authorized by Plaintiffs, and assured Plaintiffs (for a third time) that they would "receive a letter" stating the above.
21. Again, for months, no such letter came.
22. On or about August 10, 2018 – now four months after the Sham Accounts were opened - Plaintiff Virzi was contacted by his new mortgage broker at Prime Lending, who questioned Plaintiffs' why their credit reports showed multiple First Citizens credit accounts opened within the last year.
23. Upon discovering that First Citizens had lied about not reporting the Sham Accounts, Plaintiffs reviewed their credit file and saw that, instead of deleting the accounts as unauthorized, First Citizens reported them as "closed by consumer."
24. On or about August 10, 2018 Plaintiff Virzi again called David Bernier to demand he advise Plaintiffs' mortgage lender that the reported accounts were unauthorized and would be deleted from Plaintiffs' credit file.
25. Plaintiff Virzi thereafter spoke with Defendant's Senior Vice President Coney Arnette, demanding that Defendant provide letters acknowledging the account openings were unauthorized, which Defendant's employee agreed he would do. However, the letters sent to Plaintiff and his mortgage lender omitted that the accounts were unauthorized entirely, stating only that Defendant would request their deletion from his credit file.

26. To date (while acknowledging verbally that the accounts were unauthorized) Defendant has failed and refused to put same in writing or, apparently, to address the larger issue of its Sham Account openings.
27. As a direct and proximate result of Defendant's wrongful acts, Plaintiffs have been damaged, including the misuse of their names and financial information, breach of their privacy, jeopardization of their home loan, damage to their credit, lost time, frustration, and emotional distress and worry, and other concrete injuries in fact.
28. As a direct and proximate result of Defendant negligent, reckless, willful, intentional, and unlawful conduct, its violations of the Plaintiffs' statutory rights under state and federal law Plaintiffs have been damaged in an amount to be determined by the trier of fact.
29. The harms caused by Defendant is likely to be redressed by a favorable judicial decision, and through both injunctive reliefs, an award of damages, and assessment of fines and punitive damages.

CLASS ALLEGATIONS

30. Plaintiffs incorporate each of the foregoing allegations as fully as if repeated verbatim.
31. Plaintiffs sue as a class action under Rule 23 of the South Carolina Rules of Civil Procedure, on behalf of themselves and all other similarly situated persons as members of classes initially defined as:
 - a. All persons for whom Defendant opened one or more unwanted or unauthorized accounts in the State of South Carolina; and
 - b. All person whom Defendants created applications for without authorization and who were not "approved" who a) had their credit accessed in violation of 1681b, below, and/or b) did not receive an adverse action notice as required by ECOA, as described below.
32. The class as defined above is so numerous that joinder of all members is impracticable.
33. Class members can be identified by records maintained by Defendant.

34. There are questions of law or fact common to the class. Common questions of law and fact include whether Defendant failed in its statutorily-imposed, common law, and other duties to prevent the disclosure of private account status, credit, and/or information, whether the Plaintiffs and the class members have suffered damages because of Defendant's negligent or wrongful actions or omissions; whether Defendant's actions violated federal or state law, and whether Plaintiffs and the class members are entitled to injunctive relief.
35. The claims or defenses of the representative parties are typical of the claims or defenses of the class. Plaintiffs' claims are typical of the claims of members of the Class because all suffered the same type of damages arising out of Defendant's wrongful conduct as described herein. Specifically, the claims of Plaintiffs and class members arise from Defendant's unauthorized application for credit.
36. The representative parties (one of whom is a licensed South Carolina attorney) will fairly and adequately protect the interests of the class. Consumer has retained counsel competent and experienced in class action lawsuits. Consumer has no interests antagonistic or in conflict with those of class members and therefore is an adequate representative for class members.
37. The damages in controversy for each member of the class exceeds \$100.00.

FIRST CAUSE OF ACTION

(Violation of FCRA, 15 USC §1681)

38. Plaintiffs reallege and incorporate the allegations contained elsewhere herein to the extent not inconsistent with the allegations of this Cause of Action.
39. Defendant is a user and furnisher of information as defined in the Fair Credit Reporting Act, as amended.
40. Each time Defendant opens or seeks to open a new credit card or loan account, it obtains, reviews, and uses a consumer report about the consumer for whom the account is opened, to assess creditworthiness.

41. Defendant agreed and represented in its subscriber agreements with the credit reporting agencies from which it obtains consumer credit reports that Defendant would obtain and use consumer reports procured from the agencies only for purposes lawful under the FCRA as defined under 15 U.S.C. § 1681b.
42. Defendant was required by 15 U.S.C. §§ 1681b, 1681n, and 1681q to refrain from obtaining or using consumer credit reports from CRAs under false pretenses, and without proper authorization from the consumer who is the subject of the report.
43. Defendant must follow reasonable procedures, including those that would prevent the impermissible accessing of consumer credit reports. 15 U.S.C. § 1681b(f).
44. Despite these clear and unambiguous requirements of the FCRA, Defendant regularly pulled the consumer credit reports regarding consumers without their knowledge or consent to open new credit card accounts as part of its sales practices, in violation of FCRA.
45. As a direct and proximate result of Defendant's negligent and willful violations of the FCRA, Plaintiffs and the putative class members have suffered and continue to suffer actual damages, including economic loss, invasion of privacy, emotional distress and interference with normal and usual activities, for which they seek damages in an amount to be determined by the jury. 15 U.S.C. §§1681n and 1681o.
46. Plaintiffs further request attorney fees under 15 U.S.C. §1681o(a).

SECOND CAUSE OF ACTION

(Violation of ECOA, 15 USC §1691)

47. Plaintiffs reallege and incorporate the allegations contained elsewhere herein to the extent not inconsistent with the allegations of this Cause of Action.
48. Defendant, a financial institution, regularly extends, renews, or continues credit, and/or arranges for the extension, renewal, or continuation of credit.

49. Under the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq., Defendant must provide an applicant with notice of action taken on the applicant's request for credit, whether favorable or adverse, within thirty days after receiving a completed application.
50. Defendant is further required to preserve all written or recorded information connected with an application for twenty-five months after the date on which Defendant informed the applicant of action taken on an application, or of incompleteness of an application.
51. Contrary to the above requirements, Defendant created fraudulent or shadow applications which it failed to preserve, and/or (if adverse action was taken) on which it failed to provide notice of same as required.
52. Upon information and belief Defendant has inadequate policies or procedures in place to comply with the ECOA's notice and record-keeping requirements.
53. Plaintiffs and the members of the class have suffered damages by Defendant's violations of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq., and are liable for actual damages, punitive damages of up to \$10,00.00 per Plaintiff and/or class member, in the total amount of \$500,000.00, and declaratory relief of the violations, injunctive relief prohibiting violative practices, and attorney's fees and costs. § 1691e.

THIRD CAUSE OF ACTION

(Violation of TILA, 15 USC §1601)

54. Plaintiffs reallege and incorporate the allegations contained elsewhere herein to the extent not inconsistent with the allegations of this Cause of Action.
55. Defendant was required, under the Truth in Lending Act, to give written disclosures on or with an application to open a credit or charge card account, or loan under 15 U.S.C. § 1638, Reg. Z § 226.5(a).
56. The disclosures had to be made in writing, in form that could be kept by the consumer at the time of the application.

57. Defendant, seeking to conceal its actions, failed to make the required disclosures in violation of the Act.
58. Defendant further gave false or inaccurate information, as prohibited by the Act. 15 U.S.C. § 1611.
59. Defendant committed multiple other violations of the Act by its failure to disclose to consumers they had “applied” for credit, by reason of the forgery of or unauthorized use of the Plaintiffs and similarly situated consumers’ names, and such other manners as shown at trial.
60. Defendants’ acts violate 15 U.S.C. § 1601 et seq. and the regulations promulgated therefor, including Regulation Z.
61. Defendants are liable to Plaintiffs twice the amount of any finance charge in connection with the transaction up to \$5,000, or such higher amount as may be appropriate with an established pattern or practice of such failures, and/or for Plaintiffs and putative class such amount as the court may allow up to and including \$1,000,000, plus attorney’s fees and costs. 15 U.S.C. § 1640.

FOR A FOURTH CAUSE OF ACTION

(Unjust Enrichment)

62. The allegations contained hereinabove are repeated as if fully alleged verbatim, to the extent not inconsistent with this cause of action.
63. Because of Defendants’ unlawful and deceptive actions described above, Defendants were enriched at the expense of Plaintiffs and the Class through the payment of fees, penalties, and other charges resulting from accounts, products, and services that Defendant unlawfully and/or deceptively sold to or opened for customers.
64. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits.

65. As a direct and proximate result of the wrongful acts and omissions of the Defendant, judgment should be granted to the Plaintiffs and the members of the class for both actual and punitive damages.

PRAYER FOR RELIEF

WHEREFORE, the prayer of the Plaintiffs, individually and for other similarly situated, request judgment as follows:

- A. For an Order certifying the Class and appointed Plaintiffs as representatives of the class, and the undersigned as counsel for the Class;
- B. Declaring Defendant's actions unlawful, false, misleading and deceptive;
- C. Enjoining Defendant from such acts in the future;
- D. For all recoverable actual damages, punitive damages, statutory damages, such interest as is allowable by law, costs, attorney's fees, including disgorgement of all monies wrongfully earned by Defendant;
- E. For such other relief as is just and proper.

DAVE MAXFIELD, ATTORNEY, LLC

By: s/ Dave Maxfield
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803-509-6800
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September 26, 2018

ELECTRONICALLY STORED INFORMATION REQUEST

This notice demands that you preserve all documents, tangible things and electronically stored information (“ESI”) potentially relevant to any issues in the above entitled matter. This specifically includes, but is not limited to, all information pertaining to the above matter, including specifically all credit applications relating to Plaintiffs, and all recordings of any telephone communication between your company and Plaintiffs.

As used in this request, “you” and “your” refers to your organization, and its predecessors, successors in interest, assignees, parents, subsidiaries, divisions or affiliates, and their respective officers, directors, employees, servants, agents, attorneys, and accountants.

Much of the information subject to disclosure or responsive to discovery is stored on your current and former computer systems and other media and devices (such as: personal digital assistants, voice-messaging systems, online repositories and cell phones).

Electronically stored information (hereinafter, “ESI”) should be afforded the broadest possible definition and includes (for example and not as an exclusive list) potentially relevant information whether electronically, magnetically or optically stored.

This preservation obligation extends beyond ESI in your care, possession or custody and includes ESI in the custody of others that is subject to your direction or control. You must notify any current or former agent, attorney, employee, custodian or contractor in possession of potentially relevant ESI to preserve such ESI to the full extent of your obligation to do so, and you must take reasonable steps to secure their compliance.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [First Citizens Bank Sued Over Allegedly Unauthorized 'Sham' Account Openings](#)
