

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

FEB 14 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
By: JAMES W. MCCORMACK, CLERK
DEP CLERK

FRENZETTA WILSON, BETINA INGRAM, RONNE DICKERSON, and DEVON BYRD, on behalf of themselves and all others similarly situated

Plaintiffs,

v.

SANTANDER CONSUMER USA, INC.,

Defendant.

Civil Action No. 4:20-cv-152-KGB

[Removed from the Circuit Court of Jefferson County, Arkansas, Case No. 35CV-20-43]

NOTICE OF REMOVAL

PLEASE TAKE NOTICE THAT, pursuant to 28 U.S.C. §§ 1332, 1453, and 1711-1715, Defendant Santander Consumer USA Inc. (“SC”) hereby removes this case from the Circuit Court of Jefferson County, Arkansas (the “State Court”) to the United States District Court for the Eastern District of Arkansas on the following grounds:

(1) ***CAFA Jurisdiction:*** This Court has original jurisdiction over this civil action pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §§ 1332(d), 1453, 1711-1715 because minimum diversity exists, the amount of controversy exceeds \$5 million, and the number of members of the proposed putative class in the aggregate is at least 100 class members.

In support of this Notice of Removal, SC states as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. On or about January 13, 2020, Plaintiffs Frenzetta Wilson, Betina Ingram, Ronnie Dickerson, and Devon Byrd (collectively “Plaintiffs”) filed their Class Action Complaint in Case No. 35CV-20-43, *Frenzetta Wilson, et al. v. Santander Consumer USA, Inc.*, in the Circuit Court of Jefferson County, Arkansas (the “State Court Action”). A copy of the Class Action Complaint is attached hereto as **Exhibit 1**.

This case assigned to District Judge Baker
and to Magistrate Judge Deere

2. On January 16, 2020, SC was served with summons and a copy of the Class Action Complaint in the State Court Action.

3. Plaintiffs are residents of Arkansas. Compl. at ¶¶ 11-12.

4. SC is an Illinois corporation headquartered in Dallas, Texas.

5. Plaintiffs assert claims against SC for violations of the Texas Debt Collections Act (“TDCA”). See Compl. at ¶¶ 5-7, 15-23, 49-58.

6. Plaintiffs seek monetary relief for “actual, compensatory, punitive, and treble damages in an amount to be determined at trial.” Compl., Prayer for Relief at 11. Plaintiffs further seek attorney’s fees and an order “enjoining Santander from collecting and attempting to collect Pay-to-Pay fees.” *Id.*

7. Plaintiffs seek to represent a putative class of “all persons in the United States who (1) have a car loan with Santander, (2) that provides Federal and Texas law apply to this contract, and (3) who paid a fee for making their loan payments online or over the phone.” *Id.* at ¶ 38.

8. Plaintiffs allege the proposed class “consists of thousands of members.” *Id.* at ¶ 41.

II. THE COURT HAS ORIGINAL SUBJECT MATTER JURISDICTION UNDER THE CLASS ACTION FAIRNESS ACT

9. Pursuant to 28 U.S.C. §§ 1332 and 1441, removal to this Court is proper under the Class Action Fairness Act (“CAFA”). Under CAFA, this Court has jurisdiction over class actions where: (1) there is minimal diversity (*i.e.*, the citizenship of at least one plaintiff is diverse from the citizenship of at least one defendant), 28 U.S.C. § 1332(d)(2); (2) there are at least 100 putative class members, 28 U.S.C. § 1332(d)(5)(B); (3) the amount in controversy based upon the class members’ aggregate claims exceeds \$5 million exclusive of interest and costs, 28 U.S.C. § 1332(d)(2); (4) the primary defendants are not states, state officials, or other governmental entities against whom the district court may be prevented from ordering relief, 28 U.S.C.

§ 1332(d)(5)(A); and (5) the 30-day deadline for removal is met, 28 U.S.C. § 1446(b). CAFA authorizes removal of such actions under 28 U.S.C. § 1446.

10. As required by 28 U.S.C. § 1441, Defendant seeks to remove this case to the United States District Court for the Eastern District of Arkansas, which is the District Court embracing the place where the State Court Action has been filed.

A. Minimal Diversity Exists

11. To satisfy CAFA's diversity requirement, a party seeking removal need only show that minimal diversity exists, that is, that one putative class member is a citizen of a state different from that of one defendant. 28 U.S.C. § 1332(d)(2).

12. For diversity purposes, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. 1332(c)(1). SC is an Illinois corporation with its principal place of business in Texas. *See Exhibit 2*, Declaration of Randy Bockenstedt ("SC Decl."), ¶ 3.

13. Plaintiffs are citizens of Arkansas. Compl. at ¶¶ 11-12 (stating "Ms. Wilson, Ms. Ingram, and Mr. Dickerson reside in Jefferson County, Arkansas" and "Ms. Byrd resides in Union County, Arkansas"). Diversity therefore exists between the parties under CAFA.

B. The Putative Class Consists of More Than 100 Members.

14. Plaintiffs purport to bring this action on their own behalf, as well as on behalf of "all persons in the United States who (1) have a car loan with SC, (2) that provides Federal and Texas law apply to this contract," and (3) who paid a fee for making their loan payments online or over the phone." *Id.* at ¶ 38.

15. Plaintiffs assert that the "Class consists of thousands of members." *Id.* at ¶ 41. Based on SC's preliminary investigation of the putative class, as alleged, there are in excess of 1,000 SC accounts of customers with a car loan serviced by SC, and who have paid a SpeedPay

Fee.¹ See SC Decl. at ¶¶ 6-7. The aggregate membership of the proposed class is therefore at least 100 as required under CAFA.

C. As Alleged, the Aggregate Amount in Controversy Exceeds \$5 Million

16. To invoke federal court jurisdiction, a notice of removal “need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co., LLC*, 135 S. Ct., 547, 554 (2014) (“[W]hen a defendant seeks federal-court adjudication, the defendant’s amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court.”).

17. Here, Plaintiffs do not allege a specific amount in controversy. Thus, the Court “may consider facts in the removal petition.” See e.g., *Peterman v. Tinsley*, No. 3:07 CV 00047 WRW, 2007 WL 1589549, at *1 (E.D. Ark. June 1, 2007). If the amount in controversy is unclear or ambiguous from the face of the complaint, a removing defendant must only satisfy the “preponderance of the evidence” standard. See *id.*; *Faltermeier v. FCA US LLC*, 899 F.3d 617, 621 (8th Cir. 2018), *i.e.*, that it is “more likely than not” that the amount in controversy is satisfied. *Id.* at 622.

18. Under CAFA, the claims of individual members in a class action are aggregated to determine if the amount in controversy exceeds the sum or value of \$5,000,000. See 28 U.S.C. § 1332(d)(6). In addition, Congress intended for federal jurisdiction to be appropriate under CAFA “if the value of the matter in litigation exceeds \$5,000,000 either from the viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought (e.g., damages, injunctive relief, or declaratory relief).” Senate Judiciary Committee Report, S. Rep. 109-14, at 42.

19. Moreover, the Senate Judiciary Committee’s Report on the final version of CAFA makes clear that any doubts regarding the maintenance of class actions in state or federal court should be resolved in favor of federal jurisdiction. S. Rep. 109-14, at 42-43 (stating that “if a

¹ SC does not have a way to systematically query which car loans provide that Federal and Texas law applies to the contract.

federal court is uncertain about whether ‘all matters in controversy’ in a purported class action ‘do not in the aggregate exceed the sum or value of \$5,000,000, the court should err in favor of exercising jurisdiction over the case. . . . Overall, new section 1332(d) is intended to *expand substantially federal court jurisdiction over class actions*. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant”) (emphasis added).

20. “When determining the amount in controversy, the question ‘is not whether the damages *are* greater than the requisite amount, but whether a fact finder *might* legally conclude that they are.’” *Raskas v. Johnson & Johnson*, 719 F.3d 884, 887 (8th Cir. 2013) (citing *Bell v. Hershey Co.*, 557 F.3d 953, 959 (emphasis in the original)).

21. This Court has held that “[e]ven if the aggregated actual damages in [an] action do not exceed \$5 million, those actual damages could . . . approach the \$5 million threshold, and far lesser amounts of actual damages have been held to satisfy the CAFA amount-in-controversy requirement because of the potential for punitive damages and attorneys’ fees.” *Jarrett v. Panasonic Corp. of N. Am.*, 934 F. Supp. 2d 1020, 1025 (E.D. Ark. 2013) (surveying cases where actual damages well below \$5 million were sufficient to establish CAFA amount-in-controversy requirements because plaintiffs sought punitive damages and attorney’s fees); *see also Brown v. City Chevrolet, LLC*, No. 09–0642–CV–W–GAF, 2009 WL 3485833, *1 (W.D. Mo. Oct. 28, 2009) (holding that amount in controversy was met under CAFA where actual aggregated damages could amount to roughly \$1,004,099, leaving a \$3,995,992 difference between the amount of actual damages and the \$5,000,000 jurisdictional requirement because “[a] fact finder could legally and permissibly award such an amount as punitive damages (*i.e.*, a little more than 3.98 times actual damages), not to mention reasonable attorney fees”); *Thornton v. DFS Services LLC*, No. 4:09cv1040, 2009 WL 3253836, *1–2 (E.D. Mo. Oct. 9, 2009) (“[e]ven if only a fraction of the [class members] suffered actual damages, plaintiff is bringing additional claims for punitive damages and attorneys’ fees, which could easily exceed the \$5,000,000 threshold” of CAFA); *Kates v. Chad Franklin Nat. Auto Sales North LLC*, No. 08–0384–CV–W–FJG, 2008 WL

3065009, *2 n. 5 (W.D. Mo. July 30, 2008) (“The Court can easily imagine how \$900,000 in actual damages, combined with punitive damages and attorney's fees, could exceed the jurisdictional threshold” of CAFA); *Bass v. Carmax Auto Superstores, Inc.*, No. 07–0883–CV–W–ODS, 2008 WL 441962, *2 (W.D. Mo. Feb. 14, 2008) (actual damages of \$658,431 satisfied CAFA amount-in-controversy requirement as an award of punitive damages in an amount approximately 6.7 times the actual damages “would likely be constitutionally acceptable,” and “the total of punitive damages and attorney fees could easily (and legally) be sufficient to bring the total amount in controversy over the jurisdictional requirement”).

22. Here, Plaintiffs seek to recover “actual, compensatory, punitive, and treble damages.” Compl., Prayer for Relief at 11. Plaintiffs also seek an Order “enjoining Santander from collecting and attempting to collect Pay-to-Pay fees.” *Id.* Further, Plaintiffs assert a claim for attorneys’ fees. *Id.*

23. While SC denies any liability as to Plaintiffs’ claims, based on the allegations, claims, and prayer for relief set forth in the Complaint, the amount in controversy in this action, exclusive of interests and costs, exceeds the sum of \$5,000,000.² Defendant’s establishment of the amount-in-controversy, as set forth below, is based on assumptions for purposes of removal only as to the amounts that Plaintiffs claim to be able recover if they prevailed on their claims.

i. Compensatory Damages: “Pay-to-Pay” Fees

24. Based on SC’s preliminary investigation, the “Pay-to-Pay” fees, as alleged, paid by individuals who have a car loan serviced by SC, paid Speedpay Fees that total in excess of five million dollars (\$5,000,000).³ SC Decl. at ¶ 8. Based on SC’s preliminary investigation of the putative class, the class as alleged includes in excess of 1,000 customers. *Id.* at ¶ 7.

² SC does not concede and reserves the right to challenge Plaintiffs’ theory of liability and damages.

³ As explained above, SC has no way to systematically determine whether a particular car loan provides that Federal and Texas law applies to the contract (as the putative class is alleged by plaintiffs).

25. As discussed above, this Court has made clear that under CAFA, where plaintiffs seek punitive damages and attorney's fees, the alleged amount of actual damages can fall well below \$5 million. However, Plaintiffs' asserted damages for "Pay-to-Pay" fees alone meets the \$5 million threshold.

ii. Punitive Damages

26. In addition, Plaintiffs assert a claim against SC for punitive damages. *See* Compl., Prayer for Relief at 11; *see also* ¶ 44 (asserting that a "question of law and fact common to the class" is "[w]hether Santander's actions are sufficiently egregious as to warrant punitive damages").

27. "Where both actual and punitive damages are recoverable under a complaint each must be considered to the extent claimed in determining jurisdiction amount." *Bell v. Preferred Life Assurances Soc'y*, 320 U.S. 238, 240 (1943); *see also Jarret v. Panasonic Corp. of North America*, 934 F. Supp. 2d 1020, 1025 (discussing cases finding amount in controversy was met in light of potential punitive damage awards). "Courts considering the availability of punitive damages in the CAFA amount-in-controversy context have held that utilizing multipliers of four to six times the total amount of compensatory damages is acceptable in determining what punitive damages award might be legally permissible." *Basham v. Am. Nat. Cty. Mut. Ins. Co.*, 979 F. Supp. 2d 883, 889 (W.D. Ark. 2013) (citing cases utilizing multipliers in calculating permissible punitive damages).

28. Based on the allegations in the Complaint, Plaintiffs could be awarded punitive damages equal to six times Plaintiffs' asserted compensatory damages.⁴ Even applying a conservative punitive damages multiplier in light of the monetary damages sought, a potential punitive damages award could exceed the \$5 million jurisdictional amount.

⁴ SC does not concede and reserves the right to challenge any claim of punitive damages.

iii. Attorneys' Fees

29. Plaintiffs' Complaint also seeks an award of attorneys' fees. Compl., Prayer for Relief, at 11 (seeking "attorney's fees for bringing this claim for injunctive and declaratory relief as representatives of the public").

30. "Statutory attorney fees do count toward the jurisdictional minimum for diversity jurisdiction." *Toller v. Sagamore Ins. Co.*, 514 F. Supp. 2d 1111, 1116 (E.D. Ark. 2007) (citing *Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760, 766) (8th Cir.)). Section 392.403 of the Texas Fair Debt Collection Act provides that a person who successfully maintains an action for injunctive relief or actual damages under the Act "is entitled to attorney's fees reasonably related to the amount of work performed and costs." Tex. Fin. Code § 392.403.

31. In determining attorney's fees for purposes of calculating the amount in controversy, Arkansas courts have held that 40% of the total potential recovery is a reasonable estimate of attorney's fees under CAFA. *See Basham v. Am. Nat. Cty. Mut. Ins. Co.*, 979 F. Supp. 2d 883, 890 (W.D. Ark. 2013) (holding that jurisdictional amount under CAFA is met "[c]onservatively applying [] 40% recovery to only compensatory damages and statutory penalties"); *see also Standard Fire Ins. Co.*, 2013 WL 3968490, at *6 ("[E]ven though other courts have found it reasonable to award attorney's fees at a rate of 20–25% of the total recovery, this does not mean that a 40% rate would be legally impossible.").

32. Applying this benchmark to the potential amounts in controversy on Plaintiffs' claims identified above, Plaintiffs appear to seek additional millions of dollars in attorney's fees, which further confirms that the amount in controversy is well above the \$5 million threshold for removal under CAFA.

D. Defendant Is Not a State or State Official

33. Defendant SC is not a state nor a state official.

III. PROCEDURAL REQUIREMENTS FOR REMOVAL HAVE BEEN SATISFIED

34. This action has not previously been removed to federal court.

35. This Notice of Removal is timely pursuant to 28 U.S.C. § 1446(b)(3), which provides that such Notices “may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.”

36. SC filed this Notice of Removal within 30 days of January 16, 2020, the date on which SC was served with the Class Action Complaint. The Class Action Complaint was the first pleading from which it could be ascertained “that the case is one which is or has become removable.” *See* 28 U.S.C. § 1446(b)(3). Accordingly, this action is being removed within 30 days of the first date after the receipt by SC of service of any paper giving it notice that the action was removable.

37. Notice has been sent to the state court regarding removal of this action.

38. Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of the process, pleadings, and orders served upon SC in the State Court Action are attached hereto as **Exhibit 3**.

39. Venue is proper in this Court. Pursuant to 28 U.S.C. §1441(a), removal to this Court is appropriate because it is the “district court of the United States for the district and division embracing the place where [this] action is pending.”

40. Nothing in this Notice of Removal is intended or should be construed as any type of express or implied admission by SC of any fact, of any validity or merits of any of Plaintiffs’ claims, causes of action, theory of damages, and allegations, or of any liability for the same, all of which are hereby expressly denied, or as any type of express or implied waiver or limitation of any of SC’s rights, claims, remedies, and defenses in connection with this action, all of which are hereby fully and expressly reserved. SC expressly reserves the right to amend or supplement this Notice of Removal, should any aspect of this removal and/or the information set forth herein be challenged.

WHEREFORE, SC hereby removes the above-captioned action now pending in State Court to the United States District Court for the Eastern District of Arkansas.

Dated: February 14, 2020

Respectfully submitted,

/s/ Blaec C. Croft
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*Counsel for Defendant
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February 2020, a true and correct copy of the forgoing was served via first class U.S. Mail, postage paid, upon the following:

Lee Lowther
Randall K. Pulliam
Cassandra DeCoursey
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/s/ Blaec C. Croft

Blaec C. Croft

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

FRENZETTA WILSON, BETINA INGRAM,
RONNIE DICKERSON, and
DEVON BYRD, on behalf of themselves
and all others similarly situated

PLAINTIFFS

v.

CASE NO. _____

SANTANDER CONSUMER
USA, INC.

DEFENDANT

CLASS ACTION COMPLAINT

Plaintiffs Frenzetta Wilson, Betina Ingram, Ronnie Dickerson, and Devon Byrd individually and on behalf of all persons similarly situated, seek actual damages and an injunction against Santander Consumer USA, Inc. (“Santander”) for violations of the Texas Debt Collection Act and for grounds state:

1. Plaintiffs each entered into a Retail Installment Sales Contract with Santander to finance the purchase of their respective vehicles.

2. Every time Plaintiffs have made loan payments online or over the phone, Santander has charged them a fee of up to \$10.95 (“Pay-To-Pay fees”). Santander is prohibited by law from collecting these fees.

3. The contract each Plaintiff entered with Santander is a form contract that contains a Texas choice-of-law provision: “Federal and Texas law apply to this contract.” *See, e.g.*, Ex. 1 at 2, ¶ 8.

4. An Arkansas federal court recently found that the Texas choice-of-law provision in Santander’s contract is binding on Arkansas residents. *Brunson v. Santander Consumer USA, Inc.*, 5:17-cv-284-JM, ECF No. 26 (E.D. Ar. Aug. 27,

EXHIBIT

1

2018). In arguing (successfully) for the enforceability of this provision, Santander explained that it, “like any multistate company entering into consumer contracts, has an interest in ensuring that its contracts are governed by uniform law to ensure consistency in their interpretation and application.” *Id.*, ECF No. 17 at 8 (E.D. Ark. July 6, 2018).

5. One such law that applies to Santander’s form contract is the Texas Debt Collection Act (“TDCA”).

6. Santander is a debt collector as defined by the TDCA. The TDCA prohibits debt collectors from “collecting or attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is *expressly authorized* by the agreement creating the obligation or *legally chargeable* to the consumer[.]” Tex. Fin. Code § 392.303(a)(2) (emphases added). Pay-to-Pay fees are neither.

7. Moreover, on information and belief, Santander pockets nearly the entire amount of the Pay-to-Pay fees as profit. Nevertheless, Santander represents them as pass-through fees to the payment processor: “A third party payment processing company may charge a fee to process your payment.”¹

8. During the course of their loans, Plaintiffs have paid these fees multiple times.

¹ <https://santanderconsumerusa.com/support/payments> (last accessed by counsel on January 10, 2020).

9. On behalf of themselves and all others similarly situated, Plaintiffs bring claims for actual damages and injunctive relief against Santander for its violations of the TDCA.

PARTIES

10. Defendant Santander Consumer USA, Inc. is an Illinois corporation that has its principal place of business in Dallas, Texas. It is a consumer finance company that focuses on vehicle finance and unsecured consumer lending products. Santander is registered to do business in Arkansas.

11. Ms. Wilson, Ms. Ingram, and Mr. Dickerson reside in Jefferson County, Arkansas.

12. Ms. Byrd resides in Union County, Arkansas.

JURISDICTION AND VENUE

13. This Court has jurisdiction over Santander because it does business in Arkansas. Each Plaintiff executed his or her Retail Installment Sales Contract in the State of Arkansas and made payments on those contracts from the State of Arkansas.

14. Venue is proper because a substantial part of the events giving rise to Plaintiffs' cause of action occurred in Jefferson County, Arkansas.

COMMON FACTUAL ALLEGATIONS

15. The Texas Debt Collection Act ("TDCA") prohibits a debt collector from "us[ing] unfair or unconscionable means" in the collection of a consumer debt. Tex. Fin. Code § 392.303(a).

16. Santander is a *debt collector* under the TDCA because it is “a person who directly or indirectly engages in debt collection . . .” *Id.* at § 392.001(6).

17. Santander engages in *debt collection*, which the TDCA defines as “an action, conduct, or practice in collecting, or in soliciting for collection, consumer debts that are due or alleged to be due a creditor.” *Id.* at § 392.001(5).

18. A *consumer debt* under the TDCA is “an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction.” *Id.* at § 392.001(2).

19. As “an individual who has a consumer debt,” each Plaintiff is a *consumer* under the TDCA. *Id.* at § 392.001(1).

20. As alleged above, the Pay-to-Pay fees Santander charges are not expressly authorized in the uniform contract each Plaintiff executed.

21. Nor is there any law that affirmatively permits Santander to collect Pay-to-Pay fees from the Plaintiffs or other borrowers.

22. By charging those fees, Santander engaged in prohibited “unfair or unconscionable means” of debt collection by “collecting or attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is expressly authorized by the agreement creating the obligation or legally chargeable to the consumer[.]” *Id.* at § 392.303(a)(2).

23. Moreover, Santander’s violations of the TDCA have been willful and knowing.

24. In June 2015, Santander was sued in California for nearly identical violations of an analogous state debt-collection law. Thus, Santander has persisted in its unlawful behavior despite being on notice that Pay-to-Pay fees violate certain state debt collection laws.

25. More particularly, Santander has been on notice that its collection of Pay-to-Pay fees beyond what is necessary to reimburse a third-party payment processor violates provisions of the federal Fair Debt Collection Practices Act and state debt-collection laws analogous to the TDCA.

26. Furthermore, Santander has concealed, and continues to conceal, these violations from its borrowers.

27. As of the date of this filing, Santander continues to misrepresent to its borrowers that Pay-to-Pay fees are fees imposed by the third-party payment processor.

28. On information and belief, Santander collects and retains more than 90% of each Pay-to-Pay fee its borrowers pay.

PLAINTIFFS' ALLEGATIONS

29. Plaintiff Frenzetta Wilson took out a loan with Santander to finance the purchase of her car. Texas law applies to Ms. Wilson's loan.

30. During the life of that loan, Ms. Wilson paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

31. Plaintiff Betina Ingram took out a loan with Santander to finance the purchase of her car. Texas law applies to Ms. Ingram's loan.

32. Ms. Ingram has paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

33. Plaintiff Ronnie Dickerson took out a loan with Santander to finance the purchase of his car. Texas law applies to Mr. Dickerson's loan.

34. During the life of his loan, Mr. Dickerson paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

35. Plaintiff Devon Byrd took out a loan with Santander to finance the purchase of her car. Texas law applies to Ms. Byrd's loan.

36. Ms. Byrd has paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

CLASS ALLEGATIONS

37. Plaintiffs bring this action individually and on behalf of all others similarly situated pursuant to Arkansas Rule of Civil Procedure 23. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Rule 23.

38. The proposed Class is defined as:

All persons in the United States who (1) have a car loan with Santander, (2) that provides "Federal and Texas law apply to this contract," and (3) who paid a fee for making their loan payments online or over the phone.

39. Plaintiffs reserve the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate.

40. Excluded from the Class are Santander, its parents, subsidiaries, affiliates, officers and directors, any entity in which Santander has a controlling

interest, all customers who make a timely election to be excluded, governmental entities, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

41. The members of the Class are so numerous that joinder is impractical. The Class consists of thousands of members, the identities of whom are within the knowledge of Santander and can be ascertained only by resort to Santander's records.

42. Plaintiffs' claims are typical of the claims of the Class in that Santander collected from Plaintiffs, like all Class members, Pay-to-Pay fees that are neither authorized by contract nor legally chargeable to the borrower. Plaintiffs, like all Class members, have been damaged by Santander's misconduct. Furthermore, the factual basis of Santander's misconduct is common to all Class members.

43. There are numerous questions of law and fact common to the Class and those common questions predominate over any questions affecting only individual Class members.

44. Among the questions of law and fact common to the Class are:

- a. Whether Santander collected a portion of the Pay-to-Pay fees its borrowers paid;
- b. Whether Santander violated the TDCA by collecting Pay-to-Pay fees;
- c. Whether Plaintiffs' are entitled to actual damages and, if so, in what amount;

- d. Whether Plaintiffs are entitled to an injunction restraining Santander from future collections and attempted collections Pay-to-Pay fees; and
- e. Whether Santander's actions are sufficiently egregious as to warrant punitive damages.

45. Plaintiffs' claims are typical of the claims of other Class members, in that they arise out of the same wrongful policies and practices of Santander. Each Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other Class member.

46. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers. Accordingly, each Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

47. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of Santander, no Class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the Class members will continue to suffer losses and Santander's misconduct will proceed without remedy.

48. Even if Class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows claims to be heard which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

CAUSE OF ACTION

Violations of the Texas Debt Collection Act

49. Plaintiffs executed Santander's standard loan agreement, which contains a Texas choice-of-law provision.

50. Each Plaintiff took out his or her loan to purchase a car for personal, family, or household use.

51. Each Plaintiff is therefore, under the TDCA, a "consumer" who took out a "consumer debt."

52. Santander is a "debt collector" under the TDCA.

53. In the process of "debt collection," by collecting or attempting to collect Pay-to-Pay fees, Santander engaged in "unfair or unconscionable means" of "collecting or attempting to collect . . . a charge, fee, or expense incidental to the

obligation” that was not “expressly authorized by the agreement creating the obligation or legally chargeable to the” Plaintiffs and the Class.

54. As such, Santander has violated the TDCA.

55. Moreover, Santander has misrepresented, and continues to misrepresent, to its borrowers that Pay-to-Pay fees are fees charged and collected by third-party payment processors.

56. In truth, Santander collects and retains nearly the entire amount of each Pay-to-Pay fee a borrower pays.

57. These continual misrepresentations demonstrate the Santander’s violations of the TDCA were made with ill will or gross negligence to the rights of Plaintiffs and the Class as to amount to willful and wanton acts.

58. On behalf of the Class, Plaintiffs seek actual damages and an injunction restraining Santander from collecting and attempting to collect Pay-to-Pay fees.

TOLLING

59. Santander concealed from Plaintiffs and the Class the fact that Santander, not the third-party payment processor, collected nearly the entirety of every Pay-to-Pay fee.

60. These intentional misrepresentations prevented Plaintiffs from discovering a basis for a TDCA claim existed.

61. For these reasons, Plaintiffs’ claims that pre-date two years before the filing of this Complaint are tolled.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and members of the Class demand a jury trial on all claims so triable; an order certifying the class, appointing Plaintiffs as Class representatives, and designating the undersigned counsel as Class Counsel; and judgment as follows:

1. That judgment be entered against Santander and in favor of Plaintiffs and Class members on Count One and Count Two as alleged in this Complaint, and for actual, compensatory, punitive, and treble damages in an amount to be determined at trial;

2. That judgment be entered imposing interest on damages, litigation costs, and attorneys' fees against Santander;

3. That judgment be entered enjoining Santander from collecting and attempting to collect Pay-to-Pay fees from members of the Class; and

4. Such other relief as this Court deems just and proper.

DATED: January 10, 2020

/s/ Lee Lowther
CARNEY BATES & PULLIAM, PLLC
Lee Lowther, ABN 2013142
llowther@cbplaw.com
Randall K. Pulliam, ABN 98105
rpulliam@cbplaw.com
Cassandra DeCoursey, ABN 2018179
519 W. 7th St.
Little Rock, AR 72201
Telephone: (501) 312-8500
Facsimile: (501) 312-8505

EXHIBIT 1

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| OTHER TERMS AND CONDITIONS | |
|---|---|
| <p>1. FINANCE CHARGE AND PAYMENTS</p> <p>A. HOW WE FIGURE THE FINANCE CHARGE. The Finance Charge is based on the amount of the loan outstanding. The Finance Charge will be applied to your account on a monthly basis. The Finance Charge will be added to the amount of your payments. The Finance Charge will be applied to your account on the first day of each month. The Finance Charge will be applied to your account on the first day of each month. The Finance Charge will be applied to your account on the first day of each month.</p> <p>B. HOW WE WILL APPLY YOUR PAYMENTS. We will apply your payments to the Finance Charge first. If you have any late charges, we will apply your payments to those first. If you have any other charges, we will apply your payments to those next. If you have any principal, we will apply your payments to that last.</p> <p>C. HOW LATE OR EARLY PAYMENTS AFFECT YOUR FINANCE CHARGE. If you pay your payments on time, your Finance Charge will be lower. If you pay your payments late, your Finance Charge will be higher. If you pay your payments early, your Finance Charge will be lower.</p> <p>D. INTEREST RATE. The interest rate is 12.99% per year. The interest rate is 12.99% per year. The interest rate is 12.99% per year.</p> <p>E. TERM OF LOAN. The term of the loan is 60 months. The term of the loan is 60 months. The term of the loan is 60 months.</p> <p>F. SECURITY. The vehicle is the security for the loan. The vehicle is the security for the loan. The vehicle is the security for the loan.</p> | <p>2. YOUR OTHER RIGHTS AND OBLIGATIONS</p> <p>A. USE AND CARE OF THE VEHICLE. You must use the vehicle for personal, family, or household use. You must use the vehicle for personal, family, or household use. You must use the vehicle for personal, family, or household use.</p> <p>B. MAINTENANCE. You must maintain the vehicle in good condition. You must maintain the vehicle in good condition. You must maintain the vehicle in good condition.</p> <p>C. DAMAGE TO THE VEHICLE. You must not damage the vehicle. You must not damage the vehicle. You must not damage the vehicle.</p> <p>D. LOSS OF THE VEHICLE. If the vehicle is lost or stolen, you must notify us immediately. If the vehicle is lost or stolen, you must notify us immediately. If the vehicle is lost or stolen, you must notify us immediately.</p> <p>E. TITLE AND REGISTRATION. You must title and register the vehicle. You must title and register the vehicle. You must title and register the vehicle.</p> <p>F. INSURANCE. You must have insurance on the vehicle. You must have insurance on the vehicle. You must have insurance on the vehicle.</p> <p>G. ASSIGNMENT. You may not assign the vehicle. You may not assign the vehicle. You may not assign the vehicle.</p> <p>H. SEIZURE. We may seize the vehicle if you do not pay. We may seize the vehicle if you do not pay. We may seize the vehicle if you do not pay.</p> <p>I. REPOSSESSION. We may repossess the vehicle if you do not pay. We may repossess the vehicle if you do not pay. We may repossess the vehicle if you do not pay.</p> <p>J. RESALE. We may sell the vehicle if we repossess it. We may sell the vehicle if we repossess it. We may sell the vehicle if we repossess it.</p> <p>K. DEFENSE. You may have a defense if we repossess the vehicle. You may have a defense if we repossess the vehicle. You may have a defense if we repossess the vehicle.</p> <p>L. WAIVER. You may waive your rights. You may waive your rights. You may waive your rights.</p> <p>M. ENTIRE AGREEMENT. This contract is the entire agreement. This contract is the entire agreement. This contract is the entire agreement.</p> <p>N. ASSIGNMENT. We may assign our rights. We may assign our rights. We may assign our rights.</p> <p>O. SEVERABILITY. If a part of this contract is invalid, the rest is still valid. If a part of this contract is invalid, the rest is still valid. If a part of this contract is invalid, the rest is still valid.</p> <p>P. LEGAL LIMITATIONS. We may limit our liability. We may limit our liability. We may limit our liability.</p> <p>Q. SELLER'S DISCLAIMER OF WARRANTIES. The seller makes no warranties. The seller makes no warranties. The seller makes no warranties.</p> <p>R. USED CAR BUYER'S GUIDE. This information is for your information. This information is for your information. This information is for your information.</p> <p>S. APPLICABLE LAW. Federal and Texas law apply. Federal and Texas law apply. Federal and Texas law apply.</p> |

| |
|--|
| <p>3. RETURNED INSURANCE PREMIUMS AND SERVICE CONTRACT CHARGES. If we get a refund on insurance or service contracts, we will send it to you. If we get a refund on insurance or service contracts, we will send it to you. If we get a refund on insurance or service contracts, we will send it to you.</p> <p>4. APPLICATION OF CREDITS. Any credit that reduces your debt will apply to your payments in the reverse order of when they are due, unless we decide to apply it to another part of your debt. Any credit that reduces your debt will apply to your payments in the reverse order of when they are due, unless we decide to apply it to another part of your debt.</p> <p>5. IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES</p> <p>A. LATE CHARGE. You will pay us a late charge as agreed to in this contract when it occurs. You will pay us a late charge as agreed to in this contract when it occurs. You will pay us a late charge as agreed to in this contract when it occurs.</p> <p>B. DEFAULT. You will be in default if:</p> <ol style="list-style-type: none"> You do not pay any amount when it is due. You give false information, or withholding information on a credit application. You do not follow the instructions of a lien agent, you or the vehicle becomes involved in a lawsuit. You allow a judgment to be entered against you or the contract. You break any of your promises in this agreement. <p>If you default, we can exercise our rights under this contract and our other rights under the law.</p> <p>C. OUR RIGHT TO DEMAND PAYMENT IN FULL. If you default, or we believe in good faith that you are not going to keep any of your promises, we can demand that you immediately pay all that you owe. We can demand that you immediately pay all that you owe. We can demand that you immediately pay all that you owe.</p> <p>D. REPOSSESSION. If you default, we may repossess the vehicle from you if we do so peacefully. If you default, we may repossess the vehicle from you if we do so peacefully. If you default, we may repossess the vehicle from you if we do so peacefully.</p> <p>E. YOUR RIGHT TO REDEEM. If we take your vehicle, we will let you have it back if you pay us what you owe. If we take your vehicle, we will let you have it back if you pay us what you owe. If we take your vehicle, we will let you have it back if you pay us what you owe.</p> <p>F. DISPOSITION OF THE VEHICLE. If you don't pay us to get the vehicle back, we can sell it or take other action allowed by law. We will send you notice at least 10 days before we sell it. We can use the money we get from selling it to pay allowed expenses and to reduce the amount you owe. Allowed expenses are expenses we pay as a direct result of taking the vehicle, holding it, preparing it to sell, and selling it. If the money from the sale is not enough to pay us, you must pay the rest of what you owe us plus interest. If we take or sell the vehicle, you will give us the certificate of title and any other document required by state law to record transfer of title.</p> <p>G. COLLECTION COSTS. If we hire an attorney who is not our employee to enforce this contract, you will pay reasonable attorney's fees and court costs in the applicable law state. You will also pay our reasonable and documented expenses incurred in connection with repossessing, holding, and selling the vehicle as the applicable law allows.</p> <p>H. CANCELLATION OF OPTIONAL INSURANCE AND SERVICE CONTRACTS. This contract may contain charges for insurance or service contracts or for services included in the cash price. If you default, you agree that we can cancel these contracts to the extent allowed, and withhold them to offset interest or allowed charges to reduce what you owe or repair the vehicle, if the vehicle is total loss because it is damaged or stolen, we may retain benefits under these contracts and cancel them to offset amounts of unearned charges to reduce what you owe.</p> <p>6. INTEGRATION AND SEVERABILITY CLAUSE</p> <p>This contract contains the entire agreement between you and us relating to the sale and financing of this vehicle. If any part of this contract is not valid, all other parts will still be valid.</p> <p>7. LEGAL LIMITATIONS ON OUR RIGHTS</p> <p>If we don't enforce our rights every time, we can still enforce them later. We will exercise all of our rights in a legal way. We don't have to pay finance charges or other amounts that are more than the law allows. This provision, however, limits all other parts of the contract and over all other state laws.</p> <p>8. SELLER'S DISCLAIMER OF WARRANTIES</p> <p>Unless the seller makes a written warranty, or enters into a service contract within 30 days from the date of title transfer, the seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose.</p> <p>This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide.</p> <p>9. USED CAR BUYER'S GUIDE. The information you see on the window here for this vehicle is part of this contract. Information on the window here overrides any contrary provisions in the contract of sale.</p> <p>10. APPLICABLE LAW. Federal and Texas law apply to this contract.</p> |
|--|

NOTICE: ANY THE SELLER NOT EXCEED THE PROVISIONS

THIS IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST ANY HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL BE LIMITED TO THE AMOUNT OF THE PROCEEDS.

If in the contract was purchased for personal, family, or household use.

Form No. 553-FR-1-11

PAID IN FULL
 APR 30 2019
 IC: COPY THIS TO DEBIT AND EXACT COPY OF THE ORIGINAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS**

FRENZETTA WILSON, BETINA
INGRAM, RONNE DICKERSON, and
DEVON BYRD, on behalf of themselves
and all others similarly situated

Plaintiffs,

v.

SANTANDER CONSUMER USA, INC.,

Defendant.

CIVIL ACTION NO.

DECLARATION OF RANDY BOCKENSTEDT

I, Randy Bockenstedt, of full age, certify, declare, and state, pursuant to 28 U.S.C. § 1746:

1. My name is Randy Bockenstedt. I am currently employed as Senior Director of Collections with Santander Consumer USA Inc. ("SC").

2. I make this declaration based upon my personal knowledge, my review of SC's business records, and/or my communications with SC employees. I submit this Declaration in support of SC's Notice of Removal of Civil Action from State Court. The business records referred to in this Declaration were made and kept in the ordinary course of SC's business and were prepared in the normal course of business at or near the time of the events to which they refer or relate. If required, I could and would competently testify to these facts in a court of law.

3. SC is an Illinois Corporation headquartered in Dallas, Texas.

4. SC is a specialized consumer finance company focused in large part on vehicle finance. SC is an indirect automobile lender, meaning that it takes assignment of the Retail Installment Sales Contracts (“RISC”) entered into between customers and automobile dealerships. While there are some variations in RISCs, they all provide that customers will make monthly payments to SC and grant a security interest to SC in the automobiles they purchase.

5. To provide its customers with more payment options, SC employed a third party vendor, Western Union, to provide a service to its customers called “Speedpay,” which facilitated faster, alternative methods of electronic payments—ACH, Debit, and Credit transactions. When customers used Western Union’s Speedpay, customers paid a flat rate of \$10.95 for each payment processing transaction (the “Speedpay Fee”).

6. I reviewed SC’s records, ran a query, and compiled data relating to Speedpay Fees. The query included the following data points:

- (a) SC customers for whom SC maintains and services a car loan;
- (b) the accounts for any Speedpay Fees paid up to the present;
- (c) the total amount of Speedpay Fees assessed to an account; and
- (d) the total amount of Speedpay Fees paid on an account.¹

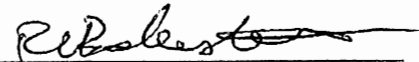
¹ SC does not have a way to systematically query whether a particular car loan provides that Federal and Texas law applies to the contract.

7. Based upon my review of SC's records, there are in excess of 1,000 SC customer accounts for which the customer paid a SpeedPay Fee.

8. Further, based on my review of SC's records, the total amount of Speedpay fees paid by SC customers exceeds five million dollars (\$5,000,000).

9. I declare under penalty of perjury the foregoing is true and correct based upon my personal knowledge, my review of SC's records, and/or communications with SC employees.

Executed February 7, 2020 in Dallas, TX.



Randy Bockenstedt
Senior Director of
Collections
Santander Consumer USA
Inc.

THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

_____ DIVISION [Civil, Probate, etc.]

FRENZETTA WILSON, et al

Plaintiff

v.

No. _____

SANTANDER CONSUMER USA

Defendant

SUMMONS

THE STATE OF ARKANSAS TO DEFENDANT:

Santander Consumer USA, Inc. [Defendant's name and address.]

1601 Elm St., Dallas, TX 75201

A lawsuit has been filed against you. The relief demanded is stated in the attached complaint. Within 30 days after service of this summons on you (not counting the day you received it) — or 60 days if you are incarcerated in any jail, penitentiary, or other correctional facility in Arkansas — you must file with the clerk of this court a written answer to the complaint or a motion under Rule 12 of the Arkansas Rules of Civil Procedure.

The answer or motion must also be served on the plaintiff or plaintiff's attorney, whose name and address are:

Lee Lowther, 519 W. 7th Street, Little Rock, AR 72201

If you fail to respond within the applicable time period, judgment by default may be entered against you for the relief demanded in the complaint.

EXHIBIT

3

Additional Notices Included: _____

CLERK OF COURT

Address of Clerk's Office

[Signature of Clerk or Deputy Clerk]

Date: _____

[SEAL]

No. _____ This summons is for _____ (*name of Defendant*).

PROOF OF SERVICE

On _____ [date] I personally delivered the summons and complaint to the defendant at _____ [place]; or

After making my purpose to deliver the summons and complaint clear, on _____ [date] I left the summons and complaint in the close proximity of the defendant by _____ [describe how the summons and complaint was left] after he/she refused to receive it when I offered it to him/her; or

On _____ [date] I left the summons and complaint with _____, a member of the defendant's family at least 18 years of age, at _____ [address], a place where the defendant resides; or

On _____ [date] I delivered the summons and complaint to _____ [name of individual], an agent authorized by appointment or by law to receive service of summons on behalf of _____ [name of defendant]; or

On _____ [date] at _____ [address], where the defendant maintains an office or other fixed location for the conduct of business, during normal working hours I left the summons and complaint with _____ [name and job description]; or

I am the plaintiff or an attorney of record for the plaintiff in a lawsuit, and I served the summons and complaint on the defendant by certified mail, return receipt requested, restricted delivery, as shown by the attached signed return receipt.

I am the plaintiff or attorney of record for the plaintiff in this lawsuit, and I mailed a copy of the summons and complaint by first-class mail to the defendant together with two copies of a notice and acknowledgment and received the attached notice and acknowledgment form within twenty days after the date of mailing.

Other [specify]:

I was unable to execute service because:

My fee is \$ _____.

To be completed if service is by a sheriff or deputy sheriff:

Date: _____ SHERIFF OF _____ COUNTY, ARKANSAS

By: _____
[signature of server]

[printed name, title, and badge number]

To be completed if service is by a person other than a sheriff or deputy sheriff:

Date: _____

By: _____
[signature of server]

[printed name]

Address: _____

Phone: _____

Subscribed and sworn to before me this date: _____

Notary Public _____

My Commission Expires: _____

Additional information regarding service or attempted service:



Arkansas Judiciary

Case Title: FRENZETTA WILSON ET AL V SANTANDER
CONSUMER USA IN
Case Number: 35CV-20-43
Type: SUMMONS - FILER PREPARED

So Ordered

Katherine White, DC



Katherine White, Deputy Clerk

ELECTRONICALLY FILED
Jefferson County Circuit Court
Lafayette L. Woods, Circuit Clerk
2020-Jan-13 09:12:08
35CV-20-43
C11WD02 : 14 Pages

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

FRENZETTA WILSON, BETINA INGRAM,
RONNIE DICKERSON, and
DEVON BYRD, on behalf of themselves
and all others similarly situated

PLAINTIFFS

v.

CASE NO. _____

SANTANDER CONSUMER
USA, INC.

DEFENDANT

CLASS ACTION COMPLAINT

Plaintiffs Frenzetta Wilson, Betina Ingram, Ronnie Dickerson, and Devon Byrd individually and on behalf of all persons similarly situated, seek actual damages and an injunction against Santander Consumer USA, Inc. (“Santander”) for violations of the Texas Debt Collection Act and for grounds state:

1. Plaintiffs each entered into a Retail Installment Sales Contract with Santander to finance the purchase of their respective vehicles.

2. Every time Plaintiffs have made loan payments online or over the phone, Santander has charged them a fee of up to \$10.95 (“Pay-To-Pay fees”).

Santander is prohibited by law from collecting these fees.

3. The contract each Plaintiff entered with Santander is a form contract that contains a Texas choice-of-law provision: “Federal and Texas law apply to this contract.” *See, e.g.,* Ex. 1 at 2, ¶ 8.

4. An Arkansas federal court recently found that the Texas choice-of-law provision in Santander’s contract is binding on Arkansas residents. *Brunson v.*

Santander Consumer USA, Inc., 5:17-cv-284-JM, ECF No. 26 (E.D. Ar. Aug. 27,

2018). In arguing (successfully) for the enforceability of this provision, Santander explained that it, “like any multistate company entering into consumer contracts, has an interest in ensuring that its contracts are governed by uniform law to ensure consistency in their interpretation and application.” *Id.*, ECF No. 17 at 8 (E.D. Ark. July 6, 2018).

5. One such law that applies to Santander’s form contract is the Texas Debt Collection Act (“TDCA”).

6. Santander is a debt collector as defined by the TDCA. The TDCA prohibits debt collectors from “collecting or attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is ***expressly authorized*** by the agreement creating the obligation or ***legally chargeable*** to the consumer[.]” Tex. Fin. Code § 392.303(a)(2) (emphases added). Pay-to-Pay fees are neither.

7. Moreover, on information and belief, Santander pockets nearly the entire amount of the Pay-to-Pay fees as profit. Nevertheless, Santander represents them as pass-through fees to the payment processor: “A third party payment processing company may charge a fee to process your payment.”¹

8. During the course of their loans, Plaintiffs have paid these fees multiple times.

¹ <https://santanderconsumerusa.com/support/payments> (last accessed by counsel on January 10, 2020).

9. On behalf of themselves and all others similarly situated, Plaintiffs bring claims for actual damages and injunctive relief against Santander for its violations of the TDCA.

PARTIES

10. Defendant Santander Consumer USA, Inc. is an Illinois corporation that has its principal place of business in Dallas, Texas. It is a consumer finance company that focuses on vehicle finance and unsecured consumer lending products. Santander is registered to do business in Arkansas.

11. Ms. Wilson, Ms. Ingram, and Mr. Dickerson reside in Jefferson County, Arkansas.

12. Ms. Byrd resides in Union County, Arkansas.

JURISDICTION AND VENUE

13. This Court has jurisdiction over Santander because it does business in Arkansas. Each Plaintiff executed his or her Retail Installment Sales Contract in the State of Arkansas and made payments on those contracts from the State of Arkansas.

14. Venue is proper because a substantial part of the events giving rise to Plaintiffs' cause of action occurred in Jefferson County, Arkansas.

COMMON FACTUAL ALLEGATIONS

15. The Texas Debt Collection Act ("TDCA") prohibits a debt collector from "us[ing] unfair or unconscionable means" in the collection of a consumer debt. Tex. Fin. Code § 392.303(a).

16. Santander is a *debt collector* under the TDCA because it is “a person who directly or indirectly engages in debt collection . . .” *Id.* at § 392.001(6).

17. Santander engages in *debt collection*, which the TDCA defines as “an action, conduct, or practice in collecting, or in soliciting for collection, consumer debts that are due or alleged to be due a creditor.” *Id.* at § 392.001(5).

18. A *consumer debt* under the TDCA is “an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction.” *Id.* at § 392.001(2).

19. As “an individual who has a consumer debt,” each Plaintiff is a *consumer* under the TDCA. *Id.* at § 392.001(1).

20. As alleged above, the Pay-to-Pay fees Santander charges are not expressly authorized in the uniform contract each Plaintiff executed.

21. Nor is there any law that affirmatively permits Santander to collect Pay-to-Pay fees from the Plaintiffs or other borrowers.

22. By charging those fees, Santander engaged in prohibited “unfair or unconscionable means” of debt collection by “collecting or attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is expressly authorized by the agreement creating the obligation or legally chargeable to the consumer[.]” *Id.* at § 392.303(a)(2).

23. Moreover, Santander’s violations of the TDCA have been willful and knowing.

24. In June 2015, Santander was sued in California for nearly identical violations of an analogous state debt-collection law. Thus, Santander has persisted in its unlawful behavior despite being on notice that Pay-to-Pay fees violate certain state debt collection laws.

25. More particularly, Santander has been on notice that its collection of Pay-to-Pay fees beyond what is necessary to reimburse a third-party payment processor violates provisions of the federal Fair Debt Collection Practices Act and state debt-collection laws analogous to the TDCA.

26. Furthermore, Santander has concealed, and continues to conceal, these violations from its borrowers.

27. As of the date of this filing, Santander continues to misrepresent to its borrowers that Pay-to-Pay fees are fees imposed by the third-party payment processor.

28. On information and belief, Santander collects and retains more than 90% of each Pay-to-Pay fee its borrowers pay.

PLAINTIFFS' ALLEGATIONS

29. Plaintiff Frenzetta Wilson took out a loan with Santander to finance the purchase of her car. Texas law applies to Ms. Wilson's loan.

30. During the life of that loan, Ms. Wilson paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

31. Plaintiff Betina Ingram took out a loan with Santander to finance the purchase of her car. Texas law applies to Ms. Ingram's loan.

32. Ms. Ingram has paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

33. Plaintiff Ronnie Dickerson took out a loan with Santander to finance the purchase of his car. Texas law applies to Mr. Dickerson's loan.

34. During the life of his loan, Mr. Dickerson paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

35. Plaintiff Devon Byrd took out a loan with Santander to finance the purchase of her car. Texas law applies to Ms. Byrd's loan.

36. Ms. Byrd has paid numerous Pay-to-Pay fees not authorized by her contract or legally chargeable to her.

CLASS ALLEGATIONS

37. Plaintiffs bring this action individually and on behalf of all others similarly situated pursuant to Arkansas Rule of Civil Procedure 23. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Rule 23.

38. The proposed Class is defined as:

All persons in the United States who (1) have a car loan with Santander, (2) that provides "Federal and Texas law apply to this contract," and (3) who paid a fee for making their loan payments online or over the phone.

39. Plaintiffs reserve the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate.

40. Excluded from the Class are Santander, its parents, subsidiaries, affiliates, officers and directors, any entity in which Santander has a controlling

interest, all customers who make a timely election to be excluded, governmental entities, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

41. The members of the Class are so numerous that joinder is impractical. The Class consists of thousands of members, the identities of whom are within the knowledge of Santander and can be ascertained only by resort to Santander's records.

42. Plaintiffs' claims are typical of the claims of the Class in that Santander collected from Plaintiffs, like all Class members, Pay-to-Pay fees that are neither authorized by contract nor legally chargeable to the borrower. Plaintiffs, like all Class members, have been damaged by Santander's misconduct. Furthermore, the factual basis of Santander's misconduct is common to all Class members.

43. There are numerous questions of law and fact common to the Class and those common questions predominate over any questions affecting only individual Class members.

44. Among the questions of law and fact common to the Class are:

- a. Whether Santander collected a portion of the Pay-to-Pay fees its borrowers paid;
- b. Whether Santander violated the TDCA by collecting Pay-to-Pay fees;
- c. Whether Plaintiffs' are entitled to actual damages and, if so, in what amount;

- d. Whether Plaintiffs are entitled to an injunction restraining Santander from future collections and attempted collections Pay-to-Pay fees; and
- e. Whether Santander's actions are sufficiently egregious as to warrant punitive damages.

45. Plaintiffs' claims are typical of the claims of other Class members, in that they arise out of the same wrongful policies and practices of Santander. Each Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other Class member.

46. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers. Accordingly, each Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

47. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of Santander, no Class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the Class members will continue to suffer losses and Santander's misconduct will proceed without remedy.

48. Even if Class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows claims to be heard which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

CAUSE OF ACTION

Violations of the Texas Debt Collection Act

49. Plaintiffs executed Santander's standard loan agreement, which contains a Texas choice-of-law provision.

50. Each Plaintiff took out his or her loan to purchase a car for personal, family, or household use.

51. Each Plaintiff is therefore, under the TDCA, a "consumer" who took out a "consumer debt."

52. Santander is a "debt collector" under the TDCA.

53. In the process of "debt collection," by collecting or attempting to collect Pay-to-Pay fees, Santander engaged in "unfair or unconscionable means" of "collecting or attempting to collect . . . a charge, fee, or expense incidental to the

obligation” that was not “expressly authorized by the agreement creating the obligation or legally chargeable to the” Plaintiffs and the Class.

54. As such, Santander has violated the TDCA.

55. Moreover, Santander has misrepresented, and continues to misrepresent, to its borrowers that Pay-to-Pay fees are fees charged and collected by third-party payment processors.

56. In truth, Santander collects and retains nearly the entire amount of each Pay-to-Pay fee a borrower pays.

57. These continual misrepresentations demonstrate the Santander’s violations of the TDCA were made with ill will or gross negligence to the rights of Plaintiffs and the Class as to amount to willful and wanton acts.

58. On behalf of the Class, Plaintiffs seek actual damages and an injunction restraining Santander from collecting and attempting to collect Pay-to-Pay fees.

TOLLING

59. Santander concealed from Plaintiffs and the Class the fact that Santander, not the third-party payment processor, collected nearly the entirety of every Pay-to-Pay fee.

60. These intentional misrepresentations prevented Plaintiffs from discovering a basis for a TDCA claim existed.

61. For these reasons, Plaintiffs’ claims that pre-date two years before the filing of this Complaint are tolled.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and members of the Class demand a jury trial on all claims so triable; an order certifying the class, appointing Plaintiffs as Class representatives, and designating the undersigned counsel as Class Counsel; and judgment as follows:

1. That judgment be entered against Santander and in favor of Plaintiffs and Class members on Count One and Count Two as alleged in this Complaint, and for actual, compensatory, punitive, and treble damages in an amount to be determined at trial;
2. That judgment be entered imposing interest on damages, litigation costs, and attorneys' fees against Santander;
3. That judgment be entered enjoining Santander from collecting and attempting to collect Pay-to-Pay fees from members of the Class; and
4. Such other relief as this Court deems just and proper.

DATED: January 10, 2020

/s/ Lee Lowther
CARNEY BATES & PULLIAM, PLLC
Lee Lowther, ABN 2013142
llowther@cbplaw.com
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EXHIBIT 1

ACCT. #
9-167899

MOTOR VEHICLE RETAIL INSTALLMENT SALES CONTRACT
SIMPLE FINANCE CHARGE

Buyer: FRENZETTA WILSON
Address: 184 WEST 2ND
City: PINE BLUFF STATE: AR ZIP: 71661
Phone: (878) 518-3294
Seller: SMART CHEVROLET COMPANY
Address: 515 W 5TH AVE.
City: PINE BLUFF STATE: AR ZIP: 71611
Phone: (878) - - -

The Buyer is referred to as "you" or "your." The Seller is referred to as "we" or "us." This contract may be transferred by the Seller.
PROMISE TO PAY: The credit price is shown below as the "Total Sales Price." The "Cash Price" is also shown below. By signing this contract, you agree to purchase the vehicle on credit according to the terms of this contract. You agree to pay the Amount Financed, Finance Charge, and any other charges in this contract. You agree to make payments in U.S. funds according to the Payment Schedule in this contract. If more than one person signs as a Buyer, you agree to keep all the promises in this agreement even if the others do not.

VEHICLE IDENTIFICATION
YEAR: 2012 MAKE: NISSA MODEL: SENTRA
VEHICLE IDENTIFICATION NUMBER: 3N1AB6AP3CL766288
NEW DEMONSTRATOR FACTORY OFFICIAL/EXECUTIVE USED
ADJUDICATED AGRICULTURAL

Trade-In: Make _____ Model _____
Year _____ VIN _____ License No. _____

FEDERAL TRUTH-IN-LENDING DISCLOSURES

| ANNUAL PERCENTAGE RATE | FINANCE CHARGE | Amount Financed | Total of Payments | Total Sale Price |
|------------------------|----------------|-----------------|-------------------|------------------|
| 1.8.00% | \$ 9,716.84 | \$ 14,831.88 | \$4,567.84 | \$27,367.84 |

Your Payment Schedule will be:
Number of Payments: 72
Amount of Payments: \$ 341.22
When Payments Are Due: Monthly beginning 03/11/2013
Or at 15 days

Late Charge: If we do not receive your payment on time, we will charge you a late charge of 1% of the amount due.
Payments: 90 days after the date of the last payment, you will pay a late charge of 1% of the amount due.
Security Interest: We will have a security interest in the vehicle being purchased.

RECAPITULATION OF AMOUNT FINANCED

| | | | |
|--|------------------|-----------|------------------|
| Cash Price (including any discounts, rebates, etc.) | N/A | SALES TAX | \$ 1,972.88 |
| N/A | N/A | and | N/A |
| Total Development (if applicable, enter "N/A" if not applicable) | N/A | | \$ 17,358.88 (1) |
| Gross Trade-In | \$ N/A | | |
| Pay Off Made by Seller | \$ N/A | | |
| Net Trade-In | \$ N/A | | |
| Cash | \$ 3,559.30 | | |
| Gifts, Rebates | \$ N/A | | |
| Other (describe) | \$ N/A | | |
| Total Development | \$ 3,559.30 (2) | | |
| Unpaid Balance of Cash Price (1 minus 2) | \$ 14,358.88 (3) | | |

Other Charges including Amount Paid in Advance of the Debt (Seller may keep part of these amounts):
A. Not included in payoff: N/A
B. Cost of Optional Credit Insurance Paid to Insurance Company or Company: N/A
C. Dealer Optional Insurance Policy Insurance: N/A
D. Dealer Fee Paid to Government agencies: N/A
E. Dealer Fee Paid to Seller: N/A
F. Dealer Fee Paid to Third Party: N/A
G. Dealer Fee Paid to Government: N/A
H. Dealer Fee Paid to Seller: N/A
I. Dealer Fee Paid to Third Party: N/A
J. Government Certificate of Title Fee: N/A
K. Government Vehicle Inspection Fee: N/A
L. Dealer Service Fee Paid to Dealer: N/A
M. Documentary Fee (if applicable): N/A

PROPERTY INSURANCE: You must keep the vehicle insured against damage or loss in the amount you owe. You must keep this insurance until you have paid all that you owe under this contract. You may obtain property insurance from anyone you want or provide proof of insurance you already have. The insurer will be authorized to do business in Texas. You agree to give us proof of property insurance. You must name us as the person to be paid under the policy in the event of damage or loss.

Optional Credit
Life and Credit Disability Insurance: Credit life insurance and credit disability insurance are not required to obtain credit. They will not be provided unless you sign and agree to pay the extra cost. You consent to try to get the best insurance coverage available to you at the credit approval price.

Credit Life, one buyer: N/A
Credit Life, both buyers: N/A
Credit Disability, one buyer: N/A
Credit Disability, both buyers: N/A

Optional Insurance Coverages and Dealer Conciliatory Agreement
The granting of credit will be dependent on the purchase of the insurance coverages in this contract. The dealer will not be responsible for the amount of the insurance coverages. The dealer will not be responsible for the amount of the insurance coverages. The dealer will not be responsible for the amount of the insurance coverages.

CONSUMER CREDIT COMMISSIONER NOTICE
To contact the CONSUMER CREDIT COMMISSIONER about this account, call (888) 548-5626. This contract is subject to the Uniform Consumer Credit Code, which is entered by the Consumer Credit Commissioner, 2601 N. Lamar Blvd., Austin, Texas 78705-4207; (800) 538-1575. www.occc.state.tx.us, and can be contacted relative to any inquiries or complaints.

The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this contract and retain its right to...
Any change to this contract must be... with you and we must sign it. No oral changes to this contract are enforceable.

Buyer: Frenzetta Wilson Co-Buyer: [Signature]
See back for important information.
CONSUMER WARNING: You are entitled to a copy of this contract and under certain circumstances you may have a right to rescind this contract.

BUYER'S ACKNOWLEDGEMENT OF CONTRACT RECEIPT: YOU AGREE TO THE TERMS OF THIS CONTRACT AND ACKNOWLEDGE RECEIPT OF A TRUE AND CORRECT COPY OF IT. YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, YOU WERE GIVEN THE OPPORTUNITY TO REVIEW IT.

Buyer Sign: [Signature] Date: 03/27/13
Co-Buyer Sign: [Signature] Date: 03/27/13
Seller Sign: [Signature] Date: 03/27/13

SALES REPRESENTATIVE: [Signature]
SALES REPRESENTATIVE: [Signature]
SALES REPRESENTATIVE: [Signature]

PAID IN FULL
APR 30 2019

AN EXACT COPY OF THE ORIGINAL

9967899

| OTHER TERMS AND CONDITIONS | |
|---|---|
| 1. FINANCE CHARGE AND PAYMENTS | <p>a. SHOW UP FINANCE CHARGE: The Finance Charge will be figured by the Amount Financed for the month outstanding. The Finance Charge will be applied to your payments in the order of: first, to pay the Finance Charge; second, to pay the principal of the loan; and third, to pay any interest on the loan.</p> <p>b. HOW LATE OR EARLY PAYMENTS: The Finance Charge will be added to the amount of the Finance Charge if you do not pay your Finance Charge on the date shown on the Finance Charge statement. If you do not pay your Finance Charge on the date shown on the Finance Charge statement, the Finance Charge will be increased by the Finance Charge.</p> <p>c. INTEREST: The Finance Charge will be added to the amount of the Finance Charge if you do not pay your Finance Charge on the date shown on the Finance Charge statement. If you do not pay your Finance Charge on the date shown on the Finance Charge statement, the Finance Charge will be increased by the Finance Charge.</p> |
| 2. YOUR OTHER RIGHTS | <p>a. USE AND TRANSFER: You may use the vehicle for personal or business purposes. You may not use the vehicle for hire or for any other purpose. You may not transfer the vehicle to anyone else without our written consent.</p> <p>b. CARE OF VEHICLE: You must take reasonable care of the vehicle and keep it in good condition. You must pay all taxes, license fees, and other charges. You must not use the vehicle for any illegal or unauthorized purpose.</p> <p>c. SECURITY: You must keep the vehicle insured for its full value. You must not use the vehicle for any purpose that would increase the risk of loss.</p> |
| 3. RETROGRADE INSURANCE PREMIUMS AND SERVICE CONTRACT CHARGES | <p>a. RETROGRADE INSURANCE PREMIUMS AND SERVICE CONTRACT CHARGES: If you get retrograde insurance or service contracts or other contracts included in the plan price, we will deduct them from what you owe. Once all amounts owed under this contract are paid, any remaining amounts will be paid to you.</p> <p>b. APPLICATION OF CREDITS: Any credit that reduces your debt will apply to your payments in the reverse order of when they are due, unless we decide to apply it to another part of your debt. The amount of the credit and all finance charge or interest on the credit will be applied to your payments in the reverse order of your payments.</p> |
| 4. IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES | <p>a. LATE CHARGE: You will pay us a late charge as agreed to in this contract when a payment is not received.</p> <p>b. DEFAULT: You will be in default if:</p> <ol style="list-style-type: none"> You do not pay any amount when it is due. You give false, incomplete, or misleading information on a credit application. You file for bankruptcy, insolvency, or reorganization, or you file a petition for protection under Chapter 11 of the U.S. Bankruptcy Code. You allow a judgment to be entered against you in the collection of your debt. You break any of your promises in this agreement. <p>c. OUR RIGHT TO DEMAND PAYMENT OR RECALL: If you default, or we believe in good faith that you are not going to keep any of your promises, we can demand that you immediately pay all that you owe. We don't have to give you notice that we are demanding or have to demand immediate payment of all that you owe.</p> <p>d. REPOSSESSION: If you default, we may repossess the vehicle from you if we do so peacefully. If your vehicle has an electronic tracking device, you agree that we may use the device to find the vehicle. If any personal items are in the vehicle, we can store them for you and give you written notice at your last known address shown on our records within 15 days of discovering that we have your personal items. If you do not get them from us within 30 days from the day we mail or deliver the notice to you, we may dispose of them as applicable law allows. Any accessories, equipment, or replacement parts fitted with the vehicle.</p> <p>e. YOUR RIGHT TO REDEEM: If we take your vehicle, we will let you know how much you have to pay to get it back. If you do not pay us to get the vehicle back, we can sell it or take other action allowed by law. Your right to redeem ends when the vehicle is sold or we have obtained a contract for sale or accepted the contract as full or partial satisfaction of a contract.</p> <p>f. DEPOSITION OF THE VEHICLE: If you don't pay us to get the vehicle back, we can sell it or take other action allowed by law. We will send you notice at least 10 days before we sell it. We can use the money we get from selling it to pay allowed expenses and to reduce the amount you owe. Allowed expenses are: expenses we pay to get it back, cost of taking it back, holding it, repairing it by law, and selling it. If the money from the sale is not enough to pay us what you owe, you must pay the rest of what you owe us plus interest. If we take or sell the vehicle, you will give us the certificate of title and any other document required by state law to record transfer of title.</p> <p>g. COLLECTION COSTS: If we hire an attorney who is not our employee to collect on this contract, you will pay reasonable attorney's fees and court costs as the applicable law allows. We will also pay any reasonable out-of-pocket expenses incurred in connection with sending, holding, and selling the vehicle, as the applicable law allows.</p> <p>h. CANCELLATION OF OPTIONAL INSURANCE AND SERVICE CONTRACTS: This contract may contain charges for insurance or service contracts or for services included in the plan price. If you default, you agree that we can cancel these optional contracts in the event of a default, and terminate them to obtain refunds of unearned charges to reduce what you owe or apply to the vehicle, if the vehicle is a total loss because it is damaged or stolen. We may claim benefits under those contracts and deduct them to obtain refunds of unearned charges to reduce what you owe.</p> |
| 5. INVESTIGATION AND SEVERABILITY CLAUSE | <p>a. INVESTIGATION AND SEVERABILITY CLAUSE: This contract contains the entire agreement between you and us relating to the sale and financing of this vehicle. If any part of this contract is not valid, all other parts will still be valid.</p> <p>b. LEGAL LIMITATIONS ON OUR RIGHTS: If we don't enforce our rights every day, we can still enforce them later. We will exercise all of our rights in a lawfully way. The don't have to pay interest charge or other amounts that are more than the law allows. This provision prevails over other parts of this contract and over our other acts.</p> <p>c. SELLER'S DISCLAIMER OF WARRANTIES: Unless the seller makes a written warranty, or enters into a service contract within 30 days from the date of this contract, the seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose. This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide.</p> <p>d. Used Car Buyer's Guide: The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary promises in the contract of sale.</p> <p>e. Spanish Translation: Osta para consumidores de vehículos usados. La información que se ve en el formulario de la ventana para este vehículo tiene parte del propósito de proporcionar información del fabricante de la información de los vehículos. La información del fabricante de la información de los vehículos puede ser responsable de la información de los vehículos.</p> <p>f. APPLICABLE LAW: Federal and Texas law will apply to this contract.</p> |

NOTICE: ANY THE SELLER NOT EXCEED THE PROVISIONS OF THIS CONTRACT. THIS CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE CREDITOR OR WITH THE PROCEEDS HEREOF, RECOVERY HEREUNDER BY THE DEBTOR SHALL BE LIMITED TO THE AMOUNT OF THE CONTRACT PRICE PAID BY THE DEBTOR. THIS CONTRACT WAS PURCHASED FOR PERSONAL, FAMILY, OR HOUSEHOLD USE.

PAID IN FULL
APR 30 2019

THIS COPY IS NOT VALID UNLESS IT IS THE ORIGINAL AND EXACT COPY OF THE ORIGINAL

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Class Action Alleges Santander Charged Unauthorized Fee for Payments Made Online or By Phone](#)
