IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HUGH KELLY and CHRISTINE KELLY, individually and on behalf of all others similarly situated	)	CIVIL ACTION
	)	No. 2:20-cv-03698
Plaintiffs,	)	
v.	)	
SANTANDER CONSUMER USA, INC.,	)	
Defendant.	)	

FIRST AMENDED CLASS ACTION COMPLAINT [1]

Representative Plaintiffs Hugh and Christine Kelly, on behalf of themselves and all others similarly situated, hereby file this Class Action Complaint against Defendant Santander Consumer USA, Inc. and allege as follows:

INTRODUCTION

1. Plaintiffs bring this consumer class action on behalf of similarly situated residents of Pennsylvania, seeking monetary, injunctive and declaratory relief through the Uniform Commercial Code ("UCC"), independently, and in *pari materia* with the Motor Vehicle Sales Finance Act ("MVSFA"),[2] necessitated by Defendant Santander's failure to comply with the strict statutory requirements for Post-Repossession Consumer Disclosure Notices ("Notices of

[1] This amended complaint is filed pursuant to Rule 15(a)(1)(B). This Honorable Court stayed the briefing of the Motion to Dismiss (ECF 3) within 21 days after its service. In the event that this Honorable Court requires Plaintiffs to seek leave to amend, Plaintiffs will immediately seek leave. This amended complaint is intended to moot some challenges raised in ECF 3.

[2] The MVSFA was originally found in Chapter 7 of Title 69 of Purdon's Statutes. In 2014, it was repealed and recodified in Chapter 62 of Title 12 of Pennsylvania Consolidated Statutes.

Repossession") that Santander sent to consumer vehicle owners after the repossession of a motor vehicle securing a retail installment sales contract.

PARTIES

2. Hugh and Christine Kelly are adult individuals who at all relevant times resided at 114 Opal Ct, Cranberry Township, PA 16066.

3. Santander Consumer USA Inc. ("Santander") is a corporation with its headquarters in Dallas, Texas.

4. All Representative Plaintiffs purchased their subject vehicle in Pennsylvania.

5. Santander caused all Representative Plaintiffs' and (putative) class members' vehicles to be repossessed in Pennsylvania.

6. Santander is a nationally chartered bank which purchases retail installment sales contracts through vehicle dealerships, including through Chrysler franchise dealerships under the name of "Chrysler Capital."

7. While some Notices of Repossession sent by Santander listed the sender as "Santander Consumer USA Inc.," and others listed the sender as "Chrysler Capital," all were caused to be sent by Santander, who was the holder, owner, and servicer of all subject loans at issue.

8. At all relevant times, FCA US LLC (formerly Chrysler Group LLC) permitted Santander to use the Chrysler Capital trade name when providing financing services to its dealers and retail customers.

VENUE

9. Santander regularly and systematically conducts business throughout Pennsylvania.

DEFINITIONS

10. **Debtor**: The term "Debtor" is "A: (1) person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor …" *See*, 13 Pa. C.S.A. §9102.

11. **Good Faith**: The term "Good Faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. 13 Pa.C.S.A. §1201; See, "Obligation of Good Faith" below.

12. **Motor Vehicle**: Except as otherwise stated, the terms "Motor Vehicle" and "Vehicle" mean a device in which, upon which, or by which a person or property is or may be transported or drawn upon a public highway, including an automobile, a truck, a sports utility vehicle, a van, a minivan, a camper, a recreational vehicle, a motorcycle, or a truck. The term is not intended to include a semitrailer or manufactured home.

13. **Notice of Repossession**: The term "Notice of Repossession" refers to a post-repossession consumer disclosure notice and has the same meaning as the term "notification of disposition," in 13 Pa.C.S.A. §§9611, 9613, and 9614 and as "Notice of Repossession" in 12 Pa.C.S. §6254. Santander used at least one standardized, uniform form throughout the Class Period. The only information modified in the Notices of Repossession that is unique to each customer consists of amounts, personally identifiable information, unique data pertaining to the repossessed vehicle, the customer's loan information, and dates.

14. **Obligation of Good Faith**: The term "Obligation of Good Faith" refers to the requirement that "Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement." 13 Pa. C.S.A. §1304.

15. **Obligor:** The term "Obligor" refers to A person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral: (1) owes payment or other performance of the obligation; (2) has provided property other than the collateral to secure payment or other performance of the obligation; or (3) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include any issuer or nominated person under a letter of credit.

16. **Personal Property Fee**: The term "Personal Property Fee" refers to a fee that Santander and/or a third party repossessor, and/or the auction selling the repossessed vehicle charged to (and/or would have charged to) Representative Plaintiff and/or (putative) class members as a precondition to: (a) to regain possession of his/her/their personal belongings left in the repossessed vehicle; (b) to redeem their repossessed vehicle; and/or, (c) reinstate their loan.

17. **Post-Sale Notice**: The term "Post-Sale Notice" is a post-sale consumer disclosure notice which has the same meaning as the term "Explanation of Calculation of Surplus or Deficiency" in 13 Pa.C.S.A. §9616. This term also refers to the "deficiency notice" as required by 12 Pa.C.S. §6261(d).

18. **Redeem/Redemption:** Unless stated otherwise, the terms "Redeem" and "Redemption" mean a "buy back" of the repossessed vehicle by terminating the contract upon payment of the unpaid portion of the amount financed and the finance charge, plus late charges, costs of retaking, repairing and storing the vehicle, and any other amounts lawfully due under the contract. 12 Pa.C.S.A. §6259.

19. **Redemption Fee**: The term "Redemption Fee" refers to a fee that Representative Plaintiffs and (putative) class members were required to pay Santander, and/or a third party

repossessor, and/or the auction selling the repossessed vehicle, as a precondition to redeem (buy back) their repossessed vehicle or reinstate his/her/their contract.

20. **Schumer Box**: The term "Schumer box" is a table with a standardized format that discloses the rates, fees, terms and conditions of a credit card or other lending agreement as required under the federal Truth in Lending Act (TILA).

21. **Storage Expense or Storage Fee**: The term "Storage Expense" or "Storage Fee" is a fee or expense (depending on if incurred by Santander) listed on the Notices of Repossession purportedly for the storage of the repossessed vehicle.

FACTUAL BACKGROUND

22. In approximately June 2017, Santander caused Hugh and Christine Kelly's 2006 Chrysler Pacifica to be repossessed. Santander then sent them each a Notice of Repossession (**Exhibit 1** and **Exhibit 2**) dated June 16, 2017. After Santander sold the vehicle, Santander sent them each a Post-Sale Notice dated June 24, 2018. (**Exhibit 3** and **Exhibit 4**).

23. The Notices of Repossession sent to the Plaintiffs and all class members had the following identical or substantially similar language:

As of the date of this notice, you can redeem the Vehicle by paying us the following:

1)	Unpaid balance:	$ xxx.xx
2)	Accrued Interest:	$ xxx.xx
3)	Unpaid default charges due:	$ xxx.xx
4)	Repossession expenses:	$ xxx.xx
5)	Storage expenses **incurred** through date of this Notice (@ **$25.00 per day**)	$ 25.00
6)	Other: [specify]_____	$ xxx.xx
Total sum required to redeem as of date of this Notice*		$ xxx.xx

(Emphasis added to the word "incurred" and "$25.00 per day")

24. Santander, however, as a matter of uniform policy, procedure, and practice, did not pay to any third party or otherwise "***incur***" any expense[3] for storing the repossessed vehicles of the Representative Plaintiffs or (putative) class members ***as of the date of the Notice of Repossession***.

25. The Post-Sale Notices attached hereto as **Exhibits 3** and **Exhibit 4** each reflect $0 for the "cost of storing the vehicle," thereby evidencing that the itemization of the Storage Expense on the Notices of Repossession was systematically wrong.

26. Because the Storage Fee in the Notice of Repossession was inaccurate, the total amounts due for Redemption in the Notices were, as a matter of policy, procedure, and practice not accurate.

27. In addition to the Storage Fee, Santander (or its broker) has arrangements with the repossessor, repossession broker, and/or auction permitting the assessment of a Redemption Fee and/or Personal Property Fee.

28. The Notice of Repossession sent to all Plaintiffs and putative class members failed to inform them that, if he/she/they wanted to redeem their vehicle, they would need to pay a Redemption Fee and/or a Personal Property Fee, both of which were not bona fide expenses to Santander as they were not reasonable, necessary, nor actually incurred (nor would be incurred).

29. Or, in the alternative and/or in addition, if either of these fees were incurred by Santander as relating to a Redemption, then – in such instance - Santander would be acting as a collection agent for the repossessor, repossession broker, and/or action for such "fees," mischaracterizing both (or either) of them as expenses to the debtor (putative) class members.

[3] An "expense" is "an expenditure of money…." *Black's Law Dictionary Abridged*, 7th Ed. at 473.

30. Or, in the alternative and/or in addition, Santander failed to disclose these fees in the Notices of Repossession it sent to the Representative Plaintiffs and (putative) class members. The assessment of these fees, irrespective of whether they were disclosed, nonetheless violates the statute(s) as set forth below.

THE UCC AND MVSFA MUST BE READ *IN PARI MATERIA*

31. Santander, as a secured creditor who elects to exercise self-help repossession of motor vehicles is required to comply with both the UCC, independently, and in *pari materia* with the MVSFA, 12 Pa.C.S.A. §6201, *et seq*. These statutes much be applied in *pari materia*. *Industrial Valley Bank & Trust Co. v. Nash*, 349 Pa. Super. 27, 502 A.2d 1254 (1985).

32. The Eastern District of Pennsylvania and other trial courts in Pennsylvania have have certified similar claims involving defective Notices of Repossession and, adhering to *Industrial Valley Bank and Trust Co. v. Nash*, 349 Pa. Super. 27, 502 A.2d 1254 1263 (Pa. Super. Ct. 1985), have held that the secured creditor must comply with the MVSFA in *pari materia* with the UCC to ensure that the notice is commercially reasonable, pursuant to the UCC.

A. *Dudo v. Capital One, N.A.*, 296-2020 (CCP Jefferson County)(final approval order): "Common issues of law and fact … predominate over potential individual issues, including whether Defendant complied with certain content requirements of the MVSFA independently, and the UCC and MVSFA in *pari materia* regarding forms Defendant used when issuing post-repossession consumer disclosure notices sent to all class members --- such that Defendant's failure to comply is per se commercially unreasonable as a matter of law. *Ryan v. Tidewater Finance Co*., 03529-2017 (Phila. CCP., July 23, 2018). **Exhibit 5**.

B. *Ryan v. Tidewater Finance Finance Co, supra*., 03529 Sept. Term, 2017 (preliminary approval order): "The question of sufficiency or commercial reasonableness of Tidewater's form disclosures do not vary among Class Members because each omit the same mandatory content and were mailed in the same manner. … A disclosure notice cannot be commercially reasonable if the text violates the MVSFA, the UCC, or the MVSFA and the UCC in *pari materia* and form notices and/or standardized practices." **Exhibit 6**.

C. *Cosgrove v. Citizens Auto. Finance, Inc.*, 2011 WL 3740809 (E.D. Pa. 2011)("The Pennsylvania UCC does not define "reasonable" notice, but Pennsylvania courts define the term by looking at statutes governing vehicle finance and repossession. See, *Industrial Valley Bank and Trust Co. v. Nash*, 349 Pa. Super. 27, 502 A.2d 1254 1263 (Pa. Super. Ct. 1985);" and,

D. *McCall v. Drive Financial Services, L.P., et al.*, January Term, 5 (2006)(certifying a post-repossession disclosure notice class action stating "[t]he legislature, through the UCC and the MVSFA, requires secured parties to provide consumers with specific, detailed notices of repossession and sale)." **Exhibit 7**.

33. "Statutes or parts of statutes are in *pari materia* when they relate to the same persons or things or to the same class of persons or things." 1 Pa. C.S. §1932(a). "Statutes in *pari materia* shall be construed together, if possible, as one statute." 1 Pa. C.S. §1932(b).

34. The MVSFA sets forth notice requirements for secured parties who repossess other than by legal process. Likewise, the UCC sets forth the notice requirements for secured parties who repossess other than by legal process. Therefore, these statutes clearly relate to the same persons or things and/or to the same class of persons or things, debtors whose vehicles were repossessed outside the judicial process.

35. Further, Comment 9 to 13 Pa.C.S.A.§9620 states:

> **Applicability of Other Law**. This section does not purport to regulate all aspects of the transaction by which a secured party may become the owner of collateral previously owned by the debtor. For example, a secured party's acceptance of a motor vehicle in satisfaction of secured obligations may require compliance with the applicable motor vehicle certificate-of-title law. State legislatures should conform those laws so that they mesh well with this section and Section 9-610, and courts should construe those laws and this section harmoniously. A secured party's acceptance of collateral in the possession of the debtor also may implicate statutes dealing with a seller's retention of possession of goods sold.

36. Comment 9 specifically directs courts to construe UCC provisions "harmoniously," i.e. in *pari materia*, with other laws that regulate secured transactions. The MVSFA is such a law.[4]

STATUTORY VIOLATIONS

Deficiencies in Notices of Repossession

37. In the course of the repossession and disposition process, Santander had a statutory obligation to provide a "reasonable authenticated notification of disposition" (i.e. "Notice of Repossession") of the collateral, containing important mandatory information about the repossession and intended disposition of the vehicle. 13 Pa.C.S.A. §9611, §9614 and 12 Pa.C.S.A. §6254.

38. A Notice of Repossession that lacks **any** of the required information is ***insufficient as a matter of law***. 13 Pa.C.S.A. §9614, comment 2.

39. Section 9623(b) of the UCC states:

> "…[t]o redeem the collateral, a person shall tender … (2) the reasonable expenses and attorney fees described in section 9615(a)(1)(relating to application of proceed)." (emphasis added).

40. Thus, Santander's Notices of Repossession, which claims to inform the vehicle owner how much he/she/they will have to tender to Redeem the vehicle, can only include in that Redemption Amount those expenses listed in Section 9615(a)(1).

41. Section 9615(a)(1) limits these expenses to:

> "the **reasonable expenses** of retaking, holding, preparing for disposition, processing and disposing…**incurred by the secured party**." (emphasis added).

42. Further, the MVSFA states that a secured party can only be reimbursed for expenses

[4] Plaintiffs do not assert claims under the MVSFA, independently, seeking a private right of action. Rather, Plaintiffs' claims for violation of the MVSFA are asserted in *pari materia* with the UCC only.

that are "actual, necessary and reasonable." 12 Pa.C.S. §6256.

43. At all relevant times, as a matter of standardized policy, procedure, and practice, Santander did not incur the amount it listed in the Notices of Repossession as a Storage Expense. Therefore, it could not include that amount in its Notices of Repossession.

44. Moreover, Santander sent Notices of Repossession that failed to disclose a Redemption Fee and/or Personal Property Fee – payment of one or both of which were required in order for the Representative Plaintiffs and (putative) class members to Redeem his/her/their vehicle.

45. As a result of the above averments regarding the Storage Fee, Redemption Fee, and/or Personal Property Fee, the total amounts due for Redemption listed in the Notices of Repossession sent to the Representative Plaintiffs and (putative) class members were not accurate, in violation of 12 Pa.C.S. §6254(c)(2), §6256, 13 Pa. C.S. §9615, §9623, §9610 and the UCC and MVSFA in *pari materia*.

46. In the alternative and/or in addition, Santander charged Redemption Fees and/or Personal Property Fees that purportedly incurred, acting in essence, as a collection agent for the repossessor(s), repossession broker(s), and/or auction(s). These fees were, nonetheless, not actual, necessary, nor reasonable, in violation of 13 Pa.C.S. §9615(a)(1), §9623(b), and/or 12 Pa.C.S. §6254(c)(2) and §6256 in *pari materia* with the UCC.

47. At all relevant times, Santander permitted (and ratified the conduct of its) repossessors, repossession agents, and/or auctions to charge Redemption Fees and/or Personal Property Fees.

48. Santander violated both the UCC, independently, and in *pari materia* with the MVSFA, including the following ways: (1) failing to disclose fees that were purportedly required

to be paid in order for Plaintiffs and class members to Redeem, resulting in an inaccurate amount required to Redeem; and, (2) charging (and/or permitting third parties to charge) fees that were unincurred and/or not actual, necessary, and/or reasonable; and/or, (3) inflating the Redemption amount as stated in the Notice of Repossession and/or listing an inaccurate Redemption Amount.

Commercial Unreasonableness/Violation of Good Faith

49. There are two overarching principles that must guide a secured creditor's conduct in repossessing and selling a financed vehicle. First, all aspects of its conduct must be "commercially reasonable," as required by Section 9610(b). Section §9610(b) of the UCC requires that ***all aspects*** of the sale of a repossessed vehicle must be commercially reasonable. It further expressly prohibits the sale of the collateral if the sale is not commercially reasonable. The statute states, in relevant part, as follows:

> (b) Commercially reasonable disposition – ***Every*** aspect of a disposition of collateral, including the method, manner, time, place and other terms, ***must be*** commercially reasonable. **[*Only*] *If*** commercially reasonable, a secured party may dispose of collateral by **public** or **private** proceedings. …
> (Emphasis added).

50. Second, regardless of whether there is ultimately a reinstatement of the loan or a redemption or sale of the repossessed vehicle, a secured creditor must fulfill its Obligation of Good Faith to conduct itself honestly and observe reasonable commercial standards of fair dealing. *See*, 13 Pa. C.S §1201 and §1304.

51. At all relevant times, as Santander had possession, custody, and control of motor vehicles which were not owned by itself, it had a fiduciary duty and/or a bailor's duty towards Plaintiffs and the putative class members.

52. The actions and omissions by Santander averred above are commercially unreasonable in violation of 13 Pa.C.S.A.§9610(b) and/or are a violation of Santander's

Obligation of Good Faith and/or its bailor/fiduciary duty that it owed to Plaintiffs and class members. All claims herein are set forth within the ambit of the UCC, Article 9, which has a statute of limitations of 6-years. See, *Cubler v. TruMark Financial Credit Union*, 83 A.3d 235 (2013).

DAMAGES

53. 13 Pa. C.S.A. §9625(c)(2) allows consumer Debtors/Obligors such as Plaintiffs and Class Members to recover statutory damages equal to the credit service charge (finance charge) plus 10% of the principal amount of the obligation (amount financed). These figures are readily determinable simply by a review of the Schumer Box of each Class Members' retail installment sales contract.

54. The Official Comments to the UCC are entitled to great weight under Pennsylvania law. Comment 4 to Section 9625 makes clear that these statutory damages are intended to establish a secured party's liability for violations of, *inter alia*, the notice provisions in consumer goods transactions, regardless of whether "actual damages" are greater, lesser, or even absent. That comment states in pertinent part:

> 4. **Minimum Damages in Consumer-Goods Transactions.** Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former Section 9507(1) and is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, **regardless of any injury that may have resulted**. [emphasis added] Official Comment to §9625(c)(2).

CLASS ALLEGATIONS

55. Plaintiffs bring this action on their own behalf and on behalf of the following class of individuals designated pursuant to Rule 23 of the Federal Rules of Civil Procedure.

56. Plaintiffs propose the "Notice of Repossession Class" defined as: All Debtors, Obligors, and Co-Obligors:

(a) who entered into a retail installment sales contract for the financing of the purchase of a Motor Vehicle primarily used for personal, family or household use in Pennsylvania; and,

(b) from whom Santander, as secured party, repossessed the vehicle or ordered it to be repossessed, causing a repossession to occur in Pennsylvania; and,

(c) to whom Santander sent a Notice of Repossession to a Pennsylvania address at any time on or within the period commencing six years prior to the filing of the original complaint in this action through the date of class certification:

i. which listed an amount (other than $0) for "Storage expenses incurred through date of this Notice," and/or,

ii. who were sent a notice with an identification of "PA-NOI-420," "PA-NOI-450," or "PA-NOI-420_2799_050713."

57. Plaintiffs reserve the right to amend this class definition.

58. Plaintiffs believe that there are at least 39 members of this (putative) class. This class is sufficiently numerous that joinder of all members would be impractical.

59. The class and any trial would be readily manageable as the claims relate to standardized policies, procedures, and/or practices and disclosure notices based on standardized template forms.

60. There are questions of law and fact common to all Plaintiffs and Class Members include but are not limited to the following:

(a) Whether Plaintiffs and the Class obtained Motor Vehicle financing through Santander and pledged their vehicle as collateral;

(b) Whether each Class Member had his/her vehicle repossessed in Pennsylvania;

(c) Whether Santander was the secured creditor of each Class Member's subject vehicle loan at the time of repossession;

(d) Whether Santander sent a Notice of Repossession to the Class Member within six years prior to the filing of the original complaint; and,

(e) Whether the subject Notice of Repossession complied with the UCC, independently, and the UCC and MVSFA in *pari materia*.

61. The Representative Plaintiffs' claims are typical of those of the class. All are based on the same factual and/or legal theories. Santander was the secured creditor on Plaintiffs' and Class Members' consumer vehicle loans. Santander declared a default on all Plaintiffs' and Class Members' loans. Additionally, Santander repossessed their vehicle(s), and sent Notices of Repossession to them based on the same or substantially similar forms and with the same or substantially similar deficiencies.

62. Plaintiffs will fairly and adequately represent and protect the interests of the classes.

63. The Plaintiffs are represented by counsel competent and experienced in both consumer protection and class action litigation.

64. Plaintiffs have no conflict with Class Members in the maintenance of this action, and their respective claims are identical to or at least typical of claims of the Class Members.

65. A class action is superior to other available means for the fair and efficient adjudication of this controversy since individual joinder of all Class Members is impracticable. This class action represents the fairest and most efficient method of adjudicating this controversy.

66. Plaintiffs and the Class Members have substantive claims that are similar, if not identical, in all material respects and will require proof of the same kind and application of the same law.

67. Santander has acted or refused to act on grounds generally applicable to the class.

68. There are no unusual legal or factual issues that would cause management problems not normally and routinely handled in class actions.

69. Plaintiffs' counsel intends to send a class notice which will include the calculation for the class members' respective statutory minimum damages and (disputed) deficiency balance, if any claimed by Santander to be then due and owing. Any class member will then be afforded adequate notice, an opportunity to be heard, and have an opportunity to opt-out of the class action (i.e., in the event that the class member chooses to seek actual damages).

70. Minimum statutory damages can be calculated easily and with mathematical precision and can be easily determined, *inter alia*, by accessing the electronically stored records of Santander.

71. Because most Class Members either do not know that Santander did not meet the consumer notice requirements related to their vehicle repossession, could not economically justify the effort and expense required to litigate their individual claims, or have little interest in or ability to prosecute an individual action, due to the complexity of the issues involved in this litigation, a class action is the most practical proceeding in which they can recover.

72. The questions of law and fact common to the class predominate over any questions affecting only individual members.

73. The prosecution of several separate actions by the members of the class would create a risk of inconsistent or varying adjudications. A class action will serve the goals of judicial economy and ensure uniformity of decision.

COUNT 1

74. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

75. Santander systematically violated the UCC, including but not limited to the following ways:

(a) Sending Notices of Repossession which included a Storage Fee/Expense under the ruse of an "incurred" expense which Santander either did not incur or, in the alternative, if it did incur, the fee did not constitute a bona fide expense as such amount was not actual, reasonable, nor necessary and/or the amount / procedure to include same in Notice of Repossession was not commercially reasonable or otherwise a not permitted by statute;

(b) Sending Notices of Repossession that failed to disclose a Redemption Fee and/or Personal Property Fee or other fees which were required in order for the Representative Plaintiffs and (putative) class members to have redeemed their vehicle; and/or,

(c) Santander charged Redemption Fees and/or Personal Property Fees and/or other fees under the ruse of an expense which were not bona fide expenses, not actual, necessary, nor reasonable and/or permitted and ratified its third party vendor repossessors, repossession brokers, and/or auctions to assess such fees; and/or,

(d) Acting in an otherwise commercially unreasonable manner, including violating the MVSFA [12 Pa.C.S.A. §6254(c)(2) and §6256] in *pari materia* with the UCC, its Obligation of Good Faith and Fair Dealing, and/or its fiduciary duty/bailor duty.

76. As a result of the foregoing, Santander violated the following UCC statutes: 13 Pa.C.S. §9610(b), 13 Pa. C.S.A. §1304, §9610(b), §9614, §9615(a)(1), and/or §9623(b).

WHEREFORE, Plaintiffs, individually and on behalf of these putative classes, request that this Honorable Court grant the following relief as against Defendant Santander as follows:

A. Certify the requested classes and appoint the undersigned as class counsel

B. Monetary Damages as provided by 13 Pa. C.S. §9625(c)(2)

C. Declaratory Relief

1. Declare that the practices complained of were not commercially reasonable pursuant to 13 Pa.C.S. 9610(b);

2. Declare that the disputed deficiency balances of Plaintiffs and class members are invalid and cannot be collected, as a matter of law; and,

3. Declare that any loan by which a Class Member borrowed funds to refinance a disputed deficiency balance is null and void and cannot be collected, as a matter of law.

D. Injunctive and Equitable Relief

1. Pursuant to 13 Pa. C.S. §9625(a), impose a constructive trust on all ill-gotten proceeds; order an accounting of all such proceeds, and their expedited return, with interest, by ordering the Bank to disgorge all monies received from any Class Member as a payment towards a disputed deficiency balance or as a payment towards a loan to the extent that such loan refinanced a disputed deficiency balance;

2. Enjoin the collection of any invalid and disputed deficiency balance as permitted by 13 Pa.C.S. §9625(a);

3. Temporarily and/or permanently enjoin the use of all statutorily non-compliant post-repossession disclosure notices and unlawful fees; and,

4. Order Santander to make credit report reparations for the Plaintiffs and all class members by removing the credit trade lines.

E. Grant such other and further relief as may be deemed just and proper.

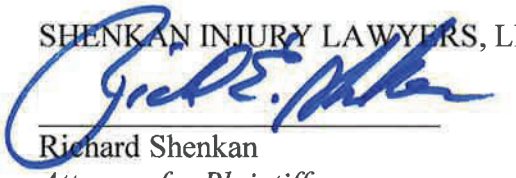
Respectfully submitted,
SHENKAN INJURY LAWYERS, LLC.

Richard Shenkan
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this pleading have been sent to all counsel of record who subscribe to the ECF, contemporaneously when filed.

SHENKAN INJURY LAWYERS, LLC.



Richard Shenkan
Attorney for Plaintiffs

Santander CONSUMER

Santander Consumer USA Inc.
P.O. Box 961245
Fort Worth, TX 76161-1245
(888) 222-4227

NOTICE OF REPOSSESSION AND NOTICE OF OUR PLAN TO SELL PROPERTY

EXHIBIT tabbies 1

Date: 06/16/2017

Hugh Kelly
114 OPAL CT
CRANBERRY TWP, PA 16066-6354

CHRISTINE E KELLY
114 OPAL CT
CRANBERRY TWP, PA 16066

SENT VIA CERTIFIED MAIL

Re: Account No. 30000175073161000
Retail Installment Sale or Credit Sale Contract or Note and Security Agreement dated 02/26/2011
2006 // CHRYSLER // PACIFICA-V6 // VIN 2A8GF68416R657517

Dear Hugh Kelly:

We have your Vehicle because you broke promises in our Agreement.

We will sell the Vehicle at the expiration of fifteen (15) days from the date we mail this notice (shown above) at a private sale sometime after 07/05/2017. A sale could include a lease or license.

The money we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you *will* still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the Vehicle back at any time (redeem it) before we sell it by paying Santander Consumer USA Inc., 5201 Rufe Snow Dr., Suite 400, North Richland Hills, TX 76180-6036 the total amounts itemized below **PLUS** any amounts incurred by us **after the date of this Notice.** If you were in default fifteen (15) days or less at the time we repossessed the Vehicle, you must pay the unpaid balance, plus the amount of any accrued default charges, plus any other amount lawfully due under the Agreement, less a rebate of unearned finance charges. If you were in default more than fifteen (15) days before we repossessed the Vehicle, you will also have to pay the costs of retaking, repairing, repossessing, and storing the Vehicle.

As of the date of this notice, you can redeem the Vehicle by paying us the following:

1) Unpaid balance:	$4,019.06
2) Accrued interest:	$129.49
3) Unpaid default charges due:	$267.81
4) Repossession expenses:	$385.00
5) Storage expenses incurred through date of this Notice (@ $25.00 per day)	$25.00
6) Other: [specify] _____	$0.00
Total sum required to redeem as of date of this Notice *	**$4,846.36**

* The total sum required to redeem may change based on charges that are incurred following the date of this letter or credits that are received and applied to the amount due. Please call on the date of redemption to find out the exact amount.

You must also pay to us any payments or expenses that may become due or be incurred **after the date of this Notice.**

9307 1100 1170 0917 9104 89
PA-NOI-450
(Rev. 091814)

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at (888) 222-4227 or write us at P.O. Box 961245, Fort Worth, TX 76161-1245 and request a written explanation.

If you need more information about the sale call us at (888) 222-4227 or write us at the above address.

The Vehicle is stored at:

A L Recovery-2189 North Main St 2189 North Main St Hubbard, OH 44425

Any personal property we found in the Vehicle will be held by us for thirty (30) days from the date set forth at the top of this Notice. This property will be held at the address listed above for these thirty (30) days and may be redeemed between the hours of 9:00 AM local time and 5:00 PM local time. Please be advised that any property we find that is not claimed within thirty (30) days from the date of this Notice may be disposed of in the same manner as the Vehicle.

Payment should be directed to and notice may be served upon Reinstatement Dept., Santander Consumer USA Inc., 5201 Rufe Snow Dr., Suite 400, North Richland Hills, TX 76180-6036.

We are sending this notice to the following other people who have an interest in the Vehicle, or who owe money under your Agreement: Hugh Kelly.

Sincerely,

Santander Consumer USA Inc.

NOTICE: If you are entitled to the protections of the United States Bankruptcy Code (11 U.S.C. §§ 362; 524) regarding the subject matter of this letter, the following applies to you: THIS COMMUNICATION IS NOT AN ATTEMPT TO COLLECT A DEBT FROM YOU PERSONALLY IN VIOLATION OF THE BANKRUPTCY CODE AND IS FOR INFORMATIONAL PURPOSES ONLY.

SANTANDER CONSUMER USA IS A DEBT COLLECTOR UNLESS THE NOTICE ABOVE APPLIES TO YOU. THIS IS AN ATTEMPT TO COLLECT YOUR DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Santander Consumer USA can report information about your account to credit bureaus. Late payments, missed payments or other defaults on your account may be reflected in your credit report.

Santander CONSUMER

Santander Consumer USA Inc.
P.O. Box 961245
Fort Worth, TX 76161-1245
(888) 222-4227

NOTICE OF REPOSSESSION AND NOTICE OF OUR PLAN TO SELL PROPERTY

EXHIBIT tabbies 2

Date: 06/16/2017

CHRISTINE E KELLY
114 OPAL CT
CRANBERRY TWP, PA 16066-6354

Hugh Kelly
114 OPAL CT
CRANBERRY TWP, PA 16066

SENT VIA CERTIFIED MAIL

Re: Account No. 30000175073161000
Retail Installment Sale or Credit Sale Contract or Note and Security Agreement dated 02/26/2011
2006 // CHRYSLER // PACIFICA-V6 // VIN 2A8GF68416R657517

Dear CHRISTINE E KELLY:

We have your Vehicle because you broke promises in our Agreement.

We will sell the Vehicle at the expiration of fifteen (15) days from the date we mail this notice (shown above) at a private sale sometime after 07/05/2017. A sale could include a lease or license.

The money we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you will still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the Vehicle back at any time (redeem it) before we sell it by paying Santander Consumer USA Inc., 5201 Rufe Snow Dr., Suite 400, North Richland Hills, TX 76180-6036 the total amounts itemized below **PLUS** any amounts incurred by us **after the date of this Notice**. If you were in default fifteen (15) days or less at the time we repossessed the Vehicle, you must pay the unpaid balance plus the amount of any accrued default charges, plus any other amount lawfully due under the Agreement, less a rebate of unearned finance charges. If you were in default more than fifteen (15) days before we repossessed the Vehicle, you will also have to pay the costs of retaking, repairing, repossessing, and storing the Vehicle.

As of the date of this notice, you can redeem the Vehicle by paying us the following:

1) Unpaid balance:	$4,019.06
2) Accrued Interest:	$129.49
3) Unpaid default charges due:	$287.81
4) Repossession expenses:	$385.00
5) Storage expenses incurred through date of this Notice (@ $25.00 per day)	$25.00
6) Other: [specify] _____	$0.00
Total sum required to redeem as of date of this Notice *	**$4,846.36**

* The total sum required to redeem may change based on charges that are incurred following the date of this letter or credits that are received and applied to the amount due. Please call on the date of redemption to find out the exact amount.

You must also pay to us any payments or expenses that may become due or be incurred **after the date of this Notice.**

7307 1100 1170 0917 7097 35

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at (888) 222-4227 or write us at P.O. Box 961245, Fort Worth, TX 76161-1245 and request a written explanation.

If you need more information about the sale call us at (888) 222-4227 or write us at the above address.

The Vehicle is stored at:

A L Recovery-2189 North Main St 2189 North Main St Hubbard, OH 44425

Any personal property we found in the Vehicle will be held by us for thirty (30) days from the date set forth at the top of this Notice. This property will be held at the address listed above for these thirty (30) days and may be redeemed between the hours of 9:00 AM local time and 5:00 PM local time. Please be advised that any property we find that is not claimed within thirty (30) days from the date of this Notice may be disposed of in the same manner as the Vehicle.

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We are sending this notice to the following other people who have an interest in the Vehicle, or who owe money under your Agreement: Hugh Kelly.

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Santander Consumer USA Inc.

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9307 1100 1170 0917 9097 35

Santander Consumer USA
P.O. Box 961245
Fort Worth, TX 76161-1245
(888) 222-4227

Explanation of Calculation of Surplus or Deficiency

Date: 06/24/2018

HUGH KELLY
114 OPAL CT
CRANBERRY TWP, PA 16066-6354

EXHIBIT
tabbies
3

SENT VIA CERTIFIED MAIL

Re: Account No. 30000175073161000
Retail Installment Sale or Credit Sale Contract dated 02/26/2011 ("Agreement")
2006 // CHRYSLER // Pacifica // VIN 2A8GF68416R657517 ("Vehicle")

Dear Hugh Kelly:

Please be advised that we disposed of the Vehicle on 06/05/2018. The proceeds of the sale have been applied as explained below. If you financed a premium for credit insurance under your Agreement, you may be entitled to a refund of any unearned portion of the premium.

1.	Aggregate unpaid balance of Agreement as of 06/24/2018		$4,188.23		
2.	Rebate of unearned finance charges as of 06/24/2018, if any	-	$0.00		
3.	Accrued and unpaid late fees	+	$287.81		
4.	Net balance due (1 minus 2 plus 3)			=	$4,476.04
5.	Gross proceeds from the sale of the Vehicle	-	$800.00		
6.	Subtotal after deducting proceeds of sale (4 minus 5)			=	$3,676.04
7.	Costs of retaking the Vehicle		$385.00		
8.	Costs of storing the Vehicle	+	$0.00		
9.	Costs of preparing the Vehicle for sale	+	$0.00		
10.	Costs of selling the Vehicle	+	$236.50		
11.	Attorneys' fees and court costs	+	$0.00		
12.	Other costs:	+	$0.00		
13.	Total Costs (7 through 12)			=	$621.50
14.	Credit: Rebate of unearned insurance premiums		$0.00		
15.	Credit:	+	$0.00		
16.	Credit:	+	$0.00		
17.	Total Credits (14 through 16)			=	$0.00
18.	Balance due/surplus after sale (6 plus or minus 13, plus or minus 17)			=	$4,297.54

(The checked box applies to you).

☑ Deficiency balance for which you are liable and for which demand* is hereby made $4,297.54. **
☐ Surplus balance to be remitted to you $0.00. **
☐ Surplus balance paid to a subordinate party $0.00.**

**Future debits, credits, charges, finance charges or interest, rebates or other expenses may affect this amount.

9307110011700962521845

If you need more information about the transaction, contact us: Santander Consumer USA, P.O. Box 961245, Fort Worth, TX 76161-1245, (888) 222-4227.

Sincerely,

Santander Consumer USA

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Santander Consumer USA can report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.

9307110011700962521845

Santander Consumer USA
P.O. Box 961245
Fort Worth, TX 76161-1245
(888) 222-4227

Explanation of Calculation of Surplus or Deficiency

Date: 06/24/2018

CHRISTINE E KELLY
114 OPAL CT
CRANBERRY TWP, PA 16066-6354

EXHIBIT
tabbies
4

SENT VIA CERTIFIED MAIL

Re: Account No. 30000175073161000
Retail Installment Sale or Credit Sale Contract dated 02/26/2011 ("Agreement")
2006 // CHRYSLER // Pacifica // VIN 2A8GF68416R657517 ("Vehicle")

Dear CHRISTINE E KELLY:

Please be advised that we disposed of the Vehicle on 06/05/2018. The proceeds of the sale have been applied as explained below. If you financed a premium for credit insurance under your Agreement, you may be entitled to a refund of any unearned portion of the premium.

1.	Aggregate unpaid balance of Agreement as of 06/24/2018		$4,188.23		
2.	Rebate of unearned finance charges as of 06/24/2018, if any	-	$0.00		
3.	Accrued and unpaid late fees	+	$287.81		
4.	Net balance due (1 minus 2 plus 3)			=	$4,476.04
5.	Gross proceeds from the sale of the Vehicle	-	$800.00		
6.	Subtotal after deducting proceeds of sale (4 minus 5)			=	$3,676.04
7.	Costs of retaking the Vehicle		$385.00		
8.	Costs of storing the Vehicle	+	$0.00		
9.	Costs of preparing the Vehicle for sale	+	$0.00		
10.	Costs of selling the Vehicle	+	$236.50		
11.	Attorneys' fees and court costs	+	$0.00		
12.	Other costs:	+	$0.00		
13.	Total Costs (7 through 12)			=	$621.50
14.	Credit: Rebate of unearned insurance premiums		$0.00		
15.	Credit:	+	$0.00		
16.	Credit:	+	$0.00		
17.	Total Credits (14 through 16)			=	$0.00
18.	Balance due/surplus after sale (6 plus or minus 13, plus or minus 17)			=	$4,297.54

(The checked box applies to you).

☑ Deficiency balance for which you are liable and for which demand* is hereby made $4,297.54. **
☐ Surplus balance to be remitted to you $0.00. **
☐ Surplus balance paid to a subordinate party $0.00.**

**Future debits, credits, charges, finance charges or interest, rebates or other expenses may affect this amount.

If you need more information about the transaction, contact us: Santander Consumer USA, P.O. Box 961245, Fort Worth, TX 76161-1245, (888) 222-4227.

Sincerely,

Santander Consumer USA

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COURT OF COMMON PLEAS
JEFFERSON COUNTY, PENNSYLVANIA

MICHAEL DUDO, DANIELLE DUDO, GWENDOLYN TERRELL, SCOTT CLARK, INDIVIDUALLY AND AS ADMIN. OF THE ESTATE OF LISA CLARK, ROBERT ACQUILLO, CONSTANCE WAGNER, ANTHONY WAGNER, and JAMES DWYER,	)	Civil Action
Plaintiffs,	)	No. 296-2020-CD
v.	)	
CAPITAL ONE, N.A., d/b/a CAPITAL ONE AUTO FINANCE,	)	
Defendant.	)	

FINAL APPROVAL ORDER

The matter coming before the Court on the request for final approval of the class action settlement by Plaintiffs, Michael Dudo, Danielle Dudo, Gwendolyn Terrell, Scott Clark, the Estate of Lisa Clark, Robert Acquillo, and James Dwyer ("Plaintiffs"), final approval of the settlement and dismissal being unopposed by Defendant, Capital One Auto Finance, a Division of Capital One, N.A. ("Defendant"), with due notice given to Class Members and all parties, the parties appearing through counsel, with many Representative Plaintiffs also appearing themselves,[1] and the Court being fully advised, **IT IS HEREBY ORDERED**:

1. This Court has jurisdiction over the parties, the Class[2], and the claims asserted in this lawsuit.

2. Pursuant to the Pennsylvania Rules of Civil Procedure, the settlement of this action, as embodied in the terms of the Settlement Agreement, is hereby finally approved as a fair,

EXHIBIT
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[1] The Court has conducted this hearing telephonically in light of the Covid-19 pandemic.
[2] Capitalized terms in this Order have the same meaning as defined in the Settlement Agreement.

reasonable, and adequate settlement, in the best interests of the Settlement Class, in light of the factual, legal, practical and procedural considerations raised by this case.

3. The Class, as defined as in paragraph 2.12 of the Settlement Agreement, is hereby certified for settlement purposes.

4. This class definition is sufficient to render the class ascertainable.

5. The Class meets all certification requirements set forth in Pa.R.C.P. 1702.

6. The Class is sufficiently numerous that joinder is impracticable.

7. The questions of fact and law are common to the class. Here, the issues are common across the Class and relate to the same course of conduct and include whether Defendant's Post-Repossession Disclosure Notice (here, a "Notice of Repossession") failed to comply with certain strict content requirements of the UCC and, consequently, were commercially unreasonable – issues to be determined as a matter of law.

> Common issues of law and fact ... predominate over potential individual issues, including whether Defendant complied with certain content requirements of the MVSFA independently, and the UCC and MVSFA in *pari materia* regarding forms Defendant used when issuing post-repossession consumer disclosure notices sent to all class members --- such that Defendant's failure to comply is *per se* commercially unreasonable as a matter of law.

Ryan v. Tidewater Finance Co., 03529-2017 (Phila. Co., July 23, 2018).

Claims that a Notice of Repossession is commercially unreasonable have been routinely found to satisfy the commonality and predominance requirements of certification. Pennsylvania and the federal courts sitting in Pennsylvania routinely certify UCC Post-Repossession Disclosure Notice class actions. *Maszgay v. First Comm. Bank*, 686-2015 (Jefferson Co. Pa., July 23, 2018); *Antonik, et al., v. First National Community Bancorp, et al.*, 13-4438 (Lackawanna County 2017); *Cooley, et al., v. F.N.B. Corporation, et al.*, 10010 (Lawrence County 2003); *Langer, et al., v. Capital One, N.A.*, 2:16-CV-06130-HB, ECF Doc. 109 (E.D. Pa. 2019); *McCall v. Drive Fin. Services,*

L.P., 236 F.R.D. 246 (E.D. Pa. 2006); *Cosgrove v. Citizens Auto. Finance, Inc.*, 2011 WL 3740809 (E.D. Pa. 2011); *Haggerty v. Citadel Fed. Credit Union*, No. 11003725 (Phila. Court Common Pleas 2011); *Hartt v. Flagship Credit Corp.*, 10-CV-0822-NS (E.D. Pa. 2010); *Simonson v. American Heritage Fed. Credit Union*, No. 11003762 (Phila. Court Common Pleas 2011); *Spry v. Police & Fire Fed. Credit Union*, No. 110900007 (Phila. Court Common Pleas 2011); *Zawislak v. Beneficial Savings Bank*, No. 110303622 (Phila. Court Common Pleas 2011). Cases involving the use of form documents (such as a Notice of Repossession or Post-Sale Notice) are particularly appropriate for class treatment. *Orloff v. Syndicated Office Systems, Inc.*, 2004 WL 870691 at *3-4 (E.D. Pa. Apr. 22, 2004). Because the alleged notice deficiencies are the same, the question of extinguishment of the Disputed Deficiency Balances will be the same among all Class Members. The commonality requirement is readily satisfied as the issues of law and fact are the same, class-wide. Class certification as to issues of commercial reasonableness are certainly appropriate and easily adjudicated, as a matter of law, when reviewing form documents and/or standardized, uniform policies and practices in the context of clear statutory requirements.

8. Plaintiffs' claims are typical of the Class Members' Claims. All of the core claims of the Plaintiffs and the Class Members arise from Defendant's alleged statutorily deficient Notices of Repossession. There is no evidence that Plaintiffs' claims are atypical or antagonistic to any other Class Members.

9. The common questions of the class predominate over individual questions. Here, the predominant question of the Notice of Repossession claim is whether Defendant failed to provide Notices of Repossession that complied with the requirements of the UCC, rendering the notices per se commercially unreasonable as a matter of law. Here, where a form notice was sent to all class members, and liability for statutory damages is not contingent on *any* injury to the class member (*see* 13 Pa.C.S. 9625, Official Comment 4), these common questions predominate over

questions affecting only individual members. There are no individualized issues to prevent the common statutory compliance issues, commercial reasonableness issue, and damages from predominating. Further, there are no predominating individual issues regarding the Disputed Deficiency Balances, as the amounts would be extinguished if Defendant failed to rebut the presumption that follows from Plaintiff's averment that the notice is not commercially reasonable pursuant to 13 Pa. C.S. §9610 and/or violates 13 Pa. C.S. §9614.

The only variations in the Class Members' Claims is the *amount* of damages. However, variations in damages do not impair certification. *Samuel-Bassett v. Kia Motors Am., Inc.*, 613 Pa. 371, 34 A.3d 1 (2011). Statutory minimum damages are easily calculated using the formula set forth in 13 Pa.C.S.A. §9625(c)(2). Though actual damages would require alternative proofs and are similarly permissible in the class action context, a showing of a specific actual injury to each class member is not required.

A violation of the disclosure notice provisions constitutes *per se* commercial unreasonableness, as it is a defect in the disposition process that these notices are an integral part of. *Tidewater*, *supra*. The commercial reasonableness of form Notices of Repossession or Post-Sale Notices are not issues of fact when the disclosure notices do not comply with statutory requirements and where neither reliance or injury is required. Accordingly, the question of commercial unreasonableness is not an individualized issue predominating over common issues to the class, but rather, is a common issue. *Id.*

10. Plaintiffs' appointment as Class Representatives and Attorney Richard Shenkan and Shenkan Injury Lawyers, LLC.'s appointment as sole Class Counsel for the class is maintained.

11. Upon the Affidavit of William G. Atkinson, a partner in the Settlement Administrator BrownGreer, PLC, the Court finds that the notice provided to the Settlement Class Members was

the best notice practicable under the circumstances and it satisfied the requirements of due process and Pennsylvania Rules of Civil Procedure.

12. No Class Members objected to the Settlement or the equal division of the monetary relief (in instances of co-borrowers). Similarly, no class members have opted-out or excluded themselves. Therefore, no Class Members are excluded from, and all Class Members are bound by, the terms of the Settlement Agreement and this Order.

13. The Court hereby finds that the Settlement Agreement is the result of good faith, arm's-length negotiations by the parties thereto, and that it will further the interests of justice. The Settlement Agreement is hereby incorporated into and adopted as part of this Order; any conflicts controlled by the text of this Order.

14. After due consideration of, among other things, (a) the uncertainty about the likelihood of the Class' ultimate success on the merits, the range of possible recovery, and the expense and duration of the litigation; (b) the substance and amount of class members' opposition to the settlement (no objections); (c) the state of proceedings at which the settlement was achieved; (d) all written submissions, declarations and arguments of counsel; and (e) after notice and hearing, this Court finds that the settlement is fair, adequate and reasonable.

15. This Court also finds that the financial settlement terms fall within the range of settlement terms that are fair, adequate and reasonable. The Court has taken into account and concurs with the Affidavit of Judge Richard B. Klein (Ret.) that the terms of this Settlement are just, fair, reasonable, and particularly favorable to the class, and that the attorney fees sought are reasonable and justified. Therefore, the settlement of this matter is approved. All parties (including all Class Members, their heirs, assigns, and any person or entity claiming by or through him or her) are hereby bound by terms of and releases set forth in the Settlement Agreement.

16. A Settlement Fund has been created consisting of the $7.5M Settlement Amount and will be supplemented with approximately $78,000 relating to Post-Stay Payments. The Settlement Fund shall be used to pay Class Members (including Post-Stay Return Payments), the Settlement Administration Costs, Class Counsel Fees, Class Counsel Costs, and Incentive Awards as set forth in the Settlement Agreement. All unclaimed and excess monies in the Settlement Fund shall be distributed to the *Cy Pres* Recipients in accordance with the Settlement Agreement.

17. The Court approves Incentive Awards of $15,000 for each named Plaintiff for serving as the Class Representatives. This amount shall be paid from the Settlement Fund.

18. The Court has reviewed the application for Class Counsel fees and expenses. Consistent with the criteria set forth in Pa.R.Civ.P. 1717, and the established law providing for payment of reasonable counsel fees and expenses to class counsel from a common fund created for the benefit of the Class, the Court finds that the cash value of the Settlement along with the aggregate compromise of the disputed Deficiency Balances of approximately $22.6 million, which does not include the valuable equitable relief, pursuant to 13 Pa. C.S. §9625(a), including credit report tradeline expungement, the return by the Bank of amounts paid by Class Members towards any disputed Deficiency Balances on or after March 26, 2018 (the "Post-Stay Return Payments," as set forth in the Agreement), and the vacating of any deficiency judgments.

While not amenable to a precise measurement for all class members, the tradeline deletion provides a tangible benefit that will likely, *inter alia,* improve Class Members' credit ratings, potentially resulting in a lower and/or more favorable cost of credit in the future. As this Court held in *Maszgay, supra.*, the tradeline expungement benefit likely removes a significant negative influence on Class Members' potential loan, insurance, mortgage, housing, and employment decisions. *See* Lea Shepard, *Seeking Solutions to Financial History Discrimination,* 46 Conn. L. Rev. 993, (2014). In *Maszgay, supra.*, this Court followed the reasoning in *Ciccarone v. B.J.*

Marchese, Inc., 2004 WL 2966932 (E.D. Pa. Dec. 22, 2004), and maintains such in this case, that a reasonable estimation of the value of the removal of this blot on Class Members' credit is reasonably equal to the cash component of the settlement. *See also, Cosgrove v. Citizens Auto Fin., Inc.*, 2011 WL 3740809, at *7 (E.D. Pa. Aug. 25, 2011) ("additional obligation to correct negative entries on class members' credit reports is tangible and adds value to the settlement").

The request for an award of fees to Class Counsel in the sum of $3 million, to be paid to Shenkan Injury Lawyers, LLC., as sole counsel, is approved as fair and reasonable in light of all the relevant factors to be considered, based on the percentage-of-recovery method. Class Counsel costs incurred to date in the amount of $14,325.50 are also fair and reasonable. Those amounts shall be paid from the Settlement Fund to Richard Shenkan and Shenkan Injury Lawyers, LLC., as sole Class Counsel. Plaintiffs' counsel Richard Shenkan has considerable additional work to undertake relating to the orderly administration of this matter and, accordingly, may make a subsequent request(s) for additional reimbursement of costs.

19. Furthermore, the contingency fee agreement between counsel and each of the Representative Plaintiffs provides for a fee equal to 40% of the total conferred upon the class. Class Counsel's requested fee only asks for a 13.3% fee based on the cash payment and compromise by accord and satisfaction of the Deficiency Balances. One-third of the total benefit conferred on the class would be reasonable. *See, Maszgay, supra.*; *See also, Cullen v. Whitman Medical Corporation*, 197 F.R.D. 136 (E.D. Pa. 2000)(a fee for the forgiveness of debt is compensable and can be included in a common fund recovery).

20. The Court expressly adopts and incorporates herein all the terms of the Settlement Agreement. The Parties shall carry out their respective obligations under that Agreement with dispatch.

21. The terms of the Settlement Agreement and of this Order shall be forever binding on the Class, and those terms shall have *res judicata* and other preclusive effect in all pending and future claims, lawsuits or other proceedings maintained by or on behalf of any such persons, to the extent those claims, lawsuits, or other proceedings involve Released Claims.

22. The Court hereby specifically retains jurisdiction of this matter in order to resolve any disputes or any other matters which may arise in the implementation of the Settlement Agreement, the reasonable administration of this claim, and the allocation of the Settlement Fund. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

23. The Defendant is hereby dismissed with prejudice from this action. The prothonotary shall so mark the docket.

IT IS SO ORDERED.

BY THE COURT:

Dated: July 6, 2020

Judge John H. Foradora, P.J.

c: Atty Shenkan (2)

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

SIMONE RYAN, individually and on behalf of all others similarly situated,	:	CIVIL ACTION
Plaintiff,	:	September Term, 2017
v.	:	No. 03529
TIDEWATER FINANCE COMPANY,	:	
Defendant.	:	Control Number 20050325

ORDER GRANTING PLAINTIFF'S UNCONTESTED MOTION FOR CONDITIONAL CERTIFICATION OF SETTLEMENT CLASSES AND PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE

AND NOW, this 23rd day of June, 2020, after consideration of Plaintiff's Uncontested Motion for Conditional Certification of Settlement Classes and Preliminary Approval of Class Action Settlement Agreement and Release ("Motion"), Defendant's notice of no opposition and after a conference with Counsel, it hereby is **ORDERED** as follows:

1. **Classes and Conditional Certification**

For purposes of a settlement class, Class 1 is defined as follows:

All Borrowers:

> (i) who financed a motor vehicle primarily for personal, family, or household purposes through a RISC using a motor vehicle as security interest which RISC was assigned to Tidewater;
> (ii) from whom Tidewater, as secured party, repossessed the vehicle or ordered it to be repossessed;
> (iii) where the vehicle was repossessed in Pennsylvania; and,
> (iv) to whom, during the Class Period[1], Tidewater sent a Post-Repossession Notice ("Notice") that did not provide the location where the motor vehicle was stored at the time of the Notice, and/or did not state that any personal property left in the vehicle would be held for 30 days from the mailing date of the Notice.

[1] September 28, 2011 through the Effective Date, inclusive.

For purposes of a settlement class, Class 2 is defined as follows:

All Borrowers in Class 1

(i) who were a co-borrower on an account where one co-borrower was not sent a separate, separately addressed Post-Sale Notice; or
(ii) to whom Tidewater sent or caused to be sent a Post-Sale Notice any time after December 1, 2014, which was not sent by registered or certified mail.

2. Class Findings for Settlement Purposes.

These class definitions satisfy all requirements set forth in Pa.R.C.P. 1702 and 1708.

1. The numerosity requirement of Pa. R. Civ. P. 1702(1) is satisfied since there are 63 RISC Accounts with 80 Class Members.
2. The commonality requirement of Pa. R. Civ. P. 1702 (2) is satisfied. The Classes share at least one common factual or legal issue, including whether Tidewater's post-repossession disclosure notices failed to meet the requirements of the UCC independently and/or the UCC and MVSFA in *pari materia,* and whether any such failure rendered the notices commercially unreasonable, including all aspects of the sale of vehicles including the reasonableness of the statutorily mandated pre-sale and post-sale, post-repossession consumer disclosure notices.
3. The typicality requirement of Pa. R. Civ. P. 1702 (3) is satisfied. All of the core claims of the Plaintiff and the Class Members arise from Tidewater's statutorily deficient post-repossession disclosure notices. There is no evidence that Plaintiff's claim is atypical or antagonistic to any other Class Members. The question of the sufficiency or commercial reasonableness of Tidewater's form disclosures do not vary among Class Members because each omit the same mandatory content and were mailed in the same

manner. The sufficiency and commercial reasonableness analysis is the same for all Class Members.

4. The adequacy requirement of Pa. R. Civ. P. 1702(4) is satisfied. Plaintiff (1) will adequately represent the interests of the classes; (2) has no conflict of interest in the maintenance of the class action; and (3) has adequate financial resources to assure that the interests of the class will not be harmed (as Class Counsel is advancing his time and costs). Simone Ryan is preliminarily appointed Representative of the Classes. Plaintiff will receive an incentive award of $15,000.00 which is fair and reasonable subject only to objection by any class member. Plaintiff and the class members are represented by qualified, experienced class counsel, Richard Shenkan, Esquire and Shenkan Injury Lawyers, LLC, who have been certified as class counsel in similar class actions. Richard Shenkan, Esquire is appointed as Class Counsel. Class counsel's attorney fee in the amount of $120,000.00 and reimbursement of costs advanced in the amount of $16,255.07 are fair and reasonable subject only to an objection by any class member.

5. The requirements of Pa. R. Civ. P. 1702(5) and 1708 are met, in that a Class Action for settlement purposes provides a fair and efficient method for the resolution of the controversy.

6. Common issues of law and fact alleged by Plaintiff predominate over potential individual issues, including whether Defendant complied with certain content requirements of the MVSFA independently, and the UCC and MVSFA in *pari materia* regarding forms Defendant used when issuing post-repossession consumer disclosure notices sent to all class members--- such that Defendant's failure to comply is per se

commercially unreasonable as a matter of law. Also, common to all class members is the fact that class members have experienced more than minimum statutory damages.

7. Pa.R.Civ.P. 1708(b) (2) is satisfied because Tidewater actions on review here are generally applicable to all class members. This is because proposed relief that extinguishes disputed deficiency balances and corrects class member's individual credit report tradelines. This proposed relief is based on the alleged form disclosure notice violations of the UCC, independently, and of the UCC in *pari materia* with the MVSFA.

3. Findings Regarding Proposed Settlement.

The Court finds that: (a) this Settlement resulted from extensive arms-length negotiations; (b) this Settlement involves direct and substantial cash payments to Class Members in the amount of $2,281.66, after the payment of attorney fees and cost, plaintiff's incentive award and the administration expense, on a per account basis, assuming all settlement checks are cashed, and which will be divided evenly amongst co-borrowers unless an objection is made; (c) for those Class Members that made payment toward a Deficiency Balance after a particular date, this Settlement provides for direct reimbursement of those payments; (d) the Settlement provides other valuable relief including modification of Class Members' credit reports and a complete release of Disputed Deficiency Balances and deficiency judgments for applicable Class Members, and, (e) this Settlement as set forth in the Agreement is *prima facie* fair and is reasonable. All this warrants conditional approval of the Settlement and conditional certification of the Class in order to facilitate sending notice of this Settlement to the Class Members and to schedule a final approval hearing for this Settlement.

Tidewater's extinguishment of the Disputed Deficiency Balances as part of this Settlement constitutes a bona fide accord and satisfaction. The plaintiff's and Class Members' release of their claims for statutory damages, which is a greater dollar amount than the anticipated benefits they will receive in this Settlement, is a clear and unequivocal offer of payment in full satisfaction of the Disputed Deficiency Balances. This full satisfaction, which will be accepted and retained by Tidewater as part of this Settlement, constitutes accord and satisfaction. *See King v. Boettcher*, 616 A.2d 57, 62 (Pa. Cmwlth. 1992); *Gywnedd Club Condo. Ass'n v. Dahlquist*, 2019 WL 1601916, (Pa. Commw. Ct.), *reargument denied* (June 3, 2019); *PNC Bank, Nat. Ass'n v. Balsamo*, 430 Pa. Super. 360, 634 A.2d 645 (1993).

Tidewater's extinguishment of the Disputed Deficiency Balances as part of this Settlement also constitutes a good faith resolution of Class Members' contested liability within the meaning of *Zarin* v. *Commissioner of Internal Revenue,* 916 F.2d 110 (3d Cir. 1990), rather than a discharge of indebtedness which would require the issuance of IRS Forms 1099-C by Tidewater to applicable Class Members. Upon presentation of the evidence and a review of the verified pleadings in this case, the Court finds that *Zarin* controls this situation because Tidewater's compromise of the Disputed Deficiency Balances is a critical part of this Settlement. The settlement and compromise of a good faith disputed debt or contested liability is not a discharge of indebtedness within the meaning of 26 U.S.C. § 61(11), and does not give rise to an obligation under 26 U.S.C. §6050P for Tidewater to issue a Form 1099-C for each qualified Class Member. Tidewater need not send 1099-C forms to Class Members or to the IRS.

Further:

(a) Within seven (7) business days after the later of (i) the Effective Date; (ii) Tidewater's receipt of a completed and signed IRS Form W-9 with its taxpayer identification number

associated with the Settlement Account; and (iii) Tidewater's receipt of wire transfer instructions for payment to the Settlement Account, Tidewater will pay Three Hundred Thousand Dollar ($300,000) into the Settlement Account.

(b) These funds shall be used, subject to further order: (1) to pay class counsel fees and reimburse costs as approved by the Court; (2) to pay the costs of the class notice and administration of the settlement as approved by the Court; (3) to pay an incentive award to the Representative Plaintiff; and, (4) to pay Class Member(s).

(c) In the event that the Court grants final approval of this settlement, then, within thirty (30) days after the Effective Date, Tidewater shall cause the Post-Complaint Payment Total (which counsel has represented to be no more than $12,000 representing approximately 6 accounts) to be deposited into the Settlement Account and to provide Class Counsel and the Settlement Administrator with a detailed list of these payor class members, the amount(s) paid, and the date of such payment(s).

(d) No later than thirty (30) days after the Post-Complaint Payment Total is deposited Into the Settlement Account, these funds will be distributed to Class Members who made Post-Complaint Payments towards their Disputed Deficiency Balances, in the amount paid by each respective Class Member.

(e) The balance of the principal of any uncashed checks (or returned checks) and any accrued interest will be distributed in accordance with Section 7.17 of the Settlement Agreement.

(f) Within thirty (30) days after the Effective Date, Tidewater will extinguish all of the Disputed Deficiency Balances of the Class Members (all of which are disputed and which are reasonably estimated to total $667,000) with such Disputed Deficiency Balances being compromised through an accord and satisfaction. Excluded from receiving these Disputed

Deficiency Balances are Class Members whose requests for exclusion are approved by this Court in the Final Approval Order. Tidewater will further vacate or mark satisfied any unsatisfied deficiency judgments against Class Members related to the subject Auto Loan Accounts. Tidewater will also account in favor of individual Class Members any checks or other payments received by Class Members after the Effective Date that were to go towards their Disputed Deficiency Balances---so the result is all qualified Class Members have no Deficiency Balance remaining.

(g) Within thirty (30) days after the Effective Date, the Settlement Administrator shall provide Tidewater with a list of Class Members who have requested exclusion from the class membership in accordance with 5.07(d) of the Agreement. Tidewater shall make a written or electronic request to the Credit Reporting agencies to entirely delete the trade line relating to the RISC Account from the Class Member's credit file, excluding Class Members who have excluded themselves from the Class. Tidewater shall provide Class Counsel in digital form with a record of all its filings to credit agencies to correct the credit report tradelines of Class Members whose Disputed Deficiency Balance are extinguished per terms of the Settlement Agreement.

(h) The non-excluded Class Members, including the plaintiff, will release all claims against Tidewater, and Tidewater will release all claims against the non-excluded Class Members, as agreed in Sections 9.01 and 9.02 of the Agreement.

(i) As part of the Settlement Agreement and in furtherance of the public interest goals of this class action, Tidewater shall now, and in the future at all times, include clear disclosures in all its post-repossession disclosure notices to state: (1) the location where the repossessed motor vehicle is being stored at the time of the sending of the notice and (b) that any personal property

left in the vehicle will be held for 30 days from the mailing of the notice. Settlement Agreement, Par. 8.05.

This Court finds that all equitable relief encompassed by the settlement is a benefit conferred on the class and qualifies as relief which plaintiff and Class Members are permitted to seek and which this Court can grant pursuant to 13 Pa.C.S. §9625(a).

4. Final Approval hearing.

The Final Approval Hearing will be held on Wed. September 30, 2020, at 10:00am via Zoom[2] to determine, *inter alia*,

(a) Whether this Settlement should receive final approval as fair, reasonable and adequate;

(b) The propriety of any objections and the identity of any opt-outs;

(c) Whether this action should be dismissed with prejudice pursuant to this Settlement and the Agreement; and,

(d) Whether the Representative Plaintiff's application for an award of Class Counsel Fees and Class Counsel Costs, an Incentive Award, and Settlement Administration Costs, are fair and reasonable and should be approved.

The Final Approval Hearing may be postponed, adjourned, or rescheduled by Order of the Court without further notice to the Class Members. The Final Approval Hearing will not be scheduled before September 30, 2020. As permitted, under relevant Commerce Court and/or first Judicial District protocol, this Court may change the mode or manner of the hearing and require a hearing in open court at Court Room 425, City Hall, Philadelphia, PA on Wednesday, September 30, 2020 at 10:00am. Unless the hearing is scheduled for open

[2] Counsel will be emailed the login information for the Zoom Hearing. Counsel will be responsible for providing this information to any objecting Class Members or any Class Members who wish to participate.

court by order entered no later than September 11, 2020, the Final Approval Hearing shall be held by Zoom.

Within ten (10) days before the Final Approval Hearing, plaintiff shall file a Motion for Final Approval seeking a Final Approval Order approving the Agreement as final, fair, reasonable, adequate, and binding on all Class Members who have not excluded themselves from the Class and ordering that the Settlement Fund be distributed in accordance with the Settlement Agreement and that any additional class relief be conferred to the eligible Class Members.

5. Class Administrator

Class-settlement.com of 20 Max Avenue, Hicksville, NY 11801 is approved to act as the Settlement Administrator, to provide the Class Members with the Class Notice in the manner attached to the Settlement Agreement. Class Administration expenses are approved as fair and reasonable to the extent the amount is not greater than $5,000.00.

The Settlement Administrator is authorized to establish the Settlement Account at Citizens Bank or another federally insured institution, which satisfies the requirements, as set forth in the Agreement, to be a "Qualified Settlement Fund" ("QSF") within the meaning of Treasury Regulation Section 1.468B-1, promulgated under Section 468B of the Internal Revenue Code of 1986, as amended. As set forth in the Settlement Agreement, the Settlement Administrator shall administer the Settlement Fund and will be the Administrator of this QSF within the meaning of Treasury Regulation § 1.468B-2(k)(3).

The Settlement Administrator must establish this QSF within ten (10) business days of entry of this Order. As set forth in the Settlement Agreement, no later than the date on which the QSF is established, the Settlement Administrator shall apply for an employer identification number for the QSF in accordance with Treasury Regulation §1.468B-2(k)(4).

The Settlement Administrator and the Bank holding the class funds shall he deemed to within the jurisdiction of this Court for matters relating to this case.

6. Notice by Mail.

The Settlement Administrator shall mail the Class Notice (with the proper dates completed and substantially in the form filed with this Court) to the last-known address of each Class Member as reflected on Tidewater's current and reasonably accessible records. These records shall be updated, as necessary and appropriate, by the Settlement Administrator using an *Accurint* database and/or *Westlaw* database or other equivalent database, as necessary. The Class Notice must be sent by first-class U.S. mail, postage prepaid, no later than thirty (30) days following entry of this Order.

7. Proof of Mailing.

Within ten (10) days before the Final Approval Hearing, the Settlement Administrator shall submit to Class Counsel and Defendant's Counsel an Affidavit that the Class Notice has been mailed. This affidavit shall identify any Class Members who have filed timely objections or requested exclusion from the Settlement Agreement. Class Counsel shall file the Affidavit along with plaintiff's motion for final approval.

8. Findings Concerning Notice

This Court finds that the Class Notice, attached hereto as Exhibit "A" is the best practicable notice and is reasonably calculated, under the circumstances, to apprise the Class Members, *inter alia*: (i) of the Settlement of this action; (ii) of the elimination of the disputed Deficiency Balance and cash payment, as applicable; (iii) of their right to exclude themselves from the Classes and this Settlement; (iv) that any judgment, whether favorable or not, will bind all Class Members who do not request exclusion; and (v) that any Class Member who does not request exclusion may object to the Settlement and, if he or she desires, may enter an appearance at the Final Approval Hearing, either personally or through counsel. The Court further finds that the Class Notice, as proposed

and submitted, is written in plain English and is readily understandable by the Class Members. In sum, the Court finds that the proposed Notice and the way it shall be made available to Class Members are reasonable, and constitute due, adequate, and sufficient notice to all persons entitled to be notified. This Court also finds the Notice meets requirements pursuant to the Pennsylvania Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), and other applicable law. The Court further finds that disclosure to the Settlement Administrator of data concerning the Class Members, including social security numbers, is necessary to implement the proposed notice program, and authorizes Tidewater to disclose such data to the Settlement Administrator.

The method set forth in the Class Notice to identify all persons wishing to be excluded or to object is approved. Any Class Member who does not timely send a compliant written objection will be deemed to have waived — and shall be foreclosed from raising any objection to this Settlement, absent extraordinary circumstances for appearance at the Final Approval Hearing on September 30, 2020 or at any time scheduled thereafter.

9. Termination of Settlement.

This Order shall become null and void, and without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before the Court entered this Order, if (a) this Settlement does not obtain Final Approval pursuant to the terms of the Agreement; or (b) this Settlement is terminated in accordance with the Settlement Agreement, or does not become effective as required by the terms of the Agreement. In such event, this Settlement and the Settlement Agreement will become null and void and be of no further force and effect. Further, in such event, neither the Settlement Agreement nor this Court's Orders regarding the Settlement Agreement---including this Order--- shall be used or referred to for any purpose in

this litigation. Also, in this event, the litigation reverts to status that existed prior to entry of this Order, any and all funds paid into the Settlement Account shall be returned pursuant to terms set forth in the Agreement.

10. Jurisdiction

The Court retains jurisdiction to consider all further applications arising out of or related to the Settlement Agreement. The Court may modify the Settlement Agreement but only upon motion for on the record argument at the Final Approval Hearing and no modification shall affect the substantive relief promised to Class Members in the Notice and Settlement Agreement. A copy of this Order shall be provided to the Settlement Administrator and the financial institution selected to hold the Qualified Settlement Fund.

BY THE COURT

RAMY I. DJERASSI, J.

EXHIBIT “A”

IN THE COURT OF COMMON PLEAS FOR
PHILADELPHIA COUNTY, PENNSYLVANIA

Ryan v Tidewater Finance Company
September Term, 2017, No. 03529

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

You may be entitled to receive a settlement payment and other valuable benefits in connection with a class action against Tidewater Finance Company

A Court has authorized this Notice.
This is not a solicitation from a lawyer.

This proposed settlement (the **"Settlement"**), if approved by the Court, will resolve a class action lawsuit against Tidewater Finance Company (**"Tidewater"**) over whether Tidewater sent proper post-repossession disclosure notices to borrowers to explain their rights after Tidewater repossessed their motor vehicles. These include the notice after the repossession and the notice before the sale ("**Notice of Repossession**") and after the sale ("**Post-Sale Notice**").

The class action lawsuit, *Ryan v. Tidewater Finance Company (Phila. Co. September Term 2017, No.* 03529*)*(the **"Lawsuit"**),is pending before the Court of Common Pleas for Philadelphia County. Tidewater denies and disputes the claims asserted in the Lawsuit. The Settlement avoids the costs and risks to the parties associated with proceeding with the Lawsuit.

The settlement will: (**a**) provide a gross settlement payment of $300,000 to be used to pay administrative costs which will not exceed $5,000, class counsel's legal fees and costs totaling $136,255.07, and an incentive payment to the representative plaintiff totaling $15,000; and, assuming no member of the class excludes themselves and all cash their checks, the payment on a per account basis will be **$2,281.66**. This amount will be split between co-borrowers, unless you object to this equal division. Instructions for an objection are described below; (**b**) permanently extinguish by way of an accord and satisfaction the disputed deficiency balances that Tidewater claims are owed on the class members' auto loans with Tidewater in the amount of approximately $667,000; (**c**) refund payments that class members have made to Tidewater toward claimed deficiency balances on or after September 28, 2017, the date of the filing of the complaint; (**d**) request that the credit reporting agencies delete any and all credit reporting trade lines associated with the class members' auto loans with Tidewater; and, (**e**) vacate all deficiency judgments and the return of any monies paid to Tidewater by any Class Member in connection with the deficiency judgments. In exchange, Tidewater will be released from liability, as set forth in the Settlement Agreement. The Settlement Agreement can be reviewed at [website address], by reviewing the pleadings at the **Court of Common Pleas Office of Judicial Records in Philadelphia County**, or by requesting a copy from Class Counsel Richard Shenkan and Shenkan Injury Lawyers, LLC:

Richard Shenkan
Shenkan Injury Lawyers, LLC
6550 Lakeshore St.
West Bloomfield, MI 48323
rshenkan@shenkanlaw.com

You are receiving this Notice because you may be a class member for purposes of the Settlement.

Your rights may be affected whether or not you act in response to this Notice. Please read this Notice carefully.

Brief Summary of Settlement Benefits

The Settlement will provide several benefits for you as outlined below. The law permits you to obtain the relief regardless whether you purchased your repossessed vehicle, reinstated your account after repossession, received the challenged post-repossession disclosure notice, or filed for bankruptcy.

Settlement Payments

Members of the Classes will receive a net settlement payment. Equal payments will be made per account. Accounts with more than one borrower will be split evenly among the coborrowers, unless requested otherwise. You will receive the same amount whether you are in Class I or both classes. All class members in Class 2 are also in Class 1. Assuming no member of the Class 1 excludes him or herself, and all class members cash or deposit their checks, your payment should be **$2,281.66**.

Compromised and Extinguished Deficiency Balances

Any balance that a finance company claims has remained on an auto loan after the financed vehicle was repossessed and sold by a bank or financing company is called a "deficiency balance." The parties are in a good faith dispute as to the validity of this debt. In connection with the Settlement Agreement, Tidewater has agreed to compromise and permanently extinguish (by way of an accord and satisfaction) all disputed deficiency balances it claims are remaining on the auto loans of the class members.

Request to Delete Credit Reporting

Tidewater has agreed to submit requests to the three major credit reporting agencies – Experian, Equifax, and TransUnion – to delete any and all credit reporting related to the class members' auto loans.

Refund of Certain Deficiency Balance Payments and Vacating of all Deficiency Judgments

Tidewater has agreed to refund to the class members any payments that class members have made toward their deficiency balances on or after September 28, 2017, the date of the filing of this lawsuit. Tidewater has also agreed to refund all payments made to Tidewater by any class member in connection with any deficiency judgments. You **are/are not** entitled to such a payment. Your refund payment will be $_____ **[for those class members entitled to the payment]**. This figure is in addition to the estimated $2,281.66 amount, per account.

Your Options

At this time, you are assumed to be a class member who is participating in the Settlement. Therefore, your rights will be affected even if you do nothing. Please read this Notice carefully.

The following is a general summary of the actions you can take and the results of those actions. If you want to have a detailed discussion regarding your specific situation or have other questions or concerns, you may contact Class Counsel at [toll-free number].

YOUR ACTION	RESULT OF THAT ACTION
DO NOTHING	You remain in the Settlement. If the Settlement is approved, you will receive the benefits summarized above, and, in exchange, you give up the right to sue Tidewater for matters concerning your auto loan and the repossession and sale of your vehicle as set forth in the Settlement Agreement.
ASK TO BE EXCLUDED	You are removed from the Settlement. You will not receive the benefits summarized above. However, this is the only option that allows you to pursue your own lawsuit or to participate in any other lawsuit against Tidewater concerning your auto loan or the repossession and sale of your vehicle. The deadline for you to submit your request to be excluded is **[DATE]**, forty-five (45) days after the date of this Notice, so you must act promptly.
OBJECT TO SETTLEMENT	If you object to the Settlement, you are still in the Settlement, but you have notified the Court in writing that you don't like the Settlement and explain your reasons. The deadline for you to submit an objection is **[DATE]**, forty-five (45) days after the date of this Notice, so you must act promptly.
OBJECT TO ALLOCATION OF SETTLEMENT PAYMENTS OR REFUND PAYMENTS (CO-BORROWERS ONLY)	If you are a co-borrower, you may also object to the equal allocation between co-borrowers on an auto loan of the (1) settlement payment; and/or, (2) the refund of deficiency payments made on or after September 28, 2017. You must explain the reasons. This is not the same as objecting to the Settlement. The deadline for you to submit an objection to the refund payment allocation is **[DATE]**, forty-five (45) days after the date of this Notice, so you must act promptly.
GO TO THE HEARING WHERE THE COURT CONSIDERS WHETHER TO APPROVE THE SETTLEMENT	You are still in the Settlement and get the benefits of the Settlement, if approved by the Court. You do not need to attend the hearing to get the benefits of the Settlement, but you are invited to attend and will be afforded an opportunity to speak in Court about the fairness of the Settlement (should you choose to do so) or, if applicable, why any late objection should be considered or ask that a late request for exclusion be considered.

HOW TO GET BENEFITS

Do I need to do anything to get the credit reporting benefit, or to have my alleged but disputed deficiency balance eliminated, or receive a refund payment if I paid money towards my deficiency balance on or after September 28, 2017?

No. Assuming that the Court approves the Settlement, you do not need to do anything further in order to remain a part of the Settlement and to receive the credit reporting benefit, the extinguishment of your compromised deficiency balance, and, if eligible, the refund payment.

EXCLUDING YOURSELF FROM THE SETTLEMENT

If you do not want a settlement payment or the other significant benefits from this Settlement, and you instead want to keep the right to sue or continue to sue Tidewater on your own about the issues in this case, then you must take steps to exclude yourself from (or "opt out" of) the Settlement.

How do I exclude myself from the Settlement?

In order to exclude yourself, send a letter that clearly states that you want to be excluded from the Settlement. Be sure to include your name, address, email (if available), telephone number, and signature. You must send a written exclusion request to Class Counsel by e-mail or to the mailing address set forth above. The exclusion request must be postmarked or sent with a transmittal date no later than **[DATE]**, forty-five (45) days after the date of this Notice.

If I do not exclude myself, can I sue Tidewater for the same thing later?

No. Unless you exclude yourself, you give up any right to sue Tidewater for the claims that this Settlement resolves on your behalf. If you have a pending lawsuit, speak to your lawyer in that case immediately because your legal rights may be adversely affected by this Settlement. You must exclude yourself from this Settlement in order to start or to continue your own lawsuit for the same or similar claims. Your rights may be affected by this Settlement.

If I exclude myself, can I still benefit from this Settlement?

No. If you exclude yourself, you will not receive any money from this lawsuit or Settlement, the compromise and extinguishment of your deficiency balance, or any other benefit in connection with the Settlement.

THE LAWYERS REPRESENTING YOU

Do I have a lawyer in the case?

Yes. The Court has approved Richard Shenkan and the law firm of Shenkan Injury Lawyers, LLC. to represent you and other class members. This lawyer and law firm are called "Class Counsel." You will not be charged individually for this legal service; rather, Class Counsel's fees will be paid from the Settlement Fund with the approval of the Court. If you want to be represented by your own lawyer, you may hire one at your own expense. Class Counsel's phone number is [toll-free number]. You can speak with Class Counsel at no charge about this case.

How will the lawyers be paid?

Class Counsel has asked the Court for attorneys' fees in the amount of $120,000 plus reimbursement of expenses of $16,255.07. An attorneys' fee in this amount represents less than one-fourth of the value of the aggregate benefit conferred including the compromise and extinguishment of the disputed deficiency balances. The value of the requests for credit tradeline removal will vary based upon each class member; however, these are significant additional benefits. The attorney fees and expenses awarded by the Court, including an amount not to exceed $5,000.00 for payment of the Settlement Administrator, will be paid out of the $300,000 settlement fund. Class Counsel will also request incentive awards of $15,000 for the Representative Plaintiff for her services as class representative for the Class. This will also be paid from the settlement fund.

OBJECTING TO THE SETTLEMENT OR OBJECTING TO THE DISTRIBUTION/REFUND

How do I tell the Court if I do not like the Settlement?

If you are a class member, you can object to the Settlement if you do not like any part of it. You should state why you object and why you think the Court should not approve the Settlement. The Court will consider your views. To do so, you must timely send a written communication request to Class Counsel by e-mail or to the mailing address set forth above. The objection must be postmarked or sent with a transmittal date no later than **[DATE]**, forty-five (45) days after the date of this Notice. The letter must include the following:

- A statement that you object to the Settlement;
- Your full name, address, email address (if available), and telephone number;
- The specific reasons why you object to the Settlement; and,
- Your signature.

If I am a co-borrower, can I request an alternate division to the equal division of the settlement payment or the refund payment as between both co-borrowers?

Yes. To do so, you and your co-borrower must timely send a written communication request to Class Counsel by e-mail or to the mailing address set forth above. The objection must be postmarked or sent with a transmittal date no later than **[DATE]**, forty-five (45) days after the date of this Notice. The letter must include the following:

- A statement that each of you are co-borrowers and that you request an alternative to the equal split of the settlement payment or deficiency payment refund;
- A description of how the co-borrowers want the payment to be made;
- The full name, address, email address (if available), and telephone number of each co-borrower;
- The signature of each co-borrower.

If you and your co-borrower cannot agree on whether to object to an equal division or as to what the division should be, you must send a letter no later than [DATE], forty-five (45) days after the date of this Notice.

The letter must include the following:

- A statement that you are a co-borrower and that you request an alternative to the equal split of the settlement payment or deficiency payment refund;
- A description of the dispute between you and your co-borrower as to how the payment should be made;
- The full name, address, email address (if available), and telephone number of each co-borrower.
- The signature of each co-borrower (or of one co-borrower if they send separate letters)

What is the difference between objecting and asking to be excluded?

Objecting to the Settlement is informing the Court that you do not like something about the Settlement, and that you, for a clearly stated reason, do not want the Settlement to be approved or that you object to a particular part of the Settlement. You can object only if you do not exclude yourself from the Settlement. Excluding yourself is informing the Court that you do not want to be part of the Settlement. If you exclude yourself, you have no basis to object, because the Settlement no longer affects you.

THE COURT'S FAIRNESS HEARING

The Court will hold a hearing to decide whether to approve the Settlement. You may attend and you may ask to speak, but you do not have to do so.

When, where, and how will the Court decide whether to approve the Settlement?

The Court will hold a fairness hearing on **[DATE]** at **[TIME]** in Courtroom [Number], 1400 John F Kennedy Blvd (City Hall) Philadelphia, PA 19107. The hearing may be moved to a later date or time, or be held via videoconference or telephone conference, without additional notice so if you intend to attend the hearing, it is suggested that you confirm in advance that the date and time of the hearing has not changed. Additionally, in light of the restrictions necessitated by the COVID-19 pandemic, the Court, in its discretion, may change the mode or manner of the hearing. You may confirm this information by checking [website address] or calling [toll-free number]. At this fairness hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them and will listen to class members who ask to speak at the hearing. Similarly, if you are a co-borrower and object to the even split of the deficiency payment refund, the Court will also decide your objection if you are able to resolve any differences between yourself and your co-borrower with the assistance of Class Counsel. Upon objection, the Court may also modifyl other aspects of the Settlement including how much to pay the Representative Plaintiff for her incentive award and Class Counsel for their services and expenses. Following the hearing, the Court will decide whether to approve the Settlementwhich is expected to be prompt.

Do I have to attend the fairness hearing?

No. Class Counsel will answer questions the Court may have, but you are welcome to come at your expense. If you file an objection, you do not have to come to Court to talk about it, but you may. As long as you timely filed your written objection the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

May I speak at the hearing?

Yes. Any class member that has not excluded himself/herself from the Settlement may speak at the fairness hearing.

GETTING MORE INFORMATION

How do I get more information?

This notice briefly summarizes the key aspects of the proposed Settlement. More details are in the Settlement Agreement. You can get a copy of the Settlement Agreement and other important case documents at [website address]. You may also examine these documents in person during regular office hours at the Philadelphia Office of Judicial Records, located at Room 284, City Hall, 1400 John F Kennedy Blvd (City Hall), Philadelphia, PA 19107 or by accessing the Court's online docket at [docket url]. You may contact Class Counsel with questions at [toll-free number] or rshenkan@shenkanlaw.com. You should not call Tidewater or the Court.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

COLEMAN McCALL, JR.,	:	**January Term, 2006**
Individually and on behalf of all others	:	
Similarly situated	:	
v.	:	**No. 00005**
	:	
DRIVE FINANCIAL SERVICES, L.P.	:	
and	:	
DRIVE GP, LLC	:	

OPINION

Plaintiff brings this class action pursuant to Pennsylvania's Uniform Commercial Code ("UCC"), 13 Pa C.S. § 9601, et seq., and Pennsylvania's Motor Vehicle Sales Financing Act ("MVSFA"), 69 P.S. § 601, et seq. The legislature , through the UCC and the MVSFA, requires secured parties to provide consumers with specific, detailed notices of repossession and sale. Consumers are entitled by statute to deficiency notices post sale. Only by receiving a prompt deficiency notice can the consumer know whether a creditor will claim that the vehicle proceeds do not satisfy the remaining obligation and that the creditor intends to hold the consumer liable for a deficiency balance.

Plaintiff Coleman McCall alleges among other things, that Defendants Drive Financial Services, L.P. and Drive, GP, LLC, have violated state law notice requirements in connection with motor vehicle repossessions. There is no dispute that Defendants have utilized uniform procedures, forms and manner of notice with respect to their vehicle repossessions in the Commonwealth of Pennsylvania.

Defendant Drive Financial Services, L.P. ("Drive") is a Texas based automobile-finance company. When a consumer has defaulted on a loan, Drive repossesses and re-sells the consumer's vehicle that collateralizes the loan. In the course of repossessing vehicles belonging to plaintiff and the potential class, Drive failed both substantively and procedurally to provide plaintiff and the potential class with, among other information, the 15 day notice period required under (1) the UCC, (2) the parties' retail installment contract, and (3) the statute specifically governing repossession practice – the MVSFA.

The UCC requires a creditor to provide "reasonable authenticated notification of disposition" after repossessing a vehicle, 13 Pa. C.S. § 9611. The UCC does not itself define what is "reasonable" but looks to other sources for definition. The MVSFA is the Pennsylvania statute designed to cover repossessions and protect consumers from abuses by allowing a minimum period to cure any default or redeem before sale. *See,* 69 P.S. § 623D. Under the MVSFA, a creditor must provide:

> [a] written "notice of repossession" delivered in person, or sent by registered certified mail directed to the last known address of the buyer. Such notice shall set forth the buyer's right as to reinstatement of the contract, if the holder extends the privilege of reinstatement and redemption of the motor vehicle, shall contain an itemized statement of the total amount required to redeem the motor vehicle by reinstatement or payment of the contract in full, shall give notice to the buyer of the holder's intent to re-sell the motor vehicle at the expiration of fifteen (15) days from the date of mailing such notice, shall disclose the place at which the motor vehicle is stored, and shall designate the name and address of the person to whom the buyer shall make payment, or upon whom he may serve notice. The holder's notice shall also state that any personal property left in the repossessed vehicle will be held for thirty (30) days from the date of the notice's mailing. The personal property may be reclaimed within the thirty (30) day time period. Thereafter the property may be disposed of in the same manner as the motor vehicle and other collateral.

As set forth above, the MVSFA requires that a notice of repossession be sent to the consumer advising the consumer of several items, including 15 days notice of intent

to sell the repossessed vehicle. 69 P.S. §623D. Under 1 Pa. C.S. § 1933, a particular provision of one statute i.e. the MVSFA, controls a general provision of another statute addressing the same topic, i.e. the UCC. Since provisions of the UCC and the MVSFA are read *in pari materia,* plaintiff and the potential class were entitled, inter alia, to at least 15 days notice of the intent to sell the repossessed vehicle, which did not occur. *Industrial Valley Bank & Trust v. Nash,* 502 A.2d 1254, 1263 (Pa. Super. 1985)("On the question of the kind of notice to be given to a debtor by the secured creditor, the MVSFA and the U.C.C. are clearly in *pari materia* since they relate to the identical thing – the sale of a repossessed motor vehicle."); *Coy v. Ford Motor Company*, 618 A.2d 1024, 1026(Pa. Super.1993).

In addition to the MVSFA's statutory requirement of at least 15 days notice of sale, the parties agreed in their finance contract that a borrower whose car is repossessed would have at least 15 days notice to redeem. The finance contract at issue provides at ¶ 12(b) under "some things you should know if we repossess the vehicle":

> You have the right to buy back (redeem) the vehicle within 15 days of the mailing of the Notice and at any later time before we sell the vehicle. If you do not redeem, you give up all claim to the vehicle.

Driver's notice provided only 10 days, despite the contractual and statutory obligation to provide a minimum of 15 days.

Under the MVSFA, Drive was also required to provide plaintiff and the class information both regarding (1) the location of the repossessed vehicle; and (2) that any personal property left in the vehicle would be held for 30 days from the date of mailing the notice so plaintiff and potential members of the class could retrieve the property. 69 P.S. § 623D. Drive, in its form Notice, also failed to provide that information.

If after the sale of the vehicle there is a deficiency balance, a creditor must send a letter explaining the deficiency (referred to herein as "Deficiency Notice") when it first makes written demand for the deficiency, or within 14 days after receipt of a request for an explanation by the consumer. 13 Pa C.S. § 9616. The Deficiency Notice must provide information about the aggregate amount of the obligation secured by the security interest; the proceeds from the sale; the remaining balance after applying the sale proceeds; a breakdown of the expenses incurred in selling the property; any credit to which the consumer is entitled; and the amount of the deficiency claimed. Defendant did not send out Deficiency Notices to plaintiff and the class.

Plaintiff and the potential class are entitled to uniform statutory damages as a result of defendant's failure to comply with the UCC (and the MVSFA). 13 Pa. C.S.A. § 9625(c) provides consumers with a uniform minimum liquidated damages, "regardless of any injury that may have resulted". *See*, Official Comment 4 to 13 Pa. C.S.A. § 9625 9-625(c):

> Persons entitled to recover damages; statutory damages in consumer goods transaction. If the collateral is consumer goods, a person that was a debtor or secondary obligator at the time a secured party failed to comply with this chapter may recover for that failure in any event an amount not less than the credit service charge plus 10% of the principal amount of the obligation or the time price differential plus 10% of the cash price.

This statutory damage provision has routinely been applied as written. *See e.g., Kruse v. Voyager Ins. Co.*, 648 N. E.2d 814 (Ohio 1995).

Separately, the failure to send the deficiency notice provides for a uniform, statutory damage of $500.00. 13 Pa C.S.A. § 9625(e)(5).

I. Factual Background

In or about September 2002, Mr. McCall obtained an automobile loan from Drive for the purchase of a used Ford automobile. After two years of timely payments, in 2004, Mr. McCall fell behind on his car payments to Drive as a result of a serious family situation and Drive repossessed Mr. McCall's vehicle on February 28, 2005.

On or about March 1, 2005, Drive sent Mr. McCall a "Notice of Plan to Sell Property" in connection with the repossession by Drive of his vehicle. The Notice states that the vehicle would be sold after 10 days, i.e. "at a private sale sometime after 03/11/05", and that McCall would have to pay the sum of $ 8,968.24 to redeem the vehicle. This is the only notice sent to McCall advising of the repossession. Drive's Notice failed to comply with the 15 day notice required under their agreement(s) the UCC; and the MVSFA.

Drive acknowledges that it sent this non-compliant notice to approximately 750 Pennsylvania residents. Drive, through its counsel, has also acknowledged that approximately 1,520 cars belonging to Pennsylvania residents were repossessed during the class period.

If a deficiency remains after the sale of the vehicle, a creditor must send a letter explaining the deficiency ("Deficiency Notice") when it first makes written demand for the deficiency or within 14 days after the receipt of the request for same by the consumer. 13 Pa C.S. § 9616. Drive did not provide a notice explaining any deficiencies claimed due as required under 13 Pa.C.S. § 9616. Drive has provided no evidence that a single deficiency notice was issued to any consumer. Pursuant to 13 Pa. C.S. § 9625(e), each

consumer class member may recover a uniform $500.00 damages as a result of a creditor's failure to provide an explanation of the deficiency, where that failure is part of a pattern or practice of noncompliance. Both of Plaintiff's damages claims are uniform and based upon a statutory formula.

Plaintiff has provided an expert report from Larry Goodman, CPA, who opines that the arithmetic calculation of damages (finance charge plus 10%) would be an easy, straightforward calculation for each class member.

II. Discussion

In determining whether this action is properly certifiable as a class action, the court is confined to a consideration of the class action allegations and is not concerned with the merits of the controversy. The court's purpose in resolving the motion for class certification is to decide solely whether the action shall continue as a class action or as an action with individual parties only. Pa.R.C.P. § 1707 (Explanatory Note 1977). Accordingly, in resolving the pending motion, the Court cannot make any ruling on Plaintiffs' ultimate recovery against any named defendant nor on the merits of any defense raised. The burden of proving that classification is appropriate falls upon the party seeking certification. D'Amelio v. Blue Cross of Lehigh Valley, 347 Pa. Super. 441, 449, 500 A.2d 1137, 1141 (1985); Janicik v. Prudential Insurance Company of America, 305 Pa. Super. 120, 128, 451 A.2d 451, 454 (1982).

In order for the court to grant class certification, the plaintiff must demonstrate that the requirements set forth in Pa.R.C.P. § 1702 have been satisfied. Rule 1702 sets forth those requirements as follows:

Rule 1702: Prerequisites to a class action.

One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:

(1) the class is so numerous that joinder of all members is impractical;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

1.NUMEROSITY

Drive has acknowledged that approximately 750 Pennsylvania residents received a notice like the one attached to the Complaint. The class size will likely be closer to the number of repossessions, i.e. 1520, during the class period as recently identified by Drive's counsel. Drive's representations in its pleadings establish numerosity for purposes of class certification.

2. COMMONALITY

Rule 1702(2) requires that plaintiff's show that "there are questions of law or fact common to the class." Commonality does not require that every question of law or fact be common to every member of the class; rather, the requirement is generally met if the class members' legal grievances arise out of the "same practice or course of conduct" on the part of the class opponent. *Janicik*, 451 A.2d at 457, *accord, Rose v. Shawmut*

Developnet Corp., 460 Pa. 328, 333 A.2d 751, 753 (1974) (claims arising from form mortgages generally give rise to common questions).

The common questions in this case are set forth at ¶31 of plaintiff's Complaint.

(a) Whether defendant failed to send the Notice of Repossession required under the MVSFA as required after repossessing a vehicle;

(b) Whether defendant failed to send the Notice in the form and manner required under the UCC and MVSFA after repossessing a vehicke;

(c) Whether defendant sent a written explanation of the deficiency claimed due as required under the UCC; and

(d) The statutory or other damages provided for such misconduct. These issues are common to each of the 750 or more Pennsylvania consumers identified by Drive at this juncture, and therefore plaintiff meets the commonality standard.

3. TYPICALITY

Plaintiffs must demonstrate that their claims or defenses are typical of the claims or defenses of a class. Pa.R.C.P. § 1702(3). In order to satisfy the typicality requirement, the position of the class representative on the common issues must be sufficiently aligned with that of the absent class members to insure that the pursuit of the named plaintiffs' own interest will advance those of the proposed class members. D'Amelio, Supra, 347 Pa. Super. At 458, 500 A.2d at 457; Ablin, Supra, 291 Pa.Super. at 47, 435 A.2d at 212.

A named plaintiff's claim is considered to be typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class

members, and if claims of the named plaintiff emanate from the same legal theory or common allegation as the claims of the class members.

Instantly, the complaint delineates Dive's regular use of an improper form letter: a repossession notice contrary to that mandated by the UCC and MVSFA for consumers who have suffered a repossession, and the ensuing (absent) deficiency notice. The illegality of these form documents will not vary in any significant way among class members – either the forms are illegal or not.

Typicality does not require identical claims and a variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class. *See Bucci v. Cunard Line Ltd.*, 35 D & C 3d 228, 237 (1985). In this case, plaintiff McCall is a Pennsylvania resident who financed a vehicle through Drive, who after repossessing the car, failed to provide the notices required under the UCC, the retail installment contract and the MVSFA, and failed to send a proper deficiency notice. Each class member is in the identical situation. The Complaint alleges no claims that are particular to Mr. McCall such that he would be atypical of or antagonistic to any other class member. Even if Drive argues that each class member owed a deficiency and that it is entitled to a set off, that would only impact the amount of damages to be awarded. *See also Walczak*, 850 N.E. 2d at 371-372 (rejecting claim that deficiency set-offs may be a bar to class treatment).

Additionally, the statutory damage formula is the same for all class members. The formula is a question of simple math, assuming the common liability question is resolved in favor of the class. From Drive's records, one would only need to add the finance charge and principal balance outstanding on each of the finance agreements in the

class to calculate aggregate as well as individual statutory damages. It is well-settled that minor variations in damages do not impair typicality or preclude certification. *See, In Re Comm. Bank of N. Va.*, 418 F.3d 277 at 305-06(3d Cir. 2006). Because the damages formula is uniform for all class members and may be calculated with mathematical certainty, there is no impediment to class certification in this case.

4. **ADEQUACY**

Rule 1702(4) requires that "the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709." This requirement has three elements: (1) whether counsel for the name dplaintiff will adequately represent the interests of the class; and (2) whether the representative parties have a conflict of interest in the maintenance of the class action; and (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Generally, competency of class counsel is presumed. This Court finds that McCall is represented by counsel experienced in consumer class action litigation. Cary L. Flitter and Lundy, Flitter, Beldecos & Berger, P.C. have been approved as competent counsel by this Court in other consumer class actions. Flitter has presented at lectures and CLE's regionally and nationally for over 10 years. Flitter teaches Consumer Credit Litigation at Widener University Law School (adjunct faculty) and is co-author of *Pennsylvania Consumer Law*, Geo. Bisel Publishing Co. Mr. McCall and the class will also be represented by Theodore E. Lorenz of the Lundy, Flitter firm. Mr. Lorenz has significant trial experience and has been previously named class co-counsel in consumer matters in federal court.

The class is also represented by Michael D. Donovan, a principal in the firm of Donovan Searles, LLC. Mr. Donovan has extensive experience representing investors, consumers, and small businesses in class actions, shareholder rights, consumer and commercial litigation. Donovan has been previously named class counsel by this Court and by other courts in this and other federal districts.

Plaintiff McCall will fairly and adequately represent the class. Plaintiff McCall sits in virtually the same position as the putative class members who, like him, were not provided with the notices required under the UCC and the MVSFA. There is nothing to suggest that McCall may have any interest antagonistic to the vigorous pursuit of the class claims against Drive.

The Court has been made aware that some 15 years ago, that McCall was arrested and convicted of robbing a convenience store in Bucks County. He served 5 years in jail and was released in September 1996. According to counsel, Mr. McCall is not on parole and does not have to see a parole officer or anyone related to the conviction, which is now more than a decade in his past. He has not had any further convictions other than this singular criminal episode dating to 1991. This old offense has no bearing on this prong of class certification. *See Haywood v. Barnes*, 109 F.R.D. 568, 579(E.D.N.C. 1986). Mr. McCall is an adequate class representative, knowledgeable and interested to bring this case on behalf of himself and the other members of the putative class.

Furthermore, Plaintiff also sued Drive under the federal Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. *McCall v. Drive Financial Services*, U.S.D.C. E.D. Pa No. 05-cv-2463(AB). In opposition to the federal action, Drive argued extensively that Mr. McCall's old conviction somehow rendered him inadequate to serve as class

representative. The federal court rejected Drive's argument, finding the conviction both old and entirely unrelated to any aspect of the case. *McCall v. Drive Financial Services*, 236 F.R.D. 246 (E.D. Pa. 2006).

Finally, the named plaintiff has adequate financial resources. Pa.R.C.P. 1709(3). Class counsel are advancing their time and the litigation costs, as they are permitted to do. Therefore, the adequacy prong is met.

5. Fair and Efficient Method for Adjudication of the Controversy

Pa.R.C.P. § 1702(5) requires that the Court find that a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Pa.R.C.P. 1708 as a prerequisite to class certification. The factors set forth in Pa.R.C.P 1708 to be considered in deciding whether or not a class action is a fair efficient method of adjudication include, in relevant part, "whether common questions of law or fact predominate over any question effecting only individual members" (Pa.R.C.P 1708(a)(1); the size of the class and the difficulties likely to be encountered in the management of the action as a class action (Pa.R.C.P. 1708(a)(2)); and whether the claims of individual class members are insufficient in amount to support separate actions (Pa.R.C.P. 1708(a)(7)).

In determining fainess and efficiency, a court is required to balance the interests of the litigants, including putative class members, and the interests of the court system, with the court being mindful that the class action is inherently a procedural device designed to promote efficiency and fairness in handling large numbers of similar claims. *Lillian v. Commonwealth*, 467 Pa. 15, 21, 354 A 2d 250, 253 (1976).

Pursuant to Rule 1708 (c), "[w]here both monetary and other relief is sought, the court shall consider the criteria all the criteria in both subdivisions (a) and (b) of the Rule.

Class cases challenging improper repossession and deficiency notices under the UCC's remedy provision have been regularly certified by sister state courts. *Walczak*, 850 N.E.2nd at, 366-372 (affirming certicication of class of motor vehicle buyers in action against finance company with respect to repossession and deficiency misconduct); *Middleton v. Sunstar Acceeptance Corp.*, 2000 WL 33385388, *3-*8 (S.C. Com. P1. Jan. 13, 2000)(certifying class of motor vehicle buyers alleging that financing companies repossession form violated the UCC); *Chisolm v. Transouth Financial Corp.*, 194 F.R.D. 538, 557-569 (E.D. Va. 2000)(certifying class and subclasses against financing company for violation of UCC notice requirements in alleged car churning scheme); *Patrick v. Wix Auto Co.*, 681 N.E.2d 98, 102 (I11. App. 1st Dist. 1997)(holding that repossession notice utilized by financing company violated state law).

Here, common questions predominate throughout the class as a result of Drive's failure to provide both the repossession and deficiency notices required under the UCC ans the MVSFA. *See* Rule 1708(a)(1). The predominance standard is "closely akin to" the commonality requirement of Rule 1702(2) discussed above, which is clearly satisfied in the matter. *Janicik* at 461.

There is no basis to conclude that any difficulties would be encountered with the management of this matter on a class action basis. Rule 1709(a)(2). The class consists of between 750 and 1520 Pennsylvania consumers and involves Drive's failure to provide the notices required under the UCC and the MVSFA in connection with Drive's repossession of vehicles belonging to plaintiff and the class. Drive's business is highly computerized and as such, Drive should be able to readily access information relating to plaintiff and the class; *compare Janicik* at 462 ("...the names, addresses and insurance

records of all potential class members were centrally stored by [defendant]. Consequently, management problems unique to the class porceedure would not be unduly burdensome...").

This forum is particularly appropriate in which to address the claims of the plaintiff and the putative class. *See* Rule 1708(a)(3),(5),(6), and (7). The cost of proceeding on an individual basis would not be practical or economical given the potential size of individual awards and members of the putative class will benefit by proceeding on a class basis.

In addition to monetary relief, Plaintiff also seeks declaratory relief in this action. Declaratory relief is appropriate in this case since Drive has acted or refused to act, or failed to perform a legal duty, on grounds generally applicable to all class members. *See* Rule 1708 (b)(2). The defendant's conduct does not, however, have to be directed at or damaging to each member of the class to justify declaratory relief. *Willams v. Empire Funding*, 183 FRD at 435-37.

Declaratory relief is also appropriate because Drive's repossession and deficiency procedures fail to comply with Pennsylvania law. As Plaintiff asserts in his Motion, "the public interest in seeing that the rights of consumers are vindicated favors the disposition of the instant claims in a class action form." *Lake v. First Nationwide Bank*, 156 F.R.D. at 626; *accord Baldassari*, 808 A.2d at 195.

II. CONCLUSION

Plaintiff has shown that each of the requirements for class certification set forth in Rule 1702 are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) plaintiff's

claims are typical of those of the class members: (4) plantiff is ans adequate representative of the class; and (5) the class action provides a fair and efficient method for adjudication of the controversy. Plaintiff has shown that the criteria of Rule 1708 are satisfied.

The Court therefore grants Plaintiff class certification.

BY THE COURT:

Gary F. Di Vito, J.

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