UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

JOHN TAYLOR, on behalf of himself and others similarly situated, Plaintiff, v. TIMEPAYMENT CORPORATION, Defendant.	Civil Action No.: CLASS ACTION COMPLAINT JURY TRIAL DEMANDED

NATURE OF ACTION

1. This is a class action brought under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*., and its implementing regulation, 12 C.F.R. § 1026 ("Regulation Z"); the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667 *et seq*., and its own implementing regulation, 12 C.F.R. § 1013 ("Regulation M"); as well as Virginia law governing secured transactions and prohibiting excessive interest in credit transactions.

2. As one district court recognized, "Congress enacted the CLA as an amendment to the TILA and [thereby] extended the TILA's 'credit disclosure requirements to consumer leases.'" *Clement v. Am. Honda Fin. Corp.*, 145 F. Supp. 2d 206, 209 (D. Conn. 2001) (quoting *Turner v. Gen. Motors Acceptance Corp.*, 180 F.3d 451, 454 (2d Cir. 1999)).

3. The TILA—and, by extension, the CLA—was put in place to protect consumers from obfuscation or misinformation in credit sale and lease transactions.

4. Congress recognized and sought to remedy the information imbalance in such transactions, particularly for inexperienced or uninformed consumers lacking the financial acumen of those companies responsible for extending them credit.

5. This action is founded upon the failures of one such company, TimePayment Corporation ("Defendant"), to provide adequate disclosures with respect to consumer credit sales disguised as leases for personal property.

6. Defendant's use of lease agreements for consumer purchases serves a sinister purpose: to ostensibly allow it to avoid the stringent disclosure requirements of the TILA—including disclosure of the astronomically high interest rates applicable to those purchases—and to steer clear of related requirements for secured transactions under state-law analogs of the Uniform Commercial Code.

7. In the case of John Taylor ("Plaintiff"), that interest rate—undisclosed to him—topped 77% for the purchase and installation of a new heat pump required to keep his home warm during the autumn and winter months.

8. This effective rate far exceeds the limit under Virginia law of 12 percent for personal debts like Plaintiff's.

9. What's more, various other provisions of his Consumer Equipment Lease Agreement ("Agreement")[1] with Defendant contravene important protections mandated by Virginia's Commercial Code governing secured transactions.

10. This case centers on Defendant's manipulation of consumer credit sales into personal leases to obfuscate important financial information regarding the subject transactions and to skirt various protections otherwise afforded those transactions, in violation of federal and state law.

[1] A true and correct copy of Plaintiff's Agreement is attached as Exhibit A.

PARTIES

11. Plaintiff is a natural person who at all relevant times resided in Chesterfield County, Virginia.

12. Plaintiff leased personal property—a heat pump for his home HVAC system—pursuant to an Agreement with Defendant, and therefore is a "lessee" as defined by 15 U.S.C. § 1667(2).

13. Defendant is a for-profit corporation with its principal office located in Burlington, Massachusetts.

14. Defendant describes itself as "an award-winning equipment leasing company that specializes in transactions with a selling price starting as low as $500, and up to $100,000."[2]

15. Its "programs are designed to meet the needs of the broadest range of equipment buyers and sellers with competitive finance solutions for equipment of all types, and support for every credit profile."[3]

16. Defendant advertises that its "vendors and brokers are able to maximize sales by offering equipment leasing- while customers get the equipment they need, when they need it, and are able to manage cash flow through affordable monthly payment[s]."[4]

17. Among the industries served by Defendant's leasing programs:

- Automotive repair and service equipment;
- Fitness and exercise equipment;
- Recreational equipment like powersports vehicles;

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2 http://timepayment.com/about-us (last visited May 31, 2018).

3 http://timepayment.com/about-us (last visited May 31, 2018).

4 http://timepayment.com/about-us (last visited May 31, 2018).

- Computers and mobile devices;
- Security systems and home alarm monitoring equipment;
- HVAC and heating and cooling equipment; and
- Water purification and filtration equipment.[5]

18. At all relevant times, Defendant regularly engaged in leasing, offering to lease, or arranging to lease personal property under a consumer lease.

19. Plaintiff's Agreement with Defendant identifies Defendant as the "Lessor." Ex. A.

20. Defendant thus is a "lessor" within the meaning of the CLA. *See* 15 U.S.C. § 1667(3); 12 C.F.R. § 1013.2(h).

21. Further, at all relevant times, Defendant, in the ordinary course of its business, regularly extended consumer credit payable by agreement in more than four installments or for which the payment of a finance charge is or may be required.

22. Additionally, Defendant is the entity to whom the debt arising from the Agreement is initially payable.

23. Defendant thus is also a "creditor" within the meaning of the TILA. *See* 15 U.S.C. § 1602(g); 12 C.F.R. § 1026.2(17).

JURISDICTION AND VENUE

24. This Court has jurisdiction under 15 U.S.C. § 1640(e), 15 U.S.C. § 1667d(c), and 28 U.S.C. § 1331.

25. Venue is proper before this Court pursuant to 28 U.S.C. § 1391(b), as the acts and transactions giving rise to Plaintiff's action occurred in this district and as Defendant transacts business in this district.

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[5] http://timepayment.com/equipment-financing/industries (last visited May 31, 2018).

FACTUAL ALLEGATIONS

The TILA

26. "The TILA reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.'" *Layell v. Home Loan & Inv. Bank, F.S.B.*, 244 B.R. 345, 350 (E.D. Va. 1999) (quoting *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 377 (1973)).

27. The statute thus "has been found uniformly to be remedial in nature and thereby liberally and broadly construed in favor of the consumer." *Travis v. Trust Co. Bank*, 621 F.2d 148, 151 (5th Cir. 1980).

28. The TILA accordingly is strictly enforced, and absolute compliance is necessary. *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983) ("To insure that the consumer is protected, as Congress envisioned, requires that the provisions of the Act and the regulations implementing it be absolutely complied with and strictly enforced."); *see also In re Porter*, 961 F.2d 1066, 1078 (3d Cir. 1992) ("A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor's intent.").

29. "[S]trict interpretation of the TILA has largely been responsible for the TILA's success in achieving widespread compliance with its requirements." *In re Brown*, 106 B.R. 852, 857 (Bankr. E.D. Pa. 1989).

30. Indeed, without strict compliance, the TILA's goals of standardized uniform disclosures quickly would be eroded.

31. Regulation Z requires creditors to make TILA disclosures "clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 1026.17.

32. The clarity of a creditor's disclosure is a question of law, determined under an "ordinary consumer" standard. *Palmer v. Champion Mortg.*, 465 F.3d 24, 28 (1st Cir. 2006).

33. And because this standard is objective, what any given consumer knows or does not know is immaterial when evaluating a creditor's TILA disclosures.

The CLA

34. "Passed by Congress as an amendment to the Truth In Lending Act [], the CLA purports 'to assure a meaningful disclosure' of personal property lease terms to 'enable the lessee to compare more readily the various lease terms available to him [and] limit balloon payments in consumer leasing.'" *Gaydos v. Huntington Nat. Bank*, 941 F. Supp. 669, 672 (N.D. Ohio 1996) (quoting 15 U.S.C. § 1601(b)).

35. The CLA's primary purpose is to

> "assure a meaningful disclosure of the terms of leases . . . so as to enable the lessee to compare more readily the various lease terms available to him." 15 U.S.C. § 1601(b). Because lease financing had become recognized as an alternative to credit financing and installment sales contracts, Congress also intended CLA disclosure requirements to "enable comparison of lease terms with credit terms where appropriate." *Id.* The CLA thus requires lessors of personal property subject to its provisions to make specified disclosures when a lease is entered into. *See* 15 U.S.C. § 1667a (consumer lease disclosures).

Turner, 180 F.3d at 454.

36. Accordingly, the TILA's "strict liability standard attaches to violations of CLA disclosure requirements as well." *Gaydos*, 941 F. Supp. at 672.

Plaintiff's Credit Transaction

37. In or around October 2017, Plaintiff needed a new heat pump to warm his home, so he and his wife contacted a local dealer named Williams and Fogg Heating & Air Co. ("Williams and Fogg") to obtain an estimate.

38. Plaintiff inquired about financing for a potential equipment purchase and installation, and Williams and Fogg indicated that it worked with a financing company—Defendant—that could assist.

39. So, Plaintiff opted to purchase a new heat pump from Williams and Fogg given that he could finance the purchase through Defendant, at Williams and Fogg's suggestion.

40. The cost for the heat pump and installation by Williams and Fogg totaled $5,325.

41. The Agreement required an initial payment of $384.72 at the time of signing, plus 21 additional monthly payments thereafter of $410.44 each. Ex. A at 1.

42. The 21 monthly payments of $410.44 total $8,619.24 in all.

43. The Agreement also requires Plaintiff to return the heat pump equipment to Defendant, at Plaintiff's own expense, at the end of the 21-month lease term, unless he exercises his purchase option to keep the equipment permanently. *Id*. at 2.

44. To do so, Plaintiff must pay the equipment's "fair market value" at that time, which amount may not exceed the sum of three regular monthly lease payments—$1,231.32—per the Agreement. *Id*. at 1.

45. Thus, the total cost of the Agreement, including the initial payment due at signing ($384.72), the subsequent periodic payments ($8,619.24), and the equipment removal and return cost (amount to be determined), exceeds $9,003.96.

46. The maximum total cost of the Agreement, assuming Plaintiff elects to purchase the equipment at lease-end at the maximum potential "fair market value" of $1,231.32, is $10,235.28.

47. Accordingly, the finance charge associated with the Agreement is a minimum of $3,678.96 (if Plaintiff does not keep the equipment) or as much as $4,910.28 (if he exercises his purchase option at the maximum value of three monthly payments).

48. This financing charge represents a minimum of 69% of the purchase price of the heat pump (assuming no purchase option) or a maximum of 92% of the purchase price (if the Agreement's purchase option is exercised at maximum value).

49. The corresponding interest rate associated with the Agreement thus would range from over 68% to nearly 78%.

50. Plaintiff has made regular monthly payments under the Agreement since its inception, and his account with Defendant remains current.

A Credit Sale Disguised as an Equipment Lease

51. Significantly, just before and after he signed the Agreement, Plaintiff specifically inquired as to the applicable interest rate, but Williams and Fogg's representatives could not provide an answer.

52. After reviewing the Agreement more closely with his wife, Plaintiff also began to question the additional taxes and fees being charged beyond the monthly payments.

53. Plaintiff and his wife next directed their questions to Defendant but were told that there is no interest rate to disclose—because the Agreement is a lease—and that various fees for property tax, sales tax, and a damage waiver were necessary and unavoidable under the Agreement.

54. Notably, Defendant styled the Agreement as a "Consumer Equipment Lease," but the Agreement is, in reality, a deceptively disguised credit sale.

55. The Eighth Circuit Court of Appeals recognized long ago:

> The legislative history of the TILA shows that Congress was aware that "some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish," *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365, 93 S. Ct. 1652, 1658, 36 L.Ed.2d 318 (1973), and that it intended to include within the statutory definition of "credit sales" purported leases "if they are, in essence, disguised sale arrangements." 1968 U.S. Code Cong. & Ad. News 1962, 1980.

Clark v. Rent-it Corp., 685 F.2d 245, 248 (8th Cir. 1982).

56. Per Regulation Z, a lease agreement is treated as a credit sale under the TILA when a consumer:

> (i) Agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and service involved; and
>
> (ii) Will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.

12 C.F.R. § 1026.2(a)(16).

57. Under the Agreement, Plaintiff will pay Defendant a sum reaching more than $9,000, which is well in excess of the heat pump's purchase and installation price of $5,325.

58. And after fulfilling his monthly lease obligations, Plaintiff may purchase the heat pump equipment for a one-time payment of the pump's "fair market value" at that time—though such value may not exceed three monthly payments, or $1,231.32, per the Agreement.

59. Of course, if the fair market value of the pump is less than $1,231.32 at the end of the lease, Plaintiff's purchase option would be valued at that lesser amount.

60. Accordingly, the purchase option, at most, would comprise approximately 13% of the total proceeds required under the Agreement, and if the "fair market value" of the heat pump

after 21 months proves to be less than $1,231.32, it would necessarily represent an even smaller percentage of the total proceeds required under the Agreement.[6]

61. If the Agreement is terminated early, Plaintiff must return the heat pump and pay an "Early Termination Balance" that includes any amounts due and owing to Defendant as of the date of early termination, *plus* (i) the present value of all remaining monthly payments due through the end of the Agreement, discounted at a rate of 4%, and (ii) any expenses incurred and taxes payable to Defendant as a result of early termination.

62. Given the foregoing, the Agreement qualifies as a consumer credit sale subject to the mandatory disclosure provisions of the TILA and Regulation Z.

63. The TILA requires disclosure of, *inter alia*, the "amount financed," a statement of the consumer's right to obtain a written itemization of the amount financed, the "finance charge" (expressed as an "annual percentage rate"), the sum of the amount financed and the finance charge, and the number, amount, and due dates or period of payments scheduled to repay the total of payments. 15 U.S.C. § 1638(a)(2)-(6).

64. By styling its finance agreement with Plaintiff as a lease, Defendant obfuscated the exorbitant cost of the credit it extended to him.

65. To be sure, the annual percentage rate for Plaintiff's Agreement, when calculated according to Appendix J of Regulation Z, is 77.98%.

66. At the time he signed the Agreement, Plaintiff was unaware of the true financing cost associated with his purchase of the heat pump.

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[6] Also noteworthy, while the Agreement allows for a purchase option in the amount of the heat pump's "fair market value" after 21 months, it alternatively requires that Plaintiff return the pump to Defendant, *at his own expense*. Thus, the Agreement requires an additional expenditure by Plaintiff at lease-end regardless of whether he keeps the heat pump, so the true "additional consideration" necessary to purchase the equipment is even less than the equipment's "fair market value" after 21 months, whatever that amount may be. *See* 12 C.F.R. § 1026.2(a)(16).

67. Plaintiff and his wife were surprised to later discover that the Agreement requires Plaintiff to pay an effective interest rate of more than 77% on the purchase price of the pump.

68. By not disclosing this very high finance charge, Defendant effectively hid from Plaintiff the true cost of the credit that it was extending him, and deprived him of the ability to shop intelligently for alternative financing.

69. What's more, unlike other consumer goods such as electronics, furniture, or automobiles, it is not common for individuals to "use" home heating pumps for only a limited period of time—say, 21 months—under the expectation that those pumps will be returned for future use by other consumers.

70. Plaintiff purchased his heat pump to warm his home during the autumn and winter months in Virginia.

71. This heat pump is not a luxury akin to a new automobile or laptop computer; rather, it is a *necessity* in any modern home in Virginia.

72. Any sensible person who uses Defendant's lease agreement to purchase and install new heating equipment to warm his or her home will undoubtedly elect to purchase that equipment at the end of the lease agreement for its continued, long-term use.

73. In Plaintiff's case, if he were to return the equipment instead of exercising his purchase option, such a return process would require professional assistance in removing the pump and other associated portions of his home's HVAC system.

74. And, of course, Plaintiff would then have to purchase *another* heat pump, and also pay for custom installation of that new unit, or else his home would remain without central heating.

75. Defendant preys on the necessity of the equipment installed to extract extraordinary finance charges—undisclosed to the consumer—by offering "leases" with (all but guaranteed) nominal purchase options in the place of traditional credit sales subject to greater scrutiny under the TILA.

76. And the purchase option employed here qualifies as "nominal" in relation to the Agreement—regardless of its percentage of the whole—given (a) the need for such heating equipment in homes like Plaintiff's, and (b) the upfront custom installation costs coupled with the additional costs to be incurred to later dismantle and return the pump, all of which effectively preclude the possible return of the property at lease-end. *Accord In re Grubbs Const. Co.*, 319 B.R. 698, 715-18 (Bankr. M.D. Fla. 2005) (in differentiating lease agreements from security interests under the Uniform Commercial Code, "[t]he 'sensible person' test provides that 'where the terms of the lease and option to purchase are such the only sensible course for the lessee at the end of the lease term is to exercise the option and become the owner of the goods, the lease was intended to create a security interest,'" while "[t]he Economic Realities Test focuses on all the facts and circumstances surrounding the transaction as anticipated by the parties at contract inception, rather than at the time the option arises") (collecting cases).

Violations of the Virginia UCC

77. The commonwealth of Virginia has adopted the Uniform Commercial Code ("UCC") governing secured transactions, otherwise known as "Article 9." *See* Va. Code Ann. § 8.9A-101 *et seq*.

78. "Article 9 of the UCC is a comprehensive statutory scheme governing the rights and relationships between secured parties, debtors, and third parties." *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 53, 644 S.E.2d 43, 49 (2007).

79. Article 9 serves "to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty." *Haas' Estate v. Metro–Goldwyn–Mayer, Inc.*, 617 F.2d 1136, 1140 (5th Cir. 1980).

80. The provisions of Virginia's Article 9 apply to "a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract." Va. Code Ann. § 8.9A-109(a)(1).

81. Here, the Agreement creates a security interest, and is therefore subject to the Virginia UCC, for the same reasons it is a credit sale within the scope of the TILA and Regulation Z.

82. That is, consistent with Va. Code Ann. § 8.1A-203(b), Plaintiff (1) may not freely terminate the Agreement without incurring a significant monetary penalty for doing so, and (2) has the option to become the owner of the heat pump at lease-end for only "nominal additional consideration" of *no more than* $1,231.32—just 13% of the total contract value—and possibly much less, depending on the equipment's fair market value at the close of the lease.

83. Indeed, with regard to rent-to-own contracts like Plaintiff's Agreement, the Supreme Court of Virginia has recognized:

> Article 9 of the UCC governs any transaction, "regardless of its form," which is intended to create a security interest in personal property. Code § 8.9–102. Thus, we turn to the UCC definition of "security interest," which is applicable throughout the Commercial Code. In defining the term "security interest," Code § 8.1-201(37) provides, in relevant part:
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> > Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property *for no additional consideration or for a*

> *nominal consideration does make the lease one intended for security.* [Emphasis added.]
>
> We have not previously addressed this statutory provision. The plain language of the statute creates a security interest in property as a matter of law if the parties' contract allows the lessee to become the owner of the leased property for nominal or no additional consideration upon compliance with the terms of the lease. Further, we note that this construction is in accord with the holdings of several courts that have considered the issue. *See, e.g., Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*, 890 F.2d 1453, 1459 (9th Cir. 1989); *Percival Construction Co. v. Miller & Miller Auctioneers, Inc.*, 532 F.2d 166, 171 (10th Cir. 1976); *Stanley v. Fabricators, Inc.*, 459 P.2d 467, 469-70 (Alaska 1969); *Eimco Corp. v. Sims*, 100 Idaho 390, 393, 598 P.2d 538, 541 (1979); *Taylor Rental Corp. v. Ted Godwin Leasing, Inc.*, 209 Mont. 124, 681 P.2d 691, 695 (1984); *Reyna Financial Corp. v. Lewis Service Ctr., Inc.*, 229 Neb. 878, 429 N.W.2d 380, 383 (1988); *Tackett v. Mid–Continent Refrigerator Co.*, 579 S.W.2d 545, 548 (Tex. Civ. App. 1979).
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> This statutory language is based on the rationale that when the terms of the "lease" and option to purchase are such that the only sensible course of action for the "lessee" at the end of the term is to exercise that option and become the owner of the property, the "lease" becomes one intended to create a security interest under Code § 8.1–201(37) (citation omitted). If a contract contains such an option, the agreement is conclusively presumed to be one intended as security, without reference to other facts from which the opposite conclusion might be drawn. *In re J.A. Thompson & Son, Inc.*, 665 F.2d 941, 947 (9th Cir. 1982); *see In re Marhoefer Packing Co., Inc.*, 674 F.2d 1139, 1142 (7th Cir. 1982); *Morris v. Lyons Capitol Resources, Inc.*, 510 N.E.2d 221, 223 (Ind. Ct. App. 1987); *Commercial Credit Equipment Corp. v. Parsons*, 820 S.W.2d 315, 319 (Mo. Ct. App. 1991); *Peco, Inc. v. Hartbauer Tool & Die Co.*, 262 Or. 573, 500 P.2d 708, 709–10 (1972); *FMA Financial Corp. v. Pro–Printers*, 590 P.2d 803, 805 (Utah 1979).

C.F. Garcia Enters. v. Enter. Ford Tractor, Inc., 253 Va. 104, 107-08 (1997).

84. The lease agreement in *C.F. Garcia Enters.* constituted a security agreement under the UCC "because it provided Garcia the option to purchase the backhoe for nominal consideration upon compliance with the terms of the agreement." 253 Va. at 108; *see also In re Smith*, 262 B.R. 365, 369 (Bankr. E.D. Va. 2000) (applying *C.F. Garcia Enters.* to deem rent-to-own contracts security agreements within the purview of the UCC).

85. Likewise, here, Plaintiff's Agreement allows him to purchase the heat pump at the close of the lease for a nominal additional payment of no more than $1,231.32—approximately 13% of the total proceeds owed under the Agreement.

86. And if the fair market value of the heat pump at lease-end is less than $1,231.32, then Plaintiff must only pay that lesser amount to exercise his purchase option.

87. Further, given the circumstances of Plaintiff's transaction—(i) the heat pump is a necessity in a residential HVAC system to warm one's home; (ii) it required custom installation at the time of purchase; (iii) it would require additional custom labor to remove it from Plaintiff's home HVAC system for return to Defendant; and (iv) should Plaintiff do so, he would then need to purchase and install a new heat pump for his home after having just removed the old one—"the only sensible course of action for" Plaintiff at lease-end is to exercise the purchase option to keep this particular heat pump permanently. *See C.F. Garcia Enters.*, 253 Va. at 108.

88. Accordingly, the Agreement creates a security interest subject to the Virginia UCC.

89. By instead styling the transaction a lease agreement, Defendant sought to deprive Plaintiff of the numerous protections afforded him by Article 9, many of which are expressly *non*-waivable.

90. For example, under Virginia law, Plaintiff may *not*, through the Agreement, waive or vary certain rights afforded him by Virginia's Article 9, including:

- His rights under § 8.9A-609 regarding Defendant's repossession of the heat pump in the event of a default;
- His rights under § 8.9A-614 regarding Defendant's disposition of the heat pump in the event of a default; and
- His rights under § 8.9A-620(g) regarding Defendant's acceptance of the return of the heat pump in complete satisfaction of the Agreement.

See Va. Code Ann. § 8.9A-602.

91. However, the Agreement, in fact, does just that—waiving or otherwise varying Plaintiff's rights under § 8.9A-609, § 8.9A-614, and § 8.9A-620(g) as follows:

- In the event of a default, § 8.9A-609 allows a secured party (*i.e.*, Defendant) to repossess the collateral (*i.e.*, the heat pump), without judicial process, so long as repossession occurs "without breach of the peace," but here, should Plaintiff default, the Agreement allows Defendant to "take back the [pump]" without any limitation on the means for it to do so, and with no provision to protect "the peace" of Plaintiff's home, particularly considering that the heat pump has been custom installed in Plaintiff's home HVAC system, *see* Ex. A at ¶ 19;

- In the event of a default in a consumer-goods transaction,[7] § 8.9A-614 requires that the secured party (*i.e.*, Defendant) provide adequate notice to the debtor (*i.e.*, Plaintiff) before the secured party may dispose of the debtor's collateral (*i.e.*, the heat pump), but here, should Plaintiff default, the Agreement requires only that Defendant provide Plaintiff a notice of termination of the Agreement—with no further requirement regarding that notice's form or substance—before Defendant repossesses and disposes of the heat pump, *see* Ex. A at ¶ 20; and

- In the event of a default in a consumer transaction,[8] § 8.9A-620(g) prohibits a secured party (*i.e.*, Defendant) from accepting collateral (*i.e.*, the heat pump) in *partial* satisfaction of the obligation that collateral secures, but here, should Plaintiff default, the Agreement allows Defendant to *both* accept the return of the heat pump *and* sue Plaintiff for "any remaining amount due" under the Agreement—to be sure, "[e]ven if [Defendant] repossess[es] the [heat pump], [Plaintiff] must still pay [Defendant] at once the Early Termination Balance, computed by the formula for early termination [spelled out elsewhere in the Agreement] at the time of the Default," *see* Ex. A at ¶ 19.

92. As a result of the foregoing variances, the Agreement specifically violates the Virginia UCC at § 8.9A-602(6), § 8.9A-602(7), and § 8.9A-602(10).

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[7] According to the Virginia Code, a "consumer-goods transaction" is a consumer transaction in which an individual incurs an obligation primarily for personal, family, or household purposes, and a security interest in consumer goods secures that obligation. Va. Code Ann. § 8.9A-102(a)(24).

[8] According to the Virginia Code, a "consumer transaction" is a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes; (ii) a security interest secures that obligation; and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. Va. Code Ann. § 8.9A-102(a)(26). The term "consumer transaction" necessarily encompasses "consumer-goods transactions." *Id.*

93. What's more, the lease Agreement violates Virginia's Article 9 more generally by virtue of its design to specifically avoid application of Article 9 in the first place despite having created a security interest for Defendant.

Deficiencies Under the CLA

94. No matter, even accepting the Agreement as a lease rather than a credit sale, it still violates the law.

95. For example, the CLA requires disclosure of certain basic terms of consumer lease agreements for personal property, some of which must also be segregated from the remainder of the lease terms.

96. Among those disclosures *not* required to be segregated, lessors must provide "[a] statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and whether or not the lessee has the option to purchase the leased property and at what price and time," 15 U.S.C. § 1667a(5), and lessors also must state "[t]he number, amount, and due dates or periods of payments under the lease and the total amount of such periodic payments." 15 U.S.C. § 1667a(9).

97. Regulation M at § 1013.4—by way of § 1013.3(a)(2)—additionally mandates that the following disclosures, among others, be "segregated from other information" provided to lessees like Plaintiff:

> (b) Amount due at lease signing or delivery. The total amount to be paid prior to or at consummation or by delivery, if delivery occurs after consummation, using the term "amount due at lease signing or delivery." The lessor shall itemize each component by type and amount, including any refundable security deposit, advance monthly or other periodic payment, and capitalized cost reduction; and in motor vehicle leases, shall itemize how the amount due will be paid, by type and amount, including any net trade-in allowance, rebates, noncash credits, and cash payments in a format substantially similar to the model forms in appendix A of this part.

> (c) Payment schedule and total amount of periodic payments. The number, amount, and due dates or periods of payments scheduled under the lease, and the total amount of the periodic payments.
>
> (d) Other charges. The total amount of other charges payable to the lessor, itemized by type and amount, that are not included in the periodic payments. Such charges include the amount of any liability the lease imposes upon the lessee at the end of the lease term; the potential difference between the residual and realized values referred to in paragraph (k) of this section is excluded.
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> (e) Total of payments. The total of payments, with a description such as "the amount you will have paid by the end of the lease." This amount is the sum of the amount due at lease signing (less any refundable amounts), the total amount of periodic payments (less any portion of the periodic payment paid at lease signing), and other charges under paragraphs (b), (c), and (d) of this section. In an open-end lease, a description such as "you will owe an additional amount if the actual value of the vehicle is less than the residual value" shall accompany the disclosure.
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> * * *
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> (i) Purchase option. A statement of whether or not the lessee has the option to purchase the leased property, and:
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> (1) End of lease term. If at the end of the lease term, the purchase price; and
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> * * *
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> (j) Statement referencing nonsegregated disclosures. A statement that the lessee should refer to the lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable.[9]

98. And per 12 C.F.R. §§ 1013.3(a)(2) and 1013.4, these segregated disclosures must "be provided in a manner substantially similar to the applicable model form in appendix A" of Regulation M.

[9] Regulation M at § 1013.4 additionally requires certain other segregated disclosures not reprinted herein concerning lease terms not applicable here.

99. In other words, the requisite segregated disclosures must be given in a manner that mirrors, or which is at least "substantially similar to," the model form attached to the regulations, and which is also attached here as Exhibit B.

100. Defendant's Agreement fails to comply with the CLA's and Regulation M's disclosure requirements in several respects.

101. As to form, Defendant did not use the model form or something "substantially similar to" that model form to provide the necessary segregated disclosures. *Compare* Ex. A *with* Ex. B.

102. As to substance, first, Defendant did not disclose, in a segregated manner, the "total amount of the periodic payments" due under the Agreement, in violation of 12 C.F.R. § 1013.4(c).

103. In its failed attempt to do so, Defendant disclosed that Plaintiff "will have paid by the end of the Lease" a total of $8,619.24, which equals the sum of periodic payments (21 x $410.44), not the sum of *all* payments due "by the end of the lease" as Defendant misleadingly represents. *See* Ex. A at 1.

104. Second, Defendant did not correctly disclose, in a segregated manner, "[t]he total of payments" due under the Agreement, which amount "is the sum of the amount due at lease signing (less any refundable amounts), the total amount of periodic payments (less any portion of the periodic payment paid at lease signing), and other [relevant] charges," in violation of 12 C.F.R. § 1013.4(e). *See id*. at 1.

105. Though Defendant attempted to disclose "[t]he amount [Plaintiff] will have paid by the end of the Lease," *id*., it listed only $8,619.24—which is incorrect as it fails to account for

the $384.72 paid at lease signing, plus whatever additional costs will be incurred at lease-end when Plaintiff is required to return the equipment to Defendant at his own expense.

106. Additionally, because this total of $8,619.24 is misidentified as the total Plaintiff "will have paid by the end of the Lease," *id*., and not the total of periodic payments owed under the Agreement, Defendant further violated 15 U.S.C. § 1667a(9).

107. Third, Defendant did not disclose, in a segregated manner, "whether or not the lessee has the option to purchase the leased property," and if at the end of the lease, "the purchase price" of such option, in violation of 12 C.F.R. § 1013.4(i)(1). *See id*.

108. Instead, beneath the heading "Non-segregated disclosures required under Regulation M," Defendant later explains that such a purchase option is available at the "fair market value" of the leased equipment as of lease-end, "not to exceed 3 regular monthly lease payments, if [Plaintiff is] not in default of the lease." *See id*.

109. Of course, this *non-segregated* disclosure still leaves open the question of exactly *how much* Plaintiff will have to pay to purchase the pump, in further violation of 15 U.S.C. § 1667a(5).

110. Fourth, and finally, Defendant did not disclose, in a segregated manner, "[a] statement that the lessee should refer to the lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable," in violation of 12 C.F.R. § 1013.4(j).

111. This is not surprising considering that Defendant failed to segregate the necessary disclosures in the first place.

112. In short, in both form and substance, Defendant's attempted segregated disclosures on the first page of its Agreement fail to meet the stringent requirements specifically articulated in both the CLA and Regulation M. *See* Ex. A.

113. Additionally, the Agreement further violates the CLA by requiring payment of an unreasonable early termination fee in the event Plaintiff terminates the Agreement before the end of the lease term.

114. That is, should Plaintiff terminate early, he must pay not only all amounts then due and owing under the Agreement, plus any expenses incurred by Defendant and taxes payable by Defendant as a result of the early termination, but also "[t]he present value of all unpaid Lease Payments through the end of the lease Term, discounted at the rate of 4%." Ex. A at ¶ 20.

115. In other words, no matter how early Plaintiff terminates the Agreement, he must nevertheless pay the *entirety* of the monthly obligations owed under the contract, discounted at a rate of just 4%.

116. The CLA provides that "[p]enalties or other charges for delinquency, default, or early termination may be specified in the lease *but only at an amount which is reasonable* in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." 15 U.S.C. § 1667b(b) (emphasis added).

117. The early termination fee required by the Agreement allows no concession or adjustment for any of the foregoing factors; instead, it requires payment of *all* costs incurred by Defendant, *all* taxes payable by Defendant, and *all* payments otherwise due under the lease—past, present, and future—with future payments merely discounted at a rate of 4%. Ex. A at ¶ 20.

118. Correspondingly, the Agreement's early termination provision violates the CLA.

The Agreement is Usurious

119. What's more, the effective finance charge applied to Plaintiff's purchase—over 77%—far exceeds the 12% limit imposed by Virginia law for debts like his. *See* Va. Code Ann. § 6.2-303(A).

120. That is, "[u]nder Virginia law, a creditor cannot charge more than twelve-percent interest, *see* Va. Code § [6.2-303], unless the seller and buyer *expressly* agree to a different rate, *see* Va. Code § [6.2-311] ("Any seller of goods or services who extends credit under a closed-end installment credit plan or arrangement may impose finance charges at such rate or rates as may be agreed upon by the seller and purchaser.")." *Alston v. Crown Auto, Inc.*, 224 F.3d 332, 335 (4th Cir. 2000) (emphasis added).

121. There was no such express agreement here between Plaintiff and Defendant.

122. Indeed, Plaintiff specifically asked Defendant for the interest rate associated with his purchase, but Defendant replied that no interest rate was applicable.

123. Because the effective annual percentage rate contravenes Virginia law, Defendant must refund to Plaintiff the total amount of interest he paid under the Agreement, plus twice the amount of interest he paid within two years preceding the filing of this complaint. *See id*. at § 6.2-305(A)(1)-(2).

124. The same is true for all other Virginia consumers who unwittingly contracted to similar exorbitant interest rates beyond those allowed by Virginia law.

CLASS ACTION ALLEGATIONS

125. Plaintiff brings this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of the following four classes:

CLA Class

All persons (a) with an address in the United States (b) to whom TimePayment Corporation leased personal property for personal, family, or household purposes, (b) with an initial lease term greater than four months, (d) for which the lease is currently in force or was terminated on or after June 1, 2017, and (e) in connection with which TimePayment Corporation (1) charges the lessee an early termination fee that includes payment of the present value of all unpaid lease payments through the end of the lease term discounted at a rate of 4% or less; or (2) failed to disclose the total amount of the periodic payments owed under the lease; or (3) failed to disclose the total of payments due under the lease; or (4) failed to disclose whether or not the lessee has the option to purchase the leased property, and if at the end of the lease, the purchase price for doing so; or (5) failed to disclose that the lessee should refer to the lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable.

TILA Class

All persons (a) with an address in the United States (b) to whom TimePayment Corporation leased personal property for personal, family, or household purposes, (c) within the year preceding the filing of this complaint through the date of class certification, and (d) in connection with which TimePayment Corporation (1) charged payments totaling in excess of the total value of the property involved, (2) allowed the lessee to become the owner of the leased property upon compliance with the lease agreement for no additional consideration or for additional consideration totaling no more than 15% of the total of payments owed under the lease, and (3) failed to disclose the annual percentage rate charged on the transaction.

Virginia Security Interest Class

All persons (a) with an address in Virginia, (b) to whom TimePayment Corporation leased personal property for personal, family, or household purposes, (c) within five years preceding the filing of this complaint through the date of class certification, (d) under which the lessee (1) may not terminate the lease without penalty, and (2) may become the owner of the leased property upon compliance with the lease agreement for no additional consideration or for additional consideration totaling no more than 15% of the total of payments owed under the lease, and (e) in connection with which TimePayment Corporation may, upon the lessee's default, (1) repossess the leased property without any limitation on its means for doing so, or (2) dispose of the leased property upon provision to the lessee of a notice of termination of the lease agreement, or (3) repossess the leased property in only partial satisfaction of the lessee's obligations under the lease agreement.

Virginia Usury Class

> All persons (a) with an address in Virginia, (b) to whom TimePayment Corporation leased personal property for personal, family, or household purposes, (c) in connection with which TimePayment Corporation charged an effective annual percentage rate of greater than 12%, and (d) for which that person paid interest in excess of 12% within the two years preceding the filing of this complaint through the date of class certification.

126. Excluded from the classes are Defendant, its officers and directors, members of their immediate families and their legal representatives, heirs, successors, or assigns, and any entity in which Defendant has or had controlling interests.

127. The proposed classes satisfy Rule 23(a)(1) because, upon information and belief, they are so numerous that joinder of all members is impracticable. The exact number of class members is unknown to Plaintiff at this time and can only be determined through appropriate discovery.

128. The members of the proposed classes are ascertainable because the classes are defined by reference to objective criteria.

129. The proposed classes are identifiable in that, upon information and belief, the names and addresses of all members of the proposed classes can be identified in business records maintained by Defendant.

130. The proposed classes satisfy Rules 23(a)(2) and (3) because Plaintiff's claims are typical of the claims of the members of the classes.

131. To be sure, the claims of Plaintiff and all of the members of the classes originate from the same conduct, practice, and procedure on the part of Defendant, and Plaintiff possesses the same interests and has suffered the same injuries as each member of the proposed classes.

132. Plaintiff satisfies Rule 23(a)(4) because he will fairly and adequately protect the interests of the members of the classes and has retained counsel experienced and competent in class action litigation.

133. Plaintiff has no interests that are irrevocably contrary to or in conflict with the members of the classes that he seeks to represent.

134. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable.

135. Furthermore, as the damages suffered by individual members of the classes may be relatively small, the expense and burden of individual litigation make it impracticable for the members of the classes to individually redress the wrongs done to them.

136. There will be no difficulty in the management of this action as a class action.

137. Issues of law and fact common to the members of the classes predominate over any questions that may affect only individual members, in that Defendant has acted on grounds generally applicable to the classes.

138. Among the issues of law and fact common to the classes are:

a) Defendant's failure to properly provide disclosures required by the CLA, the TILA, and their implementing regulations;

b) Defendant's violations of Va. Code Ann. § 8.9A-602, as alleged herein;

c) Defendant's violations of Va. Code Ann. § 6.2-303(A), as alleged herein;

d) the availability of statutory penalties;

e) the availability of interest reimbursement; and

f) the availability of attorneys' fees and costs.

COUNT I: VIOLATIONS OF 15 U.S.C. § 1667a AND 12 C.F.R. § 1013.4

139. Plaintiff repeats and re-alleges each and every factual allegation contained in paragraphs 1 through 138.

140. The CLA at 15 U.S.C. § 1667a provides in pertinent part:

> Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease, as applicable:
>
> * * *
>
> (5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and whether or not the lessee has the option to purchase the leased property and at what price and time;
>
> * * *
>
> (9) The number, amount, and due dates or periods of payments under the lease and the total amount of such periodic payments;
>
> * * *

141. Regulation M at 12 C.F.R. § 1013.4 provides in pertinent part:

> For any consumer lease subject to this part, the lessor shall disclose the following information, as applicable:
>
> * * *
>
> (c) Payment schedule and total amount of periodic payments. The number, amount, and due dates or periods of payments scheduled under the lease, and the total amount of the periodic payments.
>
> (d) Other charges. The total amount of other charges payable to the lessor, itemized by type and amount, that are not included in the periodic payments. Such charges include the amount of any liability the lease imposes upon the lessee at the end of the lease term; the potential difference between the residual and realized values referred to in paragraph (k) of this section is excluded.
>
> (e) Total of payments. The total of payments, with a description such as "the amount you will have paid by the end of the lease." This amount is the sum of

> the amount due at lease signing (less any refundable amounts), the total amount of periodic payments (less any portion of the periodic payment paid at lease signing), and other charges under paragraphs (b), (c), and (d) of this section. In an open-end lease, a description such as "you will owe an additional amount if the actual value of the vehicle is less than the residual value" shall accompany the disclosure.
>
> * * *
>
> (i) Purchase option. A statement of whether or not the lessee has the option to purchase the leased property, and:
>
> (1) End of lease term. If at the end of the lease term, the purchase price;
>
> * * *
>
> (j) Statement referencing nonsegregated disclosures. A statement that the lessee should refer to the lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable.
>
> * * *

142. Defendant violated 15 U.S.C. § 1667a(5) by failing to specify in the Agreement at what price Plaintiff has the option to purchase the heat pump equipment at the conclusion of the lease.

143. Instead, Defendant states that Plaintiff has an option to purchase the equipment at an unspecified "fair market value," which amount may not exceed the sum of three regular monthly payments under the Agreement but is otherwise undefined. *See* Ex. A at 1.

144. Defendant violated 15 U.S.C. § 1667a(9) by not disclosing the total amount of periodic payments owed under the Agreement.

145. In its failed attempt to do so, Defendant instead disclosed that Plaintiff "will have paid by the end of the Lease" a total of $8,619.24, which equals the sum of periodic payments (21 x $410.44), but Defendant misleadingly represented this amount as the sum of *all* payments due "by the end of the lease"—which is not true. *See* Ex. A at 1.

146. For this same reason, Defendant also violated 12 C.F.R. § 1013.4(c) by failing to disclose, in a segregated manner, the total amount of periodic payments due under the Agreement.

147. Defendant violated 12 C.F.R. § 1013.4(e) by failing to disclose, in a segregated manner, "[t]he total of payments" due under the Agreement, which "is the sum of the amount due at lease signing (less any refundable amounts), the total amount of periodic payments (less any portion of the periodic payment paid at lease signing), and other [relevant] charges."

148. In attempting to disclose "[t]he amount [Plaintiff] will have paid by the end of the Lease," Ex. A at 1, Defendant listed merely $8,619.24—which is incorrect because it fails to account for the $384.72 paid at lease signing, plus whatever additional costs will be incurred at lease-end when Plaintiff is required to return the equipment to Defendant at his own expense.

149. Defendant violated 12 C.F.R. § 1013.4(i) by failing to disclose, in a segregated manner, "whether or not [Plaintiff] has the option to purchase the leased property," and if at the end of the lease, "the purchase price" of that option.

150. A partial explanation of Plaintiff's purchase option may be found beneath the heading, "Non-segregated disclosures required under Regulation M." Ex. A at 1.

151. There, Defendant states that a purchase option is available at the "fair market value" of the leased equipment as of lease-end, in an amount "not to exceed 3 regular monthly lease payments, if [Plaintiff is] not in default of the lease." *Id*.

152. The Agreement thus leaves open the true "purchase price" for the equipment.

153. Finally, Defendant violated 12 C.F.R. § 1013.4(j) by failing to disclose, in a segregated manner, "[a] statement that [Plaintiff] should refer to the lease documents for

additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable."

154. In addition to failing to segregate the requisite disclosures in the first place, Defendant also failed to direct Plaintiff to other, *non-segregated* disclosures.

155. By virtue of its violations, Defendant is liable to Plaintiff under 15 U.S.C. § 1667d(a), 15 U.S.C. § 1640(a)(1), and 15 U.S.C. § 1640(a)(2)(A)(i) for all actual damages incurred and for statutory damages in the amount of 25% of the total amount of monthly payments due under the Agreement.

156. The harm suffered by Plaintiff is particularized in that the violative Agreement was presented to him personally, regarded his personal obligations in connection with the lease of a residential heat pump, and failed to give him statutorily-mandated disclosures to which he was entitled.

157. Likewise, the CLA's disclosure provisions

> serve[] to protect a consumer's concrete interest in "avoid[ing] the uninformed use of credit," a core object of the TILA. These procedures afford such protection by requiring a creditor to notify a consumer, at the time he opens a credit account, of how the consumer's own actions can affect his rights with respect to credit transactions. A consumer who is not given notice of *his* obligations is likely not to satisfy them and, thereby, unwittingly to lose the very credit rights that the law affords him. For that reason, a creditor's alleged violation of each notice requirement, by itself, gives rise to a "risk of real harm" to the consumer's concrete interest in the informed use of credit.

Strubel v. Comenity Bank, 842 F.3d 181, 190-91 (2d Cir. 2016) (emphasis in original).

158. No matter, that risk of real harm materialized here, as Plaintiff was unaware of the true financing cost associated with the purchase of his heat pump as a result of Defendant's inadequate disclosures.

159. Moreover, Plaintiff made multiple payments to Defendant pursuant to the Agreement.

COUNT II: VIOLATION OF 15 U.S.C. § 1667b(b)

160. Plaintiff repeats and re-alleges each and every factual allegation contained in paragraphs 1 through 138.

161. The CLA at 15 U.S.C. § 1667b(b) provides:

> Penalties or other charges for delinquency, default, or early termination may be specified in the lease but *only at an amount which is reasonable* in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

(emphasis added).

162. Here, should Plaintiff terminate the Agreement early, he must pay not only all amounts then due and owing, plus any expenses incurred by Defendant and taxes payable by Defendant as a result of the early termination, but also "[t]he present value of all unpaid Lease Payments through the end of the lease Term, discounted at the rate of 4%." Ex. A at ¶ 20.

163. In other words, no matter how early Plaintiff terminates the Agreement, he must nevertheless pay the *entirety* of the future monthly obligations still owed under the contract, discounted at a rate of just 4%.

164. This early termination fee allows for no concession or adjustment based on "the anticipated or actual harm caused by the . . . early termination, the difficulties of proof of loss [as a result of the early termination], [or] the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy" following the early termination. 15 U.S.C. § 1667b(b).

165. Instead, the Agreement simply requires payment of *all* costs incurred by Defendant as a result of early termination, *all* related taxes payable by Defendant, and *all* payments otherwise due under the lease—past, present, and future—with future payments merely discounted at a rate of 4%. Ex. A at ¶ 20.

166. Lacking any tether to the anticipated or actual harm that Defendant would suffer in the event of early termination, or to any purported difficulties of proof of Defendant's loss in such a scenario, or to the inconvenience or non-feasibility of Defendant otherwise obtaining an adequate remedy post-termination, Defendant's excessive, one-size-fits-all early termination fee is unreasonable under the CLA and thus violates 15 U.S.C. § 1667b(b).

167. By virtue of its violation, Defendant is liable to Plaintiff under 15 U.S.C. § 1667d(a) and 15 U.S.C. § 1640(a)(2)(A)(i) for statutory damages in the amount of 25% of the total amount of monthly payments due under the Agreement.

168. The harm suffered by Plaintiff is particularized in that the violative Agreement was presented to him personally, regards his personal obligations in connection with the lease of a residential heat pump, and obligates him, personally, to pay an unreasonable fee in the event of an early termination of the lease.

169. Likewise, the CLA's disclosure provisions

> serve[] to protect a consumer's concrete interest in "avoid[ing] the uninformed use of credit," a core object of the TILA. These procedures afford such protection by requiring a creditor to notify a consumer, at the time he opens a credit account, of how the consumer's own actions can affect his rights with respect to credit transactions. A consumer who is not given notice of *his* obligations is likely not to satisfy them and, thereby, unwittingly to lose the very credit rights that the law affords him. For that reason, a creditor's alleged violation of each notice requirement, by itself, gives rise to a "risk of real harm" to the consumer's concrete interest in the informed use of credit.

Strubel, 842 F.3d at 190-91 (emphasis in original).

170. No matter, that risk of real harm materialized here, as Plaintiff is subject to an unreasonably large early termination fee that effectively precludes him from canceling the contract in search of better alternatives.

COUNT III: VIOLATIONS OF 15 U.S.C. § 1638(a)

171. Plaintiff repeats and re-alleges each and every factual allegation contained in paragraphs 1 through 138.

172. The TILA at 15 U.S.C. § 1638 provides in pertinent part:

> (a) **REQUIRED DISCLOSURES BY CREDITOR** For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:
>
> (1) The identity of the creditor required to make disclosure.
>
> (2)
>
> (A) The "amount financed", using that term, which shall be the amount of credit of which the consumer has actual use. This amount shall be computed as follows, but the computations need not be disclosed and shall not be disclosed with the disclosures conspicuously segregated in accordance with subsection (b)(1):
>
> (i) take the principal amount of the loan or the cash price less downpayment and trade-in;
>
> (ii) add any charges which are not part of the finance charge or of the principal amount of the loan and which are financed by the consumer, including the cost of any items excluded from the finance charge pursuant to section 1605 of this title; and
>
> (iii) subtract any charges which are part of the finance charge but which will be paid by the consumer before or at the time of the consummation of the transaction, or have been withheld from the proceeds of the credit.
>
> (B) In conjunction with the disclosure of the amount financed, a creditor shall provide a statement of the consumer's right to obtain, upon a written request, a written itemization of the amount financed. The statement shall include spaces for a "yes" and "no" indication to be initialed by the consumer to indicate whether the consumer wants a written itemization of the amount financed. Upon receiving an affirmative indication, the creditor shall provide, at the time other disclosures are required to be furnished, a written itemization of the amount financed. For the purposes of this subparagraph, "itemization of the amount financed" means a disclosure of the following items, to the extent applicable:
>
> (i) the amount that is or will be paid directly to the consumer;

(ii) the amount that is or will be credited to the consumer's account to discharge obligations owed to the creditor;

(iii) each amount that is or will be paid to third persons by the creditor on the consumer's behalf, together with an identification of or reference to the third person; and

(iv) the total amount of any charges described in the preceding subparagraph (A)(iii).

(3) The "finance charge", not itemized, using that term.

(4) The finance charge expressed as an "annual percentage rate", using that term. This shall not be required if the amount financed does not exceed $75 and the finance charge does not exceed $5, or if the amount financed exceeds $75 and the finance charge does not exceed $7.50.

(5) The sum of the amount financed and the finance charge, which shall be termed the "total of payments".

(6) The number, amount, and due dates or period of payments scheduled to repay the total of payments.

(7) In a sale of property or services in which the seller is the creditor required to disclose pursuant to section 1631(b) of this title, the "total sale price", using that term, which shall be the total of the cash price of the property or services, additional charges, and the finance charge.

(8) Descriptive explanations of the terms "amount financed", "finance charge", "annual percentage rate", "total of payments", and "total sale price" as specified by the Bureau. The descriptive explanation of "total sale price" shall include reference to the amount of the downpayment.

* * *

173. Further, Regulation Z at 12 C.F.R. § 1026.2(a)(16) declares:

(a) Definitions. For purposes of this part, the following definitions apply:

* * *

(16) Credit sale means a sale in which the seller is a creditor. The term includes a bailment or lease (unless terminable without penalty at any time by the consumer) under which the consumer:

(i) Agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and service involved; and

> (ii) Will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.

174. As the Agreement requires compensation for Defendant well in excess of the total value of Plaintiff's heat pump, and considering that Plaintiff may purchase the heat pump at the end of the lease for a "fair market value" price of *no more than* $1,231.32—or, at most, 13% of the total contract value—the lease qualifies as a credit sale subject to the TILA's disclosure requirements.

175. To be sure, any rational consumer *would* purchase the heat pump at the end of the lease given the pump's function, the need for the pump to heat one's home, the custom installation required at the time of purchase, and the subsequent effort and expenditure that would be needed to un-install and return the equipment. *See, e.g., In re Grubbs Const. Co.*, 319 B.R. at 715-18 ("[t]he 'sensible person' test provides that 'where the terms of the lease and option to purchase are such the only sensible course for the lessee at the end of the lease term is to exercise the option and become the owner of the goods, the lease was intended to create a security interest,'" while "[t]he Economic Realities Test focuses on all the facts and circumstances surrounding the transaction as anticipated by the parties at contract inception, rather than at the time the option arises").

176. Defendant, by way of its Agreement, thus violated 15 U.S.C. § 1638(a) in several ways, including, for example, by failing to adequately disclose: the "finance charge," not itemized, using that term (§ 1638(a)(3)); the finance charge expressed as an "annual percentage rate," using that term (§ 1638(a)(4)); or the sum of the amount financed and the finance charge, which must be termed the "total of payments" (§ 1638(a)(5)).

177. That is, Defendant hid from Plaintiff the exorbitant annual percentage rate applied to his purchase—over 77%.

178. By virtue of its violation, Defendant is liable to Plaintiff under 15 U.S.C. §§ 1640(a)(1) and 1640(a)(2)(A)(i) for actual damages incurred and for statutory damages in the amount of twice the amount of the finance charge imposed by the Agreement.

179. The harm suffered by Plaintiff is particularized in that the violative Agreement was presented to him personally, regarded his personal obligations in purchasing and installing a residential heat pump, and failed to give him statutorily-mandated disclosures to which he was entitled.

180. In addition, Plaintiff has made monthly payments to Defendant pursuant to the Agreement.

181. Further, the TILA's disclosure provisions

> serve[] to protect a consumer's concrete interest in "avoid[ing] the uninformed use of credit," a core object of the TILA. These procedures afford such protection by requiring a creditor to notify a consumer, at the time he opens a credit account, of how the consumer's own actions can affect his rights with respect to credit transactions. A consumer who is not given notice of *his* obligations is likely not to satisfy them and, thereby, unwittingly to lose the very credit rights that the law affords him. For that reason, a creditor's alleged violation of each notice requirement, by itself, gives rise to a "risk of real harm" to the consumer's concrete interest in the informed use of credit.

Strubel, 842 F.3d at 190-91 (emphasis in original).

182. No matter, that risk of real harm materialized here, as Plaintiff was unaware of the true financing cost associated with the purchase of his heat pump as a result of Defendant's inadequate disclosures, and Plaintiff paid exorbitant interest to Defendant.

183. Had Plaintiff been made aware of the true cost of Defendant's credit, he would have pursued alternative financing options.

184. Defendant's failure to disclose the excessive interest rate charged—over 77%—prevented him from being able to intelligently compare financing options.

COUNT IV: VIOLATION OF VA. CODE ANN. § 8.9A-602

185. Plaintiff repeats and re-alleges each and every factual allegation contained in paragraphs 1 through 138.

186. Virginia has adopted the UCC governing secured transactions, which applies to any "transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract." Va. Code Ann. § 8.9A-109(a)(1).

187. On this point, the Virginia UCC further explains:

> (b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:
>
> (1) the original term of the lease is equal to or greater than the remaining economic life of the goods;
>
> (2) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
>
> (3) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or
>
> (4) the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

Va. Code Ann. § 8.1A-203(b).

188. Here, Plaintiff's Agreement creates a security interest pursuant to § 8.1A-203(b)(4) in particular because (i) Plaintiff may not freely terminate the Agreement without incurring a substantial monetary penalty for doing so, *see* Ex. A at ¶ 20, and (ii) Plaintiff has the option to become the owner of the heat pump at lease-end for "nominal additional consideration"

of *no more than* $1,231.32—13% of the total contract value—and possibly much less. *See id*. at 1 (purchase option of "fair market value" of equipment at lease-end). *Accord C.F. Garcia Enters.*, 253 Va. at 108; *In re Smith*, 262 B.R. at 369.

189. Further, the circumstances of Plaintiff's transaction leads one to conclude that "the only sensible course of action for" Plaintiff at lease-end is to exercise the purchase option: (i) the heat pump is a necessity in a residential HVAC system to warm one's home; (ii) the pump required custom installation at the time of purchase; (iii) the pump would require additional custom labor to remove it from Plaintiff's home HVAC system for return to Defendant; and (iv) if Plaintiff were to do so, he would then need to purchase and install a new heat pump for his home after having just removed the old one. *See C.F. Garcia Enters.*, 253 Va. at 108.

190. Having thusly created a security interest, the Agreement contravenes Virginia law by specifically avoiding the protections built into Article 9 for debtors like Plaintiff subject to such a security interest.

191. By way of example, the Agreement may *not* cause Plaintiff to waive or vary certain rights afforded him by the Virginia UCC, including:

- His rights under § 8.9A-609 regarding Defendant's repossession of the heat pump in the event of a default;
- His rights under § 8.9A-614 regarding Defendant's disposition of the heat pump in the event of a default; and
- His rights under § 8.9A-620(g) regarding Defendant's acceptance of the return of the heat pump in complete satisfaction of the Agreement.

Va. Code Ann. § 8.9A-602.

192. But Defendant violated § 8.9A-602 because its Agreement does, in fact, contravene or vary the foregoing rights in several different ways.

193. For example, in the event of a default, § 8.9A-609 protects the debtor (*i.e.*, Plaintiff) by allowing a secured party (*i.e.*, Defendant) to repossess the collateral (*i.e.*, the heat pump), without judicial process, only if the repossession occurs "without breach of the peace."

194. But here, should Plaintiff default, the Agreement allows Defendant to "take back the [heat pump]" without any limitation on the means for it doing so, and with no provision to protect "the peace" of Plaintiff's home, particularly considering that the heat pump has been custom installed in Plaintiff's home HVAC system. *See* Ex. A at ¶ 19.

195. Moreover, in the event of a default in a consumer-goods transaction like here, § 8.9A-614 protects the debtor by requiring that the secured party provide adequate notice before the secured party may dispose of the debtor's collateral.

196. Such notice must include, *inter alia*, a description of the debtor, the secured party, the collateral that is the subject of the intended disposition, and the method of intended disposition; a statement that the debtor is entitled to an accounting of the unpaid indebtedness; a statement of the time and place of a public disposition or the time after which any other disposition is to be made; a description of any liability by the debtor for a deficiency; and a telephone number or mailing address from which additional information concerning the disposition is available. Va. Code Ann. § 8.9A-614.

197. But here, should Plaintiff default, the Agreement requires only that Defendant provide him a notice of termination of the Agreement—without any specification as to what details must be included therein—before Defendant repossesses and disposes of the heat pump. *See* Ex. A at ¶ 20.

198. Additionally, in the event of a default in a consumer transaction like this one, § 8.9A-620(g) protects the debtor by prohibiting a secured party from accepting collateral in only *partial* satisfaction of the obligation that collateral secures.

199. But here, in the event of Plaintiff's default, the Agreement allows Defendant to not only accept the return of the heat pump, but then also sue Plaintiff for "any remaining amount due" under the Agreement; that is, "[e]ven if [Defendant] repossess[es] the [heat pump], [Plaintiff] must still pay [Defendant] at once the Early Termination Balance, computed by the formula for early termination [spelled out elsewhere in the Agreement] at the time of the Default." *See* Ex. A at ¶ 19.

200. These are just a few examples of how Plaintiff's lease Agreement with Defendant violates Virginia law by virtue of its design to specifically avoid application of Article 9 despite having created a security interest for Defendant in the heat pump installed in Plaintiff's home.

201. Under § 8.9A-625(c)(2), in consumer-goods transactions, debtors may recover statutory damages from secured parties for certain violations of the Virginia UCC in "an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price."

202. The Agreement constitutes a consumer-goods transaction because Plaintiff, an individual, incurred an obligation primarily for personal, family, or household purposes—the purchase and installation of a home heat pump—and a security interest in consumer goods (the heat pump) secures that obligation for Defendant. *See* Va. Code Ann. § 8.9A-102(a)(24).

203. As a result of Defendant's multiple violations of Virginia's Article 9, as shown above, and because the Agreement constitutes a consumer-goods transaction within the purview of the Virginia UCC, Defendant is liable under § 8.9A-625(c)(2) for statutory damages to

Plaintiff in "an amount not less than the credit service charge plus ten percent of the principal amount of the obligation"—or, in other words, for the total finance charge required under the Agreement, plus 10% of the heat pump's initial purchase and installation price of $5,325.

COUNT V: VIOLATION OF VA. CODE ANN. § 6.2-303(A)

204. Plaintiff repeats and re-alleges each and every factual allegation contained in paragraphs 1 through 138.

205. Section 6.2-303(A) of the Virginia Code provides that, "[e]xcept as otherwise permitted by law, no contract shall be made for the payment of interest on a loan at a rate that exceeds 12 percent per year."

206. Virginia law allows various exceptions to this general cap, including for closed-end installment credit plans where the purchaser and seller agree upon a higher rate: "Any seller of goods or services who extends credit under a closed-end installment credit plan or arrangement may impose finance charges at such rate or rates as the seller and the purchaser have agreed." Va. Code Ann. § 6.2-311(A).

207. However, here, Plaintiff and Defendant never expressly agreed on *any* interest rate, let alone one higher than 12%.

208. In turn, section 6.2-305(A) of the Virginia Code allows:

> If interest in excess of that permitted by an applicable statute is paid upon any loan, the person paying may bring an action within two years from the first to occur of: (i) the date of the last scheduled loan payment or (ii) the date of payment of the loan in full, to recover from the person taking or receiving such payments:
>
> 1. The total amount of the interest paid to such person in excess of that permitted by the applicable statute;
>
> 2. Twice the total amount of interest paid to such person during the two years immediately preceding the date of the filing of the action; and
>
> 3. Court costs and reasonable attorney fees.

209. The Agreement extends Plaintiff financing for the purchase price and installation costs of his residential heat pump ($5,325) in exchange for his commitment to an initial payment of $384.72, plus 21 additional monthly payments of $410.44, for a total outlay of $9,003.96.

210. Taking into account additional costs associated with the purchase option to retain the heat pump after the end of the lease—at the pump's "fair market value" at that time, not to exceed three regular monthly payments, or $1,231.32—Plaintiff will have paid Defendant as much as $10,235.28 by the end of the Agreement to keep his heat pump indefinitely.

211. Alternatively, if the "fair market value" of the heat pump is as little as $1 at lease-end, Plaintiff still will have paid Defendant at least $9,004.96 to keep his heat pump for good.

212. No matter, the total of payments required of Plaintiff to purchase the heat pump for use indefinitely amounts to an effective annual percentage rate in excess of 77%.

213. This annual percentage rate far exceeds the limit of 12% allowed by Virginia law for a debt like Plaintiff's, where no alternative rate has been expressly agreed to.

214. Accordingly, per section 6.2-305(A) of the Virginia Code, Defendant must refund to Plaintiff: (a) the total amount of interest paid under the Agreement; and (b) *twice* the amount of interest he paid in connection with the Agreement during the two years preceding the filing of this action.

WHEREFORE, Plaintiff respectfully requests relief and judgment as follows:

A. Determining that this action is a proper class action under Rule 23 of the Federal Rules of Civil Procedure;

B. Adjudging and declaring that Defendant violated 15 U.S.C. § 1667a and 12 C.F.R. § 1013.4;

C. Adjudging and declaring that Defendant violated 15 U.S.C. § 1667b(b);

D. Adjudging and declaring that Defendant violated 15 U.S.C. § 1638;

E. Adjudging and declaring that Defendant violated Virginia Code § 8.9A-602;

F. Adjudging and declaring that Defendant violated Virginia Code § 6.2-303(A);

G. Awarding Plaintiff and members of the classes actual damages pursuant to 15 U.S.C. § 1667d(a) and 15 U.S.C. § 1640(a)(1), and/or statutory damages pursuant to 15 U.S.C. § 1667d(a) and 15 U.S.C. § 1640(a)(2);

H. Awarding Plaintiff and members of the Virginia Security Interest Class reimbursement of all interest paid to Defendant, plus 10% of the principal of their obligations, pursuant to Virginia Code § 8.9A-625(c)(2);

I. Awarding Plaintiff and members of the Virginia Usury Class reimbursement of all interest paid to Defendant, plus twice any amount of interest paid to Defendant within two years of the filing of this action, pursuant to Virginia Code § 6.2-305(A);

J. Enjoining Defendant from future violations of 15 U.S.C. § 1667a, 15 U.S.C. § 1667b(b), 12 C.F.R. § 1013.4, 15 U.S.C. § 1638, and Virginia Code §§ 8.9A-602 and 6.2-303(A), with respect to Plaintiff and the classes;

K. Awarding Plaintiff and members of the classes their reasonable costs and attorneys' fees incurred in this action, including expert fees, pursuant to 15 U.S.C. § 1640(a)(3), Va. Code Ann. § 6.2-305(A)(3), and Rule 23 of the Federal Rules of Civil Procedure;

L. Awarding Plaintiff and the members of the classes any pre-judgment and post-judgment interest as may be allowed under the law; and

M. Awarding other and further relief as the Court may deem just and proper.

TRIAL BY JURY

Plaintiff is entitled to and hereby demands a trial by jury.

DATED: June 1, 2018

Respectfully submitted,

/s/ Joshua Erlich
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*To seek admission *pro hac vice*