

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOY J. BRITT, Individually and on)	
behalf of all similarly situated persons)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 3-03-0422
)	
PRIMUS AUTOMOTIVE FINANCIAL)	JURY DEMAND
SERVICES, INC., d/b/a MAZDA)	
AMERICAN CREDIT; FORD MOTOR)	
CREDIT COMPANY)	
)	
Defendants.)	

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff, complaining of Defendants, alleges for herself and on the behalf of all others similarly situated and would show as follows

1. Plaintiff Joy J. Britt is a citizen and resident of the Commonwealth of Kentucky, residing in New Concord, Calloway County, Kentucky.
2. Defendant Primus Automotive Financial Services, Inc. d/b/a Mazda American Credit is a New York for profit corporation with its principal place of business located in Franklin, Tennessee. Defendant Primus Automotive Financial Services, Inc. d/b/a Mazda American Credit may be served with process by service on its registered agent: C.T. Corporation System, 530 Gay Street, Knoxville, Tennessee 37902.
3. Defendant Ford Motor Credit Company is a Delaware corporation with its principal place of business in Dearborn, Michigan. It is the parent corporation of Primus Automotive Financial Services, Inc. d/b/a Mazda American Credit. According to attorneys for Ford Motor Credit Company (see **Exhibit 1**), Ford Motor Credit

Company does business as Mazda American Credit. Ford Motor Credit Company may be served with process by service on its registered agent: C.T. Corporation System, 530 Gay Street, Knoxville, Tennessee 37902

JURISDICTION & VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 based upon diversity of citizenship. The amount in controversy exceeds the sum of \$75,000 exclusive of interest and costs.

5. The venue of this action is proper in the United States District Court for the Middle District of Tennessee pursuant to 28 U.S.C § 1991.

FACTUAL BACKGROUND

6. Plaintiff alleges upon information and belief that Mazda of Clarksville entered into a loan and security agreement (“Loan Agreement”) with Primus Automotive Financial Services, Inc. d/b/a Mazda American Credit and/or Ford Motor Credit to be its primary lender under a floorplan financing agreement. “Flooring” is the process of advancing payment on the dealer’s behalf to the manufacturer for a new car inventory. The lender takes a security interest in the new autos and when each car is sold, the dealer repays the advance to the lender. Under the Loan Agreement, Mazda of Clarksville was required to repay the advance on a car within a certain number of days of receiving payment or within a certain number of days of receiving the car, whichever came first.

7. Plaintiff alleges that when the dealership began to experience cash flow problems due to declining sales it was not able to repay flooring advances as required by the Loan Agreement and there was a collateral deficiency of over eight hundred thousand dollars (\$800,000.00) owed to Defendants. The dealer was thus “out of trust” by over \$800,000.00 as revealed by an audit in February 2003. Because of this

collateral deficiency, on February 11th, 2003, Defendants sent its own personnel to the dealership to effectively supervise, manage and control the dealer's finances by controlling accounts receivables and the dealer's account. At that time and until the dealership closed, Defendants' employees took possession of vehicle keys and manufacturer certificates of origin (called an "MCO" – a document from the manufacturer necessary to obtain title certificates) and held the keys and MCOs until presented with paperwork for sales by Mazda of Clarksville salesman. These practices continued until the dealership closed its doors. Test drives, for example, could not occur until Defendants' employees relinquished the keys. Defendants also received Mazda of Clarksville Financial Statements (on or about the 10th day of each month) that showed outstanding liens were not being paid, especially after February 11th. An itemized section of the financial statements showed liens outstanding and Defendants thus knew that the dealership was not paying off liens. On or after February 11th Defendants copied and review the individual deal files for all vehicles that were "out of trust" and saw the liens on the vehicles that were out of trust. Defendants also received Mazda of Clarksville's Bank History Transaction Report on several occasions after February 11th from First Federal bank that showed bank balances and check transactions (and again did not show lien payoffs). After Defendants seized the keys and MCOs and placed its employees at the dealership, Defendants made demands on the dealership to make payments to Defendants to reduce the "backlog" of the \$800,000 collateral deficiency (the "out of trust" amount) and proceeded to control the dealer's bank account so as to deplete it to the point that liens could not be paid. In some cases accounts receivables payors (the CO-OP for example) were told by Defendants to make payments directly to Mazda Credit. ACH (automatic clearing house) payments were also controlled and directed after February 11th so that payments that would have gone

to the dealership checking account at First Federal instead were directed to go to Mazda credit. These monies were allocated by Defendants to be applied to the \$800,000.00 backlog . The dealership complained and protested to Defendants that these practices by Mazda Credit were squeezing all of the cash out of the dealership's account and did not leave any money to run the business, but to no avail. Defendants after February 11th required the dealership to make *greater* payments by internet payment or cashier's check by returning no profit to the dealership on Mazda credit sales and altering rebate, payment and accounting practices to favor the Defendant at the expense of Plaintiff and those similarly situated. By these acts and practices Defendants aggressively sought to bleed and squeeze all money from the dealership's account, having knowledge that liens on trade-ins were outstanding, unpaid and that there was no money to pay the liens from the dealer's account because of the Defendants' insistence that funds first be used to pay the Defendants' backlog collateral deficiency.

8. From February 11th to April 4th, therefore, Defendants controlled the dealership's sales, keys, titles and accounts so as to effectively make it impossible for the dealership to satisfy the contractual and fiduciary obligation to pay off liens on trade-ins. Although the Loan Agreement only obligated the dealer to remit or pay to Mazda the *proceeds* of a sale (proceeds generally defined in business and finance as "money received through a sale or loan, *after* any commissions and fees are deducted"), Defendants insisted that the dealership pay to Defendants the factory invoice price for the sold vehicle (or, in the case of a vehicle financed through Mazda credit) the *entire* amount of the sale *before* any deductions for lien payments. Defendants took control of all receivables (including, for example monies from wholesale sales) and directed that funds in the dealer's account be first paid to benefit Defendants (and reduce the backlog/collateral deficiency). By these acts and practices the lending Defendants were

always in a position control payments to themselves first. All this the time customers continued to buy cars with trade-in liens that Defendants knew could not be paid off because Defendants had a stranglehold squeeze on the dealer's account (with actual knowledge that the dealer's funds could not pay off the trade in liens). For example, as the dealership was shutting its door's a managerial employee of Defendants called the dealership to ask for a "list of every car traded in that had not had the lien paid." Defendants' actual knowledge that the dealership was not paying on trade-ins included vehicles where the trade-in lienholder was none other than Mazda Credit and customers who had traded in Mazda Credit financed cars were calling the dealership saying that they had been called by Mazda Credit and "dunned" to make payment on a car that had already been traded in. . Plaintiff avers that under these circumstances Mazada of Clarksville was an agent of Defendants and was engaged in a conspiracy with Defendants to obtain money by a scheme, artifice and fraud.

9. On or about March 17, 2003, Joy Britt purchased a new Mazda Protegé, Serial No. JM1BJ225031112550 (emerald mica color), Model Year 2003. The date of the purchase contract was March 17, 2003. The contract was between Joy Britt, as purchaser, and Johnson McKinney & Associates, Inc. d/b/a Mazda of Clarksville, 2068 Wilma Rudolph Boulevard, P.O. Box 30055, Clarksville, Tennessee 37040. A true and correct copy of this contract is attached hereto as **Exhibit 2**. As part of the transaction, Plaintiff traded in a used 1999 Mitsubishi Eclipse (the "trade-in") for which she received a \$ 9,223.67 trade-in allowance. The Plaintiff also entered into a retail installment contract with Mazada of Clarksville that was assigned to Old National Bank, Evansville, Indiana (branch office in Clarksville, Tennessee).

10. Defendants, by and through their agent and co-conspirator, represented that the loan on the trade-in vehicle would be satisfied and the lien to Mitsubishi

extinguished with the proceeds from the new financing. The payoff (for the lien) was \$9,179.25 and was to be paid to Mitsubishi Motor Credit and Plaintiff relied on the promise and obligation to pay off the lien and conditioned the sale and trade-in on the promise to pay off the lien.

11. Defendants took control of the Mazda dealership and controlled the dealer's finances in all material respects. The money obtained, for example, from Old National Bank was taken by Defendants, through its agent/co-conspirator, without paying off the underlying lienholder (Mitsubishi Credit). By signing over her title to her 1999 Mitsubishi Eclipse to Mazda of Clarksville, this title was then controlled by the Defendants who never have paid off the lien to Mitsubishi.

12. The 1999 Mitsubishi Eclipse was subsequently sold by Mazda of Clarksville to Mark Poole Auto Sales, 144 College Street, Clarksville, Tennessee 37040. Therefore, the Plaintiff has lost her trade-in vehicle and has no title on her 2003 Mazda Protegé. She is in possession of the Mazda Protegé, but has no title to the vehicle and her temporary tags expire within 30 days. She cannot obtain a Tennessee title certificate for this vehicle. Her credit has been harmed.

13. On or about April 18, 2003, a letter was sent to Joy Britt (addressed incorrectly to "Joy Brill") from attorneys for "Ford Motor Credit Company d/b/a Mazda American Credit" indicating the dealership had filed bankruptcy and that "Ford Credit" had "posted" a security interest at the dealership to "protect its interest." A copy of this letter is attached as **Exhibit 1**. The letter further stated:

"The vehicle you traded has been sold by Mazda of Clarksville. Therefore we can be of no further assistance to you. You have the right to file a claim against the bankruptcy estate of Mazda of Clarksville. Any questions regarding your claim should be addressed to Jeanne Gregory, United States Trustee for this case located in Nashville, Tennessee."

14. Mazda of Clarksville filed for bankruptcy on or about April 4, 2003.

15. Plaintiff avers that Defendants controlled the business and financing operations of the dealership from on or about February 11, 2003 (acting directly and/or thorough its agent and co-conspirator dealership) and engaged in fraud for the purpose of deceiving the Plaintiff and others similarly situated. *See In re Pupello*, 281 B.R. 763 (Bkrcty. M.D. Fla. 2002) (similar fact pattern established fraudulent misrepresentation and reliance). Defendants violated the obligation to payoff the underlying lienholders to unjustly enrich Defendants at the expense of the Plaintiffs.

16. Plaintiff was the direct or third-party beneficiary to the warranty of Mazda of Clarksville (and its principal and co-conspirators, Defendants herein) that the financing and assignment was “free of all liens and not subject to the claims or defenses of the Buyer and may be sold or assigned by the Seller.”

17. In fact, in an acts of fraud, deceit, fraudulent concealment, fraudulent misrepresentation and/or negligent misrepresentation, Defendants, acting in concert, conspiracy and concert of action with its agent/co-conspirator Mazda of Clarksville, took possession of the funds from Old National Bank and other Plaintiffs’lenders for trade-ins and defrauded the Plaintiff and others similarly situated by intentionally failing to pay the balance due and owing to trade-in creditors, including Mitsubishi Credit.

18. From February 11, 2003, through the filing of bankruptcy on April 4, 2003, (and thereafter) Defendants dominated and controlled the financial affairs of the dealership and directed the payment and flow of funds using Mazda of Clarksville as its agent to effect a fraud, theft and outrage on the Plaintiff and others similarly situated.

19. Plaintiff alleges upon information and belief that through the deceptive and fraudulent acts of Defendants hundreds of thousands of dollars were diverted with

the full knowledge, control and direction of Defendants that trade-in liens were consciously and deliberately not being paid. These acts Defendants justify the award of punitive damages.

CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action individually and as a representative of all similarly situated consumers and customers of Mazda of Clarksville who purchased vehicles with trade-ins after Defendants assumed control of the financial management of the Mazda Clarksville dealership (believed to be after February 11, 2003) until the present. Plaintiff avers on information and belief that over 60 customers have been defrauded and thus the numerosity requirement of Rule 23 is satisfied. The claims of the representative Plaintiff are typical of those of the class and her claims are common to all class members. A class action is a superior device to adjudicate the claims in this case. The claims of the Plaintiff involve common questions of law and fact for the class. Joinder of all plaintiffs is impractical given the number of Plaintiffs, including their location in different states (and given the nature of the claims). The Plaintiff and her counsel will adequately represent the interests of the class. Plaintiff seeks a Rule 23(b)(3) class.

COUNT I: BREACH OF CONTRACT AGAINST ALL DEFENDANTS

21. The allegations of paragraph 1 through 20 are incorporated as if fully set forth herein.

22. Defendants, through acts of conspiracy, agency, acts of the principal, control, domination and/or assumption of the contract pursuant to the loan agreement and security agreement breached the contract to pay off the lienholders on the trade-ins during the class period. Defendants placed profit above the contractual duty and promise to pay off the lien.

23. As a direct and proximate cause of Defendants' breaches of contractual agreements, Plaintiffs have suffered substantial financial damages and losses, injury to reputation and credit, and mental distress, pain and suffering.

COUNT II: CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST DEFENDANTS

24. The allegations of paragraphs 1 through 23 are incorporated as if fully set forth herein.

25. Defendants breached their fiduciary duties to the Plaintiff and class members by not making payments that were entrusted to Defendants for payoff to the lienholders. As a direct and proximate result of Defendants' breaches of fiduciary duty, Plaintiff and the class have suffered substantial damages, losses and injuries.

COUNT III: FRAUD AND/OR DECEIT

26. The allegations of paragraphs 1 through 25 are incorporated as if fully set forth herein.

27. Defendants' conduct, as described above, was undertaken with fraud and deceit (and/or negligent misrepresentation as set forth below). Plaintiffs and/or the class relied on the promise to pay off liens, which promises were intentionally and or recklessly breached. As a direct and proximate result of fraud and deceit and/or negligent misrepresentation, Plaintiff and the class have suffered substantial damages, losses and injuries.

COUNT IV: NEGLIGENT MISREPRESENTATION

28. The allegations of paragraphs 1 through 27 are incorporated as if fully set forth herein.

29. Defendants knowingly accepted money with the representation that liens to creditors on trade-in vehicles would be paid off, but through Defendants' reckless

and/or negligent acts, such payments were not made and Defendants misappropriated these funds. Based upon the foregoing, Defendants are liable to the Plaintiff and the class for negligent misrepresentation. As a direct and proximate result of negligent misrepresentation, Plaintiff and the class have suffered substantial damages, losses and injuries.

COUNTS V AND VI: NEGLIGENCE & RECKLESSNESS

30. The allegations of paragraphs 1 through 29 are incorporated as if fully set forth herein.

31. Defendants acted negligently and recklessly. As a direct and proximate result of negligence and recklessness, Plaintiff and the class have suffered substantial damages, losses and injuries.

COUNTS VII: CONSPIRACY TO DEFRAUD

32. The allegations of paragraphs 1 through 31 are incorporated as if fully set forth herein.

33. Defendants conspired and agreed by contract, plan or other agreement to take monies and payments for trade-ins with the certain and known obligation, promise and representation to pay off the liens but knowingly misused funds and engaged in self-enrichment by not paying the liens and instead using the funds themselves. . Plaintiffs relied on the representations to pay off liens in entering into the sales contracts and trading in their vehicles. .Accordingly joint and several liability principles apply. As a direct and proximate result of this conspiracy, Plaintiff and the class have suffered substantial damages, losses and injuries.

COUNT VIII DECEPTIVE TRADE PRACTICES

34. The allegations of paragraphs 1 through 33 are incorporated as if fully set forth herein.

35. The actions of Defendants constitute deceptive and unfair trade practices within the meaning of T.C.A. § 47-18-101, *et seq.* Defendants falsely promised to pay off liens and yet pocketed the funds instead. Accordingly, Defendants are liable under for deceptive trade practices.

COUNT IX BREACH OF WARRANTY OF TITLE

36. The allegations of paragraphs 1 through 37 are incorporated as if fully set forth herein.

37. Defendants gave, as a matter of law, a warranty of good and marketable title to the vehicles sold; however, Defendants willfully breached the warranty of title by knowingly selling and delivering a vehicle whose title was encumbered and clouded without clear title or, no title.

COUNT X: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

40. The allegations of paragraphs 1 through 40 are incorporated as if fully set forth herein.

41. Defendants intentionally acted to inflict serious emotional distress on the Plaintiffs, in some cases on soldiers (and the families of soldiers) and others whose income's were stretched to pay for one vehicle. Plaintiff and the class have sustained fright, fear, stress, uncertainty, loss of sleep, financial worry and family discord due to financial harm and vehicle loss – as the direct and proximate result of Defendants' misconduct.

COUNT XI: OUTRAGE

42. The allegations of paragraphs 1 through 41 are incorporated as if fully set forth herein.

43. The acts of Defendants are so far beyond the bounds of decency and acceptable human behavior (essentially stealing and theft of cash and property for

essential personal transportation) that the tort of outrage applies to these facts.

COUNT XII: PUNITIVE DAMAGES

44. The allegations of paragraphs 1 through 43 are incorporated as if fully set forth herein.

45. Defendants acted with deliberate and/or reckless disregard for the rights of the Plaintiff and class. These acts were willful and/or wanton or reckless for their own self-interest. Defendants should be held liable for punitive damages.

DEMAND FOR JURY TRIAL

46. A jury trial is demanded.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the class, request the following relief:

1. Certifying this action as a class action of affected persons for Plaintiffs as defined herein;
2. Awarding Plaintiff and the Class damages in the amount of **One Hundred Million Dollars (\$100,000,000.00)**;
3. Granting Plaintiff and the Class attorneys' fees and interest, including pre-judgment interest, post-judgment interest, costs and disbursements herein.
4. Awarding Plaintiff and the Class treble damages based upon the Defendants' willful and intentional disregard of their rights, or in the alternative, punitive damages based upon the Defendants' willful, intentional and/or reckless disregard of rights.
5. Granting such other relief that the Court may direct.

Respectfully Submitted,

DAVID RANDOLPH SMITH & ASSOCIATES

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing document has been served upon the following via first-class, postage prepaid, U.S. Mail on this 29th day of May, 2003:

George F. Legg, Esq.
Stone & Hinds
507 Gay Street, S.W., Suite 700
Knoxville, TN 37902-1504

David Randolph Smith