

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY  
STATE OF MISSOURI

2010 APR 28 PM 2:45

JOHN J. ...  
Clerk of Court

TIMOTHY WITHROW, and )  
DAVID TUCKER, individually, )  
and on behalf of all others similarly situated, )

Plaintiffs, )

v. )

ENTERPRISE HOLDINGS, INC., )  
dba ENTERPRISE RENT-A-CAR )  
COMPANY, a foreign corporation, )

Hold for Service )

and )

THE ENTERPRISE RELATED )  
ENTITIES LISTED IN EXHIBIT A )

Hold for Service )

Defendants. )

Cause No. 10SLC001712

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CLASS ACTION PETITION

Plaintiffs, Timothy Withrow and David Tucker (collectively "Plaintiff"), through counsel, on behalf of themselves and all others similarly situated, hereby commence this individual and class action lawsuit against ENTERPRISE HOLDINGS, INC., dba ENTERPRISE RENT-A-CAR COMPANY ("EHI") and the ENTERPRISE RELATED ENTITIES ("ERE") LISTED IN EXHIBIT A (ERE and EHI are collectively referred to herein as "ENTERPRISE" or Defendant) for compensatory, equitable, injunctive, and declaratory relief.

Plaintiff makes the following allegations based upon his personal knowledge as to his own acts, and upon information and belief as well as upon their attorneys' investigative efforts as to Defendant's actions and misconduct, and allege as follows:

## **GENERAL ALLEGATIONS**

### **Parties, Jurisdiction, and Venue**

1. Plaintiff, brings this lawsuit individually and on behalf of the class of all persons who are not automobile dealers, wholesalers or auctioneers and who on March 16, 2010 owned a "Vehicle," defined as one of the following vehicles, which (a) was previously owned, and sold (either on a retail or wholesale basis) by ENTERPRISE or returned to the manufacturer by ENTERPRISE, and (b) lacks side curtain airbags on the following makes and model years: 2006, 2007, or 2008 model year Chevrolet Impala; 2008 or 2009 model year Chevrolet Cobalt; 2009 model year Chevrolet Heritage High Roof (HHR); or 2006 or 2007 model year Buick LaCrosse. Excluded from the class are (i) officers, directors, agents and legal representatives of ENTERPRISE, (ii) this Court, and (iii) any person who prior to this date has suffered a personal injury as a result of an accident involving a Vehicle ("the Class").

2. Defendant, EHI, at all times material hereto, was a corporation registered to transact business in this State and actually transacting business in this County and this State. At all times relevant herein, EHI maintained its principal place of business in St. Louis County, Missouri.

3. The Defendant ERE are subsidiaries or affiliates of EHI. The ERE are incorporated and/or formed in the states listed in Exhibit A.

4. The activities of EHI and the ERE in this County and this State subject them to personal jurisdiction in this Court and make venue proper in this Court.

5. This Court has subject matter jurisdiction over this action as the claims arise solely from state law. Plaintiff asserts no claim arising out of the laws of the United States and disclaim and explicitly are not bringing any claim arising under or completely preempted by the laws (common, statutory, and administrative) of the United States. Plaintiff further disclaim any such claim that would support removal of this action to a United States District Court on the basis of federal question jurisdiction.

#### **Class Allegation**

6. Plaintiff brings this action on his own behalf, and as a class action on behalf of the Class defined herein, pursuant to, and properly maintainable under Missouri Supreme Court Rule 52.08 and Rev. Stat. Mo. Secs. 407.025.2 and 407.025.3.

7. Plaintiff Withrow is a member of the Class because he purchased a 2008 Chevrolet Impala on March 18, 2008 which was previously sold at wholesale by EHI or one of the ERE which upon the request of EHI or an ERE was manufactured without "standard" side curtain airbags.

8. Plaintiff Tucker is a member of the Class because he purchased a 2008 Chevrolet Impala on or about May 3, 2008 which was previously sold at wholesale by EHI or one of the ERE which upon the request of EHI or an ERE was manufactured without "standard" side curtain airbags.

9. Plaintiff believes that the Class numbers in excess of 125,000 vehicles and is sufficiently numerous that joinder of all Class members is impracticable.

10. Plaintiff and the members of the Class all purchased the Vehicles during the class period, have been harmed in the same manner and now seek redress.

11. There are questions of law and fact common to the Class, including:

- a) Whether Defendant represented that its motor vehicles included standard side curtain airbags;
- b) Whether Defendant has knowledge that its motor vehicles were not equipped with standard front and rear side curtain airbags;
- c) Whether Defendant's acts constitute a violation of the Merchandising Practices Act, Chapter 407 RS Mo.;
- d) Whether Defendant's acts conduct fraud;
- e) Whether Defendant fraudulently induced purchasers into buying its motor vehicles;
- f) Whether Defendant breached its contract.
- g) Whether the Defendant was unjustly enriched.

12. Plaintiff's claims are typical of the Class members' claims because Plaintiff's claims arise from the same common course of conduct giving rise to the claims of the members of the Class and the relief sought is common to the Class.

13. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff has no interests that are antagonistic to other members of the Class and have retained counsel competent and experienced in the prosecution of complex litigation including commercial, product defect, and class action litigation to represent Plaintiff and the Class.

14. The prosecution of separate actions by the individual members of the Class would create a risk of inconsistent or varying adjudications, or establish incompatible standards of conduct for Defendant.

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

16. A class action is superior to other available methods for the fair and efficient adjudication of the controversy since individual joinder of all damaged Class members is impracticable. Prosecution as a class action will eliminate the possibility of repetitious litigation. The damages suffered by individual members of the Class are similar, and the expense and burden of individual prosecution of the claims asserted in this litigation would make it difficult for individual claimants to pursue individual claims. Absent the availability of class action procedures, it would not be feasible for Class members to redress the wrongs done to them. Even if the Class members could afford individual litigation, the court system could not so afford the burden. The class action device present fewer case management difficulties, and will provide the benefits of unitary adjudication, economy of scale and comprehensive supervision by a single court, without the duplication of effort and expense that numerous individual actions would create.

**Allegations Common to All Counts**

17. Defendant ordered, purchased, distributed, wholesaled, marketed, sold, and/or warranted the Vehicles.

18. General Motors designed and manufactured the Vehicles. General Motors designed and manufactured the Vehicles with standard safety equipment of front and rear side curtain airbags.

19. Defendant is General Motors largest Fleet vehicle purchaser. Defendant ordered the Vehicles from General Motors requesting that the standard safety equipment of front and rear side curtain airbags be deleted. General Motors manufactured and sold the Vehicles as Fleet vehicles to Enterprise.

20. General Motors extensively advertised and marketed the Vehicles as having the above standard safety equipment.

21. Defendant or its authorized agents sold the Vehicles that were ultimately purchased by Plaintiff and the Class without disclosing that the standard equipment front and rear side curtain airbags had been deleted from the Vehicles.

22. Side impacts are the second most frequent type of motor vehicle crashes, and they often result in serious head injuries, which is the most common type of injury regardless of crash angle. In recognition of this safety gap, manufacturers began fitting side airbags with head protection or side curtains to many vehicles in the early 2000s. These features allowed manufacturers to improve crash test ratings. Safety experts, in turn, listed side airbags or curtains as must-have safety features to reduce fatalities, and prevent injuries and deaths caused by ejections in rollovers.

23. An examination of a salvaged 2007 Impala originally sold to Enterprise revealed that the space normally occupied by the side curtain head bag was filled with corrugated plastic.

24. Reviews and other media pieces regarding Chevrolet Impalas, Cobalts, and HHR's Buick LaCrosse during the years at issue heavily emphasized the presence of standard side curtain airbags. For example, every major crash-test rating and consumer buying guide lists front and rear side impact air bags as standard safety equipment on the 2007 and 2008 Impala. In 2006, the Insurance Institute for Highway Safety praised the 2006 Impala's performance in side-impact crash tests—in part—because of the side air bags: "Impala and Avalon are star performers: The side structures of these two cars performed reasonably well in resisting intrusion from the striking barrier during the crash test. Both cars are equipped with standard curtain-style side airbags designed to protect the heads of people in both front and rear seats."

25. The Vehicles have been listed as having standard side-impact air bags including at MSN autos, NHTSA's consumer website Safercar.gov, and nearly every other consumer vehicle buying site – including General Motors'. This would lead any consumer to reasonably assume that the Impala it buys from Enterprise would be the same as a used Impala purchased from any other source.

26. Defendant knew that the Vehicles did not contain the standard front and rear passenger side curtain airbags and knew or should have known that the purchasers of the Vehicles would assume that the Vehicles contained all standard equipment; however, Defendant failed to directly or indirectly inform Plaintiff or the Class of the nonconformity.

27. During the class period Plaintiff and the members of the Class purchased the Vehicles after they were sold by the Defendant believing that the vehicle contained all standard safety equipment.

28. Defendant fraudulently concealed the nonconformity by failing to disclose the deletion of the standard safety features in the Vehicles.

**Count I: Violation of the Merchandising Practices Act, Chapter 407 RS Mo.**

29. The foregoing paragraphs are incorporated herein.

30. This is a count for Defendant's violation of the Merchandise Practices Act, Chapter 407 RS Mo.

31. The Defendant's actions as set forth above constitute the illegal act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce.

32. As a result of the forgoing, Plaintiff and the other members of the Class suffered an ascertainable loss of money or property as a result of Defendant's conduct.

WHEREFORE, Plaintiff and other members of the Class seek compensatory, proximate, incidental and consequential damages, punitive damages, costs, attorneys' fees, and such other relief that the Court deems necessary or proper.

**Count II: Fraudulent Omission**

33. Paragraphs 1 through 32, above, are incorporated herein.

34. This is a count for Defendant's fraudulent omission.

35. Defendant knowingly concealed material facts to induce Plaintiff and the members of the Class to act in their detriment by purchasing the Vehicles.

36. Specifically, Defendant failed to disclose to Plaintiff and the members of the Class that the Vehicles were not equipped with standard safety equipment of front and rear side curtain airbags.

37. Defendant's aforementioned misrepresentation by omission was made recklessly with knowledge in order to induce Plaintiff and the members of the Class to purchase the Vehicles.

38. Plaintiff and the members of the Class suffered injury in justifiable reliance on Defendant's fraudulent omissions in that they purchased the Vehicles that were inferior to the true standard versions of the Vehicles.

WHEREFORE, Plaintiff and the other members of the Class seek compensatory, proximate, incidental and consequential damages, punitive damages, costs, attorneys' fees, and such other relief that the Court deems necessary or proper.

### **Count III: Fraudulent Concealment**

39. The paragraphs above are incorporated herein.

40. This is a count for Defendant's Fraudulent Concealment.

41. Defendant successfully concealed the instant cause of action by concealing and failing to inform Plaintiff and the members of the Class that the Vehicles were not equipped when sold with the standard safety features of front and rear side curtain airbags while having knowledge that they were in fact manufactured without them at Defendant's request.

42. Defendant's fraudulent concealment is sufficient to toll the statute of limitations.

43. Defendant's fraudulent concealment constitutes common law fraud by omission.

WHEREFORE, Plaintiff and the other members of the Class seek compensatory, proximate, incidental and consequential damages, punitive damages, costs, attorneys' fees, and such other relief that the Court deems necessary or proper.

### **Count IV: Breach of Contract**

44. The paragraphs above are incorporated herein.

45. This is count for Defendant's breach of contract.

46. The Defendant sold the Vehicles purchased by Plaintiff and each member of the Class as standard vehicles without informing them that standard equipment had been deleted.

47. Defendant's failure to provide the Vehicles with the aforementioned standard equipment constitutes a material breach of contract.

48. Plaintiff and members of the Class suffered damages as a direct and foreseeable consequence of Defendant's material breach of warranty or breach of contract.

WHEREFORE, Plaintiff and the other members of the Class pray for actual damages against Defendant, and such other relief that the Court deems necessary or proper.

**Count V: Unjust Enrichment**

49. The paragraphs above are incorporated herein.

50. This is count for unjust enrichment.

51. The Defendant sold the Vehicles purchased by Plaintiff and each member of the Class as standard Vehicles without informing them that standard side curtain airbags had been deleted.

52. In doing so Defendant was able to sell the vehicles for a higher price than it would have been able to do so had it disclosed that the standard safety equipment had been deleted.

53. The receipt of this extra money by the Defendant constitutes money in the hand of the Defendant which belongs to the Plaintiff and the Class, and which, in equity and good conscience Defendant should pay over.

WHEREFORE, Plaintiff and the other members of the Class pray for actual damages against Defendant, and such other relief that the Court deems necessary or proper.

**PRAYER FOR RELIEF**

- A. That the Court determine that this action may be maintained as a class action, that the Class as defined herein be certified, that the undersigned counsel for Plaintiff be appointed counsel for the Class, and direct that reasonable notice of this action be given to members of the Class;
- B. That the Court adjudge and decree that Defendant's acts and practices violate the Merchandising Practices Act;
- C. That the Court adjudge and decree that Defendant committed fraud omission;

- D. That the Court adjudge and decree that Defendant fraudulently induced Plaintiff and the members of the Class;
- E. That the Court adjudge and decree that Defendant Action has obtained money in hand which belongs to Plaintiff and the Class, and which, in equity and good conscience Defendant should pay over to Plaintiff and the Class.
- F. That the Plaintiff and members of the Class recover compensatory damages;
- G. That the Plaintiff and members of the Class recover incidental damages;
- H. That the Plaintiff and members of the Class recover consequential damages;
- I. That the Plaintiff and members of the Class recover statutory damages;
- J. That the Court award Plaintiff and members of the Class's fees and costs as provided by law;
- K. That the Court award Plaintiff and members of the Class pre-judgment ad post-judgment interest as permitted by law, and that interest be awarded at the highest legal rate from and after the date of service of the initial complaint in this action;  
and
- L. That the Court award Plaintiff and members of the Class such other further relief as may be deemed necessary or proper.

**PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.**

Respectfully submitted,

*Fernando Bermudez*

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