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SPATT, J.

BOYLE, M.J.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

_____x		:	Case No. _____
JUDY AZOSE,		:	
	Plaintiff,	:	<u>CLASS ACTION</u>
		:	
vs.		:	COMPLAINT
		:	
FORD MOTOR COMPANY,		:	
	Defendant.	:	
_____x		:	

Plaintiff Judy Azose ("Azose"), by and through her attorneys of record, brings this class action complaint against Defendant Ford Motor Company, ("Ford") and alleges as follows:

NATURE OF THE CASE

1. The transmissions and torque converters in 2004-2005 models of the Ford Freestar and Mercury Monterey minivans (collectively, the "Class Vehicles") suffer from a defect. The defect manifests itself when the vehicles suddenly lose power. This occurs without any warning or prior signs of transmission problems. Although Ford has, in limited cases, been

willing to replace the transmissions and torque converters, the replacement parts have the same intrinsic defect as the original.

2. Both vehicles and brands are owned and manufactured by Ford Motor Company.

3. The National Highway Traffic Safety Administration (“NHTSA”) is aware of the issue and is currently conducting a probe into the engineering of the Freestar and Monterey. Ford has made no official announcement concerning this particular issue with the Freestar or Monterey, but there are unofficial reports that Ford is willing to replace the faulty system. Unfortunately, the replacement transmission is equipped with the same faulty products as the original.

4. Both the Mercury Monterey and Ford Freestar come equipped with an AX4N transmission which has earned a less-than-stellar reputation when used in minivans.

5. As of mid-November, 2009, the New York Times has reported that the NHTSA is considering the possibility of transmission failure on a total about 205,000 Ford Freestars and Mercury Montereys, model years 2004-2005, throughout the United States.

6. As a result of Ford’s practices, the members of the proposed class have suffered injury in fact, including economic damages, and have lost money or property. Plaintiff, on behalf of herself and all others similarly situated, brings claims for statutory violations of the New York General Business Law § 349, breach of express warranty, breach of the implied warranty of merchantability, violation of Magnuson-Moss and unjust enrichment.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under 28 U.S.C. § 1332(d). The aggregated claims of the individual class members exceed the sum value of \$5 million, exclusive of interests and costs, and this is a class action in which more than two-thirds of the proposed plaintiff class, on the one hand, and Defendant Ford, on the other, are citizens of different states.

The Court also has federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367.

8. This court has personal jurisdiction over Defendant Ford because Ford has purposefully availed itself of the privilege of conducting business activities with the State of New York by manufacturing, warranting, advertising, and selling its vehicles to Plaintiff and the class members, and further, generally maintained systematic and continuous business contacts with the State of New York.

9. Venue is proper in this district under 28 U.S.C. § 1391 as a substantial part of the events or omissions giving rise to Plaintiff's claims occurred and continue to occur in this judicial District.

PARTIES

10. Plaintiff Judy Azose is, and at all times relevant to this case has been, a resident of West Hempstead, New York. Ms. Azose owns a 2005 Ford Freestar, which, at the time of the incident, had just 41,164 miles on it.

11. Defendant, Ford Motor Company, is a corporation organized under the laws of the State of Michigan and headquartered in Dearborn, Michigan.

FACTUAL ALLEGATIONS

12. Ford markets, distributes, and warrants Ford Freestar and Mercury Monterey vehicles in the United States.

13. Starting in the 2004 model year and continuing in the 2005 models, the Class Vehicles came equipped with a flawed transmission and torque conversion system, which, due to faulty engineering design, would split the output shaft splines in the torque converter and cause a sudden loss of power to the drivetrain. The minivan's ability to steer is unaffected, but any attempt to maintain speed or to accelerate is in vain once the driver has lost power.

14. Ford widely advertised the Class Vehicles as safe and reliable. The family-oriented minivans were marketed as the ideal cars for safely transporting a family around town. The vehicles both received “Best Pick” ratings for safety from the Insurance Institute for Highway Safety and the Freestar earned 5 star crash test ratings from the NHTSA in all categories but side collisions on the front seats. These facts were widely advertised, but are useless when a driver cannot control the speed of his or her minivan because of transmission failure.

15. The basic warranty on both Ford Freestar and Mercury Monterey covered the minivans for 3 years or 36,000 miles. The warranty covered all defective parts of the vehicle that are not subject to normal wear and tear like window wiper blades, tires, and filters. Purchasers and lessees of the Class Vehicles also had the option to purchase an extended warranty.

16. Most importantly, purchasers of the Class Vehicles obtained a drive train or power train warranty. This warranty covers all defects on parts that make the car move. The AX4N transmission and torque conversion issue is covered under this warranty, but replacement with the same defective product only leaves the customer waiting for the next transmission failure and sudden loss of power to the drive train. Upon information and belief, this warranty extends for eight (8) years or eighty thousand (80,000) miles.

17. The National Highway Traffic Safety Administration began a preliminary investigation on the Class Vehicles after receiving 178 complaints of transmission failure from around the country. After moving into an engineering analysis, the NHTSA has received 227 complaints of a loss of power and has attributed 124 to “the torque converter shaft splines stripping, causing a sudden loss of power to the drivetrain.” (

<http://wheels.blogs.nytimes.com/2009/11/18/ford-minivans-investigated-for-transmission-failure>.)

18. Ford has acknowledged publicly that it has received 2,791 warranty claims over a loss of drivetrain power to the NHTSA, but claims that no injuries and only one accident have been reported as a result of this malfunction.

19. The defective transmission results in a sudden loss of power. A sudden deceleration is a dangerous condition that renders the vehicle unsafe to operate and to use the vehicle for the purpose of transportation. Consumer complaints lodged online in multiple car forums reflect the serious implications of this defect that Ford has placed its Freestar owners and lessees in:

My wife was driving during rush hour traffic. Turned a busy corner and continued to go up the hill on boulevard, suddenly the engine acted as if it were slammed into neutral, car lost all acceleration, she was able to coast to shoulder through busy traffic. I cannot believe this is as common with 2004/2005 Freestars as the online forums make it appear, and Ford and the NHTSA have done nothing to alert owners. This is extremely dangerous. If the trans would have gone out 60 seconds earlier, my wife was turning a corner and would have been t-boned by oncoming traffic. (http://www.carcomplaints.com/Ford/Freestar/2005/transmission/transmission_failure_without_warning.shtml)

PLAINTIFF AZOSE'S 2005 FORD FREESTAR

20. Plaintiff Judy Azose purchased a 2005 Ford Freestar minivan in July 2005 from Able Ford in Rockville Centre, New York. Ms. Azose relied on the marketing representations that the Ford Freestar was a "safe" vehicle when making the purchasing decision. She also considered the reliability of and the warranties covering the vehicle as part of her purchasing decision.

21. In the summer of 2009, Ms. Azose took her husband and four children (aged 12, 10, 6, and 2) on a cross-country road trip from New York to Seattle, Washington, and back. On

Monday, August 10, 2009, shortly after beginning the return leg of the trip, Mr. Azose was driving at approximately 70 mph on Interstate 90 near Spokane, Washington, when the engine “started revving like mad” and there was a sudden loss of power.

22. The transmission failed and stranded the Plaintiff and her family. The Plaintiff called AAA Roadside Assistance and waited three (3) hours for AAA to arrive, with no ability to drive her car that had just over 41,000 miles on it at the time.

23. After two days, \$220 of towing expenses, and \$2,000 of repair costs to fix the failed torque converter and transmission, Ms. Azose and her family got back on the road towards New York in the evening on Wednesday, August 12, 2009.

24. At the time of transmission failure, Ms. Azose’s Freestar was still under warranty for transmission failure.

25. Both Ms. Azose and Ms. Azose’s husband requested that Ford honor the warranty and cover the costs of the transmission failure but Ford refused to do so.

CLASS ACTION ALLEGATIONS

26. Plaintiff brings this action on behalf of herself and a class of persons initially defined as follows:

All (i) current owners or lessees of a 2004 or 2005 Ford Freestar or Mercury Monterey minivans residing in the United States; and (ii) former United States owners or lessees of 2004 or 2005 Ford Freestar or Mercury Monterey minivans (collectively, the “Class”).

27. Excluded from the Class are (i) Ford Motor Company; any affiliate, parent, or subsidiary of Ford Motor Company; any entity in which Ford Motor Company has a controlling interest; any officer, director, or employee Ford Motor Company; any successor or assign of Ford Motor Company; (ii) anyone employed by counsel for Plaintiff in this action; (iii) any

Judge to whom this case is assigned as well as his or her immediate family and staff; and (iv) anyone who purchased a Class Vehicle for the purpose of resale.

28. This action has been brought and may properly be maintained on behalf of the Class proposed above under the criteria of Federal Rule of Civil Procedure Rule 23.

NUMEROSITY

29. Members of the Class are so numerous that their individual joinder herein is impracticable. Thousands of Class Vehicles have been sold or leased in the United States. Class members may be notified of the pendency of this action by mail, supplemented (if deemed necessary or appropriate by the Court) by published notice.

EXISTENCE AND PREDOMINANCE OF COMMON QUESTIONS

30. Common questions of law and fact exist as to all members of the Class and predominate over questions affecting only individual Class members. These common questions include the following:

- a. Whether Ford provided Plaintiff and the Class with a minivan installed with a defective transmission and/or torque converter that caused the Class Vehicles to lose drive train power;
- b. Whether the transmission system is defective and requires a replacement system that is free from defect;
- c. Whether Ford has (or had) a duty to disclose the transmission defect to Plaintiff and the Class;
- d. Whether Ford withheld facts concerning the defective transmission (that is, facts relating to the safety of the Class Vehicles) from Plaintiff and the Class;

- e. Whether Ford has violated the Magnuson Moss Warranty Act and/or applicable state deceptive trade practices acts as alleged in this Complaint;
- f. Whether Ford has breached its express warranty by manufacturing and selling the Class Vehicles with a defective transmission and/or torque conversion system;
- g. Whether Ford has breached the implied warranty of merchantability by manufacturing and selling the Class Vehicles with a defective transmission and/or torque conversion system;
- h. Whether Plaintiff and the Class are entitled to equitable relief, including but not limited to restitution or a preliminary and/or permanent injunction; and
- i. Whether Plaintiff and the Class are entitled to damages and other monetary relief.

TYPICALITY

31. Plaintiff's claims are typical of the claims of the Class, because, among other things, Plaintiff purchased a Class Vehicle, which contains the same defective transmission and torque conversion system found in all other Class Vehicles.

ADEQUACY

32. Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the members of the Class he seeks to represent. Plaintiff has retained counsel competent and experienced in complex class action litigation, and Plaintiff intends to prosecute this action vigorously. The interests of members of the Class will be fairly and adequately protected by Plaintiff and her counsel.

SUPERIORITY

33. The class action is superior to other available means for the fair and efficient adjudication of this dispute. The injury suffered by each Class member, while meaningful on an individual basis, is not of such magnitude as to make the prosecution of individual actions against Ford economically feasible. Even if Class members themselves could afford such individualized litigation, the court system could not. In addition to the burden and expense of managing myriad actions arising from the transmission system defect, individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties and the court system presented by the legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

34. In the alternative, the Class may be certified because:
- a. the prosecution of separate actions by the individual members of the Class would create a risk of inconsistent or varying adjudication with respect to individual Class members which would establish incompatible standards of conduct for Ford Motor Company;
 - b. the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them which would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and

- c. Ford has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final and injunctive relief with respect to the members of the Class as a whole.

FIRST CAUSE OF ACTION
(Violation of General Business Law § 349)

35. Plaintiff, on behalf of herself and all others similarly situated, alleges each and every allegation set forth herein.

36. Ford's acts and practices, as alleged in this complaint, are unfair or deceptive actions in violation of the General Business Law § 349.

37. The business practices engaged in by Ford that violate the General Business Law § 349 include failing to disclose at the point of sale, the point of repair, or otherwise, that the transmission and torque converter is intrinsically defective.

38. Ford deceptively marketed the Freestar and Monterey as safe vehicles, knowing the problems of sudden loss of power resulting from a defective transmission.

39. Ford also deceptively marketed the Freestar and Monterey by misrepresenting that it would honor a warranty related to transmission failures.

40. Ford engaged in unfair business practices by, among other things:

- a. Engaging in conduct that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to Plaintiff and the Class; and
- b. Engaging in conduct that has the capacity to injure its consumers, not outweighed by any countervailing benefits to consumers or to competition, which the consumers could not have reasonably avoided.

41. Ford engaged in fraudulent business practices by engaging in conduct that was and is likely to deceive consumers acting reasonably under the circumstances.

42. As a direct and proximate result of Ford's unfair and fraudulent business practices as alleged herein, Plaintiff suffered injury in fact and lost money or property, in that he purchased a vehicle he otherwise would not have, paid for transmission diagnoses, repairs, and replacements, and is left with a Class Vehicle of diminished value and utility because of the defective transmission. Meanwhile, Ford has sold and leased more Class Vehicles and transmission parts than it otherwise could have and charged inflated prices for Class Vehicles, unjustly enriching itself thereby.

43. Plaintiff and the Class are entitled to equitable relief including restitution of all fees, restitutionary disgorgement of all profits accruing to Ford because of its unfair, fraudulent, and deceptive practices, attorneys' fees and costs, declaratory relief, and a permanent injunction enjoining Ford from its unfair, fraudulent, and deceitful activity.

SECOND CAUSE OF ACTION
(Breach of Express Warranty)

44. Plaintiff, on behalf of herself and all others similarly situated, alleges each and every allegation set forth herein.

45. In conjunction with each sale of the vehicles, Defendant Ford warranted that its' dealers "will repair, replace, or adjust all parts on your vehicle that are defective in factory-supplied materials or workmanship."

46. Defendant Ford breached its express warranty to when it used defective components and ineffective procedures to perform its repair of the Class Vehicle's transmission and torque converter system. Neither Plaintiff, the class, nor any party other than Defendant Ford caused it to repair the Class Vehicles using defective components or procedures.

47. Ford's express warranty fails of its essential purpose in that Ford fails to replace or repair the defective transmissions using a similarly defective replacement transmissions and

torque converters. Repairing the defective transmission system with replacement parts that contain the same defect is a breach of the warranty.

48. Plaintiff Azose has either provided timely notice to Defendant Ford or is excused from providing such notice of the breach of warranty alleged herein. The Plaintiff sent a letter certified mail to Ford that was received on July 30, 2010 requesting the Ford honor the warranty. Prior to sending the letter, Plaintiff has verbally requested that Ford honor its warranty.

49. Applying any warranty limitations to avoid the need to repair this defect would be unconscionable in that, inter alia, the Class Vehicles contained an inherent defect that Defendant knew of (or was reckless in not knowing of) that could not have been discovered by Plaintiff or the Class at the time of their purchase or lease, and owners and lessees lacked any meaningful choice with respect to the warranty terms.

50. The warranty limitations are void because Defendant knew before the Plaintiff and the Class experienced transmission and torque converter failure that the Class Vehicles contained an inherently defective transmission system but failed to disclose or otherwise failed to notify Plaintiff and the Class of that fact.

51. As a direct and proximate result of Defendant Ford's breach of its express warranty, Plaintiff and the Class are entitled to the relief set forth in the prayer below.

THIRD CAUSE OF ACTION
(Breach of Implied Warranty of Merchantability)

52. Plaintiff, on behalf of herself and all others similarly situated, alleges each and every allegation set forth herein.

53. An implied warranty that Plaintiff's vehicle was merchantable arose by operation of law as part of the sale, and as part of the sales of the Class Vehicles to members of the Class.

Ford also impliedly warranted that the vehicle was fit for the ordinary purposes that minivans are used and that it was of even kind and quality as comparable minivans.

54. Defendant breached the implied warranty of merchantability in that the Class Vehicles sold to Plaintiff and the Class were not in merchantable condition when sold or at any time thereafter because the Class Vehicles have defective transmissions that were substantially certain to result in the vehicle's malfunction during the vehicle's useful life, and, in fact, did result in malfunction during the vehicle's useful life.

55. When purchasing and leasing their Class Vehicles, Plaintiff and the Class were not aware of the transmission and torque converter defect as the defect was and is not open or obvious.

56. Any attempt by Defendant Ford to limit the duration and scope of the implied warranty of merchantability is unreasonable, unconscionable, and void as Ford knew or recklessly disregarded the fact that the defect existed at the time of manufacture and might not be discovered, if at all, until such time as a vehicle owner or lessee experienced a transmission failure and vehicle breakdown. Ford withheld information about the transmission and torque converter defect from vehicle owners and lessees intending that they would not uncover the inherent defect until such time as any Ford express warranty in effect expired. Moreover, the terms of Defendant Ford's express warranty were not subject to negotiation, unreasonably favored Ford, and were not provided to consumers prior to sale, thus, rendering any limitations unconscionable.

57. As a result of Defendant Ford's breach of the implied warranty of merchantability, Plaintiff and the Class have suffered incidental and consequential damages, including expenses incurred to repair or replace their transmissions and torque converters, and

damages representing the difference between the value of the defective vehicles purchased or leased and the value the vehicles would have had if they had been sold or leased as warranted and did not have defective transmission systems.

58. By reason of the foregoing, Defendant Ford is liable to Plaintiff and the Class for the damages that they have suffered as a result of Ford's actions, the amount of such damages to be determined at trial.

FOURTH CAUSE OF ACTION
(Magnuson-Moss Warranty Act)

59. Plaintiff, on behalf of herself and all others similarly situated, alleges each and every allegation set forth herein.

60. As part of the basis of the bargain between Plaintiff and others similarly situated and Defendant, Ford provided a written warranty and implied warranty on the manufactured automobiles.

61. The sales transaction was subject to the provisions and regulations of the Magnuson Moss Warranty Act, 15 U.S.C. 2301 et. seq.

62. Plaintiff and members of the Class are "consumers" as defined in the Magnuson Moss Warranty Act. Defendant Ford is a "supplier" and "warrantor" as defined by the Magnuson-Moss Warranty Act.

63. The automobiles in question are a "consumer product" as defined in the Magnuson Moss Warranty Act and were manufactured and sold after July 4, 1975. The express warranty provided by Ford and/or required by statute to be provided by Ford is a "written warranty" as defined in the Magnuson-Moss Warranty Act.

64. Defendant breached the written warranty with regard to Plaintiff and other Class members Ford Freestar and Mercury Monterey minivans.

65. Defendant also breached implied warranties as indicated above. The defective condition rendered the vehicle a thing of danger. Sudden de-acceleration of a vehicle creates significant risk of injury.

66. Defendant was aware or should have been aware of the defects at the time of the sale.

67. Plaintiff provided Defendant with verbal notice requesting reimbursement for repairs. Plaintiff also provided written notice of the defect to the Defendant on July 30, 2010.

68. Defendant's conduct described herein is a violation of the Magnuson-Moss Warranty Act.

SIXTH CAUSE OF ACTION
(Unjust Enrichment)

69. Plaintiff, on behalf of herself and all others similarly situated, alleges each and every factual allegation set forth herein.

70. As a result of the Defendant's deceptive advertising, marketing and/or sale of defective vehicles, the Defendant was enriched, at the expense of Plaintiff and all others similarly situated through the payment of a purchase price for the defective vehicles.

71. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits that it received from Plaintiff and all other similarly situated, in light of the fact that the vehicles were sold in a defective condition. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to the Plaintiff and all others similarly situated.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on her own behalf and on behalf of the Class, prays for judgment as follows:

- a. For an order certifying the Class and appointing Plaintiff and her counsel to represent the Class;
- b. For an order awarding Plaintiff and the Class damages, both consequential and punitive, specific performance, and/or rescission;
- c. For an order awarding Plaintiff and the Class restitution, or other equitable relief as the Court deems proper;
- d. For an order enjoining Ford from continuing to engage in the unlawful business practices as alleged herein;
- e. For an order awarding Plaintiff and the Class pre-judgment and post-judgment interest;
- f. For an order awarding Plaintiff and the Class reasonable attorneys' fees and costs of suit, including expert witness fees; and
- g. For an order awarding such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury.

DATED this 9th day of August, 2010

Respectfully submitted,

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