

<p>SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 101 West Colfax Avenue Suite 800 Denver, CO 80202</p>	
<p>COLORADO COURT OF APPEALS Case No. 09CA1465 Opinion by Graham, J.; Furman and Booras, JJ., concurring</p> <p>District Court, County of Jefferson The Hon. Jane A. Tidball, Presiding Case No. 07-CV-2447</p>	
<p>Plaintiff/Petitioner: TRINA GARCIA, individually and on behalf of all persons similarly situated – Class Representation</p> <p>Defendants/Respondents: MEDVED CHEVROLET, INC., d/b/a MEDVED CADILLAC, INC., d/b/a MEDVED CADILLAC OLDSMOBILE, INC., d/b/a MEDVED CHEVROLET-GEO, INC., d/b/a MEDVED OLDSMOBILE, INC. AND d/b/a MEDVED CRAIG CHEVROLET, INC.; MEDVED CHEVROLET SOUTH, INC., d/b/a MEDVED HUMMER SOUTH; CASTLE ROCK FORD-MERCURY, INC., d/b/a MEDVED BRUTYN FORD LINCOLN MERCURY, INC.; MEDVED BUICK PONTIAC GMC, INC.; LAKEWOOD CHRYSLER-PLYMOUTH, INC., d/b/a MEDVED CHRYSLER JEEP, INC.; MEDVED CHRYSLER JEEP DODGE SOUTH, INC.; MEDVED CHRYSLER JEEP DODGE, INC.; MEDVED PONTIAC BUICK GMC, INC.; MEDVED SUZUKI NORTH, INC.; MEDVED SUZUKI SOUTH, INC.; and JOHN MEDVED, individually.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>AMICUS BRIEF OF THE COLORADO AUTOMOBILE DEALERS ASSOCIATION</p>	

CERTIFICATE OF COMPLIANCE

Pursuant to C.A.R. 32, undersigned counsel certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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It contains 7,480 words.

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s/William E. Walters, III

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INTRODUCTION

The Colorado Automobile Dealers Association (“CADA”) represents the interests of over 250 franchised new car and truck dealers in the state of Colorado. The organization’s purposes (as stated in its Articles of Incorporation) include “encouraging sound business policies and ethical trade practices” and “broadening public understanding of the retail franchised automobile dealer’s place and function in the community.” In a recent report, CADA described its purpose as “[making] it as easy as possible for dealers and their customers to buy, sell, and maintain automotive vehicles.” Colo. Auto. Dealers Ass’n, *2009 Economic Impact Report: The Economic Impact of Franchised New Car Dealerships on the Colorado Economy 2* (2009), available at http://www.coloradodealers.org/downloads/2009_colorado_economic_impact_study.pdf.

New vehicle dealerships have a significant economic impact on the Colorado economy. In 2009, Colorado dealerships made over \$9.6 billion in sales. *Id.* at 3, 6. With about 80% to 85% of dealerships locally—and often family—owned, the vast majority of the money generated by dealers in Colorado stays in Colorado. Dealers employ

directly and indirectly over 26,000 Coloradans who earn nearly \$1.5 billion in salary and fringe benefits. *Id.* at 3-5. In 2009, the Colorado auto retail industry paid \$410 million in taxes to state and local municipalities, including \$38 million in state payroll taxes, and an additional \$194 million in federal payroll taxes. *Id.* at 3, 5.

Beyond the billions of dollars in taxes, salaries, and benefits paid by dealers annually, new vehicle dealerships are integral members of the local communities in which they operate. New vehicle dealerships contributed \$5.5 million last year to charitable causes, an average of nearly \$20,000 per dealership. *Id.* at 3, 7. In 2010, CADA created the Clear the Air Foundation as a 501(c)(3) tax exempt organization which will accept donations of high pollution emitting vehicles and provide them to salvage operators for destruction. Any proceeds will go towards scholarships in automotive engineering at Colorado community colleges.

CADA members are committed to fair and transparent business practices and the education of vehicle consumers. Three new car dealers serve on the Colorado Motor Vehicle Board which oversees the regulation and licensing of dealers and salespersons. C.R.S. § 12-6-101

et seq. CADA's counterpart at the federal level, the National Automobile Dealers Association, provides information and assists the public in the car buying process. See <http://www.autofinancing101.org>. Next to buying a home, purchasing a vehicle is one of the most significant financial transactions that consumers will undertake. As a result, dealerships seek to ensure that consumers are treated fairly by complying with industry best practices as well as appropriate state and federal regulations, including the Colorado Consumer Protection Act (the "CCPA"). One negative experience by a consumer can mean a dozen lost sales through word-of-mouth discussions with friends and family, and local dealers recognize that an honest reputation and consumer trust are hard to earn and easy to lose. See RightNow Techs., Inc., *Customer Experience Impact Report 2* (2010), available at <http://www.rightnow.com/files/analyst-reports/RightNow-Customer-Experience-Impact-North-America-Report.pdf>. In representing Colorado automobile dealers, CADA has a long-term financial and educational commitment to the Colorado community and is interested in ensuring that the state's consumer protection laws are fairly and evenly enforced.

SUMMARY OF ARGUMENT

Plaintiff's argument that presumptions of causation and injury can be imposed in class action CCPA claims violates the delineation made in the CCPA between Attorney General actions for civil penalties, which do not require a showing of causation and injury, and private consumer actions for treble damages, which do require such a showing. This case illustrates the policy reasons for limiting private parties who seek to find, at best, a technical violation of the CCPA resulting in a potential financial windfall without any benefit to consumers.

Presuming causation and injury in this case is particularly inappropriate because of the highly individualized nature of negotiating the purchase price of a vehicle, as nearly every car purchaser will end up paying a different price based on the outcome of the negotiation. Beyond the individualized price, the method for agreeing on a final price and the information received from a salesperson during face-to-face negotiations makes individual issues predominate in the sale of motor vehicles.

Moreover, Plaintiff's purported ground for this suit, the installment sales provision of the CCPA, C.R.S. § 6-1-105(m), is primarily

concerned with the disclosure of the terms for financing a purchase, and does *not* require the itemization of dealer-added goods which are included in the final negotiated price of all vehicles, whether financed or not.

The Court also should be aware of the impossible burden which Plaintiff's ruling would place on motor vehicle dealers, which would result in a need to allocate the final negotiated price among the manufacturers' suggested retail price (the "MSRP"), dealer-added products, and, in some cases, manufacturer-installed items. This "negotiating the negotiation" will not change the actual price paid by the consumer but simply exposes car dealers to additional class action liability for purported technical violations of the CCPA.

Finally, the automotive industry is a highly regulated industry by both the state and federal government, including several CCPA provisions dealing specifically with sales of vehicles. None of these statutes or regulations requires the itemization demanded here by Plaintiff—a strong indication in a heavily regulated industry that her claim is without merit.

ARGUMENT

I. Permitting a Private Party to Presume Causation and Reliance Violates the Clear Statutory Language of the CCPA and Will Encourage Frivolous Class Actions.

“In contrast to a private action, a showing of actual injury is not required in a district attorney’s or attorney general’s action for civil penalties.” *Crowe v. Tull*, 126 P.3d 196, 209 n.10 (Colo. 2006). A presumption of causation/reliance and injury in all CCPA claims would violate the clear distinction in the CCPA between actions instituted by the Attorney General for civil penalties under C.R.S. § 6-1-112 (which do not require proof of causation and injury) and private consumer actions for treble damages under C.R.S. § 6-1-113, which do require proof of those elements. Ending this statutory distinction will encourage class actions against reputable car dealerships (as well as other businesses) and allow isolated, and at best technical, violations of the CCPA to result in significant liability with no showing that the alleged violation caused any injury to the purchaser.

As noted by Maryland’s highest court, important policy reasons exist for requiring a private plaintiff to prove causation and actual injury:

Many of the state consumer protection acts permit a consumer to bring a private action against a businessman who has acted unfairly or deceptively only if the consumer has been injured or damaged by the businessman's conduct. This restriction is said to prevent aggressive consumers who were not personally harmed by the prohibited conduct, or even involved in a transaction with the offending businessman, from instituting suit "as self-constituted private attorneys general" over relatively minor statutory violations. Another fear is that the powerful weapon given to consumers in the form of the private remedy "was capable of being used improperly for harassment and improper coercive tactics."

CitaraManis v. Hallowell, 613 A.2d 964, 968 (Md. 1992) (quoting 1 H. Alperin & R. Chase, *Consumer Law: Sales Practices and Credit Regulation* § 136 (1986)).

In a federal case applying Illinois law, the plaintiff argued "that a per se violation of the [Illinois CFA] does not require her to show actual damage caused by deception." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006). The Seventh Circuit flatly rejected such assertion:

It is true that a violation of the Uniform Deceptive Trade Practices Act violates the [consumer protection act], but such violations do not automatically entitle an individual to damages. Unlike public actions for violating the [consumer protection act], a private cause of action under the [consumer protection act] requires a showing of proximate causation.

Id. at 514-15.

The case at bar is an excellent example of why proof of causation and injury must continue to be required in private consumer fraud actions. Here, a single consumer attempts to take an alleged technical violation of the CCPA and turn it into a multimillion dollar lawsuit. If causation and injury are presumed here, car dealers in the future will face incredible pressure to settle other class actions based upon an erroneous presumption. Instead of furthering the CCPA's goals of protecting consumers, adopting a presumption of causation and injury in this case would merely create a windfall for the purported class plaintiffs and their lawyers.

The Court should also recognize the nationwide impact of a holding in Plaintiff's favor. Many car dealers, both in Colorado and across the country, use buyer's order forms which are generated from standardized software systems from various vendors. These forms have been developed over time and have become an industry standard. If the Plaintiff prevails in bringing a complaint directed at the buyer's order form under the installment sales contract provision of the CCPA, without having to prove causation and damages, she will in effect be

engaged in a complete re-writing of these nationally accepted forms. Every dealer that uses a standardized buyer's order form would be exposed to potential class action lawsuits and would be required to make additional (yet unnecessary) disclosures to avoid liability, even if those dealers' customers were not injured by the use of the buyer's order form.

Even if warranted, such a drastic action should only be undertaken by a state attorney general, who could secure injunctive relief and civil penalties without needing to prove causation and injury. Given the highly regulated nature of motor vehicle sales coupled with a CCPA statutory structure which so clearly delineates between attorney general proceedings and private causes of action, erasing the distinction between these separate forms of legal relief would result in an error with significant, adverse consequences.

In her brief, Plaintiff argues that "the Court of Appeals' decision . . . effectively abolishes all such [class] actions under the CCPA." Op. Br. at 22 (discussing David Benjamin Lee, Note, *The Colorado Consumer Protection Act: Panacea or Pandora's Box?*, 70 Denv. U. L. Rev. 141

(1992)). This argument misstates the holding of the court of appeals and mischaracterizes the CCPA.

Nothing in the CCPA nor in the referenced article supports a claim that the standards of proof are relaxed or presumed in pleading the elements of causation and injury for a CCPA claim versus a common law fraud claim. Instead, the article states that the General Assembly, by providing for treble damages and attorney fees, appears to have intended to encourage private plaintiffs by “giv[ing] consumers the ability and incentive to pursue redress without the fear of owing extraordinary court costs and attorney fees, despite success on the merits of the case.” *See Lee, supra*, at 144.¹ Thus, even in situations where damages are small and a common law fraud claim would not be financially viable, CCPA claims for an individual consumer are financially worthwhile. In contrast, the General Assembly prohibited treble damages and attorney fees in private plaintiff *class action* cases because the potential damages makes such claims financially viable—without the need to also eliminate critical elements of proof. *See C.R.S. § 6-1-113(2)*.

¹ Because there is no legislative history for the CCPA, the General Assembly’s exact motivations for passing the act remain “speculative.” *See Lee, supra*, at 148.

Moreover, the notion that the General Assembly through the CCPA lowered the burden of proof as compared to a common law fraud claim ignores that the General Assembly mandated an *additional* showing—that the conduct at issue has a significant public impact—which common law fraud does *not* require. *See Anson v. Trujillo*, 56 P.3d 114, 118 (Colo. App. 2002). Therefore, it was not by relaxing pleading standards, but by dramatically improving the available damages and providing for attorney fees not available in common law fraud claims, that the General Assembly incentivized private CCPA actions.

Finally, under C.R.S. § 13-2-108, procedural rules and devices may not be used to “abridge, enlarge, [or] modify the substantive rights of any litigants.” *See Mijares v. Kniss*, 357 P.2d 352, 355-56 (Colo. 1960) (applying statute to limit the use of a *quo warranto* action). Plaintiff is essentially asking this court to lessen her burden of proof simply because she seeks to bring a class action. Pursuant to state and federal statutes akin to § 13-2-108, courts across the nation have rightly refused to grant similar requests by class plaintiffs, and this Court should rule no differently. *See, e.g., Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (noting that Tex. R. Civ. P. 815 prohibits the use of class

actions “to enlarge or diminish any substantive rights or obligations of any parties to any civil action”); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) (“The Rules Enabling Act, 28 U.S.C. § 2072—and due process—prevents the use of class actions from abridging the substantive rights of any party.”).

II. The Highly Individualized Nature of Purchasing a Vehicle Makes Presuming Causation and Injury Particularly Inappropriate.

The court of appeals recognized that presuming causation and injury would be inappropriate in the vehicle sales context, noting that “individual prices [are] negotiated by car buyers, some of which may pay hundreds less than other buyers for an identically equipped automobile.” *Garcia v. Medved Chevrolet, Inc.*, 240 P.3d 371, 380 (Colo. App. 2009).

Price negotiation of an automobile can proceed in countless different ways based on the vehicle at issue, the purchaser, the dealership, and the particular salesperson. For example, some purchasers are skilled bargainers and succeed in paying a lower price for a vehicle than the list price. Even skilled bargainers, however, may pay a different price based on countless other factors particular to that

transaction, including the time of year, value and desirability of a proposed trade-in vehicle, dealer inventory, manufacturer incentives, sales promotions, and credit worthiness of the purchaser. Other purchasers do not wish to negotiate or are less successful at bargaining and may pay a different price for the same vehicle. Some vehicle sales never occur because the potential purchaser and the car dealer cannot reach a mutually satisfactory agreement on price. Finalizing a sale may also depend on whether or not the customer is willing to pay for a particular item on a vehicle, such as a dealer-added product. Presuming causation and injury when car purchasers pay different prices for different reasons for different products ignores the reality of the “arm’s length,” “face-to-face” nature of vehicle sales. *Garcia*, 240 P.3d at 380, 381.

The process of purchasing a motor vehicle stands in stark contrast to most consumer purchases conducted online, through the mail, or in retail stores. For example, when an individual purchases a gallon of milk at a large grocery store, the price listed on the shelf is the price the consumer will pay for the milk. A consumer cannot enter a large national supermarket chain and negotiate with a store associate or a

store manager to pay less for the milk, or to have a tub of butter thrown in for free, no matter how skilled the consumer is at negotiating.

Therefore, the highly individualized, face-to-face nature of negotiating a price for a vehicle, resulting in a marketplace where customers pay different prices for different reasons for the same car, makes it a particularly inappropriate industry on which to impose a presumption of causation and reliance. Courts specifically recognize that claims of non-disclosure in negotiated vehicle sales are ill-suited to class action treatment. *See Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423 (5th Cir. 2004) (denying certification and recognizing that an assumption that all vehicle purchasers pay the same amount for various charges “defies the realities of the haggling that ensues in the American market when one buys a vehicle. Although some purchasers certainly negotiate a price that excludes taxes, titles, and fees, others negotiate with an eye to the ‘bottom line.’ Bottom-line purchasers base their negotiations on the *final* purchase price, including every tax, fee, and surcharge.”) (footnote omitted and emphasis in original); *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 550 (5th Cir. 2003) (denying class certification because in purchases of motor homes “[r]eliance will vary

from plaintiff to plaintiff, depending on the circumstances surrounding the sale”).

Courts across the country also routinely refuse to certify class actions where proof of causation, reliance, or injury is premised upon statistical evidence or other generalized methods of aggregate proof. *See In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 434 (E.D.N.Y. 2009) (“Together, this large body of case law constitutes a now widely held view of aggregate litigation, particularly in the products liability or fraud context, that statistical proof is in most instances insufficient to show reliance, loss-causation, or injury on the part of individual class members or claimants (the ‘Individualized Proof Rule’).”).

Statistical analysis is particularly ill-suited to class actions involving individualized sales because it fails to account for issues of causation and economic loss. *See, e.g., Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1088 (N.J. 2007) (“To the extent that plaintiff intends to rely on a [statistical] expert to establish a price effect in place of a demonstration of an ascertainable loss or in place of proof of a causal nexus between defendant’s acts and the claimed damages, however, plaintiff’s proofs

would fail.”).

Plaintiff uses a flawed analysis in an attempt to prove class-wide injury and causation by conjecturing that thousands of purchasers were injured based only on the inconclusive record of a few transactions. *See* Op. Br. 4-5. Courts have rejected much more sophisticated statistical models as too speculative to meet the predominance inquiry. *See In re Neurontin*, 257 F.R.D. 315, 324-28 (D. Mass. 2009) (discussing cases). Accepting such an analysis as adequate to establish predominance under Rule 23 would place thousands of Colorado businesses at risk for frivolous class action suits based on defective methods of aggregate proof.

III. The CCPA’s Installment Sales Contract Provision Does Not Apply to the Dealer-Added Products at Issue in this Suit

As troubling as Plaintiff’s attempt to have this Court create new regulations is her attempt to recover damages for conduct that is not even covered by the CCPA’s section 6-1-105(1)(m). This is of particular importance to CADA because if Plaintiff is allowed to persist in her claim, other plaintiffs could bring similar CCPA class actions against Colorado automobile dealerships by ignoring the clear language of what the CCPA’s installment sales provision does and does not cover.

“The goal in construing statutes is to ascertain and give effect to the general assembly’s intent.” *In re Crow v. Penrose-St. Francis Hosp.*, 169 P.3d 158, 165 (Colo. 2007). “To effectuate the General Assembly’s intent, [courts] will read and consider the statute as a whole, giving consistent, harmonious, and sensible effect to all parts.” *In re O’Donnell v. State Farm Mut. Auto. Ins. Co.*, 186 P.3d 46, 50 (Colo. 2008). Courts “may not read additional terms into, or modify, the plain language of a statute” *Dubois v. Abrahamson*, 214 P.3d 586, 588 (Colo. App. 2009).

Section 6-1-105(1)(m) states that a person commits a deceptive trade practice if one:

Fails to deliver to the customer at the time of an *installment* sale of goods or services a written order, contract, or receipt setting forth the name and address of the seller, the name and address of the organization which he represents, and all of the terms and conditions of the sale, including a description of the goods or services, stated in readable, clear, and unambiguous language

(emphasis added). Because there is no recorded legislative history of the CCPA, *May Dep’t Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 973 n.9 (Colo. 1993), and no published cases specifically explaining the scope or purpose of subsection (m), a court interpreting this provision should look to statutes specifically regulating installment sales contracts for guidance.

Installment sales contracts are regulated by the Colorado Uniform Consumer Credit Code, C.R.S. § 5-1-101 *et seq.* (the “UCCC”), for which the stated statutory purpose is, in relevant part, to “simplify, clarify, and modernize the law governing retail installment sales, consumer credit, small loans, and usury” and “provide rate ceilings to assure an adequate supply of credit to consumers.” *See* C.R.S. § 5-1-102(1)(a) & (b). The UCCC regulates various types of installment sales contracts and consumer credit transactions, *but it does not regulate the base cash price of consumer goods.* *See, e.g., id.* §§ 5-2-202 (setting rate cap for consumer loans and consumer credit sales, under the latter of which automobile purchases fall, as well as cap on additional charges); -203 (cap on delinquency charges “in connection with a consumer credit transaction”); -204 (cap on deferral charges); -205 (cap on finance charge on refinance); -206 (cap on finance charge on consolidation); -207 (cap on prepaid finance charge).

The purpose of section 6-1-105(1)(m) is not to require itemization of all components of consumer products. Rather, it requires an explanation of the “terms and conditions” of *installment sales contracts*, which include the fees and rates associated with financing a

purchased item. *Accord Scott v. Forest Lake Chrysler-Plymouth-Dodge*, 611 N.W.2d 346, 352 (Minn. 2000) (“The retail installment contract sets forth the details of how the financing is to work—the interest rate, the finance charge, amount financed, total payment and total sales price . . .”).

None of the alleged practices here involves the regulation and disclosure of the fees and rates associated with financing an individual item for an automobile. Plaintiff’s complaint challenges how Medved itemized certain additional products included in the final price for a vehicle. These items are not associated with financing rates or fees, but are installed before the dealer knows whether the ultimate purchaser of any specific vehicle will finance the purchase or pay with cash or a trade-in. Accordingly, the UCCC and CCPA’s section (m) are not applicable because these items are part of the final list price of all vehicles and are not related to the financing charges paid by individual purchasers for certain vehicles.

This plain language reading of the CCPA and UCCC is bolstered by looking at other state court decisions interpreting similar statutes. These decisions make clear that a statutory provision concerning

installment sales contracts does not require itemization of the final list price. *See, e.g., In re Mierkowski*, 580 F.3d 740, 746 (8th Cir. 2009) (“In Missouri, motor vehicle installment contracts are regulated by the Missouri Motor Vehicle Time Sales Act . . . The MMVTSA and other similar state statutes serve as consumer protection laws and *require sellers and lenders to provide full disclosure of the costs associated with credit.*”) (emphasis added); *In re Sanders*, 377 B.R. 836, 849 (Bankr. W.D. Tex. 2007) (describing the Texas Motor Vehicle Installment Sales Act as “address[ing] the *unique issues regarding what may be financed, how finance charges are to be computed, and how financing and charges are to be disclosed to retail purchasers of motor vehicles.* In short, it is a consumer protection statute.”) (emphasis added), *rev’d on other grounds*, 403 B.R. 435 (W.D. Tex. 2009); *Scott*, 611 N.W.2d at 351 (describing the Minnesota Motor Vehicle Retail Installment Sales Act as “informing the automobile buyer of the cost of the credit extended” and stating “The plain purpose of the MMVRISA is to *require disclosure to consumers of the cost of credit extended to them, including sale price, amount of down payment, insurance charges, and finance charges.*”) (quotations omitted) (emphasis added).

Other state statutes explicitly declare that the purpose of installment sales acts is to regulate the disclosure of credit terms, and these provisions do not require itemization of the final list price. *See, e.g., Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1021 n.7 (D.C. App. 2007) (quoting statutory purpose of District of Columbia vehicle installment sales act as to “provide for the regulation of finance charges for retail installment sales of motor vehicles in the District of Columbia and for other purposes”) (quoting D.C. Mun. Regs. Tit. 16, § 300 (2007)); *Maley v. 7111 Sw. Freeway, Inc.*, 843 S.W.2d 229, 233 (Tex. App. 1992) (quoting Texas Installment Sales Act’s stated purpose as “These facts conclusively indicate a need for a comprehensive code of legislation to . . . classify and regulate loans and lenders, to regulate credit sales and services, and place limits on charges imposed in connection with such sales and services”) (quoting Tex. Rev. Civ. Stat. Tit. 79 Decl. of Legis. Intent (Vernon 1987)) (emphasis omitted).

Federal consumer finance law further supports a plain language reading of section 6-1-105(m). The Federal Truth in Lending Act requires a seller/creditor in a closed-end credit transaction—such as the financing of a vehicle—to state the “cash price,” plus the elements of

the credit transaction, including finance charges, payment schedule, total number of payments, annual percentage rate, and whether there is a demand feature to the loan. 12 C.F.R. § 226.18. “Cash price” is defined as:

[T]he price at which a creditor, in the ordinary course of business, offers to sell for cash property or service that is the subject of the transaction. At the creditor’s option, *the term may include the price of accessories, services related to the sale, service contracts and taxes and fees for license, title, and registration.* The term does not include any finance charge.

12 C.F.R. § 226.2(9) (emphasis added). Therefore, under the federal Truth in Lending Act the seller/creditor need only disclose the “cash price,” a term that “may include the price of accessories [and] services related to the sale.” *Id.*

The Truth in Lending Act is particularly persuasive authority as to the interpretation of the UCCC and CCPA here because one of the Colorado UCCC’s stated purposes is “[t]o conform the regulation of consumer credit transactions to the policies of the federal ‘Truth in Lending Act.’” C.R.S. § 5-1-102(1)(f). Consequently, because automobile dealers (including Medved) do not need to itemize the individual add-on

products under the federal act, it follows that they do not need to do so under the UCCC and the CCPA.

Plaintiff's proposed classes are also flawed because they encompass anyone who purchased a vehicle from Medved with additional dealer items regardless of whether the consumer financed the purchase or paid by cash or trade-in or a combination of trade-in and cash. Someone who did not finance their vehicle *by definition* cannot be part of a putative class based on the CCPA installment sales provision which deals *only* with those who finance a commercial transaction. The method of payment should not determine whether separate conduct violates the CCPA, but it does under Plaintiff's reading of the statute. This is yet further confirmation that the CCPA's installment sales provision was not intended to remedy the purported violation of which Plaintiff complains, as its clear language does not encompass all new vehicle purchasers, in contrast with the many federal and state statutes and regulations already in force that apply to all vehicle purchasers and do not require itemization of dealer add-on products.

If Plaintiff is successful in imposing her reading of the CCPA, CADA members could be exposed to liability in the future because many Colorado dealers use standardized buyers' order forms created by the company Reynolds & Reynolds and other vendors. Any customer who financed a vehicle could argue that a technical failure to disclose a vehicle's component parts violates the installment sales provision of the CCPA. Plaintiff's reading would also harm many other Colorado businesses who engage in consumer financing transactions.²

IV. Were Plaintiff to Prevail, It Would Put Impossible Burdens on Car Dealers with No Discernible Benefit to Customers

To avoid violating section (m) of the CCPA, Plaintiff would require all automobile dealers to list a final price paid for each and every dealer-added product. Plaintiff neglects to consider, however, the practical manner in which car prices are negotiated. Before a vehicle leaves the

² For example, consider: (1) a purchaser of a sofa set on store credit and the sofa set included a slip cover which was added to the sofa by the store; and (2) the additional cost for the slip cover was disclosed on a tag to next to the tag showing the retail price. The customer was told of the slip cover by the salesperson when she was considering buying the sofa set, decided to buy the slip cover, but the final sales receipt from the store did not itemize the slip cover separately but included it within the total price of the sofa set. The department store would arguably have violated section 6-1-105(1)(m) under Plaintiff's reading of the statute even though the omission of the separate slip cover charge has nothing to do with the terms of the installment contract.

dealership, the customer and the dealer negotiate a final, total price for the vehicle that the customer is willing to pay. While this price may include dealer-added items, the prices of these items and multiple other negotiated goods are ultimately subsumed into one, final price agreed to by the parties. Just as there is no separate negotiated price for manufacturer options such as leather seats, DVD players, and sport packages, dealers which add other items at their discretion do so as part of standard business practices.

Plaintiff would require the final price to be arbitrarily allocated among all the additional items. For example, assume the sale of a vehicle with a \$15,000 MSRP with pinstriping for \$500 and a front-end protective coating (e.g. “clear bra” product) for \$250, for a total pre-negotiation price of \$15,750, and the purchaser announced during the negotiation that she liked the clear bra but hated pinstriping, and the final negotiated price was \$14,750, what is the “final” price of the car, the pinstriping, and the clear bra? Should the pinstriping be listed as \$0, \$250 for the clear bra and \$14,500 for the car? Or, should the \$1,000 discount be divided evenly between the car, pinstriping, and clear bra? Should the discount be apportioned based on the relative price of the

preloaded car, pinstriping, and clear bra? Whose perceptions of what the final negotiated price and the allocated price controls if there is a dispute? In addition, extending Plaintiff's argument to its logical conclusion, would the dealer also be required to itemize the manufacturer-installed add-ons to the base model, such as a DVD player, sunroof, or leather seats? More significantly, how does it help the consumer to allocate these post-negotiation costs?

If Plaintiff was to prevail, the consumer and purchaser would have to "negotiate the negotiation," and allocate the discounted amounts to all dealer-added products after already negotiating the final price of the vehicle. Requiring this disaggregation dance serves no practical purpose for the Colorado consumer and exposes new car dealers to potential class action liability for purported CCPA technical violations.

V. Car Dealers Are Highly Regulated and None of the Statutes and Regulations Require the Disclosure Sought Here

Automobile dealers doing business in the state of Colorado must comply with numerous, complex federal and state laws designed to protect and inform consumers during the vehicle sales process. This includes a CCPA provision dealing specifically with the conduct of car dealers regarding representations about financing, accepting trade-ins,

returning down payments, and disclosing salvage vehicles. However, none of these regulations or statutes requires the disclosure and itemization of the post-negotiation price of dealer-added products. The absence of such a disclosure requirement in a heavily regulated industry further illustrates that Plaintiff's interpretation and application of section (m) is incorrect.

A. *CCPA Regulations of Motor Vehicles Sales*

Colorado has a specific statutory provision defining what constitutes a deceptive trade practice under the CCPA in the context of a motor vehicle sale or lease. C.R.S. § 6-1-708. Under this provision, a person engages in a deceptive trade practice when he or she commits any of the following acts pertaining to the sale or lease of a motor vehicle:

(b) Fails to disclose in writing, prior to sale, to the purchaser that a motor vehicle is a salvage vehicle . . . or that a vehicle was repurchased by or returned to the manufacturer from a previous owner for inability to conform the motor vehicle to the manufacturer's warranty . . . or with any other state or federal motor vehicle warranty law or knowingly fails to disclose in writing, prior to sale, to the purchaser that a motor vehicle has sustained material damage at any one time from any one incident. . . .

(a)(I) Guarantees to a purchaser or lessee of a motor vehicle or used motor vehicle who conditions such purchase or

lease on the approval of a consumer credit transaction . . . that such purchaser or lessee has been approved for a consumer credit transaction if such approval is not final . . .

(a)(II) Accepts a used motor vehicle as a trade-in on the purchase or lease of a motor vehicle or used motor vehicle and sells or leases such . . . vehicle before the purchaser or lessee has been approved for a consumer credit transaction . . . , if such approval is a condition of the purchase or lease;

(a)(III) Fails to return to the purchaser or lessee any collateral or down payment tendered by such purchaser or lessee conditioned upon a guarantee by a motor vehicle dealer or used motor vehicle dealer that a consumer credit transaction . . . , has been approved for such purchaser or lessee, if such approval was a condition of the sale or lease and if such financing is not approved and the purchaser or lessee is required to return the vehicle;

Id. at § 708(a)(I) – (III), (b).

Nowhere in this section does the Colorado legislature state that a failure to separately disclose dealer-added products, much less redisclosing the products and a post-negotiated price in a buyer's order, constitutes an unfair or deceptive trade practice.

B. *Federal Motor Vehicle Laws and Regulations*

In the course of retail operations, dealers of new automobiles must comply with an extensive array of federal rules and regulations.³ These provisions require both visual disclosures on the vehicle and written disclosures in the sales documents.

(1) Visual Disclosures

Perhaps the most well-known labeling requirement is the Monroney sticker, mandated by the Automobile Information Disclosure Act, 15 U.S.C. §§ 1231-1233. A Monroney sticker must be placed on all new passenger cars and must include, among other things, the following information: (1) the manufacturer's suggested retail price; (2) the make and model of the vehicle; (3) handling and freight charges; (4) optional equipment and pricing; and (5) crash test ratings as determined by the National Highway Traffic Safety Administration (the "NHTSA"). 15 U.S.C. § 1232.

Under the Magnuson-Moss Act, 15 U.S.C. §§ 2301-2312, the Federal Trade Commission (the "FTC") requires automobile dealers to display warranties near products or post signs in prominent places

³ There are additional federal and state regulations specifically governing disclosures in the sales of used automobiles as well as the leasing of vehicles.

informing consumers that copies of warranties are available for review.
16 C.F.R. pts. 700-702.

The NHTSA also has promulgated a regulation dealing specifically with alteration disclosures. 49 C.F.R. pt. 567. Under this regulation, any dealer who significantly alters a new vehicle must affix a label to that vehicle identifying the alteration and guaranteeing that the vehicle continues to meet federal safety and theft standards. *See id.* at § 567.7. For instance, an alteration label would be required whenever equipment is added to a vehicle that reduces its cargo-carrying capacity, or when tire replacements differ in size or inflation pressure from those referred to on the original Monroney sticker, or if a vehicle is altered to make it handicap accessible. *See id.*

An alteration label is *not* required, however, when a dealer makes minor alterations to a vehicle, such as adding extra products to the vehicle. *Id.* at § 567.6. The NHTSA regulation specifically addresses the type of products at issue in this case:

A person who does not alter a motor vehicle or who alters such a vehicle only by the addition, substitution, or removal of readily attachable components such as mirrors or tires and rim assemblies, or minor finishing operations such as painting, in such a manner that the vehicle's stated weight ratings are still valid, need not affix a label to the vehicle, but

shall allow a manufacturer's label that conforms to the requirements of this part to remain affixed to the vehicle. If such a person is a distributor of the motor vehicle, allowing the manufacturer's label to remain affixed to the vehicle shall satisfy the distributor's certification requirements under the Vehicle Safety Act.

Id. (emphasis added).

Accordingly, the NHTSA alteration regulation plainly states that dealers are free to leave the Monroney sticker in place and need not affix an additional label if the vehicle's stated weight ratings remain the same. *Id.* Attaching an addendum sticker is an additional disclosure provided, but not required of, dealers to inform their customers of any additional items. Dealers are under no obligation to provide such stickers and may fulfill their certification requirements solely through the Monroney sticker. *Id.*

(2) Written Disclosures

In addition to visual disclosures, federal law also mandates that dealers provide a number of written disclosures to customers purchasing motor vehicles. For instance, under FTC regulations, dealers must give consumers certain information on warranties and limited warranties. *See* 16 C.F.R. pts. 700-702.

Moreover, if a customer decides to finance a motor vehicle purchase, a number of federal laws and regulations are triggered. The Federal Truth in Lending Act, 15 U.S.C. §§ 1601-1667, requires that all creditors make several written disclosures to consumers concerning finance charges and related aspects of credit transactions (including disclosing finance charges expressed as an annual percentage rate). Under the FTC's Credit Practices Rule, 16 C.F.R. pt. 444, a dealer must provide a written disclosure statement to a cosigner before the cosigner signs an installment sales contract. This rule also forbids dealers from "pyramiding" late charges (i.e. tacking a late charge onto a payment made in full and on time when the only delinquency was a late charge on a previous statement). *Id.* If a dealer violates any of these or other federal rules, the dealer could also be in violation of section five of the FTC Act, 15 U.S.C. § 45, for committing an unfair or deceptive trade practice.⁴

⁴ Additional federal regulations of consumer finance are found in the Equal Credit Opportunity Act 15 U.S.C. § 1691 *et seq.* & 12 C.F.R. § 202.9 (prohibiting discriminatory practices against credit applications, regulating retention of credit information, and requiring written notification when credit is denied), the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681 *et seq.* (regulating use of credit reports and sharing of credit information and requiring anti-identity theft efforts and disclosure when dealership reports negative

C. *Colorado Motor Vehicle Laws and Regulations*

Beyond the CCPA, Colorado's regulatory scheme (which includes oversight by the Colorado Attorney General, the Colorado UCCC Administrator and the Colorado Motor Vehicle Board) addresses all aspects of the vehicle sales process. Colorado has its own set of mandatory sales disclosures and suggested sales forms. In particular, for every vehicle sold in Colorado, a dealer is required to make the following written disclosures in the vehicle sales contract: (1) an instruction that the form is a legal instrument and the purchaser can seek legal assistance; (2) an instruction that only those terms in written form embody the sales contract; (3) a notice to consumers that fraud or misrepresentation in the sale of vehicle is punishable by law; (4) a provision that the sale is either for a single lump sum or it will be paid through credit financing at a rate not greater than a certain annual percentage rate of financing; and (5) a provision concerning what happens if financing cannot be arranged and the contract is cancelled. 1 C.C.R. § 205-1:12-6-104(3)(k).

information to consumer reporting agency), and the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.* (requiring dealers to provide accurate privacy notice to finance customers and follow restrictions on disclosure of non-public personal information).

Other state-required disclosures may also be necessary depending on the circumstances of a vehicle sale. For instance, if a dealer is to receive any compensation from a prior owner of a used vehicle when the vehicle is sold, the dealer must disclose that information to the client in writing. *Id.* at § 205-1:12-6-108(1)(b). If a vehicle is known to be a salvage vehicle or has sustained any material damage, the dealer must include that information in the vehicle sales contract. *Id.* at § 205-1:12-6-118(3)(i); C.R.S. § 42-6-206. For new vehicles, a dealer must provide the customer with a certificate of title and the bill of sale must contain the following information: (1) the make and model of the motor vehicle; (2) the identification number placed upon the vehicle by the manufacturer; (3) the manufacturer's suggested retail price; (4) the date of the sale or transfer; (5) a description of any mortgage given to secure any part of the vehicle's purchase price; and (6) any other information mandated by rule or regulation. C.R.S. § 42-6-113.

In short, the Colorado General Assembly and the United States Congress provide a comprehensive statutory and regulatory scheme for motor vehicle sales and transactions, including a specific CCPA

provision, to ensure that customers are provided with a wide array of information to inform their purchasing decision. All of this information is provided in addition to the promotional brochures and sales presentations given by dealer representatives. None of these regulations requires an itemized disclosure of additional products to be displayed on the vehicle or in the final sales document. Indeed, mandating such a disclosure would directly contradict the NHTSA alteration regulation, which specifically exempts dealers from disclosing the “addition, substitution, or removal of readily attachable components such as mirrors or tires and rim assemblies, or minor finishing operations such as painting.” 49 C.F.R. § 567.6. If no disclosure is required at all, it cannot be necessary to include such information in a sales contract or addendum sticker.

Implying further regulation of new car dealers in the absence of federal or state statutory directives, through general CCPA provisions, would violate principles of statutory interpretation. If Congress or the Colorado General Assembly wished to require disclosure of additional products through labels on the vehicle or written disclosures in the sales documents, they would have specifically done so, as they have

regulated so many other elements of the purchasing and financing of new motor vehicles. *Accord, e.g., Anderson v. United States*, 85 Fed. Cl. 532, 545 (Fed. Cl. 2009) (“When there is ‘particularization and detail’ in a statutory scheme that Congress has created, a court should not add provisions that are not present in the scheme.”) (quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926)).

Rather, in such a heavily regulated industry, a court should draw the opposite conclusion from legislative silence and find that dealer add-ons have been specifically excepted from disclosure requirements. *Accord Cal. Med. Ass’n, Inc. v. Aetna U.S. Healthcare of Cal., Inc.*, 114 Cal. Rptr. 2d 109, 121 & n.20 (Cal. App. 2001) (“If the Legislature had intended to effect such purported major structural change in the existing highly-regulated health care finance and delivery schemes, such intent would have been expressly reflected in the text of [statute] or its legislative history. . . . In the ‘absence of clear legislative direction,’ courts ‘are unwilling to engage in complex economic regulation under the guise of judicial decision making.’”) (citations omitted); *Gray v. Seaboard Secs., Inc.*, 788 N.Y.S.2d 471, 472 (N.Y. App. Div. 2005) (rejecting plaintiffs’ purported deceptive practice action by reasoning

that “because the securities arena is one which is highly regulated by the federal government, it is questionable that the ‘legislature intended to give securities investors an added measure of protection beyond that provided by securities acts.’”) (citations omitted).⁵ As stated in the *California Medical Association* decision, this Court should be unwilling to engage in additional, complex economic regulation under the guise of judicial decision making, particularly in a heavily regulated arena like motor vehicle sales.

⁵ See also *Kenebrew v. Conn. Gen. Life Ins. Co.*, 882 F. Supp. 749, 754 (N.D. Ill. 1995) (“[T]he court notes that the insurance industry is highly regulated in Illinois. If the Illinois legislature intended to protect insurance sales representatives, it most likely would have done so specifically, rather than lumping such protection into a general statute.”); *Renown Health, Inc. v. Vanderford*, 235 P.3d 614, 616 (Nev. 2010) (“The Legislature has heavily regulated hospitals and would have codified a nondelegable duty to emergency room patients if the Legislature had intended such a duty to be imposed on hospitals.”).

CONCLUSION

Amicus requests that this Court affirm the Court of Appeals' opinion.

Dated: December 13, 2010

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