IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

Yuling Zhan,	)	
Plaintiff	)	
V.	)	No: 04 M1 23226
Napleton Buick Inc,	)	
Defendant	)	

REPLY TO DEFENDANT'S AFFIRMATIVE DEFENSES 2 AND 4

NOW COMES the plaintiff, YULING ZHAN, respectfully submits a Reply To Defendant's Affirmative Defenses 2 and 4, and states as follows:

I. BACKGROUND

On December 22, 2004, plaintiff filed the instant lawsuit against a car dealership Napleton Buick Inc. ("Buick"), now named as D'Andrea Buick Inc., and raised a variety of claims. On May 5, 2005, Plaintiff filed an Amended Complaint ("Complaint"). One month later on June 21, 2005, Buick submitted its Motion To Dismiss And/Or Strike.

On October 20, 2005, defendant's Motion To Dismiss And/Or Strike was stricken, and Buick became in default for failure to plead because it did not move for leave to file an Answer.

On November 28, 2005, defendant eventually filed an Answer, but failed to serve plaintiff an official file-stamped copy, further, defendant and its counsel claimed on oath that they had served papers upon Ford Motor Company. Even for this reason only, as stated in Plaintiff's Motion To Reconsider February 28, 2006 Order, the answer, including

Affirmative Defenses incorporated therein, should have no legal effect other than providing evidence in support plaintiff's claims .

On March 13, 2006, plaintiff filed a Motion To Strike Defendant's Affirmative Defense, and on March 28, 2006, plaintiff's motion was granted as to defendant's Affirmative Defenses 1, 3, and 5; that meant those affirmative defenses were stricken by the Honorable Court.

Here, plaintiff will further address the fatal defects in defendant's Affirmative Defenses 2 and 4. And Buick's original Affirmative Defenses have been attached as Exhibit A.

II. REPLY TO AFFIRMATIVE DEFENSE 2

1. Under Magnuson-Moss Act, Illinois UCC, Illinois Fraud Act and common law, revocation of acceptance is a viable private cause of action. When defendant and its counsel assert otherwise as they always did, the argument would be not only frivolous, but also scandalous. This is one of the reasons why defendant's June 21, 2005 Motion To Dismiss And/or Strike was stricken.
2. The moment after plaintiff noticed defendant her intention to revoke on September 9, 2003, evidence had to be reserved, the condition of the subject car can not be altered in any way under 810 ILCS 5/2-515. And defendant did not need any car key to participate in a joint inspection.
3. It is improper for defendant to attack the legal ground of plaintiff's pleading in an affirmative defense. By definition, defendant's second Affirmative Defense is not affirmative at all, and it should be stricken as a matter of law. Here, plaintiff incorporates II LEGAL STANDARD and IV B in Plaintiff's Motion To Strike Affirmative Defense, filed on March 13, 2006.
4. When asserting an affirmative defense, defendant failed to offer any fact, therefore, its second Affirmative Defense should be

stricken as a matter of law. See Illinois statute and case law cited in II B, Plaintiff's Motion To Strike Affirmative Defense, which was filed on March 13, 2006.

5. On September 9, 2003, plaintiff sent a letter and fax to Buick as a notice of revocation, asking the dealer to respond in three days by fax, so the problem could be solved in one week. But in fifteen months, Buick failed to do so. Such statement has been included in the Complaint and plaintiff's other court filings. It is improper for defendant to attack the factual allegations in plaintiff's pleading in order to concoct an affirmative defense.

6. Without question, after September 8, 2003, possession of car key had no benefit for plaintiff except prevention from altering the car condition.

7. On September 14, 2003, plaintiff wrote a letter to the Illinois Attorney General's Office ("Office"). In its undated response to the same government agency, Buick contended it would repair the car, and argued it sent out a letter, allegedly dated September 10, 2003, addressed to plaintiff and asked for car keys. In her November 2, 2003 letter sent to the same Office, plaintiff promptly pointed out that the letter was falsified. For more than one year, Buick had never challenged plaintiff's assertion before the lawsuit was filed. Therefore, it would be improper for defendant and its counsel to attack the same factual allegation in an affirmative defense.

8. On October 17 of 2003, Buick sent a "Thank you" note to plaintiff and informed her the license plate was available. See Exhibit B. In the mail, Buick did not ask for car keys, did not mention any warranty, and Buick did not show any interest to inspect or repair the car. Without question, by its action and inaction, Buick considered the transaction of the subject car was complete at that time. After the lawsuit has been filed, Buick and its counsel will be

in an irreconcilably contradictory position whenever they argue that defendant did send plaintiff a September 10, 2003 letter and asked for car keys in order to repair the car.

9. In August of 2004, Buick sent out advertisement material, inviting plaintiff to "trade in" the subject car. See Exhibit C. In the mail Buick did not mention any warranty, and showed no interest to fix or inspect the car. Without question, Buick considered the transaction of the subject car was complete by this action and inaction. After a lawsuit has been filed, Buick and its counsel will be in irreconcilably contradictory position whenever they argue, that defendant did send plaintiff a September 10, 2003 letter and seek an opportunity to repair the car.

10. Beyond any reasonable doubt, it is defendant's counsel, Ms. Elaine S. Vorberg and Mr. Ryan Haas, who became eager and eager to demand the car keys in and out of court, but they had no legitimate reason to do so. Their motive became crystal clear after they cooked up a counterclaim and demanded a Court Order to depose of the subject car. As the Honorable Court can see, it would be an insult to human intelligence if defendant and its counsel argue they were seeking an opportunity to repair the vehicle to honor any warranty during court proceedings and before discovery. And the logic is absurd when defendant and its counsel contend their effort in spoliation can be a factual ground for an affirmative defense. Further, there would be no doubt, that misconduct from defendant's counsel is in violation of IRPC 3.4, which is part of Illinois Supreme Court Rules, and which shall have the force of law.

III. REPLY TO AFFIRMATIVE DEFENSE 4

1. The federal Magnuson-Moss Act imposes limitations on disclaimers of implied warranty, as 15 U. S. C. § 2308 articulates, in part, "[N]o supplier may disclaim or modify *** any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product***. "
2. In *Vicki v. Ford Motor Company*, No. 1-02-2058, Slip opinion, (Ill. 1st Div. July 31, 2003), the Court holds that there is a relationship between Magnuson-Moss Act (the "Act"), State Statutes and common law. Under the supremacy clause of the U. S. Constitution, "[f]ederal preemption of state law can occur in three circumstances: *** (3) implied preemption, where there has been an actual conflict between federal and state law." See *Mejia v. White GMC Truck, Inc*., 336 Ill. App. 3d 702, 705 (2002). In any such situations, the Act controls.
3. Without question, for the subject car, there should be a written warranty at the time of purchase, no matter what its term had been. Buick shall be in per se violation of the Act in breach of implied warranty when it did disclaim the implied warranty in the contract. As well known, when establishing the Act, it is the legislative intent to provide more protection for consumers. But defendant and its counsel consistently refuse to recognize that whenever there is a written warranty, there should be an implied warranty governed by the UCC. Here, defendant and its counsel are completely wrong to suggest there is any conflict between the Act and Illinois UCC on the issue of implied warranty.
4. As stated in <u>Plaintiff's Motion To Strike Affirmative Defense</u> IV D, defendant misinterprets the law, attacks the legal foundation of plaintiff's claims. This cannot constitute an affirmative defense, and it should be stricken as a matter of law.

5. As the Honorable Court can see, here and as always, defendant and its counsel have been trying to deny that the subject car was under any implied warranty when it was sold. This provides the best evidence that Buick is in breach of written warranty under the Magnuson-Moss Act and Illinois UCC, Buick is in violation of Illinois Fraud Act, and Buick has committed common law fraud.

6. In several months of court proceedings, defendant filed its <u>Motion To Dismiss And/Or Strike</u> twice in the court, presented it to three Judges on four occasions in order to solicit a ruling in their favor. There are already one oral ruling and two written orders on the same issue of implied warranty under Magnuson-Moss Act. Defendant and its counsel simply cannot face the fact that their frivolous, laboring and desperate argument has been either "denied" or "stricken" by two Judges on three occasions. As the Honorable Court can see, it is an impermissible practice for defendant and its counsel to repackage and recycle an old and failed contention as an affirmative defense, trying to play the same trick again.

Respectfully submitted,

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(Plaintiff's Signature) (Date)

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