

556723

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

DAVID BUSCH

NO.

Individually and on behalf of all
others similarly situated,

Plaintiff

vs.

VOLKSWAGEN OF AMERICA, INC.

Defendant

Case: 2:07-cv-11759
Assigned To: Zatkoff, Lawrence P
Referral Judge: Scheer, Donald A
Filed: 04-20-2007 At 03:43 PM
CMP BUSCH V VOLKSWAGEN OF AMERICA I
NC (LH)

JURY TRIAL DEMANDED

Class Action Complaint

Notice To Preserve Records And Documents

You are hereby notified to preserve all records and documents in all forms and formats (digital, electronic, film, magnetic, optical, print, etc.) during the pendency of this action that are relevant or may lead to relevant information and to notify your employees, agents and contractors that they are required to take appropriate action to do so.

Introduction

Plaintiff¹ brings this class action against Volkswagen Of America, Inc. (VWOA) due to its failure to provide warranty service for VWOAs with factory installed analog only OnStar telematic equipment. VWOA sold factory installed OnStar systems as

¹ All information concerning the plaintiff is based on personal knowledge. All other allegations in this complaint are based on information and belief of the plaintiff and his counsel, after reasonable investigation.

optional equipment on 2004 VWOA Passat and other VWOA models. OnStar is an in-vehicle telecommunication device that provides automatic crash notification to emergency responders, stolen vehicle location, remote door unlock and remote diagnostics in the event of problems with airbags, anti-lock brakes or other systems. VWOA represented that the OnStar equipment was covered under the vehicle's "New Vehicle Warranty". In March, 2007 VWOA informed plaintiff that his OnStar equipment, due to its analog only design, would not function after December 31, 2007. VWOA refuses to provide plaintiff with warranty repairs or replacement. Plaintiff seeks damages for himself and all others similarly situated.

The Parties

1. Plaintiff is David Busch of 43 Moffat Road, Washingtonville, New York. Plaintiff is a citizen of the state of New York. He brings this action individually and on behalf of all others similarly situated as more fully defined below.

2. Defendant Volkswagen of America (VWOA) is a corporation engaged in the sale and distribution of motor vehicles in the United States. VWOA maintains its corporate headquarters at 3800 Hamlin Rd., Auburn Hills, Michigan and is a citizen of the state of Michigan.

3. At all relevant times, VWOA acted by and through its agents, servants, workmen and employees who were then and there acting within the course and scope of their permission, agency, employment and authority, in furtherance of VWOA's business, and otherwise on behalf of VWOA.

Jurisdiction and Venue

4. This is a class action involving parties of diverse citizenship. The amount in controversy is in excess of \$5 million. The court has diversity and/or minimum diversity jurisdiction under 28 U.S.C. §§1441 and 1446(d).

5. Venue is proper in this district because this is where VWOA maintains its corporate headquarters and where the policies and practices were formulated and directed. Many of the acts and transactions giving rise to the violations of law alleged herein occurred within and emanated from VWOA's offices in Michigan. Specifically, the marketing and sales materials discussing OnStar, and containing the material misstatements and omissions alleged herein, were designed, developed and approved by VWOA personnel at facilities in Michigan. The overall marketing and sales efforts for OnStar were directed and controlled from VWOA's facilities in Michigan.

Background

6. At all relevant times, VWOA has been engaged in the business of selling OnStar equipped motor vehicles through a network of authorized dealers throughout the United States.

7. OnStar is a factory installed telematic device that provides communications, position and vehicle monitoring services for the owners/lessors and occupants of vehicles equipped with the device.

(a) OnStar is essentially a cellular telephone and global positioning device that is connected to the vehicle's electrical and computer system with controls that are accessible in the passenger compartment.

(b) Occupants of a VWOA OnStar equipped vehicle can communicate with the OnStar Center by pressing a button. The equipment uses confidential access numbers arranged by VWOA with third-party cellular service providers.

(c) In the event of a crash, OnStar equipment is programmed to automatically communicate with the OnStar Center and provide vital emergency information to police and other rescue personnel and responders. The OnStar device can also provide other services including diagnostic information about the vehicle, remote door lock and stolen vehicle location.

(d) From its inception and for a considerable period of time thereafter, VWOA's OnStar equipment used analog signals to communicate with cellular systems.

(e) Vehicles with analog only OnStar equipment only function on analog cellular systems.

8. VWOA supplied and installed analog-only OnStar systems as optional equipment and charged its customers added fees of several hundred dollars for the OnStar equipment.

9. OnStar service is available on a subscription basis only to OnStar equipped vehicles.

10. VWOA touted OnStar as optional equipment that would provide added safety, security and convenience.

11. Since at least September 2002, VWOA knew that analog only OnStar equipment installed in its vehicles would not function as of February 18, 2008.

Facts As To The Representative Plaintiffs

12. On or about March 9, 2004, plaintiff purchased a new 2004 VWOA Passat from an authorized VWOA dealer. His vehicle included OnStar telematic equipment as a factory installed option. The MSRP for the OnStar device was \$899.

13. At the time of purchase, VWOA expressly represented and warranted that plaintiff's vehicle was covered by a "New Vehicle Warranty" for a period of four years or 50,000 miles which ever occurs first. Further, VWOA represented and warranted that the New Vehicle Warranty covered "any repair to correct a manufacturer's defect in material or workmanship", that the Warranty would be honored by any authorized VWOA dealer in the United States, and that repairs or replacements would be made "free of charge".

14. The OnStar equipment in plaintiff's vehicle was covered by the New Vehicle Warranty.

15. Plaintiff purchased his vehicle for personal, family and household use.

16. At the time of purchase, VWOA expressly and impliedly represented to plaintiff that his OnStar equipment would provide him with safety and security and would function and be available for the life of his vehicle.

17. At the time of purchase, VWOA expressly and impliedly represented and warranted to plaintiff that the OnStar equipment in his vehicle was free of defects and would be suitable for use as a telematic device and compatible with the OnStar system.

18. VWOA's implied warranties included its custom and practice of providing repair parts and service for defective safety components for the reasonable life of a vehicle. This custom and practice was part of plaintiff's bargain to purchase his vehicle.

19. At the time of purchase, VWOA did not disclose to plaintiff that the OnStar equipment in his vehicle was analog only and would not function on digital cellular systems.

20. By letter dated February 26, 2007, VWOA advised plaintiff that his OnStar equipment would not function after December 31, 2007 because of its analog only design and that it would not repair or replace the OnStar equipment to function on a digital cellular service.

21. Prior to February 26, 2007, VWOA concealed from plaintiff that the OnStar equipment in his vehicle would be incompatible with the OnStar system, that VWOA would not provide or make available compatible equipment, that his OnStar equipment would be inoperable and would cease to function after December 31, 2007.

22. The OnStar equipment in plaintiff's vehicle is defective, does not function as warranted and was defective at the time of purchase.

23. The OnStar equipment in plaintiff's vehicle is not suited for its intended purpose.

24. VWOA directly and through its dealer network refuses to repair and/or replace the OnStar equipment in plaintiff's vehicle so that it will operate on digital cellular networks.

25. Solely as a result of VWOA's conduct:

(a) plaintiff will incur costs and expenses to replace and/or repair the analog OnStar equipment in his vehicle to function with digital cellular service;

(b) plaintiff will suffer significant depreciation and the loss of value of his vehicle due to the nonfunctional analog OnStar equipment; and

Class Action Allegations

26. Any applicable statute of limitations that might otherwise bar class members' claims should be tolled because plaintiff and members of the class had no realistic ability to discern that the OnStar equipment would become useless.

27. Notwithstanding the exercise of due diligence, plaintiff and class members could not reasonably have been expected to learn or discover the fact that they were deceived, and that material information concerning the OnStar equipment was concealed from them. Therefore, the claims being asserted by plaintiff and the class present the archetypical scenario in which the discovery rule is applicable.

28. VWOA is also estopped from relying on any statutes of limitation by virtue of its acts of fraudulent concealment. Upon information and belief, VWOA knew or should have known that its OnStar systems were defective since at least 2002, if not

earlier, and concealed from owners and lessees of the motor vehicles the impending failure of their OnStar equipment.

29. Plaintiff bring this action individually and on behalf of the following class:

All persons and entities in the United States who own or lease VWOA motor vehicles equipped with analog only OnStar equipment.

Excluded from the class are VWOA's and OnStar's officers, directors, and senior executives.

Plaintiff reserves the right to modify the class definition after discovery and at any time up to and including trial.

30. Plaintiff believes that VWOA has acted in the same or similar manner with respect to all class members.

31. All class members purchased the same or similar incompatible, defective and unsuitable analog only OnStar equipment, received the same representations, have the same express and implied agreements and warranties, and have or will sustain the same or similar damages.

32. Numerosity. Members of the class are so numerous that joinder of all members is impracticable. Plaintiff believes that there are many hundreds of class members.

33. Commonality. There are numerous questions of law and fact that are common to all class members and that predominate over individual questions, if any.

- (a) Common questions of fact include but are not limited to:
 - (i) All class members purchased or leased a vehicle with factory installed analog only OnStar equipments.
 - (ii) All class members' OnStar equipment is covered under the VWOA New Vehicle Warranty.
 - (iv) All class members' OnStar equipments is defective.
 - (v) All class members are entitled to repair, replacement or reimbursement at the expense of VWOA.
 - (vi) All class members purchased their OnStar equipment as a consumer product.
 - (vii) VWOA maintains the same customs, policies and practices regarding service and repairs for analog only OnStar equipment.
 - (viii) VWOA concealed and failed to disclose the same information regarding its failure to provide repairs, replacements or reimbursement for analog OnStar equipment.
 - (ix) VWOA refuses to provide class members with repairs, replacements or reimbursement.
 - (x) All class members have suffered the same or similar damage as a result of VWOA's conduct.
- (b) Common questions of law include but are not limited to:
 - (i) Did VWOA breach its express warranties?

- (ii) Did VWOA breach its implied warranties of merchantability?
- (iii) Did VWOA breach its implied warranties of fitness for particular purpose?
- (iii) Did VWOA violate the Michigan Consumer Protection Act?

34. Typicality. Plaintiff's claims are typical of the claims of the class. Plaintiff is a member of the class. He is asserting the same rights, making the same claims, and seeking the same relief for himself and for all other class members.

35. Adequate and Fair Representation. Plaintiff will fairly and adequately represent and protect the interests of the class. Plaintiff has no interests that conflict with or which are adverse to the interests of other class members. Plaintiff has retained qualified counsel who are able and experienced in class action litigation.

36. Fairness and Efficiency/Superiority. A class action is a fair and efficient method to adjudicate this controversy.

(a) Common questions of law and fact predominate over individual questions.

(b) Plaintiff's claims and the class's claims are based on the same common nucleus of operative facts. Proof of plaintiff's claims will effectively prove the claims of all other class members.

(c) Resolution of the class's claims will depend on the application of common principles of law.

(d) A class action will permit a large number of relatively small claims involving similar facts and legal issues to be resolved efficiently in one proceeding based on common proof.

(e) This case is manageable as a class action in that:

(1) The material evidence is relatively simple and centralized.

(2) VWOA maintains computer and business records which will enable plaintiff to identify class members and establish liability and damages.

(3) Damages for class members can be calculated in the same or similar manner.

(f) the claims of individual class members are not sufficiently large enough to support litigation on an individual, case-by-case basis.

(g) A class action will result in an orderly and expeditious administration of claims and will foster economies of time, effort and expense.

(h) A class action will contribute to uniformity of decisions concerning defendants' conduct.

(i) This class action is the best available method, and indeed the only realistic method, by which plaintiff and the class can seek redress for the harm caused by VWOA.

37. Plaintiff incorporates all of the above paragraphs into all of the Counts of the Complaint set forth below.

Count I- Breach Of Express Warranty

38. VWOA expressly warranted to plaintiff and all other class members that their OnStar equipment would be free of defects in workmanship and materials for four (4) years or 50,000 miles from the date of purchase, whichever occurs first, and that VWOA would repair or replace such defective equipment at no cost to plaintiff and other class members.

39. The OnStar equipment sold and delivered to plaintiff and all class members was defective in materials and workmanship and failed during the warranty period.

40. Contrary to its warranty, VWOA refuses to repair or replace plaintiff's defective OnStar equipment and the defective OnStar equipment of all other class members at no cost to plaintiff and the class.

41. VWOA breached its express warranties to plaintiff and all other class members to repair and/or replace their OnStar equipment so that it is in good operational condition and repair and suitable for its intended use.

Count II - Breach of Implied Warranty Of Merchantability

42. At the time of contracting, VWOA impliedly warranted that plaintiff's OnStar equipment and the OnStar equipment of all class members was of merchantable quality and suitable for ordinary use.

43. The OnStar equipment sold and delivered to plaintiff and all class members was not of merchantable quality and was not suited for its ordinary use.

44. VWOA breached its implied warranty of merchantability of the OnStar equipment to plaintiff and all other class members.

45. Plaintiff and the class incurred damages as a proximate result of VWOA's breach.

Count III - Breach of Implied Warranty Of Fitness

46. At the time of contracting, VWOA knew or had reason to know that plaintiff's OnStar equipment and the OnStar equipment of all class members would be used for a particular purpose: as a telematic device on digital cellular networks.

47. The OnStar equipment was unfit for this particular purpose.

48. Plaintiff and the class relied on VWOA's skill and judgment in selecting the OnStar equipment in their vehicles.

49. VWOA breached its implied warranty of fitness for a particular purpose to plaintiff and all other class members.

50. Plaintiff and the class incurred damages as a proximate result of VWOA's breach.

Count IV – Violation of Consumer Protection law

51. Plaintiff and members of the class are consumers and VWOA is a seller and is therefore subject to the Michigan Consumer Protection Act and under similar consumer protection statutes in other states.

52. The VWOA's warranties are consumer warranty and service contracts, products and merchandise.

53. VWOA uniformly and knowingly misrepresented the terms of its warranties as providing coverage for navigational/motorist assistance equipment such as OnStar.

54. VWOA uniformly and knowingly omitted from its statements to consumers the material fact that its warranties would not cover analog only OnStar equipments, thus misleading plaintiff and all class members, as to the true nature and character of the VWOA warranties.

55. VWOA's actions in connection with the sale of OnStar equipment and the administration of its warranties evidence a lack of good faith, honesty in fact and observance of fair dealing, and constitute unconscionable and unfair business practices.

56. VWOA's actions in connection with the sale of OnStar equipment and the administration of its warranties caused confusion and misunderstanding over the character, quality and coverage of the warranties, and constitute unconscionable and unfair business practices.

57. VWOA's statements, representations, omissions, and practices made in connection with their sale of the OnStar equipment as alleged herein were in violation of the following sections of the Michigan Consumer Protection Act, MCL § 445.903:

(a) §445.903(c) by representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities, which they do not have

or that a person has sponsorship, approval, status, affiliation, or connection, which he does not have.

(b) §445.903(n) by causing a probability of confusion or of misunderstanding as to the legal rights, obligations or remedies of a party to a transaction.

(c) §445.903(p) by disclaiming or limiting the implied warranty of merchantability and fitness for use, without clearly and conspicuously disclosing a disclaimer.

(d) §445.903(s) by failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

(e) § 445.903(bb) by making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

(f) §445.903(cc) by failing to reveal facts which are material to the transaction in light of representations of fact made in a positive manner.

58. VWOA's actions constitute unfair competition or unfair, unconscionable, deceptive or fraudulent acts or practices in violation of consumer protection laws of Michigan and the similar consumer protection laws and unfair trade practices laws of other states.

59. VWOA's violations of the Michigan Consumer Protection Act and the similar laws of other states proximately caused plaintiff and the class to suffer ascertainable economic damage and loss.

WHEREFORE, plaintiff, individually and on behalf of all class members, request judgment in their favor and against defendant, VWOA, and requests the following relief:

- (a) certification of the plaintiff class, the appointment of plaintiff as the class representative, and the appointment of plaintiff's counsel as class counsel;
- (b) compensatory damages for the class to be determined at trial, together with interest and costs;
- (c) exemplary damages and reasonable attorney's fees pursuant to the Michigan Consumer Protection Act; and
- (d) such other relief as may be just, necessary or appropriate.

JURY DEMAND

Plaintiff demands a jury trial.

Respectfully submitted,

Date: April 20, 2007

By: 

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Plaintiff Class*

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
DAVID BUSCH

DEFENDANTS
VOLKSWAGEN OF AMERICA, INC.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Orange Cnty. NY
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED Oakland Cnty. MI
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(C) ATTORNEYS (FIRM NAME, ADDRESS AND TELEPHONE NUMBER)
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ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(FOR DEF)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in item III)

Case: 2:07-cv-11759
Citi: Assigned To: Zatkoff, Lawrence P DEF 4
Citi: Referral Judge: Scheer, Donald A 5
Filed: 04-20-2007 At 03:43 PM
CMP BUSCH V VOLKSWAGEN OF AMERICA I
Citi: NC (LH) 6
Fc: _____

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
110 Insurance 120 Marine 130 Millar Act 140 Negotiable Instrument 150 Recovery of Overpayment & Enforcement of Judgment 151 Medicare Act 152 Recovery of Defaulted Student Loans (Excl. Veterans) 153 Recovery of Overpayment of Veteran's Benefits 160 Stockholders' Suits 180 Other Contract 195 Contract Product Liability	PERSONAL INJURY 310 Airplane 315 Airplane Product Liability 320 Assault, Libel & Slander 330 Federal Employers' Liability 340 Marine 345 Marine Product Liability 350 Motor Vehicle 355 Motor Vehicle Product Liability 360 Other Personal Injury	362 Personal Injury—Med. Malpractice 365 Personal Injury—Product Liability 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY 370 Other Fraud 371 Truth in Lending 380 Other Personal Property Damage 385 Property Damage Product Liability	610 Agriculture 620 Other Food & Drug 625 Drug Related Seizure of Property 21 USC 881 630 Liquor Laws 640 R.R. & Truck 650 Airline Regs. 660 Occupational Safety/Health 690 Other	422 Appeal 28 USC 158 423 Withdrawal 28 USC 157 PROPERTY RIGHTS 820 Copyrights 830 Patent 840 Trademark
REAL PROPERTY 210 Land Condemnation 220 Foreclosure 230 Rent Lease & Ejectment 240 Torts to Land 245 Tort Product Liability 290 All Other Real Property	CIVIL RIGHTS 441 Voting 442 Employment 443 Housing/Accommodations 444 Welfare 440 Other Civil Rights	PRISONER PETITIONS 510 Motions to Vacate Sentence HABEAS CORPUS 530 General 535 Death Penalty 540 Mandamus & Other 550 Civil Rights 555 Prison Condition	LABOR 710 Fair Labor Standards Act 720 Labor/Mgmt. Relations 730 Labor/Mgmt. Reporting & Disclosure Act 740 Railway Labor Act 790 Other Labor Litigation 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY 801 HIA (1395ff) 802 Black Lung (923) 803 DWC/DIWW 804 SSID Title XVI 805 RSI (405(g)) FEDERAL TAX SUITS 870 Taxes (U.S. Plaintiff or Defendant) 871 IRS — Third Party 26 USC 7509
				400 State Reapportionment 410 Antitrust 430 Banks and Banking 450 Commercial/CC Rates/etc. 480 Deportation 470 Racketeer Influenced and Corrupt Organizations 810 Selective Service 850 Securities/Commodities/Exchange 875 Customer Challenge 12 USC 3410 881 Agricultural Acts 882 Economic Stabilization Act 893 Environmental Matters 894 Energy Allocation Act 895 Freedom of Information Act 900 Appeal of Fee Determination Under Equal Access to Justice 950 Constitutionality of State Statutes 980 Other Statutory Actions

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)
 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multidistrict Litigation
 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)
 28 USC §§ 1441 and 1446(d)

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE April 20, 2007 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY
 RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

SUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed? Yes
 No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.) Yes
 No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

Notes:
