

INTRODUCTION

1. This is an action for damages arising from breach of contract and breach of implied and express warranty due to Defendants' inability to deliver a merchantable vehicle to Mr. Atwell and the other Class Members.

2. GM manufactures the Chevrolet Avalanche. Defendants together market and sell the Avalanche. The Avalanche is designed to be a flexible vehicle that is able to convert between an SUV and a truck. However, Defendants' Avalanche vehicle contains defective window panels that substantially affects their use, value and safety. Specifically, the window panels in the midgate section of the vehicle leak any fluid that comes into contact with the surface of the Avalanche. This leaking renders the Avalanche incapable of carrying cargo or passengers in the affected section. In addition, the uncontrolled leaking also proves to be a dangerous distraction for the driver of the vehicle. This defect diminishes the value of the Avalanche. Moreover, consumers of the Avalanche are being deprived of the normal and reasonable use of the vehicles without alternatives, other than to drive the vehicle with the defect and/or to return the vehicles for constant, ineffective repair attempts on a regular basis. Additionally, Defendants violated the express and implied warranties given with the Avalanche by failing to remedy the defect and/or by charging consumers for repairs and replacement parts due to the leakage defect.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this class action pursuant to 28 U.S.C. § 1332 as amended by the Class Action Fairness Act of 2005 because the matter in controversy exceeds \$5,000,000, exclusive of interest and costs, and is a class action in which some members of the Class are citizens of states different than Defendants. See 28 U.S.C. §

1332(d)(2)(A). This Court also has personal jurisdiction over Defendants because they are authorized to do business and in fact do business in this state and District and Defendants have sufficient minimum contacts with this state and District, and/or otherwise intentionally avail themselves of the markets in this state and District through the promotion, marketing and sale of their products in this state, to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

3. Venue is proper in this District under 28 U.S.C. §§ 1391. Defendants do substantial business in the State of Missouri and within this Federal Judicial District, advertise in this District, receive substantial compensation and profits from the sales of their automobiles and other goods and services in this District, and have breached contracts and warranties in this District so as to subject them to in personam jurisdiction in this District. The transactions between Defendants and the named Plaintiff, Michael Atwell, occurred in this District.

PARTIES

4. Plaintiff Michael Atwell is an adult individual and a citizen of the State of Missouri, residing in Marceline, Missouri. He brings this action in his own right and on behalf of all others similarly situated.

5. Defendant GM is a Delaware Corporation with its principal place of business located in Detroit, Michigan. Upon information and belief, GM is in the business of manufacturing and selling automobiles as well as goods and services related to the sale and maintenance of automobiles. GM is registered with the Missouri Secretary of State and, upon information and belief, either directly or through its predecessors, successors, and/or affiliates, marketed and/or sold automobiles, including the Chevrolet Avalanche at issue in the present case, and related goods and services in this District.

6. Cupp is a Missouri corporation with its principal place of business located in Marceline, Missouri. Cupp is in the business of selling new cars manufactured by GM. Cupp also offers repair and warranty services. Cupp acts as an agent of GM for the purposes of repair and warranty services.

FACTUAL BACKGROUND

7. GM first began manufacturing the Chevrolet Avalanche in 2001. The Avalanche is a four-door six-passenger sport utility truck. The open bed of the Avalanche opens to the back seat via a folding panel (marketed as a “midgate”) and removable rear window. A series of three removable panels form a supposedly watertight top over the cargo bed.

8. GM expressly warranted to all purchasers and lessees the Avalanche would be free of defects in material and workmanship for 3 years or 36,000 miles. Cupp acts as GM’s agent for purposes of this warranty.

9. Despite this express warranty, Defendants have known for years of the defect in the midgate area of the vehicle that allows water and other fluid to leak into the cabin of the Avalanche. A multitude of customers, including Mr. Atwell, have complained and submitted their vehicles for repair work related to this defect. However, as Defendants are aware, this defect is incapable of being repaired.

10. The leakage defect is a systemic design, materials and/or workmanship defect and not merely a manufacturing peculiarity of a select number of Defendants’ Avalanche vehicles.

The leakage defect has, does, or will affect all members of the Class, including Mr. Atwell.

The Defect in Michael Atwell’s Vehicle

11. On or about January 12, 2006, Michael Atwell purchased a 2006 Chevrolet Avalanche for \$26,030.35 plus tax from Cupp bearing the Vehicle Identification Number

3GHEC12Z66G135087. Mr. Atwell purchased the vehicle primarily for personal use. The transaction was accomplished via an oral contract exchanging cash for title.

12. Since Mr. Atwell's purchase of the Avalanche the vehicle has consistently exhibited and suffered from the leakage defect. Mr. Atwell notified Defendants of the leakage defect and returned the Avalanche to Cupp for repairs under the warranty on at least five different occasions. Defendants have been unable to remedy the defect. In fact, on one trip to the repair shop employees of Cupp tried to use housing caulk to seal the leak. However, all repair attempts have been ineffective and the defect persists to this day.

13. As a result of the leakage defect, Mr. Atwell's use and enjoyment of his Avalanche has been constantly and substantially impaired. Specifically, Mr. Atwell has been unable to carry cargo or passengers in the rear area of the vehicle; he has been forced to drive through hazardous conditions with the distraction of water leaking into his vehicle; he has forced to take his vehicle to Cupp for numerous attempts at repairing the defect, costing Mr. Atwell time and money; and his vehicle has been diminished in value because of the defect.

14. Due to this defect, Mr. Atwell demanded rescission in a timely manner from Defendants. Defendants have refused to honor this demand.

15. As a direct and proximate result of Defendants' conduct Mr. Atwell and the Class Members are entitled to actual damages for the failure of consideration in connection with and/or difference in value arising out of the variance between Defendants' vehicle as warranted and Defendants' vehicle containing the defect; the depression of resale value of the Avalanche suffered by Mr. Atwell and class members arising out of the leakage defect; sufficient funds to permit Mr. Atwell and the class to obtain effective repairs for each affected vehicle using proper parts and adequately trained labor; a refund of all monies paid out-of-pocket by Mr. Atwell and

the Class as compensation for all out-of-pocket expenses that Mr. Atwell and the Class have incurred as a result of being unable to use their vehicles, including any and all alternative forms of transportation; and/or rescission of their contracts of sale and/or lease, as appropriate.

CLASS ACTION ALLEGATIONS

16. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff seeks certification of a nationwide Consumer Class defined as follows:

All persons and entities in the United States and its territories that purchased a Chevrolet Avalanche.

Excluded from the proposed Class are (i) any Defendant, any entity in which any Defendant has a controlling interest or which has a controlling interest in, and Defendants' legal representatives, predecessors, successors, and assigns; (ii) the judge to whom this case is assigned and any member of the judge's immediate family; and (iii) all persons who properly execute and file a timely request for exclusion from the Class.

17. The Class is composed of at least hundreds of thousands of individuals who purchased Defendants' Avalanche vehicle.

18. The Class is so numerous that joinder of all members is impracticable.

19. There are questions of law and fact common to the Class. Representative questions of law and fact include:

(a) whether the terms and conditions sales contract between Defendants and Class

Members are substantially similar;

~~(b) whether the terms and conditions of the express warranty between Defendants and~~

Class Members are substantially similar;

(c) whether the water leakage in the Avalanche constitutes a defect;

(d) whether the Avalanche, as sold, was of merchantable quality;

(e) whether Defendants are merchants with respect to vehicles such as the Avalanche;

- (f) whether the Avalanche, as sold, breached Defendants' express warranty;
- (g) whether the Avalanche, as sold, breached Defendants' contract with the Class Members; and
- (h) whether the conduct alleged here results in damages to Defendants' customers and, if so, the proper measure of those damages.

20. The claims of the representative Plaintiff are typical of the claims of the Class.

21. Plaintiff will fairly and adequately assert and protect the interest of the Class,

because:

- (a) Plaintiff has retained counsel experienced in the prosecution of class action and consumer protection litigation, which counsel will adequately represent the interests of the Class;
- (b) Plaintiff and his counsel are aware of no conflicts of interest between Plaintiff and the absent Class Members or otherwise;
- (c) Plaintiff is knowledgeable concerning the subject matter of this action and will vigorously prosecute this litigation.

22. A class action provides a fair, efficient, and superior method for adjudicating this controversy because:

- (a) common questions of law or fact predominate over any questions affecting only individual members;
- (b) Plaintiff is aware of no difficulties likely to be encountered in the management of this action as a class action;
- (c) Plaintiff is aware of no litigation already commenced by a member of the Class involving the issues presented in this action;

- (d) this Court is appropriate for the litigation of the claims of the entire Class. This is so because the judges of this Court are learned and experienced in class action issues; because Defendants conduct substantial and continuous business in this District;
- (e) the amount of Plaintiff's and other Class Members' individual damages is too small to make individual litigation an economically viable alternative; thus, a class action is the only practical means of adjudication of this controversy;
- (f) few class members have any interest in individually controlling the prosecution of separate actions, and those who do may opt out;
- (g) despite the relatively small size of individual Class members' claims, a class action will achieve judicial economy by obviating the need for numerous, identical suits against the same Defendants in various forums.

23. Class certification is proper under Federal Rule of Civil Procedure 23(b)(1)(A) because the prosecution of separate actions by individual Class Members would create a risk of inconsistent or varying adjudications with respect to individual members of the Class and establish incompatible standards of conduct for Defendants.

24. Class certification is proper under Federal Rule of Civil Procedure 23(b)(1)(B) because the prosecution of separate actions by individual Class Members would create a risk of adjudications with respect to individual Class Members which would, as a practical matter, be dispositive of the interest of the other members not parties to these adjudications and/or substantially impair their ability to protect these interests.

25. Class certification is proper under Federal Rule of Civil Procedure 23(b)(3), because common issue of law and fact predominate over any questions affecting only individual

members of the Class, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class adjudication is superior to individual litigation, which would foreclose the ability of most Class Members to litigate their claims, impose an undue burden on the courts, and result in inconsistent determinations of common issues.

26. Plaintiffs seek a class certification decision that, regardless of the applicable subsection of Rule 23 under which class treatment is granted, (1) preserves the right of Class Members to exclude themselves from the Class under Rule 23(c)(2)(B), unless the Court makes a finding that Defendants' available assets and insurance constitute a traditional "limited fund" under the meaning of Ortiz v. Fibreboard, 527 U.S. 815, 816 (1999) and (2) if appropriate, grants class certification with respect to particular issues under 23(c)(4)(A).

27. The need for class wide notice does not present a barrier to certification because notice can be effectively disseminated to the Class by techniques commonly used in consumer class actions. Notice may be provided to Class Members under the requirements of Fed.R.Civ.P. 23(c)(2) by such combination of print publication, broadcast publication, internet publication, and/or first class mail that this Court determines best comports with modern Fed.R.Civ.P. 23(c)(2) class notice form, content, and dissemination techniques, as used in other consumer class actions and as recommended by the Manual for Complex Litigation, 4th and the Federal Judicial Center.

COUNT I
BREACH OF IMPLIED WARRANTY

28. Plaintiff and the Class re-allege all prior paragraphs of this Petition as though fully set forth here.

29. Defendants' Avalanche is not of merchantable quality and not fit for the ordinary purposes for which such products are used, given the leakage defect.

30. Defendants are merchants with respect to vehicles such as the Avalanche.

31. As a direct and proximate result of Defendants' breach of implied warranty, Mr. Atwell and the Class have been damaged by the failure of consideration in connection with and/or difference in value arising out of the variance between Defendants' vehicle as warranted and Defendants' vehicle containing the defect; the depression of resale value of the Avalanche suffered by Mr. Atwell and class members arising out of the leakage defect; out-of-pocket expenses that Mr. Atwell and the Class have incurred as a result of being unable to use their vehicles, including any and all alternative forms of transportation; loss of time waiting for ineffective repairs to be accomplished; damage to other property due to the leakage defect, and other incidental and consequential damages.

COUNT II
BREACH OF EXPRESS WARRANTY

32. Plaintiff and the Class re-allege all prior paragraphs of this Petition as though fully set forth here.

33. Defendants sold the Avalanche to Mr. Atwell and other members of the Class.

34. Defendants warranted the Avalanche would be free from defects in material and workmanship, and if there were defects Defendants would repair them for a period of 3 years or 36,000 miles.

35. Mr. Atwell and the Class Members were induced to pay large sums of money based, at least in part, on the statement of quality and promise to repair contained within Defendants' express warranty. Absent the express warranty Mr. Atwell and other members of the Class would not have purchased the Avalanche, or would have paid substantially less for the Avalanche than they did.

36. The Avalanche did not conform to the representations of Defendants contained in the express warranty due to the leakage defect.

37. Mr. Atwell and the other Class Members timely notified Defendants of the leakage defect by tendering the vehicle for repair; and/or communicating the nature of the problem to Defendants; and/or demanding rescission of the sales contract.

38. As a direct and proximate result of Defendants' breach of express warranty, Mr. Atwell and the Class have been damaged by the failure of consideration in connection with and/or difference in value arising out of the variance between Defendants' vehicle as warranted and Defendants' vehicle containing the defect; the depression of resale value of the Avalanche suffered by Mr. Atwell and Class Members arising out of the leakage defect; out-of-pocket expenses that Mr. Atwell and the Class have incurred as a result of being unable to use their vehicles, including any and all alternative forms of transportation; loss of time waiting for ineffective repairs to be accomplished; damage to other property due to the leakage defect, and other incidental and consequential damages.

COUNT III
BREACH OF CONTRACT

39. Plaintiff and the Class re-allege all prior paragraphs of this Petition as though fully set forth here.

40. Mr. Atwell and Defendants entered into an oral contract for the sale of the Avalanche. Mr. Atwell tendered a substantial cash payment of \$26,030.35 plus tax in exchange for a vehicle of merchantable quality, free of defects in material and workmanship and with an express warranty covering the vehicle for 3 years or 36,000 miles.

41. This contract entered into by Mr. Atwell and Defendants is uniform across all members of the Class.

42. Defendants breached this contract by delivering a vehicle that was not of merchantable quality, was not free of defects in material and/or workmanship, and the express warranty was illusory as Defendants failed to make repairs as warranted.

43. The nature of the failure of Defendants tender and subsequent breach of contract is uniform across all members of the Class.

44. As a direct and proximate result of Defendants' breach of contract, Mr. Atwell and the Class have been damaged by the failure of consideration in connection with and/or difference in value arising out of the variance between Defendants' vehicle as warranted and Defendants' vehicle containing the defect; the depression of resale value of the Avalanche suffered by Mr. Atwell and Class Members arising out of the leakage defect; out-of-pocket expenses that Mr. Atwell and the Class have incurred as a result of being unable to use their vehicles, including any and all alternative forms of transportation; loss of time waiting for ineffective repairs to be accomplished; damage to other property due to the leakage defect, and other incidental and consequential damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, for himself and all others similarly situated, respectfully requests that this Court enter a judgment against Defendants and in favor of Plaintiff, and grant the following relief:

- A. Determine that this action may be maintained as a class action, pursuant to the appropriate subsections of Rule 23 of the Federal Rules of Civil Procedure; that the court certify a class action with respect to particular issues if appropriate, and

that the Court designate and appoint Plaintiff and counsel to serve as Class Representatives and Class Counsel;

- B. Grant Class Members awards of actual and compensatory damages in such amount as to be determined at trial and as provided by applicable law;
- C. Grant Class Members their costs of suit, including reasonable attorneys' fees, and expenses as provided by law;
- D. Grant Class Members a rescission of the sales contract and a refund of all monies paid; and
- E. Grant Class Members such other, further, and different relief as the nature of the case may require or as may be determined to be just, equitable, and proper by this Court.

DEMAND FOR JURY TRIAL

COMES NOW the Plaintiff, Michael Atwell and requests a trial by jury on all issues deemed so triable.

DATED: June ~~25~~, 2008

Respectfully Submitted,

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