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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

JUL 24 1995

ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

* * * * *

BILLY COOK and
BARRY KUPERMAN

: CIVIL ACTION NO. 94-1730
COMPLAINT - CLASS ACTION
DEMAND FOR JURY TRIAL

Plaintiffs

VERSUS

: JUDGE WALTER

POWELL BUICK, INC., HUB CITY
FORD, INC., and LOUISIANA
AUTOMOBILE DEALERS ASSOCIATION,
INC.

: MAGISTRATE PAYNE

Defendants

**FIRST AMENDED AND RESTATED COMPLAINT
FOR CLASS ACTION UNDER CLAYTON ACT FOR
PRICE FIXING, TREBLE DAMAGES, ATTORNEY FEES, AND OTHER RELIEF**

NOW INTO COURT, through undersigned counsel, comes Billy Cook and Barry Kuperman, appearing individually and on behalf of all others similarly situated, herein referred to as named Plaintiffs, who with respect represent:

1.

This Complaint is filed and this action is instituted under 15 U.S.C. §1 as amended and supplemented, commonly known as the Sherman Act, and 15 U.S.C. §15, as amended and supplemented, commonly known as §4 of the Clayton Act, and Articles 1953 et seq, 2301, 2302 and 2310, Louisiana Civil Code.

2.

This civil action arises under the above mentioned Acts of Congress regulating commerce or protecting trade and commerce

against restraints and monopolies under 28 U.S.C. §§1337 and 1331, and 15 U.S.C. §15. This Court therefore has jurisdiction. Venue in this Court is proper pursuant to 15 U.S.C. §22 and 28 U.S.C. §1392(a).

3.

Each of the persons named below brings this action individually and on behalf of the class of Plaintiffs described herein below:

- a) Billy Cook, a resident of and domiciled in Bossier Parish, Louisiana; and
- b) Barry Kuperman, a resident of and domiciled in Bienville Parish, Louisiana.

4.

Each of the corporations named below is made a Defendant herein individually and as representatives of the class of Defendants (herein referred to as "Defendant Class") described herein below:

- a) Powell Buick, Inc., a Louisiana corporation doing business in Caddo Parish, Louisiana;
- b) Hub City Ford, Inc., a Louisiana corporation doing business in Lafayette Parish, Louisiana; and
- c) Louisiana Automobile Dealer Association, Inc. (LADA), a Louisiana Corporation domiciled in East Baton Rouge Parish, and at all times acting as a trade organization and representing the interests of the Defendant Class.

5.

This action is brought by named Plaintiffs as a class action pursuant to Rule 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. The Plaintiff Class is defined as follows:

All persons whether corporations, partnerships, individuals, or other, that purchased one or more new motor vehicles from one or more motor vehicle dealership (defined below in paragraph 13) during the applicable prescriptive periods which purchase price included an additional fee or charge identified as an "ad valorem tax", "ad valorem (inventory) tax" or similarly styled add-on charge, generally referred to herein as "ad valorem tax" or "ad valorem taxes".

6.

The Plaintiff Class is so numerous that joinder of all members is impracticable. The class encompasses thousands of purchasers who live in numerous parishes and in several states. The claims of the Plaintiff Class are based upon the same legal theories and their damages arise out of the same identical and repetitive course of conduct by the Defendants.

7.

There are questions of law and fact common to the class which predominate over any questions affecting individual members of the class. Among the questions of law and fact common to the Plaintiff Class are the following:

- a. Whether by agreeing and conspiring among themselves to add a fee or charge to the sales price of each vehicle to compensate the dealer for a portion of the dealer's ad valorem tax, the Defendants participated in a price fixing scheme in violation of §4 of the Clayton Act;
- b. Whether the Louisiana Automobile Dealers Association (LADA) conspired

or acted in combination with the Defendant Class to fix prices of all motor vehicles sold in Louisiana;

- c. Whether the ad valorem (inventory) tax on motor vehicles is an obligation of the consumer/purchaser;
- d. Whether La. R.S. 47:1961 et seq authorized the Defendant Class to charge customers ad valorem tax on the sale of motor vehicles;
- e. Whether the Defendant Class has made the following material written misrepresentations to wit:
 - (i) Plaintiff Class is responsible for paying ad valorem taxes;
 - (ii) Adding to each invoice or buyer's order a line item amount identified as ad valorem tax and failing to identify that the ad valorem tax is not due by the consumer; and/or
 - (iii) Failing to identify on the invoice or buyer's order that the tax is the motor vehicle dealer's tax.
- f. Whether the Plaintiff Class reasonably relied on those material misrepresentations;
- g. Whether the Plaintiff Class was induced to pay the "ad valorem tax" based upon those material misrepresentation;
- h. Whether "ad valorem taxes" charged by the Defendants to the Plaintiff Class is a part of a pattern or practice of unlawful and fraudulent activity of misrepresenting or suppressing the truth with the intention of obtaining an unjust advantage over the Plaintiff Class entitling the Plaintiff Class to recover the full amount of the "ad valorem taxes" paid, the sales taxes charged thereon, and reasonable attorneys fees;
- i. Whether the Defendant Class is obligated to restore to the

Plaintiff Class, those sums representing "ad valorem taxes" collected by Defendant Class;

- j. Whether the Plaintiff Class paid "ad valorem tax" to Defendant Class by mistake because of the written misrepresentations identified above on the buyer's order, purchase agreement, or invoice and are therefore entitled to reclaim what each paid.

8.

This action should be maintained as a Plaintiff Class action because questions of law and fact common to the members of the Class predominate over any questions affecting only individual members. A class action is superior to other available methods for fair and efficient adjudication of the controversy since there is little interest for individual class members separately to control this litigation. Named Plaintiffs are interested litigants who will prosecute the claims for all class members. Moreover, the management of this class action will not be unduly difficult since only limited contact with individual class members will be necessary because Defendants' conduct and not the conduct of the Plaintiff Class members, is the primary issue in this litigation.. Furthermore, most Plaintiff Class members injured by the conduct of the Defendant Class would not be compensated for their claims in the absence of a class action, since it is too expensive for most individual members to prosecute this litigation. The claims of the named Plaintiffs are typical of the claims of the members of the Plaintiff Class.

9.

On July 7, 1994, Billy Cook purchased a motor vehicle from Powell Buick, Inc. A charge of \$59.99, represented as "ad

valorem (inventory) tax", was added to the sales price.

10.

On September 8, 1993, Barry Kuperman purchased a motor vehicle from Hub City Ford, Inc. A charge of \$51.14, represented as "ad valorem tax", was added to the sales price.

11.

The add-on charge identified by Powell Buick, Inc. and Hub City Ford and the Dealer Class described below as "ad valorem tax" or "ad valorem (inventory) tax" is actually a standard charge (not a tax) added by the dealer to collect additional funds from the customer to pay into the dealer's tax account maintained by the sheriff for later payment of the dealer's tax.

12.

This action is brought against the named defendants as a class action pursuant to Rule 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. The Defendant Class is defined as follows:

All the motor vehicle dealerships who are members of LADA and who have included in the sales price an additional fee or charge identified to the customer as an "ad valorem tax", "ad valorem (inventory) tax", or similarly styled add on charge, generally referred to herein as "ad valorem tax" or "ad valorem taxes" in connection with the sale of its motor vehicles. "Motor vehicle dealership" means and refers to all persons whether corporations, partnerships, sole proprietorships, or other, that engaged in the retail sale of new motor vehicles in the State of Louisiana during the applicable prescriptive periods and are members of LADA during these same periods.

13.

The representative Defendants are Powell Buick, Inc. and Hub City Ford, Inc., motor vehicle dealerships located in Caddo

Parish and Lafayette Parish, Louisiana, respectively and Louisiana Automobile Dealers Association, Inc., an automobile dealership trade and legislative lobbying organization located in East Baton Rouge, Parish, Louisiana.

14.

This Defendant Class is so numerous that joinder of all members is impracticable. This class encompasses several hundred dealerships who are doing business throughout the State of Louisiana. The claims of the Plaintiff Class against the Defendant Class are based upon the same legal theories and claims for damages and restitution arise out of the same identical and repetitive course of conduct by the members of the Defendant Class.

15.

There are questions of law and fact common to the Defendant Class which predominate over any questions affecting individual members of the class. Among the questions of law and fact common to the class are the following:

- a. Whether by agreeing and conspiring among themselves to add a fee or charge to the sales price of each vehicle to compensate the dealer for a portion of the dealer's ad valorem tax, the Defendants participated in a price fixing scheme in violation of §4 of the Clayton Act;
- b. Whether the Louisiana Automobile Dealers Association (LADA) conspired and acted in combination with the Defendant Class to fix prices of all motor vehicles sold in Louisiana;
- c. Whether the ad valorem (inventory) tax on motor vehicles is an obligation of the consumer/purchaser;

- d. Whether La. R.S. 47:1961 et seq authorized the Defendant Class to charge customers ad valorem tax on the sale of motor vehicles;
- e. Whether the Defendant Class has made the following material written misrepresentations, to wit:
- (i) Plaintiff Class is responsible for paying ad valorem taxes;
 - (ii) Adding to each invoice or buyer's order a line item amount identified as ad valorem tax and failing to identify that the ad valorem tax is not due by the consumer; and/or
 - (iii) Failing to identify on the invoice or buyer's order that the tax is the motor vehicle dealer's tax.
- f. Whether the Plaintiff Class reasonably relied on those material misrepresentations;
- g. Whether the Plaintiff Class was induced to pay the "ad valorem tax" based upon those material misrepresentation;
- h. Whether "ad valorem taxes" charged by the Defendants to the Plaintiff Class is a part of a pattern or practice of unlawful and fraudulent activity of misrepresenting or suppressing the truth with the intention of obtaining an unjust advantage over the Plaintiff Class entitling the Plaintiff Class to recover the full amount of the "ad valorem taxes" paid, the sales taxes charged thereon, and reasonable attorneys fees;
- i. Whether the Defendant Class is obligated to restore to the Plaintiff Class, those sums representing "ad valorem taxes" collected by Defendant Class;
- j. Whether the Plaintiff Class paid "ad valorem tax" to Defendant Class by

mistake because of the written misrepresentations identified above on the buyer's order, purchase agreement, or invoice and are therefore entitled to reclaim what each paid.

16.

This action should be maintained as a Defendant Class action because questions of law and fact common to the members of the Class predominate over any questions affecting only individual members. A class action is superior to other available methods for fair and efficient adjudication of the controversy since the representative Defendants and the LADA will adequately protect the interest of the Defendant Class members. Moreover, the management of this class action will not be unduly difficult since all members of the Defendant Class are members of the Louisiana Automotive Dealer's Association ("LADA"), which upon information and belief, has kept each member fully informed on the issues set out herein through correspondence and newsletters, and will likely coordinate and/or assist in the defense of this suit. Further, the actions of the named Defendants are typical of the actions of the members of the Defendant Class.

17.

At all times pertinent hereto, the Defendant Class was engaged in the business of selling motor vehicles in the state of Louisiana.

18.

At all times pertinent hereto, the Plaintiff Class paid an "ad valorem tax" on motor vehicles purchased from the Defendant Class, which payment was improper and unauthorized by law, and is

the basis for recovery by the Plaintiff Class for the reasons more fully set out herein.

19.

R.S. 47:1951 provides that certain property situated within the state shall be subject to an ad valorem tax based on the assessed value.

20.

R.S. 47:1961 provides that inventory is subject to this ad valorem tax; R.S. 47:1461.2 allows motor vehicle dealers to deposit funds in an escrow account with the local taxing authority, on a monthly basis, amounts sufficient to pay the motor vehicle dealer's ad valorem tax on its vehicles held in inventory the previous year. The amount paid into the account is calculated monthly based upon a ratio of the prior year's taxes paid to the prior year's dealer costs of sales multiplied by the current months dealer costs of sales and represents an estimate of the dealer's actual ad valorem tax. The dealer's actual ad valorem tax is based upon the average monthly assessed value of the inventory in the prior year and the applicable millage rate.

21.

At all times pertinent hereto, the Defendant Class, misrepresented to Plaintiff Class that the dealer's estimated tax payment on the vehicle sold was a tax due by the consumer by identifying the dealer's tax on the buyer's order or invoice or similar written agreement as ad valorem tax and failed to identify that the amount charged was actually the estimated payment towards

the dealer's ad valorem tax account for payment of the dealer's ad valorem tax.

22.

The motor vehicle dealers are the persons responsible (i.e., the taxpayer) to pay the "ad valorem tax" on the inventory of motor vehicles. Motor vehicles used on public highways are specifically exempt from parish "ad valorem tax" under Article 7, §21 of the Louisiana Constitution, and therefore the payment of this tax cannot be the obligation of Plaintiff.

23.

The Defendant Class sold motor vehicles to the Plaintiff Class on the basis of an agreed sales price plus typical add-on charges, commonly referred to as "tax, title and license" or a similar phrase and included the charge for the dealers ad valorem tax as a part of that "tax, title and license".

24.

The Attorney General of Louisiana issued Opinion No. 93-507 on December 15, 1993, which concluded that collection of such ad valorem taxes from the consumer/purchaser is not authorized by law. The Louisiana Automobile Dealer's Association asked the Attorney General's office to reconsider Opinion 93-507. Opinion No. 93-507 A which was issued on March 15, 1994, stated that there is neither explicit authorization nor prohibition to permit a dealer to shift or pass on an ad valorem vehicle inventory tax to the purchaser of a vehicle. The Opinion noted that "courts have held that although contracts between parties in which tax

consequences are shifted from one to the other are strictly construed, nevertheless such are valid objects of a contract."

25.

Ad valorem taxes are direct taxes that are due by the Defendant Class, owners of the inventory, and are not generally shifted from the responsible party to another. An agreement to shift the consequences of an ad valorem tax to another must be construed strictly and the burden of proving such agreement is on the true taxpayer (members of Defendant Class).

26.

The practice of the Defendant Class since January, 1988 of adding a line item charge to the price identified as "ad valorem tax" or "ad valorem (inventory) tax" on the "buyer's order" and, in some cases, the "invoice" constitutes a written misrepresentation by the Defendant Class that the charge is a tax due by the Plaintiff Class (purchaser/consumer). The Plaintiff Class is obligated to pay sales taxes and other indirect taxes which are due by consumers but collected by the seller; however, the ad valorem tax is a direct tax due by the owner of the inventory not due by the consumer. The shifting of the dealer's tax obligation to the customer is not disclosed, not explained, and not agreed to.

27.

The practice of charging the customer the ad valorem tax was agreed to by the automobile dealers in 1988 in combination among these automobile dealers and the LADA (the Defendant Class).

28.

Although "ad valorem tax" is uniformly listed on the "Buyer's Orders" and/or invoice, utilized by the Defendant Class, there is no contract or agreement between the parties to shift the payment of the ad valorem tax from the Defendant Class to the Plaintiff Class, nor is there any explanation that the tax charge represents only an amount due by the dealer toward his tax escrow account, not an ad valorem tax on the vehicle and not a tax due by the consumer.

29.

The Defendant Class has disguised their ad valorem tax by including "ad valorem tax" as an add-on charge, by failing to identify the charge as a portion of the dealer's estimated tax payment to the dealer's account, and by identifying it as "ad valorem tax" and treating it on the written documentation as an add-on obligation due by the purchaser in the nature of a sales tax. In so doing, the Defendant Class increased the actual sales price by the amount of the "ad valorem tax" plus the additional sales tax charged on the amount misidentified as "ad valorem tax".

COUNT I PRICE FIXING - CLAYTON ACT

30.

The allegations contained in paragraphs 1 through 29 above are reiterated herein.

31.

The Defendant Class and LADA have continuously engaged in an unlawful combination and conspiracy to restrain trade and commerce by adding a standardized portion of the dealer's estimated

payment for "ad valorem tax" to the sales price of each motor vehicle sold. The charge added and misidentified as "ad valorem tax" is based on a "computation factor" determined by the dealer at the beginning of each year. The "computation factor" is calculated based upon the ratio of the prior year's ad valorem taxes paid by the dealer to the total cost of sales for the previous year. As such, the charge represents not the ad valorem tax on the vehicle sold, but an estimate of that vehicle's portion of the dealer's monthly payment to the dealer's tax escrow account. The actual ad valorem tax is not based on the cost of sales but is based on the previous year's average monthly assessed value of inventory multiplied by the applicable millage rate.

32.

The aforesaid combination and conspiracy by the entire Defendant Class and the LADA have consisted of a continuing agreement and concert of action to increase the sales price for all vehicles sold by the amount of the add-on charge misidentified as "ad valorem tax".

33.

The LADA, in combination and conspiracy with the Defendant Class published and circulated information to all members of Defendant Class setting out the procedure to follow in the price fixing scheme. Specifically, the LADA agreed and conspired with the Defendant Class to require the sales invoice to the customer show the vehicle selling price, plus the inventory tax, plus the sales tax. Additionally, the LADA agreed and conspired with the Defendant Class that a line item identified as "ad valorem

(inventory) tax" "...must be shown on the customer's buyers order and should be placed after the 'Price of Vehicle' and before the 'Sales Tax'.

34.

The effect of this per se violation of the anti-trust law includes a restraint on the individual dealer to sell in accordance with his own judgment. A dealer desiring to bargain with a price conscious purchaser without adding the "ad valorem tax" as an add-on charge would be at a competitive disadvantage when quoting a stated sales price.

35.

The aforesaid combination and conspiracy has had an effect of increasing the sales price on all vehicles sold, causing, as a direct result, the monetary loss by the Plaintiff Class of a sum equal to the "ad valorem tax" collected by the Defendant Class.

36.

The Plaintiff Class is entitled to recover threefold the damages sustained and the costs of the suit, including a reasonable attorney's fee, pursuant to 15 U.S.C. §15(a).

COUNT II FRAUD

37.

The allegations contained in paragraphs 1 through 29 above are reiterated herein.

38.

The Defendant Class charged "ad valorem taxes" to Plaintiff Class, as described above, which is part of a pattern or practice of unlawful and fraudulent activity of misrepresenting or

suppressing the truth with the intention of attaining an unjust advantage over the Plaintiff Class in the sale of motor vehicles, and Plaintiff Class is therefore entitled to recover the full amount of "ad valorem taxes" paid to Defendant Class and reasonable attorneys fees pursuant to Articles 1953 et seq of the Louisiana Civil Code.

39.

The Defendant Class made written material misrepresentations that payment of the "ad valorem tax" was the responsibility of Plaintiff Class which Plaintiff Class relied upon. These misrepresentations were made on the buyers order, purchase orders and/or invoices by including an add-on charge to the sales price of the vehicle misidentified as ad valorem tax, by failing to identify the charge as an estimated portion of the dealer's ad valorem tax monthly payment to the dealer's ad valorem tax account, and by failing to disclose that there is in fact no ad valorem tax or that the consumer is not obligated to pay ad valorem tax on motor vehicles.

40.

This pattern of activity promoted by the LADA was consistent among the members of the Defendant Class and the materiality and existence of these alleged misrepresentations are questions of law and fact common to all Defendant Class members.

COUNT III RESTORE THING UNDULY RECEIVED

41.

The allegations contained in paragraphs 1 through 29 above are reiterated herein.

42.

The Defendant Class received from Plaintiff Class the "ad valorem taxes", when such taxes were not due by Plaintiff Class and, whether received through error or knowingly, the Defendant Class is obligated to restore this sum to Plaintiff Class pursuant to Article 2301 of the Louisiana Civil Code.

COUNT IV RECLAIM THING UNDULY PAID

43.

The allegations contained in paragraphs 1 through 29 above are reiterated herein.

44.

The Plaintiff Class paid this "ad valorem tax" to the Defendant Class by mistake, each believing himself a debtor, and is therefore entitled to reclaim what each paid, that being the amount misidentified as "ad valorem tax" and charged by the Defendant Class to Plaintiff Class, pursuant to Article 2302 of the Louisiana Civil Code.

COUNT V PAYMENT OF DEBT OF ANOTHER

45.

The allegations contained in paragraphs 1 through 29 above are reiterated herein.

46.

The Plaintiff Class, through mistake, paid the obligation of the Defendant Class when by suggestion or implication they were told by the Defendant Class that the obligation to pay the "ad valorem taxes" belonged to the customer, contrary to law, and therefore is entitled to have the amount paid to Defendant Class

restored to them pursuant to Article 2310 of the Louisiana Civil Code.

COUNT VI DECLARATORY RELIEF

47.

The Plaintiff Class is entitled to declaratory relief under 23(b)(2) against the Defendant Class as follows:

- 1) The addition of the "ad valorem tax" to the sales price is a per se violation of 15 U.S.C. §1 et seq.;
- 2) The ad valorem (inventory) tax on motor vehicles is an obligation of the motor vehicle dealer;
- 3) La. R.S. 47:1961 et seq does not authorize the motor vehicle dealer to charge its customers an ad valorem tax on the sale of motor vehicles; and
- 4) A contract to shift the consequences of an ad valorem tax from the motor vehicle dealer to the customer must exist to authorize the shifting of the obligation and that the burden of proof of the existence of such contract and the validity of such contract is upon the motor vehicle dealer.

COUNT VII INJUNCTIVE RELIEF

48.

The Plaintiff Class is entitled to final injunctive relief against the Defendant Class restraining and enjoining all members of the Defendant Class, its officers, agents, or employees, from taking action more fully described as follows:

1. Adding the "ad valorem tax" to the sales price;
2. Issuing any statement or disclosing on any sales documents that the "ad valorem

tax" is a tax to be paid by the purchaser; and

3. Shifting the consequences of an ad valorem tax from the motor vehicle dealer to the purchaser without clear written authorization by the purchaser.

49.

Plaintiffs request a jury trial.

WHEREFORE, PLAINTIFFS PRAY that this Court certify the Plaintiff Class and Defendant Class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

FURTHER PRAY that, as to Count I, judgment be entered against the Defendant Class for threefold the damages sustained and the costs of the suit, including a reasonable attorney's fee.

FURTHER PRAY that, as to Count II-V, judgment be entered against the Defendant Class for restitution, costs and reasonable attorney's fee.

FURTHER PRAY for declaratory relief as follows:

- 1) Declaring the addition of the "ad valorem tax" to the sales price is a per se violation of 15 U.S.C. §1 et seq;
- 2) Declaring the ad valorem (inventory) tax on motor vehicles is an obligation of the motor vehicle dealer;
- 3) Declaring La. R.S. 47:1961 et seq does not authorize the motor vehicle dealer to charge its customers an ad valorem tax on the sale of a motor vehicle;
- 4) Declaring a contract to shift the consequences of an ad valorem tax from the motor vehicle dealer to the customer must exist to authorize the shifting of the obligation and that the burden of proof of the existence of such contract and the validity of such contract is upon the motor vehicle dealer.

FURTHER PRAY for injunctive relief against the Defendant Class restraining and enjoining all members of the Defendant Class, its officers, agents or employees from taking the following action, to wit:

1. Adding the "ad valorem tax" to the sales price;
2. Issuing any statement or disclosing on any sales documents that the "ad valorem tax" is a tax to be paid by the purchaser; and
3. Shifting the consequences of an ad valorem tax from the motor vehicle dealer to the purchaser without clear written authorization by the purchaser.

FURTHER PRAY for trial by jury.

SIMON, FITZGERALD, COOKE, REED & WELCH

BY: _____

Paul M. Cooke (#4311)
Keith M. Welch (#13347)
Kevin R. Molloy (#17331)
4700 Line Avenue, Suite 200
Shreveport, LA 71106-1546
Telephone: (318) 868-2600

ATTORNEYS FOR PLAINTIFFS

PETERS, WARD, BRIGHT & HENNESSY

BY: _____

J. Patrick Hennessy (#6791)
Trial Attorney
400 Texas Street, Suite 1000
Post Office Box 91
Shreveport, LA 71161-0091
Telephone: (318) 221-8000

ATTORNEYS FOR PLAINTIFFS