

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

[plaintiff]JOHNSON, VEGA, RODRIGUEZ, NORRELL, NORRELL, DURAN,  
and SEILER, individually and on behalf of all other persons  
similarly situated,

Plaintiffs,  
[vs.]

[defendant]FIRST NATIONAL BANK IN ALAMOGORDO, THE CAR LOT, INC.,  
a New Mexico Corporation, DOUGLAS RAY BURNS, Sr., DOUGLAS RAY  
BURNS, Jr., and SALLY BURNS,

Defendants.

[action]No. CIV 89-1137 HB

**ORDER PRELIMINARILY APPROVING  
SETTLEMENT OF CLASS ACTION**

THIS MATTER HAVING COME TO BE CONSIDERED upon the Motion For Approval of Class Action Settlement, the Court being fully advised in the premises, having considered the representations of Plaintiffs and finding that the proposed settlement as recited herein is fair, reasonable, and equitable and hereby preliminarily approving the same subject to a final determination following the hearing to be held following notice to the class members as provided herein, and otherwise for good cause shown, FINDS:

1. Substantial evidence supports the conclusion that the Defendant The Car Lot, Inc., and its principals (hereinafter "the Dealer Defendants") engaged in a pattern and practice in the course of conducting their business as merchants of used motor vehicles of altering the odometer readings of used cars with the intent to defraud the purchasers thereof and making false odometer disclosures to customers in violation of the Federal Odometer Act, 15 U.S.C. Section 1901, 1981-1991.<sup>1</sup>

2. In the course of conducting its business as a national bank, the Defendant Bank entered into a consumer financing arrangement with the Dealer Defendants whereby the Defendant Bank purchased by assignment certain motor vehicle retail

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<sup>1</sup> [Editor's Note: Citations throughout this order as in original.]

installment contracts through which certain of the motor vehicle sales conducted by the Dealer Defendants were financed.

3. There is no evidence that the Defendant Bank had any knowledge of or involvement with the misconduct of the Dealer Defendants, and, to the contrary, all evidence supports the finding that said misconduct was concealed by the Dealer Defendants from the Defendant Bank as well as from their customers.

4. Each installment contract assigned to the Defendant Bank contains in identical language the notice mandated by the Federal Trade Commission Trade Regulation Rule entitled "Preservation of Consumers' Claims and Defenses," 16 C.F.R. Section 433.1 *et seq.*, and states that the Defendant Bank as the "holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof . . . ."

5. While the Defendant Bank denies liability, it has agreed to the settlement set forth herein.

WHEREFORE, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. As contemplated by the Order Granting Conditional Class Certification entered herein on December 12, 1990, this action shall be certified as a class action defined as follows: all persons who have purchased a used motor vehicle from the Dealer Defendants, the odometer in whose vehicle was altered, who received odometer disclosure statements from the Dealer Defendants in violation of the Federal Odometer Act, who discovered said violations within two years before the date of filing of the Complaint in this action, and who purchased the vehicle through an installment contract assigned by the Dealer Defendants to the Defendant Bank.

2. The Defendant Bank shall undertake the initial task of identifying on an individualized basis each member of the class by determining from its own records for the entire period when it was purchasing installment contracts from the Dealer Defendants all persons who purchased a used motor vehicle from the Dealer Defendants through an installment contract assigned to it by the Dealer Defendants.

3. Each person so identified who has been found by the Alamogordo Department of Public Safety in its criminal investigative report to be a victim of the odometer fraud committed by the Dealer Defendants will then be entitled to receive the recovery as determined in accordance with the formula summarized in paragraph 8, below.

4. As to the remainder of the persons so identified, the Defendant Bank will undertake an individualized review of the title documentation from the last transfer of the subject vehicle prior to its transfer to the dealer Defendants and compare the disclosed odometer reading from the previous transfer to the odometer disclosures in the sales transaction to the Dealer Defendants and from the Dealer Defendants to the current customer now identified.

5. If the odometer reading disclosed in the sales transaction with the Dealer Defendants is less than the odometer reading from the previous transfers, then the purchaser of each such vehicle will be conclusively determined to be a victim of odometer fraud committed by the Dealer Defendants and will be entitled to receive the recovery as determined in accordance with the formula summarized in paragraph 8, below.

6. The remaining purchasers regarding whom an apparent odometer rollback is not indicated through this comparison of documents will not be entitled to any monetary recovery pursuant to this settlement but will receive individualized notice as provided herein.

7. In addition to reviewing public record title documentation from the records of the New Mexico Motor Vehicle Division, the Defendant Bank will, as necessary, review and compare documents available through any other state motor vehicle division where the previous transfer occurred or where the current purchaser initially registered the vehicle following its purchase from the Dealer Defendants.

8. Except as further set forth in Paragraph 9, below, all persons so identified as victims of the odometer fraud committed by the Dealer Defendants will be entitled to recover from the Defendant Bank the greater of their actual damages trebled or \$1500 as determined by the following formula: actual damages will be calculated by the Defendant Bank as the difference between the average retail price of each individual buyer's purchased vehicle as a high-mileage car as determined by the

NADA Buyer's Guide from the month of purchase subtracted from the cash price recited in that individual's sales contract.<sup>2</sup>

9. The Defendant Bank has produced documentation showing that three class members have received compensation from the Defendant The Car Lot, Inc., as follows: Irene E. Estrada, \$1500; Leroy W. Geist, \$1158.75; and William K. Victory, \$175. The documentation further shows that each of these three individuals executed a release form reciting that the sum so received is "in full settlement of my claim I may have regarding [sic] this incident." Plaintiffs and the Defendant Bank differ as to whether the referenced release inures to the benefit of the Defendant Bank (thus barring any further recovery whatsoever) or whether the amounts so paid are only to be treated as a set-off against the full recovery otherwise owing. As a compromise resolution of this dispute, the Defendant Bank shall calculate the recovery to which each of these three class members is entitled to receive as set forth in Paragraph 8, above, and deduct the amount of the previous payment received by them, and shall offer to pay these three individuals on the same terms as all other class members the sum of 50% then owing following the deduction. The Defendant Bank has also produced documentation showing that a fourth person, class member Sunny J. Clay, has received \$1450, as compensation from the bonding company for the Defendant The Car Lot, Inc., pursuant to Section 66-4-7, N.M.S.A. 1978. Class Member Clay shall be entitled to receive the sum calculated as set forth in Paragraph 8, above, minus the amount of the bond payment actually received.

10. The Defendant Bank shall provide confirmation and verification of each of the tasks performed and results reached in identifying both those persons who are entitled to a recovery hereunder and those persons who are not so entitled as well as in calculating the amount of such recovery by providing affidavit(s) executed by the person(s) with actual and personal knowledge of the work performed attesting to the mechanics, completeness, and accuracy of that work. Copies of all documents used in making these calculations and the title document comparisons shall be maintained on file at the Bank until at least six (6) months after the Court enters its final

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<sup>2</sup>NADA Guide figures are a useful means of approximating the difference in value for purposes of a settlement. However they usually understate the consumer's damages because they only show the diminution in value that results from higher mileage, not the additional diminution that results from the fact that the odometer reading is not accurate. Individualized proof at trial can often show a greater diminution in value. See §§ 6.8.1.1, 10.10.5, *supra*.

order approving the settlement herein and shall be available for inspection by interested parties and their attorneys during normal business hours. The documents so prepared shall be organized in a manner facilitating ease of review and comprehension. Additionally, two copies of the calculations, confirmation and verification shall be produced, one which will be filed with this Court and made available during normal business hours for the review of any interested person and the other which will be provided to the undersigned counsel for Plaintiffs which, together with the documents on file at the Bank, will be available for their review and approval of the accuracy and completeness of the Defendant Bank's work.

11. Each person who purchased a used motor vehicle from the Dealer Defendants, which purchase was financed through an installment contract assigned to the Defendant Bank, will receive individualized notice of the pendency of this action, of the terms of the settlement, and of his/her rights and options. The Defendant Bank shall use reasonable efforts to determine the current mailing address of each such person. Notice shall be sent to the last known address of each such person as maintained in its customer files with instructions to the United States Postal Service requesting address correction. If other information comes to the attention of the Defendant Bank indicating other possible methods of contacting such persons, the Defendant Bank shall employ other reasonable efforts to attempt to ascertain the correct current address of each such person.

12. All communications and notices to be sent to each person as provided herein shall be sent by the Defendant Bank by first-class mail, postage prepaid with appropriate instructions as set forth above.

13. Those persons who are entitled to receive the recovery as determined in accordance with the formula summarized in paragraph 8, above, shall be sent the notice attached hereto and incorporated herein as Exhibit 1 [*not reprinted*]. Class member Clay shall be sent the notice attached hereto and incorporated herein as Exhibit 1-A [*not reprinted*], and class members Estrada, Geist, and Victory shall be sent the notice attached hereto and incorporated herein as Exhibit 1-B [*not reprinted*]. Each such notice shall be accompanied with an explanation of the amount of money to which he/she is entitled as determined in accordance with that formula and will be informed that he/she may request from the Bank a copy of each document employed by

the Bank in identifying him/her as entitled to the recovery and in calculating the recovery figure.

14. Each person so identified who is not entitled to a recovery hereunder shall be sent the notice attached hereto and incorporated herein as Exhibit 2 [*not reprinted*] and will be informed that he/she may request from the Bank a copy of each document employed by the Bank in determining that he/she was not the apparent victim of the odometer fraud committed by the Dealer Defendants.

15. If following the hearing provided hereinafter the Court grants final approval of this class action settlement, the Defendant Bank shall send to each person who is entitled to receive the recovery as determined in accordance with the formula summarized in paragraph 8, above, and who does not opt out of the class a check in the amount of that entitlement within twenty (20) days of the entry of the Order granting that final approval.

16. Fourteen (14) days prior to the hearing set hereunder for the Court to consider final approval of this class action settlement, the Defendant Bank shall submit to the Court and to counsel for the plaintiffs an affidavit(s) executed by the person(s) with actual and personal knowledge attesting to whom and when the notices required in paragraphs 13 and 14, above, were sent, identifying any persons who chose to opt out and decline the recovery offered them, attaching any written communications and summarizing any oral communications received from any person who received notice, and summarizing all efforts to provide notice to those persons who are entitled to receive it but whose notice was returned by the post office as undeliverable. In addition, at the same time counsel for the Plaintiffs will report the Court and counsel for the Defendant Bank all such information of a similar nature. Both sides shall supplement that information at the hearing.

17. One hundred and twenty days (120) following entry of the Order granting final approval to this class action settlement, the Defendant Bank shall file with the Court and serve on counsel for the Plaintiffs a final accounting and report by affidavit(s) executed by the person(s) with actual and personal knowledge attesting to all payments made pursuant hereto and, if any such person has not been located or not cashed his/her recovery check, the efforts undertaken by it to locate that person and to provide payment to him/her.

18. If the Court determines that the Defendant Bank has made reasonable and adequate efforts to locate and pay any person entitled to a recovery hereunder but without success, the Defendant Bank shall have no further obligation to make payment to that person pursuant to this settlement agreement and may retain the sums otherwise owing.

19. In order to facilitate the pursuit by any individual of remedies independent of this class action and to resolve the outstanding dispute as to whether and to what extent the statute of limitations has been tolled by either the concealment of the odometer fraud at issue, the pendency of this class action or otherwise, any person who opts out of the class recovery or who does not receive a recovery pursuant to this settlement agreement will be permitted to pursue his/her individual remedies by instituting an action to enforce liability against the Defendant Bank for the alleged odometer fraud of the Dealer Defendants within six (6) months from the date when he/she received the notice as required by paragraphs 13 and 14 above.

20. The Defendant Bank shall pay to the counsel for Plaintiffs herein reasonable attorney fees and costs at the rate of \$140 per hour plus applicable New Mexico gross receipts tax and reimbursement of all costs and other out-of-pocket expenses incurred. Such payment shall occur as follows: upon the preliminary approval by the Court of the class action settlement, the Defendant Bank shall pay counsel for the Plaintiffs attorney fees and applicable New Mexico gross receipts tax for all work performed through March 12, 1991, not to exceed 135 hours upon presentation of supporting documentation comprised of the time sheets which counsel have filed with the Clerk of this Court under seal in accordance with Local Rule 54.5 and shall pay all costs and other out-of-pocket expenses incurred through March 12, 1991, not to exceed \$1500 upon presentation of a statement of those costs and expenses; following the preliminary approval by this Court of the class action settlement, counsel for Plaintiffs shall present to the Defendant Bank the remaining time sheets which will have been filed with the Clerk pursuant to Local Rule 54.5 and will thereafter continue to serve upon the Defendant Bank the subsequent time sheets so filed, which will then no longer need to be filed under seal; upon the final approval by this Court of the class action settlement and then following the entry of the final Order in this matter, the Defendant Bank shall pay to counsel for the Plaintiffs reasonable attorney fees at the rate of \$140 per hour plus applicable New Mexico gross receipts tax and all costs and other out-of-pocket expenses then accrued.

For attorney fees accruing after March 12, 1991, the Defendant Bank reserves the right to object to the reasonableness of any time expended or the necessity thereof, and in the event of any such objection, the dispute shall be submitted to the Court for its resolution; if no such objection arises, the Defendant Bank shall promptly pay the amounts owing or that portion to which no objection is raised. The Defendant Bank further agrees to advise counsel for the Plaintiffs upon its receipt of the submitted time sheets of any concerns or questions regarding the reasonableness or necessity of the time spent, and the parties undertake to discuss and attempt to resolve in good faith all such matters as they arise.

21. Upon the receipt and approval by the Court of the final report as provided in paragraph 16 above, an Order shall be entered dismissing the claims against the Dealer Defendants without prejudice and otherwise entering final judgment in accordance herewith.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the class action settlement be and hereby is preliminarily approved subject to a final determination to be made following hearing and opportunity to be heard by any persons with objections hereto;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this matter be and hereby is set to be heard by this Court on the 8th day of November, 1991, at the hour of 10 A.M. at the United States Courthouse, 200 East Griggs, Las Cruces, New Mexico, before the undersigned United States District Judge.

United States District Judge

SUBMITTED BY:  
Attorneys for Plaintiffs

APPROVED:  
Attorney for Defendant  
First National Bank in Alamogordo

IN THE UNITED STATES DISTRICT COURT  
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[plaintiff]JOHNSON, VEGA, RODRIGUEZ, NORRELL, NORRELL, DURAN,



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[defendant]FIRST NATIONAL BANK IN ALAMOGORDO, THE CAR LOT, INC., a New Mexico Corporation, DOUGLAS RAY BURNS, Sr., DOUGLAS RAY BURNS, Jr., and SALLY BURNS,

Defendants.

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### **JUDGMENT**

THIS MATTER came before the Court in accordance with the FINAL ORDER APPROVING SETTLEMENT OF CLASS ACTION filed herewith, and the Court being fully advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the ORDER PRELIMINARILY APPROVING SETTLEMENT OF CLASS ACTION filed herein August 27, 1991, be and hereby is given final approval, the claims of the named Plaintiffs and the Plaintiff Class be and hereby are declared fully satisfied as to the Defendant Bank and those claims are hereby dismissed with prejudice.<sup>3</sup>

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that as to the remaining persons identified by the Defendant Bank to have met all the criteria for inclusion in the Class except for evidence that their odometers were altered, thereby excluding them from the Class, those claims are hereby dismissed without prejudice subject to the terms of Paragraph 19 of the ORDER PRELIMINARILY APPROVING SETTLEMENT OF CLASS ACTION.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that as soon as Defendant Bank pays attorneys fees and costs to the counsel for the Plaintiff Class, counsel shall file with the

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<sup>3</sup>This order was drafted before the United States Supreme Court issued its decision in *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), which is discussed in detail in National Consumer Law Center, *Consumer Warranty Law* § 2.7.6.6 (4th ed. 2010 and Supp.). In light of that decision it is best to resolve all attorney fee issues in full before a case is dismissed.

Court a satisfaction of judgment upon which filing this matter shall be concluded.

United States District Judge

Attorney for Plaintiffs

Attorney for Defendants