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STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

December 30, 2011

Michele Lumbert, Clerk
Kennebec County Superior Court
95 State Street
Augusta, Maine 04330

Re: State of Maine v. Maine Mall Motors, Inc., et al.

Dear Michele:

Please find enclosed for filing the Unfair Trade Practice Act Complaint in the above referenced matter. The parties have negotiated a settlement of this matter and I am also enclosing a signed Consent Decree for the Court's consideration. Could you please present the Consent Decree to the Court for its signature? Of course, if the Court has any questions about this Consent Decree the parties will appear before the Court at the Court's convenience. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "James A. McKenna".

JAMES A. MCKENNA
Assistant Attorney General
Maine Bar No. 1735
Office of the Attorney General
State House Station #6
Augusta, Maine 04333-0006
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JAM/gac
Enclosures

Cc: Roy T. Pierce, Esq., P.O. Box 9546, Portland, Maine 04112-9546

File Copy

This summary sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the Maine Rules of Court or by law. This form is required for the use of the Clerk of Court for the purpose of initiating or updating the civil docket. (SEE INSTRUCTIONS ON REVERSE)

I. County of Filing or District Court Jurisdiction: Kennebec			
II. CAUSE OF ACTION (Cite the primary civil statutes under which you are filing, if any.) <i>Pro se</i> plaintiffs: If unsure, leave blank. 5 M.R.S.A. §§ 205-214			
III. NATURE OF FILING			
<input checked="" type="checkbox"/> Initial Complaint <input type="checkbox"/> Third-Party Complaint <input type="checkbox"/> Cross-Claim or Counterclaim <input type="checkbox"/> If Reinstated or Reopened case, give original Docket Number _____ (If filing a second or subsequent Money Judgment Disclosure, give docket number of first disclosure)			
IV. <input type="checkbox"/> TITLE TO REAL ESTATE IS INVOLVED			
V. MOST DEFINITIVE NATURE OF ACTION. (Place an X in one box only) <i>Pro se</i> plaintiffs: If unsure, leave blank.			
<u>GENERAL CIVIL (CV)</u>			
<input type="checkbox"/> Property Negligence <input type="checkbox"/> Auto Negligence <input type="checkbox"/> Medical Malpractice <input type="checkbox"/> Product Liability <input type="checkbox"/> Assault/Battery <input type="checkbox"/> Domestic Torts <input type="checkbox"/> Other Negligence <input type="checkbox"/> Other Personal Injury Tort <input type="checkbox"/> Non-Personal Injury Tort <input type="checkbox"/> Libel/Defamation <input type="checkbox"/> Auto Negligence <input type="checkbox"/> Other Negligence <input type="checkbox"/> Other Non-Personal Injury Tort	<input type="checkbox"/> Contract <input type="checkbox"/> Contract <input type="checkbox"/> Declaratory/Equitable Relief <input type="checkbox"/> General Injunctive Relief <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Other Equitable Relief <input type="checkbox"/> Constitutional/Civil Rights <input type="checkbox"/> Constitutional/Civil Rights <input type="checkbox"/> Statutory Actions <input checked="" type="checkbox"/> Unfair Trade Practices <input type="checkbox"/> Freedom of Access <input type="checkbox"/> Other Statutory Actions <input type="checkbox"/> Miscellaneous Civil <input type="checkbox"/> Drug Forfeitures	<input type="checkbox"/> Other Forfeitures/Property Libels <input type="checkbox"/> Land Use Enforcement (80K) <input type="checkbox"/> Administrative Warrant <input type="checkbox"/> HIV Testing <input type="checkbox"/> Arbitration Awards <input type="checkbox"/> Appointment of Receiver <input type="checkbox"/> Shareholders' Derivative Actions <input type="checkbox"/> Foreign Deposition <input type="checkbox"/> Pre-action Discovery <input type="checkbox"/> Common Law Habeas Corpus <input type="checkbox"/> Prisoner Transfers <input type="checkbox"/> Foreign Judgments <input type="checkbox"/> Minor Settlements <input type="checkbox"/> Other Civil	
<u>CHILD PROTECTIVE CUSTODY (PC)</u>			
<input type="checkbox"/> Non-DHS Protective Custody			
<u>SPECIAL ACTIONS (SA)</u>			
<input type="checkbox"/> Money Judgment <input type="checkbox"/> Money Judgment Request Disclosure			
<u>REAL ESTATE (RE)</u>			
<input type="checkbox"/> Title Actions <input type="checkbox"/> Quiet Title <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Easements <input type="checkbox"/> Boundaries	<input type="checkbox"/> Foreclosure <input type="checkbox"/> Foreclosure for Non-pmt (ADR exempt) <input type="checkbox"/> Foreclosure - Other <input type="checkbox"/> Trespass <input type="checkbox"/> Trespass	<input type="checkbox"/> Misc. Real Estate <input type="checkbox"/> Equitable Remedies <input type="checkbox"/> Mechanics Lien <input type="checkbox"/> Partition <input type="checkbox"/> Adverse Possession	<input type="checkbox"/> Nuisance <input type="checkbox"/> Abandoned Roads <input type="checkbox"/> Other Real Estate
<u>APPEALS (AP) (To be filed in Superior Court) (ADR exempt)</u>			
<input type="checkbox"/> Governmental Body (80B) <input type="checkbox"/> Administrative Agency (80C) <input type="checkbox"/> Other Appeals			
VI. M.R.Civ.P. 16B Alternative Dispute Resolution (ADR):			
<input type="checkbox"/> I certify that pursuant to M.R.Civ.P. 16B(b), this case is exempt from a required ADR process because:			
<input type="checkbox"/> It falls within an exemption listed above (i.e., an appeal or an action for non-payment of a note in a secured transaction).			
<input type="checkbox"/> The plaintiff or defendant is incarcerated in a local, state or federal facility.			
<input type="checkbox"/> The parties have participated in a statutory prelitigation screening process with _____ (name of neutral) on _____ (date).			
<input type="checkbox"/> The parties have participated in a formal ADR process with _____ (name of neutral) on _____ (date).			
<input type="checkbox"/> This is a Personal Injury action in which the plaintiff's likely damages will not exceed \$30,000, and the plaintiff requests an exemption from ADR.			

VII. (a) PLAINTIFFS (Name & Address including county)
or Third-Party, Counterclaim or Cross-Claim Plaintiffs
 The plaintiff is a prisoner in a local, state or federal facility.

State of Maine

(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number) If all counsel listed do NOT represent all plaintiffs,
(If *pro se* plaintiff, leave blank) specify who the listed attorney(s) represent.

James A. McKenna, ME Bar No. 1735
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006
(207) 626-8842

VIII. (a) DEFENDANTS (Name & Address including county)
and/or Third-Party, Counterclaim or Cross-Claim Defendants
 The defendant is a prisoner in a local, state or federal facility.

Maine Mall Motors, Inc.
d/b/a Berlin City Auto Group,
MMH, LLC,
Berlin City of Portland, Inc.
191 Riverside St.
Portland, ME 04103

Cumberland County

(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number) If all counsel listed do NOT represent all
(If known) defendants, specify who the listed attorney(s) represent.

Roy T. Pierce, Esq.
P.O. Box 9546
Portland, ME 04112-9546
207-791-3000

IX. RELATED CASE(S) IF ANY _____

Assigned Judge/Justice _____ Docket Number _____

Date: December 30, 2011

James A. McKenna, Assistant Attorney General
Name of Lead Attorney of Record or *Pro se* Party

Roy T. Pierce, Esq.

James A. McKenna
Signature of Attorney or *Pro se* Party

c:

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AUGSC-CV-2011-_____

STATE OF MAINE,)
)
Plaintiff)
)
v.)
)
MAINE MALL MOTORS, INC.,)
d/b/a Berlin City Auto Group,)
MMH, LLC, BERLIN CITY OF)
PORTLAND, INC.,)
)
Defendants)

CONSENT DECREE
(Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207)

Plaintiff, State of Maine, filed its Unfair Trade Practice Complaint in the above-captioned matter on Dec. 30, 2011. Pursuant to 5 M.R.S.A. § 209, the Defendants have agreed to the entry of this Consent Decree without trial or adjudication of issue of fact or law herein. This Consent Decree does not constitute evidence against the Defendants or any admission by the Defendants of any of the allegations in the Plaintiff's Complaint.

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby **ORDERED** as follows:

1. This Court has jurisdiction over the subject matter of this action and over the parties' consent to this Decree. The Complaint states claims which can be granted against the Defendants pursuant to the Maine Unfair Trade Practices Act (UTPA), 5 M.R.S.A. §§ 205-A – 214 and 10 M.R.S.A. § 1174(1), prohibited dealer conduct.
2. The Defendants, their agents, employees, assigns and any other persons acting in concert or participation with the Defendants in the sale of goods or services are enjoined from the following unfair or deceptive conduct when selling new motor vehicles to Maine consumers for personal, family or household purposes:

- A. Using the following language to disclaim the implied warranties of merchantability (11 M.R.S.A. §2-314) and fitness for a particular purpose (11 M.R.S.A. §2-315) or the remedies for breach of these warranties (11 M.R.S.A. §2-715):

FACTORY WARRANTY: ANY WARRANTY ON ANY NEW VEHICLE OR USED VEHICLE STILL SUBJECT TO A MANUFACTURER'S WARRANTY IS THAT MADE BY THE MANUFACTURER ONLY, AND THE SELLER HEREBY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED THEREFORE, WITH RESPECT TO THE SELLER, THE VEHICLE IS SOLD "AS IS" AND THE ENTIRE RISK AS TO QUALITY AND PERFORMANCE OF THE VEHICLE IS WITH THE BUYER AND/OR MANUFACTURER, AND IF THE VEHICLE PROVES DEFECTIVE AFTER PURCHASE, THE BUYER AND/OR MANUFACTURER, NOT THE SELLER, SHALL ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING OR REPAIR.


- B. Refusing to honor the Maine Uniform Commercial Code remedies for breach of the implied warranties of merchantability (11 M.R.S.A. § 2-314) and fitness for a particular purpose (11 M.R.S.A. § 2-315)
3. Pursuant to 5 M.R.S.A. § 209 of the Maine Unfair Trade Practices Act, Defendants must pay within 10 days of this Order a civil penalty of \$5,000. This civil penalty shall be paid by certified bank check or money order payable to the Office of the Maine Attorney General.
4. The Defendants are further ordered to mail to their customers listed below in paragraph 5 a letter which informs the consumer that the implied warranty and remedy disclaimers described above in Paragraph 2(A) are retracted and that customers can seek reimbursement for repairs of serious defects that the customer paid for. Appendix A to this Consent Decree is a copy of the letter the Defendants are required to send. Further, this letter must be posted on the Defendant's web pages for the 30 days following the Defendants' receipt of the signed Consent Decree.

5. The customers who must be mailed the Appendix A letter are customers who received the warranty and remedy disclaimer language set forth in paragraph 2A and who purchased a new motor vehicle for personal, family, or household purposes:
 - A. Between December 2, 2009 and December 1, 2011; or
 - B. Between December 1, 2007 and December 1, 2009 and who subsequently had a service repair on that vehicle performed by the Defendants.
6. Within 90 days of the date of the Consent Decree, the Defendants must disclose to the Attorney General the name and address of any customer who has sought relief pursuant to this Consent Decree and the relief, if any, the Defendant provided to the customer.
7. Until the provisions of this Consent Decree are complied with in full, including payment of the consumer restitution provided in paragraph four and the civil penalty ordered in paragraph three, the Defendants shall remain under the jurisdiction of this Court.
8. Each violation of this Consent Decree shall be treated as a separate contempt hereof.
9. The undersigned, with the knowledge of the terms of the above Consent Decree, agree to these terms and the entry of this Consent Decree.
10. Jurisdiction is retained by this Court for the purpose of enabling any party of this Consent Decree to apply to this Court at any time for such further orders as may be necessary for the enforcement or modification of any of the provisions of this Decree.

Dated: _____

Justice, Superior Court

Dated: 12-13-11



William H. Carmichael, Vice President
Maine Mall Motors d/b/a
Berlin City Auto Group,
MMH, LLC
Berlin City of Portland, Inc.

Dated: 12/30/2011

James McKenna

James A. McKenna
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State House Station #6
Augusta, ME 04333-0006
Maine Bar No. 1735
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E-Mail: jim.mckenna@maine.gov

STATE OF MAINE
KENNEBEC, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AUGSC-CV-2011-

STATE OF MAINE,)
)
Plaintiff)
)
v.)
)
MAINE MALL MOTORS, INC.,)
d/b/a Berlin City Auto Group,)
MMH, LLC, BERLIN CITY OF)
PORTLAND, INC.,)
)
Defendants)

**COMPLAINT FOR INJUNCTIVE
AND OTHER RELIEF
(Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207)**

INTRODUCTION

This is an action brought pursuant to the Maine Unfair Trade Practices Act, 5 M.R.S.A. §§ 205-214, seeking to enjoin the Defendants from disclaiming Maine's statutory warranties and their remedies when selling new motor vehicles.

PARTIES

1. Plaintiff State of Maine ["State"], a sovereign, by and through the Attorney General, commences this action under 5 M.R.S.A. §§ 205-A to 214.
2. The Defendants are Maine corporations doing business as Berlin City Auto Group. The Defendants [hereinafter referred to as "Berlin City Auto Group"] have multiple dealerships in Portland and South Portland, Maine.

JURISDICTION AND VENUE

3. The Court has jurisdiction over this action pursuant to 4 M.R.S.A. § 105 and 5 M.R.S.A. § 209.
4. Venue is properly laid in this County pursuant to 5 M.R.S.A. § 209.

STATUTORY BACKGROUND

5. Pursuant to 5 M.R.S.A. § 207, “Unfair and deceptive acts or practices in the conduct of any trade or commerce are...unlawful.”

6. Pursuant to 5 M.R.S.A. § 209:

Whenever the Attorney General has reason to believe that any person is using or about to use any method, act or practice declared by §207 to be unlawful and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary or permanent injunction the use of such method, act or practice and the Court may make such orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice, any monies or property, real or personal, which may have been acquired by means of such method, act or practice....

7. Pursuant to the Maine Uniform Commercial Code [“UCC”] 11 M.R.S.A. § 2-314 consumer goods sold in Maine come with an implied warranty of merchantability and cannot be seriously defective. The remedy for breach of this warranty is a repair at no cost to the buyer.

8. Pursuant to the Maine UCC, 11 M.R.S.A. § 2-315 consumer goods sold in Maine come with an implied warranty of fitness for a particular purpose if the buyer relies on the seller’s assurance that the good is fit for such a purpose. The remedy for breach of this warranty is a repair at no cost to the buyer.

9. Pursuant to the Maine UCC, 11 M.R.S.A. § 2-316(5):

Any language, oral or written, used by a prior seller or manufacturer of consumer goods and services that attempts to exclude or modify the warranty or reimbursement remedy of a retail seller of consumer goods and services that attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer’s remedies for breach of those warranties is unenforceable. Consumer goods and services are those new or used goods and services, including mobile homes, which are used or bought primarily for personal, family or household purposes.

10. Pursuant to the Maine UCC, 11 M.R.S.A. § 2-715, consumers can be eligible for incidental and consequential damages for the sellers breach of implied or express warranties.

11. Pursuant to 10 M.R.S.A. § 1174, Maine motor vehicle dealers cannot engage in the following unfair and deceptive practices: "...any action which is arbitrary, in bad faith or unconscionable" and which causes damage to the public.

FACTS

12. The Berlin City Auto Group sells new and used motor vehicles to Maine consumers.
13. The Defendants have dealerships located in Portland and South Portland, Maine.
14. In the past, Paragraph 9 of the Berlin City Auto Group's new car Purchase Order has included a warranty disclaimer that reads as follows:

9. FACTORY WARRANTY: ANY WARRANTY ON ANY NEW VEHICLE OR USED VEHICLE STILL SUBJECT TO A MANUFACTURER'S WARRANTY IS THAT MADE BY THE MANUFACTURER ONLY, AND THE SELLER HEREBY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED THEREFORE, WITH RESPECT TO THE SELLER, THE VEHICLE IS SOLD "AS IS" AND THE ENTIRE RISK AS TO QUALITY AND PERFORMANCE OF THE VEHICLE IS WITH THE BUYER AND/OR MANUFACTURER, AND IF THE VEHICLE PROVES DEFECTIVE AFTER PURCHASE, THE BUYER AND/OR MANUFACTURER, NOT THE SELLER, SHALL ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING OR REPAIR.

15. In the past, Paragraph 10 of the Berlin City Auto Group Purchase Order has included a limit on damages that reads as follows:

10. PURCHASER SHALL NOT BE ENTITLED TO RECOVER FROM DEALER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS, OR INCOME, OR ANY OTHER INCIDENTAL DAMAGES.

COUNT I

(Unfair and Deceptive Disclaimer of Maine Implied Warranties)

16. The State repeats, realleges, and incorporates herein by reference Paragraphs 1 through 16 of this Complaint.
17. As described in paragraphs 14, the Defendants when selling new motor vehicles to Maine consumers for personal, family or household purposes disclaimed the Maine Implied

Warranties of Merchantability(11 M.R.S.A. §2-314) and Fitness for a Particular Purpose (11 M.R.S.A. §2-315).

18. As described in paragraph 15, the Defendants when selling new motor vehicles to Maine consumers specifically disclaimed the statutory UCC remedies for breach of warranty such as consequential damages and incidental damages.
19. The Defendants' disclaimers of UCC warranties and their remedies for breach is in violation of 11 M.R.S.A. § 2-316(5).
20. The Defendants' disclaimer of Maine's implied statutory warranties and remedies is in violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207.
21. The Defendants' conduct as described in this Count is intentional.

RELIEF REQUESTED

WHEREFORE, the State respectfully requests that this Court:


1. Declare that the practices described in this Complaint are in violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207.
2. Issue a permanent injunction restraining the Defendants when selling new motor vehicles to Maine purchasers for primarily personal, family or household purposes from disclaiming or refusing to honor:
 - A. The Implied Warranty of Merchantability as established by 11 M.R.S.A. § 2-314;
 - B. The Implied Warranty of Fitness for a Particular Purpose established by 11 M.R.S.A. § 2-315; and
 - C. The consumers' statutory remedies for breach of these warranties, including the Buyer's Rights to Incidental and Consequential Damages pursuant to 11 M.R.S.A. §2-715.
3. Order the Defendants to pay restitution to consumers injured by their improper disclaimer of implied warranties and remedies.

4. Order the Defendant to notify any new car purchasers who currently are eligible for protection pursuant to the warranties established by 11 M.R.S.A. § 2-314 and 11 M.R.S.A. § 2-315 and who received this illegal disclaimer of warranties and remedies that the Defendants' disclaimer of these statutory rights is illegal, unenforceable and in violation of the Maine Unfair Trade Practices Act.
5. Pursuant to 5 M.R.S.A. § 209 order the Defendants to pay a civil penalty of up to \$10,000 for each intentional violation of 5 M.R.S.A. § 207.
6. Pursuant to 5 M.R.S.A. § 209, order the Defendants to pay the State its cost of investigation and suit, including attorneys' fees.
7. Grant such other and further relief as the Court deems just and proper.

Dated at Augusta, Maine this 30th day of December, 2011.

Respectfully submitted,

WILLIAM J. SCHNEIDER
Attorney General



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Assistant Attorney General
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