

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

| | | |
|-------------------------------------|---|--------------------------------------|
| DEBRA LEE HERBERT, |) | |
| on Behalf of Herself and All Others |) | |
| Similarly Situated, |) | <u>CLASS ACTION COMPLAINT</u> |
| |) | |
| Plaintiffs, |) | <u>JURY TRIAL DEMANDED</u> |
| |) | |
| v. |) | Docket No. _____ |
| |) | |
| DAIMLERCHRYSLER CORP., |) | CIVIL ACTION |
| |) | |
| Defendant. |) | |
| |) | |

Plaintiff, Debra Lee Herbert (“Plaintiff”), on behalf of herself and all others similarly situated, by her undersigned counsel, allege, against Defendant Daimler Chrysler Corporation, (“DCC” or “Defendant”), the following upon personal knowledge as to her own acts, and upon information and belief, based on the investigation conducted by her counsel, as to all other allegations:

SUMMARY OF THE ACTION

1. Plaintiff brings this class action complaint on behalf of herself and all other persons in the State of New Jersey residents who purchased or leased a model year 1998 - 2002 Chrysler Concorde, Chrysler Sebring, Dodge Intrepid or Dodge Stratus (the "Vehicles") equipped with a 2.7 litre engine

2. The 2.7 litre engines (the "Engines") used in the Vehicles were defectively designed. As a result of this design defect, these engines are prone to accumulate engine sludge which, regardless of routine maintenance, frequently results in engine failure.

3. By complaints of its customers, DCC was on notice that the 2.7 litre engine was defective and would fail prematurely regardless of routine maintenance. Nonetheless, DCC has routinely denied, and continues to deny, claims made under its extended powertrain warranty, and its extended warranties, and/or otherwise refuses to reimburse the costs of repairing or replacing these engines. DCC has established an unpublicized partial reimbursement program available to persons who are referred to it from certain auto safety advocates. This program provides partial reimbursements to qualify claimants, even if these claimants Vehicle's are beyond the time or mileage limitations of applicable warranties. By extending this secret program to some but not making it available to all Vehicle owners, DCC has acted arbitrarily, improperly and engaged in an unconscionable business practice.

4. Plaintiff alleges that DCC is liable for the costs of repairing or replacing the Engines and for payment of reasonable attorneys' fees.

JURISDICTION

5. This Court has original jurisdiction over this class action under 28 U.S.C. §1332(d)(2), (d) (5)(B), (d) (6) because (i) there are 100 or more class members, (ii) there is an aggregate amount in controversy of at least \$5,000,000, exclusive of interest and costs, and (iii)

there is minimal diversity because at least Plaintiff and Defendants are citizens of different states.

6. Venue in this Court is proper in that Defendants transacted business in this county and the conduct complained of occurred in this district, as well as elsewhere in New Jersey.

PARTIES

7. Plaintiff Debra Lee Herbert has been a resident of New Jersey at all times relevant to this controversy. She currently resides in Verona, New Jersey.

8. Defendant Daimler Chrysler Corporation is a foreign corporation, with its principal place of business and national headquarters located in Auburn Hills, Michigan. Defendant designs, manufacturers and sells automobiles and other vehicles throughout the United States under several prominent brand names including Chrysler® and Dodge®. In addition, the Vehicles are advertised, distributed and sold at multiple places of business in this district and the State of New Jersey. These locations were and are maintained by Defendant's dealers for the sale of the Vehicles and Defendant has sold the years and models in question in the County of Bergen, State of New Jersey during the Class Period and presently.

FACTUAL BACKGROUND AND SUBSTANTIVE ALLEGATIONS

9. Plaintiff purchased a 2002 Sebring Sedan on March 27, 2003, from Franklin Sussex Auto Mall Inc., located in Sussex, New Jersey. Plaintiff purchased her Sebring as a new-demo vehicle with an odometer reading of 10,625 miles. Plaintiff also purchased an extended warranty plan for her Sebring.

10. In or about February 2007, Plaintiff's husband was driving her Sebring on a public roadway when, without any prior warning, it seized-up and shut-down due to a

catastrophic engine failure. The safety of Plaintiff's husband and other persons on the public roadway were put in jeopardy because of the catastrophic engine failure.

11. After the engine failure, the Sebring did not restart. It was towed to the Franklin Sussex service facility. Plaintiff sought warranty coverage from DCC through the Franklin Sussex dealership. DCC denied Plaintiff warranty coverage.

12. Plaintiff's out-of-pocket expenditure for the purported repairs exceeds \$1,500. At the time of the catastrophic engine failure the odometer registered about 70,000 miles.

13. Since around 1998, DCC has designed, manufactured, marketed, advertised, warranted, distributed, sold and/or leased approximately 1,070,000 Vehicles.

14. Through various forms of mass-and-directed media such as television, print ads, brochures, Internet, on-site brochures, promotional documents, catalogues, and product labelling, DCC has marketed, advertised and warranted that each Vehicle is fit for the ordinary purpose for which such vehicles are used and that the Vehicles are free from defects in materials and workmanship.

15. During the relevant time period, DCC expressly warranted, in the Vehicles' product guides and in other documents, that during the warranty period of 3 years/36,000 miles it would replace any part, bumper to bumper, of the Vehicles that failed due to a defect in materials or workmanship.

16. DCC expressly warranted the powertrain for Vehicles sold from November 1, 2001 to July 8, 2002, for 7 years/100,000 miles.

17. DCC expressly warranted the powertrain for Vehicles sold from July 9, 2002 through December 31, 2005 for 7 years/70,000 miles.

18. DCC expressly warranted the powertrain for customers who purchased extended warranties for their Vehicle.

19. Due to a design defect, oil in the Engines oxidizes, breaks down, forms gelatinous sludge that blocks vital oil passages, fails to lubricate critical engine parts, causes engine breakdown and necessitates expensive engine repairs or replacement.

18. The failure mode of the Engines is often sudden and unexpected and may occur while the Vehicle is operating. Consequently, the defect creates a significant risk of personal injury. Owners of the Vehicles have reported numerous instances where an accident could have happened as a result of Engine failure, including the following:

- “... almost got into an accident on 2 occasions because my car turned off on me while driving! once on the expressway and once while making a turn.”
- “One afternoon when I was driving to the post office, I heard a knocking noise coming from the car. I was immediately worried so I was going to pull over. While I was about to pull over, the engine died on me. This almost caused an accident because I could not get out of the way from a car that was about to turn into a parking lot. Thankfully, I used all of my strength and power to turn the steering wheel.”
- “ My engine locked up on me while driving 12/11/2005 on my way home from a doctor visit with my 2 week old son in the car, I almost had an accident.”
- “ As I was driving the engine froze up nearly causing accident.”
- “Vehicle broke down going down highway while driving which could have caused accident.”
- “Engine failed while driving, avoided accident.”
- “Danger of accident on interstate because of engine failure.”
- “Engine came apart without warning on highway at 65 mph. Just missed being involved in serious & catastrophic accident.”

20. DCC recommends changing the oil in the Vehicles every 7,500 miles or 6 months, whichever comes first, for normal driving conditions, or 3,000 miles or 3 months for more extreme driving conditions. Nonetheless, persons who have complied with these maintenance schedules have experienced engine failure.

21. Thousands of purchasers and lessees of the Vehicles have experienced oil sludge problems with the Engines. Hundreds of complaints have been filed by consumers with the National Highway Traffic Safety Administration (“NHTSA”) and thousands have been posted on the Internet. The following is a sampling:

- Pressed the accelerator to pass someone and the car didn't sound quite right afterwards. It was due to have the oil changed and did so regularly from the beginning of the car when I bought it brand new in 2000. The technician said that when he changed the oil there was sludge build up. So I put a oil treatment in to see if it would help. I ran my car for less than a week after that and as I was driving to work my car starting knocking very loud. Right now I am looking at a possible \$500 to \$4800 fix. My car has almost 100,000 miles on it and almost paid off. My engine the 2.7 Dodge Intrepid. As I found out that my engine one of the worst on the market. There aren't very many of the engines left in the junk yards even. My mechanic said he is putting in the second engine in a couple car from last year. The 2.7 is junk.
*JB”
- I noticed there was a funny noise coming from the engine, I then informed my husband and he contacted a mechanic to come to the house, the mechanic did a diagnostic check on the engine and found nothing wrong. Well, on my way back from lunch (September 2004) the engine started to make a loud noise and the car was beginning to lose power. I took it to a mechanic and he took the engine apart and found sludge build up in the engine, which eventually led up to engine failure. **I religiously had the oil changed and even had a master mechanic do a diagnostic check on the engine before the failure.** I have been without my car since September 2004 and I am still making payment. I am having my car repaired for an outrageous amount of money and will be able to drive it again in a couple more weeks. Have a wonder day!
...”

22. As can be seen from the above sample listing, customers have reported the defect in the Vehicles' engines to DCC directly and through its dealers so that DCC is fully aware of the defect in the Vehicles. DCC has, however, actively concealed the existence and nature of the defect from Plaintiff and the Class Members at the time of purchase, or lease, and thereafter.

23. DCC has implemented a program (the “Reimbursement Program”) whereby owners of Vehicles may be able to obtain a partial reimbursement of their out-of-pocket

expenses incurred as a result of Engine failure.

24. The Reimbursement Program has not been publicized. Owners of the Vehicles have not been notified of the Reimbursement Program. DCC does not provide any information about the program on its website or elsewhere.

25. A consumer advocacy group, The Center for Auto Safety, directs persons who contact it to the Reimbursement Program. The Center for Auto Safety is the sole source of information about the program available to the general public. The Center for Auto Safety has not published any information about the Reimbursement Program on its website or elsewhere.

26. The re-sale value of the Vehicles has been diminished as a result of the defect.

CLASS ACTION ALLEGATIONS

27. Plaintiff brings this class action pursuant to Fed. R. Civ. Procedure Rule 23 (a) and (b)(3) on behalf of herself and the following Class:

All persons in the State of New Jersey who purchased or leased a model year 1998 - 2002 Chrysler Concorde, Chrysler Sebring, Dodge Intrepid or Dodge Stratus equipped with a 2.7 liter engine. Excluded from this Class are any person who is an employee, officer or director of Defendant or any person who has an action for damages for personal injury or death or property damage against Defendants.

28. Plaintiffs assert that the Class may be divided into two subclasses. The first, brought pursuant to Rule 23(b)(3), consists of all Class members who have incurred costs to repair or replace the Engines (the "Damages Subclass"). The Damage Subclass includes a subclass limited to all persons who made a claim under the Powertrain Warranty or other extended warranty and are the original or second owners.

29. Excluded from the Class are: (a) any Judge or Magistrate presiding over this action and members of their families; (b) DCC and any entity in which DCC has a controlling

interest or which has a controlling interest in DCC and its legal representatives, assigns and successors of DCC; (c) persons who purchased and, or, leased the Vehicles solely for the purpose of renting the Vehicles to other persons for such other persons' use; and (d) all persons who properly execute and file a timely request for exclusion from the Class.

30. *Numerosity:* The Class is composed of thousands of persons geographically dispersed throughout New Jersey, the joinder of whom in one action is impractical. The Class is ascertainable and identifiable. The precise number of members of the Class can only be ascertained through discovery, which includes Defendant's sales, service, maintenance and complaint records.

31. *Commonality:* Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- a. Whether the Engines were defectively designed;
- b. whether DCC violated New Jersey's Product Liability Act, N.J.S.A. 2A:58C-1, et seq.;
- c. whether DCC breached the implied warranty of merchantability;
- d. whether DCC breached the express warranty;
- e. whether the limits of the DCC's Basic Warranty and Powertrain Warranty are unconscionable and therefore unenforceable;
- f. whether the Defendant violated New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1, et seq.; and
- g. whether Class members are entitled to actual damages and if so, the appropriate amount thereof.

32. *Typicality:* Plaintiff's claims are typical of the claims of the members of the

Class, as all such claims arise out of DCC's conduct in: designing, manufacturing, marketing, advertising, warranting, distributing, selling and leasing the defective Vehicles; DCC's conduct in concealing and, or, failing to disclose the defect in the Vehicles; and the purchase and, or, lease of the Vehicles by Plaintiff and Class Members.

33. *Adequate Representation:* Plaintiff will fairly and adequately protect the interests of the members of the Class and have no interests antagonistic to those of the Class. Plaintiff has retained counsel experienced in the prosecution of complex class actions, including consumer class actions involving breach of warranties, product liability and product design defects.

34. *Predominance and Superiority:* This Class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court and Courts throughout the United States would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this Class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

35. Any applicable statute of limitations that might otherwise bar Plaintiff's and Class Members claims should be tolled because Plaintiff and the Class Members exercised all due

diligence that would reasonably be expected of consumers in the context of purchasing and, or, leasing a Vehicle. That is, they attentively reviewed the standard and safety features of the Vehicles at issue, including but not limited to test drives, but had no realistic ability to discern that the Engine was defective until it failed.

36. Notwithstanding the exercise of due diligence, Plaintiff and the Class Members could not reasonably have been expected to learn or discover the fact that they were deceived, and that material information concerning the engine was concealed from them.

37. DCC had knowledge of the defective Engines at all times relevant to this controversy. Therefore it is estopped from relying on any statutes of limitation because of its acts of fraudulent concealment.

38. Defendant is estopped from relying on any statutes of limitations that might otherwise be applicable to the claims asserted herein, because of Defendant's failure to disclose relevant non-public information that was exclusively in its control to Plaintiff and the Class Members who had no reasonable knowledge regarding the defective Engines.

FIRST CAUSE OF ACTION
(Breach of Express Warranty)

39. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

40. Plaintiff and the Class Members have entered into certain written warranty agreements with DCC. Pursuant to the express warranty, DCC is obligated to repair and, or, service any defects or problems with the Vehicles that Plaintiff and the Class Members experienced. In exchange for these duties and obligations, DCC received payment of the purchase or lease price for the above-mentioned Vehicles from Plaintiff and the Class Members.

41. Moreover, the advertisements, models and samples, and other similar uniform representations disseminated by DCC regarding the Vehicles were, and are, affirmations of fact and, or, promises with regard to the performance and quality of those Vehicles. These advertisements, models and samples, and other similar representations, formed, in whole or in part, the basis of the bargain as between DCC and members of the Class, and constituted express warranties that the Vehicles would conform thereto. As described above, Class Members' Vehicles did not conform to these warranties, representations, models and samples.

42. The express warranties provided to Plaintiff and other Class Members were limited to 3 years/36,000 miles (Basic Warranty), 7 years/100,000 miles (Powertrain Warranty) or 7 years/70,000 miles (Powertrain Warranty). DCC also sold other extended warranties (collectively, the "Warranties").

43. Plaintiff and other members of the class sought repairs or reimbursement pursuant to the Warranties. DCC denied their claims and refused to repair or replace the Engines or otherwise reimburse the Plaintiff or members of the Class their out-of-pocket expenses.

44. The time and mileage limits of the Warranties are unconscionable and unenforceable because:

a. DCC was aware of the defect in the Vehicles' engines prior to selling or leasing the Vehicles and knew or should have known that the Vehicles' engines would develop sludge and break or fail prematurely, but at a time beyond the relevant warranty period;

b. DCC had superior knowledge of the Engines and knew or should have known the warranty would not provide adequate coverage;

c. Plaintiff and the Class had no meaningful choice in determining those time limitations; the terms of the limited warranties unreasonably favoured DCC over the

Class Members; and a gross disparity in bargaining power existed as between DCC and the Class Members.

45. As a result of the foregoing, the Plaintiff and the Class Members have suffered damages that were directly and proximately caused by DCC's conduct and by the defective Vehicles and their engines. Plaintiff and the proposed Class Members are entitled to damages in an amount to be determined at trial.

SECOND CAUSE OF ACTION
(Breach of Implied Warranty of Merchantability)

46. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

47. DCC impliedly represented and warranted that the Vehicles were merchantable.

48. DCC breached this implied warranty because the Engines were not of merchantable quality at the time of sale.

49. Privity exists between DCC and the members of the Class because, *inter alia*: (1) DCC has had direct written communications with members of the Class with regard to the Vehicles in the form of standardized warranty forms, registration cards and other similar documents; (ii) DCC has had direct communications with members of the Class with regard to the Vehicles through television, newspaper and magazine advertisements; (iii) the dealers that have sold and leased the Vehicles to and communicated with members of the Class are agents, in law or in fact, of DCC; (iv) DCC has entered into contracts with members of the Class in connection with the assurance of warranties; and (vi) Plaintiff and members of the Class are third-party beneficiaries of warranties that ran from DCC to its agents, the dealers.

50. As a result of the foregoing, the Plaintiff and the members of the Class have suffered damages that were directly and proximately caused by DCC's conduct and by the

defective Vehicles and their engines. Plaintiff and the members of the Class are entitled to damages in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(Magnuson-Moss Warranty Act)

51. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

52. This claim is brought pursuant to 15 U.S.C. § 2310 (d)(1)(A) as a state law claim over which this Court may and should assert jurisdiction as a pendent state claim pursuant to 28 U.S.C. § 1337 and because this action requires exercise of diversity jurisdiction pursuant to CAFA.

53. Defendant violated the Magnuson-Moss Act in that it breached the written warranty given with the Vehicles at the time of sale.

54. Defendant further violated the Magnuson-Moss Act in that it breached the implied warranty of merchantability given with the Vehicles.

55. Defendants' violation of one or more provisions of the Magnuson-Moss Act has resulted in damages to Plaintiff and the Class Members.

56. As a result of the foregoing, the Plaintiff and member of the Class have settled damages that were directly and approximately caused by DCC's conduct and by the defective Vehicles and their Engines. The amount of damages due Plaintiff and the Class Members will be determined at trial.

FOURTH CAUSE OF ACTION
(Unfair and Deceptive Trade Practices)
(Violation of N.J.S.A. 56:8-1, et seq.)

57. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

58. DCC's practices, acts, policies and course of conduct, as described above, were intended to induce, and did induce, Plaintiff and the Class Members to purchase and, or lease the above-mentioned Vehicles with defective engines. DCC's practices, acts, policies and course of conduct violated New Jersey's Unfair Trade Practices Act, N.J.S.A. 56:8-1, et seq, in that:

a. DCC actively and knowingly misrepresented to Plaintiff and the Class Members at the time of purchase that the Vehicles, including the Engines of said Vehicles, were in good working order, not defective and fit for their intended purpose;

b. DCC failed to give adequate warnings and notices regarding the use, defects and problems with the Engines, to customers and consumers who purchased and, or, leased said Vehicles, despite the fact that DCC possessed prior knowledge of the inherent defects to the Engines;

c. DCC failed to disclose to Plaintiff and the Class Members, either through warnings or recall notices, and, or, actively concealed the fact from them that the Engines were defective, despite the fact that it learned of such defects as early as 1998

d. DCC forced Plaintiffs and the Class members to expend sums of money to repair and/or replace the Engines despite the fact Defendant had prior knowledge of the defect at the time of purchase.

e. DCC has implemented an unpublicized extended warranty program though which it provides partial reimbursement to consumers who are directed to it by the Center for Auto Safety.

59. As a result, Plaintiff and the Class Members have been damaged and have suffered ascertainable loss in that they, among other things, have expended sums of money to repair and, or replace the engines in the Vehicles, rent or lease other vehicles for their use during the time when the Engines in their Vehicles were being repaired or replaced, and sold their vehicles below their value if the Engine had performed as expected. Plaintiff seeks on behalf of himself and the Class Members to recover all damages, actual and, or, punitive permitted by law in an amount to be proven at trial and reasonable attorneys' fees.

SIXTH CAUSE OF ACTION
(Negligence)

60. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

61. The Vehicles were defectively designed and are unreasonably dangerous in that the engines breakdown due to sludge build-up and, thus, increase the likelihood of a vehicular accident.

62. At the time DCC was selling the Vehicles, it was aware, or reasonably should have been aware, of the foreseeable risks associated with the use of the Vehicles.

63. DCC had a duty to disclose to the consuming public the foreseeable risks associated with the use of the Vehicles. DCC further had a duty not to put defective and dangerous products on the market.

64. DCC breached its duties to the Plaintiff and members of the Class by failing to disclose the known risks associated with the Vehicles, and by allowing the sale, lease and use of

the Vehicles when it knew they would not perform as intended.

65. As a result of the foregoing, the Plaintiff and the members of the Class have suffered damages that were directly and proximately caused by the unreasonably dangerous Vehicles. Plaintiffs and the proposed members of the Class are entitled to damages in an amount to be determined at trial.

SEVENTH CAUSE OF ACTION
(Unjust Enrichment/Restitution)

66. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

67. Defendant marketed, advertised and, or, promoted the Vehicles as merchantable, free of defect, fit for the ordinary purpose for which they were to be use and safe for said purpose as set forth more fully above.

68. Defendant accepted payment from Plaintiff and the members of the Class for the purchase and, or, lease of the Vehicles.

69. Plaintiff and the members of the Class did not receive Vehicles that were free of defect, fit for the ordinary purpose for which they were to be use and safe for said purpose.

70. It would be inequitable for Defendant to retain this money, in light of its misrepresentations and omissions, because Plaintiff and the members of the Class did not, in fact, receive products that were free of defect, fit for the ordinary purpose for which they were to be used and safe for said purpose.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, prays for judgment as requested above against DCC and further prays for:

- (a) An order certifying the Class proposed herein and appointing Plaintiff and his counsel to represent the Class;
- (b) For restitution and/or disgorgement of amounts paid by Plaintiff and members of the Class for the purchase and/or lease of the Vehicles, together with interest from the date of payment;
- (c) For actual damages;
- (d) For statutorily provided damages;
- (e) For statutory prejudgment interest;
- (f) For reasonable attorneys' fees and the costs of this action;
- (g) For legal and equitable relief under the causes of action stated herein; and
- (h) For such other relief at this Court may deem just and proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury on all issues so triable

DATED: April 12, 2007

Respectfully submitted,

s/Gary S. Graifman

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