

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. 11
CAUSE NO. 49D11-1310-PL-038001

TAMMY RAAB, on behalf of herself and)
all others similarly situated,)

Plaintiff,)

v.)

KENT W. ABERNATHY, in his official capacity)
as Commissioner of the Indiana Bureau of)
Motor Vehicles, and the INDIANA BUREAU)
OF MOTOR VEHICLES,)

Defendants.)

FILED

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APR 13 2016

Myla A. Eldridge
CLERK OF THE MARION CIRCUIT COURT

**REPLY AND ADDITIONAL DEFENSES OF PLAINTIFF CLASS
TO COUNTERCLAIM OF DEFENDANTS**

Plaintiff, on behalf of the certified Plaintiff Class, by Class Counsel, for her Reply and Additional Defenses to the Counterclaim of Defendants, states as follows:

REPLY TO COUNTERCLAIM

1. On September 27, 2013, the BMV issued a press release notifying the public that an independent review had determined that the BMV inadvertently had been charging fees in incorrect amounts, both by overcharging and by undercharging various fees (the "Press Release") (copy attached as Exhibit A to Plaintiffs Amended Complaint).

REPLY: Plaintiff admits that the BMV issued a press release on September 27, 2013, but denies the Defendants' characterization of the contents of that press release, including but not limited to the allegation that the Press Release states that the review of the BMV's fees was "independent" or that the BMV charged fees in incorrect amounts "inadvertently" and states that the terms of the Press Release speak for themselves.

2. Contemporaneously with its issuance of the Press Release, the BMV took steps to credit the amount of identified overcharges to customer accounts. Those credits automatically are applied as part of the customer's next transaction with the BMV. Customers also may, through the BMV's website, request the issuance of a check in the amount of any refund due.

REPLY: The Plaintiff denies that the BMV has made credits or refund checks available for all of the "identified" overcharges, because the BMV has refused to release the review of its fees referenced in the Press Release and the Plaintiff therefore lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and because there are dozens of overcharged fees, amounting to tens of millions of dollars, for which the BMV has never offered a credit or refund of any kind.

3. Notwithstanding the fact that the BMV already was providing refunds to overcharged customers, which refunds are ongoing, on October 11, 2013, Plaintiff filed her Class Action Complaint "to recover millions of dollars in unlawful fees collected from Indiana residents for vehicle registrations and other services." Plaintiff's Class Action Complaint alleged that the BMV had overcharged customers with respect to twenty-nine (29) enumerated fees. On December 17, 2013, Plaintiff filed her First Amended Class Action Complaint ("Amended Complaint"), which alleges overcharges related to the same twenty-nine (29) fees.²

² Plaintiff's Amended Motion for Class Certification, filed on February 2, 2015, purports to broaden her claims to include dozens of additional fees (the "New Fees"). The Court's September 18, 2015, Order Granting Plaintiff's Motion for Class Certification does not question this broadened definition of the class, despite the fact that it is not part of any pleading, and it conflicts with the definition contained in the Amended Complaint. Regardless, to the extent the New Fees are deemed within the scope of Plaintiff's Complaint, the same equitable rules apply equally to them.

REPLY to FN2: Plaintiff denies that her Amended Motion for Class Certification purports to broaden her claims; the Complaint and Amended Complaint sought the identification of and relief for any overcharged fees collected by the BMV at any time. The Plaintiff admits only that the Court's September 18, 2015, Order Granting Plaintiff's Motion for Class Certification speaks for itself and denies the BMV's characterization of the Order. The last sentence of FN2 is a legal conclusion and does not allege any fact requiring admission or denial.

REPLY: Plaintiff denies that the BMV was already providing refunds to all overcharged customers or for all overcharged fees or for all periods of time during which fees were overcharged. There are dozens of overcharged fees, many of which the BMV has conceded, for which the BMV has never offered a refund of any kind. Plaintiff admits that she filed her Class Action Complaint on October 11, 2013 and states that the Complaint speaks for itself. Plaintiff admits that she filed her First Amended Class Action Complaint on December 17, 2013, and states that the Amended Complaint speaks for itself. Plaintiff admits that the Complaint and Amended Complaint alleged that the BMV admitted to overcharging 29 fees, but denies that the Complaint or Amended Complaint only sought relief for those 29 overcharged fees.

4. Plaintiff styles her claims as equitable, for "unjust enrichment," "money had and received," and "accounting."

REPLY: Plaintiff admits that the Amended Complaint identifies the claims in Counts I, II and III as "Unjust Enrichment," "Money Had and Received," and "Action for Accounting," respectively.

5. The remedy for equitable claims, such as those named in Plaintiff's Amended Complaint, is restitution.³

³ Defendants disagree with Plaintiff's assertion that her claims are truly equitable in nature and have argued at multiple junctures that Plaintiff's claims sound in tort and therefore are barred by the Indiana Tort Claims Act (in light of Plaintiff's undisputed failure to file a Tort Claim Notice). Defendants assert this counterclaim out of abundance of caution and in light of the Court's September 18, 2015, Order Granting Plaintiff's Motion for Class Certification, which could be read to require Defendants to assert such a counterclaim to establish the relevance of clear evidence of undercharges. By addressing Plaintiff's claims as equitable within the scope of this claim and related defenses, Defendants do not intend to waive and expressly preserve their argument that Plaintiff's claims sound in tort and are barred by the Tort Claims Act.

REPLY TO FN3: The footnote to Paragraph 5 states the BMV's legal position and does not allege any fact requiring admission or denial. Plaintiffs deny all of the remaining contentions in that footnote, including but not limited to the BMV's contention that it has not waived its argument regarding the Indiana Tort Claims Act by filing its Counterclaim and has preserved such argument..

REPLY: Paragraph 5 states a legal conclusion and does not allege any fact requiring admission or denial. To the extent that Paragraph 5 requires a response, the Plaintiff admits that the Amended Complaint does seek restitution for all fees for which the BMV overcharged at any time, but denies that restitution is the only relief requested in the Amended Complaint.

6. The application of the doctrine of restitution requires the Court to consider the extent to which any undercharges benefitted the class, because restitution "implies a restoration of the status quo." *Goff v. Graham*, 306 N.E.2d 758, 767 (Ind. Ct. App. 1974).

REPLY: Paragraph 6 states a legal conclusion and does not allege any fact requiring admission or denial. Plaintiff denies that the Court is required to consider the effect of the BMV's alleged undercharges in this case.

7. Accordingly, if the class was undercharged, any award of damages in favor of the class, must be adjusted to account for such undercharges.

REPLY: Paragraph 7 states a legal conclusion and does not allege any fact requiring admission or denial. To the extent Paragraph 7 requires a response, Plaintiff denies that any award of damages [or restitution] in favor of the class must be adjusted to account for alleged undercharges.

8. Similarly, if the amount of the undercharges is equal to or exceeds the amount by which the class was overcharged, there is no basis to award restitution to the Plaintiff Class.

REPLY: Paragraph 8 states a legal conclusion and does not allege any fact requiring admission or denial. To the extent Paragraph 8 requires a response, Plaintiff denies that if the amount of the undercharges is equal to or exceeds the amount by which the class was overcharged there is no basis to award restitution to the Plaintiff Class.

COUNT I

9. Defendants incorporate herein each of the allegations contained in the preceding paragraphs of the Counterclaim.

REPLY: Paragraph 9 does not allege any fact requiring admission or denial, but in response, Plaintiff incorporates the foregoing denials in this Reply.

10. The BMV undercharged the putative class for fees included within the "Inflated Fees" identified in Paragraph 8 above and within the "New Fees" identified in Note 2 above (the "Undercharges").

REPLY: The Plaintiff denies the allegations of Paragraph 10.

11. The BMV does not seek an affirmative award of damages against the class or any class member. The BMV seeks relief only to ensure that the amount of any award of damages to the Plaintiff and the Plaintiff Class is adjusted through a balancing of equities to off-set the amount of the Undercharges against such award.

REPLY: To the extent the BMV's statement in Paragraph 11 of what it "seeks" alleges a fact, the Plaintiff lacks knowledge or information sufficient to form a belief as to the truth of the allegation and therefore denies the same. The Plaintiff denies that any award of damages [or restitution] to the Plaintiff Class should be adjusted through a balancing of equities or otherwise to off-set the amount of any alleged undercharges against such award. The setoff requested by the BMV would require class members who did not pay any of the alleged undercharges, or who were only allegedly undercharged a small amount, to pay – out of restitution awarded to them – for undercharges purportedly benefitting other class members, which would be unjust and inequitable.

12. The Undercharges conferred a measurable benefit on the class, and under the present circumstances, in which the Plaintiff and Plaintiff Class seek an award of damages related to overcharges, the retention of that benefit without an equitable offset would be unjust.

REPLY: Plaintiff denies the allegations of Paragraph 12. Class members were unaware of any alleged undercharge for fees, and therefore did not expressly or impliedly request such a “benefit.” Further, any alleged undercharge of one class member cannot benefit those class members who were not undercharged. By treating the alleged undercharges as a benefit to the class as a whole, the BMV attempts to require class members who did not pay any of the alleged undercharges, or who were only allegedly undercharged a small amount, to pay – out of restitution awarded to them – for undercharges purportedly benefitting other class members, which would be unjust and inequitable.

13. The class is entitled to recover damages for overcharges only if and to the extent the amount of those overcharges is greater than the amount of the Undercharges.

REPLY: Paragraph 13 states a legal conclusion and does not allege any fact requiring admission or denial. To the extent Paragraph 13 requires a response, Plaintiff denies the allegations in Paragraph 13 because the proposed approach would permit the alleged undercharges of a limited number of class members to be used to off-set the restitution owed to other class members who did not pay any alleged undercharges, which would be unjust and inequitable.

WHEREFORE, the Plaintiff Class request that the Defendants take nothing by way of their Counterclaim against the Plaintiff and Plaintiff Class.

ADDITIONAL DEFENSES

1. Defendants' Counterclaim fails to state a claim upon which relief can be granted.
2. Defendants' Counterclaim is barred in whole or in part by the doctrine of waiver.
3. Defendants' Counterclaim is barred in whole or in part by the doctrine of acquiescence.
4. Defendants' Counterclaim is barred in whole or in part by the doctrine of laches.
5. Defendants' Counterclaim is barred in whole or in part by the doctrine of unclean hands.
6. Defendants' Counterclaim is barred in whole or in part by the applicable statute of limitations.
7. Defendants are equitably estopped from asserting the Counterclaim because the BMV was aware of the purported legal bases of the alleged undercharges but nonetheless represented to class members that the amount of fees actually charged to them was in accordance with applicable law, knowing that class members would rely on this representation and conceding that this reliance was reasonable.
8. Defendants are equitably estopped from asserting the Counterclaim by their conduct and statements and the conduct and statements of their counsel, including, but not limited to public statements by the Governor of Indiana and the Commissioner of the BMV, with knowledge that this lawsuit was pending, that neither the State of Indiana nor the BMV would seek to "recoup" the undercharges.
9. Defendants' Counterclaim is barred or fails in whole or in part for lack of mutuality. Even if certain fees were undercharged and the BMV actually had a valid claim for the payment of such undercharges, the BMV could only seek a setoff for such undercharges

against the restitution awarded to those class members who actually paid the undercharges, because the law only permits a setoff of claims that are mutual. The BMV's Counterclaim is for a non-mutual setoff in the aggregate of all alleged undercharges against all overcharges, and therefore must be denied.

Respectfully submitted,

Date: April 13, 2016



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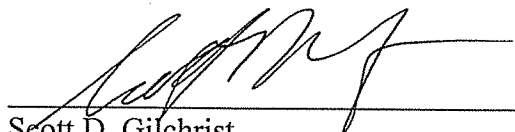
Counsel for Plaintiff and Plaintiff Class

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record by first class U.S. Mail, postage prepaid, and a courtesy copy provided by e-mail according to the Court's case management Plan, this 13th day of April, 2016:

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