

IN THE CIRCUIT COURT OF TIPTON COUNTY, TENNESSEE  
FOR THE TWENTY-FIFTH JUDICIAL DISTRICT, AT COVINGTON

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STATE OF TENNESSEE *ex rel.* HERBERT H. )  
SLATERY III, Attorney General and Reporter, )

Plaintiff, )

v. )

McDIVITT MOTORS, LLC, a domestic )  
limited liability company, )

and )

MARTIN KEITH McDIVITT, )

Defendants. )

Case No. 7670

JURY DEMAND

FILED

JUL 02 2019

MIKE FORBESS, CLERK (RE)

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**CIVIL ENFORCEMENT COMPLAINT**

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The State of Tennessee brings this civil enforcement action to stop the pervasive and ongoing deception and unfair business practices committed by Defendants in the operation of their used motor vehicle business. Defendants have unduly profited from the numerous deceptive claims made to consumers and the unfair practices employed in the course of their business. Defendants' misconduct has left a trail of harmed consumers, altered vehicle titles, unpaid trade-ins, and financial ruin in its wake. Absent immediate intervention by this Court, Defendants will continue to reap profits from financially strapped consumers and abscond with the assets needed to rectify the problems in these complicated transactions and make these harmed consumers whole.

The State of Tennessee, through its Attorney General and Reporter, Herbert H. Slatery III (State or Attorney General), brings this civil enforcement action pursuant to the Tennessee

Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101–131 (TCPA), the Uniform Fraudulent Transfer Act, Tenn. Code Ann. §§ 66-3-301–313 (UFTA), and the Attorney General’s power at common law to obtain temporary and permanent injunctive relief, rescission or reformation of contracts, restitution, refund of monies paid, disgorgement of ill-gotten gains, civil penalties, attorney fees, and other equitable and statutory relief for Defendants’ violations of the TCPA and the UFTA.

1. This proceeding is brought in the name of the State of Tennessee, in its sovereign capacity by and through its Attorney General.

2. The State’s TCPA claims are brought at the request of the Director of the Division of Consumer Affairs of the Department of Commerce and Insurance. The Director has determined, pursuant to Tennessee Code Annotated § 47-18-108(a)(2), that the purposes of the TCPA will be substantially impaired by a delay in instituting legal proceedings and has therefore not provided Defendants with 10 days’ notice of the State’s intention to initiate an action against them under the TCPA.

3. The State has reason to believe that Defendants have engaged in, are engaging in, and are about to engage in acts or practices declared to be unlawful by the TCPA and the UFTA in the operation of their used motor vehicle business.

4. At all material times, Defendants, individually, collectively, and/or as agents of one another, have engaged in acts or practices that affect the conduct of trade or commerce, as defined in Tennessee Code Annotated § 47-18-103(19).

5. The State has reason to believe that this civil enforcement action is in the public interest.

6. This Complaint is filed concurrently with a Motion for a Temporary Restraining Order and Temporary Injunction, a Motion for an Order Appointing a Receiver and Asset Freeze Over Defendants, a Memorandum of Law in Support of All Extraordinary Relief, and supporting evidence and exhibits.

### **JURISDICTION AND VENUE**

7. This Court has subject matter jurisdiction pursuant to Tenn. Code Ann. §§ 47-18-108(a).

8. As a court of general jurisdiction, the Circuit Court is authorized to hear this matter and sit as a court of equity in this matter pursuant to Tennessee Code Annotated §§16-10-101 and 111.

9. Venue is proper in Tipton County pursuant to Tennessee Code Annotated §47-18-108(a)(3) because it is one of the counties where the alleged unfair, deceptive, and misleading acts and practices took place, and is one of the counties in which Defendants conduct, transact, or have conducted or transacted business.

10. As set forth in this Complaint, this Court has specific personal jurisdiction over Defendants based on their contacts in Tennessee. *See* Tenn. Code Ann. §§20-2-201, -214, -223, and -225.

11. Among other things, Defendants have conducted and continue to conduct business in Tennessee by offering for sale and selling used automobiles in this State and transacting business with financial institutions in this State.

12. Defendants are further subject to jurisdiction in this state because they have entered into and contracted to supply or furnish things in this state through their operation of a used automobile business.

13. As set forth in this Complaint, this Court has general personal jurisdiction over Defendants because they are essentially at home in this State.

14. Defendants are further subject to jurisdiction in this State on any other basis authorized by law or not inconsistent with the constitutions of Tennessee or the United States.

### **THE PARTIES**

15. Plaintiff, the State of Tennessee, is one of the fifty sovereign States of the United States. Herbert H. Slatery III is the Attorney General and Reporter of the State of Tennessee and has been duly appointed to serve as Attorney General by the Tennessee Supreme Court.

16. Defendant McDivitt Motors, LLC (McDivitt Motors) is a Tennessee limited liability company (SOS Control No. 000408112), with a principal business address of 1723 Highway 51 South, Covington, Tennessee 38019-3628. Defendant McDivitt Motors may be served with process through its registered agent, Defendant Martin McDivitt, at Defendant McDivitt Motors' principal business address.

17. Defendant McDivitt Motors has existed since 2001 and has one member, Defendant Martin McDivitt.

18. Until May 16, 2019, McDivitt Motors was licensed as a Used Motor Vehicle Dealer (License No. 15059) with the State of Tennessee Motor Vehicle Commission (MVC). Neither McDivitt Motors nor Martin McDivitt are authorized to sell new motor vehicles in this state.

19. On May 16, 2019, the MVC summarily suspended McDivitt Motors' license to sell used motor vehicles after finding that Martin McDivitt purchased numerous new motor vehicles from other states and resold those vehicles as "new" to consumers in Tennessee.

20. The MVC further found that Martin McDivitt, or someone on his behalf, falsified the Manufacturer's Statement of Origin for at least two sales involving Tennessee consumers.

21. Additionally, the MVC found that multiple complaints had been filed against McDivitt Motors and Martin McDivitt alleging that they have unlawfully sold new motor vehicles and failed to pay off liens on trade-in vehicles.

22. Proceedings to permanently revoke McDivitt Motors' Used Motor Vehicle License are still pending before the MVC.

23. Defendant Martin Keith McDivitt (Martin McDivitt) is an individual and resident of Tipton County, Tennessee, residing at 411 McLillie Lane, Covington, Tennessee 38019.

#### **INDIVIDUAL PARTICIPATION & UNJUST ENRICHMENT**

24. Defendant Martin McDivitt is jointly and severally liable for the conduct of Defendant McDivitt Motors because he had the authority to formulate, direct, or control its activities, and knew or should have known of its unlawful conduct, but failed to stop it.

25. Defendants have received ill-gotten funds that are the proceeds of the unlawful acts and practices alleged in this Complaint and have no legitimate claim to those funds.

#### **DEFENDANTS' OPERATION OF A USED CAR BUSINESS RIDDLED WITH DECEPTIVE AND UNFAIR BUSINESS PRACTICES**

26. Defendant Martin McDivitt operates a used automobile business through Defendant McDivitt Motors. McDivitt Motors offers for sale and sells motor vehicles to consumers in Tipton County, Tennessee and the surrounding area.

27. On average, McDivitt Motors sells at least 200 motor vehicles per year. In 2018, McDivitt Motors sold 227 motor vehicles.

28. Starting in early 2019, the MVC began receiving complaints from consumers regarding McDivitt Motors and Martin McDivitt.

29. These complaints alleged, among other things, that McDivitt Motors and Martin McDivitt were selling used vehicles as “new” vehicles and were failing to pay off the liens attached to trade-in vehicles as promised.

30. These complaints represent the tip of the iceberg. Thousands of consumers may have suffered harm as a result of the numerous deceptive and unfair practices alleged in this complaint.

31. Through the deceptive and unfair practices described in this Complaint, Defendants have run horribly afoul of Tennessee’s consumer protection laws and engaged in illegal and fraudulent transfers of personal property and financial assets.

*Defendants’ Express Misrepresentations That Vehicles are New*

32. Defendants routinely advertise and/or represent to consumers in Tennessee that motor vehicles sold by Defendants to consumers are new when, in fact, such motor vehicles are used.

33. For example, Defendants sold a 2017 Chevrolet Silverado to consumer SMP Fullen Farm, LLC, on April 17, 2017. The “Car Invoice and Bill of Sale” lists the vehicle as “New,” but the Odometer Disclosure Statement indicates that this allegedly “new” vehicle had been driven for 4,865 miles before the April 17 sale. In the MVC’s May 16, 2019 summary suspension order, the MVC found that Defendants purchased this vehicle out of state, transported it to Tennessee, and re-sold the vehicle as new.

34. In addition, Defendants sold a 2017 Chevrolet Tahoe to consumer Robert M. Sanford, Jr., on April 25, 2017. The “Car Invoice and Bill of Sale” lists the vehicle as “New,” but the Certificate of Origin lists the original dealer as Sam Pierce Chevrolet, Inc., in Daleville, Indiana. In the MVC’s May 16, 2019 summary suspension order, the MVC found that

Defendants purchased this vehicle out of state from the original dealer, transported it to Tennessee, and re-sold the vehicle as new.

35. Defendants sold a 2018 Chevrolet Silverado to consumer Roger Cromwell on January 2, 2019. The “Car Invoice and Bill of Sale” provided by McDivitt Motors, LLC, lists the vehicle as “New,” but the “Certificate of Title” lists the prior owner as “Martin K. McDivitt.” In the MVC’s May 16, 2019 summary suspension order, the MVC found that Defendants purchased this vehicle out of state from the original dealer, transported it to Tennessee, and re-sold the vehicle as new.

36. Additionally, Defendants sold a 2019 GMC Sierra to consumer Fullen and Fullen, LLC, on January 21, 2019. The “Car Invoice and Bill of Sale” provided by McDivitt Motors, LLC, lists the vehicle as “New,” but a prior purchase agreement and the Manufacturer’s Statement of Origin show that the original purchaser was “Martin Keith McDivitt.” In the MVC’s May 16, 2019 summary suspension order, the MVC found that Defendants purchased this vehicle out of state from the original dealer, transported it to Tennessee, and re-sold the vehicle as new.

37. Whether or not a vehicle is “new” or “used” is a fact that would affect a consumer’s purchasing decision and is therefore a material fact. Further, a representation that a vehicle is “new” is an express claim that speaks for itself and requires no extrinsic evidence to discern its meaning. Representing that a vehicle is “new” when such is not the case is an express material misrepresentation and therefore a deceptive trade practice under the TCPA.

*Defendants’ Implied Misrepresentations That McDivitt Motors is  
Authorized to Sell New Motor Vehicles*

38. In many of Defendants’ transactions with Tennessee consumers, Defendants impliedly misrepresent their authority to sell new vehicles.

39. Motor vehicle dealers are required to obtain proper licensure from the MVC in order to transact business involving motor vehicles. The MVC issues separate licenses for used vehicle dealers and new vehicle franchises. Defendants were only licensed to engage in transactions involving used motor vehicles.

40. Nonetheless, Defendants continuously engaged in transactions with Tennessee consumers involving motor vehicles that Defendants' labeled as "New" on the "Car Invoice and Bill of Sale."

41. For example, when Defendants sold a 2017 Chevrolet Silverado to consumer SMP Fullen Farm, LLC, on April 17, 2017, Defendants listed the vehicle as "New" on the "Car Invoice and Bill of Sale."

42. Similarly, when Defendants sold a 2017 Chevrolet Tahoe to consumer Robert M. Sanford, Jr., on April 25, 2017, Defendants also listed this vehicle as "New" on the "Car Invoice and Bill of Sale."

43. Whether or not a motor vehicle dealer is authorized by law to engage in a sales transaction for a motor vehicle is a fact that would affect a consumer's purchasing decision and is therefore a material fact. Further, a representation that a vehicle is "New" on an official business invoice is an implied claim that the dealer is legally authorized to engage in the consumer transaction. Representing that Defendants' have the legal authority to engage in the sales of new motor vehicles is an implied material misrepresentation and therefore a deceptive trade practice under the TCPA.

*Defendants' Deceptive Practice of Failing to Deliver the Title to Purchased Vehicles*

44. Defendants make misleading express claims that they will deliver to consumers or their banks the titles to the vehicles that consumers purchase from Defendants. In other instances,



Defendants fail to disclose the fact that Defendants cannot or will not deliver good title to these vehicles.

45. For example, consumer Craig Dickerson purchased a 2015 Chevrolet Silverado from Defendants in or around December 2018. Mr. Dickerson obtained financing and paid Defendants for the vehicle. Defendants informed Mr. Dickerson that they would deliver title to his lender. In or around February 2019, Mr. Dickerson was pulled over by a Shelby County Deputy, who informed Mr. Dickerson that his vehicle was still registered to the previous owner. According to Mr. Dickerson, Defendants never paid the previous owner for the 2015 Silverado that Defendants sold to Mr. Dickerson.

46. Consumer Lauren Flanagan purchased a 2014 Hyundai Tucson from Defendants on or around February 23, 2019. When Ms. Flanagan paid Defendants in cash five days later on February 28, Defendants informed Ms. Flanagan that the vehicle was in Illinois. She did not sign the purchase agreement until March 1. Ms. Flanagan later discovered that her vehicle was last registered in the state of Illinois in 2017. Ms. Flanagan has never received the title to her 2014 Tucson.

47. Receiving title to a vehicle is a fact that would affect a consumer's purchasing decision and is therefore a material fact. Representing that Defendants will deliver title to vehicles sold to consumers is an express material misrepresentation and therefore a deceptive trade practice under the TCPA. Failing to disclose the fact that Defendants will not deliver title to vehicles sold to consumers is a material omission and therefore a deceptive trade practice under the TCPA.

Defendants' Material Omissions That Defendants Will Not Pay Off Trade-In Vehicles

48. Defendants fail to disclose the fact that, contrary to common practice, consumer expectation, and the understanding of the parties, Defendants do not pay off vehicles that are traded in with the purchase of a vehicle from Defendants.

49. For example, Defendants sold a 2019 Chevrolet Silverado to consumer Frank Hutcherson, Jr., in or around November 2018. At the time of the sale, Mr. Hutcherson owed around \$15,000 on his trade-in vehicle, a 2015 Chevrolet Silverado. Mr. Hutcherson turned over his 2015 Silverado to Defendants when he picked up his 2019 Silverado. In or around February 2019, Mr. Hutcherson learned that his trade-in vehicle had not been paid off. He also learned that it had been sold by Defendants. As a result, Mr. Hutcherson is now making two car payments each month, one for his 2015 Silverado trade-in and one for his new 2019 Silverado.

50. In addition, Defendants sold a 2015 Chevrolet Silverado to consumer Christopher Powell in or around July 2018. At the time of the sale, Mr. Powell traded in a 2007 GMC Sierra with a loan payoff of \$13,800 that Defendants were to pay. In or around October 2018, Mr. Powell began receiving mail notices that the payments on the 2007 Sierra were delinquent. Mr. Powell later discovered that Defendants had not paid off the loan on the 2007 Sierra. In or around March 2019, Mr. Powell learned that Defendants attempted to pay off this loan by a check that was returned for insufficient funds.

51. Whether or not Defendants will pay off the loan on a trade-in vehicle is a fact that would affect a consumer's purchasing decision and is therefore a material fact. Further, any representation that a dealer will pay off a trade-in vehicle is an express claim that speaks for itself and requires no extrinsic evidence to discern its meaning. Failing to disclose that

Defendants would not pay off vehicles traded in by consumers during the course of a motor vehicle sale is a material omission and therefore a deceptive trade practice under the TCPA.

*Defendants' Unauthorized Sales of New Motor Vehicles*

52. Defendants frequently engaged in the sale of purportedly “new” motor vehicles to consumers in Tennessee when Defendants were not licensed to engage in such transactions.

53. It is unlawful to sell “new” motor vehicles in this state without proper licensure from the MVC. Therefore, every promotion, sale, or offer for sale of a “new” motor vehicle by Defendants was illegal or unlawful.

54. Because Defendants have directly or indirectly promoted, sold, or offered for sale vehicles that were unlawful for Defendants to sell in this state, Defendants have engaged in unfair or deceptive acts or practices under the TCPA.

*Defendants' Express Misrepresentations in the Manufacturers' Statements of Origin*

55. Defendants also routinely alter the Manufacturer's Statement of Origin in order to misrepresent the previous owner of a particular vehicle.

56. For example, Defendants sold a 2017 Chevrolet Tahoe to consumer Brenda Moss on May 5, 2017. On the Certificate of Origin for this vehicle, Defendants, or someone acting at Defendants' direction, altered the name of the first purchaser from “Marty McDivitt” to “Marty McDivitt Motors, LLC.” Notably, “Marty McDivitt Motors, LLC” is not a legal entity registered with the Tennessee Secretary of State. In the MVC's May 16, 2019 summary suspension order, the MVC found that “Mr. McDivitt, or someone on behalf of Mr. McDivitt, falsified the Manufacturer's Statement of Origin” for this vehicle.

57. In addition, Defendants sold a 2018 Chevrolet Silverado to consumer Roger Cromwell on July 18, 2018. On the Certificate of Origin for this vehicle, Defendants, or someone

acting at Defendants' direction, altered the name of the first purchaser from "Martin McDivitt" to "Martin McDivitt Motors, LLC." Notably, "Martin McDivitt Motors, LLC" is not a legal entity registered with the Tennessee Secretary of State. In the MVC's May 16, 2019 summary suspension order, the MVC found that "Mr. McDivitt, or someone on behalf of Mr. McDivitt falsified the Manufacturer's Statement of Origin" for this vehicle.

58. The fact that a motor vehicle had a prior owner, especially when the vehicle is represented to be "new," is a fact that would affect a consumer's purchasing decision and is therefore a material fact. Further, a representation of the identity of a prior vehicle owner is an express claim that speaks for itself and requires no extrinsic evidence to discern its meaning. Representing that the prior owner of a motor vehicle is a particular person or entity when such is not the case and representing that a vehicle has no prior owner when such is not the case are express material misrepresentations and therefore deceptive trade practices under the TCPA.

*Defendants' Do Not Sell Vehicles as Advertised*

59. Defendants often provide a different vehicle to consumers in Tennessee than the ones consumers agreed to purchase. In many cases, consumers obtained secured loans to purchase the vehicles that Defendants later substituted for different vehicles.

60. For example, Defendants sold a 2017 Buick Enclave to consumer Lauren Fortenberry on January 3, 2019. Mrs. Fortenberry obtained secured financing for this vehicle the next day on January 4. Several days later Defendants contacted Mrs. Fortenberry to inform her that the vehicle she purchased was not acceptable, and on January 16, Defendants delivered a different 2017 Buick Enclave to Mrs. Fortenberry. This vehicle had a different VIN than the one she originally purchased and different than the VIN she provided to her lender. After Defendants used misrepresentations to induce Mrs. Fortenberry to refinance her loan on the motor vehicle

that she never received, Mrs. Fortenberry filed a lawsuit against Defendants in Tipton County Chancery Court. These proceedings are still pending.

61. In addition, Defendants sold a 2018 Dodge Ram to consumer James Franklin Gibson on February 12, 2019. During this transaction, Defendants described this vehicle as including a back-up camera, remote start, spray-in bed liner, and manufacturer's warranty. Mr. Gibson secured financing for this vehicle a week later on February 19. When Mr. Gibson received the vehicle, it did not have a number of items Defendants represented that it had, and the vehicle was not covered under a valid manufacturer's warranty despite Defendants' claim that it was. As a result of these practices, Mr. Gibson has filed a lawsuit against Defendants in Tipton County Chancery Court. These proceedings are still pending.

62. Representations about a motor vehicle's VIN, features, and warranties are facts that would affect a consumer's purchasing decision and are therefore material facts. Further, representations about a motor vehicle's VIN, features, and warranties are express claims that speak for themselves and require no extrinsic evidence to discern their meaning. Representing that a transaction involves a vehicle with a particular VIN, features, and warranties when such are not the case is an express material misrepresentation and therefore a deceptive trade practice under the TCPA.

*Defendants' Express Misrepresentations and Omissions Involving Refinancing of Vehicles*

63. Defendants misrepresent the nature of financing agreements to convince consumers to refinance their loans on motor vehicles purchased from Defendants. Instead of paying off the pre-existing loan, Defendants pocket the money from the second loan and fail to pay off the first one, leaving consumers with two loans for the same vehicle.

64. For example, after Defendants sold the incorrect 2016 Buick Enclave to consumer Lauren Fortenberry on January 3, 2019, Defendants advised Mrs. Fortenberry on January 29, 2019, to visit a new financial institution to refinance her car loan because this new institution offered better terms. Once Mrs. Fortenberry secured the refinancing agreement, she was instructed to deliver the funds to Defendants so that they could pay off the first loan. Mrs. Fortenberry delivered these funds to Defendants, but Defendants never paid off the first loan as promised. As a result of these unlawful practices, Mrs. Fortenberry has filed a lawsuit against Defendants in Tipton County Chancery Court. These proceedings are still pending.

65. Whether or not a refinancing agreement has better terms than the original agreement is a fact that would affect a consumer's purchasing decision and is therefore a material fact. Whether or not Defendants would pay off a pre-existing loan with the proceeds from a refinance loan is a fact that would affect a consumer's purchasing decision and is therefore a material fact. Representations that a financing agreement has more favorable terms than a prior agreement and that Defendants would pay off a pre-existing loan are express claims that speak for themselves and require no extrinsic evidence to discern their meaning. Representing that a refinancing agreement has more favorable loan terms than a prior agreement when such is not the case is an express material misrepresentation and therefore a deceptive trade practice under the TCPA. Failing to disclose that Defendants would not pay off a pre-existing loan with the proceeds of a refinance loan is a material omission and therefore a deceptive trade practice under the TCPA.

**DEFENDANTS HAVE ENGAGED IN A COORDINATED EFFORT TO  
FRAUDULENTLY TRANSFER FUNDS RECEIVED AS A RESULT OF THEIR  
UNLAWFUL BUSINESS PRACTICES**

66. Defendants business model depends on transfers of personal property that run afoul of the UFTA. After these transactions are consummated, Defendants improperly transfer

funds between bank accounts controlled by one or more of the Defendants. On top of it all, Defendants have obtained multiple floor-plan financing arrangements for the same vehicles, further unjustly enriching themselves.

67. Starting in 2018 and continuing into 2019, Defendants financial condition progressively worsened. The amount of cash in Defendants' bank accounts dwindled, and Defendants began to consistently overdraw their accounts.

68. In fact, in 2018, Defendant McDivitt Motors was billed \$20,220 in overdraft and insufficient funds fees by the Bank of Ripley. As of March 2019, Bank of Ripley had billed \$6,360 to Defendant McDivitt Motors in overdraft and insufficient funds fees.

69. Defendants financial straits became so dire in 2018 that one of their banks, the Bank of Tipton, would call Defendants every day to tell Defendants how much money must be deposited in their account by noon that day for the outstanding checks to clear.

70. Defendants' longtime employee, Sherry Sturm, became unsure whether her payroll checks would bounce and began cashing them at Kroger grocery stores and similar places. In early 2019, one of her payroll checks bounced. Ms. Sturm's 2018 bonus check also bounced.

71. Based on their repeated dips into the red on their business and personal checking accounts, Defendants believed or should have believed that additional incurred debts would be beyond their ability to pay as they came due.

*Defendants' Have Received Numerous Vehicles in Transactions for Which They Have Effectively Paid Nothing*

72. As described in this Complaint, Defendants made repeated purchases of vehicles from out-of-state dealers that Defendants intended to re-sell to consumers in Tennessee.

73. Defendants, knowing of their dire financial straits and repeated overdrafts, purchased these vehicles from out-of-state dealers using checks that were almost always returned as having insufficient funds.

74. For example, Defendants sold a 2018 Dodge Ram to consumer James Franklin Gibson on February 12, 2019. However, Defendants wrote a worthless check to Auto Park GMC in Plymouth, Indiana to purchase this 2018 Dodge Ram that Defendants then resold to Mr. Gibson. Mr. Gibson only learned of Defendants' failure to pay the original lienholder after Mr. Gibson purchased this vehicle from Defendants.

75. In this instance, and in all other similar instances, Defendants incurred, or believed or reasonably should have believed that Defendants would incur, debts beyond Defendants' ability to pay as they became due because Defendants knew of the insufficient funds in their checking accounts. Further, Defendants did not receive reasonably equivalent value in these transactions because Defendants exchanged worthless checks for new motor vehicles.

76. All transactions in which Defendants exchanged worthless checks for new motor vehicles were transfers made or obligations incurred that are fraudulent to a creditor. Therefore, Defendants have engaged in fraudulent transfers in violation of the UFTA.

77. In addition or in the alternative, these transfers were made with actual intent to hinder, delay, or defraud any creditor of Defendants because they were made when the debtor was insolvent and/or were made in exchange for assets not equivalent to the value of the transfer.

*Defendants Sold Vehicles to Consumers in Exchange for Consumers' Cash or Loan Proceeds,  
But Delivered Vehicles Without Titles*

78. As described in this Complaint, Defendants engaged in repeated and systematic transactions with consumers in which Defendants would provide a vehicle with defective title or no title in exchange for cash or proceeds from a loan obtained by consumers.



79. For example, consumer Craig Dickerson purchased a 2015 Chevrolet Silverado from Defendants in or around December 2018. Mr. Dickerson obtained financing and paid Defendants for the vehicle. Defendants informed Mr. Dickerson that they would deliver title to his lender. In or around February 2019, Mr. Dickerson was pulled over by a Shelby County Deputy, who informed Mr. Dickerson that his vehicle was still registered to the previous owner. According to Mr. Dickerson, Defendants never paid the previous owner for the 2015 Silverado that Defendants sold to Mr. Dickerson.

80. Additionally, consumer Lauren Flanagan purchased a 2014 Hyundai Tucson from Defendants on or around February 23, 2019. Ms. Flanagan has never received the title to her 2014 Tucson.

81. In these instances, and in all other similar instances, Defendants retained possession or control of the property transferred to consumers after the transfer. Failing to provide proper title or title at all evidences an actual intent to hinder, delay, or defraud any creditor of Defendants. Therefore, Defendants have engaged in fraudulent transfers in violation of the UFTA.

82. In addition or in the alternative, these transfers were made with actual intent to hinder, delay, or defraud any creditor of Defendants because they were made when the debtor was insolvent and/or were made in exchange for assets not equivalent to the value of the transfer.

*Defendants Received Trade-In Vehicles Without Paying Off Existing Liens*

83. As described in this Complaint, Defendants have repeatedly received trade-in vehicles as part of their transactions with Tennessee consumers, but Defendants have, in many circumstances, failed to pay off the consumers' existing liens on these trade-ins. What's more, Defendants often resold these trade-ins without ever paying off these existing liens.

84. For example, Defendants sold a 2019 Chevrolet Silverado to consumer Frank Hutcherson, Jr., in or around November 2018. At the time of the sale, Mr. Hutcherson owed around \$15,000 on his trade-in vehicle, a 2015 Chevrolet Silverado. Mr. Hutcherson turned over his 2015 Silverado to Defendants when he picked up his 2019 Silverado. In or around February 2019, Mr. Hutcherson learned that his trade-in vehicle had not been paid off. He also learned that it had been sold by Defendants. As a result, Mr. Hutcherson is now making two car payments each month, one for his 2015 Silverado trade-in and one for his new 2019 Silverado.

85. Additionally, Defendants sold a 2017 Chevrolet Silverado to consumer Matthew Pearl, on January 15, 2019. At the time of the sale, Mr. Pearl agreed to trade in a 2004 Chevrolet Silverado and a 2017 Harley-Davidson FXD. Mr. Pearl owed \$12,900 on his Harley-Davidson motorcycle. Mr. Pearl turned over his 2004 Silverado and 2017 Harley-Davidson when he picked up his 2017 Silverado. In or around March 2019, Mr. Pearl learned that the motorcycle he traded in as part of his purchase of the 2017 Silverado had not been paid off.

86. In these instances, and in all other similar instances, Defendants incurred, or believed or reasonably should have believed that Defendants would incur, debts beyond Defendants' ability to pay as they became due because Defendants knew of the insufficient funds in their checking accounts. Further, Defendants did not receive reasonably equivalent value in these transactions because Defendants received trade-in vehicles as property to resell while consumers did not receive a payoff of their loans on those vehicles.

87. All transactions in which Defendants received trade-in vehicles from consumers in the course of a used vehicle sale and failed to pay off the loans on these trade-in vehicles were transfers made or obligations incurred that are fraudulent to a creditor. Therefore, Defendants have engaged in fraudulent transfers in violation of the UFTA.

88. In addition or in the alternative, these transfers were made with actual intent to hinder, delay, or defraud any creditor of Defendants because they were made when the debtor was insolvent and/or were made in exchange for assets not equivalent to the value of the transfer.

*Defendants Obtained Multiple Floor-Plan Financing Arrangements for the Same Vehicles*

89. In addition to the fraudulent transfers above, Defendants obtained floor-plan financing arrangements from multiple financial institutions for the same vehicles.

90. Defendants had floor-plan financing arrangements from Next Gear Capital, American Motors, and Bank of Tipton.

91. The inventory listed on the Next Gear Capital floor plan would frequently go missing.

92. In these instances, and in similar instances, Defendants incurred, or believed or reasonably should have believed that Defendants would incur, debts beyond Defendants' ability to pay as they became due because Defendants knew or should have known that they could not repay more than one floor-plan financing arrangement for the same collateral. Further, Defendants did not receive reasonably equivalent value in these transactions because Defendants received large amounts of floor-plan funding in exchange for vehicles not possessed by Defendants and/or for vehicles that were subject to another floor-plan financing arrangement.

93. All transactions in which Defendants obtain floor-plan financing for vehicles they did not possess and/or for vehicles subject to another floor-plan financing arrangement were transfers made or obligations incurred that are fraudulent to a creditor. Therefore, Defendants have engaged in fraudulent transfers in violation of the UFTA.

94. In addition or in the alternative, these transfers were made with actual intent to hinder, delay, or defraud any creditor of Defendants because they were made when the debtor was insolvent and/or were made in exchange for assets not equivalent to the value of the transfer.

Defendants Made Repeated and Systematic Transfers to Themselves

95. In addition to the widespread deception and other fraudulent transfers described elsewhere in this Complaint, Defendants also systematically and repeatedly made transfers among themselves as insiders and between accounts over which they had absolute control.

96. For example, Defendant McDivitt Motors has made repeated transfers from its Bank of Ripley checking account to Defendant Martin McDivitt's personal checking account at Patriot Bank, including the following:

- November 19, 2018 – \$49,800 Transfer
- November 27, 2018 - \$4,000 Transfer
- December 10, 2018 – \$29,500 Transfer
- December 31, 2018 - \$35,500 Transfer
- January 15, 2019 – \$500 Transfer
- February 8, 2019 – \$4,100 Check
- March 4, 2019, 2019 – \$4,100 Check

97. In addition, Defendant Martin McDivitt has made repeated transfers from his personal checking account at Patriot Bank to Defendant McDivitt Motors' checking account at Bank of Ripley, including the following:

- January 5, 2018 – \$2,000 Check
- January 8, 2019 – \$3,240 Transfer

98. In these instances, and in all other similar instances, Defendants transferred assets among themselves as insiders and between accounts over which they had absolute control. These actions evidence an actual intent to hinder, delay, or defraud any creditor of Defendants. Therefore, because these transfers were made by Defendants are fraudulent as to a creditor, Defendants have engaged in fraudulent transfers in violation of the UFTA.

**COUNT I**  
**Violations of the TCPA**  
**Tenn. Code Ann. §47-18-104**

99. Plaintiff, the State of Tennessee, adopts by reference and re-alleges every allegation contained in paragraphs 1–98 of this Complaint.

100. By making express material misrepresentations that motor vehicles are “new,” when such are not the case, Defendants have engaged in deceptive trade practices that are prohibited by the TCPA. In particular, Defendants have violated Tennessee Code Annotated § 47-18-104(a) and (b)(6), (b)(7), (b)(12), and (b)(27).

101. By making implied material misrepresentations that Defendants are legally authorized to sell “new” motor vehicles when such is not the case, Defendants have engaged in deceptive trade practices that are prohibited by the TCPA. In particular, Defendants have violated Tennessee Code Annotated § 47-18-104(a) and (b)(2), (b)(3), (b)(5), (b)(12), and (b)(27).

102. By failing to deliver proper title to motor vehicles, Defendants have made material misrepresentations or omitted material facts and have therefore engaged in deceptive trade practices that are prohibited by the TCPA. In particular, Defendants have violated Tennessee Code Annotated § 47-18-104(a) and (b)(27).

103. By failing to disclose the fact that, contrary to common practice, consumer expectation, and the understanding of the parties, Defendants will not pay off vehicles that are traded in with the purchase of a vehicle from Defendants, Defendants have omitted a material fact and have therefore engaged in deceptive trade practices that are prohibited by the TCPA. In particular, Defendants have violated Tennessee Code Annotated § 47-18-104(a) and (b)(27).

104. By directly and/or indirectly promoting, selling, and offering for sale “new” motor vehicles when it was unlawful for Defendants to sell such vehicles in this state because

they lack proper licensure, Defendants have engaged in deceptive or unfair trade practices that are prohibited by the TCPA. In particular, Defendants have violated Tennessee Code Annotated § 47-18-104(b)(43)(C).

105. By making express material misrepresentations in the Manufacturer's Statement of Origin by altering the Statement to change the name of the first purchaser of a motor vehicle, Defendants have engaged in deceptive trade practices that are prohibited by the TCPA. In particular, Defendants have violated Tennessee Code Annotated § 47-18-104(a) and (b)(1), (b)(2), (b)(4), (b)(5), (b)(12), and (b)(27).

106. By failing to sell vehicles to Tennessee consumers as advertised or promoted, Defendants have engaged in deceptive trade practices that are prohibited by the TCPA. In particular, Defendants have violated Tennessee Code Annotated § 47-18-104(a) and (b)(5), (b)(6), (b)(7), (b)(12), and (b)(27).

107. By making express material misrepresentations that a refinancing agreement has more favorable loan terms than a prior agreement when such is not the case, Defendants have engaged in deceptive trade practices that are prohibited by the TCPA. In particular, Defendants have violated Tennessee Code Annotated § 47-18-104(a) and (b)(5), (b)(7), (b)(12), and (b)(27).

108. By failing to disclose that Defendants would not pay off a pre-existing loan with the proceeds of a refinance loan, Defendants have omitted a material fact and therefore engaged in deceptive trade practices prohibited by the TCPA. In particular, Defendants have violated Tennessee Code Annotated § 47-18-104(a) and (b)(27).

109. By actively participating in, approving, directing, or otherwise controlling the acts and practices referenced in paragraphs 1-99 on behalf of Defendant McDivitt Motors, Defendant

Martin McDivitt is individually liable for those acts and practices, as they apply to the TCPA violations asserted in this Complaint.

**COUNT II**  
**Violations of the UFTA**  
**Tenn. Code Ann. §66-3-305**

110. Plaintiff, the State of Tennessee, adopts by reference and re-alleges every allegation contained in paragraphs 1–98 of this Complaint.

111. By exchanging worthless checks for new motor vehicles when Defendants were functionally insolvent, Defendants have made transfers or incurred obligations that are fraudulent to a creditor. Therefore, Defendants have engaged in fraudulent transfers that are prohibited by the UFTA. In particular, Defendants have violated Tennessee Code Annotated § 66-3-305(a)(1) and (a)(2)(B).

112. By exchanging vehicles with defective title or no title in exchange for cash or loan proceeds from Tennessee consumers when Defendants were functionally insolvent, Defendants have made transfers or incurred obligations that are fraudulent to a creditor. Therefore, Defendants have engaged in fraudulent transfers that are prohibited by the UFTA. In particular, Defendants have violated Tennessee Code Annotated § 66-3-305(a)(1) and (a)(2)(B).

113. By receiving vehicle trade-ins as part of a motor vehicle transaction and failing to pay off the lien associated with that trade-in when Defendants were functionally insolvent, Defendants have made transfers or incurred obligations that are fraudulent to a creditor. Therefore, Defendants have engaged in fraudulent transfers that are prohibited the UFTA. In particular, Defendants have violated Tennessee Code Annotated § 66-3-305(a)(1) and (a)(2)(B).

114. By using vehicle titles for vehicles they did not own or possess to obtain multiple floor plan financing arrangements when Defendants were functionally insolvent, Defendants have made transfers or incurred obligations that are fraudulent to a creditor. Therefore,

Defendants have engaged in fraudulent transfers that are prohibited by the UFTA. In particular, Defendants have violated Tennessee Code Annotated § 66-3-305(a)(1) and (a)(2)(B).

115. By making repeated and systematic transfers of financial assets to themselves as insiders and/or when they had complete control over the relevant financial accounts, Defendants have engaged in transfers with actual intent to hinder, delay, or defraud any creditor of Defendants. Therefore, Defendants have engaged in fraudulent transfers that are prohibited by the UFTA. In particular, Defendants have violated Tennessee Code Annotated § 66-3-305(a)(1).

116. By actively participating in, approving, directing, or otherwise controlling the acts and practices referenced in paragraphs 1–99 on behalf of Defendant McDivitt Motors, Defendant Martin McDivitt is individually liable for those acts and practices, as they apply to the UFTA violations asserted in this Complaint.

#### **PRAYER FOR RELIEF**

Therefore, Plaintiff, the State of Tennessee, pursuant to Tennessee Code Annotated §§ 47-18-108(a)–(b), 66-3-308, the Attorney General’s power at common law, and this Court’s own equitable powers, requests that this Court:

A. Enter judgment against each Defendant and in favor of the State of Tennessee for each violation alleged in this complaint;

B. Enter a temporary restraining order, temporary injunction, and permanent injunction to prevent future violations of the TCPA and UFTA by Defendants;

C. Enter an injunction to effect avoidance of any unlawful transfers pursuant to Tenn. Code Ann. §§ 47-18-108 and 66-3-308(a)(1);

D. Enter an injunction against further disposition by Defendants of assets that lawfully belong to the State, freezing assets, appointing a receiver to take charge of the assets



that rightfully belong to the State, and granting any other relief the circumstances may require pursuant to Tenn. Code Ann. §§ 47-18-108 and 66-3-308(a)(3);

E. Enter an order temporarily or permanently revoking any licenses or certificates authorizing Defendants to engage in business in this state because the allegations in this Complaint establish knowing and persistent violations of the TCPA.

F. Award such relief as the Court finds necessary to redress consumer injury resulting from Defendants' violations of the TCPA and the UFTA, including, but not limited to, rescission or reformation of contracts, restitution including pre-judgment statutory interest and the costs of a restitution administrator to effectuate redress, refund of monies paid, and disgorgement of ill-gotten gains;

G. Adjudge and decree that each Defendant has engaged in the aforementioned acts and practices which violate the TCPA and the UFTA;

H. Adjudge and decree that each Defendant separately pay civil penalties of not more than \$1,000 per violation to the State of Tennessee for each violation of the TCPA as provided by Tenn. Code Ann. § 47-18-108(b)(3);

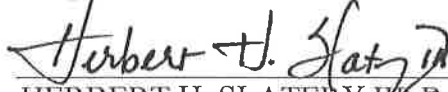
I. Enter judgment against Defendants and in favor of the State of Tennessee for the reasonable costs and expenses of the investigation and prosecution of this action, including attorney fees, expert and other witness fees, and costs, as provided by Tenn. Code Ann. § 47-18-108(a)(5) and (b)(4);

J. Order that this Complaint be filed without cost bond as provided by Tenn. Code Ann. §§ 20-13-101, 47-18-108, and 47-18-116;

K. Order that all costs in this case be taxed against Defendants and no costs be taxed to the State of Tennessee as provided in Tenn. Code Ann. § 47-18-116; and

L. Award the State of Tennessee such other and additional relief as the Court may determine just and proper.

Respectfully submitted,



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