

DISTRICT COURT, DENVER COUNTY, COLORADO
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TIM MAZZA, individually and on behalf of all similarly
situated persons,

Plaintiff,

v.

AIR ACADEMY FEDERAL CREDIT UNION,

Defendant.

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CLASS ACTION COMPLAINT AND JURY DEMAND

Plaintiff Tim Mazza, on behalf of himself and all others similarly situated, brings this action against Defendant Air Academy Federal Credit Union (“AAFCU” or “Defendant”).

INTRODUCTION

1. This putative class action concerns AAFCU’s practice of failing to refund unearned Guaranteed Automobile Protection (“GAP”) fees to Colorado customers when the customer’s auto loan is paid off early – *i.e.*, prepaid prior to the original maturity date of the customer’s finance agreement (an “early payoff”). AAFCU, as the creditor on the finance agreement, has an obligation to refund unearned GAP fees to its customers upon an early payoff of a finance agreement. *See* 4 Colo. Code Regs. § 902-1:8 (h).

2. Plaintiff and the Class Members paid off their auto loans early, but AAFCU (their creditor) failed to refund the unearned GAP fees. Accordingly, AAFCU has breached its contracts with Plaintiff and the Class Members and violated Colorado law.

FACTUAL BACKGROUND

3. Plaintiff and the Class Members financed the purchase of their cars by entering into a finance agreement with automobile dealerships (the “dealer” or “dealers”). The dealer then sells and assigns the finance agreement to AAFCU, who becomes the creditor on the finance agreement. Under the finance agreement, the customer agrees to pay for the car in monthly installments, with interest, over a multi-year term. These finance agreements are commonly referred to as “retail installment sales contracts” (or “RISCs” for short) because the car is being purchased over time in “installments.” The finance agreements are “consumer credit transactions” under C.R.S. § 5-1-301.

4. The finance agreements of Plaintiff and the Class Members include GAP Waiver forms. The GAP Waiver form is an addendum to the finance agreement and part of the contract. It is a debt cancellation term that provides that if a customer suffers a “total loss” and the customer’s liability insurance payout for the car is insufficient to pay off the customer’s remaining loan balance, then the creditor on the finance agreement will agree to waive the difference. This difference is known as the “GAP.” For example, assume a customer’s car is stolen and they still owe \$10,000 on their finance agreement. Also, assume the customer’s liability insurer only agrees to pay \$8,000 for the “total loss,” because that is the car’s “actual cash value.” Without a GAP Waiver form, the customer would still owe the \$2,000 difference to the creditor on the finance agreement, even though the customer no longer possesses the vehicle. However, if the finance agreement has a GAP Waiver, then the creditor is required to “waive” the \$2,000 difference.

5. Plaintiff and the members of the Class financed the cost of their GAP coverage for the full term of their auto loans – for example, \$800 for a four-year loan (“GAP fees”). The GAP Waiver fees were included as a separate line item in the finance agreements. They were incrementally paid in monthly installments by the customer over the life of the loan, with interest, along with the rest of the purchase price of the car. In other words, while the customer was told up-front what the total cost of the GAP coverage will be for the full term of the loan, the customer actually pays this amount incrementally over time to the creditor on a month-to-month basis as part of their “car payments.” These GAP fees are often referred to as “GAP premiums,” because they are similar to insurance premiums.

6. When customers pay off their finance agreements early (before the original maturity date) this results in what AAFCU, the industry and Colorado law refer to as an “unearned” GAP fee. For example, if the total GAP fees for four years of GAP coverage are

\$800, but the customer pays off their finance agreement in two years, then the customer will be entitled to a refund of \$400 for the unused half of the loan.

7. Colorado law requires that creditors (here AAFCU) refund customers any unearned fee paid for GAP when the customer pays off the finance agreement early and no GAP claim has been made for a total loss. Specifically, 4 Colo. Code Regs. § 902-1:8 (h) provides:

If the consumer credit sale or consumer loan is prepaid prior to maturity or the vehicle is no longer in the consumer's possession due to the creditor's lawful repossession and disposition of the collateral, and if no GAP claim has been made, the creditor must refund to the consumer the unearned fee or premium paid for GAP. If GAP was provided as a contractual term, the refund shall be made using a pro-rata method. If GAP is determined to be insurance, the refund method used shall be any method authorized under applicable insurance statutes, rules, or interpretations of the Colorado Division of Insurance.

8. Pursuant to 4 Colo. Code Regs. § 902-1:8 (h), AAFCU was required to refund unearned GAP fees upon an early payoff. Plaintiff's GAP Waiver form also specifies that a refund is owed when a loan is paid off early.

9. AAFCU breached its finance agreements with Plaintiff and the Class Members, and violated Colorado law, by failing to refund the unearned GAP fees when Plaintiff and the Class Members paid off their loans.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction pursuant to C.R.S. § 13-1-124(a), as the claims set forth herein arise out of Defendant's business conducted in the State of Colorado.

11. Venue is proper pursuant to C.R.C.P. 98(c), as Defendant conducts business in this county.

FACTS SPECIFIC TO PLAINTIFF

12. Plaintiff is an individual and a citizen and resident of Colorado. Plaintiff (a) entered into a finance agreement with a GAP Waiver form that was assigned to AAFCU, (b) paid

off his finance agreement early (i.e., before the original maturity date), and (c) did not receive a refund of the unearned GAP fees collected.

13. Plaintiff purchased a 2006 Scion XA from One Source Auto on September 28, 2019. Plaintiff's loan term for the 2006 Scion XA, financed through AAFCU, was 48 months. As part of the financing agreement, Plaintiff purchased a GAP Waiver for \$300.00. Plaintiff paid off the loan with AAFCU on November 5, 2019.

14. AAFCU breached its contract with Plaintiff and violated Colorado law by failing to refund Plaintiff his unearned GAP fees. Calculated on a pro-rata basis, AAFCU owes Plaintiff approximately \$292.20 in unearned GAP fees, excluding interest.

DEFENDANT

15. Defendant Air Academy Federal Credit Union ("AAFCU") is, and at all relevant times was, a credit union with its headquarters in Colorado Springs, Colorado. AAFCU owned, serviced, and/or oversaw the automobile loans secured by Plaintiff and the other Class Members in Colorado. Upon information and belief, executives and/or employees within AAFCU implemented, oversaw and/or approved the strategy and operations relating to the company's GAP policies and procedures, including its refund policies.

CLASS ACTION ALLEGATIONS

16. Plaintiff brings this action pursuant to Rule 23 of the Colorado Rules of Civil Procedure on behalf of the following class (the "Class"): All persons who: (1) entered into finance agreements with GAP Waivers in Colorado that were assigned to AAFCU, (2) who paid off their finance agreements before the end of the original maturity date, and (3) who did not receive a refund of the unearned GAP fees

17. The Class Period begins six years prior to the filing of this Complaint.

18. The aforementioned members of the Class are referred to herein as “Class Members.”

19. Excluded from the proposed Class are: (a) Defendant and its agents, officers, directors, parent companies, subsidiaries, and affiliates; (b) counsel representing Plaintiff and any person employed by counsel; and (c) any judicial officers assigned to this case and their staff.

20. Plaintiff reserves the right to revise the definition of the Class based upon subsequently-discovered information.

21. **Numerosity:** While the exact numbers of the members of the Class are unknown to Plaintiff at this time, membership in the Class may be ascertained from the records maintained by AAFCU. At this time, Plaintiff is informed and believes that the Class includes at least 40 members, and most likely includes hundreds if not thousands of members. Therefore, the Class is sufficiently numerous that joinder of all members of the Class in a single action is impracticable, and the resolution of their claims through a class action will be of benefit to the parties and the Court.

22. **Ascertainability:** The names and addresses of the members of the Class are contained in AAFCU’s records. Notice can be provided to the members of the Class through direct mailing, publication, or otherwise using techniques and a form of notice similar to those customarily used in consumer class actions arising under state and federal law.

23. **Common Facts:** Common facts exist as to all members of the Class and predominate over any issues affecting individual members of the Class. The common facts include the following:

a. Plaintiff and the members of the Class entered into finance agreements with GAP Waiver forms to finance the purchase of their cars.

b. The finance agreements and GAP Waiver forms were initially executed by Plaintiff and the members of the Class, on the one hand, and representatives from the dealers, on the other hand.

c. The finance agreements (including their GAP Waiver forms) were form contracts and were executed in Colorado.

d. The finance agreements (including their GAP Waiver forms) were sold and assigned by the dealers to AAFCU.

e. The full cost of every GAP Waiver form was listed as a separate line item on the first page of the finance agreement and included in the “total amount financed.”

f. After the assignment to AAFCU, Plaintiff and the members of the Class were required to make all payments under the finance agreements to AAFCU with interest, including, but not limited to, the amount financed for the cost of the GAP Waiver forms (the “GAP fees”).

g. Plaintiff and the members of the Class paid off the balances on their finance agreements before the end of the original loan term, which resulted in unearned GAP fees.

h. AAFCU did not refund Plaintiff and the members of the Class their unearned GAP fees.

24. **Common Questions of Law:** Common questions of law exist as to all members of the Class and predominate over any issues solely affecting individual members of the Class. The common questions of law include, but are not limited to:

a. Whether AAFCU breached its contracts and violated Colorado law by failing to refund unearned GAP fees to Plaintiff and the Class Members upon an early payoff.

b. Whether Plaintiff and the Class Members are entitled to interest on the unearned GAP fees that AAFCU did not refund, including the date when the interest began to accrue.

25. **Adequacy:** Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff is an adequate representative of the Class, because he does not have any interests which are adverse to the interests of the members of the Class. Plaintiff is committed to the vigorous prosecution of this action and, to that end, Plaintiff has retained counsel who are competent and experienced in handling class action litigation on behalf of consumers.

26. Plaintiff's interests are co-extensive with, and not antagonistic to, those of the absent members of the Class. Plaintiff will undertake to represent and protect the interests of the absent members of the Class.

27. Plaintiff has engaged the services of the undersigned counsel. Counsel is experienced in complex consumer class action litigation, will adequately prosecute this action, and will assert and protect the rights of, and otherwise represent, Plaintiff and the absent members of the Class.

28. **Superiority:** A class action is superior to all other available methods for the fair and efficient adjudication of the claims asserted in this action because, at a minimum: (a) the expense and burden of individual litigation make it economically unfeasible for members of the Class to seek redress of their claims other than through the procedure of a class action; (b) if separate actions were brought by individual members of the Class, the resulting duplicity of lawsuits would risk inconsistent results; and (c) absent a class action, AAFCU will likely retain the benefits of its wrongdoing, resulting in a failure of justice.

29. **Predominance:** Class action status is warranted because, at a minimum, questions of law or fact common to the members of the Class predominate over any questions

affecting only individual members. The interests of the members of the Class in individually controlling the prosecution of separate actions are theoretical and not practical. Prosecution of this action through multiple Class Representatives would be superior to individual lawsuits. Plaintiff is not aware of any difficulty which will be encountered in the management of this litigation which should preclude its maintenance as a class action.

FIRST CLAIM
BREACH OF CONTRACT
(On Behalf of Plaintiff and the Class)

30. Plaintiff hereby repeats, realleges and incorporates by reference each and every allegation contained above as though the same were fully set forth herein.

31. Plaintiff brings this claim on behalf of himself and the members of the Class.

32. Plaintiff and the members of the Class entered into finance agreements with GAP Waiver forms that were assigned to AAFCU. Under that contract, AAFCU was required to refund unearned GAP fees to Plaintiff and the members of the Class in the event of an early payoff. Plaintiff and the members of the Class performed their obligations under the finance agreement and its GAP Waiver form.

33. A true and correct copy of Plaintiff's finance agreement and its GAP Waiver form are attached as Exhibit 1.

34. The terms of the GAP Waiver form were presented to Plaintiff and the members of the Class on a non-negotiable "take-it or leave-it" basis and are therefore contracts of adhesion.

35. Plaintiff and the members of the Class financed the cost of the GAP Waivers as part of their finance agreements and were charged for GAP protection for the full term of the loans. These amounts were paid directly to AAFCU.

36. Plaintiff and the members of the Class paid off the balance on their finance agreements to AAFCU prior to end of the loan term. This resulted in unearned GAP fees.

37. AAFCU breached the parties' contract, and violated Colorado law, by collecting and then failing to refund Plaintiff and the members of the Class their unearned GAP fees.

38. Plaintiff and the members of the Class were harmed, suffered out-of-pocket loss, and did not receive the benefit of their bargains because AAFCU failed to refund the unearned GAP fees after the early payoff of the finance agreements and failed to pay the interest that accrued on those unpaid amounts.

39. AAFCU is liable to Plaintiff and the members of the Class for the damages they suffered as a direct result of AAFCU's collection and failure to promptly refund the unearned GAP fees, as well as the interest that accrued on those unpaid amounts.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court enter a judgment against AAFCU in favor of Plaintiff and the members of the Class and award the following relief:

1. An order certifying this lawsuit as a class action pursuant to Rule 23, appointing Plaintiff as the representative of the Class, and appointing Plaintiff's counsel as Class Counsel for the Class;
2. An award to Plaintiff and the members of the Class of all appropriate relief, including actual damages, restitution and disgorgement of the unearned GAP fees;
3. An award of all costs for prosecuting the litigation, including expert fees;
4. An award of pre- and post-judgment interest;
5. An award of attorneys' fees, if any, as permitted by law; and
6. An order granting any such additional relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury of all claims in this Class Action Complaint so triable.

Respectfully submitted this 1st day of July, 2020.

FRANKLIN D. AZAR & ASSOCIATES, P.C.
Pursuant to C.R.C.P. 121 § 1-29(9), original is duly signed and on file at the office of Franklin D. Azar & Associates, P.C., and will be made available for inspection by other parties of the Court upon request.

s/Franklin D. Azar

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ATTORNEYS FOR PLAINTIFF

Plaintiff's Address:

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2020, a true and correct copy of the foregoing **CLASS ACTION COMPLAINT AND JURY DEMAND** was filed via Colorado Courts E-Filing and served upon:

/s/ Stephanie Chateauneuf
Stephanie Chateauneuf, Paralegal