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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

JUDICIAL COUNCIL COORDINATION Department Number: 32
PROCEEDING

Case Number: JCCP NOS
4266 & 4270

Special Title (Rule 1550(b))
BRIDGESTONE/FIRESTONE TIRE
CASES I & II

RULING ON SUBMITTED MATTER:

Included Actions:

Katz v. Bridgestone/Firestone,
Inc.
Los Angeles County Superior
Court No. BC279457

Tompkins v. Bridgestone/
Firestone, Inc.
Sacramento County Superior
Court No. 03AS03901

Katz v. Motor Company
Los Angeles County Superior
Court No.
BC279458

Gray v. Ford Motor Co.
Sacramento Superior Court No.
03AS04782

Montoya v. Ford Motor Company
Sacramento Superior Court No.
03AS05213

**FORD MOTOR COMPANY'S MOTION
FOR PARTIAL SUMMARY
ADJUDICATION ON PLAINTIFFS'
UNFAIR COMPETITION LAW AND
FALSE ADVERTISING LAW CLAIMS**

1 On March 12, 2007, 9:00 a.m. in department 32, the
2 above-entitled matter came on for hearing and after having
3 considered the oral arguments of counsel, the moving,
4 opposing and reply papers and the points and authorities and
5 declarations filed by each party in support of their papers,
6 the court took the matter under submission. The Court now
7 rules as follows:

8 Defendant's motion for summary adjudication is **denied**.

9 Defendant seeks summary adjudication of plaintiffs'
10 Unfair Competition Law (UCL) (Bus. & Prof. Code § 17200 et
11 seq.) and False Advertising Law (FAL) (Bus. & Prof. Code §
12 17500 et seq.) claims on two grounds. First, defendant
13 contends that it cannot, as a matter of law, be found to
14 have committed an unlawful, unfair or fraudulent act or to
15 have engaged in unfair, deceptive, untrue or misleading
16 advertising when it advertised, marketed and sold Explorers.
17 Second, defendant contends the claims cannot be maintained
18 because plaintiffs are not entitled to restitution. The UCL
19 and FAL claims are encompassed in one cause of action. (See
20 e.g. Gray Complaint First Cause of Action)
21

22 A party may move for summary adjudication of one or
23 more causes of action, one or more affirmative defenses, one
24 or more claims for damages, or one or more issues of duty.
25 (Code Civ. Proc. § 437c(f)(1).) A motion for summary
26 adjudication shall be granted only if it completely disposes
27 of a cause of action, an affirmative defense, a claim for
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1 damages, or an issue of duty. (*Ibid.*)

2 The party moving for summary judgment bears the initial
3 burden of production to make a prima facie showing of the
4 nonexistence of any triable issue of material fact. If this
5 burden of production is met, the burden shifts and the
6 opposing party is then subjected to a burden of production
7 to make a prima facie showing of the existence of a triable
8 issue of material fact. (*Smith v. Wells Fargo Bank, N.A.*,
9 (2005) 135 Cal. App. 4th 1463) If any evidence or
10 reasonable inference therefrom shows or implies the
11 existence of the required element(s) of a cause of action,
12 the trial court is required to deny the motion for summary
13 adjudication if a reasonable trier of fact could find for
14 plaintiffs. (*Id.* at 1489)

15 In ruling on a motion for summary adjudication, the
16 Court construes the moving party's affidavits strictly, the
17 opponent's affidavits liberally, and resolves doubts about
18 the propriety of granting the motion in favor of the party
19 opposing it. (*Seo v. All-Makes Overhead Doors* (2002) 97
20 Cal.App.4th 1193, 1201-1202)

21 Defendant sets forth thirty two facts in its separate
22 statement in support of the motion. Defendant also
23 incorporated by reference the facts stated in support of its
24 CLRA no-merit motion. The Court has already ruled on the
25 latter in its order denying the motion to find the CLRA
26 claims have no merit.
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(1) Defendant contends that "plaintiffs have no evidence that Ford did anything unlawful, unfair, fraudulent, deceptive, untrue, or misleading when it advertised, marketed, and sold Explorers that were as safe as or safer than other SUVs and that plaintiffs do not even contend were defective within the meaning of any recognized body of law." (defendant's points and authorities page 3, lines 9-12)

The contentions lack merit.

The Court notes that defendant produced selective evidence based on its characterization of plaintiffs' claims. In opposing the motion, plaintiffs assumed defendant had met its burden of showing the non-existence of a triable issue of material fact. The Court adopts the same assumption.

Plaintiffs have produced evidence in the form of advertisements and sales brochures, the deposition testimony of Explorer Brand Manager Douglas Scott and expert testimony from which a trier of fact could infer that defendant made express and implied representations regarding the safety of the Explorer. Douglas Scott testified that defendant's goal in advertising was to have a strong message that conveyed Ford's national advertisements with three to five common themes being consistently maintained down through the Ford California dealer associations' regional advertising. (Scott deposition at 38-39)

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According to Mr. Scott, the "go anywhere, do anything" brand positioning has been pretty consistent throughout Explorer's life span. Ford used its "Ford Tough" logo as a means to link the Explorer with the Ford heritage of durability and reliability, (*Id.* at 69:20 -70:2.) Advertising was designed to meet consumers' deep seated needs including safety and security. (*Id.* at 92- 93) Confidence in any driving situation has been a theme from the inception of the Explorer. (*Id.* at 95) Advertising affects consumer perceptions when deciding what vehicle to buy and the purpose of advertising is to affect customer perceptions and affect ultimately their buying decision. (*Id.* at 147-148)

The totality of the evidence is sufficient to create triable issues of material fact regarding actionable misrepresentations.

Failure to disclose may also be actionable under the UCL and FAL. (See e.g. *People ex rel. Department of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1016)

Defendant did not specifically address this issue in its moving papers in support of the motion for summary adjudication.

Plaintiffs, nevertheless, have shown there are triable issues of fact as to whether evidence exists that defendant failed to disclose material facts concerning the Explorers

1 rollover propensity to plaintiffs and the class members.

2 For the reasons stated in the Court's order on the CLRA
3 claim, there are triable issues of material fact as to
4 whether the advertising claims were mere "puffing."

5 (2) Defendant also contends it is entitled to judgment as a
6 matter of law because plaintiffs are not entitled to
7 restitution as class members did not buy their vehicles from
8 Ford and Ford did not obtain any funds directly from class
9 members.

10 The Court notes as a preliminary matter that defendant
11 requests the Court to adjudicate claims by different classes
12 of plaintiffs pursuant to *Lilienthal & Fowler v. San*
13 *Francisco* (1993) 12 Cal.App.4th 1848, 1854. The Court does
14 not agree that the claims of class members who purchased
15 their vehicles used or who have not sold their vehicles are
16 properly the subject of separate adjudication. The request
17 to separately adjudicate these claims is denied. Defendant
18 is required to show that it is entitled to summary
19 adjudication of the entire cause of action as to all
20 plaintiffs. Defendant has not met that burden.

22 Although the UCL and FAL are broad, the remedies are
23 narrow. (See *Korea Supply Co. v. Lockheed Martin Corp.*
24 (2003) 29 Cal.4th 1134, *Madrid v. Perot Systems* (2005) 130
25 Cal.App.4th 440; *Alch v. Superior Court* (2004) 122
26 Cal.App.4th 339.

27 Defendant contends that plaintiffs do not seek
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1 injunctive relief. Plaintiffs dispute this fact relying on
2 the prayer of the amendment to the complaint. That prayer
3 requests injunctive relief for the CLRA cause of action but
4 not for the UCL cause of action. It is, thus, undisputed
5 that plaintiffs do not at this time pray for injunctive
6 relief on the basis of the UCL claims.

7 Defendant further contends that plaintiffs are not
8 entitled to restitution because Ford does not sell vehicles
9 directly to consumers and plaintiffs are not actual direct
10 victims who may claim restitution. Defendant relies on
11 *Korea Supply Co. v. Lockheed Martin Corp. (supra); Madrid v.*
12 *Perot Systems (supra);* and *Alch v. Superior Court (supra)*.
13 The reliance is misplaced. The cases are distinguishable.
14

15 The plaintiff in *Korea Supply* was an arms broker
16 retained to promote its principal's bid to sell a missile
17 defense system to the Republic of Korea. Instead, the
18 contract was awarded to defendant Lockheed Martin's
19 predecessor. Plaintiff sued defendant, alleging the
20 contract was unfairly won through bribes and sex offered to
21 Korean officials; plaintiff sought an award of restitution
22 in the form of an order forcing Lockheed to disgorge all
23 profits earned from the missile defense contract. The
24 Supreme Court reversed the court of appeal (which had
25 reversed the trial court's order sustaining the demurrer).
26 Holding that restitution is limited to either money or
27 property that defendants took directly from plaintiff or
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1 money or property in which plaintiff has a vested interest.
2 (*Korea Supply (supra)* at 1146-1147) Since the profits came
3 from the Republic of Korea and plaintiff has no vested
4 interest in them, he was not entitled to restitution.

5 In *Alch v. Superior Court (supra)* the class plaintiffs
6 sought an award of back pay under the UCL based on a
7 practice of age discrimination in employment that denied
8 class members employment opportunities. Plaintiffs conceded
9 that *Korea Supply (supra)* prevented them from obtaining
10 restitution under the second clause of section 17203 because
11 restitution is available only if a defendant has wrongfully
12 acquired funds or property in which a plaintiff has an
13 ownership or vested interest. The court then considered
14 whether the first prong of section 17203 (the necessary to
15 prevent prong) would permit the order of disgorgement. The
16 *Alch* court said no. The fact that *Alch* was brought as a
17 class action did not change the result: "The question is not
18 whether the trial court could order fluid class recovery of
19 a damages award; it is whether the trial court has the
20 authority to award non-restitutionary back pay under the UCL
21 in the first instance. The *Alch* court concluded it does not.

22
23 In *Madrid v. Perot Systems (supra)* the Third District
24 Court of Appeal held that non-restitutionary disgorgement is
25 not available even in a true class action case and even if
26 the moneys are disgorged into a fluid recovery fund. In
27 reaching its decision the *Madrid* court emphasized that the
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1 object of restitution under the UCL is to return to the
2 plaintiff funds in which he or she has an ownership
3 interest. Thus, plaintiff's assertion that defendants
4 received ill-gotten gain did not make a viable UCL claim
5 unless the gain was money in which plaintiff had a vested
6 interest. As plaintiff admitted in the trial court that he
7 did not seek a refund for money spent for his electricity,
8 he was not seeking money in which he had a vested ownership
9 interest. (Id at 455)

10 The common theme in the cited cases is that plaintiffs
11 were not seeking restitution of money they had paid or in
12 which they had a vested ownership interest. Plaintiffs in
13 this action seek restitution of money paid by them as a
14 result of the alleged unfair competition and false
15 advertising. Defendant's contention that they cannot
16 succeed because they did not pay the money directly to Ford
17 is not persuasive. Business and Professions Code sections
18 17203 and 17535 do not require that the victim have paid
19 money directly to the violator. (See *Colgan v. Leatherman*
20 (2006) 135 Cal.App.4th 663)

21 In *Colgan* the court undertook a lengthy review of how a
22 plaintiff may prove a claim for restitution in a false
23 advertising case. The *Colgan* court approved the market
24 approach that plaintiffs' recovery is measured by the
25 difference between the actual value of that with which the
26 defrauded person parted and the actual value of that which
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he received.

It is undisputed that the plaintiffs are Explorer owners or lessees. It is axiomatic that an automobile manufacturer ultimately receives money for the vehicles it manufactures. Plaintiffs here have shown that at least some, if not all, of them spent money to acquire the vehicle. The evidence is sufficient to require the issues of entitlement to, and the amount of, restitution be determined by the trier of fact.

IT IS SO ORDERED.

Date:

**Honorable DAVID DE ALBA
Judge of the Superior Court of
California, County of Sacramento**

** Certificate of Service is Attached **