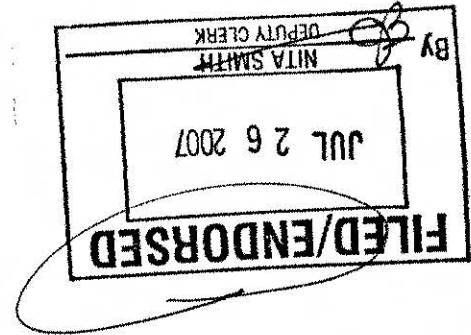


1 Elizabeth J. Cabraser (State Bar No. 083151)
2 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
3 Embarcadero Center West
4 275 Battery Street, 30th Floor
5 San Francisco, CA 94111-3339
6 Telephone: (415) 956-1000
7 Facsimile: (415) 956-1008

8 Kevin P. Roddy (State Bar No. 128283)
9 WILENTZ, GOLDMAN & SPITZER, P.A.
10 90 Woodbridge Center Drive, Suite 900
11 Woodbridge, NJ 07095-0958
12 Telephone: (732) 636-8000
13 Facsimile: (732) 726-6686



14 **Co-Lead Counsel for Plaintiffs and the Class**

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF SACRAMENTO**

17 Coordination Proceeding
18 Special Title (Rule 1550(b))

JCCP Nos. 4266 & 4270

19 **FORD EXPLORER CASES**

CLASS ACTION

20 Included Actions:

[Assigned to Coordination Trial Judge
David DeAlba – Dept. 1]

21 *Tompkins v. Bridgestone/Firestone, Inc.*
22 Sacramento County Super. Ct. Case No.
23 03AS0391

**SUPPLEMENT TO PLAINTIFFS'
CORRECTED TRIAL BRIEF RE:
DISGORGEMENT OF FORD'S UNJUST
PROFITS**

24 *Katz v. Bridgestone/Firestone, Inc.*
25 Los Angeles Super. Ct. Case No. BC279458

Trial Date: June 4, 2007

26 *Gray v. Ford Motor Co.*
27 Sacramento Super. Ct. Case No. 03AS04782

28 *Montoya and McLachlan v. Ford Motor Co.*
Sacramento Super. Ct. Case No. 03AS05213

A. Introduction

Plaintiffs and the members of the Class, by counsel and pursuant to this Court's invitation during the afternoon trial session on July 25, 2007, hereby file this Supplement to Plaintiffs' Corrected Trial Brief Re: Disgorgement of Ford's Unjust Profits. In this Supplement, Plaintiffs

1 further explicate the disgorgement of unjust profits explicitly authorized in this certified class
2 action under the Unfair Competition Law (Bus. & Prof. Code, § 17200 *et seq.*) (the “UCL”), as
3 well as the necessary evidentiary support for a restitution award to be made by this Court. In
4 addition, Plaintiffs further explicate the well-settled economic theory of the “first mover”
5 advantage relied upon by Dr. Alan Goedde, Plaintiffs’ well-qualified expert witness, to “quantify
6 ... the advantage realized by” Ford. (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135
7 Cal.App.4th 663, 700.)

8 As previously stated, the remedies sought by Plaintiffs and Class members are based on
9 three alternative models of calculating the amount of money that Ford acquired, through its
10 wrongful conduct, from Plaintiff and Class members. The simplest economic model advanced by
11 Plaintiffs and Class members is the amount of profits Ford received from the sale of Explorers,
12 model years 1991-2001, in the State of California. The second model calculates the amount of
13 profits received by Ford from California sales as a result of the “first mover” advantage it gained
14 by rushing the Explorer to market, rather than responding to its engineers’ concerns and proposals
15 as to how to build a safer and more stable vehicle. The third model, based upon the expert
16 testimony of Dr. James Langenfeld and Craig Elson already heard by this Court, uses regression
17 analysis to determine the decline in value that the market attributes to the disclosure of safety
18 information about the Explorer that was not reflected in its market price prior to August 2000.¹

19 **B. Explication Of Plaintiffs’ And Class Members’ Disgorgement Claim**

20 The First Cause of Action in the *Gray* Complaint, which alleges violations of the UCL,
21 expressly demands restitutionary disgorgement of Ford’s unjust profits received from sales of the
22 Ford Explorer, model years 1991-2001, in the State of California during the Class Period:
23

24 ¹ For the Court’s reference, these three economic models -- including Plaintiffs’ claim for
25 disgorgement of Ford’s unjust profits under the UCL and Dr. Goedde’s reliance upon the “first
26 mover” advantage economic theory -- are discussed in Plaintiffs’ Corrected Trial Brief, pp. 6-9
27 (filed June 4, 2007); Plaintiffs’ Omnibus Opposition to Defendant’s Motions in Limine, pp. 19-22
(filed March 9, 2007); and Plaintiffs’ Opposition to Ford Motor Company’s Motions to Exclude
28 Plaintiffs’ Expert Witnesses Alan G. Goedde and Jerry Arnold, pp. 2-7 (filed Feb. 9, 2007).

1 As a proximate result of its unlawful, unfair or fraudulent practices, Ford
2 has been unjustly enriched and should be required to make restitution and/or
3 disgorgement of profits unjustly earned to the Plaintiff and the Class pursuant to
4 Sections 17203 and 17204 of the UCL and/or provide other appropriate equitable
5 relief.

6 (Gray v. Ford Motor Co., Class Action Complaint, ¶ 70 [filed Aug. 26, 2003].) Paragraph 3 of
7 the Prayer for Relief asks this Court to order “[d]isgorgement of [Ford’s] revenues or profits
8 attributable to its unjust enrichment as to Plaintiff and the members of the Class.” (*Id.*, p. 22:1-
9 2.)²

10 Under Section 17203 of the UCL,³ “a private person may recover restitution only of those
11 *profits* that the defendant has unfairly obtained from such person or in which such person has an
12 ownership interest.” (*Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223,
13 232 [emphasis added] [citing *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134,
14 1144-1150].) In this class action, Plaintiffs and Class members have the requisite “ownership
15 interest” in the hundreds of millions of dollars in profits Ford received from selling Explorers in
16 the State of California, as well as any interest that Ford may have earned on such monies. (*Juarez*
17 *v. Arcadia Finan., Ltd.* (2007) ___ Cal.App.4th ___, 61 Cal.Rptr.2d 382, 399-403; *see also In re*

18
19 ² During the afternoon session on July 25, 2007, Ford’s counsel mischaracterized the “first
20 mover” advantage as an “unpleaded theory” of recovery. It is not a matter required to be pleaded
21 under Section 452 of the Code of Civil Procedure; rather, the “first mover” advantage theory is
22 simply an economic model that provides a useful tool for the analysis of evidence and
23 determination by this Court of what portion of Ford’s profits are “unjust” – that is, attributable to
24 its wrongful conduct.

25 ³ Section 17203 authorizes courts to make such orders as “may be necessary to restore to
26 any person in interest any money or property, real or personal, which may have been acquired by
27 means of such unfair competition.” (Bus. & Prof. Code, § 17203.) “The purpose of such orders
28 ‘is to deter future violations of the [UCL] and to foreclose retention by the violator of its ill-gotten
gains.’” (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267 [citation omitted]; *see*
also Fletcher v. Security Pac. Nat’l Bank (1979) 23 Cal.3d 442, 450 [trial court has “broad
authority” under UCL to fashion a remedy to “deter the defendant ... from engaging in such
practices in the future”; “The requirement that a wrongdoing entity disgorge improperly obtained
moneys surely serves as the prescribed strong deterrent.”]; *People v. Beaumont Inv., Ltd.* (2003)
111 Cal.App.4th 102, 135 [“statutory restitution is not solely ‘intended to benefit the [victims] by
the return of money, but instead is designed to penalize a defendant for past unlawful conduct and
thereby deter future violations”] [citation omitted].)

1 *Ditropan XL Antitrust Litig.* (N.D. Cal. May 11, 2007) 2007 WL 1411617, *4-5, 2007-1 Trade
2 Cas. (CCH) ¶ 75,737 [applying UCL and holding that indirect purchasers – consumers – “allege
3 an ownership interest in funds received by” the defendant drug manufacturer, “namely, the profits
4 [defendant] obtained by allegedly inflating the price of Ditropan XL” by keeping a less expensive
5 generic drug from the market].)

7 **C. The Evidentiary Basis For Plaintiffs’ Disgorgement Claim**

8 As the Court of Appeal held in *Leatherman*, “[t]here must be evidence that supports the
9 amount of” restitutionary disgorgement ordered by this Court. (135 Cal.App.4th at p. 697.) Such
10 an award must be “supported by substantial evidence” (*id.* at p. 700), and “expert testimony may
11 be necessary to establish the appropriate measure of recovery.” (*Id.* at p. 699.) In that case, the
12 Court of Appeal overturned the trial court’s restitution award because plaintiffs’ expert witness
13 “did not attempt to quantify *either* the dollar value of the consumer impact *or* the advantage
14 realized by *Leatherman*.” (*Id.* at p. 700 [emphasis added].) In this class action, two of Plaintiffs’
15 expert witnesses – Dr. Langenfeld and Mr. Elson – have already quantified the “dollar value of
16 the ... impact” upon Plaintiffs and Class members (*id.*), while another expert witness, Dr.
17 Goedde, will “quantify ... the advantage realized by” Ford. (*Id.*)

19 Consistent with the Court of Appeal’s instructions in *Leatherman*, Dr. Goedde’s expert
20 testimony provides the necessary “factual and rational basis for the amount” of restitutionary
21 disgorgement to be awarded by this Court. (*Id.* at p. 699 [citing *People v. Carbajal* (1995) 10
22 Cal.4th 1114, 1125 [involving restitution under Penal Code].) Dr. Goedde properly applies the
23 “first mover” advantage to quantify the unjust profits received by Ford from its premature entry
24 into the mid-size sport utility vehicle (“SUV”) market in California in February 1990, rather than
25 in February 1991 or August 1991. Contrary to Ford’s counsel’s assertion to this Court on July
26 25, 2007, the deposition testimony of Professor Lee Cooper, one of Ford’s designated experts,
27
28

1 unequivocally supports Dr. Goedde's opinion that Ford secured the "first mover" advantage
2 during 1990-1991. As Cooper testified:

3 Q. [By Mr. Roddy] Are you familiar with something called the first mover
4 advantage?

5 A. Yes I am.

6 Q. What is the first mover advantage as you understand it?

7 A. The creator or the very early participant in a new or in essence new market
8 has a time when the company has leverage over the dimensions that
9 consumers use to judge or experience the category such as in this case
10 versatile, roomy and comfortable which were the characterization of the
11 early days in the Ford Explorer.

12 Q. *So is it your testimony that at the beginning – at least at the beginning of
13 the class period Ford had a first mover advantage?*

14 A. *I believe with respect to the mid-size SUV that they did.*

15 Q. "They" being Ford?

16 A. Ford.

17 (Depo. of Lee G. Cooper [Sept. 12, 2006] pp. 150:15-151:8 [emphasis added] [Exhibit A hereto].)

18 There is ample support for employment of this economic theory in applicable case law
19 and secondary authorities. In *Children's Broadcasting Corp. v. The Walt Disney Co.* (8th Cir.
20 2001) 245 F.3d 1008 [Exhibit B hereto], the Eighth Circuit held that there was sufficient evidence
21 from which the jury could approximate the amount of damages sustained by the plaintiff
22 broadcaster as a result of a breach of contract and torts committed by the defendant broadcasting
23 networks. At trial, the plaintiff's expert witness testified as to "'first mover' advantage: when a
24 business is the first of its kind and it gets to a certain level, competitors will have a difficult time
25 unseating it." (*Id.* at p. 1015.)⁴ Following remand for retrial, the trial court again entered
26 judgment on a jury verdict in favor of the plaintiff broadcaster. During the retrial, plaintiff's
27 expert witness (Dr. Putnam) "offered a theory regarding [defendants'] accelerated entry into
28 children's radio." As the Eighth Circuit observed, "[t]he jury could have used all or some or none

⁴ As plaintiff's expert witness succinctly described the theory in his trial testimony, "the people who get there first and in the biggest way will win." (*Children's Broadcasting, supra*, 245 F.3d at p. 1016.)

1 of Dr. Putnam's various acceleration intervals (eleven months to two years) as benchmarks to
2 calculate the appropriate amount of damages, depending on the jury's findings regarding the
3 amount of acceleration resulting from [defendants'] conduct." (*Children's Broadcasting Corp. v.*
4 *The Walt Disney Co.* (8th Cir. 2004) 357 F.3d 860, 864 [Exhibit C hereto].) As in this case, where
5 Dr. Goedde has testified that he utilized Ford documents to calculate the "amount of acceleration"
6 resulting from Ford's misconduct (*id.*), the Eighth Circuit stated that "[i]n calculating the various
7 intervals, Dr. Putnam considered evidence, including two [of defendant's] documents, regarding
8 the length of time it would take to launch a children's radio network." (*Id.*) "Dr. Putnam
9 provided dollar amounts to the jury of the increased value of [defendants] based on three
10 acceleration intervals – eleven months, twelve months, and twenty-four months – to which Dr.
11 Putnam assigned the values of \$35 million, \$37 million, and \$54 million." (*Id.*) In affirming the
12 jury verdict for plaintiff at the retrial and finding that the evidence supported that verdict (*id.* at
13 863-865), the Eighth Circuit emphasized that "[t]he district court stated it was satisfied with Dr.
14 Putnam's credentials for valuing trade secrets, and Dr. Putnam *used an accepted academic*
15 *methodology.*" (*Id.* at p. 864 [emphasis added]; *see also* Jonathan M. Barnett, *Private Protection*
16 *of Patentable Goods* (2004) 25 CARDOZO L. REV. 1251, 1257 fn. 17 ["There is well-developed
17 business economics and marketing literature on the first-mover advantage."] [citing articles]
18 [Exhibit D hereto].)

19
20
21
22 Dr. Goedde's employment of the "first mover" advantage to "quantify ... the advantage
23 realized by" Ford, thereby providing the necessary "substantial evidence" to justify this Court's
24 award of restitutionary disgorgement (*Leatherman, supra*, 135 Cal.App.4th at p. 700), is well
25 supported by precedent.

26 We emphasize that deployment of a "first mover" strategy is not *per se* a violation of the
27 UCL. A company that captures market share by introducing a great product may earn its "first
28

1 mover" premium justly; while competitors might grumble, consumers may benefit. While
2 improper deployment may violate the UCL *vis-à-vis* competitors, as this Court has observed, it
3 may *also* give rise to an actionable claim brought by consumers, as the scenario described by
4 Judge White in *In re Ditropan XL Antitrust Litig.* (N.D. Cal. May 11, 2007) [Exhibit E],
5 demonstrates. (See p. 4, *supra*.) In this case, as Ford's expert (Professor Cooper) recognized (see
6 page 5, *supra*), Ford indeed successfully deployed a "first mover" strategy. Dr. Goedde simply
7 quantifies the resulting additional sales and profits, utilizing the data that Ford provided. What
8 renders those profits unjust (and, therefore, subject to disgorgement under Section 17203) is
9 Ford's decision to deploy the "first mover" strategy to the detriment of its consumers – Plaintiffs
10 and Class members.
11
12
13

14 Dated: July 26, 2007

LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP

16 By Elizabeth J. Cabraser
17

18 Elizabeth J. Cabraser
19 Embarcadero Center West
20 275 Battery Street, 30th Floor
21 San Francisco, CA 94111-3339
22 Telephone: (415) 956-1000
23 Facsimile: (415) 956-1008
24
25
26
27
28

WILENTZ, GOLDMAN & SPITZER, P.A.

By: 

Kevin P. Roddy

Kevin P. Roddy
90 Woodbridge Center Drive, Suite 900
Woodbridge, NJ 07095-0958
Telephone: (732) 636-8000
Facsimile: (732) 726-6686

**Co-Lead Counsel for Plaintiffs and the
Class**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
84

2

3
4
5
6

7
8
9
10

11

12

13
14
15