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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

Coordination Proceeding
Special Title (Rule 1550(b))

FORD EXPLORER CASES

Included Actions:

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

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

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

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

JCCP Nos. 4266 & 4270

CLASS ACTION

[Assigned to Coordination Trial Judge David DeAlba – Dept. 29]

PLAINTIFFS' CORRECTED TRIAL BRIEF

Trial Date: June 4, 2007

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Pursuant to this Court's request, Plaintiffs set forth below (1) their theories of recovery; (2) the relevant evidence supporting Plaintiffs' theories; and (3) the legal authority supporting their prayers for relief on behalf of those California residents who bought, owned, or leased new or used 1991-2001 model year Ford Explorers in California between 1990 and August 9, 2000, and who either still own their Explorer or who sold, ended their lease, or otherwise disposed of it after August 9, 2000.

I. LEGAL THEORIES FOR RECOVERY

In this certified class action, Plaintiffs assert a claim against Defendant, Ford Motor Company ("Ford"), for "unlawful, unfair or fraudulent" violations of the Unfair Competition Law (Bus. & Prof. Code, § 17200 *et seq.*) (the "UCL" or "Section 17200"). (*See* Class Action Complaint, ¶¶ 64-69, *Rose Marie Gray v. Ford Motor Co.*, Case No. 03AS04782 [filed Aug. 26, 2003] ["*Gray* Complaint"].)

Plaintiffs contend that by disseminating "unfair, deceptive, untrue or misleading advertising," Ford violated the False Advertising Law, Bus. & Prof. Code § 17500 *et seq.* (the "FAL" or "Section 17500"). Plaintiffs also contend that Ford violated the Consumers Legal Remedies Act (Civ. Code, § 1750 *et seq.*) (the "CLRA") by its active concealment and failure to disclose material information "regarding the Explorer['s] safety and handling characteristics"; "representing that Explorers have . . . characteristics, . . . uses, [or] benefits . . . which they do not have"; "representing that Explorers are of a particular standard, quality, or grade, . . . [when] they are of another"; and "advertising goods with intent not to sell them as advertised." (*Id.*, ¶ 74.)[1] By violating the FAL and the CLRA, Ford engaged in "unlawful" violations of the UCL. (*See Cel-Tech Comm., Inc. v. Los Angeles Cellular Tele. Co.* (1999) 20 Cal.4th 163, 180 ("By proscribing any unlawful business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable"

[1] Plaintiffs' pending request to dismiss, with prejudice, their jury trial claim against Ford alleging violations of the CLRA does not eliminate such violations as predicate acts under the "unlawful" prong of Section 17200.

internal quotations omitted). *See also Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950 ("[a]ny violation of the [F]alse [A]dvertising [L]aw . . . necessarily violates" Section 17200).)

The UCL does more than just borrow other statutorily proscribed practices, however. It broadly prohibits schemes "which on [their] face violate the fundamental rules of honesty and fair dealing." (*See id.*, 20 Cal.4th at p. 181.) As the California Supreme Court stated in *Cel-Tech*, "In permitting the restraining of all 'unfair' business practices, [Section 17200] undeniably establishes only a wide standard to guide courts of equity . . . . since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." (*Id.*) Thus, here, Plaintiffs' UCL claims also derive from Ford's unfair course of conduct in the research, development, design decisions, launch and continued manufacture of the Explorer. (*See, e.g. Gray* Complaint, ¶¶ 16-47.) Because the UCL's unlawful, unfair and fraudulent prongs are read in the disjunctive, Plaintiffs can establish liability by establishing Ford violated the FAL, by establishing Ford violated the CLRA, or by establishing its conduct was unfair or fraudulent. (*See Cel-Tech Comm.*, 20 Cal.4th 163, 180.)

II. SUMMARY OF RELEVANT EVIDENCE TO BE OFFERED AT TRIAL

A. Ford's Advertising And Marketing Campaign For The Explorer

To prove a claim under either Section 17200 or Section 17500, "based on false advertising or promotional practices, 'it is necessary only to show that 'members of the public are likely to be deceived.'" (*Kasky*, *supra*, 27 Cal.4th at p. 951 [quoting *Comm. on Children's Television, Inc. v. Gen'l Foods Corp.* (1983) 35 Cal.3d 197, 211]; *see also Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.) As the Court of Appeal explained:

> "By their breadth the statutes encompass not only those advertisements which have deceived or misled ***because*** they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . .. A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, ***such as by failure to disclose other relevant information***, is actionable under these sections." Tellingly, a plaintiff need not prove that anybody was misled.…

(*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 99 [second emphasis added] [quoting *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332-33]; *see also McKell v. Washington Mut., Inc.*

(2006) 142 Cal.App.4th 1457, 1471; *Massachusetts Mut. Life Ins. Co. v. Sup. Ct.* (2002) 97 Cal.App.4th 1282, 1289-1290.) "The 'misleading character' of a given representation 'appears on applying its words to the facts.'" (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 679 [citing *People v. Wahl* (1940) 39 Cal.App.2d Supp. 771, 774].)[2]

Because, as the Court of Appeal has stated, "the primary evidence in a false advertising case is the advertising itself," (*Colgan, supra,* 135 Cal.App.3d at p. 682), in the following section Plaintiffs summarize the marketing and advertising campaign for the Explorer, model years 1991-2001, carried out by Ford in the State of California.

The documentary and testimonial evidence to be offered by Plaintiffs and Class members at trial will demonstrate that, beginning in at least 1987, Ford and its consultants devised a marketing and long-term advertising campaign intended to portray the Explorer as a "safe" vehicle. As Plaintiffs' marketing and advertising expert witnesses – Professors Michael Kamins and Douglas Holt – and Doug Scott, Ford's designated person "most qualified" as to Explorer marketing and advertising, are expected to testify at trial,[3] Ford created and implemented a brand image for the Explorer as a "go anywhere, do anything" vehicle that catered to consumers' deep-seated needs for safety and security. The Explorer, which was derivative of the Bronco II, was portrayed as a practical vehicle for the family that one would be comfortable taking anywhere, a dual-purpose replacement for the family station wagon, being used primarily by the female household head to take the children safely to and from baseball games or Brownie Scout meetings, or as a recreational vehicle for weekend trips to the park or to the beach. Ford's brand image research showed that safety perceptions were an important driver of vehicle purchase in the SUV character and, accordingly, Explorer 4-door models were targeted at women who desired 4-

[2] A "reasonable consumer" standard applies when determining whether a given claim is misleading or deceptive. (*Colgan, supra,* 135 Cal.App.4th at p. 682.) A "reasonable consumer" is "the ordinary consumer acting reasonably under the circumstances," and "is not versed in the act of inspecting and judging a product, in the process of its preparation or manufacture." (*Colgan, supra,* 135 Cal.App.4th at p. 682 [citing, *inter alia, Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 512-13].)

[3] The expert opinions to be offered by Professors Kamins and Holt, and a summary of Mr. Scott's testimony on behalf of Ford, are set forth in Plaintiffs' Separate Statement of Disputed and Undisputed Material Facts in Opposition to Ford Motor Company's Motions for Summary Adjudication, which was filed on Feb. 9, 2007.

wheel-drive safety and security. (*See* Trial Exhibits 1089, 1100, 303, 1088, 848, 1096, 831, 401, 851, 1108, and 1101.)

In its long-term advertising campaign for the Explorer, consistent with the "go anywhere, do anything" brand theme,[4] Ford portrayed the Explorer as a safe and functional vehicle, suitable for family use. (*See* Trial Exhibits 1089, 1100, 938, 833.) Based upon reactions gleaned from consumer focus groups, Ford's marketers decided that in advertisements and promotional materials the Explorer should be shown in active, recreational wilderness settings to demonstrate that the vehicle was capable of reaching remote areas safely, with children in tow. Ford knew that the tag lines of Explorer advertisements, such as "Your Explorer Is Ready" and "Ford Tough," conveyed to consumers that the vehicle would provide confidence in any driving situation. Advertisements featuring images of the Explorer in an off-road situation, or showing the vehicle on a roadway navigating in poor weather conditions stressed more safety and less the fun and recreational image. (*See* Trial Exhibits 1104, 1095, 831, 939, 941, 1090, and 382.) Sales brochures for the Explorer made express representations about the vehicle's purported stability, handling characteristics, and safety. (*See* Trial Exhibits 541, 547-554, 556-557, and 937.) Plaintiffs assert that Ford's express and implied representations were false and misleading and, therefore, actionable under Section 17200 and Section 17500, because Ford concealed and failed to reveal the material facts it knew concerning the Explorer's handling and stability deficiencies, as set forth in the next section.

B. Ford's Wrongful Conduct And Failure To Disclose Material Facts Concerning The Explorer

California law has long-recognized the obligation of manufacturers like Ford to honestly assess the handling and stability characteristics of passenger transport vehicles. In *Culpepper v. Volkswagen of America, Inc.* (1973) 22 Cal.App.3d 510, a 19 year old plaintiff sued Volkswagen

[4] "A long-term advertising campaign may seek to persuade by cumulative impact, not by a particular representation on a particular date." (*Children's Television, supra*, 35 Cal.3d at p. 219.) In this class action, the issue is whether the Explorer marketing and advertising campaign, "***as a whole*** was likely to mislead." (*Prata v. Sup. Ct.* (2001) 91 Cal.App. 4th 1128, 1143 [emphasis added].) Section 17200 and Section 17500 encompass implied as well as express false representations. (*See, e.g., Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1662.)

after the vehicle she was driving rolled over when she attempted an emergency lane change maneuver. The consumer claimed that the vehicle was defectively designed because it would roll over on a flat paved surface, such as a freeway, street or highway, without being tripped by a curb or other obstruction. The consumer likewise contended that "in the United States, there (was) an implied standard that a car should not roll over on a smooth surface." This "implied standard" was said to exist regardless of the amount of steering wheel input utilized by the driver. The Volkswagen at issue was equipped with a suspension system that was known to have "jacking" characteristics.

After the jury returned a verdict for the consumer, Volkswagen appealed. In affirming the jury verdict, the appeals court stated:

> Emergency situations requiring severe turning movements arise every day. Cars should not be built just to coincide with normal driving conditions. *While the car, driver and road are all interrelated, situations of peril do arise* daily requiring heroic turning maneuvers. … vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products. (citations omitted) If manufacturers must take accidents into consideration in designing their products, then similarly automobile engineers and designers should reasonably foresee that a turn of the front wheels of a car 18 degrees may be necessitated in a variety of emergency situations at a wide range of speeds. [emphasis added by the court][page 115].

(*Culpepper*, 22 Cal.App.3d at 115 (emphasis in original)). Long before Ford introduced the Explorer in 1990, Ford knew that the dangers associated with the design meant that the vehicle should not be routinely placed in the hands of young, inexperienced drivers, or in the hands of those not specially trained. Despite this knowledge, Ford intentionally chose to market the vehicle for use by females and young, inexperienced drivers, and those with no special training.

Ford's unique and extensive experience with the Bronco II provides a vital foundation for the misrepresentations and omissions made with regard to the Explorer because the evidence uncovered regarding the Explorer duplicates the same pattern of misconduct demonstrated during development of the 4 door Bronco II, which later became known as the Explorer.

III. PRAYERS FOR RELIEF: REMEDIES FOR UCL/FAL VIOLATIONS

The remedies available under the UCL and FAL are "unquestionably broad." (*Fletcher v.*

Security Pacific Bank (1979) 23 Cal.3d 442, 451.) As the Court stated, "section 17535 authorizes . . . an order of restitution of any money which a trial court finds 'May have been acquired by means of any . . . (illegal) practice.'"[5] This remedy is commonly known as disgorgement.

The disgorgement remedy "consists of factfinding by a . . . court to determine the amount of money acquired through wrongdoing — a process sometimes called accounting — and an order compelling the wrongdoer to pay that amount plus interest to the court." (*See SEC v. Cavanagh* (2d Cir. 2006) 445 F.3d 105, 166 (affirming judgment ordering disgorgement of profits of securities fraud into court). *Cavanagh* explains the historical origins of the term to mean the giving up of wrongly gotten assets: "the disgorgement of past plunder", and its primary purpose: preventing wrongdoers "from unjustly enriching themselves through violations, which has the effect of deterring subsequent fraud." (*Id.*, 455 F.3d at p. 117.) In disgorgement, "the emphasis on public protection, as opposed to simple compensatory relief, illustrates the equitable nature of the remedy", "it need not equal actual damages", and it may exceed "actual damages to victims." (*Id. See also Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 66-68 (restitution award exceeding actual damages affirmed).)

As *Cavanagh* notes, tracing the equitable lineage of the remedy, "that the term 'disgorgement' has entered legal parlance only recently cannot obscure that the ancient remedies of accounting, constructive trust, and restitution have compelled wrongdoers to 'disgorge' — i.e., account for and surrender — their ill-gotten gains for centuries." (*Id.*, 455 F.3d at p. 119.) In short, "disgorgement of profits from fraud [is] a 'classic' restitutionary remedy inherently distinct from compensable damages awarded at law", granted under courts' equitable powers. (*Id.*)

Fletcher notes these equitable origins, applies the equitable concepts of deterrence through disgorgement of the profit of unlawful conduct in the consumer fraud/UCL context, and emphasizes that Section 17535 reinforces, rather than delimits "the full range of power" that California courts may exercise, "even in the absence of the specific authorization contained in Section 17535" under their "inherent power to order restitution" and thus, "to accomplish full

[5] Section 17535 governs remedies for violations of the FAL; Section 17203 governs remedies for violations of the UCL. The statutes and the remedies they apply are the same.

justice between the parties." (*Id.*, 22 Cal.3d at 452.)

In *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126-27, citing the language from Section 17203 that authorizes a court to make orders necessary to restore money "to any person in interest," the California Supreme Court held that the UCL provides for orders compelling a defendant "to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person."

The remedies that Plaintiffs seek in this action are based on three alternative models of calculating the amount of money that Ford acquired, by its wrongful conduct, from members of the class. The simplest model advanced by Plaintiffs is the amount of profits Ford earned through its sale of Ford Explorers in California. The second model calculates the profits generated by Ford in California as a result of its "first mover" advantage gained by rushing the Explorer to market, rather than responding to its engineers' suggestions on how to provide a more safe and stable vehicle. The third model uses regression analysis to determine the amount of money that the market attributes to the disclosure of safety information about the Explorers that was not reflected in price prior to August 2000. The three models are summarized below. Additionally, Plaintiffs seek pre-judgment and post-judgment interest, attorneys' fees and costs, and injunctive relief.

A. Remedy Model 1: Restitutionary Disgorgement of Ford's Profits

Analysis of Ford's financial results for Explorer sales in California, based upon financial data Ford supplied, reveals that Ford realized profits of $2,135,593,493 on sales of 414,569 vehicles. (*See Fletcher*, 23 Cal.3d at p. 451 ("To permit the retention of even a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement of the law is to be achieved. One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom" (internal quotation, citation and brackets omitted). *See also In re Ditropan XL Antitrust Litig*. (N.D. Cal. 2007) Case No. M:06-CV-01761-JSW, 2007 WL 1411617, *4-5 (May 11, 2007).)

B. Remedy Model 2: Disgorgement of "First Mover" Advantage Profits

Plaintiffs' expert, Dr. Alan Goedde, also calculated Ford's profits realized from Explorer sales in California solely due to rushing the 1991 model year Explorer to market, rather than taking the time to engineer a safe and stable Explorer as recommended by Ford's own engineers. This calculation focuses on the amount of profits realized by the number of additional vehicles Ford was able to sell because of its "first mover" advantage. The additional sales include sales made during those first few months, as well as a portion of sales in subsequent years that related to the first mover advantage. Dr. Goedde calculated the amount of these "first mover" profits in a range from $383 million to $442 million, depending on the period of time which the Court finds as the amount of advantage that Ford obtained through its wrongful conduct. The "period of time" refers to the delay that Ford would have encountered had it addressed the stability and handling issues its engineers identified. The Explorer was introduced to the market in March 1990. If Ford had taken the time to address the safety issues, the launch would have been delayed until February 1991 or, perhaps, as late as August 1991. (*See Children's Broadcasting Corp. v. Walt Disney* (8th Cir. 2001) 245 F.3d 1008, 1015-17 (describing the "first mover" advantage).) The Court denied Ford's motion in limine seeking to exclude Dr. Goedde's testimony quantifying these unjust profits.

C. Remedy Model 3: Market Approach

Alternatively, Plaintiffs and Class members seek restitution of safety information-related overcharges Ford unjustly received from their sales of Ford Explorers to Class members or their predecessors in interest. (*Gray* Complaint, p. ¶ 2 [Prayer for Relief].) As this Court recognized in its March 24, 2007, Ruling on Ford Motor Company's Motion for Class Decertification, this Court may award restitutionary amounts based on a "market approach." (Ruling on Ford's Mot. for Decertification, p. 9 [citing *Colgan, supra,* 135 Cal.App.4th at p. 700].) The amounts Ford gained from the sale of Explorers that related to its misrepresentations and omissions regarding safety can be calculated by comparing the pricing on each vintage of Explorer before and after August 9, 2000. For example, comparing the pricing of one year old Explorers as reflected in the market before August 9, 2000 as compared to after August 9, 2000 generates a material difference

that is explained by the safety information that came into the market after August 9, 2000 and that resulted in a lower public perception of the safety of the Explorer.

Plaintiffs' experts used regression analysis to sort out the various potential causes of the decline and, from this analysis, determined the amount of the decline that was attributable to the safety information. Dr. James Langenfeld will testify about his analysis of the post event data from used Explorer transactions that support his conclusions. Craig Elson looked at how the post event data can be tracked back to the original wholesale price that Ford received in connection with its initial sales of the Explorer vehicles in California. Ford contends, incorrectly, that the decline in pricing and value of Explorers after the tire recall is related to the problems with Firestone tires, rather than a problem with the vehicle. However, Explorer purchasers would not have reduced Explorer prices to account for the tires after August 2000 because the tires were recalled and replaced with new tires (so the vehicles had brand new, non recalled tires) without cost to the owners.

Ford sold Explorers to dealers at a wholesale price that was inflated due to the misrepresentations and omissions discussed above. Dealers, in turn, sold the Explorers to consumers with a mark up, typically based on the manufacturer's suggested retail price (MSRP). Plaintiffs' experts analyzed the relationship between the wholesale price paid to Ford as compared to the MSRP and determined that the wholesale price paid to Ford was 15% less than the MSRP. Accordingly, the amount claimed by Plaintiffs was also reduced by 15% to ensure that the amounts claimed reflected moneys actually paid to Ford and not moneys paid only to dealers. The amount of unjust enrichment per vehicle was calculated by Craig Elson as:

- 4-door 4-wheel drive $1,302
- 4-door 2-wheel drive $1,194
- 2-door 4-wheel drive $1,241
- 2-door 2-wheel drive $1,108

D. Allocation of Recovery

The goal of the UCL and FAL remedies is to "arm the trial court with the cleansing power to order restitution to effect complete justice." (*Fletcher*, supra, 23 Cal.3d at 449.) "Fluid

recovery may be essential to ensure that the policies of disgorgement or deterrence are realized." (*Kraus, supra*, at 135). Whichever model the Court ultimately selects, the Court may calculate the aggregate total benefit Ford received as a result of its false and misleading representations concerning safety and create a common fund from which Plaintiffs and Class members may collect individual shares by submitting claim forms that identify the year and model Explorer they owned during the Class Period and the dates on which they bought and sold the vehicle, if applicable. Ford has the ability to identify and locate Class members through its records or DMV records. (*See, e.g.*, Trial Exhibit 1016 [Oct. 24, 2000 letter from Ford to Plaintiff Tompkins, with VIN number, sent as part of recall notification program].) After completion of the claims process, this Court could distribute any unclaimed funds as it sees fit through the "fluid recovery" doctrine, which refers to the application of "*cy pres*" in class actions. (*See State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472; Code Civ. Proc., § 384.) A related option that this Court may invoke is to require Ford to "identify, locate, and repay" its ill-gotten gains to each class member. (*Kraus, supra*, 23 Cal.4th at p. 138.) Alternatively, this Court may award a specific amount per vehicle, which would be paid pursuant to a claims process to each class member who comes forward with a claim. (*See, e.g., Granberry v. Islay Inv.* (1995) 9 Cal.4th 738.) Through this method of distribution, Ford would retain all ill-gotten profits that Class members do not come forward and claim.

E. <u>Pre-judgment and Post-judgment Interest</u>

Plaintiffs seek an award of pre-judgment and post-judgment interest. (*Gray* Compl. at 22, ¶ 4). This Court has the authority to award both under either Civil Code section 3287 or 3288. Section 3287 applies primarily to liquidated and contractual actions, while section 3288 applies primarily to unliquidated tort actions. (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 102; *But see Levy-Zetner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 798 [finding section 3287 applicable to tort actions for damage to personal property].) Pursuant to either statute, prejudgment interest should be awarded where the amount of restitution to be awarded is ascertainable "because the interest compensates the plaintiff for the loss of calculable funds that belonged to the plaintiff, or should have been paid to

the plaintiff." (*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1997) 60 Cal.App.4th 13, 21.) That is, interest may be awarded here, because this Court "[u]sing recognized and established techniques . . . can [] compute with fair accuracy the interest on a specific sum of money, or on property subject to specific valuation." (*Greater Westchester, supra,* 26 Cal.3d at p. 103.)

Pre-judgment interest is available on a restitutionary award. *See Irwin v. Mascott* (N.D. Cal. 2000) 122 F.Supp.2d 937, 956 [finding prejudgment interest to be due on money paid as restitution for violations of California's Unfair Business Practices and Fair Debt Collection Acts pursuant to section 3287].) Accordingly, courts regularly award both post-judgment and pre-judgment interest in UCL and FAL cases. (*See, e.g., In re Yeganeh* (N.D. Cal. Oct. 23, 2006) Nos. C06-2788 CW, 05-30047TEC, 2006 WL 3020939 at *7 [upholding award of pre-judgment interest and rejecting appellant's argument that such interest cannot be permitted on restitution awards in UCL cases]; *People ex. rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 132 [upholding trial court award of restitution plus pre-judgment interest in UCL case].)

F. Attorneys' Fees and Costs

Plaintiffs seek all reasonable costs and attorneys fees associated in litigating this action. (*Gray* Complaint at 22, ¶ 5). This Court has the authority to award attorneys fees pursuant to California Code of Civil Procedure section 1021.5. Section 1021.5 allows courts to award attorneys fees to successful parties in any action resulting in the enforcement of an important right affecting the public interest where (1) a significant benefit has been conferred on the general public or a large class of persons, (2) the necessity and financial burden of private enforcement are such to make the award appropriate, and (3) it would be against the interest of justice for fees to be paid out of the recovery.

Attorneys fees are awarded under section 1021.5 for consumer class law suits affecting a large number of people. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578.) Enforcement of consumer protection laws such as the FAL and UCL constitutes "an important right affecting the public interest." (*Colgan, supra,* 135 Cal.App.4th at p. 703 [citing *Lavie,*

supra, 105 Cal.App.4th at p. 503].) This is especially true where the lawsuit "implicate[s] an issue of public safety, and . . . benefit[s] thousands of consumers . . . by acting as a deterrent to discourage lax responses to known safety hazards." (*Graham, id.* [false statements regarding a truck's towing capacity created safety risks].) The "necessity and financial burden" prong is met where "the necessity for pursuing the lawsuit placed a burden in the [claimant] out of proportion to his individual stake in the matter." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 89 [citing *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 941].)

G. Costs of Class Notice and Administration

Plaintiffs ask this Court to shift the costs associated with class notice and administration to Ford pursuant to Civil Code section 1781(d) and Rule of Court 3.766(a). (*See Gray* Complaint at 22, ¶¶ 5, 6; *see also State ex rel. Dep't. of Motor Vehicles v. Sup. Ct.* (1998) 66 Cal.App.4th 421, 438 [citing Cal. Civ. Code § 1781(d)] ["The trial court may impose the costs of notification of defined class members on either party."]; *Civil Serv. Employees Ins. Co. v. Sup. Ct.* (1978) 22 Cal.3d 362, 365-66, 375-76 [affirming trial court's discretionary ruling directing defendant to bear the cost of class notice].) Although section 1781(d) is a part of the CLRA, it applies to all class actions—even those without substantive CLRA claims. (*Civil Serv. Employees Ins. Co.*, 22 Cal.3d at p. 376 [citing *Vasquez v. Sup. Ct.* (1971) 4 Cal.3d 800, 820] ["[T]he class action procedures prescribed by the [CLRA] . . . should appropriately be utilized by trial courts in all class actions."].) Pursuant to these rules, courts have required defendants to bear the costs of class notice in the interests of fairness. (*See e.g., Hypertouch, Inc. v. Sup. Ct.* (2005) 128 Cal.App.4th 1527, 1551-53 [finding cost-shifting to be appropriate where defendant's conduct complicated identifying and notifying the class, or where defendant possesses the ability to provide class notice easily and at relatively little cost]; *Dep't. of Motor Vehicles, supra*, 66 Cal.App.4th at p. 437-38 [finding that because class members could not be easily identified, it was equitable to require defendant to shares the costs of class notification].)

H. Injunctive Relief

The Prayer for Relief requests award of "[s]uch other and further relief as the Court deems just and appropriate." (*Gray* Complaint, p. 22, ¶ 7.) This "general prayer for relief is sufficient"

for this Court to award injunctive relief against Ford. (*City of Los Angeles v. Los Angeles Farming & Milling Co.* (1908) 152 Cal. 645, 653; *accord Stearns v. Los Angeles City School Dist.* (1962) 244 Cal.App.2d 696, 743.) Plaintiffs and Class members seek injunctive relief in the form of corrective disclosures and advertisements and placing explicit warning labels on class Explorers that are still in use in California. (*See, e.g., Colgan, supra,* 135 Cal.App.4th at pp. 677-78, 701-702; *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 517-18, 537-43; *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 656; *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963, 967, 971-76.)

Dated: June 5, 2007

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Co-Lead Counsel for Plaintiffs and the Class

DECLARATION OF SERVICE BY HAND DELIVERY

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Sacramento, over the age of 18 years, and not a party to the within action; that declarant's business address is 275 Battery St., 30th Flr., San Francisco, CA 94111.

2. That on June 5, 2007, declarant served **PLAINTIFFS' CORRECTED TRIAL BRIEF** by hand-delivering a true copy at Sacramento, California to:

Mr. Malcolm Wheeler at the Sacramento County Superior Court.

3. I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of June, 2007 at Sacramento, California.