SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

JUDICIAL COUNCIL COORDINATION PROCEEDING

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

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

Department Number: 32

Case Number: JCCP NOS 4266 & 4270

RULING ON SUBMITTED MATTER:

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

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

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

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

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

damages, or an issue of duty. (*Ibid.*)

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

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

Defendant sets forth thirty two facts in its separate statement in support of the motion. Defendant also incorporated by reference the facts stated in support of its CLRA no-merit motion. The Court has already ruled on the latter in its order denying the motion to find the CLRA claims have no merit.

(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)

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

rollover propensity to plaintiffs and the class members.

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

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

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

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

Defendant contends that plaintiffs do not seek

injunctive relief. Plaintiffs dispute this fact relying on the prayer of the amendment to the complaint. That prayer requests injunctive relief for the CLRA cause of action but not for the UCL cause of action. It is, thus, undisputed that plaintiffs do not at this time pray for injunctive relief on the basis of the UCL claims.

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

The plaintiff in *Korea Supply* was an arms broker retained to promote its principal's bid to sell a missile defense system to the Republic of Korea. Instead, the contract was awarded to defendant Lockheed Martin's predecessor. Plaintiff sued defendant, alleging the contract was unfairly won through bribes and sex offered to Korean officials; plaintiff sought an award of restitution in the form of an order forcing Lockheed to disgorge all profits earned from the missile defense contract. The Supreme Court reversed the court of appeal (which had reversed the trial court's order sustaining the demurrer). Holding that restitution is limited to either money or property that defendants took directly from plaintiff or

money or property in which plaintiff has a vested interest. (*Korea Supply (supra)* at 1146-1147) Since the profits came from the Republic of Korea and plaintiff has no vested interest in them, he was not entitled to restitution.

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

In *Madrid v. Perot Systems (supra)* the Third District Court of Appeal held that non-restitutionary disgorgement is not available even in a true class action case and even if the moneys are disgorged into a fluid recovery fund. In reaching its decision the *Madrid* court emphasized that the

object of restitution under the UCL is to return to the plaintiff funds in which he or she has an ownership interest. Thus, plaintiff's assertion that defendants received ill-gotten gain did not make a viable UCL claim unless the gain was money in which plaintiff had a vested interest. As plaintiff admitted in the trial court that he did not seek a refund for money spent for his electricity, he was not seeking money in which he had a vested ownership interest. (Id at 455)

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

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

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 **