

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Westgate Ford Truck Sales, Inc.)	
)	Case No. CV 02-483526
Plaintiff)	
)	
vs.)	<u>RULINGS</u>
Ford Motor Company,)	
)	
Defendant)	

Peter J. Corrigan, J.:

Summary Judgment rulings:

Prior to trial, the Court conducted hearings on all of the motions for summary judgment and gave the parties ample opportunity to present and/or rebut the arguments for and against summary judgment. On December 30, 2010, the Court issued rulings on all 10 summary judgment motions. In making these rulings, the Court applied the summary judgment test found in Civ.R. 56(C): "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *** A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also

Welco Industries, Inc. v. Applied Cos. (1993), 67 Ohio St. 3d 344. This Court now offers its findings for these earlier decisions.

Ford Motor Company's Dispositive Motion No. 1, Motion for Summary Judgment Based on the Terms of the Contract is denied. Ford breached the unambiguous terms of the contract, read as a whole, when it failed to publish prices to all dealers. Ford has failed to prove that plaintiff waived the publication requirement by its course of conduct or by an explicit written or verbal waiver. Nor does equitable estoppel relieve Ford of its contractual obligation to Westgate. Westgate has proven damages proximately caused by the breach. Westgate has not failed to give timely notice as the UCC does not apply.

Ford Motor Company's Dispositive Motion No. 2, Motion for Summary Judgment (No. 2) Based on Waiver and Equitable Estoppel is denied. Ford has failed to prove that the course of conduct indicates Westgate's waiver of Ford's publication obligation to Westgate. Ford has also failed to prove that Westgate either explicitly in writing or verbally waived the publication obligation, or the contractual requirement that modifications be in writing or that the anti-waiver clause should not apply.

Ford Motor Company's Dispositive Motion No. 3, Motion for Summary Judgment Based on Inability to Prove the Fact of Damage is denied. Westgate has shown by its experts that Ford's breach of its obligation to sell Westgate trucks only at prices published to any dealer proximately caused damage to Westgate by decreasing the portion of retail dollars potentially available to Westgate and shifting any surplus in profit from Westgate to Ford.

Ford Motor Company's Dispositive Motion No. 4, Motion for Summary Judgment Based on the Notice Provision of Uniform Commercial Code 2-607 is denied. Neither

Michigan statutes of limitation MCL 600.5807(8) and MCL 440.2725 nor Ohio's R.C. 1302.98 bar Westgate's action because the UCC does not apply to this distributorship agreement as the terms do not indicate quantity. Therefore, the contract is not for the sale of goods within the meaning of UCC 2-607 as codified by Michigan and Ohio law. *Lorenz Supply Company v. American Standard, Inc.* (1984), 419 Mich. 610, 358 N.W.2d 845.

Ford Motor Company's Dispositive Motion No. 5, Motion for Partial Summary Judgment on Truck Sales with no Appeal-Level CPA Discount is denied. Westgate's claim is that Ford's breach of the contract stems from the implementation and operation of the entire CPA scheme, therefore, Westgate's claim encompasses all truck sales made in the wholesale market where all potentially available prices were not published, including sales made with no appeal-level CPA discount. Because every potential price was not published, each sale is affected by hidden discounts in each negotiation of the artificially inflated published price.

Ford Motor Company's Dispositive Motion No. 6, Motion for Partial Summary Judgment on Truck Sales which were not Eligible for Appeal CPA is denied. Westgate's claim that Ford's breach includes the entire CPA program where discounts were hidden and dealer profits siphoned in violation of the contractual obligation of published prices including sales that were arbitrarily deemed not eligible for appeal CPA.

Ford Motor Company's Dispositive Motion No. 7, Motion for Partial Summary Judgment on Floor Plan Interest, Lost Use of Monies and other Undisclosed or Abandoned Damages is uncontested by Westgate, therefore, is denied as moot. Westgate is not seeking damages other than overcharges paid by dealers during the class period and related interest computed by Westgate's expert based on Ohio's statutory rate.

Ford Motor Company's Dispositive Motion No. 8, Motion for Partial Summary Judgment against all Claims for Certain Absent Members of the Class Based on Res Judicata Release or Lack of Capacity to Sue and Motion to Correct Identity of Class Members is denied. Ford failed to plead release as an affirmative defense in either of its two answers and therefore, the argument is waived. Ford failed to produce sufficient evidence to prove that res judicata bars the claims. Finally, the termination of a dealership does not equate to dissolution of a corporation and Ford did not identify any terminated dealers who have dissolved their corporation and lack the capacity to sue.

Westgate's Motion for Summary Judgment on Liability is granted. Westgate demonstrated that Ford's operation of the CPA program breached Paragraph 10 of its franchise agreements as a matter of law. Specifically, Westgate showed that the CPA program, through its scheme of unrealistically high published wholesale prices and secretive unpublished discounts, systematically violated the Paragraph 10 requirement that Ford sell medium and heavy trucks to dealers at prices and discounts that were published in accordance with all dealer Terms of Sale Bulletins.

Westgate's Motion for Summary Judgment on Damages is denied. Westgate and Ford each submitted different damage models. It is up to the jury to decide which model is more credible.

Motion to Amend. Ford Motor Company's Motion for Leave to File Instant Second Amended Answer to Add the Defenses of Release and Res Judicata is moot.

Motions in Limine. See trial transcript for preliminary rulings on all motions in limine. The Court incorporates by reference each preliminary ruling made on the record as if restated here in their entirety.

Motions to Decertify. Ford's motions to Decertify the Class are denied. A plaintiff must satisfy seven requirements to maintain a class action under Civ.R. 23: (1) identification of an unambiguous class, (2) the named representative's inclusion in the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims of the representative must be typical of the claims of the class; (6) the representative must fairly and adequately protect the interests of the class; and (7) one of the three requirements of Civ.R. 23(B) must be met. This Court granted Westgate's motion to certify a class under Civ.R. 23(B)(3): class certification is appropriate where common questions of law or fact predominate over individual issues, and a class action is found to be a superior method for the fair and efficient adjudication of the controversy. Westgate met all requirements.

Westgate is a member of an unambiguous class; the class of more than 3000 dealers satisfies the numerosity requirement; the legal and factual issues related to Ford's breach are common for all class members; Westgate's breach of contract claim is typical of the class members' claims; Westgate has adequately represented and will continue to adequately represent the interests of the class; the many common questions of law and fact predominate over any individual issues; and class treatment is a superior method for adjudicating the dealers' breach claim.

Ford argues that Westgate abandoned its damage methodology model used to certify the class at trial when a new damage model was used. However, the methodology used at trial and employed by Drs. Burke and Rosen is consistent with the Dr. Ben-Shahar methodology used to describe the impact of hidden discounts in the negotiation of each sale in the entire CPA program. The establishment of breach-free discounts, the comparison of

breach-free discounts to actual discounts and the identification of “low price set” and “high price set” as discussed by Drs. Burke and Rosen is the same methodology suggested by Dr. Ben-Shahar. Nor does the Burke Rosen damage calculation create antagonism among class members. A dealer’s damage is the total of the differences between the discounts he should have received and the discounts he actually received. Where a truck was purchased at a discount greater than the breach-free discount, that dealer does not have damage associated with that truck. However, the fact that a dealer may have purchased a truck in the low price set range does not cause his interest in the litigation to become antagonistic to dealers in the high price set. Finally, Westgate did not abandon the breach of contract claim that was certified as a class action. Westgate consistently challenged the contractual legitimacy of the CPA program, not just Ford’s use of the “appeal” CPA. The testimony adduced in trial did not establish sufficient credible evidence to decertify the class.

Post-trial Motions. Defendant’s Motion for Judgment Notwithstanding the Verdict or, in the alternative, for New Trial is denied. According to Civ.R. 50, the test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is that the court must construe the evidence most strongly in favor of the party against whom the motion is made and where there is substantial evidence to support the movant’s side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied.

First, this Court rejects Ford’s argument that Westgate incurred no actual damage based upon Westgate witness Mr. Beule’s testimony. Ford takes Mr. Beule’s testimony out of context. The jury heard all the evidence from Mr. Beule and that of Westgate’s experts and also heard competing expert testimony presented by Ford. The jury rejected

defendant's expert's analysis and instead adopted the Burke Rosen analysis of damages. To do so was well within the jury's province. The jury award is based upon evidence in trial and supported by credible testimony.

Ford argues it is entitled to a partial judgment notwithstanding the verdict based on the four-year statute of limitations under Michigan statutes incorporating the UCC. This argument fails as the UCC does not govern the contract. *Lorenz Supply Co. v. American Standard, supra., Wolverine Worldwide, Inc. v. Wolverine Canada, Inc.* (W.D. Mich. 2009), 653 F.Supp.2d 747, 757. (See Ford Dispositive Motion No. 4 above.)

Ford argues it is entitled to a new trial because the Court excluded evidence of the competitive market in which the parties operated. However, many of these arguments are related to liability and no material facts were in dispute as to the breach, thus, they are not relevant to the trial that focused on damages only. Also, Ford contends the Court made erroneous pretrial rulings, erroneously admitted evidence that was inconsistent with Michigan contract and damages law and gave erroneous jury instructions and failed to give requested jury interrogatories. Again, many of these rulings pertain to Ford's attempt to introduce evidence regarding the retail market that was irrelevant to the damages at issue in the captive wholesale market contemplated by the parties to the contract.

Plaintiffs' Motion for the Entry of Judgment for Westgate and for the Entry of Judgment for all Class Members is granted. As to Westgate, the jury award of \$4.5 million dollars was the result of its adoption of the Burke Rosen methodology and is supported by evidence elicited with respect to testimony such as litigation costs (payments to the economists and a data specialist) incurred by Westgate as a result of Ford's breach. Since Ford did not request a remittitur and as the jury award is consistent with the Court's charge,

i.e., that the jury should award the amount that would put Westgate “in as good a position it would have been in had the contract been fully performed” (Tr. 1604), the Court declines to disturb the jury verdict in favor of Westgate. Also, the award of pre-judgment interest pursuant to R.C. 1343.03(A) is appropriate as it serves to make the parties whole. *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110. Although Ford makes an argument that the Ohio pre-judgment statute does not apply to a Michigan contract, according to the Michigan Supreme Court “interest is to be computed according to the law of the place where the judgment is recovered and not according to that of the place where the contract was made.” *Michigan v. Reolds Farm Co.*, (1934), 268 Mich. 301, 312-313, 256 N.W. 445, 449. Therefore, based upon the jury verdict, the Burke Rosen methodology and the revised interest calculation,¹ judgment is entered for Westgate and against Ford in the total amount of \$11,154,157 (verdict \$4,500,000.00 plus pre-judgment interest \$6,654,157).

As to all class members, it is undisputed that the franchise agreements were identical in all material respects between Ford and all of Ford’s medium and heavy truck dealers throughout the country. It is also undisputed that the CPA program was conducted in an identical manner as to each dealer. The Burke Rosen methodology included a truck-by-truck analysis of each of the 474,289 trucks sold during the class period. Drs. Burke and Rosen repeatedly testified throughout the trial that the same methodology which had been applied to determine Westgate’s damages could be applied to each truck sold to every

¹ At the request of Westgate’s counsel, Burke and Rosen revised the class damage calculation for several reasons: to incorporate into the interest computation interest on transactions in the “low price set;” to incorporate all pre-judgment interest accrued through February 10, 2011; to remove dealers precluded from participating in the Westgate litigation as a result of the federal court’s injunction order in *Bayshore Ford Truck Sales, Inc. v. Ford Motor Company*, civil action no. 99-cv-0173, United States District Court for the Northern District of Georgia; and to identify and assign damages to dealers that sustained nominal damages as a result of Ford’s breach (\$1.00 each to 28 dealers). The Court finds Burke and Rosen’s calculations, not mathematically challenged by Ford, are reasonably calculated to make plaintiffs whole.

other dealer who purchased heavy and or medium duty trucks during the class period. Drs. Burke and Rosen then aggregated the damages on each truck sold to each dealer to arrive at the dealer's damages.

Yet, Ford argues that an entry of judgment for each class member would violate Ford's constitutional right to trial by jury and due process under the Fourteen Amendment. To prevail on this argument Ford would have to demonstrate that Civ.R. 23 and Civ.R. 56 are unconstitutional. Ford, rightly so, does not challenge the constitutionality of these civil rules. Therefore, according to the Burke Rosen methodology and the revised interest calculation, judgment is entered for all class members and against Ford in the amount of \$780,616,018 exclusive of Westgate's compensatory damages and exclusive of nominal damages for 28 class members (at \$1.00 each), plus class-wide prejudgment interest in the amount of \$1,192,819,975 (exclusive of Westgate's accrued interest through February 10, 2011). The grand total amount of damages awarded to Westgate and the class is \$1,984,590,150. The Court also awards post-judgment interest at the statutory rate from the date of judgment.

The Court will consider the issue of attorney fees after all appeals have been exhausted as the Court agrees with Westgate that the submission of a fee application would be premature at this time. The Court retains limited jurisdiction to determine attorney fees and to conduct any necessary and appropriate claims administration upon remand.

The Court will stay the execution of its judgment upon defendant's posting of a supersedeas bond in the amount of \$50,000,000. There is no just cause for delay. Final.

IT IS SO ORDERED.


PETER J. CORRIGAN, JUDGE 6/10/11

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GERALD E. FUERNBERG CLERK
By  Deputy

DATE: June 10, 2011

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