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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

REGINALD NELSON,
Plaintiff, Appellant, and Cross-Respondent,

v.

PEARSON FORD CO.,
Defendant, Respondent, and Cross-Appellant.

APPEAL FROM SAN DIEGO COUNTY SUPERIOR COURT
JOHN S. MEYER, JUDGE • CASE NO. GIC881178

CROSS-APPELLANT'S REPLY BRIEF

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CROSS-APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply brief, we reaffirm that, as a matter of law, Pearson Ford fully or substantially complied with the ASFA's disclosure requirements, informing plaintiff of all the material terms of his car-purchase transaction. The judgment should be reversed with directions to enter judgment for Pearson Ford.

STATEMENT OF FACTS

Plaintiff asserts that "Pearson Ford's 'evidence' should not be trusted." (X-RB 13, boldface and initial capitalization omitted.) Specifically, plaintiff claims that Pearson Ford's opening brief cites

statements of fact that Pearson Ford submitted and plaintiff disputed, or that plaintiff submitted as possibly disputed, during the summary judgment proceedings below. (X-RB 13-14.)

The few statements of fact that plaintiff claims were disputed were cited by Pearson Ford in its opening brief to support propositions that *plaintiff takes no issue with* in his brief, namely:

(1) "The lender Pearson Ford wanted to use apparently had a problem with the 48-month term of plaintiff's loan." (X-AOB 6.)

One of Pearson Ford's five citations to the record in support of this proposition was a statement of fact that Pearson Ford submitted and plaintiff disputed during the summary judgment proceedings. (X-RB 14, listing 6 JA 1421 [item 28], where plaintiff disputed the statement that: "Due to the age of the vehicle and the number of miles, a term of 48 months was not acceptable to the lender.")

The basis for plaintiff's dispute was a hearsay objection, which was overruled. (6 JA 1421 [item 28]; X-AOB 5, fn. 2.) More importantly, in his brief, plaintiff expresses no disagreement with the proposition that the lender apparently had a problem with the 48-month term (which ended up being reduced to 36 months (X-AOB 6-7)).

(2) "On October 8, 2004, six days after plaintiff bought his car, someone from Pearson Ford called and asked him to return to the dealership to fill out more paperwork, which plaintiff did the same day." (X-AOB 6.)

One of Pearson Ford's two citations to the record in support of this proposition was a statement of fact that Pearson Ford

submitted and plaintiff partially disputed during the summary judgment proceedings. (X-RB 14, listing 6 JA 1423 [item 34], where plaintiff partially disputed the statement that: "A second RISC was written and executed by Nelson and Pearson Ford on October 8th, which replaced the original purchase transaction.")

The part that plaintiff disputed was not the part that Pearson Ford cited. (6 JA 1423 [item 34]: "Plaintiff does not dispute that a second RISC was written and executed by Nelson and Pearson Ford on October 8, 2004.") And again, in plaintiff's brief, he expresses no disagreement with the proposition that, six days after buying his car, he returned to Pearson Ford for more paperwork.

(3) "Up until mid 2005, it was Pearson Ford's policy to use the date of the original RISC on a rewritten RISC." (X-AOB 8.)

Two of Pearson Ford's 10 citations to the record in support of this proposition were statements of fact that plaintiff submitted as possibly disputed during the summary judgment proceedings. (X-RB 14, listing 6 JA 1497 [item 9]: "Pearson Ford had a policy set by its General Manager and co-owner, Gary Hertica, to backdate purchase contracts"; X-RB 14, listing 6 JA 1497 [item 10]: "Pearson Ford trained its finance managers to backdate purchase contracts.")

Again, in his brief, plaintiff expresses no disagreement with the proposition that Pearson Ford had a policy of antedating RISCs.

In addition to claiming that Pearson Ford cites disputed facts, plaintiff asserts that, if there were " 'facts the parties implicitly agreed to during the bench trial,' " "such facts certainly do not include the 'testimony' by Pearson Ford's counsel labeling the failure to properly disclose the cost of insurance as a 'clerical

mistake.' " (X-RB 14.) We address this subject in context, pages 14-15, *post*.

LEGAL ARGUMENTS

I. AS A MATTER OF LAW, PLAINTIFF HAD NO STANDING TO PURSUE CLAIMS UNDER THE UCL.

A. The judgment in favor of Class 1 was entirely under the UCL, and the judgment in favor of Class 2 was partially under the UCL.

In Pearson Ford's opening brief, we demonstrated that much of the judgment in this case was based on the UCL. (X-AOB 17-18.)

Plaintiff is silent in response.

B. Plaintiff never had standing to pursue claims under the UCL.

In Pearson Ford's opening brief, we demonstrated that causation is an element of standing to purse a claim under the UCL. (X-AOB 19-20.) In other words:

"To establish standing with regard to his Class 1 claim, plaintiff was required to prove that, if he had known the $2,082.36 finance charge in RISC-2 included $27 (actually, $19.53) in interest for the six days between the effective date and the signing date of RISC-2, and if he had known the APR was 21.23% instead of

21.00%, *he would not have bought the car.* To establish standing with regard to his Class 2 claim under the UCL, plaintiff was required to prove that, if he had known the $250 insurance premium should have been itemized in RISC-2 instead of lumped together with the cash price of the car, which increased the total cost of the car [*sic*: insurance] by about $30, *he would not have bought the car.*

"Plaintiff presented no such proof—not as to his Class 1 claim, not as to his Class 2 claim, and not as to the two claims taken together." (X-AOB 21-22, original emphasis, fns. omitted.)

In response, plaintiff argues that, for his Class 1 claim, he had standing because he would not have paid $19.53 in interest if Pearson Ford had not charged the $19.53.[1] (X-RB 16-17.) This simplistic reasoning gets plaintiff nowhere. Of course he would not have paid the $19.53 if Pearson Ford had not charged it in the first place. Given that Pearson Ford *did* charge the $19.53, however, the causation question for purposes of standing was: What would plaintiff have done if he had known that, for the six-day period between October 2 and 8, 2004, the interest he was charged totaled $19.53?[2]

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[1] Plaintiff repeatedly refers to the $19.53 as an "illegal" interest charge. (See X-RB 1, 3, 5, 6, 14, 16, 19, 26, 29, fn. 3.) It was not. (X-AOB 28-29.)

[2] Plaintiff knew he was being charged interest from October 2 to October 8. He just did not know the precise dollar amount. (X-AOB 21, fn. 14.)

The answer depended on what plaintiff was seeking in terms of restitution.[3] " '[T]here must be a causal connection between the harm suffered and the unlawful business activity.' " (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1349 [Fourth Dist., Div. One] (*Troyk*).) In other words, if plaintiff was seeking restitution of $19.53, he had to prove that, if he had known the amount of interest was $19.53, he would have refused to pay it and Pearson Ford still would have been willing to sell him the car.[4] On the other hand, if plaintiff was seeking restitution of all the money he paid for the car, he had to prove that, if he had known the interest was $19.53, he would not have bought the car.

Plaintiff was seeking "restitution of all payments made by Mr. Nelson and members of Class 1" to Pearson Ford. (X-RB 2; see X-AOB 14.) Since the harm plaintiff claimed to have suffered consisted of the money he paid for the car, he had to prove standing *with respect to that harm*. Plaintiff presented no evidence that, had

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[3] Restitution was the only monetary remedy available to plaintiff under the UCL. (X-AOB 57-59.)

[4] Of course, if Pearson Ford would not have sold him the car, no conceivable harm would have occurred.

In *Troyk*, *supra*, 171 Cal.App.4th at page 1350, this court held that the plaintiff was not entitled to summary judgment because he failed to present evidence that he would have refused to pay the insurer's monthly service charges had they been disclosed in the policy documents. This court could have added that the plaintiff failed to present evidence that the insurer would have been willing to sell him the policy if he refused to pay the monthly service charges. (See *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1591 ["They do not allege they could have bought the same insurance for a lower price"].)

he known the amount of interest was $19.53, he would not have bought the car. (Plaintiff did not even present any evidence that, had he known the interest was $19.53, he would not have paid the $19.53.)

For his Class 2 claim, plaintiff argues that he had standing because he would not have paid $30 in sales tax on his insurance premium if Pearson Ford had not charged the $30.[5] (X-RB 16-17.) Of course he would not have paid the $30 if Pearson Ford had not charged it in the first place. Given that Pearson Ford *did* charge the $30, however, the causation question for purposes of standing was: What would plaintiff have done if he had known that he was being charged $30 in sales tax on his insurance premium that he should not have been charged?

If plaintiff was seeking restitution of $30, he had to prove that, if he had known about the $30, he would have refused to pay it and the insurance broker still would have been willing to sell him the insurance and Pearson Ford still would have been willing to sell him the car.[6] (The evidence warranted a reasonable inference that this is what would have happened, since the $30 in sales tax was simply a mistake to begin with.) On the other hand, if plaintiff was seeking restitution of all the money he paid for the car, he had to

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[5] To be completely accurate, it was sales tax plus finance charges on sales tax that added up to about $30. (X-AOB 11, fn. 7.) We use "$30 in sales tax" as shorthand for both the sales tax and the finance charges.

[6] See *ante*, footnote 4 (otherwise, no conceivable harm would have occurred).

prove that, if he had known about the $30, he would have refused to pay it and would not have bought the car.[7]

Plaintiff was seeking, and the judgment awarded, restitution of all the money he had paid to Pearson Ford for the car. (X-AOB 14, 15-16.) Since this was the harm plaintiff claimed to have suffered, *this was the harm for which plaintiff had to prove standing to sue.* But plaintiff presented no evidence that, if he had known about the $30 in sales tax on the insurance premium, he would not have bought the car. (Plaintiff did not even seek restitution of the $30. (X-AOB 21, fn. 15.))

Plaintiff never had standing to sue under the UCL.

C. Because plaintiff never had standing, the judgment in favor of Class 1 should be vacated, and the judgment in favor of Class 2 should lose whatever underpinning it had under the UCL.

In Pearson Ford's opening brief, we addressed what happens when a UCL class action goes to judgment in favor of the class even though the named plaintiff never had standing. (X-AOB 22-26.) We demonstrated that substituting a new named plaintiff will not work when the original named plaintiff lacked standing from the outset of the case. Consequently, both the judgment in plaintiff's favor and

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[7] Since plaintiff's refusal to pay the mistaken $30 would not have kept the insurance broker from selling plaintiff the insurance or Pearson Ford from selling plaintiff the car, plaintiff had to prove that, nevertheless, he would not have bought the car.

in favor of the classes under the UCL should be vacated. (X-AOB 23-26.)

Plaintiff is silent in response.

II. AS A MATTER OF LAW, PEARSON FORD COMPLIED WITH THE ASFA AS TO CLASS 1.

A. Pearson Ford was not required to itemize in plaintiff's retail installment sale contract that his $2,082.36 finance charge included $19.53 in interest for the six-day period between October 2 and 8, 2004.

The trial court listed several provisions of the ASFA that Pearson Ford supposedly violated by not itemizing the interest charged for the period of time between the effective and signing dates of RISC-2. In Pearson Ford's opening brief, we addressed each provision and explained why it did not apply. (X-AOB 29-33.) We concluded: "[P]laintiff paid no more than the $2,082.36 finance charge disclosed to him in RISC-2; he knew this finance charge included interest from October 2; and nothing in the ASFA required Pearson Ford to itemize that $19.53 was the amount of interest for the six-day period between October 2 and 8." (X-AOB 33.)

Plaintiff responds by simply asserting that Pearson Ford "failed to specifically itemize the amount being financed" as required by *Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, 979 [Fourth Dist., Div. One]. (X-RB 17.) We discussed *Thompson* in detail in Pearson Ford's opening brief. (X-

AOB 46-47.) In that case, the dealer failed to accurately disclose the amount financed and did not properly identify and disclose the finance charge. (*Thompson*, at p. 979.) In our case, the amount financed ($5,661.60) was accurately disclosed and the finance charge ($2,082.36) was properly identified and disclosed. (X-AOB 7, 30-31, 33.) Nothing in *Thompson* supports plaintiff's assertion that the ASFA required Pearson Ford to break down the $2,082.36 finance charge and state that $19.53 was for the period of time between October 2 and October 8, 2004, and $2,062.83 was for the period of time between October 8, 2004, and November 16, 2007 (the last day of the 36-month term of plaintiff's loan (X-AOB 7)).

Before leaving this topic, we note that, in the trial court, plaintiff claimed Pearson Ford also was required to itemize $7.47 in interest that supposedly accrued on the $19.53 in interest during the life of the contract. In Pearson Ford's opening brief, we demonstrated that no such interest on interest ever accrued. (X-AOB 33-34.)

Plaintiff is silent in response.

III. AS A MATTER OF LAW, PEARSON FORD COMPLIED WITH THE ASFA AS TO CLASS 2.

A. Pearson Ford substantially complied by itemizing in a companion document to plaintiff's retail installment sale contract that he had purchased insurance for a $250 premium.

In Pearson Ford's opening brief, we argued that the trial court misapplied Civil Code section 2981.9 (which plaintiff refers to as the "single document rule").[8] We said: "Since *insurance* is not part of the 'total cost [or] the terms of payment *for the motor vehicle*' (§ 2981.9, emphasis added), section 2981.9 does not preclude using more than a single document for matters relating to insurance." (X-AOB 36-37, original emphasis.)

Plaintiff responds that the companion document, the due bill, was an "agreement as to what is included in the 'total price' of the vehicle," and therefore was an "agreement as to the 'total cost' of the vehicle" within the meaning of section 2981.9. (X-RB 25.) The subject of the due bill, however, was the $250 insurance premium, which plainly was not part of the "total cost . . . for the motor vehicle" (§ 2981.9). The premium was the cost of *insuring* the vehicle. The clerical mistake that lumped together the cost of insuring the vehicle with the cash price of the vehicle could not transform the cost of *insuring* into a cost of the *vehicle itself.*

[8] From here on, all statutory references are to the Civil Code unless otherwise stated.

Because the insurance premium was not a cost of the vehicle, the "single document rule" did not apply.

In Pearson Ford's opening brief, we also argued that, even if section 2981.9 did apply, Pearson Ford substantially complied, "since plaintiff was fully aware that he was purchasing insurance for a premium of $250 . . . ." (X-AOB 37.) Plaintiff's only response is to pretend this argument was not made. (X-RB 24 ["Pearson Ford avoids arguing it 'substantially complied' with . . . Section 2981.9"].)

In Pearson Ford's opening brief, we next argued that the trial court erred by ruling that Pearson Ford failed to substantially comply with section 2982, subdivision (a)(3), which required that plaintiff's $250 insurance premium be itemized in RISC-2. The premium was instead itemized in a companion document, the due bill, which gave plaintiff all the information he needed to be fully aware that he was purchasing insurance for a $250 premium. Therefore, Pearson Ford substantially complied with section 2982, subdivision (a)(3). (X-AOB 37-38.)

Plaintiff's first response is to distort Pearson Ford's position. According to plaintiff, "[t]he only defense Pearson Ford raises and asks this court to rule on is whether adding the cost of insurance to the cost of the vehicle [in RISC-2] 'substantially complies' with the disclosure requirements of Civil Code Section 2982(a)." (X-RB 21.) In reality, Pearson Ford's position is that *disclosing the $250 insurance premium in the due bill* substantially complied with section 2982, subdivision (a)(3). (X-AOB 37-38.)

Addressing Pearson Ford's true position, plaintiff argues that the fact he could "ascertain the amounts of the missing items (the

cost of insurance) by calculation based on figures appearing in the due bill" does not show substantial compliance with section 2982, subdivision (a)(3). (X-RB 24.) But no calculation of any sort was required to ascertain the cost of insurance. The due bill plainly stated the insurance premium was $250. (X-AOB 11.) This is what distinguishes our case from the case plaintiff relies on, *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal.2d 267, 273. There, neither the RISC nor the companion document, the sales order, disclosed the finance charge or the total of the installment payments. (X-AOB 85.) Ascertaining these amounts required two calculations: 30 x $166.75 = $5002.50, the total of the installment payments; $5,002.50 - $4,232.38 = $770.12, the finance charge. (See *Lindsey*, at p. 271.)

Pearson Ford relies primarily on *Stasher v. Harger-Haldeman* (1962) 58 Cal.2d 23 (*Stasher*). (X-AOB 38-42.) Plaintiff attempts to distinguish *Stasher* as a case in which the costs of the car were all disclosed in one way or another in the RISC itself.[9] (X-RB 23.) But the same is true in our case. The costs of plaintiff's car were all disclosed in RISC-2 itself. The insurance premium disclosed in the due bill instead of in RISC-2 was *not* a cost of the car; it was the cost of *insuring* the car. (*Ante*, p. 11.)

In any event, the determinative factor in *Stasher* was that the buyer was fully informed of all aspects of the transaction: "Plaintiff does not claim that she and her husband had any doubts whatever

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[9] At first, plaintiff tries to make it look like *Stasher* involved nothing more than "a ***typographical error***." (X-RB 7-8, boldface, italics, and underlining in original.) Nonsense. (X-AOB 38-42.)

as to the amount that defendant was charging them for the car and its accessories . . . ." (*Stasher, supra,* 58 Cal.2d at p. 31.) "[P]laintiff and her husband were well aware of the terms of their deal with defendant concerning the trade-in, the payoff on the old car and th[e] discount." (*Id.* at pp. 31-32.) Similarly, plaintiff in our case does not claim that he had any doubt whatever as to the amount that Pearson Ford was charging him for the car and the insurance. Plaintiff was well aware of the terms of his deal with Pearson Ford.[10]

The due bill stating that the insurance premium was $250 was in substantial compliance with the requirement that the insurance premium be itemized in RISC-2.

Plaintiff's final argument is that "[a]dding the cost of insurance to the 'cash price' [in RISC-2 was] inaccurate and dishonest, and not permitted by the ASFA." (X-RB 21.) According to plaintiff, there was no evidence that this was just a clerical mistake. (X-RB 25-26.) Yes, there was. During the hearing below, plaintiff did not dispute, and the trial court accepted, Pearson Ford's representation that, out of approximately 12,000 deals, "approximately 300 customers financed their insurance premium. And out of the 300, ten had the cost of the insurance placed in the cash price on line 1(a)1 of the contract, that's it." (4 RT 518; see 4

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[10] To be completely accurate, plaintiff was not aware that the correct APR was 21.23% instead of 21.00%, but he has not sought any remedy for this slight inaccuracy. (X-AOB 9-10, fn. 5 [last par.].) And plaintiff was not aware that he mistakenly was charged $30 in sales tax on his insurance premium, but he has not sought to be reimbursed the $30. (X-AOB 21-22, fn. 15.)

RT 518-521, 549-550, 595-596, 681-682, 703, 711; X-AOB 3-5, 11-12, 13.) Ten out of 300 is only 3.33%, which certainly looks like clerical mistake.

In any event, the due bill prevented any confusion concerning the $10,245 cash price stated on lines 1.A and 1.A.1 in RISC-2. The due bill disclosed not only that the insurance premium was $250, but also that the $250 premium was "included in the total price of $10245.00 as show[n] on line 1(A) of my contract." (2 JA 541, 543.)

Pearson Ford did not violate either of the two ASFA provisions (§§ 2981.9, 2982, subd. (a)(3)) on which the trial court based its Class 2 award.

B. Plaintiff's argument that the substantial compliance doctrine does not apply to the ASFA is meritless.

In plaintiff's own appeal from the judgment as to Class 1, he argues that, while the doctrine of substantial compliance applied to the predecessor to the ASFA, it does not apply to the ASFA itself. (AOB 14-18.)

In Pearson Ford's opening brief, we explained in detail why plaintiff is wrong about this. (X-AOB 44-48.)

Plaintiff is silent in response.[11] (See X-RB 3-5, 21.)

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[11] The "summary of argument" in plaintiff's brief states that he will be addressing his argument that "the doctrine of 'substantial compliance' does not apply to the mandatory disclosure requirements of the ASFA" (X-RB 2), but plaintiff never does address it.

IV. AS A MATTER OF LAW, THE MONETARY AWARD TO CLASS 1 WAS ERRONEOUS.

In Pearson Ford's opening brief, we said: "Assuming arguendo that any monetary award at all could be made to Class 1, the only amount supported by the evidence was the stipulated amount of $43.40," not the $50 awarded by the judgment. (X-AOB 51.)

Plaintiff agrees that $50 was incorrect. He argues it should have been $63.14. (X-RB 26-27.) We already have demonstrated this is incorrect. (X-AOB 50-51, 88-89.) Just because the trial court agreed that plaintiff's expert could use statistical sampling to calculate, not only the average amount of interest that accrued between the effective and signing dates of Class 1's RISCs, but also interest on that interest over the life of the RISCs (X-RB 26-27), does not mean the trial court agreed to actually award interest on interest. The interest that accrued between the effective and signing dates was not financed, so there was no basis for the court to award interest on interest. (X-AOB 33-34.)

V. AS A MATTER OF LAW, THE MONETARY AWARD TO CLASS 2 WAS ERRONEOUS.

A. Nothing in the ASFA permitted plaintiff to (1) recover back the entire $14,743.96 that he paid for his car up to the date of entry of judgment, (2) keep his car, and (3) pay only the monthly payments remaining after the judgment date.

In Pearson Ford's opening brief, we said: "We are not aware of anything suggesting that the Legislature intended that the remedy for violating the ASFA be so Draconian as to allow buyers to *retain their vehicles without paying for them*." (X-AOB 54, original emphasis.) "[S]ection 2983 must be read along with section 2983.1, which makes it explicit that, in order to recover the total amount paid, the buyer must rescind the RISC and return the vehicle." (X-AOB 53; see *Bermudez v. Fulton Auto Depot, LLC* (2009) 179 Cal.App.4th 1318, 1324 [quoting section 2983.1 as providing the remedy for an ASFA violation].)

Plaintiff responds that, under section 2983, the dealer's failure to prepare a lawful contract renders the contract unenforceable and allows the buyer to recover his or her payments (X-RB 10, 31); then, under section 2983.1, the buyer has the option to keep the car and affirm the remainder of the contract, or return the car and rescind the entire contract (X-RB 11, 32).

Plaintiff's interpretation of the statutory scheme makes no sense. He is assuming that an installment contract to purchase a

car is severable, i.e., subject to two or more partial performances on each side (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 859, p. 946). It is not. (See *Jozovich v. Central California Berry Growers Assn.* (1960) 183 Cal.App.2d 216, 222-225 ["the general rule [is] that a contract which calls for the payment of a specified sum for performance by the other party is not 'severable' merely because payments are divided into installments" (pp. 223-224)]; *World Sav. & Loan Assn. v. Kurtz Co.* (1960) 183 Cal.App.2d 319, 327-328.) Because the installment contract is not severable, "the aggrieved party must rescind the *whole* contract; he or she cannot repudiate the undesirable parts and affirm the rest." (1 Witkin, *supra*, § 934, p. 1028, original emphasis.) And the aggrieved party "must '*[r]estore* to the other party *everything of value* which he has received from him under the contract . . . ." (*Id.* § 941, p. 1035, original emphasis.)

No doubt, the Supreme Court had just these principles in mind when it said, with regard to violation of section 2982, subdivision (a) of the predecessor to the ASFA, that the "buyer cannot both recover the consideration with which he [or she] has parted and keep the vehicle; he [or she] cannot simultaneously avoid the conditional sale contract and assert rights in the conditionally sold car." (*General Motors Accept. Corp. v. Kyle* (1960) 54 Cal.2d 101, 111-112.)

Plaintiff asserts: "If a consumer could recover their payments only if they elected to rescind their contract, Civil Code Section 2983 becomes meaningless." (X-RB 32.) Plaintiff elaborates: "[O]nly consumers seeking rescission would bring actions for violations of

the ASFA. . . . [A] consumer not seeking rescission does not have a remedy under the ASFA." (X-RB 33.) This hardly makes the ASFA meaningless. If a dealer fails to substantially comply with the ASFA's disclosure requirements, a car buyer who believes the nondisclosure was serious enough to warrant undoing the entire transaction has the remedy of rescission under the ASFA. A car buyer who wants to keep the car may have other remedies, such as a claim for damages for breach of contract (express or implied) or fraud, or a statutory claim under the UCL or the CLRA.

Plaintiff complains that, under section 2983.1, a buyer who does not rescind the contract and return the vehicle "with reasonable diligence" (§ 2983.1 [4th par.]) "would have no remedy. . . . Such an interpretation of the statute makes no sense." (X-RB 33.) What makes no sense is the notion that a buyer who does not act with reasonable diligence should be treated the same as one who does. A buyer who fails to act with reasonable diligence may still have other remedies, but loses the remedy of rescission under the ASFA.

Plaintiff observes that a buyer who fails to act with reasonable diligence will be liable for the dealership's attorney fees and costs. (X-RB 33.) Only if, despite having failed to act with diligence, the buyer goes ahead and sues anyway.

Plaintiff's final argument is that he acted with reasonable diligence. (X-RB 35.) Even if that were true, it would not alter the fact that the trial court erred when it awarded plaintiff and the other members of Class 2 a full recovery of all the money they paid

under their RISCs up to the date of the judgment—even if they retained their vehicles.

In Pearson Ford's brief, we also argued that "the trial court's error in giving plaintiff and the other members of Class 2 the option to rescind their RISCs yet retain their vehicles was compounded by the court's erroneous failure to require an offset for their use of their vehicles." (X-AOB 55.)

Plaintiff is silent in response.

B. Nothing in the UCL, either, permitted a windfall.

In Pearson Ford's opening brief, we explained that the only monetary remedy available to a private plaintiff under the UCL is restitution, but the award to plaintiff and the other members of Class 2 went far beyond restitution: "Plaintiff . . . was awarded all the money he had paid for a car that he had been driving for four years without complaint. And plaintiff was allowed to keep the car, owing only the monthly payments that came due after judgment was entered. Plaintiff received a windfall—an almost free car." (X-AOB 59, fn. omitted.)

Plaintiff is silent in response.

VI. AS A MATTER OF LAW, THE PERMANENT INJUNCTIONS WERE ERRONEOUS.

In Pearson Ford's opening brief, we explained: " 'An injunction . . . must be supported by actual evidence that there is a

realistic prospect that the party enjoined intends to engage in the prohibited activity.' " (X-AOB 63.) The injunction in favor of Class 1 was not supported by actual evidence that Pearson Ford intended to antedate RISCs in the future. (X-AOB 60-64.)

Plaintiff argues in response that evidence of 72 cases of antedating contracts in 2007, the second year after Pearson Ford's change in policy, was "sufficient evidence for the trial court to conclude that the conduct was on-going, and therefore properly the subject of an injunction." (X-RB 36.) But 72 cases was less than 5% of the 1500 cases of antedating that occurred during the 60-month class period, and only half as many cases as occurred the year before. (X-AOB 63.) Also, plaintiff presented no evidence of the number of cases of antedating, if any, that occurred during the final seven months between the end of the class period (March 27, 2008 (10 JA 2735: 8)) and the actual date of the injunction (October 24, 2008 (10 JA 2734)). Absent evidence of a reasonable probability that Pearson Ford would antedate RISCs in the future, there was no basis for an injunction.

In Pearson Ford's opening brief, we also argued that the injunction in favor of Class 2 was not supported by actual evidence that Pearson Ford intended to handle insurance premiums incorrectly in the future. (X-AOB 64.)

Plaintiff is silent in response.

VII. IF THE MONETARY AWARD TO CLASS 2 UNDER THE ASFA WAS CORRECT, THEN, AS A MATTER OF LAW, THE ONE-YEAR STATUTE OF LIMITATIONS FOR ACTIONS ON A STATUTE IMPOSING A FORFEITURE APPLIED. IF SO, PLAINTIFF'S CLAIM WAS TIME-BARRED AND HE COULD NOT REPRESENT CLASS 2 AS TO THE ASFA.

A. The monetary award to Class 2 under the ASFA was a forfeiture; therefore, the period of limitation was one year.

In Pearson Ford's opening brief, we said: "If the members of Class 2 were allowed to recover back all the money they paid for their vehicles up to the date of judgment, yet retain their vehicles, Pearson Ford would be left with nothing: no money and no vehicles. This would be forfeiture, plain and simple." (X-AOB 66.) We cited *Stone v. James* (1956) 142 Cal.App.2d 738, which applied the one-year limitation period for forfeiture in a case involving the predecessor to the ASFA. (X-AOB 66-67.)

Plaintiff argues that *Stone* is distinguishable because it involved a contract that was enforceable to begin with but became unenforceable due to the dealer's failure to refund unearned finance charges, whereas, in our case, Pearson Ford's conduct prevented a valid contract from ever being formed. According to plaintiff, this made the judgment in our case compensatory in nature. (X-RB 41-45.)

The judgment could have been deemed compensatory, if it had returned both parties to their pre-contract status, i.e., if plaintiff had been awarded the money he paid for the car and Pearson Ford had been awarded the car with an offset for the reasonable value of plaintiff's use. Instead, the judgment awarded plaintiff what he paid for the car up to the date of judgment and allowed him to keep the car and pay only the monthly payments remaining after judgment was entered. Since plaintiff apparently had *no* monthly payments remaining after judgment was entered,[12] the judgment left Pearson Ford with nothing: no money and no car. This was forfeiture, plain and simple.

To attempt to persuade this court otherwise, plaintiff relies heavily on *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094. (X-RB 45-49.) The facts of *Murphy* bear no similarity whatever to the facts of our case. There, the issue was: Does the additional hour of pay owed by law to an employee who is denied his or her meal or rest period constitute a wage or premium pay subject to a three-year statute of limitations, or a penalty subject to a one-year statute of limitations? (*Murphy*, at p. 1099.) The Supreme Court held that "neither the behavior-shaping function of [the additional hour of pay] nor the lack of a perfect fit between the pay remedy and the injury compels classifying the remedy as a penalty." (*Id.* at p. 1114.) This is a far cry from giving a car buyer a free car

[12] RISC-2 provided for 36 monthly payments starting November 16, 2004; therefore, plaintiff's last payment should have been made on October 16, 2007. (X-AOB 7; 3 JA 677 [federal truth-in-lending disclosures].) The judgment was entered a year later, on October 24, 2008. (10 JA 2734.)

because the dealer did not write the insurance premium on the correct line of the RISC.

Besides *Murphy*, plaintiff cites *Lewis v. Robinson Ford Sales, Inc.* (2007) 156 Cal.App.4th 359 [Fourth Dist., Div. One]. (X-RB 38-39.) No statute of limitations issue was raised in *Lewis*. "It is axiomatic that cases are not authority for propositions not considered." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127, internal quotation marks omitted.)

Plaintiff also cites *Jack Heskett Lincoln-Mercury, Inc. v. Metcalf* (1984) 158 Cal.App.3d 38. (X-RB 39.) There, the one-year statute of limitations for forfeiture did not apply because, as the court put it, "[t]his case has nothing to do with a forfeiture or penalty." (*Metcalf*, at p. 42.)

Finally, plaintiff cites *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, and argues that its procedural facts demonstrate that, if the one-year limitations period for a forfeiture applies to the ASFA, lenders and dealers who intend to sue car buyers would be able to avoid cross-complaints under the ASFA by waiting to file suit until more than one year after the car was purchased. (X-RB 39-41.) The cross-complaint in *Fireside Bank*, however, was not under the ASFA. It was under the UCL—based on a "borrowed" violation of the ASFA. (*Fireside Bank*, at pp. 1075-1076; see *Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 363-364.) "The UCL has a four-year statute of limitations, which applies even if the borrowed statute has a shorter limitations statute." (*Blanks*, at p. 364.) In other words, a lender or dealer cannot avoid liability for an

ASFA violation under the UCL by delaying filing suit.[13] Furthermore, regardless of the ASFA statute of limitations, a car buyer can successfully *defend* against a lender's or dealer's suit on the ground that an ASFA violation has rendered the contract unenforceable. (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 450, p. 572-573.)

In conclusion, we repeat: The judgment in favor of Class 2 imposed a forfeiture, plain and simple.

Since plaintiff signed RISC-2 on October 8, 2004 (X-AOB 7), but did not sue until March 2, 2007 (X-AOB 12), his suit was well outside the one-year period of limitation for a forfeiture.

B. Assuming arguendo that the delayed discovery doctrine applied, it would not help plaintiff; his claim was time-barred. Therefore, he could not represent Class 2, which means the judgment in favor of Class 2 should be vacated.

In Pearson Ford's opening brief, we demonstrated that the delayed discovery doctrine would not prevent plaintiff's Class 2 claim from being time-barred, given that plaintiff's attorney discovered plaintiff's ASFA claim more than one year before plaintiff filed suit. (X-AOB 68-70.)

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[13] *Standing* to cross-complain for an ASFA violation under the UCL will exist if the car buyer does not overreach in the way plaintiff did in this case. (See X-AOB 19-22; *ante*, pp. 4-8.)

Plaintiff responds: "While the viability of the action was conveyed to Plaintiff's counsel in February 2006, that information was not conveyed to Mr. Nelson until April 2006, when he retained Plaintiff's counsel. . . . Thus, Mr. Nelson filed his claim within one year of learning of his potential claim . . . ." (X-RB 51-52.)

Plaintiff is silent about the authorities cited in Pearson Ford's opening brief for the propositions that: (1) an attorney-client relationship existed between plaintiff and the attorney who learned in February 2006 of the "viability of the action" (X-RB 51), and (2) plaintiff is charged with the knowledge that his attorney acquired in February 2006. (X-AOB 69-70.)

Plaintiff also is silent in response to our point that, since plaintiff's claim was time-barred, he could not represent Class 2, which means the judgment in favor of Class 2 should be vacated and the matter remanded with instructions to dismiss plaintiff's complaint as to Class 2 (X-AOB 70-71).

VIII. THE ATTORNEY FEE AND COST AWARDS SHOULD BE REVERSED.

In Pearson Ford's opening brief, we argued: (1) "Upon reversal of the judgment in favor of Class 1 and Class 2, the awards of attorney fees and costs should be reversed as well." (X-AOB 72.) (2) "If either the judgment in favor of Class 1 or Class 2, but not both, is reversed, then the awards of attorney fees and costs should be reversed and remanded for reconsideration, because there could be two prevailing parties at that point." (X-AOB 72.)

Plaintiff is silent in response.

We also argued: "[I]f any part of the judgment in favor of Class 1 or Class 2 or both survives this court's review, then the awards of attorney fees and costs should be reversed and remanded for reconsideration to allow the trial court to determine whether the judgment exceeds Pearson Ford's Code of Civil Procedure section 998 offer . . . ." (X-AOB 72-73.) We challenged the trial court's ruling that the 998 offer was invalid. (X-AOB 74-80.)

Plaintiff argues that the 998 offer was invalid because it was a lump-sum offer made to multiple plaintiffs without specifying how it was to be allocated among them. (X-RB 52-56.) According to plaintiff, "the Legislature placed the burden on Pearson Ford to make a proper offer that allocated the 'lump-sum' to all who would receive a portion of it" (X-RB 56), namely, "himself, the two Classes, and his attorneys" (X-RB 55).

In Pearson Ford's opening brief, we explained that a 998 offer can be made to another "party" to the action, and we demonstrated that "[t]here was only one party—one plaintiff—opposite Pearson Ford in this case: Reginald Nelson." (X-AOB 75; see X-AOB 75-78.) "[T]he fact that plaintiff . . . had both individual claims and class claims did *not* make him two separate *parties* . . . . He was but one party, in multiple legal capacities." (X-AOB 78, original emphasis.)

Plaintiff is silent in response. Instead, he complains about all the decisions he would have had to make in order to allocate the lump-sum offer among himself, the two classes, and his attorneys. (X-RB 53-54.) And he points to the fact that the court would have had to approve his allocation. (X-RB 55-56.) Since plaintiff in all

his capacities was but one party, however, this is what the law required that he and the court do. And the law makes good sense. If Pearson Ford had to make separate offers to, or allocate its offer among, plaintiff as an individual, plaintiff as the representative of Class 1, the other members of Class 1, plaintiff as the representative of Class 2, the other members of Class 2, and plaintiff's attorneys, section 998 would be unusable in a case like this—indeed, unusable in most class actions.

"Section 998 . . . reflects this state's policy of encouraging settlements . . . ." (*Marcey v. Romero* (2007) 148 Cal.App.4th 1211, 1214 [Fourth Dist., Div. One].) "We should apply section 998 'in a manner which best promotes its purpose.' " (*Id.* at p. 1215.) To encourage settlement of class actions, this court should hold that a lump-sum offer made by the defendant to the named plaintiff—a single party appearing in more than one legal capacity—is valid.

CONCLUSION

The judgment in favor of Class 1 and Class 2 and the awards of attorney fees and costs should be reversed with directions to enter judgment for Pearson Ford.

April 6, 2010.

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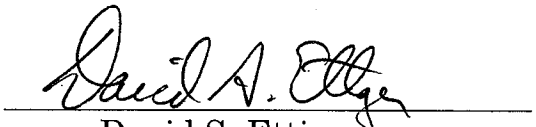
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 6,781 words as counted by the Microsoft Word version 2007 word processing program used to generate the combined brief.

Dated: April 6, 2010.



David S. Ettinger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On April 6, 2010, I served true copies of the following document(s) described as **CROSS-APPELLANT'S REPLY BRIEF** on the interested parties in this action as follows:

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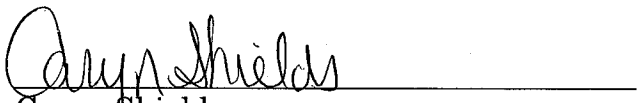
BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 6, 2010, at Encino, California.



Caryn Shields

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Court of Appeal Case No. D054369

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