SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SOUTHWEST DISTRICT (SMALL CLAIMS DIVISION, Department SW-8)

HEATHER PETERS, Plaintiff, vs. AMERICAN HONDA MOTOR CO., INC., Defendant.	NO. SBA 11S02156 MEMORANDUM OF DECISION

The court provides the following Memorandum of Decision in the captioned matter.

Procedural history.

The case was filed November 29, 2011 and regularly set for trial in Department 8 of the above-entitled court for January 3, 2012. The narrative portion of the Plaintiff's Claim reads, in answer to the prompt "Why does the Defendant owe the Plaintiff money?": "Fraudulently represented gas mileage and hybrid performance. Also fraudulently induced me to do software update that made things worse."

The original monetary demand on the Plaintiff's Claim was for $7500, the then jurisdictional limit of the small claims court. However, on December 20, 2011, plaintiff amended the monetary portion of her claim to the $10,000 limit that went into effect on January 1, 2012 and which was operative on the date of trial. See California Code of Civil Procedure (hereinafter "CCP") 116.221. In the amended pleading the operative date alleged by the plaintiff for the defendant's alleged unlawful behavior is "April 23, 2006." (In the original complaint the plaintiff alleges bracketing dates of "September 23, 2010 to November 24, 2011.")

The original claim was regularly served on the defendant, but service of the amended claim was not accomplished within the time provided by the Small Claims Act. Therefore, the defendant at trial was offered by the court a statutory postponement of the trial for that reason. Defendant declined the continuance.

Between the original filing of the claim and the trial date there were various requests for postponement of the trial (for other reasons) by the defendant, and requests for a pretrial inspection of the subject vehicle. There were also several requests for outright dismissal of the claim. All of these requests were denied by the court in chambers (see CCP 116.130[h], 116.,310[b] and 116.510), with notice given.

Prior to trial, the plaintiff requested that the clerk's office issue three subpoenas duces tecum, with compliance date for January 3. The clerk did this. Two of the SDTs were served prior to trial by the plaintiff. The third was withdrawn by her at trial on January 3. Of the two that were served, one of them (on the defendant) was also withdrawn (although the plaintiff was offered by the court a chance to enforce partial compliance with it through a postponement of the trial). The third subpoena was responded to by the witness Maala and the plaintiff was satisfied

with his compliance. Materials produced by Maala at trial were shared with both sides immediately prior to trial.

On the original trial date the court received a number of requests for media coverage of the trial under California Rules of Court, Rule 1.150 and Los Angeles Superior Court Rule 2.17. A hearing was held off-camera before the trial at which the media representatives and the parties were invited to comment further on these requests. Neither party objected to the requests and they were all granted and orders regarding them signed by the court before the merits of the case were heard.

At the opening of the case on January 3 the court disclosed its knowledge of a Honda employee and the fact that the courtroom clerk in Department 8 and her husband are members of a class of Honda owners subject to a certain relevant class action (see below regarding the class action). The parties waived further comment on these disclosures.

Trial proceeded on the merits on January 3, pursuant to all the above orders and rulings, before Douglas G. Carnahan, Court Commissioner.[1] Ms. Peters appeared for herself.[2] Honda

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[1]California law provides that each Superior Court may appoint court commissioners to hear "subordinate judicial matters," and to hear other matters as temporary judges. Cal.Const., Art. VI, Secs. 21, 22. When a commissioner sits as a commissioner, rather than as a temporary judge, he or she has the plenary power of a judge of the court in the subordinate matter being heard. Ironically in light of the case at bench, a small claims case is by law a "subordinate matter," thereby giving judicial power to a commissioner to hear and determine the proceeding. Govt.Code 72190. Commissioners must have been licensed attorneys for ten years prior to appointment to the bench, and serve at the pleasure of the judges of their courts.

[2]Note that the general prohibition against attorney representation in the initial small claims hearings (CCP 116.530) does not apply to an attorney, such as Ms. Peters, representing him- or herself. CCP 116.530(b)(1). On a small claims appeal, available to a dissatisfied small claims defendant, the parties may be represented by counsel (CCP 116.770[c]), although the general informality of small claims proceedings still applies (CCP 116.770[b]).

was represented by Mr. Neil Schmidt, a Technical Specialist at Honda (not an attorney).

The cause was regularly submitted for decision on January 3.

On January 4, filings by the plaintiff reached the court in chambers, mainly having to do with plaintiff's objecting to a previous submission on defendant's behalf filed by an attorney.

On January 9, 2012 the court issued an order removing the matter from submission and resetting it for further hearing on January 25, 2012, largely to address issues connected with relevant statutes of limitation. In this order the court sustained plaintiff's objection to the defense attorney submission.

On January 13, 2012, in response to a request by the plaintiff for clarification of its January 9 order, the court ruled that while the January 25 hearing would focus on the statute of limitations issue, the court would consider any further factual or legal presentations made at that time. In her request for clarification, the plaintiff submitted certain legal arguments regarding the statute of limitations issue, and further factual presentations.

On January 25, 2012, the parties appeared again. One new media order was granted and the plaintiff withdrew a previously made request to videotape the proceedings herself.

Further legal and factual arguments were made, not only on the statute of limitations questions, but also on the plaintiff's underlying claims. The defendant offered an additional witness, Darren Johnson, a Honda expert on the relations between Honda's and the EPA's testing for mileage standards. Honda had filed (January 24) an additional brief of legal and factual points that the court discussed with the parties and has read and considered.

The case was again submitted for decision. This judgment and memorandum ensue.

Appropriateness of the small claims forum.

The California Small Claims Act (CCP 116.110, et seq.) is "established to provide a forum to resolve minor civil disputes," in order to hear them "expeditiously, inexpensively, and fairly..." CCP 116.120. In establishing the small claims system, the California Legislature has also expressed something of a procedural preference for individual over corporate parties: CCP 116.120(d) states, "The small claims divisions, the provisions of this chapter [of the CCP], and the rules of the [California] Judicial Council regarding small claims actions shall operate to ensure that the convenience of parties and witnesses who are individuals shall prevail, to the extent possible, over the convenience of any other parties or witnesses."

Noting all this, and noting that CCP 116.120(d) applies to procedural convenience only (and not to the ultimate outcome of the case), it is also true that the complexity of a case, or the numbers of plaintiffs, or the widespread import of the controversy, do not prevent a matter from being brought in small claims. (See *City and County of San Francisco* v. *Small Claims Court* [1983] 141 Cal.App.3d 470, in which the Court of Appeal noted that, "The language of the [Small Claims Act] makes it clear that the word 'minor' [in CCP 116.120] refers to the financial value of the claim to the individual plaintiff," and not necessarily to the complexity or public interest in the case itself.)[3] A plaintiff with a claim valued at greater than the jurisdictional limit of the court is free to remit down to that limit, for judgment purposes, to come into the small claims court. CCP 116.220(d).

Yet a case of the nature of the one at bench, in small claims, does present practical and legal problems. There are no formal pleadings to frame the issues (CCP 116.310[a]). There is

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[3]In the *San Francisco* v. *Small Claims* case, 183 small claims plaintiffs were consolidated and heard together in a complex case involving airport noise.

no pretrial discovery (CCP 116.310[b]), although, as noted above, subpoenas are available to procure evidence at the trial itself. Lawyers are not permitted to assist the parties and the court, at trial, in the presentation of evidence or in the focus on particular issues (CCP 116.530).[4] The small claims hearing itself is informal and expedited, before the court alone, without a jury. *Crouchman* v. *Superior Court* (1988) 45 Cal.3d 1167. CCP 116.510 states: "The hearing and disposition of the small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively." (*Peters* v. *Honda* took approximately 90 minutes of in-court time to try, on January 3, and another 90 minutes or so on January 25, all of which is longer than the average small claims case, but still expedited considering the issues involved.)

In short, the plaintiff here is certainly not prevented from prosecuting her case in the small claims court, but there remains a question of what public resources can be brought to bear on a case which has obvious widespread implications yet is brought within the limited confines of the small claims system. Furthermore, a small claims judgment, whether final after an appeal, or if there is no appeal, has no collateral estoppel (i.e., precedential) effect, except in a subsequent suit between the same parties on the same cause of action. The *California Judges Benchbook: Small Claims Court and Consumer Law* (Administrative Office of the Courts, Thomsen/West, 2011, Sec. 10.26) comments: "The judgment in small claims court is not given collateral estoppel effect because the parties are not bound by formal rules of pleading, evidence, and procedure, and therefore, the issues may not be fully (i.e., technically) framed and considered. Consequently, issues decided in small claims proceedings should not be considered

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[4]Although counsel are free to advise small claims litigants outside the confines of the trial itself. CCP 116.530(c)(2).

conclusively decided in a second action between the parties on a different cause of action, whether the second action is commenced in small claims court or in a different division of the superior court." Of course the same reasoning would apply to a subsequent suit on the same theory brought by a different plaintiff. See *Sanderson* v. *Niemann* (1941) 17 Cal.2d 573 and *Rosse* v. *DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047.

The subject of the appropriateness of the small claims forum, in light of plaintiff's testimony (see below) that she has actually suffered more than $100,000 in damages, was discussed among the court and the parties, and the plaintiff insisted on remaining in the small claims forum. This is her right.

Sources of evidence.

The court has reviewed or been exposed to the following potential sources of evidence in arriving at its factual and legal conclusions:

The testimony of the four witnesses (Peters, Maala, Schmidt, and Johnson). (Ms. Peters's husband gave brief testimony on January 3, but only generally corroborating plaintiff's own presentation.)

The court file, which by now has a good deal of evidentiary material in it accompanying the defendant's various motions,[5] and the plaintiff's responses thereto.

A voluminous file of documentary evidence submitted by the plaintiff.

A number of large placards submitted by the defendant reproducing the subject vehicle's

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[5]Note, however, that one of Honda's most recent set of motions, signed by a David Peim, the court has not considered for evidentiary or legal argument purposes, since Mr. Peim is apparently a licensed attorney. Plaintiff objected to this consideration in a late-filed document and that objection was sustained. Small claims courts do not react to motions filed by counsel at the trial level.

window sticker and a printout from "www.fueleconomy.gov" regarding EPA mileage estimates for the subject vehicle, along with other factual and argumentation points.

Plaintiff's motion for clarification filed January 12, 2012.

Defendant's detailed submission of January 24. Note, however, that accompanying this was a large stack of purported testimonials from satisfied hybrid owners that were "filed under seal." The court exercised its discretion to not review these, largely because of their voluminous nature and because the plaintiff was in a poor position to digest and respond to them. Plaintiff herself attempted to submit a smaller list of dissatisfied owners (and indeed had some with her in court). These presentations by the plaintiff were also rejected by the court (although it would be fair to observe that the court is certainly aware that there are hundreds of hybrid owners lined up on each side of this dispute; that fact, and the opinions of all of these well intentioned people, are only peripherally germane to the dispute between Peters and Honda).

Articles from the *Los Angeles Times*, of December 27, 2011, January 4, 2012, January 11, 2012, and January 26, 2012.

Articles from the *Los Angeles Daily Journal* of January 11, 2012 and January 26, 2012.[6]

An article reprinted from an Associated Press report in the Los Angeles *Metropolitan-News Enterprise* for January 26, 2012.

Evening news stories on the case broadcast the evenings of January 3, 2012 by the local NBC channel, Channel 4, and on January 25, by the local ABC outlet, Channel 7.

An evening news story on the NBC national news broadcast the evening of January 4,

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[6]The January 26 *Daily Journal* piece has some interesting legal discussion in it concerning the possible effects of multiple small claims cases on related class actions. Whatever effects these might be, they play no part in the decision on the instant dispute.

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The Kelley Blue Book internet listing for Honda Civic Hybrids of a similar vintage to plaintiff's.

The court is of course aware that media interest in the case has been high, and that coverage of it has occurred in many other outlets.

Note also that the media reports do not add much in the way of information about the case beyond what was presented in open court and what is already in the court file. To the extent that they do, a small claims court is given latitude in reviewing evidence outside the trial itself. CCP 116.520 (subsection [c]) states: "The court may consult witnesses informally and otherwise investigate the controversy with or without notice to the parties." This rule, specific to small claims and inapplicable in the higher courts, must be used with caution, for obvious reasons of fairness and notice to the parties.

Ms. Peters also filed a number of pieces of correspondence immediately subsequent to the first hearing, including the objections to Mr. Peim's motion. The court has reviewed these but they also do not add much to the substantive consideration of the case.

Factual background.

On April 23, 2006, plaintiff purchased a 2006 Honda Civic Hybrid (HCH) with a Continuously Variable Transmission from Honda of Santa Monica. She paid $30,485.96 in cash for it.[7]

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[7]The contract, which was offered in evidence, indicates that the car was financed, but plaintiff testified that the deal was later modified to be a cash purchase. The issue is unrelated to the determination of the case, since even under the originally written contract the car was to be paid off by May 7, 2011.

Plaintiff was always dissatisfied with the car's mileage, and starting in March of 2008 she began a series of technical consultations and repairs with the Honda dealer having to do with the hybrid operations of the vehicle. These lasted between 2008 and 2011.

In August of 2010 she received a "Product Update" from Honda. The update stated, in part, "Your vehicle's integrated motor assist (IMA) battery may deteriorate and eventually fail before its normal usable life is reached. Frequent stop-and-go driving during warm weather speeds up the IMA battery deterioration. **To help prevent early IMA battery deterioration, a software update is needed for the IMA battery** [bold in the original]." The product update also stated that the customer "may notice":

"- When the vehicle is in auto idle stop, the engine restarts sooner. It also now restarts with only two bars displayed on the IMA battery level gauge.

- Even with up to four bars displayed on the IMA battery level gauge, auto idle stop may not occur.

- To ensure there's plenty of power for engine starting and accelerating from a stop, the IMA system reserves more battery power. This reduces the IMA assist as the vehicle speed increases.

- The IMA battery level gauge more accurately indicates the battery's state-of-charge. You will also notice that the level bars stay in the middle of the gauge much longer."

Plaintiff testified, believably, that after the software update, which she did solicit (at no charge) the car's performance actually deteriorated, and that the first condition noted above was not present. She also persuasively testified that her mileage remained considerably lower than the 50 mpg she had originally been led to believe would be the case, and links performance of

the battery running the vehicle with the use by the vehicle of gasoline. For purposes of further analysis, the court accepts plaintiff's conclusions regarding the effects of the software update.

On November 18, 2011 plaintiff wrote to Honda asserting that the software update had been misrepresented, and demanding compensation for a diminished value of the vehicle, not only for that reason, but based on other theories of misrepresentation relating to the car's mileage.

When no accommodation was reached between the parties this suit resulted.

Contentions of the parties.

Plaintiff contends, generally, that the original mileage performance of the vehicle, and, later, the utility of the software update, were misrepresented to her, in advertising and otherwise, causing her pecuniary damage. She bases her legal theories on several California statutes and on certain common law tort and contract theories. In sum, she alleged by testimony, and in her documentation, that she has suffered a total loss of $122,113.46, summarized as being comprised of: "difference between MSRP LX v. Hybrid ($5440.00); premium paid over MSRP for "Hybrid Premium" ($3290); interest on both premiums paid ($4974); reduced resale value due to stigma ($5208); actual increased gas cost to date ($1110.48); future increased gas cost ($8200); IMA battery replacement costs ($2304.98); punitive damages for fraud ($91,585.09)." The punitive damage figure is apparently derived by trebling the claimed compensatory damages.

Defendant contends that neither the mileage of the vehicle nor the effect of the software update was misrepresented, and that it has violated no laws. In summary, it further contends that:

- Plaintiff's complaint is barred by the equitable doctrine known as "laches."

- Honda is not liable for mileage estimates provided by the Environmental Protection Agency, and that there have been no misrepresentations made by the defendant based upon such, and that, in any event, plaintiff has not materially relied upon any representations made.

- Certain of plaintiff's claims are preempted by federal law.

- The court should depend on the mileage achievements of other satisfied Honda hybrid owners.

- Plaintiff has shown neither an entitlement to damages nor the suffering of actual damage.

Note that, in a small claims court, even a lawyer-plaintiff is not restricted to a recovery based on only the legal theories she presents. The Small Claims Act refers only to judgments for "recovery of money," without reference to any need for the small claims bench officer to restrict him- or herself only to claims which are pleaded, and indeed the pleadings in small claims are extremely informal, consisting only of a "Claim of Plaintiff," which itself is in summary form. Thus, if the plaintiff is entitled to a recovery of money based on any legal theory, she is entitled to it. CCP 116.220(a)(1). The same is true, naturally, concerning affirmative defenses and defensive factual responses that would normally be raised in pleadings by attorneys, such as statutes of limitations and laches.

Relevant other litigation.

The court has become aware through the evidence of three relevant pieces of litigation that have some potential bearing on this case.

- *Lockabey.* A class action suit currently pending in the San Diego County Superior Court, styled "Lockabey v. American Honda," and bearing the case number 37-2010-00087755-

CU-BT-CTL. This case, involving claims by a potential class similar to those brought by Ms. Peters, is currently, as best this court can tell, in a status such that a class has been certified for settlement purposes and a Class Action Settlement Notice has gone out, or is the process of going out, to potential members of the class. The suit is actually a compendium of five related class actions on issues similar to Ms. Peters's, the first of which was filed March 9, 2007. The Settlement Notice, which is in the court file, bears a deadline for class members to opt out of the class of February 11, 2012. Honda had attempted to argue, before trial here, that the current small claims case is enjoined by the court in the class action, but it seems rather that Ms. Peters has adequately opted out of the class (by letter to a claims administrator in December of 2011) and that she is therefore not bound by any injunction or proposed injunction in the class action. The argument that Peters is enjoined was not pursued by Honda at trial on January 3.[8] The class action apparently contemplates awarding members of the class from $100 to $200 each and provides them other rights. Since no judicial findings have yet been made in the class action, the case has no collateral estoppel effect here, although, as noted below, the filing of the class action operates to toll what probably would have otherwise been expired statutes of limitation on plaintiff's causes of action.

- *Paduano.* A trial and appellate court action, also in San Diego County, styled "Paduano v. American Honda Motor Company," and bearing the trial court number GIC85441 and the Court of Appeal (Fourth District) number D050112. *Paduano* is now a published opinion of the

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[8]It is quite clear, and Peters has never denied, that one of her motives is to influence members of the class in the class action to not settle with Honda. She has apparently done this, using a website and other means, because she has confidence in her case. The parties' subjective feelings about each other have no bearing on the outcome of this trial.

Court of Appeal (citable as 169 Cal.App.4th 1453). It has much interesting language in it about the history of the "Honda hybrid controversy," as it were. It is legally significant to the case at bench since it is a published opinion, by which this court is bound, holding that any breach of warranty claims asserted by Peters are preempted by federal law and fail on that ground. This court is bound by that holding.

On the other hand, the *Paduano* court goes on (in a 2-1 decision) to hold that the trial court in the Paduano case erroneously granted summary judgment in favor of Honda on Mr. Paduano's otherwise pleaded state law claims under the California Consumer Legal Remedies Act (CRLA) (Civil Code 1770 et seq.) and the California Unfair Competition Law (UCL) (Business & Professions Code 17200 et seq.). At that, the Court of Appeal, after an extensive discussion of the legal principles involved, reversed the trial court (in part) and remanded the case to the trial court for further proceedings, in effect extinguishing Paduano's warranty claims but leaving his other two theories intact.

This court is not presented with much further information about the Paduano case. Ms. Peters testified that her information is that Paduano settled with Honda for $100,000 (see discussion below), which still leaves the case of limited usefulness here, on its facts. This court has no information before it indicating that the Paduano trial court made any factual or legal findings that would collaterally estop the Peters case (other than in connection with the preemption argument). To the extent that Paduano settled with Honda, that fact, while not exactly inadmissible in small claims court (where strict rules of evidence, including the general inadmissibility of settlements to prove liability, are not applied), is of limited use for the basic reason contained in the rule. Settlements can occur for all sorts of reasons, and it is difficult to

pin liability on Honda in the Peters matter simply because it settled with Paduano. While the outcome in *Paduano* is of interest, Peters requires independent proof of liability to obtain a judgment here.

- *True v. American Honda Motor Co.* This is a federal class action apparently still pending in the United States District Court for the Central District of California (Riverside). It bears the case number EDCV 07-0287-VAP and has been reported, initially at 749 F.Supp.2d 1052 (2010). In this case a United States District Judge (Judge Virginia Phillips) declined to approve a class settlement between a representative pair of plaintiffs and American Honda based on the court's ultimate conclusion that the proposed settlement was unfair. As best this court can determined, this action is currently stayed pending the outcome of the *Lockabey* case, but the court has read Judge Phillips's decision and there is some further interesting language in it concerning the District Court's analysis of the *Paduano* case,[9] although, again, this relates largely to the District Court's analysis of the efficacy of a proposed class action settlement, and does not control the actual outcome in *Peters* v. *Honda.*

Possible legal theories of relief.

In reviewing the evidence, the court has been able to identify the following potential theories of relief upon which the plaintiff might depend.

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[9]"Developments in a California state court lawsuit alleging substantially similar claims suggest it may be the claims of the representative plaintiff's [in *True*], not the claims of the entire class, that are weak. In *Paduano* v. *American Honda Motor Company, Inc.*, 169 Cal.App.4th 1453, 1470-1473, 88 Cal.Rptr.3d 90 (2009), the California Court of Appeal reversed a grant of summary judgment to AHM, holding that an HCH owner had presented a sufficient question of fact for his UCL and CLRA claims based on the false or misleading nature of AHM's fuel economy misrepresentations to go to trial. *Paduano* has now been settled, and AHM has agreed to pay Gaetano Paduano $50,000 to settle his claims, in addition to a minimum of $50,000 for his attorney's fees....This suggests the claims of class members may have significant value."

1. Federal claims under the Magnuson-Moss Warranty Act (15 U.S.C. 2301 et seq.) This was a theory considered and rejected in *Paduano*, on its merits.

2. State warranty claims under the California Song-Beverly Consumer Warranty Act (Civil Code 1793.2 et seq.). This was also rejected in *Paduano* based on conclusions largely having to do with federal preemption.

3. The California Consumer Legal Remedies Act (CLRA) (Civil Code 1770 et seq.) (although note that in her January 12 submission, plaintiff states, "Ms. Peters is not making a claim under the CLRA....Instead she has elected to pursue alternative claims that have no...pre-filing notice requirement including: common law theories of intentional and negligent misrepresentation, as well as claims pursuant to California Business & Professions Code Sections 17200 & 17500.").

4. The California Unfair Competition Law (UCL) (Bus. & Prof. Code 17200 et seq.).

5. California statutory law regulating false advertising (Bus. & Prof. Code 17500 et seq.).

6. Common law theories of misrepresentation (see Civil Code 1571-72 and 1709-1710 and related case law).

7. A claim for punitive damages, based on plaintiff's assertion that mileage figures and the problems with the software update were intentionally, fraudulently, maliciously, and oppressively concealed.

Analysis.

The warranty claims having been obviated by the decision in *Paduano*, the court proceeds to discuss the case using the framework of the other theories of relief. As will be seen,

the court is of the view that plaintiff has stated a claim in several respects.

The California Consumer Legal Remedies Act. Civil Code 1770(a)(7) does say that one of the statute's enumerated deceptive practices is, "Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another." "Goods" are "tangible chattels bought or leased for" personal use (Civil Code 1761[a]). Thus, a car is "goods," and if it is deceptively represented a statutory violation can occur.

A serious bar to a CLRA action based on the advertising and the software raises its head, though. Civil Code 1782 requires that thirty days prior to commencement of a CLRA action the plaintiff notify the defendant of the acts alleged to have been committed. Here, plaintiff's demand was dated November 18, 2011 and the suit was filed November 29. Thus, the action is facially barred by the lack of the presuit notice. The court has given some consideration to whether that bar operates definitively, or merely to abate the action, but the acceptance by the court of certain of plaintiff's other theories moots the question, and, additionally, as noted above, plaintiff has withdrawn any CLRA theory, apparently acknowledging the pre-suit notice requirement.

California Unfair Competition Law. Bus. & Prof. Code 17200 states, "...unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by...Section 17500 [et seq.]...of the Business and Professions Code." The statute has a four-year statute of limitations (B&P 17208).

This brings to the fore the question of whether, since plaintiff's case was not filed until

November 29, 2011, her claims are barred by any relevant statute of limitations, the four-year statute of B&P 17200 being the longest she would have had to face. The answer is no. Both controlling federal (and state) law provide that putative members of a class have statutes of limitation on their individual claims tolled during the pendency of the related class action. This principle, an outgrowth of the older, general, principle of "equitable tolling" of statutes of limitation, is encapsulated in a basic United States Supreme Court decision, and is discussed in a number of lower federal and state court decisions. Since the relevant related class action was filed in 2007, well within operative time periods from the sale of Peters's car to her, she is not barred by any state statute of limitations. See *Crown, Cork & Seal Co.* v. *Parker* (1983) 462 U.S. 345, *Hatfield* v. *Halifax PLC* (2009) 564 F.3d 1177, and *Becker* v. *McMillin Construction* (1991) 226 Cal.App.3d 1493.

Defendant, beyond the limitation of actions defense, argues that plaintiff is guilty of laches, the equitable defense that eliminates relief for a plaintiff who has "slept on her rights," as the equitable maxim (Civil Code 3527) goes. Defendant's main argument is that since Peters declined to opt out of *True* she was on notice at least by then (*True* had an initial opt-out deadline of December 2009) that she should have complained about her mileage earlier. Peters responds that it was really the unfairness in the software patch of 2010, and the effects thereof, that attracted her attention and began her inquiry. The court finds this persuasive, and is otherwise reluctant to penalize a plaintiff who is within operative legal statutes of limitation. The plaintiff's claim is not barred by laches.

This then brings the court squarely face to face with whether Honda misrepresented the mileage of the hybrid in 2006.

The court believes, for purposes of this statute, that it did.

The statute uses the word "misleading." This is a strict liability rule (see *Paduano*). The requirement is met. At a bare minimum, Honda was aware (in part from the Paduano case) that by the time Peters bought her car there were problems with its living up to its advertised mileage. Misleading representations that plaintiff has correctly identified include:

- That the HCH would use "amazingly little fuel."

- That the vehicle would help her "save plenty of money on fuel - with up to 50 mpg during city driving." This figure is supported by the window sticker.

- That the HCH's "motor adds extra power when needed...."

- That the vehicle "provides plenty of horsepower while still sipping fuel."

- That "under most conditions, an idle stop feature automatically shuts off the Hybrid's gasoline engine when you stop, so gas consumption ceases."

Actual performance of plaintiff's vehicle did not live up to these standards.[10]

As plaintiff pointed out in court, a difference in mileage of only a couple of miles per gallon would not have affected her, but when she (as Paduano) began receiving much less than the advertised mileage she knew she had a problem.

As with Paduano, Peters was told that her driving habits would starkly affect her mileage.

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[10]Two related points: 1) Both sides wish to depend on comparisons between Mr. Paduano's situation and Ms. Peters's. Apparently Honda did weaken its advertising somewhat between the sales brochures that were available to Paduano (relating to a 2005 hybrid) and the ones available to Peters. However, in connection with the basic 50 mpg estimate still offered to Peters, the court sees little practical difference between the two cases. 2) Buried in the advertising and other data available on the vehicle has always been cautionary language - about which the court can probably even take judicial notice - words to the effect that "actual mileage may vary." This obvious fact needs to be judged in context with the advertising.

No doubt this is true, but drivers in large urban areas, such as Los Angeles, or San Diego, are naturally going to experience stop-and-go driving and are normally going to make use of their air conditioning, both of which will have an effect on mileage that deserves to be explained, in advertising and elsewhere.

Honda responds that it is stuck with EPA mileage figures provided to it. This does not seem to be the case. Honda's own testing should be the guideline for how it advertises its vehicles' mileages, not the generalized work, valuable though it is, done by the EPA. Can a Honda hybrid driven in careful and tested ways achieve 50 mpg? No doubt. Did it happen with Peters's car? No.[11]

On the question of the alleged misrepresentations regarding the software update the plaintiff has a further point. This did not come up until 2010, and upon relying upon it to have the software installed (admittedly free of charge) the plaintiff's mileage did not improve, and indeed at least one of the distinct promises made in the Product Update regarding the engine starting sooner was not fulfilled. Plaintiff's mileage continued to be unsatisfactory and her engine had trouble turning off at stops, let alone restarting.

False advertising. The statute in question, Business & Professions Code 17500, indeed prohibits false advertising, but there is a general problem for plaintiff in that the statute (except as it is read in conjunction with B&P 17200) does not provide a right of private relief for monetary damages. The section allows injunctive relief, which small claims courts cannot give, and may provide relief by way of restitution. It has a three-year statute of limitations (CCP

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[11]Note also that there are apparent deficiencies in the EPA protocols for testing, in that, as testified to by the witness Johnson, the EPA does not require testing under all extreme urban driving conditions. No air conditioner use is involved, for instance.

338[h]). See, as to the question of the election of damages under the statute. *Buckland* v. *Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798.

As to rescission and restitution, plaintiff prefers to keep her car, so the court cannot unwind the deal in the usual way. There will be fuel costs which should be restituted to her (see below), but the general question of injunction-rescission-restitution is mooted by the court's other findings on other theories.

Misrepresentation. Beyond the rights in the plaintiff stemming from the UCL, plaintiff of course can fall back on common law misrepresentation theories. Peters argues that as to both the original purchase of the vehicle and the installation of the software, she was victimized by the usual elements of fraud - that either intentionally or negligently the defendant made material representations to her that were untrue, upon which she depended, reasonably, to her detriment. See Witkin, *Summary of California Law*, 10th Ed., "Torts," Sec. 772 (and the exposition of the statutory bases for California fraud actions in Sec. 767).

At least as to negligent misrepresentation, for the reasons noted above, the court finds for the plaintiff.

As to intentional fraud, it is difficult for the court to isolate any information before it from which to conclude that Honda behaved as to intentionally misrepresent this vehicle. (Here the generalized results Honda had obtained from customers does have some relevance.)

Punitive damages. Civil Code 3294 requires proof of punitive damages by clear and convincing evidence. As noted above, however, the court is not finding there is clear and convincing evidence that Honda concealed or misrepresented the problems with the vehicle generally, or with the software patch, out of oppression, malice or intentional fraud, as required

by the statute.

Damages. Plaintiff would be entitled to the lowest figure that would make her whole for her found losses. If part of the found loss is due to the misrepresentation regarding the software patch, the price of a new IMA battery would solve that problem in compensatory terms. Plaintiff has provided an estimate for this for $2304.98 from Honda of Hollywood, which seems a reasonable effort to provide this damage figure.

But there is the larger issue of plaintiff's damages stemming from the original misrepresentation, and running from purchase of the vehicle (April 23, 2006) to the date of the software patch (September 23, 2010). There is also a question of whether Honda should be credited with the fact that Peters was entitled, on her 2006 federal income taxes, a tax credit for the purchase of the vehicle.

Tax credit. The tax credit would have been $2100. Peters did not take it. She testified that somehow she thought the tax credit was some kind of rebate, and did not claim it. This is not an issue that can be laid at Honda's door. The tax credit was available and thereby diminishes Peters's other damages.[12] A California state tax credit for hybrid vehicles apparently went into effect for vehicles purchased after Peters's car.

Mileage methodology.

At the time of the patch the car's odometer reading was 43536.

At 50 mpg that number of miles equals 870.72 gallons (the court accepting plaintiff's mileage figure).

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[12]Because of the court's other calculations, and the jurisdictional limit of the small claims court, the point is, in practical terms attenuated.

At 40 mpg (the court accepting plaintiff's figure) that number of miles equals 1088.4 gallons.

The difference is 217.68 gallons. Using the average gas price figure provided by plaintiff of $3.69 per gallon, this is a difference in fuel costs of $803.24.

In addition, plaintiff would be entitled to compensation for increased fuel costs since the installation of the software patch, which occurred September 23, 2010, and which would run to the date of filing. At the time of the patch the car's mileage was 43536 miles and as of December 2, 2011 the mileage was 48361 (both figures come from repair records submitted by the plaintiff). The December 2 is close enough to the filing date to be usable (since mileage costs will be estimates in any event). The calculation of damages based on lost mileage during the subject time frame thus goes:

The miles differential (48361 less 43536) is 4825 miles.

4825 miles at 50 mpg uses 96.5 gallons (the court accepting plaintiff's mpg figures).

4825 miles at 30 mpg uses 160.83 gallons.

The difference in usage is 64.33 gallons.

Use $3.69 as the average California gas price, as provided by plaintiff's research.

$3.69 times 64.33 gallons is lost fuel cost of $237.38.

Other damages: loss of use? Plaintiff has not claimed lost use of the vehicle during the time it was being examined by mechanics on the mileage issue, nor is there any specific evidence of this before the court. The car was apparently regularly maintained as to other issues than mileage and there is some suggestion that the mileage issues were addressed contemporaneously. The court awards nothing for loss of use.

Other damages: diminution in value theory. Peters wishes to argue that she should be compensated both for the difference in price paid for the hybrid and what she would have paid for a gasoline-powered Civic. This argument must fail because it would amount to double recovery, i.e., if the compensation for mileage costs makes her whole on that question then she should not be entitled to a diminished cost for the purchase of the vehicle. Since the mileage losses are the lesser of the two figures, she is entitled only to that. However, having said that, the court notes that she persuasively argues that now she is stuck with a car that has a diminished sales value, and provides persuasive documentation (comparing auction figures to the Kelley Blue Book) that this loss amounts to $5208. The court accepts this.

Other damages: loss of future fuel costs. Even if the reinstalled battery is helpful, plaintiff argues that she will suffer enhanced costs of fuel since the car would no doubt return to the 40 mpg rate. Of course this argument, to avoid speculativeness, must depend on a found intention by Peters to keep the vehicle for some period of time. She testified that this was her intention, and wants to claim $8200 in these losses (figured at a future odometer addition of 150,000 miles). While this may be extreme in terms of the cost mathematics, the court is constrained to accept Peters's stated desire to keep the car for the mileage indicated, which would end its useful life with about 200,000 miles on it. That would amount to fuel losses, using the above methodology, of $2767.50 ([150,000/40 x $3.69] - [150,000/50 x $3.69]).[13] This

[13]Defendant argues that plaintiff should be benefitted, and her claim reduced, by having had access to California's high-occupancy vehicle lanes as a solo driver in a hybrid vehicle. While this "benefit" may have been available to Peters for some period, damages in this area are highly speculative. No actual evidence was adduced regarding Peters's use of the carpool lanes in Los Angeles and, even if she had had such a driving pattern the value of it to her, or to any driver, is legally vague (some people who have the right to drive in the HOV lanes prefer not to, for instance). In a more common type of automobile-related property damage case - the highway

would make the vehicle older than the average length American car owners are statistically keeping vehicles nowadays,[14] but would not be unreasonable. See CCP 116.510.

Additionally, on the cost of the battery, plaintiff would be entitled to prejudgment interest, since that sum is readily ascertainable (see Civil Code 3287). The interest would run from September 23, 2010 to the date of judgment (February 2, 2012) and would equal, at 10%, $313.22 ([$2304.98 x .10]/365 x 496 days).

These sums come to: $2304.98 (battery) + $803.24 (fuel) + 237.38 (fuel) - $2100 (the tax credit) + $5208 (diminution in value) + $313.22 (interest) + $2767.50 (future fuel) = $9534.32.

The jurisdictional limit of small claims court for this sort of claim is $10,000, exclusive of costs (interest is subsumed into the award within the $10,000 limit).

Thus, plaintiff's award is:

- Principal of $9534.32.

- Costs of $85 (filing fees).

- Costs of $247.87 (copying). These costs, in the court's view, were "reasonably necessary to the conduct of the litigation" (CCP 1033.5[c][2]). (Note that plaintiff's claimed service of process cost of $35 was not reflected on any of the proofs of service filed by her.)

Thus, the total award is $9867.19.

Judgment/disposition.

"fender bender" - would the loss of a hybrid's use also include lost time in the HOV lane? It is doubtful. The use of the carpool lanes is convenient to drivers, and a potential selling point, but is difficult to translate into monetary terms. The "hybrid-in-the-carpool" program for HOV lanes ended, in any event, under California law, on July 1, 2011.

[14]See autoremarketing.com, citing the Polk research firm on auto sales data (see www.polk.com).

For all the above reasons, judgment is for the plaintiff and against the defendant for $9867.19 ($9534.32 plus costs of $332.87).

The clerk is directed to enter judgment in accordance with the above and give notice. The clerk is also directed to maintain the exhibits for pick up by the respective parties in Department 8 for sixty days.

IT IS SO ORDERED.

Dated: 2/1/12

DOUGLAS G. CARNAHAN
Superior Court Commissioner