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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GORDON ROSE, Plaintiff and Appellant, v. TRUECAR, INC., Defendant and Respondent.	B292906 (Los Angeles County Super. Ct. No. BC605278)

APPEAL from an order of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Affirmed.

Kabateck, Christopher B. Noyes and Joana Fang, for Plaintiff and Appellant.

Alston & Bird, Kathy J. Huang, John E. Stephenson, Jr., Jonathan D. Parente, and Rachel A. Naor, for Defendant and Respondent.

Defendant and respondent TrueCar, Inc. (TrueCar) operates a website that makes information about vehicles available to consumers and allows them to connect with local dealers willing to offer guaranteed discounts on models of interest. Consumers do not pay to use the TrueCar service, but participating dealers pay variable subscription fees to TrueCar each month. Plaintiff and appellant Gordon Rose (Rose) filed a class action complaint against TrueCar alleging it engaged in unfair competition by operating as a car dealer and broker without prior approval from the Department of Motor Vehicles. When Rose moved to certify a class of all California consumers who registered for a TrueCar account and purchased a vehicle from a dealer after April 1, 2012, the trial court denied certification. It reasoned common issues did not predominate among the class because Rose had not shown that entitlement to restitution, the only available remedy he sought, could be established by common proof. We consider whether Rose showed he could prove, via evidence suitable for class-wide adjudication, that dealers passed along the TrueCar fees they paid to consumers such that the putative class could be entitled to restitution.

I. BACKGROUND

A. TrueCar's Business Model

TrueCar operates a website (and has relationships with affiliated internet sites) on which consumers shopping for vehicles can, for free, get information about vehicles of interest and view data for sales transactions in their area. A consumer visiting the TrueCar website is prompted to identify the make, model, and trim of the vehicle they are interested in, to specify

whether they are interested in factory-installed optional equipment, and to enter their zip code. Based on that information, the consumer receives a pricing report that includes historical pricing information for their local area, the Manufacturer Suggested Retail Price (MSRP), the factory invoice price, the market average consumers pay for the vehicle, and the TrueCar average, which is based on recent sales to consumers introduced to dealers through the TrueCar platform.

If a TrueCar website user wants to further pursue his or her interest in a vehicle, the user can register for a TrueCar account by providing his or her name, address, zip code, telephone number, and email address. If a TrueCar registrant then chooses to connect with dealers in the TrueCar network (Certified Dealers), TrueCar's system provides the Certified Dealers with the registrant's contact information and information regarding the type of car in which the registrant is interested. At that point, up to three Certified Dealers contact the registrant and state the minimum amount of savings off of MSRP they are offering for the type of vehicle in which the registrant is interested by providing a "guaranteed savings certificate"; the Certified Dealers may also provide guaranteed savings and pricing information for specific vehicles in the dealer's inventory. TrueCar has no control over the prices and MSRP discounts the Certified Dealers choose to offer. TrueCar plays no role in any negotiations that may take place after the consumer receives the guaranteed savings certificate, or in any vehicle purchase that follows.

Though consumers do not pay for TrueCar's services, dealers do. In California, Certified Dealers pay a variable monthly subscription fee, which is calculated as follows. At the

beginning of each month, TrueCar sends each California Certified Dealer a report estimating the number of introductions to TrueCar registrants that will lead to a completed sale that month. The projected number of sales is multiplied by $325, and the resulting number is the dealer's maximum fee for the month. If the number of actual TrueCar-matched sales at the end of the month exceeds the estimate, the dealer will not pay any extra fees. If the number of TrueCar-matched sales is lower than projected, the total amount invoiced is reduced by $325 for each sale short of the estimate. During the putative class period, there were approximately 550,000 TrueCar-matched sales in California to approximately 433,000 people.

The relationship between TrueCar and its Certified Dealers is governed by the TrueCar Dealer Agreement. Under the Master Terms and Conditions in effect at the time of Rose's purchase, dealers agreed to comply with the Auto Information Service Requirements on TrueCar's website. The Auto Information Service Requirements obligate dealers "[n]ot [to] charge or pass along all or any portion of a fee due by Dealer to Customer in connection with the Agreement."[1]

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[1] The Auto Information Service Requirements do not separately define the terms "Dealer" and "Customer." The Master Terms and Conditions and Service Terms define "Dealer" as "the dealer identified in the TrueCar Dealer Registration Form . . . , and if applicable, any of its Participating Dealers" and "Customer" as "a user of a TrueCar-powered automotive information website, including a member of Customer's household or immediate family."

B. Rose's TrueCar Experience

Rose was shopping for a 2015 Nissan Rogue in or about August 2015 when he registered for a TrueCar account. Rose decided he wanted to buy that particular car before he learned about TrueCar. Rose submitted a request to be connected with local dealers on the TrueCar website and requested pricing for in-stock Nissan Rogue S vehicles. Three dealers in the area, including Nissan of Elk Grove, sent guaranteed savings certificates and car-specific offers to Rose. The guaranteed savings certificate from Nissan of Elk Grove stated the dealer would sell him any Nissan Rogue S on its lot for $2,762 off MSRP. It also provided Rose with three offers for specific Nissan Rogue S vehicles.

Rose ultimately purchased a car from Nissan of Elk Grove because they were more friendly and he found the specific car he wanted. But Rose ultimately decided to buy a Nissan Rogue SV, rather than the Nissan Rogue S that had been the subject of his TrueCar search.

Rose's automobile purchase contract with Nissan of Elk Grove does not mention TrueCar; Rose understood Nissan of Elk Grove was the dealer selling him the car. At a deposition in this case, Rose testified he had not received a guaranteed savings certificate promising he would receive a discount on a Nissan Rogue SV. Rose testified, however, that he confirmed with the salesperson that he was receiving the "TrueCar price" before completing the purchase.[2]

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[2] Rose purchased his car for $24,184 (not including fees and taxes). He paid a $5,000 down payment with required monthly payments in the amount of $346.93. As part of the purchase,

Rose had owned the Rogue SV for approximately two and a half years at the time of his deposition. According to Rose, the car operated "great," he loved it, he was satisfied with his purchase decision, he had no complaints about the car, and he would buy it again. Rose had paid a price he agreed to pay and believed the price was fair both when he paid it and at the time of his deposition. Rose had not seen a lower price for a Nissan Rogue with the same features advertised, either before he purchased the car or since purchasing it.

After Rose purchased the vehicle, he saw something on the internet about a class action against TrueCar. Rose provided his contact information in response to the internet solicitation and he was contacted by a law firm employee. The employee informed Rose TrueCar was not licensed to do business in California. That was the first time Rose had thought about whether TrueCar had a license to do business in California. Rose later testified at deposition that he did not know TrueCar was not operating in compliance with California Vehicle Code requirements governing dealers and brokers when he purchased the Rogue SV and he would not have used TrueCar's services to facilitate the purchase if he had known.

C. This Class Action Lawsuit

1. The complaint

Rose, as the representative of a putative class of consumers, filed the original complaint in this matter in December 2015, and a First Amended Complaint (the operative

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Rose traded in his 2007 Chrysler PT Cruiser, which was valued at $500.

complaint) in July 2016. The operative complaint alleges three causes of action: unjust enrichment, violation of the Consumer Legal Remedies Act, and violation of the Unfair Competition Law, Business and Professions Code section 17200 et seq. (the UCL). Rose alleges TrueCar is a "dealer" within the meaning of the pertinent Vehicle Code definition, is in violation of the Vehicle Code because it is operating as a dealer without first having been issued a license by the California Department of Motor Vehicles, and is in violation of a separate Vehicle Code provision because it engaged in automobile "brokering" without paying fees required by the Vehicle Code. He further alleges TrueCar does not affirmatively disclose its business model is illegal, putative class members were and are likely to believe the model is legal and the services TrueCar is providing are in conformity with California law, and he and putative class members would not have utilized TrueCar's services if they had known it was not operating in conformity with California law.

Rose further alleges that as a direct and proximate cause of the unlawful business activity, he "'lost money' . . . by paying for a vehicle with Defendant's price certificate that he *could not* have purchased but for Defendant's unlawful business practices, and *would not* have purchased but for Defendant's representations and omissions . . . ." The operative complaint additionally asserts Rose and putative class members lost money by purchasing vehicles TrueCar was not legally allowed to sell—vehicles Rose and putative class members would not have purchased had they known about the "illegality" of TrueCar's scheme.

The operative complaint defines the putative class as "All California consumers who purchased an automobile by using TrueCar, Inc.'s price certificate during the applicable statute of

limitations." The prayer for relief seeks, among other things, restitutionary disgorgement of the fees TrueCar received for sales between TrueCar registrants and Certified Dealers.

2. The motion for class certification and opposition

Over a year after filing the operative complaint, Rose filed a motion for class certification. The motion asked the trial court to certify a class comprised of "[a]ll California consumers who registered for a TrueCar account and purchased a vehicle from a California TrueCar Certified Dealer between April 1, 2012 and [the] date notice is provided to the Class."

Rose's certification motion stated he sought certification of the class solely "based upon [TrueCar's] violation of the unlawful prong of [the UCL]," i.e., not for either of the other causes of action asserted in the operative complaint and not for any other theory of unfair competition. Rose argued TrueCar's conduct was unlawful within the meaning of the UCL because it violated certain of the aforementioned provisions of the Vehicle Code concerning dealer licensing and automobile brokering. Rose stated he was seeking, "[o]n behalf of himself and all others similarly situated," "restitution in the form of the fees illegally collected by TrueCar because TrueCar was not a licensed California dealer and did not have an autobroker's endorsement or pa[y] the required fees." Rose's motion "anticipated that TrueCar will argue the fees it received were not paid directly by consumers to TrueCar and instead were paid by TrueCar Certified Dealers," but the motion contended this was not a bar to certification and maintained there was common evidence by which the violation of the UCL's unlawfulness prong could be proven.

Specifically, Rose contended the amount subject to restitutionary disgorgement to class members could be established by the monthly invoices TrueCar sends to its certified dealers. In Rose's view, because TrueCar collected fees based on approved sales, and the fees were obtained unlawfully, the UCL authorized disgorgement of all such fees in the form of restitution to customers using the TrueCar system.

TrueCar opposed Rose's class certification motion, arguing (1) Rose lacked standing because he obtained the benefit of his bargain and could not show he suffered injury, (2) Rose had not established that the putative class's entitlement to restitution could be established by common proof, either in terms of the existence of a measurable amount of restitution supported by the evidence or that money (the TrueCar fees) had been taken from class members (consumers, not dealers) by improper means, and (3) Rose was not typical of the class because he never saw the guaranteed savings certificate issued in his name and did not purchase the type of vehicle identified on the certificate.

3. The trial court's order denying certification

The trial court denied the motion for class certification. In doing so, it noted the class Rose sought to certify in his motion was narrower than the class defined in his operative complaint. It found Rose proposed a class consisting of at least 433,000 individuals, and noted TrueCar had not challenged the proposed class on numerosity grounds. The court found the class was ascertainable because it was defined based on objective criteria, Rose had presented evidence class members could be identified from TrueCar's records, and putative class members could identify themselves.

The court determined, however, that Rose had not satisfied any element of the community of interest requirement for suing as a class. Specifically, the court found restitution, the only available non-injunctive remedy under the UCL, could not be established by common proof because Rose had not presented any evidence showing that if the dealers had not paid TrueCar a subscription fee, putative class members would have paid a lower price for their cars. Absent such evidence, the trial court concluded the putative class could not establish by common proof they had money taken from them by improper means—which was necessary to justify a restitutionary remedy—or that the putative class had any interest in the funds. The court further found it significant that Rose had not presented a methodology by which common proof could be used to connect the subscription fee to the ultimate purchaser of the vehicle.

As another independent ground for denying certification, the trial court found Rose was not typical of the putative class because his experience with TrueCar's services was unusual in material ways. Specifically, Rose had not seen his guaranteed savings certificate until the day before his deposition, and he had not accessed the platform and generated the certificate himself. The trial court concluded this meant Rose went through negotiations and ultimately purchased a car from a dealership without ever having reviewed, received, or relied upon the guaranteed savings certificate—the main benefit consumers receive from using the TrueCar platform. Additionally, the court noted the certificate Rose received from the dealership did not conform to the car he purchased. The court concluded these idiosyncrasies meant there were unique defenses that would apply to Rose but not the rest of the class.

As a final independent ground for denying certification, the trial court found Rose was an inadequate class representative because he lacked UCL standing, i.e., an injury-in-fact flowing from the alleged wrong about which he complained.

II. DISCUSSION

TrueCar correctly argues the restitutionary remedy is only appropriate for a plaintiff who can show he or she had something of value that was wrongfully taken and must be restored to him or her. (See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1151 ["[R]estitution is limited to restoring money or property to direct victims of an unfair practice"] (*Korea Supply*).) That poses an obvious problem for Rose because it was the dealers, not consumers, that paid TrueCar its fees. Rose nevertheless posits he can prove, via a method suitable for class adjudication, that putative class members can seek restitution on a pass-through theory—i.e., that TrueCar effectively took money from the 400,000-plus members of the class because, as he puts it, class members "paid the dealer's price for [their] vehicle[s] which inevitably included TrueCar's fee through the cost of the Certified Dealer's subscription."

That does not solve Rose's problem, for two reasons. First, typing "inevitably" into an appellate brief is no substitute for evidence, of which Rose proffered none. Second, the only pertinent evidence that *is* in the record are the contractual terms that *prohibited* dealers from passing the fees they paid onto consumers—and Rose identifies no means of establishing the contrary via common proof. Instead, individualized inquiries would predominate because Rose would have to prove, as to each of the more than 400,000 car purchase transactions engaged in by

class members throughout California, that the relevant dealership passed on TrueCar fees to the class member in violation of the governing contractual terms. That is not a process amenable to class treatment. The trial court therefore did not abuse its discretion when refusing to certify Rose's proposed class on predominance grounds, and we accordingly need not discuss the other grounds the trial court relied on to justify its ruling (*Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 981).

A. Class Certification Principles

A plaintiff may proceed by way of a class action "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." (Code Civ. Proc., § 382.) Our Supreme Court has "articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives . . . . '[T]he "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."' [Citation.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

When considering the first of these last three factors, "whether individual questions or questions of common or general interest predominate," the "'ultimate question'" is "whether 'the

issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.]" (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) "The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. 'As a general rule if the defendant's *liability* can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their *damages*.'" (*Id.* at pp. 1021-1022, italics added; accord, *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 968 (*Noel*).) The party seeking class certification bears the burden of satisfying the requirements of Code of Civil Procedure section 382, including the test for predominance we have just described. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

"'"The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion . . . ."'" (*Noel*, *supra*, 7 Cal.5th at pp. 967-968.) "[I]n the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [citation]." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 (*Linder*).) In our review,

we "'consider only the reasons cited by the trial court for the denial . . . .' [Citation.]" (*Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1297-1298.) But any valid stated reason for denying certification suffices to affirm. (*Linder*, *supra*, at p. 436.)

B. The Trial Court Correctly Denied Class Certification

"The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.' ([Cal. Bus. & Prof. Code,] § 17200.) Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.' [Citations.]" (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320.) Restitution, along with injunctive relief, are remedies available under the UCL. (*Id.* at p. 337.)

"'Restitution under [Business and Professions Code] section 17203 is confined to restoration of any interest in "money or property, real or personal, which may have been acquired by means of such unfair competition." A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other.' [Citation.]" (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371 (*Zhang*), italics omitted; accord, *Clark v. Superior Court* (2010) 50 Cal.4th 605, 614 ["The word 'restitution' means the return of money or other property obtained through an improper means to the person from whom the property was taken"]; *Korea Supply*, *supra*, 29 Cal.4th at p. 1149 ["The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest"].) Neither compensatory damages nor non-

restitutionary disgorgement are recoverable under the UCL. (*Zhang*, *supra*, at p. 371 [compensatory damages]; *Korea Supply*, *supra*, at pp. 1150-1152 [non-restitutionary disgorgement].)

In the operative complaint, Rose sought "restitutionary disgorgement" of the fees TrueCar collected from Certified Dealers based on approved sales.[3] On appeal, he takes issue with the established principle, just described, that restitution is appropriate only for a plaintiff who can show some money or property was wrongfully taken from him or her. In doing so, Rose cites cases that hold a plaintiff may obtain restitution even where the defendant who wrongfully acquired the plaintiff's money or property did not acquire it *directly* from the plaintiff. (*People ex rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539 (*Sarpas*); *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305 (*Troyk*); *Shersher v. Superior Court* (2007) 154 Cal.App.4th 1491 (*Shersher*).)

In each of these cases, however, it was clear (from the facts developed or assumed to be true) that money or property alleged to have been wrongfully acquired by the defendant was taken *from the plaintiff(s)* in question, even if the money or property passed through the hands of an intermediary before reaching the defendant. (*Sarpas*, *supra*, 225 Cal.App.4th at p. 1562 ["[The defendants] received money indirectly from customers by having them pay [an intermediary company]. The customers parted with property in which they had an ownership interest and are

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[3] Rose's complaint also sought injunctive relief. Rose did not argue below, however, that an injunction-only class could or should be certified. Nor has Rose raised that argument on appeal.

entitled to its return"]; *Troyk*, *supra*, 171 Cal.App.4th at p. 1340 [a substantial portion of service charges paid by class members to an intermediary company, which was the agent and wholly owned subsidiary of the companies named as defendants, were indirectly received by the defendant companies]; *Shersher*, *supra*, 154 Cal.App.4th at p. 1499 ["In [cases cited by the UCL defendant, Microsoft], the plaintiffs never had any interest in the money they sought to recover. Here, plaintiff and the putative class members clearly had an ownership interest in the restitutionary relief sought because they purchased Microsoft's product"].) These cases therefore do not support the remarkable—and incorrect—proposition Rose appears to advance: that a plaintiff can obtain restitution even when nothing of his or hers was wrongfully taken. That is the discredited non-restitutionary disgorgement theory our Supreme Court rejected years ago in *Korea Supply*. (*Korea Supply*, *supra*, 29 Cal.4th at p. 1147 ["[W]e find nothing to indicate that the Legislature intended to authorize a court to order a defendant to disgorge all profits to a plaintiff who does not have an ownership interest in those profits"].)

There is accordingly no concern here that the trial court misunderstood or misapplied legal principles. Indeed, its ruling is not inconsistent with Rose's unremarkable assertion that "the fact that consumers paid TrueCar's Certified Dealers and not TrueCar directly does not bar an award of restitution." That is true so far as it goes, but Rose's problem is factual, not doctrinal. There is no evidence that supports his theory that the car dealers effectively served as intermediaries and conveyed class members' money to TrueCar, and presenting such evidence (if it existed) would require a process unsuitable for class-wide adjudication.

Rose put forward no evidence demonstrating money from putative class members was passed through to TrueCar by Certified Dealers. Rose also presented no evidence—not even evidence pertaining to his own transaction—demonstrating one or more Certified Dealers would have charged consumers who connected with them through TrueCar less if they had not used the TrueCar system, or that the subscription fees were in some way added to the cost paid by one or more putative class members. All Rose offers is a bare assertion to the contrary, which is insufficient to support his theory at the class certification stage.[4] (*Brinker*, *supra*, 53 Cal.4th at p. 1021; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108.) Having failed to show *by evidence* there was a means of establishing via common proof that the putative class members had ownership interests in fees received by TrueCar, the trial court was justified in concluding Rose had not carried his burden to demonstrate the requisite community of interest.

Furthermore, and putting Rose's failure to offer evidence aside, the only evidence that is in the record on this issue is antithetical to Rose's restitutionary theory. The Auto Information Service Requirements (Service Requirements) each

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[4] *Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, a case Rose cites in arguing UCL standing requirements, is not to the contrary. The plaintiff in *Medrazo* alleged a motorcycle dealership violated the unlawful prong of the UCL by failing to comply with statutes mandating the disclosure of dealer-added charges before a consumer begins negotiating the purchase price of the motorcycle. (*Id.* at p. 13.) It was clear in that case the money the dealership was alleged to have wrongfully acquired had come from the plaintiff.

Certified Dealer agreed to—which *would* constitute a proper method of common proof—provide that Certified Dealers will "[n]ot charge or pass along all or any portion of a fee" the Dealer owed to TrueCar. Rose would have to attempt to prove the contrary to prevail on his theory, i.e., that the various Certified Dealers in fact violated the Service Requirements and passed the fees onto consumers in violation of their contractual agreement. That attempt, however, would destroy any prospect of predominant common questions of fact among the putative class. Individualized inquiries or a series "mini-trials" would be necessary in which Rose would try to show, as to each of the more than 400,000 vehicle transactions contemplated by the California-wide class, that the dealer in question passed through to the customer some or all of the cost of the subscription fee it paid to TrueCar when setting the price the customer paid.[5]

Perhaps it goes without saying, but that is not a "'theory of recovery . . . [that], as an analytical matter, [is] likely to prove amenable to class treatment.'" (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) Thus, even though, as the trial court found, Rose's case also "present[ed] the common legal question" of whether TrueCar violated Vehicle Code sections 11700 and 11735 by operating as an automobile dealer and/or broker, the court did not abuse its discretion by determining common questions did not predominate

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[5] The record also indicates individualized inquiries would be necessary to determine the appropriate measure of restitution for each class member if liability were established. Certified Dealers who made more than the estimated number of approved sales in a given month did not have to pay an increased subscription fee. The amount purportedly passed through to consumers would thus vary in some months.

given the individualized inquiries that would be necessary to determine whether the putative class of consumers was entitled to relief.

DISPOSITION

The order denying class certification is affirmed. Respondent shall recover its costs on appeal.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.