

CONSUMER RESEARCH  
AND PROTECTION, INC.,

Plaintiff,

vs.

FRED MEYER STORES, INC.,

Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT (CASE MOTION #1); ORDER DENYING DEFENDANT'S CROSS-  
MOTION FOR SUMMARY JUDGMENT (CASE MOTION #3)**

This is a putative class action suit for damages and injunctive relief under the Unfair Trade Practices and Consumer Protection Act (“UTPA”).<sup>1</sup> Consumer Research and Protection, Inc. (“CRP”) alleges Fred Meyer Stores, Inc. (“Fred Meyer”) posted a placard to advise prospective battery purchasers that Alaska law requires Fred Meyer to collect a “core charge” for each battery sold, when in fact Alaska law does not require such a charge. CRP contends that this alleged misrepresentation of Alaska law violates the UTPA. Alaska law provides a private right of action to a person who suffers an ascertainable loss of money caused by a violation of the UTPA in the amount of “three

3AN-17-04679 CI  
Page 1 of 8

times the actual damages or \$500, whichever is greater.”<sup>2</sup> Alaska law also authorizes a private party to seek an injunction prohibiting the violation of the UTPA.<sup>3</sup>

## II. BACKGROUND

On October 23, 2016, Plaintiff purchased a car battery from the Fred Meyer store located at 2300 Abbott Road, Anchorage.<sup>4</sup> Plaintiff paid \$106.99 for the battery and \$15.00 for “core deposit.”<sup>5</sup> Plaintiff testifies she read a placard posted in the battery department which stated “It’s the law. When you buy a battery, state law also requires us to include a core charge of five dollars or more if you do not return your old battery for exchange.”<sup>6</sup> Plaintiff filed a complaint alleging that Fred Meyer charged a core charge, which ranged from \$5 to \$16 depending on the type of battery purchased, and that CRP paid Fred Meyer a core charge of \$15. CRP seeks class certification, damages for itself of \$500 and a like amount for each class member, an injunction prohibiting Fred Meyer from displaying the placard, disgorgement of any un-refunded core charges, and costs and full reasonable attorney’s fees.<sup>7</sup>

After motion by Fred Meyer, the case was removed to U.S. District Court for the District of Alaska, but remanded back to Superior Court. Plaintiff then moved for partial summary judgment on two issues: (1) whether Alaska law requires Fred Meyer to impose a core charge when consumers purchase a lead acid battery; and, (2) whether Fred

---

<sup>2</sup> AS 45.50.531(a).

<sup>3</sup> AS 45.50.535(a).

<sup>4</sup> Affidavit of Alicia Martinez.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> AS 45.50.537.

Meyer's placard telling consumers that state law requires the imposition of a core charge was a material misrepresentation in violation of Alaska's UTPA. Fred Meyer opposes the motion, arguing there is a question of fact whether the placard was a "material misrepresentation," and cross moves for summary judgment on the issue of damages, arguing CRP has not established the alleged misrepresentation caused damages.

### **III. SUMMARY JUDGMENT STANDARD**

Alaska Civil Rule 56(c) provides that summary judgment should be granted if the pleadings, depositions, admissions, interrogatories, affidavits, or other admissible evidence show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law.<sup>8</sup>

The standard for finding a genuine issue of fact is lenient. All reasonable inferences, or inferences that a reasonable fact finder could draw from the evidence, are drawn in favor of the non-movant.<sup>9</sup> The burden begins with the moving party, who must make a prima facie showing that it is entitled to judgment on the established facts as a matter of law. Upon such a showing, the non-moving party must demonstrate that there is a genuine issue of fact by showing that it can produce admissible evidence reasonably tending to dispute the movant's evidence.<sup>10</sup> The non-moving party cannot rely on mere allegations, mere assertions of fact in pleadings and memoranda, or unsupported

---

<sup>8</sup> *Broderick v. King's Way Assembly of God*, 808 P.2d 1211, 125 (Alaska 1991).

<sup>9</sup> *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 449 (Alaska 2002).

<sup>10</sup> *Broderick* at 1215.

assumptions and speculation.<sup>11</sup> The non-moving party must only present some, but more than a mere scintilla of, contrary evidence.<sup>12</sup>

#### **IV. ANALYSIS**

##### **A. The Unfair Trade Practices Act**

The Unfair Trade Practices Act (UTPA) prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce.”<sup>13</sup> While subsection (a) broadly declares unfair or deceptive acts to be unlawful, subsection (b) provides a non-exhaustive list of acts that are “unfair methods of competition” and “unfair or deceptive acts or practices.”

The UTPA is a remedial statute, which Alaska courts liberally construe.<sup>14</sup> A claim under the UTPA requires two elements:

(1) that the defendant is engaged in trade or commerce; and (2) that in the conduct of trade or commerce, an unfair act or practice has occurred....

The Alaska Supreme Court has held whether an act or practice is deceptive is determined simply by asking “whether it has the capacity to deceive.” The plaintiff need not prove that the defendant intended to deceive; it is enough to show that the acts and practices were “capable of being interpreted in a misleading

---

<sup>11</sup> *Witt v. State, Dep’t of Corrections*, 75 P.3d 1030, 1033 (Alaska 2003).

<sup>12</sup> *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

<sup>13</sup> AS §45.50.471(a).

<sup>14</sup> *State v. O’Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980).

way.”<sup>15</sup> Moreover, “intent, scienter, actual reliance or damages, and even actual deception are all unnecessary to show deception” under the UTPA.<sup>16</sup>

#### **B. CRP’s Motion for Partial Summary Judgment**

CRP argues there is no Alaska law requiring Fred Meyer to impose a \$5-\$16 core charge and therefore Fred Meyer is in violation of the UTPA. Fred Meyer does not dispute there is no Alaska law requiring the charge; Fred Meyer does dispute the conclusion the placard is a violation of the UTPA as a matter of law. Fred Meyer argues a question of fact remains whether the placard is deceptive to consumers, and whether the alleged misrepresentation is “material.”

Fred Meyer has applied the incorrect standard to determining deception. CRP does not need to submit evidence to prove the sign had a capacity to deceive. The standard for deceptive acts is an objective standard. If the representation has the capacity to deceive, it is deceptive as a matter of law. The court finds the placard deceptive, as a matter of law, because it states “state law requires” when Alaska state law does not require a core charge.

Fred Meyer goes on to argue the placard is only incorrect as it applies in Alaska. In other words, the placard itself does not contain a mistake because other states do require a core charge – the placard transmits inaccurate information only when posted in

---

<sup>15</sup> *Kenai Chrysler Center, Inc. v. Denison*, 167 P.3d 1240, 1255 (Alaska 2007)(quoting *O’Neill Inv.*, 609 P.2d at 534-35).

<sup>16</sup> *ASRC Energy Services Power & Comm., LLC v. Golden Valley Elec. Ass’n, Inc.*, 267 P.3d 1151, 1163 (Alaska 2011) (quoting National Consumer Law Center, *Unfair & Deceptive Acts & Practices*, § 4.2.3.1, at 190 (citing *ITMO Cliffdale Assoc. Inc, et al.*, 103 F.T.C. 110 (1984))).

Alaska because core charges are not required by Alaska state law. It is hard to see how this argument helps Fred Meyer's position. Customers in Fred Meyer Alaska stores could not reasonably be expected to draw such a distinction, i.e., the average customer would not know or question that Alaska law does not require core charges, whereas other states do require them.

In addition to arguing that the sign is not deceptive as a matter of law, Fred Meyer argues the misrepresentation is not "material." CRP disagrees, and contends that a misrepresentation concerning price is material as a matter of law. The court agrees with CRP on this issue for several reasons. First, the court is persuaded that misrepresentations concerning a fee or surcharge are material as a matter of law is in accord with other jurisdictions.<sup>17</sup> Second, Fred Meyer has misapplied a definition of material to the facts by arguing it is not material because it did not affect plaintiff's purchasing decision. Fred Meyer's definition of material as something likely to affect a buyer's decision is correct, but in this case, it is incomplete. The misrepresentation in this case would not affect a buyer's decision because it gives the impression that a consumer has no choice but to pay the core charge. Wherever one would buy a battery in Alaska, a consumer would be expecting the state required core charge in addition to the price of the battery. For this reason, the court finds that the misrepresentation was material.

### **C. Fred Meyer's Cross-Motion for Partial Summary Judgment**

---

<sup>17</sup> See *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 170 P.3d 10 (Wash. 2007), *Long v. Dell, Inc.*, 93 A.3d 988 (R.I. 2014), *Latman v. Costa Cruise Lines, N.V.*, 758 So.2d 699 (Fla. App. 2000).

Fred Meyer moves for Partial Summary Judgment alleging CRP is not entitled to damages because it has not shown causation under AS 45.50.531.

Alaska Statute 45.50.531 provides for damages for “(a) a person who suffers an ascertainable loss of money or property as a result of another person’s act or practice declared unlawful by AS 45.50.471 may bring a civil action to recover for each unlawful act or practice three times the actual damages or \$500, whichever is greater...”

Fred Meyer argues CRP has not submitted any evidence to prove damages are “a result of” the placard. Fred Meyer asserts the deposition testimony of Alicia Martinez does not establish factual evidence that Ms. Martinez relied on the placard when making her purchasing decision. CRP asserts Ms. Martinez’s affidavit testimony raises genuine issues of material fact.

Fred Meyer objects to the use of Ms. Martinez’s second affidavit because Fred Meyer asserts she has contradicted her deposition testimony. However, viewing the record in the light most favorable to CRP, as the non-moving party on the Cross Motion, Ms. Martinez’s affidavit testimony could be seen as explanation of her testimony at deposition. CRP has produced evidence that could reasonably dispute Fred Meyer’s position. Fred Meyer is not entitled to summary judgment on causation.

## **V. CONCLUSION**

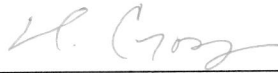
The court finds Fred Meyer in violation of AS 45.50.471(a) as a matter of law for posting the aforementioned placard and collecting a core charge under the guise of a state law requirement.

Therefore, Plaintiff's Motion for Partial Summary Judgment is GRANTED.

Defendant's Cross Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 16 May 2018.

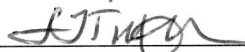


---

Dani Crosby  
Superior Court Judge

I certify that on 5/16/18 a copy  
of the above was mailed to each of the  
following at their address of record:

J. DAVIS / T. COOK / M. WILHELM



---

Judicial Assistant