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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

SUZUKI MOTOR CORPORATION, ) SA CV 96-340 AHS (ANx)  
)  
Plaintiff, )  
)  
v. ) ORDER GRANTING DEFENDANT'S  
) MOTION FOR SUMMARY JUDGMENT  
) (APPENDICES AND RELATED  
CONSUMERS UNION OF UNITED ) ORDERS OMITTED)  
STATES, INC., )  
)  
Defendant. )  
\_\_\_\_\_ )

I.

PROCEDURAL BACKGROUND

The Court heard oral argument on defendant's motion for summary judgment on June 28, 1999. After complete review of all declarations and exhibits, as hereinafter described, review of the Reporter's Transcript of counsels' oral arguments, and additional independent research, the Court, by this Order, grants defendant's motion.

Consumers Union of United States, Inc. ("CU") filed a Motion for Summary Judgment on May 3, 1999. In support of its motion, CU filed a number of declarations,<sup>1</sup> as well as a

\_\_\_\_\_ <sup>1</sup> The declarations of Karpatkin, Pittle, Knoll, Landau,  
(continued...)

1 Request for Judicial Notice, an Appendix of Extrajudicial  
2 Authorities, the Statement of Uncontroverted Facts and  
3 Conclusions of Law, and a proposed Judgment. Plaintiff Suzuki  
4 Motor Corporation ("Suzuki") filed its opposition on May 24,  
5 1999. In addition to its Memorandum of Points and  
6 Authorities, Suzuki filed opposition to CU's Request for  
7 Judicial Notice, opposition to CU's documentary exhibits  
8 attached to the declarations of Baird and Williams, its  
9 Statement of Genuine Issues ("GI"), as required by Local Rule  
10 7.14.2, objections to CU's declarations, and a number of  
11 declarations in support of its opposition.<sup>2</sup> CU filed its  
12 reply on June 7, 1999. CU submitted exhibits 393-400 as  
13 attachments to the Supplemental Declaration of Williams. In  
14 addition, CU filed Objections to Suzuki's declarations, a  
15 Response to Suzuki's Statement of Genuine Issues, a Response  
16 to Suzuki's objections to CU's Request for Judicial Notice, a  
17 Response to Suzuki's objections to documentary exhibits  
18 attached to the declarations of Baird and Williams, and a  
19 Response to Suzuki's objections to declarations. With leave  
20 of Court, Suzuki filed responses to CU's evidentiary  
21 objections on June 23, 1999.

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24 <sup>1</sup>(...continued)

24 Sheehan, Wood, Small, Conkling, Allen, Nappi, Baird (attached to  
25 which are Volumes I through VI containing exhibits 1-148), and  
26 Williams (attached to which are Exhibits 149-182).

26 <sup>2</sup> The declarations of Reichert, McCarthy,  
27 Cooperrider, Yarborough, Edwards, Guthman, Bottomley, Riley,  
28 Rudd, Rogers, Rasmussen, Murray, Schwartz, Goldie, Gomez,  
Heywood, Jacobs, Lundquist, McCloskey, Ouellette, Singley,  
Smith, Theis, Beasley, Garcia, O'Neal, Seidle, Strauss,  
Tagland, in addition to exhibits 183-392.

1           On July 1, 1999, the parties were requested, via  
2 minute order, to prepare, serve, and lodge proposed orders  
3 regarding their evidentiary objections. The parties then  
4 lodged proposed orders on July 19, 1999. Having read and  
5 considered the parties' arguments in support of or against  
6 admissibility, the Court separately files today those orders  
7 which now contain the Court's rulings on the evidentiary  
8 objections. Generally speaking, most of the plaintiff's  
9 hearsay objections are overruled because many statements and  
10 documents are not offered for the truth of the matter stated  
11 but as circumstantial evidence bearing on the issue in  
12 controversy. On the other hand, many of the defendant's  
13 objections to plaintiff's declarations are sustained because  
14 the witnesses are not qualified to opine on defendant's state  
15 of mind; to the extent that the declarants state factual  
16 matter, however, their testimony is accepted.

17           In addition, the Court this date separately files,  
18 as Appendix A to Order Granting Defendant's Motion for Summary  
19 Judgment, a list of all exhibits submitted by defendant CU in  
20 support of its motion as well as its reply. The Court also  
21 separately files, as Appendix B to Order Granting Defendant's  
22 Motion for Summary Judgment, a list of all exhibits submitted  
23 on behalf of plaintiff Suzuki, all of which, whether text,  
24 photo, or video, have been reviewed by the Court. The Court  
25 has also received, read, and considered plaintiff's Notice of  
26 Recent Additional Authority Re Summary Judgment, filed  
27 September 23, 1999, and defendant's response thereto filed  
28 September 24, 1999. Having considered the parties' arguments  
in support of and against judicial notice, the Court denies

1 Defendant's Request for Judicial Notice. Certain court  
2 decisions contained in the Request for Judicial Notice are  
3 otherwise admitted in connection with declarations of  
4 witnesses for limited purposes, as ruled upon in the  
5 aforementioned orders on evidentiary objections. The  
6 Court sustains Suzuki's objections to CU's Objections to  
7 Evidence Set Forth in Suzuki's Statement of Genuine Issues and  
8 grants Suzuki's request that those objections be disregarded.

9 **II.**

10 **FACTUAL OVERVIEW**

11 This action stems from an article that originally  
12 appeared in the July 1988 issue of Consumer Reports ("CR"), a  
13 monthly magazine published by defendant CU. In the article  
14 (Ex. 105), CU opined that the Suzuki Samurai ("Samurai") was  
15 "Not Acceptable" because CU's tests showed a tendency for the  
16 car to roll over during an accident avoidance maneuver.  
17 Plaintiff Suzuki Motor Corp. Japan is the manufacturer of the  
18 Samurai, a sports-utility vehicle. American Suzuki Motor  
19 Corp., the American distributor of the Samurai, was originally  
20 a plaintiff but was dismissed in the order granting  
21 defendant's Motion to Dismiss on February 3, 1997.

22 In this action, Suzuki asserts that statements  
23 referring to the Samurai's rollover tendency, which initially  
24 appeared in the 1988 CR article and which have been repeated  
25 in various CU and other publications, are false, disparaged  
26 the Samurai, and caused Suzuki to suffer damages. While the  
27 original complaint and the supplemental complaint contained 22  
28 claims, including defamation and libel claims, the First  
Amended

1 Complaint contains only three claims, two product-  
2 disparagement claims and one claim under California Business &  
3 Professions Code § 17200. The Court denied Suzuki's Motion  
4 for Leave to File a Second Amended Complaint on April 13,  
5 1999.

6 In this motion, CU challenges the sufficiency of  
7 plaintiff's evidence supporting one essential factual element  
8 of its case: whether CU acted with actual malice in reporting  
9 on the Samurai on the basis of its 1988 testing. Suzuki  
10 points to a number of facts, culled from a voluminous record  
11 compiled by both parties, that it contends support a finding  
12 of malice. Suzuki highlights the following:

13 1. After more than three dozen runs in the Samurai  
14 on CU's established avoidance maneuver, CU's professional  
15 drivers rated it highest of all the vehicles, and expressly  
16 stated "no tendency to tip up" and "no real problem" in the  
17 written evaluations. See Plaintiff's Statement of Genuine  
18 Issues ("GI"), ¶¶ 440-41;

19 2. After the Samurai completed the standard testing  
20 without incident, CU's editor-in-chief, Irwin Landau, remarked  
21 that "If you can't find someone to roll this car, I will."  
22 Motion at 23-25; GI ¶ 445;

23 3. CU's technical director, R. David Pittle, then  
24 asked to drive the Samurai. After nine more runs and after  
25 departing from the established track, the Samurai tipped up.  
26 Motion at 24-25; GI ¶¶ 452-54;

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1           4. After the tip-up, Pittle directed the chief of  
2 CU's auto test division, Robert Knoll, to prepare a new  
3 "modified emergency avoidance maneuver" and replicate Pittle's  
4 path. GI ¶¶465-67;

5           5. When driver Richard Small was able to tip up the  
6 Samurai on the new course after multiple successful runs by  
7 another driver, the test course video and audio tape recorded  
8 CU employees cheering, and someone said "All right Ricky  
9 baby!"

10 Motion at 22; GI ¶¶ 478-83;

11           6. Landau drafted the article reviewing the Samurai  
12 as "Not Acceptable" before the auto test division prepared its  
13 usual report on the testing and before the runs on the  
14 modified course had been completed by the other vehicles,  
15 including one vehicle whose performance was lauded by Landau  
16 in the draft. GI ¶¶ 521-26;

17           7. On the last day of testing, after Landau  
18 completed the draft and Pittle signed off on it, and CU had  
19 begun to prepare for a press conference to announce the  
20 findings, Pittle saw that the drivers were unable to tip the  
21 Samurai and exclaimed "Can't you just see it, we get no lift  
22 off the ground, Oh God!"

23 Motion at 22; GI ¶ 487;

24           8. CU refused to reconsider the validity of its  
25 testing despite the federal government's conclusion, in  
26 September 1988, that CU's "test procedures . . . do not have a  
27 scientific basis and cannot be linked to real-world crash  
28 avoidance needs, or actual crash data" and similar findings by  
other governments. GI ¶ 588;

1 9. By 1995, CU knew that one of its former test  
2 drivers, Lee Baldrick, purchased a Samurai for his own  
3 personal use. GI ¶¶ 636-44;

4 10. At the time of CU's testing in 1988, CU was  
5 financially overextended due to capital investments. Motion  
6 at 20-22; GI ¶¶ 732-35.

7 Suzuki maintains that the totality of evidence that  
8 it has presented, and especially the foregoing excerpts,  
9 satisfies the requirements of the malice standard and  
10 justifies trial proceedings.

### 11 III.

#### 12 DISCUSSION

##### 13 A. Standard of Review

14 To avoid an adverse grant of summary judgment,  
15 Suzuki must "set forth specific facts showing that there is a  
16 genuine issue for trial." Anderson v. Liberty Lobby, Inc.,  
17 477 U.S. 242, 250, 91 L. Ed. 2d 202, 212-213, 106 S. Ct. 2505,  
18 2511 (1986) (quoting Fed. R. Civ. P. 56(e)). The plain  
19 language of Rule 56(c) mandates the entry of summary judgment  
20 against a party who fails to make a showing sufficient to  
21 establish the existence of an element essential to that  
22 party's case and on which that party will bear the burden of  
23 proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322,  
24 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The inquiry  
25 involved in a ruling on a motion for summary judgment  
26 necessarily implicates the substantive evidentiary standard of  
27 proof that would apply at the trial on the merits, i.e., the  
28 "actual quantum and quality of proof necessary to support

1 liability" at trial. Liberty Lobby, 477 U.S. at 252, 254.  
2 The mere existence of a scintilla of evidence in support of  
3 the plaintiff's position will be insufficient; there must be  
4 evidence on which the jury could reasonably find for the  
5 plaintiff. See id.

6           There is no disagreement that plaintiff must prove  
7 actual malice by "clear and convincing evidence." See  
8 Plaintiff's Opposition to Motion for Summary Judgment on Issue  
9 of Actual Malice at 6. In other words, the Court must  
10 determine whether a reasonable fact-finder could conclude that  
11 the plaintiff has shown actual malice with convincing clarity.  
12 Liberty Lobby, 477 U.S. at 252. Actual malice is a term of  
13 art denoting deliberate or reckless falsification. See Masson  
14 v. New Yorker, 501 U.S. 496, 499, 115 L. Ed. 2d 447, 111 S.  
15 Ct. 2419, 2424 (1991). Malice entails a showing that the  
16 defendant made a false statement "'with knowledge that the  
17 statement was false or with reckless disregard as to whether  
18 or not it was true.'" Harte-Hanks Communications, Inc. v.  
19 Connaughton, 491 U.S. 657, 667, 105 L. Ed. 2d 562, 109 S. Ct.  
20 2678, 2685 (1989) (quoting Hustler Magazine Inc. v. Falwell,  
21 485 U.S. 46, 56 (1988)). Put another way, defendant must have  
22 made the decision to publish the relevant information with a  
23 "'high degree of awareness of . . . probable falsity,'" or  
24 defendant must have entertained "'serious doubts as to the  
25 truth of [the] publication.'" Harte-Hanks Communications, 491  
26 U.S. at 667 (quoting Garrison v. Louisiana, 379 U.S. 64, 74  
27 (1964) and St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

28           Whether a plaintiff has shown actual malice is  
determined on a case-by-case basis, and the courts have a



1 constitutional duty to "exercise independent judgment and  
2 determine whether the record establishes actual malice with  
3 convincing clarity." Bose Corp. v. Consumers Union of United  
4 States, Inc., 466 U.S. 485, 514, 80 L. Ed. 2d 502, 104 S. Ct.  
5 1949, 1967 (1984).

6 B. Application

7 The merits of CU's motion for summary judgment do  
8 not turn on the stability of the Samurai or even the soundness  
9 of CU's testing methodology. Rather, the issue is whether  
10 plaintiff has satisfied its evidentiary burden of showing with  
11 convincing clarity that CU reported on the Samurai with actual  
12 malice. Having viewed all the evidence in the light most  
13 favorable to plaintiff, in making a "case-by-case" assessment  
14 by looking to all of plaintiff's evidence, and, compressing  
15 cartloads of evidence into a legal conclusion, the Court holds  
16 that plaintiff has not shown malice by clear and convincing  
17 evidence.

18 First, the trier of fact must necessarily view the  
19 context of CU's testing of the Samurai. The trier of fact  
20 could not be expected to disregard the nature of defendant's  
21 business - testing and reporting on consumer products - nor  
22 would plaintiff so urge, and it would be error for a court to  
23 so instruct. Thus, it is clear that, based on the information  
24 CU had gathered, it was concerned about the safety of the  
25 Suzuki Samurai. Defendant was confident that its tests would  
26 disclose road-safety dangers, if there were any. This pre-  
27 testing concern is not an impermissible mindset for a  
28 publisher, particularly one which proclaims its mission as  
protecting the consumer, and particularly given the background

1 information already known about the Samurai. When the tip-up  
2 problem with the vehicle's stability appeared, defendant put  
3 the car through more rigorous tests. Plaintiff emphasizes the  
4 redesigned test (the "short course") in particular, as if  
5 defendant had irreversibly committed itself to testing all  
6 products the same, irrespective of new design or technology.  
7 All these facts, while relevant, do not evince malice as a  
8 matter of law at the requisite legal standard.

9 Plaintiff's reliance on CU's overextended financial  
10 status, supposedly due to its building program, is one example  
11 of plaintiff's attempt to impute a financial motive to  
12 defendant in causing distribution of its Samurai review.  
13 While a motive in publishing material may bear on malice, the  
14 Supreme Court has settled the issue by holding that a goal of  
15 increasing one's profits through publishing material is not  
16 sufficient to prove actual malice. Harte-Hanks  
17 Communications, 491 U.S. at 667 ("If profit motive could  
18 somehow strip communications of the otherwise available  
19 constitutional protection, our cases from New York Times to  
20 Hustler Magazine would be little more than empty vessels.").

21 Likewise, plaintiff does not explain why CU's  
22 difference of opinion with the National Highway Transportation  
23 and Safety Administration ("NHTSA," in the evidence)<sup>3</sup> over the  
24 acceptability of the driving test should compel the trier of  
25 fact to conclude that defendant is for that reason intent upon

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27  
28 <sup>3</sup> See 49 U.S.C. § 105(a) and 49 C.F.R. § 501.1, et seq.  
See also, Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Ins. Co.,  
463 U. S. 29, 33, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983),  
discussing origin and purpose of NHTSA.

1 deliberate or reckless falsification. To the contrary, part of  
2 the First Amendment's protection has to do with disagreeing with  
3 the government. See New York Times v. Sullivan, 376 U.S. 254,  
4 270-71, 11 L. Ed. 2d 686, 84 S. Ct. 710, 721 (1964) ([D]ebate on  
5 public issues . . . may well include vehement, caustic, and  
6 sometimes unpleasantly sharp attacks on government and public  
7 officials." citing Terminiello v. Chicago, 337 U.S. 1, 4  
8 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)). While  
9 the NHTSA evidence is admissible in support of plaintiff's  
10 theory of its case, it is not shown to be evidence entitled to  
11 greater weight than any other study or opinion regarding vehicle  
12 testing methods.

13 Viewing the evidence presented through the "prism of  
14 the substantive evidentiary burden," as stated in Liberty Lobby,  
15 the Court concludes that a jury could not reasonably find that  
16 plaintiff proves its case by the quality and quantity of  
17 evidence required by governing law. Defendant is therefore  
18 entitled to judgment as a matter of law.

#### 19 IV.

#### 20 CONCLUSION

21 Accordingly and for the foregoing reasons, the  
22 defendant's Motion for Summary Judgment is granted. The Court  
23 has modified, signed, and filed defendant's proposed Statement  
24 of Uncontroverted Facts and Conclusions of Law as well as  
25 defendant's proposed Judgment.

26 The Clerk is instructed to file the following  
27 documents:

28 1. Order Granting Defendant's Motion for Summary  
Judgment;

1           2. Appendix A to Order Granting Defendant's Motion  
2 for Summary Judgment (List of Defendant's Exhibits);

3           3. Appendix B to Order Granting Defendant's Motion  
4 for Summary Judgment (List of Plaintiff's Exhibits);

5           4. Suzuki Motor Corporation's Order on Evidentiary  
6 Objections, lodged July 19, 1999;

7           5. Order re Defendant Consumers Union's Objections  
8 to Declarations, lodged July 19, 1999;

9           6. Defendant's proposed Statement of Uncontroverted  
10 Facts and Conclusions of Law, as modified by the Court;

11           7. Judgment for defendant.

12           IT IS SO ORDERED.

13           IT IS FURTHER ORDERED that the Clerk shall serve a  
14 copy of this Order on counsel for all parties in this action  
15 and enter the Judgment.

16           Dated: May \_\_\_\_, 2000.

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ALICEMARIE H. STOTLER  
UNITED STATES DISTRICT JUDGE