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UNITED STATES: No Likelihood of Confusion Found Between “Brand Twins”: DRIVEWISE vs. DRIVE WISE

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On December 22, 2017, the District Court for the Central District of California reversed an advisory jury’s verdict in favor of the plaintiff Allstate Insurance Company (Allstate) on the issue of likelihood of confusion, finding that the plaintiff had not established that the defendant Kia Motors America’s (Kia) use of the mark DRIVE WISE created a likelihood of confusion with Allstate’s DRIVEWISE mark. *Allstate Insurance Company v. Kia Motors America, Inc., et al.*, No. CV-16-6108 SJO (AGRx) (C.D. Cal. Dec. 22, 2017).

Allstate, an insurance company, commenced a program in 2010 called Drivewise which tracks driving performance and provides a driving risk profile, allowing insurers to lower or raise insurance rates based on a driver’s performance and profile. The Drivewise program consists of an On Board Diagnostics II device (pictured below) and a mobile application that tracks a driver’s mileage, brake activity, speed, and other driving activities. Allstate owns several U.S. trademark registrations for the mark DRIVEWISE in International Classes 9, 35, 36, and 42.



Kia, an automobile manufacturer and distributor of Kia-branded cars, adopted the mark DRIVE WISE as a sub-brand for a suite of advanced driver assistance systems (ADAS) which are installed within Kia-branded automobiles as an optional add-on package. The ADAS includes but is not limited to blind-spot detection, lane departure warning systems, and smart cruise control. The Drive Wise ADAS is only available for Kia-branded automobiles and provided to consumers purchasing Kia-branded automobiles. Kia filed applications for registration of its marks KIA DRIVE WISE and DRIVE WISE (stylized letters) (pictured below) in International Class 12.

After the advisory jury verdict in November 2017, the court considered the damages portion without a jury and denied Allstate’s request for a permanent injunction. In the court’s finding of no likelihood of confusion between Allstate’s DRIVEWISE mark and Kia’s DRIVE WISE mark, the court carefully weighed the eight factors in the likelihood of confusion test promulgated by the Ninth Circuit in *AMF, Inc. v. Sleekcraft Boats*. 599 F.2d 341 (9th Cir. 1979).

Of note, the court concluded that Allstate had a valid, protectable trademark in DRIVEWISE, but that the mark was conceptually weak and entitled to only a narrow scope of protection. The court found Allstate had not shown that its

DRIVEWISE mark had acquired any marketplace recognition and noted that the parties stipulated that DRIVEWISE is a suggestive mark. The court was not persuaded by Allstate's testimony concerning development and operations expenditures of \$400 million and \$47 million in advertising expenditures for the Drivewise program. In fact, the court seemed perplexed that Allstate put forth no evidence in the form of studies or surveys to gauge consumer confusion "despite having the means and ability."

The court further concluded that Allstate's driver performance and tracking program and Kia's safety technology vehicle options are not closely related products and services and are not competitive. Allstate's Drivewise program was a complement to Allstate's insurance products and did not include any features of Kia's Drive Wise ADAS product installed in only Kia-branded automobiles. The disparity in cost of the respective products and services was significant, the court found; Allstate's service is essentially free to a consumer whereas Kia-branded automobiles with optional ADAS add-on would cost a consumer thousands of dollars. Another key factor in Kia's favor was the significant care of a consumer in purchasing a Kia-branded automobile.

Considering the totality of the *Sleekcraft* factors, the court held that Allstate failed to meet its burden that Kia's use of Drive Wise was "likely to cause confusion among ordinary consumers as to the source, sponsorship, affiliation, or approval of its goods."

Allstate has not yet filed an appeal of the decision.

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