

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-2080

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
)
FORTY-NINER SIERRA RESOURCES,) Protest No. PR-1973-05
INC., dba FORTY-NINER SUBARU, and)
RICHARD E. WILMSHURST,)
)
Protestants,)
)
v.)
)
SUBARU OF AMERICA,)
)
Respondent.)

DECISION

At its regularly scheduled meeting of January 26, 2006, the Public members of the Board met and considered the administrative record and "Proposed Order Granting Respondent's Motion to Dismiss Protest for Review of Warranty Repair Payment Reasonableness [Vehicle Code Sections 3064, 3065, and 3065.1]" in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 26th DAY OF JANUARY 2006.



GLENN E. STEVENS
Presiding Public Member
New Motor Vehicle Board

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2 Sacramento, California 95814
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of)
12 FORTY-NINER SIERRA RESOURCES,)
INC., dba FORTY-NINER SUBARU, and)
13 RICHARD E. WILMSHURST,)
14 Protestants,)
15 v.)
16 SUBARU OF AMERICA,)
17 Respondent.)

PROTEST No. PR-1973-05

PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTEST FOR REVIEW OF
WARRANTY REPAIR PAYMENT
REASONABLENESS [Vehicle Code
Sections 3064, 3065, 3065.1]

18 To: Richard E. Wilmshurst, In Pro Per
19 Representing Protestant
20 Post Office Box 33
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21 Maurice Sanchez, Esq.
22 Amy Toboco Kun, Esq.
BAKER & HOSTETLER LLP
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24 Suite 900
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1 OF WARRANTY FORMULA'S (SIC) FILED WITH THE BOARD [Vehicle Code §
2 3065(a)]."

3 8. On December 13, 2005, SOA filed its "REPLY IN SUPPORT OF
4 MOTION TO DISMISS PROTEST FOR REVIEW OF WARRANTY REPAIR PAYMENT
5 REASONABLENESS".

6 9. The telephonic hearing on the motion was held on December
7 20, 2005.

8 THE PROTEST

9 FACTUAL ALLEGATIONS CONTAINED IN THE PROTEST FILED BY FORTY-NINER

10 10. Forty-Niner alleges that:

11 A. "SOA has not yet filed its schedule or formula for
12 determining the reasonableness of its warranty times, hourly
13 rates, or the parts billed by the dealer used in a warranty
14 repair." (Protest, page 1, lines 23-25)

15 B. "SOA has failed to provide the NMVB with the warranty
16 information set forth as required in M.V. Code § 3065. The 230
17 pages filed in 1997 are the only warranty flat rate manual and
18 SOA Maintenance Plans showing times without specific parts
19 pricing." (Protest, page 2, lines 21-23)

20 C. "The WARRANTY FLAT RATE TIME ALLOWANCES submitted to the
21 NMVB show times only for specific repair operations; there is no
22 schedule or formula filed to determine the hourly time schedule
23 or the hourly rate paid to each dealer." (Protest, page 2, lines
24 24-26)

25 D. "The MAINTENANCE PLANS do not describe a breakdown
26 between labor or parts and the price paid for each operation.
27 There is no schedule of price or a formula provided." (Protest,
28 page 3, lines 1-3)

1 E. "SOA has designated two types of areas and two types of
2 warranty parts method and amounts of payment: the Retail States
3 and the Non-Retail States. (Protest, page 3, lines 4-5) Forty-
4 Niner then states: "As an example of Non-Retail States method of
5 payment, FORTY-NINER attaches three pages from an SOA answer to
6 an interrogatory, which set forth the Non-Retail States
7 schedule." (Protest, page 3, lines 5-7) This was attached as
8 Exhibit B to the protest.

9 F. "Forty-Niner believes SOA must pay each dealer in
10 California for warranty repairs at the same rate as parts and
11 labor are billed to a retail customer for like repairs."
12 (Protest, page 3, lines 8-9) Forty-Niner attached Exhibit C to
13 the protest and states: "Exhibit C is an explanation of how the
14 provisions of the Song-Beverly Consumer Warranty Act apply to the
15 FORTY-NINER/SOA parts warranty relationship." (Protest, page 3,
16 lines 9-11)

17 ISSUES REQUESTED TO BE DETERMINED AS STATED IN THE PROTEST

18 11. The issues in their entirety as presented to the Board in
19 the protest are:

20 Forty-Niner requests a determination of the following
21 issues:

22 A. Is the SOA parts reimbursement schedule presently
23 being applied to SOA's dealers in California reasonable?

24 B. Does the SOA parts reimbursement schedule presently
25 being applied to SOA's dealers in California meet the
26 requirements of the Song-Beverly Consumer Warranty Act?

27 C. Is the SOA schedule to establish times for
28 warranty operations and Added Security coverage operations

1 reasonable?

2 D. Is the manner in which SOA establishes the warranty
3 hourly rate paid to the dealers reasonable?" (Protest, page
4 3, lines 12-21)³

5 THE "MOTION TO DISMISS PROTEST FOR REVIEW OF
6 WARRANTY REPAIR PAYMENT REASONABLENESS"

7 THE CIVIL LITIGATION BETWEEN THE PARTIES INITIATED
8 BY FORTY-NINER IN OCTOBER 1998 AND THE ENTRY OF
9 SUMMARY JUDGMENT IN FAVOR OF SOA IN JANUARY 2005

10 12. In connection with its motion to dismiss the protest, SOA
11 has provided documents from a class action and private attorney-
12 general action lawsuit initiated by Forty-Niner on October 27, 1998
13 against SOA. Forty-Niner is the lead plaintiff in this suit, which,
14 as does this protest, challenges the propriety of the payment of
15 warranty claims by SOA. The suit, originally filed in the Superior
16 Court of Calaveras County on October 27, 1998, was removed to the
17 United States District Court for the Eastern District of California
18 (Fresno) on August 30, 2000. This civil suit was not concluded at the
19 trial level until the passage of 6+ years when, in January 2005, the
20 federal district court ruled in favor of SOA and a judgment of
21 dismissal was entered.

22 13. Forty-Niner did not dispute the accuracy of SOA's factual
23 recitals pertaining to the federal litigation as contained in the
24 pleadings filed in connection with this Motion to Dismiss, and Forty-
25 Niner's only reference to the documents provided by SOA was in Forty-
26 Niner's "OPPOSITION TO SUBARU OF AMERICA'S MOTION TO DISMISS

27 ³ It does not appear that any of the allegations or issues presented relate to
28 section 3064 or 3065.1 despite the inclusion of these two sections in the caption of
the protest filed by Forty-Niner. See footnote 2.

1 PROTEST...". In this document, while discussing the scope of the
2 federal court decision, Forty-Niner stated, "SOA has provided exhibits
3 that define the District Court action and the court's decision."
4 (Opposition, page 5, lines 3-4)

5 14. As will be discussed below, the federal litigation involved
6 claims by Forty-Niner that SOA violated statutorily imposed
7 obligations upon warrantors as contained in what is called the Song-
8 Beverly Consumer Protection Act of the California Civil Code and that
9 SOA violated what is called the Unfair Competition Law ("UCL") of the
10 California Business and Professions Code.

11 15. SOA's "Request for Judicial Notice" of the documents
12 submitted by SOA, which are some of the documents from the civil
13 litigation, is deemed unopposed by Forty-Niner and is granted.

14 16. Over six years after the class action suit was initiated by
15 Forty-Niner, Judge Robert E. Coyle of the United States District Court
16 for the Eastern District of California, after two prior orders issued
17 in favor of SOA, again, in January 2005, ruled in favor of SOA in an
18 Order Granting Defendant's Motion for Summary Judgment. This last
19 order resulted in a judgment in favor of SOA.

20 17. It was reported that Forty-Niner has filed a "Notice of
21 Appeal" from the judgment, therefore the litigation, now proceeding
22 toward its eighth year, is presently pending before the Ninth Circuit

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1 Court of Appeals.⁴

2 18. As might be expected after over seven years of litigation,
3 and with a federal trial court judgment in its favor, SOA is urging
4 that any claim, now being brought by Forty-Niner before the Board,
5 dealing with a warranty issue should be deemed barred by some aspect
6 of res judicata; or, because the federal action is now on appeal, that
7 the Board should refrain from hearing this protest because there is
8 another action pending between the same parties on the same issues;
9 and that Forty-Niner is attempting to split its claims; and that
10 Forty-Niner is "forum-shopping" in an effort to get a second bite at
11 the same apple. SOA also asserts "Forty-Niner cannot now seek a ruling
12 from the Board after having objected to the Board's involvement in the

13
14 ⁴ In this protest, Richard E. Wilmshurst is identified as being in Pro Per and is
15 representing both Forty-Niner and himself. However, in the civil suit, filed as a
16 class and private attorney-general action, Forty-Niner, was the lead plaintiff and
17 was represented by the law firm of Milberg Weiss Bershad Hynes & Leach LLP of San
18 Diego, California ("Milberg Weiss"): It would appear that Forty-Niner, in the federal
19 litigation, was represented by attorneys of high repute who were not lacking in
20 resources. As U.S. District Court Judge Coyle pointed out in his ruling of May 18,
21 2004, in which he denied Forty-Niner's Motion for Leave to Amend the First Amended
22 Complaint, "During the course of this litigation Plaintiff has been represented by
23 not only Mr. Rosemond and Ms. Somers (of Milberg Weiss), but also by Ms. Sweeney, a
24 partner at Milberg Weiss." (Order Granting Defendant's Motion for Summary Judgment,
25 Denying Plaintiff's Motion for Summary Judgment, and Denying Plaintiff's Motion for
26 Leave to Amend, page 23, lines 5-8) In addition, Forty-Niner, from the inception of
27 the civil litigation has also been represented by Michael B. Arkin of Angels Camp,
28 California: Mr. Arkin's address was later listed as McGeorge School of Law,
Sacramento, California. As will be discussed below, the causes of action in the
federal litigation charged violations of the California Civil Code and the California
Business and Professions Code. There was no reference to any Vehicle Code provisions
in the civil complaint. At some point in time in the federal litigation, Forty-Niner
was represented by the law firm of Lerach Coughlin Stoia Geller Rudman & Robbins,
LLP, of San Diego, California as well as Michael B. Arkin of McGeorge School of Law.
The documents submitted to the Board indicate this representation of Forty-Niner
continued in the federal court proceedings at least through November 2004 (the date
shown on the last federal litigation document submitted to the Board), and it is
assumed that Forty-Niner remains represented by these attorneys at the federal
appellate level. The original complaint, reportedly filed on October 27, 1998, was
not made available to the Board, but it is noted that the First Amended Complaint,
filed on July 21, 2000, in behalf of Forty-Niner by Milberg Weiss with Mr. Arkin as
co-counsel alleges that, "Plaintiff has retained attorneys experienced in the
prosecution of class actions."

1 first instance and choosing to litigate its claims in court."

2 (Protestant's Opposition, page 3, lines 10-11) This last point is
3 urged because SOA had consistently argued in its motions in federal
4 court that the suit be dismissed or suspended until Forty-Niner's
5 claims were heard by the Board under the provisions of the Vehicle
6 Code, and that Forty-Niner opposed SOA's contentions.

7 19. Although it is difficult to summarize Forty-Niner's
8 contentions in this protest, it appears that the foundation of the
9 protest is that the federal district court judgment did not
10 specifically address the application of Section 3065 pertaining to the
11 amount SOA should be required to pay in reimbursement for warranty
12 repairs, including labor and parts. Further discussion of this will
13 follow.

14 20. In order to resolve the contentions of the parties, it will
15 be necessary to analyze and determine the inter-relationship among the
16 following:

- 17 A. The Board's authority pursuant to Section 3065;
- 18 B. What claims are being made in this protest and whether they
19 are subject to the Board's jurisdiction;
- 20 C. What claims were made by Forty-Niner in the federal
21 litigation, and the outcome of the federal litigation to
22 date; and
- 23 D. The effect of the federal litigation upon the claims Forty-
24 Niner is now making in this protest.

25 THE BOARD'S AUTHORITY PURSUANT TO SECTION 3065

26 21. It is necessary to start with (A), the authority of the
27 Board under Section 3065, which must be the foundation of Forty-
28 Niner's protest, in order to get to (D), the effect of the federal

1 litigation upon the claims made by Forty-Niner in this protest, as it
2 is (D) which is at the heart of SOA's Motion to Dismiss the protest.

3 22. Section 3065 in relevant part provides as follows:

4 3065. (a) Every franchisor shall properly fulfill every
5 warranty agreement made by it and adequately and fairly
6 compensate each of its franchisees for labor and parts
7 used to fulfill that warranty when the franchisee has
8 fulfilled warranty obligations of repair and servicing and
9 shall file a copy of its warranty reimbursement schedule
10 or formula with the board. The warranty reimbursement
11 schedule or formula shall be reasonable with respect to
12 the time and compensation allowed the franchisee for the
13 warranty work and all other conditions of the obligation.
14 The reasonableness of the warranty reimbursement schedule
15 or formula shall be determined by the board if a
16 franchisee files a notice of protest with the board.

17 (b) In determining the adequacy and fairness of the
18 compensation, the franchisee's effective labor rate
19 charged to its various retail customers may be considered
20 together with other relevant criteria.

21 23. The first sentence of subsection (a) can be separated into
22 three areas.

23 (i) There is an obligation of the franchisor to "fulfill
24 every warranty agreement made by it". (Emphasis added.)

25 This could refer to "franchisor-franchisee" agreements,
26 which would be agreements by the franchisor with its franchisees
27 under which the franchisor agrees to reimburse its franchisees
28 for the franchisees' performance of the warranty obligations owed
by the franchisor to the buyers of the franchisor's vehicles.
Or, it could refer to "franchisor-consumer" agreements, which are
the warranty agreements made by the franchisor to the buyers of
the franchisor's vehicles. Or, it could, and probably does,
include both of the above types of agreements. Whether there is
any overlap between the obligation to "fulfill every warranty

1 agreement" as stated here and the proceedings in the federal
2 litigation charging violations of the statutory obligations
3 imposed by the Civil Code and Business and Professions Code will
4 be addressed later.

5 (ii) Continuing with the first sentence of subsection (a),
6 there is an obligation of the franchisor to "adequately and
7 fairly compensate each of its franchisees for labor and parts
8 used to fulfill that warranty". (Emphasis added.)

9 This refers to the dual obligation discussed above - the
10 obligation to "compensate its franchisees" (under the franchisor-
11 franchisee agreement) when the franchisee incurs expenses for
12 labor and parts used to "fulfill that warranty" that runs to the
13 consumer (franchisor-consumer agreement).

14 Whether there is any overlap between the Vehicle Code
15 obligation to "adequately and fairly compensate each of its
16 franchisees for labor and parts used to fulfill that warranty" as
17 stated here and the federal litigation charging violations of the
18 statutory obligations imposed by the Civil Code and Business and
19 Professions Code will be addressed later. The standard for
20 determining the amount of compensation established by Section
21 3065 of "adequately and fairly" may differ somewhat from the
22 standards imposed by the other statutes, but all address the same
23 right of reimbursement for labor performed and parts used in
24 fulfilling the franchisor's warranty obligations to buyers and
25 lessees of the franchisor's vehicles. These distinctions and
26 their significance will be discussed below.

27 (iii) The last part of the first sentence of subsection (a)
28 imposes an obligation on the franchisor to file a copy of its

1 warranty reimbursement schedule or formula with the Board. There
2 is no obvious overlap between this requirement and the federal
3 litigation in which Forty-Niner alleged violations of the
4 provisions of the Civil Code and the Business and Professions
5 Code.

6 24. The second sentence of Section 3065(a) establishes that the
7 franchisor's warranty reimbursement schedule or formula shall be
8 reasonable "with respect to the time" (amount of time allowed for a
9 repair procedure) "and compensation allowed...for the warranty work"
10 (this would include the dollar amount allowed per hour of labor -
11 called the labor rate, and it could also include in "compensation
12 allowed" the parts used in performing the repairs), and "all other
13 conditions of the obligation". This last language, "all other
14 conditions of the obligation" is a catch-all and could include such
15 things as the procedures required to be followed either in performing
16 the work - perhaps obtaining prior approval for a repair procedure, or
17 return or saving of defective parts - or in the submission of the
18 claims - perhaps proper coding, time limitations for claim submission,
19 etc. Whether there is any overlap between the Vehicle Code
20 requirement that the franchisor's reimbursement schedule "be
21 reasonable with respect to the time and compensation allowed" as
22 stated here and the allegations in the federal litigation charging
23 violations of the statutory obligations imposed by the Civil Code and
24 Business and Professions Code will be addressed later.

25 25. The final sentence of Section 3065(a) states "The
26 reasonableness of the warranty reimbursement schedule or formula shall
27 be determined by the board if a franchisee files a notice of protest
28 with the board." This language clearly allows for a protest to be

1 filed with the Board as does Section 3050 that provides "The board
2 shall... (d) Hear and decide,... a protest presented by a franchisee
3 pursuant to Section... 3065...".

4 26. At various times throughout the extended life of the federal
5 litigation, SOA sought dismissal of the federal suit asserting that
6 Forty-Niner had failed to exhaust its administrative remedies in not
7 filing a protest with the Board and alternatively that the federal
8 court should recognize the "doctrine of primary jurisdiction" and
9 exercise its discretion to order the matter be heard before the Board
10 under the Vehicle Code provisions. The effect of the failure or
11 refusal of Forty-Niner, until now⁵, to attempt to exercise any rights
12 it may have under Section 3065 will be discussed below.

13 27. Also, whether there is any overlap between the requirement
14 that the franchisor's reimbursement schedule "be reasonable with
15 respect to the time and compensation allowed" as stated in Section
16 3065 and the allegations in the federal litigation charging violations
17 of the statutory obligations imposed by the Civil Code and Business
18 and Professions Code will be addressed later.

19 CONTINUING WITH THE AUTHORITY GRANTED TO THE BOARD IN SECTION 3065

20 SECTION 3065 (b)

21 28. Section 3065 (b) provides guidance as to what "may be
22 considered" by the Board in determining the adequacy and fairness of
23 the compensation allowed for reimbursement for warranty work. As to
24 the labor rate, it states that the "franchisee's effective labor rate
25 charged to its various retail customers may be considered" and then

26
27
28 ⁵ The protest was not filed until after 7 years from the filing of the suit and 9
months after the entry of judgment in favor of SOA.

1 states the obvious - "together with other relevant criteria."

2 (Emphasis added.)

3 29. The use of the language "may" along with "be considered"
4 would make it doubly discretionary, rather than mandatory, that the
5 Board use the franchisee's retail labor rate in the Board's
6 determination of the adequacy and fairness of the warranty
7 compensation. Section 3065(b) does not state "must be considered",
8 (which even then would make it mandatory only to "consider" the retail
9 labor rate, but not mandatory to apply it). Had the statute said
10 "must be considered", the Board would only be required to "consider"
11 the retail labor rate, but could reject it. Had the statute said
12 "must be used", then the Board would be required to apply the retail
13 labor rate to the warranty reimbursement rate. However, the language
14 is only that the retail labor rate "may be considered", which means
15 the Board has discretion first as to whether it will "consider" it,
16 and second, even if it is "considered", the Board would have
17 discretion to reject it.

18 30. Whether there is any overlap between the language of Section
19 3065(b) expressly permitting the Board to "consider" "the franchisee's
20 effective labor rate charged to its various retail customers" and the
21 federal litigation charging violations of the statutory obligations
22 imposed by the Civil Code and Business and Professions Code will be
23 addressed later.

24 31. The remainder of Section 3065 is applicable to:

25 (c) Denial of claims for defective parts and return of the
26 part;

27 (d) The time within which a warranty claim shall be approved
28 or disapproved; and

1 (e) Warranty audits.

2 None of these subsections are at issue in this protest.

3 WHAT CLAIMS ARE BEING MADE IN THIS PROTEST AND WHETHER
4 THEY ARE SUBJECT TO THE BOARD'S JURISDICTION

5 32. Although the issues as framed in the protest itself should
6 be the basis for determining (1) whether the Board has jurisdiction,
7 and (2) the extent of overlap, if any, between them and the federal
8 litigation, in order to better understand what claims are being made
9 in the protest, it is helpful to look also at the factual allegations
10 contained in the protest and the papers filed in connection with this
11 motion. As will be seen, there is some incongruity when the issues
12 sought to be determined by the protest are compared to the factual
13 allegations of the protest.

14 33. Listed below are the issues Forty-Niner is asking the Board
15 "determine" followed by the factual allegations in the protest and a
16 discussion of what, for lack of better terminology may be called
17 "incidental issues".

18 34. ISSUE "A" AS PRESENTED BY FORTY-NINER IN ITS PROTEST:

19 "A. Is the SOA parts reimbursement schedule presently
20 being applied to SOA's dealers in California reasonable?"

21 (Protest, page 3, lines 14-15)⁶ (Emphasis added.)

22 35. FACTUAL ALLEGATIONS CONTAINED IN THE PROTEST:
23

24 ⁶ As noted elsewhere, the federal complaint alleged only failure of SOA to pay
25 properly for "parts" used in performing warranty work. Apparently Forty-Niner chose
26 not to assert any other claims in the federal court proceedings pertaining to any
27 other warranty obligations of SOA. This may have been in part due to the fact that
28 SOA reimburses its franchisees for labor at the same hourly rate the franchisees
charge their retail customers. However, the reason for the failure to include other
claims in the federal litigation is irrelevant as to whether the federal litigation
and its outcome bars, or will bar, the claims Forty-Niner is making now before the
Board.

1 "SOA has not yet filed its schedule or formula for
2 determining the reasonableness of its warranty times, hourly
3 rates, or the parts billed by the dealer used in a warranty
4 repair." (Protest, page 1, lines 23-25) (Emphasis added.)

5 "SOA has failed to provide the NMVB with the warranty
6 information set forth as required in M.V. Code § 3065. The
7 230 pages filed in 1997 are the only warranty flat rate
8 manual and SOA Maintenance plans showing times without
9 specific parts pricing." (Protest, page 2, lines 21-23)
10 (Emphasis added.)

11 36. The incongruity here is that it is difficult to see how the
12 Board could determine the issue of whether the SOA parts reimbursement
13 schedule is reasonable if Forty-Niner is correct in its assertion that
14 "SOA has not yet filed its schedule or formula for determining the
15 reasonableness of...the parts billed by the dealer used in a warranty
16 repair."

17 PRELIMINARY INCIDENTAL ISSUES

18 37. Because Forty-Niner is alleging that SOA has not filed its
19 warranty reimbursement schedule or formula with the Board⁷ and at the
20 same time is asking that the Board determine the reasonableness of the
21 schedule or formula, it becomes necessary to address the following
22 preliminary incidental issues.

23
24 ⁷ The factual assertions in Forty-Niner's protest as to the filing or lack of filing
25 by SOA are quoted in paragraph 35, above. As indicated, on one page of the protest,
26 Forty-Niner states that SOA has not yet filed its schedule or formula, but on another
27 page, Forty-Niner states that, SOA, in 1997, filed "230 pages" of a "warranty flat
28 rate manual and SOA Maintenance plans showing times". The fact that there may be no
"specific parts pricing" may be due to the fact that SOA allows a set percentage
markup over the current cost of the parts with the percentage of markup varying by
the price of the parts. Such a procedure is discussed by Judge Coyle in one of his
orders quoted from below. The effect of a filing or lack of filing of a schedule or
formula upon the right to file a protest is discussed beginning in the immediately
following paragraph.

1 filed with the Board that the franchisee could: (a) submit a claim for
2 warranty service and parts that is not in conformity with the
3 franchisor's claims policy and procedures manual (which was assertedly
4 not filed with the Board); (b) wait for the franchisor to deny the
5 claim due to non-compliance with the "unfiled" warranty manual; (c)
6 when the claim as submitted is denied, file a protest pursuant to
7 Section 3065. However, in addition to other concerns, this would
8 involve a risk to the franchisee of not getting paid at all for the
9 denied claims.

10 42. If SOA has failed to file a schedule or formula:

11 A. Is the filing of a schedule or formula a condition to
12 the right in a franchisee to file a protest or is the filing
13 merely a duty imposed upon the franchisor? First, the statute
14 does not expressly state that the filing of a schedule or formula
15 is a condition to the right of a franchisee to file a protest.
16 Secondly, when in doubt, the preferential construction of
17 statutory language would be that it is not a condition. This
18 construction is favored by the law as the failure of a condition
19 to occur (as compared to a breach of a duty) will frequently
20 cause a disproportionate loss to the other party. In this case,
21 if the filing of a schedule or formula was construed as a
22 condition (and it did not occur or was not excused), franchisees
23 would lose their rights to file a protest challenging the
24 warranty policies of the franchisor.

25 B. Even if the filing by a franchisor is construed as a
26 condition, it is hornbook law that the condition should be
27 excused if its non-occurrence was due to the conduct, or lack
28 thereof, of the franchisor in preventing the occurrence of the

1 condition. This would be so if the condition is within the
2 control of the franchisor as here. A franchisor should not, by
3 its own violation of a statute intended to protect the
4 franchisee, be able to preclude a franchisee from exercising a
5 legislatively provided right made available to the franchisee in
6 the same statute. To allow this result would not only deprive
7 franchisees of their statutory rights but might also encourage
8 franchisors to violate the legislative requirement that the
9 franchisor file a copy of the schedule or formula. Said another
10 way, a franchisor should not be able to "repeal" the statutory
11 protection provided to a franchisee by the franchisor's own
12 violation of the statute. It would be a case of "I can take away
13 your statutory right by my violation of the statute that gave you
14 that right."

15 43. It is concluded that the filing of the warranty
16 reimbursement schedule or formula is not a condition to the
17 franchisee's right to file a protest so long as it is possible and
18 practicable to ascertain the terms of the schedule or formula under
19 which the parties operated. The federal district court had no
20 difficulty in looking to the conduct of SOA and Forty-Niner to find
21 that Forty-Niner was an authorized and designated independent service
22 or repair facility for purposes of deciding the Song-Beverly Act
23 issues. Likewise here, there has been a course of conduct
24 (performance) between the parties over many years, together with the
25 documentary exchanges between them, that would make it possible as
26 well as practicable to determine the terms of the warranty schedule or
27 formula under which the parties operated and then determine whether
28 those terms were reasonable.

1 CONCLUSION AS TO WHETHER THE BOARD WOULD HAVE
2 JURISDICTION AS TO ISSUE "A" IN THE PROTEST WHETHER OR NOT
3 SOA HAD FILED A COPY OF ITS WARRANTY
4 REIMBURSEMENT FORMULA OR SCHEDULE

5 44. It is determined that, whether a proper schedule or formula
6 has been filed or not, the Board would have jurisdiction over Issue
7 "A" as stated in the protest, which is, "A. Is the SOA parts
8 reimbursement schedule presently being applied to SOA's dealers in
9 California reasonable?"

10 THE TIME WITHIN WHICH A PROTEST PURSUANT TO
11 SECTION 3065 MUST BE FILED

12 45. There is nothing in Section 3065, nor in any of the other
13 Vehicle Code sections, that establishes the time within which a
14 franchisee must file a "notice of protest with the board" in order to
15 challenge "the reasonableness of the warranty reimbursement schedule
16 or formula." Some of the other "protest sections" of the Vehicle Code
17 establish specific times within which to file a protest. These times
18 are usually specified as a certain number of days starting from
19 receipt by the franchisee and the Board of a required notice from the
20 franchisor as to the franchisor's action or intended action. However,
21 there is no such "starting time" established in Section 3065.

22 46. It is noted that Forty-Niner makes reference to an SOA
23 filing with the Board in 1997⁸, and that Forty-Niner initiated the
24 litigation on October 27, 1998. The SOA filing with the Board in 1997
25 possibly triggered the civil action but whether it did or not, the
26 1997 date, based upon Forty-Niner's pleadings could be determined to
27 be the "starting date" for the time within which to file a protest.

28 ⁸ Forty-Niner asserts that this filing was incomplete or inadequate. See paragraphs 35, 37, and footnote 7.

1 Whether Forty-Niner's protest can be challenged as untimely under some
2 "catch-all" or "default" statute or equitable concept imposing
3 definite (or indefinite) time limitations for seeking relief or
4 enforcing a right is not specifically at issue. However, the issues
5 of unreasonable delay on the part of Forty-Niner and the possible
6 prejudice to SOA as a result of the delay are addressed during the
7 discussion of the seven-plus years of federal litigation involving
8 warranty reimbursement issues between these same parties.

9 47. ISSUE "B" AS PRESENTED BY FORTY-NINER IN ITS PROTEST:

10 "B. Does the SOA parts reimbursement schedule presently
11 being applied to SOA's dealers in California meet the
12 requirements of the **Song-Beverly Consumer Warranty Act**?"

13 48. ALLEGATIONS AS CONTAINED IN THE PROTEST:

14 "Forty-Niner believes SOA must pay each dealer in California
15 for warranty repairs at the same rate as parts and labor are
16 billed to a retail customer for like repairs." (Protest, page 3,
17 lines 8-9) Forty-Niner attached Exhibit C to the protest and
18 also stated: "Exhibit C is an explanation of how the provisions
19 of the **Song-Beverly Consumer Warranty Act** apply to the FORTY-
20 NINER/SOA parts warranty relationship." (Protest, page 3, lines
21 9-11)

22 49. Issue "B" itself refers only to reimbursement for parts used
23 in performing warranty work. The discussion in the prior paragraphs
24 as to Issue "A" is also applicable here.

25 50. The distinction between Issue "A" and Issue "B" is that
26 Issue "A" is alleging that the SOA schedule or formula for computing
27 the amount to be paid for parts used in performing warranty work is
28 not reasonable, whereas, Issue "B" is asking the Board to determine

1 that the provisions of the Song-Beverly Consumer Warranty Act govern
2 the warranty reimbursement obligations owed by a franchisor to its
3 franchisees and that these provisions include the obligation that SOA
4 pay for parts at the same rate Forty-Niner charges its retail
5 customers for non-warranty repairs.

6 51. As stated above, Forty-Niner asserts that the Song-Beverly
7 Act would require that "SOA must pay each dealer in California for
8 warranty repairs **at the same rate as parts and labor** are billed to a
9 retail customer for like repairs." (Protest, page 3, lines 8-10)
10 (Emphasis added.)

11 52. If this were so found, it could then be concluded that a
12 violation of the provisions of the Song-Beverly Act would mean that,
13 under Section 3065, SOA's schedule or formula is *per se* not
14 reasonable.

15 53. However, there is nothing in Section 3065 that expressly
16 requires the Board to consider or apply the Song-Beverly Act in making
17 determinations as to the reasonableness of the warranty reimbursement
18 schedule or formula being used by SOA. As will be discussed again
19 below, under Issue "D", Section 3065(b) states that "...the
20 franchisee's effective **labor rate charged** to its various retail
21 customers **may be considered...**". This would on its face appear to be
22 in conflict with Forty-Niner's assertion that due to the Song-Beverly
23 Act, "SOA must pay each dealer in California for warranty repairs **at**
24 **the same rate as parts and labor** are billed to a retail customer for
25 like repairs." (Emphasis added.)

26 54. It would appear that Forty-Niner's assertion as to the
27 standard imposed by Song-Beverly is inconsistent with the provisions
28 of the Vehicle Code. In the event of such inconsistency, because the

1 protest was filed purportedly pursuant to Section 3065 of the Vehicle
2 Code, the Vehicle Code language should control. A further discussion
3 of the provisions of the Song-Beverly Act and the effect of the
4 federal court judgment upon any warranty claims of Forty-Niner,
5 regardless of how reimbursement is computed, will follow.

6 55. Section 3065 continues by stating that the Board, in
7 determining the adequacy and fairness of the compensation to a
8 franchisee, may consider "other relevant criteria".

9 56. It would appear that it would be for a trier of fact to
10 determine if the Song-Beverly Act, although not mandatory would be
11 "relevant criteria", even though it may be determined (and likely will
12 be determined) that the Song-Beverly Act does not control this
13 dispute. Further, as will be discussed below, the federal court
14 determinations may make the conflict between the two statutes moot.

15 CONCLUSION AS TO WHETHER ISSUE "B" WOULD COME
16 WITHIN THE JURISDICTION OF THE BOARD

17 57. Issue "B", "Does the SOA parts reimbursement schedule
18 presently being applied to SOA's dealers in California meet the
19 requirements of the Song-Beverly Consumer Warranty Act?", could also
20 come within the jurisdiction of the Board under Section 3065, even if
21 SOA has not filed its reimbursement formula or schedule, for the
22 reasons stated in the discussion of Issue "A".

23 58. However, Issue "B" would likely be limited to whether the
24 Song-Beverly Act would be relevant to the issue of the adequacy and
25 fairness of the compensation. It is possible that the provisions of
26 the Song-Beverly Act could cut both ways as to what it requires and
27 what it exempts and could be used by either side to support their
28 position. Meeting a "safe harbor exception" allowed by some other

1 code could be persuasive that the schedule or formula used by SOA is
2 adequate and fair and reasonable, as required by Section 3065. Also,
3 regardless of whether the Board has jurisdiction, to be discussed
4 below is whether any claim of Forty-Niner for warranty reimbursement
5 may be barred due to the outcome of the federal litigation.

6 59. ISSUE "C" AS PRESENTED BY FORTY-NINER IN ITS PROTEST:

7 "C. Is the SOA schedule to establish times for
8 warranty operations and Added Security coverage operations
9 reasonable?"

10 60. ALLEGATIONS AS CONTAINED IN THE PROTEST:

11 "The WARRANTY FLAT RATE TIME ALLOWANCES submitted to the
12 NMVB show times only for specific repair operations; there is no
13 schedule or formula filed to determine the hourly time schedule
14 or the hourly rate paid to each dealer." (Protest, page 2, lines
15 24-26)

16 "The MAINTENANCE PLANS do not describe a breakdown between
17 labor or parts and the price paid for each operation. There is
18 no schedule of price or a formula provided." (Protest, page 3,
19 lines 1-3)

20 61. Issue "C" as stated in the "REQUEST FOR DETERMINATION" of
21 the protest raised only the reasonableness of the time allowed, but
22 included both "warranty operations" and "Added Security coverage
23 operations". It is unclear what "Added Security coverage" is. There
24 is also, elsewhere in the allegations of the protest, a reference to
25 "maintenance plans" and the sale by SOA of "service coupons" to Subaru
26 owners. It may be that "Added Security" is a Subaru sponsored
27 "extended service contract" which may or may not be a "warranty"
28 within the scope of Section 3065. It may also be that the

1 "maintenance plans" and "service coupons" are not "warranty"
2 obligations of SOA and therefore would not be within the scope of
3 Section 3065. These are all factual questions that cannot be answered
4 in connection with the motion, but they appear to refer to what Forty-
5 Niner claims to be reimbursement issues between SOA and Forty-Niner.
6 As such, these issues could either have come within what was charged,
7 or could have been charged, in the federal suit and which now may be
8 barred.

9 CONCLUSION AS TO WHETHER ISSUE "C" WOULD COME
10 WITHIN THE JURISDICTION OF THE BOARD

11 62. To the extent Issue "C" relates to the amount of time
12 allowed for warranty repairs, Issue "C" would also come within the
13 jurisdiction of the Board under Section 3065, regardless of whether
14 SOA has filed a schedule or formula, for the reasons stated in the
15 discussion of Issue "A".

16 63. ISSUE "D" AS PRESENTED BY FORTY-NINER IN ITS PROTEST

17 "D. Is the manner in which SOA establishes the warranty
18 hourly rate paid to the dealers reasonable?" (Protest, page
19 3, lines 20-21) (Emphasis added.)

20 64. ALLEGATIONS AS CONTAINED IN THE PROTEST:

21 "SOA has not yet filed its schedule or formula for
22 determining the reasonableness of its warranty times, hourly
23 rates, or the parts billed by the dealer used in a warranty
24 repair." (Protest, page 1, lines 23-25) (Emphasis added.)

25 "Forty-Niner believes SOA must pay each dealer in California
26 for warranty repairs at the same rate as parts and labor are
27 billed to a retail customer for like repairs." (Protest, page 3,
28 lines 8-9) (Emphasis added.) Forty-Niner attached Exhibit C to

1 the protest and states: "Exhibit C is an explanation of how the
2 provisions of the Song-Beverly Consumer Warranty Act apply to the
3 FORTY-NINER/SOA parts warranty relationship." (Protest, page 3,
4 lines 9-11)

5 65. Issue "D" relates to the hourly rate paid by SOA for
6 warranty work and by its language limits the inquiry to: "Is the
7 manner in which SOA establishes the warranty hourly rate paid to the
8 dealers reasonable?" However, the allegation made by Forty-Niner is
9 that, because of the Song-Beverly Act, "SOA must pay each dealer in
10 California for warranty repairs at the same rate as parts and labor
11 are billed to a retail customer for like repairs."

12 66. As stated above in the discussion of Issue "B", Section
13 3065(b) states that "...the franchisee's effective labor rate charged
14 to its various retail customers may be considered...". This would on
15 its face appear to be in conflict with Forty-Niner's assertion that
16 due to the Song-Beverly Act, "SOA must pay each dealer in California
17 for warranty repairs at the same rate as parts and labor are billed to
18 a retail customer for like repairs." (Emphasis added.)

19 67. As discussed above, any conflict between the two statutes
20 would likely result in a finding that the Vehicle Code provisions
21 apply to this protest purportedly filed pursuant to its provisions,
22 and that the issue may be moot due to the judgment entered in the
23 federal court proceedings. Further, as will be discussed below, SOA
24 pays at the same hourly rate for warranty work that its franchisees
25 charge their retail customers for repairs not covered by a warranty.

26 See footnote 10 below.

27 ///

28 ///

1 causes of action specifically allege that SOA has failed to compensate
2 Subaru dealers for the "warranty parts" in accordance with the Song-
3 Beverly Act and the Unlawful and Unfair Business Acts and Practices
4 (also called the Unfair Competition Law, or "UCL"). It appears that
5 the judge in the federal litigation had expected that Forty-Niner
6 would assert in the federal proceedings any claim Forty-Niner might
7 have for reimbursement for labor as the judge twice mentioned that
8 Forty-Niner was not making any such claim.¹⁰

9 OUTCOME OF THE FEDERAL LITIGATION TO DATE

10 72. Supplied to the Board in connection with this motion are
11 three orders issued by United States District Court Judge Robert E.
12 Coyle. How many more orders were issued over the almost seven years
13 of litigation, almost five of which were in federal court, is unknown.
14 That there were more than these three in federal court is evident by
15 the court's reference in the content of one of them to an order of
16 March 4, 2002. The federal court orders that were provided to the
17 Board are:

18 ///

19 ///

20 ///

21 _____
22 ¹⁰ As the court stated in its Order Granting Defendant's Motion for Summary
23 Adjudication, Denying Plaintiff's Motion for Summary Judgment, and Denying
24 Plaintiff's Motion for Leave to Amend, filed May 18, 2004, in footnote 1, "Plaintiff
25 does not challenge the rates that Subaru pays for the labor involved in the warranty
26 repair services, which appear to be the same as those that are charged to consumers
27 whose automobiles are not covered by warranty." Similar language is found in
28 footnote 2 of the "Order Granting Defendant's Motion for Summary Adjudication or in
the Alternative Summary Judgment" dated January 6, 2005 - "Plaintiff does not
challenge the rates that SOA pays for the labor involved in the warranty repair
services, which appear to be the same as the rates charged in non-warranty repairs."
As will be discussed, the failure to allege any claim for failure to reimburse
properly for labor (or any other claim Forty-Niner may have had) could become barred
upon the conclusion of the litigation, if not sooner.

- 1 ▪ November 30, 2001 - Order Granting Defendant's Motion for
2 Judgment on the Pleadings on the Ground that Plaintiffs Cannot
3 Proceed under California Civil Code §1793.5; (Song-Beverly Act)
- 4 ▪ May 18, 2004 - Order Granting Defendant's Motion for Summary
5 Adjudication, Denying Plaintiff's Motion for Summary Judgment,
6 and Denying Plaintiff's Motion for Leave to Amend; and
- 7 ▪ January 6, 2005 - Order Granting Defendant's Motion for Summary
8 Adjudication or in the Alternative Summary Judgment. (Song-
9 Beverly claims and Unfair Competition Claims).

10 Judge Coyle's Order of November 30, 2001 - (7 pages in length)

11 73. This order granted SOA's Motion for Judgment on the
12 Pleadings. In this motion, SOA asserted:

- 13 ▪ Forty-Niner had no claim under Song-Beverly;
- 14 ▪ Forty-Niner must exhaust its administrative remedies before the
15 Board;
- 16 ▪ If exhaustion is not required, Forty-Niner's claims should be
17 referred to the Board under the doctrine of primary jurisdiction.

18 74. In ruling on this motion, Judge Coyle concluded that Forty-
19 Niner had no claim under Song-Beverly because Forty-Niner had been
20 designated and authorized by SOA as an independent service and repair
21 facility ("ISRF"), that as a result SOA "maintains" repair facilities
22 in California, and therefore the Song-Beverly claim of Forty-Niner "is
23 not appropriate". Judge Coyle also concluded that "having determined
24 that plaintiffs cannot proceed under California Civil Code §1793.5
25 (Song-Beverly) this statute cannot form the basis of plaintiffs' claim
26 under California Business and Professions Code §17200, et seq. (UCL).
27 Moreover, having determined that plaintiffs cannot proceed under
28 California Civil Code §1793.5, the court finds it unnecessary to reach

1 defendant's exhaustion and primary jurisdiction arguments."

2 Judge Coyle's Order of May 18, 2004 (29 pages in length)

3 75. This order did the following:

4 It granted SOA's Motion for Summary Adjudication;

5 It denied Forty-Niner's Motion for Summary Judgment; and

6 It denied Forty-Niner's Motion for Leave to Amend its First
7 Amended Complaint.

8 76. In reciting the history of the proceedings before him, Judge
9 Coyle, in this order, stated:

10 On March 4, 2002, the court entered an order¹¹ granting
11 in part and denying in part Plaintiff's Motion for
12 Reconsideration. In that motion, Plaintiff argued that it
13 never admitted that Defendant had authorized and designated
14 it a warranty service and repair facility. Plaintiff's
15 counsel had previously made affirmative representations to
16 the contrary: At oral argument on October 29, 2001
17 Plaintiff's counsel Bonney E. Sweeney represented to the
18 court that Plaintiff was a designated ISRF. (The court then
19 read several paragraphs from the record of the earlier
20 proceedings in which, contrary to what was then being
21 asserted, such representations by Forty-Niner's attorney
22 were clearly and unequivocally made.)

23 Plaintiff's counsel later explained that these
24 representations were mis-statements. The court granted
25 Plaintiff's Motion for Reconsideration with the following
26 instructions: "[i]f defendant can establish that plaintiff
27 has affirmatively been designated and authorized as an
28 independent service and repair facility, this issue may be
resolved through summary judgment. (citations omitted)

On March 13, 2003 (over a year after granting in part
Forty-Niner's Motion for Reconsideration) [SOA] moved for
summary adjudication or summary judgment. On April 7, 2003,
twenty five days after Defendant submitted its motion for
summary judgment, Plaintiff filed a cross-motion for summary
judgment and a motion for leave to amend its FAC (First
Amended Complaint). Plaintiff seeks permission to amend its
FAC to add an alternative claim under Song-Beverly §1793.6,

¹¹ A copy of this order was not supplied to the Board. As stated earlier, whether there were other orders issued by the Court during this litigation is unknown.

1 which provides for recovery for independent service
2 facilities. (This motion for leave to amend the FAC, to add
3 a claim for recovery as Forty-Niner was an independent
4 service and repair facility, was not made until more than a
5 year after the court granted Forty-Niner's motion for
6 reconsideration the basis of which was the alleged mis-
7 statement of counsel in representing that Forty-Niner was an
8 independent service and repair facility.)

9 [SOA's] motion for summary judgment or summary
10 adjudication was based on four alternative theories: (1)
11 that Plaintiff, Forty-Niner is a designated and authorized
12 service or repair facility and therefore Song-Beverly
13 §1793.5 does not apply (2) that Defendant, SOA has at all
14 times maintained in this state sufficient service and repair
15 facilities reasonably close to all areas where its consumers
16 goods are sold via its franchise agreements with Plaintiffs,
17 thereby complying with Song-Beverly § 1793.2 and
18 foreclosing recovery (3) that Plaintiff waived its right to
19 sue Defendant (4) that the NMVB is the exclusive forum for
20 this case or, alternatively, that the NMVB is the preferred
21 forum for resolution of the dispute due to the NMVB's
22 experience with warranty service contract rates.
23 Defendant's first argument suffices to support an order for
24 summary adjudication in its favor.

25 77. As can be seen, the court in the last sentence of the quote
26 declined to rule on whether the matter should be first brought before
27 the Board on either the theory of "exhaustion of administrative
28 remedies" or the Board is "the preferred forum."

29 78. Among other things, Judge Coyle reviewed the SOA/Forty-Niner
30 dealer agreement, including the Standard Provisions booklet, and the
31 Policies and Procedures Manual ("PPM") which contains "warranty labor
32 rates, body repair labor rates, and reimbursement rates for parts,
33 accessories, and materials used in the performance of warranty service
34 repairs."

35 79. Judge Coyle heard the arguments of counsel on September 8,
36 2003, and on May 18, 2004 issued the order that: Granted SOA's Motion
37 for Summary Adjudication on the Song-Beverly issues; Denied Forty-
38 Niner's cross-motion for summary judgment; and Denied Forty-Niner's
39 motion for leave to amend its First Amended Complaint. As stated in

1 the order, the court did not address any of SOA's contentions other
2 than that Forty-Niner had no claim under the cause of action in the
3 FAC based upon an alleged violation of Song-Beverly.

4 80. The next order issued by Judge Coyle that was supplied to
5 the Board was the final order that resulted in the entry of judgment
6 in favor of SOA. As it is the final order, there will be some
7 redundancy here in reviewing the history of the case as compared to
8 what was recited above.

9 Judge Coyle's Order of January 6, 2005 (18 pages in length)

10 81. This is the "ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
11 ADJUDICATION OR IN THE ALTERNATIVE SUMMARY JUDGMENT". In addition to
12 the analysis of the issues, facts, and law, Judge Coyle provided the
13 background of the litigation as well as the procedural history.
14 Excerpts from the order by way of quotes, as well as summaries,
15 follow:

16 **I. Background**

17
18 Plaintiff brings this class action on behalf of itself
19 and all of SOA's warranty service providers in California.
20 (Footnote 1 at this point states, "This class has yet to be
21 certified.") Plaintiff contends that Defendant compensated
22 it and other SOA warranty service providers in California
23 for parts (Footnote 2 at this point states, "Plaintiff does
24 not challenge the rates that SOA pays for the labor involved
25 in the warranty repair services, which appear to be the same
26 as the rates charged in non-warranty repairs.") used in
27 warranty repair services at rates that violate section
28 1793.5 of the Song Beverly Consumer Warranty Act ("Song-
Beverly"), California Civil Code section 1790 et seq.
Plaintiff also alleges that Defendant's conduct constitutes
unfair and unlawful business practices in violation of
California's Unfair Competition Law ("UCL"), California
Business and Professions Code section 17200, et seq.
Plaintiff seeks direct, consequential and statutory treble
damages, declaratory and injunctive relief and attorneys'
fees.

1 II. Procedural History

2 On November 30, 2001, this Court entered an order
3 granting Defendant's motion for judgment on the pleadings on
4 the grounds that Plaintiff could not proceed under Song-
5 Beverly. The Court denied relief under Song-Beverly because
6 liability under section 1793.5 arises only where such
7 service repair facilities are not provided and Plaintiff
8 "admit[ed] that SOA authorizes their facilities to perform
9 warranty services" in oral representation to the Court.
10 (Citations omitted)

11 On March 4, 2002, the Court entered an order granting
12 in part and denying in part Plaintiff's Motion for
13 Reconsideration. In that motion Plaintiff argued that it
14 had never admitted that SOA had authorized and designated it
15 a warranty service and repair facility. At oral argument on
16 the motion on October 29, 2001, Plaintiff's counsel Bonny E.
17 Sweeney represented otherwise to the Court. Plaintiff's
18 counsel later explained that these representations were
19 misstatements. The Court granted the motion for
20 reconsideration with the following instructions: "[i]f
21 defendant can establish that plaintiff has affirmatively
22 been designated and authorized as an independent service and
23 repair facility, this issue may be resolved through summary
24 judgment." [citations omitted]

25 Defendant subsequently moved for summary judgment or
26 summary adjudication on March 13, 2003. Twenty-five days
27 after Defendant's motion was filed, Plaintiff filed a cross-
28 motion for summary judgment and a motion for leave to amend
29 its FAC. (First Amended Complaint) Plaintiff sought to add
30 an alternative claim under Song-Beverly section 1793.6,
31 which provides a cause of action for an independent service
32 and repair facility ("ISRF").

33 On May 18, 2004, the Court entered an order granting
34 summary adjudication in favor of Defendant on Plaintiff's
35 Song-Beverly claims, denying Plaintiff's cross-motion for
36 summary judgment in its entirety and denying Plaintiff's
37 request for leave to amend. A claim under section 1793.5
38 can only be imposed if a manufacturer does not either
39 maintain service facilities or designate and authorize ISRFs
40 in California. Plaintiff's claim failed, as the Court held:

41 Summary adjudication is granted in Defendant's favor
42 on Plaintiff's claims under the Song-Beverly Act, on
43 the grounds that SOA designated and authorized Forty-
44 Niner as an ISRF (independent service and repair
45 facility). Although Defendant never expressly

1 designated and authorized Forty-Niner as an ISRF in
2 writing, Defendant's conduct in paying for the repairs
3 that Plaintiff actually performed, coupled with the
4 contractual agreements that expressly required
5 Plaintiff to perform warranty services and repairs,
6 served to designate and authorize Plaintiff as an
7 ISRF. (Citations omitted.)

8 The Court denied Plaintiff's motion for summary
9 judgment as to the Song-Beverly claims because Forty-Niner,
10 as a designated and authorized ISRF, was not entitled to
11 recovery under Section 1793.5. (Citation omitted.) The
12 Court denied Plaintiff's motion as to the unfair competition
13 claim as follows:

14 Plaintiff raised three grounds for relief under UCL
15 Section 17200, alleging that Defendant's practices are
16 unlawful, unfair, and fraudulent. The court finds
17 that Defendant complied with Song-Beverly and,
18 therefore, Plaintiff is not entitled to Summary
19 Judgment on the grounds that Defendant violated the
20 "unlawful" prong of Section 17200. Plaintiff did not
21 present any evidence or argument to the court in
22 support of its motion for summary adjudication on the
23 grounds that Defendant's practices were unfair¹² or
24 fraudulent. (Emphasis added.) Therefore, Plaintiff's
25 motion is denied with respect to the Section 17200
26 claim. (Citation omitted.)

27 The court also denied Plaintiff's motion to amend its
28 FAC. The motion, filed more than four years into the
litigation, sought to add a claim under Song-Beverly based on
allegations that SOA's warranty parts reimbursement rates do
not provide Plaintiff a reasonable profit¹³ in accordance
with Song Beverly section 1793.6. In denying the motion, the
Court characterized it as a "last-minute attempt to take a

¹² It is noted that one of the standards required to be applied under the UCL as passed upon by the court is whether SOA's warranty "practices are...unfair" and that Forty-Niner failed, not only to present "any evidence" but also failed to present "any...argument to the court" to support Forty-Niner's contentions. In comparison to one of the standards in the UCL of "unfair", the standard under Section 3065, to be applied by the Board to the warranty schedule or formula of SOA, is that it "adequately and fairly compensate" and that it be "reasonable".

¹³ It is noted the court pointed out that, more than four years into the litigation, Forty-Niner is seeking to include as an additional cause of action that SOA's warranty policies violated a Song-Beverly section providing a right in Forty-Niner to a "reasonable profit". Again, in comparison to the language in Song-Beverly of a "reasonable profit", the language in Section 3065 is whether the warranty reimbursement schedule or formula is "reasonable".

1 second bite at a vanishing apple" and determined that
2 "Plaintiff's dilatory behavior," Plaintiff's attempt to avoid
3 summary judgment, and the prejudice to SOA outweighed the
4 fact that Plaintiff's proposed claim was not frivolous.
(Citation omitted.) (Emphasis added.)

5 **III. Defendant's Current Motion (Before Judge Coyle in federal
6 court.)**

7 Defendant moves for summary judgment or summary
8 adjudication on Plaintiff's section 17200 claim for unfair
9 competition. This claim is alleged in the FAC as follows:

10 The business acts and practices of SUBARU as alleged
11 herein constitute unlawful and unfair business acts
12 and practices with the meaning of California Business
13 and Professions Code §§ 17200, et seq.

14 Subaru has engaged in "unlawful" business acts and
15 practices by compensating Class members for warranty
16 parts in an amount less than Class members would have
17 received by rendering like service¹⁴ and parts to
18 retail customers who are not entitled to warranty
19 protection, in violation of Civil Code § 1793.5.
(Emphasis added.)

20 SUBARU has also engaged in "unfair"¹⁵ business acts or
21 practices in that the justification for under-
22 compensating Class members for warranty parts is
23 outweighed by the harm the practice causes to members
24 of the Class and the general public, and because it
25 offends the public policies underlying the Song-
26 Beverly Consumer Warranty Act. (Citation omitted.)

27 Defendant presents multiple grounds for granting
28 summary judgment or summary adjudication including: SOA's
practices were not unlawful; California law provides a safe
harbor for SOA's practices; SOA's practices are not unfair
under California law, and Plaintiff has produced no evidence
to the contrary; Plaintiff contractually released its claims
in the Dealership Agreements; the New Motor Vehicle Board
("NMVB") has exclusive jurisdiction in this case; Plaintiff

14 Although the FAC may not have expressly asserted a claim in regard to the amount SOA was paying for labor, as can be seen, there was no reason why Forty-Niner could not also have asserted such a claim had a foundation for it existed.

15 Again, the claims of Forty-Niner under the UCL and Song-Beverly Act address the "fairness" of the warranty acts or practices of SOA, as compared to the standard established by Section 3065 of "adequacy" "fairness" and "reasonableness".

1 failed to exhaust its administrative remedies with the NMVB;
2 and the Court should stay the current proceedings and refer
3 the matter to the NMVB under the Doctrine of Primary
4 Jurisdiction. Defendant's first two arguments relating to
the section 17200 claim suffice to support summary judgment
in favor of Defendant.

5 IV. Undisputed Facts

6 (Under this caption the Court referred to the October
7 1991 version of SOA's "Policies and Procedures Manual"
8 ("PPM") that SOA had provided to Forty-Niner. The PPM set
9 forth the warranty labor rates, body repair labor rates, and
10 reimbursement rates for parts, accessories, and materials
11 used in the performance of warranty repairs. It was also
undisputed that the 1991 PPM was revised on five occasions:
12 June 1996, December 1997, November 1999, June 2001 and June
13 2002.)

14 ...Section 8.4.27 of all subsequent versions of the PPM
15 contains the following language regarding warranty service
16 repair reimbursement:¹⁶

17 Repair labor reimbursement is determined by the labor
18 times published in the Subaru Warranty Labor Time
19 Guide that applies to the vehicle...[L]abor times are
20 representative of the time required by a trained
21 Subaru technician in a typical Subaru dealership using
22 normally available hand tools, equipment and Subaru
23 special tools to perform repairs.

24 Defendant reimburses Plaintiff for warranty labor at the retail
25 rate. Section 13.8.3.2 establishes the reimbursement rate for
26 parts:

27 Parts will be reimbursed on the cost of the part at the
28 time of repair completion. In addition, compensation
for parts handling will be reimbursed as follows:

Non-Retail States [California]

///

16 As can be seen, the court is applying a sort of "global" analysis in evaluating the warranty policies of SOA, as it is looking at the manner in which SOA determines two things: (1) The "labor time" allowed for performance of a repair or part replacement; and (2) The "labor rate", which, as stated, is the same dollar amount per hour as Forty-Niner charges its retail customers.

- 1 • 1993 and prior model year vehicles will be reimbursed
2 at Dealer Cost plus a 30% handling allowance.
- 3 • 1994 and subsequent model year vehicles will be
4 reimbursed at Dealer Cost plus a 40% handling
5 allowance for any part with a Dealer Cost less than
6 \$500. Any part with a Dealer Cost greater than \$500
will be reimbursed at MSRP [Manufacturer's Suggested
Retail Price].¹⁷

7 V. Discussion

8

9 B. Section 17200

10 In its discussion of section 17200 of the Business and
Professions Code, the Court stated that:

11 "Unfair competition" was defined to mean "any unlawful,
12 unfair or fraudulent business act or practice."

13 There were three varieties of unfair competition -
14 unlawful, or unfair or fraudulent.

15 1. Plaintiff did not allege Defendant engaged in
"fraudulent" business practice.

16 2. The Court had previously found that Defendant had
17 complied with Song-Beverly and therefore had not engaged in

18
19 ¹⁷ The federal court found that SOA had provided Forty-Niner with copies of its
20 Policies and Procedures Manual ("PPM") containing the information indicated
21 pertaining to reimbursement of warranty claims. The date of the manual is given as
22 1991, with five revisions (through June 2002). Whether SOA had provided copies to
23 the Board has been found to be irrelevant for purposes of the right of Forty-Niner to
24 file a protest under Section 3065. As that is the case, then Forty-Niner could have
25 filed a protest starting in 1991 when the PPM referred to was first issued and, if
26 the revisions affected the warranty rights or obligations protected by Section 3065,
27 Forty-Niner could have filed a protest challenging each revision. Forty-Niner has
28 stated no reasons for waiting until September 26, 2005 for filing its protest with
the Board. This is a period of 14 years from the date first given for the PPM (1991)
and over 3 years from the fifth revision mentioned by the court (June 2002). If
Forty-Niner claims the right to file a protest "now" as it has done, even though it
alleges there was never a proper filing by SOA of a schedule or formula with the
Board, then Forty-Niner had that same right commencing at least in June 2002 (the
last revision mentioned) when SOA was applying its warranty reimbursement policies in
accordance with its PPM issued as of the date, a copy of which was apparently
provided to Forty-Niner, and under which SOA and Forty-Niner were operating. See
prior discussion re: timeliness of the protest.

1 any "unlawful" conduct and Plaintiff did not dispute that
2 its "unlawful" claim is barred by this ruling.

3 3. Defendant argued that the Legislature had provided
4 three separate safe harbor provisions that allow
5 reimbursement of parts at below retail labor rate, and thus
6 precluded Plaintiff's claim of "unfair" competition. The
7 safe harbors asserted were: Song-Beverly section
8 1793.2(a)(1)(B), B&P Code section 17042 and Vehicle Code
9 section 3065. The court concluded that "Because section
10 1793.2(a)(1)(B) provides a sufficient safe harbor, the Court
11 will not address Defendant's assertion that section 17042 of
12 the Business and Professions Code or section 3065 of the
13 Vehicle code (sic) also provide safe harbors."

14 The court analyzed the Song-Beverly provisions and
15 concluded: that SOA was entitled to a "good faith discount"
16 from the rates to be paid for warranty repairs, including
17 parts; that upon the documents submitted and the declaration
18 of Defendant's expert that "warranty reimbursement system
19 established by SOA considers a good faith discount related to
20 the dealer's reduced credit risk and SOA's general overhead
21 cost factors arising from SOA's payment of warranty charges
22 directly to its dealers." Further "...Plaintiff does not
23 cite any supporting authority for its claim that Defendant's
24 discount is not in good faith. The declaration of Mr.
25 Wilmshurst does not allege that the rates set are not in good
26 faith or are unrelated to reduced credit risks or overhead
27 costs." "...between 1994 and 1997 Plaintiff voluntarily sold
28 parts to third parties at a gross profit margin nearly
identical to that provided by Defendant's reimbursements.
Even if the mere existence of a discount could show bad
faith, it does not in this case given Plaintiff's apparent
willingness to accept the same gross profit margin from its
own transactions." (Emphasis added.)

22 SUMMARY OF CONCLUSION OF FEDERAL COURT LITIGATION TO DATE

23 82. As to the claim of Forty-Niner alleging violation of Song-
24 Beverly - On May 18, 2004, the federal court entered an order granting
25 summary judgment in favor of SOA.

26 83. As to the claim of Forty-Niner alleging violation of the
27 Business and Professions Code - On January 6, 2005, the federal court
28 entered an order stating, "ACCORDINGLY, IT IS ORDERED that summary

1 judgment as to Plaintiff's remaining claims of unfair or unlawful
2 business practices is GRANTED in favor of Defendant.

3 84. As stated above, Forty-Niner has filed a notice of appeal
4 and the matter is presently pending before the United States Ninth
5 Circuit Court of Appeals.

6 WHAT IS THE EFFECT OF THE FEDERAL LITIGATION UPON
7 ANY CLAIM FORTY-NINER IS NOW MAKING IN THIS PROTEST

8 85. In its protest, Forty-Niner has asked the Board to make four
9 determinations. These will be addressed in a different order than
10 presented in the protest with the second determination as requested by
11 Forty-Niner being addressed first.

12 THE SECOND DETERMINATION REQUESTED

13 86. The second determination requested of the Board by Forty-
14 Niner as stated in its protest, and identified as "B", is:

15 Does the SOA parts reimbursement schedule presently being applied
16 to SOA's dealers in California meet the requirements of the Song-
17 Beverly Consumer Warranty Act?

18 87. The jurisdiction of the Board as to this issue has been
19 addressed above. What might be called "limited" jurisdiction was
20 found to exist under the language of Section 3065, but, of course, if
21 there is no jurisdiction, this issue would be moot.

22 THE EFFECT OF THE FEDERAL LITIGATION UPON THIS
23 ISSUE OF WHETHER THE SOA PARTS REIMBURSEMENT
24 SCHEDULE MEETS THE REQUIREMENTS OF SONG-BEVERLY.

25 88. The federal court, in its order of May 18, 2004, found that
26 SOA was not in violation of the Song-Beverly Act. The federal court
27 thoroughly considered and rejected all of the contentions of Forty-
28 Niner as to whether there had been any violation by SOA of those
provisions of the Song-Beverly Act (as well as the (UCL)) that Forty-
Niner had specifically raised in its FAC. Also, the federal court

1 denied the attempt by Forty-Niner to claim other violations of the
2 Song-Beverly Act pointing out that Forty-Niner was seeking to do so
3 "more than four years into the litigation" and as a "last minute
4 attempt to take a second bite at a vanishing apple". Borrowing from
5 the language of Judge Coyle, Forty-Niner, is not just "more than four
6 years into the litigation", but is now seven years into the
7 litigation, and continues with its efforts with another "last minute
8 attempt to take a second bite at a vanishing apple".

9 89. The reasons given by Judge Coyle for denying Forty-Niner the
10 right to a "second bite" were valid then and remain so today in what
11 is now Forty-Niner's attempt to take a "third bite" at that same
12 "vanishing apple". These reasons, as thoroughly explained by Judge
13 Coyle, included: "... 'Plaintiff's dilatory behavior', Plaintiff's
14 attempt to avoid summary judgment, and the prejudice to SOA..."

15 CONCLUSION AS TO THE EFFECT OF THE FEDERAL LITIGATION UPON
16 THE REQUEST BY FORTY-NINER THAT THE BOARD MAKE A DETERMINATION
17 AS TO WHETHER "THE SOA PARTS REIMBURSEMENT SCHEDULE PRESENTLY
BEING APPLIED TO SOA'S DEALERS IN CALIFORNIA MEETS
18 THE REQUIREMENTS OF THE SONG-BEVERLY CONSUMER WARRANTY ACT".

19 90. It is concluded that the issue raised by Forty-Niner in its
20 Protest as Issue "B":

21 Does the SOA parts reimbursement schedule presently being applied
22 to SOA's dealers in California meet the requirements of the Song-
23 Beverly Consumer Warranty Act?

24 are the identical issues included within the federal court litigation
25 and ruled upon by the judge in the orders issued and the judgment that
26 was rendered by that court in favor of SOA (which is now before the
27 Ninth Circuit Court of Appeals). As such Forty-Niner is barred from
28 attempting to re-litigate these same issues before the Board.

29 ///

30 ///

1 discussion is incorporated here. In summary, Judge Coyle found that
2 there was no violation of any of the provisions of Song-Beverly as had
3 been alleged in the FAC, and, in particular, there was no obligation
4 on the part of SOA to pay for parts at the retail rate. Forty-Niner
5 is barred from re-litigating this issue.

6 THE EFFECT OF THE FEDERAL LITIGATION AS TO ISSUE "A", WHETHER
7 SOA IS NOT REIMBURSING FOR PARTS AT A "REASONABLE" RATE

8 96. After more than four years of the federal litigation, Forty-
9 Niner attempted to amend its FAC to include another allegation
10 charging a violation of Song-Beverly, specifically Civil Code section
11 1793.6 which provides:

12 1793.6. Except as otherwise provided in the terms of a
13 warranty service contract, as specified in subdivision (a)
14 of Section 1793.2, entered into between a manufacturer and
15 an independent service and repair facility, every
16 manufacturer making express warranties whose consumer goods
17 are sold in this state shall be liable as prescribed in this
18 section to every independent serviceman who performs
19 services or incurs obligations in giving effect to the
20 express warranties that accompany such manufacturer's
21 consumer goods whether the independent serviceman is acting
22 as an authorized service and repair facility designated by
23 the manufacturer pursuant to paragraph (1) of subdivision
24 (a) of Section 1793.2 or is acting as an independent
25 serviceman pursuant to subdivisions (c) and (d) of Section
26 1793.3. **The amount of such liability shall be an amount
27 equal to the actual and reasonable costs of the service and
28 repair, including any cost for parts and any reasonable cost
of transporting the goods or parts, plus a reasonable
profit.** It shall be a rebuttable presumption affecting the
burden of producing evidence that the reasonable cost of
service or repair is an amount equal to that which is
charged by the independent serviceman for like services or
repairs rendered to service or repair customers who are not
entitled to warranty protection. Any waiver of the
liability of a manufacturer shall be void and unenforceable.
(Emphasis added.)

26 97. This section can be read to require that SOA must pay a
27 "reasonable" sum for parts used in warranty work, as compared to "pay
28 at the retail rate" as was urged by Forty-Niner through other sections

1 of Song-Beverly.

2 98. As stated by Judge Coyle in the order of January 6, 2005:

3 The court also denied Plaintiff's motion to amend its
4 FAC. The motion, filed more than four years into the
5 litigation, sought to add a claim under Song-Beverly based
6 on allegations that SOA's warranty parts reimbursement
7 rates do not provide Plaintiff a reasonable profit in
8 accordance with Song Beverly section 1793.6. In denying
9 the motion, the Court characterized it as a "last-minute
10 attempt to take a second bite at a vanishing apple" and
11 determined that Plaintiff's dilatory behavior, Plaintiff's
12 attempt to avoid summary judgment, and the prejudice to SOA
13 outweighed the fact that Plaintiff's proposed claim was not
14 frivolous. (Citation omitted.) (Emphasis added.)

15 99. As stated above, Judge Coyle, in the federal action, found
16 that there were no violations of Song-Beverly as were alleged by
17 Forty-Niner in the FAC. In addition, Judge Coyle refused to allow
18 Forty-Niner leave to amend its FAC to include an additional allegation
19 that SOA's warranty parts reimbursement rates do not provide Forty-
20 Niner a reasonable profit in accordance with Song-Beverly Section
21 1793.6. Therefore, as Forty-Niner was barred in the federal action
22 from attempting to challenge the reasonableness of the parts
23 reimbursement by SOA, so should Forty-Niner be barred from litigating
24 this claim before the Board.

25 CONCLUSION AS TO THE EFFECT OF THE FEDERAL LITIGATION
26 UPON THE REQUEST BY FORTY-NINER THAT THE BOARD MAKE A
27 DETERMINATION AS TO THE QUESTION: "IS THE SOA PARTS
28 REIMBURSEMENT SCHEDULE PRESENTLY BEING APPLIED TO
SOA'S DEALERS IN CALIFORNIA REASONABLE?"

100. It is concluded that the issues raised by Forty-Niner in its
Protest as "Issue A - Is the SOA parts reimbursement schedule
presently being applied to SOA's dealers in California reasonable?"
would address the identical issues which Forty-Niner sought to have
included in the federal court litigation but which Judge Coyle
determined were barred as stated in the orders issued and the judgment

1 that was rendered by that court in favor of SOA, and which is now
2 before the Ninth Circuit Court of Appeals. Forty-Niner is barred from
3 attempting to re-litigate these same issues before the Board.

4 THE THIRD DETERMINATION REQUESTED

5 101. The third determination requested of the Board by Forty-
6 Niner as stated in its protest is:

7 Is the SOA schedule to establish time for warranty operations and
8 Added Security Coverage operations reasonable?

9 102. The jurisdiction of the Board as to the issue of "time for
10 warranty operations" has been addressed above.

11 103. As stated above, it is not certain that "Added Security
12 Coverage" would come within the jurisdiction of the Board as a
13 "warranty".

14 THE EFFECT OF THE FEDERAL LITIGATION UPON THIS
15 ISSUE OF WHETHER THE SOA SCHEDULE TO ESTABLISH
16 TIME FOR WARRANTY OPERATIONS IS REASONABLE

17 104. As the issue indicates, the focus is upon the amount of time
18 that is allowed by SOA for a technician to perform a warranty repair
19 operation (as compared to reimbursement for parts as covered in Issues
20 "A" and "B").

21 105. This concept of "labor time" was also (apparently
22 incidentally) addressed by Judge Coyle in his orders, which concluded
23 that there were no violations of the Song-Beverly provisions as
24 alleged by Forty-Niner. As stated above, Judge Coyle also denied the
25 request of Forty-Niner to amend its FAC to include additional specific
26 violations of Song-Beverly.

27 106. Although the protest by Forty-Niner in Issue "C" does not
28 make specific reference to Song-Beverly, it is noted that Forty-Niner
alleged that SOA had violated Civil Code section 1793.5 and that

1 Forty-Niner sought to amend its FAC to include an allegation of
2 violation of Civil Code section 1793.6.

3 107. Judge Coyle found in one ruling that SOA had not violated
4 any of the provisions of Song-Beverly that had been alleged by Forty-
5 Niner and in another ruling Judge Coyle concluded that Forty-Niner was
6 barred from amending its FAC to include additional allegations of
7 Song-Beverly violations.

8 108. A comparison of the Song-Beverly Sections alleged and sought
9 to be alleged (Civil Code section 1793.5 and Civil Code section
10 1793.6) with the allegations of Forty-Niner in Issue "C" of the
11 protest reveals that all three relate to the same issue which is the
12 amount of reimbursement that should be paid for the performance of
13 warranty work.

14 109. As has been said earlier, Judge Coyle, in looking for
15 evidence of violation of Song-Beverly and the UCL, reviewed SOA's
16 Standard Agreement as well as SOA's Policies and Procedures Manual.
17 These publications set forth the warranty labor rates, including the
18 "Subaru Warranty Labor Time Guide" that applied to each vehicle. See
19 footnote 15.

20 110. Judge Coyle in his rulings evaluated the claims alleged by
21 Forty-Niner of violations of Song Beverly and the UCL. In his
22 analysis of these claims, Judge Coyle found that in looking at the
23 allegations of violation of the UCL as stated in the Business and
24 Professions Code, "Plaintiff did not present any evidence or argument
25 to the court in support of its motion for summary adjudication on the
26 grounds that Defendant's practices were unfair or fraudulent."

27 111. This finding (of a complete lack of "any evidence or
28 argument...that (SOA's) practices were unfair...") should be

1 conclusive as to the assertion by Forty-Niner in its protest that the
2 schedule of SOA does not "adequately and fairly" compensate its
3 franchisees or that the formula or schedule used by SOA is not
4 "reasonable". Even if the finding itself is not conclusive, the fact
5 that Forty-Niner was barred from amending its FAC to allege other
6 statutory violations establishing a "reasonable" standard, is enough
7 to bar Forty-Niner from its continuing attempts to take bites out of
8 that well-gnawed apple.

9 112. Issue "C" of the protest asks, "Is the SOA schedule to
10 establish time for warranty operations and Added Security coverage
11 operations reasonable?" This is doing nothing more than challenging
12 the potential liability of SOA for reimbursement for warranty repairs
13 with the only difference, if any, being the standard for computing the
14 amount of reimbursement. As stated above, the standards among the
15 various statutes are as close to being identical as they can possibly
16 be without using the exact same vocabulary.

17 CONCLUSION AS TO THE EFFECT OF THE FEDERAL LITIGATION
18 UPON THE REQUEST BY FORTY-NINER THAT THE BOARD MAKE A
19 DETERMINATION AS TO THE QUESTION: "IS THE SOA SCHEDULE
20 TO ESTABLISH TIME FOR WARRANTY OPERATIONS AND ADDED
21 SECURITY COVERAGE OPERATIONS REASONABLE?"

22 113. It is concluded that the issues raised by Forty-Niner in its
23 Protest as Issue "C":

24 Is the SOA schedule to establish time for warranty operations and
25 Added Security coverage operations reasonable?

26 would address the identical issues which Forty-Niner included or
27 sought to have included in the federal court litigation which ended,
28 to this point, with a summary judgment in favor of SOA, and which is
now before the Ninth Circuit Court of Appeals. Forty-Niner is barred
from attempting to re-litigate these same issues before the Board.

THE FOURTH DETERMINATION REQUESTED

1
2 114. The fourth and last determination requested of the Board by
3 Forty-Niner as stated in its protest is Issue "D":

4 Is the manner in which SOA establishes the warranty hourly rate
5 paid to the dealers reasonable?" (Protest, page 3, lines 12-21)

6 115. As stated above, this issue would also come within the
7 jurisdiction of the Board.

8 116. The claim here pertains to whether the "hourly rate paid to
9 the dealers" is "reasonable", however it is not disputed that SOA
10 reimburses its franchisees for warranty work at the same hourly rate
11 as the franchisees charge their retail customers.

12 117. To the extent that there is some claim by Forty-Niner that
13 the amount as calculated or paid by SOA would violate some provision
14 of Song-Beverly or the UCL (the standards of which would also
15 encompass the standards established in Section 3065), those issues
16 have been decided by the federal court in favor of SOA.

17 118. Issue "D" purports to focus upon the "manner in which SOA
18 establishes" the "hourly rate" allowed for warranty repair. However,
19 it would appear that the "manner" is relatively straightforward. It
20 is the same amount as the franchisee charges its retail customers for
21 non-warranty work. As to the procedures required to be followed and
22 the time delays and inconvenience involved in complying with the
23 requirements of SOA in implementing the "hourly rate", these areas
24 would likely be addressed under the issue of whether the franchisee
25 would be deprived of a "reasonable profit" which is also within the
26 language of the Song-Beverly Act. If the concern is that the "hourly
27 rate" is inadequate because the SOA warranty manual does not allow for
28 an appropriate amount of time ("no time" or "low time" for diagnosis.

1 for example), this would be within Issue "C", above, and also within
2 what might have been alleged in the federal action. As stated by
3 Judge Coyle, "Plaintiff does not challenge the rates that SOA pays for
4 the labor involved in the warranty repair services, which appear to be
5 the same as the rates charged in non-warranty repairs."

6 119. The query and the analysis of Issue "D" and what was alleged
7 or sought to be alleged or could have been alleged in the federal suit
8 are the same: The propriety of the calculation for the reimbursement
9 to Forty-Niner for warranty service and parts.

10 120: The federal court found no violation of the provisions of
11 Song-Beverly or the UCL that were alleged in the complaint, and
12 refused to allow Forty-Niner to amend its FAC to include other
13 statutory violations. It would appear that Issue "D", as with the
14 other issues in the protest, involves an attempt by Forty-Niner to
15 litigate the same issues that were or should have been resolved in the
16 civil litigation initiated over seven years ago and which is still
17 ongoing. Of course, the failure to timely allege in that litigation
18 any claim for failure of SOA to reimburse properly for labor or parts
19 (or any other warranty-related claim Forty-Niner may have had) will
20 become barred upon the conclusion of the federal litigation; if not
21 sooner.

22 CONCLUSION AS TO THE EFFECT OF THE FEDERAL LITIGATION
23 UPON THE REQUEST BY FORTY-NINER THAT THE BOARD MAKE A
24 DETERMINATION AS TO THE QUESTION: "IS THE MANNER IN
25 WHICH SOA ESTABLISHES THE WARRANTY HOURLY RATE PAID
26 TO THE DEALERS REASONABLE?"

27 121. It is concluded that the issue raised by Forty-Niner in its
28 Protest as "Issue D - Is the manner in which SOA establishes the
warranty hourly rate paid to the dealers reasonable?" is either a
"non-issue" as SOA pays at the "retail rate", or the issue would

1 address the identical issues which Forty-Niner included or sought to
2 have included or should have included in the federal court litigation
3 which ended, to this point, with a summary judgment in favor of SOA
4 but which is before the Ninth Circuit Court of Appeals. Forty-Niner
5 should be barred from attempting to re-litigate these same issues
6 before the Board.

7 ADDITIONAL GROUNDS FOR DISMISSAL OF THE COMPLAINT
8 ASSERTED BY SOA IN THE FEDERAL LITIGATION BUT
9 UPON WHICH NO RULINGS WERE MADE BY JUDGE COYLE

10 122. SOA, among other assertions, sought to have summary judgment
11 granted in its favor in the federal litigation on the following
12 grounds:

- 13 1. "...the New Motor Vehicle Board ("NMVB") has exclusive
14 jurisdiction in this case;
- 15 2. "Plaintiff failed to exhaust its administrative remedies
16 with the NMVB; and
- 17 3. "...the Court should stay the current proceedings and
18 refer the matter to the NMVB under the Doctrine of
19 Primary Jurisdiction."

20 123. Each time these issues were raised before Judge Coyle, he
21 concluded that there was no need to address them as the other
22 arguments of SOA, that there were no violations of Song-Beverly or the
23 UCL, were sufficient by themselves to rule in favor of SOA and dismiss
24 the complaint of Forty-Niner.

25 SPECIFIC CONTENTIONS OF SOA IN THIS MOTION TO DISMISS

26 124. SOA's first specific contention as stated in its Motion to
27 Dismiss is: Forty-Niner's challenge to SOA's warranty reimbursement
28 practices has already been adjudicated in court, and Forty-Niner
should not be allowed to split its claims.

1 125. It is determined that this contention of SOA is well-taken.
2 The suit was originally filed in state court on October 27, 1998 and
3 removed to federal court on August 25, 2000. More than four years
4 elapsed from the time the suit "arrived" in federal court until
5 judgment was entered in favor of SOA. During that time, Judge Coyle
6 issued at least three detailed and well-reasoned orders, totaling 53
7 pages in length.²⁰ These were summarized and excerpted above and
8 consisted of: the "ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON
9 THE PLEADINGS ON THE GROUND THAT PLAINTIFFS CANNOT PROCEED UNDER
10 CALIFORNIA CIVIL CODE § 1793.5", issued on November 30, 2001; the
11 "ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION, DENYING
12 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF'S
13 MOTION FOR LEAVE TO AMEND", issued on May 18, 2004; and the "ORDER
14 GRANTING DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION OR IN THE
15 ALTERNATIVE SUMMARY JUDGMENT", issued on January 6, 2005. These
16 orders are comprehensive, detailed, well reasoned and addressed some
17 of the specific provisions of the SOA Policy and Procedures Manual as
18 they applied to the payment of warranty claims for both parts and
19

20 ²⁰ This is the combined length of just the three orders of the trial court supplied
21 to the Board. There were obviously more. Obviously, their length is not conclusive,
22 however, it is indicative of the care that Judge Coyle exercised in considering and
23 analyzing the issues. Considering the amount of time that the litigation between SOA
24 and Forty-Niner has been (and still is) ongoing, the opportunity of Forty-Niner to
25 have brought before the court and had decided all the issues between Forty-Niner and
26 SOA, the apparent high repute of Forty-Niner's counsel and their talent and
27 resources, the well-reasoned and detailed analysis by Judge Coyle as contained in his
28 orders, there is no other conclusion to be reached other than that Forty-Niner has
"had its day (in this case years) in court" and it is time to declare the apple
"vanished". The reference to Forty-Niner's counsel during the federal litigation was
not intended to demean the quality of counsel for SOA. To the contrary, the trial
court ruled in favor of SOA on all three orders brought to the Board's attention.
The purpose of the reference to counsel is to point out that the federal suit was not
just a "small town dealer, aka "David", going up in an unfair battle against a
"Goliath". The suit was filed as a class and private attorney-general action which
is the type of action that commonly requires a law firm that has great expertise in
that type of proceeding as well as talent and resources.

1 labor.

2 126. Almost seven years have passed from the time Forty-Niner
3 filed its civil suit (October 1998) to the time it filed its protest
4 with the Board (September 2005), and even now the federal court
5 judgment in favor of SOA remains on appeal. If the Ninth Circuit
6 Court of Appeals affirms the judgment of the trial court, the judgment
7 entered in favor of SOA will become final and the concept of res
8 judicata will apply. If the judgment in favor of SOA is nullified by
9 the Court of Appeals, the matter will be remanded to the federal
10 district court and there would still be no need or justification for
11 having another proceeding conducted before an administrative agency on
12 the same issues.

13 127. SOA's other contention is: Forty-Niner cannot now seek a
14 ruling from the Board after having objected to the Board's involvement
15 in the first instance and choosing to litigate its claims in court.

16 128. It is not disputed that throughout the course of the federal
17 litigation, SOA urged that the lawsuit be dismissed due to Forty-
18 Niner's failure to exhaust its administrative remedies or that the
19 federal court should exercise its discretion and defer to the
20 jurisdiction of the Board under what SOA cited in its "primary
21 jurisdiction" arguments. And, it is not disputed that Forty-Niner
22 opposed such efforts by contending that the Board was simply "an
23 alternative forum for dispute resolution".

24 129. Having already "borrowed" extensively from Judge Coyle's
25 thorough consideration of the contentions of Forty-Niner, there is no
26 need to depart from his lead. Judge Coyle determined that SOA should
27 prevail on summary judgment without the need to address the issues of
28 exclusive jurisdiction or the inter-relationship between the Board's

1 administrative jurisdiction and that of the courts. Likewise, so
2 should SOA prevail on this motion to dismiss without the need for
3 deciding the effect of Forty-Niner's refusal to proceed before the
4 Board first under Section 3065. The refusal to do so could not have
5 been due to the fact that counsel for Forty-Niner was inexperienced or
6 otherwise lacking in talent, depth, resources, etc., to have brought
7 in a timely manner, either in the civil action or before the Board,
8 all of the claims of Forty-Niner that existed.

9 130. Because the issues that were raised or could have been
10 raised in the federal court action included the same issues that could
11 have been raised between the same parties in a protest, the
12 proceedings in the federal court, if they become final would operate
13 as res judicata as to the issues raised in the protest.

14 131. The Ninth Circuit Court of Appeals could see fit to affirm
15 the judgment in favor of SOA in which case the concept of res judicata
16 would operate. All of the claims that could have been brought between
17 the parties would be merged into the final judgment which would then
18 operate to bar the same parties from again litigating in any forum the
19 causes of action that come within the scope of the prior proceeding.

20 132. It is possible that the Ninth Circuit Court of Appeals could
21 remand the matter back to the United States District Court for further
22 proceedings. However, not only is it speculative as to whether this
23 would occur, but it is also speculative as to what the parameters of
24 any such order of remand would be.

25 133. Therefore, to require SOA to defend this protest after the
26 long-lived litigation has reached what might be its final throes,
27 would be to ignore those factors that influenced Judge Coyle to deny
28 Forty-Niner's Motion to Amend its FAC to add another allegation,

1 namely: It would be another "last-minute attempt to take a second
2 bite at a vanishing apple"; that "Plaintiff's dilatory behavior" was
3 inexcusable; that this is a desperate attempt to avoid the summary
4 judgment entered in the federal litigation; and "the prejudice to SOA
5 outweighed the fact that Plaintiff's proposed claim was not
6 frivolous."

7 WHETHER THE PROTEST CAN BE BROUGHT BY
8 RICHARD E. WILMSHURST AS SOLE PROTESTANT

9 134. In the OPPOSITION TO SUBARU OF AMERICA'S MOTION TO DISMISS
10 PROTEST..., Forty-Niner alleged that: "IF THE NMVB BELIEVES THE SAME
11 ISSUES ARE BEING LITIGATED BETWEEN FORTY-NINER AND SOA, THEN THE
12 PROTEST MUST PROCEED WITH RICHARD E. WILMSHURST AS THE SOLE PROTESTANT
13 WHO WAS NOT A PARTY TO THE DISTRICT COURT ACTION".

14 135. Richard E. Wilmshurst is named in the caption of the protest
15 as a Protestant, and the body of the protest states that it is being
16 filed by Forty-Niner "and RICHARD E. WILMSHURST". However, the Dealer
17 Agreement submitted by SOA, identifies the parties to it as SOA and
18 "Forty-Niner/Sierra Resources, Inc. ("Dealer")." Richard E.
19 Wilmshurst is identified as "Record Owner" with "Percentage of Record
20 Ownership" being "100.00%" and Richard E. Wilmshurst is also shown as
21 "Beneficial Owner" with "Percentage of Record Ownership Percentage"
22 being "100.00%". Richard E. Wilmshurst is also shown as "Executive
23 Manager" and "President".

24 136. Section 3050 empowers the Board to hear a protest "presented
25 by a franchisee pursuant to Section...3065...".

26 137. The Dealer Agreement, which is the "franchise" as defined in
27 Section 331, identifies only SOA and Forty-Niner as being parties to
28 it. Only Forty-Niner would be the "franchisee", as defined in Section

1 331.1, and it would be only Forty-Niner with standing to file a
2 protest.

3 138. It is concluded that Richard E. Wilmshurst has no standing
4 to file a protest in his individual capacity and has no standing to
5 pursue in his individual capacity the claims alleged in the protest.

6 PROPOSED ORDER

7 After consideration of the pleadings, exhibits, evidence
8 presented, and oral arguments of counsel, it is ordered that:

9 1. Mr. Richard E. Wilmshurst is dismissed as a party to this
10 proceeding; and,

11 2. Respondent's "MOTION TO DISMISS PROTEST FOR REVIEW OF
12 WARRANTY REPAIR PAYMENT REASONABLENESS" is granted. Protest No. PR-
13 1973-05 is dismissed with prejudice.

14
15 I hereby submit the foregoing which
16 constitutes my proposed order in
17 the above-entitled matter, as the
18 result of a hearing before me, and
19 I recommend this proposed order be
20 adopted as the decision of the New
21 Motor Vehicle Board.

22 DATED: January 13, 2006

23 By: 

24 ANTHONY M. SKROCKI
25 Administrative Law Judge

26
27 Ken Miyao, Acting Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV