

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 Petition of )  
)  
HERB FRIEDLANDER, INC., a California ) **Petition No. P-265-93**  
corporation, dba HERB FRIEDLANDER )  
ACURA; and HERB FRIEDLANDER, an )  
individual, )  
)  
Petitioner, )  
)  
vs. )  
)  
AMERICAN HONDA MOTOR COMPANY, INC., )  
ACURA AUTOMOBILE DIVISION; and DOES )  
1 through 100, Inclusive, )  
)  
Respondent. )  
\_\_\_\_\_ )

DECISION

The attached Proposed Ruling of the Administrative Law Judge was considered by the Public members of the New Motor Vehicle Board at its special meeting of January 28, 1997. After such consideration, the Public members of the Board adopted the Proposed Ruling as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 28 day of January 1997.

  
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MANNING J. POST  
President Emeritus  
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD  
1507 - 21st Street, Suite 330  
2 Sacramento, California 95814  
Telephone: (916) 445-1888  
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8 STATE OF CALIFORNIA  
9 NEW MOTOR VEHICLE BOARD  
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19 )  
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20 )

Petition No. P-265-93

PROPOSED RULING ON  
MOTION TO DISMISS

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6 PROCEDURAL BACKGROUND

7 Petitioner, Herb Friedlander Inc., (*Friedlander*) filed Petition P-  
8 265-93 on October 7, 1993. A First Amended Petition was filed on  
9 November 3, 1994. Respondent, American Honda Motor Co., Inc. (*Honda*)  
10 filed the instant motion to dismiss claims and to strike pleadings on  
11 January 5, 1996. The parties filed briefs pursuant to the Board's  
12 briefing order dated January 25, 1996, and argument on the motion was  
13 heard on March 1, 1996 before the Board's administrative law judge. The  
14 matter was submitted for ruling upon the filing of Respondent's closing  
15 brief on March 29, 1996 and is now ready for ruling.<sup>1</sup>

16 PETITIONER'S ALLEGATIONS AND CLAIMS

17 Herb Friedlander's long association with Honda began as a franchised  
18 Honda motorcycle dealer in 1961.<sup>2</sup> In 1971 he obtained a franchise for new  
19 Honda automobiles, and he operated Westminster Honda in the City of  
20 Westminster until 1986. In January 1990, Friedlander opened a franchise  
21 for Acura automobiles in San Bernardino, voluntarily terminating it on  
22 October 14, 1991.

23 Friedlander alleges that in 1985, he proposed to sell his  
24 Westminster Honda dealership to Robert Hix, Inc., a retail automobile  
25 sales corporation in Orange County. Under the Honda dealer agreement, the  
26 proposal required Honda's prior approval. Honda advised Friedlander that

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<sup>1</sup>At hearing on the motion the administrative law judge ordered the parties to file closing briefs  
addressing particular points of law. Petitioner did not file a timely closing brief.

<sup>2</sup>For purposes of the motion only, Honda does not challenge the veracity of Petitioner's  
allegations of fact.

1 the proposed purchase price was too high and refused to approve the sale  
2 to Hix. Instead, Honda directed Friedlander to sell Westminster Honda to  
3 Mr. Martin Lufstgarten, another prospective purchaser whom Honda  
4 preferred, at a price \$500,000 less than Hix had offered. To secure  
5 Friedlander's cooperation, Honda offered Friedlander a letter of intent  
6 to establish a new Acura dealership in San Bernardino, which he could  
7 later also sell to Lufstgarten and which was valued at \$500,000.

8 Friedlander accepted the proposal and proceeded with the acquisition  
9 of land and construction of the facilities for the San Bernardino Acura  
10 dealership. Then, in 1988, Lufstgarten told Friedlander that he was no  
11 longer interested in purchasing the Acura dealership because he had  
12 obtained a Honda franchise in Ontario instead. Although Friedlander did  
13 not wish to operate the dealership himself, he completed the San  
14 Bernardino facility and began operations as an Acura dealer in 1990.

15 The first year of operation in San Bernardino was not profitable, so  
16 in March 1991, Friedlander sought Honda's approval for relocating the  
17 dealership four miles south to Loma Linda. There, Friedlander hoped to  
18 dual Acura with a Jaguar franchise he planned to purchase. In May 1991,  
19 Honda refused to approve the relocation. Friedlander then proposed to  
20 sell San Bernardino Acura, and, once again, Honda withheld its approval.  
21 Unable to continue operating at a loss, Friedlander voluntarily  
22 terminated the Acura franchise and closed San Bernardino Acura in October  
23 1991.

24 During the period over which the above events took place,  
25 Friedlander alleges that Honda management employees engaged in  
26 widespread bribery and corruption. Friedlander alleges that Honda  
27 officials manipulated its vehicle allocation program and awarded new  
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1 franchises in return for bribes paid by dealers and dealer applicants.<sup>3</sup>  
2 These activities underlie Friedlander's ten separate claims for relief.

3 In Petitioner's first claim for fraud, Friedlander asserts that  
4 Honda induced Friedlander to sell Westminster Honda to Lufstgarten and to  
5 establish San Bernardino Acura with the false promise that Friedlander  
6 could then sell the Acura franchise for \$500,000.

7 Friedlander's second claim is for intentional interference with  
8 Friedlander's agreement to sell Westminster Honda to Robert Hix by  
9 refusing to approve the sale and requiring that the sale be to  
10 Lufstgarten instead.

11 Friedlander's third claim is for "inducing breach of contract" in  
12 that Honda induced Lufstgarten to breach his agreement to purchase the  
13 San Bernardino Acura franchise from Friedlander.

14 The fourth claim is for "interference with prospective advantage" in  
15 that Honda refused to allow Friedlander to relocate his Acura  
16 dealership from San Bernardino to Loma Linda and refused to approve a  
17 buyer for the dealership.

18 The fifth claim is for breach of covenant of good faith and fair  
19 dealing based on the first four claims.

20 Friedlander, in his sixth claim, argues that by virtue of his dealer  
21 agreement with Honda, Honda assumed a fiduciary relationship with  
22 Friedlander. Friedlander claims Honda breached its fiduciary duty not to  
23 harm him.

24 The seventh claim is that Honda's alleged conduct was unfair  
25 competition in violation of Business and Professions Code sections 17200  
26 et seq.

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28 <sup>3</sup>Both parties offered evidence in the form of documents from federal proceedings involving charges of criminal conduct on the part of Honda employees and others, including evidence that Robert N. Rivers, S. James Cardiges and Raymond Hovesejian, each of whom dealt with Lufstgarten and Friedlander, were eventually imprisoned for fraud and corruption. None of the convictions involved facts directly pertaining to Petitioner's allegations in this petition.

1 Friedlander's eighth claim is for breach of its Honda and Acura  
2 dealership agreements in that Respondent (1) failed to provide an  
3 adequate supply of automobiles, (2) unreasonably refused to approve the  
4 proposed relocation of Acura to Loma Linda, (3) unreasonably refused to  
5 approve the sale of Friedlander's Honda and Acura franchises, (4) failed  
6 to find a purchaser for the Acura franchise, and (5) discriminated  
7 against Friedlander in the allocation of popular vehicle models.

8 Petitioner's ninth (misnumbered "eighth" in the Petition) claim is  
9 for negligence in general reference to the first 62 paragraphs of the  
10 Petition.

11 The tenth (misnumbered "ninth") claim is for "negligent  
12 supervision" in that Honda failed to prevent fraudulent and corrupt  
13 practices on the part of its employees.

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15 RESPONDENT'S MOTION TO DISMISS

16 AND STRIKE PORTIONS OF THE PETITION

17 Respondent seeks to avoid six of Friedlander's tort and contract  
18 related claims by arguing that they are barred by the applicable statutes  
19 of limitation and by laches. Respondent points out that the original  
20 petition was not filed until October 7, 1993 even though the events on  
21 which it is based occurred long before. Respondent supports its statutes  
22 of limitation defenses with evidence in form of the sworn deposition  
23 testimony of Herb Friedlander and his employee, Robert Carter.

24 In regard to Petitioner's claims arising from the sale of  
25 Westminster Honda, the deposition testimony alleges that Friedlander and  
26 Carter were aware in 1986 that Luftgarten participated in bribery with  
27 Honda officials, and they believed in the early 1980s that new vehicle  
28 allocations were being manipulated. They had also been made aware at

1 that time that certain Honda officials wanted to eliminate Friedlander as  
2 a Honda dealer. In Friedlander's deposition testimony, he alleged that  
3 in 1988, when Lufstgarten declined to pay Friedlander \$500,000 for the  
4 San Bernardino Acura franchise, Friedlander suspected that bribery was  
5 involved. Respondent argues that Friedlander was aware of all his  
6 Westminster related claims by 1988 and that they are now precluded by  
7 either the three year limitations period for fraud under C.C.P. sec.  
8 338(d) or the two year limitations period for business torts under C.C.P.  
9 sec. 339(1). Respondent also moves to strike those allegations  
10 underlying its breach of contract and unfair competition claims as to  
11 matters which occurred before October 14, 1989 and are precluded by the  
12 four year limitations periods provided by C.C.P. sec. 337 and Business  
13 and Professions Code section 17208.

14 As to Friedlander's business tort claims arising from Honda's  
15 alleged refusal to approve the proposed relocation to Loma Linda,  
16 Respondent argues that these are likewise barred by the two year  
17 limitation of C.C.P. sec. 338(d) because the refusal occurred in May  
18 1991, some two years and five months before the petition was filed.

19 Respondent asserts that Friedlander's, ninth and tenth claims for  
20 negligence and negligent supervision are subject to limitation of two  
21 years under C.C.P. sec. 339(1) for negligent injury to business good will  
22 and to the one year period for personal injury under C.C.P. sec. 340.3.  
23 Respondent submits that since these claims arose from events which  
24 Friedlander alleges to have occurred before October 1991, they are  
25 likewise time barred.

26 In addition to its limitations defenses, Respondent moves to dismiss  
27 Friedlander's sixth claim for breach of fiduciary duty on ground that no  
28 such relationship is established by the mere existence of a commercial

1 contract, such as an automobile franchise agreement. Respondent attacks  
2 Petitioner's ninth and tenth claims for negligence because they are based  
3 on allegations arising from Friedlander's contractual relationship with  
4 Honda. Honda cites the recent case *Freeman and Mills v. Belcher Oil Co.*  
5 (1995) 11 Cal. 4th 85 as precluding tort recovery in contract cases  
6 absent an independent duty in tort law.

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8 PETITIONER'S OPPOSITION TO THE MOTION

9 Petitioner does not dispute that the statutes of limitation cited  
10 by Respondent are applicable to its claims. Nor does Petitioner address  
11 Respondent's challenge to the sixth, ninth and tenth claims (breach of  
12 fiduciary duty and negligence). In the main, Petitioner opposes the  
13 motion on grounds that, in as much as Honda through certain of its  
14 employees was engaged in widespread corruption and fraud upon its  
15 franchisees, including Petitioner, Honda is now estopped from raising the  
16 defense of limitations or laches. More specifically, Petitioner claims  
17 that Honda concealed its knowledge of the wrongful activities of its  
18 officers and prevented Friedlander from knowing the full extent of his  
19 claims until 1993.

20 Petitioner supplements the above opposition with argument that the  
21 Board lacks jurisdiction to grant the motion and that Petitioner should  
22 be given an additional opportunity to discover facts relating to its  
23 estoppel theory. Petitioner also asserts that Respondent's motion is in  
24 the nature of a motion for summary judgement but was not accompanied by  
25 a separate statement of facts as required by Code of Civil Procedure  
26 section 437C(b).

27 Petitioner supports its opposition to the motion with the  
28 declarations of Herb Friedlander and his then-attorney, Randall L. Hite.

1 In these declarations, Petitioner largely seeks to contradict his earlier  
2 deposition testimony as to the state of his awareness of wrongdoing by  
3 Honda. Friedlander asserts that he complained to Honda and consulted an  
4 attorney in "the 1980s" concerning his dissatisfaction with Honda's  
5 vehicle allocation program, but he did not pursue the matter because he  
6 did not understand Honda's allocation program and did not perceive that  
7 bribery by others affected his own allocation. In contrast with his  
8 deposition testimony, Friedlander stated in his declaration that it was  
9 not until he consulted Mr. Hite in 1993, that he learned that Lufstgarten  
10 had actually paid a \$50,000 bribe to Honda officials in order to obtain  
11 the Ontario Honda franchise.<sup>4</sup>

#### 12 13 ANALYSIS OF THE ISSUES PRESENTED BY THE PARTIES

14 The main issue presented is the question of when the period of  
15 limitations began to run and whether Petitioner's claims are time barred.  
16 For purposes of this analysis, Petitioner's various claims will be  
17 considered in the following categories: claims arising from the sale of  
18 Westminster Honda; claims arising while Petitioner operated San  
19 Bernardino Acura; claims arising from Honda's alleged misallocation of  
20 new Honda and Acura vehicles.

21 The general rule is that a limitations period begins to run upon  
22 the occurrence of the last necessary element of a cause of action,  
23 whether or not the plaintiff is actually aware of its claim. The  
24 exception is where the cause of action is based on fraud or where a  
25 defendant has fraudulently caused the plaintiff to delay or refrain from  
26 commencing litigation until the normal limitation period has run. In

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28 <sup>4</sup>The Hite consultation came after Friedlander had initiated a lawsuit in 1992 against Honda alleging wrongful conduct by Honda in connection with the San Bernardino Acura dealership. The Court sustained Honda's demurrer for failure to exhaust administrative remedies. Mr. Hite had previously represented Mr. Robert N. Rivers, a Honda official who worked with Mr. Cardiges. It was then, in March 1993, that Friedlander learned from Hite the details of the Lufstgarten Ontario Honda bribe, confirming his long held suspicions.

1 such cases the limitation period is tolled until the plaintiff has  
2 actually discovered its claim. Under the so-called discovery rule, a  
3 plaintiff is held not only to its actual knowledge but also to such  
4 knowledge as could reasonably be obtained by investigating the  
5 plaintiff's suspicions.

6 Concerning the sale of Westminster Honda, Friedlander's deposition  
7 testimony establishes that Friedlander was suspicious of Honda's claim  
8 that the price offered by Hix was too high. Lufstgarten himself told  
9 Friedlander in 1985 that Lufstgarten bribed Honda officials to obtain  
10 franchises and favorable vehicle allocations. Friedlander should  
11 certainly have been suspicious when Honda directed him to deal with  
12 Lufstgarten and to accept \$500,000 less than Hix had offered. In 1988,  
13 when Lufstgarten reneged on the alleged agreement to pay Friedlander  
14 \$500,000 for his San Bernardino Acura letter of intent, Friedlander knew  
15 he had been wronged. Even if Honda had, as alleged, attempted to conceal  
16 the alleged wrongful conduct, the attempt clearly failed. The knowledge  
17 Friedlander had was sufficient as of 1988 at the latest to commence the  
18 limitations period for all of Petitioner's contract and tort claims  
19 related to the Westminster sale.<sup>5</sup>

20 As to Petitioner's San Bernardino Acura claims for intentional  
21 interference with prospective economic advantage involving the proposed  
22 San Bernardino Acura relocation and sale, there is no dispute that these  
23 events occurred well before the dealership closed operations in October  
24 1991. Honda did not, nor could it, conceal these matters from  
25 Friedlander. The relevant statute of limitations is two years under  
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<sup>5</sup>There is no dispute between the parties that the only facts Friedlander learned from Mr. Hite in March 1993, that he may not have known before was the amount Lufstgarten paid in bribery for the Ontario franchise and the name of the person he paid.

1 C.C.P. sec. 339(I), thus these claims are barred.<sup>6</sup> The motion does not  
2 challenge Petitioner's breach of contract claims (fifth and eighth)  
3 related to San Bernardino Acura and arising after October 1989.

4 Petitioner does not allege specific events or dates for its claims  
5 that Honda's new vehicle allocation program was tainted by bribery and  
6 corruption. However, since Friedlander became suspicious at least as  
7 early as 1982 when he consulted an attorney, he must be held to have had  
8 inquiry knowledge from that time. The longest applicable statutes of  
9 limitations would be the four year period for breach of contract under  
10 C.C.P. sec. 337 or for unfair competition under Business and Professions  
11 Code section 17208. Petitioner's allocation related claims based on  
12 events occurring while he owned Westminster Honda are clearly barred.  
13 Honda's motion does not challenge Petitioner's unfair competition claim  
14 in connection with San Bernardino Acura.

15 Petitioner's claims for negligent injury to his business, for  
16 emotional distress, and for "negligent supervision" are subject to one  
17 and two year limitations under C.C.P. sec. 339(1) and sec. 340(3). Since  
18 the alleged wrong doing occurred before October 14, 1991, the limitations  
19 periods had run by the time the petition was filed.<sup>7</sup>

20 The motion to dismiss should be granted as to Petitioner's claims  
21 for breach of fiduciary obligation (sixth) and for negligence (ninth and  
22 tenth). Respondent correctly points out that under California law no  
23 fiduciary relation is established by virtue of an arms length commercial  
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26 <sup>6</sup>Petitioner does not allege the exact dates on which Honda refused to make the requested  
27 approvals. The alleged refusal to approve the relocation appears to have occurred sometime in May  
28 1991, and it is obvious that if Honda rejected or failed to find a qualified buyer, these events must have  
occurred well before October 14, 1991, the date the Acura dealership closed. It follows that more than  
two years passed before October 7, 1993, the date the original petition was filed.

<sup>7</sup>"Negligent supervision" is not technically a cause of action itself, but may be part of a claim of  
negligence to the extent Honda may have owed a duty to Petitioner to prevent its employees from  
engaging in corruption. In any case, the applicable two year statute had lapsed by 1988.

1 contract.<sup>8</sup> Petitioner's claim for negligence alleges no facts  
2 establishing that Respondent owed any duty other than those which were  
3 purely contractual in nature. After the 1995 decision in *Freeman and*  
4 *Mills* (supra, 11 Cal. 4th 85) California no longer recognizes tort claims  
5 from breach of non-insurance contracts.

6 In its opposition to the motion and at oral argument, Petitioner  
7 argued that the motion is in the nature of a motion for summary judgement  
8 and that absent specific statutory or judicially determined authority,  
9 the Board may not grant such a motion. Respondent points out and  
10 Petitioner does not dispute, however, that the Board has broad  
11 jurisdiction under Vehicle Code section 3050 to "mediate, arbitrate or  
12 otherwise resolve" disputes within its jurisdiction. Within this  
13 jurisdiction is the inherent power to dismiss stale claims in resolving  
14 disputes. Furthermore, the Board's regulations (13 California  
15 Administrative Code sec. 551.8, and 562) provide that petitions may be  
16 dismissed for good cause, with or without prejudice.

17 The issue thus posed is whether the Board may dismiss portions of  
18 a petition containing stale or legally invalid claims without a full  
19 evidentiary hearing "on the merits". In *this* case, the answer is clearly  
20 yes. In this motion the issues are entirely questions of law, rather  
21 than fact. Respondent's challenge to the validity of Petitioner's sixth,  
22 ninth and tenth claims is purely legal argument to which Petitioner did  
23 not respond in brief or at the hearing. Ordinarily, statutes of  
24 limitation defenses are questions of fact, but when facts determined  
25 through discovery are not in dispute and are subject to only one  
26 interpretation, they may be decided as questions of law. *International*  
27 *Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal. 4th 406, *Jolly v. Eli*

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<sup>8</sup>Respondent cites *Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal App. 3d 648; two federal 9th Circuit cases applying California law have held that no fiduciary relationship arises from distributor or franchise cases.

1 *Lilly & Co.* (1988) 44 Cal 3d 1103.

2 Here, all of the relevant facts are drawn from Friedlander's own  
3 sworn deposition testimony. Petitioner may not offer evidence  
4 contradicting his own testimony merely to artificially raise a question  
5 of fact. *Roth v. Rhodes* (1994) 25 Cal. App. 4th 530. When legal  
6 questions have been fully briefed and argued and there are no disputed  
7 facts to be tried, the Board's determination of the law is sufficient to  
8 resolve the dispute, and due process does not require further evidentiary  
9 hearing where no purpose could be served. Petitioner's plea for time to  
10 discover facts demonstrating how Honda prevented him from discovering his  
11 claims is unpersuasive in light of Friedlander's own testimony showing  
12 that despite whatever attempts were made, whether conspiratorially or  
13 otherwise, to conceal the wrongs of which Friedlander complains, he knew  
14 enough to be put on inquiry notice and could have commenced legal action  
15 well before the statutory time ran out.

16 In conclusion, this petition is clearly within the ambit of the  
17 policies which the limitation statutes seek to implement. It is the  
18 policy of the law to encourage timely resolution of disputes and to avoid  
19 the need to try issues after the facts have been obscured by time and  
20 memories have faded. In this case some of the allegations extend to  
21 events that may have transpired over a decade ago. Key witnesses Robert  
22 Hix and Martin Lufstgarten are now deceased; several others, including S.  
23 James Cardiges and Robert Rivers, are no longer employed by Honda. Mr.  
24 Friedlander has not been a Honda dealer for almost five years, and his  
25 deposition shows that even his own memory of some important events is not  
26 perfect.

27 In consideration of the foregoing and the arguments and evidence  
28 presented by the parties, the motion to dismiss is granted (1) as to

1 Petitioner's first through fifth, seventh, eighth, ninth and tenth claims  
2 to the extent the claims are premised upon Petitioner's allegations of  
3 wrongdoing by Respondent occurring prior to October 7, 1989; (2) as to  
4 the second, third, fourth, ninth, and tenth claims to the extent that  
5 they are premised upon Petitioner's allegations of events which  
6 transpired before October 7, 1991; and (3) the motion is granted as to  
7 Petitioner's sixth, ninth and tenth claims as to all allegations. To the  
8 extent indicated above, the petition is dismissed with prejudice.

9 The parties shall proceed to hearing on the merits of Petitioner's  
10 fraud, contract and unfair competition claims arising out of Petitioner's  
11 ownership of San Bernardino Acura between May 1990 and October 14, 1991.  
12 Petitioner shall have leave for a period not to exceed forty-five days to  
13 amend its petition as necessary to conform to this ruling.

14 SO ORDERED.

17 DATED: April 15, 1996

NEW MOTOR VEHICLE BOARD

21 By Kenneth B. Wilson

22 KENNETH B. WILSON  
23 Administrative Law Judge  
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