

1 NEW MOTOR VEHICLE BOARD
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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.,
13 dba FORTY-NINER SUBARU,
14 Protestant,
15 v.
16 SUBARU OF AMERICA,
17 Respondent.

Protest No. PR-1972-05

**PROPOSED DECISION AFTER
REMAND**

18
19 **PROCEDURAL BACKGROUND**

20 1. Protestant Forty-Niner Sierra Resources, Inc., dba Forty-Niner Subaru (“Forty-Niner” or
21 “Protestant”) is a California Privately Held Corporation with its principal place of business at 1103 So.
22 Main Street, Angels Camp, California. Richard E. Wilmshurst is the dealer principal.

23 2. Protestant is licensed by the California Department of Motor Vehicles (“DMV”) as a new
24 motor vehicle dealer.

25 3. Respondent, Subaru of America, Inc. (“SOA” or “Respondent”), is licensed by the DMV
26 as a distributor of new motor vehicles. SOA’s headquarters are located at 2235 Route 70 West, Cherry
27 Hill, New Jersey.

28 4. Forty-Niner is a franchisee of SOA and is authorized to sell and service Subaru vehicles at

1 the address indicated above.

2 5. By letter dated August 17, 2005, SOA, pursuant to Vehicle Code section 3060¹, gave
3 notice to Forty-Niner and Richard Wilmshurst of SOA's intent to terminate Forty-Niner's Subaru
4 Dealership Agreement dated June 1, 1999. The notice stated the following reasons for termination:

5 1. Your conviction of a crime and subsequent arrest and possible probation
6 violations that, in the opinion of SOA, is (sic) harmful to the public image of Fuji Heavy
Industries ("FHI") [the parent company of SOA] and SOA.

7 2. Your failure to comply with SOA Minimum Standards. Specifically, a
8 new vehicle showroom measuring at least 960 square feet and maintaining at least three
fully trained vehicle technicians.

9 3. Your failure to maintain Facilities in a manner satisfactory in appearance
10 and condition.

11 4. Your failure to comply with SOA directives with regard to display of
Subaru signage.

12 5. Your failure to provide the best possible customer service to all Subaru
13 owners who request such service as evidenced, in part, by your failure to honor all
authorized extended service contracts, including, but not limited to Subaru Added
14 Security ®.

15 6. Your failure to procure, maintain, and utilize shop equipment and tools
specified by SOA.

16 7. Your failure to make improvements, alternations, or modifications to the
17 Facilities in accordance with Section 5.1.

18 6. Protestant filed a timely protest on September 14, 2005, with the New Motor Vehicle
19 Board ("Board"). The protest raised the following affirmative defenses: (1) SOA has unclean hands; and
20 (2) Retaliation for warranty reimbursement litigation.

21 7. A First Amended Protest was filed on September 26, 2005. The First Amended Protest
22 added Richard E. Wilmshurst as a Protestant (see ruling on Respondent's motion regarding this at
23 Paragraph Nos. 18-21)

24 8. There have been numerous motions filed in this protest. The following summarizes the
25 various motions:

- 26 ■ Protestant's "Motion to Dismiss Letter of Termination Signed by Jim Pernas as Jim Pernas is not a
27

28 ¹ All statutory references are to the California Vehicle Code unless noted otherwise.

1 Licensed Representative of the Subaru Western Region, Required by California Vehicle Code §
2 11900 et seq.” was filed November 8, 2005. This motion was briefed by the parties, heard
3 telephonically before Administrative Law Judge Anthony M. Skrocki (“ALJ Skrocki”), and denied
4 in an order dated January 4, 2006.

- 5 ■ Respondent’s “Notice of Motion and Motion for Protective Order to Prohibit the Deposition of
6 Alfonso Salazar, Senior Counsel for Respondent, Subaru of America” was filed May 7, 2007.
7 This motion was briefed, heard telephonically by ALJ Skrocki, and granted in an order dated
8 May 25, 2007.
- 9 ■ Protestant’s motion “Requiring that Subaru’s Letter of Termination be Set Aside by the New
10 Motor Vehicle Board based upon Unclean Hands for Criminal and Fraudulent Conduct in
11 Violation of Public Policy” was filed May 31, 2007. This motion was briefed, heard
12 telephonically by ALJ Skrocki, and denied in an order dated June 15, 2007.
- 13 ■ Protestant’s “Notice of Request and Request for a Ninety (90) Day Continuance” was filed
14 June 8, 2007. This request was briefed, heard telephonically by ALJ Skrocki, and denied in an
15 order dated June 13, 2007.
- 16 ■ Respondent’s “Motion to Dismiss Protest on Behalf [of] Richard E. Wilmshurst Individually” was
17 filed on June 15, 2007. This motion was briefed and is addressed at Paragraph Nos. 18-21.
- 18 ■ Protestant’s “Notice of Motion and Motion to Extend Post Hearing Briefing Schedule to Meet
19 New Motor Vehicle Board Meeting November 15, 2007 and Two Weeks to Prepare the Reply
20 Brief” was filed on June 27, 2007. This motion was briefed, heard telephonically by
21 Administrative Law Judge Jerold A. Prod (“ALJ Prod”), and denied in an order dated June 29,
22 2007.
- 23 ■ Protestant’s “Motion to Dismiss Termination Letter Directed to Richard Wilmshurst Individually”
24 was filed on June 27, 2007. This motion was briefed, heard telephonically by ALJ Prod, and
25 denied in an order dated July 19, 2007.

26 9. A hearing on the merits of the Protest was held on June 18 through June 21, 2007, before
27 ALJ Prod.

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1 10. Richard E. Wilmshurst², in Pro Per, P.O. Box 33, Angels Camp, California, represented
2 Protestant. It is the Board's practice to allow a corporation to be represented by its officers, directors, or
3 employees.³

4 11. Maurice Sanchez, Esq. and Kevin M. Colton, Esq. of Baker & Hostetler LLP, 600 Anton
5 Boulevard, Suite 900, Costa Mesa, California, represented Respondent.

6 12. Protestant presented the testimony of two witnesses, including: Andrew Mellott,
7 Service/Fixed Operations Manager for Forty-Niner, and Richard E. Wilmshurst, Dealer Principal of
8 Forty-Niner.⁴

9 13. Respondent, which presented its case first due to having the burden of proof, presented the
10 testimony of five witnesses: Jerry Van Wechel, Regional Market Development Manager, SOA; Stephen
11 Allen, former Market Development/Business Manager, Northwest Region, SOA; Scott Thompson, former
12 Regional Sales Manager, Northwest Region, SOA; Patrick Buckley, District Service Manager, SOA; and
13 Jim Pernas, Regional Vice President, SOA.

14 14. At the conclusion of the hearing, ALJ Prod set a post-hearing briefing schedule wherein
15 post-hearing briefs were filed and the matter was submitted for decision on July 26, 2007.⁵

16 15. On September 7, 2007, the Public Members of the Board met and considered the Proposed
17 Decision.

18 16. On September 12, 2007, the Board issued an Order Remanding the Proposed Decision
19 dated August 22, 2007. The order of remand stated:

20 1. The record of the matter shall be re-opened to file Protestant's Post Hearing
21 Reply Brief dated July 27, 2007, and attached exhibits thereto. The ALJ shall consider
22 said additions and to the extent appropriate, make any changes to the Proposed Decision.

23 _____
24 ² Mr. Wilmshurst has represented throughout the proceedings that he has a law degree but has not been admitted to the California Bar.

25 ³ The court in *Caressa Camille, Inc., Petitioner v. Alcoholic Beverage Control Appeals Board, Respondent; Department of*
26 *Alcoholic Beverage Control et al., Real Parties in Interest*, (2002) 99 Cal.App.4th 1094, 121 Cal.Rptr.2d 758 ("*Caressa*"), held
27 "that the general common law rule requiring corporations to be represented by counsel in proceedings before courts of record
28 other than small claims courts does not extend to proceedings before administrative agencies and their tribunals." (*Caressa* at pp. 1097 and 1103)

⁴ Karen Zaccheo, a paralegal assisting Mr. Wilmshurst and Forty-Niner, read questions to Mr. Wilmshurst during his direct and redirect testimony. Ms. Zaccheo was treated as an employee of Forty-Niner for this purpose. (RT Vol. IV, pp. 25-28)

⁵ In response to Mr. Wilmshurst's request, a one-day extension to file the simultaneous reply briefs was granted thereby deeming the matter submitted on July 26, 2007, instead of July 25, 2007.

1 No additional pleadings, evidence, or argument shall be considered.

2 17. Protestant's Post Hearing Brief dated July 27, 2007, with attached exhibits was added to
3 the record and considered by ALJ Prod in this Proposed Decision after Remand. No additional pleading,
4 evidence, or argument was considered by ALJ Prod.

5 **RULING DENYING RESPONDENT'S MOTION TO DISMISS**
6 **PROTEST ON BEHALF OF RICHARD E. WILMSHURST INDIVIDUALLY**

7 18. SOA has moved to dismiss this protest on behalf of Richard E. Wilmshurst individually.
8 The motion is well founded. The statutory and regulatory scheme providing for the Board's jurisdiction
9 and procedure contemplates a franchisee as the protestant. It does not contemplate any other person
10 separate and distinct from or in addition to the franchisee, as a protestant in his own right. Section
11 3060(a)(2) states that upon receipt of a notice of termination "[t]he franchisee may file a protest with the
12 board" (Emphasis added.)

13 19. Statutory provisions setting forth the form of notice required of a franchisor to initiate a
14 proposed termination are quite precise (§ 3060(a)(1)(C)). The use of the words "you" and "your" is
15 specifically provided for in the statutory language. To communicate with the dealer principal of a
16 franchisee using those words does not convert the dealer principal into a potential protestant with rights
17 separate and distinct from or in addition to the franchisee to whom the notice is addressed. The dealer
18 principal is not a franchisee.

19 20. The parties to this franchise are SOA and Forty-Niner as franchisor and franchisee.
20 Richard E. Wilmshurst is the dealer principal of Forty-Niner. The procedural statutory rights are those of
21 the franchisee. The dealer principal does not have individual standing as a protestant. He owns,
22 represents, and speaks for his dealership, the franchisee, which is the only pro per protestant.

23 21. SOA's Motion to Dismiss Protest on Behalf of Richard E. Wilmshurst Individually is
24 granted.

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1 **ISSUES PRESENTED**

2 **Whether SOA Has Established Good Cause for the Termination of**
3 **Forty-Niner's Subaru Franchise**

4 22. Pursuant to Section 3066(b), SOA has the burden to establish good cause for the
5 termination of Forty-Niner's franchise. In determining whether SOA has established good cause for the
6 termination, Section 3061 requires that the Board consider the "existing circumstances", including but not
7 limited to all of the following:

8 (a) Amount of business transacted by the franchisee, as compared to the business
9 available to the franchisee;

10 (b) Investment necessarily made and obligations incurred by the franchisee to perform
11 its part of the franchise;

12 (c) Permanency of the investment;

13 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be
14 modified or replaced or the business of the franchisee disrupted.

15 (e) Whether the franchisee has adequate motor vehicle sales and service facilities,
16 equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of
17 the consumers for the motor vehicles handled by the franchisee and has been and is rendering
18 adequate services to the public;

19 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to
20 be performed by the franchisee; and

21 (g) Extent of the franchisee's failure to comply with the terms of the franchise.

22 **GENERAL FINDINGS OF FACT⁶**

23 23. The Wilmshurst family has operated a dealership or dealerships in Angels Camp since
24 1933, starting with Mr. Wilmshurst's grandfather. The franchises held during that time included
25 Chevrolet, Isuzu, and Subaru. (RT Vol. IV, pp. 47, 101-102) The dealership acquired the Subaru
26 franchise in 1981 and became an exclusive Subaru dealership in 2005. (RT Vol. IV, pp. 30-31)

27 _____
28 ⁶ The references to testimony, exhibits, or other parts of the record contained herein are examples of the evidence relied upon to reach a finding, and are not intended to be all-inclusive.

1 24. Mr. Wilmshurst has lived in Angels Camp since his early childhood in the 1930s and
2 started working at the dealership in 1953. He bought the business in 1965 and became the dealer
3 principal and 100% owner. Mr. Wilmshurst, having inherited the real estate upon which the dealership is
4 located, owns the property free and clear. (RT Vol. IV, p. 87)

5 25. The Forty-Niner physical facilities date from the late 1930s and the mid 1960s. Mr.
6 Wilmshurst remembers the beginning of construction of the present facilities in 1939 when he was a small
7 child. Forty-Niner's facilities are located on State Highways 4 and 49 (Main Street) in the historic area
8 of the town of Angels Camp. The dealership looks almost exactly the same now as it did in 1967, save
9 that it has physically deteriorated since that time. (RT Vol. IV, p. 141; Exh. R 579) There is no indoor
10 enclosed showroom. The new car operation and the service area are located on opposite sides of Main
11 Street. (Exh. R 504, p. A) The only restroom facility is on the side of the street where the service area is
12 located. One must jaywalk across the highway from the new car operation to use the restroom. The
13 restroom facility is filthy and inadequate, and has been frequented by homeless people. The Subaru
14 signage is outdated by at least a generation. (Exh. R 504, pp. N, O, P; Exh. R 507; RT Vol. II, pp. 27-28,
15 104-105, 107-114)

16 26. SOA has tried for years, with no success, to persuade Mr. Wilmshurst to update and
17 upgrade the Forty-Niner facility. (RT Vol. I, pp. 71-75, 96-97, 111, 116-117) Despite more than
18 adequate financial capability, Mr. Wilmshurst has steadfastly refused to consider or make any changes,
19 modifications, or improvements to the dealership. (RT Vol. II, pp. 98-106; Vol. IV, pp. 142-143; Exhs.
20 R 512 – R 515) This includes modernization of the buildings and grounds, the addition of an enclosed
21 showroom, provision of decent restrooms and amenities for customers, and appropriate Subaru signage.
22 (RT Vol. I, pp. 71-75, 96-97, 111, 116-119; Exhs. R 541, R 546) SOA has offered support in many
23 forms, to include no-cost architectural services, financial assistance, a risk-free sign lease program, and
24 other incentives. (RT Vol. I, pp.167-173; Vol. II, pp. 52-56; Exhs. R 564, R 573)

25 27. Mr. Wilmshurst offered as his primary reason for refusal to upgrade and improve the aging
26 and deteriorating Forty-Niner facility, the fact that it is located in the historic preservation district of
27 Angels Camp, and that it is difficult to gain approval for any changes. (RT Vol. I, pp. 96-97) SOA has
28 successfully faced this situation in other locations in the country, notable examples being Portland,

1 Oregon and Rhinebeck, New York. SOA requirements have built-in flexibility to deal with these
2 situations. (RT Vol. I, pp. 86-88, 122-126; Exh. R 545) The Valero gas station and the Napa Auto Parts
3 facilities in Angles Camp, also located in the historic district on the same street as Forty-Niner, are
4 modern, clean, and comfortable. (RT Vol. II, pp. 28-30; Vol. IV, pp. 95-97; Exh. R 504, pp. K, L, M)

5 28. Forty-Niner's sales of new Subaru vehicles have declined in recent years. (RT Vol. IV, pp.
6 60, 86) The penetration of other Subaru dealers into Forty-Niner's area of responsibility ("AOR") has
7 been steadily increasing. (RT Vol. II, pp. 175-177; Exh. R 571; see chart at Paragraph No. 40) Primarily,
8 Forty-Niner retains the loyalty of its older customers, most of who are retired and on fixed incomes. This
9 customer base is becoming smaller as it ages. (RT Vol. IV, pp. 5, 8, 31-33, 35, 86) SOA sees itself as a
10 good fit for the younger more affluent, outdoor-oriented portion of the population of the Forty-Niner
11 AOR, but sees Forty-Niner as unable and/or unwilling to take advantage of the opportunities presented by
12 this fast emerging demographic group. (RT Vol. I, pp. 164-166; Vol. III, pp. 35-36, 115, 119; Exh.
13 R 562, pp. SOA001828, SOA001852)

14 29. Despite declining sales and the acknowledged shrinkage of its loyal customer base, the
15 Forty-Niner dealership is in exceptionally good financial condition. There is no mortgage on the facility,
16 and virtually no other long term debt. (RT Vol. I, pp. 98-99) Cash on hand is in the neighborhood of just
17 under to just over \$1,000,000, which is much more than SOA would require. (RT Vol. I, pp. 101, 230)
18 Monthly expenses are around \$82,000, a small figure for the dealership. (RT Vol. I, p. 101) Net profit
19 has been well above a quarter of a million dollars per year for several years. (RT Vol. I, pp. 99, 103-105)
20 In fact, the dealership is in such a strong financial position that it always owns whatever inventory it has
21 without the need for a flooring plan or flooring charges. (RT Vol. I, pp. 231-232; also see generally
22 Forty-Niner Financial Statements, Exhs. R 512 – R 515)

23 30. This compels a conclusion that Forty-Niner's refusal to participate in any of SOA's
24 programs for facility upgrading or signage is a matter of choice rather than financial inability to do so.
25 SOA has received what it reasonably interprets as a long-term, consistent, ongoing message of
26 unreasonable refusal or unwillingness to invest in or modernize the dealership facilities in any way. (RT
27 Vol. I, pp. 97-106, 232)

28 31. Richard E. Wilmshurst has had an extensive and long-running adversarial relationship with

1 law enforcement and with regulatory entities, entailing a truly noteworthy involvement with the local,
2 state, and federal court systems. Judicial notice is taken of much or most of this (see Paragraph No. 80)
3 SOA, rightfully, in large part, sees this as highly detrimental to its position not only in the community but
4 to its goals, visions, and the image it seeks to cultivate as a responsive and responsible entity in the larger
5 society. (RT Vol. II, pp. 171-175; Vol. III, pp. 14-17; Exhs. R 577- R 587) As measured by the number
6 of incidents, most of this, and the attendant publicity, relates to the law enforcement and criminal justice
7 systems. (See Exh. R 577- R 587) Of particular and separate relevance, however, is litigation pending in
8 regards to alleged hazardous waste/toxic substance violations at the Forty-Niner facility and/or grounds
9 adjacent to Forty-Niner and owned by it and its dealer principal. (See Exh. R 528 and photos at pp.
10 FSR00042-59 thereof)

11 32. Over the past 20 or so years, SOA has worked hard on its core values, its image, and its
12 product, making major changes to all of these. (RT Vol. II, pp. 158-159, 161-163) A significant part of
13 this is a decision to emphasize becoming and being an exceptionally green, environmentally friendly,
14 outdoor-oriented automobile company. (RT Vol. III, pp. 33-36, 119; Exh. R 506) SOA finds the
15 photographic evidence of environmental conditions at Forty-Niner (irrespective of the technical outcome
16 of the litigation) very disturbing and completely at odds with the direction in which it is intent on going.
17 To have these conditions at one of its dealerships subjects SOA to legitimate potential charges of
18 hypocrisy. (RT Vol. III, pp. 33-39, 119-120)

19 33. Forty-Niner remains unapologetic in its refusal to honor extended service contracts
20 purchased by Subaru buyers from other dealerships despite language in its franchise agreement requiring
21 that it do so. (RT Vol. II, pp. 122-124; Vol. III, p. 17; Exh. R 536) Forty-Niner also strongly objects to
22 the SOA (and industry) practice of providing internet inquirers within its AOR the names, locations, and
23 phone numbers of the three dealers nearest to them. Forty-Niner would have SOA modify this practice to
24 notify inquirers within Forty-Niner's AOR only of its dealership, and not others. Forty-Niner disagrees
25 sharply with SOA on the subject of allowing and/or encouraging consumer choice leading to competition
26 among Subaru dealerships. (RT Vol. II, pp. 214-217; Exhs. R 537, R 568)

27 34. The relationship between Forty-Niner's dealer principal and SOA has, over a period of the
28 last several years, been confrontational, antagonistic, and adversarial; on occasion to an extreme. Mr. Van

1 Wechel, SOA Regional Market Representation Manager, testified that Mr. Wilmshurst, in response to
2 SOA's offerings of programs to improve Forty-Niner's operations, went beyond mere refusal to an
3 attitude of defiance. He used threats and innuendos in routine business settings. (RT Vol. I, pp. 173-174,
4 178) On one such routine visit in 2000, the situation became heated and Mr. Wilmshurst reached around
5 behind himself to a shelf, and brought a handgun down and set it on the desk between himself and Mr.
6 Van Wechel. Mr. Van Wechel corresponds and talks on the phone with Mr. Wilmshurst, but since that
7 incident has never gone back to the dealership. (RT Vol. I, pp. 174-177)

8 35. Mr. Buckley, SOA District Service Manager, has visited Forty-Niner roughly 200 times.
9 (RT Vol. II, p. 103) He testified to the ongoing relationship with Mr. Wilmshurst as combative and
10 adversarial. He described Mr. Wilmshurst as a bully, one who resorts to intimidation at every
11 opportunity. (RT Vol. II, p.114) On one occasion during a routine business visit, Mr. Wilmshurst told
12 Mr. Buckley that he was causing him stress, and that in response he (Wilmshurst) would be acting
13 appropriately to defend himself physically. (RT Vol. II, p. 116)

14 36. Mr. Pernas, SOA Regional Vice President, testified that after he sent Mr. Wilmshurst the
15 August 17, 2005 Notice of Termination letter, Mr. Wilmshurst stated that he could get him (Pernas) fired,
16 vaguely citing an example of an Isuzu Vice President. (RT Vol. III, p. 53) Scott Thompson, a former
17 SOA manager who has known Mr. Wilmshurst since childhood, testified to needing to defend his
18 employees from verbally abusive attacks by Mr. Wilmshurst. (RT Vol. III, pp. 56-58, 87- 90)

19 37. Mr. Wilmshurst testified that he never shot anyone, physically harmed anyone, or
20 threatened to shoot anyone. (RT Vol. IV, p. 75) He also testified that most of the people he knows in
21 Angels Camp have firearms. (RT Vol. IV, p. 74)

22 **FINDINGS OF FACT RELATING TO THE GOOD CAUSE FACTORS**

23 **Findings Relating to the Amount of Business Transacted by the Franchisee,** 24 **as Compared to the Business Available to the Franchisee [§ 3061(a)]**

25 38. Forty-Niner, located in Angels Camp, California, is an isolated Subaru dealership. The
26 closest Subaru dealers to Forty-Niner are in Turlock and Shingle Springs. These are 40 and 45 air miles
27 distant from Forty-Niner, respectively, reachable by car only over narrow and twisting country roads
28 involving about an hour and one-half of driving time. (RT Vol. I, p. 62; Vol. II, p. 132; Exh. R 501)

1 39. SOA's expectation, a reasonable one, is that a well-performing dealership should dominate
2 sales within its own AOR. (RT Vol. II, p. 177) Forty-Niner's AOR consists of zip codes surrounding the
3 dealership in Angels Camp. There is no contention that Forty-Niner's assigned AOR is in any respect
4 unreasonable or unfair. (See Exh. R 536, Bates No. SOA001156)

5 40. Sales⁷ of Subaru vehicles in Forty-Niner's AOR for 2005, 2006, and January 1, 2007,
6 through April 30, 2007, were as follows:

Year	Total Sales	Forty-Niner	Others	Forty-Niner %
2005	209	140	69	67
2006	233	123	110	52.8
2007*	65	34	31	52.3

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8
9
10
11 * January 1, 2007, through April 30, 2007
12 (Exh. R 571)

13 41. A reasonable expectation is that an isolated dealer such as Forty-Niner should be even
14 more dominant in sales in its AOR than normal. SOA would reasonably expect Forty-Niner to achieve
15 80-90 percent of sales in its AOR. (RT Vol. II, p. 177)

16 42. The above chart shows total Subaru sales in Forty-Niner's AOR increasing, and also shows
17 Forty-Niner sales decreasing; both in absolute numbers and as a percentage of sales within the AOR. The
18 percentage drop of Forty-Niner sales (67 to 52.3) stands in stark contrast to the increase of in-sells by
19 other dealers; this at a time when SOA is doing increasingly well in the area. (RT Vol. II, pp. 175-177;
20 Exh. R 571) A reasonable inference from this data is that if Forty-Niner was performing better, the
21 increase would not be largely at the expense of other dealers, but would also result in some increase of
22 total Subaru sales in the AOR.

23 43. Mr. Wilmshurst himself acknowledges that performance should have been better in 2006.
24 (RT Vol. IV, p. 60) By Mr. Wilmshurst's own assessment, Forty-Niner now caters mainly to the older
25 portion of its customer base that, as it ages and shrinks, will yield diminished vehicle sales. (RT Vol. IV,
26 p. 86) These customers, besides being elderly, retired and on a fixed income, are generally limited in
27

28 ⁷ "Sales" will be used to mean "vehicles registered in Forty-Niner's AOR that were sold by Forty-Niner or "Others" in the subsequent discussion as well.

1 what they can do. Many are on oxygen. (RT Vol. IV, pp. 5, 8, 31-33) This segment of the population of
2 Forty-Niner's AOR is increasingly not able or inclined to spend high dollar amounts on vehicles designed
3 for fairly rugged use in hilly or mountainous terrain by outdoor-oriented people.

4 44. Correspondingly, surveys reveal a decline in the younger and more affluent demographic
5 of Forty-Niner customers. (Exh. R 562, Bates Nos. SOA001828, SOA001840, SOA001852) As SOA
6 increasingly orients its products toward those interested in the fun, freedom, and adventure afforded by its
7 exclusively all-wheel drive technology, it finds the loss and erosion of sales to those demographics
8 (young and affluent), which tend to be more outdoor-focused and environmentally conscious, very
9 disturbing. (RT Vol. I, p. 164; Vol. II, pp. 158-159, 162, 204-205; Vol. III, pp. 36-35)

10 45. Forty-Niner contends in its Post Hearing Opening Brief that the business available
11 to it is not great, but that Subaru sales in its AOR are 500% of the California average Subaru
12 penetration. (Protestant's Post Hearing Opening Brief, pp. 4, 7-8) The inference is misleading
13 because Forty-Niner is counting all of the vehicles registered within its AOR, which includes
14 sales made by dealers outside of the Forty-Niner AOR. (Vol. II, p. 214; Vol. III, pp. 110-111;
15 Exh. R 567) An inordinately high percentage of these sales were made by other Subaru dealers
16 to people residing in Forty-Niner's AOR.

17 46. Forty-Niner is in effect taking credit for the nearly 50 percent in-sell by other dealers in its
18 AOR. The Subaru vehicle is a particularly good fit for Forty-Niner's AOR. This results from the
19 outdoor-oriented nature of the clientele, changing weather conditions in mountainous and hilly areas, and
20 the Subaru all-wheel drive technology. The critical fact here, as noted above, is that Forty-Niner accounts
21 for an increasingly inadequate share of that penetration (see Paragraph Nos. 40-42). (RT Vol. III, p. 115)

22 **Findings Relating to the Investment Necessarily Made and Obligations Incurred**
23 **by the Franchisee to Perform its Part of the Franchise [§ 3061(b)]**

24 47. Forty-Niner first became a Subaru franchisee in 1981 and last entered into a Dealership
25 Agreement on June 1, 1999. (Exh. R 536) The facilities are located on both sides of Main Street. The
26 dealership's parts and service buildings date to the late 1930s, and the sales building dates to the mid
27 1960s. (RT Vol. IV, pp. 93-94) The buildings are respectively 69 and 40-plus years old. It does not
28 appear, nor is it claimed, that any significant renovations or updates to the physical facilities have been

1 made since at least as far back as 1967. (Exhs. R 507, R 509) Conditions actually appear now to have
2 worsened. (RT Vol. III, p. 145) Mr. Wilmshurst admitted that he told the Angels Camp City Council that
3 the main dealership was old and inadequate. (RT Vol. IV, p. 141)

4 48. Mr. Wilmshurst purchased the dealership in 1965 when it was a Chevrolet franchisee. He
5 owns the real estate free and clear, having inherited it. (RT Vol. IV, p. 87) There has never been a
6 mortgage on the property. (RT Vol. I, pp. 98-99; Vol. IV, p. 87; Exhs. R 512 – R 515)

7 49. Mr. Wilmshurst has urged as his primary reason for refusal to upgrade and improve the
8 aging and deteriorating Forty-Niner facility, the fact that it is located in the historic preservation district of
9 Angels Camp, and that it is difficult to gain approval for any changes. (RT Vol. I, pp. 96-97) SOA has
10 faced this situation in other locations in the country (notable examples being Portland, Oregon and
11 Rhinebeck, New York); and, with the cooperation of dealer principals, has been successful in achieving
12 dealerships that harmonize with the surrounding area and are both modern in terms of the physical facility
13 and compliant with SOA requirements. SOA requirements have built-in flexibility to deal with these
14 situations. (RT Vol. I, pp. 86-88, 122-126; Exh. 545) The Valero gas station and the Napa Auto Parts
15 facilities, located in the historic district on the same street as Forty-Niner, are modern, clean, and
16 comfortable, and incorporate signage appropriate to both the Angels Camp historical area surroundings
17 and their respective nationwide logos. (RT Vol. II, pp. 28-30; Vol. IV, pp. 95-97; Exh. R 504, pp. K, L,
18 M)

19 50. SOA operates a Subaru Signature Facility Program (“SSFP”), the purpose of which is to
20 provide a framework for dealers to make needed exterior and interior upgrades. (RT Vol. I, pp. 71-72)
21 SOA does not require significant changes if the existing facilities meet SOA’s minimum standards.
22 Flexibility is provided for, as is financial assistance, and architectural consultation at no cost to the dealer.
23 (RT Vol. I, pp. 73-76) Of the 85 dealerships in SOA’s Northwest Region, Forty-Niner alone has refused
24 to at least plan for participation in SOA’s SSFP. (RT Vol. I, pp. 80, 116; Exhs. R 541, R 546)

25 51. In addition to Mr. Wilmshurst’s admission that his dealership is old and inadequate, there
26 are observations of others. Stephen Allen’s uncontroverted testimony was that the Forty-Niner dealership
27 facilities were “... horrible in terms of its appearance and its layout...”, reminiscent of “... dealerships
28 that had long since passed ... back from the early seventies...”, and that the restroom “... was in a

1 separate building and it was like out [sic] a gas station of the forties, maybe even worse, that hadn't been
2 remodeled or updated, or cleaned." (RT Vol. I, pp. 111-112)

3 52. Jerry Van Wechel opined, and it was found that Mr. Wilmshurst had "... put absolutely no
4 money into the store other than some necessary upkeep, and that might even be questionable ...", no
5 renovations, and no remodeling. He described the Forty-Niner facility as "... extremely substandard, you
6 know, in one word it's a dump. It is. It's embarrassing." (RT Vol. I, pp. 161-162) Regarding the
7 restroom, Mr. Van Wechel testified that he would not use it in any facility; would not set foot in it. (RT
8 Vol. I, pp. 163-164) He was unable to identify any portion of the facility that could be described as a
9 showroom. (RT Vol. I, pp. 162-163) He has visited each and every dealership in the region, and in terms
10 of cleanliness and general condition, would rank Forty-Niner "... Dead last, the worst." (RT Vol. I, p.
11 171)

12 53. Scott Thompson described the Forty-Niner facility as "... in pretty bad shape visually ...
13 extremely worn down, [in] disrepair, and in bad need of work ..." and "... not a very clean place." (RT
14 Vol. II, p. 12) Patrick Buckley described it as, among other things, dirty, just a mess, and lacking any
15 modernization at all, the worst he has seen of 120 or so dealerships he has visited. (RT Vol. II, pp. 104-
16 105) Jim Pernas described the Forty-Niner facility as "horrendous, it's horrible ..." in comparison with
17 others in the region. (RT Vol. II, p. 186)

18 54. As noted above, Forty-Niner's financial condition and resources available are excellent.
19 (See Exhs. R 512 – R 515) Mr. Van Wechel's opinion, not challenged by Mr. Wilmshurst, is that Mr.
20 Wilmshurst simply does not want to invest in the franchise, and is unwilling to consider the SSFP
21 program. He is positive that if Mr. Wilmshurst were willing, any objections or issues with the property
22 and the City of Angels Camp could be resolved. (RT Vol. I, pp. 105-106)

23 **Permanency of the Investment [§ 3061(c)]**

24 55. Forty-Niner has put no significant investment into the dealership facility, other than
25 possibly some necessary but inadequate upkeep. No significant renovations or remodeling have been
26 done. (RT Vol. I, pp. 161 – 162) The oldest buildings (parts and service) at the Forty-Niner dealership
27 date to 1938. The sales facility at the dealership was built in the 1960s for Chevrolet. It has not been
28 renovated since then, as is shown in a postcard dated 1967, which shows essentially the same buildings

1 with a western façade, as compared with more recent photographs taken forty years later. By all accounts,
2 the buildings have not been changed much since they were built. (RT Vol. I, pp. 93-95; Exhs. R 504, R
3 507, and R 509) If anything, they have deteriorated. (RT Vol. III, p. 145)

4 56. The dealership facilities can be converted to use for another brand of vehicles, as a used
5 car dealership, or for some other commercial use. What investment has been made will not be lost. The
6 property has in the past been converted to such use for other line-makes of vehicles. According to Mr.
7 Wilmshurst, it can be utilized as a used vehicle dealership and show more profit, “with no bricks and
8 mortar investment.” (RT Vol. III, p. 50; Exh. R 567)

9 57. Forty-Niner’s claimed investment in an inventory of vehicles, parts and tools for the
10 dealership is not a permanent investment. The other items claimed by Forty-Niner as investments; cash,
11 net worth, and amount owed to officers and others are not permanent, as admitted by Mr. Wilmshurst. He
12 could withdraw the funds, but simply “choose[s] to leave it there,” and claims he “probably” won’t
13 withdraw the funds. (RT Vol. IV, pp. 39-43, 86-88) In fact, Mr. Wilmshurst has recently used dealership
14 funds for his personal benefit, unrelated to the dealership. He admitted he used those funds to post bail
15 very quickly (“in and out”) after his arrest for assaulting an officer on May 17, 2007, (just a month prior
16 to the merits hearing on this protest) paying the bail amount in cash. (RT Vol. IV, pp. 138-139; Exh. R
17 587)

18 58. Subaru will honor its obligations pursuant to the Dealership Agreement regarding
19 repurchase of Forty-Niner’s current inventory of new Subaru vehicles and parts upon termination, which
20 are not a permanent investment in any event. (Exh. R 536, Standard Provisions, Section 16, Bates Nos.
21 SOA001674 – SOA001676)

22 59. Mr. Wilmshurst alluded to an “investment” he and a business partner had made in 12.8
23 acres of land north of the dealership in Angels Camp at the site of a by-pass of Highway 4 and 49, where
24 they hope to build a “small auto mall” one day and to relocate the Subaru dealership there. (RT Vol. IV,
25 pp. 48-49, 106-109) However, that investment is clearly not for a Subaru dealership, as the 12.8 acre site
26 is much too large for a Subaru dealership alone. (RT Vol. IV, p. 109)

27 60. The property was purchased by Mr. Wilmshurst and his partner 20 or 25 years ago, and
28 there are several lawsuits pending between Mr. Wilmshurst’s group and Caltrans, regarding the property.

1 The litigation must be resolved before the highway by-pass construction is begun. The lawsuits are not
2 set to go to trial until 2008, with no resolution in sight. In addition, it is not known how long the trials
3 will last and if and when any appeals will be filed and resolved. (RT Vol. IV, pp. 49, 106-109)

4 61. There are no commitments from any automobile manufacturers or distributors, including
5 SOA, to locate a dealership at the potential future "auto mall," nor even any serious discussions with
6 manufacturers or distributors about it. (RT Vol. IV, pp. 106, 109) No plans have been submitted to SOA
7 for the alleged proposed dealership location, nor have any plans ever been developed for that property.
8 (RT Vol. II, pp. 96-97; Vol. IV, p. 109)

9 62. This auto mall plan is not an investment for the benefit of Forty-Niner's Subaru franchise.
10 It is too speculative to be taken seriously by the Board, and is insufficient to atone for the lack of
11 investment by Forty-Niner in the existing dealership for the last 25 years. The termination of Forty-
12 Niner's Subaru franchise will not result in any loss of permanent investment.

13 **Whether it is Injurious or Beneficial to the Public Welfare for the Franchise to be**
14 **Modified or Replaced or the Business of the Franchisee Disrupted [§ 3061(d)]**

15 63. Richard E. Wilmshurst has testified that the Forty-Niner facility can be converted to a used
16 car dealership and show more profit, without any bricks and mortar investment. (RT Vol. III, p. 50; Exh.
17 R 567) This observation largely contradicts any inference that the City of Angels Camp would
18 necessarily be worse off in terms of loss of the already declining tax revenue now produced by Forty-
19 Niner. In any event, SOA intends, if Forty-Niner is terminated, to replace it with a dealership to service
20 the market in the area, which would in all likelihood produce increased tax revenue. (RT Vol. III, pp. 24-
21 25, 54)

22 64. In the abstract it can always be contended that the closure of any dealership of any line-
23 make adversely affects the public welfare in that there is one less place for those nearby to go for sales
24 and service. Although there was no testimony or declaration forthcoming from any individuals that they
25 would be damaged by the closure of Forty-Niner, there was testimony that some loyal customers preferred
26 going there. (RT Vol. IV, pp. 8-9) There are, however, countervailing factors.

27 65. Forty-Niner is adamant in its refusal to honor Subaru Added Security Maintenance
28 Agreements, which are contracts entitling Subaru owners to have specified service work performed at any

1 Subaru dealer. These Maintenance Agreements are available for purchase by Subaru buyers at an extra
2 cost and, under the SOA franchise, all Subaru dealers are obligated to honor the terms of these
3 Maintenance Agreements regardless of whether they were the selling dealer. (See Exh. R 536, Bates No.
4 SOA001669) Subaru owners who purchased these Maintenance Agreements and sought to have the
5 services to which they were entitled be performed by Forty-Niner were told by Forty-Niner that it did not
6 honor the agreements and Subaru owners would have to pay for services covered by the Maintenance
7 Agreements. These Subaru owners complained that they had spent dollars for their agreements and could
8 not use them. (RT Vol. IV, pp. 17-20) Andrew Mellott, the Forty-Niner Service Manager, testified that
9 two such customers understood, were not upset, smiled and shook his hand, paid (extra) for service, told
10 him that they would be coming back, and would not be going to another dealer to have their purchased
11 agreements honored.⁸ (RT Vol. IV, pp. 18-19)

12 66. Another factor in this inquiry is whether the diminishment in competition among Subaru
13 dealers, resulting from a termination of one of them, is beneficial or injurious to the public welfare. In
14 this instance, as noted above, sales by other dealers considerably remote from Forty-Niner have been
15 accounting for nearly half of all sales in the Forty-Niner AOR, and if present trends hold, are probably
16 now exceeding 50%.

17 67. Forty-Niner objects to the industry practice, employed by SOA among others, of providing
18 internet inquirers within its AOR the identity of the three closest dealers to their location. (RT Vol. II, pp
19 214-217; Exh. R 568) Mr. Wilmshurst wrote a letter to Turlock Subaru castigating its dealer principal for
20 placing an attractive Subaru ad in a newspaper serving Angels Camp. (Exh. R 537) As time passes
21 Forty-Niner is providing a steadily less competitive Subaru purchasing alternative in its own backyard.

22 68. Given the documented conditions at Forty-Niner and the deplorable state of the physical
23 facility (described elsewhere herein), termination would likely lead to the establishment of a business
24 concern much more in tune with the general appearance and ambience of the historical area of downtown
25 Angels Camp. The public welfare will not be adversely affected by termination of the Forty-Niner
26 franchise.

27
28 ⁸ This testimony is found not to be credible or so highly inconsistent with general experience as to be deserving of no weight without the customer's corroboration.

1 **Whether the Franchisee has Adequate Motor Vehicle Sales and Service Facilities,**
2 **Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide**
3 **for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee**
4 **and has been and is Rendering Adequate Services to the Public [§ 3061(e)]**

5 69. The Forty-Niner facility is old, has not been updated since construction, and is in a state of
6 considerable disrepair. Richard E. Wilmshurst himself has publicly described the dealership as "... old
7 and inadequate." (RT Vol. IV, p. 141) He has admitted that it is dangerous for people to have to cross
8 the busy highway to look at new and used cars. (Exh. R 579)

9 70. Several SOA employees have described the facility as "horrible", "a dump",
10 "embarrassing", "extremely worn down", in "disrepair", "in bad need of work", "not a very clean place",
11 and ranked "dead last" and "the worst" of all of the 85 dealerships in SOA's Northwest Region. Of
12 particular concern to all who testified was the deplorable state of the restroom, which from the new car
13 sales building was reachable only by crossing the highway. (See Paragraph Nos. 47-54, citations therein,
14 and pictures at Exhs. R 504, pp. D-J, N, O, P; R 507, R 509)

15 71. Patrick Buckley has been a District Service Manager for SOA since 1989. He has visited
16 the Forty-Niner facility about 200 times. (RT Vol. II, p. 103) The first time he visited he drove past it
17 because he could not recognize it as a dealership. It was dirty, and a mess. What amenities there were,
18 such as a customer lounge or service write-up area, were barely describable as such, and not up to any
19 kind of standard. He describes Forty-Niner as now being the worst of about 120 dealerships he
20 has seen in terms of appearance, cleanliness, and modernization. (RT Vol. II, pp. 104-105)

21 72. The dealership has no functioning indoor showroom. There was testimony and
22 documentation that a particular designated area was measured at 787 square feet rather than the minimum
23 required 960 square feet, but in any event the area was not being used as a showroom. No vehicles were
24 displayed. (RT Vol. I, p. 92; Vol. II, p. 81; Vol. III, pp. 138-139; Exh. R 536, Bates No. SOA001161)
25 The use of an adequate indoor showroom, not exposed to the elements, is essential to the presentation of
26 the product to prospective buyers. (RT Vol. III, pp. 128-129)

27 73. Customer assessments of Forty-Niner's facilities are consistent with the testimony of SOA
28 employees.

///

Question	Fall 2004	Fall 2005	Fall 2006
19d "A clean and inviting interior"	35% Forty-Niner 77% Region	36% Forty-Niner 80% Region	51% Forty-Niner 83% Region
19f "Clean restrooms"	44% Forty-Niner 76% Region	26% Forty-Niner 78% Region	44% Forty-Niner 80% Region
19i "A clean, comfortable and organized showroom"	25% Forty-Niner 70% Region	20% Forty-Niner 72% Region	28% Forty-Niner 75% Region

(Exh. R 562, Subaru Dealer Ownership Experience Report)

74. There was inadequate evidence presented to establish the adequacy or lack thereof of Forty-Niner's service facilities. The magnitude of any deficiencies in this area is lesser than for sales, except for common concerns, such as restroom(s), and waiting area.

Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee [§ 3061(f)]

75. Forty-Niner is forthright and unapologetic in refusing to honor service contracts purchased by Subaru owners under the Subaru Added Security Maintenance Program. (Protestant's Post Hearing Opening Brief, pp. 20-21; RT Vol. II, pp. 123-124; Vol. IV, pp. 17-20) One may argue (although Protestant has not) that an obligation bargained for in one of these purchased contracts is not warranty work; that it is separate from both the purchase of the vehicle and the warranties under that purchase. This issue is dealt with in sections on Public Welfare Impacts (Paragraph Nos. 63-68) and Failure to Comply with Terms of the Franchise (Paragraph Nos. 77-88).

76. It is noted that there has been extensive litigation between Forty-Niner and SOA over a period of eight (8) years in both State and Federal courts regarding reimbursement for warranty work. Judicial notice has been taken of this litigation, which has been decided against Forty-Niner and Mr. Wilmhurst at all stages. (See Exhs. R 524, R 529 – R 535) This Board has determined the matter of reimbursement for warranty work to be res judicata in a decision adopted January 26, 2006. (Exh. R 531) Forty-Niner continues to try to re-raise the warranty reimbursement issue in this proceeding. (RT Vol. IV, pp. 65-66; Protestant's Post Hearing Opening Brief pp. 25-27)

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1 **Extent of the Franchisee’s Failure to Comply with the Terms of the Franchise [§ 3061(g)]**

2 77. Section 4.1 of the Forty-Niner/SOA Dealership Agreement reads as follows:

3 4.1. Ethical Standards. Dealer shall safeguard and promote the reputation of
4 Subaru Products and of Fuji, SOA, Distributor and all other Subaru distributors and
5 dealers. Dealer shall refrain from all conduct which might be harmful to such
6 reputations or to the marketing of Subaru Products or which might be inconsistent
7 with the public interest. Dealer shall avoid all illegal, deceptive, misleading or
8 unethical practices. (Exh. 536, Standard Provisions, Bates No. SOA001663)

7 78. Section 15.1.10 of the Forty-Niner/SOA Dealership Agreement reads as follows:

8 15.1.10 Impairment of the business reputation or financial standing of, or
9 conviction of any crime or other violation of law in any court of competent
10 jurisdiction of, Dealer, any member of its management, or any partner, stockholder,
11 officer or director of Dealer, if in Distributor’s reasonable opinion such impairment
12 or conviction might adversely affect the conduct of Dealer’s business or would tend
13 to be harmful to the public image of Fuji, SOA or Distributor, or to the marketing of
14 Subaru products. (Exh. 536, Standard Provisions, Bates No. SOA001673)

12 79. SOA has alleged as a key factor in its case supporting termination of the franchise the fact
13 that Forty-Niner dealer principal, Richard E. Wilmshurst, was convicted of a felony in April 2005; to wit,
14 unlawful possession of a machine gun and assault weapons. It is argued that this alone, without more, is
15 sufficient good cause for SOA to terminate the Forty-Niner franchise. (Respondent’s Post-Hearing Brief,
16 pp. 1-2, 28-30) Judicial notice has been taken of documentation pertaining to this conviction; from the
17 filing of the original felony complaint, through the published opinion of the Third Appellate District of
18 the Court of Appeal, to the denial of a petition for review by the California Supreme Court. It is noted
19 that during the course of the hearing, Mr. Wilmshurst on more than one occasion expressed his belief that
20 the conviction would be at some point eventually reduced to a misdemeanor and/or reversed by the United
21 States Supreme Court.

22 80. It was noted above in the General Findings Section (Paragraph Nos. 23-37) that Mr.
23 Wilmshurst has compiled a noteworthy record of involvement with the criminal justice system and the
24 courts. The following is a complete summary of a two-inch stack of documents of which judicial notice
25 has been taken:

- 26 ▪ In the matter entitled, *PEOPLE OF THE STATE OF CALIFORNIA, ex. rel. B.B. Blevins, Director,*
27 *Department of Toxic Substances Control v. FORTY-NINER SIERRA RESOURCES, INC., et al.,*
28 filed in the Superior Court of Sacramento County as Case No. 05A600377.

- 1 ○ Complaint for Civil Penalties and Injunctive Relief Pursuant to California Hazardous
- 2 Waste Control Law, filed January 28, 2005.
- 3 ■ Records of Investigation by the California Department of Toxic Substances Control.
- 4 ○ Photo Log and Photographs, dated January 23, 2002.
- 5 ■ In the matter entitled *FORTY-NINER SIERRA RESOURCES, INC., A Corporation, doing business*
- 6 *as FORTY-NINER SUBARU/ISUZU v. STATE OF CALIFORNIA, DEPARTMENT OF MOTOR*
- 7 *VEHICLES*, filed before the California New Motor Vehicle Board as Appeal No. A-131-95.
- 8 ○ Accusation of *FORTY-NINER SIERRA RESOURCES, INC., A Corporation, dba FORTY-*
- 9 *NINER SUBARU-ISUZU*, Case No. D-4643, filed September 2, 1992.
- 10 ○ First Amended Accusation, Case No. D-4643/OAH No. N-41606, filed December 23,
- 11 1992.
- 12 ○ Department of Motor Vehicles Decision, Case No. D-4643/OAH No. N-41606, entered
- 13 January 17, 1995.
- 14 ○ New Motor Vehicle Board Final Order, Appeal No. A-131-95, entered October 18, 1995.
- 15 ○ Department of Motor Vehicles Order Implementing Final Order, Case No. D-4643, entered
- 16 December 14, 1995.
- 17 ○ New Motor Vehicle Board Final Order After Remand, Appeal No. A-131-95, entered
- 18 January 6, 1998.
- 19 ■ In the matter entitled, *PEOPLE OF THE STATE OF CALIFORNIA vs. RICHARD WILMSHURST*
- 20 filed in the Superior Court of Calaveras County, as Case No. F3229.
- 21 ○ Complaint (Felony), filed July 7, 2004.
- 22 ○ Minute Order Recording Guilty Verdicts, dated March 11, 2005.
- 23 ○ Minute Order Recording Sentencing, dated April 21, 2005.
- 24 ○ Petition of Probation Officer to Revoke and to Terminate Probation, filed July 14, 2005.
- 25 ○ Minute Order Recording Sentencing on Violation of Probation, dated January 24, 2006.
- 26 ○ *THE PEOPLE v. RICHARD E. WILMSHURST*, opinion of the California Court of Appeal,
- 27 Third Appellate District, Case No. C050103, filed January 8, 2007, reported at 146 Cal.
- 28 App. 4th 621.

- 1 ○ Docket, last updated June 6, 2007.
- 2 ▪ In the matter entitled, *FORTY-NINER SIERRA RESOURCES, INC., dba FORTY-NINER SUBARU*
- 3 *et al. vs. SUBARU OF AMERICA, INC. et al.*, filed in the Superior Court of Calaveras County as
- 4 Case No. CV25303, and removed to the United States District Court for the Eastern District of
- 5 California as Case No. Civ-F-00-6250 REC/SMS.
- 6 ○ First Amended Class Action Complaint for Equitable Relief and Damages, filed July 21,
- 7 2000.
- 8 ○ Order Granting Defendant’s Motion for Judgment on the Pleadings on the Ground that
- 9 Plaintiffs Cannot Proceed Under California Civil Code §1793.5, dated November 30, 2001.
- 10 ○ Order Granting Defendant’s Motion for Summary Adjudication, Denying Plaintiff’s
- 11 Motion for Summary Judgment, and Denying Plaintiff’s Motion for Leave to Amend, filed
- 12 May 18, 2004.
- 13 ○ Order Granting Defendant’s Motion for Summary Adjudication or in the Alternative
- 14 Summary Judgment, entered January 6, 2005.
- 15 ▪ In the matter entitled, *FORTY-NINER SIERRA RESOURCES, INC., dba FORTY-NINER*
- 16 *SUBARU, and RICHARD E. WILMSHURST*, filed before the California New Motor Vehicle
- 17 Board, as Protest No. PR-1973-05.
- 18 ○ Protest for Review of Warranty Repair Payment Reasonableness, dated September 23,
- 19 2005.
- 20 ○ New Motor Vehicle Board Decision, entered January 26, 2006.
- 21 ▪ In the matter entitled, *FORTY-NINER SIERRA RESOURCES, INC., dba FORTY-NINER SUBARU*
- 22 *v. NEW MOTOR VEHICLE BOARD; SUBARU OF AMERICA, Real Party in Interest*, filed before
- 23 the Superior Court of Sacramento County, as Case No. 06CS00347.
- 24 ○ Judgment on Petition for Writ of Administrative Mandamus, filed June 29,
- 25 2006.
- 26 ▪ In the matter entitled, *FORTY-NINER SIERRA RESOURCES, INC., dba FORTY-NINER*
- 27 *SUBARU, and RICHARD E. WILMSHURST v. SUBARU OF AMERICA*, filed before the
- 28 California New Motor Vehicle Board, Petition No. [P-454-05].

1 o Petition, dated December 28, 2005.⁹

2 81. Much of this has been accompanied by publicity in local papers. Articles are included in
3 the record herein as Respondent's Exhibits R 577 – R 587. The articles are mostly negative and adverse;
4 and do, as alleged, link Mr. Wilmshurst with SOA as a Subaru dealer. The most recent event was the
5 arrest of Mr. Wilmshurst for assaulting a police officer during a frog jump youth parade. (RT Vol. II, p.
6 174) He posted bail for this in cash, using dealership funds. (RT Vol. IV, P. 139) SOA's concerns
7 regarding the felony conviction and the recent arrest were mentioned by all SOA witnesses, and are
8 summarized in particular by the testimony of Jim Pernas as follows:

9 Q What, in your opinion, in your reasonable opinion,
10 what has been the affect of that conviction and the
11 resulting media coverage on the reputation of Subaru and its
12 parent company, and other dealers?

13 A Oh, [it] absolutely hurt us, [it] damaged us, [it's]
14 guilt by association, [it's] every time every one of those
15 articles I heard read this morning it mentioned Forty-Niner
16 Subaru, so [we're] right in there in every one of those. And
17 our name is dragged in the mud of this felony conviction.
18 So, it hurts, it hurts what [we're] trying to accomplish as a
19 brand.

20 MR. SANCHEZ: And just for the Judge's reference,
21 I was referring to the media articles this morning that
22 were introduced as Exhibits 577 through 587.
23 (RT Vol. II, pp. 173-174)

24 ...

25 Q Sir, I note that there was one particular article
26 that we introduced this morning, and I m referring to
27 Exhibit 587, if you could turn to that?

28 _____
⁸ These are reproduced as Exhs. R 516 – R 535.

1 A Okay.

2 Q Are you familiar with this news story?

3 A Yes, I am.

4 Q What does this news story discuss?

5 A "Local Businessman Assaults Angels Camp Police
6 Officer. [It's] about Mr. Wilmshurst being arrested for
7 assaulting a police officer during a frog jump youth parade.

8 Q And we [don't] know, [there's] been no court decision
9 necessarily on this incident at this point in time, correct?

10 A Not that I know of.

11 Q Regardless of that, sir, what does this news
12 article, in your opinion, as recently as a month ago, tell
13 the public about, or what is its affect on [Subaru's]
14 reputation?

15 A Well, it hurts us tremendously, as the sole owner,
16 100 percent stockholder of Forty-Niner Subaru, [we're]
17 implicated right in there. It drags our name down and [here]
18 it is, in the second paragraph Forty-Niner Subaru in
19 downtown Angels Camp. So, [it's] dragging our name through
20 the mud and denigrating the Subaru brand.
21 (RT Vol. III, pp. 86-87)

22 82. On May 1, 2007, SOA launched an ad campaign called "The Soul of Subaru." (RT
23 Vol. III, p. 34) The message is that SOA is a green, clean company with clean manufacturing.
24 SOA's customers enjoy the environment, enjoy the wilderness. They believe in sustainable life
25 for the future. Dealers have a role in the environmental message, that part of who SOA markets
26 itself as. If there is a disconnect by a dealer between the Soul of Subaru message and its
27 practice, SOA is legitimately seen as hypocritical. (RT Vol. III, pp. 34-36)

28 83. Forty-Niner and Richard E. Wilmshurst are defendants in a Complaint for Civil

1 Penalties and Injunctive Relief Pursuant to California Hazardous Waste Control Law. (Exh. R
2 528) The litigation is pending. (RT Vol. III, p. 43) Attached to the complaint are photographs
3 depicting hazardous waste in containers in various states of decay and disrepair. (Exh. R 528,
4 pp. FSR00042-FSR00059) Mr. Pernas stated that the photographs are "... disturbing and scary
5 ... just a disregard for the environment ... looks like there's chemicals seeping on the ground,
6 55 gallon drums open all over the place ... a complete contradiction to every bit of Subaru of
7 America's efforts on taking care of the environment, environmental stewardship." (RT Vol. III,
8 pp. 41-43) This situation is bad for SOA, as Mr. Pernas stated on cross-examination by Mr.
9 Wilmshurst "... because we are an environmentally friendly car company. Our customer enjoys
10 the outdoors, the environment. They go camping, they go fishing. They want to preserve the
11 earth for their grandchildren and great grandchildren. They believe in sustainability, eco
12 friendly business. And what this says, and shows in the pictures, are disturbing. A 55 gallon
13 drums [sic] and seepage into the earth, and people in spacesuits, quite frankly, touching the
14 stuff, what it tells me is inconsistent with our brand image, it's inconsistent with our customer
15 values, our core values, and as a result of that, will cost us business as it becomes a matter of
16 public record, gets out, word of mouth. People see it, people see this onsite at your dealership.
17 That's the damage. And it's severe." (RT Vol. III, p. 119)

18 84. Signage is an important element "... inherent in the car business." (RT Vol. I, p.
19 167) Section 5.4 of the Dealership Agreement sets forth what is required of all dealers in
20 general terms; that signs shall be displayed meeting SOA specifications. (Exh. R 536, Bates No.
21 SOA001664)

22 85. SOA went to a lease sign program in 1995, which is set forth in Respondent's
23 Exhibit R 573. The rationale was to have control over signs and insure that they are kept up to
24 date. (RT Vol. I, pp. 168-170) In furtherance of this aim, SOA pays for new generations of
25 signs to replace older ones at SOA expense, as long as a dealer is participating in the lease sign
26 program. (RT Vol. III, pp. 28-32) All SOA Northwest dealers participate in that program, with
27 the single exception of Forty-Niner. (RT Vol. I, p. 169)

28 86. Forty-Niner has not been a Chevrolet Dealer for over 20 years, but there is still a

1 Chevrolet sign on the property, covered in black plastic or a tarp. (RT Vol. II, pp. 20, 25; Exh.
2 R 504, pp. C, E, F) Forty-Niner has not been an Isuzu dealer for at least two years, but the
3 facility still has Isuzu signage on the buildings, and a billboard on the edge of town still
4 describes Forty-Niner as a Subaru and Isuzu dealer. (RT Vol. IV, pp. 101-103; Exhs. R 504, pp.
5 C, E, F, I; Exh. R 504, p. B) The Subaru signage on the facility property is one or more
6 generations out of compliance with current SOA versions. (RT Vol. I, p. 166; Exhs. R 504, R
7 573 – R 574)

8 87. The general conditions at Forty-Niner have been described in the section herein on
9 the good cause factor relating to adequate sales and service facilities (Paragraph Nos. 69-74).
10 They will not be repeated in detail here, save to observe that they are not "... attractively
11 designed and well maintained for the safety and comfort of customers and employees", as
12 required by the Dealership Agreement. (See Exh. R 536, Bates No. SOA001683) Mr.
13 Wilmshurst acknowledges as much. (RT Vol. IV, p. 141; Exh. R 579)

14 88. Forty-Niner effectively admits it double-charges customers who have purchased
15 SOA authorized Added Security Maintenance Agreements from other Subaru dealers. (RT Vol.
16 IV, p. 17) While this is technically not warranty work, the honoring of these contracts is
17 required by the terms of the Dealership Agreement mandating "... prompt and efficient service
18 for all Cars whether or not under Warranty and without regard to where the Car was originally
19 purchased. (Exh. R 536, Bates No. SOA001669)

20 OTHER FACTORS

21 89. The list of good cause factors set forth in Section 3061 for termination of a
22 franchise is not exclusive. The existing circumstances must be considered, including, but not
23 limited to the seven factors specifically set forth. Relations between manufacturers and dealers
24 can often be contentious, but the relationship in this case rises to a level that merits separate
25 notation. Normal communication between the parties to this franchise has become all but
26 impossible.

27 90. Mr. Van Wechel testified that the relationship had become, in a word,
28 "adversarial." In the course of Mr. Wilmshurst's refusals to participate in even the most basic

1 programs the company offered, constant threats and innuendos, including routine threats of
2 legal action, and actions to intimidate SOA employees, became commonplace. SOA personnel
3 could not work with him. (RT Vol. I, pp. 173-174)

4 91. Mr. Thompson, who has known Mr. Wilmshurst since Mr. Thompson was seven
5 (7) years old, wrote a memo to him stating that "...your constant effort in pointing out faults is
6 not healthy." He was responding to what he termed "attacks" and "verbal abuse" of his people
7 by Mr. Wilmshurst. (RT Vol. II, pp. 56 – 58, 87; Exh. R 564) Mr. Wilmshurst, according to the
8 memo, provides "debate and scrutiny, with no discussion on growth, opportunity or even
9 constructive criticism." (Emphasis in original; Exh. R 564) Mr. Thompson could not count the
10 relationship with Mr. Wilmshurst as a positive relationship. (RT Vol. II, 58:20 – 59:21)

11 92. Mr. Buckley, who has called on the dealership over 200 times, described the
12 relationship as "combative, adversarial" and described Mr. Wilmshurst as a "bully." Mr.
13 Buckley, as did several SOA witnesses, testified that Mr. Wilmshurst tends to "intimidate at
14 every opportunity." (RT Vol. II, 114) Mr. Buckley testified as to an incident in which Mr.
15 Wilmshurst had yelled at, been rude to and hung up on a SOA employee. According to Mr.
16 Buckley, when he asked Mr. Wilmshurst for an explanation of the incident, Mr. Wilmshurst did
17 not explain or even deny the incident, but instead referred to the SOA employee as an "idiot and
18 son of a bitch." (RT Vol. II, 118, 119; Exh. R 554) Mr. Wilmshurst denies this and other
19 specific incidents in a declaration attached to his post-hearing reply brief dated July 26, 2007, at
20 pages 4 and 5, and Protestant's Post Hearing Reply Brief, dated July 27, 2007, at pages 6-8.

21 93. Mr. Buckley also described an incident in which Mr. Wilmshurst tried to
22 intimidate him, when, for no apparent reason, he told him about "... an independent distributor
23 of ours, and he's to have a service rep killed", making Mr. Buckley feel uncomfortable and
24 intimidated. (RT Vol. II, 114, 115; Exh. R 553) According to Mr. Buckley, even attempting to
25 conduct routine business with Mr. Wilmshurst frequently became an adversarial encounter. Mr.
26 Buckley recalled one incident, for example, in which he was communicating a very routine
27 business need to Mr. Wilmshurst. In response, Mr. Wilmshurst advised Mr. Buckley that, if Mr.
28 Buckley caused Mr. Wilmshurst stress, Mr. Wilmshurst would defend himself physically, which

1 Mr. Buckley took as yet another threat from Mr. Wilmshurst. (RT Vol. II, p. 116)

2 94. Mr. Pernas, the Regional Vice President, told of Mr. Wilmshurst's attitude of
3 defiance and intimidation, including an incident in which Mr. Wilmshurst threatened to get Mr.
4 Pernas fired, as he had done to an Isuzu representative, if he did not rescind the Notice of
5 Termination. (RT Vol. III, p. 53)

6 95. Both Mr. Van Wechel and Mr. Buckley described two separate incidents in which
7 Mr. Wilmshurst produced a handgun at the dealership while they were there on a routine
8 business call. Mr. Van Wechel testified regarding an incident in 2000, during which he was
9 discussing very routine business matters with Mr. Wilmshurst and Mr. Wilmshurst reached
10 around to a shelf from behind his desk and put a handgun down on the desk between them. This
11 incident made Mr. Van Wechel uncomfortable and intimidated enough that he ended the
12 conversation, left the dealership and has not been back since. (RT Vol. I, pp. 174 - 177)

13 96. Mr. Buckley also testified as to another incident in which the Service Manager at
14 the dealership made a mistake, and Mr. Wilmshurst took a gun out and handed it to the Service
15 Manager, suggesting that he put it to his head and pull the trigger. Mr. Buckley said he had
16 never seen anything like that in all the years he has been calling on dealers, and it made him feel
17 very intimidated and nervous. (RT Vol. II, pp. 115-116)

18 97. Mr. Wilmshurst admits that he keeps a handgun on a shelf behind his desk at the
19 dealership, but denies that he handled it in the manner described by Mr. Buckley. (RT Vol. IV, p. 82)
20 There was no attempt to refute the description given by Mr. Van Wechel of the separate incident. As
21 noted above, Mr. Wilmshurst's denials and versions of specific events are set forth in his post-hearing
22 reply brief dated July 26, 2007, at pages 4 and 5, and Protestant's Post Hearing Reply Brief,
23 dated July 27, 2007, at pages 6-8.

24 98. In his pre-hearing brief, Mr. Wilmshurst specifically states in bold capital letters,
25 **"SUBARU PERSONNEL ARE GOOD PEOPLE** Having done business over twenty-six
26 years, we have found Subaru people to be quality people. (Emphasis in original) Subaru hires
27 and retains a high standard of corporate people". (Protestant's Pre-Hearing Brief, p.5)

28 99. During the hearing Mr. Wilmshurst was civil and polite in his demeanor, though

1 often overwhelmed and disorganized. (See RT Vol. II, pp. 77-81) He was given considerable
2 latitude and assistance at all stages, and informed very explicitly of what was required in the
3 post-hearing briefing. (RT Vol. III, pp. 90-91; Vol. IV, pp. 63-64, 170-174)

4 100. Mr. Wilmshurst's manner of communication changed dramatically in the post-
5 hearing briefing.¹⁰ There is little or no citation to the record regarding most of his contentions.
6 Most relevant to the question of termination of the franchise on this point, however, is not the
7 merits of the briefing one way or another, but rather Mr. Wilmshurst's reversion to accusation
8 and innuendo as a tactic. He accuses SOA's witnesses of lying, demands lie detector tests, and
9 accuses SOA's attorneys of suborning perjury. In Protestant's July 27, 2007, Post Hearing
10 Reply Brief, Mr. Wilmshurst puts his accusations and demands in yet more strident terms.
11 There was no discernable basis during four days of hearing for this type of charge. No such
12 charges were raised during the hearing. This post hearing diatribe tends to raise the credibility
13 of SOA's characterization of the relationship between it and Forty-Niner, and diminish the
14 credibility of Mr. Wilmshurst's version of events surrounding the relationship.

15 DETERMINATION OF ISSUES

16 101. SOA has established that Forty-Niner is not transacting a satisfactory amount of
17 business as compared to what is available to it (§ 3061(a)). Subaru's penetration in Forty-
18 Niner's AOR is far greater than average due to the terrain and the characteristics of the
19 population, but Forty-Niner is responsible for far less of that than it should be, and that share is
20 declining. Forty-Niner is not inclined to take any of the steps required to increase its business.

21 102. SOA has established that Forty-Niner has not made the investment necessary to
22 properly perform its part of the franchise (§ 3062(b)). The Forty-Niner facility is old,
23 deteriorating, and in a poor state of cleanliness and repair. The dealer principal is financially
24 capable of making the necessary investment but is emphatically not inclined to do so.

25 103. SOA has established that what investment there is in the Forty-Niner franchise is
26 not permanent (§ 3061(c)), and in any event would not be lost if the franchise was terminated.

27
28 ¹⁰ Both of Protestant's Post Hearing Reply Briefs and attached exhibits (dated July 26, 2007, and July 27, 2007) were considered in the Proposed Decision after Remand.

1 104. SOA has established that termination of the Forty-Niner franchise would not be
2 injurious to the public welfare (§ 3061(d)), and that the public welfare might actually benefit
3 therefrom.

4 105. SOA has established that Forty-Niner does not have adequate facilities to properly
5 provide for the needs and well being of the consuming public (§ 3061(e)). The facilities are old,
6 deteriorating, and unclean. There is no functioning indoor showroom, and normal amenities
7 such as restrooms or a waiting room are grossly substandard and inadequate.

8 106. SOA has not established that Forty-Niner has failed to perform required warranty
9 obligations (§3061 (f)).

10 107. SOA has established that Forty-Niner has failed substantially in complying with
11 the terms of the franchise agreement (§ 3061(g)). Forty-Niner's signage is badly out of date.
12 Service agreements purchased from other dealers are not being honored. In addition to the
13 extremely poor condition of the facility generally, the property has become a dangerous
14 repository for improperly stored hazardous waste, directly at odds with the image and reputation
15 SOA strives for as an environmentally conscious car company.

16 108. SOA has established that the relationship between it and Forty-Niner dealer
17 principal Richard E. Wilmshurst has become openly hostile and adversarial to the point where
18 business can no longer be discussed and/or transacted in a normal manner (§3061 generally).
19 Mr. Wilmshurst's tendency toward intimidation, bullying, threats, and innuendo, have gone well
20 beyond such disagreement as may be expected in the normal course of business. The
21 relationship is characterized by recurring vitriolic episodes, some with physical overtones.

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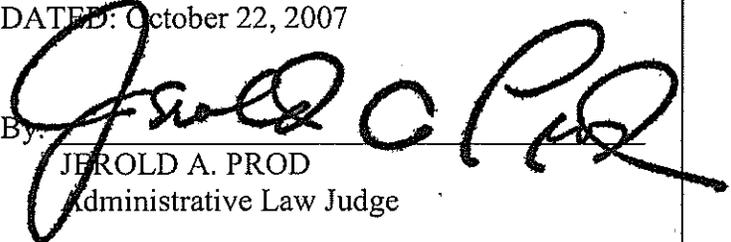
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1 **PROPOSED DECISION**

2 Based on the evidence presented and the findings herein, it is hereby ordered that the Protest is
3 overruled. Respondent has met its burden of proof under Vehicle Code Section 3066(b) to establish that
4 there is good cause to terminate Forty-Niner's franchise.
5
6
7

8 I hereby submit the foregoing which constitutes my
9 Proposed Decision after Remand in the above-
10 entitled matter, as the result of a hearing before me
11 and I recommend this Proposed Decision after
12 Remand be adopted as the decision of the New
13 Motor Vehicle Board.

14 DATED: October 22, 2007

15 By: 

16 JEROLD A. PROD
17 Administrative Law Judge
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27 George Valverde, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV