

A. Facts Relating to 49er's Refusal to Pay
the Warranty Charge-back Against Its Open Account
with Chevrolet and Chevrolet's Resulting Decision
to Place 49er on C.O.D. for Parts Ordered

74. Chevrolet and 49er maintain a mutual open account whereby charges owing to Chevrolet by 49er are debited and charges owing to 49er by Chevrolet are credited. The account is due and payable on the tenth (10th) of each month.

75. As a result of the 1973 audit, Chevrolet determined that it had overpaid 49er for warranty work and debited 49er's account for approximately \$3,000. 49er contended that the debit was improper in that Chevrolet was not at that time paying 49er at 49er's retail price for the parts and labor used in performing warranty work.

76. Upon receipt of the monthly statement showing the charged-back amount, 49er paid the statement with the exception of the amount of the charge-back.

77. 49er continued to pay its open account balance owed to Chevrolet with the exception of the \$3,000 charge-back. Rather than instituting legal action, Chevrolet chose to put 49er on a C.O.D. basis for 49er's purchase of parts from Chevrolet. There was no evidence to indicate that Chevrolet was concerned about the solvency of 49er or that the \$3,000 that was not paid was anything more than a dispute between the parties. Chevrolet chose to put 49er on C.O.D. in an effort to apply economic pressures on 49er.

78. Sometime prior to 1975, 49er was taken off C.O.D. for parts without the \$3,000 charge-back being resolved.

79. At the end of 1976 and in 1977, the warranty charge-back again surfaced but the sum in dispute had been reduced to approximately \$1,900. Chevrolet again attempted to collect the charge-back by withholding from 49er the amounts Chevrolet owed to 49er as a result of the holdback account which Chevrolet holds on vehicles sold to 49er. When 49er did not receive its full holdback amount, 49er deducted the sum it had been shorted by Chevrolet from the mutual account. This prompted Chevrolet to again threaten placing 49er on C.O.D. status, and when 49er refused to pay the full balance of the amount charged back, Chevrolet again on July 31, 1977, placed 49er on C.O.D. status for parts.

80. 49er was on C.O.D. status from July 31, 1977, through May 15, 1978.

81. During this period of time, 49er had a credit balance on its open account with Chevrolet. This resulted in Chevrolet forwarding to 49er a check for each of those months. There was nothing to indicate that Chevrolet was concerned about the solvency of 49er. 49er's dependence on Chevrolet for parts allowed Chevrolet to attempt to extract a disputed sum from 49er by other than judicial or administrative process through the use of economic pressures.

82. The charge-back which arose as a result of the 1973 warranty audit, was eventually recredited to 49er's account by Chevrolet on September 18, 1978. (See footnote 4 above.)

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B. Facts Pertaining to Reimbursement to
49er by Chevrolet for the Parts Used by 49er
in Performing Warranty Work and Repairing Transportation Damage

83. Pursuant to Chevrolet's Policies and Procedures Manuals (which are incorporated into the dealer agreement), Chevrolet limits its obligation to pay dealers for parts used in performing warranty repairs to an amount equal to the current dealer's cost of the part from Chevrolet plus a markup of 30%. This converts into a gross profit for the dealer of 23.08%. Chevrolet does not permit a dealer to charge more than the dealer's actual cost if the part involved is a tire.

84. Chevrolet's Policies and Procedures Manuals provide that parts necessary to accomplish transportation damage repairs may be billed to Chevrolet at the dealer's cost plus 30% with the exception of tires and glass. These are to be billed at the dealer's actual cost with no markup permitted.

85. 49er determined that its cost of doing business required a higher gross profit than permitted by Chevrolet's limitations. 49er believed Chevrolet was in violation of Business and Professions Code, Section 17048.5, which provides:

It is unlawful for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of such person, to enter into a contract with any service or repair agency for the performance of warranty service and repair for products manufactured, distributed or sold by such person, below the cost to such service or repair agency of performing the warranty service or repair.

86. At Wilmshurst's request, Senator David Roberti requested that the Attorney General's Office provide an opinion as to whether the provisions of Business and Professions Code Section

17048.5 apply to reimbursement under an agreement between an automobile manufacturer and a new car dealer. The opinion of the Attorney General was issued on November 30, 1979. The opinion concluded:

In light of the provisions of Vehicle Code Sections 3050 and 3065 giving authority to the New Motor Vehicle Board to regulate and hear complaints concerning warranty reimbursement agreements between an automobile manufacturer and a new car dealer, the provisions of Section 17048.5 of the Business and Professions Code relating to warranty-service agreements between, among others, a manufacturer and a person performing warranty services do not apply to reimbursement under such agreements between an automobile manufacturer and a new car dealer.

87. Wilmshurst disagrees with the opinion of the Attorney General and maintains that Chevrolet's conduct is illegal under Business and Professions Code, Section 17048.5.

C. Facts Relating to Chevrolet's Policy
in Regard to Reimbursing 49er
for 49er's Performance of Labor Necessary to
Accomplish Warranty Repair Work and Transportation
Damage Repairs

88. Prior to March 1978, the dealer was required to perform the warranty repairs for Chevrolet at a price which frequently was below the retail price charged by the dealer. Since March 1978, Chevrolet has given its California dealers the option to be reimbursed for labor at the dealer's retail labor rate for labor used in performing warranty repairs or transportation damage repairs.

89. Chevrolet limits the amount of time which the dealer can charge Chevrolet for warranty work or transportation damage repair work to the amount shown in Chevrolet's labor time guides.

These guides are prepared by Chevrolet for use by the dealer. A dealer is not required to use Chevrolet's time guides for performance of retail work for customers.

90. 49er and other dealers use other independent commercially prepared labor time guides for retail repair work. These guides generally show a greater time required for a labor operation than does Chevrolet's. The Chevrolet time guides are purportedly based on studies of actual repairs conducted in a "normal shop environment" by "average mechanics". The procedures are reviewed for accuracy every five years and are periodically updated.

91. Chevrolet's labor time guides were not the subject of any of the accusations by Wilmshurst against Chevrolet's employees which lead to Chevrolet's decision not to offer 49er a new Sales and Service Agreement.

92. In respect to sublet repairs, for both warranty and transportation damage claims, Chevrolet will not allow a dealer to be reimbursed for more than his actual cost. The specific provision in the Chevrolet Service Policies and Procedure Manual is as follows:

D. Sublet Repairs

A dealer will be reimbursed for sublet repairs at the dealer's actual cost less any discounts or allowances that apply to the sublet invoices. This is not to exceed the dealer labor and/or parts allowances as set forth in A and B above. Sublet repairs must not be shown on a warranty claim as a dealer-performed repair. Refer to part VI-7, 8; V-80 for details on required dealer records.

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93. This limitation does not take into consideration the dealer's cost of doing business, i.e., transportation, telephone, and general overhead of the department handling the sublet item. This also has the effect of precluding the dealer from recovering his actual cost paid to the sublet supplier. One example of this involved a vinyl roof repair to a customer's car as a result of a warranty claim. The Chevrolet manual in its time allowance allowed only \$9.80 for performing the repair; however, since 49er Chevrolet did not have a vinyl repair facility at its shop, it was necessary for the vehicle to be driven to a vinyl repair shop in the area (the only one available) for the repair to be accomplished. The invoice amounted to \$35.20 which was paid by 49er. When submitted to Chevrolet for reimbursement, Chevrolet offered to pay only \$9.80 as fixed by its labor time guide operations showing the amount of time authorized as being required for such repair. Not only was 49er prevented from recovering the amount it actually paid to have the work performed, it also received no allowance for 49er's expense for the trips to the sublet facility.

D. Facts Relating to Threats of Cancellation to Coerce
Acceptance of Warranty Payments

94. In January of 1975 the Chevrolet Dealer Organization and Development Department recommended to Chevrolet that 49er be notified that its franchise was to be terminated. This recommendation was not followed by Chevrolet.

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95. However, in July of 1975 a meeting was held with Wilmshurst at the Red Lion Inn in Sacramento, California. The persons present were Wilmshurst, 49er's Vice President of the dealership, Mr. Allen Correll (Correll), and Chevrolet's Assistant General Sales Manager for the Western Region, as well as Mr. James Halbrok (Halbrok) of the Chevrolet Central Office Staff.

96. The meeting had been called by Chevrolet specifically to ask several questions of Wilmshurst. The first question asked was, "Do you wish to continue to be a Chevrolet dealer?"

97. Halbrok asked Wilmshurst whether he intended to comply with the terms of the Chevrolet Car and Standard Truck Dealer Sales and Service Agreement. Wilmshurst was also asked about which terms of the Chevrolet dealer agreement did he disagree. Wilmshurst's only disagreement related to the warranty administration including Chevrolet and General Motors price formulas for parts and labor rates for performing warranty work.

E. Facts Relating to the Delivery of Citations
to Fleet Customers

98. Prior to the introduction of the Citation in April of 1979, Chevrolet decided to allocate 18% of Citation production to its fleet accounts. This was based upon the prior history of fleet sales of Chevrolet Novas and Vegas.

99. 49er's complaints to Chevrolet were based upon Wilmshurst's belief that Chevrolet failed to deliver Citations in reasonable quantities and within a reasonable time to 49er

and its customers. Wilmshurst maintained that this was a violation of Vehicle Code Section 11713.3(a) which reads in part as follows:

It shall be unlawful and a violation of this code for any manufacturer...licensed under this code:

(a) to refuse or fail to deliver in reasonable quantities and within a reasonable time after receipt of an order from a dealer having a franchise for the retail sale of any new vehicle sold or distributed by the manufacturer...any new vehicle...as are covered by such franchise, if such vehicle...are publicly advertised as being available for delivery or actually being delivered...

100. Although 49er was one of the last dealers in the Oakland Zone to receive a Citation model vehicle, 49er did have a Citation available for resale to the public on the date of introduction of the vehicle.

101. 49er encountered significant delays in receiving Citations that were ordered. These delays were experienced by three customers--Apley, Miessler, Cleaver--whose orders were not filled by Chevrolet for five, six, and seven months respectively.

102. 49er had a record of complaints to Chevrolet in regard to allocation of vehicles that 49er was unable to acquire in what it considered adequate numbers.

103. 49er's complaints to Chevrolet also allege that Chevrolet's fleet distribution system violates Vehicle Code Section 11713.3(a) because of its effect upon the number of vehicles available to retail consumers throughout the Chevrolet dealer network.

104. Chevrolet's Central Office determines the number of vehicles to be allocated to fleet accounts in the United States.

105. A fleet account which submits an order to Chevrolet will receive a commitment from Chevrolet that the order will be filled through the fleet distribution system. This commitment is subject to availability of the desired vehicles within the fleet system.

106. Once acquiring this commitment, the fleet buyer is free to shop for a dealer to deliver the vehicles. This commitment from Chevrolet places the fleet buyer in a strong bargaining position since he is merely looking for a dealer through which he can receive delivery of the already committed vehicles. This results in a situation in which the competition is among the dealers as to who will charge the least amount for accomplishing delivery of the vehicles from Chevrolet to the fleet buyer.

107. Chevrolet receives the same price from the sale of a retail or fleet vehicle. The variance in price between retail and fleet sales occurs in the transaction between the dealer and the buyer.

108. 49er contends that Chevrolet's dual distribution system results in:

- a) a lack of available vehicles to the retail consumer.
- b) an increased price to the retail consumer of high demand vehicles.
- c) delays to the retail consumer in receipt of ordered vehicles.
- d) a decrease in the value of the vehicle to the retail consumer in that the consumer receives the ordered vehicle later in the model year and is subject to significant numbers of resales by fleet buyers.

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109. Due to the concentration of fleet buyers in the Oakland Zone, the numbers of Citations allocated and delivered to fleet buyers is substantially higher than the 18% nation-wide average.

110. Chevrolet polices the fleet allocation and distribution system to make certain that a dealer does not sell a fleet vehicle to a retail consumer. If a dealer sells a fleet vehicle to a retail consumer, Chevrolet reduces the number of retail units allocated to the dealer by the number of fleet units which were sold in this manner. If retail units are delivered to fleet buyers, however, there is no reduction of the retail allocation to the dealer.

111. Wilmshurst believed that Chevrolet's attempt to enforce its fleet allocation system was an attempt to control the distribution of a product after it had been sold to a dealer. He believed that this conduct was a violation of the antitrust laws.

F. Facts Relating to Chevrolet's Price Protection Policy

112. 49er's complaints included charges that Chevrolet has consistently over-billed 49er for new vehicles purchased by 49er for retail consumers in violation of Vehicle Code Section 11713.3(h) which provides:

It shall be unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code: ...

(h) To increase prices of motor vehicles which the dealer had ordered for private retail consumers prior to the dealer's receipt of the written official price increase notification. A sales contract signed by a private retail consumer shall constitute evidence of each such order. ...

113. Chevrolet bills all new vehicles delivered to its dealers at the current Chevrolet price at the time of shipment. The current price must be paid by the dealer to Chevrolet regardless of the fact that the vehicle had been ordered under a contract of sale for a retail consumer prior to a price increase. To recover the over-charge, the dealer must file "Bonafide Sold Order Summaries" and "Certifications", with Chevrolet listing the vehicles which the dealer had ordered as sold units for a retail consumer prior to a price increase. The dealer is required to submit evidence that the vehicle was in fact sold and delivered to the retail consumer.

114. Prior to January 1980, the Chevrolet procedures required a separate certification that the vehicle was in fact delivered to the customer indicated on the "Bonafide Sold Order Summary". Since January 1980 Chevrolet has changed its procedures so that it can use the retail delivery card, which dealers must submit for other purposes, to indicate the identity of the buyer to whom the delivery was made.

115. Prior to January 1980, a dealer was required to file "Bonafide Sold Order Summaries" each time there was a price increase. In some cases this required the filing of several summaries.

116. In practice, the price protection policies of Chevrolet often cause significant delays to the dealer in recovering the amount the dealer was over-charged. 49er provided three specific examples of this problem. 49er was required to pay for the Apley, Cleaver, and Miessler vehicles when they were

delivered.^{8/} Between the dates of order and the dates of delivery, these vehicles had increased in price as follows:

Apley	\$715.63
Cleaver	\$930.45
Miessler	\$858.13

At the time of delivery, 49er paid the then current Chevrolet price for the vehicles which included the above increases. As of July or August 1980, 49er had not been fully reimbursed for the over-charges.

117. No interest is paid to the dealers by Chevrolet pending reimbursement for over-charges.

G. Facts Relating to Chevrolet's Alleged Coercion of 49er to Participate in Chevrolet's Programs

118. 49er's complaints to Chevrolet included allegations that Chevrolet violated Vehicle Code Section 11713.2(d) which provides:

It shall be unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to coerce or attempt to coerce any dealer in this state: ...

(d) To participate in an advertising campaign or contest, any promotional campaign, promotional materials, training materials, showroom or other display decorations or materials at the expense of the dealer.

119. In August of 1979 49er received a shipment of Chevrolet Distribution Management Training Program materials and a bill for the material. Wilmshurst informed Hill that the materials had not been ordered by anyone at 49er. Hill contended that he had contacted Correll, in January of 1979, and that Correll had authorized shipment of the materials in their phone conversation.

8. The Apley vehicle was delivered in January of 1980; the Cleaver vehicle in March 1980; and the Miessler vehicle in December 1979.

Hill had completed the necessary order form and had signed Wilmshurst's name on the form. Correll had never previously approved a program by telephone. Correll denied authorizing such an order.

120. Wilmshurst eventually paid the bill because, "Until I have something more concrete than both men's word, I wouldn't really want to make a decision on who was at fault and I had nothing else to go on."

H. Facts Relating to the Alleged Coercion of 49er
to Order Unwanted Vehicles

121. 49er's complaints to Chevrolet alleged that Chevrolet was in violation of Vehicle Code Section 11713.2(a) which provides:

It shall be unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to coerce or attempt to coerce any dealer in this state:

(a) To order or accept delivery of any motor vehicle, part or accessory thereof, appliance, equipment or any other commodity not required by law which shall not have been voluntarily ordered by the dealer.

122. In March 1979 Wilmshurst wrote to Hill complaining about threatened retaliation by Hill in the event 49er did not place sufficient orders for all lines of Chevrolet vehicles. In response, Hill wrote on March 14, 1979, indicating: "...if I could not expect your cooperation on this very important facet of our business, which is both our responsibility (sic) to maintain, then you could expect the same type of cooperation from me.

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If you construe this as a threat, so be it; however, it was not meant as such."

123. In May of 1979 Correll was told by Hill that 49er had to order vehicles it did not want or could not easily sell in order to get the vehicles it could sell.

124. In May 1980 during the ordering session for the introduction of the 1981 model Chevrolets, Hill told both 49er and other dealers that they would not be permitted to order any vehicles unless they accepted their entire allocations which had previously been made by Chevrolet for various models.

125. A memo sent to all dealers in the Oakland Zone by West concerning the 1981 model year order-taking meeting indicates that the dealers "will be required to order" the vehicles allocated by Chevrolet. A Chevrolet form entitled "1981 Model Startup Dealer Order Requirements" indicates that "No deviations will be allowed" in the "model quantities specified by the zone."

126. Upon complaints from the dealers, Chevrolet indicated that the statements were merely intended to emphasize the fact that no changes were allowed in the model of the vehicles or their equipment on the initial production run.

I. Facts Relating to Chevrolet's Time Limitation
for Submission of Warranty Claims
and Re-submission of Previously Rejected Claims

127. Under Chevrolet's Policies and Procedures Manuals, dealers are required to submit warranty claims, referred to as GSD-970 Forms, to Chevrolet within 30 days from the date the

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repair order is written or within 30 days from the date the repair is completed, whichever is later.

128. If Chevrolet rejects a claim, the dealer is notified by a turn-around document, called a GSD-971, which identifies the error. The error must be corrected on that same GSD-971 document and returned to Chevrolet within 30 days from a date placed on the document by Chevrolet. The date on the document is Chevrolet's estimate of when the document will be received by the dealer. The date on the GSD-971 may be earlier than the time the document is actually received by the dealer.

129. Chevrolet's provisions concerning warranty claims provide in part:

A. TIME LIMIT FOR FILING CLAIMS

Credit will not be allowed on any warranty claim that is submitted more than thirty (30) days after the repair order date on which the work is completed (unless otherwise authorized by the Zone).

130. Warranty claims which do not meet this time limitation are returned to the dealer with the following code number and notation:

87. CLAIM NOT RECEIVED WITHIN ALLOTTED TIME

The claim was not received by Chevrolet within 30 days of the date the repair was performed. Authorization from Zone Office is required prior to resubmission of claim.

131. If the GSD-971 form is not returned within 30 days of the date placed on the form by Chevrolet, the warranty claim

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will again be rejected with the following code number and notation:

90. CORRECTION NOT RECEIVED WITHIN ALLOTTED TIME

Correction was not received by Chevrolet within 30 days of the 30 day start date appearing on the GSD-971. Authorization from your Zone Office is required prior to resubmission.

132. Chevrolet's own personnel who are charged with preparation and administration of the Service Policies and Procedures Manual and the Warranty Claims Processing Manual were unable to determine when the thirty day periods imposed upon the dealers would begin or expire. They were unable to determine whether the words used in the various manuals such as "filing" and "submission" meant that the claim must be mailed or must be received by Chevrolet prior to the expiration of the time limit.

133. At the hearing, 49er learned for the first time, and it appeared as though some Chevrolet people also learned for the first time, that the computer at the warranty claims processing center in Michigan was programmed to accept a 970 warranty claim form if it reached the computer within 52 days after the date of the repair order and to accept a 971 turn-around document if it reached the computer within 66 days after the start date.

134. The decision by Chevrolet not to make the true time limitations public causes dealers to operate on the assumption that the thirty day time limitations apply. This appears to be the assumption of Chevrolet's Zone management personnel as well, as demonstrated by West's response to one of 49er's requests

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for permission to resubmit a previously rejected 971 turn-around document. West informed 49er that:

These documents...were mailed to you with a 30-day start date of 11/28/77 and were received back at the Warranty Processing Center on 1/17/78. This is an elapsed time of 51 days and beyond the time allowed for resubmission. Therefore, the claims were rejected for 'Correction Not Received Within Allotted Time'.

This rejection in Michigan occurred in spite of the fact that, according to Chevrolet's policy, the claims are to be accepted if received within 66 days.

135. Chevrolet asserts that the additional time is provided in order to allow for mailing time so that a dealer a great distance from the processing center has the same opportunity to submit claims as a dealer close to the processing center.

136. Chevrolet does not divulge this information to the dealer body because Chevrolet maintains that such disclosure would in effect extend the deadline from the date of submission to the date of receipt and would thereby advantage the dealer close to the processing center.^{9/}

137. Chevrolet rationalizes the necessity of time limitations upon submission of warranty claims based upon the fact that it receives about 90,000 such claims per day. It is Chevrolet's contention that, without time limitations on submission of claims, there could be no orderly processing of claims and that delays in payments to the dealers would result.

9. This policy still discriminates against distant dealers since a dealer near the processing center could submit a claim in 50 days and still receive payment.

138. Chevrolet justifies the use of the short time periods for submission of claims by dealers upon the fact that dealers' labor rates occasionally change and Chevrolet's parts prices, which it charges the dealers, change from time to time. Chevrolet's policy is based upon the theory that, without restrictions on when claims could be submitted, it would be necessary for Chevrolet to track down stale labor rates and parts prices, thereby slowing the processing of claims and adversely affecting the time within which dealers could be paid.

139. Chevrolet's Zone Office Service Manual establishes policies which the Zone Service Manager is to follow in considering whether to approve the resubmission of over age claims. The manual provides, "should it be determined that a dealer's request is to receive favorable consideration...it is recommended over age claims be processed at net dealer cost of parts and labor".

140. Chevrolet's National Sales Manager, Cook, recognized that some dealers did not make a profit performing warranty work. In regard to transportation claims, which are also subject to time limitations for submission, he noted that he did not think that "the system was designed for the dealer to make a profit on transportation claims".

141. 49er does not maintain any log or other system to insure the timely submission of warranty claims.

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J. Facts Relating to 49er's Allegations
that Chevrolet Is Conducting Illegal
Sales Contests

142. 49er's communications to Chevrolet in regard to Chevrolet's sales campaigns, such as its "Show the Way" campaign, were based upon Wilmshurst's belief that such campaigns constitute a violation of California Penal Code Section 337a and the Federal Racketeering Statute found in 18 USC Section 1952.

143. Penal Code Section 337a provides in part:

Section 337a pool selling; . . . stake holding;
recording wagers; . . .

Every person,

1. Who engages in pool selling . . . at any time or place; or
2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, . . . occupies, for any period of time whatsoever, any . . . building . . . with a book or books, paper or papers, . . . for the purpose . . . of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, . . . or contest, or purported contest, of skill, . . . of man . . . or between men, . . . or upon the result, . . . of any lot, chance, casualty, unknown or contingent even whatsoever; or
3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, . . . any money, . . . or the equivalent or memorandum thereof, staked, pledged, bet or wagered, . . . upon the result . . . or contest, or purported contest, of skill, . . . of man, . . . or between men, . . . or upon the result, or purported result of any lot, chance, . . . or contingent event whatsoever; or
4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result or purported result, of any . . . contest, or purported contest, . . . of man . . . or between men, . . . or upon the results, . . .

of any lot chance . . . or contingent event whatsoever; or

5. . . .

6. . . . is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison.

(a) . . .

(b) . . .

This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive.

144. Title 18, USC, Section 1952, Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises, provides as follows:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) . . .

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means:

(1) any business enterprise involving gambling . . . on which the Federal excise tax has not been paid . . .

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145. Chevrolet's "Show the Way" campaign was estimated to cost approximately \$12,400,000; \$5,700,000 of which was contributed by the dealers.

146. The sales campaign resulted in competition among dealer groups. The dealers with the best sales performance within each group win prizes; all other dealers lost their entry fees.

147. Wilmshurst's belief that Chevrolet's sales contest constituted gambling in violation of Penal Code Section 337a was partially based upon the opinion of an attorney in Calaveras County who had reviewed the situation with Wilmshurst.

148. Wilmshurst was also of the belief that Chevrolet engaged in unlawful "tying" by requiring the purchase of prize points in connection with the sales campaigns. The sales campaigns were conducted in conjunction with the E. F. McDonald Company. Chevrolet required that a dealer who entered the contest purchase a certain amount of prize points which could be redeemed only for merchandise from E. F. McDonald Company.

149. Wilmshurst's conduct was based on his belief that the requirements that the prize points be purchased in order to take a chance on winning a travel trip is a "tying" arrangement in violation of Federal and State antitrust laws. It was Wilmshurst's belief that, since the dealer was not permitted to enter the contest without purchasing these prize points, the effect was to require the dealer to actually use the prize points and thereby make a purchase for a particular dollar amount of merchandise at a price set by the E. F. McDonald Company.

K. Facts Relating to Allegations of Parts
Price Fixing by Chevrolet

150. 49er's conduct in regard to parts price fixing allegation was based on Wilmshurst's belief that Chevrolet fixes the price at which 49er must sell parts to Chevrolet and the common carriers which transport the vehicles. Wilmshurst believed that Chevrolet's conduct is in violation of the Federal Antitrust Statute, the Sherman Act (15 USC, Section 1, et seq.) which provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .

151. Wilmshurst also believed that Chevrolet's conduct violated the California Antitrust Statute found in the Cartwright Act, Business and Professions Code Section 16720, et seq., which states, in part:

Section 16726. Trusts against public policy. Except as provided in this chapter, every trust is unlawful, against public policy and void.

Section 16720. Trust. A trust is a combination of capital skill or acts by two or more persons for any of the following purposes:

(a) . . .

(b) . . .

(c) . . .

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or

commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) . . .

Section 16755 prescribes the punishment for any violation of the Cartwright Act:

(a) Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, is punishable by fine of not more than one million dollars (\$1,000,000) if a corporation, or one hundred thousand dollars (\$100,000) if an individual, or by imprisonment in a state prison for not more than three years, or by imprisonment for not more than one year in a county jail, or by both such fine and imprisonment.

152. Chevrolet's Service Policies and Procedure Manuals establish the rate of reimbursement that a dealer will receive

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for using parts in accomplishing warranty repairs in behalf of Chevrolet. The Chevrolet manual provides:

REIMBURSEMENT FOR PARTS:

Chevrolet will credit dealers the current dealer price plus 30% for defective parts replace.

153. Chevrolet's manuals also establish the reimbursement rate 49er is entitled to charge for parts necessary in accomplishing transportation damage repairs. The Chevrolet manual provides:

(1) Parts Credits.

(a) GM Parts and accessories will be credited at dealer cost plus 30%.

(b) Paint material allowances, including supplies, will be credited in accordance with the quantities listed with paint operations in the current Chevrolet Labor Time Guide. Paint prices will be found in The Material Allowance Conversion Chart at the end of the paint labor operation numbers section of the Chevrolet Labor Time Guide.

(c) Glass and other material purchased from a local supplier will be credited in the amount paid by the dealer as shown by the supplier's invoice less any applicable discounts or allowances. No credit will be more than the amount for which material can be obtained from GM sources.

(d) Tires will be credited at the amount paid by the dealer as shown by the supplier invoice, less any discounts or allowances applicable.

(e) Reimbursement for batteries missing or damaged (due to collision in battery area) in transit are to be handled on a Dealer Transportation Claim at dealer cost plus 30%.

(2) Labor Credits.

(a) Credit for repair or replacement operations done within the dealership will be based on the dealer's approved Warranty Labor Rate and the Chevrolet Labor Time Guide of time allotments or straight time where applicable.

(b) Paint mixing time allowances are in the Material Conversion Charts at the end of the paint labor operation number section or the Chevrolet Labor Time Guide. Any mixing time must be entered in the flat rate or actual time column as straight time, with appropriate operation number.

(3) Sublet Repairs.

Sublet repairs will be credited as shown by the sublet invoice less any discounts or allowances applicable to such invoice, but not more than the dealer labor and/or parts allowances as shown in 1 and 2 above.

154. The dispute between 49er and Chevrolet in this regard concerns the limitations on reimbursement for transportation damage repairs. The record is unclear as to who, between Chevrolet and the dealer, bears the risk of loss while the vehicle is in transit. There are inconsistencies concerning who has the right to submit a claim to the transportation carrier upon which is the ultimate risk of loss while the vehicle is in transit. Chevrolet's Manager of Financial Controls and Systems testified that Chevrolet bears the risk of loss, and that the claims presented by Chevrolet to the carrier are therefore Chevrolet's. Chevrolet's Zone Office Service Manual, however, states that Chevrolet is acting as 49er's (or any other dealer's) agent in submitting a claim to a carrier for reimbursement to 49er by the carrier.

155. Chevrolet will not submit a claim to the carrier for transportation repairs performed by the dealer if the claim does not conform with Chevrolet's manuals. Chevrolet will also reject transportation claims submitted by a dealer if the amount or type of

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damage is unrecoverable under the terms of the agreement between Chevrolet and the carrier.

156. In some instances, Chevrolet will not allow a dealer to claim any markup or profit margin on either parts or sublet repairs necessary for transportation damage repair because the agreement between Chevrolet and the carrier does not provide for such.

157. Chevrolet also prohibits the dealer from submitting a claim directly to the carrier and the carrier likewise refuses to accept such direct claims from the dealers because of the carrier's agreements with Chevrolet.

DETERMINATION OF ISSUES

Chevrolet has failed to establish that there is good cause to "terminate or refuse to continue" the 49er franchise, in that:

(a) Chevrolet did not establish that the amount of business transacted by 49er was inadequate as compared to the business available to 49er; (§3061(1))

(b) Chevrolet did not establish that 49er does not have a material investment and Chevrolet did not establish that 49er has not incurred material obligations in the performance of its part of the franchise; (§3061(2))

(c) Chevrolet did not establish that 49er's investment is not permanent; (§3061(3))

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(d) Chevrolet did not establish that it would be beneficial or not injurious to the public welfare for the business of 49er to be disrupted; (§3061(4))

(e) Chevrolet did not establish that 49er does not have adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of consumers of Chevrolet vehicles and has not been and is not rendering adequate services to the public; (§3061(5))

(f) Chevrolet did not establish that 49er has failed to fulfill the warranty obligations of Chevrolet; (§3061(6))

(g) Chevrolet did not establish that 49er's failure to comply with the terms of the franchise was material. (§3061(7))

Chevrolet did establish that Wilmshurst engaged in a course of conduct attacking Chevrolet's policies and required procedures as well as Chevrolet personnel charged with implementing such policies. However, all the disputes between the parties involved, or had their origin in, Chevrolet's policies pertaining to reimbursement of 49er for sums owed to 49er by Chevrolet.

Some of Wilmshurst's conduct disrupted the relationship between the parties. In the absence of other circumstances, Wilmshurst's conduct would be unjustified and inexcusable. However, the circumstances present here evidence that Wilmshurst had reasons for his complaints, and that his belief that Chevrolet's policies and procedures operated unfairly and illegally against his dealership was reasonable and held in good faith.

Although not condoning the manner and method chosen by Wilmshurst to attempt to rectify what he perceived to be inequities in their relationship, Chevrolet's policies and procedures, and their application to 49er, mitigate against allowing Chevrolet to "terminate or refuse to continue" the 49er franchise.

In addition to the above, it is determined that Chevrolet did not meet its burden of proof, pursuant to §3066, in regard to the specific good cause factors enumerated in §3061.

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The following proposed decision is respectfully submitted:

The Protest is sustained. Chevrolet has not established good cause to "terminate or refuse to continue" the 49er franchise.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing had before me on the above dates at Sacramento, California, and recommend its adoption as the decision of the New Motor Vehicle Board.

Dated: *December 30, 1980*

Anthony M. Skrocki
ANTHONY M. SKROCKI
Administrative Law Judge
New Motor Vehicle Board