

New Motor Vehicle Board
1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest)
and Petition of)
MATHEW ZAHERI CORPORATION, dba) Petition No. P-233-92
HAYWARD MITSUBISHI, and MATHEW ZAHERI,) Protest No. PR-1254-92
Protestants-Petitioners,)
vs.)
MITSUBISHI MOTOR SALES OF AMERICA, INC.)
DOE ONE COMPANY, DOE TWO COMPANY, and)
DOES 3-25 Inclusive,)
Respondents.)

DECISION

At its regulary scheduled meeting of October 12, 1994,
the public members of the Board met and considered the
administrative record and proposed decision in the above-entitled
matter. After such consideration, the Board adopted the Proposed
decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 13th day of October 1994.

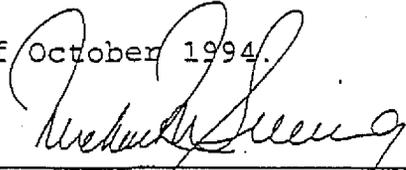

MICHAEL M. SIEVING
Assistant Executive Secretary/
Administrative Law Judge

TABLE OF CONTENTS

PROCEDURAL BACKGROUND 1

SYNOPSIS OF DECISION 4

BACKGROUND FACTS 5

PETITIONERS' ISSUES PRESENTED 6

RESPONDENT'S ISSUES PRESENTED 12

FEDERAL COURT'S ISSUES PRESENTED 19

APPLICABLE LAW 19

 A. Applicable Law Pertaining to the Interpretation of the Dealer Sales and Service Agreement 19

 B. Applicable Law Pertaining to Duty to Disclose 21

 C. Applicable Law Pertaining to Fraud 22

 D. Applicable Law Pertaining to the Validity of the Audit 26

 E. Applicable Law Pertaining to the Allegation of Breach of the Implied Covenant of Good Faith and Fair Dealing and the Dealers-Day-In-Court Act 27

 F. Applicable Law Pertaining to the Allegation of Discrimination 30

 G. Applicable Law Pertaining to the Allegation of Defamation 30

 H. Applicable Law Pertaining to Miscellaneous Issues Raised by Petitioners and Respondent 32

FINDINGS OF FACT 32

 A. General Findings of Fact 32

 B. Findings of Fact Pertaining to the Interpretation of the Dealer Sales and Service Agreement 33

 C. Findings of Fact Pertaining to the Agency Relationship between Mathew Zaheri and Hayward Mitsubishi Employees 38

 D. Findings of Fact Pertaining to the Defense of Estoppel 40

E.	<u>Findings of Fact Pertaining to the Duty to Disclose</u>	41
F.	<u>Findings of Fact Pertaining to Fraud</u>	41
G.	<u>Findings of Fact Pertaining to the Validity of the Audit</u>	52
H.	<u>Findings of Fact Pertaining to the Allegation of Breach of the Implied Covenant of Good Faith and Fair Dealing and the Dealers-Day-In-Court Act</u>	56
I.	<u>Findings of Fact Pertaining to the Allegation of Discrimination</u>	56
J.	<u>Findings of Fact Pertaining to the Allegation of Defamation</u>	58
L.	<u>Findings of Fact Pertaining to Damages</u>	59
	DETERMINATION OF ISSUES	60
A.	<u>Determination of Issues Pertaining to the Interpretation of the Dealer Sales and Service Agreement</u>	60
B.	<u>Determination of Issues Pertaining to Contract Interpretation</u>	62
C.	<u>Determination of Issues Pertaining to the Agency Relationship between Mathew Zaheri and Hayward Mitsubishi Employees</u>	62
D.	<u>Determination of Issues Pertaining to the Defense of Estoppel</u>	63
E.	<u>Determination of Issues Pertaining to the Duty to Disclose</u>	63
F.	<u>Determination of Issues Pertaining to Fraud</u>	64
G.	<u>Determination of Issues Pertaining to the Validity of the Audit</u>	68
H.	<u>Determination of Issues Pertaining to the Allegation of Breach of the Implied Covenant of Good Faith and Fair Dealing and the Dealers-Day-In-Court Act</u>	70
I.	<u>Determination of Issues Pertaining to the Allegation of Discrimination</u>	71
J.	<u>Determination of Issues Pertaining to the Allegation of Defamation</u>	72

K.	<u>Determination of Issues Pertaining to the Remedies Sought</u>	72
L.	<u>Determination of Issues Pertaining to Damages</u>	73
M.	<u>Determination of Issue Pertaining to Petitioners' Motion</u>	74
	PROPOSED DECISION	75

1507 21st Street, Suite 330
Sacramento, California 95814
Telephone (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest)	Protest No. PR-1254-92
and Petition of)	Petition No. P-233-92
)	
MATHEW ZAHERI CORPORATION,)	
dba HAYWARD MITSUBISHI, and)	
MATHEW ZAHERI,)	
)	
Protestants-Petitioners,)	
)	
v.)	<u>PROPOSED DECISION</u>
)	
MITSUBISHI MOTOR SALES OF)	
AMERICA, INC., DOE ONE)	
COMPANY, DOE TWO COMPANY,)	
and DOES 3-25, inclusive,)	
)	
Respondents.)	
)	

PROCEDURAL BACKGROUND

1. On July 12, 1991 Protestant-Petitioner Mathew Zaheri Corporation, dba Hayward Mitsubishi ("Hayward"), and Mathew Zaheri ("Zaheri") filed a complaint in state superior court against Mitsubishi Motor Sales of America, Inc. ("MMSA" or "Respondent") for damages (collectively "Petitioners").

2. Zaheri is a licensed new motor vehicle dealer enfranchised to sell Mitsubishi vehicles. Hayward is located at 22196 Mission Boulevard, Hayward, California.

3. Zaheri is the dealer principal of Hayward.

4. MMSA is a manufacturer and distributor of new motor vehicles in California.

~~5. The state court complaint set forth six causes of~~
action, assumpsit debitatus, breach of contract, slander, trade libel, and negligent and intentional infliction of emotional distress.

6. MMSA demurred to each cause of action because Petitioners had failed to exhaust their administrative remedies.

7. MMSA asserted the claims were based upon Petitioners' dissatisfaction with MMSA's charge back of warranty claims and were within the jurisdiction of the New Motor Vehicle Board ("Board").

8. The Superior Court agreed and sustained MMSA's demurrer and dismissed the state causes of action.

~~9. Petitioners timely filed a notice of appeal on December~~
27, 1991.

10. Hayward and Zaheri filed a protest on February 3, 1992 with the Board pursuant to California Vehicle Code § 3065.

11. The Board assigned Protest Number PR-1254-92 to the protest of Hayward and Zaheri.

12. Hayward and Zaheri filed a petition on February 3, 1992 with the Board pursuant to Vehicle Code § 3050.

13. The Board assigned Petition Number P-233-92 to the petition of Hayward and Zaheri.

14. On February 14, 1992, the Board ordered the protest and petition consolidated for purposes of hearing due to the

existence of similar facts relating to the protest and petition.

15. On July 16, 1993, Petitioners commenced an action in ~~the United States District Court, Northern District of~~ California.

16. Petitioners' federal complaint alleged violations of the Dealers-Day-In-Court Act, 15 U.S.C. § 1220 et seq., (hereinafter "DDICA"), racial discrimination, 42 U.S.C. § 1981, and the following pendent state claims: intentional and negligent interference with economic relations; and fraudulent and negligent misrepresentation.

17. On July 22, 1993, the California Court of Appeal, First Appellate District, Division Three, in Mathew Zaheri Corp. v. Mitsubishi Motor Sales, Inc. (1993) 17 Cal. App. 4th 288, affirmed the Superior Court's dismissal of the action for failure of the parties to exhaust their administrative remedies and found the dispute within the jurisdiction of the Board.

18. By order of United States District Judge Sandra Brown Armstrong, on May 18, 1994, MMSA's motion for dismissal of the DDICA claim for failure to state a claim upon which relief can be granted was denied, MMSA's motion to stay the DDICA and race discrimination claims under the doctrine of primary jurisdiction was granted, and MMSA's motion for dismissal of the state-law claims due to failure to exhaust administrative remedies was granted.

19. Judge Armstrong held, based on Mathew Zaheri Corp. v. Mitsubishi Motor Sales, Inc. (1993) 17 Cal. App. 4th 288, under

the doctrine of primary jurisdiction the Board has regulatory authority over the subject matter and the parties involved, ~~because the legislature intended the Board to replace the courts~~ as the preliminary forum of franchise or other disputes between dealers and manufacturers.

20. Judge Armstrong indicated that the Board's resolution should provide a solid factual foundation on which the District Court may rely in deciding the federal claims.

21. A thirty-three (33) day hearing was held before Douglas H. Drake, Administrative Law Judge, commencing on August 10, 1993, and ending on April 29, 1994.

22. Petitioners were represented by Michael J. Flanagan, Esq. of Coder, Tuel & Flanagan, 8801 Folsom Boulevard, Suite 172, Sacramento, California.

~~23.~~ Petitioners were also represented in the hearing until March 28, 1994, by Robert L. Bianco, Esq. and Lawrence A. Mercer, Esq. of Bianco, Brandi & Jones, 44 Montgomery Street, Suite 900, San Francisco, California.

24. Respondent was represented by Elizabeth Grimes, Esq. and Robert Mackey, Esq. of Gibson, Dunn & Crutcher, 333 South Grand Avenue, Los Angeles, California.

SYNOPSIS OF DECISION

25. Petitioners claim that MMSA, after an audit, unfairly charged back warranty claims paid by MMSA over a 2 year period totalling \$137,444.79.

26. MMSA did unfairly charge back \$57,054.68 of those

claims because the auditors failed to take into consideration a modification made to the Warranty Policy and Procedures Manual.

~~27. However, Petitioners engaged in massive warranty fraud,~~
claiming reimbursement for work not done and parts not used in somewhere between 50 and 2000 claims. The fraud was so sophisticated that MMSA is unable to quantify all the dollar amounts.

28. Hayward had obtained a confidential copy of computer reports designed to detect this fraud, and with this knowledge had the ability to keep its fraudulent activity within the guidelines set by MMSA to detect said fraud. Petitioners then took advantage of the very unsophisticated MMSA computer system to defraud MMSA.

BACKGROUND FACTS

~~29. When a customer came into Hayward for service, the~~
customer would be met by either a service advisor or, on occasion, the service manager for diagnosis. The service advisor would then generate a repair order [R.O.] and give it to the technicians to do the repairs.

30. The technicians would do the repairs, charging parts out of the parts department from the parts clerk. The parts clerk would note the parts used on the R.O.s.

31. The technicians would then write comments on the R.O.s and give the R.O.s to the service manager who would review them, assign codes, and give them to the warranty clerk.

32. A warranty clerk would then input the warranty claims

into the Diamond Network Computer supplied by MMSA pursuant to procedures set forth in the Warranty Policy and Procedure Manual.

~~MMSA would never see the R.O.s, only the bits of electronic~~
information typed into the computer by the Hayward warranty clerk.

33. The MMSA computer, using a very unsophisticated program incapable of detecting fraud or even errors, would then make an entry onto Hayward's account, in effect transferring cash to Hayward.

34. MMSA would then seek reimbursement from its vendors for defective parts, vendors such as Hyundai, Mitsubishi-Japan, Mitsubishi-Australia, and Diamond Starr Motors.

35. If the warranty clerk typed in either an erroneous claim or a fraudulent claim, the unsophisticated computer would still pay the money to the dealer.

36. The only safeguards to this system were certain trend reports generated by MMSA, the "WAS" (Warranty Activity Summary) report, the threat of an audit, and an audit of claims. If the dealer had access to the WAS reports, the dealer could structure fraudulent claims away from sensitive areas and continue the fraud undetected except by audit.

PETITIONERS' ISSUES PRESENTED

37. Does the conduct of parties to a contract in applying the terms of an agreement override contrary boiler-plate language in the written document?

38. Has MMSA waived any right to demand strict compliance

with record keeping requirements set forth in the Warranty Policy and Procedure Manual?

~~39. Did MMSA adequately train the principals, management,~~
or service staff regarding the Warranty Policy and Procedures Manual?

40. Is MMSA precluded from challenging the validity of District Service Manager (DSM) approvals because MMSA provided minimal instruction regarding the Warranty Policy and Procedures Manual through the DSMs?

41. Did MMSA fail to comply with the Warranty Policy and Procedures Manual...

a. through the use of overlapping labor operations?

b. in the administration of "Prior Work

Authorizations"?

~~c. by instructing to use the closest code?~~

42. Did MMSA establish what policies and procedures were applicable for all time periods encompassed within the audit period?

43. Is MMSA estopped from challenging the validity of warranty reimbursement categories that it's own representatives previously reviewed and approved; and is MMSA estopped from challenging after-the-fact record keeping practices that it had authorized?

44. Did MMSA DSMs approve the record keeping practices of Hayward?

45. Is MMSA estopped from contesting problems at Hayward if

they were aware of alleged problems at the Cziska-Price dealership and decided to remain silent about the practices?

~~46. Does Federal and State law prohibit the discriminatory treatment of automobile dealerships absent a legitimate business reason?~~

47. Does California Vehicle Code § 11713.3(p) prohibit unfair discrimination in the warranty reimbursement of franchisees?

48. Does federal law mandate that a manufacturer deal with its franchisees in good faith?

49. Does the evidence presented establish that MMSA conducted the disputed audit in a malicious and discriminatory manner?

~~50. Did the Hayward audit cover a much more extensive period than audits of other dealers with similar violations?~~

51. Did MMSA fail to audit or charge back other dealers who committed the very same violations at issue in this case?

52. Does the evidence conclusively establish that MMSA failed to charge back the accounts of other franchisees who committed violations identical to those asserted against Hayward with the result that the contested audit contravenes both state and federal law?

53. If the evidence establishes that the vast bulk of the warranty work that is the subject of the disputed audit was in fact performed, would MMSA be unjustly enriched if the charge back were upheld?

54. Does California law create a contract implied in law or a quasi-contract in order to fairly compensate an aggrieved party where one party obtains a benefit which it may not justly retain?

55. Is California Vehicle Code § 3065 a statutory codification of the principle of quasi-contractual recovery requiring a manufacturer to compensate a franchisee for warranty work actually performed?

56. Does California law prohibit the interpretation of a contract in such a way as to work a forfeiture upon one of the parties to the agreement?

57. Can MMSA charge back sums that were not reimbursed to vendors?

58. Is the audit report, prepared and issued by MMSA, seriously flawed, and therefore not support the charge back levied against Hayward?

59. Is the methodology of the MMSA audit report, and the categories set forth therein, so inherently deficient that they do not support the Hayward charge back?

60. Are the charge backs for the claims categorized in the Kmetz report demonstrably invalid?

61. Is MMSA bound by the categories set forth in the audit report?

a. If they are not, can they re-categorize a claim?

62. Do the changes in the positions and testimony of key MMSA representatives emphasize the critical infirmities in both the audit and the charge back?

63. Is MMSA estopped from asserting fraud as a justification for the charge back in view of their repeated denials that the contested charge back was not based on fraud and the absence of any claims of fraud in the audit report itself?

64. Are MMSA's allegations of "massive" warranty fraud irrelevant to the question of the validity of the audit report and the charge back given the fact that the audit report is based on application of the Warranty Policy and Procedures Manual, which is an issue of contractual interpretation?

65. Does MMSA's consistent disavowals of fraud prevent it from changing tactics solely for the purpose of this proceeding?

66. In order to prove a claim of fraud, must MMSA establish: (1) a false representation or concealment of a material fact; (2) made with knowledge of its falsity or without sufficient knowledge to warrant a representation; (3) with the intent to induce MMSA to act upon it; and MMSA must have (4) acted in reliance upon the representation (5) to its damage.

67. Did MMSA prove that the principals of Hayward authorized, ratified, approved, or condoned any alleged warranty fraud at the dealership?

68. Has MMSA failed to quantify or define the extent of any alleged warranty fraud?

69. Has MMSA suffered any loss or damage as a result of alleged warranty fraud because it did not reimburse vendors?

70. Do MMSA's own reports and analysis, as well as those of Hayward, contradict the claims of MMSA that the dealership

engaged in "massive" warranty fraud?

71. While balancing the credibility and possible bias of former Hayward service technicians who testified regarding warranty fraud at the dealership, has MMSA presented any credible evidence on its claim of "massive" fraud?

72. Did the principals and management of Hayward authorize, approve, ratify, condone, or otherwise participate in fraudulent warranty claims?

a. Did they act promptly to correct wrongdoing when advised of a problem?

b. If they acted promptly, can the actions of a few service technicians be imputed to the dealership?

73. Did MMSA have a duty to disclose to Hayward, information about the service department problems at the former Cziska-Price dealership because MMSA was the only party with knowledge of, or access to, the alleged problems?

74. Did MMSA have a duty to disclose the deficiencies in the Cziska-Price service department at the time Hayward acquired the franchise?

75. Did MMSA have a duty to disclose any deficiencies in the warranty practices of Hayward at the time it first became aware of the alleged problems?

76. Has MMSA substantially damaged the business reputation of Hayward and is therefore guilty of defamation.

77. Did MMSA make representations to numerous individuals that massive warranty fraud had occurred at Hayward and that the

present ownership would soon be terminated?

a. If MMSA made the representations was Hayward's
business reputation substantially damaged?

78. Were the alleged circumstances of the contested audit designed to deprive Hayward of some of the intended benefits of the franchise agreement, and therefore constitute a breach of the implied covenant of good faith and fair dealing? Specifically.

a. the lack of adequate advance notice?

b. the intrusive manner in which the audit was performed?

c. the critical errors in the audit?

d. the failure to adjust the charge back amount in the face of documentation establishing the validity of questioned claims?

79. Has Hayward incurred a significant monetary loss because of the manner in which MMSA conducted and enforced the disputed audit?

80. Should Petitioners motion for an order requiring production of evidence or, in the alternative, request for specific findings in view of the failure to produce evidence, be granted?

RESPONDENT'S ISSUES PRESENTED

81. Is MMSA entitled to charge back the warranty claims specified in the 1990 audit report in the adjusted total amount of \$137,444.79 in conformance with Vehicle Code § 3065, because some or all of the claims were false or fraudulent and Hayward

failed to reasonably substantiate the claims in accordance with the requirements of MMSA?

82. Did Hayward breach its contract with MMSA by submitting claims which did not comply with the Warranty Policy and Procedures Manual?

83. Was Hayward obligated to comply with the Warranty Policy and Procedures Manual?

84. Was it fair for MMSA to charge back claims lacking documentation to substantiate them?

85. Are MMSA's documentation requirements fair, reasonable, and consistent with industry-wide standards and California state law requirements?

86. Are MMSA's documentation requirements reasonably designed to insure only valid claims are paid?

87. Did Hayward breach its contract with MMSA by submitting fraudulent warranty claims to MMSA?

88. Did Hayward submit false claims?

89. Did Hayward know the claims were false?

a. Did the technicians know?

b. Did the service advisors know?

c. Did the service manager know?

d. Did parts department employees know?

e. Did Zaheri know the dealership was committing warranty fraud and encourage or condone it, or did he have enough information from which he should have known of the fraud?

90. Is Hayward responsible for the fraud even if Zaheri did not know?

91. Did Hayward intend to defraud MMSA and conceal its fraud from MMSA?

92. Did Hayward put a minimum of about 35 forged repair orders in its vehicle files with the intent to deceive and trick MMSA's auditors?

93. Did Hayward perpetuate the deceit referred to above by failing to disclose it had forged repair orders until late in discovery, and by charging MMSA with knowledge of the forgery and willful withholding of documents in discovery allegedly given to MMSA by Brian Nicolson?

94. Did Hayward misrepresent the number of Eclipse fender adjustments made during the launch of the Eclipse as a new ~~Mitsubishi model vehicle?~~

95. Did Hayward refuse to let the auditors in to begin the audit to buy time to conceal the fraud?

96. Did Hayward neglect to admonish employees after the audit not to commit warranty fraud?

97. Did Hayward neglect to investigate which employees were perpetrating the warranty fraud and take appropriate steps with respect to their employment?

98. Did Hayward, in effect, hire the fox to guard the chickens, by rehiring Tom Gannon in January 1992 to work at the dealership at night unsupervised, reviewing and "auditing" repair orders?

99. Did Hayward attempt to cover up the fraud by trying to intimidate technicians to discourage them from testifying about their participation in the fraud?

100. Has Hayward steadfastly refused to acknowledge and take responsibility for the fraud, choosing instead to:

a. Demand in 1990 that MMSA dismiss the audit report, reverse the charge back, make a written apology, and remodel the dealership;

b. Devote over 2,000 hours of Hayward's management time to covering up the fraud instead of doing something constructive to prevent it;

c. Make much of Zaheri's statement in 1990 that he would pay for what his people stole, yet never state what evidence would satisfy Zaheri that there was fraud nor

~~investigate to what extent there was fraud;~~

d. Offer implausible explanations for the unsubstantiated claims;

e. Offer implausible explanations for the conduct of the service manager who orchestrated the fraud?

101. Did Hayward trick MMSA's District Service Managers into giving the approval for repairs, known as PWAs, on the basis of misrepresented facts?

102. Did MMSA actually and justifiably rely on Hayward's misrepresented warranty claims?

103. Did MMSA pay Hayward's warranty claims as they were submitted?

104. Does MMSA's warranty system, which allows for claims to be made without first inspecting documentation and provides for reimbursement for those claims without any further information provided to MMSA (subject to the requirement to keep records in the event of audit), evidence MMSA's reliance?

105. Does the procedure of giving PWAs without the DSM inspecting the vehicle before the repair is performed further evidence MMSA's reliance on the trust relationship at the heart of the warranty system?

106. Did MMSA suffer damage as a result of Hayward's fraud?

107. Was it MMSA's responsibility to tell Hayward what its procedures and requirements were and how to comply with them?

a. If so, did MMSA take reasonable steps to fulfill its obligation?

~~108. If MMSA had given Zaheri more advice about warranty administration, would that have made any difference given Zaheri's tendency to ignore or misconstrue the advice or suggestions of MMSA's service representatives?~~

109. Did any conduct by MMSA's field representatives modify the terms of the contract between MMSA and Hayward, thereby relieving Hayward from the duty to comply with the Warranty Policy and Procedures Manual?

110. Did MMSA waive or is MMSA estopped to assert Hayward's breach of the contract?

111. Is Hayward responsible for the acts of its employees in breach of the contract?

112. Is Hayward relieved of its contractual obligations because MMSA knew at the time Zaheri acquired Hayward that Zaheri had no experience in service operations, or because MMSA representatives made positive statements and no negative statements about the Cziska-Price service operations?

113. At the time Zaheri acquired Hayward, did MMSA believe the Cziska-Price service operation was grossly mismanaged, and did MMSA recommend that Zaheri retain and promote certain key employees of the Cziska-Price organization?

114. Was Hayward adequately and fairly compensated for warranty repairs during the period July 1988 - July 1990?

115. Was Hayward unusually profitable and did it make relatively more money off warranty than other Mitsubishi dealers?

116. Is it more likely than not that MMSA failed to detect ~~and charge back all the fraudulent warranty claims?~~

117. Did MMSA unfairly discriminate among its dealers with respect to warranty reimbursement to the detriment of Hayward and in violation of Vehicle Code § 11713.3(p)?

118. Was the audit a valid audit, performed by competent auditors, using standard procedures followed by the MMSA audit department in the selection of dealers for audit and in the conduct of the audit itself?

119. In the conduct of claims reviews and audits at other dealers, and in the conduct of business between MMSA's representatives and dealers in the field, was MMSA fair in its application of its warranty requirements to Hayward and other

dealers?

120. Was it reasonable for MMSA not to charge back Warranty claims against the account of Cziska-Price one year after Cziska-Price terminated, or was that unfair discrimination?

121. Did MMSA treat Hayward more favorably than other dealers in the conduct of the audit, by giving Hayward extra time to find parts for inspection, to submit missing repair orders and sublet bills, and by offering through the Regional Service Manager and Vice President of Service to accept additional documents in support of the claims several months after the audit, and by other conduct?

122. Did MMSA discriminate against Zaheri or Hayward on the basis of racial or ethnic bias?

123. Did MMSA act in good faith with Hayward within the meaning of the Dealers-Day-In-Court Act, 15 U.S.C. §§ 1221-1225, without coercion, intimidation, or threats of coercion or intimidation?

124. Is MMSA liable to Hayward for defamation?

125. Did any representative of MMSA publish any defamatory statement about Hayward or Zaheri?

126. Was any allegedly defamatory statement about Hayward or Zaheri substantially true?

127. Did Hayward suffer any damages that were caused by MMSA's allegedly defamatory statements?

//

//

FEDERAL COURT'S ISSUES PRESENTED¹

128. Did MMSA engage in coercive and intimidating conduct in auditing the warranty service practices of Hayward in violation of the Dealers-Day-In-Court Act, 15 U.S.C. § 1220 et seq.?

129. Did MMSA discriminate against Zaheri or Hayward on the basis of race in violation of 42 U.S.C. § 1981?

APPLICABLE LAW

A. Applicable Law Pertaining to the Interpretation of the Dealer Sales and Service Agreement.

The elements of a cause of action for breach of contract, as set forth in Reichert v. General Insurance Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, are as follows:

1. that a contractual relationship existed between the parties;
2. that the petitioner either performed what it was required to do under the contract, or was legally excused from such performance;
3. that the respondent failed to comply with the terms of the contract;
4. that the respondent's failure to perform caused the damages that petitioner complains of; and
5. that petitioner sustained actual damages as a result thereof.

California Automotive Act, Business & Professions Code §§ 9884.8-9884.11 [in pertinent part]:

§ 9884.8 All work done by an automotive repair dealer,

¹ Under the doctrine of primary jurisdiction, the Board is to determine the issues which pertain to race discrimination, 42 U.S.C. § 1981 and the Dealers-Day-In-Court Act, 15 U.S.C. §§ 1221-1225.

including warranty work, shall be recorded on an invoice and shall describe all service work done and parts supplied. . .

§ 9884.9(a) The automotive repair dealer shall give to the customer a written estimated price for labor and parts necessary for a specific job. No work shall be done and no charges shall accrue before authorization to proceed is obtained from the customer. No charge shall be made for work done or parts supplied in excess of the estimated price without the oral or written consent of the customer . . .

§ 9884.10 Upon request of the customer at the time the work order is taken, the automotive repair dealer shall return replaced parts to the customer at the time of the completion of the work excepting such parts as may be exempt because of size, weight, . . . and excepting such parts as the automotive repair dealer is required to return to the manufacturer or distributor under a warranty arrangement. . .

§ 9884.11 Each automotive repair dealer shall maintain any records that are required by regulations adopted to carry out this chapter. Those records shall be open for reasonable inspection by the chief or other law enforcement officials. All of those records must be maintained for at least three years.

130. "Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted and acquiesced in without objection is given great weight in the interpretation of the agreement." Witkin, Summary of California Law, Contracts, § 689, at p. 622 (9th ed. 1987); Rest.2d, Contracts § 202(4)

131. Waiver is the intentional relinquishment of a known right. (BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1252) Performance of a condition precedent is excused when, the condition is waived. BAJI No. 10.81 (1990 New)

132. "A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by

the parties." Cal. Civ. Code § 1698 (Deerings 1994)

133. Civil Code § 1452 provides that "a condition involving forfeiture must be strictly interpreted against the party for whose benefit it is created." Cal. Civ. Code § 1452 (Deerings 1994) Nothing in this section prohibits forfeitures.

B. Applicable Law Pertaining to Duty to Disclose.

Fraud involving nondisclosure requires the following elements:

1. The respondent must have concealed or suppressed a material fact.
2. The respondent must have been under a duty to disclose the fact to the petitioner;
3. The respondent must have intentionally concealed or suppressed the fact with the intent to defraud the petitioner;
4. The petitioner must have been unaware of the fact and would not have acted as he did if he had known of the ~~concealed or suppressed fact;~~
5. As a result of the concealment or suppression of the fact, the petitioner must have sustained damage.

BAJI No. 12.35 (1992 Revision)

134. "The duty to disclose may arise without any confidential relationship where defendant alone has knowledge of material facts which are not accessible to the plaintiff."

Witkin, Summary of California Law, Torts, § 700, at p. 801 (9th ed. 1988); La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1152; Nussbaum v. Weeks (1989) 214 Cal. App. 3d 1589, 1599; People v. Highland Fed. Savings & Loan (1993) 14 Cal. App. 4th 1692, 1719

135. "Although material facts are known to one party and

not the other, failure to disclose them is ordinarily not actionable fraud unless there is some fiduciary relationship giving rise to a duty to disclose." Witkin, Summary of California Law, Torts, § 697, at p. 799 (9th ed. 1988) and cases therein cited.

C. Applicable Law Pertaining to Fraud.

Fraud involving intentional misrepresentation requires the following elements:

1. The defendant must have made a representation as to a past or existing material fact;
2. The representation must have been false;
3. The defendant must have known that the representation was false when made or must have made the representation recklessly without knowing whether it was true or false;
4. The defendant must have made the representation with an intent to defraud the plaintiff, that is, he must have made the representation for the purpose of inducing the plaintiff to rely upon it and to act or to refrain from acting in reliance thereon;
5. The plaintiff must have been unaware of the falsity of the representation; must have acted in reliance upon the truth of the representation and must have been justified in relying upon the representation; and
6. As a result of the reliance upon the truth of the representation, the plaintiff must have sustained damages.

BAJI No. 12.31 (1991 Revision)

136. A principal may escape liability for the fraudulent conduct of an agent if he repudiates the acts immediately upon discovery of the fraud and gives up any benefits received.

Witkin, Summary of California Law, Agency and Employment, § 143, at p. 140 (9th ed. 1987) and cases cited therein

137. Discrepancies in a witness's testimony or between such witness's testimony and that of other witnesses do not necessarily mean that such witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. BAJI No. 2.21 (1991 Revision)

138. In determining the believability of a witness a judge may consider any matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to the following:

- [a] The demeanor of the witness while testifying and the manner of testifying;
- [b] The character of that testimony;
- [c] The extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testified;
- [d] The opportunity of the witness to perceive any matter about which the witness has testified;
- [e] The character of the witness for honesty or veracity or their opposites;
- [f] The existence or nonexistence of a bias, interest, or other motive;
- [g] A statement previously made by the witness that is consistent with the testimony of the witness;
- [h] A statement made by the witness that is inconsistent with any part of the testimony of the witness;
- [i] The existence or nonexistence of any fact testified by the witness;
- [j] The attitude of the witness toward the action in which testimony has been given by the witness or

toward the giving of testimony;

[k] An admission by the witness of untruthfulness.

BAJI No. 2.20

139. "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations . . ." Cal. Civ. Pro. § 431.70 (Deerings 1994)

140. Liability for an employee's fraud may be based upon the doctrine of respondeat superior. Witkin, Summary of California Law, Agency and Employment, § 115, at p. 109 (9th ed. 1987) Liability may result from the employer's direction or authorization to perform a tortious act, the employer being liable for his own wrong. Witkin, Summary of California Law, Agency and Employment, § 113 at p. 107 (9th ed. 1987); Rest.2d, Agency §§ 212, 215

141. "Liability may also be based upon imputed knowledge. Where the principal actually or apparently authorizes representations about a matter related to the agent's duties, and the agent has knowledge of their falsity, this knowledge may be imputed to the principal, even though the agent is acting adversely." Witkin, Summary of California Law, Agency and

Employment, § 140 at p. 138 (9th ed. 1987); Rest.2d, Agency §256
Comment d, § 272 et seq.

142. "Liability under the doctrine of respondeat superior extends to malicious acts and other intentional torts of an employee committed within the scope of his employment." Witkin, Summary of California Law, Agency and Employment, § 135, at p. 131 (9th ed. 1987)

143. "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof." Cal. Civ. Code § 2310 (Deerings 1986)

144. "The usual conduct which will establish ratification is voluntary acceptance of the benefits of the transaction by the principal." Witkin, Summary of California Law, Agency and Employment, § 89, at p. 89 (9th ed. 1987); Cal. Civ. Code § 2310 (Deerings 1986)

145. "But the acquiescence or acceptance of benefits must be with full knowledge of the material facts, and at the time the principal learns of the unauthorized act he must be in a position to reject it and restore the things received. If at such time he is unable, through no fault of his own, to make such restoration, the involuntary retention of benefits will not constitute a ratification." Witkin, Summary of California Law, Agency and Employment, § 89, at p. 90 (9th ed. 1987)

146. "If, however, the principal's ignorance of the facts

arises from his own failure to investigate, and the circumstances are such as to put a reasonable man on inquiry, he may be held to have ratified the acts in spite of his lack of full knowledge."

Hutchinson Co. v. Gould (1919) 180 C. 356, 358, 181 P. 651;
Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App. 2d 731, 737

147. Failure to discharge an employee may be evidence tending to show ratification of his tortious act. McChristian v. Popkin (1946) 75 Cal. App. 2d 249, 256

148. Under the doctrine of respondeat superior, the innocent employer is liable for the torts of the employee, committed while acting within the scope of his employment. It is immaterial that employees act in excess of his authority or contrary to instructions. Witkin, Summary of California Law, Agency and Employment, § 115, at p. 109 (9th ed. 1987); Cal. Civ. Code § 2338 (Deerings 1986)

D. Applicable Law Pertaining to the Validity of the Audit.

Vehicle Code § 11713.3 (Deerings 1994). It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:

- (p) To unfairly discriminate among its franchisees with respect to warranty reimbursement or authority granted its franchisees to make warranty adjustments with retail customers.

Vehicle Code § 3065 (Deerings 1984)² :

² The 1984 version of Vehicle Code § 3065 was in effect throughout the time period encompassed by the audit.

§ 3065(a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill such warranty when the franchisee has fulfilled ~~warranty obligations of repair and servicing and shall file~~ a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation. The reasonableness thereof shall be subject to the determination of the board; provided that a franchisee files a notice of protest with the board.

§ 3065(b) In determining the adequacy and fairness of such compensation, the franchisee's effective labor rate charged to its various retail customers may be considered together with other relevant criteria.

§ 3065(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that such part, in fact, is not defective, the franchisor shall return such part so alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

§ 3065(d) All such claims made by franchisees hereunder ~~shall be either approved or disapproved within 30 days after~~ their receipt by the franchisor. When any such claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within such period, and each notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this section and Section 3064 for such labor and parts shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

E. Applicable Law Pertaining to the Allegation of Breach of the Implied Covenant of Good Faith and Fair Dealing and the Dealers-Day-In-Court Act.

149. California law recognizes two separate causes of action for breach of an implied covenant of good faith and fair dealing, one founded in contract law and the other in tort law.

150. In case law involving insurance companies there is a

well-developed history of recognizing a tort remedy for breach of the covenant. Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654 Recognition of the tort remedy was based upon the existence of the special relationship existing between the insurer and insured. Seaman's Direct Serv. Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752 The Seaman's Court suggested that "(n)o doubt there are other relationships with similar characteristics and deserving of similar legal treatment (as insurance relationships)." Id. at page 769

151. Thereafter, in Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, the court announced a five-part description of the characteristics of the "special relationship" which must be present in a non-insurance case in order for a cause of action for breach of the implied covenant to lie:

1. ~~The contract between the parties must be such that the parties are in inherently unequal bargaining positions.~~
2. The motivation for entering the contract must be a nonprofit motivation, i.e. to secure peace of mind.
3. Ordinary contract damages must not be adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party 'whole'.
4. One party must be especially vulnerable because of the type of harm it may suffer and, of necessity, places trust in the other party to perform.
5. The other party is aware of this vulnerability.

Dealers-Day-In-Court Act (DDICA), 42 U.S.C. §§ 1221-1225:

§ 1221(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or

intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

§ 1222 An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after the passage of this Act to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, that in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

§ 1223 Any action brought pursuant to this Act shall be forever barred unless commenced within three years after the cause of action shall have accrued.

§ 1224 No provision of this Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

~~§ 1225 This Act shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this Act and an express provision of State law which can not be reconciled.~~

152. "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract . . . [T]his covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." Witkin, Summary of California Law, Contracts, § 743, at p. 674 (9th ed. 1987) and cases cited therein; Harm v. Frasher (1960) 181 Cal. App. 2d 405, 417

F. Applicable Law Pertaining to the Allegation of Discrimination.

Equal Rights Under the Law, 42 U.S.C. § 1981:

§ 1981(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1981(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

§ 1981(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Proceedings in Vindication of Civil Rights; Attorney's Fees;

Expert Fees, 42 U.S.C. § 1988 [in pertinent part]:

~~In any action or proceeding to enforce a provision of sections . . . 1981-1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.~~

153. Vehicle Code § 11713.3(p) prohibits manufacturers from unfairly discriminating among its franchisees with respect to warranty reimbursement or authority granted its franchisees to make warranty adjustments with retail customers. Cal. Veh. Code § 11713.3(p) (Deerings 1994)

G. Applicable Law Pertaining to the Allegation of Defamation.

Civil Code § 44 (Deerings 1990). Defamation is effected by either of the following:

- (a) Libel.
- (b) Slander.

Civil Code § 45 (Deerings 1990). Libel is a false and unprivileged publication by writing, printing, picture, effigy, ~~or other fixed representation to the eye, which exposes any~~ person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in occupation.

Civil Code § 46 (Deerings 1990) [in pertinent part]:
Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

* * *

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office ~~or other occupation peculiarly requires, or by imputing~~ something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

* * *

5. Which, by natural consequence, causes actual damage.

154. Libel and slander are intentional torts. Witkin, Summary of California Law, Torts, § 471, at p. 558 (9th ed. 1988)

155. An essential element of defamation is that the statement published was false. If the statement was, in fact true, there can be no defamation, regardless of defendant's motivation. BAJI No. 7.07 (1991 Revision)

//

//

H. Applicable Law Pertaining to Miscellaneous Issues Raised by Petitioners and Respondent.

156. "The object of equitable estoppel is to prevent a person from asserting a right which has come into existence by contract, statute or other rule of law where, because of his conduct, silence or omission, it would be unconscionable to allow him to do so." Brown v. Brown (1969) 274 Cal. App. 2d 178, 188, 82 Cal. Rptr. 238

157. "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." Cal. Evid. Code § 623 (Deerings 1986)

158. Quasi-contract, or contract "implied in law", is an obligation created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his former position by return of the thing or its equivalent in money. Witkin, Summary of California Law, Contracts, § 91, at p. 122 (9th ed. 1987); Rest. 2d Contract § 4 Comment b).

FINDINGS OF FACT³

A. General Findings of Fact.

159. Hayward became a Mitsubishi dealer in July 1988 when Petitioners and Respondent executed a Interim Sales and Service

³ The Findings of Fact are addressed according to categories based on the list of issues submitted by Petitioners and Respondent.