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Feb. 7, 1973.

Evelle J. Younger, Atty. Gen., Mark Leicester and Mark A. Levin, Deputy Attys. Gen., for defendant and appellant.

Linder, Schurmer, Drane & Bullis, and Scott Schurmer, Los Angeles, for plaintiff and respondent.

BY THE COURT.

New Car Dealers Policy and Appeals Board appeals from a judgment awarding costs to Ralph's Chrysler-Plymouth (hereinafter referred to as Ralph's) for preparation of the record accompanying a petition for a writ of mandamus.

An accusation against Ralph's, the subject of which is not here material, was filed with the Department of Motor Vehicles and a hearing was held before a hearing officer to determine the merits of the accusation. The officer's proposed decision was adopted by the department.

Pursuant to Vehicle Code section 3052, subdivision (c), Ralph's appealed the department's decision to the board. Ralph's accompanied the appeal with evidence indicating that it had made application for preparation of the administrative record of the department and had advanced the necessary costs.

At the hearing before the board no additional evidence or testimony was taken. The board based its findings entirely upon the record supplied and paid for by Ralph's, and rendered a decision against Ralph's.

Primarily urging irregularities reflected in the transcript of the original hearing before the Department of Motor Vehicles, Ralph's petitioned the Superior Court of Los Angeles County for a writ of mandamus. The writ was granted, and the trial court allowed recovery of the costs incurred in petitioning for the wirt, including the costs of preparing the transcript.

At the outset it seems clear that before appealing to the superior court, Ralph's was first required to appeal the department's adverse decision to the board. It is a well-recognized rule that if an administrative remedy is provided by statute, relief must be sought from the administrative body and such remedy exhausted before relief can be had under section 1094.5, subdivision (a), of the Code of Civil Procedure. (*Eye Dog Foundation* v. *State Board of Guide Dogs For The Blind*, 67 Cal.2d 536, 543, 63 Cal.Rptr. 21, 432 P.2d 717; *Flores* v. *Los Angeles Turf Club*, 55 Cal.2d 736, 746--747, 13 Cal.Rptr. 201, 361 P.2d 921; *Temescal Water Co.* v. *Dept. Public Works*, 44 Cal.2d 90, 106, 280 P.2d 1; *Abelleira* v. *District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942; *Muir* v. *Steinberg*, 197 Cal.App.2d 264, 269, 17 Cal.Rptr. 431; *Vogulkin* v. *State Board of Education*, 194 Cal.App.2d 424, 434, 15 Cal.Rptr. 335; *Pete* v. *State Board of Education*, 144 Cal.App.2d 38, 41, 300 P.2d 147.) The administrative remedy in the case at bar was an appeal to the board pursuant to Vehicle Code section 3052 et seq.

Section 3052, subdivision (c), reads in part: 'The appeal shall be accompanied by evidence that the appellant (Ralph's) has made application for the administrative record of the department and advanced the cost of preparation thereof. . . .' Clearly Ralph's was to provide a complete copy of the administrative record before it could proceed with any further appeal. Thus, the costs advanced to prepare the record were not voluntarily incurred but were undertaken in order to exhaust administrative remedies.

Judicial review of administrative decisions is provided for by section 11523 of the Government Code. That section requires petitioner to furnish the court with a record of the administrative proceedings including the transcript and exhibits at petitioner's expense. It reads as follows: 'Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. . . . The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him, upon the payment of the fee specified in Section 69950 of the Government Code . . . for the transcript, the cost of preparation of other portions of the record and for certification thereof. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. . . .'

Because Ralph's was required under Vehicle Code section 3052, subdivision (c), to obtain the administrative record in order to appeal to the board in exhausting its administrative remedies, the 'request' specified in section 11523 of the Government Code obviously was not made. The record which was required by the board for its purposes and for which costs were necessarily incurred and advanced at that intermediate stage included the transcript and exhibits which were presented to the superior court with the petition for the writ of mandamus.

No additional evidence or testimony was taken at the hearing before the board. The record in this case included the transcript of the administrative hearing which was provided both to the board and to the superior court at Ralph's expense.

Section 1094.5, subdivision (a), of the Code of Civil Procedure which concerns judicial review by the use of a writ of mandamus provides: 'Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, . . . If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.' (Italics added.) On the basis of this last sentence the trial court ruled that costs allowed by section 1094.5 can be recovered by the prevailing party when they were incurred at an intermediate stage pursuant to the exhaustion of administrative remedies, and prior to filing the petition for the writ of mandate.

Several cases involving the preparation of the record immediately prior to petitioning for a writ of mandamus have held that under section 1094.5, subdivision (a), the prevailing party must be allowed to recover the costs of such preparation. (*Moran* v. *Board of*

Medical Examiners, 32 Cal.2d 301, 315, 196 P.2d 20; *Williams* v. *Santa Maria Joint Union High Sch. Dist*., 252 Cal.App.2d 1010, 1013, 60 Cal.Rptr. 911; *Sinclair* v. *Baker*, 219 Cal.App.2d 817, 824, 33 Cal.Rptr. 522.) Moran, the leading case on the interpretation of section 1094.5, subdivision (a), involved the suspension of the appellant from medical practice by the board. Moran petitioned the superior court for a writ of mandamus asking that the court review the proceedings before the board, and supplied the court with an authenticated copy of the board proceedings. We held that where the prevailing party has borne the expense of preparing the transcript of the board hearing he shall recover all costs incurred in its preparation.

We are satisfied that the same rule applies as to the allowable costs when the costs were incurred as here in the intermediate proceeding.

Since Code of Civil Procedure section 1094.5, subdivision (a), specifically authorizes expenses incurred in preparation of the record (including the transcript and exhibits) to be 'taxable as costs,' a reasonable interpretation of the statute allows recoupment of those costs incurred in preparation of a copy of the record for the mandamus proceedings. The section makes no exception for costs incurred prior to filing the petition for mandate. The section makes absolutely no reference to when the expense must be borne, and there seems to be no reason to penalize a successful petitioner merely because a transcript was prepared during a trial, or prepared in the course of the administrative process so long as the transcript was essential to review and its cost allowable under the language of the applicable statute. (FN1) It is not reasonable to deny Ralph's those costs it would have incurred had the record been prepared initially for the mandamus proceedings merely because the costs were incurred earlier in the litigation.

Insofar as *Turner* v. *East Side Canal & Irr. Co*., 177 Cal. 570, 171 P. 299, and *Regents of University of California* v. *Morris*, 12 Cal.App.3d 679, 90 Cal.Rptr. 816, are contrary to this conclusion they are disapproved.

It appears that the trial judge in allowing costs may have included some costs for copies of transcripts and exhibits which, although used in the administrative proceeding, were not part of the record in the mandamus proceeding. Section 1094.5 provides for recovery of costs of the record in the mandamus proceeding only; this would include the cost of any transcript or exhibits its which are part of the record in that proceeding. It would not include additional copies which might have been required in the administrative proceeding. Accordingly, Ralph's is entitled to recover as costs the expense incurred in preparation of the original record filed in the superior court even though such expense was disbursed for preparation of that record for use during the administrative proceedings. Costs incurred for any additional copies of the record required in the administrative proceedings shall not be recovered.

That part of the judgment awarding costs is reversed, and the trial court is directed to fix costs in accordance with the views expressed herein. Each party shall bear its own costs on this appeal.

FN* Pursuant to Constitution, article VI, section 21.

FN1. Allowing costs does not improperly encourage parties to appeal since, in any event, costs can only be recovered by the prevailing party.

RALPH WILLIAMS FORD, Plaintiff and Respondent, v. NEW CAR DEALERS POLICY AND APPEALS BOARD et al., Defendant and Appellants (1973) 30 Cal. App. 3d 494 [106 Cal. Rptr. 340].
Civ. No. 40265
Court of Appeal of California, Second Appellate District, Division Two
February 9, 1973

Evelle J. Younger, Attorney General, and Alan Hager, Deputy Attorney General, for Defendants and Appellants.

Linder, Schurmer, Drane & Bullis and Ellis J. Horvitz, for Plaintiff and Respondent.

FLEMING, J.

The New Car Dealers Policy and Appeals Board, pursuant to its authority under Vehicle Code sections 3050 to 3057, affirmed a decision of the Director of Motor Vehicles finding that Ralph Williams Ford (Williams) on three specified occasions in 1968 violated Vehicle Code, section 4456, and on nine specified occasions in 1968 violated Vehicle Code, section 11713, subdivision (g). n1 The board, separately for each group of violations, revoked Williams' dealer's license, certificate, and special plates; stayed the revocation; and placed Williams on a three-year probation whose conditions included a 10-day suspension of its dealer licensing privileges.

n1 Vehicle Code section 4456 in pertinent part authorizes the dealer to issue a temporary identification device to the purchaser, provided the dealer applies to the department on behalf of the purchaser for registration or transfer of the vehicle within 20 days of sale.

Vehicle Code section 11713, subdivision (g) makes it unlawful and a violation of the Vehicle Code for a license holder to include as an added cost to the selling price of a vehicle an amount for licensing or transfer of title which is not owed to the state, unless the amount has been paid by the dealer prior to the sale.

The superior court confirmed the board's findings with respect to the violations but ordered the cause remanded to the board for reconsideration because in the court's view the board, (1) wrongfully imposed administrative penalties for violations of section 4456, (2) violated due process of law in finding Williams guilty of uncharged violations, and (3) imposed improper procedural terms for future revocation of probation.

The board and the department appeal the judgment.

1. Section 4456.

The board found that on three occasions Williams violated section 4456 by failing to file timely reports of sale and documents and fees for the transfer or registration of vehicles. The board noted that these violations represented only a small part of the untimely reports of sale submitted by Williams. The superior court, on an independent review of the evidence pursuant to Code of Civil Procedure, section 1094.5, confirmed the findings of

the board, but concluded that the $ 3 forfeiture imposed by section 4456 (now by § 4456.5) was the sole penalty applicable to these violations, and therefore administrative penalties of suspension and revocation were not authorized.

We disagree with the conclusion of the superior court that the penalty for these 1968 violations was limited to a $ 3 forfeiture, since at that time administrative penalties authorized by section 11705 were clearly applicable to such violations. n2 (See *Evilsizor* v*. Dept. of Motor Vehicles* (1967) 251 Cal.App.2d 216, 218-220 [59 Cal.Rptr. 375].) Not until 1970 did the Legislature enact section 4456.5 to limit the penalty for certain violations of section 4456 to a$ 3 forfeiture. Williams argues that the changes brought about by the enactment of section 4456.5 in 1970 should be used to reinterpret the intent of the Legislature in enacting the earlier texts of section 4456 in 1959, 1961, and 1963. We decline this invitation to embark on a voyage of retrospective reinterpretation.

> n2 Vehicle Code section 11705 (now renumbered §11705, subds. (a)(7) and (a)(9)) provides that the department after notice and hearing may suspend or revoke a dealer's license upon determining that the dealer has violated one or more of the terms and provisions of those parts of the Vehicle Code that include sections 4456 and 11713, subdivision (g).

Williams also contends that because the subsequently enacted section 4456.5 reduced in certain instances the penalties for violation of section 4456, the section should be applied retroactively by the courts to the violations that occurred in this case. We do not agree. It is presumed that legislative changes do not apply retroactively unless there is a clear legislative intent that they should do so. (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control,* 65 Cal.2d 349, 371 [55 Cal.Rptr. 23, 420 P.2d 735].) Had the Legislature merely mitigated the penalty for a violation of section 4456 we might well conclude it had made an express determination that its former penalty had been too severe and that a lesser penalty would be more appropriate. (See *In re Estrada,* 63 Cal.2d 740, 745 [48 Cal.Rptr. 172, 408 P.2d 948]*.)* But in adopting section 4456.5 the Legislature enacted a new, comprehensive scheme which completely revised the scope of the penalties attached to violations of section 4456. The basic penalty for violation of section 4456 is made a $3 forfeiture, but failure to pay fees to the department within 20 days continues subject to the penalty of suspension and revocation. And failure to present a proper application in compliance with section 4456 within 40 days creates a presumption of failure or neglect that provides prima facie grounds for suspension and revocation under section 11705.

We do not believe the Legislature could have reasonably intended these complex changes to be applied retroactively to cases, such as this one, that had reached final administrative decision prior to the effective date of the new law. As the court said in *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control, supra,* at page 372*:* "The Legislature's alteration of the method for enforcement of a statute, however, ordinarily reflects its decision that the revised method will work greater future deterrence and achieve greater administrative efficiency. Yet the design for efficacy of deterrence and efficiency of administration hardly affects the case which had already reached a final administrative decision based upon the old procedure."

2. Uncharged Violations.

The board adopted the findings of the Director of Motor Vehicles relating to the accounting procedures used by Williams before and after the filing of the accusation of registration-fee overcharges. Key findings included:

"XI 3(d).... Respondent did not maintain any journals, subsidiary ledgers or any other type of accounting records wherein it could be ascertained the name of the purchaser, the amount of money deposited by said purchaser for payment to the Department, the actual amount of money required by the Department and the dates and amount of the refund of the overcharge to said purchaser. ...

"(e). Respondent's employees on the managerial level, including the certified public accountant auditor, knew that the deposits made by purchasers for the fees due the Department, were fiduciary moneys requiring the highest degree of accountability. ...

"(f). At the end of respondent's 1968 accounting period, the expense account to which respondent credited the refunds from the Department had a credit balance of $ 16,570.03 ...

"(g). With one exception, respondent did not refund the excess deposit fees to purchasers identified in Finding X hereof until subsequent to the service of the Accusation."

The superior court concluded that these findings "[concerned] matters not charged in the Accusation, and the implied finding that there was a $ 16,570.03 credit balance from overcharged fees that had not been refunded or credited to the accounts of customers to whom they belonged, is not within the scope of any charge alleged in the Accusation. [These findings] were improperly considered by the Board in determining the nature and extent of the penalty ..."

In our view the superior court misconstrued the relationship between charges and findings in the administrative proceedings. The board did not find that Williams committed any violations other than those charged in the accusation. Williams produced evidence of its accounting procedures in an attempt to show it had not made the overcharges set forth in the accusation. In response to that evidence the board made findings which showed that it did not credit the evidence produced by Williams to rebut proof of overcharges, and that Williams' accounting procedures were inadequate to disclose what refunds, if any, were routinely made to overcharged purchasers. The board's basic finding that on nine occasions the price of vehicles sold by Williams included as an added cost specified licensing or transfer fees not owed to the state (Veh. Code, § 11713, subd. (g)) remained unaffected by additional findings on the subject of Williams' accounting procedures. These additional findings, however, were pertinent to questions of due care, penalty, and conditions of probation. Once the board found the charged violations had taken place, it was entitled to consider related deficiencies in order to evaluate the amount of due care exercised by Williams in past attempts to comply with the statute and in order to determine what administrative penalty and what conditions of probation would be suitable. (*Mills v. State Bar,* 6 Cal.2d 565, 567 [58 P.2d 1273].) Evidence of other possible violations need

not be disregarded by the board in arriving at an appropriate penalty and appropriate conditions of probation, merely because that evidence was produced by Williams.

In re Ruffalo, 390 U.S. 544 [20 L.Ed.2d 117, 88 S.Ct. 1222], and related cases are not controlling. In *Ruffalo*, an attorney was disbarred from the practice of law on a finding he was guilty of an instance of misconduct that had not been charged against him in the disbarment proceedings until after he had presented evidence to rebut the instances of misconduct with which he had been initially charged. The court overturned the disbarment on the ground that procedural due process requires fair notice of a charge before proceedings commence. (390 U.S. at pp. 550-551 [20 L.Ed.2d at pp. 121-123].) At bench Williams was given fair notice of the nine charged violations it was found to have committed. Other potential violations and related deficiencies were considered only in connection with a determination of the type and extent of the sanction to be imposed for the charged violations.

3. Condition of Probation.

A condition of probation imposed by the board on Williams stated: "Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that appellant has violated any of the terms and conditions of probation, he may, in his discretion and *without a hearing*, revoke said probation and order the suspension or revocation of appellant's license, certificate and special plates ..." (Italics added.)

The superior court property concluded that the italicized portion of this condition of probation violated due process of law. The Fourteenth Amendment protects the pursuit of one's profession from abridgment by arbitrary state action, and a state cannot exclude a person from any occupation in a manner or for reasons that contravene due process of law. (*Endler v. Schutzbank,* 68 Cal.2d 162, 169-170 [65 Cal.Rptr. 297, 436 P.2d 297].) Here, the revocation of probation, and therefore the revocation of Williams' dealer's license, is left to the discretion of the Director of Motor Vehicles. But "an individual must be afforded notice and an opportunity for a hearing before he is deprived of any significant property interest, ..." (*Randone v. Appellate Department,* 5 Cal.3d 536, 541 [96 Cal.Rptr. 709, 488 P.2d 13].*)* Although Williams received notice and a hearing on its past violations, the conditions of probation dispense with notice and hearing on any future violations that may bring about a revocation of its license.

In criminal law "fundamental principles of due process and fair play demand, ... that after a summary revocation of probation and before sentencing a hearing is required at which the defendant is entitled to be represented by counsel, to be advised of the alleged violation and given an opportunity to deny or explain it, and, if necessary, present witnesses on his own behalf." (*People v. Youngs,* 23 Cal.App.3d 180, 188 [99 Cal.Rptr. 101]; *People v. Vickers*, 8 Cal.3d 451, 458-461 [105 Cal.Rptr. 305, 503 P.2d 313]; see also, *Morrissey v. Brewer,* 408 U.S. 471 [33 L.Ed.2d 484, 92 S.Ct. 2593].) Due process requires a comparable opportunity for notice and hearing on the revocation of an occupational license. (Cf. *Goldberg v. Kelly,* 397 U.S. 254 [25 L.Ed.2d 287, 90 S.Ct. 1011].)

The judgment granting the writ of mandate is reversed, and the cause is remanded to the superior court with instructions to issue its writ for the sole purpose of directing the board to strike from page 32 of its final order the phrase "without a hearing" and substitute therefor the phrase "on notice and hearing." Appellant to receive their costs on appeal.

Robert C. COZENS, Director, Plaintiff and Appellant, v.
NEW CAR DEALERS POLICY AND APPEALS BOARD of the State of California, Defendant and Respondent; WILLIAMS CHEVROLET, INC., a California Corporation, Real Party in Interest. (1975) 52 Cal.App.3d 21 [124 Cal.Rptr. 835]
Civ. 15086.
Court of Appeal, Third District, California.
Oct. 9, 1975.
As Modified on Denial of Rehearing Oct. 24, 1975.
Hearing Denied Dec. 4, 1975.

Evelle J. Younger, Atty. Gen., by Junian O. Standen, Deputy Atty. Gen., San Francisco, for plaintiff and appellant.
Robert B. Kutz, Chico, for defendant and respondent.
Minsky, Garbey & Rudof by B. W. Minsky, Los Angeles, for real party in interest.

REGAN, Associate Justice.
On October 4, 1973, Robert C. Cozens, Director of the Department of Motor Vehicles ('Director' and 'Department'), filed a petition for writ of mandate to compel respondent New Car Dealers Policy and Appeals Board (FN1) ('Board') to vacate and set aside the board's final order upon review of the director's decision revoking the car dealer's license of the real party in interest, Williams Chevrolet, Inc. ('Williams').
During the years 1970 and 1971, the department filed accusations against Williams, a car dealership, alleging certain violations of the Vehicle Code. Subsequently a hearing was held pursuant to the Administrative Procedure Act (Gov.Code, § 11500 et seq.).
On October 24, 1972, the director adopted a decision prepared by the hearing officer which found that Williams had violated numerous sections of the Vehicle Code in the operation of its business and revoked Williams' license.
Williams then filed with the director a petition for reconsideration of the decision revoking its license. (See Gov.Code, § 11521.) This petition set forth a number of alleged facts, including the facts that Williams had new supervisory personnel and a new general manager, and that all employees had been specifically instructed to refrain from any practices charged in the accusation. On November 24, 1972, the director denied this petition.
Thereafter, Williams filed an appeal with the board from the decision revoking its license. (See Veh.Code, § 3052.) On April 26, 1973, the board issued an order amending and reversing certain findings of the director, affirming others, and remanded the matter to the director for refixing of the penalty.
On May 10, 1973, the director issued its order refixing penalty which again revoked Williams' license.

On May 24, 1973, counsel for Williams addressed and sent a letter to the director requesting reconsideration of his order refixing the penalty. The letter stated, in part, as follows: 'It has been some time since the events occurred which brought about your most recent decision. Since then, no problems have occurred at the agency, and this should stand in their good stead.' The director treated this letter as a petition for reconsideration of the order refixing penalty and denied the same on June 6, 1973.

A second appeal was made to the board by Williams from the order refixing penalty. On September 5, 1973, the board made its final order whereby it affirmed the director's order of revocation but stayed the execution thereof and placed Williams on probation for a period of three years, subject to certain terms and conditions. In its final order the board stated, in part, as follows: '(T)he major issue raised by this appeal is whether the penalty is commensurate with the findings. We hold absolutely no disagreement With the appropriateness of the order revoking the corporate license for the violations found to have been committed by the appellant. However, we are moved to modify the order by providing for a period of probation because of attendant circumstances.

'The factor which we find most persuasive in our determination is the argument of the appellant that it has continued in business as a new car dealer licensed by the department for a period in excess of two years since the filing of the accusation in this case. This fact is supported by the records before us and no information of any derelictions whatever by appellant during this time has been brought to our attention.

'Additionally, we have considered the mitigation as found by the director with particular cognizance attached to the fact that appellant's president has made certain changes in the operation of the dealership and has employed a new general manager.' (Emphasis added.)

On October 4, 1973, the director brought this action in mandate in the superior court to compel the board to set aside its final order. The trial court denied the petition.

The director contends the board abused its discretion and exceeded its jurisdiction by, without compiling a record, setting aside the penalty imposed by the department despite its finding that the penalty was supported by the record.

While recognizing that the board has been vested with the authority in 'proper cases' to substitute its judgment on penalties for licensees for that of the department, the director still maintains the Legislature intended the board primarily to be an advisory and review body to the department.

The board, at the time of these proceedings, had only three duties, which can be summarized as follows: (1) prescribe rules and regulations, after consultation with the department, relating to licensing of new car dealers; (2) hear and consider appeals from department decisions concerning licensees; and (3) consider matters concerning activities or practices of applicants or licensees and, if necessary, refer such matters to the department for appropriate action. (Veh.Code §3050.) (FN2)

The powers of the board with respect to appeals from the department are set forth in sections 3054 and 3055.

Section 3054 provides: 'The board shall have the power to reverse or amend the decision of the department if it determines that any of the following exist:

'(a) The department has proceeded without or in excess of its jurisdiction.

'(b) The department has proceeded in a manner contrary to the law.

'(c) The decision is not supported by the findings.

'(d) The findings are not supported by the weight of the evidence in the light of the whole record reviewed in its entirety, including any and all relevant evidence adduced at any hearing of the board.

'(e) There is relevant evidence, which in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing.

'(f) The determination or penalty, as provided in the decision of the department is not commensurate with the findings.'

Section 3055 provides: 'The board shall also have the power to amend, modify, or reverse the penalty imposed by the department.' (FN3)

The director contends that the board could have acted only under either subdivision (f) of section 3054 or section 3055. Since the board concluded that the license revocation was appropriate, the director argues the board concedes the penalty is commensurate with the findings and hence it was barred from resorting to section 3054, subdivision (f).

The director further argues that the board could not invoke section 3055 because, in general, the board held no evidentiary hearings and made no findings of its own. The director contends the board takes the position that section 3055 entitles it to act for any reason it chooses, whether or not based on an evidentiary record. The director maintains this claim of the board is based on several false assumptions.

He first contends it must be assumed the Legislature intended that the board should have a greater scope of review over the department than the courts have over the board or any other administrative agency under Code of Civil Procedure section 1094.5. Under this section the court's inquiry into the agency's decision is generally limited to the administrative record. (See *Strumsky* v. *San Diego County Employees Retirement Ass'n* (1974) 11 Cal.3d 28, 34--35, 112 Cal.Rptr. 805, 520 P.2d 29.) The director relies upon *Topanga Ass'n For a Scenic Community* v. *County of Los Angeles* (1974) 11 Cal.3d 506, 515, 113 Cal.Rptr. 836, 841, 522 P.2d 12, 17, wherein the court states that 'implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.' He therefore concludes that the board must also take evidence and make independent findings on which to base its order. (FN4)

The director next contends it must be assumed that the Legislature intended that board orders be 'unreviewable.' (FN5)

Thirdly, the director contends it cannot be assumed the Legislature intended subdivision (f) of section 3054 to be surplusage without purpose or effect.

Finally, the director argues that a holding that the board can set aside department penalties for whatever reasons it chooses would result in the emasculation of the department's authority over car dealer licenses. (See Merrill v. Department of Motor Vehicles (1969) 71 Cal.2d 907, 918--919, 80 Cal.Rptr. 89, 458 P.2d 33.)

In summary, the director contends that section 3054, subdivision (f) empowers the board to amend a department imposed penalty for reasons found in the department's record, whereas section 3055 empowers the board to amend a department imposed penalty for reasons found in its own record.

The board maintains it has never taken the position that section 3055 empowers it to take whatever action it chooses, whether or not supported by a record. To the contrary, the board submits that it took its action only after considering the entire record, including the petitions for reconsideration. The board did not consider it necessary to take additional

evidence since it may rely upon the record compiled by the department. (See §3053; *Ralph's Chrysler-Plymouth* v. *New Car Dealers Policy & Appeals Bd*. (1973) 8 Cal.3d 792, 794, 106 Cal.Rptr. 169, 505 P.2d 1009.) It further maintains that its powers under section 3055 merely subject the director's penalty power to review upon appeal by a carefully selected board of nine members, and confer upon the board the power to arrive at a different conclusion. The board emphasizes that it did nothing more than to substitute probation for outright revocation of Williams' license (I.e., it did not reverse the decision but modified the penalty pursuant to section 3055). It also notes that the power of review set forth in the Vehicle Code differs substantially from that contained in section 1094.5 of the Code of Civil Procedure. The board concludes that the trial court did not err in denying the director's petition for a writ of mandate since the board neither abused its discretion nor exceeded the jurisdiction conferred upon it by sections 3050, 3053 and 3055. (Cf. *Lake* v. *Civil Service Commission* (1975) 47 Cal.App.3d 224, 228, 120 Cal.Rptr. 452; *Wingfield* v. *Fielder* (1972) 29 Cal.App.3d 209, 221, 105 Cal.Rptr. 619.) (FN6)

Williams, the real party in interest, notes that both section 3054 and 3055 were enacted simultaneously and the presumption is against the Legislature indulging in an idle act or duplication. (See 45 Cal.Jur.2d, Statutes, §99, p. 613.) Since section 3055 deals solely and specifically with penalties, Williams submits the only conclusion that can be drawn is that section 3055 amplified and broadened the board's discretion. Williams finds it significant that in enacting this section the Legislature included the word 'also.' Williams maintains this is a clear indication that the Legislature intended to confer on the board more authority than that vested in it under subdivision (f) of section 3054.

Turning to the director's argument, we hold there is no statutory requirement that the board hold an evidentiary hearing. As we have previously pointed out, the board can act upon the administrative record of the department and the briefs of the parties alone. We do not regard subdivision (f) of section 3054 as surplusage. Rather, we conclude that section 3055 is a legislative expansion of the board's powers.

We hold that the board properly relied on the record compiled by the department and the briefs of the parties. We find nothing arbitrary or capricious in the board's order and we shall therefore affirm the judgment of the trial court denying the writ of mandate.

There is a strong undercurrent in the director's arguments to the effect that if his position is not accepted, it will lead to unbridled power vested in the board with absolutely no checks or restraints. This is simply not true. The board must still exercise judicial discretion, as explained in *Brown* v. *Gordon* (1966) 240 Cal.App.2d 659, 666--667, 49 Cal.Rptr. 901: 'It is well settled that in a mandamus proceeding to review an administrative order the determination of penalty by the administrative body will not be disturbed unless there is a clear abuse of discretion. (Citations.) Although the administrative body has broad power with respect to the determination of the penalty to be imposed, this power is not absolute or unlimited, but must be exercised with judicial discretion. (Citations.) The term 'judicial discretion' is defined as follows: 'The discretion intended . . . is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' (Citations.) 'Abuse of discretion' in the legal sense is defined as discretion exercised to an

end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. (Citations.)' (Emphasis added.)

The judgment denying petition for writ of mandate is affirmed.

FRIEDMAN, Acting P.J., and EVANS, J., concur.

FN1. The board is now known as the 'New Motor Vehicle Board.' (Veh.Code, §3000.)

FN2. Unless otherwise noted, all statutory references are to the Vehicle Code.

FN3. Both of these sections were added by Statutes 1967, chapter 1397, section 2, pages 3265--3266.

FN4. Section 3053 provides: 'The board shall determine the appeal upon the administrative record of the department, any evidence adduced at any hearing of the board, and upon any briefs filed by the parties. If any party to the appeal requests the right to appear before the board, the board shall set a time and place for such hearing, the production of any relevant evidence and argument.'

Thus, although the board is authorized to take additional evidence, it is not required to do so. It appears to be undisputed that the board had before it the entire record compiled by the department, including the transcript of the administrative hearing, the exhibits, and the petitions for reconsideration filed with the director by Williams (referred to as 'letters of advocacy' by the appellant director.) As to the transcript of the administrative hearing, it was before the trial court. However, it was never offered or admitted into evidence and was not designated as a part of the record on appeal.

FN5. However, section 3058 specifically provides for judicial review of final orders of the board.

FN6. The board also relies upon *Ralph Williams Ford* v. *New Car Dealers Policy & Appeals Bd*. (1973) 30 Cal.App.3d 494, 106 Cal.Rptr. 340. In that case the court referred to criminal law in ruling upon a due process question presented by the board's order of probation. By analogy, the board applies the law relating to criminal probation matters and apparently concludes that the board could validly consider the petitions for reconsideration and argument of counsel in reaching its decision. It does not concede, however, that there were any 'facts' supplied to the board outside the record.

AMERICAN MOTORS SALES CORPORATION, Plaintiff and Respondent, v. NEW MOTOR VEHICLE BOARD OF the STATE OF CALIFORNIA, Defendant and Appellant. Ken COLLINS, doing business as Ken Collins Buick, Real Party in Interest. (1977) 69 Cal.App.3d 983 [138 Cal. Rptr. 594].
Civ. 15971.
Court of Appeal, Third District, California.
May 23, 1977.
Rehearing Denied June 15, 1977.
Hearing Denied Aug. 4, 1977.

Joseph M. Malkin, Los Angeles, for plaintiff-respondent.

Crow, Lytle & Gilwee, Sacramento, amici curiae Northern Calif. Motor Car Dealers Assn.

Evelle J. Younger, Atty. Gen., by Robert L. Mukai and Edna R. Walz, Deputy Attys. Gen., Sacramento, for defendant-appellant.

PARAS, Associate Justice.

On April 24, 1974, American Motors Sales Corporation (hereinafter 'American Motors') notified its South Lake Tahoe dealer, Ken Collins, that it would terminate his Jeep franchise in 90 days for 'failure to develop a sufficient sales volume . . .' On July 26, 1974, Collins filed a protest with the New Motor Vehicle Board of the State of California (hereinafter 'Board') under Vehicle Code section 3060. (FN1)

A hearing was held under section 3066, and the hearing officer's proposed decision found 'good cause' for termination, (§ 3060, subd. (b)). But the Board rejected the proposed decision, took additional testimony from the zone manager of American Motors and from Collins, and concluded that the termination was without good cause. American Motors then successfully sought a writ of mandate from the superior court. The trial judge ruled that sections 3060 and 3066 are violative of due process of law under article I, section 7 of the California Constitution and section 1 of the Fourteenth Amendment to the United States Constitution, 'because four of the nine members of the Board are, by statute, (Vehicle Code section 3001), new car dealers, who may reasonably be expected to be antagonistic to franchisors such as American Motors.'

The Board appeals, and is supported in this Court by the Northern California Motor Car Dealers Association and the Motor Car Dealers Association of Southern California, amici curiae.

I

There is a long history of legal warfare between the automobile manufacturers and their dealers, ranging from the 'military discipline' of the Ford Motor Company in the 1920's to litigation under the 1956 federal 'Dealers' Day in Court Act,' (15 U.S.C. §§ 1221--1225). (FN2) The Act provides in part that 'An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States . . . and shall recover . . . damages . . . by reason of the failure of said automobile manufacturer . . . to act in Good faith . . . in terminating, cancelling, or not renewing the franchise with said dealer'. (15 U.S.C.§1222.) (Emphasis added.) The Act does not however preempt State laws (15 U.S.C.§1225).

The Board (originally called the 'New Car Dealers Policy and Appeals Board') was established in 1967 to hear appeals of new car dealers regarding licensing by the Department of Motor Vehicles. (§§ 3000, 3050.) Its duties at that time (FN3) were substantially the same as those of many other state occupational licensing boards; and as with other boards, (FN4) the Legislature mandated that certain of the Board members (four of the nine) be new car dealers (§ 3001). In 1973, the Legislature renamed the Board the 'New Motor Vehicle Board,' and added sections 3060 to 3069 which became operative July 1, 1974. These statutes established a series of procedures for the adjudication of disputes between two distinct classes of litigants, new car dealers and new car manufacturers. They empower the Board to resolve controversies relating to: (1) whether there is 'good cause' to terminate or to refuse to continue a franchise (§ 3060); (2) whether there is 'good cause' not to establish or relocate a motor vehicle dealership in a 'relevant market area' (§ 3062); (3) delivery and preparation obligations § 3064); and (4) warranty reimbursement § 3065).

The result is that although under the 1973 legislation the adversaries before the Board invariably derive from two distinct groups, dealers and manufacturers, the Board

which resolves their disputes must include four members from the dealer group but need not include any members from the manufacturer group. Does an administrative tribunal so constituted meet the requirements of due process? Is it such 'a competent and impartial tribunal in administrative hearings' (*Peters* v. *Kiff* (1972) 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83) as to comport with due process? We agree with the trial judge's negative answer to these questions.

II

The conclusion is unavoidable that dealermembers of the Board have an economic stake in every franchise termination case that comes before them. The ability of manufacturers to terminate any dealership, including that of a Board member, depends entirely upon the Board's interpretation of 'good cause.' It is to every dealer's advantage not to permit termination for low sales performance, which fact however is to every manufacturer's disadvantage. As Professor Macaulay puts it: 'For example, a Ford dealer might be able to make a hundred dollar profit on the sale of one car or a ten dollar profit on each sale of ten cars. The immediate result of either strategy is the same for the dealer, but clearly the impact on the Ford Motor Company differs greatly, because in one case it sells only one car while in the other it sells ten. And even if our hypothetical Ford dealer sells ten cars at only a ten dollar profit on each one, he has no reason to care whether he sells Mustang sport cars, Falcon station wagons, or Thunderbirds. Yet the Ford Motor Company does. It must sell many units of all of the various models it makes, and it must sell its less popular models to recover its tooling costs on them.' (FN5)

Amici curiae respond to this financial interest by pointing to instances in which a dealership-board-member may be more financially interested in ruling in favor of the manufacturer; this would occur, for example, where the franchise of a dealer-member's direct competitor is being terminated, or where the member may wish to ingratiate himself with his own manufacturer. We do not view this as fairness, but rather as an equalizing unfairness. Either way, the objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members.

The landmark case on due process limitations upon such pecuniary conflicts of interest is *Tumey* v. *Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. There a mayor-judge, in addition to his regular salary, was paid a certain sum per case in liquor law violation cases in which he found the defendant guilty. The United States Supreme Court found this a denial of due process, saying: 'The mayor received for his fees and costs in the present case $12, and from such costs under the prohibition act for seven months he made about $100 a month, in addition to his salary. We can not regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest. It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal.

'. . . There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance

nice, clear and true between the state and the accused denies the latter due process of law.' (Emphasis added.) (273 U.S. at pp. 531--532, 47 S.Ct. at p. 444.)

The Tumey doctrine has been extended recently. In *Ward* v. *Village of Monroeville* (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267, the mayor-judge had no direct pecuniary interest in convicting the accused, but the fines he levied constituted somewhere between 40 and 50 percent of the village revenues. Again finding a violation of due process, the Supreme Court stated (409 U.S. at p. 60, 93 S.Ct. at p. 83) that the mayor-judge's interest as chief executive officer of the village, responsible to account for village finances to the council, presented a 'possible temptation' by which 'the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.' (FN6) (See also *People* v. *Superior Court (Greer)* (1977) 19 Cal.3d 255, 266, 137 Cal.Rptr. 476, 483, 561 P.2d 1164, 1171.)

While the foregoing cases involved due process in a criminal law context, *Gibson* v. *Berryhill* (1973) 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488, is more directly in point. The issue there was whether the Alabama Board of Optometry was a fair tribunal to determine that it did or did not constitute 'unprofessional conduct' for an optometrist to practice in Alabama as a salaried employee of a business corporation. The Board of Optometry consisted exclusively of privately practicing optometrists and included none who were either salaried or employed by business corporations. Only privately practicing optometrists were eligible to become members of the Alabama Optometric Association, and by statute only such members could sit on the Board of Optometry. The Association filed charges of unprofessional conduct with the Board of Optometry against nine optometrists who were employed on a salaried basis by Lee Optical Co., a business corporation. Upon the lodging of the charges, the Board of Optometry deferred hearing thereon and filed its own lawsuit in an Alabama state court against Lee Optical Co. and its optometrist-employees, charging them with 'unlawful practice of optometry.' After prevailing in the trial court, the Board of Optometry then undertook to hear and decide the Association's charges. Lee Optical Co.'s optometrists then sued in federal district court under the Civil Rights Act of 1871 (42 U.S.C.§1983) and obtained an injunction.

Affirming the district court's decision, the Supreme Court ruled that the Board of Optometry was not a fair tribunal for the determination of the 'unprofessional conduct' charges. It stated: 'First (the district court determined that), the Board had filed a complaint in state court alleging that appellees had aided and abetted Lee Optical Co. in the unlawful practice of optometry and also that they had engaged in other forms of 'unprofessional conduct' which, if proved, would justify revocation of their licenses. These charges were substantially similar to those pending against appellees before the Board and concerning which the Board had noticed hearings following its successful prosecution of Lee Optical in the state trial court.

'Secondly, the District Court determined that the aim of the Board was to revoke the licenses of all optometrists in the State who were employed by business corporations such as Lee Optical, and that these optometrists accounted for nearly half of all the optometrists practicing in Alabama. Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was

constitutionally disqualified from hearing the charges filed against the appellees.' (411 U.S. at p. 578, 93 S.Ct. at pp. 1697--1698.)

'. . . Arguably, the District Court was right on both scores, but we need reach, and we affirm, only on the latter ground of possible personal interest.

'It is sufficiently clear from our cases that Those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. *Tumey* v. *Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). And *Ward* v. *Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), indicates that the financial stake need not be as direct or positive as it appeared to be in Tumey. It has also come to be the prevailing view that '(m)ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.' K. Davis, Administrative Law Text s 12.04, p. 250 (1972), and cases cited.' (Emphasis added.) (411 U.S. at pp. 578--579, 93 S.Ct. at p. 1698.)

In *Withrow* v. *Larkin* (1975) 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, the United States Supreme Court additionally notes: 'Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness. " (See also *In re Murchison* (1955) 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942.)

The Board erroneously equates the issue before us with that involved in cases which hold that a licensing or regulatory agency may constitutionally be composed in whole or in part of members of the business or profession regulated. (*Ex parte McManus* (1907) 151 Cal. 331, 90 P. 702; *Rite Aid Corp*. v. *Bd. of Pharmacy of State of N.J.* (D.C.1976) 421 F.Supp. 1161; *Hortonville Joint School District* v. *Hortonville Ed. Asso*. (1976) 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1.) We have no quarrel with such holdings. Indeed who can better judge the qualifications to practice of a doctor of medicine (as one example), or his adherence to ethical standards of the medical profession, than other doctors of medicine? Whatever incidental economic benefit doctors may gain by disciplining other doctors is not of constitutional proportion; their training, technical knowledge, and experience give them the necessary expertise to make such judgments, while prima facie these are lacking in lay persons.

Accordingly, given its functions prior to the 1973 legislation, the Board was legally constituted. But as noted, matters were then substantially altered. No longer did the Board solely sit in judgment upon new car dealers in such matters as eligibility and qualification for a license, regulation of practices, discipline for rule violations, and the like. It was given the added power to intrude upon the contractual rights and obligations of dealers and their product suppliers, entities whose respective economic interests are in no way identical or coextensive, frequently not even harmonious. No longer did members of a trade or occupation (dealer-Board-members) regulate only their own kind; they began to regulate the economic and contractual relations of others with their own kind. The considerations which support and dictate the rule of Ex parte McManus no longer prevail, for car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers.

Despite this reality, the Legislature retained the requirement that the nine-man Board consist of at least four car dealers. In effect it took sides in all Board-adjudicated controversies between dealers and manufacturers, making certain that the dealer interests would at all times be substantially represented and favored on the adjudicating body. This legislative partisanship damns the Board. The State may not establish an adjudicatory

tribunal so constituted as to slant its judicial attitude in favor of one class of litigants over another. By doing so in this instance, the Legislature violated its obligation to assure even-handedness in the adjudicatory process.

The Tumey, Ward, and Berryhill cases above cited differ from the present case in one substantial particular. There the entire adjudicatory body (a single judge in Tumey and Ward and all the board members in Berryhill) was infected by pecuniary interest, while here a minority of the full Board is so infected. Thus we do not read those cases as authority for a rule that every multiple-person administrative agency or board ipse dixit runs afoul of due process whenever one or more of its members is possessed of the condemned pecuniary interest. Nonetheless they serve as a springboard for our holding that in the context of this case there has been a denial of due process of law.

The Board argues that antagonism or bias of a judge toward a class (rather than toward an individual litigant) is not constitutionally disqualifying (*N.L.R.B*. v. *Dennison Mfg*. *Co*. (1st Cir. 1969) 419 F.2d 1080, 1085; *Tele-Trip Company* v. *N.L.R.B*. (4th Cir. 1965) 340 F.2d 575, 581), and that a disqualifying bias may not be inferred from the mere circumstance of the adjudicator's private life, i.e., 'the bare circumstance that four Board members are new car dealers.' (*Parker Precision Products Co*. v. *Metropolitan Life Ins. Co*. (3d Cir. 1969) 407 F.2d 1070, 1077--1078; *Commonwealth of Pa*. v. *Local U. 542, Int. U. of Op. Eng*. (E.D.Pa.1974) 388 F.Supp. 155, 159; *Central Sav. Bank of Oakland* v. *Lake* (1927) 201 Cal. 438, 257 P. 521; *McKay* v. *Superior Court* (1950) 98 Cal.App.2d 770, 220 P.2d 945.) As we elsewhere more specifically point out however, we do not rest our holding upon simple status. Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases (cf. *Gibson* v. *Berryhill*, supra), their mandated presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process. (FN7)

For any who might yet have difficulty comprehending the reason why the guaranteed minimum of four car dealers on the Board is both unfair and unconstitutional, the American Motors' brief offers one final telling argument. If the Legislature in 1973 had deleted the requirement that car dealers sit on the Board and had made it mandatory that four officers of car manufacturer corporations sit thereon, would the car dealers have found this acceptable? Of course not.

In summary, we do not hold, as might be argued by the Board, that car dealers are biased solely because they are members of the dealer-class of litigants and are thus per se constitutionally ineligible to sit on the Board. What we hold is that the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal.

III

We next consider what is in effect a harmless error argument. Because a majority of the Board (the five remaining members) is composed of disinterested persons, amici curiae argue that the Board as a whole must be considered impartial, citing a number of cases dealing with delegation of legislative power To fix prices and make rules. (*State Board* v. *Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 254 P.2d 29; *Allen* v. *California Board of Barber Examiners* (1972) 25 Cal.App.3d 1014, 102 Cal.Rptr. 368; *Bayside*

Timber Co. v. *Board of Supervisors* (1971) 20 Cal.App.3d 1, 97 Cal.Rptr. 431.) Since we are not concerned with the right to an impartial lawmaker but with an undisputed right to an impartial adjudicator, the cases cited do not apply.

The argument in any case has no merit. We reiterate that a new car dealer as such is not per se biased to a degree that he cannot or should not under any circumstances serve on the Board. Simple presence of a biased member does not deprive a board of jurisdiction in a particular case. (*Winning* v. *Board of Dental Examiners* (1931) 114 Cal.App. 658, 300 P. 866; *Dyment* v. *Board of Medical Examiners* (1928) 93 Cal.App. 65, 268 P. 1073; *Butler* v. *Scholefield* (1921) 54 Cal.App. 217, 201 P. 625.) T he evil here lies in the state's insistence that under all circumstances the adjudicatory deck of cards be stacked in favor of car dealers. That evil is not eliminated by stacking the deck 4/9ths of the way rather than all the way.

Insofar as the Board is given the power to adjudicate disputes between dealers and manufacturers, it is invalidly constituted. Its decision herein is a nullity because reached in violation of due process.

The judgment is affirmed.

FRIEDMAN, Acting P.J., concurs.

REGAN, Associate Justice, dissenting.

I dissent. In the proceeding in mandate the trial court ruled sections 3060 and 3066 of the Vehicle Code are violative of due process of law 'because four of the nine members of the Board are, by statute, . . . new car dealers, who may reasonably be expected to be antagonistic to franchisors such as American Motors.' The majority, in sustaining the trial court, asserts 'the objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members.' Further, the majority states: 'The State may not establish an adjudicatory tribunal so constituted as to slant its judicial attitude in favor of one class of litigants over another.' Following this observation to its logical conclusion the presence on the Board of one dealer would be violative of due process of law. This conclusion is flawed in a number of respects. It is sheer speculation to conclude, absent a finding of actual bias, that a dealer-member has a pecuniary interest antagonistic to the manufacturer in disputes between dealer and manufacturer. It is more reasonable to conclude that a dealer-member would 'slant its judicial attitude' against a competitive dealer.

I am in agreement with the holding in *Rite Aid Corp*. v. *Board of Pharmacy of State of N.J.* (D.N.J.1976) 421 F.Supp. 1161. There a pharmacy chain store system sought to declare unconstitutional and to enjoin the enforcement of certain New Jersey statutes regulating the practice of pharmacy. The pertinent state law provides memberships in the Board of Pharmacy shall consist of five members who shall be registered pharmacists actually engaged in conducting a pharmacy and who shall continue in the practice of pharmacy during the term of his office.

Rite Aid contended the statute facially unconstitutional because it requires that pharmacists regulate their business competitors and is unconstitutional as applied to *Rite Aid* and chain stores in general as independent pharmacists are required to regulate chain store pharmacies. (The court found *Rite Aid's* constitutional claims to be without merit.)

Thus, argued *Rite Aid*, the Board members are necessarily biased and can neither be impartial in their regulatory functions nor in adjudicating alleged violations of the Pharmacy Act by *Rite Aid* and other non Board-member pharmacists.

The court took notice of *Tumey* v. *Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 relied upon by the majority here as a 'landmark case on due process limitations upon such pecuniary conflicts of interest', and noted in *Rite Aid*, supra, 421 F.Supp. 1169--1170:

'It is fundamental that one accused of violating the law is entitled to a fair trial in a fair tribunal. *Tumey* v. *Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). In achieving that standard we have sought to prevent not only actual bias, but also the appearance of bias. *In re Murchison*, supra at 136, 75 S.Ct. 623. To this end, the Supreme Court has stated that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused, deprives the latter due process of law. " *Tumey* v. *Ohio*, supra, 273 U.S. at 532, 47 S.Ct. at 444. It is clear that where the adjudicator has a substantial pecuniary interest in the outcome, the probability of actual bias is too high to be constitutionally tolerable. *Withrow* v. *Larkin*, 421 U.S. 35, 46--47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Gibson* v. *Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973).

'We do not believe that the Board, consisting as it does of five pharmacists and two lay persons as required by N.J.S.A. 45:14--1, creates a situation of probable bias in the regulation of pharmacists. The claim made by *Rite Aid* is similar to the argument advanced by the plaintiff in *Kachian* v. *Optometry Examining Board*, 44 Wis.2d 1, 170 N.W.2d 743, 747--48 (1969). In this argument *Rite Aid* is not claiming actual bias but rather contends that '. . . there is an inbuilt, inescapable even if indirect, financial interest involved when (a pharmacist) board member sits in judgment on a fellow-(pharmacist).' *Kachian*, 170 N.W.2d at 747--48.

'Admittedly, the practice and conduct of a retail pharmacy primarily involves commercial activity in which various retail pharmacies compete for customers. Cf. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). However, mere theoretical competition alone has never been a sufficient predicate for an inductive conclusion of probable economic bias. *Apoian* v. *State*, 235 N.W.2d 641 (S.D.1975); *Blanchard* v. *Michigan State Bd. of Exam. in Optometry*, 40 Mich.App. 320, 198 N.W.2d 804 (1972); *Kachian* v. *Optometry Examining Board*, supra.

'*Rite Aid*, however, argues that *Gibson* v. *Berryhill*, supra, and *Wall* v. *American Optometric Association, Inc*., 379 F.Supp. 175 (N.D.Ga.) (3 judge dist. ct.) aff'd mem. 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974), support its facial attack on the N.J.S.A. 45:14--1. We cannot agree.

'*Gibson* v. *Berryhill* involved a disciplinary proceeding against a non-self-employed optometrist who was not, and could not become a member of the Alabama Optometric Association. The disciplinary proceeding was conducted by the Alabama Board of Optometry whose members were limited by statute to members of the Association, which itself, limited its members to self employed optometrists. Thus, out of Alabama's 192 practicing optometrists, only the 100 Association members were eligible for appointment to the Board. On that record, the Supreme Court agreed 'that the pecuniary interest of the

members of the Board of Optometry had sufficient substance to disqualify them, given the context in which (the) case arose.' 411 U.S. at 579, 93 S.Ct. at 1698.

'In *Wall* v. *American Optometric Association, Inc*., supra, the members of the Georgia State Board of Examiners in Optometry were traditionally chosen by the governor from among the members of the Georgia Optometric Association, a private organization which was composed of 'dispensing' as contrasted with 'prescribing' optometrists. Thus, out of Georgia's 300 optometrists, only the 200 members of the Association were eligible for appointment to the Board which regulated the practice of optometry. In this circumstance, the district court found that the board members had a substantial pecuniary interest and hence could not be 'called disinterested in the outcome of plaintiffs' license revocating proceedings.' 379 F.Supp. at 189.

'It is clear that both *Gibson* and *Wall* involve constitutional attacks addressed not to the face of the statutes involved, but rather to the manner in which they were applied. In neither case did the courts rest their holdings on the fact that mere board membership of individuals in the identical profession as those to be regulated, created a temptation to be biased.

'There is nothing that appears on the face of N.J.S.A. 45:14--1 to indicate the presence of that kind of substantial pecuniary interest which was found to disqualify board members in *Gibson* and *Wall*. As in *Gibson* and *Wall*, to determine if such an interest exists, we must look to more than the mere words of the statute. Evidence is required. Recognizing that the plaintiffs here attack the statute on both facial and 'as applied' grounds, we therefore ordered the taking of evidence to afford the plaintiffs an opportunity to prove, if they could, the existence of the required substantial pecuniary interest. We treat with that argument Infra.

'In connection with the instant facial attack, however, we have been shown no basis for us to require the disqualification of board members just by reason of their sharing the same profession as plaintiffs. Nor have we been shown any authority which holds that, as a matter of law, mere self regulation of a profession without more, violates due process. We decline to so hold and therefore reject *Rite Aid's* facial argument.' (Fns. omitted.)

In *Hortonville Joint School District No. 1* v. *Hortonville Education Association* (1976) 426 U.S. 482, 491, 96 S.Ct. 2308, 2313, 49 L.Ed.2d 1, 8, the Supreme Court has recently reiterated general language about due process and disqualifying bias in one case cannot reliably be applied to another case without further analysis. 'We must focus more clearly on first, the nature of the bias respondents attribute to the Board, and second, the nature of the interests at stake in this case.'

The Board contends in its closing brief that: 'As expressed in a recent law review article: 'An analysis of the circumstances which permit conclusive presumptions of invalidity (because of the possibility of bias on the part of the decision-maker) indicates that it is the degree of monetary benefit accruing to the decision maker, or the degree of prejudgment, or the degree of previously formulated hostility or animosity which determines whether the decision is to be disregarded because of bias.' F. Davis, *Withrow* v. *Larkin* and the 'Separation of Functions' Concept in State Administrative Proceedings, 27 Ad.L.Rev. 407, 409 (1975). Emphasis in original; footnotes deleted, brackets supplied.'

In commenting upon the situation where there is a dealer and manufacturer dispute the majority points to the mandated dealer-Board members, and the lack of counter balance in mandated manufacturer members. We must note on this point the Appendix A

to appellant's opening brief, a declaration concerning the drafting, negotiations and movement of the legislation creating the board. It declares: ( ) 'One of the major issues . . . before successful. passage was the question of adding manufacturer's representatives on the . . . Board.' This was declined by their representatives allegedly because it would create potential antitrust liabilities. Thus the majority's claim that 'The evil here lies in the state's insistence that under all circumstances the adjudicatory deck of cards be stacked in favor of car dealers' is negated. In this dissent I stress the importance of having members on the Board with the expertise to understand all aspects of each case before it. Sans such members a Board can become an ineffectual group directed in its deliberations and decisions by an executive officer or consultant.

I cannot accept the judgment of the majority which is predicated on an unfounded assumption of 'antagonism' by the Board toward manufacturers. The dealer-members have not been shown to possess a pecuniary interest which would bias them under any judicially accepted test. It has no been established that the Board is not an impartial tribunal for franchise termination protests.

I would reverse the judgment.

Rehearing denied; REGAN, J., dissenting.

Hearing denied; BIRD, C.J., dissenting.

FN1. Unless otherwise noted, all section references are to the California Vehicle Code.

FN2. An excellent review of this history, from both a legal and sociological perspective, is in Macaulay, Stewart, Law and the Balance of Power: The Automobile Manufacturers and their Dealers (New York: Russell Sage Foundation, 1966).

FN3. Originally the Board's functions were:

1. To prescribe rules and regulations relating to the licensing of new car dealers;
2. To hear and consider, within certain limitations, an appeal by an applicant for or the holder of a license as a new car dealer from an action or decision by the Department of Motor Vehicles; and
3. To consider any other matter concerning the activities or practices of applicants for or holders of licenses as new car dealers. § 3050.)

FN4. In its opening brief the Board lists 21 instances of other occupational licensing boards a majority of whose members must be licensees. Examples are the Board of Governors of the State Bar (15 of 21, Bus. & Prof.Code, §§ 6013, 6013.5), State Board of Cosmetology (3 of 5, Bus. & Prof.Code, §7301), State Board of Accountancy (6 of 8, Bus. & Prof.Code, §5000), and Board of Dental Examiners (7 of 8, Bus. & Prof.Code, §1601).

FN5. Macaulay, Stewart, Law and the Balance of Power. The Automobile Manufacturers and their Dealers (New York: Russell Sage Foundation, 1966) page 8.

FN6. See note 'The 'Right' to a Neutral and Competent Judge in Ohio Mayor's Courts,' 36 Ohio S.L.J. 889 (1975).

FN7. A seemingly contrary holding in *Ford Motor Company* v. *Pace* (1960) 206 Tenn. 559, 335 S.W.2d 360, appeal dismissed 364 U.S. 444, 81 S.Ct. 235, 5 L.Ed.2d 192 (1960) rehearing denied 364 U.S. 939, 81 S.Ct. 377, 5 L.Ed.2d 371 (1961), does not impress us. The Tennessee court did not address the specific issue directly but disposed of it under the doctrine that generally a licensing and regulatory agency may constitutionally be composed of members of the business or profession regulated. (335 S.W.2d at p. 367; cf. *Ex parte McManus* (1970) 151 Cal. 331, 90 P. 702.) We do not find it persuasive.

New Motor Vehicle Board of California et al. v. Orrin W. Fox Co., et al. (1978) 439 U.S. 96 [58 L.Ed.2d 361] [99 S.Ct. 403].
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. 77-837.
Argued October 3-4, 1978
Decided December 5, 1978*

[Footnote *] Together with No. 77-849, Northern California Motor Car Dealers Assn. et al. v. Orrin W. Fox Co. et al., also on appeal from the same court.

The California Automobile Franchise Act (Act) requires an automobile manufacturer to obtain approval of the California New Motor Vehicle Board (Board) before opening or relocating a retail dealership within the market area of an existing franchisee if the latter protests, and the Act also directs the Board to notify the manufacturer of such requirement upon the existing franchisee's filing of a protest. The Board is not required to hold a hearing on the merits of the protest before sending the notice to the manufacturer. Appellee manufacturer and proposed new and relocated franchisees, after being notified pursuant to the Act of protests from existing franchisees and before any hearings were held, brought suit challenging the constitutionality of the statutory scheme on due process grounds. A three-judge District Court held that the absence of a prior hearing requirement denied manufacturers and their proposed franchisees the procedural due process mandated by the Fourteenth Amendment. Held:

1. The statutory scheme does not violate due process. Pp. 104-108.

(a) The Act does not have the effect of affording a protesting dealership a summary administrative adjudication in the form of a notice tantamount to a temporary injunction restraining the manufacturer's exercise of its right to franchise at will. The Board's notice has none of the attributes of an injunction but serves only to inform the manufacturer of the statutory scheme and of the status, pending the Board's determination, of its franchise permit application. Pp. 104-105

(b) Nor can the Board's notice be characterized as an administrative order, since it did not involve any exercise of discretion, did not find or assume any adjudicative facts, and did not terminate or suspend any right or interest that the manufacturer was then enjoying. *Fuentes* v. *Shevin*, 407 U.S. 67; *Bell* v. *Burson*, 402 U.S. 535, distinguished. P. 105. [439 U.S. 96, 97]

(c) Even if the right to franchise constituted an interest protected by due process when the Act was enacted, the California Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right. In particular, the legislature was empowered to subordinate manufacturers' franchise rights to their franchisees' conflicting rights where necessary to prevent unfair or oppressive trade practices, and also to protect franchisees' conflicting rights through customary and reasonable procedural safeguards, i. e., by providing existing dealers with notice and an opportunity to be heard by an impartial tribunal (the Board) before their franchisor is permitted to inflict upon them grievous loss. Such procedural safeguards cannot be said to deprive the franchisor of due process. Pp. 106-108.

(d) Once having enacted a reasonable general scheme of business regulation, California was not required to provide for a prior individualized hearing each time the Act's

provisions had the effect of delaying consummation of the business plans of particular individuals. P. 108.

2. The statutory scheme does not constitute an impermissible delegation of state power to private citizens by requiring the Board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest. An otherwise valid regulation is not rendered invalid simply because those whom it is designed to safeguard may elect to forgo its protection. Pp. 108-109.

3. The Act does not conflict with the Sherman Act. Pp. 109-111.

(a) The statutory scheme is a system of regulation designed to displace unfettered business freedom in establishing and relocating automobile dealerships and hence is outside the reach of the antitrust laws under the "state action" exemption. This exemption is not lost simply because the Act accords existing dealers notice and an opportunity to be heard before their franchisor is permitted to locate a dealership likely to subject them to injurious and possible illegal competition. *Schwegmann Bros*. v. *Calvert Distillers Corp*., 341 U.S. 384, distinguished. Pp. 109-110.

(b) To the extent that there is a conflict with the Sherman Act because the Act permits dealers to invoke state power for the purpose of restraining intrabrand competition, such a conflict "cannot itself constitute a sufficient reason for invalidating the . . . statute," for "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation [439 U.S. 96, 98] would be effectively destroyed." *Exxon Corp*. v. *Governor of Maryland*, 437 U.S. 117, 133. Pp. 110-111.

440 F. Supp. 436, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion, post, p. 111. BLACKMUN, J., filed an opinion concurring in the result, in which POWELL, J., joined, post, p. 113. STEVENS, J., filed a dissenting opinion, post, p. 114.

Robert L. Mukai, Deputy Attorney General of California, argued the cause for appellants in No. 77-837. With him on the briefs were Evelle J. Younger, Attorney General, and Stephen J. Egan, Deputy Attorney General. James R. McCall argued the cause and filed briefs for appellants in No. 77-849.

William T. Coleman, Jr., argued the cause for appellees in both cases. With him on the brief were Girard E. Boudreau, Jr., George R. Baffa, Norin T. Grancell, Otis M. Smith, and Robert W. Culver.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the California Automobile Franchise Act, a motor vehicle manufacturer must secure the approval of the California New Motor Vehicle Board before opening a retail motor vehicle dealership within the market area of an existing franchisee, if and only if that existing franchisee protests the establishment of the competing dealership. The Act also directs the Board to notify the manufacturer of this statutory requirement upon the filing of a timely protest by an existing franchisee. The Board is not required to hold a hearing on the merits of the dealer protest before sending the manufacturer the notice of the requirement.[1] [439 U.S. 96, 99]

A three-judge District Court for the Central District of California entered a judgment declaring that the absence of such a prior-hearing requirement denied manufacturers and [439 U.S. 96, 100] their proposed franchisees the procedural due process mandated by the Fourteenth Amendment, 440 F. Supp. 436 (1977). We noted probable jurisdiction of the appeals in both No. 77-837 and No. 77-849,[2] 434 U.S. 1060 (1978). We now reverse.[3]

I

The disparity in bargaining power between automobile manufacturers and their dealers prompted Congress[4] and some [439 U.S. 96, 101] 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers.[5] California's version is its Automobile Franchise Act.[6] Among [439 U.S. 96, 102] its other safeguards, the Act protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intrabrand competition would be injurious to the existing franchisees and to the public interest.[7] [439 U.S. 96, 103]

To enforce this prohibition, the Act requires an automobile manufacturer who proposes to establish a new retail automobile dealership in the State, or to relocate an existing one, first to give notice of such intention to the California New Motor Vehicle Board and to each of its existing franchisees in the same "line-make" of automobile located within the "relevant market area," defined as "any area within a radius of 10 miles from the site of [the] potential new dealership."[8] If any existing franchisee within the market area protests to the Board within 15 days, the Board is required to convene a hearing within 60 days to determine whether there is good cause for refusing to permit the establishment or relocation of the dealership.[9] The Board is also required to inform the franchisor, upon the filing of a timely protest, "that a timely protest has been filed, that a hearing is required . . ., and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing . . ., nor thereafter, if the board has determined that there is good cause for not permitting such dealership."[10]

Violation of the statutory requirements by a franchisor is a misdemeanor and ground for suspension or revocation of a license to do business.[11] [439 U.S. 96, 104]

Appellee General Motors Corp. manufactures, among other makes, Buick and Chevrolet cars. Appellee Orrin W. Fox Co. signed a franchise agreement with appellee General Motors in May 1975 to establish a new Buick dealership in Pasadena. Appellee Muller Chevrolet agreed with appellee General Motors to transfer its existing Chevrolet franchise from Glendale to La Canada, Cal., in December 1975. T he proposed establishment of Fox and relocation of Muller were protested respectively by existing Buick and Chevrolet dealers. The New Motor Vehicle Board responded, as required by the Act, by notifying appellees that the protests had been filed and that therefore they were not to establish or relocate the dealerships until the Board had held the hearings required by the Act, nor thereafter if the Board determined that there was good cause for not permitting such dealerships. Before either protest proceeded to a Board hearing, however, appellees General Motors, Fox, and Muller brought the instant action.

II

At the outset it is important to clarify the nature of the due process challenge before us. Appellees and the dissent characterize the statute as entitling a protesting dealership to a summary administrative adjudication in the form of a notice having the effect of a

temporary injunction restraining appellee General Motors' exercise of its right to franchise at will. We disagree.

The Board's notice has none of the attributes of an injunction. It creates no duty, violation of which would constitute contempt. Nor does it restrain appellee General Motors from [439 U.S. 96, 105] exercising any right that it had previously enjoyed; General Motors had no interest in franchising that was immune from state regulation. It was the Act, not the Board's notice, that curtailed General Motors' right to franchise at will. The California Vehicle Code explicitly conditions a motor vehicle manufacturer's right to terminate, open, or relocate a dealership upon the manufacturer's compliance with the procedural requirements enacted in the Automobile Franchise Act and, if necessary, upon the approval of the New Motor Vehicle Board.[12] The Board's notice served only to inform appellee General Motors of this statutory scheme and to advise it of the status, pending the Board's determination, of its franchise permit applications.

Moreover, the Board's notice can hardly be characterized as an administrative order. Issuance of the notice did not involve the exercise of discretion. The notice neither found nor assumed the existence of any adjudicative facts. T he notice did not terminate or suspend any right or interest that General Motors was then enjoying. The notice did not deprive General Motors of any personal property, or terminate any of the incidents of its license to do business. [439 U.S. 96, 106]

Thus, this is not a case like *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *Bell* v. *Burson*, 402 U.S. 535 (1971), relied upon by appellees, in which a state official summarily finds or assumes the existence of certain adjudicative facts and based thereon suspends the enjoyment of an entitlement. There has not yet been either the determination of adjudicative facts, the exercise of discretion, or a suspension.

Notwithstanding all this, appellees argue that the state scheme deprives them of their liberty to pursue their lawful occupation without due process of law. Appellees contend that absent a prior individualized trial-type hearing they are constitutionally entitled to establish or relocate franchises while their applications for approval of such proposals are awaiting Board determination. Appellees' argument rests on the assumption that General Motors has a due process protected interest right to franchise at will - which asserted right survived the passage of the California Automobile Franchise Act.

The narrow question before us, then, is whether California may, by rule or statute, temporarily delay the establishment or relocation of automobile dealerships pending the Board's adjudication of the protests of existing dealers. Or stated conversely, the issue is whether, as the District Court held and the dissent argues, the right to franchise without delay is the sort of interest that may be suspended only on a case-by-case basis through prior individualized trial-type hearings.

We disagree with the District Court and the dissent. Even if the right to franchise had constituted a protected interest when California enacted the Automobile Franchise Act, California's Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right. "[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited." *Zemel* v. *Rusk*, 381 U.S. 1, 14 (1965). At least since [439 U.S. 96, 107] the demise of the concept of "substantive due process" in the area of economic regulation, this Court has recognized that, "[l]egislative bodies have broad scope to experiment with economic problems. . . ." *Ferguson* v. *Skrupa*, 372 U.S.

726, 730 (1963). States may, through general ordinances, restrict the commercial use of property, see *Euclid* v. *Ambler Realty Co*., 272 U.S. 365 (1926), and the geographical location of commercial enterprises, see *Williamson* v. *Lee Optical Co*., 348 U.S. 483, 491 (1955). Moreover, "[c]ertain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. . . . [S]tatutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency." *Nebbia* v. *New York*, 291 U.S. 502, 528 (1934).

In particular, the California Legislature was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices. "[S]tates have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . [T]he due process clause is [not] to be so broadly construed that the Congress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." *Lincoln Union* v. *Northwestern Co*., 335 U.S. 525, 536-537 (1949). See also *North Dakota Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *Ferguson* v. *Skrupa*, supra; *Williamson* v. *Lee Optical Co*., supra.

Further, the California Legislature had the authority to protect the conflicting rights of the motor vehicle franchisees through customary and reasonable procedural safeguards, i. e., by providing existing dealers with notice and an opportunity [439 U.S. 96, 108] to be heard by an impartial tribunal - the New Motor Vehicle Board - before their franchisor is permitted to inflict upon them grievous loss. Such procedural safeguards cannot be said to deprive the franchisor of due process. States may, as California has done here, require businesses to secure regulatory approval before engaging in specified practices. See, e.g., *North Dakota Board of Pharmacy* v. *Snyder's Drug Stores*, supra (pharmacy-operating permit); *St. Louis Poster Adv. Co*. v. *St. Louis*, 249 U.S. 269 (1919) (billboard permits); *Hall* v. *Geiger-Jones Co*., 242 U.S. 539 (1917) (securities registration); *Adams* v. *Milwaukee*, 228 U.S. 572 (1913) (milk inspection); *Gundling* v. *Chicago*, 177 U.S. 183 (1900) (cigarette sales license).

These precedents compel the conclusion that the District Court erred in holding that the California Legislature was powerless temporarily to delay appellees' exercise of the right to grant or undertake a Buick or Chevrolet dealership and the right to move one's business facilities from one location to another without providing a prior individualized trial-type hearing. Once having enacted a reasonable general scheme of business regulation, California was not required to provide for a prior individualized hearing each and every time the provisions of the Act had the effect of delaying consummation of the business plans of particular individuals. In the area of business regulation "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Investment Co*. v. *Colorado*, 239 U.S. 441, 445 (1915).

III

Appellees and the dissent argue that the California scheme constitutes an impermissible delegation of state power to [439 U.S. 96, 109] private citizens because the Franchise Act requires the Board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest.

The argument has no merit. Almost any system of private or quasi-private law could be subject to the same objection. Court approval of an eviction, for example, becomes necessary only when the tenant protests his eviction, and he alone decides whether he will protest. An otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection. See *Cusack Co*. v. *Chicago*, 242 U.S. 526 (1917).

IV

Appellees next contend that the Automobile Franchise Act conflicts with the Sherman Act, 15 U.S.C. 1 et seq.[13] They argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade, and thus is invalid under *Schwegmann Bros*. v. *Calvert Distillers Corp*., 341 U.S. 384 (1951).

The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption. *Parker* v. *Brown*, 317 U.S. 341 (1943); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). See also *City of Lafayette* v. *Louisiana Power & Light Co*., 435 U.S. 389 (1978). [439 U.S. 96, 110]

The Act does not lose this exemption simply because, as part of its regulatory framework, it accords existing dealers notice and an opportunity to be heard before their franchisor is permitted to locate a dealership likely to subject them to injurious and possibly illegal competition. Protests serve only to trigger Board action.[14] They do not mandate significant delay. On the contrary, the Board has the authority to order an immediate hearing on a dealer protest if it concludes that the public interest so requires. The duration of interim restraint is subject to ongoing regulatory supervision.

Appellees' reliance upon *Schwegmann Bros*. v. *Calvert Distillers Corp*., supra, is misplaced. In *Schwegmann*, the State attempted to authorize and immunize private conduct violative of the antitrust laws. California has not done that here. Protesting dealers who invoke in good faith their statutory right to governmental action in the form of a Board determination that there is good cause for not permitting a proposed dealership do not violate the Sherman Act, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc*., 365 U.S. 127 (1961), *and Mine Workers* v. *Pennington*, 381 U.S. 657, 670 (1965)[15]

Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition. "This is merely another way of stating that the . . . [439 U.S. 96, 111] statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act - `our charter of economic liberty.' . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to

render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp*. v. *Governor of Maryland*, 437 U.S. 117, 133 (1978).

Reversed.

Footnotes

[Footnote 1] The pertinent provisions of the Automobile Franchise Act are as follows:

"3062. Establishing or relocating dealerships

"(a) Except as otherwise provided in subdivision (b), in the event that [439 U.S. 96, 99] a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same line-make is then represented, or relocating an existing motor vehicle dealership the franchisor shall in writing first notify the Board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

"For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

"3063. Good cause

"In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

"(1) Permanency of the investment.

"(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

"(3) Whether it is injurious to the public welfare for an additional franchise to be established.

"(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

"(5) Whether the establishment of an additional franchise would increase [439 U.S. 96, 100] competition and therefore be in the public interest." Cal. Veh. Code Ann. 3062, 3063 (West Supp. 1978).

[Footnote 2] Appellants in No. 77-849 were made defendants in intervention by uncontested order of the District Court.

[Footnote 3] On application of appellants in No. 77-837, MR. JUSTICE REHNQUIST stayed the District Court judgment, 434 U.S. 1345, (1977) (in chambers).

Appellants in No. 77-837 argue that the District Court should have abstained under the rule of *Railroad Comm'n* v. *Pullman Co*., 312 U.S. 496 (1941), arguing that the state

courts might have construed the Automobile Franchise Act so as to limit or avoid the federal constitutional question. The District Court correctly refused to abstain. Abstention may appropriately be denied where, as here, there is no ambiguity in the challenged state statute. See *Wisconsin* v. *Constantineau*, 400 U.S. 433, 439 (1971).

[Footnote 4] A congressional Committee reported in 1956:

"Automobile production is one of the most highly concentrated industries in the United States, a matter of grave concern to officers of the Government charged with enforcement of the antitrust laws. Today there exist only 5 passenger-car manufacturers, 3 of which produce in excess of 95 percent of all passenger cars sold in the United States. There are approximately 40,000 franchised automobile dealers distributing to the public cars produced by these manufacturers. Dealers have an average investment of about $100,000. This vast disparity in economic power and bargaining strength has enabled the factory to determine arbitrarily the rules by which the two parties conduct their business affairs. These rules are incorporated in the sales agreement or franchise which the manufacturer has prepared for the dealer's signature.

"Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer." S. Rep. No. 2073, 84th Cong., 2d Sess., 2 (1956). See also S. Macaulay, Law and the Balance of Power: The Automobile Manufacturers and Their Dealers (1966).

[Footnote 5] See Automobile Dealers' Day in Court Act, 15 U.S.C. 1221-1225; Ariz. Rev. Stat. Ann. 28-1304.02 (1976); Cal. Veh. Code Ann. 3060 et seq. (West Supp. 1978); Colo. Rev. Stat. 12-6-120 (1973); Fla. Stat. 320.641 (1977); Ga. Code 84-6610 (f) (Supp. 1977); Haw. Rev. Stat. 437-33 (1976); Idaho Code 49-1901 et seq. (1967); Iowa Code 322A.2 (1977); Md. Transp. Code Ann. 15-207 (1977); Mass. Gen. Laws Ann., ch. 93B, 4 (3) (West Supp. 1978-1979); Neb. Rev. Stat. 60-1422 (1974); N. H. Rev. Stat. Ann. 357-B:4 III (c) (Supp. 1977); N. M. Stat. Ann. 64-37-5 (Supp. 1975); N.C. Gen. Stat. 20-305 (5) (1978); N. D. Cent. Code 51-07-01.1 (Supp. 1977); Ohio Rev. Code Ann. 4517.41 (Supp. 1977); Okla. Stat., Tit. 47, 565 (j) (Supp. 1978); Pa. Stat. Ann., Tit. 63, 805 (Purdon Supp. 1978-1979); R. I. Gen. Laws 31-5.1-4 (Supp. 1977); S. C. Code 56-15-40 (3) (c) (1977); S. D. Comp. Laws Ann. 32-6A-5 (1976); Tenn. Code Ann. 59-1714 (c) (Supp. 1978); Vt. Stat. Ann., Tit. 9, 4074 (Supp. 1977-1978); Va. Code 46.1-547 (Supp. 1978); W. Va. Code 47-17-5 (Supp. 1978); Wis. Stat. Ann. 218.01 (1957 and Supp. 1978-1979).

[Footnote 6] California first adopted special regulations applicable to dealers and manufacturers of automobiles in 1923. 1923 Cal. Stats., ch. 266, 46 (a), (b). These required dealers and manufacturers to apply for certification and special identifying license plates as a condition of exemption from generally applicable registration requirements. In 1957 the former certification procedure became a licensing provision, and all automobile dealers were required to apply for licenses to qualify for and continue to hold the

registration exemption. 1957 Cal. Stats., ch. 1319, 7. In [439 U.S. 96, 102] addition, it became unlawful on and after October 1, 1957, to act as a dealer without having procured a license. Ibid. The prohibition on unlicensed activity was extended to manufacturers and motor vehicle transporters by 1967 Cal. Stats., ch. 557, 1. That statute made it unlawful for any person to act as a dealer, manufacturer, or transporter of motor vehicles without a valid license and certificate issued by the Department of Motor Vehicles. 2. The 1967 statute also created the New Motor Vehicle Board, originally empowered to handle licensing of new automobile retail dealerships and to review decisions of the Department of Motor Vehicles disciplining dealers. Its powers were expanded in 1973 by the Automobile Franchise Act to empower the Board to deal with the establishment of new franchises and the relocation of existing franchises. The California Legislature expressly stated that this Act was passed "in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." 1973 Cal. Stats., ch. 996, 1. The Act also sets forth rules and procedures governing franchise cancellations, delivery and preparation obligations and warranty reimbursement. See Cal. Veh. Code Ann. 3060, 3061, 3064, and 3065 (West Supp. 1978).

[Footnote 7] For a helpful discussion of the purpose served by such laws - the promotion of fair dealing and the protection of small business - see *Forest Home Dodge, Inc*. v. *Karns*, 29 Wis. 2d 78, 138 N. W. 2d 214 (1965). This concern has prompted at least 18 other States to enact statutes which, like the Automobile Franchise Act, prescribe conditions under which new or additional dealerships may be permitted in the territory of the existing dealership. See Ariz. Rev. Stat. Ann. 28-1304.02 (1976); Colo. Rev. Stat. 12-6-120 (1973); Fla. Stat. 320.642 (1977); Ga. Code 84-6610 (f) (8), (10) (Supp. 1977); Haw. Rev. Stat. 437-28 (a), (b) (22) (1976); Iowa Code 322A.4 (1977); Mass. Gen. Laws Ann., ch. 93B, 4 (3) (e) (1) (West Supp. 1978-1979); Neb. Rev. Stat. 60-1422 (1974); N. H. Rev. Stat. Ann. 357-B:4 III (c) (Supp. 1977); N. M. Stat. Ann. 64-37-5 (Supp. 1975); N.C. Gen. Stat. 20-305 (5) (1978); R. I. Gen. Laws 31-5.1-4 (C) (11) (Supp. 1977); S. D. Comp. Laws [439 U.S. 96, 103] Ann. 32-6A-3 to 32-6A-4 (1976); Tenn. Code Ann. 59-1714 (Supp. 1978); Vt. Stat. Ann., Tit. 9, 4074 (c) (9) (Supp. 1977-1978); Va. Code 46.1-547 (d) (Supp. 1978); W. Va. Code 47-17-5 (i) (Supp. 1978); Wis. Stat. Ann. 218.01 (3), (8) (1957 and Supp. 1978-1979).

[Footnote 8] See Cal. Veh. Code Ann. 507 (West Supp. 1978).

[Footnote 9] Within 30 days after the hearing, or of a decision of a hearing officer, the Board must render its decision, or the establishment or relocation of the proposed franchise is deemed approved. See Cal. Veh. Code Ann. 3067 (West Supp. 1978).

[Footnote 10] See n. 1, supra.

[Footnote 11] California Veh. Code Ann. 11713.2 (West Supp. 1978) provides:

"It shall be unlawful and a violation of this code for any manufacturer, [439 U.S. 96, 104] manufacturer branch, distributor, or distributor branch licensed under this code:

"(l) To modify, replace, enter into, relocate, terminate or refuse to renew a franchise in violation of Article 4 (commencing with Section 3060) of Chapter 6 of Division 2."

[Footnote 12] The California Legislature expressly identified the state interests being served by the Franchise Act as "the general economy of the state and the public welfare . .

." which made it "necessary to regulate and to license vehicle dealers [and] manufacturers . . . ." The statute states:

"[T]he distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and . . . in order to promote the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." 1973 Cal. Stats., ch. 996, 1.

[Footnote 13] The District Court did not pass upon this contention. We choose to address it because the underlying facts are undisputed and the question presented is purely one of law.

[Footnote 14] Appellees state, without challenge by appellants: "117 protests have been filed under 3062 since the Act became effective (July 1, 1974). Of these, only 42 have gone to a hearing on the merits, and only one has been sustained by the Board . . . . Thus, of 117 automatic temporary injunctions issued by the Board, only one ever matured into a permanent injunction." Brief for Appellees 10 n. 13.

[Footnote 15] Dealers who press sham protests before the New Motor Vehicle Board for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suits under the federal antitrust laws. See *California Motor Transport Co*. v. *Trucking Unlimited*, 404 U.S. 508 (1972).

MR. JUSTICE MARSHALL, concurring.

Although I join the opinion of the Court, I write separately to emphasize why, in my view, the California Automobile Franchise Act is not violative of the Due Process Clause. As the Court observes, ante, at 100-103, the California statute, like its state and federal counterparts, seeks to redress the disparity in economic power between automobile manufacturers and their franchisees. By empowering the New Motor Vehicle Board to superintend the establishment or relocation of a franchise, the statute makes it more difficult for a manufacturer to force its franchisees to accept unfair conditions of trade by threatening to overload their markets with intrabrand competitors.[1] [439 U.S. 96, 112]

This litigation arises because of the delay necessarily incident to the Board's inquiry. Given the unavoidable time lag between the filing of protests and the Board's hearing, the State had to elect whether to permit the establishment or relocation of dealerships pending the Board's determination of their legality. To enjoin temporarily the proposed transactions would deprive new dealers and their franchisors of legitimate profits in cases where the dealership was eventually approved. On the other hand, allowing the transactions to go forward would force existing franchisees to bear the burden of illegal competition in cases where the Board ultimately disapproved the new dealership. Perhaps because the policy of redressing the economic imbalance between franchisees and manufacturers would be thwarted if existing franchisees were left unprotected until the Board made its decision, the California Legislature chose the former option.[2]

Assuming appellees' interest in immediately opening or relocating a franchise implicates the Due Process Clause, I do not believe it outweighs the interest of the State in protecting existing franchisees from unfair competition and economic coercion pending

completion of the Board's inquiry. See *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970); *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571 (1972). The state legislature has decided to impose the burdens of delay on appellees rather than on existing franchisees. In view of the substantial public interest at stake and the short lapse of [439 U.S. 96, 113] time between notice and hearing, the Due Process Clause does not dictate a contrary legislative decision.

[Footnote 1] Although there is little legislative history on the California Act, the need for statutory constraints on manufacturers' ability to coerce their dealers is reflected in a variety of state and federal enactments. See, e. g., statutes cited ante, at 101 n. 5; H. R. Rep. No. 2850, 84th Cong., 2d Sess., 4-5 (1956); S. Rep. No. 2073, 84th Cong., 2d Sess., 2-4 (1956); Forest Home Dodge, Inc. v. Karns, 29 Wis. 2d 78, 138 N. W. 2d 214 (1965). See generally S. Macaulay, Law and the Balance of Power: The Automobile Manufacturers and Their Dealers 139 (1966).

The dissenting opinion, post, at 121, suggests that the right of existing franchisees to protest the entry of a new competitor is of "little value," since less than 1% of the protests were successful and two-thirds were [439 U.S. 96, 112] abandoned in advance of any hearing. These figures, however, may indicate merely that the California statute has successfully served a deterrent function. In any event, the California Legislature could legitimately conclude that the "right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes* v. *Shevin*, 407 U.S. 67, 87 (1972).

[Footnote 2] See n. 1, supra. The State may also have sought to protect aspiring franchisees from the economic loss they would incur if the Board disapproved their applications after they had commenced operations.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring in the result.

I agree with the Court when it concludes (a) that the District Court rightly refused to abstain under the rule of *Railroad Comm'n* v. *Pullman Co*., 312 U.S. 496 (1941); (b) that the appellees' delegation-of-power argument is unmeritorious; and (c) that the appellees' antitrust claims are also without merit.

We are concerned here, basically, only with the issue of the facial constitutionality of certain provisions of the California Automobile Franchise Act, Cal. Veh. Code Ann. 3062, 3063 (West Supp. 1978); we are not confronted with any issue of constitutionality of the Act as applied.

It seems to me that we should recognize forthrightly the fact that California, under its Act, accords the manufacturer and the would-be franchisee no process at all prior to telling them not to franchise at will. This utter absence of process would indicate that the State's action is free from attack on procedural due process grounds only if the manufacturer and the franchisee possess no liberty or property interest protected under the Fourteenth Amendment. Indeed, that is the way I would analyze the case.

Meyer v. *Nebraska*, 262 U.S. 390, 399 (1923), of course, defined "liberty" to include "the right . . . to engage in any of the common occupations of life." The California statute, however, does not deprive anyone of any realistic freedom to become an automobile dealer or to grant a franchise; it simply regulates the location of franchises to sell certain makes of cars in certain geographical areas. The absence of regulation by California prior to the Act's adoption in 1973 surely in itself created no liberty interest susceptible of later

deprivation. And the abstract expectation of a new franchise does not qualify as a property interest. [439 U.S. 96, 114]

I regard this litigation as not focusing on procedural due process at all. Instead, it centers essentially on a claim of substantive due process. Appellees have conceded that California may legitimately regulate automobile franchises and that the State may legitimately provide a hearing as part of its regulatory scheme. The only issue, then, is whether California may declare that the status quo is to be maintained pending a hearing. In my view, California's declaration to this effect is no more than a necessary incident of its power to regulate at all. Maintenance of the status quo pending final agency action is common in many regulatory contexts. The situation here, for example, is not dissimilar to the widely adopted routine of withholding the effectiveness of announced increases in utility rates until specified conditions have been fulfilled. In asserting a right to franchise at will and a right to franchise without delay, appellees are essentially asserting a right to be free from state economic regulation. But any claim the appellees may have to be free from state economic regulation is foreclosed by the substantive due process cases, such as *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), which the Court cites.

To summarize: For me, the appellees have demonstrated the presence of no liberty or property interest; having none, they have no claim to procedural safeguards; and their claim to be free from state economic regulation is foreclosed by the substantive due process cases. Perhaps this is what the Court is saying in its opinion. I am, however, somewhat unsure of that. I prefer to recognize the facts head on; when one does, the answer, it seems to me, is inevitable and immediately forthcoming.

MR. JUSTICE STEVENS, dissenting.

This case does not involve the constitutionality of any of the substantive rules adopted by California to govern the operation of motor vehicle dealerships and the conditions that [439 U.S. 96, 115] must be satisfied to engage in that business. The case involves the validity of a procedure that grants private parties an exclusive right to cause harm to other private parties without even alleging that any general rule has been violated or is about to be violated.

In order to demonstrate that this is a fair characterization of this procedure, it is necessary to review the statutory scheme as a whole, to identify the purpose of the specific provision challenged in this case, and to explain the actual operation of that provision. It will then be apparent that there is no precedent for the Court's approval of this unique and arbitrary process and that the three-judge District Court was correct in concluding that it deprived appellees of their liberty and property without the due process of law guaranteed by the Fourteenth Amendment.

As the Court recognizes, California's Automobile Franchise Act is a member of the family of state statutes that were enacted to protect retailers from some of the risks associated with unrestrained competition. Like the retail grocers and retail druggists who convinced so many legislatures to authorize resale price maintenance,[1] and the retail gasoline dealers who convinced the Maryland Legislature to prohibit oil company ownership of service stations,[2] the retail automobile dealers have been successful in persuading Congress and various state legislatures that unrestrained competition in the car business is not an unmixed blessing.[3] Many States have [439 U.S. 96, 116] enacted automobile dealer franchise statutes that regulate and limit competition in this business.

Unquestionably, as the Court holds, the mere fact that statutory rules inhibit competition is not a reason for invalidating them.[4]

The general rules contained in the California Automobile Franchise Act are of two kinds. First, they establish standards that a dealer must satisfy in order to engage in the business in California. These standards are enforced through licensing regulations.[5] Because the dealer appellees in this case are properly licensed, and because they do not question the validity of any of these rules, these standards are not relevant here. Second, there are rules regulating the contractual relationships between manufacturers and their dealers, covering such matters as franchise terminations.[6] Again, these rules are not relevant because this case involves neither a termination nor any question concerning the contract between a manufacturer and an existing dealer. In sum, the substantive rules in the California statute have nothing to do with this case. [439 U.S. 96, 117]

This case concerns only the procedure that must be followed after a licensed manufacturer and a licensed dealer have decided either to establish a new dealership or to relocate an existing dealership. The statute contains no substantive rules pertaining to the location of dealerships or the number of dealers that may operate in any given area. It includes no limitations on the manufacturer's use of the new franchise as a means of increasing its power to bargain with existing franchisees.[7] Nor does it impose any burden on the manufacturer or the new dealer to obtain a license or an approval from a public agency before the new operation may commence business.[8] It does not even authorize a public agency, [439 U.S. 96, 118] acting on its own motion, to conduct a hearing to determine whether the new operation is desirable or undesirable.[9] In short, although I assume that California is entirely free to adopt a state policy against the establishment or relocation of motor vehicle franchises, no such policy is reflected in this statute.[10]

On the contrary, the statute actually embodies a presumption in favor of new locations. That presumption, while consistent with the fact that knowledgeable businessmen do not normally make the large capital commitments associated with a new dealership unless the market will welcome the change,[11] does not rest on that economic predicate. It rests on the language of the statute and its interpretation by the New Motor Vehicle Board.

The statute grants a curiously defined group of potential protestants - competitors within the 314-square-mile area surrounding the new location who handle the same line and make of cars - the right to demand a hearing to determine whether [439 U.S. 96, 119] "there is good cause for not permitting such dealership."[12] This language is repeated in two separate sections of the California statute.[13] Notably, the statute does not place the burden of establishing that there is good cause to permit the dealership to go forward on the new dealer or the manufacturer;[14] it places the burden of demonstrating that there is good cause not to permit the new opening to take place on the [439 U.S. 96, 120] objecting dealer.[15] If the scales are evenly balanced, the presumption will prevail.

The California Board's actual administration of the statute confirms this analysis. Of the first 117 protests filed under the law, only 1 was sustained by the Board.[16] In other words, over 99% of the contested new dealerships or relocations were found to be consistent with the policy of the statute.

The conclusion that there is no state policy against new dealerships is further confirmed by the statutory limitation on the persons who have standing to object to a proposed new opening. Most significantly, no public agency has any independent right to

initiate an objection, to schedule a hearing, or to prohibit such a change.[17] Nor does any member of the consuming public have standing to complain.[18] Indeed, even neighboring dealers who might be severely affected by new competition are without standing unless they handle the same line of cars as the new dealer. Finally, if a manufacturer is able - by whatever means - to persuade its dealers in the relevant area not to protest, the statutory policy will have been wholly vindicated without any action on the part of responsible state officials.

Properly analyzed, the statute merely confers a special benefit on a limited group of private persons who are likely to oppose the establishment or relocation of a new car dealership. Because those persons may suffer economic injury as a consequence of new competition, they are given two quite different rights. One is relatively meaningless, the other is [439 U.S. 96, 121] significant. The first is an administrative right of action to try to persuade the Board that there is good cause for not permitting the new competitor to enter the market. It is obvious that this right is of little value, since less than 1% of the protests are successful. Indeed, since about two-thirds of the protests were abandoned in advance of any hearing,[19] it is fair to infer that an opportunity to prevail at the hearing itself is not the primary object of the protest.

The second right that the statute gives to a complaining dealer is the unqualified entitlement to an order that is tantamount to a preliminary injunction absolutely prohibiting the opening of the new dealership until after the relatively meaningless hearing has been completed.[20] The "injunction" issues without any showing of probable success on the merits, without any proof of irreparable harm, and without provision for a bond or other compensation to indemnify the new dealer against loss caused by the delay. The entirely uninformative words "I protest" are enough to entitle one private party to obtain an order restraining the activities of a potential competitor.[21] Violation of that order subjects the manufacturer [439 U.S. 96, 122] and franchisee to criminal penalties and revocation of their licenses.[22]

In sum, new franchisees and their franchisors are not merely identified by the statute as in essence a new class of parties defendant in a new class of lawsuits designed in extremely rare instances to block the franchise; rather, without assuring these "defendants" that they will receive notice of the claims against them, a probable-cause finding, or a hearing of any kind,[23] the statute subjects them to an immediate injunction against the pursuit of their right to establish or relocate a car dealership upon the filing of a protest by a competitor-"plaintiff."[24]

The duration of the injunctive relief is not precisely defined by the statute,[25] but the facts of these cases demonstrate that [439 U.S. 96, 123] the relief may last for many months.[26] In a dynamic, competitive business such delays may entirely frustrate the plans for the new dealership - as happened in one of these cases - [439 U.S. 96, 124] or at least cause the new dealer to lose the opportunity to participate in a favorable market for new models. That the statutory deprivation is a temporary delay rather than a permanent denial does not avoid the serious character of the harm suffered by the new dealer while the status quo is being preserved.[27]

II

Apart from some substantive due process cases which have nothing to do with the procedural question presented by this [439 U.S. 96, 125] case[28] the Court cites no authority for its novel interpretation of the Fourteenth Amendment. This is hardly

surprising because this summary procedure for resolving conflicts between private parties flagrantly violates the precepts embodied in the Court's prior cases.

Whenever one private party seeks relief against another, it is fundamental that some attention to the merits of the request must precede the granting of relief. *Mullane* v. *Central Hanover Bank & Trust Co*., 339 U.S. 306, 313. The challenged statute provides for no such consideration of the merits nor even any notice to the losing party of what the merits of the claim against him involve.[29]

It is equally fundamental that the State's power to deprive any person of liberty or property may not be exercised except at the behest of an official decisionmaker. In a somewhat different context, the Court correctly observed:

"[I]n the very nature of things, one [private] person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute [439 U.S. 96, 126] which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter* v. *Carter Coal Co*., 298 U.S. 238, 311.

More recently, the Court has applied these principles in procedural due process contexts similar to the one at issue here. For example, in *Fuentes* v. *Shevin*, 407 U.S. 67, 93, the Court had this to say in invalidating a statute that enabled private parties unconditionally to exercise the State's power:

"The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark."[30]

Because the New Motor Vehicle Board is given no control over a competitor's power temporarily to enjoin the establishment or relocation of a dealership, that body's authority in this respect is also wielded in the dark. The result is the unconstitutional exercise of uncontrolled government power. [439 U.S. 96, 127]

There is no blinking the fact that the California statute gives private parties, serving their own private advantage, the unfettered ability to invoke the power of the State to restrain the liberty and impair the contractual arrangements of their new competitors. Such a statute blatantly offends the principles of fair notice, attention to the merits, and neutral dispute resolution that inform the Due Process Clause of the Fourteenth Amendment. This statute simply cannot bear the Court's creative recharacterization as a general - and substantively constitutional - rule governing when and how dealerships may be established and relocated.[31] Accordingly, I respectfully dissent.

[Footnote 1] These efforts were also reflected in the Miller-Tydings Fair Trade Act, which was enacted by Congress in 1937 as an amendment to 1 of the Sherman Act. 50 Stat. 693, 15 U.S.C. 1. See generally *Schwegmann Bros*. v. *Calvert Distillers, Corp*., 341 U.S. 384, 390-395.

[Footnote 2] See Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).

[Footnote 3] The statutes currently in force are collected in the opinion of the Court. Ante, at 101 n. 5. These statutes were passed essentially in three waves, the first in the late 1930's, the second in the mid-1950's, and the [439 U.S. 96, 116] third in the late 1960's and early 1970's. The first two waves resulted in statutes regulating the contractual

relationships between dealers and manufacturers, and were primarily designed to equalize the bargaining power of the two groups. The third wave not only extended this well-established type of statute into additional States but also resulted in the passage of provisions, such as the one involved in this case, relating to the opening of new franchises. See generally C. Hewitt, Automobile Franchise Agreements 165-167 (1955); Macaulay, Law and Society - Changing a Continuing Relationship Between a Large Corporation and those who Deal with it: Automobile Manufacturers, their Dealers, and the Legal System, 1965 Wis. L. Rev. 483, 513-521; Note, 70 Harv. L. Rev. 1239, 1243-1246 (1957); Comment, 56 Iowa L. Rev. 1060 (1971).

[Footnote 4] By the same token, the legislative judgment that manufacturers have greater bargaining power than dealers and may have sometimes used it abusively by threatening to overload dealers' markets with intrabrand competitors does not provide a justification for a statutory procedure that deprives all manufacturers and all new dealers of their liberty and property without due process.

[Footnote 5] Cal. Veh. Code Ann. 11700 (West Supp. 1978).

[Footnote 6] 3060, 3061, 3064, and 3065 (Supp. 1978).

[Footnote 7] Cf. Haw. Rev. Stat. 437-28 (b) (22) (B) (1976); W. Va. Code 47-17-5 (i) (2) (Supp. 1978).

[Footnote 8] Cf. Fla. Stat. 320.642 (1977); Ga. Code 84-6610 (f) (8) (Supp. 1977); Iowa Code 322A.4 (1977); S. D. Comp. Laws Ann. 32-6A-3, 32-6A-4 (1976); Tenn. Code Ann. 59-1714 (c) (20) (Supp. 1978); Wis. Stat. Ann. 218.01 (3) (f) (1957).

The Court cites *Forest Home Dodge, Inc*. v. *Karns*, 29 Wis. 2d 78, 138 N. W. 2d 214 (1965), as reflective of the purposes served by statutes such as the one at issue here. Ante, at 102 n. 7. However, the Wisconsin statute involved in the Forest Home decision is considerably different from the California statute and the purposes of the former should not be uncritically imported into the latter. The Court is similarly mistaken in its characterization of the California statute as one, like Wisconsin's, that "require[s] businesses to secure regulatory approval before engaging in specified practices." Ante, at 108 (emphasis in original). As the Court itself recognizes at an earlier point, the California statute requires approval only in certain limited circumstances, i. e., "if necessary" because of a competitor's protest. Ante, at 105. As such, the statute clearly does allow competitors to "restrain appellee[s] from exercising [a] right that [they] had previously enjoyed." Ante, at 104-105.

The Court also mischaracterizes the California statute when it describes it as "prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intrabrand competition would be injurious to the existing franchisees and to the public interest." Ante, at 102. There is no such express prohibition in the [439 U.S. 96, 118] California statute. Cf. Colo. Rev. Stat. 12-6-120 (1973); Iowa Code 322A.4 (1977); N. M. Stat. Ann. 64-37-5 (P) (Supp. 1975); S. D. Comp. Laws Ann. 32-6A-3, 32-6A-4 (1976).

[Footnote 9] Cf. Fla. Stat. 320.642 (1977); Ga. Code 84-6610 (f) (8) (Supp. 1977); Iowa Code 322A.4 (1977); S. D. Comp. Laws Ann. 32-6A-4 (1976); Tenn. Code Ann. 59-1714 (c) (20) (Supp. 1978); Wis. Stat. Ann. 218.01 (3) (f) (1957).

[Footnote 10] The statutory statement of purpose quoted by the Court, ante, at 105 n. 12, includes no reference to a policy against new or relocated dealerships. By comparison, such statutes as Fla. Stat. 320.642 (1977); Ga. Code 84-6610 (f) (8) (Supp.

1977); Tenn. Code Ann. 59-1714 (c) (20) (Supp. 1978); and Wis. Stat. Ann. 218.01 (3) (f) (1957), authorize public officials to deny applications for approval of new dealerships in all cases where existing dealers in the area are providing "adequate representation" of the relevant line and make of cars.

[Footnote 11] B. Pashigian, The Distribution of Automobiles, An Economic Analysis of the Franchise System 151 (1961); Comment, supra n. 3, at 1065-1067.

[Footnote 12] California Veh. Code Ann. 3062 (West Supp. 1978) provides, in part:

"When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership." (Emphasis added.)

Section 507 defines the 314-square-mile area that encompasses competitors with standing to challenge new dealerships.

[Footnote 13] In addition to the portion of 3062 quoted in n. 12, supra, 3063 provides:

"In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

"(1) Permanency of the investment.

"(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

"(3) Whether it is injurious to the public welfare for an additional franchise to be established.

"(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

"(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest." (Emphasis added.)

[Footnote 14] Cf. Iowa Code 322A.4 (1977); S. D. Comp. Laws Ann. 32-6A-3, 32-6A-4 (1976). See generally Comment, supra n. 3, at 1062-1063.

[Footnote 15] Cal. Veh. Code Ann. 3066 (b) (West Supp. 1978) ("The [existing] franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership").

[Footnote 16] See ante, at 110 n. 14; Brief for Appellees 10 n. 13.

[Footnote 17] Cf. statutes cited in n. 10, supra.

[Footnote 18] Cf. Iowa Code 322A.7 (1977).

[Footnote 19] See Brief for Appellees 10 n. 13.

[Footnote 20] Cal. Veh. Code Ann. 3062, 3066 (West Supp. 1978).

[Footnote 21] California's statutory scheme may be contrasted with another approach that also affords existing dealers a cause of action to block new dealerships, but does so with considerably more process. Under N. M. Stat. Ann. 64-37-5 (P) (Supp. 1975), it is unlawful for a manufacturer to establish an additional franchise in a community where the same line-make is currently represented "if such addition would be inequitable to the existing dealer." The statute makes "the sales and service needs of the public" relevant "in determining the equities of the existing dealer." Existing dealers are given a private cause

of action in state courts to enforce this prohibition and are expressly afforded the right to seek either an injunction, damages, or both. 64-37-11, 64-37-13 (Supp. 1975). It is apparent from the statute that the normal incidents of civil practice - for example, the requirement of an adequate complaint, and judicial consideration of the merits before any relief is afforded - apply in these authorized suits. See also Colo. Rev. Stat. 12-6-120 (1) (h), [439 U.S. 96, 122] 12-6-122 (3) (1973); Mass. Gen. Laws Ann., ch. 93B, 4 (3) (l) (West. Supp. 1978-1979).

[Footnote 22] Cal. Veh. Code Ann. 11705 (a) (3), 11705 (a) (10), 11713.2 (l), 40000.11 (West. Supp. 1978).

[Footnote 23] In addition, the statute gives the "defendants" the burden in every case of informing the "plaintiffs" when their cause of action arises.

[Footnote 24] Put in the more traditional language of due process analysis, the California scheme recognizes a right on the part of manufacturers and prospective dealers to establish or relocate automobile dealerships. It allows the State permanently to deprive those persons of that right upon a hearing and demonstration of cause. Finally, and what is at issue here, it allows private persons to invoke the power of the State to deprive manufacturers and prospective dealers of their rights temporarily without any process at all.

[Footnote 25] Once a protest is filed, and an injunction has automatically been granted, Cal. Veh. Code Ann. 3066 (a) (West. Supp. 1978) requires the Board to set a hearing. Although the hearing must be held within 60 days under that provision, this time limit is usually avoided when the Board refers the protest to a hearing officer, upon whom no statutory time limit is imposed. Moreover, after the hearing officer reaches a decision, the Board may either take another 30 days in adopting that decision, or an indefinite period of time in reaching an independent decision. The Board may also refer the decision back to the hearing officer with directions to take additional evidence and reach a new decision.

[Footnote 26] The manner in which the passage of the Act and the administration thereof have affected the present plaintiffs is revealed in the uncontradicted affidavits and documentary exhibits submitted by the parties. The only Buick dealer in Pasadena terminated his franchise early in 1974, and a replacement dealer had not been established until May 1975, when plaintiffs General Motors and Orrin W. Fox Co. executed a franchise agreement. Protests promptly were filed by Buick dealers located in the nearby cities of Monrovia and San Gabriel on about May 22, 1975. On May 29, 1975, the Board sent letters to General Motors advising of the protests and stating that `you may not . . . establish the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership.' The letter also advised that the Board would later fix a time for the hearing and would advise accordingly. On July 8, 1975, the Board assigned the dates of August 11 and 12, 1975, for the hearing.

"However, as the result of requests for continuance by the protesters and by stipulation, and protracted litigation in the courts concerning the right to take prehearing depositions, the protests were reset for hearing on September 15, 1976. They therefore were still pending when the present action was filed, on April 13, 1976.

"The foregoing recital shows that, under the provisions of the Act, the protesters were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick

model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay.

"Plaintiff Muller Chevrolet took over an existing dealership in the Montrose section of Glendale in 1973. It soon became apparent to Muller that its physical facilities were completely inadequate and rapidly deteriorating and that a move to a new and much larger location was mandatory. In December 1974, Mr. Muller learned that the location of the current Volkswagen dealership in the adjacent community of La Canada might become available. Negotiations were begun that were contingent upon the Volkswagen dealer finding a new site for his operation, and upon the ability of the parties to finance their respective moves. [439 U.S. 96, 124] After a year of complex and time-consuming negotiations, an agreement was reached in December 1975 and the required notice of intention to relocate was served upon the Board and the surrounding Chevrolet dealers on about January 16, 1976. A few days later, Chevrolet dealers in Pasadena and Tujunga, respectively, filed with the Board letters saying, in effect, no more than `I protest,' and on February 6, 1976, the Board responded by enjoining the proposed relocation pending a hearing on the protests. About two weeks later, on February 23, 1976, the Board `tentatively' set the hearing for June 23 through 25, 1976, and on April 21, 1976, issued a formal order confirming those dates. It is worthy of note here that such hearing was scheduled for a time more than four months after the injunction had been issued.

"It appears from a supplemental affidavit filed by Mr. Muller on September 17, 1976, that the scheduled hearing took place before a hearing officer and that the latter rendered a decision favorable to the proposed relocation on about August 20, 1976. Then began the thirty-day waiting period within which time the Board might act upon that decision before the proposed relocation could be deemed approved and the injunction finally lifted (Vehicle Code 3067). On September 14, 1976, before the end of such waiting period, Muller was advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon `gave up' with respect to this litigation and is starting all over again in his attempt to find a new site for his business." 440 F. Supp. 436, 439-440 (CD Cal. 1977) (three-judge court).

[Footnote 27] *Fuentes* v. *Shevin*, 407 U.S. 67, 84-85 ("[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a `deprivation' in the terms of the Fourteenth Amendment").

[Footnote 28] See, e. g., *Ferguson* v. *Skrupa*, 372 U.S. 726; *Lincoln Union* v. *Northwestern Co*., 335 U.S. 525, 536-537; *North Dakota Board of Pharmacy* v. *Snyder's Drug Stores, Inc*., 414 U.S. 156; *Williamson* v. *Lee Optical Co*., 348 U.S. 483.

Although the Court has distinguished between economic and other rights in giving scope to the substantive requirements of the Due Process Clause, *United States* v. *Carolene Products Co*., 304 U.S. 144, 152-153, n. 4, it has carefully and explicitly avoided that distinction in applying the procedural requirements of the Clause. E. g., *North Georgia Finishing, Inc*. v. *Di-Chem, Inc*., 419 U.S. 601, 608; *Fuentes* v. *Shevin*, supra, at 89-90. Accordingly, I assume that, despite its curious citation of the cases that establish a low level of substantive protection for economic rights, the Court is not implying that those rights do not merit the procedural protection afforded by the Fourteenth Amendment.

[Footnote 29] Although the Court has endorsed the modern relaxation of pleading rules, it has never receded from the requirement that civil complaints provide parties defendant with "fair notice" of the claims against them. *Conley* v. *Gibson*, 355 U.S. 41, 48.

[Footnote 30] See also *Mitchell* v. *W. T. Grant Co*., 416 U.S. 600, 615-617; *Gibson* v. *Berryhill*, 411 U.S. 564, 578-579; *Washington ex rel. Seattle Title Trust Co*. v. *Roberge*, 278 U.S. 116, 121-122; *Eubank* v. *City of Richmond*, 226 U.S. 137, 143-144.

The Court places great store in the fact that the California Legislature, rather than some administrative or adjudicative body, stands behind the deprivation at issue in this case. Ante, at 105. But, as *Fuentes* indicates, a legislative abdication of power to private citizens who are prone to act arbitrarily is no less unconstitutional than the arbitrary exercise of that power by the state officials themselves.

[Footnote 31] Although the Court reads my opinion differently, see ante, at 106, I do not imply that there would be any constitutional defect in a statute imposing a general requirement that no dealer may open or relocate until after he has obtained an approval from a public agency. Nor do I imply that the appellees have an interest that may not be suspended except on a case-by-case basis. If, however, a State mandates a case-by-case determination of one private party's rights, the State may not confer arbitrary power to make that determination on another private party. [439 U.S. 96, 128]

CHRYSLER CORPORATION, a Delaware Corporation, Plaintiff and Respondent, v. NEW MOTOR VEHICLE BOARD of the State of California, Defendant and Appellant. (1979) 89 Cal.App.3d 1034 [89 Cal.App.3d 1034].
Civ. 15893.
Court of Appeal, Third District, California.
March 1, 1979.
Hearing Denied April 26, 1979.

McCutchen, Black, Verleger & Shea, Franklin H. Wilson, Los Angeles, for plaintiff and respondent.

Evelle J. Younger, Atty. Gen., Stephen J. Egan, Deputy Atty. Gen., for defendant and appellant.

Crow, Lytle, Gilwee, Donaghue, Adler & Weninger, Sacramento, James R. McCall, San Francisco, amici curiae on behalf of appellants.

PARAS, Associate Justice.

This litigation is concerned with certain legislation regarding automobile dealers and dealerships (Veh. Code, §§ 3000-3069) (FN1) which became operative on July 1, 1974. In pertinent part, it provides that any existing automobile dealer may prevent the establishment or relocation of additional dealerships in the "same line-make" within 10 miles of his dealership (§§ 3062, 507), initially by protesting, and thereafter by proving to the New Motor Vehicle Board (Board) that there is "good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership" (§ 3066).

On December 23, 1975, as required by section 3062, Chrysler Corporation notified the Board and Vandenberg Motors of its intention to franchise a new Chrysler-Plymouth

dealership in Sacramento County, to be operated by Lew Williams and Frank Hurling at 2329 Fulton Avenue, within 10 miles of Vandenberg's existing Chrysler-Plymouth dealership.

On December 29, within the 15 days permitted by section 3062, Vandenberg Motors filed a protest with the Board. (FN2) As required by section 3062, the Board on December 30 notified Chrysler not to establish the new dealership until the Board held a "good cause" hearing.

On January 13, 1976, Chrysler filed suit in the Sacramento County Superior Court seeking to enjoin the Board from interfering with its establishment of the new dealership. On March 26, the court granted Chrysler a preliminary injunction, stating that there was "a strong likelihood that the pertinent statutes are unconstitutional . . .." Shortly thereafter, the prospective dealership (Lew Williams Chrysler-Plymouth) was licensed by the Department of Motor Vehicles and began operations.

The Board appeals from the order granting the preliminary injunction.

After the briefs were filed herein, we held in *American Motor Sales Corp*. v. *New Motor Vehicle Bd*. (1977) 69 Cal.App.3d 983, 138 Cal.Rptr. 594, that the mandated presence of four dealers on the Board rendered it an unconstitutionally biased tribunal for the adjudication of disputes between dealers and manufacturers. The Legislature reacted to our holding by amending sections 3010, 3050, and 3066, subdivision (d), effective July 8, 1977, to provide that "(n)o member of the board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a protest . . .."

Thereafter on September 14, 1977, a three-judge Los Angeles Federal District Court, in *Orrin W. Fox Co*. v. *New Motor Veh. Bd. etc*. (C.D.Cal.1977) 440 F.Supp. 436, held that the ability of a dealer "by the simple means of filing a protest" (Id., at p. 438) to prevent a new competitor from becoming established until a hearing is held, is a "gross violation of the Due Process Clause of the Fourteenth Amendment." (Id. at p. 440.) The court enjoined the Board from enforcing the protest provisions of the legislation. However, on December 5, 1978, the United States Supreme Court reversed the District Court (*New Motor Vehicle Board* v. *Orrin W. Fox Co*. (1978) --- U.S. ----, 99 S.Ct. 403, 58 L.Ed.2d 361).

We requested and received supplemental briefs, and after perusing them requested and received a second set of supplemental briefs, directed to whether the legislation violates the Sherman Antitrust Act (15 U.S.C., §§ 1, 2) or the Commerce Clause of the United States Constitution (art. I, § 8, cl. 3).

I
REVERSAL FOR MOOTNESS

Amici Curiae (FN3) argue that the Legislature's removal of dealer-members from protest hearings has mooted the major ground upon which the superior court granted the preliminary injunction (i.e., that the Board was a biased tribunal), and therefore the injunction should be reversed summarily. We disagree. It is well settled that decisions of trial courts must be affirmed if legally correct, regardless of their stated reason. (*D'Amico* v. *Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19, 112 Cal.Rptr. 786, 520 P.2d 10; *Davey* v. *Southern Pacific Co*. (1897) 116 Cal. 325, 329, 48 P. 117.)

II
EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Board argues in its supplemental brief that the trial court had no jurisdiction to grant Chrysler relief because Chrysler failed to exhaust its administrative remedies. However, the administrative procedures which the Board claims Chrysler should have exhausted were not Chrysler's remedy; they are the very source of the asserted injury for which Chrysler sought a remedy. Thus Chrysler comes within a well-recognized exception to the exhaustion rule, where the administrative remedy is inadequate (*Glendale City Employees' Assn., Inc*. v. *City of Glendale* (1975) 15 Cal.3d 328, 342-343, 124 Cal.Rptr. 513, 540 P.2d 609; *Gibson* v. *Berryhil*l (1973) 411 U.S. 564, 574-575, 93 S.Ct. 1689, 36 L.Ed.2d 488), or the challenge is to the constitutionality of the administrative agency itself or the agency's procedure (*State of California* v. *Superior Court* (1974) 12 Cal.3d 237, 251, 115 Cal.Rptr. 497, 524 P.2d 1281).

III

BIASED TRIBUNAL

Chrysler observes that "The Board's new motor vehicle dealer members do continue to sit on hearings on petitions by dealers to review dealer licensing decisions of the DMV. Whether the veil drawn between the Board's public members and its new motor vehicle dealer members sitting in different types of proceedings will pass constitutional muster remains an open question. It is sufficient for the purposes of this case that Chrysler did not, in fact, have available to it a constitutionally required impartial tribunal at the time it sought and obtained a preliminary injunction."

The contention is technically sound, for the validity of an order or judgment should normally be determined as of the time it is issued. Yet considerations of judicial economy, procedural efficiency, and fundamental justice dictate that at least in certain cases, of which this is one, an appellate court should rule and dispose "in accordance with the law existing at the time of its own decision, even though it lead to the reversal of a judgment which was proper at the time of its rendition (fn. omitted), or the affirmance of one wherein there was error which has since been obviated by a change in the law." (5B C.J.S. Appeal & Error § 1841, pp. 246-248; see also authorities there cited.)

IV

DUE PROCESS

In its original brief, as well as in its supplemental brief, Chrysler challenges the requirement of section 3062 that upon receipt of a protest the Board must prohibit the proposed dealership until after a hearing and determination of good cause. Chrysler asserts that due process requires a prior notice and hearing before the prospective dealer's right to engage in a lawful business can be infringed.

Similar arguments were adopted by the district court, and later rejected by the United States Supreme Court, in the *Orrin W. Fox Co*. case. The issue is thus no longer viable. No useful purpose would be served by any further detailed discussion of the subject in this opinion.

Chrysler's briefs repeatedly emphasize the adverse effects of the Board's "leisurely" hearing schedule, stressing that delay has the practical effect of denial since financial and other commitments cannot be maintained over long periods of time. We are not unsympathetic to the plaint, for the time periods, both limited and unlimited, do not exactly prophesy alacrity. Yet neither are they facially unreasonable, even though they may be a proper subject for further legislative attention. We see no valid distinction between these delays and those inherent in gaining approval of various governmental agencies and

boards to use property for such as an industrial plant, a shopping center, and the like. As delay becomes an expectable part of the process, it can be anticipated in financial preparations and thus minimized.

Chrysler suggests that even if its due process rights under the federal Constitution have not been infringed, we ought to construe the California Constitution so as to find such infringement. In support of its argument it states that "California decisions have recognized that 'every individual possesses as a form of property the right to pursue any lawful calling, business or profession he may choose.' " *Edwards* v. *Fresno Community Hosp*., 38 Cal.App.3d 702, 705, 113 Cal.Rptr. 579, 581 (1974). There is also no doubt that this right is one of constitutional dimension. California Constitution, Article I, s 7(a) (1974). In *Purdy & Fitzpatrick* v. *State*, 71 Cal.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969), the California Supreme Court declared: '. . . (T)he state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation. Any limitation on the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness; courts sustain such limitations only after careful scrutiny.' 71 Cal.2d at 579, 79 Cal.Rptr. at 86, 456 P.2d at 654.

Edwards involved a doctor whose existing hospital use privileges had been curtailed, and was concerned solely with determining statute of limitation issues. *Purdy & Fitzpatrick* held that a rule prohibiting resident aliens from employment on public works violates equal protection, not due process. They do not apply here, for the statutes do not prohibit the pursuit of a business; they regulate it. Chrysler does not contend that the State has no right to license automobile dealers or to impose zoning and other regulations upon the sale and manufacture of automobiles. Indeed, its supplemental brief emphasizes the myriad of applicable regulations. Its argument appears to be that having complied with all such regulations, its efforts should not ". . . be indefinitely rendered naught at the whim of a competing dealer. It is at that point that due process breaks down."

We cannot agree. If the State may limit, or even prohibit, certain dealers or dealerships by various regulations, it is not apparent how the additional regulations in section 3062 become a "straw that breaks the camel's back." A statute merely requiring board approval to establish a new dealership (with no requirement of a protest from an existing dealer), doubtless would not offend due process; for such a statute does not differ in effect from licensing, zoning and environmental impact regulations. The fact that the challenged statute requires board approval only when another dealer protests does not give Chrysler any less due process. The wisdom of this condition is of course not for us to judge.

V
COMMERCE CLAUSE

A Virginia statute similar to the California legislation was recently held unconstitutional under the Commerce Clause of the United States Constitution in *American Motors Sales* v. *Div. of Motor Vehicles* (E.D.Va.1948) 445 F.Supp. 902. The Virginia law provided that no additional dealerships could be established if the Commissioner of the Division of Motor Vehicles determined, after a hearing, "That there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area ; . . ." (445 F.Supp. at p. 904. Emphasis in original.) The federal District Court held that the statute " amounts to nothing less than the repression of competition on grounds that the trade area is 'already being adequately served' and that

the establishment of an additional franchise will lead to 'destructive competition.' Such a result is impermissible under the Commerce Clause." (Id. at p. 910.) The Court added that "Under such circumstances, the State, rather than the marketplace, would become the arbiter of the appropriate level of competition in each franchised industry. And if Virginia could constitutionally do this, so could every other state. The end result would be the kind of restrictive and segmented economy which the Commerce Clause was specifically intended to prohibit." (445 F.Supp. at p. 911.)

However, after this decision the United States Supreme Court decided *Exxon Corp*. v. *Governor of Maryland* (1978) 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91, which compels the conclusion that the District Court erred and that the California law does not violate the Commerce Clause. In *Exxon* the court confronted a Maryland statute requiring oil producers and refiners to close all their company-operated service stations in Maryland and to sell oil and gasoline exclusively through independent retailers. The oil companies argued Inter alia that the statute (1) discriminated against interstate commerce, and (2) unduly burdened interstate commerce. (at p. 125, 98 S.Ct. at p. 2214, 57 L.Ed.2d at p. 99.)

The Supreme Court rejected the discrimination argument on the ground that since all petroleum products are produced and refined outside Maryland, there was no discrimination in favor of local Refiners. (FN4) And the statute did not discriminate in favor of local Dealers, because interstate dealers were free to operate as retailers in Maryland (as long as they were not also refiners). (at p. 130, 98 S.Ct. at p. 2216, 57 L.Ed.2d at p. 100.) Said the court: "If the effect of a state regulation is to cause local goods to comprise a larger share, and goods with an out-of-state source to comprise a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods. The sales by independent retailers are just as much a part of the flow of interstate commerce as the sales made by the refiner-operated stations." (at p. 126, 98 S.Ct. at p. 2214 n.16, 57 L.Ed.2d at p. 100, fn. 16.)

But since the effect of the statute fell exclusively upon refiners, all of whom operated interstate, the refiners argued that the statute impermissibly burdened interstate commerce. They pointed to evidence in the record that at least three refiners would stop selling in Maryland and that the elimination of company-operated stations would deprive the consumer of certain special services. The Supreme Court rejected the burden argument, reasoning that "Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another. (P) The crux of appellants' claim is that, regardless of whether the State has interfered with the movement of goods in interstate commerce, it has interfered 'with the natural functioning of the interstate market either through prohibition or through burdensome regulation.' *Hughes* v. *Alexandria Scrap Corp*., 426 U.S. 794, 806, 96 S.Ct. 2488 (2496), 49 L.Ed.2d 220. Appellants then claim that the statute 'will surely change the market structure by weakening the independent refiners . . . .' (Fn. omitted.) We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or

methods of operation in a retail market. See *Breard* v. *Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233. As indicated by the Court in *Hughes*, the Clause protects the interstate (market, not particular interstate) firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce." (at pp. 127-128, 98 S.Ct. at pp. 2214-2215, 57 L.Ed.2d at p. 101.)

The reasoning in *Exxon* is directly applicable here. California restrictions on the establishment of new motor vehicle dealerships operate even-handedly against all motor vehicle manufacturers, whether the motor vehicles are manufactured in California or elsewhere. Thus there is no Discrimination in favor of local manufacturers or dealers or against interstate manufacturers or dealers. And the Burden on interstate commerce is exactly the same here as in *Exxon* ; there may be some switching from one interstate supplier to another, and there probably will be a fewer number of dealerships established than would otherwise be the case. But there is no reason to assume that the flow of interstate motor vehicles into California will be lessened thereby. Existing dealers will simply sell more vehicles.

In its second supplemental brief, Chrysler takes issue with such assumptions, pointing to declarations in the record that it would lose not less than 600 new vehicle sales in the year 1976 if it could not enter into a new dealership in northern Sacramento. But this is no burden on interstate commerce. Those 600 sales presumably were made up by other manufacturers, or what is perhaps equally likely, were or will be recouped sooner or later by other Chrysler dealers in other areas who gain a competitive edge because competing manufacturers are themselves unable to establish or are delayed in establishing new dealerships due to the challenged legislation. Be it remembered that the specific question is one of burden on interstate commerce, not fairness to Chrysler in any given instance.

As in *Exxon*, the ultimate effect of the statute may possibly be to injure the public incidentally by the elimination of some competition. On the other hand, giving dealers greater security against manufacturers may somehow benefit the consuming public in other ways. In any event, as *Exxon* makes clear, such considerations go ". . . to the wisdom of the statute, not to its burden on commerce." (at p. 128, 98 S.Ct. at p. 2215, 57 L.Ed.2d at p. 101; see also *New Motor Vehicle Board of California* v. *Orrin W. Fox Co*., supra, --- U.S. ----, 99 S.Ct. 403, 58 L.Ed.2d 361.)

VI

ANTITRUST

In all of its briefs, Chrysler argues that the challenged legislation violates the Sherman Antitrust Act, 15 U.S.C. sections 1 and 2. This contention was resolved adversely to Chrysler by the United States Supreme Court in the *Orrin W. Fox Co*. case (99 S.Ct. 403, 58 L.Ed.2d 361), and no further discussion by us is appropriate.

The case is remanded to the trial court with instructions to vacate the order granting the preliminary injunction. But inasmuch as the proposed dealership has been in actual operation since the Spring of 1976, and will so continue if the Board ultimately finds no cause to reject it, equity requires that it be permitted to remain in operation until the Board renders a final decision. Each party shall bear its own costs on appeal.

REGAN, Acting P. J., and REYNOSO, J., concur.

FN1. Section references henceforth are to the Vehicle Code, unless otherwise noted.

FN2. John B. Vandenberg, president of Vandenberg Motors, was and is a member of the Board. However, upon filing his protest, Vandenberg withdrew from all Board matters involving Chrysler. As we shall see, after our opinion in *American Motors Sales Corp*. v. *New Motor Vehicle Bd*. (1977) 69 Cal.App.3d 983, 138 Cal.Rptr. 594, the Legislature amended Vehicle Code sections 3010, 3050 and 3066, to make such nonparticipation mandatory.

FN3. Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California.

FN4. Presumably the result would not be different even if some petroleum products were produced locally in Maryland, because the statute discriminated even-handedly against All producers, local and interstate.

Albert PIANO and Al Piano Datsun, Petitioners and Appellants, v. STATE of California, By and Through the NEW MOTOR VEHICLE BOARD, Respondent, NISSAN MOTOR CORPORATION IN U. S. A., Real Party in Interest. (1980) 103 Cal.App.3d 412 1980) [163 Cal.Rptr. 41].
Civ. 56387.
Court of Appeal, Second District, Division 3.
March 13, 1980.

Sidney I. Pilot and A. Albert Spar, Los Angeles, for petitioners and appellants.

George Deukmejian, Atty. Gen., and Richard M. Radosh, Deputy Atty. Gen., for respondent.

O'Melveny & Myers, Donald M. Wessling and Gregory R. Oxford, Los Angeles, for real party in interest.

KLEIN, Presiding Justice.

Appellant Albert Piano, doing business as Al Piano Datsun (Piano), appeals from a superior court judgment entered January 12, 1979, denying petitions for writs of mandate (Code Civ.Proc.,§1085) (FN1) and administrative mandamus (Code Civ.Proc., §1094.5). (FN2)

Piano prayed for a writ of mandate in the superior court ordering respondent State of California, by and through the New Motor Vehicle Board (Board) to set aside its decision on Piano's protest, and enter an order not permitting real party in interest Nissan Motor Corporation in U.S.A. (Nissan) to establish a dealership. Piano also requested the court to mandate the Board to promulgate meaningful standards relating to "good cause" under Vehicle Code section 3063 (FN3) through rules and regulations.

BACKGROUND INFORMATION

On November 30, 1977, Nissan gave notice pursuant to section 3062 (FN4) of its intention to establish another Datsun motor vehicle dealership in Simi Valley. On

December 12, 1977, Piano, who had the Piano Datsun dealership in Thousand Oaks, some 12 miles distant, filed a protest with the Board.

A hearing was held between March 21 and March 31, 1978, pursuant to section 3066 (FN5) before a hearing officer, during which 15 witnesses testified and 83 exhibits were introduced. The hearing officer's proposed decision recommended that the protest be overruled. On June 30, 1978, the Board unanimously adopted the proposed decision.

In determining the issue of good cause in all five categories as required by section 3063, the hearing officer made 46 Findings of Fact, unchallenged on this appeal.

A trial was had in the superior court pursuant to the petitions for writs on November 17, 1978, wherein the protest hearing transcript and exhibits were admitted in evidence and oral arguments were heard. The trial judge denied the writ of mandate on the ground that the issuance of regulations under sections 3050(a), (FN6) 3062 and/or 3063 was not a ministerial act which the law specifically enjoined, and denied the writ of administrative mandamus (review) on the grounds that there was substantial evidence to support the findings of the Board, that the Board's decision was supported by the findings, and that Piano's claims as to jurisdiction and abuse of discretion were without merit as a matter of law.

CONTENTIONS

Piano contends that he was denied basic fairness and due process because the five specific factors set out in section 3063 did not provide adequate standards to guide the Board in determining whether "good cause" existed, and that judicial review is therefore impossible. He also avers that mandate is the proper remedy to compel the Board to promulgate regulations clarifying section 3063.

We disagree with Piano's contentions and affirm the ruling of the superior court for the reasons hereinafter discussed.

STATUTORY SCHEME

Pursuant to the statutory scheme, the statewide Board is empowered to hear and consider protests by existing motor vehicle dealers against the franchising of additional dealerships of the "same line-make."

An automobile manufacturer, before establishing a new dealership, is required to serve written notice on each of its existing dealers located within a proscribed radius of the proposed dealership. Within 15 days, any such dealer may file a "protest," the automatic effect of which is to enjoin the manufacturer from franchising the new dealership until a hearing is held.

If the protesting dealer proves at the hearing that there is "good cause for not permitting" the new dealership, the Board may prohibit it permanently. "Good cause" is defined in section 3063.

The Board customarily appoints a hearing officer to hear the evidence and prepare a proposed decision. The Board's decision must be in writing and contain findings of fact and a determination of the issues presented. Either party may seek judicial review.

It would appear that by the adoption of the above set forth statutory scheme the legislature intended that the Board balance the dealers' interest in maintaining viable businesses, the manufacturers' interest in promoting sales, and the public's interest in adequate competition and convenient service.

DISCUSSION

In applying the statutory scheme to Piano, we reject his first contention in that we determine the standards set forth in section 3063 are adequate to guide those persons to be governed thereby, whether such persons be litigants, hearing officers, the Board, or judges.

California law has upheld standards far less specific than the section 3063 "good cause" factors. For example, Unemployment Insurance Code section 1256, providing that a person is disqualified for benefits if the director finds he left his most recent work "voluntarily without good cause " (emphasis added), has been upheld. *Sanchez* v. *Unemployment Ins. Appeals Bd*. (1977) 20 Cal.3d 55, 69-70, 141 Cal.Rptr. 146, 569 P.2d 740; *Syrek* v. *Cal. Unemployment Ins. Bd*. (1960) 54 Cal.2d 519, 529-532, 7 Cal.Rptr. 97, 354 P.2d 625; *Rabago* v. *Unemployment Ins. Appeals Bd*. (1978) 84 Cal.App.3d 200, 208-209, 148 Cal.Rptr. 499. "Good cause" was defined by the California Supreme Court as " 'an adequate cause, a cause that comports with the purposes of the Unemployment Insurance Code and with other laws. . . . ' " (*Syrek* v. Cal. *Unemployment Ins. Bd*., supra, 54 Cal.2d, at p. 529, 7 Cal.Rptr. at pp. 102-103, 354 P.2d at pp. 630-631.)

In *City and County of San Francisco* v. *Superior Court* (1959) 53 Cal.2d 236, 1 Cal.Rptr. 158, 347 P.2d 294, the Supreme Court found "completely devoid of merit" a constitutional challenge to agency denial of a building permit under an overall standard of " 'promotion of the public health, safety, comfort, convenience and general welfare,' in the light of existing and effective city ordinances prescribing express or minimum standards." (*Id*., at pp. 249-250, 1 Cal.Rptr. at p. 167, 347 P.2d at p. 303.)

In *Jenner* v. *City Council* (1958) 164 Cal.App.2d 490, 498, 331 P.2d 176, 182 n. 2, a statute providing that "any land which in the judgment of the legislative body will not be benefited shall not be included in (a special parking) district," was found to provide adequate standards.

The court went on to make observations particularly pertinent to the relatively detailed language of section 3063 as follows: "(F)urther refinement of this criteri(a) would serve no useful purpose for it too would be subject to the same argument that plaintiffs are now making unless it was so detailed as to restrict the exercise of any real judgment by (the agency.) This latter result would subvert the very purpose behind the delegation of authority, viz., leaving the determination to those who are acquainted with the individual and varying local conditions. Furthermore, what might be considered a benefit in one case could well be a detriment in another, and this fact militates against the fixing of any rigid standard." (*Id*., at p. 499, 331 P.2d at p. 182.)

Section 3063 requires the Board to "take into consideration the existing circumstances, including, but not limited to:" five specific areas of inquiry. (FN7) The factors are detailed and comprehensive; if they were any more specific, they would be subject to criticism as being " . . . so detailed as to restrict the exercise of any real judgment by the local authorities." (*Jenner*, supra, at p. 499, 331 P.2d at p. 182.)

The hearing officer and the litigants apparently had no difficulty following the section 3063 guidelines, as evidenced by the number and specificity of the findings. A lengthy hearing was had with 15 witnesses testifying and 83 exhibits received. The hearing officer made copious factual findings in each of the five subdivisions in pursuance of the purpose of the statutory scheme.

In the light of Piano's claims, we examine the following:

"Findings Relating to Permanency of Investment (§ 3063(1))

"5. Piano has been a franchised Datsun dealer since August, 1972, and has been located (in) Thousand Oaks . . . since 1974. Piano is also a Honda franchisee.

"6. Piano has a substantial permanent investment at its present location. The Piano facilities are valued at over one million dollars.

" . . .

"8. . . . The nearest Datsun dealers are in Oxnard . . . and in Woodland Hills, approximately 13 miles away from Piano.

" . . .

"10. The projected population growth (rate) for Thousand Oaks . . . is . . . (at) an average annual increase of 5.6%.

"11. Piano's return on investment is higher than he anticipated when purchasing the Datsun franchise in 1972.

"12. If an additional Datsun dealer is established in Simi Valley, Piano will likely still be profitable and have a substantial return on his investment.

" . . .

"Findings Relating to the Effect on the Retail Motor Vehicle Business and the Consuming Public in the Relevant Market Area (§ 3063(2))

"14. The straight line distance from Piano's location to the proposed new dealership is over nine miles and by the shortest surface route over 12 miles.

"15. The proposed dealership is in the west end of Simi Valley and most of the population of Simi Valley is to the east of the proposed dealership, therefore, more than ten miles from Piano's location.

" . . .

"17. Piano's location is in a direction away from the areas wherein most Simi Valley residents work.

"18. There is a range of hills between Simi Valley and Thousand Oaks.

"19. A new freeway will join Simi Valley to the San Fernando Valley.

"20. The proposed new dealer in Simi Valley anticipates a substantial permanent investment.

" . . .

"Findings Relating to the Effect on the Public Welfare (§ 3063(3))

"23. Simi Valley lacks commercial operations and thus a source of revenue; there is high unemployment there.

"24. Commercial growth should be encouraged in Simi Valley specifically, a new auto dealership (is) in the public interest by generating revenue for the City, creating jobs, and reducing the loss of sales.

" . . .

"Findings Relating to Adequate Competition and Convenient Consumer Care (§ 3063(4))

" . . .

"32. While Piano's total annual Datsun sales increased from 561 to 568 . . . from 1974 to 1977 its sales in Simi Valley decreased from 110 to 103 . . . . Piano's percentage of sales to Simi Valley decreased from 19.6% to 18.1%.

"33. From 1974 to 1977, . . . (P) Piano's (s)hare of the Simi Valley Datsun market . . . decreased 40.3% and San Fernando Valley dealers' share increased 40.6%.

" . . .

"37. From 1975 to 1977, Piano's annual sales decreased from 743 to 619 (- 16.7%), Datsun district sales increased from 9,693 to 12,910 per year (k 33.2%), and Datsun region sales increased from 56,493 to 81,466 per year (k 44.2%).

" . . .

"42. In both 1976 and 1977 Nissan expressed dissatisfaction with Piano's sales and performance.

"43. Piano's location is not convenient for Simi Valley residents, being more than ten miles from most of Simi Valley.

"Findings Relating to Increased Competition and the Public Interest (§ 3063(5))

"44. Datsun car sales in Simi Valley decreased from 13.9% of industry in 1975 to 8.8% in 1977.

" . . .

"46. . . . (P) Piano's share of Simi Valley Datsun market decreased 40.3% from 1974 to 1977."

From these Findings of Fact, the hearing officer concluded:

"Piano has failed to establish that good cause exists for not permitting the establishment of the additional dealership for the following reasons:

"(a) The additional dealership will not jeopardize the permanent investment of Piano. Substantial business opportunities exist and will increase in the Thousand Oaks and adjacent areas. ((P 4(a).)

"(b) The additional dealership will not adversely affect the retail motor vehicle business and the consuming public in the relevant market area. The demographics are favorable to a new dealership in Simi Valley. ((P 4(b).)

"(c) It will (not) injure the public welfare to establish the additional franchise. A new dealership is economically desirable for Simi Valley. ((P 4(c).)

"(d) The franchise of the same line-make in the relevant market area is not providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the relevant market area because of Piano's decreased efforts, reduced sales results, and distance from Simi Valley. ((P 4(d).)

"(e) The establishment of the additional franchise will increase competition and therefore be in the public interest. The sales in Simi Valley by the nearest Datsun dealer Piano can be improved upon by a dealer in Simi Valley, which dealer will also be more convenient for Simi Valley residents. ((P 4(e).)"

The ready and thorough application of section 3063 standards to the fact situation herein bolsters our conclusion that the administrative standards as to the meaning of "good cause" are sufficiently adequate to withstand due process scrutiny. (*New Motor Vehicle Bd. of Cal*. v. *Orrin W. Fox Co*. (1978) 439 U.S. 96, 106-107, 99 S.Ct. 403, 58 L.Ed.2d 361.) The findings made pursuant to such standards therefore present an appropriate record for appellate review, and upon review we uphold the ruling of the trial judge that there was substantial evidence to support the findings of the Board and that the Board's decision was supported by the findings.

Piano received notice of the hearing, was in fact represented by counsel at the hearing, and his "protest" was thoroughly litigated pursuant to adequate administrative standards. Piano was thus afforded basic fairness and due process. (*Drummey* v. *State Bd. of Funeral Directors* (1939) 13 Cal.2d 75, 80-81, 87 P.2d 848.)

As to Piano's other major contention, to the extent that Code of Civil Procedure section 1085 is the appropriate remedy to compel an agency to act, where there is such a duty to act, as we have previously indicated there was no necessity for the Board "to act" in this case. " 'A writ of mandamus will issue only against a(n) . . . inferior tribunal "to compel the performance of an act which the law specifically enjoins" upon such (tribunal.)' " (*Valley Motor Lines Inc*. v. *Riley* (1937) 22 Cal.App.2d 233, 237, 70 P.2d 672, 674.)

Nor does the use of the language "shall (instead of may): Adopt rules and regulations" found in section 3050, subdivision (a), expressly require the Board to issue substantive requirements to make even more specific section 3063's detailed "good cause" factors. Section 3050, subdivision (a) contains no requirement that the Board promulgate any particular type of regulations or that they concern any particular statutory section. To the contrary, the Government Code provisions, Government Code section 11371, subdivision (b), (FN8) to which section 3050, subdivision (a) refers, define "regulations" as either substantive or procedural. Indeed, the Board herein has adopted numerous procedural regulations. (13 Cal.Admin.Code, subch. 2.)

Piano had a fair hearing within the clear guidelines as set down by section 3063. Since there is no duty on the Board to promulgate regulations clarifying section 3063, mandate does not lie.

Although we have found Piano's arguments unpersuasive, and reasonable minds could conclude that some of his legal actions were dilatory in nature, we do not view his appeal as an abuse of process as Nissan asserts, and therefore we do not impose sanctions against Piano.

The judgment is affirmed.

COBEY and ALLPORT, JJ., concur.

FN1. Code of Civil Procedure section 1085 provides in pertinent part:

> "It may be issued by any court, . . . to any inferior tribunal, . . . to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; . . ."

FN2. Code of Civil Procedure section 1094.5 provides in pertinent part:

> "(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. . . .
>
> "(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

FN3. Vehicle Code section 3063 provides:

"In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

"(1) Permanency of the investment.

"(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

"(3) Whether it is injurious to the public welfare for an additional franchise to be established.

"(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

"(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

Hereinafter all statutory references are to the California Vehicle Code, unless otherwise stated.

FN4. Vehicle Code section 3062 provides in pertinent part:

"(a) Except as otherwise provided in subdivision (b), in the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same line-make is then represented, or relocating an existing motor vehicle dealership, the franchisor shall in writing first notify the board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue."

FN5. Vehicle Code section 3066 states:

"(a) Upon receiving a notice of protest pursuant to Section . . . 3062 . . . the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send . . . a copy of the order to the franchisor, the protesting franchisee, and all (others who) requested notification by the board of protests and decisions of the board. . . ."

FN6. Vehicle Code section 3050, subdivision (a) provides:

"The board shall:

(a) Adopt rules and regulations in accordance with the provisions of Chapter 4.5 (commencing with Section 11371), Part 1, Division 3, Title 2 of the Government Code governing such matters as are specifically committed to its jurisdiction."

FN7. See footnote 3, ante, page 42.

FN8. Government Code section 11371, subdivision (b) states:

" 'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . " (This section in its exact form becomes section 11342, subdivision (b) as of July 1980.)

MORRIS A. THARP et al., Petitioners, v. THE SUPERIOR COURT OF TULARE COUNTY, Respondent; SAM W. JENNINGS, as Secretary, etc., et al., Real Parties in Interest (1982) 32 Cal. 3d 496 [186 Cal. Rptr. 335].
S.F. No. 24412
Supreme Court of California
September 30, 1982

Arthur C. Kralowec and Christenson & Kralowec for Petitioners.
No appearance for Respondent.
George Deukmejian, Attorney General, and George J. Roth, Deputy Attorney General, for Real Parties in Interest

KAUS, J
Mandate pursuant to section 400 of the Code of Civil Procedure, to require the Tulare County Superior Court to vacate an order granting the motion of the real party, Sam W. Jennings, Secretary of the New Motor Vehicles Board (board), for a change of venue to Sacramento County.

I

Petitioners Morris A. Tharp and Michael L. Tharp, dba Tharp Chevrolet-Buick (Tharp), filed a petition for writs of prohibition and mandate in the Tulare County Superior Court seeking to compel the board to dismiss a certain proceeding pending before it under the provisions of section 3060 et seq. of the Vehicle Code and to take no further action to revoke or suspend Tharp's temporary permit to sell new motor vehicles. n1

n1 The precise issues involved in the dispute between Tharp and the board are irrelevant to this proceeding. Suffice it to say that Tharp claims that he has an absolute right that his temporary permit be made a permanent license and that the proceedings pending before the board are illegal for jurisdictional and other reasons.

Doris Alexis, the Director of Motor Vehicles who had also been named a respondent in Tharp's petition, appeared through the chief counsel for the department and answered the petition. Jennings, however, represented by the Attorney General, moved for a change of venue to Sacramento County, supporting that motion by an appropriate demand to that effect. The basis for the Attorney General's motion was Government Code section 955 which at all relevant times read as follows: "The proper court for trial of actions against the State for the taking or damaging of private property for public use is a court of competent jurisdiction in the county in which the property is situate. [para.] Except as provided in Sections 955.2 and 955.3, upon written demand of the Attorney General made on or

before answering, the place of trial in other actions shall be changed to Sacramento County."

Since Tharp's writ proceeding is obviously not an action for inverse condemnation and as the provisions of sections 955.2 and 955.3 of the Government Code concededly do not apply, it is respondent's argument that section 955 left the trial court no choice but to change the venue to Sacramento.

For reasons rooted in the legislative lineage of section 955, we disagree.

II

The oldest ancestor of section 955 of the Government Code to which we have been able to trace, is an unnumbered paragraph in section 688 of the former Political Code, enacted in 1929. (Stats. 1929, ch. 516, § 3, p. 891.)

Section 688 outlined in some detail the necessary proceedings in suits against the state on "a claim on express contract or for negligence ...." It provided, inter alia, for (1) the presentation of a claim to the board of control as a prerequisite to suit, (2) a short period of limitations after rejection of the claim, (3) an undertaking, and (4) the method of payment if the suit proved successful. About half way down the section we find the following as part of an unnumbered paragraph: "It shall be the duty of the Attorney General to defend all such suits; *and upon his written demand made at or before the time of answering, the place of trial of any such suit must be changed to the County of Sacramento*." (Italics added.)

There can be no doubt that the phrase "any such suit" refers only to the suits mentioned in section 688, that is to say, claims on express contracts or for negligence. n2

n2 Section 688 of the Political Code was twice amended, first by Statutes 1931, chapter 325, section 15, page 849 and, two years later, by Statutes 1933, chapter 886, section 1, page 2299. Neither amendment effected any change of substance as far as the issues in this litigation are concerned.

Section 688 of the Political Code was repealed in 1945, when the Legislature added to the Government Code a more detailed statute governing claims and actions against the state. (Stats. 1945, ch. 119, p. 510.) Section 16050 of the Government Code, part of the new legislation, read as follows: "The proper court for trial of actions for the taking or damaging of private property for public use is a court of competent jurisdiction in the county in which the property is situate. [para.] Upon written demand of the Attorney General made on or before answering, the place of trial in other actions shall be changed to Sacramento County."

It is immediately apparent that but for the two exceptions relating to sections 955.2 and 955.3 of the Government Code, the 1945 statute and today's section 955 are identical. It is also apparent that like its immediate predecessor (§ 688 of the Pol. Code), section 16050 of the Government Code purported to apply only to actions described in the 1945 legislation. These were, according to former section 16041 of the Government Code, claims against the state, "(1) on express contract, (2) for negligence, or (3) for the taking or damaging of private property for public use within the meaning of Section 14 of Article I of the Constitution, ..."

The 1945 legislation was, in turn, repealed in 1959 when the Legislature added chapters 1 and 3 to division 3.5 of title 1 of the Government Code. (Stats. 1959, ch. 1715, p. 4115.) This legislation covered essentially the same ground as the 1945 statute which it replaced. According to what had then become section 641 of the Government Code, it covered claims against the state based on express contract, negligence and inverse condemnation; it required the presentation of a claim before suit and, in section 651, it again provided that -- except in inverse condemnation actions -- on written demand of the Attorney General the place of trial should be changed to Sacramento County.

Finally, in 1963 (Stats. 1963, ch. 1715, p. 3372) the Legislature, as part 3 of division 3.6 of title 1 of the Government Code, enacted a comprehensive statute governing claims against all public entities, state and local. Part of the same legislation was part 4 of division 3.6, which covered actions against public entities, including the state. There can be no doubt that the actions against public entities to which part 4 relates, are only those to which the claims procedures of part 3 apply -- claims for money or damages (Gov. Code, § § 905, 905.1) -- or claims which, though for money or damages, are specifically exempted from the requirement of a claim by part 3 itself -- for example, the matters listed in sections 905 and 905.2 of the Government Code. (See Gov. Code, § § 945.4 and 945.8.) Section 955 is part of chapter 4 of part 4 -- "Special Provisions Relating To Actions Against The State" -- and there is absolutely no reason to suppose that it relates to any type of action other than those covered by the 1963 legislation which, to repeat, are: actions on claims for money or damages for which the filing of a claim is a statutory prerequisite or actions on claims for money or damages which are specifically exempted from the filing requirement.

In sum, section 955 of the Government Code and its predecessors -- Political Code section 688, Government Code section 16050, Government Code section 651 -- have always been an integral part of a statutory scheme which prescribes procedures for the presentation of claims and actions on such claims for money or damages. While the statutes in question became progressively more complex and broader in scope and, therefore, the various sections relating to venue lost their cozy relationship with the provisions of the statute which outlined its coverage -- it will be recalled that in 1945 the venue provision was an unnumbered paragraph in section 688 of the Political Code -- they never acquired, as respondent would have it, any significance beyond the four corners of the legislation of which they were a part.

This conclusion is amply borne out by the only case directly in point -- *Duval* v. *Contractors State License Board* (1954) 125 Cal.App.2d 532 [271 P.2d 194]. In *Duval*, a San Bernardino contractor whose license had been revoked, proceeded to test the validity of the revocation under section 1094.5 of the Code of Civil Procedure. He filed his petition in the San Bernardino County Superior Court. The board, purporting to proceed under the then predecessor to section 955 of the Government Code, section 16050 of that code, successfully demanded a change of venue to Los Angeles County. n3 On appeal the order was reversed. The court pointed out that section 16050 of the Government Code was contained in a part entitled "Claims Against the State," the ambit of which was defined by then section 16041 to include only claims based on express contract, negligence or inverse condemnation. If section 16050 were to be interpreted to apply to other actions against the state, it would nullify, as far as state officers were concerned, subdivision (1)(b)

of section 393 of the Code of Civil Procedure. n4 Yet only a short time before the 1945 legislation which created the part in which section 16050 was to be found, the Court of Appeal in *Cecil* v. *Superior Court* (1943) 59 Cal.App.2d 793 [140 P.2d 125] had held that an action against the Director of Agriculture based on his revocation of a milk distributor's license, was properly brought in the county in which the licensee carried on its business and where it would be hurt by the official action. If the Legislature had disagreed with the result reached in *Cecil*, it had had adequate opportunities to nullify it, but had never done so.

n3 Code of Civil Procedure section 401, subdivision (1), provides in substance that whenever an action may be removed to the County of Sacramento, it may also be removed to any other county where the Attorney General has an office, such as Los Angeles.

n4 Code of Civil Procedure section 393 reads in relevant part as follows: "(1) Subject to the power of the court to transfer actions and proceedings as provided in this title, the county in which the cause, or some part thereof, arose, is the proper county for the trial of the following actions: ... [para.] (b) Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer."

III

Jennings maintains that even if section 955 of the Government Code is inapplicable, he still has an absolute right to trial in Sacramento County by virtue of section 395 of the Code of Civil Procedure which reads, in relevant part: "(a) Except as otherwise provided by law ... the county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action ...." The question then is whether trial in another county is "otherwise provided by law." (*Central Contra Costa Sanitary Dist.* v. *Superior Court* (1978) 84 Cal.App.3d 702, 705 [148 Cal.Rptr. 801]; *Delgado* v. *Superior Court* (1977) 74 Cal.App.3d 560, 564 [141 Cal.Rptr. 528].) As this court recognized in *Regents of University of California* v. *Superior Court* (1970) 3 Cal.3d 529, 535 [91 Cal.Rptr. 57, 476 P.2d 457], subdivision (1)(b) of section 393 (see fn. 4, *ante*) is just such a provision, authorizing trial in the county where the cause of action arose in an action "[against] a public officer ... for an act done by him in virtue of his office ...." In this case, as in *Duval* and *Cecil*, the county in which Tharp's cause of action arose was the county in which it carried on its business and would be hurt by the official action -- i.e., Tulare County. (See also *Regents of University of California* v. *Superior Court, supra,* 3 Cal.3d 529, 538-539, 542.)

Jennings claims, however, that because section 393, subdivision (1)(b) has been held inapplicable to suits against public officers designed solely to prevent the doing of certain acts in the future (*Bonestell, Richardson & Co.* v. *Curry* (1908) 153 Cal. 418, 420 [95 P. 887]), section 393 does not apply here since the proceedings before the board have not yet concluded. We think that Jennings confuses the issues of ripeness and venue.

Petitioners complain, rightly or wrongly, that after they had been granted a temporary permit to operate a Chevrolet franchise, the board, without having jurisdiction to do so,

noticed and held a hearing under section 3066 of the Vehicle Code, the effect of which could be to put them out of business as a new car dealer. In fact, according to the mandate petition below, two days before it was filed, general counsel for the Department of Motor Vehicles called petitioner's counsel and indicated that the board had "ordered" the Department of Motor Vehicles to "revoke, suspend or rescind petitioner's license to sell new Chevrolet motor vehicles." While petitioners may be quite premature in seeking judicial assistance against Jennings or the department, clearly the matter has proceeded beyond the contemplation stage. The question under section 393, subdivision (1)(b), is not whether the dispute between Tharp and the board is ripe for decision. It is, rather, whether petitioners complain that they have been injured by "an act done by [Jennings] in virtue of his office." The answer is clearly "yes."

Let a peremptory writ of mandate issue directing respondent court to vacate its order for change of venue to Sacramento County.

CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION, Plaintiff and Respondent, v. The NEW MOTOR VEHICLE BOARD, Defendant and Appellant; 49ER CHEVROLET et al., Real Parties in Interest and Appellants. (1983)
146 Cal.App.3d 533
A015529.
Court of Appeal, First District, Division 3, California.
Aug. 25, 1983.

George Deukmejian, Former Atty. Gen. and John K. Van De Kamp, Atty. Gen., Gordon Zane, Deputy Atty. Gen., San Francisco, for defendant and appellant.

McCutchen, Doyle, Brown & Enersen, J. Thomas Rosch, Richard C. Brautigam, Douglas Y. Peters, San Francisco, for plaintiff and respondent.

Richard E. Wilmshurst, Angels Camp, for real party in interest and appellant, 49er Chevrolet.

Crow, Lytle, Gilwee, Donoghue, Adler & Wenninger, Richard E. Crow, James R. McCall, Sacramento, for real parties in interest and appellants, Northern California Motor Car Dealers Ass'n, Inc. and Motor Car Dealers Ass'n of Southern California, Inc.

SCOTT, Associate Justice.

This appeal is from a judgment granting a peremptory writ of mandamus, ordering that a decision of the state's New Motor Vehicle Board (the Board) be set aside. Appellants are the Board, real party in interest 49er Chevrolet (49er), and two associations of car dealers, Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers of Southern California, Inc. (Associations), who were granted leave to intervene below. Respondent is Chevrolet Motor Division, General Motors Corporation (Chevrolet).

I

The relevant facts are as follows. Chevrolet notified 49er, its dealer in Angels Camp, that when their existing franchise agreement expired on October 31, 1980, a new agreement would not be offered. 49er protested to the Board pursuant to Vehicle Code section 3060, (FN1) which provides in pertinent part that "no franchisor shall terminate or refuse to continue any existing franchise" for the marketing of new motor vehicles "unless"

the Board "finds ... good cause for termination or refusal to continue" the franchise. The Board consists of nine members, four of whom are required to be new motor vehicle dealers. (§§ 3000, 3001.) At a hearing on a dealer-manufacturer dispute, the dealer members of the Board may participate, hear, and comment or advise other members, but they may not "decide" the matter. (§§ 3050, subd. (d), 3066, subd. (d).)

After a hearing, the Board sustained 49er's protest. Chevrolet then filed this action, seeking to require the Board to vacate its decision. The trial court granted the petition for writ of mandate on two grounds: (1) participation of dealer board members in the deliberative process, without participation of manufacturers, deprived the manufacturers of an impartial tribunal, violating due process; and (2) the Board was without jurisdiction to hear 49er's protest as the manufacturer neither "terminat[ed] [n]or refus[ed] to continue any existing franchise" within the meaning of section 3060. This appeal followed.

II

When the Board was originally established in 1967 as the New Car Dealers Policy and Appeals Board, it functioned much as do other state occupational licensing boards. Among its duties, for example, was the hearing of appeals by licensed dealers from decisions of the Department of Motor Vehicles. (See Stats.1967, ch. 1397, § 2, p. 3261 et seq.; see *American Motors Sales Corp.* v*. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986, 138 Cal.Rptr. 594.) Four of the Board's nine members were required to be "new car dealers." (Stats.1967, ch. 1397, § 2, pp. 3261-3262.)

In 1973 the Legislature renamed the Board the New Motor Vehicle Board, and added sections 3060 to 3069, which established a series of procedures for the adjudication of disputes between dealers and new car manufacturers. (Stats.1973, ch. 996, § 16, pp. 1967-1971.) Among other duties, the Board was empowered to determine whether there is "good cause" to terminate or refuse to continue a franchise. (§ 3060.) The requirement that four of the Board's members be new car dealers was not changed.

In *American Motor Sales Corp.* v*. New Motor Vehicle Bd., supra,* 69 Cal.App.3d 983, 138 Cal.Rptr. 594, a dealer-franchisee protested a noticed termination to the Board, which found that good cause had *not* been shown. (*Id.,* at p. 985, 138 Cal.Rptr. 594.) As in the present case, the franchisor challenged the Board's decision by petitioning the superior court for relief in administrative mandamus. The superior court granted relief, concluding that sections 3060 and 3066 of the Act violated due process " 'because four of the nine members of the Board are ... new car dealers, who may reasonably be expected to be antagonistic to franchisors ....' " (*Ibid.*)

In a 2-1 decision, the Court of Appeal affirmed, and the Supreme Court denied a petition for hearing. After taking note of "a long history of legal warfare between the automobile manufacturers and their dealers" (*American Motors Sales Corp.* v*. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 986, 138 Cal.Rptr. 594), the court found it "unavoidable that dealer-members of the Board have an economic stake in every franchise termination case that comes before them. The ability of manufacturers to terminate any dealership, including that of a Board member, depends entirely upon the Board's interpretation of 'good cause.' It is to every dealer's advantage not to permit termination for low sales performance, which fact however is to every manufacturer's disadvantage." (*Id.,* at p. 987, 138 Cal.Rptr. 594.)

The court acknowledged that in some instances a dealer Board member might be more financially interested in ruling in favor of the manufacturer, i.e., where the franchise of

a competitor was being terminated, or where the dealer wished to ingratiate itself with its own manufacturer. The court viewed this not as fairness, but as an equalizing unfairness. "Either way, the objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*American Motors Sales Corp*. v*. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at pp. 987-988, 138 Cal.Rptr. 594.)

The court distinguished cases holding that a licensing or regulatory agency may constitutionally be composed in whole or in part of members of the business regulated, on the ground that the members of this Board were no longer merely regulating members of their own occupation. Instead, they were regulating the economic and contractual relations of others with members of their own occupation, but "... car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers." (*American Motors Sales Corp.* v*. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at pp. 990-991, 138 Cal.Rptr. 594.)

The court then stated that the Legislature's "requirement that the nine-man Board consist of at least four car dealers" meant that "[i]n effect it [the Legislature] took sides in all Board-adjudicated controversies between dealers and manufacturers, making certain that the dealer interests would at all times be substantially represented and favored on the adjudicating body. This legislative partisanship damns the Board." (*American Motors Sales Corp.* v*. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 991, 138 Cal.Rptr. 594.) "[T]he objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*Id.,* at pp. 987-988, 138 Cal.Rptr. 594.) "Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases [citation], their *mandated* presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process." (*Id.,* at p. 992, 138 Cal.Rptr. 594, original emphasis, fn. omitted.)

The court concluded as follows: "What we hold is that the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors Sales Corp.* v*. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 992, 138 Cal.Rptr. 594; cf. *General Motors Corp.* v*. Capitol Chevrolet* (Tenn.1983) 645 S.W.2d 230; *Ford Motor Company v. Pace* (1960) 206 Tenn. 559, 335 S.W.2d 360; *Gen. GMC Trucks* v*. Gen. Motors Corp.* (1977) 239 Ga. 373, 237 S.E.2d 194.)

In reaction to the *American Motors Sales Corp.* decision, the Legislature amended section 3050, subdivision (d), and added subdivision (d) to section 3066 to provide that no member of the Board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a dispute between manufacturer and dealer. (See Stats.1977, ch. 278, §§ 2-3, pp. 1171-1173; *Chrysler Corp.* v*. New Motor Vehicle Bd.* (1979) 89 Cal.App.3d 1034, 1037, 153 Cal.Rptr. 135.) However, in a 1979 enactment which took effect as urgency legislation, the Legislature again amended the statutes, this time providing that dealer members of the Board "may participate in, hear, and comment or advise other members upon, but may not decide," any matter involving a

dealer-manufacturer dispute. (§§ 3050, subd. (d), 3066, subd. (d); Stats.1979, ch. 340, §§ 1-2, pp. 1206-1207.) According to the Legislature's declaration of urgency, the amendment was necessary "[i]n order that the educated and needed advice of New Motor Vehicle Board members who are themselves new motor vehicle dealers may be utilized in the decision making process of the board ...." (Stats.1979, ch. 340, § 3, p. 1207.)

The trial court in this case concluded that the amendments to sections 3050 and 3066 did not "cure the unconstitutionality of the earlier provisions of the statute...." The court reasoned that although dealer-Board members no longer have the right to vote, they have the opportunity fully to participate otherwise in the adjudicatory process, whereas the manufacturers are still left unrepresented.

First, appellants 49er and the Board argue that Chevrolet was not entitled to raise this constitutional question for the first time in the trial court. The general rule is that an issue not raised at an administrative tribunal may not be raised in subsequent judicial proceedings. (See, e.g., *City of Walnut Creek* v. *County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020, 162 Cal.Rptr. 224.) However, a litigant who seeks to challenge the constitutionality of the statute under which an agency operates need not raise that issue in proceedings before the agency as a condition of raising the issue in the courts. (See *State of California* v. *Superior Court* (1974) 12 Cal.3d 237, 250-251, 115 Cal.Rptr. 497, 524 P.2d 1281; *Chrysler Corp.* v. *New Motor Vehicle Bd., supra,* 89 Cal.App.3d at pp. 1038-1039, 138 Cal.Rptr. 594.)

Here Chevrolet was seeking a declaration that the statutes prescribing the Board's membership were unconstitutional. The Board itself could not have granted this relief because the Constitution expressly provides that an "administrative agency ... has no power ... [t]o declare a statute unconstitutional ...." (Cal. Const., art. III, § 3.5.) There was no waiver of Chevrolet's right to raise the constitutional issue in the trial court in these circumstances.

The Board and 49er also argue that Chevrolet should have requested that the dealer members "recuse" themselves from participating. The dealer members of the Board constituted almost half of its total membership (see §§ 3000-3001), and as members they were authorized to participate in franchise disputes. (See § 3050, subd. (d).) If this argument were accepted, predictably automatic requests for the recusal of dealer members would have the effect of routinely depriving the Board of participation by a substantial number of its members in situations involving one of its basic functions. Clearly their recusal was not intended by the Legislature.

Next, appellants contend that *American Motors* is now of questionable validity, in light of *Andrews* v. *Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151. In that case, the Supreme Court held that an administrative law officer with expressed or "crystallized" political or legal views cannot be disqualified on that basis alone, even if those views result in an appearance of bias. (*Id.,* at pp. 791, 793-794, 171 Cal.Rptr. 590, 623 P.2d 151.) Appellants reason that the group antagonism and economic conflict between dealers and manufacturers mean that car dealer Board members at most may have "crystallized views" about policy issues in adjudications between manufacturers and dealers. After *Andrews,* appellants urge, absent proof of actual bias, such views are not enough to support a holding that an adjudicator cannot provide a fair tribunal.

However, the *American Motors* court did not find the dealer Board members partial because of their views on issues of law or policy; rather, that court squarely held that those

Board members had an "economic stake" in every franchise termination case which came before them. The *Andrews* court itself acknowledged that no proof of actual bias is required for disqualification when a judicial officer has a financial interest in a case. (*Andrews* v*. Agricultural Labor Relations Bd., supra,* 28 Cal.3d at p. 793, fn. 5, 171 Cal.Rptr. 590, 623 P.2d 151.)

Appellants then argue that the Board is not a biased tribunal and its action in this case did not deny Chevrolet due process because none of the "adjudicator members" of the Board were biased. Appellants emphasize that there is no contention made that any factor exists which could lead a court to find that the five public members of the Board were or are biased. According to appellants, the dealer members' participation in these proceedings was solely to provide expert advice, a function analogous to that provided to other boards or commissions by agency staff members or assistants. (See, e.g., *Porter County Chapter* v*. Nuclear Reg. Com'n* (D.C.Cir.1979) 606 F.2d 1363, 1370-1372.)

We are not persuaded by appellants' attempts to minimize the dealer Board members' role in these proceedings. Unlike agency staff, the dealer Board members have a financial stake in every dealer-manufacturer dispute which comes before the Board. (*American Motors Sales Corp.* v*. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 987, 138 Cal.Rptr. 594.) Nevertheless, they are permitted to participate actively in hearings on dealer-manufacturer disputes, hear the evidence, and comment upon and advise other Board members in such matters. In other words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decision-making process, despite their financial interest in the outcome of that process. The Board has numerous powers and duties other than hearing protests by dealers, and the dealer Board members' participation in those other tasks is unrestricted. (See § 3050.) Because of their ongoing working relationship, public members of the Board may be influenced by arguments or facts suggested by the dealer members but not included in the public record, and the parties themselves may not have the opportunity to respond.

In short, the presence of biased members on the Board presents a substantial probability that decisions in dealer-manufacturer disputes will be made on the basis of inappropriate considerations, and the fact that those members do not technically "decide" the disputes does not alter that probability. Each of the factors enumerated in *American Motors* is still present. The Board is still required by statute to have four dealer members. (See § 3001.) The statute neither requires nor authorizes manufacturer members. (See *ibid.*) The nature of the adversaries and the controversies between them remains the same. These problems have not been remedied by the subsequent changes in sections 3050 and 3066. Accordingly, the trial court did not err when it concluded that participation of the Board's dealer members in these proceedings denied Chevrolet an unbiased tribunal.

In light of our conclusion, we need not consider appellants' contention that the court also erred when it concluded that Chevrolet did not terminate or refuse to continue the franchise within the meaning of section 3060.

Judgment is affirmed.

WHITE, P.J., and FEINBERG, J., concur.

FN1. Unless otherwise indicated, all statutory references are to the Vehicle Code.

NISSAN MOTOR CORPORATION IN U.S.A., Plaintiff and Respondent, v. NEW MOTOR VEHICLE BOARD, Defendant and Appellant; DALY CITY DATSUN, Real Party in Interest and Appellant; MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, INC., et al., Interveners and Appellants (1984)153 Cal. App. 3d 109 [202 Cal. Rptr. 1].
Civ. No. 53381
Court of Appeal of California, First Appellate District, Division Four
January 19, 1984

John K. Van de Kamp and George Deukmejian, Attorneys General, N. Eugene Hill, Assistant Attorney General, Harold W. Teasdale and Gordon Zane, Deputy Attorneys General, for Defendant and Appellant.

Dario De Benedictis, Peter Anderson, Adam F. Gambel and Thelen, Marrin, Johnson & Bridges for Real Party in Interest and Appellant.

Richard E. Wilmshurst as Amicus Curiae on behalf of Real Party in Interest and Appellant.

Crow, Lytle, Gilwee, Donoghue, Adler & Weninger, Richard E. Crow and James R. McCall for Interveners and Appellants.

Gibson, Dunn & Crutcher, Robert E. Cooper, Gail E. Lees, Elizabeth A. Grimes and Timothy J. Conley for Plaintiff and Respondent.

McCutchen, Doyle, Brown & Enersen, J. Thomas Rosch and Richard C. Brautigam as Amici Curiae on behalf of Plaintiff and Respondent.

Caldecott, P. J., with Poche and Panelli, JJ., concurring.

Appellants are Daly City Datsun, a new car dealer (hereinafter DCD or franchisee) and the New Motor Vehicle Board, a state agency (hereinafter Board). The respondent is Nissan Motor Corporation in U.S.A. (hereinafter Nissan or franchisor).

In October 1979 Nissan terminated DCD's franchise on the ground that DCD had failed to fulfill the requirements of the franchise for the preceding four years. Pursuant to Vehicle Code n1 sections 3050-3069, DCD filed with the Board a protest against the intended termination of franchise. Following an extensive hearing the administrative law judge found that Nissan had amply demonstrated good cause to terminate DCD's franchise pursuant to section 3061. The Board, however, refused to accept the proposed decision of the hearing officer. Instead, the Board conducted an additional hearing in the matter at the conclusion of which it found among others that although DCD had failed to meet many of Nissan's national franchise requirements, the franchisor had not established that those requirements were reasonable. Nonetheless, the Board concluded the DCD had no substantial permanent investment and also that the service facility of the franchisee was substandard and inefficient. Consistent therewith, the Board gave DCD two years to construct a replacement facility to remedy the deficiencies in its existing service facility and held that the protest would be deemed denied and the termination approved if in two years DCD had not built such a replacement.

n1 Unless otherwise indicated, all further statutory references will be made to the California Vehicle Code.

Thereafter Nissan filed a petition for writ of mandamus in the superior court alleging inter alia that the procedure conducted before the Board violated its due process right and was invalid; that the Board acted without jurisdiction by rendering a conditional order; that the Board abused its discretion inasmuch as its decision is not supported by its findings and its findings are not supported by the evidence. After a hearing the trial court agreed with respondent and held that Nissan had been denied its constitutional right to a fair hearing because of dealer participation in the hearing process; that the conditional order issued by the Board was not authorized by the code; and that there was no substantial evidence supporting the findings and decision of the Board. Consistent therewith, the trial court entered judgment in favor of respondent. DCD and the Board first filed their respective motions for a new trial and following the denial of their motions they pursued the present appeals.

While the parties n2 raise a number of additional issues as well, the seminal question on appeal is whether the trial court correctly determined that owing to the defects in the statute Nissan's constitutional right to procedural due process had been violated in the proceedings before the Board.

n2 With leave of this court Chevrolet Motor Division of General Motors Corporation has filed an amicus brief in support of Nissan, while 49er Chevrolet, another car dealer, has filed an amicus brief in support of DCD.

In addressing this crucial issue, first we set out the pertinent provisions of the California Automobile Franchise Act (hereinafter Act), (§ 3000 et seq.). Section 3000 provides that the New Motor Vehicle Board which adjudicates the issues pertaining to the automobile franchises consists of nine members. Under section 3001 four of the nine members shall be new motor vehicle dealers, while the remaining five shall be members of the general public. The statute provides that the franchisor may terminate or refuse to continue any existing franchise only if it gives a prior notice to the franchisee and the Board (§ 3060, subd. (a)) and the Board, based upon the evidence presented by the franchisor, finds that good cause exists for such termination. (§§ 3060, subd. (b); 3061; 3066.)

The critical provisions regulating the procedure of the Board are contained in sections 3050 and 3066. As amended in 1979, section 3050 provides in relevant part: "The board shall do all of the following: ... (d) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065. *A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest* filed pursuant to Article 4 (commencing with Section 3060)." (Italics added.)

Section 3066, subdivision (d) likewise underlines that: "*A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest* filed pursuant to this article. Dealer participation shall be recorded in the minutes of the meeting." (Italics added.)

Nissan vigorously contends (as it had in the court below) that the statutory scheme set out above is fundamentally unfair inasmuch as it fails to provide an impartial and

unbiased body, a quintessential requisite for a fair hearing and due process, for the purpose of adjudicating the dealer-manufacturer disputes. More accurately, Nissan argues that, when read along with section 3001, sections 3050, subdivision (d) and 3066, subdivision (d) are unconstitutional because they ensure a lopsided participation of the car dealers in the Board proceeding without any representation by the manufacturers and thereby deny the manufacturers the right to a fair hearing by an adjudicatory body free from bias and financial interest. For the reasons which follow we agree with respondent and conclude that due to the constitutional infirmity of the cited statutory sections the decision of the Board must be held void and null in its entirety.

It is well settled that a fair trial in a fair tribunal is a basic requirement of due process. (*In re Murchison* (1955) 349 U.S. 133, 136 [99 L.Ed. 942, 946, 75 S.Ct. 623].) Due process requires a competent and impartial tribunal in the administrative hearings. (*Goldberg* v. *Kelly* (1970) 397 U.S. 254, 271 [25 L.Ed.2d 287, 300-301, 90 S.Ct. 1011].) Even if there is no showing of actual bias in the tribunal, due process is deemed to be denied by circumstances that create the likelihood or appearance of bias. (*Peters* v. *Kiff* (1972) 407 U.S. 493, 502 [33 L.Ed.2d 83, 93-94, 92 S.Ct. 2163].) As the Supreme Court stated in *In re Murchison, supra,* 349 U.S. at page 136 [99 L.Ed. at page 946]: "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

In the case at bench, the tribunal is clearly biased and slanted towards the car dealers and such fact appears upon the face of the statute. As cited above, while the code requires that four of the nine members of the Board be new car dealers, there is no provision whatsoever, that the other parties to the dispute, i.e., the manufacturers be also represented on the Board. Moreover, sections 3050 and 3066, subdivision (d) explicitly provide that the car dealer members of the Board may participate in, hear, and comment or advise other members upon any matter involving the protest, again without the required symmetry of allowing similar participation on the part of the other interested parties, namely the car manufacturers. Unquestionably, this disparity in representation of the parties on the Board creates a substantial likelihood and/or appearance of bias rendering the tribunal and its decision unconstitutional as a matter of law.

In arriving at our decision we are greatly aided by *American Motors Sales Corp.* v. *New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983 [138 Cal.Rptr. 594], and *Chevrolet Motor Division* v. *New Motor Vehicle Bd*. (1983) 146 Cal.App.3d 533 [194 Cal.Rptr. 270].

In *American Motors* a dealer-franchisee protested a noticed termination of the franchise to the Board. Although a hearing officer found good cause for the termination, similar to the case at bench, the Board rejected the proposed decision, conducted a hearing itself and found that no good cause for the termination had been shown. As in the present case, the franchisor challenged the Board's decision by petitioning the superior court for relief in administrative mandamus. The trial court granted the relief by concluding that sections 3060 and 3066 of the Act violated due process. In affirming the trial court's judgment the appellate court pointed out that the statutory requirement that the nine-man Board consisted of at least four-car dealers meant that the Legislature assumed a legal partisanship making it certain that the dealer interests would be at all times substantially represented and favored on the adjudicating body; and that the challenged Board

members had a substantial pecuniary interest in franchise termination cases which potentially prevented a fair and unbiased examination of the issues and raised the distinct possibility that the dealer-manufacturer controversy would not be decided on its merits but rather on the potential pecuniary interest of the dealer members. Based upon these observations the appellate court concluded that "the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors Sales Corp.* v*. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 992.)

Even closer to the point is *Chevrolet Motor Division* where in an almost identical situation the court was called upon to decide the constitutionality of sections 3050, subdivision (d) and 3066, subdivision (d), as amended in 1979 (Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207) and as they read today. In reaffirming the trial court's conclusion that the 1979 amendments to sections 3050 and 3066 did not cure the unconstitutionality of the earlier provisions of the statute (*American Motors Sales Corp.* v*. New Motor Vehicle Bd., supra,* 69 Cal.App.3d 983), the reviewing court emphasized that while under the amended sections the dealer-members of the Board may not decide the controversy (see §§ 3050, subd. (d), 3066, subd. (d), *supra*) they still have the opportunity to participate in the adjudicatory process and unduly influence the neutral members of the Board in its decision-making thereby rendering the procedure both unbalanced and biased. As the court stated: "they [the dealer-members] are permitted to participate actively in hearings on dealer-manufacturer disputes, hear the evidence, and comment upon and advise other Board members in such matters. In other words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decisionmaking process, despite their financial interest in the outcome of that process .... Because of their ongoing working relationship, public members of the Board may be influenced by arguments or facts suggested by the dealer members but not included in the public record, and the parties themselves may not have the opportunity to respond. [para.] In short, the presence of biased members on the Board presents a substantial probability that decisions in dealer-manufacturer disputes will be made on the basis of inappropriate considerations, and the fact that those members do not technically 'decide' the disputes does not alter that probability. Each of the factors enumerated in *American Motors* is still present." (*Chevrolet Motor Division* v*. New Motor Vehicle Bd., supra,* 146 Cal.App.3d at p. 541.)

In light of *Chevrolet Motor Division*, appellants' additional contentions may be briefly disposed of. The first argument that Nissan was not entitled to raise the constitutional question for the first time in the trial court, is properly answered by the settled rule that a litigant who seeks to challenge the constitutionality of the statute under which an agency operates need not raise that issue in the proceedings before the agency as a condition of raising the issue in the courts (*Chevrolet Motor Division* v*. New Motor Vehicle Bd., supra,* 146 Cal.App.3d at p. 539; see also *State of California* v*. Superior Court* (1974) 12 Cal.3d 237, 250-251 [115 Cal.Rptr. 497, 524 P.2d 1281]; *Chrysler Corp.* v*. New Motor Vehicle Bd.* (1979) 89 Cal.App.3d 1034, 1038-1039 [153 Cal.Rptr.135].)

Appellants' next claim that Nissan should have requested that the dealer members "recuse" themselves from participating in the dispute must be rejected for two reasons. One, under the mandatory provision of the statute the dealer members of the Board constituted almost half of its total membership (§§ 3000, 3001) and as members they were authorized to participate in franchise disputes (§ 3050, subd. (d)). Two, as *Chevrolet Motor Division* aptly underscores, due to the aforestated reasons the recusal of the dealer members clearly was not intended by the Legislature (*Chevrolet Motor Division* v*. New Motor Vehicle Bd., supra,* 146 Cal.App.3d at p. 540).

Appellants' last contention that in light of *Andrews* v*. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781 [171 Cal.Rptr. 590, 623 P.2d 151], *American Motors* has questionable validity, may also be disposed of in a brief fashion. While the Supreme Court expressed the view in *Andrews* that an administrative law officer with expressed or "crystallized" political or legal views cannot be disqualified on that basis alone, even if those views result in an appearance of bias, the court explicitly stated that no proof of actual bias is required for disqualification when, as in the present case, the judicial or quasi-judicial officer has a financial interest or economic stake in the controversy (*Andrews* v*. Agricultural Labor Relations Bd., supra*, 28 Cal.3d at p. 793, fn. 5).

In summary we have concluded that the Board is unlawfully constituted and its procedure violates the basic precepts of due process to decide disputes between manufacturers and dealers. The Board decision is invalid.

In the light of this conclusion the additional issues raised by the parties need not be reached.

The judgment is affirmed insofar as it holds that the proceedings before the Board were unconstitutional (paragraphs (1) and (2). The provisions of the judgment commanding the Board to enter a new decision to the effect that good cause was shown for the termination of the franchise and Nissan Motor Corporation was entitled to terminate the franchise in dispute are reversed. The case is remanded for further proceedings before a Board acting without the participation of the new motor vehicle dealer members (§ 3010).

TOYOTA OF VISALIA, INC., et al., Plaintiffs and Appellants,v. DEPARTMENT OF MOTOR VEHICLES et al., Defendants and Appellants. (1984) 155 Cal.App.3d 315 *[202 Cal. Rptr. 190* .]
Civ. No. 7617 (F001650).
Court of Appeal, Fifth District, California.
May 2, 1984.
Certified for Partial Publication (FN1)

Coder & Tuel and Houston N. Tuel, Jr., Sacramento, for plaintiffs and appellants.

John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Asst. Atty. Gen., and Susan P. Underwood, Deputy Atty. Gen., Sacramento, for defendants and appellants.

OPINION

ZENOVICH, Associate Justice.

This case is before us on an appeal by the Department of Motor Vehicles and the New Motor Vehicle Board from that portion of the judgment which grants a peremptory writ of mandamus commanding them to set aside the revocation of the automobile dealers' licenses of Toyota of Visalia and Pioneer Dodge and to reconsider the penalties previously imposed. That part of the judgment which denies the petition for writ of mandamus is appealed by Toyota of Visalia and Pioneer Dodge.

The Department of Motor Vehicles (Department) filed accusations against Toyota of Visalia (Toyota) and Pioneer Dodge (Pioneer) alleging, respectively, 11 and 8 different categories of violations of the Vehicle Code. (FN2)

Thereafter, a hearing was held before an administrative judge who issued his proposed decisions, finding violations on all but one count and ordering revocation on four counts against Toyota and on two counts against Pioneer, as well as several consecutive suspensions for each dealership.

After these decisions were adopted by the Department, Toyota's and Pioneer's petitions for reconsideration were denied and the dealerships appealed to the New Motor Vehicle Board (Board).

The Board thereafter issued its decisions, in each case modifying the Department's decision and affirming it as modified. These modifications consisted of increasing three penalties (one against Toyota and two against Pioneer), decreasing five penalties (three against Toyota and two against Pioneer), and reversing the Department's finding of a violation on two counts against each dealership.

Thereafter, Toyota and Pioneer filed a petition for a writ of mandamus in the Superior Court of the County of Tulare, alleging that the dealerships were denied a fair hearing, the Board exceeded its jurisdiction by increasing the penalty on appeal, the decision was not supported by the findings, and the findings were not supported by the evidence. (FN3)

After the case was heard, the court issued a decision granting the petition with respect to the penalty imposed, but denying it with respect to the findings and the conduct of the hearing. A judgment and a peremptory writ were issued remanding the

proceedings to the Board for reconsideration of the penalty assessed in light of the court's decision.

ISSUES RAISED BY THE BOARD AND THE DEPARTMENT

I

Department and Board first contend that the Board does have authority to increase administrative penalties assessed against dealers by the Department. We agree.

The Board is a nine-member body within the Department. (§ 3000.) This body is required to hear appeals brought by new motor vehicle dealers from decisions of the Department. (§ 3050, subd. (b).) The powers of the Board in deciding such appeals are found in sections 3054 and 3055. Section 3054 provides that "The board shall have the power to *reverse* or *amend* the decision of the department if it determines that any of the following exist: ... (f) The determination or penalty, as provided in the decision of the department is not commensurate with the findings." (Emphasis added.) Section 3055 provides that "The board shall have the power to *amend, modify,* or *reverse* the penalty imposed by the department." (Emphasis added.) It has been held that section 3055, empowering the Board to amend, modify or reverse a penalty imposed by the Department, is a legislative expansion of the powers of review granted it by section 3054, but that the Board is required to exercise such power with judicial discretion. (*Cozens* v*. New Car Dealers Policy & Appeals Bd.* (1975) 52 Cal.App.3d 21, 28, 124 Cal.Rptr. 835.)

The increased penalties were assessed as follows: As to the finding that Toyota placed inaccurate "PAC" stickers on vehicles which gave information about accessories, delivery, and freight charges that differed from the federal window sticker information on these vehicles, the Department imposed a 60-day suspension. The Board determined that the penalty was not commensurate with the finding and increased the penalty to license revocation. As to the finding that Pioneer overcharged on license fees, the Department issued a 10-day suspension. This was increased by the Board to a 15-day suspension. In addition, as to the finding that Pioneer advertised vehicles more than 48 hours after sale, the Department issued a 60-day suspension. The Board increased this to license revocation.

The trial court below agreed with the dealers' contention that it was the Legislature's intent to benefit aggrieved dealers by establishing the appellate process described above. The court noted that the language of the statutes outlining the powers and duties of the Board (i.e., "amend" and "modify") is unclear as to the Board's power to enhance penalties. The trial court stated, "A reading of the whole chapter relating to the creation of the New Motor Vehicle Board supports Petitioners' position that the purpose of the Board was to provide an administrative appeal to aggrieved dealers. Thus, absent express statutory language that the Board could subject an appellant to more severe sanctions than those from which he appealed, the statutes in question should be construed as not empowering the Board to enhance penalties."

Board contends the words "amend" and "modify" in the statutes in question confer the ability to enhance as well as diminish Department's penalty. Board cites the Black's Law Dictionary definition of "amend" as meaning "To improve. To change for the better by removing defects or faults.... To change, correct, revise." (Rev. 4th ed. 1968.) In addition, Board cites the Black's Law Dictionary definition of "modify" as meaning "To

alter; to change in incidental or subordinate features; enlarge, extend; limit, reduce." Thus, Board contends, "to modify the penalty could mean either to enlarge or reduce it." Board cites *American Telephone and Telegraph Company* v. *F.C.C.* (2 Cir.1974) 503 F.2d 612, which commented on a similar dispute over the meaning of the term "modify":

> "As we noted initially, Section 203(b) clearly provides that the FCC has the power to 'modify' the notice requirement. AT & T concedes this but argues that the word 'modify' can only mean reduce and cannot be interpreted to mean enlarge. The FCC and the intervenors urge that to modify means to change or to alter whether or not this results in an increase or a decrease in the notice period. Each party and the intervenors have supplied etymological support for their positions. AT & T even resorts to the philological ultimate, the Latin root, *modificare,* in which it finds particular comfort. Before succumbing to semantic aphasia, *we are persuaded that to 'modify' means to alter or change whether this involves enlargement or reduction.* Black's Law Dictionary 1155 (4th ed. 1951) so defines the word and this is the normal meaning which lawyers and judges attribute the term. Certainly, to modify an opinion or an order, it is not necessarily to reduce it but simply to change it, irrespective of any quantitative result." (*Id.,* at p. 615, fns. omitted, emphasis added.)

Board cites the statutory rule of construction that when clearly intended or indicated, words in a statute should be given their ordinary meaning. (*County of Los Angeles* v. *Frisbie* (1942) 19 Cal.2d 634, 641-642, 122 P.2d 526.) Board contends that the Legislature knows how to place limitations on a reviewing board when it wants to do so. Board asserts that it did not do so in sections 3054 and 3055.

Toyota and Pioneer contend that the Legislature intended for the Board to use its penalty amending and modifying powers only for the *dealers' benefit* because the Board's powers are only unleashed at the *dealers' request.*

Toyota and Pioneer also contend that if the Legislature had intended to give the Board extraordinary power to increase penalties without a request for increase, it would have included the appropriate enabling language. Pioneer and Toyota contend that "amend" and "modify" in the statutes in question are simply intended to let Board know that it may grant relief to appealing dealers short of complete reversal when the facts of the case do not warrant complete reversal.

Pioneer and Toyota contend that Board is ignoring the cardinal rule of statutory construction, which holds that the court should interpret statutes consistent with the intent of the Legislature so as to effectuate the purpose of the law. (See *Mercer* v. *Perez* (1968) 68 Cal.2d 104, 112, 65 Cal.Rptr. 315, 436 P.2d 315; *Hogya* v. *Superior Court* (1977) 75 Cal.App.3d 122, 132, 142 Cal.Rptr. 325; Code Civ.Proc., § 1859.) Pioneer and Toyota stress the primary rule of statutory construction to which every other rule must yield--that is, the intention of the Legislature should be given effect, and the language of any statute and provision therein may not be construed so as to nullify the will of the Legislature or to cause the law to conflict with the apparent purpose the lawmakers had in view. (*California Sch. Employees Ass'n* v. *Jefferson Elementary Sch. Dist.* (1975) 45 Cal.App.3d 683, 691-692, 119 Cal.Rptr. 668; *Struckman* v. *Board of Trustees* (1940) 38 Cal.App.2d 373, 376, 101 P.2d 151.)

We first examine the general statutory purpose behind the creation of the Board. The issue before us is one of first impression and we note there is very little history of legislative intent to guide us.

The statute creating the New Car Dealers Policy and Appeals Board was passed by the Legislature in 1967 as Senate Bill No. 91. This bill was sent to the Senate Transportation Committee and the Assembly Committee on Government Organizations; however, these committees currently have no information relative to the bill in their files. Only a few documents appear in the Governor's chaptered bill file. One is a letter from former Senator Cologne, the author of Senate Bill No. 91, urging the Governor to sign the bill, mentioning that twice before a similar bill had been vetoed. Senator Cologne mentions the Board is a "self-policing type board" and notes the members "wish to clean up their own industry."

Section 3050 describes the duties of the Board. These duties include adopting rules and regulations relating to licensing of new car dealers, considering appeals presented by applicants for, or holders of, a new car dealer's license, and considering any matter concerning the activities or practices of any person applying for or holding a license as a new car dealer. After such consideration, Board may direct Department to conduct an investigation and make a report to Board, undertake to arbitrate or resolve any honest difference of opinion between any new car dealer and any member of the public, and direct Department to exercise its authority with respect to the issuance, renewal, refusal to renew, suspension or revocation of a license and certificate of any new car dealer. (FN4)

We recognize that an important purpose of the appeal process is to benefit aggrieved dealers; however, we believe this purpose is achieved *not* by limiting the Board's power to determine penalties, but by affording the dealer a review by his peers. As Board contends, the Legislature could have limited its review power if it had wanted to do so, as it did with the Alcoholic Beverage Control Appeals Board, which can only affirm or reverse a decision of the Department of Alcoholic Beverage Control and is prohibited from limiting the department's discretion in any way. (See Bus. & Prof.Code, § 23085.)

We believe the Board exists for more than just an instrument for aggrieved automobile dealers, as Toyota and Pioneer contend. Section 1 of Statutes 1973, chapter 996, page 1964 provides:

> "The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and that *in order to promote the public welfare and in the exercise of its police power,* it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor *and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally.*" (Emphasis added.)

In addition, as has been pointed out in a recent article, while the executive secretary of Board has conceded that Board's primary purpose is the protection of dealers, he admits a secondary emphasis is on consumers' concerns. (Robertson, *The New Motor Vehicle Board: Are Consumers Being Taken for a Smooth Ride?,* Cal.Regulatory Law Rptr. (Summer 1983) vol. 3, No. 3, p. 3.) (FN5) This article provides some insight into the background behind the creation of Board:

> "State statutes protecting automobile dealers from the 'unequal bargaining power' of manufacturers have been around since the 1920's. In 1956 the federal government also enacted such a statute entitled 'The Dealers Day in Court Act,' later amended as the 'Automobile Dealers Franchise Act.' Finally, California produced similar legislation in 1967 and then expanded it in 1973, creating the New Motor Vehicle Board (NMVB) as its enforcement tool. At that time the Board was considered an innovative approach to the perceived dealer protection problem, and many states have enacted legislation similar to California's since then.
>
> "The purported purpose of these statutes, and the California NMVB, *is the protection of consumers by controlling the relationship between auto manufacturers and their dealers.*" (*Ibid.,* fns. omitted, emphasis added.)

We hold the words "amend" and "modify" in sections 3054 and 3055 confer on the Board the ability to enhance as well as diminish penalties imposed by the Department. Words in a statute should be given their ordinary meaning (*County of Los Angeles v. Frisbie, supra,* 19 Cal.2d 634, 642, 122 P.2d 526) and we believe "amend" and "modify" by their ordinary meaning connote both the concepts of "increases" as well as "deceases." (See, e.g., *American Telephone and Telegraph Company v. F.C.C., supra,* 503 F.2d 612, 615.) Moreover, as we have seen, *supra,* the Board exists for the protection of the consumer, as well as the dealer. Thus, the Board, a "self-policing" body, does, and should, have the power to increase as well as decrease penalties imposed by the Department. If the Legislature desires to limit the Board's power, it certainly has the opportunity to do so.

II

Board next contends the trial court erred in finding that the penalty of revocation was excessive. The court in the instant case applied the independent-judgment standard to the record and found that the weight of the evidence supported the decision of Board as to each of its *factual findings.* However, the court below found that the *penalty* of revocation of license was excessive in that it appeared to far exceed other penalties imposed by Board in other similar actions. The court cited "Board's decisions" concerning Pomona Chrysler-Plymouth, Inc. (No. A-85-79) and Dodge Country, Inc. (No. D-1995) (FN6) and *Harris v. Alcoholic Bev. etc. Appeals Bd.* (1965) 62 Cal.2d 589, 595-597, 43 Cal.Rptr. 633, 400 P.2d 745.

Board contends that in a mandamus proceeding to review an administrative order, the determination of the penalty by an administrative body should not be disturbed in the absence of a manifest abuse of discretion. (See *Nightingale v. State Personnel Board* (1972) 7 Cal.3d 507, 514-516, 102 Cal.Rptr. 758, 498 P.2d 1006; *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 87, 17 Cal.Rptr. 488, 366 P.2d 816.) Board contends that Department and Board are familiar with the duties of vehicle dealers and

the importance of the required procedures. "They also have a broad prospective on the gravity of the offenses because they see all the cases that occur throughout the state. It is because of their expertise in this area that great weight should be attached to their determinations (*Drummey v. State Bd. of Funeral Directors* (1939) 13 Cal.2d 75, 86, 87 P.2d 848)."

We now review the standard upon which the trial court in the instant case arrived at its decision.

Code of Civil Procedure section 1094.5, subdivision (c), provides that in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. Thus, the superior court reweighs the evidence and makes its own determination whether the administrative findings are sustained. And, where the superior court overturns such findings and an appeal is taken, the reviewing court gives the superior court's judgment the same effect as if it were rendered by any ordinary trial in that court. "In other words, on appeal the question is not whether the administrative determination was supported by the weight of the evidence, but whether, disregarding all contrary evidence, there is substantial evidence in support of the *trial court's findings.*" (5 Witkin, Cal.Procedure (2d ed. 1971) Extraordinary Writs, § 217, p. 3974; see *Strumsky v. San Diego County Employees Retirement Ass'n* (1974) 11 Cal.3d 28, 31, 112 Cal.Rptr. 805, 520 P.2d 29; *Moran v. Board of Medical Examiners* (1948) 32 Cal.2d 301, 308, 196 P.2d 20; *Lacy v. California Unemployment Ins. Appeals Bd.* (1971) 17 Cal.App.3d 1128, 1132, 95 Cal.Rptr. 566; *Almaden-Santa Clara Vine yards v. Paul* (1966) 239 Cal.App.2d 860, 866, 49 Cal.Rptr. 256.) (FN7) On appeal, after the superior court has applied its independent judgment to the evidence, all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences made to uphold the superior court's findings; moreover, when two or more inferences can be reasonably deduced from the facts, the appellate court may not substitute its deductions for those of the superior court. (*Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 72, 64 Cal.Rptr. 785, 435 P.2d 553; *Lacy v. California Unemployment Ins. Appeals Bd., supra,* 17 Cal.App.3d 1128, 1134, 95 Cal.Rptr. 566.)

Board contends that the characterization of the issue of severity of the penalty is not a question of fact, but rather, a question of law; therefore, the appellate court owes no deference to the trial court's findings. Board contends that since the trial court upheld the violations, it is purely a question of law whether the revocation of Toyota's and Pioneer's licenses was an appropriate penalty for the violations. We do not think so.

The question of the appropriateness of a penalty is a mixed question of law and fact to which the appellate court may defer to the trial court on the basis of the substantial-evidence rule. (*Id.,* at pp. 1134-1135, 95 Cal.Rptr. 566.)

In *Lacy,* the trial court determined in a mandamus action that an employer's order had been unreasonable and contrary to the administrative agency's finding below. The Court of Appeal held that the question of reasonableness was more in the nature of a factual issue than a legal one and upheld the trial court because there was substantial evidence to support its conclusion. The court recognized that the scope of appellate review may be dilated by viewing the issue as one of law rather than fact. (*Id.,* at p.

1134, 95 Cal.Rptr. 566.) The court acknowledged that many issues might with equal force be classified as questions of law or questions of fact and noted that no one could say as a matter of law that the order of the employer was reasonable or unreasonable. "In consequence, the issue is one of fact and not of law. Since the trial court's characterization possesses substantial evidentiary support, we may not reinstate that of the administrative agency even though the latter has equal evidentiary support." (*Id.,* at p. 1135, 95 Cal.Rptr. 566.)

We do not believe that one can say *as a matter of law* the penalties of revocation in the instant case are excessive or not excessive. The correctness of the penalty is not so apparent that only one inference can reasonably be drawn from the proved or admitted facts. Consequently, as in *Lacy,* we conclude the issue of excessiveness of the penalty is more an issue of fact than law.

As we have noted above, all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences made to uphold the superior court's findings and, when two or more inferences can be reasonably deduced from the facts, this court may not substitute its deductions for those of the superior court.

The trial court found that the penalty of revocation far exceeded other penalties imposed by Board in similar actions. The trial court specifically referred to actions taken against Pomona Chrysler-Plymouth, Inc., and Dodge Country, Inc.

In Pomona Chrysler-Plymouth, there were seven different types of violations charged, at least four of which were the same types charged against Toyota and Pioneer. Two of these, advertising "free" merchandise and advertising a vehicle more than forty-eight hours after sale, were found to be grounds for revoking Toyota's and Pioneer's licenses, but not for Pomona's. Suspensions for numerous days were imposed against Pomona, but stayed pending a two-year probationary period.

In Dodge Country, Inc., there were four different types of violations charged: selling advertised vehicles for more than the advertised price; advertising vehicles for sale that were not available; representing used vehicles as new; and falsifying statements of fact filed with the Department. For these violations Dodge Country received suspensions for numerous days, but the suspensions were stayed for a one-year probationary period after the dealership served a three-day suspension.

Our review of the record reveals, and the trial court impliedly found, that for at least somewhat similar conduct, Toyota and Pioneer received the most severe penalty, revocation, while Pomona and Dodge Country figuratively had their "wrists slapped." While it is true that the trial court must give great weight to the penalty imposed by the administrative agency, there is no indication in the record before us that the trial court did not place such an emphasis. As discussed above, this court cannot reweigh the evidence or replace our judgment for that of the trial court. Resolving conflicts in favor of the trial court's ruling, we conclude evidence in the record supports the trial court's finding that the imposition of the penalty of revocation was excessive. (FN8)

III (FN9)

ISSUES RAISED BY TOYOTA AND PIONEER

I (FN10)

II

Toyota and Pioneer next contend that Department and Board exceeded their jurisdiction in revoking Toyota's and Pioneer's licenses for the advertising of leases. Not so.

In finding IX of its Toyota decision, Department found:

> "Respondent, during June, 1979, advertised that it would lease both a new 1979 Toyota Corolla and a new 1979 Toyota Hilux pickup, for a price of $99.00 down and $99.00 per month. This advertisement was untrue and misleading since respondent had no intention of selling or leasing such vehicles at the advertised terms."

In finding IX of the Pioneer decision, Department found:

> "Respondent, during June 1979, advertised that it would lease two new vehicles for a price of $99.00 down and $99.00 per month. This advertisement was untrue and misleading since respondent had no intention of leasing these vehicles at the advertised terms." (FN11)

Department revoked Toyota's and Pioneer's licenses for these violations. Board concurred in the finding and the penalty. While not concurring in the penalty, the superior court below upheld the findings.

We believe that even though Department and Board do not have the authority to *regulate the leasing of vehicles,* (FN12) nonetheless, they have the authority to *regulate advertising by vehicle dealers,* irrespective of what the subject matter of the advertisement is. Section 11713, at the time relevant to this appeal, provided in pertinent part:

> "It shall be unlawful and a violation of this code for the holder of any license issued under this article:
>
> "(a) To make or disseminate or cause to be made or disseminated before the public in the state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading; or to so make or disseminate or cause to be so disseminated any such statement as part of a plan or scheme with the intent not to sell any vehicle or service so advertised at the price stated therein, or as so advertised."

Toyota and Pioneer supply no authority for their proposition that Department and Board cannot regulate lease advertising by vehicle dealers. Section 11713, subdivision (a), clearly gives Department and Board authority to regulate advertisements if they are untrue or misleading. There is sound public policy for regulating misleading vehicle lease advertising by dealers in that such advertisements may attract customers to a dealership who might end up buying rather than leasing a vehicle. Furthermore, we reject the dealers' contention that since the second clause of section 11713, subdivision (a), deals only with "sales," their advertisements are not prohibited by the statute because they advertised "leases." Reviewing the administrative record, we conclude

the advertisements in question strongly implied that the vehicles were for sale, (FN13) thereby bringing them within the scope of the second clause.

III-V (FN14)

VI

Finally, Toyota and Pioneer contend that the trial court's finding that their "free" merchandise advertising was untrue and misleading was not based on substantial evidence. Finding VII of the Department's decision in the Toyota case reads as follows:

> "Respondent, during the years 1978 and 1979, advertised it would give away free a Honda Express Moped with the purchase of any used car and would give away free a color TV or two ten-speed bikes with the purchase of any new or used car. These advertisements were untrue and misleading since the purchasers of the vehicles listed as items 7, 8, 21, 46, 47, 48, 49, 54, 56, 57, 61, and 89, in Schedule A, who bought new or used cars while the advertisement for free merchandise was still effective were not given the 'free' merchandise free of charge."

Finding VIII of the Department's decision in the Pioneer case was almost identical to the finding in the Toyota case. The findings in both cases were left intact by the Board and were also adopted by the trial court below. The Board revoked Toyota's and Pioneer's licenses for this "free" merchandise advertising, although the trial court disagreed with the penalty imposed.

Toyota and Pioneer contend that their advertisements were not false and misleading; however, they concede that their advertisements were in violation of the express terms of Department's regulation on free merchandise advertising. Title 13, California Administrative Code, section 403.08 provides as follows:

> "No merchandise shall be advertised as 'free' with the purchase of a vehicle if the advertised vehicle can be purchased from the advertiser at a lesser price without such 'free' merchandise. 'Free' merchandise offered in consideration of such things as 'visit our showroom', 'take a test drive', or phrases of similar nature, clearly and completely describe the conditions under which 'free' merchandise is offered."

Toyota and Pioneer contend that they did not violate section 11713, subdivision (a), which prohibits false and misleading advertising by dealers, but rather, they found themselves in violation of Department's regulations. They contend that if the advertisements would not be false and misleading in the absence of the regulation, then the regulations necessarily exceeded Department's authority to enact regulations, "in so much as a regulation cannot make unlawful that which is not made unlawful by the statute underlying the regulation." Not so.

The evidence produced at the administrative hearings showed that Toyota and Pioneer offered the free merchandise to customers who paid the *full retail price* for their vehicles. Evidence introduced at the Toyota hearings indicated that there were signs posted on the dealership premises which notified the public that buyers desiring the free merchandise would not receive discounts on their car purchases. Customers insisting on discount of prices were told that they could get discounts only if they were willing to waive their right to the free merchandise. Customers who chose reduced car prices

over the free merchandise were requested to execute written waivers of free merchandise.

In our opinion, such a campaign is necessarily false and misleading. Requiring customers to choose between discounts and the advertised "free" merchandise means that the offered merchandise is not truly and absolutely "free." The customer must give up something of value in order to get the free item. Since the merchandise was available only to customers who paid the full retail price for their vehicles, it was untrue and misleading to call something a "free gift with purchase" if the purchase could be made for less without a gift. We agree with Board's contention that if a vehicle were available at one price without the merchandise and available at a higher price with the merchandise, the "cost increment could only be characterized as payment for the merchandise, and therefore, it clearly was not free." Section 11713, subdivision (a), clearly provides that it is unlawful for a dealer to disseminate false or misleading advertisements. To help guide the car dealers, the administrative regulations clearly give notice to the dealers that "No merchandise shall be advertised as 'free' with the purchase of a vehicle if the advertised vehicle can be purchased from the advertiser at a lesser price without such 'free' merchandise." The judgment of the trial court is supported by substantial evidence.

The judgment is reversed insofar as it determines that the Board does not have the power to increase the penalties imposed by the Department; the judgment is otherwise affirmed. The trial court is directed to modify its judgment accordingly and to remand the cause to the Board for further consideration in accordance with this opinion.

GEO. A. BROWN, P.J., and FRANSON, J., concur.

FN1. Part III of ISSUES RAISED BY THE BOARD AND THE DEPARTMENT and parts I, III, IV and V of ISSUES RAISED BY TOYOTA AND PIONEER are not published, as they do not meet the standards for publication contained in rule 976(b), California Rules of Court.

FN2. All statutory references are to the Vehicle Code unless otherwise noted.

FN3. Toyota and Pioneer were corporations both owned by Ottmar Thomas and his wife. In filing its petition for writ of mandamus in the superior court, Toyota did so for itself and for Pioneer as its successor. Pioneer had gone out of business by the time of trial.

FN4. Section 3050 also applies to applicants for, or holders of, a license as a manufacturer, manufacturer branch, distributor, distributor branch, or representative.

FN5. This article is sharply critical of cost of Board to the consumers. The article criticizes the idea that "Poor innocent automobile dealers require statutory protection from big, nasty opportunistic manufacturers with whom they freely entered into franchise agreements." (*Ibid.*)

FN6. Actually, only Pomona Chrysler-Plymouth appealed the decision of the Department to the Board. As the result of an agreement reached with Department, Dodge Country, Inc., withdrew its notice of appeal to the Board.

FN7. In all other cases, abuse of discretion is established if the trial court determines that findings are not supported by substantial evidence in light of the whole record. This limited review by the superior court (no weighing of the evidence) is the same kind as that accorded in appeals from judgments of trial courts in judicial

proceedings. (5 Witkin, Cal.Procedure, *op. cit. supra,* Extraordinary Writs, § 217, p. 3974.) Moreover, the scope of review by the appellate court is the same as that of the trial court--a review of the administrative record to determine whether it is supported by substantial evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 93 Cal.Rptr. 234, 481 P.2d 242.)

FN8. We reject Toyota's and Pioneer's request that this court take judicial notice of the fact that approximately four years have transpired since most of the violations were committed without any further evidence of noncompliance by Toyota or Mr. Thomas. What has transpired since 1980 is not a part of the record and, in addition, not relevant to this appeal.

FN9. See footnote 1, *ante.*

FN10. See footnote 1, *ante.*

FN11. It was found that the vehicles were often not on the lot and the financial terms made it "nearly impossible" for interested purchasers or lessees to qualify.

FN12. For requirements of automobile leases, see the Automobile Leasing Act, Civil Code section 2985.7 et seq.

FN13. The Toyota ads stated, "That's right for only $99.00 down and $99.00 per month you can *own* a brand new '79 Toyota Corolla and a '79 Toyota Hilux pickup." (Emphasis added.) The Pioneer ads did not use the word "own" but were misleading nonetheless. The ads were surrounded by other ads for vehicles offered for sale and only in fine print does the ad indicate a "lease."

FN14. See footnote 1, *ante.*

BMW OF NORTH AMERICA, INC., Plaintiff and Appellant, v. NEW MOTOR VEHICLE BOARD, Defendant and Respondent, HAL WATKINS CHEVROLET, INC., doing business as Hal Watkins Imports, Real Party in Interest and Respondent.
(1984) 162 Cal.App.3d 980 [209 Cal.Rptr. 50].
Civ. 23195.
Court of Appeal, Third District, California.
Dec. 18, 1984.
Hearing Denied March 13, 1985.

Lewis, D'Amato, Brisbois & Bisgaard and Roy M. Brisbois, Los Angeles, Weil, Gotshal & Manges and Salem Katsh, Michael A. Epstein and Bryan R. Dunlap, New York City, for plaintiff and appellant.

Center for Public Interest Law, Gene Erbin, Los Angeles, and Elizabeth A. Mulroy, San Diego, McCuthchen, Black, Verleger & Shea, Howard J. Privett, Franklin H. Wilson and Michael M. Johnson, Los Angeles, amicus curiae in behalf of plaintiff and appellant.

John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Asst. Atty. Gen., Harold W. Teasdale and Gordon Zane, Deputy Attys. Gen., for defendant and respondent.

Crow, Lytle, Gilwee, Donoghue, Adler & Weninger, Richard E. Crow and James R. McCall, Sacramento, amicus curiae in behalf of defendant and respondent.

Pilot & Spar, A. Albert Spar, Michael J. Flanagan and June Spar, Los Angeles, for real party in interest and respondent.

SPARKS, Associate Justice.

In this appeal we consider the statutory restrictions on the modification of automobile dealer franchises under the New Motor Vehicle Board Act. (Veh.Code, § 3000 et seq.) BMW of North America, Inc. petitioned for a writ of administrative mandate pursuant to Code of Civil Procedure section 1094.5, directing the respondent New Motor Vehicle Board of the State of California to vacate its decision allowing the protest of the establishment of a new dealer filed by real party in interest Hal Watkins Chevrolet, Inc., and to enter a new decision denying the protest. The trial court denied the petition and BMW appeals. BMW contends that the composition of the Board is unconstitutional, that the Board lacks jurisdiction over the Watkins protest, and that the Board's interpretation of the relevant statutory provisions is constitutionally impermissible. We need not consider the constitutional questions raised because we conclude that as a matter of law the Board acted in excess of its jurisdiction in allowing the Watkins protest. We therefore reverse the judgment and remand to the trial court with directions to issue a writ of mandate.

FACTS

Hal Watkins is the sole shareholder of Hal Sales, Inc. Hal Sales, Inc., in turn owns the majority of the stock in Hal Watkins Chevrolet, Inc. In 1974 Hal Watkins applied to become a franchised dealer for BMW automobiles. At that time Hoffman Motors Corporation was the North American importer of BMW automobiles. Hoffman accepted the application and entered into a franchise agreement with Watkins. Since that time two inconsequential changes have occurred. First, Hoffman Motors Corporation has been succeeded by plaintiff BMW of North America as the BMW importer for North America. Second, although the application was on behalf of Hal Sales, Inc., the actual franchise agreement is held on behalf of Hal Watkins Chevrolet, Inc.

The franchise agreements under which Watkins and BMW have operated have been limited term contracts of one year with provision for renewal and extension by BMW unless it acts to terminate the agreement in accordance with the contract provisions. Each succeeding agreement has an annual effective date of January 1. Each of the succeeding agreements contained a clause of which the 1982 agreement is typical: "BMWNA hereby appoints Dealer [Watkins] as a retail dealer of BMW Products and grants Dealer the nonexclusive right to buy BMW Products, all in accordance with, and subject to, the provisions of this Agreement. Dealer accepts such appointment and agrees to be bound by all of the terms and conditions of the Agreement. Dealer recognizes and agrees that its appointment as a Dealer in BMW Products does not confer upon it the exclusive right to deal in BMW Products in any specific geographic area. Nothing contained in the Agreement shall limit, or be construed to limit, the geographical area within which, or the persons to whom, Dealer may sell BMW Products. BMWNA reserves the right to grant or confer rights and privileges covering the sale and servicing of BMW Products upon such other Dealers selected and approved by BMWNA, whether located in Dealer's geographic area or elsewhere, as BMWNA, in its sole discretion, shall deem necessary or appropriate." The agreements have further provided: "No representative of BMWNA shall have authority to waive any of the provisions of the Agreement or to make any amendment or modification of or any

other change in, addition to, or deletion of any portion of the Agreement ... or which renews or extends the Agreement; unless such waiver, amendment, modification, change, addition, deletion, or agreement is made in writing and signed by BMWNA and Dealer as set forth in Article H of this Dealer Agreement."

Watkins opened Hal Watkins' BMW in Camarillo, in Ventura County. From time to time BMW had inquiries from other dealers, particularly Paul Rusnak, concerning the possibility of opening a franchise in the Thousand Oaks-Westlake area of Ventura County. Eventually, after a market study of the region, BMW determined to appoint Rusnak as a BMW dealer in the Thousand Oaks-Westlake area. Rusnak was to open his dealership in late 1982 or early 1983. Rusnak's franchise was to be located 15.2 miles from Watkins' Camarillo facility, and 16.2 miles from the next closest dealership in Canoga Park, Los Angeles County. BMW and Rusnak signed a letter of intent and Rusnak began preparations for the opening of his franchise.

Watkins filed a protest with the New Motor Vehicle Board, alleging that the appointment of Rusnak as a BMW dealer in Ventura County constituted a modification of his franchise agreement. After a lengthy administrative hearing the Administrative Law Judge prepared a proposed decision in which he concluded that the appointment of Rusnak constituted a modification of Watkins' franchise agreement and that there was not good cause for the modification. In particular the Administrative Law Judge found that BMW failed to prove: (1) the amount of business transacted by Watkins is inadequate as compared to the business available; (2) the investment made and obligations incurred by Watkins was not substantial; (3) Watkin's investment was not permanent; (4) it would be beneficial to the public welfare for the franchise to be modified; (5) Watkins does not have adequate sales and service facilities or is not rendering adequate services; (6) Watkins failed to fulfill warranty obligations; and (7) Watkins failed to comply with the terms of the franchise. On January 12, 1983, the New Motor Vehicle Board adopted the proposed decision as its decision in the matter. This writ proceeding followed.

DISCUSSION

In 1967 the Legislature established the New Car Dealers Policy and Appeals Board to hear appeals of new car dealer licensing decisions of the Department of Motor Vehicles. (See Veh.Code, § 3000 et seq., added by Stats.1967, ch. 1397, § 2, p. 3261 et seq.) At that time the duties of the Board were similar to those of other occupational licensing boards, and, as is common with such other boards, the Legislature mandated that four of the nine members be new car dealers. (Stats.1967, ch. 1397, § 2, pp. 3261-3262.) In 1973 the Legislature changed the name of the Board to the New Motor Vehicle Board, and added sections 3060 to 3069 to the Vehicle Code. (Stats.1973, ch. 996, § 16, pp. 1967-1971.) Among other things, those sections empower the Board to determine whether there is good cause for the termination, refusal to renew or continue, or the modification of an existing franchise agreement (Veh.Code, § 3060), and whether there is good cause not to relocate or establish a motor vehicle dealership in a relevant market area (Veh.Code, § 3062). In *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, at pages 987 to 992, 138 Cal.Rptr. 594, this court held that the requirement that four of the nine board members be new car dealers created a slanted adjudicatory tribunal and thus denied the manufacturer litigants procedural due process of law.

In reaction to the decision in *American Motors,* the Legislature amended Vehicle Code sections 3050 and 3066 to provide that the new car dealer members of the Board could not participate in, deliberate on, hear or consider, or decide any matter involving a dispute between a manufacturer and a dealer. (Stats.1977, ch. 278, §§ 2-3, pp. 1171-1173.) In 1979 the Legislature enacted urgency legislation to provide that the new motor vehicle dealer members of the Board "may participate in, hear, and comment or advise other members upon, but may not decide," any dispute between a dealer and a manufacturer. (Stats.1979, ch. 340, §§ 1-2, pp. 1206-1207.) The stated urgency for the legislation was so that the "educated and needed advise of New Motor Vehicle Board members who are themselves new motor vehicle dealers may be utilized in the decision making process of the board ..." (Stats.1979, ch. 340, § 3, p. 1207.)

After the trial court's decision in this case, the Court of Appeal for the First District held in *Chevrolet Motor Division v. New Motor Vehicle Bd.* (1983) 146 Cal.App.3d 533, at page 541, 194 Cal.Rptr. 270, that the mere fact the new motor vehicle dealer members of the board do not technically decide the issues does not cure the constitutional problem of submitting disputes to a biased tribunal, and hence the statutory procedure remains constitutionally defective. In *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109, at page 115, 202 Cal.Rptr. 1, another division of the same court agreed with the holding in *Chevrolet Motor Division.*

The parties renew the dispute whether the procedural provisions for the adjudication of dealer protests before the New Motor Vehicle Board satisfy the requirements of due process and, if not, whether recusal of the new motor vehicle dealer members of the Board from participation in the decision cures any deficiency in the legislation. BMW additionally contends that the Board's construction of the relevant statutory provisions was itself unconstitutional. We are urged by BMW to follow *Chevrolet Motor Division* and declare the composition of the Board to be unconstitutionally biased in violation of due process of law. Watkins argues that both the *Chevrolet Motor Division* case, and our decision in *American Motors* upon which it relies, conflict with various federal decisions and with the opinion of the California Supreme Court in *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151. (FN1) In essence, Watkins contends that the asserted economic interest of dealer board members is too speculative, contingent and uncertain to rise to the level of bias which would deprive manufacturers of a fair and impartial hearing. In resolving this dispute we need not, and therefore do not, reach the constitutional questions raised. We conclude instead that as a matter of law the Board acted in excess of its jurisdiction and erred in allowing the Hal Watkins protest.

There can be no question that the relationship between automobile manufacturers and retail dealers is a relationship that is subject to governmental regulation. In *New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361, the United States Supreme Court considered whether California could, by rule or statute, temporarily delay the establishment or relocation of an automobile dealership pending the adjudication of an existing dealer's protest. The Court concluded that a state may constitutionally require the manufacturer to secure regulatory approval before engaging in specified practices. (439 U.S. at p. 108, 99 S.Ct. at p. 411, 58 L.Ed.2d at p. 374.) The California Legislature, the high court found, "was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their

franchisees where necessary to prevent unfair or oppressive trade practices." (*Id.,* at p. 107, 99 S.Ct. at p. 411, 58 L.Ed.2d at pp. 374, 376.) (FN2)

The provisions of California's regulatory scheme involved here are contained in Vehicle Code sections 3060 through 3063, which are set out in full in the margin. (FN3) The first portion of section 3060 precludes a franchisor from terminating or refusing to continue an existing franchise without compliance with certain procedural provisions and, if a protest is filed, unless the Board finds that there is good cause for the termination or refusal to continue. The second portion of section 3060 precludes a franchisor from modifying or replacing a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor complies with certain procedural provisions and in the event of a protest the Board finds good cause for the modification or replacement. Section 3061 provides the factors to be considered by the Board in determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise.

Section 3062 limits the ability of a franchisor to establish or relocate a dealership within an area where the same line-make is already represented. In doing so the section utilizes the term "relevant market area" which is in turn defined in section 507 as being "any area within a radius of 10 miles from the site of a potential new dealership." Thus under section 3062, any franchisee within 10 miles of the site of a proposed new or relocated dealership of the same line-make may protest such proposed action. At the hearing on the protest the question is whether the existing franchisee establishes good cause for not allowing the establishment or relocation of the additional dealer within the relevant market area, and section 3063 sets forth the factors which are to be considered by the Board.

Watkins concedes, as he must, that he was not entitled to file a protest of the establishment of the Thousand Oaks-Westlake BMW dealer under section 3062. That proposed dealership was more than 15 miles from Watkins' Camarillo dealership and thus Watkins is well outside the relevant market area. At the hearing on the protest Watkins specifically disclaimed any intent to proceed under section 3062. Instead, Watkins claims that the establishment of a new dealership within Ventura County would constitute a modification of his franchise. The Board agreed with this contention. In doing so it erred.

Although a franchise is technically a grant of power by a governmental entity to a private person or entity, with respect to the automotive industry a franchise has been defined as "an agreement between two private entities arising out of the 'general right to engage in a lawful business, part of the liberty of a citizen.' " (*National Labor Relations Board v. Bill Daniels, Inc.* (6th Cir.1953) 202 F.2d 579, 582, citation omitted.) This definition is consistent with the California Vehicle Code, which defines a franchise as a "written agreement between two or more persons" relating to the sale and distribution of automotive products. (§ 331.) A "franchise" within the meaning of the Vehicle Code is thus a contract, and as such is subject to the normal rules relating to contracts.

The parol evidence rule is a fundamental rule of contract law which operates to bar extrinsic evidence contradicting the terms of a written contract. (*Riley v. Bear Creek Planning Committee* (1976) 17 Cal.3d 500, 508-509, 131 Cal.Rptr. 381, 551 P.2d 1213.) It is not merely a rule of evidence but is substantive in scope. (*Estate of Gaines* (1940)

15 Cal.2d 255, 264-265, 100 P.2d 1055; see also Witkin, Cal. Evidence (2d ed. 1966) Documentary Evidence, § 715, pp. 661-662; 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) The Parole Evidence Rule, § 32.1, pp. 1121-1123.) Under that rule the act of executing a written contract, whether required by law to be in writing or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. (Civ.Code, § 1625.) Extrinsic evidence cannot be admitted to prove what the agreement was, not for any of the usual reasons for exclusion of evidence, but because as a matter of law the agreement is the writing itself. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 22-23, 92 Cal.Rptr. 704, 480 P.2d 320.) Consequently, "in determining whether substantial evidence supports a judgment, extrinsic evidence inconsistent with any interpretation to which the instrument is reasonably susceptible becomes irrelevant; as a matter of substantive law such evidence cannot serve to create or alter the obligations under the instrument. Irrelevant evidence cannot support a judgment." (*Ibid.,* citations and footnotes omitted.) (FN4)

In determining the rights and liabilities of BMW and Watkins under the franchise agreement the first reference must be to the written terms of the contract. That agreement clearly and unequivocally provides that Watkins was not granted the exclusive right to deal in BMW products in any particular geographic area and was not limited in the area in which he could trade. BMW expressly reserved the right to appoint other dealers in BMW products, whether located in Watkins' geographic area or not. This contract language, of course, cannot be reasonably construed to provide Watkins with the exclusive right to sell BMW products in Ventura County, or in any geographical area, and cannot be construed to give him the right to object to the appointment of a new dealer 15.2 miles from the site of his dealership. Accordingly, in determining to appoint a new dealer in the Thousand Oaks-Westlake area, BMW was acting pursuant to, rather than in derrogation of, Watkins' franchise agreement.

Watkins asserted, and the trial court agreed, that the reservation in the franchise agreement of the right to appoint additional dealers is "contrary to the public policy expressed in the Act, and thus void." We disagree. By virtue of section 3060, a franchisor may be required to continue existing franchise agreements without modification if a modification would substantially affect the franchisee's sales and service obligations or investment. However, that section in no manner dictates what must be included in a franchise agreement, and it does not state or imply that a franchisor may not reserve the power to appoint new dealers or that a franchise must provide an exclusive trading area to the dealer. The provision of the Act dealing with the appointment of new dealers is found in section 3062, and it specifically limits the right of an existing franchisee to object to the appointment of a new dealer to a 10-mile radius. That section not only restricts the right of a franchisee to object to the appointment of a new dealer to the 10-mile radius, but it also implicitly recognizes the right of a franchisor to appoint new dealers, subject of course to the right of an existing dealer to show good cause for precluding such appointment if it is to be within 10 miles of the existing dealer. Thus, neither the reservation of the right to appoint new dealers, nor the proposed appointment of a dealer over 15 miles from Watkins' dealership, is contrary to the public policy expressed in sections 3060 and 3062.

The trial court stated that it would alternatively find that the proposed appointment of a new dealer would constitute a modification of Watkins' franchise by changing his

"A.O.R." A.O.R. stands for area of responsibility, and this concept may be briefly explained. Essentially, for internal planning purposes, BMW utilizes data from R.L. Polk, Inc., which in turn reports annual new car registrations by post office zip code. Among other things, this information enables BMW to determine whether it is achieving sufficient market penetration in any particular area. For example, BMW regards its competition as including Porsche-Audi, Mercedes Benz, and Volvo. During 1981, in the district of which Watkins is a part, BMW maintained a 13.1 percent share of this combined market. In contrast, in the Thousand Oaks-Westlake area BMW obtained only 8.6 percent of that market. This indicated that in the Thousand Oaks-Westlake area BMW was doing very poorly against its competition and this was one of the reasons BMW determined to appoint a dealer in that area.

Another purpose for which the Polk data may be used is the estimation of required service and parts facilities. From this data BMW derives a figure known as the "U.I.O.", an abbreviation of units in operation. The U.I.O. figure is derived from a study of past registration figures together with projected sales levels. The number of units in operation in proximity to a dealer's location is one of the factors which BMW considers in determining the levels of service and parts facilities a dealer should maintain to provide adequately for the demand for services and parts. It is not, however, the only factor considered.

As we have noted, BMW utilizes the A.O.R. concept for some internal planning purposes. Under this concept every geographic area denominated by a zip code is assigned to an A.O.R. for an existing dealer. The total group of zip code areas assigned to a particular dealer is that dealer's A.O.R. By design, these areas of responsibility throughout the United States are contiguous. For this reason the size of a particular A.O.R. is dependent upon the distance between BMW dealers. Where the distances between dealers are vast, the A.O.R.'s involved are correspondingly vast; where the distances between dealers are small, the A.O.R.'s are also small. Since all geographic areas in the country are included within some A.O.R., it follows that the appointment of a new dealer will necessarily alter the A.O.R.'s of the nearest dealers. Indeed, BMW concedes that the A.O.R. for the new Thousand Oaks-Westlake dealer will include areas which were previously within the A.O.R.'s of Watkins in Camarillo and Bob Smith in Canoga Park.

The Board and the trial court erred in concluding that a change in Watkins' A.O.R. constituted a modification of his franchise agreement. The A.O.R. concept, as we have explained, is an entirely internal planning mechanism utilized by BMW, and is only one of many such mechanisms. BMW is free to use whatever planning mechanisms it desires in determining how to market its products. But these internal considerations are not relevant and are not admissible to establish a meaning of a written contract where the written contract is not reasonably susceptible of the meaning urged. (See *Blumenfeld v. R.H. Macy & Co.* (1979) 92 Cal.App.3d 38, 44-45, 154 Cal.Rptr. 652.) Watkins' franchise agreement does not refer at all to an A.O.R. or to U.I.O.'s. The agreement does not suggest that Watkins' right to market BMW products is to be in any manner exclusive in any geographical area. In fact it states just the opposite, namely that it is not exclusive and that BMW reserves the right to appoint other dealers whether in Watkins' geographic area or not. The decision of the Board disregarded the terms of Watkins' franchise agreement and imposed contractual obligations upon BMW to which

it had never consented and which no interpretation of the contract could support. In short, the fact that BMW utilizes the A.O.R. concept for internal planning purposes does not give Watkins any exclusive right within his A.O.R.

From this discussion it is apparent that in precluding BMW from appointing a dealer in the Thousand Oaks-Westlake area the Board acted in excess of its jurisdiction. The Legislature has acted to regulate the relationship between franchisors and franchisees in the automobile industry, but has done so in a limited manner pursuant to clearly articulated and specifically expressed principles. Those principles provide that a franchisor may be required to continue unmodified an existing franchise agreement, or may be precluded from establishing or relocating a dealer within 10 miles of an existing dealer. Beyond those two qualifications (and others not relevant here) the Board has been given no power to regulate the relationship between franchisors and franchisees, and with those exceptions the rule is still unfettered competition and freedom of contract. In precluding BMW from establishing the Thousand Oaks-Westlake dealer the Board disregarded rather than enforced the franchise contract between Watkins and BMW, and gave Watkins something that neither his contract nor the Act gave him, namely, an exclusive trading territory far in excess of his relevant market area.

In sum, by the nature of BMW's internal planning formula, the creation of any new dealership would necessarily change the A.O.R. of some existing dealer and hence also the units in operation in his zone. If Watkins' position were sustained, BMW could never create a new dealership without establishing good cause before the Board. The result would be that existing BMW dealers, like Watkins, in contravention of the express terms of their franchises, would be accorded a perpetual territorial monopoly. The short answer is that the appointment of a new dealer does not change a single provision of Watkins' franchise and consequently cannot constitute a modification. The power of the Board arises under the statute only when franchisor improperly "terminate[s] or refuse[s] to continue any existing franchise" or impermissibly "modif[ies] or replace[s] a franchise with a succeeding franchise." (§ 3060.) None of the statutory predicates occurred here. Instead, in violation of the parole evidence rule, Watkins and the Board would rewrite the franchise to read that BMW reserves the right to create other dealers in the present dealer's geographic area, "provided that the new dealership does not change the area of responsibility or units in operation." Having rewritten the agreement, the Board then finds that BMW modified the recast franchise without good cause. Because there was no competent evidentiary basis for that finding and because the Board has no general power over franchises absent statutory enablement, the Board exceeded its jurisdiction. It is fundamental that an administrative agency has only such power as has been conferred upon it by the constitution or by statute and an act in excess of the power conferred upon the agency is void. (See *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103-104, 77 Cal.Rptr. 224, 453 P.2d 728; *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347, 129 Cal.Rptr. 824.) A writ of administrative mandate will lie to correct acts in excess of jurisdiction. (Code Civ.Proc., § 1094.5, subd. (b).) Accordingly, the trial court erred in denying the petition of BMW for a writ of mandate.

The judgment of the trial court is reversed and the cause is remanded to the trial court with directions to issue a peremptory writ of mandate directing the respondent

New Motor Vehicle Board to vacate its decision granting the protest of Hal Watkins Chevrolet, Inc. doing business as Hal Watkins BMW, and to issue a new decision denying said protest.

PUGLIA, P.J., and CARR, J., concur.

FN1. *Andrews* involved the denial of a motion to disqualify a temporary administrative law officer in an unfair labor practices hearing. The ground for bias was the officer's practice of law with a firm which had previously represented farm workers in a suit against the Secretary of Labor and which had engaged in employment discrimination suits on behalf of Mexican-Americans. Holding that the hearing officer did not err in refusing to disqualify himself, the court noted that the "right to an impartial trier of fact is not synonmous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 790, 171 Cal.Rptr. 590, 623 P.2d 151.)

FN2. The decision in *Fox* did not settle all questions of the constitutionality of the regulatory scheme. That decision only addressed the "narrow question ... whether California may, by rule or statute, temporarily delay the establishment or relocation of automobile dealerships pending the Board's adjudication of the protests of existing dealers." (439 U.S. at p. 106, 99 S.Ct. at p. 410, 58 L.Ed.2d at p. 373.) The Court decided that regulation is permissible, but in doing so expressly noted that California's regulatory scheme was clearly articulated and affirmatively expressed, and that disputes were to be determined by an impartial tribunal. (*Id.,* at pp. 107-108, 109, 99 S.Ct. at p. 410-411, 412, 58 L.Ed.2d at pp. 374, 376.) Different questions are raised where, as is alleged here, the Legislature has since acted to create a biased rather than impartial tribunal, and the tribunal acts in a manner which is not pursuant to clearly articulated and affirmatively expressed statutory or regulatory provisions.

FN3. Vehicle Code section 3060 provides: "Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless: [¶] (a) The franchisee and the board have received written notice from the franchisor as follows: [¶] (1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue. [¶] (2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following: [¶] (A) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld. [¶] (B) Misrepresentation by the franchisee in applying for the franchise. [¶] (C) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law. [¶] (D) Any unfair business practice after written warning thereof. [¶] (E) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department. [¶] (3) The written notice shall contain, on the first page thereof, a conspicuous statement which reads as follows: 'NOTICE TO DEALER: You may be entitled to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. It is important that you act promptly.' [¶] (b) The board finds that there is good cause for termination or

refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice or within 10 days after receiving a 15-day notice. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings. [¶] (c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed. [¶] The franchisor shall not modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee notice thereof at least 60 days in advance of the modification or replacement. Within 30 days of receipt of the notice, a franchisee may file a protest with the board and the modification or replacement does not become effective until there is a finding by the board that there is good cause for the modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue."

Vehicle Code section 3061 provides: "In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following: [¶] (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee. [¶] (b) Investment necessarily made the obligations incurred by the franchisee to perform its part of the franchise. [¶] (c) Permanency of the investment. [¶] (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted. [¶] (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public. [¶] (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. [¶] (g) Extent of franchisee's failure to comply with the terms of the franchise."

Vehicle Code section 3062 provides: "(a) Except as otherwise provided in subdivision (b), in the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same line-make is then represented, or relocating an existing motor vehicle dealership, the franchisor shall in writing first notify the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 20 days of receiving that notice or within 20 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. If within this time a franchisee files with the board a request for additional time to file a protest, the board or its secretary, upon a showing of good cause, may grant an additional 10 days to file the protest. When such a protest is filed, the board shall inform the franchisor that a timely protest has been

filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue. [¶] For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership. [¶] (b) With respect to the relocation of an existing dealership, subdivision (a) does not apply to any relocation which is less than one mile from the existing location of the dealership and which is to a location within the same relevant market area within the same city where the existing dealership is located. [¶] (c) Subdivision (a) does not apply to the establishment of a branch office for selling vehicles at a fair, exposition, or similar exhibit that does not exceed 30 days."

Vehicle Code section 3063 provides: "In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following: [¶] (a) Permanency of the investment. [¶] (b) Effect on the retail motor vehicle business and the consuming public in the relevant market area. [¶] (c) Whether it is injurious to the public welfare for an additional franchise to be established. [¶] (d) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel. [¶] (e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

Unless otherwise indicated, all further statutory references are to the Vehicle Code.

FN4. Two aspects of the parol evidence rule should be noted here. First, where the written contract is not an integration, that is, the complete and final agreement of the parties, then evidence of a separate oral agreement may be introduced as to any matter on which the agreement is silent and which is not inconsistent with its written terms. (See *Masterson v. Sine* (1968) 68 Cal.2d 222, 226-228, 65 Cal.Rptr. 545, 436 P.2d 561.) Second, extrinsic evidence may be introduced to explain the meaning of a written contract and the test for admissibility is whether the meaning urged is one to which the written contract terms are reasonably susceptible. (See *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40, 69 Cal.Rptr. 561, 442 P.2d 641.) As we explain, neither of these aspects of the rule is involved here since the meaning urged by Watkins is directly contrary to the express written terms of his contract.

UNIVERSITY FORD CHRYSLER-PLYMOUTH, INC., Plaintiff and Appellant, v. NEW MOTOR VEHICLE BOARD, Defendant and Appellant; CHRYSLER CORPORATION, Real Party in Interest and Respondent. CHRYSLER CORPORATION, Plaintiff and Respondent, v. NEW MOTOR VEHICLE BOARD, Defendant and Appellant; UNIVERSITY FORD CHRYSLER-PLYMOUTH, INC., Real Party in Interest and Appellant. (1986) 179 Cal.App.3d 796 [224 Cal.Rptr. 908].

D001579.
Court of Appeal, Fourth District, Division 1, California.
April 3, 1986.
Review Denied July 16, 1986.

John K. Van De Kamp, Atty. Gen., and Melvin R. Segal, Deputy Atty. Gen., for appellant.

Murfey, Griggs & Fredrick, Robert J. Fredrick, Coder & Tuel and Michael G. Coder, for appellant and real party in interest.

Crow, Lytle, Gilwee, Donoghue, Adler & Weninger, Richard E. Crow, James R. McCall as amici curiae on behalf of appellants and real party in interest.

Franklin H. Wilson, Michael M. Johnson, John A. Ruocco, McCutchen, Black, Verleger & Shea for respondent and real party in interest.

Center for Public Interest Law and Elizabeth A. Mulroy as amicus curiae on behalf of respondent and real party in interest.

STANIFORTH, Acting Presiding Justice.

The issues presented by this appeal are (1) whether the New Motor Vehicle Board (Board) which is composed of new motor vehicle dealers and members of the public is an impartial forum for resolving disputes between motor vehicle dealers and manufacturers and (2) if it is not an impartial forum because of the new motor vehicle dealers' membership, whether such defect can be remedied by voluntary recusal of the Board's dealer members.

The appellants are the Board and the real party in interest, University Ford Chrysler Plymouth, Inc. (University). Chrysler Corporation (Chrysler) is the respondent. Amicus curiae briefs were filed by Motor Car Dealers Association of Southern California, Inc., and Northern California Motor Car Dealers Association, Inc., in favor of the Board and University and by the Center for Public Interest Law in support of Chrysler.

FACTS

In 1983, Chrysler terminated its dealer agreement with University because University had allegedly violated the dealer agreement by relocating without Chrysler's permission and by entering into a dual dealership. (FN1) University filed a protest of the termination with the Board. A hearing was held before an administrative law judge who held Chrysler lacked good cause to terminate the dealership and recommended continuation of the dealership on the condition University relocate within two years. The Board adopted the administrative law judge's decision without change. The dealer members were not present at the Board meeting.

Both University and Chrysler filed petitions for a writ of mandate in superior court; University based on the asserted invalidity of the relocation condition, Chrysler initially based on the insufficiency of the evidence and later on the partiality of the forum. The writs were consolidated. The court granted Chrysler's writ and ordered the decision of the Board be set aside "on the ground that the Board's composition which includes licensed new car dealers as members and specifically excludes any employee or

representative of an automobile manufacturer denies Chrysler Corporation its constitutionally guaranteed right to an impartial tribunal."

DISCUSSION

I

University first argues Chrysler waived its right to complain of the Board's composition because Chrysler failed to file an affidavit of prejudice against the administrative law judge as required by Board regulations.

Chrysler apparently had no objections to the particular administrative law judge's qualifications but rather to the composition of the Board itself. At the hearing before the administrative law judge, Chrysler entered an objection to the Board's composition. This objection sufficiently raised and preserved the issue. Moreover, "a litigant who seeks to challenge the constitutionality of the statute under which an agency operates need not raise that issue in the proceedings before the agency as a condition of raising the issue in the courts." (*Nissan Motor Corp. v. New Motor Vehicle Bd.,* 153 Cal.App.3d 109, 115, 202 Cal.Rptr. 1.) (FN2)

II

The Legislature has provided the Board have nine members: five members from the public at large (public members) and four members who are new motor vehicle dealers (dealer members). (Veh.Code, §§ 3000, 3001.) (FN3) The Board was originally created in 1967 as the New Car Dealers Policy and Appeals Board to deal with the licensing and regulation of new motor vehicle dealers. (§§ 3000, 3050.) Its function was similar to other occupational licensing boards. (*Chevrolet Motor Division v. New Motor Vehicle Bd.,* 146 Cal.App.3d 533, 536, 194 Cal.Rptr. 270, cert. denied 465 U.S. 1102, 104 S.Ct. 1597, 80 L.Ed.2d 129.) In 1974, the Legislature gave the Board its present name and increased its powers to include resolving disputes relating to (1) whether there is "good cause" to terminate or to refuse to continue a franchise (§ 3060); (2) whether there is "good cause" not to establish or relocate a motor vehicle dealership in a "relevant market area" (§ 3062); (3) delivery and preparation obligations (§ 3064); and (4) warranty reimbursement (§ 3065).

In 1977, the court in *American Motors Sales Corp. v. New Motor Vehicle Bd.,* 69 Cal.App.3d 983, 138 Cal.Rptr. 594, found the dealer members had "an economic stake in every franchise termination case that comes before them" (*id.,* at p. 987, 138 Cal.Rptr. 594) and concluded:

> "[T]he combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*Id.,* at p. 992, 138 Cal.Rptr. 594.)

The court distinguished cases involving licensing or regulatory agencies containing members of the business or profession regulated. The court reasoned when an agency's members regulate other individuals of the same profession, there is little if any economic benefit involved and the members' necessary expertise is lacking in lay

persons. (*American Motors Sales Corp., supra,* 69 Cal.App.3d 983, 990-991, 138 Cal.Rptr. 594.) The court concluded the Board was legally constituted when it sat in judgment solely on matters involving license eligibility and qualifications of other motor vehicle dealers but not when it heard matters involving dealer-manufacturer disputes. The court noted "car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers." (*Id.,* at p. 991, 138 Cal.Rptr. 594.) The court went on to state:

> "Despite this reality, the Legislature retained the requirement that the nine-man Board consist of at least four car dealers. In effect it took sides in all Board-adjudicated controversies between dealers and manufacturers, making certain that the dealer interests would at all times be substantially represented and favored on the adjudicating body. This legislative partisanship damns the Board. The state may not establish an adjudicatory tribunal so constituted as to slant its judicial attitude in favor of one class of litigants over another. By doing so in this instance, the Legislature violated its obligation to assure evenhandedness in the adjudicatory process." (*Ibid.*)

The *American Motors* court also found the fact a majority of the Board's members were public members did not cure the defect. The court stated:

> "The evil here lies in the state's insistence that under all circumstances the adjudicatory deck of cards be stacked in favor of car dealers. That evil is not eliminated by stacking the deck four-ninths of the way rather than all the way." (69 Cal.App.3d 983, 993, 138 Cal.Rptr. 594.)

In response to the *American Motors* decision, the Legislature in 1977 eliminated dealer member involvement in disputes between dealers and manufacturers. (See Stats.1977, ch. 278, §§ 2-3, pp. 1171-1173; *Chrysler Corp. v. New Motor Vehicle Bd.,* 89 Cal.App.3d 1034, 1037, 153 Cal.Rptr. 135.) However, after lobbying by the California Automobile Dealers Association, the Legislature in 1979 again amended the statutes in urgency legislation to provide dealer members "may participate in, hear, and comment or advise other members upon, but may not decide" any matter involving a dealer-manufacturer dispute. (§§ 3050, subd. (d), 3066, subd. (d); Stats. 1979, ch. 340, §§ 102, pp. 1206-1207.)

This provision was likewise declared unconstitutional for failing to guarantee due process. (*Nissan Motor Corp. v. New Motor Vehicle Bd., supra,* 153 Cal.App.3d 109, 202 Cal.Rptr. 1; *Chevrolet Motor Division v. New Motor Vehicle Bd., supra,* 146 Cal.App.3d 533, 194 Cal.Rptr. 270.) These courts found:

> " '[T]hey [the dealer-members] are permitted to participate actively in hearings on dealer-manufacturer disputes, hear the evidence, and comment upon and advise other Board members in such matters. In other words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decision-making process, despite their financial interest in the outcome of that process.... Because of their ongoing working relationship, public members of the

Board may be influenced by arguments or facts suggested by the dealer members but not included in the public record, and the parties themselves may not have the opportunity to respond. [¶] In short, the presence of biased members on the Board presents a substantial probability that decisions in dealer-manufacturer disputes will be made on the basis of inappropriate considerations, and the fact that those members do not technically "decide" the disputes does not alter that probability. Each of the factors enumerated in *American Motors* is still present.' (*Chevrolet Motor Division v. New Motor Vehicle Bd., supra,* 146 Cal.App.3d at p. 541 [202 Cal.Rptr. 1].)" (*Nissan Motor Corp. v. New Motor Vehicle Bd., supra,* 153 Cal.App.3d 109, 115, 202 Cal.Rptr. 1.)

III

The Board argued in both *Chevrolet* and *Nissan,* as do University and amicus here, that the *American Motors* decision is of questionable validity in light of the California Supreme Court's decision in *Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151. Both the *Nissan* and *Chevrolet* courts rejected this argument (*Nissan Motor Corp. v. New Motor Vehicle Bd., supra,* 153 Cal.App.3d 109, 116, 202 Cal.Rptr. 1; *Chevrolet Motor Division v. New Motor Vehicle Bd., supra,* 146 Cal.App.3d 533, 540, 194 Cal.Rptr. 270.) We agree *Andrews* does not undermine the validity of *American Motors.*

Andrews involved an agricultural employer charged with interfering with its employees rights under the Agricultural Labor Relations Act. The employer made a motion to disqualify the administrative law officer, an attorney. The employer asserted the attorney was biased because he practiced law in a firm which had represented farm workers in labor disputes and Mexican-Americans in employment discrimination cases. The Supreme Court held even if the nature of the attorney's law practice could be used as evidence to show the attorney had a particular political or social outlook, such evidence would not establish grounds for disqualification on the basis of bias. (*Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal.3d 781, 790, 171 Cal.Rptr. 590, 623 P.2d 151.) The court first noted " '[b]ias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification.' (2 Davis, Administrative Law Treatise (1st ed.1958)....)" (*Ibid.*) The court then observed it would be impossible, and indeed undesirable, to require adjudicators to be entirely devoid of opinions and notions on the issues before them. (*Ibid.*) The Supreme Court held a party seeking disqualification for bias must show (1) there is prejudice against a particular party and (2) the prejudice is sufficient to impair the judge's impartiality so it appears probable a fair trial cannot be had (*id.,* at p. 792, 171 Cal.Rptr. 590, 623 P.2d 151); a mere "appearance of bias" is insufficient (*id.,* at p. 793, 171 Cal.Rptr. 590, 623 P.2d 151).

The Board argues Chrysler established only the dealer members had a "crystallized point of view" and not actual bias and therefore, under *Andrews* the presence of dealer members on the Board did not deprive Chrysler of an impartial tribunal. *Andrews* is not controlling here.

First, *Andrews* is factually distinguishable. The adjudicator in *Andrews* was not a member of either class of litigants involved, i.e., he was not an agricultural employer or employee. In contrast here, the challenged adjudicators are members of one class of litigants: new motor vehicle dealers.

Second, *Andrews* involved a challenge for impartiality based on the adjudicator's perceived bias due to his political and social views. Here, the challenge of impartiality rests on the dealer members' financial interest in the outcome of the disputes. (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d 983, 992, 138 Cal.Rptr. 594.) The Supreme Court in *Andrews,* after noting "our courts have never required the disqualification of a judge unless the moving party has been able to demonstrate concretely the actual existence of bias" (*Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal.3d 781, 793, 171 Cal.Rptr. 590, 623 P.2d 151, fn. omitted), went on to explain:

> "Of course, there are some situations in which the probability or likelihood of the existence of actual bias is so great that disqualification of a judicial officer is required to preserve the integrity of the legal system, even without proof that the judicial officer is actually biased towards a party. (See, e.g., *Peters v. Kiff* (1972) 407 U.S. 493, 502 [92 S.Ct. 2163, 2168, 33 L.Ed.2d 83] ... [discussing *Tumey v. Ohio* (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] ..., in which a judge was disqualified because of his financial stake in the outcome].)" (*Id.,* at p. 793, fn. 5, 171 Cal.Rptr. 590, 623 P.2d 151.)

The Supreme Court observed the Legislature in Code of Civil Procedure section 170 has "demanded disqualification" of a judicial officer on the ground of financial interest. The court concluded such a situation is "entirely distinct from a case in which bias itself is charged." (*Ibid.*)

Thus, the *Andrews* court, while rejecting an "appearance of bias" standard based on a judicial officer's perceived political or philosophical views, specifically recognized actual bias need not be shown when the alleged bias [179 Cal.App.3d 804] is due to a financial interest in the outcome of the dispute. The *American Motors* decision and its progeny are based on the dealer members' financial interest of and not "solely because they are members of the dealer-class of litigants." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d 983, 992, 138 Cal.Rptr. 594.)

IV

The Board and University contend the dealer members' voluntary recusal cures the constitutional defect.

Here the Board submitted a declaration of its executive secretary, stating "No dealer member has participated in, heard, or commented on or advised other members" on matters involving dealer manufacturer disputes since the *Nissan* decision.

To support their position the Board and University point to the Legislature's use of the permissive language "may" in its authorization of dealer member participation in dealer-manufacturer disputes and its provision only three members of the Board are necessary to constitute a quorum in protest hearings. The Board also points to the *Nissan* court's remand "for further proceedings before a Board *acting without the participation of the new motor vehicle dealer members* " as further support. (*Nissan Motor Corp. v. New Motor Vehicle Bd., supra,* 153 Cal.App.3d 109, 116, 202 Cal.Rptr. 1, italics added.)

Both the *Nissan* and *Chevrolet* courts found the Legislature did not intend automatic recusal of dealer members since the Legislature-mandated dealer members

constitute almost one-half of the total Board membership authorized to participate in franchise disputes. (*Nissan Motor Corp. v. New Motor Vehicle Bd., supra,* 153 Cal.App.3d 109, 115-116, 202 Cal.Rptr. 1, *Chevrolet Motor Division v. New Motor Vehicle Bd., supra,* 146 Cal.App.3d 533, 539-540, 194 Cal.Rptr. 270.)

The *Chevrolet* court, in rejecting the Board's argument Chevrolet should have requested the dealer members recuse themselves, reasoned:

> "If this argument were accepted, predictably automatic requests for the recusal of dealer members would have the effect of routinely depriving the Board of participation by a substantial number of its members in situations involving one of its basic functions. Clearly their recusal was not intended by the Legislature." (*Chevrolet Motor Division v. New Motor Vehicle Bd., supra,* 146 Cal.App.3d 533, 540, 194 Cal.Rptr. 270.)

This interpretation is supported by the legislative history of the 1979 amendment. The Legislature stated it was passing the amendment as an urgency measure "[i]n order that the educated and needed advice of New Motor Vehicle Board members who are themselves new motor vehicle dealers may be utilized in the decision making process of the board." (1979 Stats., ch. 340, § 3.) The Senate Transportation Committee in its analysis stated:

> "The New Motor Vehicle Board staff claims that they lack the capacity to adequately advise Board members on dealer/franchise controversies." (Senate Transportation Committee Analysis of S.B. 417 (1979).)

The Assembly Transportation Committee explained:

> "This proposal was introduced at the request of the California Automobile Dealers' Association's Board in order to avail the board members to [sic] the expertise of the dealer members when matters are before the Board which effect [sic] vehicle dealers. The New Motor Vehicle Board [staff] has indicated that the *dealer expertise* in matters of conflict of dealer/franchise *is critical* and the Board should be permitted to benefit from the dealer's knowledge on such matters." (Assembly Transportation Committee Analysis of S.B. 417 (1979), italics added.)

This background makes it clear the Legislature intended the dealer members to actively participate in the resolution of dealer-manufacturer disputes and intended the public members to rely on the dealer members' "educated and needed advice." The fact the Legislature made the dealer members' participation permissive rather than mandatory does not negate this legislative intent. The use of the permissive "may" indicates only that participation by dealer members in general or as individuals is not required in all cases. It does not support a conclusion the Legislature contemplated automatic recusal of all dealer members in protest hearings. Nor is such a conclusion supported by the fact the Legislature designated three members as sufficient for a quorum in protest hearings. Contrary to the Board's inference that the quorum requirement is directed at three of the five public members, there is no language in the

statute to support such an inference and further, such inference conflicts with the expressed legislative intent favoring dealer member participation.

In sum, the Board's policy of automatic recusal in protest hearings, while an admirable attempt to comply with constitutionally mandated due process requirements, directly contradicts the Legislature's intent. An administrative agency may not, in the absence of valid statutory or constitutional authority, substitute its judgment for that of the Legislature under the guise of regulation. (*California State Restaurant Assn. v. Whitlow,* 58 Cal.App.3d 340, 347, 129 Cal.Rptr. 824.) "Administrative regulations in conflict with applicable statutes are null and void. [Citations.]" (*Ibid.*)

The Board here, by seeking court approval of its recusal policy is, in essence, asking the judiciary to rewrite the statutes in questions, e.g., to change the composition of the Board and the responsibilities of the dealer members. This we may not do. "If the scope of a statute cannot be limited to situations to which it may constitutionally apply except 'by reading into it numerous qualifications and exceptions' amounting 'to a wholesale rewriting of the provision,' the statute cannot be saved by judicial construction but must be declared invalid." (*Blair v. Pitchess,* 5 Cal.3d 258, 282, 96 Cal.Rptr. 42, 486 P.2d 1242, quoting *Fort v. Civil Service Commission,* 61 Cal.2d 331, 340, 38 Cal.Rptr. 625, 392 P.2d 385.) Accordingly, we must declare the statute invalid because it deprives a manufacturer litigant of its constitutionally guaranteed right to an impartial tribunal.

The judgment is affirmed.

BUTLER and MITCHELL (FN), JJ., concur.

FN1. A dual dealership is one where cars from two different manufacturers are sold at one location.

FN2. University also contends Chrysler waived the due process issue by failing to comply with the requirements of *Andrews v. Agricultural Labor Relations Bd.,* 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151, i.e., a showing of concrete facts establishing actual bias. We discuss the applicability of *Andrews* in section III, *infra.*

FN3. All statutory references are to the Vehicle Code unless otherwise specified.

FN Assigned by the Chairperson of the Judicial Council.

YAMAHA MOTOR CORPORATION, U.S.A., Petitioner, v. SUPERIOR COURT of California for the County of Los Angeles, Respondent, VAN NUYS CYCLE, INC., Real Party in Interest. (1986) 185 Cal.App.3d 1232 [230 Cal.Rptr. 382]
B018907.
Court of Appeal, Second District, Division 1, California.
Sept. 8, 1986.

Kelley Drye & Warren and Bruce L. Ishimatsu, Los Angeles, for petitioner.

Sweeney & Pafundi and John E. Sweeney, Los Angeles, for real party in interest.

Sam W. Jennings and Michael M. Sieving, Sacramento, for amicus curiae New Motor Vehicle Bd. of State of Cal. on behalf of petitioner.

No appearance for respondent.

LUCAS, Associate Justice.

Petitioner Yamaha Corporation seeks a writ of mandate to compel the superior court to vacate its order overruling Yamaha's demurrer to the first amended complaint of real party in interest Van Nuys Cycle and to enter an order sustaining the demurrer without leave to amend.

I

FACTS

Van Nuys Cycle is a motorcycle dealership franchised by Yamaha since 1966 to sell and service Yamaha motorcycles. In September 1982, Yamaha began distribution and sales of a new product which they designated as the RIVA motorscooter. Van Nuys attempted to order the RIVA products pursuant to its dealer agreement, but Yamaha refused to sell the RIVA to them or to other of their franchised dealers, choosing instead to establish new dealerships for distribution, sales and service of the RIVA products. Yamaha took the position that the RIVA was a motorscooter, not a motorcycle, and thus did not come within the terms of the motorcycle dealer agreements.

Many dealers protested this situation to the New Motor Vehicle Board, and in June 1984, that board determined in a ruling on several of these consolidated protests that the RIVA was a motorcycle, not a motorscooter, and was included within the Yamaha franchise agreements.

In March 1985, Van Nuys filed the within action against Yamaha in superior court, seeking damages for breach of the franchise agreement, breach of the implied covenant of good faith and fair dealing, and intentional interference with prospective business advantage. All causes of action arise largely out of Yamaha's refusal to sell the RIVA products to Van Nuys and its sale of such products to other dealers in that geographic area.

Yamaha demurred to the first amended complaint on the ground that the court lacked jurisdiction because Van Nuys had failed to exhaust its administrative remedies before the California New Motor Vehicle Board. In its opposition, Van Nuys asserted that its action was not based on a modification of the franchise nor on the establishment of a new franchise in its area, and thus was not within the purview of the New Motor Vehicle Board. The trial court overruled the demurrer.

Yamaha petitioned this court for a writ of mandate, which was denied. The Supreme Court granted review and retransferred the matter to this court. Pursuant to its order we issued the alternative writ and order to show cause. After hearing, we now issue a peremptory writ of mandate.

II

JURISDICTION OF NEW MOTOR VEHICLE BOARD

The New Motor Vehicle Board is contained in the Department of Motor Vehicles and was created by the Legislature in 1973 in part "to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to

insure that dealers fulfill their obligations under their franchises...." (Veh.Code, § 3000; Stats. 1973, c. 996, p. 1964, § 1.) The board is empowered to "Hear and consider, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065." (Veh.Code, § 3050, subd. (d).)

Section 3060 provides in pertinent part: "The franchisor shall not modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee notice thereof at least 60 days in advance of the modification or replacement. Within 30 days of receipt of the notice, a franchisee may file a protest with the board and the modification or replacement does not become effective until there is a finding by the board that there is good cause for the modification or replacement." Section 3061 provides a non-exclusive list of circumstances the board is to consider in making its "good cause" determination.

Section 3062 provides a similar notice requirement whenever a franchisor seeks to enter into a franchise establishing an additional dealership within a relevant market area where the same line-make is already represented or seeks to relocate an existing dealership. A franchisee may protest such establishment or relocation to the board, which will then conduct a hearing and make a good cause determination. It is clear from these statutes that the board is authorized to consider and resolve disputes between a franchisor and franchisee regarding the franchisor's modification of an existing franchise or its establishment of an additional franchise within the market area of an existing franchise.

III

APPLICABILITY TO THIS DISPUTE

Van Nuys argues that its complaint does not involve either modification of its franchise or establishment of another franchise in its area, and thus the dispute is not within the authority of the New Motor Vehicle Board. This claim does not withstand scrutiny.

In its first amended complaint, Van Nuys alleges that Yamaha breached the franchise agreement by refusing to sell the RIVA products to it. Under the terms of that agreement, which refers specifically to motorcycles, Van Nuys, as dealer, agreed "to maintain at Dealer's location: (1) a prominent display of the Products which includes at least one of each of the current models of the units, and (2) a reasonable inventory of the Products which is adequate to meet the current and anticipated demand in the market area served by Dealer's location, subject only to availability." Yamaha agreed to "make reasonable efforts to supply Dealer with the Products in accordance with accepted orders; however, during any period of shortage, Yamaha shall be permitted to allocate the Products in an equitable manner." In addition, "All orders are subject to acceptance by Yamaha based on the availability of the Products and Dealer's compliance with the terms and conditions hereof."

The agreement thus contemplates that a dealer not only may, but *will* carry all of the Yamaha models, displaying at least one of each model prominently. Yamaha's

obligation is to make reasonable efforts to supply the dealer with its products as ordered, which would of necessity include all of the Yamaha models, since the dealer is required to display and stock them all. The only conditions giving Yamaha the right to refuse to fill an order are lack of availability or dealer's failure to comply with the agreement. Neither of these grounds is asserted by either side in this case. Van Nuys thus asserts that Yamaha's refusal was a breach of the contract.

That asserted breach, however, also constitutes an attempted modification of the agreement. When Yamaha refused to sell the RIVA to Van Nuys and other franchisees, it took the position that the RIVA was a motorscooter, not a motorcycle, and was therefore not included within the franchise agreement. The affected dealers naturally took the opposite position. Several of them protested Yamaha's action to the New Motor Vehicle Board. In the decision entitled *Sports Cycle Center, Inc. dba Bill Krause Sports Cycle Center et al. v. Yamaha Motor Corporation, U.S.A.* (Protest Nos. PR-467-83 et al. (June 8, 1984)), which is incorporated by reference into the first amended complaint, the New Motor Vehicle Board determined that the RIVA was a motorcycle, not a motorscooter, and as such was included within the products covered by the Yamaha dealer agreements. It follows that Yamaha's insistence that this particular motorcycle was not to be included within the products it would supply under the franchise agreement was a modification of that agreement. (See *Champion Motorcycles, Inc., dba Champion Honda Yamaha v. Yamaha Motor Corporation, U.S.A.* (Protest Nos. PR-498-83 et al. (September 4, 1985)) in which the New Motor Vehicle Board reached the same conclusion in a dispute regarding the RIVA product.)

The agreement is expressly governed by California law, including Vehicle Code section 3060 which restricts Yamaha's right to modify the agreement by imposing a notice requirement on the franchisor and providing for a dealer protest and hearing mechanism before the New Motor Vehicle Board. Having concluded that Yamaha's refusal to supply the RIVA motorcycle to Van Nuys was a modification of the franchise agreement, we also conclude that Van Nuys' displeasure with this modification was a proper subject for protest to and determination by the New Motor Vehicle Board under section 3060.

Van Nuys also alleged that Yamaha breached the contract by establishing new dealerships for sales and servicing of the RIVA in close geographic proximity to Van Nuys' dealership. This allegation is squarely within the statutory jurisdiction of the New Motor Vehicle Board under section 3062, which provides for notice, dealer protest and good cause determination by the board when a franchisor establishes an additional franchise within the relevant market area of an existing franchise. This disagreement, too, was a proper subject for determination by the New Motor Vehicle Board.

Van Nuys asserts that by failing to give notice of its modification and establishment of new franchise as required by sections 3060 and 3062, Yamaha waived its right to insist that Van Nuys exhaust its administrative remedies. We do not read those sections to mean that failure of a franchisor to give the required notice in any way limits the availability of the administrative remedy to the franchisee. The notice provisions serve to establish a time frame within which a protest may be filed; once notice is served, a franchisee has only 20 days within which to act. Where no notice is given, presumably that clock has not yet begun to run; a protest may still be filed, even though many months have passed since the modification or new franchise was initiated. All Yamaha

waived by not giving notice is the ability to quickly finalize before the board its right to modify or establish a new franchise. Lack of notice does not prevent the board from exercising its powers to resolve disputes between franchisors and franchisees. The administrative remedy of a board protest remains available to Van Nuys Cycle, despite the lack of formal notice, and that remedy must be exhausted before Van Nuys can resort to judicial action.

IV

EXHAUSTION OF REMEDIES

In California it is a fundamental rule of procedure that "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292, 109 P.2d 942; *County of Los Angeles v. Farmers Ins. Exchange* (1982) 132 Cal.App.3d 77, 85-86, 182 Cal.Rptr. 879.) This is a jurisdictional prerequisite, not a matter of judicial discretion. (*Wilkinson v. Norcal Mutual Ins. Co.* (1979) 98 Cal.App.3d 307, 313, 159 Cal.Rptr. 416.) This is so even though the administrative remedy is couched in permissive language; an aggrieved party is not required to file a grievance or protest if he does not wish to do so, but if he does wish to seek relief, he must first pursue an available administrative remedy before he may resort to the judicial process. (*Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982, 88 Cal.Rptr. 533.)

There are several reasons for the exhaustion of remedies doctrine. "The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief." (*Morton v. Superior Court, supra,* 9 Cal.App.3d 977, 982, 88 Cal.Rptr. 533.) Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor "because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency." (*Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 980, 201 Cal.Rptr. 379.) It can serve as a preliminary administrative sifting process (*Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 698, 108 Cal.Rptr. 392), unearthing the relevant evidence and providing a record which the court may review. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476, 131 Cal.Rptr. 90, 551 P.2d 410.)

"The doctrine is not an absolute impediment to resort to the judicial process notwithstanding a failure to pursue administrative remedies. Well-established exceptions exist where the administrative remedy is inadequate [citation]; where it is unavailable [citation]; or where it would be futile to pursue such remedy. [Citation.]" (*Karlin v. Zalta, supra,* 154 Cal.App.3d 953, 979-980, 201 Cal.Rptr. 379.)

Van Nuys asserts that this case comes within the futility exception, arguing that the only issue extant between the parties, whether a franchisee was entitled to receive the RIVA products under the terms of the Yamaha franchise, was already decided by the New Motor Vehicle Board in the *Champion Motorcycles* protests. This assertion

demonstrates Van Nuys' misapprehension of the adjudicatory process of the board set forth in the Vehicle Code.

As noted earlier, the board is specifically empowered to "Hear and consider ... a protest by a franchisee pursuant to Section 3060, 3062, 3064, or 3065." (Veh.Code, § 3050.) When such protest is filed under section 3060 because of a franchise modification, the board then must make a finding as to whether there is good cause for the modification; generally the modification does not become effective until after a good cause finding is made. (Veh.Code, § 3060, subd. (c).)

The *Champion* decision included two threshold determinations applicable to our case. First, the board incorporated the decision in *Sports Cycle* that the RIVA was a motorcycle and that a Yamaha franchisee thus has the right to receive the RIVA products under the franchise. Second, the board determined that Yamaha's denial of the RIVA products to franchisee Champion was a modification of the franchise. Since these two determinations are based on the same RIVA products and Yamaha franchise agreement involved in our case, it is clear that the board's result on these issues would have been the same had Van Nuys filed a protest.

However, these two determinations do not resolve a modification dispute. Section 3060 limits a franchisor's right to modify or replace a franchise with a succeeding franchise *if* the modification or replacement would substantially affect the franchisee's sales or service obligations or investment. The board in *Champion* thus proceeded to analyze whether the modification had a substantial effect on Champion's sales or service obligations or investment, considering sales, service and financial data related specifically to the Champion dealership. The board's determination that there had been no substantial impact on Champion's sales or service obligations or investment is a factual determination based solely on the facts of that protest, and does not foretell the conclusion the board would reach in the dispute between Yamaha and Van Nuys.

The board went on to make its ultimate determination under section 3060: whether Yamaha had good cause for modifying the Champion franchise, based on the factors enumerated in section 3061. Section 3061 places emphasis on the need for the board to consider existing circumstances in each determination of good cause, including, but not limited to, *all* seven factors relating to the specific franchisee's business. This underscores the need for case-by-case determination as to whether there is good cause to modify a franchise. Once again, the board's determination was based solely on facts relating to the two parties in that dispute; although some of the factors relating to Yamaha's marketing strategy might have some bearing on the dispute between Yamaha and Van Nuys, other factors relating to Champion are simply not pertinent.

The board's finding as to good cause for modification in the *Champion* protest is not a finding that may be transferred to this dispute involving a different franchisee, and the board's conclusion in that case is therefore not a resolution of this dispute. Similar factors preclude reliance on the board's determination as to the establishment of other RIVA dealerships in the *Champion* case.

There is a need for factual determinations in this case regarding good cause for modification of the franchise and good cause for establishment of competing franchises in the area. The New Motor Vehicle Board is the administrative forum authorized to make such determinations and provide administrative remedies; it has particular expertise which makes the administrative remedy both valuable and expedient. Having

failed to exhaust its administrative remedies, Van Nuys is now precluded from seeking judicial relief. Yamaha's demurrer to those causes of action arising out of the modification of the franchise and the establishment of other franchises should have been sustained without leave to amend.

V

REMAINING ALLEGATIONS

The first amended complaint also alleges Yamaha's bad faith abandonment of advertising and promotion of its other products due to its total emphasis on the RIVA products, and Yamaha's discriminatory allocation of regular motorcycle products to Van Nuys in retaliation for Van Nuys' expressed objections to Yamaha's policies and demands. These claims, too, fall within the jurisdiction of the New Motor Vehicle Board, which is empowered to "Consider any matter concerning the activities or practices of any person ... holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative ... submitted by any person." (Veh.Code, § 3050, subd. (c).) That section provides that after such consideration, the board may do any one or any combination of several things: it may direct the Department of Motor Vehicles to conduct an investigation and make a written report, it may attempt to arbitrate the dispute, it may direct the Department to exercise its licensing power over a licensee. Van Nuys' failure to exhaust this administrative remedy is fatal to these claims as well.

DISPOSITION

Let a writ of mandate issue ordering respondent court to vacate its order overruling the demurrer of Yamaha and enter a new and different order sustaining the demurrer without leave to amend.

L. THAXTON HANSON, Acting P.J., and DEVICH, J., concur.
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AMERICAN ISUZU MOTORS, INC., Petitioner and Appellant, v. NEW MOTOR VEHICLE BOARD, Respondent, RAY FLADEBOE LINCOLN MERCURY, INC. dba Ray Fladeboe Isuzu, Real Party in Interest and Respondent. (1986) 186 Cal.App.3d 464 [230 Cal.Rptr. 769].
B013980.
Court of Appeal, Second District, Division 1, California.
Oct. 16, 1986.

Lillick, McHose & Charles and Donald F. Woods, Los Angeles, for petitioner and appellant.

John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Asst. Atty. Gen., Henry G. Ullerich, Supervising Deputy Atty. Gen., John J. Crimmins, Deputy Atty. Gen., for respondent.

Pilot & Spar and Michael J. Flanagan, Los Angeles, for real party in interest.

LUCAS, Associated Justice.

American Isuzu appeals from judgment denying its petition for writ of mandate. (Code Civ.Proc., § 1094.5.) We affirm.

I

FACTS

In November 1983, American Isuzu notified Ray Fladeboe Isuzu of its intention to terminate Fladeboe's Isuzu franchise. The notice of termination set forth the specific grounds for termination, as required by Vehicle Code section 3060: (FN1) "You have failed to maintain the authorized facility for the sale of Isuzu products open for business and have attempted to conduct your dealership operations from a facility other than the one authorized by the Isuzu Dealer Sales and Service Agreement."

Fladeboe filed a protest with the California New Motor Vehicle Board in accordance with the provisions of section 3060. After hearing, the board sustained the protest, finding that the sole grounds for Isuzu's proposed termination of franchise was Fladeboe's purported failure to provide an exclusive showroom, that the franchise agreement did not require an exclusive showroom, and that even if it did so require, good cause was not established to terminate the franchise.

Isuzu filed a petition for writ of mandate in superior court, seeking to have the board's decision set aside. The superior court upheld the decision of the board in all respects and denied the petition. Isuzu appeals, claiming error in the decision of the superior court and asserting that the New Motor Vehicle Board is unconstitutional. We reject both contentions and affirm.

II

CONSTITUTIONAL CHALLENGE

Vehicle Code section 3001 requires that four of the nine members of the New Motor Vehicle Board be new car dealers. In *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 992, 138 Cal.Rptr. 594, the court concluded that the board is not an unbiased tribunal for the resolution of dealer-manufacturer disputes, since dealer board members have a financial stake in every such dispute that comes before the board; "the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal."

In response to the *American Motors* decision, the Legislature amended section 3050, subdivision (d) and added subdivision (d) to section 3066 to provide that no member of the board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a dispute between manufacturer and dealer. (See Stats. 1977, ch. 278, §§ 2-3, pp. 1171-1173.) At the same time they amended section 3010, which required five members of the board to constitute a quorum for the transaction of any board business; five members still constitute a quorum "except that three members of the board, who are not new motor vehicle

dealers, shall constitute a quorum" for the purposes of dealer-manufacturer disputes. (Stats. 1977, ch. 278, § 1, p. 1171.)

After lobbying by the California Automobile Dealers Association, the Legislature again amended these statutes in 1979 to provide that dealer members "may participate in, hear, and comment or advise other members upon, but may not decide, any matter" involving a manufacturer-dealer dispute. (§§ 3050, subd. (d), 3066, subd. (d); as amended by Stats. 1979, ch. 340, § 1-2, pp. 1206-1207.)

In *Chevrolet Motor Division v. New Motor Vehicle Bd.* (1983) 146 Cal.App.3d 533, 540-541, 194 Cal.Rptr. 270, the court held that these changes did not cure the constitutional deficiencies of the board: "[T]he presence of biased members on the Board presents a substantial probability that decisions in dealer-manufacturer disputes will be made on the basis of inappropriate considerations, and the fact that those members do not technically 'decide' the disputes does not alter that probability. Each of the factors enumerated in *American Motors* is still present. The Board is still required by statute to have four dealer members. (See § 3001.) The statute neither requires nor authorizes manufacturer members. (See *ibid.*) The nature of the adversaries and the controversies between them remains the same. These problems have not been remedied by the subsequent changes in sections 3050 and 3066. Accordingly, the trial court did not err when it concluded that participation of the Board's dealer members in these proceedings denied Chevrolet an unbiased tribunal." The same result was reached in *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109, 114-115, 202 Cal.Rptr. 1.

In response to these holdings, the board began a policy of voluntary recusal of dealer members in all dealer-manufacturer disputes. The case before us was heard under this policy; although the relevant statutes provided that dealer members could participate in the hearing, but not in the actual decision-making, the matter was actually heard and decided only by the non-dealer members of the board, with no dealer members participating in any way.

American Isuzu argues that this policy did not correct the constitutional defect, since it demands a virtual rewriting of the statutes in a manner contradictory to the Legislature's intent that dealer members participate in dealer-manufacturer disputes. This argument was accepted in the recent decision of *University Ford Chrysler-Plymouth, Inc. v. New Motor Vehicle Bd.* (1986) 179 Cal.App.3d 796, 805-806, 224 Cal.Rptr. 908, which held the statutes unconstitutional despite the voluntary recusal policy. The court relied heavily on the Legislature's expressed intent that the 1979 amendment allowing dealer members to participate in but not decide manufacturer-dealer disputes be enacted as an urgency measure: "In order that the educated and needed advice of New Motor Vehicle Board members who are themselves new motor vehicle dealers may be utilized in the decision making process of the board, it is necessary that this act take effect immediately." (Stats. 1979, ch. 340, § 3, pp. 1207-1208.)

Although the Legislature's intent in 1979 appears to have been to utilize the expertise of dealer members in resolving dealer-manufacturer disputes, we find that subsequently a different and equally clear intent emerged in the face of the court rulings holding such participation unconstitutional. (*Chevrolet Motor Division v. New Motor Vehicle Bd., supra,* 146 Cal.App.3d 533, 540-541, 194 Cal.Rptr. 270; *Nissan Motor*

Corp. v. New Motor Vehicle Bd., supra 153 Cal.App.3d 109, 114-115, 202 Cal.Rptr. 1.) In 1985, the statutes in question were again amended to read: "A member of the board who is a new motor vehicle dealer may *not* participate in, hear, comment, advise other members upon, or decide any matter considered by the board" involving a dispute between a franchisee and franchisor. (Section 3050, subds. (c), (d), as amended by Stats. 1985, c. 1201, § 2, pp. 3-4; § 3066, subd. (d), as amended by Stats. 1985, c. 1566, § 2, p. 4; emphasis added.) These changes were enacted by urgency legislation; the Legislature explained: "The facts constituting the necessity [for urgency legislation] are: In order to comply with court decisions regarding hearings of the New Motor Vehicle Board, and to revise administrative procedures of the board as early as possible, it is necessary that this act take effect immediately." (Stats.1985, c. 1201, § 7, p. 5.) The Legislature's concern no longer appears centered on the assistance of dealer members in resolving disputes; the strong intent instead is that the board, *in a form that is constitutionally permissible,* be able to act effectively to resolve dealer-manufacturer disputes.

The voluntary recusal policy which resulted in hearing and determination of disputes solely by the public members of the board was not contrary to this intent; instead, it was a foreshadowing of the Legislature's solution to the due process problems of bias that troubled the previous statutes. Under both the voluntary recusal policy and the 1985 amendments, dealer-members do not participate in, hear, comment, advise other members upon, or decide any dispute between a dealer and a manufacturer. By its 1985 amendments, the Legislature essentially ratified the voluntary recusal policy practiced by the board. (See *Hewitt v. Rincon del Diablo Municipal Water Dist.* (1980) 107 Cal.App.3d 78, 91, 165 Cal.Rptr. 545.) Inasmuch as the Fladeboe-American Isuzu protest was determined under the voluntary recusal policy with only the public members of the board participating in any way, it was untainted by dealer bias and did not deprive American Isuzu of procedural due process. To remand this matter for a new hearing before only the public members pursuant to the 1985 amendments would serve no purpose; the panel that heard this matter the first time operated with the same makeup and restraints under the voluntary recusal policy as exist under the 1985 statutes.

Appellant argues that even without participation of dealer members in dealer-manufacturer protests, the board is still unconstitutionally biased by the dealer members' collegial influence over the public members, since they all work together on other board business such as rule-making, licensing, discipline, election of officers, and, in particular, selection of hearing officers. We disagree.

Due process, of course, requires a competent and impartial tribunal for administrative hearings. (*Peters v. Kiff* (1972) 407 U.S. 493, 501, 92 S.Ct. 2163, 2168) 33 L.Ed.2d 83. If, as appellant asserts, the public members of the board were biased, determination of matters before that tribunal would result in a denial of due process. In *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792-794, 171 Cal.Rptr. 590, 623 P.2d 151, our Supreme Court reaffirmed that disqualification of a judicial or administrative law officer for bias cannot be based solely on expressed or crystallized political or legal views, even if those views result in an appearance of bias. A party must generally allege concrete facts that demonstrate the challenged judicial

officer is contaminated with actual bias or prejudice; bias and prejudice are never to be implied. Appellant has alleged no such facts in this case.

However, Andrews recognizes "some situations in which the probability or likelihood of the existence of actual bias is so great that disqualification of a judicial officer is required to preserve the integrity of the legal system, even without proof that the judicial officer is actually biased towards a party. [Citations.] In California, these situations are codified in Code of Civil Procedure section 170, subdivisions 1-4. They include cases in which the judicial officer either has a personal or financial interest, has a familial relation to a party or attorney, or has been counsel to a party. The Legislature has demanded disqualification in these special situations regardless of the fact that the judicial officer nevertheless may be able to discharge his duties impartially. The evident and justifiable rationale for mandatory disqualification in all such circumstances is apprehension of an appearance of unfairness or bias. However, the instances addressed in section 170, subdivisions 1-4 are entirely distinct from a case in which bias itself is charged under subdivision 5 of that statute as the ground for disqualification. As explained above, the subjective charge of an appearance of bias alone does not suffice to demonstrate that a judicial officer is infected with actual bias." (*Andrews, supra,* p. 793, fn. 5, 171 Cal.Rptr. 590, 623 P.2d 151.)

The court in *Nissan Motor Corp. v. New Motor Vehicle Bd., supra,* 153 Cal.App.3d 109, 116, 202 Cal.Rptr. 1, thus held that since the challenge was to the impartiality of the board based on the participation of dealer members, who have a financial interest in the outcome of dealer-manufacturer disputes (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d 983, 987), 138 Cal.Rptr. 594, proof of actual bias was not required under *Andrews;* the mere appearance of bias is sufficient to support a holding that an adjudicator cannot provide a fair tribunal when that adjudicator has a financial interest or economic stake in the controversy. (See also *Chevrolet Motor Division v. New Motor Vehicle Bd., supra,* 146 Cal.App.3d 533, 540, 194 Cal.Rptr. 270.)

In our case, the challenge is not to the impartiality of the dealer members, whose financial interest has been recognized, but to the impartiality of the public members. Appellant offers no evidence of any financial interest these public members have in the outcome of the disputes, nor of any personal interest which would present a "probability or likelihood of the existence of actual bias so great that disqualification ... is required to preserve the integrity of the legal system," even without proof that such member is actually biased towards a party. (*Andrews, supra,* 28 Cal.3d p. 793, fn. 5, 171 Cal.Rptr. 590, 623 P.2d 151.) In the absence of any allegations of actual partiality, we find the simple interaction of the public members with the dealer members on other board business insufficient evidence of bias to overcome the presumption of honesty and integrity of adjudicators. (See *Withrow v. Larkin* (1975) 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712.)

Appellant focuses attention on the participation of the full board, including the dealer members, in the selection of hearing officers to hear dealer-manufacturer disputes. The claim seems to be that there is a financial interest involved, and so the mere appearance of bias is enough to establish that the tribunal is not impartial. Appellant has not articulated just what financial interest is involved. It has, of course, been recognized that the dealer members have a financial stake in the outcome of the dealer-manufacturer disputes. However, appellant has failed to make any showing that

the hearing officers share that financial stake or that they have any financial stake of their own. In the case before us, the hearing officer in his statement of economic interest apparently reported that he had *no* reportable economic interests.

In the absence of any evidence at all, we refuse to conjure a financial stake on the part of a hearing officer which might present an appearance of bias sufficient to hold the tribunal unconstitutional. Moreover, appellant has failed to present any facts indicating actual bias of the hearing officer. On the record before us, we simply do not find that the dealer members' participation in the selection of hearing officers results in the denial of an impartial tribunal for adjudication of dealer-manufacturer disputes in violation of due process.

III

SUFFICIENCY OF THE EVIDENCE

Appellant argues that there is no substantial evidence to support the finding that the dealership standards clause does not require an exclusive showroom. We disagree.

The trial court properly applied the substantial evidence test in this case. (See *Piano v. State of California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 422, 163 Cal.Rptr. 41.) In cases such as this one where the trial court does not exercise its independent judgment in reviewing an administrative decision, it is performing an essentially appellate function, and the trial court and appellate courts occupy identical positions with regard to the administrative record and the determination of whether the administrative decision is supported by substantial evidence. (*Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 Cal.App.3d 817, 820, 130 Cal.Rptr. 249.) An abuse of discretion is established in such cases "if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ.Proc., § 1094.5, subd. (c); *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 44-45, 112 Cal.Rptr. 805, 520 P.2d 29.)

The challenged finding is that the dealership franchise did not require Fladeboe to provide an exclusive showroom to Isuzu. Central to this finding, of course, is the dealership agreement, which requires, under article III, section A, subdivision 1, that the dealer provide, at the "Dealership Location," "Dealership Facilities" in accordance with the applicable "Dealership Standards." Both the hearing officer and the trial court looked to the definitions provided in the agreement to interpret the terms used in this requirement.

"Dealership Location" is defined as "the business location of Dealer described in the initial paragraph of this Agreement;" that paragraph describes the location as "16-20 Auto Center Drive, Irvine, Ca." "Dealership Facilities" are defined as "the land areas at the Dealership Location and the buildings and improvements erected thereon." "Dealership Standards" are defined as "such reasonable standards as may be established by Distributor for Authorized Isuzu Dealers from time to time under its standard procedures with respect to such matters as dealership facilities, tools, equipment, capitalization, inventories and personnel."

The agreement itself contains no dealership standards requiring a separate showroom; it contains no description of the dealership facilities indicating the need for a separate building. It does not even limit the dealership location to the address of one building, but rather lists 16-20 Auto Center Drive as the location. Like the board and the

trial court, we, too, conclude that the dealership agreement does not contain any express requirement for an exclusive Isuzu showroom.

Appellant presented a great deal of parole evidence to show that the dealership standards established prior to execution of the dealership agreement included an exclusive showroom requirement. The hearing officer admitted this evidence and found that the original letter of intent between the parties did require a separate showroom. However, in his findings he quoted the merger clause of the subsequently executed dealership agreement, which states: "Unless expressly referred to and incorporated herein, this agreement cancels, supersedes and annuls all prior agreements, contracts and understandings between Distributor and Dealer, and there are no representations, promises, agreements or understandings except as described herein, all negotiations, representations and understandings being merged herein." In the absence of any express incorporation of the exclusive showroom requirement in the dealership agreement, this merger clause undercuts any force the earlier showroom requirement could possibly have as a "dealership standard."

Isuzu presented testimony regarding the great importance to it of a separate showroom for its products. The western regional manager testified that the exclusive showroom requirement was part of a national marketing strategy. Although other Isuzu requirements for dealers were fairly small, the separate showroom requirement was one of the biggest parts of a dealer's investment, important for prestige and name identification.

From such evidence the hearing officer found: "Given the purported importance of the separate showroom to Isuzu it would certainly have been the type of agreement that would have been included in the Sales and Service Agreement had Isuzu so desired." Substantial evidence, mixed with common sense, support the conclusion that there was no exclusive showroom requirement either expressly set forth in the agreement or otherwise incorporated as a dealership standard under the merger clause.

IV

DISCONTINUANCE OR RELOCATION OF FACILITY

In its letter of termination, Isuzu cited as the specific grounds for termination the failure of Fladeboe to maintain the authorized facility for the sale of Isuzu products open for business and an attempt to conduct the dealership operations from a facility other than the one authorized by the dealer agreement. Appellant claims error in the rejection of its position that the discontinuance of use of the 20 Auto Center Drive as the exclusive showroom for Isuzu was a "discontinuance of use by Dealer of any of the Dealership Facilities employed ... by Dealer in the conduct of the dealership operations" without prior written consent of Isuzu in breach of the dealership agreement and as specified as grounds for termination.

Under the agreement, "Dealership Facilities" mean the land, areas and buildings at the "Dealership Location." And, as the hearing officer found, the "business location of Dealer" described in the initial paragraph of the agreement was set forth as 16-20 Auto Center Drive. The addresses of Fladeboe's showrooms are 16 Auto Center Drive, 18 Auto Center Drive and 20 Auto Center Drive. The "business location" of Fladeboe included 16, 18 and 20 Auto Center Drive; thus when the Isuzu showroom was moved from 20 Auto Center Drive to 16 Auto Center Drive, there was no discontinuance of use of the authorized facility, since both addresses are part of the described business

location. For the same reason, there was no move of the dealership to a facility other than the one authorized, since all three addresses were authorized under the agreement. Substantial evidence supports the finding that Fladeboe did not move the dealership to a facility other than the one authorized under the agreement, and that there was no breach of the franchise in that regard.

V

FAILURE TO CONSIDER OTHER GROUNDS FOR TERMINATION

Appellant argues strenuously that it was error for the board to refuse to consider additional grounds for termination of the franchise. We reject this contention.

Under Vehicle Code section 3060, subdivision (a), a franchisor must give written notice to the franchisee and the board "setting forth the specific grounds" for termination of a franchise. Appellant's letter of termination stated: "You have failed to maintain the authorized facility for the sale of Isuzu products open for business and have attempted to conduct your dealership operations from a facility other than the one authorized by the Isuzu Dealer Sales and Service Agreement." The notice makes reference to article V, section A, subdivisions (2)(e) and (i), which set forth the above-specified acts as grounds for termination of the agreement. However, at the administrative hearing, appellant argued the termination was also based on three other provisions in the agreement.

We conclude the hearing officer and the trial court properly rejected any express reliance on these additional grounds. The Vehicle Code unambiguously requires that notice be given of the *specific grounds* for termination of a franchise. When appellant cited to particular provisions of the agreement as those grounds, it limited its position to those stated grounds. To permit a franchisor to later raise additional unspecified grounds at the hearing would be to deny the franchisee the notice prior to hearing guaranteed under the statute; such denial infringes on the franchisee's right to procedural due process and cannot be allowed. The board's determination was properly limited to the grounds specified in the notice of termination.

This limitation did not render the board's considerations unduly narrow. Appellant stated several times during the hearing that the case was really only about Fladeboe's no longer providing Isuzu with an exclusive showroom. The hearing officer expressly recognized that the crux of the dispute was whether Fladeboe's failure to provide an exclusive Isuzu showroom constituted a breach of the dealership agreement, and, if so, whether such failure to comply constituted good cause for termination of the franchise. It was necessary for him to consider all the terms of the agreement as well as the parole evidence presented by Isuzu before he could reach his determination that the agreement itself did not require an exclusive showroom and that failure to provide such showroom was therefore not a breach of the agreement. These determinations find ample support in the record.

VI

CONDITIONAL ORDER

Appellant asks that, in the event we find there was a breach of the franchise agreement, we remand to the board for consideration of a conditional order. The board does indeed have the power to issue a conditional order "for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article." (Veh.Code, § 3067.) However, the board

did not find that there had been a breach of the franchise agreement on any of the grounds specified in the termination notice, and based on the substantial evidence to support that determination, we find no abuse of discretion in that decision. We therefore find no need to remand for consideration of a conditional order.

DISPOSITION

The judgment of the trial court denying the petition for writ of mandate is affirmed.

L. THAXTON HANSON, Acting P.J., and DEVICH, J., concur.

FN1. Unless otherwise noted, all statutory references are to the Vehicle Code.

TOYOTA OF VISALIA, INC. et al., Plaintiffs and Respondents, v. NEW MOTOR VEHICLE BOARD et al., Defendants and Appellants. (1987) 188 Cal.App.3d 315 [233 Cal.Rptr. 708].

No. F006297.

Court of Appeal, Fifth District, California.

Jan. 14, 1987.

John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Asst. Atty. Gen., Paul H. Dobson and Marybelle D. Archibald, Deputy Attys. Gen., Sacramento, for defendants and appellants.

Coder & Tuel, Farley & Alldredge and Houston N. Tuel, Jr., Coder & Tuel, Sacramento, Farley & Alldredge, Hanford, for plaintiffs and respondents.

GEO. A. BROWN, Presiding Justice.

On petition of Toyota of Visalia, Inc. (Toyota) (FN1) for a writ of administrative mandamus pursuant to Code of Civil Procedure (FN2) section 1094.5, the superior court admitted certain exhibits in evidence and issued its writ directing the New Motor Vehicle Board (Board) to consider the newly admitted evidence in determining the appropriate sanctions and penalties to be assessed against Toyota for certain established violations of the Vehicle Code. The issues relate to the propriety of the superior court's admitting the evidence and the scope of the direction to the Board on remand.

This is the second time this case has been before the court. The former appeal is reported as *Toyota of Visalia, Inc. v. Department of Motor Vehicles* (1984) 155 Cal.App.3d 315, 202 Cal.Rptr. 190. A brief history of the proceedings will be helpful.

On January 25, 1980, the Department of Motor Vehicles (Department) filed accusations against Toyota of Visalia alleging 11 different categories of violation of the Vehicle Code, among which were charges of false and misleading advertising and inaccurate PAC stickers. In June 1980, a hearing was held before an administrative law judge. His proposed decision was filed on November 13, 1980, finding violations on all but one count and ordering various penalties, including revocation and suspension of respondents' dealership license.

On November 26, 1980, the administrative law judge's decision was adopted by the Department, and on December 24, 1980, the Department denied Toyota's petition for reconsideration. Toyota then appealed the Department's decision to the Board. The

Board's decision dated July 14, 1981, modified the decision of the Department and affirmed the decision as modified.

On July 14, 1981, respondents filed a petition for writ of administrative mandamus in the Superior Court of the County of Tulare alleging, inter alia, that the penalty imposed by the Board was excessive.

On October 13, 1982, the court issued a decision granting the petition with respect to the penalty imposed. The proceedings were remanded to the Board for reconsideration of the penalty in light of the court's decision.

On November 22, 1982, the Board and the Department filed a notice of appeal with this court. This court reviewed the trial court's consideration of the Board's decision in an opinion filed May 2, 1984, and affirmed in part and reversed in part. This court affirmed the finding by the trial court that the penalty imposed by the Board was excessive and directed the trial court to modify its judgment and to remand the cause to the Board for further consideration in accordance with the opinion. (*Toyota of Visalia, Inc. v. Department of Motor Vehicles, supra,* 155 Cal.App.3d 315, 202 Cal.Rptr. 190.)

Prior to the hearing on remand, Toyota made a motion before the Board to augment the record with evidence Toyota considered relevant to the issue of penalty. After conducting a hearing, the Board denied the motion in its entirety. Toyota orally renewed the motion to augment at the Board's hearing on remand, at which time the motion was again denied. The Board thereafter issued an order reducing the license revocation to a 30-day suspension which Toyota could elect to take in two 15-day segments and a period of 3 years' probation.

Toyota filed a petition for a writ of administrative mandamus in the superior court. The petition alleged that appellant Board's decision was not supported by the findings, that appellant Board erred in denying the motion to augment the record, and that the penalty imposed was excessive. At the hearing on the petition for a writ of administrative mandamus, Toyota offered, and the trial court received, 11 exhibits on the theory that the evidence bore upon the issue of mitigation of penalty and that evidence in mitigation on the issue of penalty is admissible up to the time of adjudicating the penalty. The 11 exhibits are described in appendix A.

Exhibits 1, 2, 3, 4, 7, 9 and 10 were admitted into evidence without objection by the Board. In fact, as to at least two of these exhibits the Board's attorney expressly stated she had no objection. Exhibits 5, 6, 8 and 11 were admitted over the objection of the Board. Of the exhibits objected to by the Board, only exhibits 6 and 8 had previously been offered to the Board and rejected by it.

On August 9, 1985, judgment was entered by the trial court commanding the Board to set aside its decision in the administrative proceedings and to reconsider the appropriate administrative sanctions or penalty to be assessed.

DISCUSSION

Evidence of good behavior, good practices and lack of dereliction, as well as other evidence relevant to the issue of penalty, is properly admitted at the hearing on penalty even though a long period of time has transpired between the findings of violations and the hearing on the penalty. The weight to be given the evidence is within the province of the Board. While there are no cases directly in point in this context, the Board's policy of giving weight to a licensee's post-hearing conduct has been inferentially approved.

(*Cozens v. New Car Dealers Policy & Appeals Bd.* (1975) 52 Cal.App.3d 21, 24, 124 Cal.Rptr. 835.)

In the field of criminal law it is well established that evidence concerning an individual's post-conviction conduct is relevant to his sentence and that updated information should be obtained when resentencing occurs long after the original probation officer's report was obtained. (*People v. Rojas* (1962) 57 Cal.2d 676, 683, 21 Cal.Rptr. 564, 371 P.2d 300; *People v. Brady* (1984) 162 Cal.App.3d 1, 208 Cal.Rptr. 21.) An automobile dealer facing the loss or suspension of his license, and thus his livelihood, is entitled to no less. This is particularly true in this type of administrative proceeding where the applicable principle is that the primary purpose of punishment is protection of the public rather than punishment of the wrongdoer. (*Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 543, 92 Cal.Rptr. 525.)

All of the exhibits admitted by the court were offered as being relevant on the issue of mitigation of penalty. The unobjected-to exhibits (exhbits 1, 2, 3, 4, 7, 9 and 10) are clearly relevant on the issue of penalty, and we need not specifically discuss those exhibits further. Like the Board, we focus on exhibits 5, 6, 8 and 11. These exhibits were also relevant on the issue of penalty. Exhibits 6 and 8 consist of evidence of restitution to certain customers who were injured by Toyota's illegal conduct. Exhibits 5 and 11 consist of evidence tending to show that the penalty imposed by the Board, a 30-day suspension, has the potential to constitute a de facto revocation; exhibit 5 consists of a portion of the franchise agreement between respondent and Toyota Motors providing that respondent Toyota of Visalia could lose its franchise if it is closed for a period of five days or more. Exhibit 11 consists of documents indicating that the dealerships of Pasadena Motors and Lyons Buick-Opal, which were also given license suspensions by the Board, are no longer in business.

The Board argues that the court should not have admitted the evidence because it was untimely under the Board's rules.

The Board refers to section 568 (13 Cal.Admin.Code, § 568) which requires of those desiring to produce additional evidence before the Board a statement that "in the exercise of reasonable diligence [the evidence] could not have been produced or which [evidence] was improperly excluded at the hearing [before the hearing officer]."

The argument continues that since Toyota failed to submit the proper statement when it appealed to the Board in 1980, it cannot produce this evidence before the Board in 1984. The Board asserts that section 568 applies even if the evidence was not in existence at the time of the appeal to the Board.

The Board's position is manifestly unreasonable because, as construed by the Board, the section would foreclose an appellant from presenting any evidence to the Board not in existence at the time an appellant filed a notice of appeal. A more reasonable interpretation is that the section requires notice in the petition to the Board only if petitioner is aware of such evidence and if the evidence is already in existence; section 568 merely governs format and content of documents, not procedural rights of the parties.

The procedural rights of the parties are governed by Vehicle Code section 3053, providing in pertinent part: "The board shall determine the appeal upon the administrative record of the department, any evidence adduced at any hearing of the board, and upon any briefs filed by the parties." There is nothing in Vehicle Code

section 3053 that limits the evidence the Board may consider to that which was in existence at the time the notice of appeal was filed. On the contrary, evidence may be "adduced at any hearing." We conclude that section 568 (13 Cal.Admin.Code, § 568) does not foreclose the Board from considering evidence not specified in the notice of appeal to the Board.

The information contained in all of the exhibits except exhibits 5, 6 and 11 (FN3) was not in existence at the time of the Board hearing in 1980.

The Board asserts that this court in the former appeal foreclosed the Board and trial court from considering evidence of mitigation by its statement in footnote 8 of the opinion which states:

> "We reject Toyota's and Pioneer's request that this court take judicial notice of the fact that approximately four years have transpired since most of the violations were committed without any further evidence of noncompliance by Toyota or Mr. Thomas. What has transpired since 1980 is not a part of the record and, in addition, not relevant to this appeal." (*Toyota of Visalia, Inc. v. Department of Motor Vehicles, supra,* 155 Cal.App.3d at p. 328, fn. 8, 202 Cal.Rptr. 190.)

The Board misconstrues the import of this statement. The footnote does not say that evidence of exemplary post-hearing conduct is irrelevant to the issue of penalty; it says that such evidence was irrelevant "to this appeal."

Footnote 8 of the opinion in the former appeal reveals that Toyota asked that this court consider evidence of its good behavior as it related to whether the record supports the trial court's finding that the penalty of revocation imposed by the Board was excessive. In reviewing the excessiveness of the penalty imposed by the Board, this court was understandably limited to consideration of the evidence before the Board when it imposed the penalty. Only by limiting the record to the evidence before the Board could this court have scrutinized the discretion of the Board for abuse. It does not necessarily follow, however, that upon remand the Board was foreclosed from "determin[ing] the appeal upon ... any evidence adduced at *any* hearing of the board, ..." (Veh.Code, § 3053; emphasis added.).) The opinion in *Toyota of Visalia, Inc. v. Department of Motor Vehicles, supra,* 155 Cal.App.3d 315, 202 Cal.Rptr. 190, should not be interpreted to either encourage or foreclose the Board from considering additional evidence in reassessing the penalty. There is simply no directive to the Board either way in the court's former opinion.

The Board also urges that, as a matter of policy, evidence in mitigation occurring after the hearing before the Department should not be considered in arriving at the proper penalty. It is argued that to hold otherwise would be to award a disciplined dealer who is successful in his appeal with an opportunity to present mitigating evidence on remand and encourage delay while denying a disciplined dealer who is unsuccessful in an appeal the same opportunity. It must be acknowledged that this type of inequity is inherent in our judicial system and occurs by reason of the uniqueness of the facts and circumstances of each individual case. Thus, in criminal cases the period of time transpiring between the adjudication of guilt and the imposition of sentence or resentence in similar types of criminal cases varies widely, and there does not appear to be any practical way that the time period can be made uniform. In good conscience, we cannot conclude, however, that this variation should prevent those who are in a position to present mitigating evidence from doing so.

We next pass to a consideration of the provisions of section 1094.5 as they relate to the trial court's authority to admit exhibits 5, 6, 8 and 11.

The evidentiary limitation imposed on the court by section 1094.5, subdivision (e), relating to the trial court's authority to admit and consider new evidence, is a central issue in this litigation. That section provides in relevant part:

> "(e) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; ..."

The decisions discussing section 1094.5, subdivision (e), have indicated that the section operates as a limitation upon the court's authority to admit new evidence. The general rule is that a hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency. (*Beverly Hills Fed. S. & L. Ass'n. v. Superior Court* (1968) 259 Cal.App.2d 306, 324, 66 Cal.Rptr. 183.) Section 1094.5 contains limited exceptions to this rule. "It is error for the court to permit the record to be augmented, in the absence of a proper preliminary foundation ... showing that one of these exceptions applies." (Cal.Administrative Mandamus (Cont.Ed.Bar 1966) § 13.5, p. 219.)

As this court stated in *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 595, 155 Cal.Rptr. 63:

> " 'It is not contemplated by the code provision that there should be a trial de novo before the court reviewing the administrative agency's action even under the independent review test.' (*Hadley v. City of Ontario* (1974) 43 Cal.App.3d 121, 127 [117 Cal.Rptr. 513]; see generally, Netterville, *Judicial Review: The 'Independent Judgment' Anomaly* (1956) 44 Cal.L.Rev. 262.) Public policy requires a litigant to produce all existing evidence on his behalf at the administrative hearing (see *Akopiantz v. Board of Medical Examiners* (1961) 190 Cal.App.2d 81, 93 [11 Cal.Rptr. 810]. Only where the record is augmented within the strict limits set forth in the statute is evidence on the main issues ever received in the superior court (Deering, Cal. Administrative Mandamus (Cont.Ed.Bar 1966) p. 86).
>
> "...
>
> "When the Legislature granted the superior court the discretion to receive 'relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the administrative hearing,' it reasonably may be inferred that it meant to authorize the receipt of evidence of events which took place after the administrative hearing.... We conclude that the superior court is authorized under section 1094.5, subdivision (e) to receive relevant evidence of events which transpired after the date of the agency's decision. (FN4)"

Footnote 4 of the quoted passage provides:

> "This does not mean that the trial court should admit such evidence in all cases. In keeping with the principle that the administrative agency should have the first opportunity to decide the case on the basis of all of the evidence, the better practice might be to remand the action for agency redetermination in the light of the new evidence, particularly where the evidence would have been crucial to the administrative decision."

(See also *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 774-775, 122 Cal.Rptr. 543, 537 P.2d 375.)

The evidence contained in exhibits 5, 6 and 11 was available to Toyota at the time of the original hearing before the Board in 1980. The evidence contained in exhibits 5 and 11 was not offered to the Board in the 1985 hearing.

Thus, as to exhibits 5 and 11, the Board was not given the opportunity to rule on their admissibility and the Board cannot be said to have improperly excluded those exhibits.

Exhibit 6 consisted of canceled checks representing reimbursement for fee overcharges to customers. All of the reimbursements were made before the date of the original hearing in 1980, and the canceled checks were available before that hearing. However, they were not introduced because the owner of Toyota, Ottmar Thomas, testified to the reimbursements in the 1980 hearing. The checks were offered into evidence before the Board below at the 1984 hearing and were denied admission. We cannot say that the Board improperly excluded the canceled checks because they were obviously cumulative and available at the time of the 1980 hearing.

Because exhibits 5, 6 and 11 do not fall within the exception defined in section 1094.5, subdivision (e), the trial court erred in admitting them into evidence.

Exhibit 8 consists of canceled checks dated September 6, 1984, representing reimbursement to customers for "free" merchandise that had not been given to customers. They were not in existence in 1980 and are relevant on the issue of mitigation. The court did not err in admitting this exhibit over objection.

The Board argues that the trial court erred in admitting any of the exhibits in that the court should have remanded to the Board and left the matter of admission to the Board. Whether the court remanded to the Board with directions to admit the exhibits or admitted the exhibits itself and remanded to the Board to reconsider the penalty in light of the exhibits makes no difference in substance. It is tweedledum and tweedledee. Moreover, section 1094.5, subdivision (e), expressly authorizes the court to admit the evidence and "[remand] the case to be reconsidered in the light of that evidence."

This brings us to the scope of the trial court's disposition. The court's order commanded the Board to "set aside its decision dated December 7, 1984, in the administrative proceedings, to reconsider the appropriate administrative sanctions or penalty in this matter so as not to treat Toyota of Visalia, Inc., more harshly than other similarly situated dealers which have appeared before the New Motor Vehicle Board, and to reconsider its action in the light of this Court's oral findings and the record including the transcript and documentary evidence of the May 30, 1985 hearing, which shall augment the existing record, and to take any further action specially enjoined upon it by law."

Toyota flatly asserts that, based upon the administrative record and the evidence admitted by the court, the court found that the Board's determination of penalty was excessive. However, a review of the record does not support this position. The court did not render a statement of decision. The court made no express finding that the penalty assessed by the Board was excessive. The peremptory writ which was prepared by Toyota's counsel is somewhat uncertain, commanding, as it does, that the Board "set aside its decision ..., to reconsider the appropriate administrative sanctions ... so as not to treat Toyota of Visalia, Inc., more harshly than other similarly situated dealers ..., and

to reconsider its action in the light of this Court's oral findings (FN4) and the record including the transcript and documentary evidence ... [admitted by the court]."

Reference to the oral proceedings makes clear the judge was well aware of his limited authority to fix the penalty vis-a-vis the Board's authority. For example, the court stated:

> "So the court feels that under Section 1094.5 that probably it is most expeditious for the court to allow the evidence to be received and placed in the record and then the matter remanded for appropriate action by the board in light of that augmented record. So the court will proceed with the evidentiary hearing.
>
> "....
>
> "MISS ARCHIBALD [Department's counsel]: ... I certainly have an objection to the suggestion, and with all due respect to Your Honor, that this court should advise an administrative body on the issue of the disciplinary matters.
>
> "THE COURT: Well, I am really not inclined to do that. It is in their area of expertise. The court, of course, has read the language of the board with reference to what should be considered. They consider defacto defacto [*sic*] revocation, for example. Certainly those factors should be considered. The impact upon the licensee. Factors of restitution or remorse certainly should--are appropriate. They should be considered. They have considered restitution certainly as a consideration. Courts are always concerned when people come before them as to--in criminal matters whether there has been an indication of remorse, an attempt to rectify, correct, the situation. But the record is now full. It is replete with these matters of what has occurred, what the impacts have been.
>
> "...
>
> "Of course, the thing that was inappropriate was not to hear the evidence of what has occurred in this very substantial period between the hearing and their action. So counsel has made the appropriate arguments and has the record now to support those arguments. The matter really, I--the court feels should be taken back to the board and it is an area for their expertise."

The record shows that Toyota's counsel argued vigorously, attempting to persuade the judge to interfere with the Board's discretion in fixing penalty, which the judge refused to do, except to indicate that the mitigating factors were important and should be considered by the Board. The court's position is consistent with the law.

Section 1094.5, subdivision (f), in relevant part states:

> "... Where the judgment commands that the order or decision be set aside, [the court] may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, *but the judgment shall not limit or control in any way the discretion legally vested in the respondent.*" (Emphasis added.)

The cases are consistent with this concept:

> "[T]he propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency and its decision may not be disturbed unless there has been a manifest abuse of discretion. [Citations.] '[I]n reviewing the penalty imposed by an administrative body which is duly constituted to announce and enforce such penalties, neither a trial court nor an appellate court is free to substitute its own discretion as to the matter; nor can the reviewing court interfere with the

imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh. [Citation.] Such interference, in the light of the foregoing authorities, will only be sanctioned when there is an arbitrary, capricious or patently abusive exercise of discretion.' [Citation.] The foregoing principles apply whether the statewide administrative tribunal is one which is constitutionally authorized to exercise judicial functions [citations] or one which is not so empowered [citations]." (*Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 966, 103 Cal.Rptr. 455.)

Numerous cases, in various kinds of administrative proceedings, support this position. (See *Nightingale v. State Personnel Board* (1972) 7 Cal.3d 507, 515, 102 Cal.Rptr. 758, 498 P.2d 1006; *Harris v. Alcoholic Bev., etc., Appeals Bd.* (1965) 62 Cal.2d 589, 594, 43 Cal.Rptr. 633, 400 P.2d 745; *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 87-88, 17 Cal.Rptr. 488, 366 P.2d 816; *Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473, 163 Cal.Rptr. 566; *Szmaciarz v. State Personnel Bd.* (1978) 79 Cal.App.3d 904, 921, 145 Cal.Rptr. 396; *Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667, 49 Cal.Rptr. 901.)

In light of the judge's awareness of his limited authority to interfere with the discretion of the Board in its assessment of the appropriate penalty, we construe the language of the writ of mandate and the judge's remarks in the record, not as a direction to the Board to set aside its order because the court found the penalty was excessive, but to set its order aside for the purpose of considering the penalty in light of the new evidence introduced and the guidelines stated. The court's other language constitutes guidelines as to what the Board should consider in arriving at its decision. Upon remand, the Board is free to exercise its discretion based upon the evidence properly admitted by the court, the administrative record and the appropriate guidelines.

The judgment of the trial court is reversed insofar as it admitted exhibits 5, 6 and 11; the trial court is directed to modify its writ of administrative mandamus by eliminating from the evidence to be considered by the Board exhibits 5, 6 and 11. The trial court is directed to issue a new writ of administrative mandamus incorporating these changes. The judgment is otherwise affirmed.

Each party to bear its/his/her own costs.

WOOLPERT and MARTIN, JJ., concur.

APPENDIX A

Exhibit 1 Certified copies of selected decisions from the Department of Motor Vehicles.

Exhibit 2 A press release dated February 14, 1980, by the Fresno District Attorney concerning the civil complaint filed against respondents.

Exhibit 3 Newspaper articles relating to the charges against respondents.

Exhibit 4 A chart compiled by respondent Thomas representative of vehicle sales from 1977 to 1984.

Exhibit 5 Paragraph VIII, subdivision (b)(1)(a) of Toyota dealer sales and service agreement which includes a provision that the Toyota distributor may terminate the dealership agreement for cause if the dealership is closed for a continuous period of five business days.

Exhibit 6 Copies of canceled checks representing reimbursements for fee overcharges.

Exhibit 7 Correspondence relating to fee overcharges.

Exhibit 8 Copies of canceled checks dated September 6, 1984, representing payment for merchandise which had been advertised as "free" with purchase of an automobile but which was not tendered.

Exhibit 9 Newspaper articles relating to respondents' filing of a petition for writ of administrative mandamus in 1985.

Exhibit 10 Documents from the Department of Motor Vehicles indicating no consumer complaints or investigations following the administrative violations proven against Toyota of Visalia.

Exhibit 11 Documents indicating that dealerships of Pasadena Motors and Lyons Buick-Opal, which had been given license suspensions, were no longer in business.

FN1. Toyota of Visalia, Inc. is a corporation solely owned by the individual petitioners, Ottmar Thomas and his wife.

FN2. All statutory references are to the Code of Civil Procedure unless otherwise indicated.

FN3. We will hold exhibits 5, 6 and 11 were improperly admitted by the court on other grounds, so we need not discuss those exhibits in the context of section 568.

FN4. There are no oral findings as such.

SONOMA SUBARU, INC., Plaintiff and Appellant, v. NEW MOTOR VEHICLE BOARD OF CALIFORNIA, Defendant and Respondent, SUBARU OF NORTHERN CALIFORNIA et al., Real Parties in Interest and Respondents. (1987) 189 Cal.App.3d 13 [234 Cal.Rptr. 226]
Civ. 25748.
Court of Appeal, Third District, California.
Jan. 7, 1987.
As Modified Feb. 4, 1987.
Certified for Partial Publication (FN*)
Review Denied April 1, 1987.

Cannata, Genovese & Papale, Steven J. Cannata, Judith A. Genovese, San Francisco, Anderson, Zeigler, Disharoon & Gray, Barbara L. Detrich, and David G. Bjornstrom, Santa Rosa, for plaintiff and appellant.

John K. Van de Kamp, Atty. Gen., Paul H. Dobson and Ramon M. de la Guardia, Deputy Attys. Gen., for defendant and respondent.

Bullen, McKone, McKinley, Gay, Keitges & Pach, and Carol A. Wieckowski, Sacramento, for real parties in interest and respondents.

SIMS, Associate Justice.

Real parties in interest Subaru of America, Inc. and Subaru of Northern California (Subaru) determined that their dealership, plaintiff Sonoma Subaru, Inc. (Sonoma), was insolvent. Subaru sent Sonoma a statutorily-authorized 15-day notice of intent to terminate Sonoma's dealership franchise. (Veh.Code, § 3060, subd. (a)(2)(C); statutory references are to the Vehicle Code unless otherwise indicated.) (FN1) Under the

controlling statute, Sonoma's protest of the termination had to be filed with defendant New Motor Vehicle Board of California (Board) within 10 days after receiving the 15-day notice. (§ 3060, subd. (b).) Sonoma filed an untimely protest which the Board refused to consider. Sonoma petitioned the Board to hear its untimely protest but the Board refused. Sonoma then petitioned the trial court for a writ of administrative mandate (Code Civ.Proc., § 1094.5) ordering the Board to hear its protest. The trial court denied the petition.

Sonoma appeals contending: (1) the trial court should have permitted Sonoma's untimely filing; (2) Subaru's statutorily-authorized 15-day notice failed to warn it that its response was due in 10, not 15, days, thus violating due process; (3) the 15-day notice failed to meet statutory requirements for such notices (§ 3060); (4) the Board should have either stricken the 15-day notice or joined the proceeding with a prior franchise-termination proceeding over which the Board had retained jurisdiction; and (5) the Board should have made findings of fact and conclusions of law supporting its refusal to consider the untimely protest. In an unpublished portion of this opinion, we reject contentions (3) and (5). In this published portion, we reject Sonoma's remaining contentions and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 8, 1983, Subaru sent Sonoma a notice of intention to terminate its dealership agreement. The notice stated the primary ground for termination was Sonoma's financial insolvency caused by financial losses and the loss of its "flooring" line of credit under which a lender commits to finance the dealership's purchases of cars from the franchisor. Acting through its attorneys in Los Angeles, Sonoma filed a timely protest with the Board and the matter was resolved. As part of a settlement agreement, Sonoma agreed to furnish Subaru a certified balance sheet showing adequate capitalization.

Sonoma failed to furnish the certified balance sheet as promised. In addition, Sonoma's financial statements continued to reflect losses. As a result, on December 10, 1984, Subaru sent Sonoma a second notice of intention to terminate the dealership agreement. Once again, the notice provided for termination of the dealership agreement within 15 days. Again through its Los Angeles counsel, Sonoma filed a timely protest with the Board. Subaru and Sonoma entered into a second settlement agreement which provided, inter alia, that the parties shall agree upon a public accounting firm to perform an audit of Sonoma and prepare a certified financial statement for Sonoma as of December 31, 1984. The accounting firm was to render an opinion as to whether Sonoma was solvent or insolvent, and if the latter, was to state the appropriate remedial measures to correct the insolvency. If Sonoma proved solvent the termination was to be withdrawn; if insolvent, Sonoma was to be allowed 30 days to effect a cure.

As part of the settlement Subaru undertook not to initiate termination proceedings against Sonoma "on any grounds *other than* insolvency for circumstances arising *prior to* February 5, 1985," the effective date of the settlement agreement. (Emphasis added.) The Board retained jurisdiction over the matter for purposes of enforcing the settlement agreement until the time Subaru's notice of termination was withdrawn or until Sonoma's dealership agreement was terminated.

On April 1, 1985, Subaru learned that Sonoma had again lost its flooring line of credit. Sonoma did not obtain the reinstatement of, or a new source for, its line of credit

for over a month. These developments, combined with consistent financial losses through March of 1985, led Subaru to suspect that as of May, 1985, Sonoma was insolvent.

On May 10, 1985, Subaru sent to Sonoma a *third* notice of intention to terminate the dealership agreement. The notice provided in pertinent part: "Pursuant to the provisions of Section 3060(a)(2)(C) of the California Vehicle Code and the provisions of Paragraph 11 of the Subaru Dealership Agreement and Section 15.1.2 of the Subaru Dealership Agreement Standard Provisions between your dealership and Subaru of Northern California, Inc. ("SNC"), notice is hereby given to you that *FIFTEEN (15) DAYS* after receipt of this letter by you and by the New Motor Vehicle Board of the State of California, *YOUR SUBARU DEALERSHIP AGREEMENT WILL BE TERMINATED,* unless satisfactory proof is furnished to SNC prior to the expiration of that 15-day time period that the following major deficiency has been remedied...." (Emphasis in original; fn. omitted.) In a footnote at the bottom of the first page, the notice provided: "NOTICE TO DEALER: You may be entitled to file a protest with the New Motor Vehicle Board in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. It is important to act promptly."

Sonoma evidently received the May 10, 1985, termination notice on May 13, 1985. The record does not suggest Sonoma attempted to do as Subaru requested, i.e., to furnish proof its insolvency had been remedied. Instead, on May 28, 1985, 15 days following receipt of the termination notice, Sonoma filed a protest with the Board. The protest was prepared by Sonoma's newly-retained San Francisco attorneys.

On May 31, 1985, the Board returned Sonoma's protest explaining in a letter that it was not timely filed because it was filed more than 10 days after Sonoma's receipt of Subaru's notice, in violation of subdivision (b) of section 3060.

On June 13, 1985, Sonoma noticed a motion before the Board to either enforce the prior settlement agreement (concluding the December 1984 proceeding) and strike or join the subsequent termination proceeding, or in the alternative to permit untimely filing of the May 1985 termination protest.

The Board replied by letter dated June 14, 1985, that Sonoma's new attorneys had failed to file a substitution of attorneys and thus were not counsel of record. The Board also noted that the prior settlement agreement was now irrelevant because it did not pertain to Sonoma's financial condition after December 31, 1984. The Board concluded because no timely protest was filed to the May 1985 termination (premised on Sonoma's post-1984 financial condition) it was effective and the issue of Sonoma's solvency in 1984 was moot.

On June 26, 1985, Subaru filed a substitution of attorneys and noticed a motion to file its untimely protest effective May 28, 1985. In support of the motion Sonoma submitted its counsel's declaration providing in pertinent part that upon reviewing the May 10, 1985, termination notice she was of the belief Sonoma had 15 days to file a protest. The declaration also noted that counsel had been engaged in the preparation of legal materials for another client and that the law firm had been recently formed, effective May 1, 1985, and had moved to new offices on April 29, 1985. Law books were arriving sporadically, no permanent staff had been hired, and counsel's two partners were extensively involved in other work.

Sonoma also filed the declaration of its president, Robert Bohna, which provided in pertinent part that he was surprised by the May 1985 termination because he thought the prior settlement agreement would resolve the matter of Sonoma's insolvency. Bohna declared that in reading Subaru's notice he believed he had 15 days in which to file a protest with the Board. He decided not to consult his prior attorneys because they were located in Los Angeles and he wanted local counsel in order to minimize his expenses.

Sonoma also suggested Subaru's 15-day notice was so vague and misleading as to deny it due process of law. At the hearing Sonoma cited several cases from other contexts in which inadvertence of counsel was held to be sufficient cause for a late filing. The administrative law judge (ALJ) distinguished those cases stating that the Legislature had provided the short filing deadline in order to protect the franchisor. On July 15, 1985, the Board denied Sonoma's motion. The trial court denied Sonoma's petition for writ of administrative mandate (Code Civ.Proc., § 1094.5) and Sonoma appeals.

DISCUSSION

I

Sonoma urges that we imply a "good cause" exception to section 3060's 10-day filing deadline. We decline the invitation because to do so would frustrate the intent of the Legislature as revealed in the statutory scheme of which section 3060 is a part.

We begin with rules of statutory interpretation. The aim of statutory construction should be the ascertainment of legislative intent so that the purpose of the law may be effectuated; a statute should be construed with reference to the entire statutory scheme of which it forms a part in such a way that harmony be achieved among the parts; and courts should give effect to statutes according to the usual, ordinary import of the language employed in framing them. (*In re Head* (1986) 42 Cal.3d 223, 232-233, 228 Cal.Rptr. 184, 721 P.2d 65.)

We begin, as we must, with the language of section 3060. (*In-Home Supportive Services v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 734, 199 Cal.Rptr. 697; *Nunez v. Superior Court* (1983) 143 Cal.App.3d 476, 780, 191 Cal.Rptr. 893.)

Subdivision (b) of section 3060 says a franchisee "may file a protest with the board within ... 10 days after receiving a 15-day notice." The statute provides no exception for "good cause." The larger context of the statute reinforces the conclusion no "good cause" exception should be implied. Thus, the section establishes a general rule that franchises shall be terminated only upon prior notice of 60 days. (§ 3060, subd. (a)(1).) However, with respect to certain enumerated grounds the required prior notice is reduced substantially from 60 to 15 days. (§ 3060, subd. (a)(2).) As one would expect, the shorter notice is permitted only for particularly serious disruptions of the franchisor-franchisee relationship: sale of the franchise, misrepresentations in applying for the franchise, insolvency or bankruptcy of the franchisee, unfair business practices, or the cessation of business operations. (*Ibid.*) The Legislature could readily conclude that these disruptions, being particularly serious, justified swifter action by the franchisor.

The Legislature's concern with swift action is revealed, as well, in subdivision (b) of the statute which provides, as a general rule, that where a franchisor serves a 60-day notice a protest may be filed with the Board within 30 days. For the events warranting a 15-day notice, however, the Legislature has provided a special, shorter period of 10 days within which a protest must be filed.

The structure of section 3060 thus reveals the Legislature has gone out of its way to *shorten* the time in which a franchisor can react to its franchisee's insolvency. We cannot, by judicial fiat, extend what the Legislature has been careful to circumscribe. (See *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645, 335 P.2d 672.)

Nor can we to graft a "good cause" exception onto the 10-day time limit for another reason. In section 3066, the Legislature has established rules governing Board hearings on termination protests. Upon receiving a notice of protest, the Board is required to enter an order fixing the place and time of a hearing, which shall be within 60 days of the order. (§ 3066, subd. (a).) The Board is entitled to accelerate or postpone the hearing date from that initially scheduled upon a showing of "good cause." (*Ibid.*) For that purpose, "good cause" is expressly defined as including, but not limited to, "the effects upon, and any irreparable harm to, the parties or interested persons or groups if the request for a change in hearing date is not granted." (*Ibid.*) Section 3066 demonstrates that the Legislature knows how to interrupt its termination-dispute-resolution process for "good cause" when it wants to do so. The absence of a similar "good cause" exception from the 10-day deadline suggests the Legislature had a different intention. " 'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed.' " (*People v. Drake* (1977) 19 Cal.3d 749, 755, 139 Cal.Rptr. 720, 566 P.2d 622, quoting *People v. Valentine* (1946) 28 Cal.2d 121, 142, 169 P.2d 1.)

Our result is consistent with sound policy as well. The Legislature could reason that not all franchise terminations would be contested before the Board. Where no protest of the termination is filed within the allotted time, the Legislature's obvious intent is to let the franchisor treat the termination as final and effective. Thus, subdivision (c) of section 3060 provides a condition of termination of a franchise is satisfied where, "The franchisor has received the written consent of the franchisee, *or the appropriate period for filing a protest has elapsed.*" (Emphasis added.) Sanctioning late filings would undercut that finality and create uncertainty in the minds of franchisors as to whether they may treat their relationship with unsatisfactory franchisees as concluded. We conclude the Legislature did not intend that the 10-day filing deadline be extended.

II

Sonoma next contends Subaru's May 10, 1985, termination notice is misleading and vague. Sonoma asserts the Board's reliance on that notice to declare Sonoma's termination protest untimely deprived it of due process of law. We disagree. (FN2)

Neither respondent nor real party in interest has focused on the roles played by government and private parties under section 3060. The statute permits one private party (a franchisor) to terminate a private contractual relationship with another party (a franchisee) provided sufficient notice is given by one party to the other. Government plays a role in the termination only if a franchisee invokes an administrative process by filing a timely protest with the Board. In the absence of a protest, the termination of the franchise is accomplished wholly by private action.

Sonoma asserts it is entitled by constitutional guarantees of due process of law to receive fair notice of its right to protest to the Board. However, the Board proceeding is analagous to a judicial remedy in the sense that the Board merely reviews the acts of

the franchisor for statutory compliance. Since the private franchisor, not the Board, is terminating the franchise, it is far from clear that Sonoma has any constitutional due process right to notice of its potential rights of review by the Board. Nonetheless, the issue is a wormy apple that we will not bite into on our own volition. Rather, we shall assume for purposes of argument due process requires that Sonoma receive fair notice of its right to protest to the Board.

Subdivision (a)(3) of section 3060 states explicitly what the subject notice must say and where the notice must appear. Subaru's notice to Sonoma complied with the statutory command. Sonoma appears to attack the notice on two grounds: (1) that the statute fails to give fair notice because it fails to tell a franchisee it has only 10 days to file a protest and (2) that notice of the right to file a protest is misleading because it appears in conjunction with a 15-day notice, thereby seducing the franchisee into believing it has 15 days to protest. Neither contention has merit.

The first contention is an attack on the statute. " 'In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act. [Citations.]' " (*County of Sonoma v. State Energy Resources Conservation, etc., Com.* (1985) 40 Cal.3d 361, 368, 220 Cal.Rptr. 114, 708 P.2d 693, quoting *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594, 131 Cal.Rptr. 361, 551 P.2d 1193.)

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover B. & T. Co.* (1950) 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865.) Notice procedures should be evaluated not in a hypertechnical sense but according to common experience. (See *McMaster v. City of Santa Rosa* (1972) 27 Cal.App.3d 598, 602, 103 Cal.Rptr. 749, followed in *Atkins v. Kessler* (1979) 97 Cal.App.3d 784, 793, 159 Cal.Rptr. 231.) What is proper notice in a given situation must be determined on a case-by-case basis. "[T]he precise procedures necessary to prevent the arbitrary deprivation of a constitutionally protected interest vary 'with the subject-matter and the necessities of the situation.' " (*In re Bye* (1974) 12 Cal.3d 96, 103, 115 Cal.Rptr. 382, 524 P.2d 854, quoting *Moyer v. Peabody* (1909) 212 U.S. 78, 84, 29 S.Ct. 235, 236, 53 L.Ed. 410.)

The statutory notice plainly tells a franchisee of its right to protest. It also says, "It is important that you act promptly." Although the notice does not expressly state the 10-day filing deadline, such is not constitutionally required in light of the composition of the class receiving the notice: experienced franchisees presumably familiar with the fundamentals of franchising and franchise terminations. In light of the extensive regulation of automobile franchises (see *BMW of North America, Inc. v. New Motor Vehicle Board* (1984) 162 Cal.App.3d 980, 209 Cal.Rptr. 50) it can reasonably be presumed that a franchisee would have some familiarity with the basics of the Board and its operations, including the fact that franchise terminations are governed by section 3060. If Sonoma was unsure of that fact, the notice itself told Sonoma it was sent pursuant to section 3060. In light of the notice's command to "act promptly," we do not think it unreasonable to require a franchisee to find out what the filing deadline is. Thus,

assuming Sonoma was entitled by due process of law to fair notice, we conclude section 3060 prescribes constitutional notice.

Sonoma also asserts the notice of right to protest was misleading because it was contained in Subaru's notice of franchise termination that expressly mentioned a 15-day deadline. We do not think so.

The 15-day notice is also prescribed by section 3060, although its precise language is not mandated. (See fn. 1, *ante.*) In any event, Subaru's 15-day notice stated that proof of cure of the defect in the franchise was to be submitted to Subaru, not the Board. Moreover, the notice of Sonoma's right to protest to the Board was separately stated in a footnote. The two notices simply do not permit a reasonable inference that the 15-day deadline controls the time within which to protest. Moreover, this was the *third* such notice Sonoma had received; it was not confused by the first two, because it filed timely protests. We conclude the subject notice was not misleading.

Atkins v. Kessler, supra, 97 Cal.App.3d 784, 159 Cal.Rptr. 231, relied on by Sonoma is distinguishable in various respects. The facts of *Atkins* were egregious: the notice found defective was a notice of delinquency under a special tax assessment. The notice warned that foreclosure proceedings would be commenced under a bond but it did not warn that the homeowner's home could be sold out from under him. (P. 794, 159 Cal.Rptr. 231.) Thus, the adverse action itself was being concealed. The homeowner faced the loss of his home, but that is precisely what the notice did not tell him. Here, by contrast, the notice told Sonoma exactly what adverse action was being threatened: the dealership was to be terminated within 15 days unless conditions were met. Moreover, the notice told Sonoma to act promptly and it specified an opportunity to present its objections to the Board. The notice's only omission was a procedural provision of law--a statutory filing deadline. However, the notice did mention that the hearing was available under the terms of the Vehicle Code; had Sonoma wished to avail itself of its opportunity for a hearing it presumably could have consulted that code.

Atkins is distinguishable, as well, because it involved a homeowner who presumably had not received delinquency notices in the past and was unfamiliar with them. Here, the termination notice was Sonoma's third in two years and was framed in language nearly identical to its predecessors. The recipient was not a homeowner but an experienced commercial franchisee.

On the facts of this case, with an experienced franchisee receiving his third virtually identical notice, warning of an impending termination of his franchise under section 3060 and suggesting he act promptly to request a Board hearing under the terms of the Vehicle Code, we cannot say Sonoma was insufficiently alerted to the impending action or to its opportunity to object to it. (*Mullane v. Central Hanover B. & T. Co.,* supra, 339 U.S. at p. 314, 70 S.Ct. at p. 657.) We hold Subaru's notice constitutional in the circumstances. (*In re Bye,* supra, 12 Cal.3d at p. 103, 115 Cal.Rptr. 382, 524 P.2d 854.)

III (FN**)

IV

Sonoma next contends Subaru should have filed its May 1985 allegation of insolvency in the December 1984 proceeding. Sonoma contends the Board should have stricken the May 1985 filing or joined it with the December proceeding. Sonoma's argument fails.

Sonoma contends that striking or joinder was necessary in order to avoid a multiplicity of proceedings on the same issue. As support for its contention Sonoma relies on section 3060, subdivision (c), which provides in pertinent part that "In the event of multiple protests, *hearings* shall be consolidated to expedite the disposition of the issue." (Emphasis added.)

The first flaw in Sonoma's argument is that it takes the statutory language out of context. Section 3060, subdivision (c) is intended to consolidate hearings on multiple *concurrent* protests filed by different franchisees. (See fn. 1, *ante.*) The statute does not purport to require consolidation of successive protests from the same franchisee. Indeed, applying the statute in the context of this case is impossible because the hearing on the December protest has already been held and there is nothing to consolidate the May hearing with.

The second flaw in Sonoma's argument is that the issues in the December 1984 and May 1985 termination proceedings are not the same. Sonoma's financial condition in May of 1985 is affected by factors arising after December of 1984; thus the determination of solvency at the later date necessarily encompasses different issues. Sonoma cites no authority requiring the Board to join together two proceedings on separate issues. Sonoma's contention must fail.

V (FN***)

DISPOSITION

The judgment is affirmed.

EVANS, Acting P.J., and BLEASE, J., concur.

FN* The subject opinion not having been originally certified for publication, and good cause now appearing for its partial publication, pursuant to rule 976.1 of the California Rules of Court, the opinion is certified for publication with the exception of parts III and V of the Discussion.

FN1. Section 3060 provides in full as follows: "Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:

> "(a) The franchisee and the board have received written notice from the franchisor as follows: [¶] (1) Sixty days before the effective date thereof setting forth specific grounds for termination or refusal to continue. [¶] (2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following: [¶] (A) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld. [¶] (B) Misrepresentation by the franchisee in applying for the franchise. [¶] (C) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law. [¶] (D) Any unfair business practice after written warning thereof. [¶] (E) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department. [¶] (3) The written notice shall contain, on the first page thereof, a conspicuous statement which reads as follows: 'NOTICE TO DEALER: You may be

entitled to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. It is important that you act promptly.'

"(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice or within 10 days after receiving a 15-day notice. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

"(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed. [¶] The franchisor shall not modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee notice thereof at least 60 days in advance of the modification or replacement. Within 30 days of receipt of the notice, a franchisee may file a protest with the board and the modification or replacement does not become effective until there is a finding by the board that there is good cause for the modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue."

FN2. The trial court's review of the Board's factual determinations is pursuant to the substantial evidence test. (*American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 474, 220 Cal.Rptr. 769; see *Piano v. State of California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 422, 163 Cal.Rptr. 41.) In cases such as this where the trial court does not exercise its independent judgment in reviewing an administrative decision, it is performing essentially an appellate function and the trial court and appellate courts occupy identical positions with regard to the administrative record and the determination of whether the administrative decision is supported by substantial evidence. (*American Isuzu,* supra, 186 Cal.App.3d at p. 474, 220 Cal.Rptr. 769; *Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 Cal.App.3d 817, 820, 130 Cal.Rptr. 249.) This limitation does not apply to resolution of questions of law where the facts are undisputed. In such cases, as in other instances involving matters of law, the appellate court is not bound by the trial court's decision, but may make its own determination. (*Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407, 216 Cal.Rptr. 782, 703 P.2d 122.)

FN** See footnote *, *ante.*

FN*** See footnote *, *ante.*

BRITISH MOTOR CAR DISTRIBUTORS, LTD., d/b/a Maserati Import Company, Petitioner and Respondent. v. NEW MOTOR VEHICLE BOARD, Respondent and Appellant. BRITISH MOTORS OF MONTEREY, INC., Real Party in Interest. (1987) 194 Cal.App.3d 81 [239 Cal.Rptr. 280].
A031921.
Court of Appeal, First District, Division 2, California.
Aug. 17, 1987.
As Modified Sept. 10, 1987.
Review Denied Nov. 10, 1987.

John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Asst. Atty. Gen., Mary C. Michel, Lawrence J. Gumbiner, Deputy Attys. Gen., San Francisco, for respondent and appellant.

David C. Phillips, Goldstein & Phillips, A Professional Corp., San Francisco, for petitioner and respondent.

Michele C. Kennedy, Andrew H. Swartz, Spiering & Swartz, Monterey, for real party in interest.

SMITH, Associate Justice.

Real party in interest British Motors of Monterey, Inc. (British Motors) filed a protest with the California New Motor Vehicle Board (Board) over the termination of its franchise relationship with Respondent British Motor Car Distributors, Ltd. dba Maserati Import Company (hereinafter "Maserati"). After an administrative hearing, the Board found that Maserati had terminated British Motors' dealership without just cause and ordered the franchise reinstated. The superior court granted Maserati's petition for writ of administrative mandamus and overturned the decision of the Board. We find none of the grounds cited by the trial court to be supportable and therefore reverse the judgment granting the writ.

BACKGROUND

Maserati is a distributor of Maserati motor cars, headquartered in San Francisco. British Motors is a new car dealer in the City of Monterey, which sells multiple lines of foreign automobiles.

In June 1980 Maserati and British Motors entered into a standard form written franchise agreement under which the latter was appointed as a dealer of Maserati automobiles. The agreement was made effective until December 31, 1980. The contract provided that either party could terminate it upon giving the other party "not less than thirty (30) days' notice in writing." By letter from Maserati to British Motors, the dealer agreement was extended to December 31, 1981, again to June 30, 1982 and a third time to August 31, 1982.

By letter dated July 26, 1982, British Motors president Gerald Byrne notified Maserati that a new investor, Mr. Redding would become a stockholder in British Motors, and requested a meeting "to formalize, with your approval, this arrangement." Maserati's president Kjell Qvale replied with a letter dated August 9, in which he reminded Byrne that the dealership agreement gave Maserati the right to terminate if any material change in the stock ownership of the franchise occurred. Qvale advised that Maserati would be contacting Byrne to arrange a meeting to discuss "your new

arrangements as well as a reevaluation of your financial capability." During the latter part of August, a meeting took place between representatives of both parties during which the change of ownership was discussed. Maserati's representatives gave no indication that Redding's ownership participation would be unsatisfactory.

By letter dated September 21, 1982 Qvale wrote to Byrne, stating, in pertinent part, as follows:

"Dear Gerry: [¶] Your Dealer Agreement with Maserati Import Company expired on August 31, 1982. [¶] This is to inform you that we do not intend to renew your Agreement and hereby notify you that your termination will be effective 30 days from receipt of this letter."

In January 1984 British Motors filed a protest with the New Motor Vehicle Board. A hearing was held before an administrative law judge for the Board. The hearing officer found that British Motors franchise had been terminated on October 20, 1982, that the reasons for cancellation advanced by Maserati did not establish "good cause" for its termination or refusal to continue the British Motors franchise within the meaning of Vehicle Code section 3060 et seq., (FN1) and that the protest should be upheld. The full Board adopted the findings of the administrative law judge and sustained the protest. No dealer members of the Board participated in the discussion of the case or the vote.

Pursuant to Code of Civil Procedure section 1094.5, Maserati filed a petition for writ of administrative mandamus in San Francisco Superior Court. After a hearing, the court issued a minute order which stated that, "[i]n its independent judgment the court finds that the board exceeded its jurisdiction." Its stated reasons were that (1) the franchise agreement had expired at the time of the purported termination, (2) the later "termination" was for "good cause" communicated by means other than the letter of termination, and (3) the composition of the Board was unconstitutional.

Both British Motors and the Board filed timely notices of appeal.

APPEAL

I

The Constitutionality of the Board

As noted above, the dealer members of the Board recused themselves from any discussion or participation in the resolution of the dispute before us. Nevertheless, Maserati vigorously argues that the entire proceedings violated its due process rights because the mere presence of four new car dealers on the Board rendered any decision biased and therefore unconstitutional. The trial court apparently agreed. In order to assess this claim, it is necessary to briefly summarize the prior appellate decisions on this subject.

The New Motor Vehicle Board (formerly the "New Car Dealers Policy and Appeals Board") was established, in its present form, in 1973. At the same time as it was renamed, the Legislature empowered the Board to resolve controversies between new car dealers and manufacturers under section 3060, which provides that no new car franchisor shall "terminate or refuse to continue any existing franchise" without reasons constituting "good cause" which, in most cases, must be communicated in writing to the franchisee and the Board at least 60 days prior to the termination or refusal to continue. (Stats.1973, ch. 996, p. 1967, operative July 1, 1974; see *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986, 138 Cal.Rptr. 594.) Since the creation of the Board, the Legislature has required that four of its nine members shall be

new car dealers. (§ 3001; see *Chevrolet Motor Division v. New Motor Vehicle Bd.* (1983) 146 Cal.App.3d 533, 536, 194 Cal.Rptr. 270.)

Unfortunately, enforcement of the machinery established for adjudicating grievances has been hampered by a kind of ongoing warfare between the courts and the Legislature over the presence of and nature of participation in the grievance procedure by dealer members of the Board.

In *American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d 983, 138 Cal.Rptr. 594, the court held that the mandatory requirement that dealer members sit on the Board in dealer-manufacturer controversies and lack of any counterbalancing requirement that manufacturer members sit on the Board, deprived the manufacturer-litigants of due process in the adjudication of "good cause" disputes under section 3060 et seq. (*Id.* at 992, 138 Cal.Rptr. 594.) The court held that because dealer members inevitably have an economic stake in the outcome, such a "dealer-stacked" Board failed to comport with the constitutional requirement of a fair and impartial tribunal. (*Id.* at pp. 987-991, 138 Cal.Rptr. 594.)

In response to *American Motors,* the Legislature initially eliminated all dealer member involvement in termination disputes. (See Stats.1977, ch. 278, §§ 2-3, pp. 1171-1173; *Chrysler Corp. v. New Motor Vehicle Bd.* (1979) 89 Cal.App.3d 1034, 1037, 153 Cal.Rptr. 135.) However, in response to strong lobbying efforts, the Legislature amended the statute in urgency legislation to provide that dealer members "may *participate in, hear, and comment or advise* other members upon, *but may not decide* " any matter involving a dealer-manufacturer dispute. (Stats.1979, ch. 340, § 2(d) 1207, emphasis added.) However, this amendment met a chilly reception by the courts in *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109, 202 Cal.Rptr. 1 and *Chevrolet Motor Division v. New Motor Vehicle Bd., supra,* 146 Cal.App.3d 533, 194 Cal.Rptr. 270. Each of those decisions held that even though dealer members must stop short of actual voting on a dispute, their ability to "take part in every other aspect of the decisionmaking process, despite their financial interest in the outcome of that process" still rendered the statute constitutionally infirm. (*Nissan, supra,* 153 Cal.App.3d at p. 115, 202 Cal.Rptr. 1; *Chevrolet, supra,* 146 Cal.App.3d at p. 541, 194 Cal.Rptr. 270.)

To comport with the *Nissan* and *Chevrolet* decisions, the Board, on its own, voluntarily began a policy of having all dealer members recuse themselves prior to any discussion of a grievance. (See *University Ford Chrysler-Plymouth, Inc. v. New Motor Vehicle Bd.* (1986) 179 Cal.App.3d 796, 804-805, 224 Cal.Rptr. 908.) Even this was insufficient to satisfy the appellate courts. In *University Ford Chrysler-Plymouth, Inc., supra,* the court of appeal held that the recusal policy, while "admirable" in its attempt to comply with constitutional due process requirements, did not cure the invalidity of the statute because it was contrary to the declared legislative intent that dealer members actively participate in the resolution of dealer-manufacturer disputes. (*Id.,* at p. 805, 224 Cal.Rptr. 908.)

However, the Legislature has given the final word by amending the statute itself in 1985 to give its stamp of approval to the recusal policy. The statute in its present form now provides that "[a] member of the board who is a new motor vehicle dealer *may not participate in, hear, comment, advise other members upon, or decide* any matter considered by the board" which involves a dispute between a dealer and a

manufacturer. (Emphasis added.) (§ 3050, subds. (c), (d), as amended by Stats.1985, ch. 1201, § 2; § 3066, subd. (d), as amended by Stats 1985, ch. 1566, § 2.)

In *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 230 Cal.Rptr. 769, the court held that this amendment cured the constitutional defects in the prior procedure and allows the Board to "act effectively to resolve dealer-manufacturer disputes." (*Id.,* at p. 471, 230 Cal.Rptr. 769.)

Turning to the case at hand, it is clear from the record that the dealer members of the Board did not participate in any way in the adjudicatory process below. Thus, the practice followed here was free of the constitutional taint found in appellate decisions prior to *Isuzu.*

Nevertheless, Maserati argues that despite their nonparticipation in the grievance process, *merely by sitting on the Board* the dealer members influence and therefore unconstitutionally bias the public members who do decide dealer-manufacturer controversies. This precise contention was rejected in the *Isuzu* decision: "[Such a] challenge is not to the impartiality of the dealer members, whose financial interest has been recognized, but to the impartiality of the public members. Appellant offers no evidence of any financial interest these public members have in the outcome of the disputes, nor of any personal interest which would present a 'probability or likelihood of the existence of actual bias ... so great that disqualification ... is required to preserve the integrity of the legal system' ... [Citation.] In the absence of any allegations of actual partiality, we find the simple interaction of the public members with the dealer members on other board business insufficient evidence of bias to overcome the presumption of honesty and integrity of adjudicators. [Citation.]" (186 Cal.App.3d at p. 473, 230 Cal.Rptr. 769.) We agree with the *Isuzu* court that a claim of bias merely on the basis of interaction with dealer-members on unrelated matters is entirely too speculative to render the grievance procedure unconstitutional. (FN2) Because, in the proceedings below, the dealer members took no part in the decision making process, they acted in a manner which was both constitutionally permissible and legislatively sanctioned. (*American Isuzu Motors, Inc. v. New Motor Vehicle Bd., supra,* 186 Cal.App.3d at pp. 470-471, 230 Cal.Rptr. 769.) Accordingly, the trial court erred in determining that the composition of the Board provided constitutional grounds for overturning its decision.

II

The Proper Standard of Review

A second ground relied on by the trial court for its ruling was that Maserati had shown "good cause" for terminating British Motors. In doing so, the court expressly applied the "independent judgment" standard of review. Maserati does not contend that the decision below lacked substantial evidence, but maintains that the trial court correctly applied the independent judgment standard. British Motors and the Board argue that the substantial evidence test should have been applied.

In judicial review of administrative proceedings under Code of Civil Procedure section 1094.5, the test to be applied depends upon whether the administrative decision substantially affects a *fundamental vested* right. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, 93 Cal.Rptr. 234, 481 P.2d 242.) If it does, the trial court exercises its independent judgment upon the evidence; if not, its review is limited to whether the administrative decision is supported by substantial evidence in light of the whole record. (*Id.,* at pp. 143-144, 93 Cal.Rptr. 234, 481 P.2d 242.)

It has been repeatedly held that the preservation of purely economic interests does not affect the fundamental vested rights of the petitioner. (*Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal.App.3d 14, 22-23, 112 Cal.Rptr. 872; *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 305, 130 Cal.Rptr. 814; *Mueller v. MacBan* (1976) 62 Cal.App.3d 258, 273, 132 Cal.Rptr. 222.) Accordingly, at least two prior reported cases have, without extended discussion, applied the substantial evidence test to review decisions of the New Motor Vehicle Board. (*American Isuzu Motors, Inc. v. New Motor Vehicle Bd., supra,* 186 Cal.App.3d at p. 474, 230 Cal.Rptr. 769; *Piano v. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 422, 163 Cal.Rptr. 41.) We see no reason to depart from that precedent. Maserati suggests, without citation of authority, that the Board's decision affects its "fundamental" right to choose its business affiliations, which is based upon freedom of contract and freedom of association. But both freedom to contract and freedom of association have long been subject to federal, state and local regulation in areas such as employment, housing, banking and insurance. It is far too late in the day to assert that a business enterprise has a "fundamental vested right" to conduct business free from reasonable governmental regulation. (See *Northern Inyo Hosp., supra,* 38 Cal.App.3d at p. 23, 112 Cal.Rptr. 872; *Beverly Hills Fed. S. & L. Assn. v. Superior Court* (1968) 259 Cal.App.2d 306, 316, 66 Cal.Rptr. 183.)

We conclude that the trial court incorrectly applied the independent judgment standard in reviewing the Board's decision. Moreover, the court's determination that Maserati had "good cause" to terminate the franchise was erroneous, regardless of which standard was applied.

Section 3060 prohibits termination or refusal to continue dealer franchises unless both the Board and the franchisee have, *60 days prior thereto,* received written notification of the action and "*setting forth the specific grounds for the termination or refusal to continue.*" (§ 3060, subd. (a)(1), emphasis added.) It was undisputed that Maserati's notice to British Motors stated no reasons for its action. A franchisor may not assert "good cause" for a franchise termination at the hearing on any ground not asserted in its notice of termination. (*American Isuzu Motors, Inc. v. New Motor Vehicle Bd. supra,* 186 Cal.App.3d at p. 477, 230 Cal.Rptr. 769.) *A fortiori,* the trial court could not overturn the Board's decision based upon a finding of "good cause" for such termination, regardless of which standard of review it employed. Maserati's failure to comply with the notice requirements of section 3060, subd. (a) was itself sufficient to establish adequate grounds for upholding British Motors' protest and sustaining the decision of the Board.

III

The "Termination" Issue

The most substantial ground which was relied upon by the court below in reversing the Board's decision was that the Board lacked jurisdiction over the dispute because British Motors' franchise had lapsed by its own terms prior to the purported "termination" of September 21, 1982.

The crucial language upon which this argument rests is that portion of section 3060 which states, in pertinent part: "*Notwithstanding ... the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise* unless all of the following conditions are met: ..." (Emphasis added.) As Maserati correctly points out, the

written dealer agreement between the parties was extended several times in writing though August 31, 1982, and contained no clause providing for renewal or automatic extension. Consequently, Maserati argues, there can be no wrongful "refusal to continue" an *existing* franchise because the franchise agreement had expired of its own force and effect. We cannot accept Maserati's argument.

Even though the parties may not have *expressly* agreed to extend the dealer agreement past August 31, 1982, such an extension may be implied from their conduct and the surrounding circumstances. (Civ.Code, §§ 1619, 1621; 1 Corbin On Contracts (1963) § 18, p. 43; see *Marvin v. Marvin* (1976) 18 Cal.3d 660, 678, fn. 16, 134 Cal.Rptr. 815, 557 P.2d 106; *Consolidated Theaters, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 725, 73 Cal.Rptr. 213, 447 P.2d 325.) Whether the conduct of the parties manifested such an agreement is ordinarily an issue for the trier of fact. (*Caron v. Andrew* (1955) 133 Cal.App.2d 412, 416, 284 P.2d 550.)

In the case at bar, the administrative hearing officer (and by adoption, the Board) found that Maserati had *terminated* the franchise agreement on October 20, 1982. Implicit in such a finding was a finding that the parties, by their conduct, manifested an agreement to continue the franchise beyond August 31. The evidence in support of this determination was overwhelming. Maserati's president, Mr. Qvale, repeatedly testified that he had determined to "terminate" or "cancel" the British Motors dealership. The September 21 letter which Qvale wrote to Byrne advises that "we ... hereby notify you that your *termination* will be effective 30 days from receipt of this letter." (Emphasis added.) This language is an undisguised attempt to comply with that provision of the contract which requires at least 30 days written notice for *termination* of the agreement. Finally, Maserati wrote to the Occupational Licensing Division of the Department of Motor Vehicles, advising that British Motors' "*termination* is effective October 21, 1982."

In reviewing the administrative decision, the trial court was required to perform essentially an appellate function--to determine whether the Board's decision was an abuse of discretion, an abuse which is established by a lack of substantial evidence. (Code Civ.Proc. § 1094.5, subd. (c); *American Isuzu Motors, Inc. v. New Motor Vehicle Bd., supra,* 186 Cal.App.3d at p. 474, 230 Cal.Rptr. 769.) The court was not empowered to reweigh the evidence, take into account evidence which detracts from the weight of other evidence supporting the decision, or draw inferences different from those which could reasonably be drawn by the Board. (*Flowers v. State Personnel Bd.* (1985) 174 Cal.App.3d 753, 758-759, 220 Cal.Rptr. 139.) Since the Board's finding that the British Motors franchise was "terminated" rather than simply allowed to lapse was supported by substantial, and indeed rather convincing evidence in the record, the trial judge's "finding" to the contrary exceeded the proper scope of its review. We therefore find insupportable the third and final ground relied upon by the superior court for granting the writ.

In light of this conclusion, appellants' other contentions that section 3060 was intended to apply even to expired franchise agreements and that Maserati should be estopped from contending that the franchise lapsed, are moot.

IV

Timeliness of the Protest

Maserati also asserts that the decision of the superior court should be affirmed because the protest filed by British Motors was untimely. The trial court did not rely

upon this ground as a basis for its decision; however, because the trial and appellate courts occupy identical positions with respect to the review of the administrative decision below (*American Isuzu Motors, Inc. v. New Motor Vehicle Bd., supra* 186 Cal.App.3d at p. 474, 230 Cal.Rptr. 769), it is necessary to address this contention.

Although Maserati terminated the British Motors franchise in October 1982, British Motors did not file a protest until January 1984. Maserati then filed a motion to dismiss the protest on grounds of untimeliness, which was denied by the Board. The issue before us is whether that determination was supported by substantial evidence.

Subdivision (b) of section 3060 provides that the franchisee may file a protest with the Board within "30 days after receiving a 60-day notice or within 10 days after receiving a 15-day notice" as prescribed in subdivision (a) of that section. As noted previously, Maserati's termination letter failed to comply with the "statement of reasons" requirement or the 60-day prior notice requirement set forth in section 3060, subdivision (a). More importantly, the evidence shows that no notice of termination was sent to *the Board.* (FN3) Accordingly, the hearing officer overruled Maserati's timeliness objection.

This ruling did not constitute an abuse of discretion. Under the language of the statute, no franchise may be terminated until *both* the proper notices have been sent *and* the appropriate period for filing a protest has lapsed. The limitations period of section 3060 subdivision (b) is thus expressly dependent upon the franchisor first complying with the notice provisions of subdivision (a). Any other interpretation of the statute would reward franchisors who send out defective notices.

Since Maserati failed to comply with either the 60-day prior notice or the "statement of reasons" provisions of section 3060, subdivision (a), it failed to trigger the running of the limitations period. Maserati argues that even if it did not strictly comply with the statute, the lapse of more than one year from the date of termination to the date of protest was so "unreasonable" as to deny it due process of law. However, the only authority cited in support of this argument, *Garcia v. Los Angeles County Bd. of Education* (1981) 123 Cal.App.3d 807, 177 Cal.Rptr. 29, holds that procedural safeguards established by the Legislature for prompt hearings in disciplinary proceedings are intended to protect the due process rights of the accused. (*Id.,* at p. 812, 177 Cal.Rptr. 29.) Here, the Legislature has prescribed a procedure of which franchisors may avail themselves in discontinuing franchise relationships. Such procedures were part of its declared overall purpose of "avoid[ing] undue control of the independent new motor vehicle dealer by the vehicle manufacturer...." (Stats. 1973, ch. 996, § 1.) Had Maserati complied with the statutorily mandated notice requirements, it would have achieved a swift and expeditious resolution of the propriety of its actions. It is hardly in a position to complain of due process deprivation due to delay caused by its own misfeasance. (FN4)

DISPOSITION

The judgment of the superior court is reversed with directions to enter judgment in favor of the Board and real party in interest British Motors.

KLINE, P.J., and ROUSE, J., concur.

FN1. All further statutory references are to the Vehicle Code, unless otherwise indicated.

FN2. This conclusion is foreshadowed in the earlier decisions cited previously. Thus, in *American Motors Sales Corp. v. New Motor Vehicles Bd., supra,* the court took

great pains to point out that it did *not* hold that car dealers were "per se constitutionally ineligible to sit on the Board." (69 Cal.App.3d at p. 992, 138 Cal.Rptr. 594.) And in *Nissan Motor Corp. v. New Motor Vehicle Bd., supra,* the court, rather than simply reversing with directions to issue judgment in favor of the manufacturer, "remanded *for further proceedings before a Board acting without the participation of the new motor vehicle dealer members.*" (153 Cal.App.3d at p. 116, 202 Cal.Rptr. 1, emphasis added), thereby implicitly sanctioning the constitutionality of a Board with dealer members who did not participate in the adjudicatory process.

FN3. The only communication which Maserati sent to a third party was a one line letter to the Occupational *Licensing* Division of the DMV, an agency not related to the New Motor Vehicle Board.

FN4. An entirely plausible explanation offered by British Motors for the delay in filing the protest illustrates why compliance with subdivision (a) of section 3060 should be required to start the running of the statute.

After receiving the "Dear Gerry" letter of September 21, British Motors spent several months negotiating with Maserati in an attempt to persuade it to continue the franchise. In the meantime, British Motors' attorneys kept in contact with the Board, which assured them that no termination notice had been filed. British Motors therefore believed that there was no danger of untimely filing, since under section 3060 there was no way of measuring the timeliness of the protest until a termination letter was filed with the Board, a belief to which the Board's administrator lent credence in discussing the matter with them.

If this were a case where the manufacturer had notified the Board of the termination but the notice were somehow technically defective, we might pause to consider the result reached by the Board. Here however, we are dealing with a situation where the Board never even *receives* notice and the franchisee reasonably relies upon the wording of a statute which says the limitations period is not triggered until such receipt. We would be turning the doctrine of laches upside down to hold that the party in noncompliance with the plain wording of a statute has a superior equity to one who reads, and reasonably relies upon, such wording.

YAMAHA MOTOR CORPORATION, U.S.A., Petitioner, v. The SUPERIOR COURT of Santa Clara County, Respondent; Alan J. BARBIC, etc., et al., Real Parties in Interest. (1987) 195 Cal.App.3d 652 [240 Cal.Rptr. 806]
H003438.
Court of Appeal, Sixth District, California.
Oct. 19, 1987.
Review Denied Jan. 7, 1988.

Bruce L. Ishimatsu, Kelley, Drye & Warren, Los Angeles, for petitioner.

Michael M. Sieving, Sam W. Jennings, Sacramento, State of Cal., New Motor Vehicle Bd., for amicus curiae on behalf of petitioner.

No appearance for respondent.

Ardell Johnson, Clark & Korda, San Jose, for real parties in interest.

CAPACCIOLI, Associate Justice.

Petitioner, Yamaha Motor Corporation, U.S.A. (Yamaha), seeks a writ of mandate to compel the superior court to vacate its order overruling Yamaha's demurrer to the cross-complaint against it filed by real parties in interest Alan and Michele Barbic, former Yamaha dealers, and to enter an order sustaining the demurrer without leave to amend. Yamaha argues that the cross-complaint is barred either by the Barbics' failure to pursue and exhaust an administrative remedy before the New Motor Vehicle Board (Board), or alternatively, by the doctrines of res judicata and collateral estoppel based on the dismissal with prejudice of the Barbics' earlier protest to the Board.

We have concluded failure to exhaust their administrative remedy before the Board bars the Barbics' cross-complaint, for reasons we shall state.

FACTS

The complaint which began this action was filed against the Barbics and others by the entity ITT Commercial Finance Corp. (ITT), not a party to this writ proceeding, but described by Yamaha as its primary finance company and flooring agent. ITT sued the Barbics on November 25, 1985, for breach of financing agreement, recovery of possession of personal property, breach of guarantee agreement, and related damages. ITT sued as assignee of Yamaha's rights in a written inventory financing agreement between Yamaha and the motorcycle dealership Gilroy Yamaha, Inc., a Yamaha franchisee. The Barbics were sued individually as guarantors of Gilroy Yamaha's obligations and as individual signers of wholesale financing agreements giving ITT a security interest in the retail inventory of two dealerships operated by the Barbics (Gilroy Yamaha and Yamaha of San Jose).

The Barbics cross-complained against ITT and Yamaha, charging Yamaha with breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, negligent misrepresentation, interference with business relations, and unlawful restraint of trade. The Barbics alleged that Yamaha represented to the Barbics that so long as they made payments on their contractual obligations the financing contracts would remain in effect, but in violation of those promises Yamaha unjustifiably terminated the contracts, sued for past due amounts, and sought ex parte orders to seize complainants' inventories, thus effectively putting them out of business. Further, Yamaha knowingly interfered with the Barbics' attempt to sell a dealership (Yamaha of San Jose) to one Stephen McBee, by putting complainants out of business and communicating with McBee to discourage him from going through with the sale transaction. They also allege restraint of trade causes against Yamaha and ITT. The cross-complaint was first filed February 23, 1987, and later amended.

On February 7, 1986, the Barbics filed a protest notice with the Board charging that Yamaha invalidly terminated their dealership sales agreement and refused to continue the franchise. The protest also complained of Yamaha's willfully and collusively having prevented the Barbics from timely completing a sale of their San Jose business to McBee. The Barbics requested a hearing under the provisions of California Vehicle Code section 3066. (FN1)

On April 18, 1986, the Barbics dismissed this protest with prejudice. They have since contended, in opposing Yamaha's demurrer to their cross-complaint, that they did so under pressure from Yamaha which would not consent to the sale to McBee unless Barbics dismissed the protest, among other things.

Yamaha demurred to the Barbics' cross-complaint for these reasons: (1) lack of jurisdiction because of failure to exhaust administrative remedies before the Board; (2) collateral estoppel or res judicata because of the dismissal of the protest with prejudice. The trial court overruled the demurrer as to the Barbics. (The ruling was different as to another cross-complainant, Gilroy Yamaha, not a party to this proceeding, and not germane to this discussion.)

In opposing the demurrer, the Barbics detailed a history of misfortunes which had unfortunately beset them, including loss of their home in the 1985 Lexington Reservoir fire and embezzlement by the manager of Gilroy Sports Center, one of the businesses involved in this litigation. Then, they alleged, Yamaha and ITT turned their attempted sales of their businesses into distress sales by instituting foreclosures and by interfering with their attempted sale of the San Jose dealership to McBee, telling him he should allow the store to be foreclosed upon because his other store would then acquire the Barbics' market share by default. Further, when they persuaded him to buy at a depressed price, Yamaha would not consent to the sale until they promised to dismiss their Board protest; obtain a personal debt guarantee from their parents secured by the latters' home; and release Yamaha from all liability in the transaction.

Also, the Barbics alleged the Board could not provide an effective remedy for the harm alleged in their cross-complaint against Yamaha, because although the Board could prevent improper termination of their franchise (§ 3060 et seq.), it could not grant tort damages as prayed for here. Also, they contended since they no longer had a franchise relationship with Yamaha at the time of filing the cross-complaint, they no longer had access to any administrative remedy, therefore the exhaustion doctrine should not bar their claim.

Finally, they claimed res judicata and collateral estoppel do not apply here because there was no litigation of the dispute before the agency on its merits. (Citing, e.g., *Goddard v. Security Title Ins. & Guar. Co.,* (1939) 14 Cal.2d 47, 51, 92 P.2d 804.)

DISCUSSION

The Legislature has created a broad statutory scheme to regulate the franchise relationship between vehicle manufacturers and dealers. (§§ 3000 to 3069, 11700 et seq.) Specifically applying here is section 3050, subdivision (c), giving the Board authority to consider "any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer ... distributor ... pursuant to Chapter 4 (commencing with section 11700) of Division 5 submitted by any person...." The Board is empowered to direct investigations of such matters; undertake arbitration or settlement; and exercise any and all of its license revocation, suspension, and related powers with respect to licensees before it. (*Ibid.*) The statutes provide a full administrative remedy, including powers of subpoena, discovery, and hearing, and ultimate judicial review. (§§ 3050.1 et seq.; 3068.) Sections 3060 and 3061 specifically regulate termination of franchises; section 3062 deals with relocating dealerships; and section 3050, subdivision (c), quoted *supra,* specifically refers to activities pursuant to chapter 4, section 11700 et seq., which chapter in turn includes sections 11713.2 and 11713.3. These statutes define unlawful acts of a manufacturer or distributor, including, among others, preventing or requiring changes in the dealership's capital structure; preventing or requiring the sale or transfer of any part of the dealership, or unreasonably withholding consent to such sale; preventing a dealer

from receiving fair and reasonable compensation for the value of the franchised business; coercing a dealer into an agreement or into doing any prejudicial act by threatening to cancel the franchise.

There is clearly a considerable overlap between the allegations of the Barbics' cross-complaint against Yamaha and the kinds of conduct regulated or proscribed under the foregoing statutes.

The decision in *Yamaha Motor Corp. v. Superior Court* (1986), 185 Cal.App.3d 1232, 230 Cal.Rptr. 382 applied the exhaustion doctrine where a motorcycle dealer sued Yamaha for breach of the franchise agreement, breach of the implied covenant of good faith and fair dealing, and intentional interference with prospective business advantage arising out of Yamaha's refusal to sell a new product to the dealer and its sale to other dealers in the area. The court held that failure to seek relief before the Board barred the suit. The allegations of the complaint were held a proper subject of protest to the Board within sections 3060 and 3062.

The *Yamaha* decision, *supra,* points out the fundamental importance of the exhaustion doctrine in California. It is jurisdictional. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292, 109 P.2d 942.) Whether or not the administrative remedy is permissive and whether or not it may afford complete relief, the complainant must exhaust it before seeking judicial assistance. The reasons for the rule are to lighten the burden on courts by providing the benefit of the agency's expertise in preparing a full record and sifting the evidence. (*Yamaha, supra,* 185 Cal.App.3d at p. 1240, 230 Cal.Rptr. 382, citing *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982, 88 Cal.Rptr. 533; *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 980, 201 Cal.Rptr. 379.) Many cases support this proposition; "this legislatively mandated policy promoting the resolution of disputes by specialized boards and fostering judicial economy has been well explained...." (*Robinson v. Department of Fair Employment & Housing* (1987) 192 Cal.App.3d 1414, 1417, 239 Cal.Rptr. 908; see also cases cited at pp. 1416-1417, 239 Cal.Rptr. 908.)

The Board filed an amicus curiae brief asserting that under section 3050, subdivision (c), the charged conduct in the Barbics' cross complaint is substantially within the jurisdiction of the Board. The Board asserts that these matters concern the activities or practices of Yamaha, a Board licensee, and it is evident that much, if not all, of the conduct charged against Yamaha is within the scope of the statutory prohibitions outlined in sections 11713.2 and 11713.3. We agree. The gravamen of the Barbics' claim--unfair dealings with respect to the franchise, unauthorized termination of the relationship, and unwarranted interference in the sale of a dealership--consists of activities specifically forbidden by the above cited provisions. Further, the charge Yamaha applied economic duress to compel dismissal of the Barbics' protest would appear to be a matter directly concerning the agency, constituting, if true, a fraud on the agency, just as depriving a litigant of a fair judicial hearing may constitute a fraud on the court.

The Board also asserts that a purpose of the bill creating the Board was to "replace the courts with the ... board as a preliminary forum of franchise or other disputes between dealers and manufacturers or distributors. Any decision made by the Board would be final, subject only to judicial review." (Enrolled Bill Report, Dept. of Finance, Assem.Bill No. 225, (1973-1974 Reg. Sess.)

This purpose is identical to the reason for the exhaustion doctrine, to permit the expert agency to perform the preliminary evidentiary screening and early dispute resolution before invoking judicial assistance. As stated, this is a rule of jurisdictional dimension. (*Abelleira, supra; Robinson, supra,* and cases cited therein.)

The Barbics argue the Legislature has authorized them an independent judicial remedy in section 11726. That statute provides a licensee suffering pecuniary loss by virtue of various acts of noncompliance with applicable Vehicle Code provisions (including § 3052 et seq.) "may recover damages and reasonable attorney fees therefor in any court of competent jurisdiction. Any such licensee may also have appropriate injunctive relief in any such court." They argue this language expressly authorizes them to bring their tort claims against Yamaha into a court, the only forum which is authorized to award them money damages for such derelictions.

We have found no cases expressly construing section 11726. However, it is significant that the *Yamaha* decision, *supra,* does not refer to section 11726 at all, but does state categorically that whether or not the administrative remedy can grant complete relief, it must nevertheless be exploited first, so that, as discussed above, the agency can perform preliminary screening and dispute resolution functions for the court. "Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' [Citation.]" (*Yamaha, supra,* 185 Cal.App.3d at p. 1240, 230 Cal.Rptr. 382.)

Further, section 11726 provides a judicial remedy for loss caused by any willful failure of a licensee to obey stated sections of the Vehicle Code, including those referenced above (commencing, respectively, with section 3052, and 11700), or for similar disobedience of a department regulation, rule or Board decision. The statute immediately follows the provisions such as 11713.2 and 11713.3, defining unlawful acts of a licensee--which violations are specifically remediable by protest under sections 3050 et seq. Clearly the statute was intended to provide judicial enforcement of department and Board decisions, to put teeth in enforcement of the Board legislation. Its specific reference to the protest and hearing procedures of section 3050 et seq. suggests the Legislature intended the agency, in the first instance, to determine whether any such violations had been committed, before an aggrieved claimant would be authorized to invoke judicial relief. The Barbics cite no evidence indicating an intent to provide, in section 11726, anindependent judicial remedy which could be invoked at will, without first resort to the section 3050 procedures. Nor would such an interpretation comport with the general development of administrative law doctrine in this state, which, as has been exhaustively discussed elsewhere, strongly encourages first resort to the administrative agency remedy before a litigant may seek judicial relief. It seems plain to us that section 11726 contemplates a prior administrative finding that a licensee is in violation of the statutes or Board rules, before the judicial relief there provided may be invoked.

The Board brief emphasizes the particular sensitivity of the Board to the legislative mandate that the interest of the public be considered and protected in the handling of vehicle franchise matters. (See §§ 3061, 3063.) A court would also need to take such factors into account in deciding a civil contract or tort claim such as that made by the

Barbics here, but it can benefit by the special expertise of the Board in such matters, its greater familiarity with vehicle franchise practices and procedures throughout the state and its greater ability, in light of the large number of such claims it must oversee, to achieve fair and uniform results.

The Barbics argue pursuit of their administrative remedy now would be futile because they no longer have a franchise relationship with Yamaha and the Board is not empowered to grant them any present relief. If true, that result is unfortunate but irrelevant to the application of the exhaustion doctrine, which requires resort to the available remedy, at the time it is available, so as to make use of the agency's expertise and develop a preliminary record for the court. Again, this requirement is jurisdictional in California. (See *Yamaha, supra,* 185 Cal.App.3d 1232, 230 Cal.Rptr. 382 and *Robinson, supra,* 192 Cal.App.3d 1414, 239 Cal.Rptr. 908.)

Further, it is not absolutely certain that the Barbics no longer may resort to the administrative remedy. In light of their claim that Yamaha pressured them into dismissing their administrative protest, they could ask the Board to reinstitute proceedings, by a procedure analogous to recall of a remittitur or motion to set aside a judgment, by reason of impermissible conduct depriving them of their administrative forum. If such relief were granted, they could then proceed to develop a record before the Board. Therefore it is possible that even now, their presentation of this matter to the Board would not be entirely futile.

Finally, it would completely eviscerate the exhaustion doctrine if we were to hold that a party could avoid its application by simply terminating the regulated relationship--here, the franchise--before resorting to a lawsuit. The Barbics were in such a relationship with Yamaha, they had a right to and did invoke the Board administrative remedy. Their failure to complete the process, however, bars their present claim on the court's facilities.

We give great weight to the agency's position here that it did have jurisdiction and that the Barbics should have brought the dispute there first. The Board's position undercuts the Barbics' argument that the administrative remedy would have been meaningless and futile.

Our conclusion that the demurrer of Yamaha should have been sustained for failure of the Barbics to exhaust their administrative remedies makes it unnecessary to discuss Yamaha's second contention that res judicata or collateral estoppel applies. (FN2)

DISPOSITION

Real parties in interest have been notified that a peremptory writ in the first instance could be issued here, and they have filed opposition. The peremptory writ of mandate will issue in the first instance. (Code Civ.Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-182, 203 Cal.Rptr. 626, 681 P.2d 893.)

Let a writ of mandate issue ordering respondent court to vacate its order overruling Yamaha's demurrer and enter a new and different order sustaining the demurrer without leave to amend.

AGLIANO, P.J., and PREMO, J. (FN*) , concur.

FN1. All further statutory references are to the Vehicle Code unless otherwise specified.

FN2. The parties do not raise the issue whether the exhaustion doctrine should be differently applied because the Barbics here are proceeding by way of cross-complaint, rather than having been the original instigators of the lawsuit. Although there is some authority for not requiring resort to administrative remedies when one faces criminal sanctions (see, e.g., *Moore v. East Cleveland* (1977) 431 U.S. 494, 497, note 5, 97 S.Ct. 1932, 1934, note 5, 52 L.Ed.2d 531; *McKart v. United States* (1969) 395 U.S. 185, 192-203, 89 S.Ct. 1657, 1662-1667, 23 L.Ed.2d 194), and although we can conceive of situations where requiring a civil litigant to exhaust administrative remedies before raising defenses to the lawsuit could be unfair, here it seems the Barbics' cross-complaint, against an entity not a party to the original lawsuit against the Barbics, is the essential equivalent of an original complaint, affirmatively seeking to bring matters before the court which should first have been submitted to agency scrutiny.

FN* Assigned by the Chairperson of the Judicial Council.

CHAMPION MOTORCYCLES, INC., etc., Plaintiff and Appellant, v. The NEW MOTOR VEHICLE BOARD, Defendant and Respondent; YAMAHA MOTOR CORPORATION, etc., et al., Real Parties in Interest and Respondents. (1988) 200 Cal.App.3d 819 [3 Cal.Rptr.2d 546]
No. C000530.
Court of Appeal, Third District, California.
March 30, 1988.

Chris C. Vaughn, Law Office of Daniel Patterson, Auburn, for plaintiff and appellant.

John K. Van de Kamp, Atty. Gen., Steve White, Chief Asst. Atty. Gen., Faith Geoghegan, Deputy Atty. Gen., for defendant and respondent.

Forrest A. Plant, Diepenbrock, Wulff, Plant & Hannegan, Sacramento, Bruce L. Ishimatsu, Kelley Drye & Warren, Michael J. Flanagan, Law Office of Pilot & Star, Los Angeles, for real party in interest.

PUGLIA, Presiding Justice.

Appellant Champion Motorcycles, Inc., doing business as Champion Honda/Yamaha (Champion), appeals from the judgment of the trial court denying its petition for writ of administrative mandamus. (Code Civ.Proc., § 1094.5.) By that petition, Champion sought to overturn the decision of the respondent New Motor Vehicle Board (Board) which had overruled Champion's protests filed against real party in interest Yamaha Motor Corporation, U.S.A. (Yamaha). The protests were based on Yamaha's actions in (1) establishing a new franchise authorizing real party in interest Renix Corp., doing business as Newport Vespa/Riva (Newport), to sell Yamaha Riva motor scooters, and (2) modifying Champion's franchise agreement to preclude Champion from obtaining the Yamaha Riva motor scooter line. On appeal, Champion contends the trial court improperly applied the substantial evidence standard of review and improperly relied on the doctrine of laches to support its judgment. We shall affirm.

In September 1982, Champion entered into a contract to purchase a Honda/Yamaha retail motorcycle outlet in Costa Mesa from Award Motors, Inc. At about the same time, Yamaha introduced a new merchandise line of motor scooters called "Yamaha Riva." Yamaha notified both Award and Champion that neither of them would be eligible to carry the Riva line. Effective September 27, 1982, Yamaha established a new franchise with Newport to sell Riva motor scooters. Yamaha then perfected its franchise agreement with Champion on October 13, 1982. The Newport franchise was apparently located within a radius of ten miles of the Champion franchise. (FN1)

On November 23, 1983, Champion filed an "establishment protest" with the Board, contending that Yamaha failed to give notice of its establishment of a new franchise and that there was good cause to preclude the establishment of the Newport franchise, pursuant to Vehicle Code section 3062. (FN2) (All further statutory references to sections of an undesignated code are to the Vehicle Code.) "Section 3062 limits the ability of a franchisor to establish or relocate a dealership within an area where the same line-make is already represented. In doing so the section utilizes the term 'relevant market area' which is in turn defined in section 507 as being 'any area within a radius of 10 miles from the site of a potential new dealership.' Thus under section 3062, any franchisee within 10 miles of the site of a proposed new or relocated dealership of the same line-make may protest such proposed action. At the hearing on the protest the question is whether the existing franchisee establishes good cause for not allowing the establishment or relocation of the additional dealer within the relevant market area, and section 3063 sets forth the factors which are to be considered by the Board." (*BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 989, 209 Cal.Rptr. 50.)

On December 7, 1983, Champion filed a "modification protest," pursuant to section 3060, contending that Yamaha modified Champion's franchise by deleting the Riva line from the franchise agreement without good cause and, again, that Yamaha failed to give notice of the modification. Section 3060 "... precludes a franchisor from modifying or replacing a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor complies with certain procedural provisions and in the event of a protest the Board finds good cause for the modification or replacement. Section 3061 provides the factors to be considered by the Board in determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise." (FN3) (*BMW of North America,* supra, 162 Cal.App.3d at p. 989, 209 Cal.Rptr. 50.) The protesting franchisee has the initial burden of proving the modification would substantially affect the franchisee's sales or service obligations or investment; the burden then shifts to the franchisor to prove good cause for the modification. (§§ 3060; 3066, subd. (b).)

The establishment and modification protests were consolidated and a hearing held in February 1985 before an administrative law judge (ALJ). The ALJ issued a proposed decision in August 1985. As to the modification protest, the ALJ found that Yamaha did modify Champion's franchise by deleting the Riva line from the agreement. However, the ALJ found that Champion failed to prove the modification had a substantial effect on its sales or service obligations or investment. Moreover, the ALJ found Yamaha had good cause to modify the franchise agreement. As to the establishment protest, the ALJ

found Champion failed to prove good cause existed to disallow the establishment of the Newport franchise. The ALJ also found that Yamaha had good cause for its failure to give notice of modification and establishment, and further that Champion's protests were barred by laches because it did not file its protests for at least one year after it learned of Yamaha's actions, during which time Yamaha and Newport substantially changed their positions. The ALJ denied both the establishment and modification protests. The Board adopted the ALJ's findings and decision on September 4, 1985.

The trial court denied Champion's petition for writ of mandamus, finding that the substantial evidence test was the proper standard of review, that substantial evidence supported the Board's findings and that the Board did not err in applying laches.

Champion contends the trial court erroneously utilized the substantial evidence test to review its modification protest, rather than the independent judgment test. Champion concedes the substantial evidence test is proper when a trial court reviews the Board's denial of an establishment protest. (See *Piano v. State of California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 422, 163 Cal.Rptr. 41.) However, Champion argues that different rights are implicated in a modification protest and therefore the more searching independent judgment test applies. We disagree.

On petition for writ of mandamus to review the final decision of an administrative agency, the trial court must determine whether there has been a prejudicial abuse of discretion. In cases where it is claimed the findings are not supported by the evidence, if the trial court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the findings are not supported by the weight of the evidence; in all other cases, the trial court determines whether the findings are supported by substantial evidence in light of the whole record. (Code Civ.Proc., § 1094.5, subds. (b), (c).)

The trial court is authorized to exercise its independent judgment on the evidence where the administrative agency is of legislative origin and its decision affects a fundamental vested right. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34-35, 112 Cal.Rptr. 805, 520 P.2d 29.) The Board is of legislative origin. (*BMW of North America Inc. v. New Motor Vehicle Bd.,* supra, 162 Cal.App.3d at p. 985, 209 Cal.Rptr. 50; *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986, 138 Cal.Rptr. 594.) Courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects a fundamental vested right. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144, 93 Cal.Rptr. 234, 481 P.2d 242.) To determine whether a right is fundamental and vested, we look to either of two factors: "(1) the character and quality of its economic aspect; (2) the character and quality of its human aspect." (*Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 780, 163 Cal.Rptr. 619, 608 P.2d 707; see also *Strumsky,* supra, 11 Cal.3d at p. 45, 112 Cal.Rptr. 805, 520 P.2d 29; *Bixby* supra, 4 Cal.3d at pp. 144-145, 93 Cal.Rptr. 234, 481 P.2d 242.)

Recently, the court of appeal considered the scope of review of a section 3060 termination decision. (*British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.* (1987) 194 Cal.App.3d 81, modified 194 Cal.App.3d 693c, 239 Cal.Rptr. 280 [as modified] [rev. den., Nov. 10, 1987].) In *British Motor,* the franchisor terminated the franchise agreement pursuant to section 3060. The Board found that the franchisor acted without good cause and therefore ordered the franchise reinstated. However, the

trial court applied the independent judgment test and reversed. (*Id.,* 194 Cal.App.3d at pp. 85, 89, 239 Cal.Rptr. 280.) The appellate court held that the Board's decision did not affect a fundamental vested right of the franchisor and therefore the trial court erroneously applied the independent judgment test. (*Id.,* at p. 90, 239 Cal.Rptr. 280.)

The *British Motor* court explained: "It has been repeatedly held that the preservation of purely economic interests does not affect the fundamental vested rights of the petitioner." (194 Cal.App.3d at p. 90, 239 Cal.Rptr. 280, citing *Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal.App.3d 14, 22-23, 112 Cal.Rptr. 872; *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 305, 130 Cal.Rptr. 814; *Mueller v. MacBan* (1976) 62 Cal.App.3d 258, 273, 132 Cal.Rptr. 222.) The franchisor had argued that the Board's decision affected its freedoms of contract and association. The appellate court pointed out that those freedoms have long been subject to governmental regulation. "It is far too late in the day to assert that a business enterprise has a 'fundamental vested right' to conduct business free from reasonable governmental regulation. [Citations.]" (194 Cal.App.3d at p. 90, 239 Cal.Rptr. 280.)

Two other appellate courts have applied the substantial evidence test to review section 3060 termination decisions, albeit without discussion. (*Sonoma Subaru, Inc. v. New Motor Vehicle Bd.* (1987) 189 Cal.App.3d 13, 22, fn. 2, 234 Cal.Rptr. 226; *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 474, 230 Cal.Rptr. 769.)

Champion argues Yamaha's modification of the franchise agreement affected a fundamental vested right because (1) the economic aspect of the modification was enormous as it caused a substantial loss in potential earnings and a simultaneous substantial increase in expenditures, and (2) the human aspect was equally enormous because all of Champion's debts were secured by the personal property of Champion's corporate officers and principals. (FN4) We reject this analysis. The right affected by the deletion of the Riva line from Champion's franchise was purely economic. That is, according to Champion, the modification caused an increase in expenditures and a decrease in revenues. The nature of the right affected is not altered by the fact that the modification extended beyond the corporate coffers to the principal's pockets. The right affected is no different than when the Board precludes a franchisor from terminating a franchise, thus causing lost revenues to the franchisor, as was the case in *British Motor.* We concur with the analysis of the court of appeal in that case. (FN5)

Further, we disagree with Champion's contention that the right affected in a modification protest is substantially different than in an establishment protest. When the franchisor establishes a new franchise within the same market area as an existing franchise, the senior franchisee's right to operate without unfair competition is affected. That right is merely the interest of the franchisee in its economic well-being. When the franchisor modifies the franchise agreement by withdrawing a line of merchandise, the very same interest--economic well-being--is affected.

Finally, Champion misplaces its reliance on *Interstate Brands v. Unemployment Ins. Appeals Bd.,* supra, 26 Cal.3d 770, 163 Cal.Rptr. 619, 608 P.2d 707. There, the court held an administrative decision requiring an employer to make contributions to the unemployment insurance fund on behalf of striking employees implicated a fundamental vested right of the employer. (*Id.,* at pp. 773-775, 163 Cal.Rptr. 619, 608 P.2d 707.) The court distinguished cases recognizing that a purely economic interest is neither

fundamental nor vested by explaining the *Interstate Brands* employer was forced to contribute to the unemployment insurance fund by the administrative decision. (*Id.,* at p. 781, fn. 7, 163 Cal.Rptr. 619, 608 P.2d 707.) In contrast, here, Champion has not been coerced by administrative adjudication.

Champion finally contends that had the trial court applied the independent judgment test it would not have denied Champion's modification protest because the weight of the evidence favored Champion. (FN6) We need not reach this issue as we conclude the trial court was correct in applying the substantial evidence test. Champion does not contend there is no substantial evidence to support the judgment.

Champion contends the trial court erroneously approved the Board's reliance on the equitable doctrine of laches to support its decision overruling Champion's modification and establishment protests. However, the Board relied on laches as an alternative theory for the denial of Champion's protests. The Board's principal rationale was that Champion failed to meet its burden of proof as to either protest. Champion does not contend there was no substantial evidence to support the Board's findings that (1) Champion was not substantially affected by the modification, and (2) Yamaha had good cause to modify Champion's franchise. Nor does Champion challenge the Board's finding that Champion failed to prove good cause to disallow the establishment of the Newport franchise. Thus, even if the trial court erred in sustaining the Board's reliance on laches, the judgment must nevertheless be affirmed. (FN7)

The judgment is affirmed.

BLEASE and DEEGAN (FN*), JJ., concur.

FN1. The record does not indicate the distance in September 1982 between the locations of the Champion and Newport franchises. However, in November 1983, Newport moved to within a block of Champion and in September 1984 Champion moved about two blocks farther away to a distance of about seven-tenths of a mile from Newport.

FN2. Section 3062 provides in pertinent part: "[I]f a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall, in writing, first notify the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 20 days of receiving that notice or within 20 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership.... When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue."

FN3. Section 3060 provides in pertinent part: "The franchisor shall not modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee notice thereof at

least 60 days in advance of the modification or replacement. Within 30 days of receipt of the notice, a franchisee may file a protest with the board and the modification or replacement does not become effective until there is a finding by the board that there is good cause for the modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue."

FN4. Champion also contends the modification of its franchise agreement deprived it of the opportunity to carry on a lawful trade or business. This contention is gainsaid by the fact that Champion has continued to operate its business to this very day even though it has been without the Riva line of motor scooters.

FN5. We do not here consider the nature of the right affected when a franchisee's entire franchise is terminated by the franchisor under section 3060.

FN6. Champion also argues the Board's decision denying the modification protest was not supported by the findings. Champion does not provide any analysis for this contention which in any event is wrong. The Board adopted the findings of the ALJ. The ALJ found (1) the modification did not substantially affect Champion's sales, service obligations or investment and, in any event, (2) Yamaha had good cause to modify the franchise agreement. These findings amply support the denial of Champion's modification protest. (See § 3060.)

FN7. Champion contends the Board exceeded its jurisdiction in finding laches because the Board is an agency of legislative, rather than constitutional, orgin and therefore may not enforce equitable principles, absent express constitutional or statutory authorization. Champion may be correct. "It is fundamental that an administrative agency has only such power as has been conferred upon it by the constitution or by statute and an act in excess of the power conferred upon the agency is void. [Citations.]" (*BMW of North America Inc. v. New Motor Vehicle Bd.,* supra, 162 Cal.App.3d at p. 994, 209 Cal.Rptr. 50.) Laches may be asserted only in a suit in equity. (7 Witkin, Summary of Cal.Law (8th ed. 1974) Equity, § 14, p. 5240.)

Champion argues that the separation of powers doctrine permits only those administrative agencies with constitutionally-granted judicial powers to exercise equitable jurisdiction. In *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 160 Cal.Rptr. 124, 603 P.2d 41, a sharply divided Supreme Court permitted the Public Utilities Commission (PUC) to grant attorneys fees under its equitable jurisdiction in reparation cases. (*Id.,* at pp. 905-909, 917-920, 160 Cal.Rptr. 124, 603 P.2d 41.) The court's decision was premised in part on the Constitution's grant of broad quasi-judicial powers to PUC. (*Id.,* at pp. 905-906, 160 Cal.Rptr. 124, 603 P.2d 41.) On the other hand, the court held PUC could not award attorneys fees in its quasi-legislative ratemaking function. (*Id.,* at pp. 909-910, 916-917, 160 Cal.Rptr. 124, 603 P.2d 41.) The court of appeal recently applied this separation of powers analysis to hold that the Department of Social Services, an agency of legislative origin, may not apply the doctrine of equitable estoppel in exercising its adjudicatory function. However, the Supreme Court granted review. (*Lentz v. McMahon* (1986) [rev. granted, Feb. 26, 1987] reprinted to permit tracking in 197 Cal.App.3d 445, 452-455, 231 Cal.Rptr. 622.) To the

extent the analysis in *Lentz* is correct, the Board, also an agency of legislative origin, exceeded its jurisdiction by relying on the equitable doctrine of laches.

The Board cites a number of cases for the proposition that estoppel may be asserted against governmental entities in administrative cases. (*Fredrichsen v. City of Lakewood* (1971) 6 Cal.3d 353, 357, 99 Cal.Rptr. 13, 491 P.2d 805; *U.S. Fid. & Guar. Co. v. State Bd. of Equal.* (1956) 47 Cal.2d 384, 388-389, 303 P.2d 1034; *House v. State of California* (1981) 119 Cal.App.3d 861, 873-879, 174 Cal.Rptr. 279.) However, each of these cases involves the assertion of estoppel in the trial court, not before an administrative agency. Moreover, none of the cases considers the issue whether agencies of legislative origin have equitable jurisdiction. Thus, the cases are inapposite.

FN* Assigned by the Chairman of Judicial Council.

RI-JOYCE, INC., Plaintiff and Respondent, v. NEW MOTOR VEHICLE BOARD, Defendant and Appellant; MAZDA MOTORS OF AMERICA, INC., Real Party in Interest and Appellant. (1992) 2 Cal.App.4th 1145 [3 Cal.Rptr.2d 546].
No. C008797.
Court of Appeal, Third District, California.
Jan. 7, 1992.
Review Denied April 16, 1992.

John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Sr. Asst. Atty. Gen., Vincent J. Scally, Jr., Associate Supervising Deputy Atty. Gen., and Daniel J. Turner, Deputy Atty. Gen., for defendant and appellant.

Pilot, Spar & Siegler and A. Albert Spar, Los Angeles, for real party in interest and appellant.

Geary, Shea, O'Donnell & Grattan and Thomas C. Taylor, Santa Rosa, for plaintiff and respondent.

SPARKS, Acting Presiding Justice.

The New Motor Vehicle Board (Board), and Mazda Motors of America, Inc. (Mazda), appeal from a judgment of the Sacramento County Superior Court granting a petition for a peremptory writ of mandate in favor of Ri-Joyce, Inc. (Ri-Joyce). Ri-Joyce, a Mazda dealer in Santa Rosa, had attempted to protest the establishment of a new Mazda dealership in Petaluma, more than 10 miles from Ri-Joyce's dealership. The Board found this court's decision in *BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 209 Cal.Rptr. 50 (hereafter *BMW* or the *BMW* case), to be controlling and dismissed the protest. The trial court concluded that our decision in the *BMW* case was not controlling and issued a writ of mandate directing the Board to set aside its decision and to consider the protest. The court expressly cautioned, however, that "nothing in this judgment or [the] writ shall limit or control in any way the discretion legally vested in [the Board]." We agree with the decision of the trial court and shall affirm the judgment.

The relevant facts are straightforward and we will refer to them as necessary in our discussion.

DISCUSSION

The Board has jurisdiction to consider dealer-franchisee protests of certain types of intended actions of a franchisor under Vehicle Code sections 3060 through 3063, which we have set out in full in an appendix to this opinion. (Unless otherwise specified all further section references are to the Vehicle Code.) Under the first portion of section 3060, a franchisor is prohibited from terminating or refusing to continue an existing franchise without complying with certain procedural requirements and, if a protest if filed, unless the Board finds there is good cause. The second portion of section 3060 precludes a franchisor from modifying or replacing a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor complies with procedural requirements and, if a protest is filed, the Board finds good cause. A franchisor has the burden of establishing good cause for terminating or refusing to continue a franchise and, if it would substantially affect the franchisee's sales or service obligations or investment, for modifying or replacing a franchise with a succeeding franchise. (§ 3060.) The relevant factors to be considered by the Board with respect to a protest under section 3060 are set forth in section 3061.

Section 3062 limits the ability of a franchisor to establish a new dealership or relocate an existing dealership within an area where the same line/make is already represented. Under that section an existing dealer may file a protest of the franchisor's decision to establish or relocate another dealership within the same "relevant market area." A relevant market area is "any area within a radius of 10 miles from the site of a potential new dealership." (§ 507.) Upon a protest the Board can preclude the franchisor from establishing or relocating the proposed new dealership if the existing dealer can establish good cause for not permitting the dealership within its relevant market area. (§ 3062.) The relevant factors to be considered are set forth in section 3063.

In *BMW, supra,* 162 Cal.App.3d 980, 209 Cal.Rptr. 50, a BMW dealer in Camarillo, in Ventura County, sought to protest the establishment of a new BMW dealership in the Thousand Oaks-Westlake area of that same county. The dealer's franchise agreement reserved to the franchisor the power to appoint additional dealers and the new dealership was to be located at a site beyond the relevant market area of the existing dealer. Nevertheless, the existing dealer claimed that the establishment of the new dealership pursuant to the reserved power was contrary to public policy and void. We disagreed, concluding that section 3062 "not only restricts the right of a franchisee to object to the appointment of a new dealer to the 10-mile radius, but it also implicitly recognizes the right of a franchisor to appoint new dealers, subject of course to the right of an existing dealer to show good cause for precluding such appointment if it is to be within 10 miles of the existing dealer." (*Id.* at p. 991, 209 Cal.Rptr. 50.)

In the *BMW* case the dealer made the alternative argument that the establishment of the new dealership would constitute a modification of his franchise which could be protested under section 3060. In making this argument the dealer relied upon the franchisor's use of an A.O.R. (area of responsibility) system of planning and evaluation. Under this planning system all post office zip codes were assigned to the A.O.R. of the nearest dealership. The franchisor was able to determine the number of its vehicles which were registered to addresses within particular zip codes. This aided the franchisor in anticipating the service and parts requirements for particular areas as well as in evaluating its competitive performance in those areas. For these planning purposes all

post office zip codes were assigned to an A.O.R. of an existing dealer, regardless how distant the dealership may have been. Accordingly, the establishment of a new dealership would necessarily change the A.O.R. of the nearest existing dealers since zip code areas closer to the new dealership would be considered part of its A.O.R. In the *BMW* case the dealer claimed, and the Board and trial court agreed, that the change in his A.O.R. which would occur with the establishment of the new dealership would constitute a modification of his franchise. (162 Cal.App.3d at pp. 991-993, 209 Cal.Rptr. 50.)

We rejected the dealer's claim in that case under the parol evidence rule. We explained the rule as follows: "The parol evidence rule is a fundamental rule of contract law which operates to bar extrinsic evidence contradicting the terms of a written contract. It is not merely a rule of evidence but is substantive in scope. Under that rule the act of executing a written contract, whether required by law to be in writing or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. Extrinsic evidence cannot be admitted to prove what the agreement was, not for any of the usual reasons for exclusion of evidence, but because as a matter of law the agreement is the writing itself. Consequently, 'in determining whether substantial evidence supports a judgment, extrinsic evidence inconsistent with any interpretation to which the instrument is reasonably susceptible becomes irrelevant; as a matter of substantive law such evidence cannot serve to create or alter the obligations under the instrument. Irrelevant evidence cannot support a judgment.' " (*BMW, supra,* 162 Cal.App.3d at pp. 990, 209 Cal.Rptr. 50, citations & fn. omitted.) (FN1)

A short and vernacular explanation of the parol evidence rule would be that a party to a written contract cannot be permitted to urge that a contractmeans something which its written terms simply cannot mean. In the *BMW* case the written terms of the parties' contract expressly provided that the dealer was not given the exclusive right to deal in BMW products in any particular geographic area and was not limited in the area in which he could trade. BMW expressly reserved the right to appoint other dealers in BMW products. This contractual language was not reasonably susceptible to a construction which would give the dealer an exclusive trading area or which would permit him to object to the establishment of a new dealership beyond the limits of his relevant market area. BMW's use of the A.O.R. planning system could not operate to modify the express terms of the dealer's contract. Since the dealer's franchise agreement permitted BMW to establish new dealerships and the new dealership was beyond the existing dealer's relevant market area, we concluded that the Board exceeded its jurisdiction in upholding the dealer's protest. (162 Cal.App.3d at p. 994, 209 Cal.Rptr. 50.)

The situation in this case bears many similarities to the *BMW* case. In the past Mazda has used a planning mechanism similar to the A.O.R. system which was used by BMW. Under its dealer agreement Mazda is required to perform periodic reviews of a dealer's past performance and of anticipated sales, service, parts and other matters affecting the past, present and future conduct of the dealer's business and its relationship with Mazda. Until at least 1982 Mazda utilized what it referred to as an APR, for area of primary responsibility, in performing this function. Under the APR scheme postal zip codes were assigned to the APR of a nearby dealer. Here, as in the

BMW case, the dealer maintains that the alteration of its APR by establishment of another dealership would constitute a modification of its franchise which may be protested under section 3060. (FN2)

If only these circumstances were present, the *BMW* decision would appear to be directly controlling. However, Ri-Joyce asserts that its situation is different because in *BMW* the A.O.R. scheme was an "internal planning mechanism" (162 Cal.App.3d at pp. 992-993, 209 Cal.Rptr. 50), while in this case the APR scheme, when it was in use, was set forth in writing as part of Mazda's dealer operating standards, which are considered written instructions and part of the franchise agreement. This distinction lacks legal significance. Mazda's dealer agreement consists of a basic agreement, various additional agreements, and written instructions. The basic agreement provides: "If there is a conflict between them, provisions set forth in the Basic Agreement shall govern over the additional agreements, which shall govern over the written instructions." Throughout the period Mazda used the APR planning system its basic agreement specifically provided that a dealer's appointment was nonexclusive and, in a provision we will discuss more fully in a subsequent portion of this opinion, Mazda reserved the right to establish new dealerships. Moreover, throughout this period the written document by which Mazda informed a dealer of its APR specifically provided: "Dealer acknowledges that the above area is subject to modification by Mazda and that dealer's rights with respect to such area are non-exclusive." Ri-Joyce's claim that its franchise agreement gave it exclusive and unmodifiable rights within an APR is in direct contradiction to the written terms of its agreement and under the parol evidence rule, as applied in the *BMW* case, the Board would have no authority to uphold Ri-Joyce's protest under section 3060 based upon this argument.

We also reject Ri-Joyce's assertion that in 1982 it effected a unilateral amendment of its franchise to secure for itself an exclusive and unmodifiable trading area defined by its former APR. It appears that during the time Mazda used the APR scheme it periodically presented a dealer with a written document setting out the zip codes in the dealer's APR which, as we have noted, provided that the APR was modifiable and nonexclusive. On several occasions principals of Ri-Joyce signed these APR documents. In 1982 the zip codes assigned to Ri-Joyce's APR were reduced and Ri-Joyce did not sign the document. It was returned to Ri-Joyce with the notation "Dealer Refused to Sign." The written Mazda dealer agreement provides that it "constitutes the entire agreement and understanding between DEALER and MAZDA with respect to the subject matter hereof and supersedes all prior or present agreements and understandings, written or oral, between the parties with respect to the subject matter hereof. The MAZDA Dealer Agreement may be amended, modified, supplemented or interpreted only by a written instrument signed by DEALER and the President or any of the Vice Presidents of MAZDA." Ri-Joyce's refusal to sign its APR document in 1982 cannot be held to have secured an exclusive, unmodifiable trading area contrary to the express written terms of its franchise agreement.

Ri-Joyce asserts that in connection with the 1982 franchise renewal it was assured that Mazda was satisfied with its performance and intended to continue the relationship indefinitely. At that time Mazda was aware that Ri-Joyce's lease was expiring and that it would need to relocate. In January 1983, Ri-Joyce relocated its dealership to a nearby site and in doing so was required to buy out its old lease. In 1987 the owners of Ri-

Joyce purchased the land and facilities and expanded the service area at considerable expense. Ri-Joyce asserts that it took these actions in reliance upon representations that Mazda would continue the relationship, which it took to mean that Petaluma would be preserved as part of its territory.

We have noted that the Mazda dealer agreement specifically provides that it may be amended only in writing signed by Mazda's president or one of its vice-presidents. The agreement also provides: "DEALER acknowledges that designated field representatives of MAZDA having responsibility for communications with DEALER on behalf of MAZDA with respect to day-to-day operational matters do not have authority to represent MAZDA or make commitments on behalf of MAZDA concerning matters of interpretation of the MAZDA Dealer Agreement or matters of policy affecting the relationship of DEALER and MAZDA, including without limitation matters involving: ... (iv) the appointment of another Dealer near DEALER's Approved Location; or (v) the termination or renewal of the MAZDA Dealer Agreement. Accordingly, DEALER may not rely on any such field representative of MAZDA with respect to such matters. If DEALER has any questions concerning matters of interpretation of the MAZDA Dealer Agreement or other policy matters, DEALER shall consult with an appropriate officer of MAZDA having executive responsibility for the matter in question, including MAZDA's general manager." Accordingly, Ri-Joyce cannot rely upon vague oral statements of field representatives in asserting rights under its franchise agreement which are directly contrary to its written terms. (FN3)

To the extent Ri-Joyce may be relying upon an estoppel or perhaps a claim of fraud, the argument is addressed to the wrong forum. The Board is a quasi-judicial administrative agency of limited jurisdiction. (*BMW, supra,* 162 Cal.App.3d at p. 994, 209 Cal.Rptr. 50.) It does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee. The Board's jurisdiction under section 3060 encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement. Claims arising from disputes with other legal bases must be directed to a different forum.

Although we have agreed with the Board and Mazda up to this point, we nevertheless perceive a significant difference between the franchise agreement involved here and the one involved in the *BMW* case. This difference renders this case inappropriate for summary disposition by dismissal of Ri-Joyce's protest.

Initially we must clarify an apparent misconception concerning the extent of the holding in the *BMW* case. The Board and Mazda seem to believe that we held in *BMW* that the Board has no jurisdiction to consider a protest based upon the establishment of a new dealership beyond an existing dealer's relevant market area regardless of the terms of the existing dealer's franchise agreement. The *BMW* decision was not so expansive. There the franchisor had expressly reserved the unqualified power to establish new dealerships and we held that nothing in the New Motor Vehicle Board Act precluded a franchisor from reserving such power or entitled a franchisee to object to the exercise of such reserved power beyond his relevant market area. (162 Cal.App.3d at p. 991, 209 Cal.Rptr. 50.) We did not hold that the act precluded a franchisor from granting an exclusive trading area beyond a dealer's relevant market area or that a franchisee would be precluded from protesting the modification of such an agreement by establishment of a new dealer within such an exclusive trading area. (*Ibid.*) That is a

matter which is left to the agreement of the parties. If a franchise agreement does grant a dealer an exclusive, unmodifiable trading area then encroachment upon that area may constitute a modification of the franchise which is subject to protest under section 3060. (FN4)

In the *BMW* case the franchisor had reserved the unqualified power to appoint new dealers whether in the dealer's geographical area or elsewhere. (*BMW, supra,* 162 Cal.App.3d at p. 984, 209 Cal.Rptr. 50.) In contrast, in Mazda's dealer agreement the franchisor reserved a qualified right to appoint new dealers. The agreement provides: "DEALER and MAZDA acknowledge that they may not fulfill their respective expectations for the business contemplated by the MAZDA Dealer Agreement and agree that in such event the parties may take any one or more of the following actions, consistent with applicable law: (i) DEALER or MAZDA may elect to terminate or not renew the MAZDA Dealer Agreement as provided herein; (ii) DEALER may elect to utilize some of its resources to engage in businesses involving the promotion, sale and service of products other than MAZDA Products, including those which may be competitive with MAZDA Products; or (iii) if MAZDA determines it would be in the best interests of customers or MAZDA to do so, MAZDA may elect to appoint another dealer to promote, sell and service MAZDA Products near DEALER's Approved Location. DEALER and MAZDA shall give each other at least sixty days' written notice prior to taking any of the foregoing actions, for the purpose of enabling the parties to discuss whether there exist any mutually agreeable alternatives to the proposed action. To the extent any consent is required from a party, such party will not unreasonably withhold its consent to any of the foregoing actions by the other."

Under this franchise agreement Mazda reserved a qualified right to establish a new dealership "near" Ri-Joyce's approved location. "Near" is not defined in the agreement. Mazda asserts that "near" should be construed consistent with section 3062 so that it corresponds with Ri-Joyce's relevant market area. That is one, but not the only, possible interpretation of the contractual term. The contract is reasonably susceptible of the meaning urged by Ri-Joyce, that is, that "near" includes a neighboring community which has traditionally been served by Ri-Joyce and which produces a significant portion of its business.

Mazda's franchise agreement provides that the appointment of another dealer near Ri-Joyce's location is an action Mazda may take in the event its business expectations are not fulfilled and if Mazda determines that it would be in the best interests of customers or of Mazda to do so. This reservation of the power to establish another dealership is broad but not unlimited. A contract that confers discretionary decision-making authority upon one of the parties may be construed to require an objective standard of reasonableness or may be construed to permit the party to make a decision based upon subjective factors. In either case it will be implied that the party must exercise its judgment in good faith. (*Bleecher v. Conte* (1981) 29 Cal.3d 345, 352-353, 213 Cal.Rptr. 852, 698 P.2d 1154; *Larwin-Southern California, Inc. v. JGB Investment Co.* (1979) 101 Cal.App.3d 626, 638-639, 162 Cal.Rptr. 52; *Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209, 117 Cal.Rptr. 601.) The meaning and scope of Mazda's reservation of the power to appoint another dealer near Ri-Joyce's approved location is a matter which may be illuminated by extrinsic evidence and which Ri-Joyce must be accorded an opportunity to establish.

If Ri-Joyce is correct in its claim that the proposed Petaluma dealership is "near" its approved location within the meaning of the contract, then Mazda would not be precluded from establishing the Petaluma dealership but at a minimum it would be required to exercise good faith in deciding to do so. And, Mazda could take such action only after conferring with Ri-Joyce as to any mutually agreeable alternatives. The unilateral establishment of a nearby dealership without conferring with Ri-Joyce and without any attempt at justification pursuant to the contract would constitute an attempted modification of the contract which would be subject to protest under section 3060.

Like the trial court, we do not mean to suggest a particular result or otherwise limit the discretion of the Board. Where a franchisee asserts that a franchisor is attempting to modify his franchise the first step is to determine what rights were granted under the franchise. Within the meaning of section 3060 a franchise is a written agreement of the parties which is subject to the normal rules relating to the interpretation of contracts. (§ 331; *BMW, supra,* 162 Cal.App.3d at p. 990, 209 Cal.Rptr. 50.) Where a franchise agreement is reasonably susceptible to the meaning urged by a franchisee, the Board must hear and consider such extrinsic evidence as the franchisee can produce in order to determine what rights were granted under the agreement. (See *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1143, 234 Cal.Rptr. 630.) Only then can it be determined whether the franchisor's proposed action constitutes a modification of the franchise. If it does not then the franchisor is entitled to prevail. If it does then the Board must proceed with further consideration of the protest. Since in this case the franchise agreement is reasonably susceptible to the meaning urged by Ri-Joyce, it was entitled to an evidentiary hearing at which it could produce evidence in support of that interpretation. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

SIMS and MARLER, JJ., concur.

APPENDIX

At all times relevant to this case Vehicle Code section 3060 provided: "Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met: [¶] (a) The franchisee and the board have received written notice from the franchisor as follows: [¶] (1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue. [¶] (2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following: [¶] (A) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld. [¶] (B) Misrepresentation by the franchisee in applying for the franchise. [¶] (C) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law. [¶] (D) Any unfair business practice after written warning thereof. [¶] (E) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by

order of the department. [¶] (3) The written notice shall contain, on the first page thereof, a conspicuous statement which reads as follows: 'NOTICE TO DEALER: You may be entitled to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. It is important that you act promptly.' [¶] (b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice or within 10 days after receiving a 15-day notice. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings. [¶] (c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed. [¶] The franchisor shall not modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee notice thereof at least 60 days in advance of the modification or replacement. Within 30 days of receipt of the notice, a franchisee may file a protest with the board and the modification or replacement does not become effective until there is a finding by the board that there is good cause for the modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue." (Stats.1984, ch. 247, § 2, pp. 754-755.)

Vehicle Code section 3061 provides: "In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following: [¶] (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee. [¶] (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise. [¶] (c) Permanency of the investment. [¶] (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted. [¶] (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public. [¶] (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. [¶] (g) Extent of franchisee's failure to comply with the terms of the franchise."

Vehicle Code section 3062 provides: "(a) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall, in writing, first notify the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 20

days of receiving that notice or within 20 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. If, within this time a franchisee files with the board a request for additional time to file a protest, the board or its secretary, upon a showing of good cause, may grant an additional 10 days to file the protest. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue. [¶] For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership. [¶] (b) Subdivision (a) does not apply to either of the following: [¶] (1) The relocation of an existing dealership to any location which is both within the same city as, and is within one mile from, the existing dealership location. [¶] (2) The establishment at any location which is both within the same city as, and is within one-quarter mile from, the location of a dealership of the same line-make that has been out of operation for less than 90 days. [¶] (c) Subdivision (a) does not apply to any display of vehicles at a fair, exposition, or similar exhibit if no actual sales are made at the event and the display does not exceed 30 days. This subdivision shall not be construed to prohibit a new motor vehicle dealer from establishing a branch office for the purpose of selling vehicles at the fair, exposition, or similar exhibit, even though that the event is sponsored by a financial institution, as defined in Section 31041 of the Financial Code or by a financial institution and a licensed dealer. The establishment of these branch offices, however, shall be in accordance with subdivision (a) where applicable. [¶] (d) For the purposes of this section, the reopening of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership."

Vehicle Code section 3063 provides: "In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following: [¶] (a) Permanency of the investment. [¶] (b) Effect on the retail motor vehicle business and the consuming public in the relevant market area. [¶] (c) Whether it is injurious to the public welfare for an additional franchise to be established. [¶] (d) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel. [¶] (e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

FN1. There are two aspects to the parol evidence rule. First, while extrinsic evidence may not be introduced to contradict the written terms of a contract, such evidence may be introduced to explain the meaning of a written contract so long as the meaning urged is one to which the written contract terms are reasonably susceptible. (See *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40,

69 Cal.Rptr. 561, 442 P.2d 641.) Second, where a written contract is not an integration, that is, the final and complete agreement of the parties, then extrinsic evidence may be introduced as to any matter on which the agreement is silent and which is not inconsistent with its written terms. (See *Masterson v. Sine* (1968) 68 Cal.2d 222, 226-228, 65 Cal.Rptr. 545, 436 P.2d 561.)

FN2. It appears that sometime after 1982 Mazda discontinued providing dealers with written notice of their APRs. Since at least 1987 Mazda's dealer agreements make no reference to an APR. Ri-Joyce asserts that its former APR is part of its current franchise agreement because the current agreement incorporates prior written instructions to the dealer. In fact, the current dealer agreement does not incorporate prior written instructions to the specific dealer. Instead, it incorporates current written instructions which are applicable to dealers generally, which would exclude prior instructions specific to a particular dealer. However, we need not consider whether Ri-Joyce's former APR somehow remains a part of its agreement since we find this aspect of its argument meritless in any event.

FN3. We do not imply that this evidence is irrelevant. To the extent the written contract is reasonably susceptible of a meaning urged by Ri-Joyce, evidence of the manner in which the parties acted under the contract is admissible to support that meaning. (*Bohman v. Berg* (1960) 54 Cal.2d 787, 795, 8 Cal.Rptr. 441, 356 P.2d 185; *Automobile Salesmen's Union v. Eastbay Motor Car Dealers, Inc.* (1970) 10 Cal.App.3d 419, 424, 89 Cal.Rptr. 20.) And, if it should be determined that Mazda is attempting to modify Ri-Joyce's franchise, then evidence of Ri-Joyce's investment is an important consideration in determining whether such modification should be allowed. (§§ 3060, 3061.) We hold only that the scenario relied upon by Ri-Joyce cannot be held to have effected an amendment of its written contract and cannot be introduced to support a meaning to which the contract's written terms are not reasonably susceptible.

FN4. Although some dealers seem to believe that the New Motor Vehicle Board Act was enacted to protect them against competition, quite the contrary is true. The act recognizes that a new motor vehicle dealership may require a significant investment and that there is a disparity of bargaining power and thus the act was intended to protect new motor vehicle dealers against unfair or oppressive trade practices. (*BMW, supra,* 162 Cal.App.3d at p. 987, 209 Cal.Rptr. 50.) But the act recognizes that the needs of consumers are important and that competition is in the public interest. (§§ 3061, 3063.) Accordingly, a dealer cannot prevail on a protest simply by asserting a desire to limit competition. Moreover, since the interests of consumers are to be considered (*ibid.*), where a franchisor has granted an exclusive trading area beyond a relevant market area, justification for modifying the franchise will be more easily established the further a new franchise is located from the existing dealer's location.

RAY FLADEBOE LINCOLN-MERCURY, INC., dba Ray Fladeboe British Motor Cars, Plaintiff and Appellant, v. The NEW MOTOR VEHICLE BOARD, Defendant and Respondent, JAGUAR CARS INC., et al., Real Parties in Interest. (1992) 10 Cal.App.4th 51[12 Cal.Rptr.2d 598].
Civ. No. B060651.

Court of Appeal, Second District, Division 3, California.
Sept. 14, 1992.
As Modified Oct. 14, 1992.
Certified for Partial Publication (FN*)
Review Denied Dec. 31, 1992.

Hoecker, McMahon & Wade, Gary W. Hoecker and Thomas K. Buck, Los Angeles, for plaintiff and appellant.

Daniel E. Lungren, Atty. Gen., Linda A. Cabatic, Supervising Deputy Atty. Gen., and Susan P. Underwood, Deputy Atty. Gen., for defendant and respondent.

Irell & Manella, Morgan Chu and Wayne Barsky, Los Angeles, for real parties in interest.

KLEIN, Presiding Justice.

Plaintiff and appellant Ray Fladeboe Lincoln-Mercury Inc., doing business as Ray Fladeboe British Motor Cars, (Fladeboe) appeals the judgment of the trial court denying its consolidated petition for writ of administrative mandate. (Code Civ.Proc., § 1094.5.) By its consolidated petition Fladeboe sought to overturn the decision of defendant and respondent New Motor Vehicle Board (the Board) which (1) allowed real party in interest Jaguar Cars, Inc. (Jaguar) to terminate Fladeboe's Jaguar dealership, and (2) rejected Fladeboe's petition for damages arising out of Jaguar's assertedly wrongful conduct in the allocation of vehicles among its dealers.

We conclude the trial court properly denied Fladeboe's consolidated petition because substantial evidence supports the Board's findings, Fladeboe received a full and fair hearing before the Board, and the Board had jurisdiction to hear Fladeboe's petition claims.

FACTUAL AND PROCEDURAL BACKGROUND-DISCUSSION (FN**)

3. *The Board had jurisdiction to decide Fladeboe's petition claims.*

Fladeboe contends the Board does not have jurisdiction under section 3050, subdivision (c)(2), to arbitrate Fladeboe's claim, asserted by petition filed before the Board that Jaguar wrongfully underallocated vehicles to Fladeboe. (FN5) That section states in part the Board shall "[c]onsider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicles dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative ... submitted by any person.... After such consideration, the board may do any one or any combination of the following: [¶] (1) Direct the department to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board.... [¶] (2) Undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative. [¶] (3) Order the department to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer, ..." (§ 3050.)

Fladeboe asserts section 3050, subdivision (c)(2), addresses only differences of opinion between any "member of the public and any new motor vehicle dealer,

manufacturer, manufacturer branch, distributor branch, or representative." Fladeboe argues "member of the public" refers to individuals served by the new motor vehicle industry. Fladeboe claims the disputes described in section 3050, subdivision (c)(2), do not include differences between new motor vehicle businesses. Fladeboe contends the directive to "consider" matters under subdivision (c) is to be contrasted with subdivisions (b) and (d) of section 3050 which direct the Board to "hear and consider" protests and appeals by franchisees and licensees.

Although the Board possesses only such power as has been conferred upon it by statute (*BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 994, 209 Cal.Rptr. 50), two published cases (*Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 230 Cal.Rptr. 382 (*Yamaha I*), and *Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, 240 Cal.Rptr. 806 (*Yamaha II*)) have ruled the Board has administrative authority over the type of dispute presented here.

In *Yamaha I,* Yamaha refused to sell Riva motor scooters to Van Nuys Cycle, a Yamaha motorcycle franchisee. Van Nuys Cycle protested Yamaha's refusal to the Board and filed a superior court action against Yamaha for damages. The *Yamaha I* court held Van Nuys Cycle had failed to exhaust its administrative remedies with respect to the protest before the Board.

Yamaha I also considered Van Nuys Cycle's claims Yamaha had abandoned promotion of its other products in bad faith in order to promote the Riva and had discriminated against Van Nuys Cycle in the allocation of motorcycles in retaliation for its objections to Yamaha's policies. *Yamaha I* found "[t]hese claims, too, fall within the jurisdiction of the ... Board, which is empowered to 'Consider any matter concerning the activities or practices of any person ... holding a license as a new motor vehicle dealer, manufacturer, ... or representative ... submitted by any person.' (Veh.Code, § 3050, subd. (c).) That section provides that after such consideration, the board may do any one or any combination of several things: it may direct the Department of Motor Vehicles to conduct an investigation and make a written report, it may attempt to arbitrate the dispute, it may direct the Department to exercise its licensing power over a licensee. Van Nuys' failure to exhaust this administrative remedy is fatal to these claims as well." (*Yamaha I,* 185 Cal.App.3d at p. 1243, 230 Cal.Rptr. 382.) (FN6)

In *Yamaha II,* Yamaha's financing company sued the Barbics for breach of a finance agreement. The Barbics cross-complained against Yamaha for, inter alia, breach of contract, fraud, and unlawful restraint of trade. When the trial court overruled Yamaha's demur to the cross-complaint, Yamaha sought a writ of mandate. *Yamaha II* found the matter in dispute fell within the Board's power under section 3050, subdivision (c), which gives "the Board authority to consider 'any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer ... distributor' " submitted by any person. (*Yamaha II,* 195 Cal.App.3d at p. 656, 240 Cal.Rptr. 806.) *Yamaha II* concluded the Barbics cross-complaint was barred for failure to exhaust their administrative remedies before the Board.

In its reply brief, Fladeboe argues *Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2 Cal.App.4th 445, 3 Cal.Rptr.2d 546, undermines the holdings of *Yamaha I* and *II.* In that case Ri-Joyce, a Santa Rosa Mazda dealer, protested the establishment of a new Mazda dealer in Petaluma. The Board dismissed the protest relying on *BMW of North*

America v. New Motor Vehicle Bd., supra, 162 Cal.App.3d 980, 209 Cal.Rptr. 50, a case in which the franchisor reserved the unqualified power to appoint new dealers. Although *Ri-Joyce* agreed disputes concerning the establishment of new dealerships within the trading area of an existing dealer are matters within the Board's jurisdiction, the trial court directed the Board to consider the protest because Mazda had not retained the unqualified power to appoint new dealers.

Ri-Joyce stated, "To the extent Ri-Joyce may be relying upon an estoppel or perhaps a claim of fraud [to establish its entitlement to an exclusive franchise], the argument is addressed to the wrong forum. The Board is a quasi-judicial administrative agency of limited jurisdiction. [Citation.] It does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee. The Board's jurisdiction under section 3060 encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement. Claims arising from disputes with other legal bases must be directed to a different forum." (*Ri-Joyce, Inc., supra,* 2 Cal.App.4th at p. 455, 3 Cal.Rptr.2d 546.)

To the extent *Ri-Joyce* holds the Board lacks authority over disputes involving termination of franchises whenever a claim of impropriety is based upon estoppel or fraud, we disagree.

Ri-Joyce failed to mention or consider *Yamaha I* and *II.* Further, segregation of claims otherwise proper for the Board's consideration, based upon the underlying basis of the claim, would allow franchisees to circumvent the jurisdiction of the Board through artful pleading. The *Ri-Joyce* rule also would require franchisees to pursue simultaneous actions before the Board and in state court and would wreak havoc with the exhaustion of remedies doctrine and defeat the public policy which favors resolution of franchise disputes before the administrative agency.

Accordingly, we conclude, based on the holdings of *Yamaha I* and *Yamaha II,* that the Board has jurisdiction over Fladeboe's petition.

CONCLUSION

Because we agree the dealer rationalization program (the DRP) constituted a reasonable and rational response to the financial crisis faced by Jaguar, and that Jaguar implemented the DRP in a fair and nondiscriminatory fashion, Fladeboe's primary contention fails. The Board's decision and its findings are supported by substantial evidence and thus must be affirmed by this court.

Additionally, we conclude Fladeboe received a full and fair hearing before the Board and the Board had jurisdiction over Fladeboe's petition claims.

DISPOSITION

The judgment is affirmed. Fladeboe to bear costs on appeal.

CROSKEY and HINZ, JJ., concur.

FN* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for partial publication. The Factual and Procedural Background, Contentions and parts 1. & 2. of the Discussion have been omitted.FN** See footnote *, *ante.*

FN5. All further statutory references are to the Vehicle Code.

FN6. At the time of the *Yamaha I* decision, section 3050, subdivision (c)(2), permitted the Board "to arbitrate or resolve" differences of opinion. By amendment effective January 1, 1988, the Legislature amended this section to allow the Board to "mediate, arbitrate, or otherwise resolve" such disputes.

AUTOMOTIVE MANAGEMENT GROUP, INC., Plaintiff and Appellant, v. NEW MOTOR VEHICLE BOARD, Defendant and Respondent. MITSUBISHI MOTOR SALES of AMERICA, INC., Real Party in Interest and Respondent. (1993) 20 Cal.App.4th 1002 [12 Cal.Rptr.2d 598]
No. H009979.
Court of Appeal, Sixth District, California.
Dec. 2, 1993.

Robertson, Alexander, Luther, Esselstein, Shiells & Wright, and Harold C. Wright, Menlo Park, for plaintiff and appellant.

Daniel E. Lungren, Atty. Gen., Floyd D. Shimomura, Sr. Asst. Atty. Gen., Cathy A. Christian, Susan P. Underwood and Geoffrey L. Granbill, Deputy Attys. Gen., for defendant and respondent.

Gibson, Dunn & Crutcher, Elizabeth A. Grimes and Alicia J. Bentley, Los Angeles, for real party in interest.

ELIA, Associate Justice.

Automotive Management Group, Inc. (AMG) protested its termination as a franchised dealer of respondent/real party in interest Mitsubishi Motor Sales of America, Inc. (MMSA). AMG's protest was rejected because it was untimely. AMG petitioned for a writ of mandate. The trial court found that substantial evidence supported the Administrative Law Judge's (ALJ) determination that AMG's protest was untimely. It therefore denied AMG's mandate petition. We reverse and remand the matter for a hearing before respondent the New Motor Vehicle Board (Board).

Facts and Procedural Background

In 1988, AMG became a franchised Mitsubishi dealer. AMG operated in Santa Cruz, California under the name Santa Cruz Mitsubishi. AMG's relationship with MMSA was troubled. This was because AMG failed to maintain sufficient lines of credit (called "flooring") to buy vehicles from MMSA as required by its franchise agreement.

In a January 9, 1990 letter, MMSA notified AMG of MMSA's intention to terminate the franchise because of AMG's failure to maintain adequate "flooring." After AMG obtained an improved (but still insufficient) flooring commitment, MMSA rescinded the termination notice and, on April 16, 1990, the parties executed a six-month conditional Interim Sales and Service Agreement ("Interim Agreement"). This agreement gave AMG six more months in which to fully comply with MMSA's flooring requirements.

By October 1990, AMG's flooring still did not comply with the requirements of the Interim Agreement (which was a condition precedent to preserving the franchise relationship). Because of the continued flooring problems and because the Interim Agreement was due to expire on October 16, 1990, MMSA decided to discontinue AMG's franchise. Accordingly, by letter dated October 18, 1990, MMSA sent AMG a second notice of termination, by registered mail, effective January 21, 1991. AMG and the Board received the termination notice on October 22, 1990.

California Vehicle Code section 3060, subdivision (a) specifies the required form and content of a termination notice and the procedure by which notice must be given. Section 3060, subdivision (b) authorizes the franchisee to protest a termination notice. It provides, in pertinent part, that "The franchisee may file a protest with the board within

30 days after receiving a 60-day notice or within 10 days after receiving a 15-day notice. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings."

In late September 1990, AMG had begun negotiations with North Bay Ford Lincoln-Mercury for North Bay to purchase the assets of the Mitsubishi dealership from AMG. After AMG received the notice of termination, it focused its efforts on the negotiations with North Bay for the buy/sell of the franchise, rather than focusing on resolving its flooring problem.

In the months following receipt of the termination notice, AMG's principal, Bruce Canepa, was in regular contact with MMSA's agents and was aware that MMSA viewed the notice of termination as effective. At no time did Mr. Canepa, or anyone acting on behalf of AMG, indicate to MMSA that they believed the notice of termination was invalid. MMSA's representatives never told Canepa that the notice of termination was a "mere formality" or that AMG could disregard it.

During the negotiation of the buy/sell, MMSA never mentioned the pending notice of termination to the potential buyer, North Bay, or to AMG's own employees, at the express request of AMG. In early 1991, Vince Joy of MMSA warned Canepa that if he did not close the buy/sell soon, he would not have anything left to sell.

On January 18, 1991, MMSA wrote AMG a letter giving AMG a ten-day extension of time in which to submit the buy/sell proposal to MMSA for approval, so long as MMSA received all the necessary documentation by January 31, 1991.

On February 5, 1991, MMSA received a letter from AMG dated January 29, 1991, stating that North Bay had backed out of the buy/sell agreement.

MMSA terminated AMG's franchise on January 31, 1991. Five days later, MMSA disconnected AMG from its computerized dealer network.

On March 6, 1991, the Board received AMG's protest of the termination. Although the Board acknowledged receipt of the protest, it declined to file it because it was untimely. AMG admits its protest was untimely but claims MMSA's conduct caused the delay in submitting the protest. For this reason, AMG claims the filing deadline was tolled.

MMSA moved to dismiss AMG's protest on the grounds that the Board did not have jurisdiction to consider the protest because it was not received by the Board within the 30-day statutory time limit set forth in Vehicle Code section 3060, subdivision (b). In its opposition, AMG claimed MMSA should be estopped from relying upon the requirements of Vehicle Code section 3060. According to MMSA, equitable tolling did not apply because the 30-day filing requirement within section 3060 was jurisdictional, and not a statute of limitations.

In an April 11, 1991 interlocutory ruling, the Board determined that it could consider the equitable defenses raised by AMG. Accordingly, an evidentiary hearing was held before Michael J. Sieving, an ALJ and Assistant Executive Secretary of the Board. The hearing was held to determine whether the facts and circumstances surrounding MMSA's notice of termination warranted application of the equitable defenses alleged by AMG. During the two-day hearing, four witnesses testified, including the principal of AMG and its vice-president of finance, and two representatives of MMSA. At the hearing, 22 exhibits were introduced.

After the hearing, the ALJ issued an order rejecting the protest on the grounds that it was untimely and that there was insufficient evidence to establish estoppel. In support of this order, the ALJ determined that (1) the October 18, 1990 notice of termination was valid and complied with all statutory requirements of Vehicle Code section 3060; (2) AMG's purported protest was not received by the Board within the 30-day time limit set forth in Vehicle Code section 3060; and (3) there was insufficient evidence to support a finding that MMSA made representations upon which AMG could have reasonably relied, causing AMG to delay in filing a timely protest.

AMG petitioned for a writ of administrative mandamus on September 19, 1991. Answers to the petition were filed by the Board and by MMSA. AMG petitioned for a peremptory writ of mandate on December 12, 1991. MMSA and the Board opposed this motion.

A hearing was held on March 19, 1992. At the hearing, the trial court denied AMG's writ petition and affirmed the decision of the ALJ, finding, among other things, that the ALJ's decision was supported by substantial evidence. On April 27, 1992, a judgment was entered denying the petition.

This appeal ensued.

Standard of Review

The trial court reviews the decision of the Board to determine if it is supported by substantial evidence. (*Piano v. State of California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 163 Cal.Rptr. 41.) In so doing, the trial court essentially performs an appellate function. (*American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 474, 230 Cal.Rptr. 769.)

AMG argues that the trial court should have reviewed the ALJ's decision under an independent judgment standard. The independent judgment standard of review is applied only where the administrative decision substantially affects a fundamental, vested right. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, 93 Cal.Rptr. 234, 481 P.2d 242.)

No case has held that an automobile franchise is a fundamental vested right. Instead, "[i]t has been repeatedly held that the preservation of purely economic interests does not affect the fundamental vested rights of the petitioner." (*British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.* (1987) 194 Cal.App.3d 81, 90, 239 Cal.Rptr. 280.)

Indeed, a plethora of cases indicate that the substantial evidence test applies in circumstances such as these. In *Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Bd.* (1992) 10 Cal.App.4th 51, 12 Cal.Rptr.2d 598, the appellate court affirmed the trial court's decision to deny a franchisee's writ petition. In so doing, the court held that "the trial court properly denied [franchisee's] consolidated petition because *substantial evidence* supports the Board's findings...." (*Id.* at p. 53, 12 Cal.Rptr.2d 598.)

Similarly, in *Piano v. State of California ex. rel. New Motor Vehicle Bd., supra,* 103 Cal.App.3d 412, 163 Cal.Rptr. 41, the Board overruled a dealer's protest against the establishment of a new dealership. The trial court determined that the Board's decision was supported by substantial evidence. On appeal, the court stated that "upon review we uphold the ruling of the trial judge that there was substantial evidence to support the findings of the Board and that the Board's decision was supported by the findings." (*Id.* at p. 422, 163 Cal.Rptr. 41.)

Other cases applying the substantial evidence test include *Sonoma Subaru, Inc. v. New Motor Vehicle Bd.* (1987) 189 Cal.App.3d 13, 22, fn. 2, 234 Cal.Rptr. 226 and *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 474, 230 Cal.Rptr. 769. In *British Motor Car, supra,* 194 Cal.App.3d 81, 239 Cal.Rptr. 280, the trial court applied the independent judgment test but the appellate court reversed and held that the substantial evidence test applied.

In *Champion Motorcycles, Inc. v. New Motor Vehicle Bd.* (1988) 200 Cal.App.3d 819, 246 Cal.Rptr. 325, the Board overruled a franchisee's protest filed against its franchisor. After the trial court denied the franchisee's petition, the franchisee appealed. The appellate court held that the trial court properly applied the substantial evidence test because a fundamental vested right was not affected. (*Id.* at pp. 824-825, 246 Cal.Rptr. 325.)

Although AMG argues that these cases are distinguishable, it has not cited one case in which the independent judgment test was applied in circumstances such as these. Indeed, as noted above, the authority is to the contrary. For these reasons, we conclude that the trial court was correct in applying the substantial evidence test.

Discussion

A. *Motion To Dismiss*

AMG argues that the motion to dismiss procedure utilized by the Board was improper. AMG states that "The Board must file the Protest, then send the notice set forth in Vehicle Code § 3060(a)(3)(b). The Board received the AMG Protest which alleged, *inter alia,* the basis for late filing, sent the notice otherwise required by the code, but never filed the Protest, nor conducted a hearing as required by § 3066." As we shall explain, we conclude this contention is without merit.

In 1973, the New Motor Vehicle Board, formerly the New Car Dealers Policy and Appeals Board, was established in its present form. Besides renaming the Board, the Legislature also empowered the Board to resolve disputes between new car dealers and manufacturers under Vehicle Code section 3060. Section 3060 provides that no new car franchisor shall "terminate or refuse to continue any existing franchise" without reasons constituting "good cause." In general, the reasons must be communicated in writing to the franchisee and the Board at least 60 days prior to the termination or refusal to continue. (Veh.Code, § 3060; *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd., supra,* 194 Cal.App.3d 81, 87, 239 Cal.Rptr. 280.)

Section 3060 permits a franchisee to protest a notice of termination or refusal to continue. It provides, in part, that "The franchisee may file a protest with the board within 30 days after receiving a 60-day notice or within 10 days after receiving a 15-day notice. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings."

Vehicle Code section 3066 provides, in pertinent part, "(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of the order, and place of hearing, ... The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Sections

11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 of the Government Code apply to these proceedings."

In this case, MMSA filed a "motion to dismiss" AMG's protest on the grounds that the protest was untimely. In opposition to the motion, AMG claimed that MMSA should be estopped from relying upon the time requirements of section 3060. In April 1991, the Board determined that it could consider the equitable defenses raised by AMG. Thus, an evidentiary hearing was held before an ALJ. During this hearing, four witnesses testified, and 22 exhibits were introduced.

AMG contends this procedure was flawed. It contends that there is no provision in the Administrative Procedure Act for a motion to dismiss. AMG also argues that it was improper for the ALJ to preside over the hearing. We conclude that no error occurred.

"A proceeding before an administrative officer or board is adequate if the basic requirements of *notice* and *opportunity for hearing* are met." (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 518, p. 715, emphasis in original.) "The sufficiency of the notice and hearing is determined by considering the purpose of the procedure, its effect on the rights asserted, and other circumstances." (*Ibid.; Anderson Nat. Bank v. Luckett* (1944) 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692.) Although AMG argues that the Board should have accepted the petition for filing, and then adjudicated the merits of the timeliness issue, we believe that permitting the ALJ to hear the issue as a "motion to dismiss" was fair. A hearing was held. AMG was permitted to introduce evidence. Four witnesses testified. Twenty-two exhibits were introduced. Thus, it seems quite clear that AMG was afforded an opportunity to be heard consistent with the requirements of due process.

In addition, a motion to dismiss was utilized in *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd., supra,* 194 Cal.App.3d 81, 239 Cal.Rptr. 280. In that case, Maserati terminated the British Motors franchise. Over one year later, British Motors protested the termination. Maserati then filed a motion to dismiss the protest on the grounds that it was untimely. The motion was denied by the board. (*Id.* at p. 93, 239 Cal.Rptr. 280.) Although *British Motor Car Distributors, Ltd., supra,* did not analyze the propriety of the motion to dismiss procedure, it is noteworthy that the procedure *was* employed in that case, and that its propriety was never questioned by the appellate court or the parties.

Further, it was permissible for the ALJ to hear the issue. Although the statutory provisions do not address the procedure to be employed in determining whether a protest is timely, the statutory scheme as a whole indicates that either an ALJ or the Board may preside over a hearing falling within the New Motor Vehicle Board's jurisdiction. For example, Vehicle Code section 3066 states that "The board, *or a hearing officer designated by the board,* shall hear and consider the oral and documented evidence introduced by the parties...." (Emphasis added.) Further, under Government Code section 11517, which is applicable to Board proceedings (Veh.Code, § 3066), an ALJ may hear a contested case. If an ALJ hears a case, then the ALJ "shall prepare within 30 days after the case is submitted a proposed decision in such form that it may be adopted as the decision in the case. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision." (Gov.Code, § 11517, subd. (b).) Similarly, Vehicle Code section 3067, regarding the decision of the Board, refers to situations where "the

case is heard before a hearing officer alone...." Accordingly, it is evident that having an ALJ preside over the hearing is contemplated under the statutory provisions. Thus, we cannot fathom any reason why the ALJ should have been precluded from presiding over the hearing regarding the timeliness of AMG's protest.

In this case, it is not crucial whether the petition was "accepted" for filing or whether MMSA's motion is termed a "motion to dismiss." What is important is that AMG's estoppel defense was ultimately the subject of an evidentiary hearing. An ALJ was authorized to consider the issue, an evidentiary hearing was held, and AMG had an opportunity to present its position. Four witnesses testified. Twenty-two exhibits were introduced. Since these due process requirements were met, we conclude that AMG has not been prejudiced by having the ALJ preside over the motion to dismiss hearing.

B. *Review By The Board*

AMG next contends that even if the motion to dismiss procedure were permissible, the Board should have reviewed the ALJ's decision. We agree.

The statutory provisions do not address the procedure to be utilized in determining whether a protest is timely. Thus, the statutes do not delineate whether an ALJ may determine the issue alone, or whether the ALJ's determination must be reviewed by the Board. However, the statutory scheme does indicate that the Board should render the ultimate decision with respect to hearings under section 3066. We believe the same amount of review is warranted in determining whether a protest is timely. In reaching this conclusion, we shall first explain why the Board must render the ultimate decision under section 3066. Next, we shall consider why the Board should also render the final decision in determining whether a protest is timely.

Although Vehicle Code section 3066 indicates that a hearing officer may consider the evidence, the statute also suggests that the Board must make the final decision. Section 3066 states that "The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and *the board shall make its decision solely on the record so made.*" (Emphasis added.) Because there is no reference to the hearing officer in the portion of the statute referring to "decision," section 3066 appears to require that the Board make the final decision regarding protests.

Section 3050 also indicates that the Board should make the ultimate decision with regard to protests under section 3060. Section 3050 delineates the duties of the Board. It provides, in pertinent part, that the Board shall "(d) Hear and consider, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065." Since the statute uses the word "shall," section 3050 suggests that the Board must consider and render a decision regarding a protest filed pursuant to section 3060.

Vehicle Code section 3067 provides that "The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented.... If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved." Section 3067 indicates that the findings of an ALJ may be adopted by the Board (see also Gov.Code, § 11517).

Having concluded that the Board must render the ultimate decision under Vehicle Code section 3066, we next consider whether the Board should also render the final decision in deciding whether a protest is timely. We believe the same amount of review is warranted. First, harm might result if an ALJ makes an incorrect decision regarding the timeliness of a protest under Vehicle Code section 3060. Second, it is a relatively simple matter for the Board to review the ALJ's determination. Indeed, as already noted, it may be that the Board need only adopt the findings of the ALJ. (Veh.Code, § 3067; see also Gov.Code, § 11517.) Third, it makes more sense to give the Board an opportunity to review any errors by the ALJ, than it does to require an aggrieved party to seek relief through the courts. Indeed, this is the essence of the doctrine of exhaustion of administrative remedies. Finally, MMSA has not provided us with any policy reasons why the Board should not be permitted to review an ALJ's decision regarding the timeliness of a protest. Nor has MMSA cited any authority which conflicts with our conclusion. Accordingly, we hold that the Board should be required to render the ultimate decision in deciding whether a protest under section 3060 is timely.

As previously noted, Vehicle Code section 3067 indicates that the findings of an ALJ may be adopted by the Board. (See also Gov.Code, § 11517.) Thus, it might appear irrelevant that the Board failed to consider the issue in this case since the Board was empowered to adopt the ALJ's findings. However, in this case, the Board was never given an opportunity to act. The ALJ did not submit a proposed decision to the Board. The Board never exercised any discretion with regard to MMSA's motion to dismiss because the motion to dismiss was determined solely by the ALJ. In particular, in the ALJ's statement of decision, he concluded that "There shall be no further proceedings in this cause before the Board." For this reason, we believe that the Board should be given an opportunity to review the ALJ's decision.

C. *Exhaustion of Administrative Remedies*

MMSA argues that AMG never requested that the Board hear the matter. Thus, MMSA contends that AMG failed to exhaust its administrative remedies. We disagree.

Under the doctrine of exhaustion of administrative remedies, "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292, 109 P.2d 942; *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240, 230 Cal.Rptr. 382.) The purpose of the doctrine is to lighten the load upon the courts in cases where administrative remedies are available and designed to provide the requested relief. (*Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982, 88 Cal.Rptr. 533; *Yamaha Motor Corp. v. Superior Court, supra,* 185 Cal.App.3d at p. 1240, 230 Cal.Rptr. 382.)

There are exceptions to the exhaustion of administrative remedies doctrine. The doctrine is inapplicable where "the administrative remedy is inadequate [citation]; where it is unavailable [citation]; or where it would be futile to pursue such remedy [citation]." (*Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 980, 201 Cal.Rptr. 379.)

We believe this case comes within the futility exception. In his statement of decision, the ALJ concluded, "Accordingly, the protest is not accepted for filing with the New Motor Vehicle Board. *There shall be no further proceedings in this cause before the Board.*" (Emphasis added.) Thus, not only did the Board not have an opportunity to review the matter, the ALJ expressly stated that the Board should *not* consider the

protest. Given this statement, it appears that it would have been futile for AMG to have pursued the matter before the Board. Thus, we conclude that AMG has exhausted its administrative remedies.

Finally, MMSA argues that any error was harmless because the same result would have been reached had the error not been committed. (Code Civ.Proc., § 475; Cal. Const., Art. VI, § 13.) We disagree. The issue is not whether there is substantial evidence to support the ALJ's determination. The issue is whether AMG was afforded the procedure due it. And although having the ALJ consider the timeliness of the protest was permissible, it was not permissible for the ALJ to fail to submit the proposed decision to the Board. Because there is no way to determine what result would have occurred had the Board had the opportunity to review the ALJ's decision, the matter must be remanded so that the Board may consider the issue. It is not possible to label as "harmless" the Board's failure to review the ALJ's decision.

Conclusion

The ALJ's decision regarding the timeliness of the protest should have been submitted to the Board for review. Accordingly, the matter is remanded so that the Board may have an opportunity to consider this issue. Costs on appeal to AMG.

PREMO, Acting P.J., and WUNDERLICH, J., concur.

MATHEW ZAHERI CORPORATION et al., Plaintiffs and Appellants, v. MITSUBISHI MOTOR SALES OF AMERICA, INC., Defendant and Respondent. (1993) 17 Cal.App.4th 288 [21 Cal.Rptr.2d 325].

No. A056105.

Court of Appeal, First District, Division 3, California.

July 22, 1993.

Robert L. Bianco, Lawrence A. Mercer, Bianco, Brandi & Murphy, Bianco & Murphy, San Francisco, for plaintiffs and appellants.

Sam W. Jennings, Michael M. Sieving, Howard Weinberg, Sacramento, for amicus curiae on Behalf of New Motor Vehicle Bd. of the State of Cal.

Gibson, Dunn & Crutcher, Elizabeth A. Grimes, Karen N. Frederiksen, Los Angeles, for defendant and respondent.

WHITE, Presiding Justice.

In this action we consider whether the complaint filed by plaintiffs Mathew Zaheri Corporation, doing business as Hayward Mitsubishi and Mathew Zaheri was properly dismissed for failure to exhaust their administrative remedy. We conclude it was and affirm the judgment in favor of defendant Mitsubishi Motor Sales of America, Inc.

PROCEDURAL HISTORY (FN1)

On July 12, 1991, plaintiffs filed a complaint for damages. The complaint avers that Mathew Zaheri Corporation, doing business as Hayward Mitsubishi, is an authorized franchisee of defendant. Beginning on or about July 1, 1988, Hayward Mitsubishi performed warranty service and repair of Mitsubishi automobiles pursuant to a written agreement with defendant.

In July 1990, defendant conducted an audit of certain of plaintiffs' warranty service and repair records. As a result of the audit, defendant charged back $137,444.79 of the previously paid warranty claims. Thereafter, defendant caused to be disseminated statements that defendant was "pulling the franchise" because it had found evidence of "massive warranty fraud" which "hit a new record."

Based on these allegations the complaint sets forth six causes of action, two based upon contract and four sounding in tort. The contract causes of action allege assumpsit debitatus and breach of contract; the tort causes of action allege slander, trade libel, and negligent and intentional infliction of emotional distress. Each tort claim is based on statements made by defendant concerning the warranty audit.

Defendant demurred to each cause of action because plaintiffs had failed to exhaust their administrative remedy. Defendant asserted the claims were based upon plaintiffs' dissatisfaction with defendant's chargeback of warranty claims and, accordingly, were within the jurisdiction of the New Motor Vehicle Board (Board). The trial court agreed, sustained defendant's demurrer and dismissed the action.

Plaintiffs timely filed a notice of appeal on December 27, 1991. Thereafter, on or about January 31, 1992, plaintiffs filed a dealer petition and dealer protest with the Board claiming violations under Vehicle Code sections 3050 and 3065. (FN2) Plaintiffs' petition set forth the factual allegations underlying their superior court cause of action for slander and requested the Board to issue an order compelling defendant to cease and desist making defamatory statements.

DISCUSSION

Right to Appeal

As a preliminary matter defendant asserts this appeal must be dismissed because plaintiffs invoked the Board's jurisdiction after filing this appeal. Defendant relies on *Sea World Corp. v. Superior Court* (1973) 34 Cal.App.3d 494, 110 Cal.Rptr. 232 (*Sea World*) and its progeny for this assertion.

In *Sea World,* an employee of Sea World who had been physically injured filed an application for benefits with the Workmen's Compensation Appeals Board (WCAB) in which she claimed the injury arose out of the course of her employment. She also filed a complaint in superior court in which she alleged Sea World was negligent and she was not working within the scope of her employment when her injury occurred. WCAB obtained jurisdiction of Sea World four days before the superior court obtained jurisdiction. Sea World petitioned for a writ of prohibition to prevent the superior court from proceeding with the trial, claiming that WCAB had a priority of right to determine the threshold issue of subject matter jurisdiction because it was first to obtain jurisdiction over the parties.

The *Sea World* court initially recognized the general rule that where two tribunals have concurrent jurisdiction to determine jurisdiction, the question of which shall have exclusive jurisdiction shall be determined by the tribunal whose jurisdiction was first invoked. (*Sea World, supra,* 34 Cal.App.3d at p. 497, 110 Cal.Rptr. 232.) However, the court then drew a distinction between "subject matter jurisdiction," which may not be waived, and "precedential jurisdiction," which may be waived. (*Id.,* at p. 501, 110 Cal.Rptr. 232.) Observing that Sea World had moved the superior court for summary judgment, the court concluded that Sea World had invoked the jurisdiction of the superior court to make the determination of facts on which subject matter jurisdiction

would rest. Since Sea World could have challenged the court's jurisdiction by asserting the prior jurisdiction of the WCAB, Sea World had waived, or was estopped to urge, objection to the jurisdiction which it had invited the court to exercise. (*Id.,* at p. 503, 110 Cal.Rptr. 232.)

The procedural history of this case is significantly different from that in *Sea World.* Plaintiff originally filed this action in superior court and the court made its jurisdictional determination. It was not until that decision was rendered and plaintiffs noticed an appeal from the judgment that they invoked the jurisdiction of the Board.

There is no question this court has jurisdiction to hear the appeal by virtue of Code of Civil Procedure section 904.1. Although the Board may have had concurrent jurisdiction with the superior court to initially determine the question of jurisdiction, it lacks jurisdiction to review the propriety of the superior court determination. Unlike precedential jurisdiction, appellate courts have exclusive subject matter jurisdiction to review superior court judgments. As stated in *Sea World,* subject matter jurisdiction may not be waived.

Exhaustion of Administrative Remedy

Plaintiffs contend defendant's demurrer should have been overruled, since the Board lacks jurisdiction over plaintiffs' claims. They assert the Board has only as much jurisdiction as expressly authorized by statute.

It is settled that "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292, 109 P.2d 942; see also *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240, 230 Cal.Rptr. 382 (*Yamaha I*).) Even if the administrative remedy cannot resolve all issues or provide the type of relief the plaintiff desires, the exhaustion doctrine is still favored since it facilitates the development of a complete record, includes administrative expertise and promotes judicial efficiency. (*Ibid.; Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 980, 201 Cal.Rptr. 379.) On the other hand, where the Legislature has not granted an administrative agency a "pervasive and self-contained system of administrative procedure" and the agency possesses no greater expertise to consider the controversy than a judicial forum, exhaustion of the administrative remedy is not required. (See *Rojo v. Kliger* (1990) 52 Cal.3d 65, 87-88, 276 Cal.Rptr. 130, 801 P.2d 373.)

In *Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, 240 Cal.Rptr. 806 (*Yamaha II*), the Court of Appeal found the Legislature had created a broad statutory scheme to regulate the franchise relationship between vehicle manufacturers and dealers. (*Id.,* at p. 656, 240 Cal.Rptr. 806.) This view was partially based upon section 3050, subdivision (c) which gives the Board authority to consider "any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer ... [or] distributor ... pursuant to Chapter 4 (commencing with section 11700) of Division 5 submitted by any person...." Relying on *Yamaha I,* the court again found a plaintiff's administrative remedy must be exhausted before seeking judicial relief, whether or not the administrative remedy can afford complete relief. (*Yamaha II, supra,* 195 Cal.App.3d at p. 657, 240 Cal.Rptr. 806.)

Plaintiffs' cited authority does not hold otherwise. In *BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 209 Cal.Rptr. 50, a dealer objected to the franchisor's establishment of a competitor 15 miles from the dealership. The

Board found in favor of the dealer, holding that the franchisor's action was a modification of the franchise agreement. The Court of Appeal reversed the decision of the Board, finding that the franchise agreement was nonexclusive and section 3062 limited the relevant market area to 10 miles. (*BMW, supra,* at pp. 989, 991, 209 Cal.Rptr. 50.) In reversing the Board's decision, the court stated that "an administrative agency has only such power as has been conferred upon it by the constitution or by statute and an act in excess of the power conferred upon the agency is void." (*Id.,* at p. 994, 209 Cal.Rptr. 50.) However, the *BMW* court merely found the Board had exceeded its jurisdiction in admitting parol evidence to modify the express terms of the agreement; the opinion is silent on the exhaustion doctrine.

In *Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2 Cal.App.4th 445, 3 Cal.Rptr.2d 546, a dealer protested the establishment of a new dealership more than 10 miles from its premises. The Board found the above-mentioned *BMW* case controlling and dismissed the protest. The Court of Appeal disagreed, finding the franchise agreement ambiguous. (*Ri-Joyce, supra,* at p. 457, 3 Cal.Rptr.2d 546.) However, in rendering its decision, the court stated: "To the extent Ri-Joyce may be relying upon an estoppel or perhaps a claim of fraud, the argument is addressed to the wrong forum. The Board is a quasi-judicial administrative agency of limited jurisdiction. [Citation.] It does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee. The Board's jurisdiction under section 3060 encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement. Claims arising from disputes with other legal bases must be directed to a different forum." (*Id.,* at p. 455, 3 Cal.Rptr.2d 546.) The quotation is pure dictum. Moreover, *Ri-Joyce,* like the *BMW* case, never addresses the exhaustion issue.

In *Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Bd.* (1992) 10 Cal.App.4th 51, 12 Cal.Rptr.2d 598, the Board allowed a franchisor to terminate a dealership and rejected the dealer's petition seeking damages for the franchisor's asserted wrongful conduct. The dealer petitioned for writ of administrative mandamus, contending the Board did not have jurisdiction under section 3050, subdivision (c) to arbitrate the dispute. The Court of Appeal disagreed. Recognizing an apparent conflict between the *Ri-Joyce* and *Yamaha II* decisions on the question of the Board's jurisdiction, the court noted the *Ri-Joyce* statement quoted above would require franchisees to pursue simultaneous actions before the Board and in state court, would wreak havoc with the exhaustion of remedies doctrine, and would defeat the public policy which favors resolution of franchise disputes before the administrative agency. (*Ray Fladeboe, supra,* 10 Cal.App.4th at p. 56, 12 Cal.Rptr.2d 598.)

"Whether the exhaustion doctrine is to be applied in a particular instance because of its extreme utility to the court and the agency itself to initially engage administrative expertise, or is to be held inapplicable because of the alleged inadequacy of the administrative remedy, has been determined by a qualitative analysis on a case-by-case basis with concentration on whether a paramount need for agency expertise outweighs other factors." (*Karlin v. Zalta, supra,* 154 Cal.App.3d at p. 981, 201 Cal.Rptr. 379; see also *Rojo v. Kliger, supra,* 52 Cal.3d at p. 87, 276 Cal.Rptr. 130, 801 P.2d 373.) In the instant action, the genesis of the dispute between the parties concerns warranty service charges. Section 3050, subdivision (c) grants the Board authority to consider any matter concerning the activities or practices of persons holding licenses as

a new motor vehicle dealer and/or manufacturer. Section 3065 governs warranty reimbursement practices. Thus, it appears an administrative hearing by the Board would facilitate a complete record, include the Board's expertise and promote judicial efficiency. If the Board resolves those factual prerequisites within its area of expertise in plaintiffs' favor, but is unable to afford full common law relief, plaintiffs have exhausted their administrative remedy and may proceed to file a tort claim in court. If, on the other hand, the Board finds against plaintiffs, the Board's decision must be overturned by a grant of a writ of mandate prior to plaintiffs filing a tort action. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484, 131 Cal.Rptr. 90, 551 P.2d 410.)

DISPOSITION

The judgment is affirmed.

MERRILL and WERDEGAR, JJ., concur.

FN1. Pursuant to Evidence Code section 452, subdivision (d) and 459, this court has taken judicial notice of nine documents filed with or issued by the New Motor Vehicle Board. This procedural history makes reference to these documents.

FN2. All statutory references are to the Vehicle Code unless otherwise indicated.

Ruth MILLER et al., Petitioners, v. The SUPERIOR COURT of Orange County, Respondent; AMERICAN HONDA MOTOR CO., INC. et al., Real Parties in Interest.

(1996) 50 Cal.App.4th 1665 58 [Cal.Rptr.2d 584].
No. G019178.
Court of Appeal, Fourth District, Division 3, California.
Nov. 25, 1996.
Review Denied Feb. 19, 1997.

Lawrence Silver, Mark E. Field, Long Beach, Rutan & Tucker, Milford W. Dahl Jr. and Matthew K. Ross, Costa Mesa, for Petitioners.

Wittman, Mitchell & Skola, Arthur H. Skola and Suzanne R. Varco, San Diego, for amicus curiae on behalf of Petitioners.

No appearance for Respondent.

O'Neill, Lysaght & Sun, Brian A. Sun, Robert L. Meylan, Horvitz & Levy, David M. Axelrad and John A. Taylor, Jr., Encino, for Real Parties in Interest.

OPINION

SILLS, Presiding Justice.

I. INTRODUCTION

Sometime after petitioners Ruth and Roger Miller bought a Honda dealership in Huntington Beach they were sued for not making payments to the sellers. The Millers then filed a cross-complaint against Honda (FN1) for fraud and unfair business practices. In essence, the Millers alleged that they could not make any money because they refused to bribe Honda executives to obtain their fair share of popular Honda models. On demurrer, the trial court stayed the cross-complaint indefinitely, pending review by an administrative agency known as the California New Motor Vehicle Board. (FN2) The Millers then brought this writ proceeding.

To this date, a solid phalanx of Court of Appeal decisions have held that *all* disputes between new car dealers and manufacturers must be litigated first with the New Motor Vehicle Board, not in state court. (FN3) (See *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 230 Cal.Rptr. 382 (*Yamaha I*); *Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, 240 Cal.Rptr. 806 (*Yamaha II*); *Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Bd.* (1992) 10 Cal.App.4th 51, 12 Cal.Rptr.2d 598; *Mathew Zaheri Corp. v. Mitsubishi Motor Sales* (1993) 17 Cal.App.4th 288, 21 Cal.Rptr.2d 325.) One decision, in dicta, has indicated to the contrary. (*Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2 Cal.App.4th 445, 455, 3 Cal.Rptr.2d 546.)

Given the authority already extant, this would ordinarily be an easy case. The trial court followed *Yamaha I, Yamaha II, Ray Fladeboe* and *Mathew Zaheri* (as it was bound to do under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937) and, under those decisions, reached a correct result. Here, however, the petitioners raise an issue not considered in any of the published decisions so far--their right to a jury trial. Intuitively at least, it would seem that if one has a *right* to a trial by jury, a requirement that one take a detour via an administrative agency which could, at best, only render an advisory decision on the dealer's common law claims, is both a waste of time and, indeed, a "tax" on the right to a jury trial. (FN4)

Well, not exactly. As explained by our Supreme Court, such detours may be justified under the doctrine of "primary jurisdiction" when there is a "paramount need for specialized agency review." (See *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 401, 6 Cal.Rptr.2d 487, 826 P.2d 730.) Under that doctrine, a trial court may avail itself of the specialized expertise of an administrative agency before hearing a matter--the agency in effect becomes a kind of special master for the trial court. Here, it appears that there *may* indeed be such a paramount need. However, because the trial court considered itself bound by the Court of Appeal decisions which stand for a per se rule that new car dealers must *always* seek agency review before presenting any court claims, the trial court did not exercise its discretion as to whether *it* desired the benefits of specialized agency review afforded by the primary jurisdiction doctrine. We therefore grant the requested writ to provide the trial court that opportunity.

II. DISCUSSION

A. *Prior Case Law on the Board's Authority*

A brief review of the Court of Appeal decisions is necessary to establish the context of the instant proceeding, and show why the trial court stayed all proceedings on the cross-complaint.

In *Yamaha I,* a motorcycle dealership sued a manufacturer for breach of a franchise agreement, breach of the implied covenant of good faith and fair dealing, and intentional interference with prospective business advantage because the manufacturer refused to sell a certain new product to the dealer, while at the same time selling to competing dealers in the area. The manufacturer's demurrer was overruled, but the appellate court directed that it be sustained. The Court of Appeal styled the breach of contract action as, essentially, a challenge to a modification of the franchise agreement, and therefore squarely within the Board's power to hear such protests. (See *id.* at p. 1241, 230 Cal.Rptr. 382, citing Veh.Code, § 3060.) Because there was a need for a factual determination regarding whether there was good cause for any such franchise

modification, and the Board was "the administrative forum authorized to make such determinations," the court concluded that the dealer's failure to exhaust its remedy with the Board precluded judicial relief. (*Yamaha I, supra,* 185 Cal.App.3d at p. 1242, 230 Cal.Rptr. 382.)

In one paragraph at the end of the opinion, the court confronted the dealer's claims that Yamaha had abandoned advertising and promotions of its other products in bad faith. The court reasoned that because the Board is empowered under section 3050, subdivision (c) of the Vehicle Code to hear "any matter" concerning a new car or motorcycle dealer and its manufacturer, the dealer's failure to exhaust administrative remedies was fatal as well. (*Yamaha I, supra,* 185 Cal.App.3d at pp. 1242-1243, 230 Cal.Rptr. 382.)

Another panel in another district had occasion to consider the implications of *Yamaha I* in *Yamaha II,* decided almost a year later. There, a financing company sued a couple who were former motorcycle dealers for breach of finance agreement. The couple cross-complained against the manufacturer for a number of common law causes of action, including breach of contract, fraud, and interference with business relations. These claims were based on assertions that the manufacturer had unjustifiably terminated certain contracts, sued for past due amounts, and seized inventory, thus putting the dealers out of business; additionally, the manufacturer had interfered with their attempt to sell the dealership to a third party.

The manufacturer sought a writ of mandate requiring the trial court to sustain its demurrer, which the appellate court, as it had done in *Yamaha I,* granted. Once again, the "any matter" phrase in section 3050, subdivision (c) proved fatal to the dealers' judicial action. There was "considerable overlap" between the allegations of the cross-complaint and activities within the purview of the Board. Specifically, the "gravamen" of the former dealers' claim consisted of activity prohibited by two sections of the Vehicle Code (FN5) within the purview of the Board under section 3050, subdivision (c). (FN6) In the process the *Yamaha II* court relied on *Yamaha I* to conclude that the exhaustion of administrative remedies was a condition precedent to judicial relief. (See *Yamaha II, supra,* 195 Cal.App.3d at p. 657, 240 Cal.Rptr. 806.)

The next case in the phalanx was *Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Bd., supra,* 10 Cal.App.4th 51, 12 Cal.Rptr.2d 598. Unlike the *Yamaha* twins, *Ray Fladeboe* involved a case where the parties had already undergone the administrative process. There, the Board had approved the termination of a Jaguar dealership and rejected a former dealer's petition for damages arising out of the manufacturer's allocation of vehicles. The dealer contended that the Board did not have jurisdiction under section 3050 to arbitrate his claim that the manufacturer wrongfully underallocated vehicles. The dealer sought a petition for writ of administrative mandate, which was denied, and then appealed the judgment denying that petition.

In affirming the judgment the court canvassed the *Yamaha* cases, disposed of a claim based on the *Ri-Joyce* case (which we discuss below), then added the thought that any other result would allow dealers to circumvent the jurisdiction of the Board "through artful pleading," wreak havoc with the exhaustion of remedies doctrine, and defeat a public policy favoring resolutions of franchise disputes by the Board. (*Ray Fladeboe, supra,* 10 Cal.App.4th at pp. 55-56, 12 Cal.Rptr.2d 598.)

The last case in the necessity-to-exhaust series is *Mathew Zaheri. Mathew Zaheri* involved a Mitsubishi dealer who lost his franchise after a company audit suggested massive warranty fraud. The dealer sued on various causes of action including breach of contract, slander and trade libel. The manufacturer demurred on the exhaustion doctrine, the trial court dismissed the action, the dealer appealed, and *then* decided to file a dealer petition with the Board.

After dispensing with the question of whether the appeal should be dismissed because of the belated petition, the court reviewed the prior case law, including the effect of the isolated *Ri-Joyce* decision (see *Mathew Zaheri, supra,* 17 Cal.App.4th at pp. 293-294, 21 Cal.Rptr.2d 325), then resolved the case in one paragraph on page 295 of the opinion. Noting that whether exhaustion of administrative remedies is determined by a " 'a qualitative analysis on a case-by-case basis with concentration on whether a paramount need for agency expertise outweighs other factors,' " the court concluded that an administrative hearing by the Board was clearly called for: Warranty service charges are clearly within the Board's authority (see § 3065), and an administrative hearing would both facilitate a complete record and promote judicial efficiency. (*Mathew Zaheri, supra,* 17 Cal.App.4th at p. 295, 21 Cal.Rptr.2d 325, quoting *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 981, 201 Cal.Rptr. 379.) The court ended its decision with the comment that if the Board should find in favor of the dealer, yet be unable to afford it "full common law relief," the dealer could *still* file a tort claim in court. (*Mathew Zaheri, supra,* 17 Cal.App.4th at p. 295, 21 Cal.Rptr.2d 325.)

We now come to *Ri-Joyce, supra,* 2 Cal.App.4th 445, 3 Cal.Rptr.2d 546, the one decision which said something which contradicts the idea a new car dealer must absolutely exhaust administrative remedies before any recourse may be had to state court. *Ri-Joyce* was a case where the dealer went first to the Board concerning its claim that the manufacturer was undercutting its business by allowing a new, competing dealer in his area. The Board refused to even consider his claim, but the trial court granted a peremptory writ of mandate commanding it to. The *Board* appealed, and most of the opinion is devoted to a discussion of the merits of the contract dispute and a demonstration the Board was required to hear the dispute. But, in passing, on page 455 of the opinion, the court observed: "To the extent [the dealer] may be relying upon an estoppel or perhaps a claim of fraud, the argument is addressed to the wrong forum. The Board is a quasi-judicial administrative agency of limited jurisdiction. [Citation.] It does not have plenary authority to resolve any and all disputes which may arise between a franchisor and franchisee. The Board's jurisdiction under section 3060 encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement. Claims arising from disputes with other legal bases must bedirected [*sic*] to a different forum."

As the *Mathew Zaheri* court pointed out, the language is "pure dictum." (See *Mathew Zaheri, supra,* 17 Cal.App.4th at p. 294, 21 Cal.Rptr.2d 325.) The *Ri-Joyce* court had no occasion to opine on the scope of the Board's authority, or whether a fraud claim was within that authority. Nor did the court address the exhaustion issue. Then again, no published decision has addressed how the Board's authority interacts with the right to a jury trial.

B. *Right to a Jury Trial*

1. Occupation of the Field

There is, of course, no doubt that the Legislature can take common law claims which would otherwise entitle a litigant to a jury trial and subject them to the exclusive jurisdiction of an administrative agency. The workers' compensation system is the classic example on point.

However, as the Supreme Court decision in *Rojo v. Kliger* (1990) 52 Cal.3d 65, 276 Cal.Rptr. 130, 801 P.2d 373 illustrates, exhaustion of administrative remedies is only required when the Legislature intends an agency to occupy a certain field *exclusively.* (See *id.* at p. 81, 276 Cal.Rptr. 130, 801 P.2d 373.) "The general rule is that statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject." (*Id.* at p. 80, 276 Cal.Rptr. 130, 801 P.2d 373, citing *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285, 216 Cal.Rptr. 438, 702 P.2d 596.) By this token, "where a statutory remedy is provided for a preexisting common law right, the newer remedy is generally considered to be cumulative, and the older remedy may be pursued at the plaintiff's election." (*Rojo, supra,* 52 Cal.3d at p. 79, 276 Cal.Rptr. 130, 801 P.2d 373.) That is, no exhaustion is required.

Rojo involved a set of common law claims arising out of sexual harassment by a physician of two employees. The physician was granted summary judgment on the ground the employees had not exhausted their administrative remedies with the Department of Fair Employment and Housing under the Fair Employment and Housing Act (FEHA). After ascertaining that FEHA does not have a " 'pervasive and self-contained system of administrative procedure' " for the general regulation of discrimination in the employment context (see *id.* at p. 87, 276 Cal.Rptr. 130, 801 P.2d 373, quoting *Karlin v. Zalta, supra,* 154 Cal.App.3d at p. 983, 201 Cal.Rptr. 379), the *Rojo* court concluded that an employee "could proceed directly to court" on common law claims arising out of employment discrimination. (*Rojo, supra,* 52 Cal.3d at p. 88, 276 Cal.Rptr. 130, 801 P.2d 373.)

Rojo is, however, not the only Supreme Court decision which articulates principles germane to the case before us. In *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 261 Cal.Rptr. 318, 777 P.2d 91, the court had occasion to deal directly with the question whether administrative adjudication of common law claims violates the state Constitution's jury trial provision. *McHugh* arose out of the administrative apparatus set up by the city of Santa Monica to administer its rent control scheme. Under the scheme, the Santa Monica Rent Control board was empowered to allow tenants to deduct penalties from future rent payments. Two tenants filed an administrative complaint alleging their landlord charged them excess rent. The rent control board awarded them treble damages which the tenants could immediately use to offset their rent. The landlord then filed a petition for writ of mandate with the court. In the course of the litigation a group of other landlords intervened, arguing they had a right to jury trial in any case for damages or penalties.

After reviewing federal and out-of-state decisions on the right to jury trial in an administrative context, the *McHugh* court announced this rule for California: "Once a court has determined that exercise of a challenged administrative power meets the 'substantive limitations' requirement imposed by the state constitution's judicial powers doctrine--i.e., the challenged activities are authorized by statute or legislation, and are reasonably necessary to, and primarily directed at, effectuating the administrative agency's primary, legitimate regulatory purposes--then the state constitution's jury trial

provision does not operate to preclude administrative adjudication." (*Id.* at p. 380, 261 Cal.Rptr. 318, 777 P.2d 91.)

Significantly, however, earlier in the opinion the *McHugh* court also made it clear that claims "extraneous" to an agency's "regulatory functions," (such as, in *McHugh,* a landlord's common law counterclaims against a tenant) could be litigated in court because those claims would not "reasonably effectuate" the agency's regulatory purpose and would, in fact, shift the board's focus from a narrow one (the enforcement of rent levels) to a "broad range" of disputes "traditionally resolved in the courts." (*Id.* at pp. 374-375, 261 Cal.Rptr. 318, 777 P.2d 91.)

Reading *Rojo* and *McHugh* together, it is clear that the Millers' jury trial claim necessarily rests on whether the relevant administrative agency, here the Board, was established by the Legislature to adjudicate *all* disputes between new car dealers and manufacturers, or whether the Legislature had perhaps a slightly more modest role in mind.

That question, in turn, boils down to the scope of the phrase "any matter" as used in section 3050 of the Vehicle Code. The statute opens with the words, "The Board shall do all of the following:" and enumerates a list of duties the Board is to perform. The "any matter" phrase appears in third set of duties in the list, subdivision (c): "Consider any matter concerning the activities or practices of any person applying for or holding a license as a [new car dealer, distributor or manufacturer] pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person." (§ 3050, subd. (c).) The statute then elaborates on the various things the Board can do after considering such matter (see § 3050, subdivisions (c)(1-3)). After the third set of duties listed in subdivision (c), the statute finishes up with a fourth set, subdivision (d), which is to hear and consider protests "within the limitations and in accordance with the procedure provided" presented by a new car dealer pursuant to certain sections of the Vehicle Code, namely sections 3060, 3062, 3064 or 3065.

The structure of the statute reveals that the phrase "any matter" in subdivision (c) of section 3050 was not intended to confer sweeping or (to use the *Ri-Joyce* court's phrase) "plenary" power on the Board to adjudicate *every* matter between a new car dealer and a manufacturer. If the Legislature had intended *that,* subdivision (d) (directing the Board to hear protests presented by franchisees pursuant to certain statutes) would be utterly unnecessary, as would the limiting phrase in subdivision (c) concerning matters "pursuant to Chapter 4 ... of Division 5."

Furthermore, a construction of the statute which gives the Board plenary power ignores the implications of the word "submitted" in section 3050, subdivision (c) and the words "a protest presented" in subdivision (d). These words show that the enumerated duties of the Board include the consideration of certain claims *brought to* the Board. That is a far cry from the idea that the Board must adjudicate *all* claims between dealers and manufacturers, even if the claimants, usually new car dealers, would rather go to court.

Additionally, a plenary construction of the Board's powers is at odds with the language in subdivision (a) of section 3050, which instructs the Board to adopt rules and regulations "governing such matters as are specifically committed to its jurisdiction." That little word "specifically" suggests that the Board's jurisdiction is, as the *Ri-Joyce* court divined, "limited."

Finally, there is the small difference between section 3050, subdivision (c)' s "[c]onsider any matter ... submitted" and subdivision (d)'s "[h]ear and consider ... a protest presented." The latter phraseology suggests a process of *particular adjudication,* while the former naturally encompasses the *rule making* function of the Board independent of any particular dispute.

There is an old joke about a military parade at the end of World War II, where a housewife, Mrs. Murphy, points proudly to her son and tells her neighbor, "look, he's the only soldier in the whole parade who is keeping the right step." Well, this a case when Mrs. Murphy is right. Only *Ri-Joyce* is fully consonant with the Supreme Court's teaching in *Rojo* and *McHugh.* The Board does not possess exclusive jurisdiction over a case *merely* because the litigants are a new car dealer and a manufacturer.

Relying on a fragment of a legislative report quoted in *Yamaha II,* 195 Cal.App.3d at page 657, 240 Cal.Rptr. 806, Honda argues that the Legislature intended to " 'replace the courts with the ... board as a preliminary forum of franchise or other disputes between dealers and manufactures and distributors.' " (FN7) Honda thereby argues the Legislature did indeed intend to replace new car dealers' common law claims with an administrative process through the Board.

Not so. First, the phrase "or other disputes" mentioned in the report quoted in *Yamaha II* does not necessarily entail *every* dispute--it just as naturally may be read to refer to the enumerated classes of disputes listed in the Vehicle Code which the Board certainly has authority to hear. Second, and more fundamentally, there is a presumption a statute does not by implication repeal the common law (e.g., *Rojo v. Kliger, supra,* 52 Cal.3d at p. 75, 276 Cal.Rptr. 130, 801 P.2d 373) and there is nothing in the grant of powers to the Board that expressly confers upon it jurisdiction over common law disputes otherwise not enumerated within the list of disputes it *is* empowered to hear. To use *Rojo's* phrase, had the Legislature intended to abrogate a dealer's common law remedies for every dispute with a manufacturer, "it plainly knew how to do so." (*Ibid.*)

We must, accordingly, respectfully disagree with *Ray Fladeboe* to the degree that it based its decision on the possibility that "artful pleading" might circumvent the jurisdiction of the Board. The Board is not the exclusive forum for disputes between dealers and manufacturers. The Legislature established the Board to prevent "undue control" of new car dealers by manufacturers (see Stats.1973, ch. 996, § 1, p.1964), not to give manufacturers an extra line of defense from lawsuits by dealers. Indeed, given *Rojo,* we must respectfully part company from the Court of Appeal decisions which have held that the doctrine of exhaustion necessarily precludes new car or motorcycle dealers from suing a manufacturer for common law claims until they first present those claims to the Board. There simply is insufficient indicia from the Legislature that it intended the Board to occupy the field exclusively.

2. Primary Jurisdiction

There is a flip side to the exhaustion doctrine which we have just rejected--the doctrine of primary jurisdiction. (See *State Farm Fire and Casualty Company v. Superior Court* (1996) 45 Cal.App.4th 1093, 1111, 53 Cal.Rptr.2d 229 ["The judicially created doctrine of 'primary jurisdiction' is the flip side of the rule requiring the exhaustion of administrative remedies."].) Just because a party is not absolutely required to bring a claim to an administrative agency before suing in court does not mean the claim *should* still not be heard by that agency before a court gets it. Some common law claims, by

their nature, benefit from administrative expertise even though there is no steadfast requirement that the claim be first adjudicated by an administrative agency.

In *Farmers Ins. Exchange, supra,* 2 Cal.4th 377, 6 Cal.Rptr.2d 487, 826 P.2d 730, the California Supreme Court for the first time delineated in great detail the genesis and development of the primary jurisdiction doctrine, and explained the difference between it and exhaustion of remedies. *Farmers* involved a lawsuit brought under the Unfair Practices Act by the state--without first going through the Insurance Commissioner--against an insurance company for refusing to offer good driver discounts required by Proposition 103. (See *Farmers, supra,* 2 Cal.4th at p. 381, 6 Cal.Rptr.2d 487, 826 P.2d 730.) The unfair practices claim was "originally cognizable in the courts," so the usual policy considerations in favor of administrative autonomy were inapplicable. (See *id.* at p. 391, 6 Cal.Rptr.2d 487, 826 P.2d 730.) But that did not end the analysis. Exhaustion may not have been applicable, but primary jurisdiction was. (*Ibid.*)

Specifically, the allegations in the state's complaint demonstrated a paramount need for specialized agency factfinding expertise. (*Farmers, supra,* 2 Cal.4th at p. 398, 6 Cal.Rptr.2d 487, 826 P.2d 730, citing *Rojo, supra,* 52 Cal.3d at p. 88, 276 Cal.Rptr. 130, 801 P.2d 373.) In particular, the unfair practices claim by the state required the resolution of a series of questions revolving around specific Insurance Code sections, which both mandated the Insurance Commissioner's expertise and posed a risk of inconsistent adjudications if a court had to adjudicate those questions without "benefit of the views" of the commissioner. (*Farmers, supra,* 2 Cal.4th at p. 398, 6 Cal.Rptr.2d 487, 826 P.2d 730.) A stay of proceedings, with the trial court directed to retain the matter in its docket pending the agency adjudication (and "closely monitor" that adjudication to ensure against unreasonable delay), was the appropriate disposition of the case. (*Id.* at p. 401, 6 Cal.Rptr.2d 487, 826 P.2d 730.)

3. Application to Allocation Claims

Application of primary jurisdiction doctrine "is a matter within the discretion of the court as to whether a case should be stayed pending administrative action on the issue." (*State Farm Fire and Casualty Company, supra,* 45 Cal.App.4th 1093, 1112, 53 Cal.Rptr.2d 229) In the case before us, the trial court's stay of the action was not the result of an exercise of discretion under the primary jurisdiction doctrine, but of the belief that it had no choice under the exhaustion of remedies doctrine. All else being equal, that fact would compel us to grant the writ, so the trial court could have the opportunity to exercise its discretion. The tough question is, is there anything to be gained by so granting the writ in this case? After all, isn't it obvious that the trial court will want the expertise of the Board? If the Board has any special expertise it is in the allocation of vehicles by manufacturers to dealers, and allocation (or, rather, misallocation) is part and parcel of the Millers' claim.

On balance, however, the question is not so clear-cut that we should, in effect, substitute our discretion for the trial judge's. While the Board's expertise as to vehicle allocation would no doubt be extremely helpful, we do not forget that the Millers are claiming that allocation patterns were distorted because of widespread bribery. Moreover, the Millers' claims were pled by way of cross-complaint, so we cannot say that calendering and scheduling considerations (which might favor passing up the opportunity to have the Board look at the matter first) are of no import at all. Most dispositive, though, is the jury trial point which prompted our discussion to begin with.

Having concluded the doctrine of exhaustion is *not* applicable, whatever benefits *the court* might acquire from preliminary adjudication by the Board concerning allocation patterns must be balanced against the burden to the plaintiffs from the delay and their right to have questions of fact--particularly bearing on the bribery alleged--determined by a jury, not the Board. If one has a right to a trial by jury, one has a right to a trial by jury--particularly in a dispute over whether bribery ever actually occurred. (FN8) The trial court is in the best position to consider how much is to be gained by delaying that right.

Accordingly, let a peremptory writ issue commanding the trial court to vacate its order staying the Millers' cross-complaint and to consider, under the doctrine of primary jurisdiction, whether to stay proceedings on the cross-complaint pending adjudication by the New Motor Vehicle Board.

CROSBY and RYLAARSDAM, JJ., concur.

FN1. American Honda Motor Co., Inc. and Honda North America, Inc., to be precise.

FN2. Initially, the New Motor Vehicle Board (the Board) was created as an administrative agency in 1967 by the enactment of Vehicle Code section 3000, et seq. (Stats.1967, ch. 1397, § 2, p. 3261 et seq.) The Board was initially named the New Car Dealers Policy and Appeals Board. In 1973 Vehicle Code section 3000 et seq. was amended to create the new Board. One of the purposes behind the amendment was to assist independent new car and motorcycle dealers by preventing "undue control" by vehicle manufacturers. (Stats.1973, ch. 996, § 1, p.1964.)

The crux of the statutory scheme setting up the Board is found in section 3050, subdivision (c) of the Vehicle Code, which preceded the 1973 amendment. That statute states (and stated even before the 1973 amendment) that the Board shall "[c]onsider *any matter* concerning the activities or practices of any person applying for or holding a license as a new motor vehicles dealer, manufacturer ... distributor ... or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person...." (Emphasis added.)

All undesignated statutory references in this opinion are to the Vehicle Code.

FN3. For ease of reading we use the phrase "new car dealer" to refer to "new motor vehicle dealers."

FN4. A "tax" in the sense that the time and legal expense necessary to go through the process places a substantial additional cost on the presentation of the common law claim to a jury.

FN5. Vehicle Code sections 11713.2 and 11713.3.

FN6. The court pointed out that section 3050, subdivision (c) gives the Board power over matter pursuant to Chapter 4 of Division 5 of the Vehicle Code, which commences with section 11700.

FN7. *Yamaha II* in turn relied on a bill report from the Department of Finance from the 1973-1974 legislative session. (See *Yamaha II, supra,* 195 Cal.App.3d at pp. 657-658, 240 Cal.Rptr. 806.)

FN8. Because we conclude that the Millers are entitled to have their day in court at least eventually, and the doctrine of exhaustion of remedies does not apply, we need not address the thorny question of whether the Board is empowered to give them an adequate remedy. We do, however, make one observation: The doctrine of exhaustion of administrative remedy necessarily entails the idea that there *is* an administrative

remedy. The absence of any provision for damages in the statutory scheme governing the Board is thus itself some confirmation of our conclusion that the Legislature never intended the Board to completely occupy the field of disputes between dealers and manufacturers.

HARDIN OLDSMOBILE, Plaintiff and Appellant, v. NEW MOTOR VEHICLE BOARD, Defendant and Respondent, AMERICAN HONDA MOTOR CO., INC. et al., Real Parties in Interest and Respondents. (1997) 52 Cal.App.3d 21 [60 Cal.Rptr.2d 583].
No. C022987.
Court of Appeal, Third District, California.
Jan. 31, 1997.
As Modified on Denial of Rehearing Feb. 28, 1997.
Review Denied May 21, 1997.

Arthur H. Skola, Suzanne R. Varco, Mark F. Field, Mitchell & Skola, San Diego, and Lawrence Silver, for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, Martin H. Milas, Senior Assistant Attorney General, and Marybelle D. Archibald, Sacramento, for Defendant and Respondent.

Robert L. Meylan, Brian A. Sun, Santa Monica, O'Neill, Lysaght & Sun, Elizabeth A. Grimes, Gibson, Dunn & Crutcher, Los Angeles, Ellis J. Horvitz, John A. Taylor, Jr., David M. Axelrad, and Horvitz & Levy, Encino, for Real Parties in Interest and Respondents.

NICHOLSON, Associate Justice.

The jurisdiction of the New Motor Vehicle Board (Board) has limits. The claims asserted by the plaintiff, Hardin Oldsmobile (Hardin), are not within those limits. Accordingly, we reverse the trial court's contrary finding and remand for the court to issue a writ prohibiting the Board from exercising jurisdiction over Hardin's claims.

FACTS AND PROCEDURAL HISTORY

This litigation arises from Hardin's allegations of misdealing by Honda. Hardin claims Honda's executives received bribes and kickbacks in exchange for favors concerning the allocation of new cars and the location and ownership of new dealerships. Hardin asserts it did not receive a rightful allocation of the most salable cars and was not properly considered for new dealerships because it did not participate in the misconduct.

Hardin filed a civil action against Honda and other defendants in the federal district court for the central district of California, alleging causes of action for various federal statutory violations, including racketeering allegations, several California statutory violations, and five common law contract and tort claims and seeking compensatory, treble, and punitive damages.

The district court issued an order to show cause concerning whether it should dismiss Hardin's state claims for failure to submit those claims to the Board. Later, the court, instead of dismissing the claims, stayed the proceedings to allow Hardin to obtain action by the Board. Accordingly, Hardin filed a petition with the Board, alleging the

same facts and requesting the full panoply of relief sought in the federal action. Hardin, however, also requested the Board to determine it did not have jurisdiction over the claims asserted. Nonetheless, the Board accepted jurisdiction over Hardin's state statutory and common law claims, effectively returning the federal claims to the district court. The state claims include violation of four provisions of the Business and Professions Code, breach of contract, breach of the covenant of good faith and fair dealing, conspiracy to commit fraud, negligent misrepresentation, intentional misrepresentation, negligence, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage.

Hardin petitioned the superior court for a writ of review, prohibition, and mandate to prevent the Board from exercising jurisdiction over any of its claims against Honda. The superior court denied the petition, and Hardin appeals.

In August 1995, the federal Judicial Panel on Multidistrict Litigation transferred all of the federal litigation arising from allegations against Honda, pending in the federal district courts of at least 10 different states, to the federal district court in Maryland for coordination of the proceedings. The panel ruled: "[T]he actions in this litigation involve common questions of fact concerning the existence, scope and effect of an alleged illegal scheme by former Honda executives in allocating vehicles among existing Honda dealerships and/or awarding new Honda dealerships in exchange for kickbacks and bribes. Centralization ... in the District of Maryland will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation by avoiding duplication of discovery, preventing inconsistent pretrial rulings and conserving the resources of the parties, their counsel and the judiciary."

DISCUSSION

Relying almost exclusively on Court of Appeal cases from other districts and distinguishing a case from this district, the trial court denied Hardin's petition to prohibit the Board from considering the matter. We conclude the Board lacks legislative authority to preside over litigation in this matter.

There can be no dispute that the consideration and resolution of the claims made by Hardin would require the Board to carry out judicial functions. The statutory and common law claims would necessitate discovery and some sort of dispute resolution. A full resolution, in the event Hardin prevails, would also require an award of damages, which the Board and Honda assert is within the Board's jurisdiction.

We first summarize the constitutional limitations on the exercise of judicial functions by administrative agencies.

In California, "[t]he judicial power of the state is vested in the [courts]." (Cal. Const., art. VI, § 1.) The Supreme Court, however, explained this judicial powers clause does not preclude all judicial functions by administrative agencies: "An administrative agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief---including certain types of monetary relief---so long as (i) such activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372, 261 Cal.Rptr. 318, 777 P.2d 91, italics omitted.) While, as stated, any administrative execution of judicial functions must

be pursuant to legislative authorization, legislative authorization is inadequate constitutionally if it does not meet the reasonably necessary/legitimate regulatory purpose test or if it seizes the essential judicial power from the courts. (See *Bradshaw v. Park* (1994) 29 Cal.App.4th 1267, 1275, 34 Cal.Rptr.2d 872.)

Vehicle Code section 3050, subdivision (c), relied on by both the Board and Honda as authority for the Board to exercise jurisdiction over this case, provides the Board shall "[c]onsider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle ... manufacturer ... submitted by any person.... After such consideration, the board may do any one or any combination of the following: [¶] (1) Direct the department to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board within the time specified by the board. [¶] (2) Undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle ... manufacturer.... [¶] (3) Order the department to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle ... manufacturer...."

In particular, the Board and Honda point to the statutory authorization to consider "any matter" concerning a new motor vehicle manufacturer and to "mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle ... manufacturer ..." as the source of the Board's power to exercise jurisdiction here.

Broadly defined, the phrase, "[c]onsider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle ... manufacturer ... submitted by any person" (§ 3050, subd. (c)), would include consideration of criminal actions and labor disputes. No one, including, most importantly, the Legislature that wrote it, would argue those matters fall under the jurisdiction of the Board; hence, the meaning of the phrase is limited. The best indication of the scope of the limitation is found in the remainder of the subdivision, in which the Board is given authority to investigate the activities, resolve any honest differences of opinion or viewpoint with members of the public, and order the Department of Motor Vehicles to exercise its licensing authority over a malefactor.

The Board has had this basic authority to consider "any matter," granted in section 3050, since its formation in 1967. In 1973, the Legislature added section 3060 and others, expanding the Board's jurisdiction to include authority to consider protests filed by franchisees when, for example, the franchisor attempts to modify the franchise agreement or establish a new dealership. (1973 Stats. ch. 996, §§ 14, 16.) If the Board already had plenary authority in all matters pursuant to the enabling legislation in 1967, including the authority to consider any matter and resolve disputes between franchisors and franchisees, it would not have been necessary for the Legislature to give the Board jurisdiction, in 1973, over franchise disputes.

As we stated in 1992, "[t]he Board is a quasi-judicial administrative agency of limited jurisdiction. [Citation.] It does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee." (*Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2 Cal.App.4th 445, 455, 3 Cal.Rptr.2d 546.)

From the remainder of section 3050, subdivision (c), it is evident the Legislature intended to limit the jurisdiction of the Board to consideration and resolution of only a circumscribed domain of matters. What that domain includes, however, is not evident from a cursory look at the face of the statute. The subdivision gives the Board jurisdiction to "[u]ndertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle ... manufacturer ...." (§ 3050, subd. (c)(2).) This curious wording is vague. It refers to "any honest difference of opinion or viewpoint," but does not define the term. If the Legislature meant to allow the Board to resolve any legal dispute, it could have said so. Instead, it benignly referred to "honest difference[s] of opinion or viewpoint." Both the benign terminology and the absence of express authority to award the full panoply of damages, which will be discussed, establish the Legislature did not intend to replace the courts with the Board in presiding over traditional litigation involving a broad range of statutory and common law causes of action, as the Board seeks to do here.

The Legislature's use of the word "honest" in describing the differences of opinion or viewpoint subject to Board jurisdiction connotes disputes characterized by an absence of the serious misconduct, even possible criminality, and responsive denial involved here. If not so, then the addition of the word "honest" in the statute means nothing. We are not authorized to disregard the words used in a legislative enactment. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159, 278 Cal.Rptr. 614, 805 P.2d 873.)

In addition, the legal authorization to resolve "any honest difference of opinion or viewpoint" relates to differences of opinion or viewpoint the licensee has with a "member of the public." (§ 3050, subd. (c)(2).) Again, this circumscribing language reveals a legislative intent to limit the ambit of honest differences of opinion or viewpoint over which the Board may preside. When referring to licensees, section 3050 specifically so states and exhaustively lists those licensees ("applicant for, or holder of, a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative"). The legislative authorization in section 3050 to resolve differences of opinion or viewpoint, however, does not say it extends to traditional litigation between licensees; it limits the authorization to differences of opinion or viewpoint between a licensee and a member of the public. On the other hand, Vehicle Code, section 3060 explicitly gives the Board jurisdiction over certain protests between licensees. If the Legislature meant to give the Board the power it now seeks over disputes between licensees, it would have done so explicitly, as it did in section 3060.

While we readily find this so, not all divisions and districts of the Court of Appeal have agreed. Division One of the Second District of the Court of Appeal held the jurisdiction of the Board is broad, indeed, so broad the jurisdiction extends to any common law or statutory claim the facts of which could also form the basis of a protest to the Board. (*Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 230 Cal.Rptr. 382 (*Yamaha I*).) In *Yamaha I,* the dealership filed a complaint in the trial court seeking damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional interference with prospective business advantage. It based these allegations on Yamaha's refusal to sell certain products to the dealership,

bad faith abandonment of advertising of the dealership's products, and discriminatory allocation of products in retaliation for the dealership's objections to Yamaha's practices. (*Id.* at pp. 1236-1237, 1242, 230 Cal.Rptr. 382.)

The appellate court held the Board had jurisdiction over the dispute because section 3050, subdivision (d) permits the Board to hear and consider "a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065," and that the dealership had to exhaust this remedy before resorting to the courts. (*Id.* at p. 1237, 230 Cal.Rptr. 382.) Those sections mandate certain procedures for termination of a franchise (Veh.Code, § 3060), establishment or relocation of a dealership (Veh.Code, § 3062), delivery and preparation of obligations (Veh.Code, § 3064), and warranty reimbursement (Veh.Code, § 3065).

Sections 3060 and 3062, in particular, require the franchisor to give notice of modification of a franchise agreement or establishment of a new dealership and allow franchisees to protest the action and obtain from the Board a determination of whether the action is taken in good faith. The only remedy available under those sections is to prevent the franchisor from taking a limited group of specified actions without good cause.

Even though the dealership did not assert Yamaha violated section 3060 or 3062 and did not seek the remedy provided by those sections, the court concluded: "It is clear from these statutes that the board is authorized to consider and resolve disputes between a franchisor and franchisee regarding the franchisor's modification of an existing franchise or its establishment of an additional franchise within the market area of an existing franchise." (*Id.* at p. 1238, 230 Cal.Rptr. 382.) Rejecting the dealership's objection the complaint did not implicate the Vehicle Code, the court held the breach of contract alleged by the dealership constituted (1) an attempted modification of the agreement and, therefore, fell within section 3060, which restricts the right of the manufacturer to modify the agreement and (2) a violation of section 3062 because part of the factual basis for the breach of contract claim was that Yamaha established a new dealership in close proximity to the plaintiff dealership. (*Id.* at p. 1239, 230 Cal.Rptr. 382.)

We disagree with the holding in *Yamaha I.* (See also *Miller v. Superior Court* (1996) 50 Cal.App.4th 1665, 1669-1676, 58 Cal.App.4th 1665 [rejecting Yamaha I and its progeny].) The court failed to recognize that the jurisdiction of the Board and the application of the exhaustion of remedies or primary jurisdiction doctrine must be considered separately. That a litigant must exhaust *administrative remedies* before seeking relief in the courts does not bestow upon the administrative agency the jurisdiction to consider and resolve *all common law and statutory remedies.* Prior resort to the administrative agency does not take away from the litigant the right to allege and prove claims not under the jurisdiction of the agency and does not expand the jurisdiction of the agency to hear and consider those claims.

When the *Yamaha I* court said that sections 3060 and 3062 give the Board authority to resolve disputes between franchisors and franchisees, it could only mean the Board could consider a protest alleging a violation of those sections. The Board's jurisdiction over such matters is specifically limited in section 3050, subdivision (d), which states the Board shall "[h]ear and consider, *within the limitations and in accordance with the procedure provided,* a protest by a franchisee pursuant to Section

3060[or] 3062...." (Italics added.) Conspicuously missing is any statement or implication that the Board can hear and consider any common law or statutory claim the foundational facts of which could have been, but were not, alleged as a violation of section 3060 or 3062. The *Yamaha I* court's statement concerning the Board's jurisdiction over disputes between franchisors and franchisees, while true if applied to a dispute in which a protest alleging violation of section 3060 or 3062 is filed with the Board, is not true if the dispute between the franchisor and the franchisee is based only on other statutory and common law grounds and does not seek the remedy available under those sections. For example, as we have held, the Board does not have jurisdiction under section 3050, subdivision (d) to hear and consider a common law fraud or breach of contract cause of action by the franchisee against the franchisor and award damages if common law liability is found. (See *Ri-Joyce, Inc. v. New Motor Vehicle Bd., supra,* 2 Cal.App.4th at p. 455, 3 Cal.Rptr.2d 546 (Ri-Joyce).)

It cannot be said that the Board has jurisdiction over statutory and common law claims not specified in the enabling legislation merely because some of the facts forming the foundation for such a claim *could have been asserted* as the foundation of a statutory protest claims within the Board's jurisdiction. That is, in the end, an illogical argument which goes as follows: (1) the administrative agency has jurisdiction over some claims arising from a certain set of facts and (2) the exhaustion of remedies or primary jurisdiction doctrine requires prior resort to the administrative agency; therefore, (3) the administrative agency has jurisdiction over all claims arising from those facts. The conclusion does not follow from the premises. The *Yamaha I* court's leap from specific jurisdiction over protests filed alleging violations of sections 3060 and 3062 to general jurisdiction over "disputes between a franchisor and franchisee regarding the franchisor's modification of an existing franchise or its establishment of an additional franchise within the market area of an existing franchise" is unsupported.

In another case involving Yamaha in a dispute with one of its franchisees, the Sixth District of the Court of Appeal focused on the doctrine of exhaustion of administrative remedies and found that, because the common law causes of action overlapped with the allegations made in protests filed by the franchisee with the Board, the franchisee had not exhausted its administrative remedies and could not, therefore, maintain an action against Yamaha in the courts. (*Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, 654-660, 240 Cal.Rptr. 806 (*Yamaha II*).) Instead of considering the scope of the Board's jurisdiction by applying the judicial powers clause and other relevant authority, the *Yamaha II* court simply declared: "We give great weight to the agency's position here that it did have jurisdiction and that the [franchisee] should have brought the dispute there first." (*Id.* at p. 660, 240 Cal.Rptr. 806.)

Doing no more than cite and quote parts of section 3050, Division Three of the Second District of the Court of Appeal relied on the Yamaha cases to find the Board had jurisdiction over matters similar to those asserted by Hardin. (*Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Bd.* (1992) 10 Cal.App.4th 51, 12 Cal.Rptr.2d 598.) The *Fladeboe* court disagreed with *Ri-Joyce* because *Ri-Joyce* did not mention the Yamaha cases. In support of following the Yamaha cases, the court lamented the *Ri-Joyce* holding would allow dealerships to circumvent the jurisdiction of the Board through "artful pleading," that is, by alleging claims outside the jurisdiction of the Board. (*Id.* at pp. 55-56, 12 Cal.Rptr.2d 598.) Without citation to authority, the *Fladeboe* court

deemed it undesirable and against public policy to allow litigation in the courts when a protest could also be filed in the administrative agency. (*Id.* at p. 56, 12 Cal.Rptr.2d 598.) In effect, *Fladeboe* abdicated judicial power to the Board based on the court's view of public policy, never mentioning the judicial powers clause of the California Constitution.

Furthermore, there is no statutory authority for the Board to award damages. This omission from the Vehicle Code, which we can only presume is intentional, is overlooked by the divisions and districts of the Court of Appeal that grant great leeway to the Board. Yet it is perhaps most indicative of legislative intent not to erode the courts' judicial power by giving the Board authority over statutory and common law causes of action not specifically included in the Vehicle Code. The Yamaha cases made no mention of the judicial powers clause of the California Constitution and made no attempt to determine what remedy the plaintiffs could obtain by resorting to the Board.

In the view of the Board and Honda, the Board has plenary power to award compensatory damages. To do so, they argue, the Board follows the procedure upheld in a Court of Appeal opinion, *McKee v. Bell-Carter Olive Co.* (1986) 186 Cal.App.3d 1230, 231 Cal.Rptr. 304 (McKee), and discussed approvingly by the Supreme Court in *McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d at page 363, 261 Cal.Rptr. 318, 777 P.2d 91. As is evident from a careful examination, however, *McKee* neither purports nor can be construed to be an apology for the wholesale award of compensatory damages by a licensing board. Instead, the holding, as required by Supreme Court jurisprudence, is narrowly confined to awards of restitution incidental to licensee discipline.

In *McKee,* a grower sued a processor for failing to pay for olives. Alleging contract and tort claims, the grower sought compensatory and punitive damages. On the processor's motion for summary judgment, the trial court granted the motion and dismissed because the grower had failed to exhaust his administrative remedies with the Bureau of Marketing Enforcement. (186 Cal.App.3d at pp. 1232-1233, 231 Cal.Rptr. 304.) The Court of Appeal reversed. Even though the plaintiff had administrative remedies available to him, the court held he was not obligated to exhaust them because the specific statute also allowed primary resort to the courts. (*Id.* at p. 1246, 231 Cal.Rptr. 304.) Concerning the available administrative remedies, the court found the relevant regulatory scheme, set forth in the Food and Agricultural Code, explicitly gave the bureau authority to consider disputes between growers and processors concerning the payment and to suspend the processor's license until the payment was made. The court held: "[The statutes made] clear that once the Director has determined a producer is entitled to payment from a licensed processor, the Director may indirectly compel compliance with such an order by conditioning suspension of the processor's license upon payment of the money due the producer." (*Id.* at p. 1238, 231 Cal.Rptr. 304.)

The administrative remedy discussed in *McKee* is exclusively corrective and equitable. It provides for specific performance of the contract between the grower and processor. This is the type of administrative remedy discussed approvingly by the Supreme Court. (*McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d at p. 363, 261 Cal.Rptr. 318, 777 P.2d 91.)

In *McHugh,* a landlord challenged a provision in the Santa Monica City Charter giving the rent control board the authority to adjudicate excess rents and impose treble

damages. (49 Cal.3d at pp. 352-353, 261 Cal.Rptr. 318, 777 P.2d 91.) Measuring the authority of the rent control board by the limitations of the judicial powers clause, the Supreme Court concluded the adjudication of excess rents did not violate that clause. The court declared: "[A]lthough we acknowledge the constitutional importance of ensuring judicial review of administrative determinations, our prior cases do not stand for the proposition that an administrative agency may exercise all manner of 'judicial-like' power on the simple condition that judicial review of the administrative decision remains available. On the other hand, our prior licensing cases have accepted without constitutional debate the authority of licensing agencies to impose a restitutive award as a probationary condition." (Id. at p. 364, 261 Cal.Rptr. 318, 777 P.2d 91.)

Applying the judicial powers test quoted above, the *McHugh* court concluded the award of excess rents by the rent control board did not violate the judicial powers clause: "The Board's legitimate regulatory authority, and hence its incidental remedial authority, is circumscribed. It may not, and does not, hear and adjudicate all manner of disputes between landlords and tenants. Its authority is derived from the local police powers, and extends only so far as necessary to set and regulate rents. Incidental to that legitimate primary purpose--and 'in order to produce an efficient and effective administrative enforcement of the public interest,' the Board may review the rents actually charged, and order necessary adjustments to assure compliance with its price control regulations." (49 Cal.3d at p. 375, 261 Cal.Rptr. 318, 777 P.2d 91, citations omitted.) Nonetheless, the court noted: "Resolution of the question might be different in a situation in which an agency purports to adjudicate substantial 'damage' claims such that recovery of damages becomes the primary focus, as opposed to merely an incidental aspect of the regulatory scheme." (*Id.* at p. 381, fn. 53, 261 Cal.Rptr. 318, 777 P.2d 91.)

On the other hand, the *McHugh* court found the imposition of treble damages violated the judicial powers clause: "[W]e believe that the power to award treble damages in the present context poses a risk of producing arbitrary, disproportionate results that magnify, beyond acceptable risks, the possibility of arbitrariness inherent in any scheme of administrative adjudication." (49 Cal.3d at p. 379, 261 Cal.Rptr. 318, 777 P.2d 91.)

While Honda cites and quotes *McKee* as support for its assertion that the Board can award compensatory damages to Hardin, it makes no attempt to fit the damages Hardin seeks into the narrow range of restitutive damages allowed by *McKee* and *McHugh.* The damages Hardin seeks--compensatory, treble, and punitive--are not restitutive in nature. As remedies for the various statutory, contract, and tort claims, Hardin seeks damages for Honda's misdealings with respect to vehicle allocation and new dealership awards. These are not equitable in nature and do not seek specific performance of a contract. Instead, they are judicial remedies having little, if anything, to do with licensee discipline. The dispute involved here is not whether a particular allocation of vehicles was made according to a contract and, if not, what corrective action must be directed; instead, it involves broader issues and allegations of misfeasance, indeed, corruption, infecting the entire relationship between Honda and Hardin and giving rise to a possible right on the part of Hardin to prove it was damaged by such misfeasance and corruption. Were the Board permitted to award damages in an action such as this, the primary focus of the litigation would be the recovery of damages

and the regulatory purpose would be incidental, if existent at all. Neither the statute defining the duties of the Board nor the judicial powers clause of the constitution allows such a broadening of the Board's role. (See *McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d at p. 381 & fn. 53, 261 Cal.Rptr. 318, 777 P.2d 91.)

While the Vehicle Code gives the Board statutory authority to hear specific protests by franchisees and also gives general authority to resolve honest differences of opinion between licensees and members of the public, it does not replace the judiciary with the Board as the forum for litigating other statutory and common law causes of action. While some of the language giving the Board authority appears broad, such as "consider any matter," the context of the language, especially the absence of statutory authority to award general compensatory and punitive damages, makes it evident the authority of the Board over traditional litigation involving its licensees is not plenary and, indeed, has not been broadly authorized by the Legislature. (See *McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d at p. 381 & fn. 53, 261 Cal.Rptr. 318, 777 P.2d 91.)

The Board has jurisdiction over matters "submitted" to it concerning the activities of licensees. (Veh.Code § 3050, subd. (c).) It also may exercise jurisdiction over any "protest presented" by one licensee against another under the limitations found in Vehicle Code section 3060. (§ 3050, subd. (d).) In conjunction with this jurisdiction over disputes, the Board may adopt rules and regulations "governing such matters as are specifically committed to its jurisdiction." (§ 3050, subd. (a).) The Board's jurisdiction is "specific" and "limited," not general. (*Ri-Joyce, Inc. v. New Motor Vehicle Bd., supra,* 2 Cal.App.4th at p. 455, 3 Cal.Rptr.2d 546.) It may not assert jurisdiction beyond the bounds of its statutory authorization as discussed herein. The status of the litigants--a new motor vehicle and a vehicle manufacturer--does not confer jurisdiction on the Board over common law claims and statutory claims not specifically committed to it.

Here, Honda seeks to hide behind the Board in what is essentially federal litigation of interstate effect and importance. We are confident the Legislature never intended to erect such a barrier to a comprehensive and coordinated resolution of such widespread misconduct as alleged by Hardin and other plaintiffs. The claims over which the Board attempts to assert jurisdiction belong with their many siblings and cousins in the federal district court in Maryland.

In summary, because the Board does not have statutory authorization to preside over the claims asserted by Hardin, the assertion of jurisdiction by the Board violates the judicial powers clause of the California Constitution. (*McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d at p. 372, 261 Cal.Rptr. 318, 777 P.2d 91.) Given this conclusion, we need not further consider whether Board jurisdiction over the claims asserted by Hardin is "reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes" or whether "the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." (*Ibid.*) We also need not consider whether the Board's exercise of jurisdiction over Hardin's claims violates Hardin's right to a jury trial.

DISPOSITION

The judgment is reversed. The trial court is directed to issue a writ requiring the Board to decline jurisdiction over Hardin's state statutory and common law claims.

Hardin shall recover its costs on appeal. Honda's request for judicial notice of other petitions pending before the Board is denied.

SPARKS, Acting P.J., and DAVIS, J., concur.

MATHEW ZAHERI CORPORATION et al., Plaintiffs and Appellants, v. NEW MOTOR VEHICLE BOARD, Defendant and Respondent; MITSUBISHI MOTOR SALES OF AMERICA, INC., Real Party in Interest and Respondent. (1997) 55 Cal.App.4th 1305 [64 Cal. Rptr. 2d 705].

No. C022981.

Court of Appeal, Third District, California.

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Review Denied Sept. 17, 1997.

Eisen & Johnston, Jay-Allen Eisen, Marian M. Johnston, Tuel & Flanagan, Michael J. Flanagan and Christopher J. Gill, Sacramento, for Plaintiffs and Appellants.

Daniel E. Lungren, Attorney General, S. Michele Inan, Christine B. Mersten, Damon M. Connolly, Deputy Attorneys General, for Defendant and Respondent.

Latham & Watkins, J. Thomas Rosch, Richard B. Ulmer, Jr., San Francisco, Gibson, Dunn & Crutcher, Elizabeth A. Grimes, Cori L. MacDonneil, and Stephanie Yost Cameron, Los Angeles, for Real Party in Interest and Respondent.

BLEASE, Acting Presiding Justice.

This is an appeal from a judgment denying a petition for a writ of administrative mandamus under Code of Civil Procedure section 1094.5 and Vehicle Code section 3068.

Mathew Zaheri Corporation and Mathew Zaheri (Zaheri) contend the trial court erred in ruling that undisclosed ex parte communication between opposing counsel and administrative law judges did not deprive Zaheri of a fair trial.

We will affirm the judgment, concluding that the trial court properly examined the circumstances for prejudice and did not abuse its discretion in determining that the trial was fair. (FN1)

FACTS AND PROCEDURAL BACKGROUND

Zaheri is a new motor vehicle dealer franchised to sell Mitsubishi vehicles in Hayward. On February 3, 1992, Zaheri tendered a protest to the New Motor Vehicle Board (Board), under Vehicle Code sections 3050 and 3065, claiming that, after an audit, franchisor Mitsubishi Motor Sales of America (Mitsubishi) had unfairly charged back $137,444.79 in warranty service claims it had paid Zaheri.

A hearing was conducted by Douglas Drake, an administrative law judge (ALJ) for the Board. He prepared a written opinion which was adopted by the Board. The opinion concludes that part of the charge back, $57,054.68, was unfair because it was predicated upon Zaheri's failure to obtain prior written authorization for services in cases in which Mitsubishi's Warranty Policy and Procedures Manual had been modified to

permit post-repair written authorization. Notwithstanding, the opinion concludes that Mitsubishi was entitled to a full offset of the charge back because it proved that the Zaheri dealership had submitted fraudulent warranty claims totaling more than that amount.

Zaheri then filed a petition seeking to overturn the Board's decision on grounds the evidence does not support the offset granted Mitsubishi and that he was deprived of a fair hearing because of ex parte contacts between counsel for Mitsubishi and key representatives of the Board.

The claim of ex parte communications was tried to the court on depositions, declarations, and documentary evidence. The court issued a written opinion which explained its reasons for denying the petition. The written opinion and uncontroverted evidence pertaining to the ex parte communications claim disclose the following.

Sam Jennings is the Chief ALJ and the Executive Secretary for the Board. As the Chief ALJ he assigns matters to be heard by the Board's ALJs. At Zaheri's request we take judicial notice that the job description for Chief ALJ includes as one duty the direction and supervision of other ALJs. ALJ Jennings presided over a settlement conference in the Zaheri protest proceeding.

At some point during discovery prior to the protest hearing, Elizabeth Grimes, one of two attorneys representing Mitsubishi, telephoned ALJ Jennings to complain that Zaheri attempted to intimidate or threaten prospective witnesses by telling them that he would fire them or sue them if they cooperated with Mitsubishi. Jennings responded that the complaint would have to be tendered by way of a noticed motion.

While the Zaheri protest was being heard by ALJ Drake, Robert Mackey, Mitsubishi's other attorney, asked to speak to ALJ Jennings. Mackey told Jennings that Mathew Zaheri had been crying and sobbing during the testimony of a witness, that Mackey believed this boded well for possible settlement, and that Mackey was very concerned for the safety of himself and Grimes.

ALJ Jennings spoke to ALJ Drake. He asked Drake if he had noticed any change in the environment of the hearing and whether he had seen Zaheri crying or sobbing uncontrollably. Drake said he had not seen Zaheri crying or sobbing but that Zaheri was acting irrationally or illogically. Jennings told Drake that Mackey was concerned for the safety of Grimes and himself. (FN2) Drake then told Jennings that he would not proceed with the protest hearing without security. Jennings told Drake he would arrange for a state police officer to be present in the hearing room. Jennings then arranged for the attendance of a state police officer at the hearing. (FN3)

Jennings told counsel for Zaheri, during the pendency of the hearing on the Zaheri protest, that Mackey had spoken to him and informed him that Mathew Zaheri had been sobbing uncontrollably in the hearing room and that Mackey believed there might now be an opportunity to settle the matter. However, Zaheri's counsel was not informed that Mackey told Jennings he feared for the safety of Mitsubishi's counsel or that Jennings related that to ALJ Drake which was the cause of the attendance of the state police officer.

The trial court reasoned that Zaheri's claim was analogous to a claim that the tribunal was biased. Relying on California Administrative Mandamus (Cont.Ed.Bar 1989) sections 2.13-2.14, the court concluded that the standard for review of the Board's decision was whether the improper ex parte communications resulted in actual

bias or a strong likelihood of such bias. It found that the standard was not satisfied by the evidence.

Zaheri appeals from the ensuing judgment.

DISCUSSION

Zaheri contends the trial court erred in failing to overturn the Board's decision based upon improper ex parte communication. Zaheri claims that, under the trial court's findings: (1) Mitsubishi secretly provided the Board with evidence that Mathew Zaheri made threats and the Board acted upon it (2) in violation of Government Code section 11513 and (3) Zaheri's constitutional right to due process of law. Mitsubishi replies that: (1) the trial court did not find that the ex parte communications included the assertion that Mathew Zaheri made threats, (2) there was nothing improper about the ex parte communications, hence no violation of the statutory or constitutional law, and, if the communication was improper, (3) Zaheri did not show that the Board's decision-making process was "irrevocably tainted", the showing he must make to overturn the decision. (FN4)

We will reach the following conclusions. Under the trial court's findings Mitsubishi's counsel did not tell ALJ Jennings that Mathew Zaheri made threats. The ex parte communication of Mackey's fear for his safety was improper, as was the failure to disclose this communication. However, the impropriety does not warrant a rehearing of Zaheri's protest.

A.

Mitsubishi is essentially correct concerning the findings. The trial court did not find that Mackey told ALJ Jennings that Mathew Zaheri had threatened counsel.

We apply the following standards to review the facts. First, we apply the substantial evidence rule and defer to the trier of fact where the inferences are conflicting. (See, e.g., 9 Witkin, Cal. Procedure (3d ed.1985) § 288.) Applying this rule we accept as true the actual and unambiguous determinations of fact in the trial court's opinion, notwithstanding the absence of a statement of decision. (See, e.g., *Id.,* § 264, c.f., e.g., *People v. Butcher* (1986) 185 Cal.App.3d 929, 936-937, 229 Cal.Rptr. 910.)

Second, we presume that the judgment is correct. As to factual matters not actually and unequivocally determined in the opinion of the trial court, we imply any necessary findings in support of the judgment which are supported by the evidence. (See, e.g., 9 Witkin, Cal. Procedure, *supra,* § 268.)

The trial court found that Mackey told ALJ Jennings that he feared for the safety of himself and his co-counsel. This is not the same as asserting that Mathew Zaheri "made a threat;" in ordinary usage "to make a threat" is to make a threatening "statement" (see Evid.Code, § 225). In context, Mackey said no more than that he felt threatened by Mathew Zaheri's alleged behavior, his uncontrolled crying or sobbing in a public hearing, i.e., that Zaheri "presented" a potential threat because he was unable to maintain his composure under the stress of trial adversity. Notably, this has a lesser propensity to impugn Mathew Zaheri's veracity than the assertion that is the emotive linchpin of Zaheri's arguments, i.e., that he "made a threat."

B.

That brings us to the argument that the ex parte communication with the ALJs that did occur violates the statutory and constitutional law.

1.

Zaheri argues that the ex parte communication violates Government Code section 11513.

Section 11513 applies to the protest hearing by virtue of Vehicle Code section 3066. Vehicle Code section 3066 provides:

> "The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 of the Government Code apply to these proceedings."

This limits the evidence to the admissible evidence introduced in the protest hearing. As best we can make out, Zaheri's argument is that the information ALJ Drake received--Mackey's opinion that Mathew Zaheri presented a potential threat to opposing counsel--e.g., was "received as evidence," in derogation of the requirements of Government Code section 11513.

The necessary premise of this argument is that the Board (i.e., ALJ Drake) relied upon this information for the purpose of making its findings. (See generally, Annot., *Administrative Decision or Finding Based on Evidence Secured Outside of Hearing, and Without Presence of Interested Party or Counsel* (1951) 18 A.L.R.2d 552.) This is implicit in Zaheri's rhetoric: "The Board's reliance on evidence received in secret, which appellants were given no opportunity to rebut, constitutes a failure to proceed as required by law."

However, the ex parte communication can be characterized as "evidence" within the ambit of section 11513 only if the information was considered by ALJ Drake for its bearing on the issues resolved by the findings in his proposed decision. If the information was not so considered, it is not "evidence ... taken" or "evidence ... admitted," nor can Mackey be characterized as an "opposing witness." (See Evid.Code, § 140; Code Civ. Proc., § 1878.)

The trial court did not find that Drake considered the information for that illicit purpose, (FN5) nor was such a finding compelled by the evidence adduced at trial.

Zaheri submits that since Drake was made aware of Mackey's concern for his safety and told ALJ Jennings that he would not proceed without security, the information "inevitably colored his view of Mr. Zaheri and his integrity." We reject the assertion of inevitability. Litigation can engender great emotional stress regardless whether a litigant is as pure as the driven snow. An ALJ, having personally observed that a litigant is acting irrationally, may decide that the presence of a police officer is a prudent safeguard without drawing any adverse conclusions concerning the veracity of the litigant. The same is true if the impetus is increased by an expression of concern by an opposing counsel. Accordingly, Zaheri's claim that the ex parte communication resulted in a violation of section 11513 is not meritorious.

2.

The only other pertinent subconstitutional "law" (Code Civ. Proc., § 1895) is the law of legal ethics, potentially applicable under the rubric of misconduct of the tribunal or of counsel. Misconduct of court or counsel is a potential ground of reversal in a civil action, and can be a ground for overturning an administrative adjudication for denial of a fair hearing.

As appears, the ex parte communication in this case did violate the law of legal ethics. However, to warrant reversal such misconduct must be shown to be prejudicial as a miscarriage of justice or as intentional and sufficiently heinous to warrant reversal as a punishment or because it shows bias on the part of the tribunal. (See 9 Witkin, Cal. Procedure, *supra,* §§ 340, 348, and 360.) No such finding is compelled on this record.

In aid of its due process argument Zaheri points to various legal standards proscribing ex parte communications in particular contexts. For the most part these standards are not directly applicable to this setting, e.g., Zaheri points to canon 3(B)(7) of the California Code of Judicial Conduct, (FN6) and, by way of analogy, federal law and inchoate amendments to the California Administrative Procedure Act (APA), Government Code sections 11430.10 and 11430.70, which do not become operative until July 1997. (FN7)

Zaheri suggests that rule 5-300(B) of the Rules of Professional Conduct (FN8) is directly applicable and was violated by the ex parte communication in this case.

Zaheri notes that Formal Opinion Number 1984-82 of the State Bar Committee on Professional Responsibility and Conduct (1 Cal. Compendium on Prof. Responsibility, pt. II A), hereafter opinion 84-82, concludes that an ALJ is a "judicial officer" under the former rule 7-108, the predecessor of rule 5-300(B) which contains substantially identical text. However that conclusion is incorrect.

Opinion 84-82 goes awry in asserting that former rule 7-108 is derived from the American Bar Association (ABA) Model Code of Professional Responsibility, disciplinary rule 7-110(B). Rather, the ABA rule was derived from the California rule. (See ABA proposed Code Prof. Responsibility (final draft July 1, 1969) DR 7-110(B), fn. 92, p. 105.) Former rule 7-108 carries forward the language of former rule 16 of our original rules of professional conduct adopted in 1928. (204 Cal. xciii-xciv.)

The rule was adopted long before the burgeoning of our present system of administrative adjudication and the associated developments in the law and legal usage. (See generally, Kleps, Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49 (1950) 2 Stan.L.Rev. 285.) When former rule 16 was adopted "judicial officer" had a settled meaning; it referred to persons who exercised judicial power under the tripartite division of state government. The usage was frequently employed to *distinguish* between the proper function of the (administrative) officials in the executive branch and those in the judicial branch. (See, e.g., *People v. Provines* (1868) 34 Cal. 520, 534; *People v. Bird* (1931) 212 Cal. 632, 641, 300 P. 23; former Code Civ. Proc., § 282; Code Civ. Proc., § 1211.)

Thus an administrative law judge is not within the compass of the term "judicial official" as used in former rule 16. (See, e.g., 2A Sutherland, Statutory Construction (5th ed.1992) § 47.30, p. 262.) Nor did the term change its meaning when it was simply carried forward in subsequent regulations. (C.f., e.g., *Estate of Childs* (1941) 18 Cal.2d 237, 242-243, 115 P.2d 432.)

Nonetheless, the law of legal ethics is not limited to written law; it partakes of a common law or "unwritten law" (Code Civ. Proc., § 1899) aspect. (See e.g., Rule 1-100(A), Rules Prof. Conduct of State Bar.) (FN9) There is no principled basis to distinguish between an ALJ and a judge in the judicial branch for purposes of the ethical strictures against ex parte contacts. Hence, we find the same standard applicable. (See

generally, e.g., Rule 5-300(B), Rules of Professional Conduct; canon 3(B)(7) of the California Code of Judicial Conduct; Gov.Code, § 11513.5, fn. 7, *post.*)

Mitsubishi does not disagree. It notes that the general standard for improper ex parte communication is limited to communications about "issue[s] in the proceeding" and argues that the communication here did not transgress that standard.

The basic standard is stated several different ways, e.g., "regarding any issue in the proceeding," "upon the merits of a contested matter," "concerning a pending or impending proceeding." We do not assign significance to the varying terminology. "It is, in essence, a rule of fairness meant to insure that all interested sides will be heard on an issue." (*Heavey v. State Bar* (1976) 17 Cal.3d 553, 559, 131 Cal.Rptr. 406, 551 P.2d 1238.) It extends to communication of information in which counsel knows or should know the opponents would be interested. (See, *Ibid.*) Construed in aid of its purpose, we conclude the standard generally bars any ex parte communication by counsel to the decisionmaker of information relevant to issues in the adjudication.

There are exceptions to the general standard, where other interests supervene. The only overt claim of exception advanced here is for communications properly made in the context of settlement proceedings. That exception could justify part of the communication between Mackey and ALJ Jennings. However, there is no showing how the information that Mackey feared for his safety and that of Grimes was germane to settlement.

There are circumstances in which a concern about personal safety could warrant ex parte communication with the tribunal. If immediate open disclosure would compromise the safety of the participants, e.g., if counsel believed that an opposing party was unlawfully carrying a concealed weapon, counsel could communicate that information to the tribunal. However, there was no such an emergency in this case. Moreover, no reason appears why the communication should not be fully disclosed to the opponent after the immediacy of the perceived danger abates. (See canon 3(B)(7)(d), Cal.Code of Judicial Conduct, fn. 6, *ante.*)

We conclude that the undisclosed communication of this information to ALJ Drake constituted misconduct on the part of Mackey (FN10) or of the ALJs, e.g., in failing to promptly disclose the substance of the ex parte communication and to allow Zaheri an opportunity to respond. Nonetheless, this does not compel reversal of the Board's decision. As related, to warrant reversal such misconduct must be shown prejudicial or intentional and heinous.

Prejudice connotes that the Board's decision stemmed, at least in part, from the asserted misconduct. (FN11) (See, e.g., *Sabella, supra,* 70 Cal.2d at pp. 317-318, 74 Cal.Rptr. 534, 449 P.2d 750.) As explained previously, that conclusion is not compelled on this record. Nor was the trial court compelled to find that the misconduct was "actual misconduct," i.e., known to be in violation of the law of legal ethics. (FN12) In keeping with the ordinary rule, we defer to the predominantly fact-based decisions of the trial court. (See, e.g., *People v. Louis* (1986) 42 Cal.3d 969, 984-988, 232 Cal.Rptr. 110, 728 P.2d 180; cf., *Moran v. Board of Med. Examiners* (1948) 32 Cal.2d 301, 309, 196 P.2d 20.) Accordingly, there is no warrant in the subconstitutional law for reversal of the trial court on appeal.

3.

Zaheri next contends the trial court erred in failing to overturn the Board's decision for violation of Zaheri's constitutional right to due process of law. As appears, no such violation was made out and the contention of error is not meritorious.

Zaheri argues that any ex parte "receipt of evidence" violates due process. Like Zaheri's argument concerning violation of Government Code section 11513, the argument rests upon the implied premise that the Board *used* the illicit information in reaching its decision on the protest. (FN13) For the reasons that we have already given, this premise is untenable on this appeal.

When an administrative adjudicator uses "evidence" outside the record there is a denial of a fair hearing because, as to that "evidence," there has been no hearing at all, the disadvantaged party has not been heard. (See, e.g., *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159, 217 P.2d 22.) If a trial type hearing is required by due process of law (see 2 Davis and Pierce, Admin. Law Treatise (3d ed.1994) § 9.5, pp. 43-61), its deprivation a fortiori violates the due process precept.

The prohibitions against improper ex parte communications are measures imposed to avert this kind of due process violation. They also aid in preserving the due process requirement of an unbiased tribunal and the related public interest in avoiding the appearance of bias on the part of public decisionmakers. Zaheri does not identify any case law which holds that the violation of such a prohibition is itself a violation of the constitutional due process precept. (FN14) We discern no persuasive reason to characterize an ex parte communication of the kind that occurred here as presenting such a due process violation.

If the trial court appropriately concludes that the agency did not rely upon the information provided in the ex parte communication, and that the decisionmaker was not guilty of actual misconduct giving rise to a presumption of bias, there is no deprivation of a fair hearing and no denial of due process. (FN15)

II-III (FN*)

DISPOSITION

The judgment is affirmed.

SPARKS, and CALLAHAN, JJ., concur.

FN1. The Reporter of Decisions is directed to publish the opinion except for parts II and III of the Discussion.

FN2. The most disturbing aspect of this case is the trial court's rejection of the sworn assertions of ALJ Jennings, and to a lesser degree ALJ Drake and Mackey. They testified that they heard or said nothing about Mackey's fear for his and Grimes's personal safety. The trial court rejected this account based on evidence which we do not recount. We conclude that this matter is not material to the disposition of this appeal. The trial court could attribute these discrepancies to forgetfulness or even lies without contradicting its core conclusions in the matter. The trial court was not sitting as a disciplinary body. (See, e.g., *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 321, 74 Cal.Rptr. 534, 449 P.2d 750.)

FN3. The form Jennings signed to request the state police coverage gives as the reason for service: "Hearing--Threats on administrative law judge."

FN4. The Board joins in Mitsubishi's brief.

FN5. Zaheri did not tender this statutory argument in the trial court. Therefore it is unremarkable that the trial court did not address it in its opinion.

FN6. Canon 3(B)(7), applicable to "members of the judiciary" (Cal.Code Judicial Conduct, preamble), in pertinent part, is as follows.

"A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

"...

"(c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

"(d) A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

"(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

"(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

"(e) A judge may initiate or consider any ex parte communication when expressly authorized by law to do so.

FN7. Mitsubishi suggests that these APA standards are inapplicable both because of their future operative date and because of their absence from the list of applicable APA statutes in Vehicle Code section 3066, *page* 710, *ante.*

Neither party cites Government Code section 11513.5, the statute which presently addresses the subject of ex parte communications in proceedings governed by the APA. It too is absent from the list in Vehicle Code section 3066. In pertinent part, it is as follows. "Except as required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any party, including employees of the agency that filed the accusation, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication."

FN8. Rule 5-300(B) is as follows.

"(B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:

"(1) In open court; or

"(2) With the consent of all other counsel in such matter; or

"(3) In the presence of all other counsel in such matter; or

"(4) In writing with a copy thereof furnished to such other counsel; or

"(5) In ex parte matters.

FN9. Rule 1-100(a) in pertinent part provides: : "The prohibition of certain conduct in these rules is not exclusive.... Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional

conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."

FN10. Misconduct of counsel need not be intentional, i.e., an act performed with the knowledge that it is wrongful, prohibited by the law of legal ethics. (See, e.g., *People v. Bolton* (1979) 23 Cal.3d 208, 213-214, 152 Cal.Rptr. 141, 589 P.2d 396.) However, the term "misconduct" suggests that the conduct must at least be negligent in light of some legal duty of care.

FN11. Alternatively, one might use the test as that of *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243, after an examination of the entire cause, including the evidence, it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the misconduct.

FN12. If the trial court had found that ALJ Drake knew that the communication was improper and that he was obliged to disclose its substance to Zaheri, this would have afforded a strong presumption of prejudice on the ground of "actual bias." (See generally, *People v. Cooper* (1991) 53 Cal.3d 771, 835, 281 Cal.Rptr. 90, 809 P.2d 865.)

FN13. Zaheri also argues that there was a due process violation because the Board used the information in deciding to station a state police officer in the hearing room. He relies upon *Gibson v. Superior Court* (1982) 135 Cal.App.3d 774, 185 Cal.Rptr. 741. *Gibson* is inapposite. In that case, arising on a writ petition, the question was whether the court could impose highly intrusive and dramatic security measures based upon ex parte information without affording the defendants a requested hearing. "Here, the deprivatory action is the creation of a courtroom environment which will distinguish petitioners' trial from those of other defendants and possibly deter some members of the public from attending." (*Id.* at p. 781, 185 Cal.Rptr. 741.) The stationing of a single police officer on standby in an administrative hearing room presents no deterrence to public attendance and no analogous "deprivation."

FN14. The closest approach to such a holding is in *Sangamon Valley Television Corp. v. United States* (D.C.Cir.1959) 269 F.2d 221. There an interested party conveyed ex parte information to the tribunal, "[i]ts importance was great and perhaps critical," to the disposition of the merits. (*Id.* at p. 224.) The Circuit Court observed that "basic fairness requires such a proceeding to be carried on in the open." (*Ibid.*)

Sangamon Valley is not analogous to this case. The information was conveyed there for the purpose of influencing the disposition of the merits and in prejudicial violation of the agency's own rules forbidding any communication on the merits after the record was closed. (*Id.* at pp. 224-225.)

FN15. Accordingly, we need not address the interesting question of the standard of harmless error for a constitutional due process violation in a civil case. (See generally, e.g., *In re La Croix* (1974) 12 Cal.3d 146, 154, 115 Cal.Rptr. 344, 524 P.2d 816; *United States v. Valle-Valdez* (9th Cir.1977) 554 F.2d 911, 915-916, esp. fn. 7; *Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 379, 54 Cal.Rptr.2d 781.)

FN* See footnote 1, *ante*.

Tovas,et al., Plaintiffs and Appellants, v. AMERICAN HONDA MOTOR COMPANY, INC., etc., et al., Defendants and Respondents. (1997) 57 Cal.App.4th 506 [67 Cal.Rptr.2d 145].
No. B099982.
Court of Appeal, Second District, Division 3, California.
Aug. 29, 1997.

Bishton-Gubernick, Norris J. Bishton, Jr. and Jeffrey S. Gubernick, Los Angeles, for Plaintiffs and Appellants.

O'Melveny & Myers L.L.P., Wallace M. Allan and Gregory R. Oxford, Los Angeles, for Defendants and Respondents.

KITCHING, Associate Justice.

INTRODUCTION

In this case we are asked to decide whether the New Motor Vehicle Board (Board) has jurisdiction under Vehicle Code section 3050, subdivision (c), to consider allegations of serious financial misconduct asserted by plaintiffs against American Honda Motor Company (Honda). (FN1) We find that section 3050, subdivision (c) does not provide the Board with jurisdiction. A cause of action for contractual interference based on tortious business practices independent of any franchise agreement, made by a nonsignatory to a franchise agreement with Honda, is not the type of claim over which section 3050 gives the Board jurisdiction.

The heirs and ex-wife of decedent Robert L. Hix (collectively referred to as the Hix heirs) brought an action against American Honda Motor Company, Inc. and Honda North American, Inc. (collectively referred to as Honda) alleging that Honda's misconduct, stemming from an alleged commercial bribery scheme, constituted intentional interference with the purchase agreements between Robert Hix (Hix) and a Honda dealership. Hix had no contractual arrangement with Honda. The trial court ruled that under the "*Yamaha"* line of cases, (FN2) the Board had jurisdiction over the claim and the Hix heirs were first required to exhaust their administrative remedy before the Board prior to filing the lawsuit. The court then entered judgment on the pleadings in favor of Honda, and dismissed the complaint. The Hix heirs appealed.

We find that the scope of the Board's jurisdiction is limited by the legislative authority granted under section 3050, subdivision (c), and the nature of the aggrieved party's claim. The Board exercises jurisdiction only over "any matter" or dispute specifically enumerated by section 3050. This is because the Board's specialized expertise and familiarity with issues affecting vehicle franchise relationships expedites resolution of these disputes. (See *Rojo v. Kliger* (1990) 52 Cal.3d 65, 87-88, 276 Cal.Rptr. 130, 801 P.2d 373; *Miller v. Superior Court* (1996) 50 Cal.App.4th 1665, 1676-1677, 58 Cal.Rptr.2d 584.) We cannot expand the jurisdiction of the Board beyond the statutory authority granted by the Legislature.

The alleged bribery scheme asserted by the Hix heirs, however, is not the type of conduct regulated or proscribed by section 3050, or the type of conduct over which the Board has any specialized knowledge, familiarity, or expertise. Therefore, an administrative hearing before the Board is neither necessary nor required. Furthermore, we agree with the recent decisions of *Hardin Oldsmobile v. New Motor Vehicle Bd.*

(1997) 52 Cal.App.4th 585, 60 Cal.Rptr.2d 583 and *Miller v. Superior Court, supra,* 50 Cal.App.4th 1665, 58 Cal.Rptr.2d 584, and find their analysis of the Board's limited authority to be persuasive.

Accordingly, we determine that the Hix heirs' common law tort claim of contractual interference arose from independent allegations of Honda's tortious business practices. As such, the claim is beyond the scope of section 3050, subdivision (c) and the Board's jurisdiction. The Hix heirs are not required to exhaust any administrative remedies, and their claim is properly before the trial court. The judgment of dismissal is reversed.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from assertions of misconduct against Honda.

According to the factual allegations in the amended complaint, sometime prior to 1985 Hix obtained a right of first refusal to purchase Herb Friedlander Honda, an authorized Honda dealership. In February 1985, Hix entered into a buy/sell agreement with Herb Friedlander (Friedlander) to purchase the dealership. The sale agreement required Honda's approval. (FN3) In April 1985, Hix entered into an agreement with the Garden Grove Agency for Community Development to acquire a site for the Honda dealership in the Garden Grove Auto Center. Honda preferred that the dealership be relocated to this auto center. (FN4) Without providing a reason, Honda subsequently refused to approve Hix's agreement with Friedlander. Hix's right to purchase a site in the Garden Grove Auto Center expired.

In April 1986, Friedlander notified Hix of the proposed sale of the dealership to Martin Lustgarten (Lustgarten), a principal of the Martin Automotive Group. He offered Hix the opportunity to exercise his right of first refusal. The proposed Lustgarten agreement, while $500,000 less than the Hix offer, included as a material term the transfer to Friedlander of a letter of intent from Honda awarding Lustgarten a new Acura franchise in San Bernardino. The letter of intent, together with Honda's consent to the assignment of the letter, had become conditions of the sale. Hix unsuccessfully attempted to obtain from Honda a letter of intent to transfer to Friedlander, and was therefore unable to exercise his first refusal right. (FN5) Lustgarten purchased the Friedlander dealership. In 1988, Hix died.

After Hix's failed purchase attempt, Friedlander's attorney informed Hix's family that Lustgarten was being investigated in connection with criminal conduct by former Honda executives who had accepted valuable consideration in exchange for awarding franchises and giving preferential treatment to certain prospective dealers. Lustgarten had allegedly acquired numerous Honda dealerships, including the Friedlander dealership, by paying large sums of money to various Honda officials to obtain the manufacturer's required approval for the purchase. Furthermore, Honda ordered the Friedlander dealership be sold to Lustgarten and set the purchase price.

On April 5, 1995, the Hix heirs filed a complaint against Honda. In an amended complaint for intentional interference with contractual relations, the heirs alleged that Honda's wrongful business practices and the fraudulent transaction with Friedlander and Lustgarten resulted in Hix's loss of the dealership.

On September 19, 1995, Honda moved for judgment on the pleadings on the ground that the trial court lacked jurisdiction to hear the claim because the Hix heirs had failed to exhaust their administrative remedies before the Board. Honda contended that the interference claim alleged a violation of the Vehicle Code based on Honda's refusal

to consent to the sale of the dealership, and that under the *Yamaha* line of cases, the interference claim was subject to the jurisdiction of the Board. In opposition, Hix argued that the claim did not involve a controversy arising from an existing franchise agreement and was beyond the scope of section 3050, subdivision (c), and the Board's jurisdiction.

On October 27, 1995, the trial court granted Honda's motion. (FN6) On December 7, 1995, judgment was entered and the complaint was dismissed.

The Hix heirs timely filed a notice of appeal.

DISCUSSION

The Common Law Claim for Contractual Interference Is Beyond the Scope of Section 3050, Subdivision (c), and the Jurisdiction of the Board.

The Hix heirs contend that the trial court erred in finding they were required to exhaust administrative remedies before filing the civil action against Honda. They specifically argue that the interference claim is beyond the Board's jurisdiction because it is premised not on Honda's refusal to consent to Friedlander's sale of the dealership to Hix, but on Honda's independent liability for illegal acts that adversely affected Hix's sales agreements with Friedlander. We agree.

1. *Legislative History and Statutory Scheme*

a. *Legislative History*

The franchise relationship between automobile manufacturers and their retail dealers is subject to governmental regulation. (*BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 987, 209 Cal.Rptr. 50; see Veh.Code, §§ 3000 et seq.) In 1967, the Legislature adopted sections 3000 and 3050 which created the New Car Dealers Policy and Appeals Board. (*American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986, 138 Cal.Rptr. 594.) This Board was "originally empowered to handle licensing of new automobile retail dealerships and to review decisions of the Department of Motor Vehicles disciplining dealers." (*New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 102, fn. 6, 99 S.Ct. 403, 408 n. 6, 58 L.Ed.2d 361.) The Board's functions were "1. To prescribe rules and regulations relating to the licensing of new car dealers; 2. To hear and consider, within certain limitations, an appeal by an applicant for or the holder of a license as a new car dealer from an action or decision by the Department of Motor Vehicles; and 3. To consider any other matter concerning the activities or practices of applicants for or holders of licenses as new car dealers. [Citation.]" (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 986, fn. 3, 138 Cal.Rptr. 594.)

In 1973, the Legislature renamed the New Car Dealers Policy and Appeals Board the New Motor Vehicle Board and expanded the Board's authority by adding to the Vehicle Code sections 3060 to 3065. (FN7) (*University Ford Chrysler-Plymouth, Inc. v. New Motor Vehicle Bd.* (1986) 179 Cal.App.3d 796, 800, 224 Cal.Rptr. 908; *American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 986, 138 Cal.Rptr. 594.) These code sections empowered the Board to resolve disputes involving "(1) whether there is 'good cause' to terminate or to refuse to continue a franchise (§ 3060); (2) whether there is 'good cause' not to establish or relocate a motor vehicle dealership in a 'relevant market area' (§ 3062); (3) delivery and preparation obligations (§ 3064); and (4) warranty reimbursement (§ 3065)." (*Id.* at pp. 986-987, 138 Cal.Rptr. 594.) Thus, the Board no longer only sat "in judgment upon new car dealers in such matters as eligibility and qualification for a license, regulation of

practices, discipline for rule violations, and the like. [The additional statutes gave the Board] the added power to intrude upon the contractual rights and obligations of dealers and their product suppliers, entities whose respective economic interests are in no way identical or coextensive, frequently not even harmonious." (*Id.* at p. 991, 138 Cal.Rptr. 594.)

With this history in mind, we examine the scope of the Board's authority within the relevant statutory framework of the Vehicle Code, and the position of the parties.

b. *Statutory Scheme*

As explained, the Legislature created this "statutory scheme to regulate the franchise relationship between vehicle manufacturers and dealers. [Citations.]" (*Yamaha Motor Corp. v. Superior Court, supra,* 195 Cal.App.3d at p. 656, 240 Cal.Rptr. 806.) The Board adjudicates certain claims between these two entities.

(1) *Authority of Board*

The duties and the authority of the Board are embodied in section 3050. Subdivision (c) allows the Board to consider "*any matter* " concerning a new motor vehicle manufacturer or dealer. An issue in this appeal is the scope of subdivision (c) as defined by the term "any matter."

Section 3050, provides that the Board shall:

"(a) Adopt rules and regulations ... governing such matters as are specifically committed to its jurisdiction.

"(b) Hear and consider, ... an appeal presented by an applicant for, or holder of, a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative when the applicant or licensee submits an appeal provided for in this chapter from a decision arising out of the [Department of Motor Vehicles].

"(c) Consider *any matter* concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise the members upon, or decide any matter considered by the board pursuant to this subdivision that involves a dispute between a franchisee and franchisor. After such consideration, the board may do any one or any combination of the following:

"(1) Direct the department to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board within the time frame specified by the board.

"(2) Undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative.

"(3) Order the department to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative....

"(d) Hear and consider, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or

3065. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060)." (Italics added.)

The Board also has the authority, under subdivision (c), to adjudicate matters involving the unlawful activities of the manufacturer or franchisor as defined in sections 11713.2 and 11713.3. These activities include "preventing or requiring the sale or transfer of any part of the dealership, or unreasonably withholding consent to such sale;...." (*Yamaha Motor Corp. v. Superior Court, supra,* 195 Cal.App.3d at p. 656, 240 Cal.Rptr. 806.) (FN8)

(2) *Franchise Protests*

Sections 3060, 3062, 3064, and 3065 give the Board jurisdiction over specified franchise disputes or protests. Section 3060 enumerates conditions under which a franchisor can terminate the franchise or modify the terms of the existing franchise agreement. Section 3062 restricts a franchisor's ability to establish or relocate a franchise. Section 3064 provides for the franchisor's delivery and preparation requirements. Section 3065 regulates warranty reimbursement agreements between franchisors and franchisees. Finally, section 3066 sets forth procedures the Board shall use to adjudicate disputes arising under these statutes.

These statutes demonstrate that the Legislature has granted the Board authority to consider and resolve only certain disputes between franchisors and franchisees. (See *Hardin Oldsmobile v. New Motor Vehicle Bd., supra,* 52 Cal.App.4th at pp. 590, 597, 60 Cal.Rptr.2d 583.) The question remains how far that authorization extends.

2. *The Genesis of the Claim and the Authority Specifically Granted by the Legislature Determine the Scope of Subdivision (c).*

a. *The Jurisdiction of the Board is Limited*

As previously discussed, this case departs from the usual dealer-manufacturer or franchisee-franchisor dispute because the interference claim does not derive from any contractual agreement with Honda and because section 3050 does not specifically give the Board jurisdiction over this type of dispute. These facts prohibit the Board from taking jurisdiction of such common law claims arising from Honda's alleged misconduct.

A series of appellate decisions has recognized the Board's statutory limitations. We find the analyses in those cases persuasive.

In *BMW of North America, Inc. v. New Motor Vehicle Bd., supra,* 162 Cal.App.3d 980, 209 Cal.Rptr. 50, Hal Watkins (Watkins) claimed an exclusive right under his franchise agreement to sell BMW products in Ventura County. (*Id.* at pp. 983-984, 991, 209 Cal.Rptr. 50.) Watkins filed a protest with the Board after BMW announced the appointment of a new dealership to be located 15.2 miles from his franchise. (*Id.* at p. 984, 209 Cal.Rptr. 50.) He argued that the appointment of the new dealer constituted an improper modification of his franchise agreement, and the Board agreed. (*Id.* at pp. 984-985, 209 Cal.Rptr. 50.) The Court of Appeal disagreed, and reversed. (*Id.* at p. 983, 209 Cal.Rptr. 50.) The appellate court determined that under the 10-mile protest limitation in section 3062 and the clear language of the franchise agreement, Watkins was provided neither an exclusive right to sell BMW products in the entire county, nor any right to object to the appointment of a new franchise located 15.2 miles from his dealership. (*Id.* at p. 991, 209 Cal.Rptr. 50.) There was no modification of the franchise agreement. (*Ibid.*) The court found that the Board violated the parol evidence rule and exceeded its

jurisdiction by rewriting the terms of an underlying franchise agreement. (*Id.* at p. 994, 209 Cal.Rptr. 50.)

The court's ruling illustrated a limitation of the Board's authority. As the court explained, "[t]he Legislature has acted to regulate the relationship between franchisors and franchisees in the automobile industry, but has done so in a limited manner pursuant to clearly articulated and specifically expressed principles. Those principles provide that a franchisor may be required to continue unmodified an existing franchise agreement, or may be precluded from establishing or relocating a dealer within 10 miles of an existing dealer. Beyond those two qualifications ... the Board has been given no power to regulate the relationship between franchisors and franchisees,.... [¶] The power of the Board arises under the statute only when [the] franchisor improperly 'terminate[s] or refuse[s] to continue any existing franchise' or impermissibly 'modif[ies] or replace[s] a franchise with a succeeding franchise.' (§ 3060.) None of the statutory predicates occurred here. Instead, in violation of the parol evidence rule, [the dealer] and the Board [attempted to] rewrite the franchise [agreement].... Having rewritten the agreement, the Board then finds that BMW modified the recast franchise without good cause.... It is fundamental that an administrative agency has only such power as has been conferred upon it by the constitution or by statute and an act in excess of the power conferred upon the agency is void. [Citations.]" (*Id.* at pp. 993-994, 209 Cal.Rptr. 50.)

In *Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2 Cal.App.4th 445, 455, 3 Cal.Rptr.2d 546, the appellate court determined that "[t]he Board is a quasi-judicial administrative agency of limited jurisdiction. [Citation.] It does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee. The Board's jurisdiction under section 3060 encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement. Claims arising from disputes with other legal bases must be directed to a different forum." (*Id.* at p. 455, 3 Cal.Rptr.2d 546.)

Two recent decisions, *Miller v. Superior Court* (1996) 50 Cal.App.4th 1665, 58 Cal.Rptr.2d 584 and *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, 60 Cal.Rptr.2d 583, considered whether the Board's jurisdiction extended to common law tort claims alleging misconduct by Honda officials.

Miller examined the jurisdictional question in context of a party's right to a jury trial, and recognized the Board's limited jurisdiction when it construed subdivision (c) of section 3050. In *Miller,* "Ruth and Roger Miller bought a Honda dealership ... [and] they were sued for not making payments to the sellers. The Millers then filed a cross-complaint against Honda for fraud and unfair business practices. In essence, the Millers alleged that they could not make any money because they refused to bribe Honda executives to obtain their fair share of popular Honda models." (*Id.* at p. 1668, 58 Cal.Rptr.2d 584, fn. omitted.)

Miller determined that "the Millers' jury trial claim necessarily rests on whether the relevant administrative agency, here the Board, was established by the Legislature to adjudicate *all* disputes between new car dealers and manufacturers, or whether the Legislature had perhaps a slightly more modest role in mind. [¶] That question, in turn, boils down to the scope of the phrase 'any matter' as used in section 3050...." (*Id.* at p. 1674, 58 Cal.Rptr.2d 584.)

After reviewing the statute, *Miller* observed that: "The structure of the statute reveals that the phrase 'any matter' in subdivision (c) ... was not intended to confer sweeping or ... 'plenary' power on the Board to adjudicate *every* matter between a new car dealer and a manufacturer. If the Legislature had intended *that,* subdivision (d) (directing the Board to hear protests presented by franchisees pursuant to certain statutes) would be utterly unnecessary, as would the limiting phrase in subdivision (c) concerning matters 'pursuant to Chapter 4 ... of Division 5.' " (*Miller* at p. 1674, 58 Cal.Rptr.2d 584.) *Miller* determined that "[t]he Board does not possess exclusive jurisdiction over a case *merely* because the litigants are a new car dealer and a manufacturer." (*Id.* at p. 1675, 58 Cal.Rptr.2d 584.)

Miller then observed that under the doctrine of primary jurisdiction, there are "[s]ome common law claims, [that] by their nature, benefit from administrative expertise even though there is no steadfast requirement that the claim be first adjudicated by an administrative agency." (*Id.* at p. 1676, 58 Cal.Rptr.2d 584.) However, the court reasoned, "[w]hile the Board's expertise as to vehicle allocation would no doubt be extremely helpful, we do not forget that the Millers are claiming that allocation patterns were distorted because of widespread bribery." (*Id.* at p. 1677, 58 Cal.Rptr.2d 584.) Considering all the issues, the court decided the matter should be remanded to the trial court to use its discretion to determine if the Board's expertise was required. (*Id.* at p. 1678, 58 Cal.Rptr.2d 584.)

Finally, *Hardin Oldsmobile, supra,* determined that the Board's authority was limited to its specific statutory authorizations. (*Id.* at p. 598, 60 Cal.Rptr.2d 583.) In this vehicle allocation case, "litigation [arose] from Hardin's allegations of misdealing by Honda. Hardin claims Honda's executives received bribes and kickbacks in exchange for favors concerning the allocation of new cars and the location and ownership of new dealerships." (*Id.* at p. 587, 60 Cal.Rptr.2d 583.) He filed a complaint alleging, inter alia, common law contract and tort claims. (*Id.* at p. 588, 60 Cal.Rptr.2d 583.) The appellate court gave the phrase "any matter" in section 3050, subdivision (c), a limited interpretation and concluded the Board lacked jurisdiction to consider the claims. (*Id.* at p. 590, 598, 60 Cal.Rptr.2d 583.)

The *Hardin* court observed that both the Board and Honda relied on section 3050, subdivision (c) as the source of authority "for the Board to exercise jurisdiction over this case[.]" (*Id.* at p. 589, 60 Cal.Rptr.2d 583.) "In particular, the Board and Honda point to the statutory authorization to consider 'any matter'.... [¶] Broadly defined, the phrase, '[c]onsider any matter ..., would include consideration of criminal actions and labor disputes. No one, including, ..., the Legislature that wrote it, would argue those matters fall under the jurisdiction of the Board; hence, the meaning of the phrase is limited. The best indication of the scope of the limitation is found in the remainder of the subdivision, in which the Board is given authority to investigate the activities, resolve any honest differences of opinion or viewpoint with members of the public, and order the Department of Motor Vehicles to exercise its licensing authority over a malefactor.' " (*Id.* at p. 590, 60 Cal.Rptr.2d 583.) Furthermore, the court considered the expansion of the Board's authority by the 1973 addition of sections 3060 through 3065 and determined: "If the Board already had plenary authority in all matters pursuant to the enabling legislation in 1967, including the authority to consider any matter and resolve disputes

between franchisors and franchisees, it would not have been necessary for the Legislature to give the Board jurisdiction, in 1973, over franchise disputes." (*Ibid.*)

After analyzing the wording of section 3050, the *Hardin* court determined that "[f]rom the remainder of Vehicle Code section 3050, subdivision (c), it is evident the Legislature intended to limit the jurisdiction of the Board to consideration and resolution of only a circumscribed domain of matters.... [Furthermore,] [b]oth the benign terminology and the absence of express authority to award the full panoply of damages, ..., establish the Legislature did not intend to replace the courts with the Board presiding over traditional litigation involving a broad range of statutory and common law causes of action, as the Board seeks to do here." (*Hardin* at p. 591, 60 Cal.Rptr.2d 583.)

Hardin concluded that issues of misfeasance and corruption by Honda officials were not the type of matters the Board should consider. (*Id.* at p. 593-597, 60 Cal.Rptr.2d 583.) "While the Vehicle Code gives the Board statutory authority to hear specific protests by franchisees and also gives general authority to resolve honest differences of opinion between licensees and members of the public, it does not replace the judiciary with the Board as the forum for litigating other statutory and common law causes of action." (*Id.* at p. 597, 60 Cal.Rptr.2d 583.) Additionally, the court noted, the Board could "not assert jurisdiction beyond the bounds of its statutory authorization," and "[t]he status of the litigants ... does not confer jurisdiction on the Board over common law claims and statutory claims not specifically committed to it." (*Id.* at pp. 597, 60 Cal.Rptr.2d 583.) The *Hardin* court would not permit Honda to "hide behind the Board" when faced with the Hardin's misconduct charges. (*Id.* at p. 598, 60 Cal.Rptr.2d 583.)

These decisions confirm our conclusion that the Board's jurisdiction is limited. The Board can only exercise jurisdiction only over "any matter" or dispute specifically enumerated in section 3050.

b. *Honda's Reliance on a Broad Statutory Interpretation of Subdivision (c) is Not Warranted By the Facts of this Case.*

Honda contends that under a broad interpretation of the "*any matter* " language in section 3050, subdivision (c), the claim of the Hix heirs is subject to Board jurisdiction because the allegation that Honda interfered with the sale of a dealership constituted a violation of section 11713.3, subdivisions (d) and (e). Honda, however, mischaracterizes the Hix heirs' action as a "failure to consent" case.

Neither Honda nor the Hix heirs seek to enforce the terms of Honda's franchise agreement with Friedlander. Board jurisdiction would be appropriate if Friedlander were seeking to enforce a "consent" clause against Honda under the terms of his franchise agreement. (FN9) Hix, however, had no contractual agreement with Honda. The common law interference claim arose independently from Honda's alleged bribery scheme, not from the franchise agreement between Honda and Friedlander. Honda's actions adversely affected independent contractual agreements between Hix and Friedlander.

(1) *The Yamaha Cases*

To support its position, Honda relies on the "*Yamaha* " line of cases: *Yamaha Motor Corp. v. Superior Court, supra,* 185 Cal.App.3d 1232, 230 Cal.Rptr. 382 (*Yamaha I*), *Yamaha Motor Corp. v. Superior Court, supra,* 195 Cal.App.3d 652, 240 Cal.Rptr. 806 (*Yamaha II*), and *Mathew Zaheri Corp. v. Mitsubishi Motor Sales, supra,* 17

Cal.App.4th 288, 21 Cal.Rptr.2d 325. Under the facts of our case, however, Honda's legal authorities are inapplicable.

The *Yamaha* decisions interpreted the essence of the disputes between franchisees and franchisors to be conduct regulated or proscribed by section 3050 and thus to be matters coming within the Board's authority. As such, franchisees were required to exhaust their administrative remedies before seeking relief in the trial court. We do not agree with Honda that this "exhaustion necessity" applies when a non-signatory to the franchise agreement brings a common law tort claim that neither derives from the terms of the agreement nor is included within the disputes covered by section 3050.

Our case does not involve the modification or termination of a franchise (§§ 3060, 3061), the establishment or relocation of a franchise (§ 3062), the violation of delivery or preparation obligations (§ 3064), the violation of any warranty agreements (§ 3065), or any violation of sections 11713.2 or 11713.3. The misconduct alleged by the Hix heirs, by contrast, differs vastly from that present in the *Yamaha* cases. When a nonsignatory to a franchise agreement brings a common law tort claim based on allegations of commercial bribery, independent from any franchisor-franchisee relationship or agreement, the claim, as a matter of law, cannot be included within the disputes covered by section 3050.

CONCLUSION

We conclude that the Board can only exercise the authority granted by the Legislature in the Vehicle Code. Under *Miller* and *Hardin Oldsmobile,* the Board's authority is limited to statutory authorizations in section 3050, and the phrase "any matter" in subdivision (c) refers only to those specific grants of power. Therefore, the Board's jurisdiction does not extend to *all* disputes between dealers and manufacturers.

Hix had no contractual relationship with Honda. His independent contractual arrangements with a dealer were allegedly adversely affected by Honda's widespread misconduct. Nothing in the statutory scheme granted the Board jurisdiction over the common law claims asserted by the Hix heirs. Therefore, the heirs were not required to first present the claim to the Board before filing the lawsuit.

[5] Finally, *Miller* gave the trial court discretion to decide if it could benefit from the Board's expertise under the theory of primary jurisdiction. (*Miller v. Superior Court, supra,* 50 Cal.App.4th at p. 1678, 58 Cal.Rptr.2d 584.) In our case, the trial court does not have such discretion. As a matter of law, we find that the Board does not have more expertise and knowledge in the area of commercial bribery schemes than do the courts.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court to vacate the order granting judgment in favor of Honda and reinstate the complaint. Honda is to answer within 20 days after the remittitur has issued. Hix is awarded costs on appeal.

CROSKEY, Acting P.J., and ALDRICH, J., concur.

FN1. Unless otherwise indicated, all statutory references are to the Vehicle Code.

FN2. *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 230 Cal.Rptr. 382 (*Yamaha I*); *Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, 240 Cal.Rptr. 806 (*Yamaha II*); *Mathew Zaheri Corp. v. Mitsubishi Motor Sales* (1993) 17 Cal.App.4th 288, 21 Cal.Rptr.2d 325.

FN3. The automotive dealer service and sales agreement between Honda and Friedlander provided, in relevant part: "[Article] 8.1.... No change affecting such involvement, ownership or management will be made without prior written approval of American Honda, which approval will not be unreasonably withheld."

FN4. On September 6, 1985, Bob Rivers, Honda's Western Zone Sales Manager wrote to John Graichen, Garden Grove General Manager-Development: "We have been notified by Mr. Herb Friedlander, Herb Friedlander Honda, of his current negotiations to sell his Honda automobile dealership to Mr. Robert Hix. [¶] I would like to inform you that if this Buy/Sell is consummated, our preference would be to relocate the dealership to the Garden Grove Auto Mall."

FN5. In a May 6, 1996 letter to Friedlander's attorney, Hix's counsel stated: "As I indicated to you in our telephone conversation, I represent Robert L. Hix, to whom you submitted a Notice of Terms of Sale in connection with his right of first refusal to purchase the assets of Herb Friedlander Auto Sales. [¶] You indicated to me in our telephone conversation that the condition contained in paragraph 5B(1) that the buyer obtain a binding letter of intent concerning the operation of a franchise for the sale and service of Acura motor vehicles in or around the City of San Bernardino, California area and a consent to the assignment of the letter of intent to Mr. Friedlander by American Honda Motor Company has been met by the purchaser. This is a condition that could not be met by Mr. Hix, so he is unable to exercise his right of first refusal. [¶] If the transaction fails to close in accordance with the terms and conditions submitted to Mr. Hix, please resubmit the transaction to him so that he might have an opportunity to exercise his right of first refusal. If the present proposed buyer fails to close entirely, please submit any proposed future sales to Mr. Hix in accordance with the provisions contained in the right of first refusal."

FN6. The judgment read, in relevant part: "1. Pursuant to sections 438(c)(3)(B)(i) and 438(h)(3) of the Code of Civil Procedure, plaintiffs' complaint is dismissed for lack of jurisdiction because plaintiffs have failed to exhaust available administrative remedies before the New Motor Vehicle Board of the State of California. *See* Cal. Veh.Code §§ 3050(c), 11713.3(d), (e); 13 Cal. Code Regs. §§ 554 *et seq.*; *Yamaha Motor Corp., U.S.A. v. Superior Court,* 195 Cal.App.3d 652, 240 Cal.Rptr. 806 (1987)."

FN7. Section 3000 provides that "[t]here is in the Department of Motor Vehicles a New Motor Vehicle Board, which consists of nine members."

"Section 1, 39, of Stats.1973, c. 996, p.1964, provided:

"Section 1. The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and that in order to promote the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." (West's Ann.Cal.Veh.Code, § 3000, Historical Note, p. 263.)

FN8. Section 11713.2 provides, in relevant part that "[i]t 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:

"...

"(e) To enter into any agreement with the manufacturer, manufacturer branch, distributor, distributor branch, or to do any other act prejudicial to the dealer by threatening to cancel a franchise or any contractual agreement existing between the dealer and manufacturer, manufacturer branch, distributor, or distributor branch...."

Section 11713.3 provides, in relevant part that "[i]t 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:

"...

"(d) To prevent or require, or attempt to prevent or require, by contract or otherwise, any dealer, ..., or stockholder of any dealership, the sale or transfer of any part of the interest of any of them to any other person or persons. No dealer, ..., or stockholder shall, however, have the right to sell, transfer, or assign the franchise, or any right thereunder, without the consent of the manufacturer or distributor except that the consent shall not be unreasonably withheld.

"(e) To prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business. There shall be no transfer or assignment of the dealer's franchise without the consent of the manufacturer or distributor, which consent shall not be unreasonably withheld."

FN9. The record reflects that Friedlander did file a petition with the Board alleging claims of Honda's misconduct under the terms of their franchise agreement.

Maury Page KEMP et al., Plaintiffs and Appellants, v. NISSON DIVISION, NISSAN MOTOR CORPORATION IN U.S.A., Defendant and Respondent. (1997) 67 Cal.App.4th 1527 [67 Cal.Rptr.2d 794].
No. G016501.
Court of Appeal, Fourth District, Division 3, California.
Sept. 30, 1997.
Certified for Partial Publication (FN*)

James T. Duff, Los Angeles, for Plaintiffs and Appellants.

Latham & Watkins, Jon D. Anderson, Costa Mesa, Pinto, Gromet, Dubia & Worcester and Mark D. Erickson, Irvine, for Defendant and Respondent.

SILLS, Presiding Justice.

I

In July 1993, Maury Kemp, a former Palm Springs Nissan dealer, sued the Nissan Motor Corporation in U.S.A. for breach of contract because Nissan would not approve the sale of his dealership to a third party. In June 1994, i.e., prior to the decisions of the Court of Appeal in *Miller v. Superior Court* (1996) 50 Cal.App.4th 1665, 58 Cal.Rptr.2d 584 and *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, 60

Cal.Rptr.2d 583, the trial court granted summary judgment to Nissan because Kemp, by not taking his breach of contract claim to the New Motor Vehicle Board, had not exhausted his administrative remedies. Kemp appealed. Prior to oral argument we invited the parties to submit supplemental briefing on *Miller* and *Hardin Oldsmobile.* In this opinion we now explain why Nissan's proffered reasons for distinguishing *Miller* and *Hardin Oldsmobile* lack persuasive merit, and why Kemp's breach of contract action is not subject to an exhaustion requirement.

A

There are two ostensible differences between this case and the *Miller* and *Hardin Oldsmobile* cases. First, both *Miller* and *Hardin Oldsmobile* arose out of unfair *allocation* claims made against an auto manufacturer whose sales managers allegedly expected to be bribed before they would provide dealers with the most popular and salable models. (See *Miller, supra,* 50 Cal.App.4th at p. 1668, 58 Cal.Rptr.2d 584; *Hardin Oldsmobile, supra,* 52 Cal.App.4th at pp. 587-588, 60 Cal.Rptr.2d 583.) By contrast, the present case arises out of an allegedly unreasonable failure to approve the proposed buyer of a dealership, a claim which does not normally imply the kind of dishonesty and corruption involved in the *Miller* and *Hardin Oldsmobile* cases. (FN1)

Second, *Hardin Oldsmobile* held that the Board had no statutory authority *at all* to preside over the bribery and corruption claims at issue there. (See *Hardin Oldsmobile, supra,* 52 Cal.App.4th at p. 598, 60 Cal.Rptr.2d 583.) (The *Miller* decision assumed the Board had statutory authority, but did not directly address the issue.) By contrast, the claim involved here--the unreasonable withholding of approval of the sale of a new car dealership--appears at first blush to be within the province of the Board. The unreasonable failure to approve a proposed buyer of a new car dealership is the subject of an express prohibition in the licensing and business regulation provisions of the Vehicle Code. (See Veh.Code, § 11713.3, subd. (d).) (FN2)

Nissan argues that these distinctions should make a legal difference. They do not. Kemp's breach of contract claim is still not subject to an exhaustion requirement.

It is true, as demonstrated in *Hardin Oldsmobile,* that bribery and corruption claims are beyond the purview of the statutory authority of the Board. (See 52 Cal.App.4th at p. 591, 60 Cal.Rptr.2d 583.) (FN3) It does not follow, however, that the existence of authority on the part of the Board to consider a claim necessarily subjects that claim to an exhaustion requirement. In *Miller,* this court assumed that the unfair allocation claims based on bribery were properly within the ambit of the Board's statutory authority, and we *still* held that exhaustion was not required. (See *Miller, supra,* 50 Cal.App.4th at pp. 1672-1676, 58 Cal.Rptr.2d 584.) The presence of statutory authority allowing the Board to consider a claim thus does not make *Miller* distinguishable.

Conversely, it makes no difference that the Board may not have had a statutory basis to consider the bribery claims in *Miller* and *Hardin Oldsmobile.* As we showed in *Miller,* because the Legislature never intended the Board to exclusively occupy the field of claims between dealers and manufacturers--even claims otherwise within the purview of the Board's authority--exhaustion is not required. (See *Miller, supra,* 50 Cal.App.4th at pp. 1672-1676, 58 Cal.Rptr.2d 584.)

B

Independent of the application of *Miller* or *Hardin Oldsmobile* to the present case, Nissan presents a related series of policy arguments ad horrendum: If exhaustion is not

required, new car dealers will be allowed to "side step the rigors of expert scrutiny"; there will be the possibility of "inconsistent results"; dealer claims against manufactures will be rendered truly "Board optional."

The answer to all these points is simple: Take it to the Legislature. The Legislature did not establish the Board to give manufacturers an extra line of defense from dealer claims, but to protect dealers from "undue control" by manufacturers. (*Miller, supra,* 50 Cal.App.4th at p. 1676, 58 Cal.Rptr.2d 584, citing Stats.1973, ch. 996, § 1, p.1964.) If the Legislature had wanted administrative proceedings before the Board to constitute an extra gauntlet which dealers had to run before being allowed to litigate otherwise cognizable common law claims against manufacturers, it could have said so. It did not. (See *id.* at p. 1676, 58 Cal.Rptr.2d 584.) While it may (or may not) be desirable in the abstract for the Board to first pass on dealer claims against manufacturers, that is simply not the law the Legislature wrote.

We need only add that it was hardly unreasonable for the Legislature to make dealer claims, in effect, "Board optional." In light of the substantial, often huge, investments which new car dealers make in their businesses, dealers *are* in need of protection against oppressive trade practices. (See *Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2 Cal.App.4th 445, 456, fn. 4, 3 Cal.Rptr.2d 546.) It would have been highly anomalous of the Legislature to have substantively restricted--or tacked substantially increased costs onto--remedies which dealers *already possessed* in the course of trying to protect dealers from "undue control" by manufacturers. (Cf. *Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 Cal.App.4th 867, 875, 52 Cal.Rptr.2d 211 [remarking on the anomalousness of the Legislature trying to curtail insurance fraud by limiting existing right of insurers to report fraud].)

C

Because summary judgment was granted on the breach of contract claim due to Kemp's failure to exhaust administrative remedies, the judgment must be reversed. Reversal, however, raises the question of whether, under the doctrine of primary jurisdiction, the trial judge has discretion to stay the action pending administrative action. (See *Miller, supra,* 50 Cal.App.4th at p. 1677, 58 Cal.Rptr.2d 584.)

In *Miller,* this court said that a lawsuit brought by a dealer against a manufacturer, even though not subject to exhaustion, still might be stayed pending administrative action under the doctrine of primary jurisdiction. (See *Miller, supra,* 50 Cal.App.4th at p. 1677, 58 Cal.Rptr.2d 584.) The question of whether the Board had the authority to hear the bribery-unfair allocation claim *in the first place* was not raised by the parties, and we did not have the benefit of the *Hardin Oldsmobile* decision on that question. In the light of *Hardin Oldsmobile,* (FN4) it is now clear that there was no possibility of proper application of the primary jurisdiction doctrine in *Miller* because the doctrine cannot apply in cases where the administrative agency has no jurisdiction.

To the degree that *Miller* might be (erroneously) read for the proposition that common law claims of new car dealers against manufacturers can be first referred to the board under the doctrine of primary jurisdiction, the present case affords us a chance to make amends. Just because a claim may come within the board's jurisdiction does not mean that it is one appropriate for prior resort to administrative process under the primary jurisdiction doctrine. Here, for example, while it is possible that the very act of referring Kemp's claim to the board would create the jurisdiction necessary for the

board to hear it, (FN5) the claim is still not an appropriate one for application of the primary jurisdiction doctrine.

The doctrine of primary jurisdiction is based on the ideas of judicial economy and the need for uniformity in the application of administrative regulations. (See *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 396, 400, 6 Cal.Rptr.2d 487, 826 P.2d 730.) The agency review should be able to resolve complex factual questions and afford a record for subsequent judicial review. (See *id.* at p. 397, 6 Cal.Rptr.2d 487, 826 P.2d 730.) For example, questions of insurance ratemaking are tailor-made for the doctrine (*id.* at pp. 399-400, 6 Cal.Rptr.2d 487, 826 P.2d 730), as are questions of railroad shipping rates under the Interstate Commerce Commission (see *id.* at pp. 386-387, 6 Cal.Rptr.2d 487, 826 P.2d 730).

In the present case, unlike questions of administrative price control in which there is a need for uniformity in the interpretation of regulations, the claim is one traditionally sounding in common law contract: an unreasonable refusal to allow an assignment. Nissan has not pointed to the existence of any set of regulations needing uniform interpretation, how board involvement might resolve any factual issues, or how it might provide a record for subsequent judicial review. All that would be accomplished would be delay of a plaintiff's right to a jury trial. (See *Miller, supra,* 50 Cal.App.4th at p. 1678, 58 Cal.Rptr.2d 584 ["If one has a right to a trial by jury, one has a right to a trial by jury...."].) Under such circumstances, it would be error for us to even suggest that application of the doctrine of primary jurisdiction and prior resort to administrative process is a possibility.

II (FN**)

III

The judgment is reversed. Appellant Kemp is to recover his costs on appeal.

WALLIN and RYLAARSDAM, JJ., concur.

FN* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part II.

FN1. We say "normally," because it is of course possible that an unreasonable failure to approve claim can arise out of bribery (as distinct from, say, an honest disagreement as to the suitability of a buyer), as is illustrated by a case filed after oral argument but not yet final as of the filing of this opinion, *Tovas v. American Honda Motor Company, Inc.* (1997) 57 Cal.App.4th 506, 67 Cal.Rptr.2d 145.

FN2. Vehicle Code section 11713.3, subdivision (d) provides in pertinent part: "No dealer ... shall, however, have the right to sell ... the franchise ... without the consent of the manufacturer ... except that the consent shall not be unreasonably withheld."

All statutory references in this opinion are to the Vehicle Code.

FN3. As *Hardin Oldsmobile* pointed out, the Legislature's use of the word "honest"--as in "honest difference of opinion"--in the statute granting the Board its authority (Veh.Code, § 3050, subd. (c)(2)) shows the Legislature did not intend the Board to preside over disputes involving "serious misconduct, even possible criminality." (*Hardin Oldsmobile, supra,* 52 Cal.App.4th at p. 591, 60 Cal.Rptr.2d 583.) A similar point is also made in the nonfinal *Hix* case (see fn. 1, above): "When a nonsignatory to a franchise agreement brings a common law tort claim based on allegations of commercial bribery, independent from any franchisor-franchisee relationship or agreement, the claim, as a matter of law, cannot be included within the disputes covered by section 3050." (*Tovas*

v. American Honda Motor Company, Inc., supra, 57 Cal.App.4th at p. ----, 67 Cal.Rptr.2d at p. 154.)

FN4. And the as yet unfinal decision in *Tovas.*

FN5. The authorizing statute for the Board, section 3050, grants the Board power to engage in four kinds of activities, corresponding to subdivisions (a) through (d) of the statute. The first two, rule-making (subd. (a)) and consideration of certain administrative appeals (subd. (b)), are plainly not applicable to the present case or the usual common law claims brought by dealers against manufacturers. Significantly, the same may be said--for the moment at least--for the third kind of activity: consideration of "any matter" concerning the "activities" of any dealer or manufacturer "submitted by any person." (Subd. (c).) *Thus far* no one has "submitted" the dispute to the Board.

The last basis of Board authority, subdivision (d), is not applicable either. That subdivision gives the Board power to hear and consider protests "presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065." While the unreasonable refusal to approve the proposed buyer of a dealership is covered by a statute, such claims are *not* "pursuant to" sections 3060, 3062, 3064, or 3065. One looks in vain in those statutes for a requirement that manufacturers be reasonable in consenting to the sale of new car dealerships.

However, even though the Board is not *now* empowered to consider Kemp's unreasonable disapproval claim does not necessarily mean the matter could not be properly "submitted" to it. Subdivision (c) of section 3050 provides in pertinent part: "The board *shall* do all of the following: .... [¶] (c) Consider any matter concerning the *activities* or practices of *any* person ... holding a license as a new motor vehicle *dealer, manufacturer* ... or representative *pursuant to Chapter 4 (commencing with Section 11700)* of Division 5 submitted by *any person.*" (Emphases added.) As it turns out, the statute which precludes unreasonable disapproval by manufacturers, section 11713.3, subdivision (d), falls squarely within "Chapter 4 (commencing with Section 11700) of Division 5" of the Vehicle Code. Because an unreasonable refusal to approve claim is clearly within the "any matter ... submitted by any person" language of section 3050, subdivision (c), it appears that a trial court's very act of referring a case to the board could itself provide the basis for the board's jurisdiction.

FN** See footnote *, *ante*.

SOUTHBAY CREDITORS TRUST et al., Plaintiffs and Appellants, v. GENERAL MOTORS ACCEPTANCE CORPORATION et al., Defendants and Respondents.
(1999) 69 Cal.App.4th 1068 [82 Cal.Rptr.2d 1].
D028156
Court of Appeal, Fourth District, Division 1,
Feb. 5, 1999

James J. Warner; John Y. Tremblatt; Gregory A. Lutz and Jenniffer B. Appel, for Plaintiffs and Appellants.

Arter & Hadden and Jacqueline I. Valenzuela, for Defendants and Respondents Michael Farguson, Farguson Chevrolet, Inc., and Santa Clarita Motors, Inc.

O'Melveny & Myers, Wallace M. Allan and Gregory R. Oxford, for Defendants and Respondents General Motors Acceptance Corporation and General Motors Corporation.

REED, J

South Bay Chevrolet, Inc. (a motor vehicle dealership), its officers and shareholders David Ordway and Travis Reneau, and South Bay Creditors Trust[1] sued General Motors Corporation (GM) and General Motors Acceptance Corporation (GMAC) for engaging in a course of allegedly wrongful conduct designed to cause South Bay's business to fail and force South Bay to sell the dealership to defendant Michael Farguson.[2] The Farguson and GM defendants filed general demurrers to the complaint on the ground South Bay failed to exhaust its administrative remedies before the New Motor Vehicle Board (the Board). The court sustained the demurrers without leave to amend on that ground and, alternatively, referred the matter to the Board under the doctrine of primary jurisdiction. South Bay appeals these rulings, contending the court erred in applying the doctrine of exhaustion of administrative remedies and the doctrine of primary jurisdiction. We reverse the judgment of dismissal and direct the court to vacate its order referring the matter to the Board.

FACTUAL AND PROCEDURAL BACKGROUND

Because this is an appeal of a judgment of dismissal entered after the sustaining of a general demurrer, "we accept as true all the material allegations of the complaint." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 7.) South Bay's complaint alleges the following facts.

South Bay was founded in 1946 and was one of the most successful and profitable automobile dealerships in Southern California before the occurrence of the wrongdoing giving rise to this action. Between 1981, when Ordway became involved in the business, and 1995, South Bay's business and profits consistently grew and it was one of the top three Chevrolet dealerships in San Diego County.

South Bay's profitability was largely dependent upon the financial support of GM and GMAC. GMAC provided South Bay with revolving lines of credit, known as "floor planning," and working capital loans to purchase vehicles and fund its daily operations. The loans from GMAC were secured by South Bay's assets and the vehicles it purchased from GM. South Bay's operations were also funded in part by profits from its sale of conditional sales contracts to various lenders, including GMAC. South Bay profited by the difference between the interest rate a customer paid to the lender to finance a vehicle purchased from South Bay, called the "write rate," and the interest rate the lender charged to South Bay, called the "buy rate." The difference between the write rate and buy rate averaged between 2 percent and 3 percent of the amount the customer financed and was paid by the lender directly to South Bay. South Bay would shop its conditional sales contracts around the finance community to find the buy rate that would yield the greatest profit.

Before 1995 and in accordance with long-standing custom and practice, GM and GMAC granted South Bay certain privileges that helped it to operate successfully. Specifically, GM and GMAC allowed South Bay to: (1) "float" (i.e., delay making)

payments to GM or GMAC[3] on new vehicles for between six and eight days, enabling South Bay to use those funds during the float period for operating expenses;[4] (2) purchase parts for its service department on credit to avoid the "cash crunches" caused by payment on a collect on delivery basis; (3) shop its conditional sales contracts to different lenders to maximize profits from their sale; (4) trade vehicles covered by its security agreement with GM and GMAC to other Chevrolet dealers without the traded vehicles being subject to payoffs; (5) use vehicles "floored" as "demos" or demonstrators by South Bay employees or prospective customers; and (6) "floor" its inventory of used vehicles to create additional funds for operating expenses.

In 1992 GM informed South Bay that all GM dealerships in Southern California would be required to relocate to an "autopark" or "automall" within three years or they would be forced out of business. GM approved a new autopark site for South Bay's dealership and told South Bay it was a valued dealer who would be rewarded for its loyalty with special privileges, financial support, advertising and an increased allotment of "hot vehicles" (i.e., vehicles in high demand) such as Blazers, Suburbans, and Cameros.

Ordway expressed apprehension about South Bay's move from its long-established and profitable location to the new, larger, more expensive and riskier autopark facility. GMAC advised Ordway that a marketing study conducted by corporate headquarters reflected extremely optimistic projections of sales of GM vehicles at the new site. To further induce South Bay to move to the new autopark, GM and GMAC reiterated their commitment to continue granting the various privileges enumerated above. Based on the mandate to move, GM's and GMAC's representations and assurances, and South Bay's long-standing business relationship with and trust in GM and GMAC, South Bay agreed to move to the new autopark as its first dealer.

South Bay moved into the autopark in October 1994. As expected, its operating expenses increased as a result of the move and in January 1995 it experienced a "cash crunch." Consequently, Ordway met with Dan Albee, GMAC's branch manager, to request a working capital loan from GMAC to cover South Bay's increased cash needs. The morning following that meeting, GMAC sent a team of its agents to South Bay to conduct a "flooring check" or inventory of vehicles covered by South Bay's security agreement with GMAC. The flooring check revealed that South Bay was using about $335,000 in funds that were due to GMAC. Contrary to its custom of allowing a six- to eight-day float of such funds, GMAC, through Albee, demanded immediate payment of the $335,000. After Ordway reminded Albee of the parties' long-standing course of dealing and the assurances and inducements that persuaded South Bay to move, Albee gave South Bay four days to make its past due payments. However, at a meeting a couple of days later, Albee again demanded all monies due to GMAC from the sale of vehicles under the flooring and security agreements, effectively canceling South Bay's six- to eight-day float. At that time South Bay still owed GMAC floated funds of about $95,000.

A few days later, on January 25, 1995, Albee threatened Ordway with arrest and imprisonment unless the $95,000 was paid immediately. He also told Ordway that the first dealer in a new autopark always fails. When Ordway asked why GM and GMAC had not disclosed that fact before South Bay moved, Albee told him that GMAC never

explained the risks inherent in moving a dealership such as South Bay to a new autopark because if it did, no dealer would ever move.

South Bay's relationship with GM and GMAC further deteriorated between January 25 and February 15. In addition to canceling South Bay's six- to eight-day float, GM and GMAC placed a "keeper" on South Bay's premises, canceled all dealership trades between South Bay and other GM dealers, placed South Bay's parts department on a collect on delivery only status, prohibited South Bay from selling its conditional sales contracts to any lender other than GMAC, and converted sales tax revenues and Department of Motor Vehicle fees to their own use.

Between February and July, GM and GMAC carried out a plan to destroy South Bay and replace it with a dealer of their choice. They suspended their flooring agreement with South Bay and diverted at least 20 new vehicles that had been earmarked for South Bay and were critical to South Bay's survival to a rival Chevrolet dealer in San Diego County. As a result of GM's and GMAC's conduct, Ordway and Reneau ultimately were forced to attempt to sell the dealership to avoid filing for bankruptcy to protect what remained of the business.

GM and GMAC unreasonably withheld approval of various prospective buyers chosen by Ordway and Reneau. GM and GMAC refused to approve one such prospective buyer unless Ordway and Reneau signed an agreement not to sue GM and GMAC. GM and GMAC also threatened to terminate all financial support and force South Bay into bankruptcy if Ordway and Reneau did not sign the agreement. Although the agreement not to sue contained false and objectionable recitals, Ordway and Reneau signed it under duress. GM and GMAC then breached the agreement by refusing to approve that sale and withholding financial support necessary for South Bay's survival.

After refusing several other dealers who would have purchased South Bay on terms favorable to Ordway and Reneau, GM and GMAC approved Farguson, the buyer of their choice. GM and GMAC dictated the terms of the sale, which were extremely favorable to Farguson and detrimental to Ordway and Reneau. GM and GMAC induced Farguson to join in their scheme to drive Ordway and Reneau out of business and replace them with Farguson by promising Farguson, among other things, a rent reduction of more than $20,000 for the new facility and the privileges they had granted South Bay before its move to the autopark, including six- to eight-day floats on monies due GM or GMAC, more hot vehicles than the normal allotment to other GM dealers, and the ability to buy parts for the service department on credit.

South Bay filed the instant action against GM and GMAC, and also named Farguson, Farguson Chevrolet, Inc., and Santa Clarita Motors, Inc. (collectively Farguson) as defendants, pleading causes of action for fraud (intentional misrepresentation), constructive fraud/breach of fiduciary duty, breach of contract and breach of the implied covenant of good faith and fair dealing against GM and GMAC only, and causes of action for intentional interference with prospective economic advantage and negligence against GM, GMAC, and Farguson. GM and GMAC filed a general demurrer to the complaint on the ground South Bay failed to exhaust its administrative remedies before the Board under Vehicle Code[5] section 3050, subdivision (c). Farguson filed a separate demurrer on the same ground.

The court issued a telephonic ruling sustaining the demurrers without leave to amend. After oral argument, the court modified its ruling on the demurrers by adding the following language: "Although the court finds that the weight of California case law supports its analysis under an exhaustion of remedies theory, the result remains unchanged under a primary jurisdiction analysis. Under the primary jurisdiction doctrine, the Court has weighed the factors discussed in [*Miller v. Superior Court* (1996) 50 Cal.App.4th 1665] and specifically exercises its discretion to refer this matter to the Board, finding that the expertise of that agency will be helpful to the Court."

DISCUSSION

Exhaustion of Administrative Remedies

Relying on *Miller v. Superior Court, supra*, 50 Cal.App.4th 1665 and subsequent cases, South Bay contends it was not required to exhaust administrative remedies with the Board before bringing the instant action.[6]

Prior to Miller, "a solid phalanx of Court of Appeal decisions . . . held that all disputes between new car dealers and manufacturers must be litigated first with the [Board], not in state court. [Citations.]" (*Miller v. Superior Court, supra*, 50 Cal.App.4th at p. 1668, fn. omitted; see *Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Bd.* (1992) 10 Cal.App.4th 51, 54-55.) Miller parted company with those cases.

Miller cited *Rojo v. Kliger* (1990) 52 Cal.3d 65, 80-81, for the proposition that "exhaustion of administrative remedies is only required when the Legislature intends an agency to occupy a certain field exclusively. [Citation.] 'The general rule is that statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject.' [Citation.] By this token, 'where a statutory remedy is provided for a preexisting common law right, the newer remedy is generally considered to be cumulative, and the older remedy may be pursued at the plaintiff's election.' [Citation.] That is, no exhaustion is required." (*Miller v. Superior Court, supra*, 50 Cal.App.4th at pp. 1672-1673.)

Accordingly, Miller reasoned that whether a dealer's common law claims against a manufacturer had to be litigated first with the Board "rests on whether . . . the Board[] was established by the Legislature to adjudicate all disputes between new car dealers and manufacturers, or whether the Legislature had . . . a . . . more modest role in mind." (*Miller v. Superior Court, supra*, 50 Cal.App.4th at p. 1674.)7 Miller concluded: "The Board is not the exclusive forum for disputes between dealers and manufacturers. The Legislature established the Board to prevent 'undue control' of new car dealers by manufacturers [citation], not to give manufacturers an extra line of defense from lawsuits by dealers. Indeed, given Rojo, we must respectfully part company from the Court of Appeal decisions which have held that the doctrine of exhaustion necessarily precludes new car or motorcycle dealers from suing a manufacturer for common law claims until they first present those claims to the Board. There simply is insufficient indicia from the Legislature that it intended the Board to occupy the field exclusively." (Id. at p. 1676.)

Hardin Oldsmobile v. New Motor Vehicle Bd. (1997) 52 Cal.App.4th 585, also disagreed with the cases holding that dealers must present common law claims against manufacturers to the Board before asserting them in a court action. Hardin stated that the leading case of that line, *Yamaha Motor Corp. v. Superior Court* (1986) 185

Cal.App.3d 1232,8 "failed to recognize that the jurisdiction of the Board and the application of the exhaustion of remedies or primary jurisdiction doctrine must be considered separately. That a litigant must exhaust administrative remedies before seeking relief in the courts does not bestow upon the administrative agency the jurisdiction to consider and resolve all common law and statutory remedies. Prior resort to the administrative agency does not take away from the litigant the right to allege and prove claims not under the jurisdiction of the agency and does not expand the jurisdiction of the agency to hear and consider those claims." (*Hardin Oldsmobile v. New Motor Vehicle Bd., supra*, 52 Cal.App.4th at p. 593.)

The plaintiff dealer in Hardin alleged it had not received rightful allocations of the most saleable cars or been properly considered for new dealerships because it had refused to give Honda executives bribes and kickbacks in exchange for favored treatment in those areas. In addition to asserting various federal and state statutory violations, the dealer (Hardin) asserted five common law tort and contract claims and sought compensatory, treble, and punitive damages. (*Hardin Oldsmobile v. New Motor Vehicle Bd., supra*, 52 Cal.App.4th at pp. 587-588.) Hardin noted "there is no statutory authority for the Board to award damages. This omission from the Vehicle Code, which we can only presume is intentional, is overlooked by the divisions and districts of the Court of Appeal that grant great leeway to the Board. Yet it is perhaps most indicative of legislative intent not to erode the courts' judicial power by giving the Board authority over statutory and common law causes of action not specifically included in the Vehicle Code. The Yamaha cases made no mention of the judicial powers clause of the California Constitution and made no attempt to determine what remedy the plaintiffs could obtain by resorting to the Board." (Id. at p. 595.)

Hardin recognized that administrative agencies generally have the authority to grant equitable and restitutionary relief incidental to licensee discipline. (*Hardin Oldsmobile v. New Motor Vehicle Bd., supra*, 52 Cal.App.4th at pp. 595-596.) Hardin noted, however, that the plaintiff dealer in that case did not seek equitable or restitutive relief. The dealer sought compensatory, treble, and punitive damages, which are "judicial remedies having little, if anything, to do with licensee discipline." (*Id*. at p. 597.) Hardin reasoned that if the Board were permitted to award such damages, "the primary focus of the litigation would be the recovery of damages and the regulatory purpose would be incidental, if existent at all. Neither the statute defining the duties of the Board nor the judicial powers clause of the Constitution allows such a broadening of the Board's role. [Citation.]" (Ibid.)

Hardin concluded "[t]he Board's jurisdiction is 'specific' and 'limited,' not general. [Citation.] It may not assert jurisdiction beyond the bounds of its statutory authorization . . . . The status of the litigants -- a new motor vehicle and a vehicle manufacturer -- does not confer jurisdiction on the Board over common law claims and statutory claims not specifically committed to it." (*Hardin Oldsmobile v. New Motor Vehicle Bd., supra*, 52 Cal.App.4th at pp. 597-598.)

A 1997 amendment to section 3050, operative January 1, 1998, reflects the Legislature's disapproval of the Yamaha cases and confirms that Miller and Hardin correctly rejected the proposition that the Board has plenary authority over common law claims by motor vehicle dealers against manufacturers. The amendment added the following language to section 3050 as subdivision (e): "Notwithstanding subdivisions (c)

and (d), the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action directly in any court of competent jurisdiction."

The 1997 amendment to section 3050 was enacted by the passage of Senate Bill No. 690 (SB 690). In determining the legislative intent underlying the passage of a bill, courts may consider the motive or understanding of the author of the bill or other individual legislator if that "legislator's opinions regarding the purpose or meaning of the legislation were expressed in testimony or argument to either a house of the Legislature or one of its committees, . . ." (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161, fn. 3.)

In its analysis of SB 690, the Senate Judiciary Committee noted: "The sponsor [of the bill] contends that it was never intended that the Board be the exclusive arbiter of all disputes, and that common law claims of consumers and new car dealers should be able to be brought directly in court without having to complete the administrative process. For example, the sponsor asserts, manufacturers have been able to divert breach of contract actions, fraud actions, unfair deceptive practices actions, and tort actions into the Board's jurisdiction under the exhaustion doctrine." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 690 (1997-1998 Reg. Sess.) as amended Apr. 14, 1997, comment par. 2(b), italics added.) The Assembly Judiciary Committee stated: "SB 690 clarifies the jurisdiction of the [Board]. Specifically, this bill: [¶] . . . Clarifies that the courts, not the Board, have primary jurisdiction over all common law and statutory claims originally cognizable in the courts." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 690 (1997-1998 Reg. Sess.) as amended June 24, 1997, summary par. 1.; italics added in place of underscoring in original.)[9]

These committee reports show that the 1997 amendment to section 3050 was a clarification of the law regarding the Board's jurisdiction rather than a change in the law. It is well settled that "' . . . the enactment of a statute or an amendment to a statute for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; . . . it simply states the law as it was all the time, and no question of retroactive application is involved.' [Citation.]" (*Re-Open Rambla, Inc. v. Board of Supervisors* (1995) 39 Cal.App.4th 1499, 1511.) The 1997 amendment to section 3050 makes it clear that South Bay's action consisting entirely of common law claims against the various defendants was properly initiated in superior court. The Legislature never intended the Board to be the exclusive arbiter of all disputes between new motor vehicle dealers and manufacturers. Accordingly, the court erred in dismissing South Bay's complaint on the ground South Bay failed to exhaust its administrative remedies.

II

Primary Jurisdiction

The defendants contend that even if the court erred in dismissing the complaint based on South Bay's failure to exhaust administrative remedies, it properly referred the matter to the Board under the doctrine of primary jurisdiction.

In *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, the California Supreme Court explained the difference between the doctrines of primary jurisdiction and exhaustion of administrative remedies: """Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone: judicial interference is

withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.' [Citation.]" (*Id*. at pp. 390-391.) Preliminary resort to the administrative body is necessary when "'. . . the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the [administrative body].'" (*Id*. at p. 387.)

The doctrine of primary jurisdiction "advances two . . . policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws. [Citations.] [¶] No rigid formula exists for applying the primary jurisdiction doctrine [citation]. Instead, resolution generally hinges on a court's determination of the extent to which the policies noted above are implicated in a given case. [Citations.] This discretionary approach leaves courts with considerable flexibility to avoid application of the doctrine in appropriate situations, as required by the interests of justice." (*Farmers Ins. Exchange v. Superior Court, supra*, 2 Cal.4th at p. 391, fns. omitted.) In determining whether the interests of justice militate against application of the doctrine in a particular case, courts should consider the adequacy of the available administrative remedies and the expense and delay to litigants. (Id. at pp. 391-392, fn. 9.)

Here, the court's referral of the case to the Board under the doctrine of primary jurisdiction was inappropriate for two reasons. First, it was inconsistent with its dismissal of the action. The proper procedure in applying the doctrine of primary jurisdiction is not to dismiss the action but to stay it pending resolution of the issues within the administrative body's expertise. (*Farmers Ins. Exchange v. Superior Court, supra*, 2 Cal.4th at p. 401.) Following oral argument on defendants' demurrers, the court referred the case to the Board under the primary jurisdiction doctrine in addition to confirming its telephonic ruling sustaining defendants' demurrers without leave to amend. Because the referral to the Board required a stay rather than dismissal of the action, the referral was rendered ineffective by the court's simultaneous sustaining of defendants' demurrers and nunc pro tunc judgment of dismissal.

Second, referral to the Board under the primary jurisdiction doctrine was inappropriate because the factual issues and common law claims raised by South Bay's complaint are not beyond the usual competence of the courts. The complaint does not indicate a need for prior resort to the Board's administrative expertise to enhance the court's decisionmaking or assure uniform application of regulatory laws. As Hardin noted, the Board's jurisdiction is specific and limited by statute to certain types of claims; it does not extend to common law claims not specifically committed to the Board. *(Hardin Oldsmobile v. New Motor Vehicle Bd., supra*, 52 Cal.App.4th at pp. 597-598.)

In Miller, the Court of Appeal directed the trial court to consider whether claims for fraud and unfair business practices against the defendant manufacturer should be referred to the Board under the doctrine of primary jurisdiction. (*Miller v. Superior Court, supra*, 50 Cal.App.4th at pp. 1677-1678.) However, in *Kemp v. Nissan Motor Corp*. (1997) 57 Cal.App.4th 1527, 1532, the same appellate court concluded that in light of Hardin, "it is now clear that there was no possibility of proper application of the primary

jurisdiction doctrine in Miller because the doctrine cannot apply in cases where the administrative agency has no jurisdiction."

Kemp involved an action for breach of contract by a dealer (Kemp) against a manufacturer based on the manufacturer's refusal to approve the dealer's sale of the dealership to a third party. Clarifying its application of the primary jurisdiction doctrine in Miller, Kemp stated: "To the degree that Miller might be (erroneously) read for the proposition that common law claims of new car dealers against manufacturers can be first referred to the board under the doctrine of primary jurisdiction, the present case affords us a chance to make amends. Just because a claim may come within the board's jurisdiction does not mean that it is one appropriate for prior resort to administrative process under the primary jurisdiction doctrine. Here, for example, while it is possible that the very act of referring Kemp's claim to the board would create the jurisdiction necessary for the board to hear it, the claim is still not an appropriate one for application of the primary jurisdiction doctrine.

"The doctrine of primary jurisdiction is based on the ideas of judicial economy and the need for uniformity in the application of administrative regulations. [Citation.] The agency review should be able to resolve complex factual questions and afford a record for subsequent judicial review. [Citation.] For example, questions of insurance ratemaking are tailor-made for the doctrine [citation], as are questions of railroad shipping rates under the Interstate Commerce Commission [citation]." (*Kemp v. Nissan Motor Corp., supra*, 57 Cal.App.4th at pp. 1532-1533, fn. omitted.)

Kemp noted the defendant manufacturer had not pointed to any set of regulations needing uniform interpretation or shown "how board involvement might resolve any factual issues, or how it might provide a record for subsequent judicial review. All that would be accomplished would be delay of a plaintiff's right to a jury trial. [Citation.]" (*Kemp v. Nissan Motor Corp., supra*, 57 Cal.App.4th at p. 1533.) Kemp concluded that "[u]nder such circumstances, it would be error for us to even suggest that application of the doctrine of primary jurisdiction and prior resort to administrative process is a possibility." (*Ibid*.)

Prior resort to the Board is similarly inappropriate in the present case. South Bay's common law tort and contract claims do not fall within the Board's specific and limited statutory jurisdiction, but rather are '". . . within the conventional competence of the courts . . . .'" (*Farmers Ins. Exchange v. Superior Court, supra*, 2 Cal.4th at p. 390.) This case does not involve a set of regulations needing uniform interpretation and defendants have not shown a compelling need to take advantage of the Board's administrative expertise to resolve the issues raised by South Bay's complaint. Although the Board's expertise undoubtedly extends to industry standards and customs regarding new vehicle allocation, floor planning, and manufacturer-dealer financing arrangements, to the extent such matters are relevant to the issues in this case they can be readily addressed through percipient and expert witness at trial.

In considering whether to refer claims by dealers against manufacturers to the Board under the primary jurisdiction doctrine, courts should carefully consider the expense of Board proceedings to the dealer, the extent to which a referral would delay rather than expedite resolution of the case, and the adequacy of Board remedies for the claims at issue. Courts should exercise great caution to prevent the Board from being used by manufacturers as "an extra line of defense from lawsuits by dealers" rather

than fulfilling its intended purpose of protecting dealers from "'undue control' . . . by manufacturers." (*Miller v. Superior Court, supra*, 50 Cal.App.4th at p. 1676.) Here, as in Kemp, prior resort to the Board would only delay the plaintiffs' right to a jury trial at needless cost to all parties. We conclude the court abused its discretion in referring the case to the Board under the doctrine of primary jurisdiction.[10]

DISPOSITION

The judgment of dismissal is reversed. The court is directed to vacate its order sustaining defendants' demurrers without leave to amend and enter a new order overruling the demurrers. The court is also directed to vacate its order referring the case to the Board under the doctrine of primary jurisdiction. South Bay is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION

_____

REED, J.*, HUFFMAN, Acting P.J., HALLER, J., CONCUR:

*Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] The complaint alleges plaintiff South Bay Creditors Trust is a California trust acting as assignee for the benefit of the creditors of South Bay Chevrolet. We will refer to the plaintiffs collectively and in the singular as South Bay.

[2] South Bay also named as defendants Farguson Chevrolet, Inc. and Santa Clarita Motors, Inc., corporations of which Farguson allegedly is president and a stockholder.

[3] The complaint is inconsistent as to whether the floated funds were owed to GM or GMAC.

[4] South Bay was contractually obligated to pay GM for a new vehicle immediately upon receiving its payoff on the vehicle.

[5] All further statutory references are to the Vehicle Code.

[6] Section 3050 sets forth the general duties and authority of the Board. Section 3050, subdivision (c) provides, in relevant part, that the Board shall "[c]onsider any matter concerning the activities or practices of any person . . . holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide any matter considered by the board pursuant to this subdivision that involves a dispute between a franchisee and franchisor. After that consideration, the board may do any one or any combination of the following:

"(1) Direct the department to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board within the time specified by the board.

"(2) Undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative."

[7] The Legislature created a predecessor to the current Board in 1967 through the enactment of sections 3000 and 3050. The former board, known as the New Car

Dealers Policy and Appeals Board, "was 'originally empowered to handle licensing of new automobile retail dealerships and to review decisions of the Department of Motor Vehicles disciplining dealers.' [Citation.]" (*Tovas v. American Honda Motor Co*. (1997) 57 Cal.App.4th 506, 512.) "In 1973 . . . section 3000 et seq. was amended to create the [New Motor Vehicle Board]. One of the purposes behind the amendment was to assist independent new car and motorcycle dealers by preventing 'undue control' by vehicle manufacturers. [Citation.]" (*Miller v. Superior Court, supra*, 50 Cal.App.4th at p. 1668, fn. 2.)

[8] *Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, another case involving a dispute between Yamaha and one of its franchisees, followed the earlier Yamaha case in concluding the franchisee failed to exhaust its administrative remedies and therefore could not maintain a civil action because its common law claims overlapped with allegations made in protests it had filed with the Board. (*Yamaha, supra*, 195 Cal.App.3d at pp. 654-660.)

[9] South Bay requested that we take judicial notice of the Senate Judiciary Committee report; GM and GMAC requested judicial notice of the Assembly Committee on Judiciary report. We granted both requests.

[10] We do not decide whether a court would ever have discretion to refer a dealer's common law claims against a manufacturer to the Board under the doctrine of primary jurisdiction, as that issue was not adequately briefed and its resolution is not essential to the disposition of this appeal.

KAWASAKI MOTORS CORP., U.S.A., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; SABA A. SABA et al., Real Parties in Interest. (2000) 85 Cal.App.4th 200 [101 Cal.Rptr.2d 863]

No. G026843.

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

November 30,2000

Paul, Hastings, Janofsky & Walker, Donald L. Morrow, Laura A. Forbes; Alvarado, Smith & Sanchez and Maurice Sanchez for Petitioner.

No appearance for Respondent.

J. Brian Urtnowski & Associates and J. Brian Urtnowski for Real Parties in Interest Saba A. Saba, SBD Partners, Inc., and Honda Kawasaki SportCenter.

No appearance for Real Party in Interest New Motor Vehicle Board.

RYLAARSDAM, J.

Where an automotive dealer protests the termination of its franchise to the New Motor Vehicle Board and the board overrules the protest, judicial review should be conducted under the substantial evidence test, not the independent judgment test. Because the trial court applied the wrong standard, we issue a writ of mandate directing the trial court to reverse its decision.

FACTUAL AND LEGAL BACKGROUND

Petitioner, Kawasaki Motors Corp., U.S.A., entered into a dealer sales and service agreement with real parties in interest, Saba A. Saba, SBD Partners, Inc., and Honda Kawasaki SportCenter (collectively Saba). This agreement imposed various conditions on Saba, including the following: (1) Saba was prohibited from moving to a different location; (2) Saba was to maintain an adequate credit line; (3) Saba was to maintain adequate facilities; and (4) Saba was to maintain a model inventory. The agreement provided Kawasaki had the right to terminate the agreement for Saba's violation of the provisions of the contract.

Kawasaki concluded that Saba violated these contract provisions and sent Saba notices terminating the agreement. The notices specified other alleged breaches of the contract not relevant here and advised Saba it was entitled to file a protest with the California New Motor Vehicle Board.

Vehicle Code section 3060 et seq. provides that, upon protest by a dealer, a dealership may not be terminated without the approval of the New Motor Vehicle Board. The statute specifies procedures for hearing and decision by the board. Pursuant to this statute, Saba filed a protest. An administrative law judge first heard the matter. After conducting a hearing, she issued a proposed decision sustaining the protest upon conditions. The public members of the board, after reviewing this proposed decision, issued a detailed, 23-page opinion concluding, inter alia, that Saba had violated each of the four cited contract provisions. The board also conducted a careful analysis of the facts in relation to Vehicle Code section 3061 that lists the factors which should be considered by the board in determining whether good cause existed for terminating the dealership, and concluded Kawasaki was permitted to terminate the dealership.

Saba then filed a petition for a writ of mandate in the superior court. The petition sought an order compelling the New Motor Vehicle Board to set aside its decision permitting Kawasaki to terminate the dealership. After considering the evidence, including evidence of events occurring after the board issued its decision, and applying an independent judgment standard, the court issued a peremptory writ of mandate directing the board to vacate its decision and to adopt the decision of the administrative law judge. The board complied with this order and this petition by Kawasaki followed.

The petition filed in the superior court named the New Motor Vehicle Board as respondent. The Attorney General appeared in that court on behalf of the board. When Kawasaki filed its petition in this court, it did not name the board as a party; nor did Kawasaki furnish us with a proof of service indicating that any of the documents filed here were served either on the board or on the Attorney General. We thereupon issued an order inviting the parties to file a letter brief advising this court whether the board should have been named and served; we ordered a copy of this order be sent to the board and to the Attorney General.

In response to this order, we received an informal reply from Kawasaki and from the Attorney General on behalf of the board. The Attorney General advised us the board had been served with the papers herein, did not intend to appear at the hearing, and would abide by the decision of this court. The board expressed its opinion on the

merits that the trial court should have applied a substantial evidence rather than an independent judgment standard.

Subsequently we issued an order making the New Motor Vehicle Board a real party in interest and determined the board had waived the right to file a formal answer or brief.

DISCUSSION

The Appropriate Standard of Review is the Substantial Evidence Test

Code of Civil Procedure section 1094.5 applies to the judicial review of administrative orders. Subdivision (c) of the statute provides two standards for such review. "[1] Where it is claimed that the findings are not supported by the evidence, *in cases in which the court is authorized by law to exercise its independent judgment on the evidence*, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. [2] In *all other cases*, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Italics added.)

The seminal California case concerning the scope of judicial review of the decisions of administrative bodies under the statute is *Bixby v. Pierno* (1971) 4 Cal.3d 130 (*Bixby*). *Bixby* established that the independent judgment test should only be applied to "administrative decisions which substantially affect vested, fundamental rights . . . ." (*Id*. at p. 143.) Kawasaki does not dispute Saba's right to operate the dealership was a vested right; we must therefore determine whether the right to operate a Kawasaki dealership is a fundamental right. *Bixby* stated, "In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." (*Bixby, supra,* 4 Cal.3d at p. 144.) These references to "human terms" and "the individual in the life situation" raise the question whether a corporation or a business entity such as is involved here can possess "fundamental rights" as that term is used in *Bixby*.

Bixby also notes the "slighter sensitivity to the preservation of purely economic privileges" (*Bixby, supra,* 4 Cal.3d at p. 145), and illustrates this by citing *Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 328-330 (owners of bridge authority bonds cannot prevent construction of a second toll crossing), *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 103 (water company did not have a fundamental right to divert water from a particular river), and *Beverly Hills Fed. S. & L. Assn. v. Superior Court* (1968) 259 Cal.App.2d 306, 316-317 (savings and loan associations have no right to be free from additional competition). Here we are dealing with Saba's attempt to preserve purely economic privileges.

Based on the considerations spelled out in *Bixby*, we conclude that Saba's privilege to operate a Kawasaki dealership is not a fundamental right. Saba's reliance on *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519 in arguing a contrary position is misplaced. *Goat Hill Tavern* involved a city's refusal to renew a conditional use permit. In contrast, we are dealing with regulatory interference with contractual rights; very different policies govern.

The parties have called our attention to a number of reported cases regarding decisions of the New Motor Vehicle Board which confirm our conclusion. All applied the substantial evidence test; neither the parties nor we were able to find a single case involving review of decisions of the board which applied the independent judgment test. *Champion Motorcycles, Inc. v. New Motor Vehicle Bd.* (1988) 200 Cal.App.3d 819 held that the trial court properly applied the substantial evidence test, rather than the independent judgment test, to sustain the board's denial of a protest by one dealer to the establishment of an additional dealership in its area. "The right affected . . . was purely economic. [¶][¶] [W]e conclude the trial court was correct in applying the substantial evidence test." (*Id*. at pp. 825-826.)

Automotive Management Group, Inc. v. New Motor Vehicle Bd. (1993) 20 Cal.App.4th 1002 dealt with the duty of the board, rather than the administrative law judge, to determine the timeliness of a protest of the termination of a dealership. In holding the board had such a duty the court discussed the standard of review and noted that under *Bixby,* the independent judgment standard only applies where the right involved is both vested and fundamental. (*Id*. at p. 1009.) The court stated: "No case has held that an automobile franchise is a fundamental vested right. Instead, '[i]t has been repeatedly held that the preservation of purely economic interests does not affect the fundamental vested rights. . . .' [Citation.]" (*Id*. at pp. 1009-1010.)

British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal.App.3d 81 involved a petition seeking to overturn the determination of the New Motor Vehicle Board that the distributor had terminated the dealer without good cause. The trial court, applying an independent judgment standard, reversed the decision. The Court of Appeal reversed and, in doing so, held that a substantial evidence standard should have been employed. Citing *American Isuzu Motors, Inc v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 474 and *Piano v. California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 422, the court noted prior cases which applied the substantial evidence test to review decisions of the New Motor Vehicle Board and stated, "we see no reason to depart from that precedent." *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd., supra,* 194 Cal.App.3d at p. 90.) Neither do we. The trial court applied the wrong standard of review.

Saba does not contend the decision of the New Motor Vehicle Board is not supported by substantial evidence, nor could it legitimately make such an argument. Therefore, there is no reason for us to direct the trial court to reexamine the issue under the appropriate standard.

The Issue is Not Moot

After the superior court entered its judgment directing the New Motor Vehicle Board "immediately upon receipt of this Writ, to accept and issue the Proposed Decision of [the] Administrative Law Judge . . . as the Final Decision [of the board]," the board complied. It issued a new decision in compliance with the judgment. Saba argues that this makes the appeal moot. Citing *City of Carmel-by-the-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, 970-971, Saba argues that the board waived its right of appeal. This argument is hardly worthy of a response. There are two real parties in interest. Although the board did not appeal, Kawasaki did; it filed the petition for extraordinary writ.

Saba suggested during oral argument that, rather than institute these proceedings, Kawasaki should have filed a new petition in the superior court attempting to invalidate the action the board took in complying with the order of that court. Had Kawasaki done so, it is inconceivable the trial court would have agreed that the board should not have complied with its own order. A far more likely result would have been that Kawasaki would have been sanctioned for initiating a frivolous proceeding. As we learned in our first year in law school, the law does not require the performance of idle acts. (Civ.Code, § 3532.)

Adequate Remedy at Law?

The judgment of the superior court is appealable. Generally the availability of an appeal constitutes an adequate remedy at law precluding writ relief. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366.) But there are exceptions to this rule. The alternative remedy must not only be "adequate," it must also be "plain" and "speedy." (Code Civ. Proc., §1086.) We issued the writ herein because of the absence of a speedy remedy by way of appeal.

Because of Saba's filing of the administrative protest and the writ petition in the superior court, Kawasaki has been forced to sell its products through an undesirable dealer for over two years. It would be intolerable to require them to continue this relationship for another two years or more, the time required to complete an appeal.

DISPOSITION

Let a writ of mandate issue directing the respondent superior court to vacate its peremptory writ of mandate dated January 29, 2000 and filed January 31, 2000, in Orange County Superior Court No. 813732, entitled *Saba A. Saba et al. vs. New Motor Vehicle Board, etc*. The respondent superior court shall further be directed to make a new and different order denying the petition for peremptory writ of mandate.

The respondent superior court shall further be directed to include in its order an order directing the New Motor Vehicle Board to vacate its order complying with the erroneously issued peremptory writ of mandate and to reinstate its previous order denying Saba's protest.

Upon this decision becoming final, Kawasaki's appeal from the decision of the trial court filed here and having been assigned case no. G027146 (*Saba A. Saba v. Kawasaki*) shall become moot, and Kawasaki is ordered to dismiss the appeal.

Kawasaki shall recover its costs.

RYLAARSDAM, J., SILLS, P. J. and O'LEARY, J. CONCUR

DUARTE & WITTING, INC., Plaintiff and Appellant, v. NEW MOTOR VEHICLE BOARD, Defendant and Respondent; DAIMLERCHRYLSER MOTORS CORPORATION, Real Party in Interest and Respondent. (2002) 104 Cal. App. 4th 626 [128 Cal. Rptr. 2d 501].

C040142
COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT
December 18, 2002, Filed

Law Offices of Michael M. Sieving, Michael M. Sieving and Michael E. Dingwell for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Jacob Appelsmith, Lead Supervising Deputy Attorney General, Vincent J. Scally, Jr., Supervising Deputy Attorney General, and Marybelle D. Archibald, Deputy Attorney General, for Defendant and Respondent.

Caulfield, Davies & Donahue and Robert E. Davies; Wheeler Trigg & Kennedy and Gwen J. Young; Wendy S. Mirkin-Fox for Real Party in Interest and Respondent.

Duarte & Witting, Inc., dba Nader Chrysler-Plymouth (Nader) appeals from the trial court's denial of its petition for a writ of administrative mandamus seeking to compel New Motor Vehicle Board (the Board) to hold an evidentiary hearing on the merits of a termination of Nader's Plymouth franchise by real party in interest DaimlerChrysler Motors Corporation (DaimlerChrysler), pursuant to Vehicle Code section 3050 et seq. (Undesignated statutory references are to the Vehicle Code.) The reason for the termination of the Plymouth franchise was DaimlerChrysler's discontinuation of the Plymouth line. The Board granted DaimlerChrysler's motion to dismiss Nader's protest to the termination, on the ground that the Board could not require DaimlerChrysler to continue producing Plymouths and lacked authority to grant any remedy where termination was due to discontinuation of the product rather than dissatisfaction with the dealer's performance. Nader contends the Board does not have statutory authority to grant a dismissal motion and must conduct an evidentiary hearing on statutorily-enumerated "good cause" factors for termination, e.g., whether Nader performed its obligations under the franchise agreement. We shall conclude the Board has implied authority to dismiss a protest where, as in this case, the undisputed facts show good cause for termination of a franchise. We shall therefore affirm the trial court's judgment denying the petition for writ of administrative mandamus.

FACTUAL AND PROCEDURAL BACKGROUND

At all relevant times, DaimlerChrysler was a manufacturer of several line-makes of new motor vehicles, including Chrysler, Plymouth, Dodge, and Jeep. Nader was a new motor vehicle dealer in Martinez which had franchise agreements with DaimlerChrysler, authorizing Nader to sell and service Chrysler and Plymouth vehicles.

DaimlerChrysler issued a news release in November 1999 announcing the intent to phase out the Plymouth brand at the end of the 2001 model year and to strengthen the Chrysler brand, while continuing to meet its warranty obligations on existing Plymouths.

On September 19, 2000, DaimlerChrysler sent written notice to "All Plymouth Dealers," including Nader, giving notice that DaimlerChrysler "will discontinue the Plymouth line make at the end of the 2001 model year," and its Plymouth franchise agreements would terminate effective September 30, 2001 (over a year after the date of the notice). DaimlerChrysler also sent notice to all its Plymouth dealers in California

advising the dealers they could protest to the Board under California law, though DaimlerChrysler further stated it "does not acknowledge that this provision applies to the discontinuation of the Plymouth line make and is not waiving any of its rights."[1]

We note there has been no attempt by DaimlerChrysler to terminate Nader's *Chrysler* franchise; only Nader's *Plymouth* franchise is at issue. Moreover, Nader does not dispute DaimlerChrysler's commitment to continue to meet its service obligations on existing Plymouths.

Nader filed a protest with the Board pursuant to sections 3060 and 3061 (which prohibit involuntary termination of a dealership without good cause), asking the Board to order DaimlerChrysler not to terminate Nader's Plymouth franchise or to replace it with an equally valuable franchise.

DaimlerChrysler filed a motion to dismiss the protest, asserting its contract with Nader allowed for termination upon discontinuation of the Plymouth line, the Board had no jurisdiction over a franchise termination caused by a manufacturer's discontinuation of an entire line-make of vehicle, or alternatively, such discontinuation constituted "good cause" for franchise termination as a matter of law.

Nader filed an opposition to the dismissal motion, arguing it was entitled to a hearing on the merits of whether there was "good cause" for termination of the franchise. Nader argued among other things that it incurred substantial cost to acquire the dealership in March 1998 and remodel it, and would not have done so had DaimlerChrysler communicated its "impending decision" to discontinue the Plymouth line. Nader also argued DaimlerChrysler was not really exiting the market but was repackaging its Plymouth vehicles under other brand names, to the disadvantage of dealers such as Nader which would be left with single-brand dealerships, and therefore Nader should be given a franchise for such other brands. Nader complained DaimlerChrysler issued a letter of intention to award a Jeep franchise to Nader to replace the loss of the Plymouth line, but when existing Jeep dealers in the same market area protested (as authorized by statute), DaimlerChrysler withdrew the offer rather than fight the protests on Nader's behalf (resulting in withdrawal of the competitors' protests). Nader argued that without a second brand, it would suffer an unfair competitive disadvantage in comparison to its multi-brand competitors. Nader asked the Board to order DaimlerChrysler to issue a Jeep franchise.

Following a hearing before an administrative law judge (ALJ), the ALJ in May 2001 prepared a "Proposed Ruling On Motion To Dismiss," in which the ALJ proposed dismissing Nader's protest for lack of jurisdiction, because the statutory scheme requiring good cause for termination was not intended to apply to terminations due to discontinuation of the product line, and the Board had no power to grant any relief to Nader.

After consideration of the ALJ's proposal, the Board rejected the proposed ruling and instead issued its own "Ruling On Motion To Dismiss," concluding the Board did have subject matter jurisdiction over the dispute, but lacked authority to grant any

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[1] Nader's appellate brief states in a footnote that the notice of termination did not comply with statutory requirements, but Nader admits the issue was not raised in the underlying proceeding, and Nader does not present it as a basis for reversal of the judgment.

remedy where the termination was due to discontinuation of the product line, and therefore the protest was dismissed. The Board could not order DaimlerChrysler to keep making Plymouths. The Board could not, in this termination proceeding, order DaimlerChrysler to give Nader a Jeep franchise, because that would implicate rights of third parties who were not parties to this proceeding, i.e., existing Jeep dealers in the area. To the extent Nader alleged DaimlerChrysler allowed Nader to spend money remodeling the dealership despite DaimlerChrysler's knowledge it would soon discontinue the Plymouth line, the Board had no authority to award damages, even assuming such allegations could be considered in a termination proceeding. The Board noted some of these allegations may give Nader grounds for relief in a civil lawsuit filed in court.

The Board's ruling also stated "There is no contention by [Nader] that the Plymouth line-make will not cease to exist." The Board acknowledged Nader's argument that it should get a Dodge or Jeep franchise because some Plymouth vehicles may be renamed Dodge or Jeep, but the Board said this proceeding could not be used to circumvent the rights of existing dealers to protest new franchises, nor was this proceeding the proper vehicle to seek such relief.

The Board concluded "even though the Board has subject matter jurisdiction over the protest, it has no authority to grant any remedy requested in the protest which would provide relief to [Nader], since it has no power to order the manufacturer to remain in business or to continue manufacturing any particular line-make, nor can it order the issuance of a new franchise in violation of the rights of third-parties, nor does it have the power to award damages."

The Board accordingly dismissed Nader's protest, but "without prejudice because it is possible for [Nader] to file a protest containing a request for relief within the Board's jurisdiction."

In June 2001, Nader filed in the trial court a petition for writ of administrative mandamus, asserting the Board's ruling was invalid because (1) the Board acted in excess of its jurisdiction by granting a motion to dismiss without specific statutory authority to grant a motion to dismiss; (2) the Board abused its discretion by failing to proceed in a manner required by law, in that it denied Nader a hearing on the merits of its protest; (3) the Board abused its discretion in that the ruling is unsupported by the findings, specifically, the Board found it had subject matter jurisdiction yet dismissed the protest; and (4) the Board abused its discretion by making inconsistent findings that it could not grant any relief, while dismissing the protest "without prejudice" because it was possible for Nader to file a protest requesting relief within the Board's jurisdiction. Nader asked the trial court to order the Board to hold an evidentiary hearing on the merits of Nader's protest.

Following a hearing, the trial court in November 2001 issued a judgment denying Nader's petition for writ of administrative mandamus.

DISCUSSION

I. Standard of Review

Because an automobile franchise is not a fundamental vested right, a trial court reviews a decision of the Board using the substantial evidence test. (*Automotive Management Group, Inc. v. New Motor Vehicle Bd*. (1993) 20 Cal.App.4th 1002, 1009-1010.) However, when the trial court bases its decision on undisputed facts, as in the

instant case, the conclusion is a question of law, which the appellate court reviews de novo. (*Foster v. Snyder* (1999) 76 Cal.App.4th 264, 267; *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 849.)

II. The Statutory Scheme

Section 3060 provides in part:

"(a) Notwithstanding Section 20999.1[2] of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:

"(1) The franchisee and the board have received written notice from the franchisor [as specified].

"[¶] . . . [¶]

"(2) Except as provided in Section 3050.7 [stipulated decisions], the board finds that there is good cause for termination or refusal to continue, following a hearing pursuant to Section 3066. The franchisee may file a protest with the board [within specified time periods]. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings. . . ."

Section 3066 provides in part that "[t]he board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. . . .

". . . In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to . . . terminate, or refuse to continue a franchise."

"Good cause" for termination is addressed in section 3061,[3] which lists various factors to be considered but expressly states the listed factors are not exclusive, and "the board shall take into consideration the existing circumstances."

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[2] Business and Professions Code section 20999.1 provides in part: "Notwithstanding the terms of any franchise [for the sale or distribution of fuel], no franchisor shall terminate, cancel, or fail to or refuse to renew any existing franchise without good cause.

"As used in this section good cause is limited to the following:

"(a) The gasoline dealer or petroleum distributor failed to comply with essential and reasonable requirements of the franchise agreement;

"(b) The gasoline dealer or petroleum distributor failed to act in good faith in carrying out the terms of the franchise; or

"(c) The franchisor is withdrawing from the marketing location at which the franchise of a gasoline dealer is located, provided that the franchisor pays the gasoline dealer the current wholesale market value for all qualifying equipment and supplies purchased by the gasoline dealer from the franchisor or affiliate of the franchisor. . . .

"(d) For other legitimate business reasons . . . ."

Where the matter is heard by a hearing officer, the hearing officer submits a proposed decision to the board. (§ 3067, subd. (b).) The board issues a written decision containing "findings of fact and a determination of the issues presented. The decision shall sustain, conditionally sustain, overrule, or conditionally overrule the protest." (§ 3067, subd. (a).)

"Either party may seek judicial review of final decisions of the board." (§ 3068.)

Additionally, notwithstanding the Board's power to hear and decide protests, "the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action directly in any court of competent jurisdiction." (§ 3050, subd. (e).)

III. Implied Authority to Dismiss Protest

As noted by Nader, the Board did not have *express* statutory authority to dismiss the protest. Section 3050 authorizes the Board to "[h]ear and decide" a protest. We note section 3067, subdivision (a), states the Board's decision "shall sustain, conditionally sustain, overrule, or conditionally overrule the protest." Section 3067 does not mention dismissal.

Nader contends that, since the Board does not have express statutory authority to grant a motion to dismiss a protest, its grant of the dismissal motion was an act done in excess of jurisdiction. Nader cites case law purportedly holding that, once an administrative action is filed, an administrative agency can grant summary disposition only if authorized by statute or if the statutes demonstrate a clear intent that summary disposition is authorized. However, Nader fails to show how the cited cases support its position. *Stewart v. County of San Mateo* (1966) 246 Cal.App.2d 273, said a county ordinance which expressly provided for a hearing *after* the sheriff revoked a private patrol operator's license, could not be construed as allowing a hearing *before* the sheriff

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[3] Section 3061 provides: "In determining whether good cause has been established for . . . terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

"(a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

"(b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

"(c) Permanency of the investment.

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

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

"(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

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

acted. (*Id*. at p. 284.) The ordinance thus allowed a "summary suspension" subject to later review. (*Id*. at p. 286.) The other case cited by Nader, *Hough v. McCarthy* (1960) 54 Cal.2d 273, found no due process problem with a statutorily-authorized "summary procedure" whereby the department of motor vehicles could suspend or revoke a driver's license without a hearing, upon the driver's conviction of drunk driving. Nader fails to explain how either of these cases stands for the proposition that an administrative agency can grant summary disposition only if authorized by statute. (*Id*. at p. 284.)

We shall conclude the Board did not act in excess of jurisdiction, because it had implied authority to dismiss the protest.

The Board is a quasi-judicial administrative agency of limited jurisdiction. (*Hardin Oldsmobile v. New Motor Vehicle Bd*. (1997) 52 Cal.App.4th 585, 590-591 [Board did not have jurisdiction over car dealer's claim that manufacturer accepted bribes in exchange for favors concerning vehicle allocation and new dealership awards].)

"Administrative agencies only have the power conferred upon them by statute and an act in excess of these powers is void. [Citations.] However, an agency's powers are not limited to those expressly granted in the legislation; rather, "[i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers.' [Citations.]" (*Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 114, cited with approval in *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824-825 [insurance commissioner had implied power to grant interim relief from plainly invalid rates].)

Rich Vision Centers, Inc., supra, 144 Cal.App.3d 110, said no statute expressly authorized the Board of Medical Examiners to settle licensing disputes with medical professionals, and the court therefore had to decide whether the ability to negotiate settlement of disputes may be implied from the overall statutory scheme, in light of the purpose of the agency. (*Id*. at p. 114.) The appellate court concluded that "[b]ecause settlement is administratively efficient" and furthered the purpose for which the Board was created, the Board had the implied power to settle licensing disputes. (*Id*. at p. 115.)

Similarly, in *Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, we rejected a dentist's attempt to set aside a disciplinary order which was based upon his assent to settlement of an accusation filed against him by the executive director of the Board of Dental Examiners. (*Id*. at p. 540.) We observed: "Although no statute expressly authorizes the settlement of a dispute that has given rise to a disciplinary accusation, the statutory scheme has been interpreted to give administrative agencies such as the Board 'the implied power to settle licensing disputes' and to incorporate the settlement into a formal Board decision. [Citation.] Provided they do not include conditions that violate public policy, settlements are administratively efficient, further the purpose for which the Board was created, and are consistent with the general policy of favoring compromises of contested rights. [Citation.]" (*Id*. at p. 544, citing *Rich Vision Centers, Inc., supra*, 144 Cal.App.3d 110.)

A dismissal by the New Motor Vehicle Board was upheld in *Automotive Management Group, Inc. v. New Motor Vehicle Bd., supra*, 20 Cal.App.4th 1002.

There, the manufacturer moved to dismiss a dealer's protest as untimely, and the dealer retorted the manufacturer should be estopped from invoking the time requirements. The ALJ held an evidentiary hearing on the dismissal motion. On appeal, the dealer argued the dismissal procedure was improper because there was no provision in the Administrative Procedure Act for a motion to dismiss. (*Id*. at pp. 1011, 1012.) The appellate court rejected the dealer's argument, stating:

"'A proceeding before an administrative officer or board is adequate if the basic requirements of *notice* and *opportunity for hearing* are met.' [Citation.] 'The sufficiency of the notice and hearing is determined by considering the purpose of the procedure, its effect on the rights asserted, and other circumstances.' [Citation.] Although [the dealer] argues that the Board should have accepted the petition for filing, and then adjudicated the merits of the timeliness issue, we believe that permitting the ALJ to hear the issue as a 'motion to dismiss' was fair. A hearing was held. [The dealer] was permitted to introduce evidence. Four witnesses testified. Twenty-two exhibits were introduced. Thus, it seems quite clear that [the dealer] was afforded an opportunity to be heard consistent with the requirements of due process.

"In addition, a motion to dismiss was utilized in *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.* [1987] 194 Cal.App.3d 81. In that case, Maserati terminated the British Motors franchise. Over one year later, British Motors protested the termination. Maserati then filed a motion to dismiss the protest on the grounds that it was untimely. The motion was denied by the board. [Citation.] Although *British Motor Car Distributors, Ltd., supra*, did not analyze the propriety of the motion to dismiss procedure, it is noteworthy that the procedure *was* employed in that case, and that its propriety was never questioned by the appellate court or the parties." (*Automotive Management Group, Inc., supra*, 20 Cal.App.4th 1002, 1012.)

Although the foregoing cases involved different kinds of dismissal which are not at issue in this case, we shall conclude the purpose of the Board and the goal of administrative efficiency support a conclusion that the Board has implied authority to dismiss a protest where the undisputed facts demonstrate good cause for franchise termination as a matter of law and afford no basis for preventing termination of the franchise. The procedure in this case was analogous to a summary judgment motion,[4] where the franchisor established good cause for termination as a matter of law, and the undisputed facts gave Nader no viable basis to prevent termination of the franchise. In this circumstance, there would be no point to conducting an evidentiary hearing on

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[4] The Board likens the procedure to a demurrer because the Board assumed the truth of Nader's allegations. However, this assumption by the Board is consistent with summary judgment, where the existence of *non*material disputes will not defeat summary judgment. The Board says that no good cause hearing was required in these circumstances. We believe it is more appropriate to view the dismissal motion as a summary proceeding in which good cause was established as a matter of law.

In its reply brief, Nader points to documents submitted to the trial court in a request for judicial notice, reflecting a legislative bill which would have implemented summary adjudication procedures for the Board "died" in committee. Nader develops no argument on this point, and it is without consequence to our construction of the existing statutory scheme.

issues of whether the dealer was performing its obligations under the franchise agreement. Such an evidentiary hearing would simply entail the wasteful expenditure of public funds.

The purpose of the Board is reflected in an uncodified provision of a 1973 legislative amendment to the statute creating the Board (§ 3000), which stated: "The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and that in order to promote the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." (Stats. 1973, ch. 996, § 1, p. 1964.)

Dismissal of a protest in the circumstances of this case furthers the goal of administrative efficiency and is consistent with the Board's purpose. Thus, where it is undisputed that a franchisor is discontinuing manufacture of the product and the franchise agreement allows for termination upon such discontinuation, good cause for termination of the franchise exists as a matter of law. The Board has no power to conclude otherwise, nor does the Board have the power to award damages or grant the other relief sought by Nader, such as award of a new Jeep franchise to compensate for termination of the Plymouth franchise. (*Hardin Oldsmobile v. New Motor Vehicle Bd., supra*, 52 Cal.App.4th 585, 595 [Board lacks statutory authority to award damages].) Although the Board may impose conditions on termination of a franchise, "[a]ny conditions imposed by the board shall be for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article." (§ 3067, subd. (a).) Nader does not demonstrate how this statute could apply to its case. In a footnote, Nader suggests the Board could have found a binding contractual agreement for DaimlerChrysler to award a new Jeep franchise to Nader, and could have "structur[ed] the condition in such a way that the establishment is conditioned upon unsuccessful protests of the competing dealers." However, it appears Nader is suggesting the Board could place a condition on the relief (the award of a new Jeep franchise), whereas the statute only allows the Board to place a condition on termination of the existing franchise (and therefore assumes the Board has the power to prevent termination of the existing franchise in the event the condition is not met). Nader also suggests in the same footnote that the Board could have conditioned termination upon DaimlerChrysler's continuing to provide warranty service for existing Plymouth customers. However, Nader did not seek such a condition in the administrative proceedings, nor has Nader disputed DaimlerChrysler's stated intent to continue performing its warranty obligations.

If Nader has claims for damages or other relief, it may pursue those claims in court under section 3050, subdivision (e),[5] but it cannot administratively halt the termination of the franchise.

Nader suggests implied authority to dismiss is inconsistent with the Board's regulations, in that Title 13, California Code of Regulations, section 598, provides: "(a) A document which purports to be a protest pursuant to . . . section 3060 or 3062 which is received at the offices of the Board shall not be filed until the Secretary has reviewed it for compliance with the Board's enabling statutes and Title 13, Subchapter 2 of the California Code of Regulations. If the Secretary deems the document to comply, said document shall be filed. The Secretary may reject any document that does not comply with the Board's enabling statutes and Title 13, Subchapter 2 of the California Code of Regulations. . . ." Nader argues that since his protest was filed and assigned a protest number, the Board was required to give him an evidentiary hearing on the factors listed in section 3066. We disagree. The cited regulation speaks only to the filing of a protest and not to its dismissal once filed.

We also disagree with DaimlerChrysler's view that this regulation supports the Board's action, because title 13, California Code of Regulations, section 598, subdivision (c), says "The Secretary may, for good cause shown, accept for filing any papers that do not comply with the Board's enabling statutes and Title 13, Subchapter 2 of the California Code of Regulations. Good cause issues and challenges to the Secretary's compliance determinations *may be resolved by law and motion proceedings* before a hearing officer." (Italics added.) This provision is similarly limited to acceptance of protests for filing; it does not address disposition of protests after they have been filed.

Though not cited by the parties, we note that in *Frost v. State Personnel Board* (1961) 190 Cal.App.2d 1 (*Frost*), we held that in a contested case before an administrative agency, motions in the nature of demurrers to evidence or motions for nonsuit, based on want of evidence to make a prima facie case, may not be entertained and passed on to agency boards, at least in proceedings where a hearing officer alone takes the evidence. In *Frost*, a state highway patrol employee complained of board action denying him a salary raise and downgrading his position. (*Id*. at p. 8.) After the employee presented his case to an ALJ, the ALJ submitted to the board a proposed decision to grant a defense dismissal motion on the ground that the employee failed to establish a right to relief by the weight of the evidence. (*Id*. at pp. 6-7.) The trial court issued a writ of mandamus requiring the board to hold further hearings and decide the case on the merits. (*Id*. at p. 2.) We affirmed, concluding the employee had made a prima facie showing in support of his claim, and therefore the procedural error in entertaining and granting the dismissal motion at the close of the employee's evidence was prejudicial. (*Id*. at p. 10.) With respect to the procedural error in entertaining and granting a dismissal motion in the nature of a nonsuit, we said "In view of the underlying

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[5] As indicated, section 3050, subdivision (e), provides that "[n]otwithstanding [the Board's power to hear and decide protests], the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action directly in any court of competent jurisdiction."

purpose of the code for administrative procedure which is the expeditious and fair handling of adversary cases before the agencies, in view of the lack of legal training on the part of boards generally, in view of the difficulty of convening boards for the special and limited purpose of passing on such motions, in view of the lack of any prescribed procedure by which such motions are to be reported by the hearing officer to the board, and in view of the probability that the entertainment of such motions would serve no time-saving purpose, but on the contrary would probably lead to a wasteful expenditure of time, it is our opinion that such motions may not be entertained and passed on to the agency boards, at least in proceedings where a hearing officer alone is taking the evidence." (*Id*. at p. 6.) We concluded "motions based upon want of evidence to make a prima facie case are not an authorized part of administrative procedure," but if such a motion is granted, the question will be whether the procedural error is prejudicial. (*Id*. at pp. 7-8.) "If it be true that as a matter of law the evidence of respondent did not entitle him to any relief , . . . then we ought not to set aside the order of dismissal . . . ." (*Id*. at p. 8.)

The hearing in *Frost* was subject to provisions of the Administrative Procedure Act. (*Frost, supra,* 190 Cal.App.2d 1, 4-5, citing Gov. Code, § 11517.) The hearing at issue in this case was subject to the same provisions. (§ 3066 [expressly stating that Government Code section 11517 and other provisions of the Administrative Procedure Act apply to protests to the New Motor Vehicle Board].) Government Code section 11517 continues to provide, as it did when *Frost* was decided, that if a contested case is heard by a hearing officer, the hearing officer shall prepare a proposed decision for the board, and the board itself shall not decide any case without affording the parties the opportunity to present oral or written argument before the board.

Nevertheless, the case now before us does not raise the same concerns as the proceedings in *Frost*. In *Frost*, the hearing officer weighed the evidence, whereas a trial court would not weigh the evidence in passing on a motion for nonsuit. (*Frost, supra,* 190 Cal.App.2d 1, 5, 7.) In the case before us, there was no weighing of evidence and no need to weigh any evidence, because it was undisputed that DaimlerChrysler was ceasing to manufacture vehicles with the Plymouth name.

Moreover, *Frost* said a dismissal would not warrant reversal if it was harmless. Here, any evidence concerning Nader's performance of its obligations under the franchise agreement or any of the other "good cause" factors in section 3061 (fn. 3, *ante*) would have been excluded as irrelevant. Thus, section 3066, subdivision (a), states protest hearings are subject to Government Code section 11513, which provides in subdivision (f): "The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." Here, the ALJ clearly understood that any evidence of the "good cause" factors in section 3061 would have been irrelevant in light of the manufacturer's discontinuation of the manufacture of the product.

We conclude the Board properly dismissed Nader's protest.

IV. Due Process

Additionally, the dismissal in this case did not violate Nader's due process rights.[6]

"'Under the California Constitution, the extent to which procedural due process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decisionmaking process. Specifically, determination of the dictates of due process generally requires consideration of four factors: the private interest that will be affected by the individual action; the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. [Citations.]'" (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390-391.)

Here, Nader was given full opportunity to challenge DaimlerChrysler's evidence that it was discontinuing the manufacture of Plymouths. Nader did not contend and did not submit any evidence that DaimlerChrysler will continue manufacturing Plymouths.

Nader contends it was entitled to a hearing on the merits of the "good cause" factors listed in section 3061 (fn. 3, *ante*), e.g., whether Nader performed its obligations under the franchise. However, section 3061 expressly states the listed factors are not exclusive, and "the board shall take into consideration the existing circumstances." Where a franchisor discontinues manufacture of the product, such circumstance is clearly good cause to terminate the franchise, rendering moot such issues as whether the franchisee has complied with its obligations.

We conclude the Board had implied authority to dismiss the protest and properly dismissed Nader's protest.

We recognize Nader has contended that DaimlerChrysler will repackage Plymouth vehicles under other brands, and that Nader is being put at a disadvantage by DaimlerChrysler's actions. However, while these contentions may afford a basis for judicial action under section 3050, subdivision (e)--a point on which we express no opinion--they do not constitute grounds for an administrative finding that there is no good cause for termination of the Plymouth franchise.

V. No Abuse of Discretion Re: Good Cause Factors

Nader contends the Board committed a prejudicial abuse of discretion by failing to proceed in a manner required by law, by refusing to conduct a hearing on the good cause factors listed in section 3061. We disagree.

Nader claims that, since section 3061 says the Board shall take into consideration the existing circumstances "including" the listed factors, the Board is required to take evidence on each of the listed factors. We disagree. The Board need

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6 Nader waived the due process matter by raising it for the first time in its reply brief, but we consider the matter because it was raised in DaimlerChrysler's respondent's brief.

not take evidence on irrelevant matters. Where a franchise is terminated because the manufacturer stops making the product, a dealer's proof that it has performed its obligations will not avoid termination. Nader claims in a footnote that the possibility the Board may consider discontinuation of the Plymouth line as a predominant factor justifying termination is "nothing more than speculation" because Nader was never permitted to present evidence as to the other good cause factors. However, Nader fails to meet its burden as appellant to show grounds for reversal; Nader fails to state what evidence it wanted to introduce which could possibly prevent DaimlerChrysler from terminating the Plymouth franchise in light of the undisputed discontinuation of the Plymouth line. Nader simply states the Board precluded the admission of any evidence as to whether an enforceable agreement existed, and precluded argument as to whether the decision could be conditioned upon compliance with such agreement.

Nader appears to think the Board could issue a decision sustaining Nader's protest to termination, without requiring DaimlerChrysler to continue manufacturing Plymouth vehicles. In Nader's view, DaimlerChrysler could still proceed with termination, though such termination would subject it to damages in a court action filed by Nader. Thus, Nader seeks to use the Board as a predicate fact-finder to make findings which Nader hopes to use in a subsequent court action, apparently on some breach of contract theory. However, the courts have jurisdiction over such claims, which may be initiated directly in court. (§ 3050, subd. (e).) Nader cites nothing authorizing it to use the Board in this manner.

Under a separate heading, Nader argues the Board committed a prejudicial abuse of discretion, in that the Board's ruling dismissing the protest was not supported by the Board's finding that it had subject matter jurisdiction. However, the finding of subject matter jurisdiction is not inconsistent with dismissal of the protest.

VI. No Inconsistent Findings

Nader contends the Board committed a prejudicial abuse of discretion by making inconsistent findings. We disagree.

Nader notes the Board's written ruling dismissed the protest "without prejudice" because "it is possible for [Nader] to file a protest containing a request for relief within the Board's jurisdiction." Nader says this "finding" is inconsistent with other findings in which the Board found (1) it had jurisdiction over the protest, (2) it could not grant the remedy of ordering the manufacturer to stay in business, (3) it could not order DaimlerChrysler to award a Jeep franchise to Nader, (4) it could not award damages on Nader's complaint that DaimlerChrysler stood silent while Nader spent money on remodeling, and (5) Nader could have a viable claim for damages for breach of contract in court.

Nader argues these findings effectively precluded Nader from filing a new protest. However, Nader fails to show how this claimed inconsistency provides any basis for reversal on appeal. We therefore need not address DaimlerChrysler's contention that Nader waived this issue.

DISPOSITION

The judgment is affirmed. The New Motor Vehicle Board and DaimlerChrysler shall recover their costs on appeal.

SIMS, Acting P.J., NICHOLSON, J., and RAYE, J., concurring

MAZDA MOTOR OF AMERICA, INC., Plaintiff and Respondent, v. CALIFORNIA NEW MOTOR VEHICLE BOARD, Defendant and Appellant; DAVID J. PHILLIPS BUICK-PONTIAC, INC., Real Party in Interest and Appellant. (2003) 110 Cal. App. 4th 1451 [2 Cal.Rptr.3d 866].
COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT
C039922
July 31, 2003, Filed

CERTIFIED FOR PUBLICATION

APPEAL from a judgment of the Superior Court of Sacramento County, Talmadge R. Jones, Judge. Affirmed.

Bill Lockyer, Attorney General, Jacob Appelsmith, Lead Supervising Deputy Attorney General, Vincent J. Scally, Jr., Supervising Deputy Attorney General, and Marybelle D. Archibald, Deputy Attorney General, for Defendant and Appellant California New Motor Vehicle Board.

Manning, Leaver, Bruder & Berberich, Robert D. Daniels and Christian J. Scali for Real Party in Interest and Appellant David J. Phillips Buick-Pontiac, Inc.

Peter K. Welch for amicus curiae for California Motor Car Dealers Association on behalf of Real Party in Interest and Appellant David J. Phillips Buick-Pontiac, Inc.

Alvarado, Smith & Sanchez, Maurice Sanchez and Michael P. Norton for Plaintiff and Respondent.

This case centers on a jurisdictional issue, namely, whether a dispute between plaintiff Mazda Motor of America, Inc. (Mazda), and one of its dealerships, real party in interest David J. Phillips Buick-Pontiac, Inc. (Phillips), should be resolved by the California New Motor Vehicle Board (the Board) or the courts. We agree with the trial court that this dispute is not within the limited jurisdictional scope of the Board and therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Mazda is a licensed motor vehicle distributor in California, and Phillips is a licensed Mazda dealer.

Phillips entered into an agreement to sell its Mazda dealership to a third party. The franchise agreement required “Mazda’s prior written consent, which shall not be unreasonably withheld,” to transfer ownership of the Phillips dealership. This contract provision parallels the statutory provisions of Vehicle Code section 11713.3, subdivisions (d)(1) and (e). (Further undesignated statutory references are to the Vehicle Code.)

Under both the franchise agreement and statutory provisions (§ 11713.3, subd. (d)(2)(A)), Phillips was required to give Mazda written notice of a transfer of the dealership. The statutory scheme makes it unlawful for a distributor to fail to notify the franchisee of approval or disapproval of the transfer within 60 days after receiving notice and application for approval of the transfer. (§ 11713.3, subd. (d)(2)(B).) If the

franchisee does not receive notice of disapproval within that time, the transfer is deemed approved. (*Ibid.*)

Phillips submitted an application to Mazda for approval of the transfer. Mazda disapproved the application, explaining why the transferee was not an acceptable dealer candidate to Mazda.

Controversy ensued. Phillips contended that Mazda's disapproval notice was beyond the 60-day period, and therefore the transfer had to be deemed accepted. Mazda countered that the application was incomplete until additional materials it requested had been received, which occurred less than 60 days before it sent the disapproval notice.

Phillips filed a petition with the Board pursuant to section 3050, subdivision (c). This statute is central to the issues in this appeal, and we therefore set out its provisions in full. The statute states that the Board shall "[c]onsider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 [of the Vehicle Code] submitted by any person. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide any matter considered by the board pursuant to this subdivision that involves a dispute between a franchisee and franchisor. After that consideration, the board may do any one or any combination of the following:

"(1) Direct the [Department of Motor Vehicles (DMV)] to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board within the time specified by the board.

"(2) Undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative.

"(3) Order the [DMV] to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative as that license is required under Chapter 4 (commencing with Section 11700) of Division 5."

In its petition to the Board, Phillips alleged that "[c]ertain controversies and differences of opinion have arisen between petitioner and respondent, primarily relating to a change in ownership of the shares of petitioner's corporate stock." Citing various statutory provisions, Phillips asserted four claims: (1) Mazda's disapproval of the transfer was given more than 60 days after receipt of the information, and therefore the transfer must be deemed approved as a matter of law; (2) consent to the transfer was unreasonably withheld because of the delay in notifying the parties of the need for additional information; (3) consent to the transfer was unreasonably withheld because it was based on a plan to terminate the franchise if its present principal sought to transfer his interest and cease to be the active dealer; and (4) Mazda's refusal to consent to the transfer was unreasonable under all of the circumstances.

In its prayer for relief, Phillips asked the Board to hold a hearing to adjudicate matters involving the unlawful activities of respondent, and to determine that (a) the sale

"ha[d] been deemed approved by Mazda by operation of law and that Mazda's refusal to recognize said automatic approval violates . . . section 11713.3"; (b) Mazda's refusal to consent to the transfer "[was] unreasonable as a matter of law due to Mazda's delay and thus violates . . . section 11713.3"; (c) Mazda's refusal to consent also "[was] unreasonable as a matter of law because it constitutes implementation" of an illegal plan to phase out the dealership if transferred "and thus violate[d] . . . sections 11713.2 and 11713.3"; and (d) Mazda's refusal further "[was] unreasonable under all the facts and circumstances, and thus violate[d] . . . section 11713.3."

The petition also sought attorney fees and costs.

Mazda filed a motion with the Board to strike the petition on the grounds that attorney fees and costs can be awarded only by a court. (See § 11726 [court may award damages, attorney fees, and injunctive relief].) Mazda also contended the Board should exercise its discretion not to hear the petition, arguing that the superior court had jurisdiction to determine Phillips's claims and was a better forum for this dispute. In a supplemental brief, Mazda contended the Board did not have jurisdiction under section 3050, subdivision (c) to resolve disputes between licensees, and cited this court's decision in *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585 (*Hardin)*.

Phillips amended its petition to eliminate its request for attorney fees and costs. In opposition to the motion to strike, Phillips contended, in part, that the Board and the courts have concurrent jurisdiction over the type of claims asserted in the petition, and therefore the Board was an appropriate forum.

The administrative law judge denied the motion to strike. The judge held, among other things, that *"Hardin* does not limit the Board's authority to hear Petitioner's claims with allegations based on . . . sections 11713.2 and 11713.3. Petitioner's claims are precisely the types of claims which this Board has particular knowledge and expertise to hear."

Mazda filed a petition for writ of mandate and prohibition in superior court, seeking to compel the Board to set aside its order denying the motion to strike and to grant the motion. After a hearing, the court, relying on *Hardin*, determined that "[t]here is no statutory authority permitting the Board to exercise jurisdiction over the matter at issue here: a petition filed by a dealer against a manufacturer/distributor asking the Board to rule that the latter improperly refused its consent to a transfer of ownership." The court granted the petition, issuing a writ of mandate ordering the Board to dismiss the petition and writ of prohibition requiring the Board to decline jurisdiction to hear and to decide the claims raised in the petition.

The Board and Phillips appeal from the ensuing judgment.

DISCUSSION

The trial court's decision to grant Phillips's petition turned on its conclusion that there was no statutory basis for the Board's jurisdiction over a transfer dispute between a distributor and dealer. We review de novo a decision based on the interpretation of the scope of a statute. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *Beverly v. Anderson* (1999) 76 Cal.App.4th 480, 483-484.)

The Board, Phillips, and amicus curiae California Motor Car Dealers Association contend that section 3050, subdivision (c) confers jurisdiction on the Board to consider Phillips's claims, which assert violations of sections 11713.2 and 11713.3 that arise

from a dispute between Mazda, a distributor, and Phillips, a dealer, over Mazda's refusal to consent to the transfer of a dealership. We disagree.

In determining legislative intent and a statute's purposes, we look first to the statutory language, giving significance to every word and phrase. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388.) When the language is clear, we look no further and enforce the statute according to its terms. (*Ibid*.)

Various provisions of section 3050 lead us to conclude that not every dealer-distributor dispute is within the province of the Board.

Section 3050, subdivision (a), which defines the Board's rulemaking authority, indicates that the Board does not have unlimited jurisdiction, by providing that the Board shall "[a]dopt rules and regulations . . . *governing those matters that are specifically committed to its jurisdiction.*" (Italics added.) (See *Miller v. Superior Court* (1996) 50 Cal.App.4th 1665, 1675.) As we reaffirmed in *Hardin*, "'[t]he Board is a quasi-judicial administrative agency of limited jurisdiction. [Citation.] It does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee.'" (*Hardin, supra,* 52 Cal.App.4th at pp. 590-591; *Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2 Cal.App.4th. 445, 455.) The Board's jurisdiction to preside over claims is limited by its statutory authorization. (*Hardin, supra,* 52 Cal.App.4th at pp. 597-598; *BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 994.) Where the Board's activities exceed its authorization, the Board violates the judicial powers clause of the California Constitution (Cal. Const., art. VI, § 1). (*Hardin, supra,* 52 Cal.App.4th at p. 598.)

In arguing that the Board has jurisdiction over this dispute, the Board and Phillips point to the broad introductory language of section 3050, subdivision (c), which provides that the Board shall "[c]onsider *any* matter concerning the activities or practices of *any* person applying for or holding a license as a new motor vehicle dealer, . . . [or] distributor . . . submitted by *any* person." (Italics added.)

However, in *Hardin*, we determined that this language does not define the Board's jurisdictional scope. We concluded instead that the Board's jurisdiction was limited and that the subsequent subparagraphs of section 3050, subdivision (c), which set forth the scope of the Board's authority, best indicated the limited jurisdiction conferred by section o3050, subdivision (c). "Broadly defined, the phrase '[c]onsider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle . . . manufacturer [or distributor] submitted by any person' (Veh. Code, § 3050, subd. (c)), would include consideration of criminal actions and labor disputes. No one, including, most importantly, the Legislature that wrote it, would argue those matters fall under the jurisdiction of the Board; hence, the meaning of the phrase is limited. The best indication of the scope of the limitation is found in the remainder of the subdivision, in which the Board is given authority to investigate the activities, resolve any honest differences of opinion or viewpoint with members of the public, and order the Department of Motor Vehicles to exercise its licensing authority over a malefactor." (*Hardin, supra,* 52 Cal.App.4th at p. 590.)

As we noted in *Hardin*, the authority described in section 3050, subdivision (c) was granted when the Board was formed in 1967. (*Hardin, supra,* 52 Cal.App.4th at p. 590.) The Board's function was regulation and discipline of licensees, in the manner of other occupational licensing boards. (See *University Ford Chrysler-Plymouth, Inc. v.*

New Motor Vehicle Bd. (1986) 179 Cal.App.3d 796, 800 (*University Ford*); *American Motor Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986.) The Board was intended as an industry response to problems with the practices of its members (*Toyota of Viasalia, Inc. v. Department of Motor Vehicles* (1984) 155 Cal.App.3d 315, 322-323, disapproved on another ground in *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 53-54, fn. 3), and its authority under section 3050, subdivision (c) therefore focused on investigation and discipline of licensees and dispute resolution with members of the public, not adjudication of disputes between licensees.

Comprehensive amendments to the Vehicle Code gave the Board the power to adjudicate certain dealer-distributor disputes. Specifically, in 1973, the Legislature "empowered the Board to resolve disputes involving '(1) whether there is "good cause" to terminate or to refuse to continue a franchise [citation]; (2) whether there is "good cause" not to establish or relocate a motor vehicle dealership in a "relevant market area" [citation]; (3) delivery and preparation obligations [citation]; and (4) warranty reimbursement[citation].' [Citation.] Thus, the Board no longer only sat in 'judgment upon new car dealers in such matters as eligibility and qualifications for a license, regulation of practices, discipline for rule violations, and the like. [The additional statutes gave the Board] the added power to intrude upon the contractual rights and obligations of dealers and their product suppliers, entities whose respective economic interests are in no way identical or coextensive, frequently not even harmonious." (*Tovas v. American Honda Motor Co.* (1997) 57 Cal.App.4th 506, 512-513.)

To accomplish these goals, the legislation added subdivision (d) to section 3050, which gave the Board the power to hear and decide these specific dealer protests,. (Stats. 1973, ch. 996, § 14, subd. (d), p. 1967.) Sections 11713.2 and 11713.3, specifying unlawful acts by manufacturers and distributors, became part of the code in the same legislation. (Stats. 1973, §§ 29-30, pp. 1976-1977 [these sections were enacted as §§ 11713.1 and 11713.2, respectively].)

As we pointed out in *Hardin*, these amendments highlight the limited jurisdiction of the Board under its original enabling legislation. "If the Board already had plenary authority in all matters pursuant to the enabling legislation in 1967, including the authority to consider any matter and resolve disputes between franchisors and franchisees, it would not have been necessary for the Legislature to give the Board jurisdiction, in 1973, over franchise disputes." (*Hardin, supra,* 52 Cal.App.4th at p. 590.)

In addition to the types of franchisor-franchisee disputes that may come before the Board under section 3050, subdivision (d), other types of disputes between franchisors and franchisees may fall within the jurisdiction of the Board under section 3050, subdivision (c). For example, a violation of section 11713.2 or 11713.3 may be grounds for discipline, e.g., suspension or revocation of a license. This power is alluded to in the introductory language of section 3050, subdivision (c), which states that the Board may consider matters concerning the activities or practices of licensees "pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person." Subdivision (c)(3) of the statute directly authorizes such action by providing that the Board may order DMV to take disciplinary action against "the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative as that license is required under Chapter 4 (commencing with Section

11700) of Division 5." (See also § 11705, subd. (a)(10) [violations of sections 11713.2 and 11713.3 may be grounds for discipline].)

The recusal provision of section 3050, subdivision (c) recognizes that the Board may in addition consider some dealer-distributor disputes. The subdivision prohibits dealer members on the Board from participating in "any matter considered by the board pursuant to this subdivision that involves a dispute between a franchisee and franchisor." If the Board cannot consider a matter involving a dispute between a franchisee and a franchisor under section 3050, subdivision (c), the recusal provision is meaningless. We reject interpretations that render particular terms of a statute mere surplusage or devoid of meaning. (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55.)

However, the statutory authorization in section 3050, subdivision (c) does not extend to *all* disputes between dealers and manufacturers. As we determined in *Hardin,* the scope of the Board's jurisdiction over such disputes is limited by the regulatory and disciplinary actions it may take, described in the numbered subparagraphs of section 3050, subdivision (c). *(Hardin, supra,* 57 Cal.App.4th at p. 590.) It is conceivable that a dispute between a franchisee and franchisor over transfer of a dealership could give rise to a petition that asserts violations of sections 11713.2 and 11713.3 and calls for an investigation or disciplinary action of the distributor pursuant to section 3050, subdivisions (c)(1) and (3). Such a petition would be within the Board's section 3050, subdivision (c), jurisdiction, as outlined in *Hardin.*

But that is not the posture of the case before us. Phillips did not request that the Board order DMV to investigate the matter or direct DMV to discipline Mazda by suspending or revoking its license. Instead, it sought an adjudication that the franchise was deemed approved and that Mazda's refusal to recognize or consent to the transfer violated sections 11713.2 and 11713.3. Phillips, in essence, petitioned the Board to effectuate the transfer by ordering it approved and finding Mazda's failure to consent to it unlawful. The relief Phillips requested had everything to do with vindicating Phillips and accomplishing the sale of the dealership but nothing to do with licensee discipline. The petition therefore was not within the grant of authority to the Board under section 3050, subdivision (c).

The only subsection of section 3050 that gives the Board the authority to adjudicate disputes is subdivision (c)(2), which allows the Board to "[u]ndertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative." Citing *Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Bd.* (1992) 10 Cal.App.4th 51 (*Ray Fladeboe)*, Phillips argues that it is a "member of the public" and therefore this provision is applicable to its dispute with Mazda.

In *Ray Fladeboe*, the court accepted a similar contention without any analysis of the statutory language. (*Ray Fladeboe, supra,* 10 Cal.App.4th at pp. 54-56.) However, we rejected this interpretation in *Hardin,* stating that "[T]he legal authorization to resolve 'any honest difference of opinion or viewpoint' relates to differences of opinion or viewpoint the licensee has with a 'member of the public.' [Citation.] Again, this circumscribing language reveals a legislative intent to limit the ambit of honest differences of opinion or viewpoint over which the Board may preside. When referring

to licensees, section 3050 specifically so states and exhaustively lists those licensees ('applicant for, or holder of, a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative'). The legislative authorization in section 3050 to resolve differences of viewpoint, however, does not say it extends to traditional litigation between licensees; it limits the authorization to differences of opinion or viewpoint between a licensee and a member of the public." (*Hardin, supra,* 52 Cal.App.4th at p. 591.)

The Board and amicus attempt to avoid a head-on collision with *Hardin*. They suggest that because the alleged violations of sections 11713.2 and 11713.3 could lead the Board to order the DMV to conduct an investigation or take disciplinary action pursuant to section 3050, subdivisions (c)(1) and (3), the Board had jurisdiction to consider the petition and determine whether to take these courses of action. In other words, regardless of whether the petition requested the Board to do something other than take disciplinary action, the Board has jurisdiction to consider the petition and take such action.

We cannot agree. As we have explained, the essence of the petition was an effort to effectuate transfer of the dealership by Board adjudication. Beyond the fact that Phillips alleged violations of sections 11713.2 and 11713.3, the petition had nothing to do with investigation or discipline of licensees. Under *Hardin*, the Board's jurisdiction under section 3050, subdivision (c) is not determined solely by whether or not the petitioner has asserted violations of statutes referenced in the subdivision but also depends on the nature of the petition, that is, whether it seeks adjudication or discipline. Here, Phillips understandably had no interest in the suspension or revocation of its supplier's license, and did not seek that relief.

Contrary to the Board's suggestion, the relief requested was not the result of "inartful pleading." In conformance with regulations promulgated by the Board, the petition requested in clear terms that the Board resolve a dispute pursuant to section 3050, subdivision (c)(2). California Code of Regulations, title 13, section 554, provides that "[a]ny person, including a board member, concerned with activities or practices" of any licensee "may file a written petition with the board requesting that the board consider such matter and take action thereon." The petition is required to recite, among other things, "[i]f the petitioner desires that the board mediate, arbitrate or resolve a difference between the petitioner and respondent . . . [and to] describe the relief or disposition of the matter which petitioner would consider acceptable." (Cal. Code Regs., tit. 13, § 555, subd. (d).)

Phillips's petition made such a recitation. It named Mazda as respondent and alleged that "[c]ertain controversies and differences of opinion have arisen between petitioner and respondent, primarily relating to a change in ownership of the shares of petitioner's corporate stock." Phillips requested the Board to "adjudicate" the matter, that is, resolve the difference between Phillips and Mazda, and award the relief Phillips considered acceptable, a determination that the transfer was automatically approved and Mazda's failure to recognize or consent to the transfer was unlawful.

Nothing in the petition indicated that Phillips sought disciplinary action against Mazda. Instead, by its own terms, the petition invoked only the jurisdiction afforded the Board to resolve differences under section 3050, subdivision (c)(2). But, as we have explained, that section does not extend the Board's jurisdiction to disputes involving a

dealer and distributor. The statute authorizes the Board to resolve only disputes that involve members of the public.

Phillips petitioned the Board to consider a dealer-distributor dispute that was not within its jurisdiction. The trial court therefore properly issued a writ ordering the Board to dismiss the petition and to decline to entertain the claims raised in it.

In light of our disposition of this case, we need not reach Mazda's contention that section 11726 mandates that the claims raised in Phillips's petition be directed exclusively to the superior court. Additionally, we deny Mazda's request for judicial notice of a ruling by the Board in another matter. (Evid. Code, § 459.)

DISPOSITION

The judgment is affirmed. Mazda shall recover its costs on appeal.

HULL, J., BLEASE, Acting P.J, and RAYE, J., concurring