

1 NEW MOTOR VEHICLE BOARD  
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA  
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Appeal of )  
12 CHRYSLER MOTORS CORPORATION, A )  
13 MANUFACTURER, dba CHRYSLER MOTORS )  
CORPORATION, )  
14 Appellant, )  
15 vs. )  
16 DEPARTMENT OF MOTOR VEHICLES, )  
17 Respondent. )

Appeal No. A-133-96

ORDER REVERSING THE DECISION  
OF THE DEPARTMENT OF MOTOR  
VEHICLES AND REMANDING THE  
MATTER TO TAKE ADDITIONAL  
EVIDENCE AND RECONSIDER ITS  
DECISION IN LIGHT OF THIS  
ORDER

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PROCEDURAL BACKGROUND

1. On August 17, 1994 the Department of Motor Vehicles ("Department" or "DMV") filed Accusation Case No. M-605 against Chrysler Motors Corporation ("Chrysler") for alleged violations of the California Vehicle Code<sup>1</sup> and California Civil Code.

2. These alleged violations pertain to the advertisement, sale, and delivery of 119 motor vehicles to purchasers in the State of California. The subject vehicles had been reacquired by Chrysler from the original retail buyers allegedly for nonconformities which would qualify each as a "lemon" under California's "Lemon Law," Civil Code sections 1793.2 and 1793.22.

3. A nine (9) day hearing on the merits was held before Keith A. Levy, Administrative Law Judge, Office of Administrative Hearings, commencing on February 28, 1995 and ending on March 10, 1995.

4. Evidence was received and the record was held open for submission of closing briefs. The record was closed and the matter was

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<sup>1</sup>All references herein are to the California Vehicle Code unless otherwise noted.

1 submitted on September 15, 1995. Following unsuccessful settlement  
2 negotiations, a Proposed Decision was prepared and submitted for  
3 adoption by the Director of the Department on April 29, 1996.

4 5. On May 30, 1996 the Acting Director of the Department issued  
5 an Order Remanding the Proposed Decision for the purpose of taking  
6 additional evidence on the issue of the economic impact of the proposed  
7 penalty on the consumer public, local government entities, and  
8 California dealers. The Order further directed the Administrative Law  
9 Judge to consider other remedial action including:

- 10 1. Modification of the proposed length of  
11 suspension;
- 12 2. Prohibit[ion of] the resale of any  
13 repurchased vehicle by the manufacturer for a  
14 reasonable period of time;
- 15 3. Establishment of periodic monitoring  
16 requirements (to monitor the activity which  
17 allegedly caused harm to consumers);
- 18 4. Extended restriction on the use of dealer  
19 plates beyond the term of suspension; and
- 20 5. Any other additional terms and conditions to  
21 ensure compliance with the lemon law  
22 statutes.

23 6. At the pre-hearing on remand, the Administrative Law Judge  
24 instructed the parties that the issue to be considered on remand was  
25 specific to the imposition of the penalty. The Administrative Law  
26 Judge requested that the parties brief the issue of whether the  
27 Administrative Law Judge had the authority to consider evidence of  
28 economic impact, particularly as it relates to non-parties and whether

1 the Administrative Law Judge had the authority to issue an order which  
2 set up an option where Chrysler could avoid the suspension by making  
3 monetary payments in lieu of suspension. The Administrative Law Judge  
4 requested that the parties limit the number of witnesses who would be  
5 testifying at the remand hearing.

6 7. On August 27 and August 28, 1996 the remand hearing was held.  
7 On September 27, 1996 the Administrative Law Judge issued a Proposed  
8 Decision Upon Remand which addressed the issue of economic impact of  
9 the suspension on third parties. The Administrative Law Judge found  
10 that the evidence produced at the Remand Hearing did not support  
11 modification of the 60-day suspension imposed in the original Proposed  
12 Decision.

13 8. On October 16, 1996 the Director of the Department adopted  
14 the Proposed Decision Upon Remand of the Administrative Law Judge,  
15 except Determination of Issues XI, and the Order, and substituted the  
16 following therefore:

17 DETERMINATION OF ISSUES

18 1. Determination of Issues XI, paragraph 7, at pages  
19 53-54, is stricken in its entirety.

20 ORDER

21 The manufacturer's license and special plates no. MFG-  
22 004, heretofore issued to Chrysler Motors Corporation  
23 (hereinafter "Chrysler"), are hereby revoked. However, the  
24 revocation is stayed and Chrysler is placed on probation for  
25 three (3) years on the following terms and conditions:

26 1. The manufacturer's license and special plates no.  
27 MFG-004, heretofore issued to Chrysler, are  
28 suspended for forty-five (45) days. During the

1 period of actual license suspension, Chrysler is  
2 prohibited from shipping new or used vehicles into  
3 the State of California, and from selling,  
4 delivering, or otherwise supplying new or used  
5 vehicles to California dealers. The use by  
6 Chrysler of its manufacturer's special plates for  
7 any purpose is prohibited during the period of  
8 suspension only. However, during the [three (3)  
9 year] period of the suspension, warranty  
10 inspections and work may be performed by Chrysler  
11 or its authorized representatives, and parts for  
12 new or used vehicles may be shipped into the  
13 state, sold to dealers, and supplied to dealers by  
14 Chrysler or its authorized representatives.

15 2. Chrysler is prohibited from the resale in the  
16 State of California of any vehicles repurchased by  
17 the manufacturer or its dealers, whether the  
18 dealers are acting on behalf of the manufacturer  
19 or independently, which vehicles would qualify as  
20 lemon law buybacks or good-will repurchases  
21 (including trade-assisted repurchases), whether  
22 repurchased within or outside the State of  
23 California, during the period of probation. The  
24 Department retains authority under Vehicle Code  
25 section 8800 to suspend, cancel, or revoke the  
26 registration of any such vehicle when the  
27 Department is satisfied that the registration was  
28 fraudulently obtained or erroneously issued in

1 violation of the Order.

2 3. All repurchases of vehicles in the State of  
3 California by the manufacturer or any of its  
4 dealers acting on behalf of the manufacturer,  
5 including, but not limited to, prior daily rental  
6 vehicles, former company vehicles, transit-damaged  
7 vehicles, vehicles which would qualify as lemon  
8 law buybacks or good-will repurchases (including  
9 trade-assisted repurchases), shall be reported to  
10 the Department of Motor Vehicles on a quarterly  
11 basis, during the period of probation. Said  
12 quarterly reports shall be in the format  
13 prescribed by the Department and shall be directed  
14 to the attention of Roger Kramer, Assistant  
15 Director, Department of Motor Vehicles, Office of  
16 Investigations and Audits (N-215), P.O. Box  
17 825389, Sacramento, CA 94232-3890. The Department  
18 may require reasonable additional information to  
19 be submitted. Inadequate reports that are cured  
20 by the prompt and timely submission of required  
21 reasonable additional information shall not be  
22 considered a violation of probation.

23 4. Chrysler shall obey all laws of the United States,  
24 the State of California, or its subdivisions, and  
25 the rules and regulations of the Department of  
26 Motor Vehicles now or hereinafter in effect.

27 5. Should the Director of Motor Vehicles at any time  
28 during the existence of this probationary period

1 determine upon satisfactory evidence that Chrysler  
2 violated any of the terms and conditions of  
3 probation, the Director may, after notice and  
4 hearing, revoke or suspend Chrysler's license.

5 ISSUES PRESENTED

6 9. Section 3054 provides that the New Motor Vehicle Board  
7 ("Board") has the power to reverse or amend a decision of the  
8 Department of Motor Vehicles ("DMV" or "Department") if it determines  
9 that any of the conditions enumerated in subsections (a) through (f) of  
10 Section 3054 exist.

11 10. The Board may exercise the power granted pursuant to section  
12 3054 if it determines any of the following:

- 13 (a) The department has proceeded without or in  
14 excess of its jurisdiction.
- 15 (b) The department has proceeded in a manner  
16 contrary to the law.
- 17 (c) The decision is not supported by the  
18 findings.
- 19 (d) The decision is not supported by the weight  
20 of the evidence in the light of the whole  
21 record reviewed in its entirety, including  
22 any and all relevant evidence adduced at any  
23 hearing of the Board.
- 24 (e) There is relevant evidence, which in the  
25 exercise of reasonable diligence, could not  
26 have been produced or was improperly excluded  
27 at the hearing.
- 28 (f) The determination or penalty, as provided in

1 the decision of the department is not  
2 commensurate with the findings.

3 **FINDINGS OF FACT<sup>2</sup>**

4 a. Facts relating to whether the department has proceeded  
5 without or in excess of its jurisdiction.  
6 3054(a)

7 11. The Board makes no determination at this time as to whether  
8 the Department has proceeded without or in excess of its jurisdiction.

9 b. Facts relating to whether the department has proceeded in a  
10 manner contrary to the law.  
11 3054(b)

12 12. The Board makes no determination at this time as to whether  
13 the Department has proceeded in a manner contrary to the law.

14 c. Facts relating to whether the decision is not supported by  
15 the findings.  
16 3054(c)

17 13. In the Decision of the Department, a determination was made  
18 that cause for discipline of Chrysler's license and special plates for  
19 violation of sections 11713(a), 11705(a)(10) and (14), and 11705.4 was  
20 established by Findings of Fact III and XXIII. Finding of Fact III  
21 references the statutory language required for disclosures and the  
22 requirement that the manufacturer shall provide a written warranty to  
23 the buyer that the vehicle will be free for one (1) year from the  
24 nonconformity which caused the vehicle to be reacquired. Finding of  
25 Fact XXIII indicates that Chrysler failed to include the statutory  
26 language in its Disclosure Notices and failed to provide a fully  
27 detailed description of nonconformities identified in Chrysler's  
28 business records.

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<sup>2</sup>Findings of fact are grouped in the most logical category and have been considered for each of the conditions enumerated in section 3054.

1           14. Under Civil Code section 1793.22(f)(1)<sup>3</sup> the nature of the  
2 nonconformity experienced by the original buyer must be clearly and  
3 conspicuously disclosed to a prospective buyer, lessee, or transferee.  
4 Further, the prospective buyer, lessee, or transferee, must be notified  
5 that the nonconformity has been corrected and the manufacturer must  
6 warrant in writing that the vehicle will be free for one (1) year from  
7 the defect experienced by the original buyer.

8           15. When Chrysler repurchased defective vehicles, the necessary  
9 repairs were performed and a determination was made as to whether the  
10 vehicle could be resold, or whether it should be disposed of. If the  
11 vehicles were resold as used vehicles, they were sold only to  
12 authorized Chrysler dealers at closed dealer auctions. Each vehicle  
13 was accompanied by a package that included the Disclosure Notice, work  
14 repair orders, a warranty information booklet, the warranty  
15 registration card, and the dealer instruction booklet.

16           16. The current language of Civil Code section 1793.22(f)(1)  
17 requires only that a vehicle may not be sold or transferred unless the  
18 nature of the nonconformity is clearly and conspicuously disclosed, the  
19 nonconformity is corrected, and the manufacturer warrants in writing  
20 that the vehicle will be free of that nonconformity for a period of one  
21 (1) year. No evidence was presented that the intent of the Legislature  
22 in drafting this section was other than that. The one (1) year bumper-  
23 to-bumper unlimited mileage warranties provided by Chrysler necessarily  
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25           <sup>3</sup> Findings of Fact IV, VI, VII, VIII, X, XI, XIII, XV, XVI, and  
26 XVII may not support the Decision. The Administrative Law Judge  
27 determined that Chrysler failed to comply with the requirements of Civil  
28 Code section 1793.22, which was not enacted until 1993 (see 1992 ch.  
1232 § 7), after the conduct at issue here. In light of the Board's  
Order, however, it is unnecessary to determine what law governed  
Chrysler's conduct in 1990 through 1994.

1 included the nonconforming part(s).

2 17. There are a number of other inconsistencies with the Findings  
3 of Fact as they relate to the ultimate decision of the Director.  
4 However, in light of the Board's Order, it is unnecessary to address  
5 each of these.

6 d. Facts relating to whether the decision is not supported by  
7 the weight of the evidence in the light of the whole record  
8 reviewed in its entirety, including any and all relevant  
9 evidence adduced at any hearing of the Board.  
10 3054(d)

11 18. The Song-Beverly Consumer Warranty Act ("Song-Beverly"),  
12 Civil Code section 1790 et seq., enacted in 1970, is applicable to  
13 manufacturers or sellers who offer warranties in conjunction with a  
14 sale of consumer goods. The original Act was enlarged in 1982 with the  
15 addition of the "Lemon Law."

16 19. Pursuant to Civil Code section 1793.2(d) a manufacturer is  
17 obligated to replace the vehicle or reimburse the buyer if the  
18 manufacturer is unable to service the goods or conform them to the  
19 applicable express warranty after a reasonable number of repair  
20 attempts. Subdivision (e) established a standard for reasonableness  
21 with respect to new motor vehicles.

22 20. Subdivision (e) was deleted in 1992, and incorporated into  
23 the "Tanner Consumer Protection Act." (Civil Code section 1793.22)  
24 This Act, not effective until January 1, 1993, established the  
25 statutory presumption that a reasonable number of repair attempts have  
26 been made if within one (1) year from delivery, or 12,000 miles,  
27 whichever occurs first, either the same nonconformity has been subject  
28 to repairs four (4) or more times by the manufacturer or its agents and  
the buyer has notified the manufacturer of the need for repair of the  
nonconformity, or the vehicle is out of service by reason of repair of

1 nonconformities by the manufacturer or its agents for a cumulative  
2 total of more than 30 calendar days since delivery of the vehicle to  
3 the buyer.

4 21. This presumption may not be asserted if a qualified third  
5 party dispute resolution process exists, until after a consumer has  
6 resorted to that process.

7 22. The Automotive Consumer Notification Act, Civil Code section  
8 1793.23 *et seq.*, was added in 1989 for the purpose of identifying used,  
9 unrepairable vehicles repurchased by a dealer or manufacturer. The law  
10 placed the primary responsibility of disclosure of defects on the  
11 manufacturer to ensure subsequent purchasers have been given sufficient  
12 information about a vehicle's history prior to entering into a contract  
13 for sale. The completion of a disclosure notice (a copy of which is  
14 forwarded to the Department by the selling dealership, along with the  
15 applicable titling documents) put DMV on notice to brand the title of a  
16 particular vehicle by identifying that the vehicle had been replaced or  
17 repurchased due to a defect pursuant to consumer warranty laws.

18 23. Thus, under the current Civil Code section 1793.22(f)(1) the  
19 nature of the nonconformity experienced by the original buyer must be  
20 clearly and conspicuously disclosed to the prospective buyer, lessee,  
21 or transferee. Further, the prospective buyer, lessee, or transferee,  
22 must be notified that the nonconformity has been corrected and the  
23 manufacturer must warrant that the vehicle will be free for one (1)  
24 year from the defect experienced by the original buyer.

25 24. When Chrysler repurchased a defective vehicle, the necessary  
26 repairs were performed and a determination was made as to whether the  
27 vehicle could be resold, or whether it should be disposed of. If the  
28 vehicles were resold as used vehicles, they were sold only to

1 authorized Chrysler dealers at closed dealer auctions.

2 25. Each vehicle was accompanied by a package that included the  
3 Disclosure Notice, work repair orders, a warranty information booklet,  
4 the warranty registration card, and the dealer instruction booklet.  
5 For every vehicle which was included in the Accusation, Chrysler, in  
6 conformance with the provisions of Civil Code section 1793.22(f)(1),  
7 provided a completed Disclosure Notice.

8 26. Civil Code section 1793.22(f)(1) provides that a manufacturer  
9 must warrant to the new buyer, lessee, or transferee, in writing for a  
10 period of one (1) year that the motor vehicle will be free of the  
11 nonconformity experienced by the original buyer. Chrysler offered a  
12 free one (1) year bumper-to-bumper unlimited mileage warranty with  
13 every resold vehicle which warranted that the vehicle would be free of  
14 any nonconformity. Chrysler's current customer relations manager  
15 verified that 96 of the 119 supplemental one (1) year bumper-to-bumper  
16 warranties offered by Chrysler for vehicles which were the subject of  
17 the Accusation had been activated.

18 27. During the period relevant to the Accusation, Civil Code  
19 section 1793.25 provided for reimbursement to manufacturers of new  
20 motor vehicles amounts equal to sales tax which the manufacturer  
21 included in making restitution to a buyer pursuant to subparagraph (B)  
22 of paragraph (2) of Civil Code section 1793.2.

23 28. Initially, the Board of Equalization ("BOE") informed the  
24 industry that reimbursement was authorized when vehicles were  
25 repurchased as a result of a qualified third-party arbitration process.  
26 This interpretation was broadened in 1988 (see Administrative Hearing  
27 Exhibit 14, BOE Operations Memo 907 dated January 8, 1988) to include  
28 vehicles repurchased pursuant to legal settlements as well.

1 29. Internal memoranda between BOE's Deputy Director of Sales and  
2 Use Tax and BOE's Principal Tax Auditor reflect the adoption of a  
3 "liberal" interpretation of the statute with respect to reimbursement  
4 of sales tax. When faced with the fact that reimbursements were being  
5 allowed in situations arising from repurchases due to customer  
6 relations versus strictly interpreted "Lemon Law" situations, BOE  
7 believed the demarcation of a "bright line" between the two situations  
8 was difficult to establish. Thus, BOE decided to continue its policy  
9 of reimbursement without regard to whether the repurchase was made in  
10 accordance with the provisions of the "Lemon Law," or had in fact been  
11 required under Civil Code section 1793.2. The Board interprets the  
12 BOE's policy as one of encouraging the repurchase of vehicles from  
13 dissatisfied customers, regardless of basis.

14 e. Facts relating to whether there is relevant evidence, which  
15 in the exercise of reasonable diligence, could not have been  
16 produced or was improperly excluded at the hearing.  
3054 (e)

17 30. Carole Waggoner Bedwell ("Bedwell") testified pursuant to  
18 subpoena before the Board on June 24, 1997. During the relevant  
19 period, Bedwell was chief of the division responsible for branding  
20 titles of repurchased vehicles.

21 31. Bedwell testified that between 1990 and 1992 the Department  
22 branded 144 titles statewide. During 1993 and 1994 the Department  
23 branded an additional 858 titles.

24 32. During this same period, Bedwell estimated that from 10,000  
25 to 20,000 titles which were subject to title branding were not branded  
26 by the DMV.

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1 33. Prior to and during the Bedwell testimony, an assertion of  
2 attorney/client privilege<sup>4</sup> was raised by the Department with respect to  
3 two (2) documents (identified below) which had not been produced by the  
4 Department. These documents were not produced by the Department  
5 pursuant to Chrysler's document subpoena in the trial below, nor were  
6 they produced or identified in a privilege log pursuant to the Board's  
7 document subpoena prior to Bedwell's testimony before the Board.

8 34. The "privilege" was asserted with respect to a DMV memorandum  
9 dated January 27, 1995. The memorandum was addressed to Frank Zolin  
10 ("Zolin"), then-director of the Department, and was signed by Bedwell  
11 and Mary Anne Boese ("Boese"). None of the above-mentioned parties  
12 (Zolin, Bedwell, or Boese) are attorneys.

13 35. The claim of "privilege" was allegedly based on the fact that  
14 the document was prepared in part by Roger Sato ("Sato"), Esq., co-  
15 trial counsel for the Department in this matter.

16 36. The substance of the first memorandum urged the adoption of  
17 an interpretation of what constitutes a "lemon." The memorandum goes  
18 on to suggest the Department adopt a presumption that a vehicle is a  
19 lemon when: 1) the vehicle has been "through the adjudication and  
20 arbitration process specified by law;" 2) the vehicle has been  
21 repurchased by the manufacturer for the expressed reason that it is  
22 non-repairable; or 3) the vehicle has been reported to the Board of  
23 Equalization for a sales tax refund or credit "for the reason that it  
24 was a buyback."

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27 <sup>4</sup>At the July 17, 1997, Board Meeting the claim of privilege was  
28 verbally amended by counsel for the Department to one of "Privilege for  
Official Information", Evidence Code section 1040.

1           37. The January 27, 1995, memorandum indicated that once it (the  
2 memorandum) had been reviewed, the Director would make policy decisions  
3 on how to proceed. Bedwell testified that there were discussions  
4 thereafter concerning the policy. Those present at the meetings  
5 included Bedwell, Madeline Rule ("Rule") of the DMV legal office, Mary  
6 Anne Boese ("Boese") the Chief of DMV Investigations/Occupational  
7 Licensing, Zolin, Anne Bersinger, then-Chief Deputy Director, and  
8 possibly Sato. Bedwell could not testify with certainty whether any  
9 departmental policies were implemented as a result of that meeting.  
10 Bedwell also did not review the January 27, 1995, memorandum before or  
11 during her testimony before the Board.

12           38. The attorney/client privilege<sup>5</sup> was also asserted with respect  
13 to a follow-up DMV memorandum dated February 6, 1995. The memorandum,  
14 drafted by Bedwell and Boese, was also addressed to Zolin. None of the  
15 above-mentioned parties (Zolin, Bedwell, or Boese) are attorneys.

16           39. The claim of "privilege" was based on the fact that the  
17 document was prepared in part by Sato.

18           40. The substance of the memorandum addressed Zolin's apparent  
19 concern about basic assumptions as to what determined a vehicle to be a  
20 "lemon."

21           41. Two days after the testimony of Bedwell before the Board, the  
22 Department withdrew its claim of "privilege" and produced the  
23 documents.

24           42. The attorney/client privilege was asserted with respect to a  
25 third memorandum (referred to in the memorandum dated February 6, 1995)  
26 dated January 12, 1995. This memorandum was not produced by the  
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28           <sup>5</sup>see FN 3 *supra*.

1 Department pursuant to Chrysler's document subpoena in the trial below,  
2 nor was it produced or identified in a privilege log pursuant to the  
3 document subpoena included with the Bedwell subpoena.

4 43. At the July 17, 1997, Board meeting the Department's counsel  
5 informed the Board that the January 12, 1995 document was a draft of  
6 the February 6, 1995 memorandum, that it was superseded by the February  
7 6, 1995 memorandum, and that it may have been discarded or destroyed.  
8 No testimony supports this representation.

9 44. The Board finds the Department's assertion of "privilege",  
10 under any of the various Evidence Code sections cited, to be utterly  
11 without merit. The memoranda suppressed by the Department were  
12 prepared by public employees charged with implementation of public laws  
13 (see, e.g. RLI Insurance Group v. Superior Court, 51 Cal.App.4th 415,  
14 438 (1996) [there "is a manifest public interest in the avoidance of  
15 secret law and a correlative interest in the disclosure of an agency's  
16 working law. The revelation of an agency's working law promotes its  
17 accountability to the public and the consistent, predictable and  
18 nonarbitrary application and enforcement of the law." (Citations  
19 omitted)]). No attorney/client or other legitimate privilege was  
20 implicated. There was no good faith basis for the suppression of these  
21 documents. The misconduct of the Department in wrongfully concealing  
22 this probative evidence is particularly disturbing in light of the  
23 Department's unique statutory role as both prosecutor and enforcer of  
24 its own penalties. The fact that the suppressed documents deal  
25 directly with the Department's own interpretation of the very  
26 provisions it seeks to enforce in this proceeding further exacerbates  
27 its misconduct.

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1           45. Under section 1650, the authority for administration and  
2 enforcement of the provisions of the Vehicle Code relating to the  
3 Department and the adoption and enforcement of regulations as necessary  
4 to carry out the provisions of the Code relating to the Department,  
5 reside with the Director. During Bedwell's testimony, Zolin was  
6 identified by DMV Chief Counsel Marilyn Schaff ("Schaff") as, under  
7 statute, custodian of records for the Department. Bedwell's testimony  
8 indicates that the ordinary course of practice for departmental policy  
9 and procedural memoranda flowed from the originator then, prior to  
10 dissemination, to the office of the Director. As such, Zolin  
11 undoubtedly possesses information directly relevant to Chrysler's  
12 ability to advance its claim in this matter, including his knowledge of  
13 previously suppressed memoranda.

14           46. The Department's lack of an affirmative representation that  
15 Chrysler's subpoenas have been fully complied with, and its apparent  
16 willingness to withhold potentially relevant, non-privileged internal  
17 documents interfered with Chrysler's right to fully defend its position  
18 in this matter. Chrysler's rights may be further prejudiced without an  
19 opportunity to examine Bedwell, Boese, Zolin, and possibly others  
20 knowledgeable about departmental policies and procedures relating to  
21 the substantive issues included in the Accusation.

22           47. The Board finds that Chrysler's right to a full and fair  
23 hearing was deprived by the Department's misconduct. Relevant evidence  
24 which should have been produced for the hearing was not.

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1 f. Facts relating to whether the determination or penalty, as  
2 provided in the decision of the department is not  
3 commensurate with the findings.  
3054(f)

4 48. At the remand hearing, expert testimony was received from  
5 William P. Guptill ("Guptill"). In addition, three (3) Chrysler  
6 dealers - Charles O. Swift ("Swift"), Richard Allen Evans ("Evans"),  
7 and Clarence Albert Williams ("Williams") - testified.

8 49. Guptill was retained as an expert by Chrysler to investigate  
9 the economic impact a 60-day license suspension would have on Chrysler  
10 dealers in California. Guptill testified that the average dealer would  
11 lose around \$100,000, with the entire California dealer body suffering  
12 a loss of \$24,000,000, conservatively<sup>6</sup>.

13 50. The losses would be comprised of loss of gross profit, loss  
14 of income from financing and insurance income, and loss from service  
15 contract sales. An offset for savings from not having as many vehicles  
16 on the dealers' lots was applied to the calculations.

17 51. Guptill testified that front-loading of dealerships prior to  
18 the suspension is not practical due to lack of additional space for  
19 storage, security, and costs. Guptill testified that there would also  
20 be losses from a decline in parts and service sales during the  
21 suspension period.

22 52. Lastly, Guptill testified there would be additional losses to  
23 the dealerships as salespeople go elsewhere for jobs. There will be  
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26 <sup>6</sup>Because the data submitted in Guptill's report was based on a 60-  
27 day suspension, see the figures submitted in the *amicus curiae* brief  
28 submitted by Chrysler-Plymouth of San Francisco; Dodge/Chrysler/Ply-  
mouth/Jeep/Eagle of Vacaville; Huntington Jeep Eagle Hummer; Glenn E.  
Thomas Dodge; Haddad Dodge/Jeep Eagle; and Glendale Dodge for recal-  
culated amounts (beginning a paragraph 62, *infra*).

1 additional costs when these employees need to be replaced after the  
2 suspension.

3 53. New vehicle sales will decrease from prior monthly average  
4 sales levels as inventory is sold and not replaced. For each vehicle  
5 not sold, the gross profit (vehicle sales price less vehicle cost) on  
6 that vehicle will be lost to the dealer.

7 54. The average lost gross profit per dealer is \$111,232 and  
8 \$26,695,680 for all dealers. After reducing these figures for related  
9 expenses not incurred, the average dealer would lose \$102,656 and  
10 \$24,637,263 for all dealers. Applying a  $\pm$  5 percent factor produces a  
11 per dealer financial loss range of \$97,523 to \$107,789 and a loss range  
12 of between \$23,405,400 and \$25,869,126 for all dealers<sup>7</sup>.

13 55. No consideration was given to post-suspension period lost  
14 profits from lost vehicle sales nor the related gross profit and income  
15 losses.

16 56. There will be losses of profit and income beyond the vehicle  
17 gross profit loss that will be encountered because of the lost vehicle  
18 sales as follows: (1) finance and insurance - the average dealer will  
19 lose \$29,504 and \$7,080,960 for all dealers; (2) service contracts -  
20 the average dealer will lose \$31,360 and \$7,526,400 for all dealers;  
21 (3) pre-delivery inspection - not quantifiable; and (4) sale of  
22 special products - not quantifiable.

23 57. The lost vehicle sales will cause a loss in dealer gross  
24 profits from parts sales and service sales.

25 58. Gross profits from used vehicle sales will most likely suffer  
26 a decline because fewer trade-ins will be acquired because of the  
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28 <sup>7</sup>see FN 5, *supra*.

1 decrease in new vehicle sales. This will decrease the quantity of used  
2 vehicles in the used inventory and that decrease will lead to some lost  
3 sales and therefore to lost gross profits. These losses are not  
4 quantifiable without further study.

5 59. Long-term negative economic impacts on Chrysler dealers would  
6 include the following: (1) loss of top salespersons; (2) decline in  
7 CSI (Customer Satisfaction Index); and (3) future loss from lack of  
8 vehicles.

9 60. Guptill testified that a suspension of 60 days may put some  
10 dealers out of business and will increase the risk for all dealers.  
11 Financial losses will reduce each dealer's working capital and net  
12 worth compared to what they would have been without the financial loss.  
13 The specific effects are as follows: (1) loss of working capital  
14 which measures the ability of the dealership to pay its bills timely,  
15 i.e., solvency; (2) danger from termination of credit; (3) dealers  
16 with comparatively low vehicle inventories at the suspension's  
17 commencement would likely be among those financially hurt the most; and  
18 (4) suspension timing would figure into the amount of loss.

19 61. Other economic considerations for which no attempt to  
20 quantify the amount of loss, include the following: (1) increased  
21 employee per unit cost; and (2) effect on vendors and dealers.

22 62. Because the suspension imposed in the Proposed Decision was  
23 reduced by the Director, the calculations of loss identified in the  
24 report prepared by Guptill would be proportionally reduced by the  
25 imposed 45-day suspension.

26 63. The average dealer would likely lose 37 new vehicle sales  
27 during a 45-day suspension. The financial loss for the average dealer  
28 would be \$59,348.

1           64. The combined financial loss from a 45-day suspension for all  
2 of Chrysler's California dealers would be \$14,243,520.

3           65. The above figures do not include losses suffered by  
4 reductions in other dealership departments (parts, service, etc.), or  
5 intangible losses such as loss of sales personnel, market share, and  
6 loss in customer satisfaction ratings.

7           66. Swift owns a Chrysler dealership in Sacramento. Swift has  
8 been licensed as a new motor vehicle dealer in California for over 30  
9 years. During the period July 31, 1995, to June 30, 1996, Auto World  
10 sold approximately 1,800 new car units. Swift testified that the  
11 primary problems with front-end loading prior to a license suspension  
12 would include flooring costs, security, damage costs, and the  
13 possibility of theft. With regard to flooring costs, Swift testified  
14 that the normal flooring cost of a \$20,000 vehicle is approximately  
15 \$5.55 per day. If the proposed license suspension takes place, that  
16 cost could potentially jump to \$15.00 per day if a dealer has to lease  
17 storage space. Swift testified that he told Chrysler officials he  
18 would prefer this matter be resolved in a way that does not result in  
19 an actual license suspension for Chrysler.

20           67. Evans is the owner or corporate officer of a Jeep/Eagle  
21 dealership. He was called by the Department as an adverse witness.  
22 Evans testified he believes he sells approximately 136 units per month  
23 (based on a 12 month average). His dealership employs 14 salespeople.  
24 Evans testified that he would attempt to "order ahead" if the  
25 suspension occurs. Evans felt that if the suspension was imposed,  
26 there would be losses because forecasting dealership needs that far in  
27 advance is difficult and mistakes can be made. Further, he stated  
28 additional costs would be incurred, i.e., security, care of vehicles on

1 the lot, flooring, and lower profit per vehicle if there are too many  
2 cars at the facility. Finally, Evans testified that he feels he might  
3 lose valuable employees to competing line-makes.

4 68. Williams, owner of Dodge/Chrysler/Plymouth/Jeep/Eagle of  
5 Vacaville, was called by the Department as an adverse witness.  
6 Williams stated that his dealership would be considered "medium-sized."  
7 The dealership employs 13 salespeople, and sells approximately 100 cars  
8 per month, 30 of which are used vehicles. Of those 30, approximately  
9 seven (7) are Chrysler buybacks. Williams indicated that his  
10 dealership carries the complete Chrysler line. At any given time  
11 Williams stated, he may have a 90 day supply of units on the premises.  
12 If faced with a 60 day suspension, he would find it "impossible" to  
13 order extra inventory.

14 69. There are some 240 independent dealers of Chrysler products  
15 licensed to operate in the State of California. There is no dispute  
16 that only a handful of those dealers were involved in the transactions  
17 which are the subject of this Accusation. In fact, not one Chrysler  
18 dealer has been charged with wrongdoing by the Department. There is  
19 also no dispute that the impact of the suspension (loss of sales, loss  
20 of gross profits, lowered CSI ratings, loss of key salespersons, etc.)  
21 will affect the entire California dealer body irrespective of the  
22 dealers' complicity, or lack thereof, in the alleged violations.

23 70. On appeal the Department correctly observed that "[t]he  
24 Board's primary purpose is the protection of dealers..." (DMV Brief on  
25 the Merits filed June 16, 1997, at p. 18.) The Board finds that the  
26 impact of the proposed penalty will disproportionately affect dozens if  
27 not hundreds of dealers who have not been accused of any wrongful  
28 conduct. The Board further finds that the impact of the penalty is not

1 specific to dealers who have been charged with wrongful conduct under  
2 the Accusation.

3 DETERMINATION OF ISSUES

4 1. The Decision of the Department of Motor Vehicles is reversed  
5 in that:

6 a) The Board determines that the Decision is not supported by  
7 the findings. (Section 3054(c).)

8 b) The Board determines that the Decision is not supported by  
9 the weight of the evidence in the light of the whole record reviewed in  
10 its entirety, including any and all relevant evidence adduced at any  
11 hearing. (Section 3054(d).)

12 c) The Board determines that there is relevant evidence, which  
13 in the exercise of reasonable diligence, could not have been produced  
14 or was improperly excluded or withheld at the hearing. (Section  
15 3054(e).)

16 d) The Board determines that the determination or penalty, as  
17 provided in the Decision of the Department is not commensurate with the  
18 findings. (Section 3054(f).)

19 ORDER OF REMAND

20 IT IS HEREBY ORDERED THAT the decision of the Department in the  
21 above-entitled matter is remanded to take additional evidence and  
22 reconsider its decision based on the following issues:

- 23 1. Whether the DMV's violation of prior subpoenas and document  
24 requests by withholding relevant, non-privileged evidence,  
25 including memoranda dated January 12, 1995, January 27, 1995,  
26 and February 6, 1995, from Carole Bedwell and Mary Anne Boese  
27 to then-Director Frank Zolin, is cause for dismissal of the  
28 Accusation or for imposition of other sanctions against the

1 Department.

- 2 2. Whether the DMV wrongly withheld any additional relevant,  
3 non-privileged evidence.
- 4 3. To hear testimony from Carole Bedwell, Mary Anne Boese, Frank  
5 Zolin, and other knowledgeable persons regarding the  
6 previously withheld documents and all issues related thereto.
- 7 4. To consider whether the evidence suppressed by the DMV  
8 otherwise affects the prior ruling of the Administrative Law  
9 Judge.
- 10 5. To determine and make findings as to what were the policies  
11 and procedures of the DMV, if any, during the period relevant  
12 to the Accusation concerning the branding of titles of all  
13 vehicles repurchased including vehicles repurchased:  
14 a. following a decision or settlement of a Customer  
15 Arbitration Board case;  
16 b. following voluntary buyback; and  
17 c. following adjudication.
- 18 6. To determine and make findings whether the DMV's policies and  
19 procedures, if any, included any rebuttable presumptions as  
20 to what constituted a warranty buyback.
- 21 7. To determine whether DMV was in compliance with its own  
22 internal policies and procedures regarding title branding  
23 during the period relevant to the Accusation.
- 24 8. To make findings regarding the efforts, if any, by the DMV  
25 prior to 1992 to notify dealers and manufacturers of its  
26 policies regarding title branding of vehicles repurchased.
- 27 9. To make specific findings regarding the actual identity of  
28 all of the dealers involved in the alleged failure to notify

1 the DMV of the 119 vehicles which allegedly were not branded.

2 10. To consider alternative sanctions, including but not limited  
3 to, sanctions specifically limited to those dealers who  
4 actually resold the 119 vehicles at issue.

5 11. To consider whether the due process protection of dealers  
6 whose conduct was not implicated would be violated by the  
7 Proposed Decision Upon Remand of the Administrative Law Judge  
8 as adopted by the Director.

9 12. To consider whether any applicable Vehicle or Civil Code  
10 sections in effect during the period relevant to the  
11 Accusation were unconstitutionally vague.

12 13. The Director shall allow the dealers appearing as Amicus  
13 Curiae to appear as parties in the remand.

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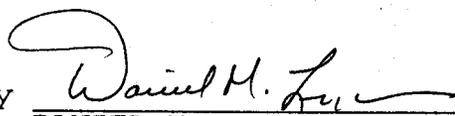
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1 IT IS SO ORDERED.

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DATED: August 18, 1997

NEW MOTOR VEHICLE BOARD

By   
DANIEL M. LIVINGSTON  
President  
New Motor Vehicle Board

27 Sally Reed, Director, DMV  
Tom Novi, Chief,  
28 Occupational Licensing Branch, DMV