

New Motor Vehicle Board
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Sacramento, California 95814
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

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

DECISION

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

This Decision shall become effective forthwith.

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

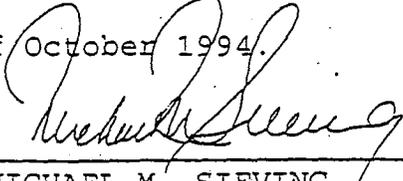

MICHAEL M. SIEVING
Assistant Executive Secretary/
Administrative Law Judge

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AMERICA, INC., DOE ONE)	
COMPANY, DOE TWO COMPANY,)	
and DOES 3-25, inclusive,)	
)	
Respondents.)	

PROCEDURAL BACKGROUND

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

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

3. Zaheri is the dealer principal of Hayward.

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

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

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

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

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

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

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

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

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

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

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

existence of similar facts relating to the protest and petition.

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

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

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

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

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

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

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

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

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

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

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

SYNOPSIS OF DECISION

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

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

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

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

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

BACKGROUND FACTS

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

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

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

32. A warranty clerk would then input the warranty claims

into the Diamond Network Computer supplied by MMSA pursuant to procedures set forth in the Warranty Policy and Procedure Manual. MMSA would never see the R.O.s, only the bits of electronic information typed into the computer by the Hayward warranty clerk.

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

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

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

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

PETITIONERS' ISSUES PRESENTED

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

38. Has MMSA waived any right to demand strict compliance

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

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

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

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

a. through the use of overlapping labor operations?

b. in the administration of "Prior Work

Authorizations"?

c. by instructing to use the closest code?

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

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

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

45. Is MMSA estopped from contesting problems at Hayward if

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

engaged in "massive" warranty fraud?

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

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

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

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

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

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

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

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

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

present ownership would soon be terminated?

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

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

a. the lack of adequate advance notice?

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

c. the critical errors in the audit?

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

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

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

RESPONDENT'S ISSUES PRESENTED

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

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

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

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

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

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

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

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

88. Did Hayward submit false claims?

89. Did Hayward know the claims were false?

a. Did the technicians know?

b. Did the service advisors know?

c. Did the service manager know?

d. Did parts department employees know?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Offer implausible explanations for the unsubstantiated claims;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dealers?

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

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

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

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

124. Is MMSA liable to Hayward for defamation?

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

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

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

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FEDERAL COURT'S ISSUES PRESENTED¹

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

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

APPLICABLE LAW

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

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

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

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

§ 9884.8 All work done by an automotive repair dealer,

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

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

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

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

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

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

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

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

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

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

B. Applicable Law Pertaining to Duty to Disclose.

Fraud involving nondisclosure requires the following elements:

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

BAJI No. 12.35 (1992 Revision)

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

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

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

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

C. Applicable Law Pertaining to Fraud.

Fraud involving intentional misrepresentation requires the following elements:

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

BAJI No. 12.31 (1991 Revision)

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

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

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

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

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

toward the giving of testimony;

[k] An admission by the witness of untruthfulness.

BAJI No. 2.20

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

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

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

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

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

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

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

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

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

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

Hutchinson Co. v. Gould (1919) 180 C. 356, 358, 181 P. 651;

Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App.

2d 731, 737

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

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

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

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

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

Vehicle Code § 3065 (Deerings 1984)² :

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

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

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

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

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

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

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

150. In case law involving insurance companies there is a

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

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

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

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

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

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

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

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

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

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

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

F. Applicable Law Pertaining to the Allegation of Discrimination.

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

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

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

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

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

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

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

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

G. Applicable Law Pertaining to the Allegation of Defamation.

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

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

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

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

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

* * *

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

* * *

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

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

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

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

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

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

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

FINDINGS OF FACT³

A. General Findings of Fact.

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

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

Agreement. The Warranty Policy and Procedures Manual is incorporated into the Dealer Sales and Service Agreement by reference.

160. On or about June 15, 1990, MMSA advised Hayward that it had scheduled an audit of all warranty claim records commencing on June 25, 1990.

161. The audit was rescheduled to commence on July 16, 1990.

162. The audit continued through July 27, 1990, and MMSA gave Petitioners the Audit Report indicating there were \$145,964.66 in claims subject to charge back which had been previously reimbursed to Hayward for warranty work performed.

163. MMSA received documentation after the audit from Petitioners substantiating some of the claims in the charge back whereby MMSA reduced the charge back to \$137,444.79.

164. MMSA reaffirmed its commitment to charge back these amounts to the account of Hayward based on noncompliance with the provisions of the Warranty Policy and Procedures Manual.

165. On February 3, 1992, Petitioners instituted the instant proceeding before the Board.

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

166. Zaheri signed an Interim Sales and Service Agreement on June 16, 1988 by which he agreed to be bound and to comply with the Warranty Manual. On March 28, 1989 Hayward renewed its Dealer Sales and Service Agreement, and again renewed the agreement on March 28, 1992. Both of these subsequent agreements

contained similar language binding Hayward and Zaheri to follow the Warranty Policy and Procedures Manual.

167. The Dealer Sales and Service Agreement Standard Provisions include the following language:

Warranty and policy service shall be performed in accordance with the Warranty Manual and any related bulletins and directives issued from time to time by MMSA to Dealer... Dealer shall be responsible for the timely submission of warranty claims in the format required by MMSA.

168. A breach of the warranty policy is a breach of the contract.

169. The Warranty Policy and Procedures Manual was accepted into evidence without objection and marked Exhibit 6.

170. MMSA, via the DSMs, was responsible for reviewing the entire contents of the current version of the Warranty Policy and Procedures Manual with Hayward.

171. On October 10, 1988, Zaheri, Tom Gannon ("Gannon"), Hayward Service Manager, and Jennifer Ratliff, MMSA District Service Manager, all signed the MMSA Dealer Acknowledgement Form which confirmed that they have reviewed the entire contents of the warranty manual with Ms. Ratliff.

172. MMSA provided ample training and instruction regarding the Warranty Policy and Procedures Manual.

173. MMSA provided a Warranty Policy and Procedures Manual, service training assistance, a DSM to answer questions via telephone and in person, who also reviewed the process monthly, and a hotline to answer dealer questions.

174. Dealer Contact Reports prepared by MMSA District

Service Managers document that MMSA provided assistance to Hayward with respect to warranty policy and procedure.

175. When Gannon needed to consult the manual, he was able to find the answers to his questions. If he needed to clarify things he would talk to the DSM or a warranty administrator at MMSA.

176. Zaheri admitted that he never told MMSA that he wanted to work with MMSA to correct the problems in his service department or to implement the corrective actions MMSA recommended.

177. The manual provided for certain types of warranty repairs to be approved by the DSM or Regional Service Personnel for certain types of claims before proceeding with the repair. This procedure is known as a prior work authorization (PWA).

178. A PWA only authorizes the repairs to be performed and the claim to be submitted. It does not guarantee payment of the claim. The claim must still be properly prepared and valid.

179. Prior work approval must be obtained from the MMSA DSM before proceeding with repairs. A PWA can be obtained after a visual inspection or after talking with the service manager over the telephone.

180. MMSA gave PWAs over the phone and in person in compliance with the requirements of the Manual.

181. The manual cannot possibly cover each and every possible labor operation for a vehicle.

182. MMSA had an established course of conduct communicated

through its DSMs that did not require strict and literal compliance with the terms of the Policy and Procedures Manual. Mitsubishi DSMs issued PWAs even if a repair order did not comply with all of the requirements of the Policy and Procedures Manual. The manual was not strictly followed or enforced by DSMs.

183. MMSA had an unwritten policy of providing PWAs after the work had been completed. This policy shall be referred to as the "second PWA policy" or "PWA of the second type".

184. MMSA modified the Dealer Sales and Service Agreement with respect to the second PWA policy. The total amount of charge backs in this category amounts to \$57,054.68. MMSA is not entitled to charge back this amount because of the contractual modification. However, the substantiated fraudulent warranty claims submitted by Hayward offset the \$57,054.68.

185. The Special Instructions for the manual provide that "each warranty claim must be substantiated by a dealer R.O. (repair order) on which the actual labor hours worked has been mechanically time punched."

186. Where the records do not substantiate the claims, MMSA has no basis on which to conclude that the work was necessary, or was performed in compliance with recommended repair procedures. Gannon could not, if he were only to look at a particular repair order, be able to determine whether it was fraudulent or genuine. Hayward has the duty to document the claims submitted to MMSA under the Warranty Policy and Procedures Manual.

187. MMSA's documentation requirements are consistent with

accepted trade standards for good and workmanlike repair.

188. MMSA's requirements are consistent with the California Automotive Repair Act in that the Act requires that repair orders specify the repair performed and the parts supplied, indicate customer authorization by the customer's signature on the repair order and authorization to do work in excess of the work specified on the repair order, and return replaced parts to the customer upon request.

189. MMSA's documentation requirements were designed to insure only valid claims were paid.

190. DSMs commonly instructed dealers to use the MMSA warranty operation code that most closely approximated the actual repair performed.

191. The Warranty Policy and Procedures Manual permits DSMs to authorize additional labor time. The service manager is instructed to add the excess labor costs to the published amount entered under the related labor operation.

192. Hayward failed to comply with all of the requirements of the Warranty Policy and Procedures Manual.

193. The Warranty Manual states that normal diagnosis and test time is included in the time allowances published and must not be included as a separate item on a Mitsubishi Warranty Claim. Gannon charged MMSA for diagnosis time because he felt it was "fair" even though he knew this was a violation of MMSA policy.

194. The Manual further provides that "all parts replaced

under warranty must be either returned to MMSA or must be held for 3 months after repair date." Hayward typically kept parts longer than 90 days.

195. When Hayward sought to enforce the Dealer Sales and Service Agreement, MMSA set up the fraud as an affirmative defense.

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

196. MMSA's Western Region sent a memorandum to a vice president of MMSA recommending the appointment of Zaheri as a Mitsubishi dealer. Nowhere in the memorandum is there any indication of doubt about Zaheri's management capabilities, in service operations or otherwise.

197. Zaheri was unable to name any individual he considered to be key personnel. There were no key individuals; rather the service and parts departments as an unnamed whole, were the key personnel allegedly so vital to Zaheri.

198. Zaheri admitted that MMSA had no responsibility to tell him whom to hire in his service department.

199. Zaheri acknowledged that it was his responsibility to employ qualified technicians, service advisors and service managers.

200. Zaheri promoted Gannon to the position of service manager based on the recommendation of the Hayward Parts Manager, John Radergard.

201. Gannon never asked Cooney or Brian Nicolson ("Nicolson"), a former Hayward Service Advisor, if they

participated in the warranty fraud.

202. Gannon admitted to his involvement in the warranty fraud perpetrated by Hayward regarding the submission of warranty claims for diagnosis where there was no actual repair attempted. These submissions were part of "Gannon's policy" even though he "knew it was in violation of MMSA policy."

203. Mike Tuttle ("Tuttle"), a former Hayward Service Advisor, and Nicolson were both dismissed by Zaheri for dishonest activities. Tuttle was dismissed for stealing a head. Nicolson was dismissed for bringing in parts that did not belong to the shop. These terminations were not for warranty fraud.

204. Sue Cooney ("Cooney"), allegedly involved in the fraud, and Gannon, admittedly involved in the fraud, still worked for Hayward as of August 19, 1993 and September 14, 1993, respectively. Presently, Gannon audits the repair orders.

205. Zaheri never fired anyone for claiming to do work they did not do. Furthermore, he took no corrective action after he received the warranty money from MMSA.

206. Zaheri admitted that he never told MMSA that he wanted to work with MMSA to correct the problems in his service department or to implement the corrective actions MMSA recommended.

207. Zaheri acknowledged to MMSA executives that if they were telling him that his people stole, just tell him how much, and he would write them a check.

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

208. MMSA performed an audit in July 1990 which resulted in Hayward being charged back for improperly submitted warranty claims.

209. Neither the language in the Interim Sales and Service Agreement nor the Dealer Sales and Service Agreements imply a fiduciary relationship between Hayward and MMSA which would give rise to the duty to disclose.

210. MMSA has the right to conduct warranty audits subsequent to a warranty claim having been paid through the MMSA computer system and to debit warranty claims not found in conformance therewith. There is no exception for claims with a PWA.

211. There is a failure of evidence that there was an intent to defraud on the part of the Cziska-Price dealership.

212. The DSMs of MMSA had an established practice of providing PWAs after the repair was completed. The DSMs always provided Gannon with PWAs after the repair had been completed.

213. The Dealer Sales and Service Agreement Standard Provisions provides as follows:

Any failure of either party at any time to require performance by the other party of any provision hereof shall in no way affect the full right to require such performance at any time thereafter, nor shall any waiver by either party of the breach of any provision hereof constitute a waiver of any succeeding breach of the same or any other provision, nor constitute a waiver of the provision itself.

214. The PWA process in no way changed or nullified the dealership's responsibility and obligation to properly code its

warranty claims submitted to MMSA for reimbursement. A PWA is not a guarantee that the warranty claim was valid or somehow immune from subsequent warranty audit, only that the dealership is authorized to submit the warranty claim for payment to MMSA.

E. Findings of Fact Pertaining to the Duty to Disclose.

215. Hayward was a new store and a new, separate corporation with a new owner.

216. It was MMSA's policy to refrain from discussing the business of one dealer with another dealer.

217. Terry Tomas ("Tomas"), MMSA Regional Service Manager, suspected in May 1990 that the entire service department at Hayward had been involved in warranty fraud. Tomas did not share these concerns with dealership principals.

218. MMSA's District Service Managers did, on a regular basis, provide training and assistance to Hayward in proper warranty claim submission and documentation. Contact Reports, prepared by the DSMS contemporaneously with their conversations with personnel at Hayward, that document their visits to Hayward, explain that the DSMS did continually bring problems in Hayward's warranty administration to the attention of management at Hayward.

F. Findings of Fact Pertaining to Fraud.

219. The fraud has a tendency to prove or disprove an affirmative defense, therefore it is relevant. Cal. Evid. Code § 210 (Deerings, 1986)

220. There are numerous examples wherein Hayward submitted

false warranty claims to MMSA.

221. Zaheri believed that Nicolson wrote false warranty claims and the possibility that Chris Mack ("Mack"), Amin Ahrari ("Ahrari"), Jesse Gistand ("Gistand"), three former Hayward Service Technicians, and Tuttle committed warranty fraud while employed at Hayward.

222. Virtually every technician admitted to involvement in the warranty fraud. Ahrari denied involvement in the fraud; however, he is unbelievable as a witness.

223. Gistand, Mark Meagher ("Meagher"), Ahrari, and Tuttle were all involved in and/or aware of the warranty fraud at Hayward.

224. Meagher identified four false warranty claims for fender adjustments and testified that he had never adjusted a fender on a Mitsubishi vehicle.

225. Ronald Bertram ("Bertram"), a MMSA Warranty Cost Control Specialist, was on the launch committee for MMSA's new Eclipse. He printed off all warranty claims for the Eclipse when it first came out and noticed that Hayward had an unusual number of fender adjustments. Bertram called Gannon at the dealership to gain information about what was going on with the vehicles and Gannon informed Bertram that the fenders needed to be adjusted.

226. MMSA launched an investigation of an apparent quality control problem with its new Eclipse on the basis of false claims submitted by Hayward. The launch committee for the new Mitsubishi Eclipse reported to the factory that the Eclipse had a

product quality problem in assembling the fenders.

227. MMSA engineers thought the Eclipse had a defective fender based on the number of warranty claims submitted by Hayward and worked to fix a non-existent problem.

228. Meagher deliberately falsified repair orders for transmission repairs, knowing that the customer would come back to Hayward because the transmission was not fixed the first time, and the dealership could submit two warranty claims for transmission repairs.

229. The Warranty Audit Report evidences that the auditors found \$17,111 worth of warranty claims for shop comebacks or ineffective repairs. No matter what the reasons were for the comeback, Hayward's high incidence of comeback repairs has damaged MMSA's reputation.

230. Meagher has never centered a steering wheel at Hayward, and all but two electrical dash repair orders were fake.

231. Meagher estimated one out of every five warranty repair orders he wrote during the period of his employment at Hayward was false.

232. In the two-year period covered by the audit, MMSA paid Hayward \$125,835 for KM175 transmission repairs.

233. When Meagher was employed at Hayward during the period January of 1991 to May of 1992 he did most⁴ of the transmission

⁴ This administrative law judge defines "most," conservatively as 51%. Exhibit 276k shows that \$100,073.92 of KM175 claims were submitted during the period of Meagher's employment. Taking 51% of \$100,073.92 there is a total of \$51,037.70. Using Meagher's testimony that 90% of his claims

repairs.

234. Meagher testified that 90%⁵ of the transmission repairs he wrote on KM175 transmissions were false.

235. Obtaining parts from the parts department was not necessary to make the repair order "fly," according to Meagher, but he said "everybody did that ... and the Parts Department said, 'I don't want them'. You know, you take them with you. You do whatever you want with them." Once, Meagher made a parts trade with the Hayward parts manager, John Radergard. Meagher traded those parts in for new parts he needed for his truck.

236. Nicolson was employed as a service advisor at Hayward from November 1989 through 1990.

237. Nicolson testified that any car that came in that was within the warranty period would receive add-on repairs. Sometimes they wrote the add-on repairs on the customer's copy of the repair order and misrepresented to the customer that they did the add-on repairs. Sometimes, they released the vehicle to the customer and then added on a couple of things and closed out the repair order. Thus the consuming public was defrauded as well.

238. Nicolson testified that 90% of the PDI claims that Hayward submitted to MMSA with miscellaneous adjustments ("add-ons") were fraudulent. Joel Kmetz, the Board's expert, confirmed that among the charged back claims, \$15,045.04 of them were PDI

were false [infra, see footnote 5] there are \$45,933.93 in fraudulently submitted warranty claims for KM175 transmissions.

⁵ Meagher testified that 9 out of 10 transmission repairs were fraudulent.

add-ons.⁶

239. Meagher and Tuttle testified that Cooney and the other service advisors, Randy McDaniels, and Brian Nicolson, all participated in preparing false repair orders. The only way a technician can get a repair order to write a false claim was when the service advisor printed it. When Tuttle wrote false warranty stories, they always began with either Gannon or one of the service advisors handing him a repair order.

240. Gannon authorized technicians to perform add-on repairs under warranty without obtaining approval of service management. Gannon instructed the technicians to perform add-on repairs to boost his warranty sales, and to promote productivity.

241. Meagher obtained PWAs for fake warranty claims he was involved in writing. Meagher specifically recalled Gannon and Cooney calling their DSM, Rick Readinger ("Readinger"), to request a PWA for a fake claim. Meagher commented that Readinger had no reason to doubt the validity of the claim.

242. MMSA relied on its dealers to take responsibility to ensure only valid claims were submitted. MMSA's computer is not capable of detecting warranty fraud. The computer will not reject a claim if the dealer has overcharged for labor or for parts, or if the dealer claims labor to replace a part but does not claim that a new part was used, or if a dealer claims a labor operation unrelated to the described repair.

⁶ Taking 90% of the charged back claims, \$15,045.04, there are \$13,540.54 in fraudulently submitted warranty claims for PDI add-ons.

243. In practice, the second PWA policy, the authorization to do the work was typically given after a telephone call between the dealership and the DSM with no inspection of the vehicle.

244. This course of conduct between the DSM and the dealership assumed a relationship of honesty between the dealership and the DSM because the vehicle which was the subject of warranty repair almost always had left the dealership before the DSM could go on-site to the dealership. In practice, the DSM did not perform a prior inspection of the vehicle on which the dealership claimed that a valid warranty repair needed to be performed.

245. Gannon understood that when the technicians told the DSMs that they had done the work and that it was necessary to correct a factory defect, the DSMs believed the technicians and accepted their word. The DSMs assumed they could rely on dealership personnel.

246. MMSA's monthly WAS report, which includes the EPUS report, showed that most of the time Hayward was within guidelines of MMSA. Zaheri had a WAS report available to him during the two year period; and these monthly reports were reviewed with Hayward management regularly.

247. Hayward's Operations Manager, David Ziony ("Ziony"), tampered with the time clock to create phony repair orders in an attempt to trick MMSA auditors.

248. Ziony intentionally created fake repair orders and planted them in the files for the auditors to find. Ziony

figured out how to use the ADP system printer in order to print a duplicate repair order. It was of no concern to him that the auditors may very well have believed that the duplicate repair orders were true repair orders. It never crossed Ziony's mind that by creating a falsified repair order, he was defrauding the auditors.

249. Ziony put the original repair orders that were duplicated in a folder, and he left the forged repair orders in the dealership files.

250. There is no substantial evidence in the record of Hayward's claim of MMSA's knowledge of the forgery or Hayward's claim of MMSA's wilfully withholding documents in discovery allegedly given to MMSA by Nicolson.

251. The Warranty Policy and Procedures Manual provides that dealers will permit MMSA to make examinations and audits of accounts and records at any time during regular business hours.

252. Bertram and Readinger went to Hayward on June 25, 1990, to begin the audit. Zaheri knew they were coming but would not allow the audit. Zaheri stated that the service files were not ready because they were being "moved."

253. The auditors were turned away from the dealership when they first arrived to conduct the audit because Zaheri was in the process of "restructuring" the files at the time.

254. The audit took place from July 16, 1990 through July 27, 1990.

255. During the audit, Bertram explained that the auditors

wanted to see the entire vehicle history file. However, Zaheri had instructed Ziony that the auditors could only see repair orders that they specifically identified and not the entire vehicle history files. Bertram explained that the auditors needed to see the whole file, and that it was to everyone's benefit to look at the entire file, but Ziony repeated that Zaheri had instructed him not to give the auditors the entire files. Bertram eventually got the entire vehicle history file.

256. In November of 1990, Zaheri demanded that the entire audit report be reversed.

257. In January of 1991, at the MMSA Advisory Board meeting with three MMSA vice presidents, Zaheri demanded that MMSA (1) reverse the entire charge back, and (2) issue a written letter of apology to Hayward stating that the audit was wrong and that Hayward did nothing wrong.

258. Ziony spent approximately 2,000 hours reviewing paperwork related to the audit in an effort to refute the charge back. Mike Griffin, a management employee at Zaheri's Volkswagen dealership, put in another 500-1,000 hours. Gannon put in another approximately 50 hours.

259. Zaheri was fond of testifying repeatedly about the statements to MMSA that "If you're telling me I stole from you, we've got some serious problem. If you're telling me my people stole, just tell me how much it is, I will write a check." Zaheri never stated what type of hard facts he would need in order to decide for himself that a claim was fake or legitimate.

Yet, Zaheri admitted that he could not distinguish a legitimate claim from a fake claim.

260. Ziony did not join Hayward until April of 1990 and thus was not employed for most of the twenty-four (24) month period covered by the audit. Ziony does not actually sell cars, work as a technician, or help out with market attempts.

261. Nevertheless, Ziony testified to the following implausible explanations for the unsubstantiated claims:

- a. mistakes in entering vehicle identification numbers and customer information into the ADP computer system at the dealership;
- b. that the wind sometimes blows away parts requisition forms, so parts are not billed to repair orders;
- c. that parts department employees might forget to bill out parts they gave to technicians;
- d. that parts department employees may bill parts to the wrong line on the repair order;
- e. a service advisor may neglect to record repairs separately on the repair order and might record the use of a part for the wrong repair;
- f. parts department employees may give the wrong part to the technician;
- g. technicians might use parts from bulk supply so the service advisor might forget to charge out a part on a warranty claim; and
- h. service advisors may make errors in entering labor operations codes.

262. Zaheri told Meagher he would prosecute people for stealing if they cooperated with MMSA.

263. Tuttle testified that Zaheri said he would press charges against anyone that blew the whistle. Tuttle also

testified that Gannon told him that Zaheri had actually sued Nicolson. Gannon said that Zaheri could out spend any technician in court. Tuttle admitted that he was afraid that Zaheri would sue him for testifying.

264. Ahrari admitted that Zaheri threatened to sue anyone who started problems for him by talking to warranty representatives.

265. Gannon admitted that Zaheri told him that he intended to sue Nicolson. He also admitted telling Ahrari that Zaheri was going to sue Nicolson.

266. Zaheri took corrective action regarding the stealing by his employees of warranty parts and the boat motor from Hayward, however, Zaheri did not repudiate the fraudulent writing of warranty stories or take any corrective action.

267. Zaheri never told the technicians at Hayward not to write fake claims. Nor did Zaheri ever instruct Gannon, when Gannon was the service manager, or Mr. Souza, when he became service manager, to tell the technicians not to commit warranty fraud. Gannon never instructed the service advisors to tell the technicians not to write false claims.

268. Neither Zaheri, Ziony, nor Gannon did anything to investigate the fraud. Hayward never fired anyone as a result of what was discovered in the audit, or in the course of this litigation. Zaheri did nothing to investigate whether Gannon was involved in the fraud at Hayward.

269. Employees involved in the fraud still work for the

dealership.

270. Gannon's present job at Hayward consists of reviewing paperwork to make sure everything is in order. Specifically, to make sure all the warranty paperwork was in order by virtue of the Policy and Procedures Manual. If the warranty repair orders did not follow the guidelines and requirements of MMSA, Gannon was to bring it to the attention of the Hayward Service Manager and also to Zaheri.

271. MMSA's warranty system allows for claims to be made without first inspecting documentation. It further provides for reimbursement of those claims without providing any further information to MMSA.

272. MMSA paid money to Hayward if all of the appropriate slots on the computer screen were filled.

273. MMSA paid Hayward's warranty claims as they were submitted.

274. MMSA would then seek reimbursement from its vendors for defective parts.

275. Zaheri kept the money and never tried to ascertain the extent of the fraud.

276. Zaheri must be held accountable to MMSA for the warranty fraud that was committed at Hayward and Hayward should not be paid for fraudulent warranty claims.

277. The issue raised by Petitioner of reimbursement of the vendors is irrelevant and involves a separate agreement between parties not present in the instant action.

G. Findings of Fact Pertaining to the Validity of the Audit.

278. There was no convincing evidence of serious flaws in the Audit Report.

279. MMSA uses a variety of selection tools to determine which dealerships are to be audited. Those methods of selection have included, in the past, recommendations from quality control personnel; recommendations from field personnel; random reviews of warranty claims; and computer reports which disclose some out of line conditions.

280. The main reason MMSA selected Hayward for audit was because Tomas, Bertram, and Robert Vrabel ("Vrabel"), MMSA Manager of Warranty Protection Plans, reviewed a number of warranty claims MMSA had paid to Hayward and observed a number of suspicious patterns. Tomas spent four days reviewing six months worth of Hayward claims. Tomas asked the warranty department to review Hayward's claims, and they saw the same trends.

281. The decision to audit Hayward was not influenced by any prejudice or racial bias against Zaheri. Nor were the audit decisions in any way influenced by prejudice or racial bias.

282. While not identical, the warranty audit reports of other Mitsubishi dealers are so similar as to belie discrimination.

283. Typically, audits take one to two weeks, depending upon the volume of claims the dealership submitted to MMSA, and the volume of questionable claims. Another factor MMSA takes into consideration in deciding whether to conduct an audit for

one week or two weeks is the total warranty payments MMSA has made to the dealer and, in general, the higher the number of dollars, the greater the possibility that the auditors will spend two weeks at the dealership. Sometimes MMSA sends one auditor, and sometimes two auditors, again, depending upon the size of the dealership and the amount of warranty work for which MMSA paid the dealership. The Hayward audit took two weeks.

284. Bertram was not given any instructions about how to conduct the audit. He had performed about half a dozen audits before.

285. In preparation for the audit, Bertram started with a computer-generated report which lists all of the warranty repairs to a vehicle by vehicle identification number (VIN). The report included claims MMSA paid to Hayward over the previous two-year time period, which was the standard time covered by an audit, since the Warranty Manual requires dealers to hold their records for two years.

286. The auditors reviewed all documentation within each vehicle history file and looked for any pattern or anything out of the ordinary.

287. The auditors allowed Ziony additional time to send missing documents to MMSA during the week following the audit. Hayward sent documents considerably past the deadline, but MMSA accepted them even though they were late.

288. Many of the warranty parts which were supposed to be kept using a 10-bin system for parts inspection were not there.

At the end of the parts inspection, Bertram gave Ziony an overnight period to locate parts, even though MMSA had never granted a dealer more time to locate parts. The auditors accepted all of the parts submitted on the following day despite their doubts that the parts were the parts removed from the vehicle.

289. Several months after the audit, Zaheri met with MMSA Western Regional representatives in Burlingame and provided still more documentation to support his position regarding the audit. In January 1991, Zaheri presented still more documentation to support the claims at a meeting with three MMSA Vice Presidents. MMSA extended several invitations to Hayward to submit additional supporting documents. MMSA adjusted the amount of the charge back on the basis of these late-submitted documents.

290. The auditors did not approach the writing of Hayward's Warranty Audit any differently than they approached the writing of any other audit report.

291. MMSA's consistency in the audit process is demonstrated in the similarity of the audit reports in evidence. MMSA has a basic, canned report that the auditors have been using over the years. Whenever they prepare an audit report, they pull up the shell of a report on word processing and adjust it, modify it, customize it, plug in the names and the numbers.

292. Not all dealers are charged back in the same categories as they appear in the Audit Report. Not all dealers have the same problem. If there is a unique problem to the

dealer the auditors will create a special category to describe that type of problem.

293. The fact that the auditors put a particular claim in a particular category does not evidence the only deficiency in that particular claim. The auditors put a claim in the category that is most evident even though it has numerous other problems.

294. A charge back was not made against Cziska-Price because Cziska-Price was a terminated dealer, and it was the business practice of MMSA's Controller not to charge back a terminated dealer for warranty claims unless the terminated dealer had committed in advance to voluntarily pay the proposed charge back. Otherwise, such a charge back could not realistically be collected.

295. There is no evidence in the record that MMSA's practice of not charging back old warranty claims against a terminated dealer violates any provision of the Warranty Manual or any other contract or policy.

296. MMSA was reimbursed by the respective vendors for all warranty claims paid to Hayward. MMSA did not, and does not as a matter of policy, reimburse vendors for sums that are recovered during the course of an audit. This lack of reimbursement is based upon the fact that an audit charge back is used by MMSA to "offset" any administrative monies that are not actually received.

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H. Findings of Fact Pertaining to the Allegation of Breach of the Implied Covenant of Good Faith and Fair Dealing and the Dealers-Day-In-Court Act.

297. There is failure of proof that MMSA threatened or coerced Hayward in any way.

298. There is no contract provision requiring any notice whatsoever and MMSA has conducted audits with only one day's notice or no notice at all. The Hayward audit did not begin on June 25, 1990 as scheduled because Zaheri refused to give auditors access to the records. MMSA agreed to reschedule the audit to a date three weeks later to accommodate Zaheri.

299. Bertram was not permitted to speak to anyone but Ziony. Gannon was not involved in the audit nor were the auditors permitted to speak with him.

300. MMSA auditors allowed Hayward to send a substantial amount of documentation to MMSA after the completion of the audit and MMSA subsequently modified the charge backs.

I. Findings of Fact Pertaining to the Allegation of Discrimination.

301. Fairness in the way audits are conducted and charge backs are levied is very important. There is no room for subjectivity in a decision to charge back sums to the account of a dealer for warranty claim deficiencies. It is important that MMSA policy and procedure be consistently applied to the dealers and in this case it was.

302. MMSA decided to audit warranty claims for the entire two year period that Zaheri had owned the dealership. This is consistent with the Warranty Policy and Procedures Manual which

provides as follows:

"Each dealer must retain complete records of any repair for which a claim is filed. These records must be retained for minimum of two (2) years following the date of payment of the claim, as they may be subject to examination and audit by MMSA . . ."

303. Petitioners failed to prove MMSA failed to audit or charge back other dealers who committed similar violations because the other MMSA audits appeared similar.

304. MMSA's decision to audit and the audit decision were in no way influenced by any prejudice or racial bias against Zaheri. All the MMSA witnesses were unequivocal that they never used nor heard fellow MMSA personnel use derogatory ethnic slurs in describing Zaheri.

305. On two occasions, a MMSA representative allegedly made racial or ethnic epithets or derogatory remarks, only one of which referred to Zaheri. According to David Ziony, in September 1989, Mr. Kuhnert ("Kuhnert"), MMSA Regional General Manager, made the following comment to Ziony regarding Zaheri, "That f---ing sand-nigger. . . I took care of him. I told him he was acting like a f---ing jew." Kuhnert emphatically denies this. Even if true, this is insufficient to establish corporate discrimination within the meaning of 42 U.S.C. § 1981.⁷

⁷ "Complaints relying on the civil rights statutes are plainly insufficient unless they contain some specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions." Koch v. Yunich (1976) 533 F. 2d 80, 85; Powell v. Jervis (2d Cir. 1972) 460 F. 2d 551, 553; Kauffman v. Moss (3d Cir. 1969) 420 F. 2d 1270, 1275; Powell v. Workmen's Compensation Board of the State of New York (2d Cir. 1964) 327 F. 2d 131, 137

306. In June of 1988, Mr. Zeuli responded to an inquiry from Ziony that ". . . Tom Price had told him that he found some towel-head to sell the dealer to -- dealership to." This comment was a statement made by an MMSA employee quoting a dealer and so cannot be attributed to MMSA.

J. Findings of Fact Pertaining to the Allegation of Defamation.

307. Petitioners failed to prove that MMSA published a defamatory statement or in the alternative intended the publication of a defamatory statement.

308. Hayward presented Zaheri's testimony of a conversation he had with Sasha Simpson ("Simpson"), who use to be Zaheri's finance manager. Simpson was never a MMSA employee. According to Zaheri, Simpson had heard from Farzan Komeili (never a MMSA employee) who had supposedly heard from John Nakamura (never a MMSA employee) the allegedly defamatory statements.

309. Nakamura testified that he learned what he knew about the warranty audit at Hayward from Hayward personnel, not MMSA personnel.

310. Kenneth Goode, a contemporaneous dealer principal, claimed at the hearing that as he walked through his own dealership in the fall of 1990, he heard his own technicians, none of whom were ever MMSA employees, discussing a customer letter about Hayward.

311. Petitioners have not averred to any damages suffered by Hayward as a result of allegedly defamatory statements made by MMSA representatives. In fact, Fred Cziska, a principal of the

prior dealership, stated that his opinion of Hayward had not changed.

K. Findings of Fact Pertaining to the Remedies Sought.

312. If the charge back was upheld, MMSA still lost massive amounts of money due to Hayward warranty fraud. The fraud is so skillful that MMSA can not quantify all of it. The service technicians could not even remember which claims were false and which were not because the fraud was so rampant.

L. Findings of Fact Pertaining to Damages.

313. The first year Hayward was in business under Zaheri ownership, the dealership reported warranty labor gross profits as a percent of sales of 71.9, compared to the district average of 69.1, regional average of 68.3, and national average of 67.3.

314. Hayward consistently reported substantially higher total warranty labor sales and warranty labor gross profits than the average Mitsubishi dealer in the district, region and nationally.

315. Zaheri is successful because he was active in his dealership. The audit affected Zaheri's attitude and this change in attitude adversely affected his sales.

316. In the letter written by Nicolson, sent to Tomas, Nicolson listed 100 repair orders that were totally fictitious. However, MMSA did not charge back all the warranty claims associated with these repair orders. MMSA only charged back warranty claims totaling \$8193.42 that were on Exhibit 4. The expert, Joel Kmetz, confirmed that the total dollar amount of all

warranty claims identified in Nicolson's letter, Exhibit 4, was \$21,061.02. Thus, MMSA paid Hayward for \$12,867.62 worth of claims which Nicolson claimed were wholly fictitious and which were never charged back.⁸

317. Hayward was paid on every properly submitted claim.

DETERMINATION OF ISSUES

A. Determination of Issues Pertaining to the Interpretation of the Dealer Sales and Service Agreement.

318. The conduct of parties to a contract in applying the terms of an agreement overrides contrary boiler-plate language in the written document.

319. MMSA has not waived any right to demand strict compliance with record keeping requirements set forth in the Warranty Policy and Procedures Manual.

320. MMSA adequately trained the principals, management, and service staff regarding the Warranty Policy and Procedures Manual.

321. MMSA is not precluded from challenging the validity of DSM approvals because MMSA provided adequate training and instruction regarding the Warranty Policy and Procedures Manual through the DSMs.

322. MMSA complied with the Warranty Policy and Procedures Manual in the use of overlapping labor operations.

323. MMSA complied with the Warranty Policy and Procedures

⁸ This figure of \$12,867.62 is not being used to offset the \$57,054.68 because MMSA representatives decided to proceed with a standard audit and rely on the results as opposed to following the claims listed in Nicolson's letter.

Manual in the administration of "Prior Work Authorizations" of the first type.

324. MMSA was not in non-compliance with the Warranty Policy and Procedures Manual by instructing to use the closest code.

325. MMSA established what policies and procedures were applicable for all time periods encompassed within the audit period.

326. Hayward was obligated to comply with the Warranty Policy and Procedures Manual.

327. Hayward breached its contract with MMSA by submitting claims which did not comply with the Warranty Policy and Procedures Manual.

328. It was fair for MMSA to charge back claims lacking documentation to substantiate them since the burden is on Hayward to submit the documentation.

329. MMSA's documentation requirements are fair, reasonable, and consistent with industry-wide standards and California state law requirements.

330. MMSA's documentation requirements are reasonably designed to insure only valid claims are paid.

331. It was MMSA's responsibility to tell Hayward what its procedures and requirements were and how to comply with them.

332. MMSA took reasonable steps to tell Hayward what its procedures and requirements were and how to comply with them.

333. It would have made no difference if MMSA had given

Zaheri more advice about warranty administration because Zaheri had a tendency to ignore or misconstrue the advice or suggestions of MMSA's service representatives.

334. MMSA's field representatives modified the terms of the contract between MMSA and Hayward but this did not relieve Hayward of the duty to comply with the Warranty Policy and Procedures Manual.

B. Determination of Issues Pertaining to Contract Interpretation.

335. California law does not prohibit the interpretation of a contract in such a way as to work a forfeiture upon one of the parties to the agreement.

C. Determination of Issues Pertaining to the Agency Relationship between Mathew Zaheri and Hayward Mitsubishi Employees.

336. The principals and management of Hayward authorized, approved, ratified, condoned, and otherwise participated in the writing of fraudulent warranty claims.

337. The principals and management did not act promptly to correct wrongdoing when advised of a problem.

338. Hayward is responsible for the fraudulent acts of its employees and for breach of the contract.

339. Hayward is not relieved of its contractual obligations because MMSA knew at the time Zaheri acquired Hayward that Zaheri had no experience in service operations, nor because MMSA representatives made positive statements and no negative statements about the Cziska-Price service operations.

340. At the time Zaheri acquired Hayward, MMSA did not

believe the Cziska-Price service operation was grossly mismanaged.

341. MMSA did recommend that Zaheri retain certain key employees of the Cziska-Price organization.

342. MMSA did not recommend that Zaheri promote certain key employees of the Cziska-Price organization.

D. Determination of Issues Pertaining to the Defense of Estoppel.

343. MMSA is estopped from challenging the validity of warranty reimbursement categories that it's own representatives previously reviewed and approved.

344. MMSA is estopped from challenging after-the-fact record keeping practices that it had authorized with respect to the second PWA policy.

345. MMSA DSMs did not approve the record keeping practices of Hayward.

346. MMSA is not estopped from contesting problems at Hayward if they were aware of alleged problems at the Cziska-Price dealership and decided to remain silent about the practices.

347. MMSA did not waive nor is MMSA estopped to assert Hayward's breach of the contract.

E. Determination of Issues Pertaining to the Duty to Disclose.

348. MMSA did not have a duty to disclose to Hayward, information about the service department problems at the former Cziska-Price dealership because MMSA was the only party with knowledge of, or access to, the alleged problems.

349. MMSA did not have a duty to disclose the deficiencies in the Cziska-Price service department at the time Hayward acquired the franchise.

350. The covenant of good faith and fair dealing required MMSA to disclose any deficiencies in the warranty practices of Hayward at the time it first became aware of the alleged problems; however, this requirement did not require MMSA to notify Hayward of suspected fraud.

F. Determination of Issues Pertaining to Fraud.

351. MMSA is not estopped from asserting fraud as a justification for the charge back regardless of its repeated denials that the contested charge back was not based on fraud and the absence of any claims of fraud in the Audit Report itself.

352. MMSA's allegations of "massive" warranty fraud are not relevant to the question of the validity of the Audit Report and the charge back given the fact that the Audit Report is based on application of the MMSA Warranty Policy and Procedures Manual, which is an issue of contractual interpretation, but is a defense to any claimed recovery by Hayward.

353. MMSA's consistent disavowals of fraud do not prevent it from changing tactics for the purpose of this proceeding.

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

acted in reliance upon the representation (5) to its damage.

355. MMSA proved that the principals of Hayward authorized, ratified, approved, or condoned the alleged warranty fraud at the dealership.

356. MMSA did not fail to quantify or define the extent of any alleged warranty fraud.

357. MMSA suffered loss and damage as a result of alleged warranty fraud even though it did not reimburse vendors.

358. MMSA's own reports and analysis, as well as those of Hayward, do not contradict the claims of MMSA that the dealership engaged in "massive" warranty fraud.

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

360. MMSA modified the Dealer Sales and Service Agreement with respect to the second PWA policy. The total amount of charge backs in this category amounts to \$57,054.68. MMSA is not entitled to charge back this amount because of the contractual modification. However, the substantiated fraudulent warranty claims submitted by Hayward offset the \$57,054.68.

361. Hayward breached its contract with MMSA by submitting fraudulent warranty claims to MMSA.

362. Hayward submitted false warranty claims.

363. Hayward knew the claims were false.

364. Hayward's technicians knew the claims were false.

365. Hayward's service advisors knew the warranty claims were false.

366. Hayward's service manager, Gannon, knew the warranty claims were false.

367. Hayward's parts department employees knew the warranty claims were false.

368. Zaheri knew the dealership was committing warranty fraud and encouraged and condoned it.

369. MMSA's allegations of fraud could constitute a claim for affirmative relief existing contemporaneously with Petitioner's claims and this defense is thus timely.

370. Hayward is responsible for the fraud even if Zaheri did not know.

371. Hayward intended to defraud MMSA and conceal its fraud from MMSA.

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

373. Hayward perpetuated the deceit referred to in the above paragraph, by failing to disclose it had forged repair orders until late in discovery, and by charging MMSA with knowledge of the forgery and willfully withholding documents in discovery allegedly given to MMSA by Brian Nicolson.

374. Hayward misrepresented the number of Eclipse fender adjustments made during the launch of the Eclipse as a new Mitsubishi model vehicle.

375. Hayward refused to let the auditors in to begin the audit to buy time to conceal the fraud.

376. Hayward neglected to admonish employees after the audit not to commit warranty fraud.

377. Hayward neglected to investigate which employees were perpetrating the warranty fraud and neglected to take appropriate steps with respect to their employment.

378. Hayward, in effect, hired the fox to guard the chickens, by rehiring Tom Gannon in January 1992 to work at the dealership at night unsupervised, reviewing and "auditing" repair orders. Amazingly, nothing was done by Zaheri to investigate the warranty claims process or to deter the further submission of false claims except to rehire Tom Gannon as an independent contractor.

379. Hayward attempted to cover up the fraud by trying to intimidate technicians to discourage them from testifying about their participation in the fraud.

380. Hayward refused to acknowledge and take responsibility for the fraud, choosing instead to: (1) demand in 1990-1991 that MMSA dismiss the Audit Report, reverse the charge back, and make a written apology; (2) devote over 2,000 hours of Hayward's management time to covering up the fraud instead of doing something constructive to prevent it; (3) never state what evidence would satisfy Zaheri that there was fraud nor investigate to what extent there was fraud; (4) offer implausible explanations for the unsubstantiated claims; and (5)

offer implausible explanations for the conduct of the service manager who orchestrated the fraud.

381. Hayward tricked MMSA's DSMs into giving PWAs on the basis of misrepresented facts.

382. MMSA actually and justifiably relied on Hayward's misrepresented warranty claims.

383. MMSA paid Hayward's warranty claims as they were submitted.

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

385. The procedure of giving PWAs without the DSM inspecting the vehicle before the repair is performed further evidenced MMSA's reliance on the dealership's integrity, which is at the heart of the warranty system.

386. MMSA suffered damage as a result of Hayward's fraud in the amount of at least \$59,474.47.⁹

G. Determination of Issues Pertaining to the Validity of the Audit.

387. MMSA can charge back sums that were not reimbursed to vendors.

⁹ This amount, \$59,474.47, was derived by adding the total amount of fraudulently submitted warranty claims for KM175 transmission repairs, \$45,933.93 [see footnote 4] and \$13,540.54 which is the total amount of fraudulently submitted warranty claims for PDI add-ons [see footnote 6].

388. The Audit Report, prepared and issued by MMSA, is not seriously flawed, and does support the charge back levied against Hayward.

389. The methodology of the MMSA Audit Report, and the categories set forth therein, are sufficient to support the Hayward charge back.

390. The charge backs for the claims categorized in the Kmetz report are valid (except for the second type of PWAs).

391. MMSA is not bound by the categories set forth in the Audit Report.

392. MMSA can recategorize a claim in an effort to justify the charge back for purposes of this hearing, however, this Administrative Law Judge did not allow recategorization.

393. The changes in the position and testimony of key MMSA representatives do not emphasize the critical infirmities in both the audit and the charge back.

394. MMSA did not discriminate unfairly among its dealers with respect to warranty reimbursement to the detriment of Hayward and in violation of Vehicle Code § 11713.3(p).

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

396. MMSA was fair in its application of its warranty requirements to Hayward and other dealers in the conduct of claims reviews and audits, and in the conduct of business between

MMSA's representatives and dealers in the field.

397. It was reasonable for MMSA not to charge back warranty claims against the account of Cziska-Price one year after Cziska-Price terminated.

398. It was not unfair discrimination for MMSA not to charge back warranty claims against the account of Cziska-Price one year after Cziska-Price terminated.

399. MMSA treated Hayward more favorably than other dealers in the conduct of the audit, by giving Hayward extra time to find parts for inspection, to submit missing repair orders and sublet bills, and by offering to accept additional documents in support of the claims several months after the audit.

400. It is not unreasonable as a matter of law to require a dealer to submit warranty claims in conformity with fixed requirements such as those in the Warranty Policy and Procedures Manual.

H. Determination of Issues Pertaining to the Allegation of Breach of the Implied Covenant of Good Faith and Fair Dealing and the Dealers-Day-In-Court Act.

401. The audit was not designed to deprive Hayward of some of the intended benefits of the franchise agreement, and did not constitute a breach of the implied covenant of good faith and fair dealing. Specifically, the notice was adequate, the audit was not intrusive, there were no critical errors in the audit, and the auditors adjusted the charge back amount when faced with documentation.

402. MMSA acted in good faith with Hayward within the

meaning of the Dealers-Day-In-Court Act, 15 U.S.C. §§ 1221-1225, without coercion, intimidation, or threats of coercion or intimidation.

I. Determination of Issues Pertaining to the Allegation of Discrimination.

403. The Board will not tolerate racial or ethnic discrimination, however even some reference to ethnic or racial epithets does not establish as a matter of law corporate discrimination. There needs to be more than one racial comment.

404. Federal and State law prohibit the discriminatory treatment of automobile dealerships absent a legitimate business reason.

405. California Vehicle Code § 11713.3(p) prohibits unfair discrimination in the warranty reimbursement of franchisees.

406. Federal law mandates that a manufacturer must deal with its franchisees in good faith.

407. MMSA did not conduct the audit in a malicious and discriminatory manner.

408. Hayward's audit did not encompass a more extensive period of time than audits of other dealers with similar violations.

409. MMSA did not fail to audit or charge back other dealers who committed the very same violations at issue in this case.

410. MMSA did not fail to charge back the accounts of other franchisees who committed violations identical to those asserted against Hayward with the result that the contested audit

contravened both state and federal law.

411. MMSA did not discriminate against Zaheri or Hayward on the basis of racial or ethnic bias.

J. Determination of Issues Pertaining to the Allegation of Defamation.

412. Petitioners have not met their burden with respect to proving the elements of defamation.

413. MMSA has not substantially damaged the business reputation of Hayward.

414. MMSA did not make representations to numerous individuals that massive warranty fraud had occurred at Hayward and that the present ownership would soon be terminated.

415. No MMSA employee ever made a defamatory statement concerning Zaheri or Hayward.

416. Any defamatory statements allegedly made about Hayward or Zaheri were substantially true.

417. Petitioners did not suffer any damages that were caused by the alleged MMSA defamatory statements.

418. MMSA is not liable to Petitioners for defamation.

K. Determination of Issues Pertaining to the Remedies Sought.

419. MMSA would not be unjustly enriched if the charge backs were upheld even if the evidence established that the vast bulk of the warranty work that is the subject of the disputed audit was in fact performed.

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

421. California Vehicle Code § 3065 is not a statutory codification of the principle of quasi-contractual recovery requiring a manufacturer to compensate a franchisee for warranty work actually performed.

L. Determination of Issues Pertaining to Damages.

422. Hayward has not incurred a significant monetary loss because of the manner in which MMSA conducted and enforced the disputed audit.

423. Hayward was adequately and fairly compensated for warranty repairs during the period July 1988 - July 1990.

424. Hayward was not unusually profitable but it did make relatively more money off warranty than other Mitsubishi dealers. (See Paragraph Nos. 313, 314)

425. MMSA failed to detect and charge back all of the fraudulent warranty claims.

426. The most believable witnesses and evidence establish that more than 33% of the warranty audit claims were fraudulent in some amount. Although this Administrative Law Judge feels that amount was much higher, MMSA proved only \$59,474.47 in fraudulent warranty claims [see footnote 9] and this figure may be as high as \$200,000 based on the evidence presented at the hearing. MMSA may offset the \$57,054.68 it owes Hayward (because of the contractual modification with respect to the second PWA policy) by \$59,474.47.¹⁰

¹⁰ These figures would leave a credit of \$2,419.79 for MMSA. However, this amount is not owed to MMSA since MMSA did not seek affirmative relief.

M. Determination of Issue Pertaining to Petitioners' Motion.

427. On February 15, 1994, Petitioners filed a motion for an order requiring production of evidence or, in the alternative, a request for specific findings in view of failure to produce evidence. In view of BAJI No. 2.02 (1992 Revision), "If weaker and less satisfactory evidence is offered by a party, when it was within such party's power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust," Petitioners' motion is denied; however, this Administrative Law Judge does have BAJI No. 2.02 in mind in making this decision.

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PROPOSED DECISION

THEREFORE, the proposed decision is respectfully submitted:

1. The relief sought by the protest/petition by MATHEW ZAHERI and MATHEW ZAHERI CORPORATION is denied.
2. MITSUBISHI MOTOR SALES OF AMERICA, INC. shall recover costs and a reasonable attorney's fee against MATHEW ZAHERI and costs against MATHEW ZAHERI CORPORATION.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing held before me on the above date and recommend adoption of this proposed decision as the decision of the New Motor Vehicle Board.

Dated: September 16, 1994



DOUGLAS H. DRAKE
Administrative Law Judge
New Motor Vehicle Board