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CLERK U.S. BANKRUPTCY COURT
Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIVISION**

In re:

**AMERICAN SUZUKI MOTOR
CORPORATION,**

Debtor(s),

Case No.: 8:12-bk-22808-SC

Chapter 11

**ORDER AND MEMORANDUM OPINION ON
OBJECTION TO PROOF OF CLAIM NO.
520-1 [DOCKET NO. 1383]**

DATE: MAY 29, 2013

TIME: 9:30 A.M.

CTRM: 5C

CLAIM OBJECTION FILED: MARCH 29,
2013 AS DK. NO. 1383.

Before the Court is an Objection to Claim of South Motors Suzuki, Inc. (Proof of Claim No. 520-1 the) (the "Claim Objection") arising from damages resulting from the Debtor's rejection of an executory automobile dealership sales and service agreement.

The Court concludes as follows:

South Motors Suzuki, Inc. ("South Motors") is entitled to compensation for rejection of the Agreement consisting of the lost profits from the sale of the automobile inventory, parts and accessories *in stock at the time of South Motor's tender of the automobile inventory, parts and accessories*. South Motors has already been paid the amounts of the contractual repurchase obligations, and thus nothing is owed further on that account. The lost profits for sales of

1 automobile inventory, and parts and accessories in stock at the time of the tender are
2 determined to be \$21,461.00. South Motors is not entitled to any damages based on lost
3 profits with respect to future sales or services for the reasons set forth within this decision.
4 South Motors is not entitled to any common law breach of contract damages based on fair
5 market value of its Suzuki business for the reasons set forth within this decision.
6

7 South Motors is not entitled to receive any damages arising under Florida state law,
8 because (a) the asserted Florida statutes are preempted by the United States Bankruptcy
9 Code (11 U.S.C. § 101 et. seq.) (the “Bankruptcy Code”) and (b) even if the Florida statutes
10 were not preempted by federal law, they are not applicable because (i) it would be
11 constitutionally impermissible to retroactively apply Florida Law and (ii) the Agreement is
12 controlled by its California choice of law provision.
13

14 The Agreement provides for recovery of attorney fees to prevailing parties. Analyzing
15 the respective positions of the parties, the demands asserted, and payments initially made
16 through the executory contract rejection process, and the results of this claim objection, the
17 Court concludes that the Debtor is the prevailing party in this proceeding, and thus shall be
18 awarded legal fees and costs in its favor and against South Motors in an amount to be
19 determined by further evidentiary presentation.
20

21 **FACTS**

22 On November 5, 2012 (the “Petition Date”), American Suzuki Motor Corporation
23 (“ASMC” or the “Debtor”) filed its petition under Chapter 11 of Title 11, United States Code (the
24 Bankruptcy Code”). The Debtor was a California corporation organized in 1986 and privately
25 owned by Suzuki Motor Corporation, a Japanese corporation. At the time of the petition date,
26 the Debtor was the sole distributor in the continental United States of Suzuki automobiles,
27 motorcycles, ATVs, and marine outboard engines (collectively “Suzuki Products”). As of the
28

1 Petition Date, the Debtor wholesaled the Suzuki Products through three primary business
2 divisions: automotive (the "Automotive Division"), motorcycles and ATV (the "Motorcycles/ATV
3 Division"), and outboard marine motors and related products (the "Marine Division"). During
4 the pre-petition operation of its business, the Debtor purchased Suzuki Products from its non-
5 debtor parent Suzuki Motor Corporation ("SMC"), Suzuki Manufacturing of America
6 Corporation, an affiliate of the Debtor, and certain other non-debtor affiliates. In turn, the
7 Debtor wholesaled most of its inventory through a network of independently owned and
8 unaffiliated dealerships located throughout the continental United States. The dealers then
9 marketed and sold the Suzuki Products to retail customers. As of the Petition Date, there were
10 approximately 220 automotive remaining dealerships, over 900 motorcycle/ATV dealerships,
11 and over 780 outboard marine dealerships.
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14 According to the Debtor's approved Third Amended Disclosure Statement,

15 The Debtor commenced this chapter 11 case to restructure its Automotive
16 Division. The Automotive Division has recently faced and will continue to face
17 numerous adverse business issues including: (a) declining sales volume and
18 market-share, (b) unfavorable foreign currency exchange rates for products
19 manufactured outside the United States, (c) the high cost associated with
20 growing and maintaining an automotive distribution system in the continental
21 United States, (d) having a limited number of models in its line-up that are being
22 offered to consumers in an already highly competitive automotive market, (e)
23 disproportionally high and increasing compliance costs associated with stringent
24 state and federal automotive regulatory requirements unique to the continental
25 United States market, and (f) existing and potential litigation costs. In the face of
26 these business challenges, the Debtor's efforts to reduce operating costs have
27 proven to be insufficient to meet the rising cost of maintaining a competitive and
28 profitable automobile distribution network in the continental United States.

As part of the Automotive Division restructuring, the Debtor will discontinue new
automotive sales after its existing automotive inventory is sold. Certain of its
existing automotive dealers will be extended an offer to transition their existing
dealerships from new sales to provide only service and parts. Through the
service and parts dealers, manufacturer's warranties relating to the Debtor's
automobiles will be honored to the extent that has been authorized by the Court
as discussed below, and the cost associated with such service will continue to be

1 reimbursed to the participating dealers as part of the Continuing Business (as
2 defined below).

3 *Third Amended Disclosure Statement, Dk. No. 587, p. 45, lines 22-28, through p. 46, lines 1-*
4 *12.*

5 Immediately following the Petition Date, the Debtor contacted its approximately 220
6 remaining automotive dealers, offering to enter into letter agreements and service and parts
7 agreements which would result in resolution of dealer claims. Less than thirty days later, the
8 Debtor had entered into 213 agreements, culminating in the December 21, 2012, approved
9 Auto Dealer Agreements Motion (the "Dealers Agreement Motion"). Since that December 2012
10 approval, the Court estimates that another six dealers have resolved their claims with the
11 Debtor under the umbrella of the Dealers Agreement Motion or related settlements. That
12 agreement provided, *inter alia*, that the approximate 220 dealers, including South Motors,
13 could have maintained their parts and service dealer status for another eight (8) years, and
14 maintained whatever financial benefits such status would have bestowed on the accepting
15 dealers. South Motors was offered the option to continue as a Suzuki service and parts dealer
16 with the successor owner of the business assets for another eight years, and chose not to
17 participate in that arrangement.
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21 **SOUTH MOTORS' CLAIM AND DEBTOR'S OBJECTION**

22 South Motor's Claim

23 South Motors was a Suzuki automobile dealer operating under the terms of a 1995
24 Three Year Dealer Sales and Service Agreement and its Standards Provisions (the "SMS
25 Agreement") with the Debtor.¹ The Court finds that the SMS Agreement was extended by
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¹ The Three Year Dealer and Service Agreement, and its accompanying Standard Provisions, are attached to the Debtor's Objection to the South Motors Claim as exhibits "A" and "D", respectively, and can be found at Dk. No.

1 letter agreement for one year, through August 15, 1999.² Finally, the parties agree that no
2 other modifications or alterations were made to the SMS Agreement and that they have been
3 operating under this agreement since that time.

4
5 By Order dated January 11, 2013, the Debtor rejected the SMS Agreement, effective as
6 of December 20, 2012. South Motors filed its Claim on January 31, 2013, in the amount of
7 \$1,595,601, plus attorney fees and costs, based on certain post-termination obligations arising
8 under the SMS Agreement and applicable state law (the "Claim"). The Claim is comprised of:
9 (a) \$531,867 under the repurchase categories articulated in the SMS Agreement and various
10 provisions of the Florida Motor Vehicle Licenses Act (the "Act"), and (b) an additional
11 \$1,063,734, based on South Motors' argument that it is entitled to treble damages under the
12 Act. South Motors asserts that "[T]he Florida laws (in question), Fla. Stat. §§ 320.64(36) and
13 320.697, provide for the calculation of South Motors' base damages claim and, where those
14 damages are not paid, a trebling of damages and the addition of reasonable attorney's fees."
15 *South Motors Opposition, Dk. No. 1533, p. 4, lines 1-3.* South Motors asserts that while
16 certain of these applicable statutes were enacted after it entered into the 1995 SMS
17 Agreement, they are retroactive in nature. South Motors also provides the Court with an
18 extensive analysis of claims damages arising from the Act and its analysis that the Act should
19 be retroactively applied.
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25 1384. These two documents are also marked as Exhibit "1" and Exhibit "3", respectively, of the jointly submitted
26 marked exhibits which were admitted into evidence during the hearing.

27 ² South Motors argued in Court that the one year extension letter was not binding because "South Motors did not
28 sign it." This Court finds that South Motors did not repudiate the letter and acted at all times, for the next
approximate 12 years, under its terms and conditions. It seems to the Court that South Motors only argues that
the letter extension does not apply so that they can then argue that they are entitled to three years of future
contract damages, since the initial agreement was three years. No other benefits or detriments exist with respect
to South Motors' argument. The Court finds South Motor's argument that the extension letter has no force or
effect disingenuous, opportunistic and simply wrong.

1 South Motors alternatively argues that if the Act does not apply, it is entitled to a
2 common law claim for breach of contract under Florida law. It states:

3 If, for any reason, the Act did not apply to the current circumstances, South
4 Motors would hold a common law claim for breach of contract under Florida law.
5 Pursuant to Section 365(g) of the Bankruptcy Code, “the rejection of an
6 executory contract or unexpired lease of the debtor constitutes a breach of such
7 contract or lease[.]” 11 U.S.C. § 365(g). In Florida, “[i]t is a fundamental principle
8 of contract law that once liability for a contract breach is established, an injured
9 party is entitled as a matter of right to compensatory damages.” *MSM Golf, L.L.C.
v. Newgent*, 853 So. 2d 1086, 1087 (Fla. Ct. App. 5th Dist. 2003) (holding that a
jury verdict that finds that one party breached two contracts but fails to award any
damages is inconsistent and cannot stand).

10 *South Motors Opposition, Dk. No. 1533, p. 6, lines 3-10.*

11 South Motors finally asserts that it is entitled to reasonable attorney fees and costs
12 pursuant to both the Act and the SMS Agreement contractual provisions. *South Motors*
13 *Opposition, Dk. No. 1533, p. 16, lines 17-25.*

14 The Debtor’s Claim Objection

15 The Debtor raises a number of objections to the South Motors’ claim. First, the Debtor
16 asserts that any repurchase obligation for inventory was satisfied on March 13, 2013, when the
17 Debtor paid South Motors the amount of \$200,898. Second, the Debtor asserts that the
18 balance of the repurchase obligation asserted by South Motors consists of reimbursement for
19 the fair market value of the dealership as of 12 months before the termination, and that amount
20 is not recoverable because (a) the Florida statutes cited by South Motors were enacted in
21 2009 and do not retroactively apply to the 1995 SMS Agreement, and (b) this provision of the
22 Act is preempted by the Bankruptcy Code. Third, the Debtor asserts that even if South Motors
23 was entitled to the fair market value of its Suzuki franchise pursuant to Fla Stat.
24 § 320.64(36)(b), the value claimed is grossly inflated. The Debtor asserts that, based on a
25 proper analysis, that amount should be no more than \$135,992. Fourth, the Debtor argues
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1 that there is no basis for treble damages, attorney fees or costs under Florida state law
2 because the Debtor has not violated any provision of the Act. Even if there were a violation,
3 the Debtor says, there is not an allegation of any pecuniary damages arising from such a
4 violation that might be trebled.
5

6 Finally, the Debtor asserts that it is entitled to reasonable attorney fees and costs under
7 provisions of the SMS Agreement.
8

9 **DISCUSSION**

10 **The Florida Dealer Statutes are Preempted** 11 **by Section 365 of the Bankruptcy Code**

12 The Ninth Circuit decision *In re Baker & Drake, Inc.* (*Baker & Drake, Inc. v. Public*
13 *Service Commission of Nevada*), 35 F.3d 1348 (9th Cir. 1994), teaches that it is “a familiar and
14 well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates
15 state laws that 'interfere with, or are contrary to,' federal law.” *Hillsborough Cty. v. Automated*
16 *Medical Labs., Inc.*, 471 U.S. 707, 712, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985) (quoting
17 *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 211, 6 L. Ed. 23 (1824)).” *Baker & Drake*, 35 F. 3d
18 at 1352. In *Baker & Drake*, a Chapter 11 debtor taxicab company proposed a plan of
19 reorganization which provided that its drivers would become independent contractors instead
20 of employees. The court approved the plan and enjoined the Nevada Public Service
21 Commission from enforcing a Nevada statute requiring drivers to be employees. The District
22 Court reversed the bankruptcy court, holding that the Bankruptcy Code did not preempt the
23 Nevada Statute. The Ninth Circuit affirmed the District Court’s finding of non-preemption,
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1 determining that the specific Nevada statute was a reasonable regulation intended to secure
2 the public convenience and safety.³

3 Guided by *Baker & Drake*, the appropriate analysis for determining preemption is to look
4 first “to the intent and sweep of the federal statute.” *Baker & Drake*, 35 F.3d at 1353. The
5 federal statute’s preemptive intent may be express or implied, and with respect to implicit
6 preemption, inference may occur where “the scheme if federal regulation is sufficiently
7 comprehensive to make reasonable the inference that Congress “left no room” for
8 supplementary state regulation.” *Baker & Drake, supra*. Drawing from the Supreme Court
9 decisions *Hillsborough County*, 471 U.S. at 713, and *Louisiana Public Serv. Comm’n v. FCC*,
10 476 U.S. 355, 368-69 (1986), the Ninth Circuit determined that

13 Even where Congress has not completely displaced state regulation in a specific
14 area, state law is nullified to the extent that it actually conflicts with federal law.
15 Such a conflict arises when "compliance with both federal and state regulations is
16 a physical impossibility," or when state law "stands as an obstacle to the
17 accomplishment and execution of the full purposes and objectives of Congress."

18 *Baker & Drake*, 35 F.3d at 1353.

19 The next step of the *Baker and Drake* analysis is to determine whether the state statute
20 “stands as an obstacle to the accomplishment and execution of the full purposes and
21 objectives” of the Bankruptcy Code, or whether the state statute is designed to protect the
22 public health or safety. This step was derived by the Ninth Circuit’s analysis of two Supreme
23 Court cases, *Perez v. Campbell*, 402 U.S. 637 (1971), and *Midlantic National Bank v. New
24 Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

25 In *Perez*, the Supreme Court found that an Arizona statute carved out an exception to
26 the federal discharge provision of the Bankruptcy Act (the bankruptcy law prior to the
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³ The Ninth Circuit in *Baker & Drake, Inc.* also confirmed that whether a state statute is preempted is a question of law reviewed de novo, citing *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 (9th Cir. 1993).

1 enactment of the 1978 Bankruptcy Code), and was thus invalid. The Arizona statute provided
2 that damages arising from accidents involving uninsured motorists were not dischargeable,
3 and, according to the Supreme Court, preemption existed as such a law frustrated the full
4 effectiveness of federal law. *Baker and Drake*, 35 F.3d at 1353, citing *Perez*, 402 U.S. at 652.

5
6 In *Midlantic National Bank*, which involved the bankruptcy of a waste oil processor, a
7 chapter 7 trustee wished to quickly abandon two hazardous material contaminated sites faster
8 than an f/1.4 lens pursuant to 11 U.S.C. § 554(a). The City and State of New York, as well as
9 the New Jersey Department of Environmental Protection, objected, asserting that such
10 abandonment would violate local and state laws. The bankruptcy court ordered abandonment;
11 however a divided three member panel of the Third Circuit (taking a direct appeal from the
12 bankruptcy court) reversed, holding that Congress did not intend to preempt all state
13 regulation, but only those grounded on policies which were outweighed by the relevant federal
14 interests. The Supreme Court granted certiorari and affirmed, holding that the Bankruptcy
15 Code did not preempt "a state statute or regulation that is *reasonably designed to protect the*
16 *public health or safety* from identified hazards." *Midlantic*, 474 U.S. at 507 (emphasis added).
17

18
19 Following examination of these Supreme Court rulings, the Ninth Circuit established an
20 analytical standard as follows:

21
22 As we view these cases, they suggest that federal bankruptcy preemption is
23 more likely (1) where a state statute facially or purposefully carves an exception
24 out of the Bankruptcy Act, or (2) where a state statute is concerned with
25 economic regulation rather than with protecting the public health and safety.

26
27 *Baker & Drake*, 35 F.3d at 1353.

28
A significant body of federal case law exists supporting the view that state laws are
preempted when they seek to impair a bankruptcy trustee or debtor from assuming or rejecting
executory contracts. These include decisions arising from automobile distributor bankruptcies

1 seeking to eliminate dealership agreements through the contract rejection mechanism under
2 11 U.S.C. § 365. The most prominent of these decisions, *In re Old Carco LLC (f/k/a Chrysler*
3 *LLC)*, 406 B.R. 180 (S.D.N.Y. 2009), directly addressed the preemption issue arising from the
4 objections of Chrysler dealers alleging that they would be unduly harmed by the rejection of
5 their dealership contracts. The New York dealers in *Old Carco* argued that their contracts
6 were of a different breed deserving heightened scrutiny in the rejection arena, not unlike
7 collective bargaining agreements, and that they should be afforded special consideration and
8 standards for rejection.⁴ The dealers promoted their argument of heightened standards for
9 rejection because of the existence of state statutes designed to protect automobile dealers (the
10 “Dealer Statutes”) or because the loss of a dealership in a community could harm the public.
11
12

13 The dealers also argued that the Dealer Statutes were not preempted by section 365 of
14 the Bankruptcy Code. This question was addressed in *Old Carco*.

15 The Dealer Statutes also set forth the rights and remedies of dealers under such
16 statutes. Relevant to this case are the rights and remedies related to termination
17 of dealership agreements. (footnote omitted.) Rights include statutory waiting and
18 notice periods for wind-downs and buy-back requirements for terminations with
19 or without cause. Remedies include specific types of damages and
20 commencement of legal or administrative proceedings. Consistent with the
21 Order, the Court concludes that the Dealer Statutes are preempted by § 365 with
22 respect to rejection of the Rejected Agreements. Of course, as with contract
23 rejection in general, damages are still calculated according to state law.

24 *Old Carco* 406 B.R. at 199.

25 This Court agrees with *Carco*’s analysis, which continued:

26 More generally, a bankruptcy court recently held that “Congress enacted [§] 365
27 to provide debtors the authority to reject executory contracts. This authority
28 preempts state law by virtue of the Supremacy Clause [and] the Bankruptcy
Clause.” *In re City of Vallejo*, 403 B.R. 72, 77 (Bankr. E.D. Cal. 2009). “Where a

⁴ Whether to assume or reject an executory contract is generally left to the business judgment of the trustee or debtor in possession. *In re G.I. Indus., Inc.*, 204 F.3d 1276, 1282 (9th Cir. 2000). The Supreme Court has ruled that a somewhat higher standard than the business judgment rule applies to collective bargaining agreements (noting “national labor policies of avoiding labor strife and encouraging collective bargaining” under the National Labor Relations Act). *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 523-24 (1984).

1 state law 'unduly impede[s] the operation of federal bankruptcy policy, the state
2 law [will] have to yield.'" *Id.* (quoting *Perez*, 402 U.S. at 649). (footnote omitted.)
3 Specifically and by no means exclusively, statutory notice or waiting periods of,
4 e.g., 60 or 90 days before termination clearly frustrate § 365's purpose to allow a
5 debtor to reject a contract as soon as the debtor has the court's permission (and
6 there is no waiting period under the Bankruptcy Rules). Buy-back requirements
7 also frustrate § 365's purpose to free a debtor of obligations once the debtor has
8 rejected the contract. Good cause hearings frustrate § 365's purpose of giving a
9 bankruptcy court the authority to determine whether a contract may be assumed
10 or rejected. (footnote omitted.) Strict limitations on grounds for nonperformance
11 frustrate § 365's purpose of allowing a debtor to exercise its business judgment
12 and reject contracts when the debtor determines rejection benefits the estate.
13 (Footnote omitted.) So-called "blocking rights," which impose limitations on the
14 power of automobile manufacturers to relocate dealers or establish new
15 dealerships or modify existing dealerships over a dealer's objection, frustrate §
16 365's purpose of giving a debtor the power to decide which contracts it will
17 assume and assign or reject by allowing other dealers to restrict that power.

18 *Id.* at 205-206.

19 As South Motors points out, the question before the Court today is not one of rejection
20 of an executory contract, but of the measure of damages on account of such rejection. State
21 law is used to measure contract rejection damages; but by state law this Court means the
22 normal, common or statutory law used to measure breach of contract damages. The dealer
23 statutes at play here are designed to adjust, in favor of dealers, the normal, common law or
24 statutory law principles guiding remedies for breach of contract. There are no health or safety
25 policies at work with these statutes; they are enacted to obtain commercial economic
26 adjustments to perceived inequities or imbalances between private parties, and are polemic in
27 nature.⁵ As a result, the adjustments and penalties set out in dealer statutes skew the cost of
28 rejection (or breach in non-bankruptcy settings) for the economic benefit of automobile dealers.
As such, dealer statutes, by approaching the political/economic leverage from the damages

⁵ During the hearing, the Court further amplified its point regarding the penalties that are part of these state dealer statutes, and the Court's view that they are designed to dissuade distributors or manufacturers from terminating dealer agreements because of the "piling on" of punitive damages. Obviously enforceable under certain circumstances in non-bankruptcy settings, the overarching principles of bankruptcy law preempt these laws in bankruptcy rejection damages proceedings.

1 angle, impair debtors' opportunities to avail themselves of the overarching principles of federal
2 bankruptcy law. While perhaps permissible in non-bankruptcy law settings, federal bankruptcy
3 law preempts these local and state economic windfalls to dealers when no public health or
4 safety issues are presented.

5
6 The purpose of contract rejection under section 365 is to permit the debtor to receive
7 the economic benefits necessary for reorganization (which includes liquidation under chapter
8 11) for the ultimate benefit of the estate and its creditors. State legislatively-imposed buy back
9 requirements, fair market value awards and treble-damages penalties are superimposed onto
10 the normal contract damage remedy provisions under state common or statutory law. While
11 Florida and many other states believe that their public policy should provide special protections
12 for the economic interest of local car dealerships, in the area of federal bankruptcy law those
13 remedies run counter to the federal policy of bankruptcy reorganization and are therefore
14 preempted.
15

16
17 The Ninth Circuit has squarely addressed this concept within the section 365 rejection
18 remedies (i.e. damages) context. Refusing to apply the remedy of specific performance, the
19 Ninth Circuit held:

20 Also, rejection of an executory contract serves two purposes. It relieves the debtor of
21 burdensome future obligations while he is trying to recover financially and it constitutes
22 a breach of a contract which permits the other party to file a creditor's claim." *In re*
23 *Norquist*, 43 Bankr. 224, 225 (Bankr.E.D.Wash. 1984). Given this purpose, the Fourth
24 Circuit recently held that specific performance was not an available relief under section
25 365 because "it would undercut the core purpose of rejection." *Lubrizol Enter., Inc. v.*
Richmond Metal Finishers, Inc. (*In re Richmond Metal Finishers, Inc.*), 756 F.2d 1043,
1048 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057, 89 L. Ed. 2d 592, 106 S. Ct. 1285
(1986).

26 *In re Rega Properties, Ltd.*, 894 F.2d 1136, 1140 (9th Cir. Wash. 1990).
27
28

1 **The Applicable Florida Dealer Statutes**
2 **Are Not Retroactive As To the SMS Agreement**

3 South Motors partially bases its claim on repurchase obligations arising under the
4 Florida Motor Vehicle Licenses Act. These include requirements to:

- 5 (1) repurchase the dealership at its fair market value pursuant to Fla. Stat. §
6 320.64(36)(b), which statute became effective on May 28, 2009;
7
8 (2) repurchase new Suzuki vehicles, parts and accessories, signs, and special tools,
9 data processing equipment, and automotive service equipment, pursuant to Fla.
10 Stat. § 320.64(36)(a), which statute became effective on July 1, 2006; and
11
12 (3) reimburse the cost of transporting, handling, packing, storing, and loading any
13 property subject to repurchase under Fla. Stat. §320.64(36)(a), which statute also
14 became effective on July 1, 2006.⁶

15 The Debtor entered into the SMS Agreement with South Motors in 1995, and the last
16 (and only) extension to the SMS Agreement was entered into in 1999. No further written
17 agreements exist.

18 Regarding the 2009 Florida statute requiring repurchase of a dealership at fair market
19 value (Fla. Stat. § 320.64(36)(b)), there is no retroactivity provision (i.e. language that asserts
20 the statutes controls *existing* or future contracts) within the statute. Under Florida law, statutes
21 that affect substantive contractual rights are presumed to apply only prospectively to contracts
22 entered after the date they are enacted. Only in limited situations may a statute may be applied
23 retroactively to impact pre-existing contracts.
24

25 Florida case law has made it clear that when determining whether an enacted statute
26 (or amendment thereto) can apply retroactively to existing contracts, the Court must determine
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28 _____
⁶ The relevant legislative histories of these statutes are set out in the Debtor's Objection (Dk. No. 1383) and shall not be repeated here.

1 whether there is clear legislative intent to apply the statute retroactively. If there is none, the
2 statute applies only prospectively, and no other constitutional analysis is necessary with
3 respect to existing contracts. See *Trustees of Tufts College v. Triple R. Ranch, Inc.*, 275
4 So.2d 521 (Fla. 1973); *In re Seven Barrels of Wine*, 79 Fla. 1, 83 So. 627 (1920). The same
5 analysis is used to determine whether amendments to existing statutes can apply retroactively
6 to pre-existing contracts. *Basel v. McFarland & Sons, Inc.*, 815 So.2d 687, 692 (Fla. 5th DCA
7 2002) (refusing to apply statutory amendment retroactively).

8
9 With respect to the statutory requirements to repurchase vehicles, parts and
10 accessories and for the cost of transporting, handling, etc. property subject to repurchase
11 pursuant to Fla. Stat. § 320.64(36)(a), those 2006 amendments contain a retroactivity
12 provision, directing that the statute applies to both existing and future dealership agreements.
13

14 The Florida Supreme Court has addressed the retroactive application of the Motor
15 Vehicle Act and had determined retroactive application to existing contracts is impermissible
16 under the Florida and United States Constitutions. *Yamaha Parts Distr., Inc. v. Ehrman*, 316
17 So.2d 557 (Fla. 1975) (finding that retroactive application of dealer termination statutes to
18 agreements pre-dating its enactment would be unconstitutional); *Dept. of Mot. Veh. v.*
19 *Mercedes-Benz, Inc.*, 408 So.2d 627, 630 (Fla. 2nd DCA 1981) (finding that retroactive
20 application of dealer transfer restrictions to agreements pre-dating its enactment would be
21 unconstitutional). The Debtor observes, and this Court finds, that while these cases dealt with
22 the retroactive application of the originally-enacted Motor Vehicle Act, later statutory
23 amendments are evaluated in the same way, and retroactive application is forbidden if existing
24 contract rights are disturbed. See *Hassen v. State Farm Mut. Auto Ins. Co.*, 674 So.2d 106
25 (1996) (refusing to apply statutory amendment retroactively); *Basel v. McFarland & Sons, Inc.*,
26 815 So.2d 687, 692 (Fla. 5th DCA 2002) (same); *Ellsworth v. Ins. Co.*, 508 So.2d 395 (Fla. 1st
27
28

1 DCA 1987) (same); *Metro. Prop. and Liab. Ins. Co. v. Gray*, 446 So.2d 216 (Fla. 5th DCA 1984)
2 (same).

3 The Court also observes that the Attorney General of the State of Florida has issued,
4 and has never withdrawn, an extensive Attorney General Advisory Legal Opinion AGO 83-47,
5 dated July 29, 1983, concerning the "Motor Vehicle Warranty Enforcement Act," Ch. 83-69,
6 Laws of Florida, which reads in pertinent part,
7

8 Further, it is a well-settled rule that a statute will not be construed as retroactive
9 unless its terms clearly show that the Legislature intended such a result. Instead,
10 the presumption is that a legislative act operates prospectively only, unless there
11 is a clear showing of retroactive intent. *See, e.g., State ex rel. Bayless v. Lee*, 23
12 So.2d 575 (Fla. 1945); *Trustees of Tufts College v. Triple R. Ranch, Inc.*, 275
13 So.2d 521 (Fla. 1973); *Keystone Water Company v. Bevis*, 278 So.2d 606 (Fla.
14 1973); *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park Inc.*, 361 So.2d
15 695 (Fla. 1978); *Seddon v. Harpster*, 403 So.2d 409 (Fla. 1981); *Indemnity
16 Insurance Company v. Brooks-Fisher Insulating Co.*, 140 So.2d 613 (2 D.C.A.
17 Fla., 1962). *See generally* 82 C.J.S. Statutes § 414. As stated in *Heberle v.
18 P.R.O. Liquidating Company*, 186 So.2d 280, 282 (1 D.C.A. Fla., 1966):

19 "A law is retroactive or retrospective if it takes away or impairs vested
20 rights acquired under existing laws, or if it creates a new obligation,
21 imposes a new duty, or attaches a new disability in respect to transactions
22 or considerations already past." (e.s.)
23

24 That the rule against retroactive application is applied in an especially strict
25 manner as to laws imposing new penalties or obligations was noted by the court
26 in *Larson v. Independent Life & Accident Insurance Company*, 29 So.2d 448 (Fla.
27 1947), wherein it was stated that "[a]cts which create new obligations and impose
28 new penalties, have been more rigidly construed as being governed by this rule."
See also Taylor v. Florida Crimes Compensation Commission, 367 So.2d 720 (3
D.C.A. Fla., 1979) (the rule that statutes will not be given retroactive application
unless such application is required in clear and explicit terms applies to statutes
which create new rights and liabilities); AGO 78-22. Compare 15 U.S.C.S. § 2312
(the effective date provision of the Magnuson-Moss Warranty Act which states
that, with the exception of one section, the provisions of that Act "shall take effect
6 months after the date of its enactment [enacted January 4, 1975] but shall not
apply to consumer products manufactured prior to such date"). An exception to
the general rules stated above applies to remedial or procedural statutes which
do not create new rights or obligations or enlarge, diminish or destroy vested or
contractual rights but only operate in furtherance of the remedy or confirmation of
rights already existing; such statutes are generally held to operate retrospectively
unless such operation or application would adversely affect substantive rights.

1 See 82 C.J.S. Statutes § 416; *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla.
2 1961).

3 ***

4 The obligation of a contract is impaired in the constitutional sense when the
5 substantive rights of the parties to the contract are changed, *Hardware Mutual*
6 *Casualty Company v. Carlton*, 9 So.2d 359 (Fla. 1942), or where new and
7 different liabilities are imposed thereunder, *Manning v. Travelers Insurance*
8 *Company*, 250 So.2d 872 (Fla. 1971). As the court stated in *Manning v.*
9 *Travelers Insurance Company, supra*, "[i]n order for a statute to offend the
10 constitutional prohibition against enactment of laws impairing the obligation of
11 contracts, the statute must have the effect of rewriting antecedent contracts, that
12 is, of changing the substantive rights of the parties to existing contracts." 250
13 So.2d at 874. See also *Commodore Plaza at Century 21 Condominium*
14 *Association, Inc. v. Cohen*, 378 So.2d 307, 309 (3 D.C.A. Fla., 1979), in which
15 the court found that the statutory imposition of attorneys' fees pursuant to a
16 legislative enactment effective subsequent to the execution of a ninety-nine year
17 lease in which attorneys' fees were not bargained for materially changed the
18 binding force of the agreement and would impair the obligation of the existing
19 lease and contract between the parties and was unconstitutional as applied to
20 that instrument. And see *Dewberry v. Auto-Owners Insurance Company*, 363
21 So.2d 1077, 1079-1080 (Fla. 1978), and *Hausler v. State Farm Mutual*
22 *Automobile Insurance Company*, 374 So.2d 1037, 1038 (2 D.C.A. Fla., 1979)
23 (where statute in question was not in effect at time of contracting, it cannot be
24 retroactively applied to alter obligations of that contract, and this is true even
25 though the act which triggers the obligation occurs after statute is enacted).

17 *Attorney General Advisory Legal Opinion AGO 83-47*, dated July 29, 1983.

18 The Court also notes the analysis by the Florida Senate's Professional Staff of the
19 Transportation Committee, set forth in "The Florida Senate Bill Analysis and Fiscal Impact
20 Statement" for SB 740, dated March 3, 2011. It is both self-explanatory and illuminating:

22 I. Summary:

23 Manufacturers, distributors, and importers (collectively referred to as licensees)
24 enter into contractual agreements with franchised motor vehicle dealers to sell
25 particular vehicles that they manufacture, distribute, or import. Existing law
26 provides for the licensing of motor vehicle dealers and motor vehicle
27 manufacturers, distributors, and importers, and regulates numerous aspects of
28 the franchise contracts these businesses enter into to conduct business in the
State of Florida.

28 The Department of Highway Safety and Motor Vehicles (DHSMV) held, in an
administrative proceeding, amendments to the Florida Automobile Dealers Act

1 (§§. 320.60-320.071, F.S.) do not apply to dealers having franchise agreements
2 which were signed prior to the effective date of the amendment. *Motorsports of*
3 *Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. DMV-09-0935 (Fla.
4 DOAH 2009). The Petitioner appealed the final order to the First District Court of
5 Appeal, but ultimately voluntarily dismissed the appeal. The DHSMV has
6 indicated it will be applying this holding to every amendment to the Florida
7 Automobile Dealers Act. That means dealers have different protections under the
8 law depending on when they signed their franchise agreement.

9 The bill amends § 320.6992, F.S., to provide for the application of §§ 320.60-
10 320.70, F.S., including any amendments to ss. 320.60-320.70, F.S., to all
11 existing or subsequently established systems of distribution of motor vehicles in
12 the state unless such application would impair valid contractual agreements in
13 violation of the State or Federal Constitution. All agreements amended
14 subsequent to October 1, 1988, are governed by §§ 320.60-320.70, F.S.,
15 including any amendments to §§ 320.60-320.70, F.S., which have been or may
16 be from time to time adopted unless the amendment specifically provides
17 otherwise.

18 ***

19 Section 320.6992, F.S., provides this act [Florida Automobile Dealers Act] shall
20 apply to all presently existing or hereafter established systems of distribution of
21 motor vehicles in this state, except to the extent that such application would
22 impair valid contractual agreements in violation of the State Constitution or
23 Federal Constitution. The provisions of this act shall not apply to any judicial or
24 administrative proceeding pending as of October 1, 1988. All agreements
25 renewed or entered into subsequent to October 1, 1988, shall be governed
26 hereby.

27 **The DHSMV recently held, in an administrative proceeding, amendments to**
28 **the Florida Automobile Dealers Act do not apply to dealers having**
franchise agreements which were signed prior to the effective date of the
amendment. *Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*,
Case No. DMV-09-0935 (Fla. DOAH 2009). The Petitioner appealed the final
order to the First District Court of Appeal, but ultimately voluntarily
dismissed the appeal.

In this holding, the DHSMV ruled the 2006 amendment to the Florida
Automobile Dealers Act which requires that if a dealer's franchise
agreement is terminated the manufacturer must buyback from the dealer its
unsold vehicles, parts, signs, special tools, and other items, does not apply
to a dealer terminated in 2008 because the dealer's franchise agreement
was entered into prior to the effective date of the amendment.

The DHSMV has indicated it will be applying this holding to every
amendment to the Florida Automobile Dealers Act. That means dealers

1 **have different protections under the law depending on when they signed**
2 **their franchise agreement. (Emphasis added).**

3 Fla. S. Comm. on Transp. CS for SB 740 (2011) Staff Analysis (Mar. 3, 2011), available at
4 <http://www.flsenate.gov/Session/Bill/2011/0740/Analyses/=PL=vG/aZPamDkEYIJgyh4VVoOS39E=%7C7/Public/Bills/0700-0799/0740/Analysis/2011s0740.pre.tr.PDF>.

5 This Court has reviewed the *Motorsports of Delray, LLC v. Yamaha Motor Corp.*,
6 *U.S.A.*, decision and finds it persuasive. See *Motorsports of Delray, LLC v. Yamaha Motor*
7 *Corp., U.S.A.*, Case No. DMV-09-0935 (Fla. DOAH 2009). The final order in *Motorsports of*
8 *Delray* adopted the recommended order as its final order. The recommended order adopted
9 the undisputed material facts and analysis of the Administrative law judge. That Court entered
10 an order “i) granting Yamaha’s Motion, ii) finding that there are no disputed material facts; iii)
11 ruling that the buyback provision in section 320.64(26), Florida Statutes, is prospective only;
12 and iv) relinquishing jurisdiction to the Department pursuant to section 120.57(1)(i), Florida
13 Statutes...The undisputed material facts and analysis as stated in the Administrative Law
14 Judge’s Order Relinquishing Jurisdiction are adopted herein and made a part of this
15 Recommended Order.” *Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No.
16 DMV-09-0935 (Fla. DOAH 2009).

17 Because the SMS Agreement was entered into in 1995 and extended through 1999,
18 any application of the Act, as amended, to South Motors’ claim would be retroactive in nature.
19 The Act is not applicable in the case of the fair market value buy-back provisions, and as to all
20 of the Act’s pertinent provisions, whether they include retroactive language or not, they
21 unconstitutionally impair the Debtor’s contract rights contained in the SMS Agreement, and are
22 therefore unenforceable.
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**South Motors is Entitled to Breach of Contract Damages
Under the Terms of the SMS Agreement**

Termination Obligations Under the Dealer Agreement

Section 11.07 of the Standard Provisions of the operative SMS Agreement provides as follows:

Suzuki Repurchase Option Upon Termination. Upon termination of this Agreement for any reason, Suzuki will repurchase from Dealer, free and clear of all liens, charges and encumbrances, the following:

a. New, unused, unaltered, undamaged, unlicensed and marketable current model Suzuki Vehicles, with mileage of 100 miles or less, which were purchased by Dealer from Suzuki, and are in Dealer's inventory, at Dealer's vehicle price less destination charges and any voluntary advertising associated assessments made on behalf of a Suzuki Advertising Association. Suzuki shall pick up said Suzuki Vehicles and pay all transportation charges for return of said vehicles; and

b. The new, current model Suzuki Parts and Accessories at Suzuki's invoice price to dealer, less Suzuki's prevailing restocking charge, but only if delivered by Dealer at Dealer's expense, to Suzuki's Parts Warehouse located nearest Dealer provided, however, that these Suzuki Parts and Accessories must be in a new, unused, undamaged and saleable condition and in the original package and original package quality; provided further, that Suzuki will not purchase any Suzuki Parts and Accessories which Suzuki deems to be obsolete.

Dealer Sales and Service Agreement Standard Provisions (April 1990), Debtor's Appx., Ex. D. [Dk. No. 1384].

The Court's first inquiry is whether this provision is the appropriate breach of contract damages afforded South Motors because of contract rejection under § 365.⁷ These provisions

⁷ Executory contract rejection under § 365 does not automatically terminate the contract. The contract is breached by the trustee/debtor in possession, but the contract is terminated by the innocent party. In this case, South Motors terminated the contract when it tendered its rolling stock inventory, parts and accessories. This distinction has been the subject of a multitude of decisions and amplified in *CASC Corp. v. Milner (In re Locke)*, 180 B.R. 245, 259 (Bankr. C.D. Cal. 1995) (J. Zurzolo). Relying on *In re Austin Development Co.*, 19 F.3d 1077 (5th Cir. 1994), *Locke* explained:

Further, Congress knew how to authorize the termination of executory contracts and leases in § 365. 'Termination' is used in § 365(h)(i) and (n) as one option available respectively to the purchaser of an interest in a time share project, the vendee of real property, or the licensee from the debtor of a right to intellectual property if the trustee has rejected the executory contract. Accordingly, the trustee may reject any of these contracts, but termination does not occur except

1 of the SMS Agreement might be relevant as a measure of damages for breach of contract by
2 the Debtor, as they are contract provisions agreed to at the beginning of the distributor-dealer
3 relationship between the Debtor and South Motors to guide the economic unwinding of the
4 relationship when the SMS Agreement is terminated by the Debtor. Although not called
5 "liquidated damages" within the SMS Agreement, this is a classic example of parties pre-
6 determining the final economic results of a concluded contractual arrangement. On the other
7 hand, just as statutory damages provided under the Florida Motor Vehicle Act tend to skew the
8 economic outcomes of contract rejection and are thus preempted, liquidated damage
9 provisions within contracts may also adversely impact the federal policy of executory contract
10 rejection under § 365. Some cases have permitted a court to consider liquidated damage
11 provisions, while others have not permitted such consideration. One article addresses the
12 matter as follows:
13
14

15 In the liquidated damages context, the scenario changes slightly. Although one
16 would think that a liquidated damages provision - negotiated by the parties as
17 part of a complex process of give-and-take - would simply constitute one of the
18 many burdens and benefits of a contract, courts have treated such clauses in
19 differing manners in the rejection context. Professor Andrew criticized some
20 courts' treatment of liquidated damages provisions, (footnote omitted) arguing
21 that liquidated damages provisions should remain enforceable. It was not clear
22 from Andrew's article whether he meant that courts should grant non-debtor
23 parties "specific performance" of liquidated damages provision or whether the
24 value of the non-debtor's unsecured rejection damages claim should be
25 calculated using the liquidating damages clause of the rejected contract (footnote
26 omitted). The former proposition is clearly erroneous, and it is not clear that the
27 latter proposition fares any better. First, if courts are to enforce liquidated
28 damages provisions, what advantage would the debtor even gain by rejecting
any of those numerous contracts that in fact contain such liquidated damages

at the other party's option. The option to terminate a time share lease, § 365(h)(i), or a license § 365(n)(1)(A), arises where the trustee's rejection 'amounts to such a breach as would entitle the [party] to treat such lease or [contract] as terminated by virtue of its own term, applicable non-bankruptcy law or other agreements...' Under an objective reading, the provisions of § 365 may be redundant and complex, but Congress was not confused in its differing usages of the terms rejection, breach and termination. *Austin Development* at 1081-83.

CASC Corp. v. Milner (In re Locke), 180 B.R. 245, 259 (Bankr. C.D. Cal. 1995).

1 provisions? As one court has stated: "If liquidated damages clauses were
2 enforceable, there would be no reason for rejection of the contract by the debtor."
3 *In re Ei Int'l*, 123 B.R. 64 (Bankr. D. Idaho 1991). Second, enforcing a
4 burdensome and perhaps penalty-imposing liquidated damages clause
5 contradicts the "broad purpose of Chapter 11": facilitating "successful
6 rehabilitation of debtors." (footnote omitted). In the interests of equity, courts
7 should grant damages in only the amount of harm the debtor caused. (footnote
8 omitted). Enforcing liquidated damages provisions merely in the name of state
9 law comity (footnote omitted) serves only to unnecessarily enrich an individual
10 non-debtor at the expense of the underlying estate.

11 Pickerell, Carl N., *Executory Contracts Re-Revisited*, 83 Am. Bankr. L.J. 63, 91-92 (2009).

12 This Court believes that the correct general practice is to utilize traditional breach of
13 damage calculations, and when appropriate, liquidated damages provisions, if on occasion
14 liquidated damages provisions assist the Court in determining the proper damages, so much
15 the better.⁸

16 Breach of Contract Damages

17 "The question of the measure and amount of damages for wrongful termination of
18 automobile dealership contracts has been complicated by the varying contractual provisions,
19 problems relating to proof and certainty, and the fact that the majority of cases on the subject
20 date from the early days of automobiles when the future of the industry was uncertain, dealer
21 investments were low, and the great disparity in bargaining power between the dealer and
22 manufacturer had not yet developed." Joseph T. Bockrath, J. D., *Damages for Wrongful
23 Termination of Automobile Dealership Contracts*, 54 A.L.R.3d 324, 2a.

24 ⁸ The unpublished (and thus non-precedential) Ninth Circuit's decision in *In re Dailey*, 1994 U.S. App. LEXIS 3890
25 (9th Cir. Feb. 24, 1994) takes another view about liquidated damage provisions in rejected contracts. Overturning
26 a bankruptcy court's decision of ignoring contract termination provisions, the Ninth Circuit held "[t]he gist of the
27 bankruptcy court's treatment of this issue is that rejection means termination and, since a terminated agreement
28 cannot provide guidance to a court, the bankruptcy court was free to ignore the lease's liquidated damages clause
and choice of law provision. We disagree. The lease was merely breached, not rescinded or declared void ab
initio, and there is nothing in 11 U.S.C. §§ 365(g) or 502(g) that prohibits a court from examining the terms of the
parties' agreement to determine the amount of damages due the nonbreaching party or the law applicable thereto.
As there is nothing in the lease's formula for calculating damages that runs afoul of the Bankruptcy Code, and
there was nothing improper in the parties' selection of Washington law (footnote omitted), we hold that the
bankruptcy court erred by ignoring the lease's damage calculation formula and choice of law provision."
Mercedes-Benz Credit Corp. v. Dailey (In re Dailey), 1994 U.S. App. LEXIS 3890 (9th Cir. Feb. 24, 1994).

1 Loss of future profits is the method most often used to determine damages from a
2 wrongful termination of a contract. See, Joseph T. Bockrath, Annotation, *Damages for*
3 *Wrongful Termination of Automobile Dealership Contracts*, 54 A.L.R.3d 324, 4.⁹ (citing
4 *Volkswagen Interamericana, S. A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966), cert. den. 385 US
5 919; *Moon Motor Car Co. v. Moon Motor Car Co.*, 29 F.2d 3 (2nd Cir. 1928); *Garvin v.*
6 *American Motors Sales Corp.* 202 F. Supp 667, (D.C.Pa. 1962), rev'd. on issue of liability 318
7 F.2d 518 (3rd Cir. 1962); *Chevrolet Motor Co. v. Gladding* 42 F.2d 440 (4th Cir. 1930), cert.
8 den. 282 U.S. 872; *Chevrolet Motor Co. v. McCullough Motor Co.* 6 F.2d 212 (9th Cir. 1925);
9 *American Motors Sales Corp. v. Semke* 384 F.2d 192 (10th Cir. 1967)).
10
11

12 The A.L.R. 3d analysis of future profit awards continues:

13 The determination of what constitutes "future profits" has been inconsistent. The
14 inconsistency stems partly from the fact that in some cases the contract is
15 terminable at will, while in others it has a set period. Some cases hold that the
16 prospective profits can be awarded for no further into the future than the term of
17 the contract. (Footnote omitted). In one case, it was said that the notice period
18 was the furthest into the future that damages could be projected. (Footnote
19 omitted). Cases arising under the Automobile Dealers' Fair Day in Court Act,
20 (footnote omitted) however, indicate that the contrary is true and expressly hold
21 that there is no basis to limit damages to a single year. (Footnote omitted). In a
22 few early cases, recovery was allowed only for prospective profits on cars
23 already ordered at the time of the termination, and one case held that recovery
24 might be had only for cars on order for which the dealer had binding purchase
25 orders. (Footnote omitted). In one situation, where the dealership contract was
26 terminable at will and the manufacturer was under no obligation to supply
27 vehicles, it was held that damages must be based on proof of how many cars the
28 manufacturer would have supplied voluntarily. (Footnote omitted).

54 A.L.R.3d 324, 2a.

Several cases, *Chevrolet Motor Co. v Gladding*, *supra*, and *Chevrolet Motor Co. v*
McCullough Motor Co., *supra*, have determined that where recovery was sought for a wrongful

⁹ The Court particularly enjoyed reviewing the 1912 decision in *Isbell v Anderson Carriage Co.* (1912) 170 Mich 304, 136 NW 457, where the court found that the automobile business was too competitive and speculative for future profits to be awarded.

1 termination of an auto dealership contract, and in which a "future profits" measure of damages
2 was adopted, the "future" was limited to the period of the dealership contract.

3 An alternative method for measuring damages for the wrongful termination of an
4 automobile dealership franchise is the value of the franchise at the time of the termination.

5
6 “Although no cases rule directly that this measure should be applied, its use has been
7 approved by implication.” Joseph T. Bockrath, J. D., *Damages for Wrongful Termination of*
8 *Automobile Dealership Contracts*, 54 A.L.R.3d 324, 2a (citing *Volkswagen Interamericana, S.*
9 *A. v Rohlsen*, 360 F.2d 437 (1st Cir. 1966), cert. den. 385 U.S. 919.) In reviewing
10 *Volkswagen Interamericana*, this Court finds it to be a very thin implication, justifying A.L.R.’s
11 comment that no cases have ever directly ruled on this measure. Indeed, this Court has found
12 none.
13

14 The Court has heard from three expert witnesses in this matter. The first was Mr. John
15 W. Forehand, in house counsel to “South Motor Company of Dade County”. His testimony
16 consisted of his opinion of the fair market value (the “FMV”) of South Motors as of October 31,
17 2011. He testified that this particular date was selected based upon his interpretation of
18 property damages provided by Florida statute. No effort to value South Motors on the Petition
19 Date, at the time of (or the effective date of) the rejection of the executory contract, or any date
20 perceived by South Motors as the date of termination of the contract, was undertaken by Mr.
21 Forehand. Mr. Forehand opined that the value of the business on October 31, 2011 was
22 \$330,000.00.
23
24

25 While the Court declared Mr. Forehand as an expert for purposes of valuation of car
26 dealerships during the initial portions of the hearing, the Court also noted that it would be
27 determining the weight to be given to his FMV analysis. Based on his Declaration, his
28 testimony during cross-examination and re-direct examination, as well as responses to

1 questions directly poised by the Court, the Court finds that Mr. Forehand's valuation opinion is
2 neither temporally nor substantively significant so as to allow the Court to grant any weight at
3 all to the valuation. The opinion of \$330,000 value was based upon stale and significantly
4 incomplete financial information and lacked true economic analysis that would be utilized in an
5 actual valuation or sales transaction. For instance, Mr. Forehand never attempted to allocate
6 significant and accurate operations costs to his valuation, since most of the operational costs
7 of the Suzuki portions of South Motor's business operations were subsidized by other
8 automobile line businesses. Simply put, as the Court hears the testimony and evidence, it is
9 as likely as not that South Motors' Suzuki sales and service operations would have lost money
10 all of the years analyzed by Mr. Forehand had the other automobile line operations not been
11 subsidizing the Suzuki operations. Further, Mr. Forehand's own testimony clearly implied that
12 his activities, skills, experience and analysis were quite similar to a real estate broker or agent
13 undertaking determination of an appropriate "listing price" for a home being put on the market.
14 He had no information on South Motors sales for 2012 or 2013 at his disposal for purposes of
15 his analysis, and he undertook no effort to acquire such information. No meaningful weight
16 can be given to Mr. Forehand's valuation, and the Court declines to do so.
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20 On a bright note, Mr. Forehand testified that in 2011, the "average" profits from sales of
21 new Suzuki automobiles (69 that year) were approximately \$531.00 per vehicle. Mr. Forehand
22 also confirmed to the Court that eight (8) automobiles were repurchased by the Debtor at the
23 time of the tender. Finally, Mr. Forehand testified that with respect to the parts and
24 accessories sales, typical profit margins were between 65% and 70%. The Court has no
25 problem adopting this testimony, and does so later in its own calculations.
26

27 A second valuation expert was offered by South Motors, Mr. Joseph Roesner. Mr.
28 Roesner provided the Court with testimony concerning loss of profits based solely on the parts

1 and service sales for South Motors over a period running through March 2016. His testimony
2 brought out that the South Motors new sales component of business brought little or no net
3 profit to South Motors. His analysis was based solely on parts and service sales for the period
4 of December, 2013 through March, 2016 (which was a period requested by South Motors and
5 based on the original three year sales and service contract and not the one year extension).
6
7 Mr. Roesner's opinion was that the loss of profits for a three and a half year period was
8 \$294,242. Within his declaration and on cross-examination, Mr. Roesner explained that his
9 conclusion of lost profits amounts was based, first, on a regression analysis of South Motors
10 gross sales and service profits from January 2009 through November 2011, demonstrating a
11 decline of sales and services net profits, combined with a view of the the average yearly
12 service and parts gross profits for years 2009 through 2012 minus the average "Service and
13 Parts Incremental Expenses" that were provided to him by South Motors. These, he opined,
14 resulted in his net profit calculation of \$121,043.00. He then multiplied this amount by
15 approximately 3.5 years (three years from the contract rejection date) to find lost profits of
16 \$295,242.00.
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19 On cross-examination, Mr. Roesner agreed that he did not calculate the incremental
20 expenses figure, and those were simply given to him by South Motors. He further explained
21 that had he not been provided those numbers, he would have used instead an industry
22 standard as the appropriate number, which would have been significantly higher. Had he used
23 the industry standard, he explained, his calculation of net lost profits would have been
24 approximately \$220,000.00 and not \$295,242.00. Rebuttal from Debtor's expert witness
25 Herbert E. Walter, raised doubt regarding Mr. Roesner's methodology, including the
26 "regression" analysis, with respect to its use, relevancy and meaning. The "incremental
27 expenses" used by Mr. Roesner were also challenged by Mr. Walter, who explained that these
28

1 stated expenses severely understated the true expenses being incurred by South Motor,
2 especially in light of South Motor's other divisions' subsidy of South Motors (Suzuki)
3 operations.
4

5 The Court has its own concerns regarding this testimony and analysis. It appears the
6 South Motors business carries parts and repairs a large variety of vehicle brands, and they
7 might just as easily be able to redirect the work that would have gone into stocking Suzuki
8 parts and repairing Suzuki vehicles to stocking other brands and repairing other vehicles, and
9 make up the lost business. *They also are at liberty to contact the new distributor of Suzuki*
10 *parts and enter into a new agreement.* They can also buy Suzuki parts from other dealers.¹⁰ Is
11 South Motors going to have mechanics just sitting around not performing work? If so, this
12 means they would terminate their employment, which could be a savings associated with not
13 having to pay their wages. None of these considerations were presented to the Court.
14

15 The issue of mitigation was not considered by Mr. Roesner, and only briefly touched on
16 by South Motors within its arguments. Had South Motors mitigated its damages by entering
17 into the initially offered eight year parts and service agreement offered (as 97% of the other
18 dealers did), no lost profits, assuming any, could have existed.¹¹ Also, as earlier discussed,
19 there is no evidence that South Motors attempted to enter into a new sales and service
20 agreement with the new distributor.
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25 ¹⁰ While the Court places no special emphasis on it, the Court was surprised to hear Mr. Roesner's testimony that
26 South Motor would have been required to pay rack prices for parts from other Suzuki distributors. It is common
27 knowledge that dealers have reciprocity arrangements with other dealers regarding parts. For instance, a Suzuki
28 parts dealer today may need a VW part which South Motors has in stock. These trade of parts for a very small
markup is a common occurrence.

¹¹ Counsel for South Motors expressed at the hearing that legal fees for prosecution of its claim and claim defense
is currently over \$200,000.00. The Court compares and places this amount into the context of South Motors'
assertions of its "best" estimates of FMV and lost profits by the rejection of the sales and service agreement.

1 This Court finds that the methodology and calculations presented by Mr. Roesner are
2 not completely sound and little weight can be placed on his opinion of lost profits. The Court
3 also finds that the rationale for the 3.5 year multiplier of the estimated average lost profits
4 (which the Court does not accept as accurate) is without support. Ultimately, however, the
5 Court holds that lost profits for future sales and services are not recoverable at all because
6 South Motors had voluntarily rejected the opportunity to continue as a Suzuki Sales and
7 Servicing dealer for another eight (8) years by the specific offer made early in this case to each
8 and every Suzuki dealer. The Court notes that 97% of all of the Suzuki Dealers agreed to
9 continue operating in the parts and services business with the successor to the Debtor. The
10 irony is not lost on this Court that had South Motors accepted this offer, or had negotiated a
11 new parts and service agreement with the current distributor, any "lost profits", calculable or
12 not at this time, would not be at issue. Little or nothing would have changed for South Motors
13 in that instance.

14
15
16 Finally, the Debtor offered Herbert Walter as an expert as to the fair market value of
17 South Motors' "good will" "immediately preceding Suzuki's bankruptcy filing...". During cross-
18 examination and re-direct examination, the Court reviewed Mr. Walter's calculus for
19 determining the described value of "good will" and learned from him that he knew of no other
20 economist or business valuation expert that had utilized his self-designed methodology. He
21 explained to the Court that the methodology for valuation of South Motors' business was new
22 and innovative and that he knew of no previous valuation of an automobile dealership that had
23 utilized his methodology. The Court finds that Mr. Walter's methodology is unpersuasive and
24 too innovative and new to be given any weight. The Court, reviewing Mr. Walter's credentials,
25 has no doubt of his expertise, and continues to believe he is an expert qualified in the areas
26
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28

1 required in this case. However, under the standards of consideration of expert testimony, the
2 Court can give no weight to the valuation range provided by Mr. Walter.

3 That said, during the hearing, the Court explained that it was reversing its decision to
4 overrule the Motion to Strike Mr. Walter's declaration, in order to dismiss the valuation
5 presented within his testimony. That motion was partially based on allegations that he was not
6 an expert. This in-court statement (of reversing the decision to overrule the Motion) was a
7 mistake, a regrettable overstatement and a self-mischaracterization of the Court's desired
8 position, which the Court regrets making. Mr. Walter is a qualified expert in the field, and only
9 his valuation method was discounted by the Court.¹² Instead of being discounted as an expert,
10 no weight has been given to Mr. Walter's valuation testimony because it is new, innovative, not
11 peer-reviewed and untested. Therefore, the Court was intending to reverse its own earlier
12 decision overruling a Motion to Strike Mr. Walter's testimony only as to fair market value of the
13 South Motors' dealership. Mr. Walter's service as a expert rebuttal witness to address matters
14 raised by South Motor's experts was appropriate. The Court must finally note that the
15 presented rebuttal testimony was limited and not particularly helpful or useful in the Court's
16 factual determinations made today.

17 The Appropriate Measure and Time of Measure of Damages

18 On January 11, 2013, an order was entered by this Court authorizing the Debtor to
19 reject the SMS Agreement pursuant to § 365. This action created a breach of contract by the
20 Debtor. South Motors and the Debtor agree that following the rejection, South Motors tendered
21 its inventory, parts and tools to the Debtor and the Debtor paid South Motors the amounts due.
22 That tender occurred on or about March 13, 2013, which this Court considers the date of
23 notice of termination by South Motors. The Suzuki Dealers Sales and Service Standard
24

25 ¹² "This is the operative statement. The others are inoperative." Ziegler, Ronald, April 17, 1973.

1 Provisions, which is part of the SMS Agreement, states that a dealer may terminate the
2 agreement “by serving thirty (30) day’s written notice of termination on Suzuki.” § 11.01.

3 At the time of the tender, the value of inventory held by South Motors (according to
4 South Motors’ Proof of Claim) was \$210,250.00, and is broken down as follows:

5 Automobiles – \$162,985.00. These amounts have been paid to South Motors.

6 Parts and accessories– \$24,590.00. These amounts have been paid to South Motors.

7 Special tools and data processing equipment – \$22,675.00. These amounts have been
8 paid to South Motors.
9

10 This Court finds that the lost profit from lost sales of those eight automobiles was
11 \$4,248.00, based on evidence presented of the per sold automobile gross profit in 2011.
12 (\$531.00 times eight cars equals \$4,248.00). This amount is on the very high (i.e. generous)
13 side, since other evidence offered by South Motors was that little or no net profits were actually
14 generated by new Suzuki automobile sales, and takes into account few expenses. Further,
15 based on the amount that was paid to South Motors for all of the parts and accessories
16 (\$24,590.00), the lost profits from the parts and accessories equals \$17,213.00, which is a
17 70% gross profit. This is based on the highest amount opined by South Motor’s own expert.
18 There is no “profit” attributable to the repurchase of special tools and data processing
19 equipment, as they were not resold by South Motors.
20
21
22

23 The case *Martin v. U-Haul Co. of Fresno*, 204 Cal. App. 3d 396, 408-409 (Cal. App. 5th
24 Dist. 1988), thoroughly discusses the measure of breach of contract damages when the
25 contract provides for a notice period of termination.

26 In *Martin*, the court said

27 ...[t]he Pecarovich court cites several out-of-state authorities for the proposition
28 that the contract damages are limited to the notice period. (*Pecarovich v. Becker*,
supra, 113 Cal.App.2d at 318.)

1
2 As one of those cases explained within the context of an employment contract, "If
3 the employer has the unconditional right to terminate the contract of employment
4 after certain notice, discharge has the effect of notice to terminate and damages
5 are allowed only up to the time the contract would have terminated if notice had
6 been given." (*Bitterman v. Gluck* (1939) 256 App.Div. 336 [9 N.Y.S.2d 1007,
7 1008].)

8 In *Cline v. Smith* (1929) 96 Cal.App. 697 [274 P. 761], the court reached a similar
9 conclusion. There a contract which had eight years to run was breached. The
10 trial court had instructed the jury that, in arriving at proper measure of damages,
11 it could consider the fact that the contract had eight years to run. The contract
12 provided that "either party may terminate this contract at any time by giving to
13 the other party sixty days notice of its intention to do so." (*Id.* at p. 699.) The
14 Court of Appeal reversed. It held that the portion of the instruction permitting
15 consideration of the fact that the contract had eight years to run was prejudicially
16 erroneous "[in] view of the company's right to terminate the contract at any time
17 on sixty days' notice" (*Id.* at p. 702.) Therefore, although not expressly
18 restricting damages to a 60-day period, it implied that that would be the proper
19 measure and did explicitly find that permitting damages based on the total
20 unexpired term of the contract was erroneous in light of the termination provision.

21 In the venerable case of *Jewell v. Colonial Theater Co.* (1910) 12 Cal.App. 681
22 [108 P. 527], a contract for the employment of an actress contained a provision
23 stating, "This contract may be cancelled at any time after the first performance
24 by either party giving two weeks' notice in writing to the other." (*Id.* at p. 683.)
25 Before the expiration of the plaintiff's contract, the theater closed, and she was
26 dismissed without receiving the required two weeks' notice. The appellate court
27 found that she was properly awarded her salary for the two-week period following
28 her discharge as part of her damages. (*Id.* at p. 684.)

California Civil Code section 3300 provides for the general measure of damages
for a breach of contract. It reads: "For the breach of an obligation arising from
contract, the measure of damages, except where otherwise expressly provided
by this code, is the amount which will compensate the party aggrieved for all the
detriment proximately caused thereby, or which, in the ordinary course of things,
would be likely to result therefrom."

California case law has long held the correct measure of damages to be as
follows: "Damages are awarded in an action for breach of contract to give the
injured party the benefit of his bargain and insofar as possible to place him in the
same position he would have been in had the promisor performed the contract.
[Citations.] Damages must be reasonable, however, and the promisor is not
required to compensate the injured party for injuries that he had no reason to
foresee as the probable result of his breach when he made the contract.
[Citations.]" (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 603 [262 P.2d 305]; *accord*
Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66

1 Cal.App.3d 101, 123 [135 Cal.Rptr. 802]; *Bravo v. Buelow* (1985) 168 Cal.App.3d
2 208, 215 [214 Cal.Rptr. 65].)

3 Witkin explains the "foreseeability" rule when he states: "The requirement of
4 knowledge or notice as a prerequisite to the recovery of special damages is
5 based on the theory that a party does not and cannot assume limitless
6 responsibility for all consequences of a breach, and that at the time of contracting
7 he must be advised of the facts concerning special harm which might result
8 therefrom, in order that he may determine whether or not to accept the risk of
9 contracting." (1 *Witkin, Summary of Cal. Law* (9th ed. 1987) § 815, p. 733,
10 original italics.)

11 The specific rule that a termination clause limits recoverable damages to the
12 notice period is consistent with the general requirement that contract damages
13 are limited to those foreseeable by the parties at the time of contracting. Parties
14 who agree that a contract may be terminated for any reason, or no reason, upon
15 the giving of the specified notice could not reasonably anticipate that damages
16 could exceed that notice period.

17 *Martin v. U-Haul Co. of Fresno*, 204 Cal. App. 3d 396, 408-409 (Cal. App. 5th Dist. 1988).

18 The notice of "termination" of the SMS Agreement could be considered several dates,
19 including the Petition Date, the Rejection Date, or the Rejection Application Date. It really does
20 not matter in this instance, since the inventory, parts and accessories and tools all had a fixed
21 amount on the date of the tender. Further, the issue of whether the "contract" between the
22 Debtor and South Motors had no time remaining on its term, one year remaining, or three
23 years remaining, can be parsed out in all directions, with all manner of metaphysical analyses
24 and results arising. It does not matter in this instance. No credible evidence of any fair market
25 value of the South Motors dealership business was presented to the Court, and the fact is,
26 since new Suzuki-manufactured cars are no longer available in this country now, a Suzuki car
27 sales dealership is almost valueless. Further, in this case, no credible evidence exists as to
28 any lost profits of future sales or service.¹³

¹³ The Debtor correctly asserts that the Force Majeure provision contained in the SMS Agreement Standard Provisions (§ 3.13) limits its liability when it cannot deliver inventory due to discontinuance of sales of Suzuki Products ordered or curtailment of production due to economic or trade conditions or for any cause beyond the

1 Addressing South Motors' argument that it is entitled to three and a half years of lost
2 profits, because the Letter Extension was not signed by South Motors, or even the concept
3 that any future profits should be used as a measure, the Ninth Circuit has rejected that notion.

4
5 Similarly, allowing recovery of the contract price would also undercut the purpose of
6 rejection under section 365. As the district court pointed out in its memorandum
7 decision, "if the Court were to accept the argument made by the Dunkleys, that is that
8 they were entitled to the balance due on the contract, presumptively in cash, what point
9 would there be to a rejection of an executory contract under 11 U.S.C. § 365?" *Dunkley*
10 *v. Rega Properties, Ltd. (In re Rega Properties, Ltd.)*, No. C-87-719 RJM, slip op. at 5-6
11 (E.D.Wa.Sept. 13, 1988).

12 *In re Rega Properties, Ltd.*, 894 F.2d 1136, 1141 (9th Cir. Wash. 1990).

13 The *Martin* decision sums up the views of this Court on the California law¹⁴ and damage
14 calculations that apply in this instance. The lost profits from the value of the inventory, parts
15 and accessories, as defined under the SMS Agreement on hand at the time of the tender are
16 the correct measure of breach of contract damages.

17 **Attorney Fees To Be Awarded** 18 **Under the SMS Agreement**

19 South Motors' claim includes amounts owed for attorney fees and costs, based on
20 Florida statutes and the SMS Agreement. It asserts

21 As noted above, Section 320.697 of the Act provides for an automobile dealer
22 such as South Motors to recover attorneys' fees in addition to its actual damages
23 and treble damages in connection with a violation of the Act. See FLA. STAT. §

24 Debtor's control. How could any lost future profits, or fair market value, be considered with such a liability-limiting
25 provision in force? South Motors made no significant effort to explain away the application of this provision.

26 ¹⁴ Mr. Justice Traynor once asked how it came about that "the plot got so thick when the mystery was so thin" in
27 the mystery play we like to call "the choice of law." Ehrenzweig, Albert A., *Choice of Law: Current Doctrine and*
28 *True Rules*, 49 Cal. L. Rev. 240 (1961). The SMS Agreement provides that the choice of law for all issues arising
under the agreement is California. The Ninth Circuit is clear that renvoi is generally dead-letter, and that only the
substantive law of the selected state law, and not procedural matters such as renvoi, is operative. *Chan v.*
Society Expeditions, 123 F.3d 1287, 1297 (9th Cir. Wash. 1997). South Motor's arguments that certain provisions
of the SMS Agreement are, by implication, controlled by Florida law, are both irrelevant, since the provisions of
Florida laws referenced by South Motors are irrelevant to this bankruptcy claims procedure, as well as preempted.
Further, they are mainly retroactive in nature (and others prospective only), and not constitutionally applicable,
because of their date of enactment as compared to when the SMS Agreement was initially established.

1 320.697 (“Any person who has suffered pecuniary loss or who has been
2 otherwise adversely affected because of a violation by a licensee of ss. 320.60-
3 320.70, notwithstanding the existence of any other remedies under ss. 320.60-
4 320.70, has a cause of action against the licensee for damages and may recover
5 damages therefor in any court of competent jurisdiction in an amount equal to 3
6 times the pecuniary loss, together with costs and a reasonable attorney’s fee to
7 be assessed by the court.”) (emphasis added). Where a basis for attorneys’ fees
8 exists, such as by contract or under state law, attorneys’ fees are properly
9 includable as part of a claim. See *Travelers*, 549 U.S. at 450-454 (allowing
10 attorneys’ fees by reference to state law).

11 *Opposition*, p. 16, lines 7 - 16.

12 South Motors continues,

13 In addition to Florida law, section 13.12 of the Dealer Agreement provides that
14 “[i]f [the Debtor] is required to retain an attorney to enforce its rights under the
15 terms of this Agreement, [the Debtor] shall be entitled to reasonable attorneys’
16 fees.” Pursuant to Section 57.105(7) of the Florida Statutes: “If a contract
17 contains a provision allowing attorney’s fees to a party when he or she is required
18 to take any action to enforce the contract, the court may also allow reasonable
19 attorney’s fees to the other party when that party prevails in any action, whether
20 as plaintiff or defendant, with respect to the contract.” Thus, South Motors is
21 entitled to an award of attorneys’ fees under both Section 320.697 and Section
22 57.105(7) of the Florida Statutes and, as such, respectfully requests that this
23 Court enter an order allowing South Motors’ claim for attorneys’ fees.

24 *Opposition*, p. 16, lines 17 - 25.

25 California has a similar statute, California Civil Code § 1717(a), conferring attorney fee
26 and cost reciprocity on contracting parties.

27 A party who prevails in a civil action is entitled to recover its costs as a matter of
28 right unless otherwise provided by statute. (*Code Civ. Proc.*, § 1032, *subd.* (b);
see *Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 104 [45 Cal. Rptr. 2d 874].)
However, California law generally requires that a party to a lawsuit pay its own
attorney fees, regardless of whether it prevailed in the action. (*Code Civ. Proc.*, §
1021; *Trope v. Katz* (1995) 11 Cal.4th 274, 278–279 [45 Cal. Rptr. 2d 241, 902
P.2d 259].) An exception to this general rule is recognized where a contract,
statute or other law specifically authorizes the prevailing party to recover attorney
fees. (*Code Civ. Proc.*, § 1033.5, *subd.* (a)(10); see also *Santisas v. Goodin*
(1998) 17 Cal.4th 599, 606 [71 Cal. Rptr. 2d 830, 951 P.2d 399].) Where the
recovery of attorney fees is authorized by a contract, the agreement will generally
be subject to section 1717(a), which provides in part: “*In any action on a contract*,
where the contract specifically provides that attorney’s fees and costs, which are
incurred to enforce that contract, shall be awarded either to one of the parties or

1 to the prevailing party, then the party who is determined to be the party prevailing
2 on the contract, whether he or she is the party specified in the contract or not,
3 shall be entitled to reasonable attorney's fees in addition to other costs.” (Italics
added.)

4 *Baldwin Builders v. Coast Plastering Corp.*, 125 Cal. App. 4th 1339, 1343-1344 (Cal. App. 4th
5 Dist. 2005).

6
7 The history of recovery of reasonable legal fees and costs within the confines of
8 bankruptcy law disputes is a storied one. In 1991, the Ninth Circuit established the “Fobian
9 Rule” which prevented the award of legal fees and costs, even though provided for within a
10 contract, when parties were litigating issues peculiar to federal bankruptcy law and not basic
11 contract enforcement questions. Put another way, the Ninth Circuit acknowledged that where
12 a contract or statute provided for an award of attorney fees, a creditor could be entitled to such
13 fees in bankruptcy proceedings, inasmuch as such an award is governed by state law.
14 However, attorney's fees would not be awarded absent bad faith or harassment by the losing
15 party if most of the litigation concerned aspects of bankruptcy law. *In re Fobian*, 951 F.2d 1149
16 (9th Cir. 1991).

17
18
19 The United States Supreme Court overturned the Fobian Rule in *Travelers Cas. And*
20 *Sur. Co. v. Pacific Gas and Elec. Co.*, 549 U.S. 443 at 450-454 (2007).

21 The Fobian rule finds no support in the Bankruptcy Code, either in § 502 or
22 elsewhere. In Fobian, the court did not identify any provision of the Bankruptcy
23 Code as providing support for the new rule. See 951 F.2d, at 1153. Instead, the
24 court cited three of its own prior decisions, *In re Johnson*, 756 F.2d 738 (1985);
25 *In re Coast Trading Co.*, 744 F.2d 686 (1984); and *In re Fulwiler*, 624 F.2d 908
26 (1980)(per curiam). Significantly, in none of those cases did the court identify any
27 basis for disallowing a contractual claim for attorney's fees incurred litigating
28 issues of federal bankruptcy law. Nor did the court have occasion to do so; in
each of those cases, the claim for attorney's fees failed as a matter of state law.
See *Johnson, supra*, at 741-742; *Coast Trading, supra*, at 693; *Fulwiler, supra*, at
910.n3

Travelers Cas. & Sur. Co. of Am. v. PG&E, 549 U.S. 443, 452 (U.S. 2007).

1 This Court finds that the prevailing party to this claim objection is entitled to its legal fees
2 and costs directly pursuant to the SMS Agreement. The determination of the identity of the
3 prevailing party is guided by the decision of the California Supreme Court in *Hsu v. Abbara*, 9
4 Cal.4th 863, 876 (1995).

6 Accordingly, we hold that in deciding whether there is a “party prevailing on the
7 contract,” the trial court is to compare the relief awarded on the contract claim or
8 claims with the parties’ demands on those same claims and their litigation
9 objectives as disclosed by the pleadings, trial briefs, opening statements, and
10 similar sources. The prevailing party determination is to be made only upon final
11 resolution of the contract claims and only by “a comparison of the extent to which
12 each party ha[s] succeeded and failed to succeed in its contentions.” (*Bank of
13 Idaho v. Pine Avenue Associates* (1982) 137 Cal.App.3d 5, 15, 186 Cal.Rptr.
14 695.)

15 *Hsu v. Abbara*, 9 Cal. 4th 863, 876, 891 P.2d 804, 813 (1995).

16 This decision was recently amplified in the California Court of Appeals Fourth District
17 decision in the *In re Tobacco Cases I*, 2013 Cal. App. LEXIS 398; 2013 WL 1777303,
18 published on May 20, 2013.

19 Section 1717, subdivision (a) provides for an award of attorney fees to “the party
20 prevailing on the contract.” Under section 1717, subdivision (b)(1), the prevailing
21 party is the party “who recovered a *greater relief* in the action on the contract.”
22 (Italics added.) Section 1717 allows “those parties whose litigation success is not
23 fairly disputable to claim attorney fees as a matter of right.”

24 *In re Tobacco Cases I*, 2013 Cal. App. LEXIS 398; 2013 WL 1777303.

25 South Motors has contended throughout this proceeding that it was entitled to remedies
26 under various Florida motor vehicle statutes, which even Florida has repudiated in a recent
27 previously cited motor vehicle decision *Motorsports of Delray, LLC*. See *Motorsports of Delray*,
28 *supra*. South Motors’ demands for recovery under the Florida statutes lack legal merit. Its
claims for recovery of common law breach of contract damages also are far short of their proof
or legal reasoning. South Motors has already been paid, prior to this proceeding, the amounts
due it under the SMS Agreement itself with respect to reimbursement for automobile inventory,

1 parts and accessories. The Court's finding today that South Motors is only entitled to lost
2 profits of inventory, parts and accessories on hand at the time of the tender, provides South
3 Motors with a miniscule fraction of its contention of damages. As the California Supreme Court
4 instructed,

5
6 "If neither party achieves a complete victory on all the contract claims, it is within
7 the discretion of the trial court to determine which party prevailed on the contract
8 or whether, on balance, neither party prevailed sufficiently to justify an award of
9 attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109, 86
10 Cal.Rptr.2d 614, 979 P.2d 974; § 1717, subd. (b)(1).) "[I]n deciding whether there
11 is a 'party prevailing on the contract,' the trial court is to compare the relief
12 awarded on the contract claim or claims with the parties' demands on those
13 same claims and their litigation objectives as disclosed by the pleadings, trial
14 briefs, opening statements, and similar sources. The prevailing party
15 determination is to be made only upon final resolution of the contract claims and
16 only by 'a comparison of the extent to which each party [had] succeeded and
17 failed to succeed in its contentions.'" (*Hsu v. Abbara, supra*, 9 Cal.4th at p. 876,
18 39 Cal.Rptr.2d 824, 891 P.2d 804.)

19 *In re Tobacco Cases I*, 2013 Cal. App. LEXIS 398; 2013 WL 1777303, published on May 20,
20 2013.


21 CONCLUSION

22 For all of the reasons set out above and orally on the record by the Court, the Debtor's
23 objection to South Motors Suzuki's Claim Number 520-1, in the amount of \$1,595,601 plus
24 attorney fees and costs is sustained. South Motors' unsecured claim is determined to be
25 \$21,461.00, based on the lost profits as of the date of the tender of the inventory, parts and
26 accessories, as described above. Prevailing party attorney fees and costs are awarded to the
27 Debtor and against South Motors in the amount to be determined following an evidentiary
28 hearing to be conducted on July 25, 2013 at 1:30 p.m. in Courtroom 5C of the Ronald Reagan
Federal Building and Courthouse, 411 West Fourth Street, Santa Ana, California. Application
for fees and costs, together with supportive declaratory evidence (with respect to the amount
of fees and costs, and not on the ultimate legal issue of prevailing party or award entitlement,

1 which has already been determined by this decision) shall be filed and served by the Debtor on
2 all interested parties by no later than twenty one days prior to the hearing. Any opposition
3 (with respect to the amount of fees and costs, and not on the ultimate legal issue of prevailing
4 party or award entitlement, which has already been determined by this decision) shall be filed
5 and served by South Motors by no later than fourteen (14) days prior to the hearing. Any reply
6 may be filed and served by no later than seven (7) days prior to the hearing. Cross-
7 examination and re-direct only of declarants shall occur. If declarants are not available for
8 cross-examination their declaration will be stricken.
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10 **IT IS SO ORDERED.**
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25 Date: June 4, 2013

26 
27 Scott C. Clarkson
28 United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): **ORDER AND MEMORANDUM OPINION ON OBJECTION TO PROOF OF CLAIM NO. 520-1 [DOCKET NO. 1383]** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner stated below:

1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF) Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of **6/4/13**, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

Service information continued on attached page

2. SERVED BY THE COURT VIA UNITED STATES MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

American Suzuki Motor Corporation
3251 East Imperial Highway
Brea, CA 92821

Service information continued on attached page

3. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an AEntered@ stamp, the party lodging the judgment or order will serve a complete copy bearing an AEntered@ stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

Service information continued on attached page

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