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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 LISA ROBINSON and KEVIN  
12 ROBINSON,

No. 2:10-cv-03187-MCE-GGH

13 Plaintiffs,

MEMORANDUM & ORDER

14 v.

15 KIA MOTORS AMERICA, INC., a  
16 California corporation,

17 Defendant.

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19 Through this action, Plaintiffs, Lisa Robinson and Kevin  
20 Robinson ("Plaintiffs") allege violations of the Song-Beverly Act  
21 and Magnuson-Moss Warranty Act. Defendant, Kia Motors America,  
22 Inc. ("Defendant") now moves for summary adjudication, pursuant  
23 to Federal Rule of Civil Procedure 56,<sup>1</sup> on Plaintiffs' claim for  
24 punitive civil penalties arising from Defendant's alleged  
25 violation of the Song-Beverly Act, California Civil Code § 1793  
26 et seq. For the reasons set forth below, Defendant's motion is  
27 denied.

28 <sup>1</sup> Unless otherwise noted, all further references to Rule or  
Rules are to the Federal Rules of Civil Procedure.

1 **BACKGROUND**

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3 On February 24, 2007, Plaintiffs purchased from Defendant's  
4 dealership, Folsom Lake Kia, a new 2007 Kia Sportage. Included  
5 in the sale were express warranties on the vehicle pursuant to  
6 which Defendant undertook to maintain the vehicle's utility or  
7 performance, or provide compensation if Plaintiffs' vehicle  
8 failed in such utility or performance. In August 2010,  
9 Plaintiffs began having difficulties with the vehicle. Over the  
10 next month, the vehicle was subjected to five repair attempts at  
11 the Folsom Lake Kia dealership to fix the defect. None of these  
12 attempts at repair were successful, and the final invoice dated  
13 September 14, 2010 stated in the notes section that Folsom Lake  
14 Kia was unable to fix the vehicle in this most recent attempt and  
15 that the dealership still did not know what the problem was.  
16 (Decl. Mark Romano Ex. 2 at 7.)

17 On September 17, 2010, Plaintiff Lisa Robinson called  
18 Defendant's Customer Assistance Center for the first time to  
19 explain her problem with the vehicle. She further explained that  
20 she did not want to keep taking the vehicle in for repairs and  
21 requested a buyback under the so-called automobile "Lemon Law"  
22 codified by California's Song-Beverly Act. The customer service  
23 agent responded by informing Plaintiff Lisa Robinson that if she  
24 wanted to pursue a Lemon Law claim, then she would need to follow  
25 the arbitration procedure.

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1           Shortly thereafter, Plaintiffs received a call from Chris  
2 Valenti, another representative for Defendant. Plaintiff Lisa  
3 Robinson again explained to him that she believed the vehicle was  
4 a "lemon" and wanted a buyback or replacement vehicle.  
5 Mr. Valenti replied that he wanted to schedule a vehicle  
6 inspection for October 11, 2010, to which Plaintiffs agreed. On  
7 or about September 30, 2010, Plaintiff Lisa Robinson left a  
8 voicemail for Mr. Valenti cancelling the inspection. In that  
9 message, she again reiterated that she did not want to take the  
10 vehicle in for another repair, and only wanted a buyback or  
11 replacement. Mr. Valenti returned her call, and, according to  
12 Plaintiffs, he informed her that her vehicle was not a "lemon"  
13 and that Defendant would not buyback or replace it. He further  
14 stated that Defendant would take no further action towards  
15 honoring Plaintiffs' request for a buyback or replacement.  
16 Mr. Valenti did, however, offer compensation for Plaintiffs'  
17 inconvenience if they brought the vehicle in for inspection.

18           Defendant left Plaintiff Lisa Robinson a voicemail message  
19 on October 7, 2010 requesting she call him back, but no further  
20 communications between Plaintiffs and any agent of Defendant took  
21 place. Plaintiffs then filed the instant suit.

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1 **STANDARD**

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3       The Federal Rules of Civil Procedure provide for summary  
4 judgment when "the pleadings, depositions, answers to  
5 interrogatories, and admissions on file, together with  
6 affidavits, if any, show that there is no genuine issue as to any  
7 material fact and that the moving party is entitled to a judgment  
8 as a matter of law." Rule 56(c). One of the principal purposes  
9 of Rule 56 is to dispose of factually unsupported claims or  
10 defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

11 Under summary judgment practice, the moving party

12       "always bears the initial responsibility of informing  
13 the district court of the basis for its motion, and  
14 identifying those portions of 'the pleadings,  
15 depositions, answers to interrogatories, and admissions  
on file together with the affidavits, if any,' which it  
believes demonstrate the absence of a genuine issue of  
material fact."

16 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting  
17 Rule 56(c)).

18       Rule 56 also allows a court to grant summary adjudication on  
19 part of a claim or defense. See Rule 56(a) ("A party seeking to  
20 recover upon a claim...may...move...for a summary judgment in the  
21 party's favor upon all or any part thereof."); see also Allstate  
22 Ins. Co. v. Madan, 889 F. Supp. 374, 378-79 (C.D. Cal. 1995);  
23 France Stone Co., Inc. v. Charter Township of Monroe, 790 F.  
24 Supp. 707, 710 (E.D. Mich. 1992).

25       The standard that applies to a motion for summary  
26 adjudication is the same as that which applies to a motion for  
27 summary judgment. See Rule 56(a), 56(c); Mora v. ChemTronics,  
28 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998).

1 If the moving party meets its initial responsibility, the  
2 burden then shifts to the opposing party to establish that a  
3 genuine issue as to any material fact actually does exist.  
4 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
5 585-587 (1986); First Nat'l Bank v. Cities Ser. Co., 391 U.S.  
6 253, 288-289 (1968).

7 In attempting to establish the existence of this factual  
8 dispute, the opposing party must tender evidence of specific  
9 facts in the form of affidavits, and/or admissible discovery  
10 material, in support of its contention that the dispute exists.  
11 Rule 56(e). The opposing party must demonstrate that the fact in  
12 contention is material, i.e., a fact that might affect the  
13 outcome of the suit under the governing law, and that the dispute  
14 is genuine, i.e., the evidence is such that a reasonable jury  
15 could return a verdict for the nonmoving party. Anderson v.  
16 Liberty Lobby, Inc., 477 U.S. 242, 248, 251-52 (1986); Owens v.  
17 Local No. 169, Assoc. of Western Pulp and Paper Workers, 971 F.2d  
18 347, 355 (9th Cir. 1987). Stated another way, "before the  
19 evidence is left to the jury, there is a preliminary question for  
20 the judge, not whether there is literally no evidence, but  
21 whether there is any upon which a jury could properly proceed to  
22 find a verdict for the party producing it, upon whom the onus of  
23 proof is imposed." Anderson, 477 U.S. at 251 (quoting  
24 Improvement Co. v. Munson, 14 Wall. 442, 448 (1872)).

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1 As the Supreme Court explained, "[w]hen the moving party has  
2 carried its burden under Rule 56(c), its opponent must do more  
3 than simply show that there is some metaphysical doubt as to the  
4 material facts ... Where the record taken as a whole could not  
5 lead a rational trier of fact to find for the nonmoving party,  
6 there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at  
7 586-87. In judging evidence at the summary judgment stage, the  
8 court does not make credibility determinations or weigh  
9 conflicting evidence. Anderson, 477 U.S. at 255, see also  
10 Matsushita, 475 U.S. 587.

#### 11 12 **ANALYSIS**

13  
14 As indicated above, Defendant moves to dismiss Plaintiffs'  
15 claims under the Song-Beverly Act, known as California's  
16 automobile "Lemon Law." The Act requires manufacturers of  
17 consumer goods containing express warranties to maintain  
18 sufficient service and repair facilities to carry out the terms  
19 of the warranty. Cal. Civ. Code, § 1793.2(a)(1).

20 A plaintiff pursuing an action under the Song-Beverly Act  
21 must prove the following: (1) the vehicle had a nonconformity  
22 covered by the express warranty that substantially impaired the  
23 use, value or safety of the vehicle; (2) the vehicle was presented  
24 to an authorized representative of the vehicle's manufacturer for  
25 repair; and (3) the manufacturer did not repair the nonconformity  
26 after a reasonable number of repair attempts. Cal. Civ. Code.  
27 § 1793.2(d); Oregel v. American Isuzu Motors, Inc., 90 Cal. App.  
28 4th 1094, 1101 (2001) (internal citations omitted).

1           There are two means by which a plaintiff in a Cal. Civ. Code  
2 § 1794 action may recover punitive civil penalties against a  
3 defendant who has violated the Song-Beverly Act. See Jernigan v.  
4 Ford Motor Co., 24 Cal. App. 4th 488, 491-92 (1994).

5 Section 1794(c) grants civil penalties to buyers of any type of  
6 consumer goods, but only where the defendant willfully violated  
7 the Act. Id. Section 1794(e) permits civil penalties  
8 specifically for buyers of new motor vehicles without requiring a  
9 showing of willfulness, unless the manufacturer of the motor  
10 vehicle maintains a qualified dispute resolution process. Id. at  
11 493.

12           Defendant argues that it is entitled to summary adjudication  
13 of Plaintiffs' claims for civil penalties arising out of alleged  
14 violations of the Song-Beverly Act because Plaintiffs cannot  
15 establish that Defendant knew of any liability under the Act.  
16 Defendant argues that Plaintiffs have therefore failed to  
17 demonstrate that it willfully failed to comply with the Song-  
18 Beverly Act, and so it is not liable for any civil penalty under  
19 Cal. Civ. Code § 1794(c). Defendant further argues that it is  
20 not liable for civil penalties under Cal. Civ. Code § 1794(e) (1)  
21 because it maintains a qualified third-party dispute resolution  
22 process pursuant to Cal. Civ. Code, § 1794(e) (2).

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1           **A.    Cal. Civ. Code § 1794(c) - Civil Penalties For Buyers**  
2           **Of All Consumer Goods**

3           Subsection (c) of 1794 provides civil penalties for  
4 consumers of goods who were damaged by the manufacturer's failure  
5 to comply with any obligation under the Song-Beverly Act, or  
6 under an implied or express warranty. Cal. Civ. Code § 1794(a).  
7 In order to collect civil penalties under subsection (c), the  
8 buyer must establish that the defendant's failure to comply with  
9 the Act was willful. The violation Plaintiffs allege is that  
10 Defendant was unable to service or repair the vehicle to conform  
11 to the applicable express warranties after a reasonable number of  
12 attempts pursuant to Cal. Civ. Code § 1793.2(d), and that it  
13 declined to replace or buyback the vehicle.

14           Defendant maintains that it did not willfully violate the  
15 Act because it did not know of its obligation to replace or  
16 buyback Plaintiffs' vehicle. Defendant further argues that a  
17 violation cannot be willful where it has requested that the  
18 customer bring in the vehicle for evaluation or repair.  
19 Defendant does not contest at this point Plaintiffs' allegation  
20 that a violation of the Act did in fact occur, but only argues  
21 that Plaintiffs cannot prove that Defendant actually knew of its  
22 obligation and failed to comply in willful disregard of the Act.  
23 In support of its contention that it did not act willfully,  
24 Defendant relies on Hatami v. Kia Motors Am., Inc., No. 08-0226,  
25 2009 WL 1396358 (C.D. Cal. Apr. 20, 2009) and Dominguez v. Am.  
26 Suzuki Motor Corp., 160 Cal. App. 4th 53, 60 (2008). Both Hatami  
27 and Dominguez, however, are distinguishable.

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1        Hatami involved many of the same facts as the instant case;  
2 the plaintiff allegedly made five attempts to have his vehicle  
3 repaired before requesting his car be repurchased, and instead,  
4 defendant Kia Motors offered to inspect and repair the vehicle,  
5 at which point the plaintiff filed suit. Hatami, 2009 WL  
6 1396358, at \*1. The court in Hatami found that summary  
7 adjudication was appropriate for plaintiff's civil penalties  
8 claim under subsection (c). Id. at \*5. The court explained that  
9 willful conduct was absent due to both defendant's initial  
10 response to inspect the vehicle, and its subsequent offers to buy  
11 back the vehicle. Id. Because Defendant in this case has not  
12 made any offers to repurchase Plaintiffs' vehicle, this Court  
13 does not find Hatami to be sufficiently analogous to support  
14 summary adjudication.

15        Dominquez, which Defendant also relies upon in support of  
16 its contention that a request for an evaluation of the vehicle is  
17 not willful conduct, is similarly distinguishable. In Dominquez,  
18 the plaintiff allegedly made five repair attempts and then  
19 submitted a written request to the defendant for a buyback.  
20 160 Cal. App. 4th at 55-56. In response, the defendant requested  
21 that the plaintiff bring in his vehicle for an inspection. Id.  
22 Significantly, in Dominquez, the defendant noted the reasons for  
23 its request to inspect as follows: 1) the repair mechanics were  
24 unable to duplicate the reported problem, 2) the excessive  
25 mileage on the motorcycle did not indicate that there was a  
26 "recurrent problem," and 3) plaintiff brought the motorcycle in  
27 for issues unrelated to the alleged problem. Id. at 56.

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1 Approximately six weeks after plaintiff's demand, the defendant  
2 offered to repurchase the vehicle. Id. at 59. The court held  
3 that there was no evidence that defendant willfully failed to  
4 comply with the Act. Id. at 59. Dominguez is distinguishable  
5 both because of that defendant's offer to repurchase plaintiff's  
6 vehicle, and because that particular request for inspection was  
7 predicated on a good faith belief that the Song-Beverly Act did  
8 not apply to the alleged problem. Neither of these facts are  
9 present in the instant case. Accordingly, this Court does not  
10 find Dominguez persuasive.

11 A violation of § 1793.2(d)(2) is not willful if the  
12 defendant's failure to replace or refund was the result of a good  
13 faith and reasonable belief that the facts imposing the statutory  
14 obligation were not present. Kwan v. Mercedes-Benz of N. Am.,  
15 Inc., 23 Cal. App. 4th 174, 185 (1994). This standard does not  
16 require the plaintiff to prove the defendant actually knew of its  
17 obligation to refund or replace because that requirement would  
18 allow manufacturers to escape the penalty by remaining ignorant  
19 of the facts. Id. "A decision made without the use of  
20 reasonably available information germane to that decision is not  
21 a reasonable, good faith decision." Id. at 186. The Song-  
22 Beverly Act requires a manufacturer to maintain service and  
23 repair facilities in the state, and so the manufacturer is  
24 capable of knowing every failed repair attempt by reading its  
25 dealers' service records. Krotin v. Porsche Cars N. Am., Inc.,  
26 38 Cal. App. 4th 294, 303 (1995).

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1 Cal. Civ. Code § 1793.2(d) obligates a manufacturer to offer a  
2 replacement or reimbursement when it is unable to repair the  
3 vehicle in conformity with the express warranty after a  
4 reasonable number of attempts.

5 The question addressed at this stage is not whether  
6 Defendant was in fact willful and subject to § 1794(c) civil  
7 penalties, but instead, whether a reasonable jury could find that  
8 it acted willfully. Anderson, 477 U.S. at 251-52. Though  
9 Defendant contends that Plaintiffs only contacted it once to  
10 report the vehicle's defect, Mr. Valenti admitted in his  
11 deposition that he received and reviewed the repair orders, which  
12 noted that the defect had not been fixed. (Decl. of Mark Romano,  
13 Ex. 4 at 223:1-11.) Further, in light of Krotin, Defendant is  
14 expected to review its dealers' service records, and so should  
15 have known of the failed attempts to repair the defect. 38 Cal.  
16 App. 4th at 303. Both Defendant and Mr. Valenti were on notice  
17 of Plaintiffs' multiple attempts to repair the vehicle.

18 Defendant has provided no authority establishing that its  
19 actions demonstrated the conclusive non-willfulness necessary to  
20 evade liability under Cal. Civ. Code § 1794(c). To the contrary,  
21 case law in this area is highly fact-specific, and one or two  
22 slight differences between cases can change the outcome.

23 Plaintiffs' claim for civil penalties under § 1794(c) therefore  
24 raises triable issues of fact for the jury to decide. Because  
25 the claim is consequently not amenable to summary adjudication,  
26 Defendant's motion as to civil penalties under subsection (c) is  
27 DENIED.

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1           **B.    Cal. Civ. Code § 1794(e) (1) - Civil Penalties For**  
2           **Buyers Of Motor Vehicles**

3           The Song-Beverly Act requires a manufacturer of motor  
4 vehicles who is unable to service or repair a new vehicle in  
5 conformity with applicable express warranties to either promptly  
6 replace the vehicle or make restitution after a reasonable number  
7 of repair attempts. Cal. Civ. Code § 1793.2(d) (2). If the buyer  
8 establishes a violation of § 1793.2(d) (2), he or she may recover  
9 damages, reasonable attorneys fees and costs, and a civil penalty  
10 of up to two times the amount of damages. Cal. Civ. Code  
11 § 1794(e) (1). A plaintiff may recover civil penalties under  
12 subsection(e) (1) where the defendant's violation of the Act was  
13 not willful. Jernigan, 24 Cal. App. 4th at 492.

14           Subsection (e) (1) calls for the same standard as  
15 subsection (c) for an award of civil penalties, except that a  
16 finding of willfulness is not required. See Cal. Civ. Code  
17 § 1794(c) and (e) (1). Subsection (e) was intended to apply to  
18 purchases of new motor vehicles only, whereas subsection (c)  
19 covers any type of consumer goods as defined in the Act. See  
20 Suman v. BMW of N. Am., Inc., 23 Cal. App. 4th 1, 6-7 (1994).

21 The only distinction between the analysis contained in  
22 subsections (c) and (e) (1), then, is with respect to a finding of  
23 willfulness and a more particularized showing that the purchase  
24 of a motor vehicle is involved.

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1 If Plaintiffs' claim under the more rigorous requirements of  
2 subdivision (c) survives for purposes of summary adjudication, as  
3 the Court has already concluded, a reasonable jury could likewise  
4 find that Plaintiffs have also demonstrated the elements  
5 necessary to collect civil penalties under subsection (e), which  
6 relaxes any requirement that Defendant's refusal be willful.

7  
8 **C. Cal. Civ. Code § 1794(e) (2) - Qualified Dispute**  
9 **Resolution Process**

10 A buyer of a motor vehicle that cannot be repaired after a  
11 reasonable number of attempts may recover a civil penalty  
12 pursuant to Cal. Civ. Code § 1794(e) (1) unless the manufacturer  
13 maintains a qualified third-party dispute resolution process.  
14 Cal. Civ. Code § 1794(e) (2). To be exempted from subsection (e)  
15 civil penalties, the manufacturer's qualified dispute resolution  
16 process must substantially comply with Cal. Civ. Code § 1793.22.  
17 Id. Cal. Civ. Code § 1793.22(d) provides nine conditions that a  
18 third-party dispute resolution process must satisfy in order to  
19 be considered "qualified" for the purposes of § 1794(e) (2)  
20 exemption.

21 Defendant participates in the Better Business Bureau  
22 Autoline program ("BBB"). Defendant maintains that BBB is  
23 certified by the State of California as an Arbitration Program  
24 for any Song-Beverly claims against certain automotive  
25 manufacturers. Defendant, therefore, argues that since the  
26 program "...is so certified, it meets the requirements of the  
27 statute." (Def.'s Mot. for Summary Adj. at 6.)

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1 Certification of a dispute resolution program, however, fulfills  
2 just one of nine conditions required to be considered "qualified"  
3 in satisfaction of § 1794(e)(2). Thus, certification of BBB does  
4 not necessarily lead to the conclusion that BBB complies with the  
5 requirements of the § 1794(e)(2) exemption. Defendant has failed  
6 to address the remaining eight conditions for qualification in  
7 its Motion for Summary Adjudication. Instead, Defendant relies  
8 on Mr. Valenti's conclusion that BBB complies with the  
9 requirements of the Song-Beverly Act.

10 A declaration used to support or oppose a motion must be  
11 made on personal knowledge. Rule 56(c)(4). In sole support of  
12 its stated contention that participation in the BBB process  
13 exempts it from subsection (e) civil penalties, Defendant points  
14 to Christopher Valenti's declaration at ¶ 13. Mr. Valenti's  
15 declaration attests that BBB is certified by the State of  
16 California, and "complies with the requirements of the Song-  
17 Beverly Act." (Decl. Christopher Valenti ¶ 13.) Plaintiffs  
18 dispute this declaration arguing, based on statements made in his  
19 deposition on March 8, 2011, that Mr. Valenti does not have  
20 personal knowledge of those facts. In this deposition,  
21 Mr. Valenti was asked "Is anything contained in paragraph 13  
22 actually stated from your personal knowledge," to which he  
23 responded, "No." (Decl. of Mark Romano, Ex. 4 at 226:1-4.)  
24 Because declarations used in support of a motion for summary  
25 adjudication must be made on personal knowledge, Mr. Valenti's  
26 statement in paragraph 13 is an insufficient basis on which to  
27 grant such a motion.

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1 Defendant has offered no other evidence or case law to support  
2 its contention that Plaintiffs cannot prevail on a claim for  
3 subsection (e) civil penalties.

4 Beyond mere conclusory statements, Defendant has not  
5 established that its participation in the BBB dispute resolution  
6 process exempts it from civil penalties pursuant to  
7 subsection (e). Defendant's Motion for Summary Adjudication as  
8 to civil penalties under Cal. Civ. Code § 1794(e) is DENIED.

9  
10 **CONCLUSION**

11  
12 For the reasons stated above, Defendant's Motion for Summary  
13 Adjudication (ECF No. 7) is DENIED.<sup>2</sup>

14 IT IS SO ORDERED.

15 Dated: April 14, 2011

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18 MORRISON C. ENGLAND, JR.  
19 UNITED STATES DISTRICT JUDGE  
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27 <sup>2</sup> Because oral argument will not be of material assistance,  
28 the Court ordered this matter submitted on the briefing. E.D.  
Cal. Local Rule 230(g).