SENATE DOCKET, NO. 1655 FILED ON: 1/18/2013

SENATE . . . . . No. 103

The Commonwealth of Massachusetts

PRESENTED BY:

John Hart, Jr.

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to reconcile Chapter 241 of the Acts of 2012 and Chapter 368 of the Acts of 2012.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
John Hart, Jr.	*First Suffolk*
Garrett J. Bradley	*3rd Plymouth*
Theodore C. Speliotis	*13th Essex*
Stephen L. DiNatale	*3rd Worcester*
Dennis A. Rosa	*4th Worcester*

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SENATE . . . . . No. 103

By Mr. Hart, a petition (accompanied by bill, Senate, No. 103) of John Hart, Jr., Garrett J. Bradley, Theodore C. Speliotis, Stephen L. DiNatale and other members of the General Court for legislation relative to motor vehicle repairs. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

In the Year Two Thousand Thirteen

An Act to reconcile Chapter 241 of the Acts of 2012 and Chapter 368 of the Acts of 2012.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

The General Laws are hereby amended by inserting after chapter 93I the following chapter:-

CHAPTER 93J

Section (1) As used in this chapter, the following words shall, unless the context clearly indicates a different meaning, have the following meanings:

"Dealer", any person or business who, in the ordinary course of its business, is engaged in the business of selling or leasing new motor vehicles to consumers or other end users pursuant to a franchise agreement and who has obtained a class 1 license pursuant to the provisions of section 58 and 59 of chapter 140 and is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines pursuant to said franchise agreement.

"Franchise agreement", an oral or written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a motor vehicle dealer a license to use a trade name, service mark or related characteristic and in which there is a community of interest in the marketing of new motor vehicles or services related thereto at wholesale, retail, leasing or otherwise.

"Fair and Reasonable Terms". In determining whether a price is on "fair and reasonable terms," consideration may be given to relevant factors, including, but not limited to, the following:

(i) The net cost to the manufacturer franchised dealerships for similar information obtained from manufacturers, less any discounts, rebates, or other incentive programs.

(ii) The cost to the manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the onboard computer and its software or any other vehicle part or component. Amortized capital costs for the preparation and distribution of the information may be included.

(iii) The price charged by other manufacturers for similar information.

(iv) The price charged by manufacturers for similar information prior to the launch of manufacturer web sites.

(v) The ability of aftermarket technicians or shops to afford the information.

(vi) The means by which the information is distributed.

(vii) The extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use.

(viii) Inflation.

"Immobilizer system", an electronic device designed for the sole purpose of preventing the theft of a motor vehicle by preventing the motor vehicle in which it is installed from starting without the correct activation or authorization code.

“Independent repair facility", a person or business operating in the commonwealth that is not affiliated with a manufacturer or manufacturer’s authorized dealer of motor vehicles, which is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines; provided, however, that, for the purposes of this chapter, a dealer, notwithstanding its affiliation with any manufacturer, shall be considered an independent repair facility for purposes of those instances when said dealer engages in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines that are not affiliated with the dealer’s franchise manufacturer.

"Manufacturer", any person or business engaged in the business of manufacturing or assembling new motor vehicles.

"Motor vehicle", a vehicle, originally manufactured for distribution and sale in the United States, driven or drawn by mechanical power and manufactured primarily for use on public streets, roads and highways, but excluding: (i) a vehicle that may be operated only on a rail line; (ii) a recreational vehicle or auto home equipped for habitation; (iii) an ambulance; (iv) a bus, motor coach or trackless trolley designed for the carriage of persons for hire or for school-related purposes; (v) vehicles used exclusively for the building, repair and maintenance of highways or designed primarily for use elsewhere than on the traveled part of ways; (vi) any

53 vehicle with a gross vehicle weight rating of more than 10,000 pounds; (vii) any vehicle
54 excluded from the definition of “motor vehicle” in chapter 90; and (viii) a motorcycle, as defined
55 in section 1 of chapter 90.

56 “Owner", a person or business who owns or leases a motor vehicle registered in the
57 commonwealth.

58 "Trade secret", anything, tangible or intangible or electronically stored or kept, which
59 constitutes, represents, evidences or records intellectual property including secret or
60 confidentially held designs, processes, procedures, formulas, inventions, or improvements, or
61 secret or confidentially held scientific, technical, merchandising, production, financial, business
62 or management information, or anything within the definition of 18 U.S.C. § 1839(3).

63 Section (2)(a) Except as provided in subsection (2)(e), for Model Year 2002 motor
64 vehicles and thereafter, a manufacturer of motor vehicles sold in the commonwealth shall make
65 available for purchase by owners of motor vehicles manufactured by such manufacturer and by
66 independent repair facilities the same diagnostic and repair information, including repair
67 technical updates, that such manufacturer makes available to its dealers through the
68 manufacturer's internet-based diagnostic and repair information system or other electronically
69 accessible manufacturer’s repair information system. All content in any such manufacturer’s
70 repair information system shall be made available to owners and to independent repair facilities
71 in the same form and manner and to the same extent as is made available to dealers utilizing such
72 diagnostic and repair information system. Each manufacturer shall provide access to such
73 manufacturer's diagnostic and repair information system for purchase by owners and independent
74 repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable
75 terms.

76 (2)(b) Any manufacturer that sells any diagnostic, service, or repair information to any
77 independent repair facility or other third party provider in a format that is standardized with other
78 manufacturers, and on terms and conditions more favorable than the manner and the terms and
79 conditions pursuant to which the dealer obtains the same diagnostic, service or repair
80 information, shall be prohibited from requiring any dealer to continue purchasing diagnostic,
81 service, or repair information in a proprietary format, unless such proprietary format includes
82 diagnostic, service, repair or dealership operations information or functionality that is not
83 available in such standardized format.

84 (2)(c)(i) For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor
85 vehicles sold in the commonwealth shall make available for purchase by owners and independent
86 repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless
87 capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate
88 the same functional repair capabilities that such manufacturer makes available to dealers. Each

manufacturer shall offer such tools for sale to owners and to independent repair facilities upon fair and reasonable terms.

(2)(c)(ii) Any diagnostic tool or information necessary to diagnose, service or repair a motor vehicle that a manufacturer sells to any independent repair facility in a manner and on terms and conditions more favorable than the manner and the terms and conditions pursuant to which the dealer obtains the same diagnostic tool or information necessary to diagnose, service or repair a motor vehicle, shall also be offered to the dealer in the same manner and on the same terms and conditions as provided to such independent repair facility.

Any manufacturer that sells to any independent repair facility any diagnostic tool necessary to diagnose, service or repair a motor vehicle and such diagnostic tool communicates with the vehicle using the same non-proprietary interface used by other manufacturers, the manufacturer delivering such a diagnostic tool shall be prohibited from requiring any dealer from continuing to purchase that manufacturer's proprietary tool and interface unless such proprietary interface has a capability not available in the non-proprietary interface.

(2)(c)(iii) Each manufacturer shall provide diagnostic repair information to each aftermarket scan tool company and each third party service information provider with whom the manufacturer has appropriate licensing, contractual or confidentiality agreements for the sole purpose of building aftermarket diagnostic tools and third party service information publications and systems. Once a manufacturer makes such information available pursuant to this section, the manufacturer will have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of aftermarket diagnostic tools or service information systems.

(2)(d)(i) Commencing in Model Year 2018, except as provided in subsection (2)(e), manufacturers of motor vehicles sold in the commonwealth shall provide access to their onboard diagnostic and repair information system, as required under this section, using an off-the-shelf personal computer with sufficient memory, processor speed, connectivity and other capabilities as specified by the vehicle manufacturer and: (i) a non-proprietary vehicle interface device that complies with the Society of Automotive Engineers SAE J2534, the International Standards Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or published by the Society of Automotive Engineers or the International Standards Organizations; or, (ii) an on-board diagnostic and repair information system integrated and entirely self-contained within the vehicle including, but not limited to, service information systems integrated into an onboard display, or (iii) a system that provides direct access to on-board diagnostic and repair information through a non-proprietary vehicle interface such as Ethernet, Universal Serial Bus or Digital Versatile Disc. Each manufacturer shall provide access to the same on-board diagnostic and repair information available to their dealers, including technical updates to such on-board systems, through such non-proprietary interfaces as referenced in this paragraph.

126 Nothing in this Chapter shall be construed to require a dealer to use the non-proprietary
127 vehicle interface (i.e., SAE J2534 or ISO 22900 vehicle interface device) specified in this
128 subsection, nor shall this Chapter be construed to prohibit a manufacturer from developing a
129 proprietary vehicle diagnostic and reprogramming device, provided that (i) the manufacturer also
130 complies with Section 2(d)(i), and (ii) the manufacturer also makes this device available to
131 independent repair facilities upon fair and reasonable terms, and otherwise complies with Section
132 2(a).

133 (2)(d)(ii) No manufacturer shall be prohibited from making proprietary tools available to
134 dealers if such tools are for a specific specialized diagnostic or repair procedure developed for
135 the sole purpose of a customer service campaign meeting the requirements set out in 49 CFR
136 579.5, or performance of a specific technical service bulletin or recall after the vehicle was
137 produced, and where original vehicle design was not originally intended for direct interface
138 through the non-proprietary interface set out in (2)(d)(i). Provision of such proprietary tools
139 under this paragraph shall not constitute a violation of this chapter even if such tools provide
140 functions not available through the interface set forth in (2)(d)(i), provided such proprietary tools
141 are also available to the aftermarket upon fair and reasonable terms. Nothing in this subsection
142 (2)(d)(ii) authorizes manufacturers to exclusively develop proprietary tools, without a non-
143 proprietary equivalent as set forth in (2)(d)(i), for diagnostic or repair procedures that fall outside
144 the provisions of (2)(d)(ii) or to otherwise operate in a manner inconsistent with the requirements
145 of (2)(d)(i).

146 (2)(e) Manufacturers of motor vehicles sold in the commonwealth may exclude
147 diagnostic, service and repair information necessary to reset an immobilizer system or security-
148 related electronic modules from information provided to owners and independent repair
149 facilities. If excluded under this paragraph, the information necessary to reset an immobilizer
150 system or security-related electronic modules shall be obtained by owners and independent repair
151 facilities through the secure data release model system as currently used by the National
152 Automotive Service Task Force or other known, reliable and accepted systems.

153 (2)(f) With the exception of telematics diagnostic and repair information that is provided
154 to dealers, necessary to diagnose and repair a customer's vehicle, and not otherwise available to
155 an independent repair facility via the tools specified in 2(c)(i) and 2(d)(i) above, nothing in this
156 chapter shall apply to telematics services or any other remote or information service, diagnostic
157 or otherwise, delivered to or derived from the vehicle by mobile communications; provided,
158 however, that nothing in this chapter shall be construed to abrogate a telematics services or other
159 contract that exists between a manufacturer or service provider, a motor vehicle owner, and/or a
160 dealer. For purposes of this chapter, telematics services include but are not limited to automatic
161 airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location,
162 remote door unlock, transmitting emergency and vehicle location information to public safety
163 answering points as well as any other service integrating vehicle location technology and

164 wireless communications. Nothing in this chapter shall require a manufacturer or a dealer to
165 disclose to any person the identity of existing customers or customer lists.

166 Section (3) Nothing in this chapter shall be construed to require a manufacturer to divulge
167 a trade secret.

168 Section (4) Notwithstanding any general or special law or any rule or regulation to the
169 contrary, no provision in this chapter shall be read, interpreted or construed to abrogate, interfere
170 with, contradict or alter the terms of any provision of chapter 93B or the terms of any franchise
171 agreement executed and in force between a dealer and a manufacturer including, but not limited
172 to, the performance or provision of warranty or recall repair work by a dealer on behalf of a
173 manufacturer pursuant to such franchise agreement; provided, however, that any provision in
174 such a franchise agreement that purports to waive, avoid, restrict or limit a manufacturer's
175 compliance with this chapter shall be void and unenforceable.

176 Section (5) Nothing in this chapter shall be construed to require manufacturers or dealers
177 to provide an owner or independent repair facility access to non-diagnostic and repair
178 information provided by a manufacturer to a dealer, or by a dealer to a manufacturer pursuant to
179 the terms of a franchise agreement.

180 Section (6)(a) In addition to any other remedies that may be available under law, a
181 violation of this chapter shall be deemed to be an unfair method of competition and an unfair or
182 deceptive act or practice in the conduct of trade or commerce in violation of section 2 of chapter
183 93A.

184 Section (6)(b) An independent repair facility or owner who believes that a manufacturer
185 has failed to provide information or a tool required by this chapter must notify the manufacturer
186 in writing through the National Automotive Service Task Force (NASTF) Service Information
187 Request process or its successor organization or process, and give the manufacturer thirty (30)
188 days from the time the manufacturer receives the complaint to cure the failure. If the
189 manufacturer cures said complaint within the cure period, damages shall be limited to actual
190 damages in any subsequent 93A litigation.

191 Section (6)(c) If the manufacturer fails to respond to the notice provided pursuant to
192 (6)(b), or if an independent repair facility or owner is not satisfied with the manufacturer's cure,
193 the independent repair facility or owner may file a complaint in the superior court, or if
194 applicable in the federal district court for the district of Massachusetts. Such complaint shall
195 include, but not be limited to the following: (i) written information confirming that the
196 complainant has visited the relevant manufacturer website and attempted to effect a proper repair
197 utilizing information provided on such website, including communication with customer
198 assistance via the manufacturer's toll-free call-in assistance, if made available by such
199 manufacturer; (ii) written information confirming that the complainant has obtained and utilized

200 the relevant manufacturer's scan or diagnostic tool necessary for such repair; and (iii) evidence
201 of manufacturer notification as set out in (6)(b).

202 Section (6)(d) Except in the instance of a dispute arising between a franchisor
203 manufacturer and its franchisee dealer related to either party's compliance with an existing
204 franchise agreement, which is required to be resolved pursuant to chapter 93B, a dealer shall
205 have all the rights and remedies provided in this chapter, including, but not limited to, in the
206 instance when exercising rights and remedies as allowed as an independent repair facility under
207 chapter 93J.