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CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of LEEHAN, INC. HANLEES HILLTOP NISSAN, Protestant, v. NISSAN NORTH AMERICA, INC., Respondent.	**Protest No. PR-2307-11** **AMENDED PROPOSED ORDER GRANTING RESPONDENT'S MOTION TO DISMISS SECOND PROTEST**

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1. Protestant Leehan, Inc. Hanlees Hilltop Nissan (hereinafter Hanlees or protestant) is a new motor vehicle dealer in Richmond, California and a franchisee of respondent Nissan North America (hereinafter NNA or respondent). On June 21, 2011, Hanlees filed this protest pursuant to Vehicle Code section 3065.1 (claims arising out of franchisor incentive programs). On July 15, 2011, NNA filed a motion to dismiss the protest as untimely.

2. This is Hanlees' second protest regarding NNA's franchisor incentive program. It alleges that a chargeback of $64,350 was untimely as it was made more than 90 days after the completion of the program audit. Hanlees relies on the language in section 3065.1(b) in support of its argument.

FACTUAL BACKGROUND

3. The following facts are not in dispute.

4. From October 5 to December 9, 2009, NNA conducted an audit of payments made to Hanlees pursuant to NNA's franchisor incentive program. The period covered by the audit was July 1, 2008 - September 30, 2009. The auditor determined that Hanlees had received a net overpayment during this period of $70, 500.

5. The audit result was communicated to Hanlees at a closing meeting on December 9, 2009, orally and with documentation. On that date NNA also gave Hanlees notice of a forthcoming chargeback in the amount of $70, 500.

6. On January 5, 2010, NNA received an appeal letter from Hanlees challenging the audit determinations. The letter initially led to a reduction of the amount of the proposed chargeback from $70,500 to $67,875. Additional negotiations led to a further reduction to $64,350. NNA so advised Hanlees in a letter, with detailed attachments, dated February 26, 2010. NNA charged back the $64,350 in two installments. The first was in the amount of $8,775 on March 10, 2010, and the second was in the amount of $55,575 on April 12, 2010.

7. On February 25, 2011, Hanlees filed its first Vehicle Code section[1] 3065.1 protest with the New Motor Vehicle Board (hereinafter Board), Protest No. PR-2291-11, challenging the audit findings (hereinafter referred to as the first Hanlees protest). At the May 26, 2011, General Meeting, by

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[1] Unless otherwise indicated, all statutory references are to the California Vehicle Code.

a unanimous vote, the Public Members adopted the Proposed Order which dismissed the first Hanlees protest as untimely.

8. On June 21, 2011, Hanlees filed this protest (Protest No. PR-2307-11), challenging not the audit findings (the subject of the first Hanlees protest), but rather the timing of the chargeback of the finalized amount of $64,350 (hereinafter referred to as the second Hanlees protest).

9. On July 15, 2011, NNA filed a motion to dismiss the second Hanlees protest as untimely. On August 10, 2011, a telephonic hearing was held before Administrative Law Judge (hereinafter ALJ) Jerold A. Prod. Nelson Mullins Riley & Scarborough, LLP, by M. Ronald McMahon, Jr., appeared for respondent and moving party NNA. Callahan Thompson Sherman & Caudill, LLP, by Tina Hopper, appeared for protestant and responding party Hanlees.

10. On July 29, 2011, Hanlees objected to any consideration of the Board's May 26, 2011, decision in the first Hanlees protest that resulted in the dismissal of Protest No. PR-2291-11. The objection was on the ground that the decision has not been designated as precedent by the Board. (See Gov. Code §§ 11425.10(a)(7) and 11425.60) During the telephonic hearing on August 10, 2011, ALJ Prod overruled Hanlees' objection because the decision in Protest No. PR-2291-11 is part of the administrative record in the first Hanlees protest and involves the same parties and the same audit that is at issue in this protest.

ISSUE

11. The only issue is whether NNA's chargebacks of $8,775 on March 10, 2010 and $55,575 on April 12, 2010 were timely within the meaning of section 3065.1. If the chargebacks were timely the motion to dismiss must be granted. If the chargebacks were untimely the motion must be denied.

12. Section 3065.1 provides as follows:

> (a) All claims made by a franchisee for payment under the terms of a franchisor incentive program shall be either approved or disapproved within 30 days after receipt by the franchisor. When any claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within the required period, and each notice shall state the specific grounds upon which the disapproval is based. Any claim not specifically disapproved in writing within 30 days from receipt shall be deemed approved on the 30th day. Following the disapproval of a claim, a franchisee shall have one year from receipt of the notice of disapproval in which to appeal the disapproval to the franchisor and file a protest with the board. All claims made by franchisees under this section shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the

franchisor, do not constitute a violation of this article.

(b) Audits of franchisee incentive records may be conducted by the franchisor on a reasonable basis, and for a period of 18 months after a claim is paid or credit issued. Franchisee claims for incentive program compensation shall not be disapproved except for good cause, such as ineligibility under the terms of the incentive program, lack of material documentation, or fraud. Any chargeback to a franchisee for incentive program compensation shall be made within 90 days of the completion of the audit. If a false claim was submitted by a franchisee with the intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the board. (Emphasis added.)

NNA's Position

13. NNA argues that the one year period allowed from the disapproval of a franchisor incentive program claim for a franchisee to file a protest applies to all activities covered by section 3065.1(a) and 3065.1(b), and not just the disapproval of the claim referenced in 3065.1(a). The contention is that since this second protest regarding the timing of the chargeback referenced in section 3065.1(b) was filed more than one year after the disapproval of the underlying claims on December 9, 2009, it is untimely and must be dismissed, as was the first Hanlees protest. The argument is that the one year statute of limitations in 3065.1(a) makes no distinction between a protest challenging the audit and a protest challenging the chargeback pursuant thereto.

14. NNA argues that the rationale in the first Hanlees decision is persuasive for purposes of this proceeding. It relies on dicta in the decision stating that section 3065.1 must be read as an integrated whole. It is inferred that the one year limitation on protests challenging claim disapprovals in section 3065.1(a) also serves as a one year limitation on protests challenging untimely chargebacks.

Hanlees' Position

15. Hanlees contends that the one year period allowed for franchisee appeals to the franchisor and protests to the Board of denied franchisor incentive program claims set forth in section 3065.1(a) does not apply to chargebacks made by the franchisor (section 3065.1(b)). The argument is that the limitation period properly at play in this proceeding is the one in section 3065.1(b), giving a franchisor no more than 90 days from the completion of any audit to make chargebacks. Hanlees contends that since the one year period to file a protest set forth in section 3065.1(a) is inapplicable, the appropriate statute of limitations to file a protest alleging an untimely chargeback is the four year limit in Code of Civil Procedure section

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343.[2]

PROCEDURAL SETTING OF THIS MOTION

16. Hanlees' first protest was dismissed by the Board on May 26, 2011, as untimely filed. The decision held that the one year period in which to file a protest commenced on December 9, 2009, the date Hanlees was notified that its claims under the franchisor incentive program were disapproved. Hanlees had one year from December 9, 2009, to appeal this disapproval to the franchisor and to file a protest with the Board. Hanlees did not file its first protest until February 25, 2011. NNA's motion to dismiss was therefore granted. Hanlees accepts that for now the ruling is binding on the parties unless and until reversed. Hanlees has sought superior court review of the decision in the first protest, which is presently set for hearing in January 2012.

17. The timeliness of the chargebacks of March 10 and April 12, 2010, were not at issue in first Hanlees protest. This issue was not addressed in the Board's May 26, 2011 decision on that protest.

ANALYSIS

18. There are several time limitations in section 3065.1 concerning franchisor incentive programs. They are in both subsection (a) and subsection (b), as follows:

1. Claims under the franchisor incentive program by a franchisee must be approved or disapproved by the franchisor within 30 days after receipt by the franchisor (failure to act constitutes approval).
2. Following the disapproval of a claim, the franchisee must appeal the disapproval to the franchisor and file a protest with the Board within one year from receipt of the notice of the disapproval. The application of this limitation was the subject of the first Hanlees protest.
3. All approved franchisee claims must be paid within 30 days following approval.
4. Audits of franchisee incentive records can be conducted by the franchisor on a reasonable basis for a period of 18 months after a claim is paid or credit issued.

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[2] Section 343 of the Code of Civil Procedure provides as follows: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

5. Any chargeback to a franchisee flowing from a completed audit of franchisee records by the franchisor must be made within 90 days of the completion of the audit. This is the limitation directly applicable in the instant motion.

19. The controlling fact in this proceeding is that NNA's chargebacks to Hanlees of $64,350 on March 10 and April 12, 2010, were made within 90 days of the February 26, 2010, completion of the audit. Prior to February 26, 2010, the final amount resulting from the audit had not been determined.

20. Moving party NNA argues that because section 3065.1 must be read as a whole, the one year limitation on the filing of a protest challenging the disapproval of a claim must also be the limitation on the filing of a protest challenging the timing of the chargeback. Responding party Hanlees argues that the date of the completion of the audit is the same date as the disapproval of the claim, i.e., December 9, 2009. Hanlees contends that the chargebacks occurred more than 90 days after the completion of the audit and were therefore untimely.

21. Neither argument is persuasive. The disapproval of the claim and the completion of the audit are not the same. The limitation on the time to file a protest on the disapproval of the claim is a limitation on the franchisee. The limitation on the time to make a chargeback pursuant to a completed audit is a limitation on the franchisor. They are dealt with separately in subsections (a) and (b) of section 3065.1.

22. The claims were disapproved on December 9, 2009. This was communicated by NNA to Hanlees at a closing meeting on that date, together with the results of the audit, which at the time indicated an overpayment to Hanlees of $70,500. Hanlees appealed the result of the audit, which appeal was accepted by NNA on January 5, 2010. The amount of the proposed $70,500 chargeback was reduced in two steps. The first was to $67,875 as the result of an internal review by NNA. The second was to $64,350, resulting from additional negotiations with Hanlees.

23. The illogic of Hanlees' contention that the audit was completed on December 9, 2009, is apparent. Suppose that the internal review by NNA and the subsequent negotiations with Hanlees had not been concluded at the amount of $64,350 by February 26, 2010, but rather, say, April 26, 2010. Hanlees would then be in the absurd position of contending that NNA was duty bound to charge back against it the entire earlier amount of $70,500, and to have done it no later than March 9, 2010 (90 days after December

9, 2009).

24. That did not happen in this case, although the 90 days allowed NNA to charge back the $64,350 commenced on February 26, 2010, the date the final amount flowing from the audit was established. It cannot logically be concluded that the audit was completed any earlier than the date the final amount thereof was determined. Hanlees maintains that it is not challenging the findings of the audit, and also that the audit was completed on December 9, 2009. It is doubtful that Hanlees is arguing that it is bound to give up the $6,150 it gained on February 26, 2010, by its appeal from the December 9, 2009, audit result of $70,500.

25. Respondent NNA is correct to point out that the entire legislative scheme establishing the Board and its proceedings is oriented toward expeditious resolution of disputes. NNA makes this point in refuting Hanlees' contention that if a franchisor takes 91 days to make a chargeback pursuant to a completed audit, the franchisee has four years to file a protest challenging the timing of the chargeback. NNA is not necessarily correct, however, in its assertion that the one year limitation on the time to file a protest of a disapproved claim (section 3065.1(a)) also applies to a protest over the timing of any chargeback.

26. In light of the fact that the chargeback was timely made, it is not necessary to decide whether protestant has four years from December 9, 2009 to file a protest, or whether the protest should be dismissed on the sole ground that it was untimely filed.

CONCLUSION

This protest was filed solely on the ground that the chargeback of $64,350 allegedly was not made within 90 days of the completion of the audit (argued to have been on December 9, 2009). The chargeback was in fact made within 90 days of the completion of the audit on February 26, 2010. A dismissal of the protest is therefore in order, although not on the precise ground moved by NNA.

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PROPOSED ORDER

After consideration of the pleadings, briefs, and exhibits thereto, and the oral arguments of counsel, it is ordered that the motion of respondent NNA to dismiss the protest is granted. Protest No. PR-2307-11 (*Leehan, Inc. Hanlees Hilltop Nissan v. Nissan North America, Inc.*) is dismissed with prejudice.

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

DATED: September 12, 2011

By: _____
JEROLD A. PROD
Administrative Law Judge

George Valverde, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV