NEW MOTOR VEHICLE BOARD
1507 – 21ST Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

**CERTIFIED MAIL**

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

| | |
|---|---|
| In the Matter of the Protest of<br><br>M&M AUTOMOTIVE GROUP, INC., dba INFINITI OF OAKLAND,<br><br>Protestant,<br><br>v.<br><br>INFINITI WEST, a Division of Nissan North America, Inc.,<br><br>Respondent. | **Protest No. PR-2360-13**<br><br>**PROPOSED ORDER GRANTING RESPONDENT'S MOTION TO DISMISS** |

To: Michael J. Flanagan, Esq.
Gavin M. Hughes, Esq.
Danielle R. Vare, Esq.
Attorneys for Protestant
LAW OFFICES OF MICHAEL J. FLANAGAN
2277 Fair Oaks Boulevard, Suite 450
Sacramento, California 95825

Maurice Sanchez, Esq.
Kevin M. Colton, Esq.
Attorneys for Respondent
BAKER & HOSTETLER LLP
600 Anton Boulevard, Suite 900
Costa Mesa, California 92626-7221

///

///

///

In the instant Motion to Dismiss filed February 28, 2013, Respondent Infiniti West, a Division of Nissan North America, Inc., argues that Protest No. PR-2360-13 filed by Protestant M&M Automotive Group, Inc., dba Infiniti of Oakland, should be dismissed because Protestant voluntarily terminated its franchise.

A hearing on Respondent's Motion to Dismiss came on regularly for telephonic hearing on Wednesday, May 22, 2013, before Kymberly Pipkin, Administrative Law Judge for the New Motor Vehicle Board ("Board").

## PARTIES AND COUNSEL

1. Protestant M&M Automotive Group, Inc., dba Infiniti of Oakland ("Protestant"), located at 2735 Broadway, Oakland, California, is a new motor vehicle dealer and franchisee authorized to sell Infiniti vehicles under a dealer agreement executed in October 2011. (Protest, p.1, lines 23-25)

2. Michael Murphy is the dealer principal of Protestant. Mr. Murphy also owns a franchised Nissan dealership in Oakland. (Respondent's Exh. E/Protestant's Exh. H.)

3. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J. Flanagan, Esq., and Danielle R. Vare, Esq.

4. Respondent Infiniti West, a Division of Nissan North America, Inc. ("Respondent" or "Infiniti"), is licensed as a distributor with its business address at 1 Nissan Way, Franklin, Tennessee. (Respondent's Exh. A/Protestant's Exh. A)

5. Respondent is represented by Baker & Hostetler LLP, by Maurice Sanchez, Esq.

## STATEMENT OF THE CASE AND POSITION OF THE PARTIES

6. On January 29, 2013, Protestant filed a protest pursuant to the provisions of Vehicle Code section 3060.[1]

7. The gravamen of the protest is that Protestant received a letter from Respondent dated January 18, 2013, that Respondent intended to terminate Protestant's franchise agreement effective January 31, 2013, without good cause. (Protest, p. 2, lines 4-6)

8. On February 28, 2013, Respondent filed the instant Motion to Dismiss contending that

---

[1]All statutory references are to the California Vehicle Code unless noted otherwise.

Protestant voluntarily terminated the Dealer Agreement in compliance with Section 11E of the Infiniti Dealer Sales and Service Agreement ("Dealer Agreement"), and that a voluntary termination is not subject to the good cause requirements under section 3060. (Motion to Dismiss, p. 1, line 28 through p. 2, line 3; p. 5, lines 17-26; and p. 6, lines 1-24)

9. On April 19, 2013, Protestant filed its Opposition to the Motion to Dismiss ("Opposition") which cited numerous theories: (1) that Protestant gave notice of its intent to voluntary terminate under certain conditions; (2) that no consideration was given for the voluntary termination to take effect; (3) that the dealer's right to terminate the franchise is also freely revocable by the dealer; (4) that Infiniti allowed Protestant to revoke its termination by stating in its acceptance letter "*...if we are not notified to the contrary...* "; and (5) given Protestant's revocation of its voluntary termination, Infiniti terminated Protestant's franchise without good cause. (Opposition, p. 2, lines 2-3, p. 4, lines 6-24, p. 5, lines 10-19 and p. 6, lines 16-20)

10. On May 3, 2013, Infiniti filed its Reply Brief in Support of Motion to Dismiss ("Reply Brief") contending that Protestant exercised its contractual right to terminate the Dealer Agreement, properly communicated that decision in writing to Infiniti, and thus terminated the Dealer Agreement. Respondent denied that Protestant had a right to 'undo' its previously announced voluntary termination under the Dealer Agreement, any act or statement of Infiniti, or any California code or common law. (Reply Brief, p. 2, lines 5-16)

## STATEMENT OF FACTS

11. By a letter dated May 2, 2012, Protestant submitted a proposal to Infiniti's and Nissan's Western Region Managers regarding a temporary change in its Nissan and Infiniti locations for three years, with a shared service drive and parts department, in the hopes of becoming profitable. (Opposition, p. 2, lines 13-17; Declaration of Michael Murphy, p. 2, lines 7-12; Protestant's Exh. B) Protestant indicated that it had been losing $70,000 per month in the Nissan and Infiniti dealerships.[2] (Protestant's Exh. B, ¶ 4)

12. In a letter dated June 29, 2012, Infiniti approved the concept, but before it could agree, it

[2] Months later, in a letter dated January 16, 2013, Mr. Murphy represented that he had been losing $80,000 per month at the Infiniti dealership. (Respondent's Exh. E/Protestant's Exh. H, p. 1, ¶ 4)

needed numerous conditions to be met, a list of required documentation, and approval from Nissan. (Declaration of Michael Murphy, p. 2, lines 13-18; Protestant's Exh. C; Opposition, p. 2, lines 17-21; Respondent's Exh. E/Protestant's Exh. H, p. 1, ¶ 4; Respondent's Exh. D/Protestant's Exh. G, enumerated point 2)

13. In a letter dated July 3, 2012, Nissan required numerous conditions to be met and necessary documentation to be received before Nissan would approve Protestant's request. (Protestant's Exh. C)

14. In late June 2012, Protestant was approached by Troy Duhon, owner of another Nissan dealership, to purchase Protestant's Infiniti and Nissan stores. A Letter of Intent for the purchase was signed by Messrs. Murphy and Duhon on August 2, 2012. (Respondent's Exh. B/Protestant's Exh. E, ¶ 1; Respondent's Exh. E/Protestant's Exh. H, p. 2, ¶ 1)

15. On October 1, 2012, Protestant and Mr. Duhon executed a buy/sell agreement which was set to expire on December 31, 2012. (Declaration of Michael Murphy, p. 2, lines 19-21; Opposition, p. 2, lines 22-24)

16. Section 11 E of the Dealer Agreement states in full:

> Dealer has the right to terminate this Agreement at any time by giving notice to Seller, such termination to be effective thirty (30) days after the giving of such notice (unless the thirty (30) day notice period is waived in writing by Seller) or on such other date as may be mutually agreed to in writing by Seller and Dealer.
> (Respondent's Exh. A/Protestant's Exh. A)

17. By letter dated November 29, 2012, Protestant sent the following letter to Eric Anderson:

> As you know on August 2, 2012, we entered into a letter of intent with Mr. Troy Duhon to sell him our Infiniti and Nissan franchises. On October 1, 2012, we executed a buy/sell which we forwarded to you. We opened an escrow on October 8, 2012.
>
> I am under the impression that this transaction is being delayed while Mr. Duhon is attempting to negotiate certain points with Nissan. As I have discussed with you on the telephone, I am frustrated with our ability to make Infiniti a viable business here in Oakland. I cannot risk this deal being delayed into 2013.
>
> My buy/sell with Troy expires on December 31, 2012. **This letter is my 30 day notice to terminate Infiniti as of December 31, 2012.**
>
> Hopefully the transaction with Mr. Duhon will go through and all of the money we have spent to reestablish Infiniti in Oakland will not go to waste and Infiniti will thrive and prosper in Oakland, that is my sincere desire.

///

> It has been a pleasure working with Infiniti, you and your team, I hope you understand the position I am in. If you have any questions please do not hesitate to contact me.
> (Emphasis added; Respondent's Exh. B/Protestant's Exh. E)

18. By a letter to Protestant dated December 20, 2012, Infiniti acknowledged receipt of the voluntary termination letter and sought to change the effective date of the voluntary termination. (Declaration of Michael Murphy, p. 2, lines 26-27 and p. 3, lines 1-2; Respondent's Exh. C/Protestant's Exh. F, ¶ 1) Infiniti stated:

> . . .**However if the APA [asset purchase agreement] is not consummated, for any reason, this letter will serve as Infiniti's acceptance of the voluntary termination** of the Infiniti Dealer Sales and Service Agreement between [Protestant] and Infiniti Division of Nissan North America, Inc., as provided by that letter. Your letter requests an effective date of termination of December 31, 2012. As you know, Infiniti's offices are closed for the holiday, and will not reopen until January 2, 2013. **The voluntary termination is therefore accepted and will be effectuated on January 2, 2013, if we are not notified to the contrary, or if the APA does not close as anticipated.**
> (Emphasis added; Respondent's Exh. C/Protestant's Exh. F, ¶ 2)

19. In an e-mail to Respondent sent on December 31, 2012, Protestant requested an extension of the voluntary termination for an additional 30 days, if Infiniti would still repurchase Protestant's vehicles as if the termination took place on December 31, 2012 (to maintain the repurchase obligation under the Dealer Agreement). (Declaration of Michael Murphy, p. 2, lines 3-4; Respondent's Exh. D/Protestant's Exh. G, ¶ 1) The buy/sell agreement with Mr. Duhon was in serious jeopardy ("Troy has asked for an extension to close the deal, but he was not willing to remove the contingencies, so I said no.") (Respondent's Exh. D/Protestant's Exh. G, enumerated point 1)

> I am seriously considering going back to our original plan before the buy/sell came into play. That was to move to Nissan and Infiniti and dual service and parts for 3 years. The problem we have today is finding out if this is still Nissan's and Infiniti's desire, since no one is working we can't find out....**If we can't work out this move, then I am forced to terminate Infiniti...**
> (Emphasis added; Respondent's Exh. D/Protestant's Exh. G, enumerated points 2 and 6)

20. On January 11, 2013, Respondent agreed to extend the voluntary termination date to January 31, 2013, but rejected the facility change proposal. (Motion to Dismiss, p. 2, line 18; Respondent's Exh. F/Protestant's Exh. I, p. 1, ¶¶ 3 and 4)

21. In a letter to Respondent dated January 16, 2013, Protestant requested reconsideration of its facility change proposal. Protestant recounted its Infiniti dealership's history; that Mr. Murphy had been an absentee owner, greatly affected by the death of his wife shortly before opening the Infiniti

dealership; and that Mr. Murphy had relied upon a General Manager whom he ultimately fired on December 31, 2012, after the buy/sell agreement with Mr. Duhon fell through. (Respondent's Exh. E/ Protestant's Exh. H, p. 2, ¶¶ 4, 5 and 7; Respondent's Exh. I/Protestant's Exh. K, p. 1, ¶ 3) Protestant concluded the letter: "**If you do not want to do this deal I have no other choice than to terminate Infiniti effective January 31, 2013** and leave Nissan where it currently is." (Emphasis added; Respondent's Exh. E/Protestant's Exh. H, p. 3, last ¶)

22. On January 18, 2013, Infiniti confirmed its acceptance of Protestant's voluntary termination effective the close of business January 31, 2013. (Respondent's Exh. F/Protestant's Exh. I, p. 1, ¶ 5)

23. In a letter dated January 25, 2013, Infiniti acknowledged receipt of Protestant's January 16th letter, and reconfirmed its acceptance of the previously submitted voluntary termination effective January 31, 2013. (Respondent's Exh. G/Protestant's Exh. J, ¶¶ 2 and 3)

24. In an e-mail and letter to Infiniti dated January 25, 2013, Protestant stated: "So once again, I wish to rescind my voluntary termination." (Respondent's Exhs. H and I/Protestant's Exh. K, p. 2, last ¶)

## ISSUES PRESENTED

25. Does the dealer have the unilateral right to rescind a voluntary termination prior to its effective date, when notice of the voluntary termination complied with the Dealer Agreement?

## APPLICABLE LAW

26. Section 3060(a) sets forth the conditions under which the *franchisor* may terminate or refuse to continue any existing franchise. "Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no *franchisor* shall terminate or refuse to continue any existing franchise unless...(3) [t]he franchisor has received the written consent of the franchisee..." (Emphasis added.)

27. Termination of a contract occurs when either party pursuant to power created by agreement or law puts an end to the contract otherwise than for breach. (1 Witkin, Summary of Cal. Law (10th ed. 2010), Contracts § 925)

28. The Board is within its authority to dismiss a protest without a full merits hearing.

(*Duarte & Witting* v. *New Motor Vehicle Board* (2004) 104 Cal. App. 4th 626) The Court of Appeals in *Duarte & Witting* held that the Board has implied authority to dismiss a protest upon motion of the Respondent where there is an overriding issue that renders a merits hearing on the standard good cause factors moot. "...There would be no point to conducting an evidentiary hearing on issues of whether the dealer was performing its obligations under the franchise agreement. Such an evidentiary hearing would simply entail the wasteful expenditure of public funds." (*Id.* at p. 637)

**ANALYSIS**

29. Section 11E of the Dealer Agreement gave Protestant the unilateral right to terminate its Infiniti franchise. Protestant exercised this right on November 29, 2012, with the voluntary termination to be effective December 31, 2012, in accordance with the only requirement imposed on the franchisee in the exercise of its right: to give 30 days' notice to Infiniti.

30. The Dealer Agreement did not give Infiniti the right to reject the voluntary termination, nor did it impose any obligation on Infiniti to formally accept the voluntary termination. The only authority that Infiniti did have under Section 11E was either to waive the 30 day notice requirement in writing *or* mutually agree with Protestant to some other effective date in writing.

31. In its letter of December 20, 2012, Infiniti sought to extend the effective date of the voluntary termination to January 2, 2013, citing the holiday closure of its offices. Protestant attempts to characterize the clause "if we are not notified to the contrary" as providing it with the ability to rescind or revoke its voluntary termination (see ¶18 above). The clause, however, modifies the proposed effective date of the agreement as to *when* the voluntary termination is effective, not *if* there is a voluntary termination. Under the clear terms of Section 11E of the Dealer Agreement, Infiniti was without authority to change Protestant's stated effective date of the voluntary termination unless it had the mutual consent of Protestant. The parties thereafter mutually agreed to an extension of the effective date to January 31, 2013.

32. Protestant floated the idea in its e-mail of December 31, 2012, that it was "seriously thinking" about reverting back to its proposal of May 2012. Protestant was clear, however, that it intended to go through with the voluntary termination *unless* Infiniti or Nissan would agree to its former

///

proposal, both in its December 31st e-mail and in its letter of January 16, 2013.[3] It is not until its letter of January 25, 2013, that Protestant requests that it be permitted to rescind its previous voluntary termination without the condition that its May 2012 proposal be accepted.

33. Protestant argues that Section 11E contains a "freely revocable right for Protestant to terminate its franchise" that could be revoked any time prior to the previously agreed-upon date of termination. Section 11E confers no such implied right. The 30 day notice requirement in Section 11E is not a cooling off period where the dealer is free to reconsider its voluntary termination; it facilitates the orderly winding down of the franchised dealer for both parties.

34. Protestant claims that Infiniti gave no consideration for it to terminate the contract. None is required, however, in the exercise of a unilateral right.

35. Protestant's letters of January 16 and 25, 2013, spelled out in very personal terms that Mr. Murphy did not personally manage his Infiniti franchise until January 1, 2013. Had Infiniti not agreed to Protestant's request for an extension of the effective date of the termination to January 31, 2013, Protestant might never have come to the belief that Mr. Murphy could turn around his unprofitable franchise. Protestant chose to voluntary terminate its Dealer Agreement when Mr. Murphy was an absentee owner, and its eleventh hour plea to rescind the termination is without effect.

## DETERMINATIONS

36. Protestant's election to invoke its unilateral right under Section 11E of the Dealer Agreement to voluntary terminate the Dealer Agreement satisfies the condition of Section 3060(a)(3) that the franchisor has the written consent of the franchisee to terminate the franchise agreement. Accordingly, no hearing on the merits of the protest is required.

///

///

///

///

---

[3] Protestant's May 2012 proposal had never been accepted. Both Nissan and Infiniti responded separately in the summer of 2012 that documentation was required and specified conditions would have to be met before either would agree to Mr. Murphy's proposal. Protestant never went forward with submitting documentation and meeting the conditions because the possibility of a sale to Mr. Duhon intervened.

## PROPOSED ORDER

After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered that Respondent's Motion to Dismiss Protest is granted. Protest No. PR-2360-13 (*M&M Automotive Group, Inc., dba Infiniti of Oakland v. Infiniti West, a Division of 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: June 13, 2013

By: Kymberly P. Pipkin
KYMBERLY PIPKIN
Administrative Law Judge

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