

1 Maurice Sanchez, Bar No. 101317
Kevin M. Colton, Bar No. 93654
2 BAKER & HOSTETLER LLP
600 Anton Boulevard, Suite 900
3 Costa Mesa, California 92626-7221
Telephone: 714.754.6600
4 Facsimile: 714.754.6611
Email: msanchez@bakerlaw.com
5 kcolton@bakerlaw.com

6 Attorneys for Respondent
Infiniti Division, Nissan North America, Inc.

7
8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
10

11 In The Matter Of The Protest Of:
12 M&M AUTOMOTIVE GROUP, INC., dba
13 INFINITI OF OAKLAND,
14 Protestant,
15 v.
16 INFINITI WEST, a Division of Nissan North
America, Inc.,
17 Respondent.
18

Protest No. PR-2360-13
**REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS**

19
20 Protestant does not refute that it sent Infiniti Division, Nissan North America, Inc.
21 (“INFINITI”) a notice terminating its Infiniti Dealer Term Sales and Service Agreement (“Dealer
22 Agreement” – Exh. A, Declaration of Anderson attached to Motion to Dismiss), that INFINITI
23 informed Protestant that it acknowledged the receipt and acceptance of its voluntary termination
24 notice and that this Board has the ability to dispose of this protest via a Motion to
25 Dismiss.¹ Protestant does not claim that INFINITI in any way coerced Protestant to issue the

26 _____
27 ¹ INFINITI’s citation to *Duarte & Witting v. New Motor Vehicle Board* (2004) 104 Cal. App. 4th 626 in its Motion to
28 Dismiss was solely to support the proposition 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

1 voluntary termination notice, ending its Dealer Agreement. Rather, Protestant asserts irrelevant
2 and/or unsupported legal propositions, either in an attempt to support its effort to nullify its own
3 voluntary act of termination, or to unilaterally reinstate the Dealer Agreement without the consent
4 of INFINITI. These efforts fail.

5 In short, Protestant exercised its contractual right to terminate the Dealer Agreement
6 according to its terms, and properly communicated that decision to INFINITI, in writing. Once
7 that was done, the Dealer Agreement was terminated. The only issue remaining was the effective
8 date of the termination, which the Dealer Agreement allows the parties to negotiate, if they want
9 to change the “default” period of thirty (30) days. The parties did that, and ultimately agreed
10 upon an effective date of January 31, 2013. *Protestant urges that it had an unwritten right to*
11 *“undo” its termination of the Dealer Agreement by asserting that it had simply changed its mind*
12 *in the interim.*

13 No language of the Dealer Agreement, act or statement of INFINITI, or any statutory or
14 common law of California changes the fact of termination or allows Protestant to unilaterally
15 “undo” its decision. Protestant’s mischaracterization of the language (“unless notified to the
16 contrary”) in INFINITI’s December 20, 2012 letter accepting Protestant’s voluntary termination,
17 cannot be the basis to find that INFINITI gave Protestant the ability to withdraw its termination
18 on a whim. As explained in section F below, Protestant’s interpretation is wholly inconsistent
19 with the remainder of that letter, which stated that the termination would be effective on January
20 2 (later extended by agreement to January 31) if the proposed sale of the dealership did not go
21 through, “*for any reason.*” (Italics added.) Contrary to Protestant’s assertion, the language in
22 question referred to the effective *date* of the termination, rather than the *fact* of the termination.

23 Because the termination underlying this protest is the result of *Protestant’s* voluntary
24 termination, no hearing is required, and the Protest should be dismissed.

25
26 _____
27 moot.” (Motion at 3). Protestant concedes that the Board has this authority. (Opposition at 6). Protestant’s claim
28 that INFINITI relies on this case for any other proposition, however, is erroneous. These arguments are merely a
distraction to the resolution of INFINITI’s Motion.

1 Protestant's voluntary termination of its Dealer Agreement cannot be refuted. Protestant's ability
2 to terminate the Dealer Agreement is contained as a term in the Dealer Agreement:

3 Dealer has the right to terminate this Agreement at any time by giving notice to
4 Seller [INFINITI], such termination to be effective thirty (30) days after the
5 giving of such notice (unless the thirty (30) day notice period is waived in writing
6 by Seller) or on such other date as may be mutually agreed to in writing by Seller
7 and Dealer.

8 Dealer Agreement at Section 11E (explanation added). Here, Protestant does not deny that on
9 November 29, 2012 it gave notice to INFINITI that it was voluntarily terminating the Dealer
10 Agreement. The notice states, "This letter is my 30 day notice to terminate Infiniti as of
11 December 31, 2012." (Exh. B, Declaration of Anderson attached to Motion to Dismiss).

12 INFINITI'S response, sent on December 20, 2012 acknowledged its receipt of the both the
13 voluntary termination letter from Protestant, as well as a proposed asset purchase agreement
14 ("APA"). Because Protestant sought to sell the Infiniti dealership assets prior to the effective date
15 of the termination, INFINITI's response further stated, "However, if the APA is not
16 consummated, *for any reason*, this letter will serve as Infiniti's acceptance of the voluntary
17 termination of the Infiniti Dealer Sales and Service Agreement between [Protestant and
18 INFINITI], as provided by [Protestant's] letter." (Italics inserted, full names of the parties
19 excluded.) INFINITI's response then discussed the effective date of the termination. (Exh. C,
20 Declaration of Anderson attached to Motion to Dismiss).

21 The asset purchase agreement was not consummated. Nothing more was required to make
22 the termination binding, as INFINITI had no basis to avoid Protestant's voluntary termination,
23 either by rejecting it or failing to accept it. Though it did not need to do so, INFINITI made its
24 position on the issue very clear in its December 20, 2012 letter to Protestant, by explicitly
25 "accepting" Protestant's voluntary termination. Therefore, the only requirement for Protestant's
26 termination of the Dealer Agreement – notice to INFINITI – was satisfied.

1 **B. No Consideration Was Required For Protestant To Terminate The Dealer**
2 **Agreement.**

3 Protestant attempts to avoid the impact of its unequivocal voluntary termination of the
4 Dealer Agreement by mischaracterizing its tendered termination as an “offer” that must be
5 accepted and supported by consideration before it can be enforced. The issue here, however, is
6 not whether a new contract was formed between the parties when Protestant gave its notice of
7 voluntary termination. Rather, the issue is whether Protestant’s exercise of its right to terminate
8 under the existing contract, i.e., the Dealer Agreement in fact did terminate that agreement.
9 Protestant’s exercise of its right to terminate, *as a term of the existing contract between the*
10 *parties*, does not need to be supported by separate, additional consideration,² any more than any
11 other contractual provision in the Dealer Agreement needs to be. Any such interpretation would
12 lead to the absurd result of having to find separate consideration for each and every provision in
13 an agreement. That is not the law.³

14 Moreover, characterizing the exercise of the right to terminate as an “offer” that could be
15 nullified by a lack of consideration would dilute the right that the Dealer Agreement confers upon
16 Protestant. Section 11E allows Protestant to terminate the Dealer Agreement *at will*. Overlaying
17 a consideration requirement would be contrary to that unfettered right. Protestant’s argument
18

19 ² The issue of consideration arises in some cases regarding termination provisions because one of the parties argues
20 made that the ability to terminate a contract without cause means that the *underlying contract* lacks consideration or
21 mutuality. *See, e.g., Thomas v. Anthony* (1916) 30 Cal. App. 217 [holding that a contractual requirement that a party
22 give fifteen days’ notice prior to terminating an agreement is sufficient consideration]. No court has ever found that
23 separate consideration was necessary for a party to exercise a right that it already had under a fully enforceable
24 contract.

25 ³ Even though separate consideration was not needed for the voluntary termination, several instances of consideration
26 can be found in this situation. First, Protestant requested that INFINITI continue to consider its proposed sale *after* it
27 gave notice of termination. INFINITI agreed to do so – that is consideration. Second, Protestant later asked
28 INFINITI if it could extend the effective date of termination to January 31, 2013. Again, INFINITI agreed –
providing consideration. Third, Protestant’s request that it be given an extension on the effective date to January 31,
2012 was made with the condition that INFINITI “would still buy back the cars as if the termination took place on
December 31, 2012.” (Exh. D, Declaration of Anderson attached to Motion to Dismiss). This “backdating” of the
termination for 30 days, for purposes of determining eligible vehicle repurchases under the Dealer Agreement was an
accommodation that INFINITI was not required to make, but did, and thus also constitutes consideration. Note that
Protestant was still indicating that the termination would be effective even if the proposed sale did not go through, as
it was contemplating receiving *post-termination benefits* from INFINITI, *i.e.*, vehicle repurchases. (Dealer
Agreement at section 12.B – Repurchases by [Infiniti] Upon Termination. Thus, Protestant continued to assure
INFINITI that it would cease being an Infiniti Dealer at the latest by January 31, 2013 whether by sale of the
dealership or by its voluntary termination.

1 concerning consideration is a red herring and has no bearing on this matter.

2 **C. INFINITI Is Not Required To Show Good Cause To Terminate When The**
3 **Dealer Terminates The Agreement.**

4 Section 11E grants Protestant the right to terminate the Agreement at will. The contract
5 simply does not require INFINITI to show good cause so that *Protestant* can exercise that right.
6 Moreover, Section 3060 *et seq.* of the Vehicle Code only applies when *the manufacturer* seeks to
7 terminate the Agreement. As INFINITI did not seek to terminate the Agreement, the requirement
8 to demonstrate “good cause” to terminate under the factors of Vehicle Code Section 3061 is not
9 applicable here.⁴

10 **D. The Effective Date Of The Termination Does Not Change The Fact Of The**
11 **Termination.**

12 Protestant also attempts to confuse the act of terminating the Dealer Agreement with the
13 date on which the termination will be effective. Section 11E of the Dealer Agreement, however,
14 is clear. The first part of that Section requires only that the dealer give notice. The second part
15 then deals with when, not if, the termination will be effective. In other words, the second part of
16 Section 11E allows for an independent agreement between the parties that could modify the
17 default 30-day effective date, but does not change the fact of the termination itself. Therefore,
18 discussions or agreements about alternative effective dates have no impact on the fact of the
19 termination itself.

20 Protestant nevertheless makes the unsupported argument that the delay provided in the
21 Dealer Agreement for the effective date of the termination provides a *de facto* period during
22 which the dealer may change its mind with regard to its unequivocal notice of termination. The
23 language of Section 11E, however, does not support this position. And, Protestant’s claimed right
24 to “change its mind” at any point in the termination process makes no sense when considered in

25 _____
26 ⁴ California courts have recognized that a dealer’s contractually-supported voluntary action does not trigger the need
27 to establish good cause for that action under the Vehicle Code. *DaimlerChrysler Motors Company v. Lew Williams,*
28 *Inc., et al.* (2006) 142 Cal. App. 4th 344, 353 – 355 [Dealer’s waiver of protest rights regarding establishment of new
dealership was valid and effective without application of Vehicle Code provisions relating to demonstration of good
cause to establish additional dealership.]

1 context with the rest of the Dealer Agreement.

2 INFINITI relies on its dealers to sell and to service its vehicles to the public. The delay in
3 the effective date of the termination was included in the Dealer Agreement (as it is in every such
4 agreement in the industry) to give INFINITI the ability to plan and prepare for the exit of the
5 terminating dealer from the market. If dealers were able to voluntarily terminate without
6 advance notice to INFINITI, INFINITI would be left without the ability to determine how best to
7 respond to the needs of the public in that market. Moreover, if the dealer could simply “change
8 its mind” after giving notice of the termination, INFINITI would never know whether it had to
9 make such plans for market coverage, as the “termination” could be undone anytime up to the
10 hour before the termination would be effective. Therefore, Protestant’s effort to imply a “right to
11 rescind” based on the advance notice requirement should be rejected.

12 **E. Protestant’s Unequivocal, Voluntary Act Must Be Accepted.**

13 Protestant then makes the unsupported argument that Section 11E of the Dealer
14 Agreement or some other “law” gives the dealer the right to change its mind, and that if the dealer
15 changes its mind, the termination of the agreement should not be enforced. Protestant baldly
16 claims, “It is clear that if a dealer exercises its *right* under a controlling agreement and then
17 decides not to exercise such right, then the provision in the controlling agreement should not be
18 enforced against the dealer.” (Opposition at 5). Neither the Dealer Agreement, the Vehicle Code
19 nor contract law, however, provides for such an outcome.

20 Once Protestant exercised its right to terminate the agreement, it was terminated.

21 “Termination” occurs when either party pursuant to a power created by
22 agreement or law puts an end to the contract otherwise than for its breach. On
23 “termination” all obligations which are still executory on both sides are
24 discharged but any right based on prior breach or performance survives. (Quotes
25 in the original, citations omitted.)

26 1 Witkin, Summary of California Law (10th Ed., 2005), *Contracts*, § 925.

27 As was found in *Siegel v. Lewis* (1946) 74 Cal. App. 2d 86, 91, “[o]nce an option to
28

1 terminate a contract is exercised, the contract is extinguished and discharged.” Any subsequent
2 attempt to undo that act would require the formation of a new contract – which never happened
3 here. *See generally California Canning Peachgrowers v. Bardell & Oregoni*, 132 Cal.App. 153
4 (1933) (while this case discusses the appropriate assent required to reinstate the contract after
5 termination, such discussion would be unnecessary if assent were not required).⁵ The subsequent
6 discussions between the parties were just that – discussions. No agreement was ever reached that
7 Protestant could be reinstated as an INFINITI dealer. As Protestant validly terminated the
8 contract, no justification exists to ignore the consequences of that voluntary act.

9 **F. INFINITI Did Not Agree To Allow Protestant To Withdraw Its Notice Of**
10 **Termination.**

11 Protestant takes one line out of INFINITI’s December 20th letter to it and suggests that
12 INFINITI’s acceptance of the termination provided Protestant with an opportunity to change its
13 mind. (Opposition at 3 (“ . . . if we are not notified to the contrary . . .”)) The full quote of
14 INFINITI’s letter in response leaves no room for such an interpretation:

15 However if the APA is not consummated, for any reason, this letter will serve as
16 Infiniti’s acceptance of the voluntary termination of the Infiniti Dealer Sales and
17 Service Agreement between M&M Automotive Group, Inc., dba Infiniti of
18 Oakland and Infiniti Division of Nissan North America, Inc., as provided by that
19 letter.

20 This statement accepting the termination, although not technically necessary, is also not
21 equivocal. The letter does continue, however, to discuss a potential agreement as to an alternative
22 date for the termination to become effective:

23 Your letter requests an effective date of termination on December 31, 2012. As
24 you know, Infiniti’s offices are closed for the holiday, and will not reopen until
25 January 2, 2013. The voluntary termination is therefore accepted and will be
26

27 ⁵ Protestant attempts to distinguish these cases on the basis that neither contract had a delayed effective date. As was
28 explained above, however, termination of the contract is distinct from the date on which the termination would
become effective. Therefore, both of these cases are directly on point.

1 effectuated on January 2, 2013, **if we are not notified to the contrary**, or if the
2 APA does not close as anticipated. [highlighted language quoted by Protestant in
3 its Opposition].
4 (Exh. C, Declaration of Anderson attached to Motion to Dismiss). When *not* taken out of context,
5 as Protestant did in its Opposition, INFINITI’s “qualifying” language applies only to the effective
6 date of the termination, not the fact of the termination itself after unequivocally stating “The
7 voluntary termination is therefore accepted.”⁶ Therefore, Protestant’s subsequent attempt to
8 change its mind and unilaterally to “undo” its notice of termination was *not* “as requested by
9 Infiniti” as Protestant now claims. (Opposition at 3.) As a result, Protestant’s effort to persuade
10 this Board that INFINITI agreed that Protestant’s termination notice could be withdrawn should
11 be rejected, and Protestant’s protest should be dismissed.

12 For these reasons and those stated in its Motion to Dismiss, Protestant’s “protest” should
13 be dismissed, as the Infiniti Dealer Term Sales and Service Agreement was effectively terminated
14 by Protestant in compliance with the contractual provisions in that Dealer Agreement, allowing
15 for voluntary termination by the dealer.

16
17 Dated: May 3, 2013

BAKER & HOSTETLER LLP

18
19 By: 
20 Maurice Sanchez
Kevin M. Colton

21 Attorneys for Respondent
22 Infiniti Division, Nissan North America, Inc.
23
24
25
26

27 ⁶ At most, the “qualifying” language indicates a willingness to allow Protestant to seek more time to close the
28 buy/sell, if needed, which is exactly what Protestant eventually did, asking for an extension of the effective date to
January 31, 2013. INFINITI agreed to do so. (Exh. D, Declaration of Anderson attached to Motion to Dismiss).

PROOF OF SERVICE

I, Elly Cordero, declare:

I am employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 600 Anton Boulevard, Suite 900, Costa Mesa, California 92626-7221. On May 3, 2013, I served a copy of the within document(s):

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Costa Mesa, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- following ordinary business practices, the envelope was sealed and placed for collection by Overnite Express on this date, and would, in the ordinary course of business, be retrieved by Overnite Express for overnight delivery on this date.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via electronic mail the document(s) listed above to the e-mail address(es) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.

Michael J. Flanagan, Esq.
Gavin M. Hughes, Esq.
LAW OFFICES OF MICHAEL J. FLANAGAN
2277 Fair Oaks Boulevard, Suite 450
Sacramento, CA 95825
Telephone: (916) 646-9100
Facsimile: (916) 646-9138
Email: lawmjf@msn.com

Counsel for Protestant
M&M AUTOMOTIVE GROUP, INC.,
dba INFINITI OF OAKLAND

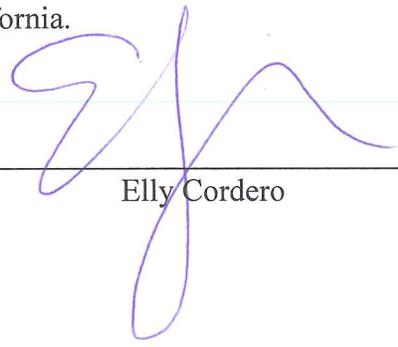
I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 3, 2013, at Costa Mesa, California.



Elly Cordero

601754727

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
COSTA MESA