Exhibit A

STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

DOAH CASE NO.: 04-2247

FINAL ORDER #: HSMV-06-471-FOF-DMV

LOVE NISSAN, INC.,

Petitioner,

vs.

NISSAN NORTH AMERICA, INC.,

Respondents.

_______________________________________/

APPENDIX TO FINAL ORDER

RULING ON PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

EXCEPTION I

Paragraph (2) of Preliminary Statement – Rejected. The evidentiary ruling is correct and was based on competent substantial evidence.

Paragraph (3) of the Preliminary Statement – Rejected. The evidentiary ruling is correct.

Findings of Fact

54. Rejected. The finding is based on competent substantial evidence.

57. Rejected. The finding is based on competent substantial evidence.

63. Rejected. The finding is based on competent substantial evidence.

83. Rejected. The finding is based on competent substantial evidence.

85. Rejected. The finding is based on competent substantial evidence.

86. Rejected. The finding is based on competent substantial evidence.

89. Rejected. The finding is based on competent substantial evidence.

Conclusions of Law

93. Rejected. The conclusion is legally correct.

97. Rejected. The conclusion is legally correct.

106. Rejected. The conclusion is legally correct.

107. Rejected. The conclusion is legally correct.

108. Rejected. The conclusion is legally correct.

109. Rejected. The conclusion is legally correct.

EXCEPTION II

Exception to evidentiary ruling – Rejected. The ruling is correct.

Findings of Fact

57. Rejected. The finding is based on competent substantial evidence.

74. Rejected. The finding is based on competent substantial evidence.

82. Rejected. The finding is based on competent substantial evidence.

83. Rejected. The finding is based on competent substantial evidence.

84. Rejected. The finding is based on competent substantial evidence.

85. Rejected. The finding is based on competent substantial evidence.

86. Rejected. The finding is based on competent substantial evidence.

Conclusions of Law

97. Rejected. The conclusion is correct.

106. Rejected. The conclusion is correct.

EXCEPTION III

Paragraph (3) of preliminary statement – Rejected. The conclusion is correct.

Findings of Fact

81. Rejected. The finding is based on competent substantial evidence.

82. Rejected. The finding is based on competent substantial evidence.

83. Rejected. The finding is based on competent substantial evidence.

84. Rejected. The finding is based on competent substantial evidence.

85. Rejected. The finding is based on competent substantial evidence.

86. Rejected. The finding is based on competent substantial evidence.

87. Rejected. The finding is based on competent substantial evidence.

Conclusions of Law

97. Rejected. The conclusion is correct.

102. Rejected. The conclusion is correct.

106. Rejected. The conclusion is correct.

107. Rejected. The conclusion is correct.

108. Rejected. The conclusion is correct.

109. Rejected. The conclusion is correct.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOVE NISSAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2247
	)	
NISSAN NORTH AMERICA, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was conducted in this case on March 7-11 and 16-18, 2005, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether Respondent Nissan North America, Inc.'s April 1, 2004, Notice of Termination of the Dealer Sales and Service Agreement between itself and Petitioner Love Nissan, Inc., was undertaken in good faith; undertaken for good cause; clearly permitted by the franchise agreement; and was based on a material and substantial breach of the dealer agreement; and whether the grounds relied upon for termination have been applied in a uniform and consistent manner.

PRELIMINARY STATEMENT

On April 1, 2004, Nissan North America, Inc., (Nissan) issued a Notice of Termination (NOT) of its Dealer Sales and Service Agreement to Love Nissan, Inc., (Love Nissan or Love). Love timely filed a protest with the Florida Department of Highway Safety and Motor Vehicles. The matter was referred to the Division of Administrative Hearings on or about June 25, 2004.

By agreement of the parties, this cause was originally scheduled for a final hearing on the merits on February 7-18, 2005. Ultimately, the case was rescheduled, again at the parties' request, for the dates set forth above.

According to law, and by stipulation of the parties, Nissan bore the duty to go forward and the burden of proof by a preponderance of the evidence of all statutory elements. All concerned acknowledge that, regardless of the style of these proceedings, the Florida Department of Highway Safety and Motor Vehicles is the agency which will enter the final order herein.

Nissan presented the testimony of Jonathan Finkel, Andrew Delbrueck, Patrick Doody, Herbert Walter, and James Anderson. Nissan's Exhibits 9, 11, 14, 16-38, 40-46, 72, 91, 95-98, and 100-112, were admitted in evidence.

Love presented the testimony of Joseph Roesner, Robert (Bob) Halleen, Chad Halleen, and Robert Dilmore. Love's Exhibits 10, 14, 17, 23, 39, 45, 52, 54-57, 59-60, and 60A were admitted in evidence. Love's Exhibits 10A and 61 were not admitted in evidence, but were proffered, along with related testimony.

Some exhibits constitute depositions of additional witnesses.

Springs, Citrus County, Florida. The Honda dealership is called, "Love Honda." (<u>See</u> Finding of Fact 11.) Honda is a competitor of Nissan.

4. Nissan and Love are parties to a Dealer Sales and Service Agreement, which is a "franchise agreement" as defined by Section 320.60(1), Florida Statutes, and which is referred to herein as "the dealer agreement."

5. This is an automobile dealer termination case, arising from Nissan's April 1, 2004, Notice of Intent to Terminate the Dealer Sales and Service Agreement.

6. Love's dealer agreement with Nissan, executed March 4, 1999, is the acknowledged contract between the parties. Nissan drafted it.

7. Charles Halleen purchased Love Nissan on July 23, 1990. At all times material, Charles Halleen had a long and successful history in the automotive sales and service industry. From the time Charles Halleen purchased the dealership, his son, Robert Halleen, worked at the dealership. Robert also has been involved in the automotive sales and service industry most of his life. When Charles Halleen acquired Love, Robert took control over most dealership operations, other than sales. Robert Halleen's duties increased as he began to oversee used car sales. Chad Halleen, Charles Halleen's grandson and

Robert Halleen's son, also worked part-time or full-time at the dealership from 1990 through the date of hearing.

8. However, until 1994, a non-family member served as Love's executive manager and was responsible for new vehicle sales, advertising, and ordering from Nissan of the vehicles to be sold by Love.

9. From 1994 to 1999, Charles Halleen owned the Love dealership and served as its dealer principal. During the same period, Robert Halleen served as Love's general manager. Since 1994, Love has been a poor performer saleswise.

10. Effective March 4, 1999, Nissan approved Charles Halleen's transfer of ownership of Love Nissan to Robert Halleen, and to Robert's son, Chad Halleen. Robert Halleen became 90 percent owner of the dealership, and Chad Halleen received the remaining 10 percent ownership. At the same time, Robert Halleen and Chad Halleen entered into the dealer agreement with Nissan that is at issue in these proceedings. Pursuant to that dealer agreement, Robert Halleen became Love's dealer principal and Chad Halleen became Love's executive manager.

11. Robert and Chad Halleen also own Love Honda, which is located adjacent to Love Nissan. The Nissan and Honda dealerships have separate showrooms, display areas, and parking

areas, but they share a service facility which is located behind the Love Nissan showroom.

12. Section 320.645, Florida Statutes, prohibits a manufacturer from owning a motor vehicle dealership that sells the cars it manufactures directly to the public. Nissan cannot sell cars at retail in Florida and therefore must rely on its dealers to sell cars to the ultimate consumers. Accordingly, Nissan's agreements with its dealers contain provisions to help ensure that dealers achieve and maintain sufficient and satisfactory levels of sales performance.

13. Within the dealer agreement, Love is referred to as "dealer," and Nissan is referred to as "seller."

14. The following provisions of the dealer agreement impact this case:

> Section 3: Vehicle Sales Responsibilities of Dealer.
>
> 3.A. General Obligations of Dealer. Dealer shall actively and effectively promote through its own advertising and sales promotion activities the sale at retail (and if Dealer elects, the leasing and rental) of Nissan Vehicles to customers located within Dealer's Primary Market Area. Dealer's Primary Market Area is a geographic area which Seller uses as a tool to evaluate Dealer's performance of its sales obligations hereunder. Dealer agrees: that it has no right or property interest in any such geographic area which Seller may designate; that, subject to Section 4 of this Agreement, Seller may add, relocate or replace dealers in Dealer's Primary Market

Area; and that Seller may, in its reasonable discretion, change Dealer's Primary Market Area from time to time.

3.B. Sales of Nissan Cars and Nissan Trucks. Dealer's performance of its sales responsibility for Nissan Cars and Nissan Trucks will be evaluated by Seller on the basis of such reasonable criteria as Seller may develop from time to time, including for example:

3.B.1. Achievement of reasonable sales objectives which may be established from time to time by Seller for Dealer as standards for performance.

3.B.2. Dealer's sales of Nissan Cars and Nissan Trucks in Dealer's Primary Market Area and/or the metropolitan area in which Dealer is located, as applicable, or Dealer's sales as a percentage of:

3.B.2.(i) registrations of Nissan Cars and Trucks;

3.B.2.(ii) registrations of Competitive Vehicles;

3.B.2.(iii) registrations of Industry Cars;

3.B.2.(iv) registrations of vehicles in the Competitive Truck Segment;

3.B.3. A comparison of Dealer's sales and/or registrations to sales and/or registrations of all other Authorized Nissan Dealers combined in Seller's Sales Region and District in which Dealer is located and, where Section 3.C applies, for all other Authorized Nissan Dealers combined in the metropolitan area in which Dealer is located; and

3.B.4. A comparison of sales and/or registrations achieved by Dealer to the sales or registrations of Dealer's competitors.

The sales and registration data referred to in Section 3 shall be those utilized in Seller's records or in reports furnished to Seller by independent sources selected by it and generally available for such purpose in the automotive industry. If such reports of registration and/or sales are not generally available, Seller may rely on such other registration and/or sales data as can be reasonably obtained by Seller.

3.C. Metropolitan Markets.
If Dealer is located in a metropolitan or other marketing area where there are located one or more Authorized Nissan Dealers other than Dealer, the combined sales performance of all Nissan Dealers in such metropolitan or other marketing area may be evaluated as indicated in Sections 3.B.2 and 3.B.3 above, and Dealer's sales performance may also be evaluated on the basis of the proportion of sales and potential sales of Nissan Vehicles in the metropolitan or other marketing area in which Dealer is located for which Dealer fairly may be held responsible.

3.D. Additional Factors for Consideration.
Where appropriate in evaluating Dealer's sales performance, Seller will take into account such reasonable criteria as Seller may determine from time to time, including, for example, the following: the Dealership Location; the general shopping habits of the public in such market area; the availability of Nissan Vehicles to Dealer and to other Authorized Nissan Dealers; any special local marketing conditions that would affect Dealer's sales performance differently from the sales performance of other Authorized Nissan Dealers; the recent and long term trends in Dealer's sales performance; the manner in which Dealer has conducted its sales operations (including advertising, sales promotion, and treatment of customers); and the other factors, if any, directly affecting Dealer's sales opportunities and performance.

* * *

3.G. Assistance Provided by Seller.
3.G.1. Sales Training Courses.
Seller will offer from time to time sales training courses for Dealer sales personnel. Based on its need thereof, Dealer shall, without expense to Seller, have members of Dealer's sales organization attend such training courses and Dealer shall cooperate in such courses as may from time to time be offered by Seller.
3.G.2. Sales Personnel.
To further assist Dealer, Seller will provide to Dealer advice and counsel on matters relating to new vehicle sales, sales personnel training and management, merchandising, and facilities used for Dealer's vehicle sales operations.

3.H. Evaluation of Dealer's Sales Performance.
Seller will periodically evaluate Dealer's performance of its responsibilities under this Section 3. Evaluations prepared pursuant to this Section 3. Evaluations prepared pursuant to this Section 3.H. will be discussed with and provided to Dealer, and Dealer shall have an opportunity to comment, in writing, on such evaluations. Dealer shall promptly take such action as may be required to correct any deficiencies in Dealer's performance of its responsibilities under this Section 3.

* * *

Section 12. Termination.

* * *

12.B. Termination by Seller for Non-Performance by Dealer.

12.B.1. If, based upon the evaluations thereof made by Seller, Dealer shall fail to substantially fulfill its responsibilities with respect to:

12.B.1.a. Sales of new Nissan Vehicles and the other responsibilities of Dealer set forth in Section 3 of this Agreement;

12.B.1.b. Maintenance of the Dealership Facilities and the Dealership Location set forth in Section 2 of this Agreement;

12.B.1.c. Service of Nissan Vehicles and sale and service of Genuine Nissan Parts and Accessories and the other responsibilities of Dealer set forth in Section 5 of this Agreement;

12.B.1.d. The other responsibilities assumed by Dealer in this Agreement including, without limitation, Dealer's failure to:

12.B.1.d.(i) Timely submit accurate sales, service and financial information concerning its Dealership Operations, ownership or management and related supporting data, as required under this Agreement or as may be reasonably requested by Seller;

12.B.1.d.(ii) Permit Seller to make an examination or audit of Dealer's accounts and records concerning its Dealership Operations after receipt of notice from Seller requesting such permission or information;

12.B.1.d.(iii) Pay Seller for any Nissan Products or any other products or services purchased by Dealer from Seller, in accordance with the terms and conditions of sale; or

12.B.1.d.(iv) Maintain net worth and working capital substantially in accordance with Seller's Guides therefore; or

12.B.2. In the event that any of the following occur:

12.B.2.(i) any dispute, disagreement or controversy between or among Dealer and any third party or between or among the owners or management personnel of Dealer relating to the management or ownership of Dealer develops or exists which, in the reasonable opinion of Seller, tends to adversely affect the conduct of the Dealership Operations or the interests of Dealer or Seller, or

12.B.2.(ii) any other act or activity of Dealer, or any of its owners or management occurs, which substantially impairs the reputation or financial standing of Dealer or of any of its management subsequent to the execution of this Agreement:

Seller will notify Dealer of such failure and will review with Dealer the nature and extent of such failure and the reasons which, in Seller's or Dealer's opinion, account for such failure.

Thereafter, Seller will provide Dealer with a reasonable opportunity to correct the failure. If Dealer fails to make substantial progress towards remedying such failure before the expiration of such period, Seller may terminate this Agreement by giving Dealer notice of termination, such termination to be effective at least ninety (90) days after such notice is given.

During such period Dealer will commence such actions as may be necessary so that the termination obligations of Seller and Dealer set forth in this Agreement may be fulfilled as promptly as practicable.

15. Therefore, it may be said that Love and Nissan have agreed and contracted that Love will "actively and effectively promote the sale at retail" of new Nissan vehicles; that Love will be evaluated by Nissan on Love's sales performance within its designated Primary Market Area (PMA); and that Nissan may evaluate Love's "performance of . . . sales responsibility . . . on the basis of such reasonable criteria as [Nissan] may develop from time to time."

16. At all times material, Love's PMA has included all of Citrus County and parts of Levy and Hernando Counties, although during the critical period of time, Nissan twice adjusted Love's PMA boundaries as described below.

17. At all times material, Robert and Chad Halleen knew that Nissan makes periodic evaluations of Love's sales performance, and that pursuant to the dealer agreement, Nissan could terminate Love for failure to "substantially fulfill its responsibilities with respect to sales of new Nissan vehicles."

18. Nissan, in fact, used the criteria set forth in Section 3.B.2.(ii), of the dealer agreement to evaluate Love, that is: Love's percentage of competitive vehicle registrations, compared to the "sales and/or registrations of all other Authorized Nissan Dealers combined in [Love's] sales region." It is undisputed that the dealer agreement outlines the "sales penetration" calculation Nissan is permitted to use, and did use, to evaluate Love and all other Nissan dealers' sales performance.

19. This is a statistically dense case, and accordingly, the weight and credibility of testimony in the respective experts' various fields has been analyzed and considered in arriving at the following factual analysis of those statistics, but it is unrefuted that Love's sales performance on Nissan

automobiles has always been below Nissan's southeast region average by every standard used to evaluate Love's performance.

20. Nissan has consistently used sales penetration to evaluate the sales performance of all Nissan dealers, not just Love. Sales penetration is calculated by dividing a dealer's total new vehicle sales by the number of competitive new vehicles registered in a dealer's PMA. The resultant quotient is expressed as a percentage, to show the dealer's sales penetration. Each dealer's sales penetration is then compared as a ratio to Nissan's sales penetration throughout the region, to determine whether the dealer being analyzed is penetrating its PMA below, at, or above the average for all Nissan dealers in the region. Historically, by case law, and by expert testimony in the instant proceeding, it is found that Nissan's method for evaluating its dealers' sales performances is a reasonable, industry-accepted practice for evaluating new car dealers.[2/]

21. Furthermore, this methodology has "built-in" benefits for the dealers being analyzed. Because all sales are included in the denominator of the calculation, and not just those sales from the geographical market areas assigned to the respective dealers, the total region penetration figure is lowered, thus helping more dealers demonstrate at least average penetration.

22. Nissan advises dealers who are in trouble saleswise, or who are likely to get in trouble saleswise, before it is too late to salvage the dealership. Among other means of doing this is Nissan's practice of sending dealers who rank in the bottom 10 of the sales penetration rankings a quarterly letter expressing Nissan's concern with the dealership's sales performance. From 1997 to 2004, Love Nissan received many such letters. The first such letter arrived in 1997, before Robert and Chad Halleen took over the running of Love Nissan. Robert Halleen claims that in 1997, upon receipt of Love's first "bottom 10" letter, Nissan's District Operations Manager (DOM) told him that bottom 10 letters were a mere formality and that he should not worry about receiving them. While this unrefuted testimony is credible, it does not excuse Love's later failure to respond to requests and advice from Nissan; failure to respond to bottom 10 letters; or failure to respond to notices of default (NODs), by bringing Love's sales penetration into line with the region average for the next six-plus years.[3/]

23. From 1997 to April 1, 2004, in addition to bottom 10 letters, Nissan repeatedly notified Love of its evaluations on the basis of Love's sales penetration as compared to the region average and Love's ranking among Nissan dealers; notified Love that it was not meeting Nissan's expected level of sales; and

offered advice and counsel, through its DOM, on increasing sales, as more specifically described below.

24. On November 29, 1999, nine months into Robert and Chad Halleen's ownership and administration of Love, Love received Nissan's certified bottom 10 letter, stating that Love needed to improve its sales penetration to meet the region average. As of that date, Love's penetration was 33 percent of the region average.

25. On November 21, 2000, Nissan sent Love an NOD, advising that Love was in default on several provisions of the dealer agreement. The letter notes that it is the third such notice.

26. Love had unilaterally, and without Nissan's prior approval as required by the dealer agreement, added the Daewoo car line to Love's dealership. Daewoo is another import competitor of Nissan. Although Love's showroom for Daewoo was located elsewhere, some Daewoo automotive service was conducted at the Love Nissan service facility, which already was shared with Love Honda. Nissan cited this situation as one of the four elements of a default by Love, along with Love's failure to maintain its facilities, insufficient capitalization, and poor sales performance/penetration.

27. The NOD also advised Love that its sales penetration had been decreasing: 35.5 percent of region average in 1998,

which was 390 units short of the region average units sold that year; 32.0 percent of the region average in 1999; and 28.1 percent of region average in 2000, year to date (YTD). Nissan gave Love 90 days to avoid termination by reaching the region's average sales penetration.

28. By year's end, Love was only at 29.5 percent penetration, but Love Nissan's attorney sent an explanation of the Daewoo situation to Nissan on January 9, 2001. His letter stated, in pertinent part:

> . . . as you note in your letter, Mr. Halleen has purchased land adjacent to the dealership facilities and has already moved the Daewoo sales to that land. Also, the rest of the Daewoo related complaints are not an issue as Mr. Halleen has remedied that problem so that Daewoo service or parts is not infringing on any portion of Nissan's use of any of the facilities.
>
> . . . the numbers that have been provided to you are not accurate or have not been appropriately applied to the situation regarding Love Nissan's Guides for Dealership Facilities. At this time, we believe that Love Nissan is now, and has been in substantial compliance with these Guides. [There follows a discussion of alleged square footage of the facility as Love compared it to the Nissan guidelines.]
>
> . . . Mr. Halleen . . . disagrees with the current "planning potential" that has been assessed to Love. . . .

29. On February 1, 2001, Nissan sent Love a follow-up NOD, again advising Love that its current sales penetration was the

lowest of the 58 Florida dealers, and again advising that Love must remedy its default of the dealer agreement.

30. On June 29, 2001, Nissan sent Love another certified letter. Nissan again informed Love that it was in breach of the dealer agreement based upon its sales penetration through April 2001, which was only 47.2 percent of region average. Nissan requested a response from Love by July 16, 2001, with a plan to cure its default, but Love did not respond.

31. The effect of this correspondence was additional time beyond the 90 days in which Love could show performance improvement.

32. By a July 16, 2001, NOD, Nissan reiterated the same unauthorized addition of Daewoo to the already shared service department, failure to meet facility guidelines, and unsatisfactory sales performance, and set a 30 days' time limit for Love to come up with a written plan for improvement and a 90 days' deadline for Love to meet the region sales average.

33. The July 16, 2001, NOD also advised Love that, at Love's request, Nissan had reduced the size of Love's PMA and had recalculated sales penetration pursuant to the new PMA, but that Love's sales penetration, as recalculated, was still at only 54 percent of the average region sales penetration.

34. The NODs were jointly signed by W. J. Kirrane, Nissan's Vice-President and General Manager, and Brad Bradshaw, Nissan's then-Southeast Region Vice-President.

35. Love's response to the July 16, 2001, NOD came from Robert Halleen, dated August 10, 2001. It was addressed to Mr. Kirrane, in California, and was copied to Mr. Bradshaw. It read, in pertinent part:

> Your letter sent to me July 16, 2001, Notice of Default . . . shows a total lack of communication within Nissan as well as a total lack of commitment to your dealers. Our DOM's [sic.] have continually worked to adjust our PMA to try to eliminate some of the obstacles in penetrating this market.
>
> Even by your own numbers, our penetration is increasing. . . . I would appreciate any help you can give me. . . . We currently have thirty two Nissans in stock (we normally stock 70-80) and had 3 units taken from our last allocation. If Nissan wants me to sell more cars they need to provide them.
>
> Regarding your concerns over Daewoo, there is no evidence of Daewoo parts and service in our Nissan facility now or in the past. Daewoo currently resides in a building one mile south of our Nissan facility.
>
> Concerning your facilities question, I do not believe anyone who has ever been to our dealership could call it inadequate. We have more than enough land to adequately display and sell Nissans (approximately 4 acres). Our service department is not running at full capacity, so I must assume that it also is more than adequate for the job.

* * *

> Mr. Kirrane, if you are truly interested in Love Nissan improving its penetration, then sit down with me at the upcoming dealer meeting and explain how I can do this.

36. The foregoing letter indicates several troubling things about the Halleens' approach to solving Love's sales penetration problems: a misunderstanding of how a PMA is established; a failure to recognize that Nissan had recently readjusted Love's PMA; and a peculiar belief that the PMA itself somehow inhibited sales, as opposed to being just an evaluation tool. Further, it at least suggests that Robert Halleen misunderstood Nissan's allocation and ordering system as explained by several witnesses. It did not propose any plan for improving sales penetration. The letter also did not re-address, with any specificity, the Nissan facility guidelines by square-footage of each part of the facility, but it did give an owner's reassurance that Daewoo service was no longer being performed in Love's Nissan-Honda facility.[4/]

37. Mr. Kirrane, from California, did not meet with Robert Halleen as suggested, or personally respond to the foregoing letter. Nissan's position is that Love was adequately served by its local DOMs and by Nissan's Region Vice-President.

38. On September 5, 2001, a certified letter from Region Vice-President Bradshaw responded to Robert Halleen's August 10,

2001, letter. Mr. Bradshaw's response memorialized a phone conversation between himself and Robert Halleen, which Mr. Bradshaw believed had resolved the PMA issue; offered Love help with allocation of product (inventory); acknowledged Love's relocation of Daewoo service; and cited several visitations by the DOM to assist Love. The Region Vice-President's letter further addressed Love's poor sales penetration and requested that Love propose a plan for achieving the region average. Love did not send Nissan any written plan.

39. On November 26, 2001, Nissan sent another certified letter to Love, advising that, even with Love's new PMA, Love's sales penetration had fallen to 51.1 percent of the region average, and requesting a plan of improvement. No plan was received.

40. Nissan sent a certified letter to Love on March 4, 2002, advising that Love's sales penetration was only 50 percent of region average and requesting a plan for improvement by March 31, 2002. Love did not respond with a plan of correction for improvement of its sales.

41. In October 2002, Nissan's DOM visited Love to discuss sales performance and the need to improve.

42. On March 24, 2003, Nissan sent Love another certified letter, advising that Love's sales penetration percentage had declined in 2002 to 50.6 percent from an already low 50.9

percent the previous year, and that Love was in breach of the dealer agreement.

43. Chad Halleen responded to Nissan's then-Region Vice-President, Patrick Doody, generally stating Love's intent to increase sales via increased advertising and expressing concerns about how Nissan calculates sales penetration <u>versus</u> how Honda calculates sales penetration. He also expressed a concern about getting new Nissan cars/trucks and the desired type of Nissan cars/trucks in time to sell Nissan units in July 2003, based on how few units he currently had on his lot and how few he had on order. This letter also evidenced Chad Halleen's misunderstanding of Nissan's allocation and ordering system, and it proposed no plan of correction.

44. Jon Finkel, Nissan's then-DOM, met with the Halleens on April 11, 2003, at the dealership. Love's then 51.2 YTD percent of region average sales penetration was discussed.

45. On May 23, 2003, Nissan sent Love another certified letter, advising that Love's sales penetration had fallen to 45.9 percent of region average through March 2003, which constituted a decrease from both the previous month and the previous year.

46. On June 24, 2003, DOM Finkel again visited Chad Halleen to assist with new signage, inventory, and "leads" for sales.

47. On June 27, 2003, Nissan issued another NOD to Love, again based on Love's current sales penetration of 46.7 percent and long-term sales penetration deficits. It gave notice of a breach of the dealer agreement and held out to Love the option of curing its breach by increasing sales penetration to reach the region average. At this stage, Love's performance had resulted in 200-plus lost Nissan sales <u>per</u> year, <u>each</u> year since 1999.

48. Mr. Finkel also called on Love in July of 2003 and advised that Love had improved to 48.2 percent of the region average in sales penetration. He also called on August 8, 2003, and advised that Love had climbed to 50.7 percent of average, but reminded Love that under the terms of the current NOD, Love had to attain region average sales penetration by September 2003 or Nissan would terminate the dealer agreement.

49. On August 15, 2003, Nissan sent another bottom ten letter, again advising Love of its deficient sales penetration and requesting that Love submit a plan for improvement to region average by September 15, 2003. Love's response was received by Nissan on September 18, 2003, but it contained no specific plan for the future and mostly related Love's previous July and August 2003 changes in hiring trained personnel in both sales and service areas; discussed compensation incentives already instituted for sales personnel; and stated that Love recently

had sometimes lost money on new car deals by pricing them low, just to move Nissan units. These prior changes so far had produced minimal effect and so far had not significantly improved Love's sales penetration figures. Cutting Love's profit margin clearly was not a long-term solution to improve the dealer's sales penetration.

50. On September 24, 2003, Mr. Finkel again met with Love to discuss Love's sales penetration, which was then at 53.1 percent of the region average, through July 2003. He again reminded Love that it needed to meet the region average sales penetration by the end of the month or Nissan would terminate the dealer agreement.

51. However, Love's raw score of new car sales and penetration percentage had modestly increased after the June NOD, and Nissan accordingly extended the NOD as of November 5, 2003.

52. Mr. Finkel met with Love on December 8, 2003, to discuss the October 2003 sales penetration report, which for Love still hovered at only 56.6 percent of region average sales penetration.

53. Mr. Finkel's report memorializes that at that time, Chad Halleen indicated he planned to renovate parts of the facility; Mr. Finkel urged Chad Halleen to "de-dual" with Honda in order to take advantage of the generally improving Nissan

market; Mr. Halleen said he did not think he could do that financially, due to Nissan's space requirements; and Mr. Finkel said he would get back to Mr. Halleen about the space requirements. Love did not volunteer capital to build a new facility or to de-dual or offer a comprehensive sales penetration plan.

54. Mr. Finkel also set a sales objective for Love of 400 new Nissan vehicles for 2004. This goal was not a Nissan requirement or an approved Nissan evaluation tool, and the figure has never been used to evaluate Love for active and effective sales performance/penetration. It was Mr. Finkel's own incentive idea. Love contends that an aspirational raw score like this should have been Nissan's requirement all along, yet at no time did Love ever sell 400 new Nissan vehicles in a year.

55. On February 10, 2004, Mr. Finkel again met with Love to discuss that the 2003 year-end data showed that Love had fallen back to a 55.8 percent of region average sales penetration.

56. On April 1, 2004, Nissan issued the NOT which gave rise to the instant case. The NOT was based on Love's historical and continued poor sales performance, as evidenced by statistics and evaluation through December 31, 2003.

57. At the time that the NOT was sent to Love, Nissan did not base the NOT on Love's sales penetration for the first quarter of 2004, which ended March 31, 2004. Due to a nationwide audit, Love's PMA had been inconsequentially changed on March 1, 2004.[5] However, the figures representing actual sales penetration up to the date of termination, April 1, 2004, including calculations based on the latest PMA, have since been reviewed by Nissan, and these statistics support a finding that through March 2004, Love's sales penetration ranked 147th of the 154 Nissan dealers in the region; 56th of the 57 Nissan dealers then in Florida; and 17th of the 17 Nissan dealers in its district.

58. After five years of a variety of counseling sessions, warnings, NODs, and extensions, and after Nissan's realignment of Love's PMA in 2001, at Love's request, Love still had failed to ever meet the regional sales average and, despite repeated solicitation by Nissan of a comprehensive written plan for improvement of Love's sales penetration, Love had failed to submit such a plan.

59. Nonetheless, the Halleens, father and son, testified that since they took over Love in 1999, they have had a private plan that is best described as "slow, stable growth." This seems to mean, among other things, that they chose not to accept all of Nissan's suggestions simultaneously, but wanted to build

and improve Love's sales force first, before increasing its advertising, before ordering/stocking certain new models of Nissan vehicles. The problem with this "plan," apparently first advanced at hearing, is that it has never resulted in Love meeting the region sales penetration average.

60. In attempting to fulfill its obligations under Subpart 3.G.2., of the dealer agreement, Nissan, through its DOMs, Region Vice-Presidents, and other corporate management, at various times during the last five years, has advised Love as set out previously (see Findings of Fact 38, 46, and 53) and has also advised Love to stay open on Sundays; increase advertising; and hire and train competent personnel in both sales and service fields, including getting all Love's service personnel trained and certified by Nissan so that Love could offer customers "certified Nissan used cars and service," thereby engendering customer satisfaction and brand loyalty. Nissan also has suggested that Love maintain a steady workforce, conduct off-site sales, and stock and move new models. Few of these suggestions have been implemented by Love.

61. Love had previously tried staying open on Sundays, but found it not to be cost-effective and decided to stay closed on Sundays, even though staying open would have meant Love would have been the only dealer of any brand open on Sundays in Homosassa and therefore more competitive. The Halleens

represented at hearing that they intend to eventually stay open one or more Sundays per month, but they did not clearly indicate this to Nissan prior to the NOT or explain why they would not open on Sundays at that time.

62. Only since late 2003, have the current owners significantly increased their advertising budget and spread out their advertising through several newspapers, billboards, coupon books, two radio stations, mail-delivered print ads, cable television spots, various telephone books, and direct mail. This effort was late, and the amounts spent up to the date of the NOT were well below Nissan's advertising recommendations.

63. Love's sales manager testified that sales staff has been adequate for several years at Love. However, traditionally, Love has maintained that there are not a lot of trained dealership personnel in its local community or its PMA and that there are few persons who are willing to move to Homosassa to work. Love asserts that it is difficult to lure trained sales personnel to Love's rural location, and that larger markets, where income and prestige are more attractive, lure away personnel that Love has trained. Yet the fact remains that other dealers with similar problems are outselling Love. Also, traditionally, Love would not follow Nissan's advice to send its salespeople to training sessions conducted at other Nissan dealerships for fear that its employees would be lured

away by that dealership, and Love has frequently not had Nissan certified mechanics in its service department. Since 2003, Chad Halleen works on the premises from opening until after closing. He has created an aggressive recruitment program and sales incentive program. He has instituted daily sales meetings with staff, weekly motivational meetings, and promotional cookouts, but these late efforts did not result in effective sales penetration figures prior to the NOT.

64. Traditionally, Love has resisted holding off-site sales, as recommended by Nissan, but Love pointed out only one location where there might, possibly, be a legal impediment to off-site sales, and offered no other reason for not holding off-site sales.

65. Love's recent reduced pricing to increase unit sales has increased its unit sales while adversely affecting its gross profit margin, but even these extraordinary efforts did not result in reaching region average sales penetration figures before termination. Moreover, this sacrifice has the potential of adversely affecting Love's capitalization and long term success.

66. The parties have each formed the opinion that Love's problems with Nissan new car/truck inventory impacted its sales penetration. Love maintains that it could not get the amount and variety of Nissan inventory it needed. Nissan suggests that

the Halleens did not understand how to use the Nissan allocation of product and ordering system to their advantage.

67. Nissan established that, over time, Love sometimes failed to confirm its allocations, so that Nissan had to contact Love directly; that over time, Love sometimes declined vehicles offered under Nissan's current production order system; and that over time, Love frequently declined to take "pass 2" vehicle offerings, believing them to be somehow inferior or having been repeatedly rejected by other Nissan dealers, neither of which perceptions is accurate. Nissan further established that on occasion, its DOM intervened to provide units when Nissan complained about availability.

68. The totality of the evidence also shows that there was an on-going discussion between Love and Nissan's successive DOMs to the effect that Nissan repeatedly recommended that Love should stock more cars, in more or different models, in more colors, with more optional packages, in order to make more sales, and that, for a long period of time, the Halleens' concept of slow and steady growth caused them to resist the varietal approach suggested by Nissan. This was because the Halleens believed they knew their potential clientele, up close (see Findings of Fact 59 and 71), better than did Nissan, at a distance, and the Halleens perceived that they might be "stuck" with new Nissan models they believed they could not turn over in

a reasonable amount of time. However, Love's inventory regularly stayed at 60-90 days supply,[6/] which was the level the Halleens wanted, and Love's inventory sometimes exceeded 90 days' supply, the level advocated by Nissan's representative. Therefore, it is clear that Love got its ordered inventory; had the inventory mix it selected; and that same inventory did not penetrate Love's PMA adequately and never reached the region average sales penetration.

69. Love was responsible for selecting and ordering its own inventory for its potential clientele both by quantity and variety. No fault in this regard has been credibly attached to Nissan.

70. Pursuant to 3.D. of the dealer agreement, there are additional factors beyond just sales penetration/performance that Nissan is obligated to consider in the termination of a dealer.

71. Herein, one of the factors identified by Love as unique is that 32 percent of the residents of Love's PMA as constituted at any time were retirees, the majority of whom are over 65 years of age and who wanted to pay cash, without taking advantage of the several new car financing plans and packages which are the financial lifeblood of most dealerships and which would benefit Love's gross profit margin, capitalization, and cash flow, while Nissan's targeted customer demographic is 29 to

54 years of age. However, the financing issue is a capitalization problem, which periodically has been a concern voiced by Nissan. Likewise, the segmentation analysis, which is part of Nissan's regional evaluations and rankings, divides competitive registrations into separate types or "segments" of vehicles sold in a market. The dealer is evaluated only on its expected penetration for each segment. If one segment does not perform well in a certain PMA, the dealer is held to a lower sales expectation for that type of vehicle. Even adjusting for segments, Love's sales penetration figures do not pass muster.

72. Another unique factor alleged by Love is that there is no significant retail activity in Homosassa or Crystal River to draw consumers to Love from other parts of its PMA. That said, Nissan credibly represented that its sales penetration methodology took into account the local marketing conditions, area, shopping habits of the public, traffic patterns, natural and man-made boundaries, and other relevant issues concerning the Homosassa market when it performed a market study in Love's area and when it twice re-evaluated and altered Love's PMA.[7/]

73. Love identified commuting patterns in its PMA to be going away from Love's location to other PMAs and claims this factor exposes commuters to more advertising by other dealers than to Love's advertising, as well as exposing them to the presence of those other dealers in and outside Love's PMA, but

this would seem to be a problem with Love's advertising, if anything. Finally, even Love ultimately conceded that this is not a phenomenon unique to Love Nissan but is faced by all dealers near Love experiencing sales into the PMA by competing same line dealers.

74. Demographic factors are a built-in component of the assigned PMA. Region average sales penetration is achievable, regardless of metropolitan or more rural location. Sales penetration by non-metropolitan dealers (as defined by Nissan) in Florida for March 2004 YTD was 98.3 percent versus 98.6 percent for metropolitan dealers (as defined by Nissan). While Florida dealerships are not the comparison required by the dealership agreement, this statistic is meaningful in the present case, because of Love's approach to the issue. More to the point, however, is the fact that each analysis of the region and the PMA found Love lacking in sales and provided a fair comparison with all other dealers.

75. Love complained that its sales penetration success was impeded because there are more domestic car dealerships in its PMA than import dealerships in its PMA, but how this renders Love's situation different from other Nissan dealers in the same region was not clearly enunciated and no nexis between this factor and Love's lack of sales success was clearly established.[8/]

76. Love claims, as another unique factor, that dealers in larger communities tend to stock more inventory than dealers in smaller communities and that greater variety can be a reason for potential car buyers to travel further to a larger dealer. Once again, this factor would seem to have been a problem solvable by Love's stocking a larger inventory and a more varied inventory, but it does not render Love's situation unique. (See Findings of Fact 59 and 66-69.)

77. Also, Love asserts that consumers on the periphery of Love's PMA are physically closer to dealers in other PMAs, but this is clearly a factor common to almost every PMA in the nation.

78. Love submits that it should only be required to sell in, and be evaluated on, its sales based on Citrus County, its home county, because Citrus County is the only area Love can "reasonably be expected to serve," but Love offered no credible reason why it should be singled out to be assigned such a limited territory. Robert and Chad Halleen knew the size and extent of Love's PMA when they assumed control of Love in 1999, and the dealership agreement is clear as to how Love's sales were to be evaluated by Nissan. Nissan re-evaluated and adjusted Love's PMA once at Love's request and once pursuant to a national audit of PMAs. A reduction of the PMA to one county was not demonstrated to be a reasonable measuring technique.[9/]

Even Love's expert, Mr. Roesner, admitted that Love's PMA was properly drawn and that none of the areas included in Love's PMA should be assigned to other dealers.

79. All the foregoing allegedly "unique factors" raised by Love amount to Love's dissatisfaction with its inventory, PMA, or capitalization. As previously stated, Love largely controlled and intentionally limited its own inventory. Capitalization was also under Love's control. Love's PMA is a creation of Nissan, but one which reasonably measures demographics and sales. The PMA adjustments have been previously discussed.

80. Finally, Love contends that Nissan has not treated Love in "a uniform and consistent" manner with other specifically named dealerships that have also, in some years, not met their region sales average. These are: Nissan of Melbourne, which did not meet its region sales average for four years and which had worse results than Love in 2001 and 2003; Alan Jay Nissan, which did not meet its region sales average for four years and had worse results than Love for 2001, 2002, and 2003; Hampton Nissan and Hill Nissan, each of which did not meet the region average for four years and each of which was worse than Love in 2002 and 2003; Nissan of Lakeland/Jenkins Nissan, which did not meet the region sales average for four years; and Lake Nissan, which was worse than Love in 2002.

81. Nissan readily admitted that any individual circumstances considered for one dealer should be considered for all dealers, but in fact, each of the foregoing dealerships presented a unique situation very different than Love's situation. Obviously, the degree of Nissan corporate knowledge about each dealer on the date of Love's April 1, 2004, NOT is pivotal.[10/]

82. Nissan of Melbourne experienced two ownership changes between 2001 and April 1, 2004. Its sales penetration improved with the new dealer in 2001, but it was sold again. After the second sale, Nissan also gave the second new dealer a chance to improve sales penetration. After the second sale, Melbourne's sales penetration was still higher than Love's for each of the first three months of 2004, but Nissan would not have known the whole of that quarter's statistics for either dealer on April 1, 2004.

83. Alan Jay Nissan's dealer principal recognized that his dealership was in trouble and personally sought out Nissan's current Southeast Region Vice-President, Patrick Doody, to lobby a comprehensive Nissan sales improvement plan which included relocation and construction of a new, exclusive Nissan dealership separate from Alan Jay's existing Toyota dealership. The dealer presented a detailed marketing plan, personnel changes, changes in compensation, and a plan for increased

capitalization. The capitalization of the project was initially raised by the dealer, and he made a "dramatic investment" in Nissan inventory before Nissan committed to his plan. Alan Jay's plan was implemented in 2003. Love had been offered several chances to submit a comprehensive improvement plan to Nissan, but did not. Nissan management perceived Love's principals as not involved and uncooperative in sales improvement; they perceived Alan Jay's principal as implementing a practical plan for success and gave him an opportunity to succeed. Although the first quarter of 2004 figures were not available when Love was terminated, they ultimately showed that, by the time Nissan issued the NOT to Love, Alan Jay's sales penetration had gone from 48.09 percent in 2003, to 88.61 percent of the region sales penetration through March 2004.

84. Hampton Nissan was on the road to termination at one point. After study, Nissan adjusted Hampton's PMA, effective March 1, 2004, as part of a nationwide revision of PMAs. Love's PMA was adjusted at the same time, but was not substantially altered. (See Finding of Fact 57.) Prior to proceeding to termination, Nissan gave Hampton an opportunity to be evaluated upon its new PMA, much as it had given Love the same opportunity in 2001. Nissan had not compiled and analyzed the March 2004 results of its regional evaluations, including the new 2004 PMAs, when it terminated Love on April 1, 2004, but the sales

already made by both dealers ultimately showed that Hampton was performing far better than Love by April 1, 2004. When the compiled and analyzed first quarter 2004 sales penetration figures became available shortly after April 1, 2004, they demonstrated that Hampton's penetration had risen to 95.74 percent of the region in March. Neither in 2001, nor 2004, did changes to Love's PMA meaningfully improve Love's sales penetration performance.

85. Sales penetration by Hill Nissan had been adversely affected by the re-routing of a major thoroughfare away from that dealership. Hill responded to Nissan's complaints about Hill's declining sales penetration by requesting to relocate and construct an improved facility, but before Nissan committed to this, Hill demonstrated a dramatic improvement in sales.

86. Nissan of Lakeland was sold to a new dealer and renamed "Jenkins Nissan" in 2003. The new owner instituted a plan to relocate the dealership in order to improve its sales penetration up to the region average, but within a year and even before the move to the new location, there had been significant improvement. As of March 2004, Jenkins had reached sales penetration at 81.68 percent of the region average.

87. The access road in front of Lake Nissan was rerouted and closed for an extended period due to construction. Lake created a plan of correction which included constructing a new

facility to attract customers and agreed with Nissan that if Lake did not meet region average sales penetration by June 2005, Lake would sell the dealership, presumably to a retailer who could meet the desired average.

88. Love has not demonstrated that any road construction, sale of the dealership, or any other problem beyond its control affected Love's poor sales penetration.

89. Love also ascribes lack of good faith to Nissan's business decisions to not terminate these other struggling dealers who were confronted with conditions largely beyond their control and who offered Nissan detailed plans to overcome their disadvantages, but Love has not presented any persuasive evidence to that effect. Love only has presented evidence that after Hill, Lake, and Lakeland/Jenkins committed their finances to building new facilities to take advantage of Nissan's growth in the industry, Nissan gave some additional money toward those goals up to amounts consistent with the maximum amounts in Nissan's dealer assistance program for such projects. Nissan will provide assistance money up to $420,000.00 for major facility changes but requires that the dealer submit a plan and/or demonstrate improved performance first. An additional $80,000.00 can be "earned" by the dealer based on improved performance. However, there is no indication that Love has ever considered building a new facility, let alone offered to build a

new facility, or has asked for financing from Nissan for such a project. Basically, Love has never offered Nissan any tangible plan of correction or substantial improvement of its penetration percentage, as have the other named dealers.

90. Love demonstrated that Nissan has suggested to Love that it build a new facility and let its Honda dealership go so as to take advantage of the improving Nissan market, but Love was free to reject that suggestion along with all the other Nissan suggestions it rejected. The penetration figures are the result of Love's choices, not Nissan's coercion.

91. Love also has suggested that the NOT herein is related to Nissan's 2001 objection to Love's adding a Daewoo dealership and due to Love's continuing association with Honda. Neither suggestion was proven. Indeed, there was no mention of the Daewoo connection by either party after 2001, and mention of the Honda connection was reasonable in the context it came up. (See Findings of Fact 38 and 53.)

CONCLUSIONS OF LAW

92. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding, in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

93. This cause is governed by Chapter 320, Florida Statutes, including but not limited to Section 320.641(3),

Florida Statutes. This section was most recently amended on June 8, 2001, to include a provision requiring "uniform and consistent application of the grounds for termination." The dealer agreement between Love and Nissan was executed on March 4, 1999, and has not been amended since its execution. However, the amendments to Section 320.641(3) apply to this action from their effective date, June 8, 2001, until April 1, 2004, the date of the Notice of Termination herein.

94. Section 320.641(3), Florida Statutes, provides:

> Any motor vehicle dealer who receives a notice of intent to discontinue, cancel, not renew, modify, or replace may within 90-day notice period, file a petition or complaint for a determination of whether such action is an unfair or prohibited discontinuation, cancellation, nonrenewal, modification, or replacement. Agreements and certificates of appointment shall continue in effect until final determination of the issues raised in such petition or complaint by the motor vehicle dealer. A discontinuation, cancellation, or nonrenewal of a franchise agreement is unfair if it is not clearly permitted by the franchise agreement; is not undertaken in good faith; is not undertaken for good cause; or is based on an alleged breach of the franchise agreement which is not in fact a material and substantial breach; or, if the grounds relied upon for termination, cancellation, or nonrenewal have not been applied in a uniform and consistent manner by the licensee. A modification or replacement is unfair if it is not clearly permitted by the franchise agreement; is not undertaken in good faith;

or is not undertaken for good cause. The applicant or licensee shall have the burden of proof that such action is fair and not prohibited.

95. The duty to go forward and the burden to prove, by a preponderance of the evidence, Nissan's compliance with Section 320.641(3), Florida Statutes, is upon Respondent Licensee, Nissan.

96. The thrust of Love's defense in this cause has been (1) that Love's only obligation, pursuant to the dealer agreement, was to "actively and effectively promote the sale at retail" of Nissan vehicles within its PMA, and (2) that Nissan inequitably terminated Love, while permitting other equally, or more egregiously, unsuccessful Nissan dealers to continue to operate. More specifically, Love asserts that, because Nissan could have imposed, but did not from the beginning impose, upon Love a specific, objective performance obligation, such as requiring the sale of a given number of new cars which Nissan expected Love to sell in a specified period of time, there is no clear criteria for measuring Love's "active and effective" promotion of Nissan sales. Love argues that the dealer agreement does not require that Love achieve a particular level of sales penetration or exceed the level of sales penetration of other Nissan dealers. Love suggests, instead, that Nissan is free to use as an evaluation tool Love's level of sales

penetration, as compared to the region average and the sales penetration of other dealers, but that Love's failure to meet the region average or to perform above the bottom of the dealer ranking is not, in and of itself, a valid basis for termination of the dealer agreement. While acknowledging that it is a low volume sales performer, Love suggests that Love's failure to meet the regional sales average is an improper measuring guide when the term or terms, "average" or "average sales," are not specifically used in the dealer agreement as a measurement of "active and effective promotion of sales." Rather, Love asserts that the threshold issue is whether, in light of problems "unique" to its PMA, Love's sales activities satisfy the "active and effective" obligation established in the dealer agreement. Love also maintains that, to the extent the obligations imposed by the dealer agreement upon Love are ambiguous, such ambiguity should be resolved in Love's favor, because Nissan was the drafter of the agreement. <u>See</u> <u>Homestead v. Johnson</u>, 760 So. 2d 80 (Fla. 2000).

97. In addressing Love's arguments generally, it can be said that Love may have <u>actively</u> promoted Nissan sales, but Love did not meet the conjunctive requirement of <u>effectively</u> promoting Nissan sales. The NOT specifically cites Love Nissan's historical performance and its sales penetration in the calendar years 2001, 2002, and 2003. Although sales performance

in 2004 is mentioned, this was not a basis for termination. Even if the first quarter of 2004 is considered, it affords Love no comfort. The evidence is clear that Love's performance has always been below the region average pursuant to an evaluation methodology which is generally accepted in the industry and which is a reasonable one. It is a methodology Nissan has consistently used to evaluate all its dealers, not just Love. Love's principals knew of, and agreed to, the evaluation method used, and the PMAs upon which it was sequentially based from the inception of the dealer agreement. The PMA was adjusted once, at Love's request. Pursuant to their contract, Nissan advised Love periodically of the jeopardy of the dealership arising from Love's poor sales penetration and offered advice on how to improve sales penetration. Love deliberately chose not to implement most of Nissan's suggestions. Love identified other dealers who ranked below or near Love during one time period or another but no dealer whose performance was as consistently poor and long-standing as Love's at the time of Love's termination.

98. The dealer agreement permits Nissan to select its methodology for evaluating its dealers' sales performance. One commonly-accepted, industry-wide methodology for measuring "effectiveness" of a dealership is the methodology employed by Nissan. Nissan demonstrated, and it is undisputed, that sales penetration is an industry-wide accepted standard for evaluation

of dealers, and therefore falls within the scope of "reasonable criteria," as permitted by the dealer agreement. Nissan has used this methodology for a minimum of the preceding five years, including the period since the most recent statutory amendments in 2001. Love did not demonstrate that Nissan has used any other dealer evaluation methodology in the preceding five years or since the statutory amendments in 2001. While competing statistics may be slippery things, there is no dispute that Nissan's statistical analysis has correctly measured Love's results and has correctly compared those results with the other dealers in the PMA. While Love correctly asserts that statistics should not be "conclusive," they are permitted by the franchise agreement and persuasive here.

99. The dealer agreement establishes the terms of the business relationship between [a manufacturer] and a dealer. Stella Chevrolet, Inc., et al. v. Roberts Chevrolet, Inc., et al., DOAH Case No. 88-3099 (Administrative Law Judge Sartin, RO January 30, 1990; FO May 4, 1990).

100. The Florida Legislature could have mandated, in its amendments, the methodology by which manufacturers evaluate dealer sales performance or could have imposed minimum sales performance standards for termination, but it chose to leave those matters up to the agreement between the parties. Section 3.A. of the dealer agreement in this case clearly obligated Love

to "actively and effectively promote the sale at retail" of Nissan vehicles within its PMA. Love accepted and agreed to this obligation, yet Love's sales performance was chronically poor. Nissan demonstrated that by a commonly recognized methodology within the industry, Love consistently ranked sales at only about half the rate of an average dealer in Love's region. Section 3.B. of the dealer agreement clearly permits Nissan to evaluate Love's sales performance utilizing reasonable criteria. Sales penetration is specifically set forth in Section 3.B. of the dealer agreement as an acceptable dealer evaluation methodology. Nissan has consistently used region average sales penetration as its evaluation standard. This standard has not been hidden from Love and has been repeatedly disclosed to Love. Indeed, pursuant to Section 3.H. of the dealer agreement, Nissan has repeatedly advised Love of its failure to achieve and maintain region average and that continued failure in this regard was grounds for termination of the dealer agreement. Section 12.B.1.a. of the dealer agreement also clearly permits Nissan to terminate a dealer when that dealer has failed to substantially fulfill its responsibilities with respect to sales of new Nissan vehicles. Therefore, it is concluded that Love's termination was clearly permitted by the franchise agreement between the parties.

101. It is likewise concluded that Nissan undertook the April 1, 2004, termination due to a material and substantial breach of the dealer agreement, in good faith, and for good cause.

102. Love introduced no evidence proving any ulterior motive or lack of good faith for the termination. The evidence shows that Nissan terminated Love solely for its poor sales performance. Love's poor sales performance dates back to at least 1994, a total of 10 years. Since 1999, Nissan has sent eight or more certified letters to Love, reiterating that Nissan uses sales penetration to evaluate dealer performance and that Love remained substantially below region average. The undersigned has considered the "miscue" of one Nissan DOM to Mr. Robert Halleen (see Finding of Fact 22) and that Nissan has been influenced by extensively detailed action plan(s) submitted by another dealer or dealers (see Findings of Fact 80-87), but the material and substantial fact remains that each time Nissan requested from Love a response and action plan to cure Love's deficiencies, Love failed to provide one.

103. Additionally, Nissan's DOMs repeatedly visited Love's dealership to advise and assist Love in improving its sales performance. Love rarely followed their suggestions and ultimately little effect was felt. See Bill Gallman Pontiac GMC Truck, Inc. v. General Motors Corp, DOAH Case No. 89-0505

(Administrative Law Judge Donnelly, RO June 28, 1990; FO February 28, 1991), finding termination undertaken in good faith by manufacturer and for good cause where the manufacturer "continuously encouraged the dealer to meet sales performance standards and has worked with [the dealer] in an effort to achieve this goal." Cf-Nolette Motors, Inc. v. Mazda Motors of America, Inc., DOAH Case Nos. 98-1457 and 98-2596 (Administrative Law Judge Adams, RO May 12, 1999; FO August 13, 1999), finding lack of good faith where manufacturer failed to notify the dealer of alleged breaches, but the result turned upon abandonment of the franchise. Nissan demonstrated good faith by, at Love's request, reevaluating and reducing Love's PMA in 2001. Nissan demonstrated good faith by providing Love multiple opportunities to cure its default of sales obligations prior to issuing the NOT. Nissan issued to Love four separate NODs between 2000 and 2003. In each NOD, Nissan clearly advised Love of its deficiencies and allowed Love at least 90 days to cure the deficiencies. Even when Love did not timely cure its deficiencies, Nissan granted Love more time, including a final extension in November of 2003. Nissan was within its rights to terminate Love on the basis of sales penetration figures through December of 2003, which penetration figures it had as of the date of the April 1, 2004, NOT. See Broward Truck and Equipment Company v. Navistar International Transportation Corp., DOAH

Case No. 93-5966 (Administrative Law Judge Harrell, RO April 29, 1994; FO August 19, 1994) vacated on other grounds by In Re: Broward Truck and Equipment, Case No. 94-21195 (S.D. Florida Bankruptcy Court, October 4, 1994), finding that termination was undertaken in good faith where manufacturer gave dealer six months' notice and opportunity to cure, but the case also discusses capitalization problems more explicitly; and Rick Starr Lincoln-Mercury, Inc., v. Nissan Motor Corp., DOAH Case No. 92-5187 (Administrative Law Judge Rigot, RO June 10, 1993; FO August 5, 1993), finding good faith where manufacturer acted in "consistent, honest, and forthright manner" with its dealer and even offered to extend deadlines for compliance on several occasions, but the case also discusses an exclusive facility contract clause more explicitly. On April 1, 2004, Nissan had additional figures for the quarter immediately preceding, January-March, 2004. Those figures were not fully compiled and analyzed until after the NOT had been sent. Those compiled figures, when analyzed in accordance with the standard sales penetration methodology that Nissan had appropriately and consistently used, showed that Love's sales penetration had further declined each of those first three months of 2004, which immediately preceded the NOT.

104. Love has been a chronically poor new sales performer for Nissan. In 1999, Love received 32.0 percent of the average

sales penetration achieved by dealers in the region. In 2000, Love achieved 29.5 percent of the region average new car sales. In 2001, following Nissan's reduction of Love's PMA, Love achieved 50.9 percent of region average. In 2002, Love's region average was 50.6 percent. In 2003, Love achieved 55.8 percent of the region average. While Love demonstrated improvement in its percentage scores between 1999 and the end of 2003, if the Nissan sales penetration region average is comparable to a passing grade of "C," Love's average sales penetration, at best, in 2003, rated only a little more than half of an average "C" grade. Love's poor sales performance has resulted in substantial lost sales opportunity for the manufacturer Nissan in the Homosassa, Florida, market. Nissan has met its burden of showing good cause for termination of its dealer agreement with Love. See Broward Truck and Equipment Company v. Navistar International Transportation Corp., and Bill Gallman Pontiac GMC Truck, Inc., v. General Motors Corp., both supra, finding dealer's failure to achieve reasonable share of market to be substantial and material breach of contract and good cause for termination.

105. Not every failure to achieve the manufacturer's region average sales penetration standard will constitute a material and substantial breach of the agreement warranting termination. The magnitude of the short-fall must be considered

in determining whether the dealer's performance is so ineffective as to warrant termination. Unfortunately, herein, Love has materially and substantially failed to meet its sales obligations under its dealer's agreement with Nissan. Love has never achieved Nissan's region average sales penetration standard, and at least since 1999, Love's yearly sales penetration has ranged only between 29.5 percent and 55.8 percent of that achieved by the average dealer in Nissan's region. Consequently, Nissan has established that its loss of the new sales market occasioned by continuing to work through the Love dealership has been so material and substantial as to go directly to the core of the business relationship between Nissan and Love. Nissan has met its burden of showing that Love's breach of sales performance obligations constitutes a material and substantial breach of the dealer agreement. See Broward Truck and Equipment Company v. Navistar International Transportation Corporation, and Bill Gallman Pontiac GMC Truck, Inc. v. General Motors, Corp., both supra.

106. This brings us to the last test, that is, whether or not Nissan has applied the grounds for termination in a "uniform and consistent" manner. Love puts forth that no matter how it is described, at least one-half of the dealers in Nissan's Southeast Region will not achieve the regional average sales penetration. This is certainly true, simply because

mathematical averaging principles work that way. However, Love's premise that to terminate Love without terminating all other dealers who fall below average or below Love is to behave inconsistently or without uniformity is unreasonable and contrary to the statute's intent. Love referred to six other dealers whom Love implied were not "treated the same" as Love. Nissan presented evidence that it had applied the same performance penetration evaluation standards to all dealers, and then took into account all appropriate individual dealer circumstances. Nissan then distinguished Love's circumstances from those of the other six dealers. Most of these dealers received some sort of extension, much as Love had received in 2001 (see Finding of Fact 33) and in 2003 (see Finding of Fact 51), causing some overlapping of statistical reporting periods. One received an extension based on a PMA change, but experienced significant sales penetration after its PMA was revised; some of the other six dealers performed better than Love historically; some improved their performance dramatically by the time Love was terminated; some performed poorly but not for the extended length of time that Love performed poorly; some went through recent ownership changes and demonstrated subsequent improvement; and some had poor performance caused by road construction and other outside elements but instituted plans of corrective action that impressed corporate Nissan.

107. As to whether Nissan's giving those other dealers time extensions, financing, or plan approval based on their de-dualling with Nissan competitors, or based on their building new facilities partly financed by Nissan, constituted lack of good faith by Nissan toward Love is concerned, Nissan provided adequate commercial reasons, including a changed PMA; improved performance; aggressive, affirmative proposals; dramatic investment in Nissan inventory; and new facility capitalization initiated by the dealers, as reasons for those corporate decisions. Love was not similar to these dealers in any of those respects.

108. A free marketplace mandates that a manufacturer be free to consider particular dealer circumstances affecting a dealer's sales performance prior to terminating that dealer. It is the essence of a free economy that industry executives be able to use their expertise in granting reasonable exceptions to contractual dealers in order to help those dealers improve their performance, thus making a profit for both the franchisor and the franchisee. An example of this may be found in Nissan's repeated grants of extensions of time for improvement to Love. To interpret the amended Section 320.641(3), Florida Statutes, to require that a manufacturer treat every dealer "identically" as opposed to "uniformly and consistently" would be to abrogate the clear language of the statute. Rather, the "uniform and

consistent" requirement of Section 320.641(3), Florida Statutes, is here interpreted to impose upon a manufacturer the burden of showing that it has treated similarly-situated dealers in a uniform and consistent manner, and that it has not singled out any particular dealer for disparate treatment. This case is complicated by monthly and quarterly statistical analysis by Nissan, but there is no contractual or statutory requirement that Nissan select a particular day, week, month, or year, and terminate only the dealer whose sales performance is numerically "worse" or "worst" at the selected time, nor is there any contractual or statutory provision which requires that no accommodation be made for any dealer, and that only sales penetration figures be applied to invoke termination in every case of poor performance. Indeed, to read such requirements into the statute, when the statute has not specifically established them, would be counter-productive to manufacturer-dealer relations and would inhibit sales within the entire automotive industry. If a manufacturer's patience and efforts in favor of helping a failing dealer elevate that dealer from a "worse" or "poor" performer to a "better" performer and the manufacturer is thereby deemed to have forfeited its right to pursue termination if that dealer fails to succeed, it is doubtful that any manufacturer would dare to devote substantial time and effort to help dealers improve. Dealers in Love's situation would be the worse for such an interpretation. Indeed, under such an interpretation, Love would probably not have received several extensions or its requested change of PMA.

109. Herein, the evidence shows that Nissan applied the same performance/penetration evaluation standards to each of its dealers, and then took into account all appropriate individual dealer circumstances related to each individual dealer's performance, and that those individual circumstances were considered on a case-by-case basis, but none of those individual circumstances which applied to the six other dealers were applicable to Love. Love's sales penetration has ranked consistently among the very worst in the state of Florida and throughout the entire southeast region longer than any other named dealer. Accordingly, it is concluded that Nissan has met its burden of showing uniform and consistent application of the grounds relied upon in this case for termination of Love.

110. Nissan has established all statutory grounds for termination.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED: that a final order be entered, dismissing Love's Protest/Petition and ratifying the April 1, 2004, Notice of Termination by Nissan.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

Exhibit B

SACRAMENTO SUPERIOR AND MUNICIPAL COURTS
IN AND FOR THE COUNTY OF SACRAMENTO

DATE/TIME : JANUARY 29, 1997		DEPT. NO : 1	
JUDGE : NANCY SWEET		CLERK : C. LEWIS	
REPORTER : NONE		BAILIFF : D. BUNCH	

FORD MOTOR COMPANY, LINCOLN-MERCURY DIVISION, a corporation
Petitioner,

J. KEITH MCKEAG

VS. Case No.: 96CS0247

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA,
Respondent.

ANDREW LOOMIS

RAY FLADEBOE LINCOLN MERCURY, INC.,
Real Party in Interest

A. ALBERT SPAR

Nature of Proceedings: STATEMENT OF DECISION ON WRIT OF MANDATE

The Court hereby rules on the above-entitled matter by the attached Statement of Decision.

Certificate of Service by Mailing attached.

BOOK : 1
PAGE
DATE : JANUARY 29, 1997
CASE NO. : 96CS0247
CASE TITLE : FORD MOTOR V NEW MOTOR VEHICLE

SACRAMENTO SUPERIOR COURT

BY: C. LEWIS,

Deputy Clerk

CASE NUMBER: 96CS0247 DEPARTMENT: 1
CASE TITLE: FORD MOTOR V NEW MOTOR VEHICLE
PROCEEDINGS: STATEMENT OF DECISION ON WRIT OF MANDATE

CERTIFICATE OF SERVICE BY MAILING
C.C.P. Sec. 1013a(3))

I, the undersigned deputy clerk of the Sacramento Superior and Municipal Courts of the State of California, in and for the County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled notice in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

J. KEITH MCKEAG
DOWNEY, BRAND, SEYMOUR AND ROHWER
555 CAPITOL MALL, 10TH FL.
SACRAMENTO CA 95814-4686

ANDREW LOOMIS
OFFICE OF THE ATTORNEY GENERAL
1300 I STREET STE 125
SACRAMENTO CA 94244-2550

A. ALBERT SPAR
PARKER, MILLIKEN, CLARK,
O'HARA & SAMUELIAN
333 SOUTH HOPE ST.,
LOS ANGELES, CA 90071-1488

Dated: JANUARY 29, 1997

Sacramento Superior Court

By: C. LEWIS,
Deputy Clerk

)OK	:	1
.GE	:	19
.TE	:	JANUARY 29, 1997
.SE NO.	:	96CS0247
.SE TITLE	:	FORD MOTOR V NEW MOTOR VEHICLE

SACRAMENTO SUPERIOR COURT

BY: C. LEWIS,

Deputy Clerk

The within-entitled matter came on for hearing in the Sacramento County Superior Court on October 25, 1996, before the Honorable Nancy Sweet, Judge presiding. All parties appeared, represented by counsel as follows: J. Keith McKeag, Esq., for Petitioner; Deputy Attorney General Andrew Loomis, Esq., for Respondent; and J. Albert Spar, Esq., for Real Party in Interest. The matter was argued and submitted. The court hereby rules as follows on the issues presented.

Real Party in Interest Ray Fladeboe Lincoln-Mercury, Inc., ("Fladeboe") is a Lincoln-Mercury dealer in Irvine, California. Petitioner Ford Motor Company, Lincoln-Mercury Division, was dissatisfied with Fladeboe's continued poor sales performance and gave it notice of its intent to terminate its dealer franchise. Fladeboe filed a protest with Respondent New Motor Vehicle Board ("Board"). After a fifteen day hearing, the Board determined that Petitioner failed to establish any of the grounds constituting good cause for termination of the franchise under Vehicle Code section 3061, except that Fladeboe is not transacting an adequate amount of business as compared to the business available to it. The Board further found that Petitioner failed to establish that Fladeboe's sales performance was inadequate under the standards set forth in paragraph 2(a) of the Lincoln-Mercury Sales and Service Agreement. Relying on its own prior decision in **Kon Tiki Motorcycle v. Kawasaki Motors Corporation, USA**, Protest No. PR-179-78 (attached as Exhibit B to Petitioner's Memorandum in Support of Petition for Writ of Mandamus), the Board held that low sales alone is insufficient in itself to establish good cause for termination of a franchise and that the franchise in the instant case should not be terminated.

Petitioner then filed the instant petition for a writ of mandate pursuant to Code of Civil Procedure section 1094.5, seeking an order that the Board comply with its duties under Vehicle Code sections 3000 et. seq. and render a decision which conforms to the requirements of law and which is supported by the evidence, and alleging that the Board did not proceed in the manner required by law, that its decision is not supported by the findings, and that its findings are not supported by the evidence. Petitioner articulates its contentions that the Board's decision is erroneous as follows:

1. The Board imposed an improper burden of proof on Petitioner.

2. Poor sales performance alone is a sufficient ground for termination.

3. The Board ignored Petitioner's proof of Fladeboe's material breach of the Sales and Service Agreement.

4. The Board admitted testimony from a witness, on the issue of whether Fladeboe provided adequate service to the public, which witness was not qualified to express an opinion on that issue.

Standard of Review

The standard of review for proceedings under Code of Civil Procedure section 1094.5 is stated as follows in subdivision (b) of that section:

"The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

In the instant case, Petitioner contends that the Board did not proceed in the manner required by law, i.e., that the Board did not follow the law as stated in relevant sections of the Vehicle Code.

Burden of Proof

Vehicle Code section 3066, subdivision (b), provides in pertinent part that "In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate or refuse to continue a franchise". Vehicle Code section 3061 provides:

> In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:
> (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
> (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(c) Permanency of the investment.
(d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchise disrupted.
(e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.
(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.
(g) Extent of franchisee's failure to comply with the terms of the franchise.

Petitioner argues that the Board improperly imposed on Petitioner the burden to prove all of the above-stated factors, even those which obviously are ones that would favor the dealer's position. Petitioner contends that it only has the burden of proving the factors it relied on for terminating the franchise.

The plain language of the statute (section 3066) provides that the burden is on the franchisor (Petitioner) to prove good cause for termination of a franchise. In determining whether good cause has been established, the Board must consider all of the factors set forth in section 3061 for which evidence has been presented from any party. The Board is then required to weigh the relevant factors and determine whether the weight of those factors favors termination of the franchise or its continuation. The burden on Petitioner was to prove good cause by producing sufficient evidence relating to some or all of the seven factors at issue to tip the balance in its favor, i.e., to show the weight of those factors favored termination of the franchise.

Petitioner's contention that it was required only to establish the factors specified in its Notice of Termination (i.e., those set forth in Section 3061, subdivisions (a) and (g)) is unsupported by any citation to authority and is contrary to the plain language of Section 3061, which requires that the Board consider all of the seven factors on which evidence has been presented, from whatever party. In the instant case, the Notice of Termination (Exhibit 29) provides in pertinent part that "This Notice of Termination is being issued pursuant to the provisions of subparagraph 17(c)(1) of the Lincoln and Mercury Sales and Service Agreements because of Fladeboe's continued failure to fulfill its responsibilities of achieving satisfactory sales and penetration performance under subparagraph 2(a) . . ." Presumably, Petitioner would have wanted to prove factors (a) and (g), as well as any other factors listed in section 3061 which would support termination. Petitioner was neither limited to proof of the factors stated in the Notice of Termination nor did the Notice of Limitation limit the Board as to the factors it could consider had evidence been presented on any additional factors by either party.

Petitioner further contends that the Board required it to prove that termination of the franchise would be injurious to the public under section 3061, subdivision (d). Petitioner's argument has support in the record in language in the Board's Determination of Issues. In particular, the finding at page 19, paragraph 94, subdivision (d), states that Petitioner "failed to establish that it would be injurious to the public welfare for the franchise to be" terminated. Obviously, section 3061, subdivision (d), does not require the franchisor to prove (contrary to its own position and interests) that termination would injure the public welfare. The statute plainly contemplates that the franchisor will present evidence to show termination would benefit the public welfare, while the franchisee will attempt to show termination would be injurious. Upon reconsideration as required by this ruling, the Board should reevaluate the evidence and findings on the subdivision (d) factor in light of this discussion.

In summary, the Board should properly weigh all the relevant factors and evidence in support thereof to arrive at its decision.

Sufficiency of Poor Sales Alone as Ground for Termination

In its Decision on Protest No. PR 1462-95 in the instant case, the Board adopted the Proposed Decision of the Administrative Law Judge. (Exhibit B to Petition for Writ of Mandamus). That decision included the following finding on page 18 (para. 92):

> The Board determined in **Kon Tiki Motorcycle v. Kawasaki Motors Corporation, USA**, Protest No. PR 179-78 that "the amount of (retail sales) business transacted by Kon Tiki has been low as compared to the business available to it. This, however, is insufficient in itself to meet the burden of proof imposed upon the franchisor by section 3066 to show good cause as set forth in section 3061 to terminate the franchise."

The Board further determined that Petitioner (Lincoln-Mercury established that Real Party in Interest dealer (Fladeboe) is not transacting an adequate amount of business as compared to the business available to it.

The Concurring Opinion of the Board indicated in parag. 3 that that Board Member disagreed with the Majority Opinion to the extent that it might infer, whether intended or not, that a franchise agreement cannot be terminated solely on the basis of poor sales performance.

Petitioner contends that the Board erred in holding that poor sales alone can never be a sufficient ground for termination of a franchise. Petitioner also argues that the **Kon Tiki** case is not binding on the parties in the instant case and that that case was wrongly decided.

Petitioner is correct that the statutes do not expressly provide that poor sales alone is insufficient to establish good cause. Section 3061 requires the Board to consider all the circumstances presented, including all seven which are set forth in the statute. However, nothing in that statute prohibits a finding that, in any given set of facts, one factor may be so egregious that it would outweigh any remaining factors as to which proof was adduced. Each case must be decided on its merits in light of the totality of the evidence presented, not on the basis of an arbitrary rule unauthorized by law which would restrict the Board's weighing process in the determination of good cause for termination.

Under the Board's interpretation, a franchisee could make no sales and no effort to improve sales and yet be protected from termination. (Petition, page 23). The purpose of including sales as a separate statutory criteria was obviously to allow the fact of poor performance to be considered to terminate a franchise, unless shown to be outweighed on the balance of other existing circumstances. The Board acted outside the authority granted to it by establishing a **per se** rule that no matter how poor a dealer's sales performance is, it will never be sufficient to constitute good cause for termination of the franchise. The **Kon Tiki** case is not binding precedent and was similarly wrongly decided in respect to the **per se** rule.

Real Party in Interest dealer asks the court to uphold the Board's **per se** rule on the basis of numerous cases from other jurisdictions (federal and state). None of the rulings in those cases have constitutional law underpinnings. To the extent that they interpret statutes other than the California Vehicle Code, they are not binding on the California courts nor is the legislative intent regarding foreign statutes relevant to the California statutory scheme. Those cases are included in an Appendix to Real Party in Interest's Memorandum of Points and Authorities. In one of the cases applying a different California statute, the Ninth Circuit Court of Appeals did not establish a **per se** rule that poor sales can never justify termination, but only that under the facts of that case the dealer's poor sales performance could not justify termination. **Marquis v. Chrysler Corp. (1978 9th Cir.) 577 F.2d 624, 632-633.** The cases cited by Real Party in Interest do not control as to the interpretation of California Vehicle Code section 3061.

The Board erred to the extent it ruled that poor sales alo[redacted] (factor (a)) can **never**, under any circumstances, outweigh all the other section 3061 factors and justify termination of a franchise. It is conceivable that, under some factual scenario, factor (a) (poor sales) could be weighed against all other factors and found to outweigh all other factors as to which evidence has been presented. The Board should reconsider its finding in light of the above discussion.

Evidence of Dealer's Purported Breach of the Sales and Service Agreements

Real Party in Interest (dealer's) responsibilities with regard to the sale of vehicles, and the criteria by which its sales performance will be measured, are set forth in paragraph 2(a) of the Sales and Service Agreement. Paragraph 2(a) provides in relevant part:

> 2(a). **Sales**. The Dealer shall promote vigorously and aggressively the sale at retail (and, if the Dealer elects, the leasing and rental) of VEHICLES to private and fleet customers within the DEALER'S LOCALITY, and shall develop energetically and satisfactorily the potentials for such sales and obtain a reasonable share thereof . . .
>
> The Dealer's performance of his sales responsibility for VEHICLES shall be measured by such reasonable criteria as the Company may develop from time to time, including:
>
> (1) The Dealer's sales of VEHICLES to private and fleet users located in the DEALER'S LOCALITY as a percentage of:
>
> (i) all private and all fleet registrations of VEHICLES in the DEALER'S LOCALITY,
>
> (ii) all private and all fleet registrations of COMPETITIVE VEHICLES in the DEALER'S LOCALITY,
>
> (iii) all private and all fleet registrations of INDUSTRY VEHICLES in the DEALER'S LOCALITY, and
>
> (iv) the private and fleet sales objectives for VEHICLES estab[illegible] from time to time.
>
> (2) If the Dealer is not the only authorized dealer in VEHICLES in the DEALER'S LOCALITY, the following factors shall be used in computing percentages

pursuant to 2(a)(1) above:

(i) The Dealer's sales of VEHICLES to users located in the DEALER'S LOCALITY shall be deemed to be the total registrations thereof in the DEALER'S LOCALITY multiplied by the Dealer's percent of sales of all VEHICLES made by all authorized Mercury dealers located in the DEALER'S LOCALITY unless the Dealer or the Company shows that the Dealer actually has made a different number of such sales,

(ii) The registrations of VEHICLES and COMPETITIVE and INDUSTRY VEHICLES in the DEALER's LOCALITY against which the Dealer shall be measured shall be the total thereof multiplied by the DEALER'S PERCENT responsibility, and

(iii) THe Dealer's objectives for VEHICLES shall be the total objectives therefor of all authorized Mercury dealers in the DEALER'S LOCALITY multiplied by the DEALER's PERCENT RESPONSIBILITY.

(3) A comparison of each such percentage with percentages similarly obtained for all other authorized Mercury dealers combined in the Company's sales zone and district in which the Dealer is located, and where subparagraph 2(a)(2) applies, for all other authorized Mercury dealers combined in the DEALER'S LOCALITY.

Petitioner contends that the Board ignored the evidence showing the inadequacy of Real Party Fladeboe's sales performance under the above-stated criteria. Petitioner's argument is somewhat confused, since it is evident from the Board's decision that it did not ignore this evidence, as the Board found that Fladeboe was not transacting an adequate amount of business. (Decision, page 19, paragraph 94(a)). Rather, the Board erroneously concluded that this factor alone could never be good cause for terminating the franchise under the Board's precedents.

What Petitioner really appears to be arguing here is that the Board erred as to the effect of its finding of inadequate sales. Petitioner concedes this in its reply brief at pages 7-8. Petitioner's argument seems to be that, even if inadequate sales alone are not good cause for termination under the Vehicle Code, they are also a breach of contract which justifies termination of the contract. (see Vehicle Code section 3061, subdivision (g)).

There are several difficulties with Petitioner's argument. First, while paragraph 2(a) provides that Fladeboe shall obtain a "reasonable share" of sales, and provides criteria for measuring Fladeb:e's performance, Petitioner does not cite any provision of the Agreement where Fladeboe promised to sell a certain amount of vehicles, or that termination would result if a certain sales level were not accomplished. It is not clear that poor sales performance is an actual breach of the contract.

Next, one of the problems with review of the Board's decision is that the Decision is not very clear as to its reasoning. The parties both appear to believe that the Board found that Petitioner presented "no evidence as to Fladeboe's performance under subparagraph 2(a) of the Sales and Service Agreements" (Decision, page 20, paragraph 95) because Petitioner's evidence of Fladeboe's poor sales was based on a comparison with other dealers in the "region", rather than Fladeboe's "Dealer's Locality". The Decision itself states that Petitioner's expert used a national average to measure Fladeboe's performance, rather than measuring it based on the "Dealer Locality". (Decision, pages 17-18, paragraphs 87-88). In either event, it appears that while the Board found thise evidence sufficient to establish poor sales, it found it inadequate to establish a breach of the Agreements because the measure of performance used was not the one specified by the Agreements.

Consequently, Fladeboe argues that, in order to establish a breach of the franchise agreement, paragraph 2(a) required Petitioner to measure its sales performance by reference to Fladeboe's "Dealer Locality" (which was Orange County, which has six other Lincoln-Mercury dealers). Fladeboe contends that Petitioner presented no evidence of Fladeboe's sales performance within the "Dealer Locality", and therefore it presented no evidence showing a breach of the agreement. Petitioner counters that paragraph 2(a), subdivision (3), authorized it to measure Fladeboe's performance in comparison to the "region" (which is not explained in the briefs, but apparently encompasses the Western United States - see Decision, page 8). Petitioner argues that its evidence of sales performance measured on a regional basis did establish a breach, and that it presented evidence of poor sales measured by reference to the "Dealer Locality" as well. Petitioner asks the court to interpret paragraph 2(a), and subparagraph 3 thereof, as authorizing it to use regional comparisons.

However, an examination of paragraph 2(a) shows it is far from clearly supportive of Petitioner's position. Paragraph 2(a) subparagraph (1), sets forth percentages Petitioner may use to measure dealers' sales performance. Subparagraph (2) then sets forth how these percentages shall be computed if the dealer is not the <u>only</u> dealer in the "Dealer's Locality".

This language implies that subparagraph (1) applies where the dealer is the only one in the "Locality". In both cases, however, the measurement is made with reference to the "Dealer's Locality". Subparagraph (3) then states that Petitioner may compare these percentages to those for other dealers in the dealers "sales zone and district", and, where subparagraph (2) applies, to those for all other dealers in the "Dealer's Locality".

Petitioner relies on the first part of subparagraph (3) to claim its regional comparison evidence was proper. However, the more logical interpretation in view of paragraph 2(a) as a whole is that the first part of subparagraph (3), arguably authorizing regional comparisons, applies to dealers who are the only dealer in their "Locality"; where subparagraph (2) applies, i.e., where the dealer is not the only dealer in its "Locality", the comparison must instead be made with the other dealers within the "Locality". Under this interpretation, the Board's rejection of the regional (or national) comparison as evidence of a breach of the franchise agreement was proper.

In sum, Petitioner's ground for terminating the franchise was based on one thing: Fladeboe's poor sales performance. The Board did not ignore the evidence of poor sales, and its Decision is replete with reference to evidence showing poor sales. Instead, it appears that the Board did consider the evidence, but determined that it did not establish a breach of the Agreements. Petitioner has not demonstrated that the Board improperly ignored Petitioner's evidence. Such evidence should obviously be considered again upon reconsideration.

Admission of Opinion of Unqualified Witness

Petitioner contends that the Board erred in that it admitted the testimony of Fladeboe's expert witness for the limited purpose of establishing section 3061, subdivision (e), and then used that testimony to support its finding on the section 3061, subdivision (d), issue. Petitioner also contends that the expert's opinion was incompetent and should not have been admitted.

Even assuming that the opinion evidence was incompetent and utilized for an improper purpose beyond its limited admission, Petitioner has failed to demonstrate that any error was prejudicial. Petitioner simply argues in conclusory fashion that the error was prejudicial. Since Petitioner has failed to demonstrate or explain how the alleged error was prejudicial, it is not a basis for granting the writ.

(Code of Civ. Proc., section 1094.5, subd. (b)).

Conclusion

The petition for writ of mandamus is granted for the reasons above-stated and the matter is remanded to the Board for reconsideration in light of this court's ruling. Petitioner is directed to prepare a formal order in accordance with the ruling.

DATED: January 29, 1997

Nancy Sweet

Nancy Sweet J.
Judge, Superior Court

Exhibit C

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-2080

RECEIVED JUN 1 2 2002

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of CORNING TRUCK & RADIATOR SERVICE, INC., Protestant, vs. INTERNATIONAL TRUCK & ENGINE CORPORATION, Respondent.	**Protest No. PR-1765-01**

DECISION

At its regularly scheduled meeting of June 6, 2002, the Public members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 6th DAY OF JUNE 2002.

GLENN E. STEVENS
Vice President
New Motor Vehicle Board

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-2080

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of CORNING TRUCK & RADIATOR SERVICE, INC., Protestant, vs. INTERNATIONAL TRUCK & ENGINE CORPORATION, Respondent.	**Protest No. PR-1765-01** **PROPOSED DECISION**

PROCEDURAL BACKGROUND

1. By letter dated March 15, 2001, Respondent International Truck and Engine Corporation (hereafter "International") notified Protestant (hereafter "Corning"), pursuant to Vehicle Code Section 3060[1], of International's intent to terminate Corning's franchise as an International dealer. A copy of the notice was also served on the Board.

2. Corning is a California corporation, licensed to sell new

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

motor vehicles in Corning, California. Its sole new motor vehicle franchise is with International. The shareholders of Corning are Bill and Barbara Boot, who have operated a truck and radiator repair facility in Corning since the 1960's, and an International dealership at its present location along Interstate 5 since acquiring the franchise in 1980.

3. International is the successor to International Harvester Corporation. It is headquartered near Chicago, Illinois and maintains a dealer network of approximately 371 dealers in the United States and Canada. It is licensed as a manufacturer and distributor of new motor vehicles by the State of California.

4. Navistar Financial Corporation, doing business as International Finance Group (hereafter "IFG") provides financing to International's dealers. International and IFG are each subsidiaries of Navistar International Corporation.

5. Corning filed this Protest pursuant to Section 3060 on April 23, 2001.

6. The Protest hearing was held on December 11-14 and 17-19, 2001, before J. Keith McKeag, Administrative Law Judge, in Sacramento, California. Protestant was represented by Arthur C. Chambers, 2095 Van Ness Avenue, San Francisco, California. Respondent was represented by Matthew G. Jacobs and Jeffrey S. Galvin, Downey, Brand, Seymour & Rohwer LLP, 555 Capitol Mall, Tenth Floor, Sacramento, California. Post-hearing briefs were filed by the parties and the matter was submitted for decision on April 30, 2002.

THE STATUTORY STANDARD

7. When, as here, a seasonable protest has been filed in response to a notice of intent to terminate a franchise, pursuant to Section

3060, the termination cannot go forward until a hearing has been held by the Board and a determination is made that "good cause" exists for the termination. Section 3066 provides that the burden of proof to establish that there is good cause to terminate a franchise is on the franchisor.

8. Section 3061 requires the Board to consider the existing circumstances including, but not limited to, all of the following:

(A) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(B) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(C) Permanency of the investment.

(D) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(E) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(F) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(G) Extent of the franchisee's failure to comply with the terms of the franchise.

FACTUAL BACKGROUND

9. The Boots opened a radiator repair shop in Corning in 1961. A few years later they purchased the assets of a neighboring truck repair

facility and went into that business. They incorporated in 1973. In 1980, the Boot's purchased a seven (7) acre parcel of land along Interstate 5 and built a 9,600 square foot building. At that same time Corning became an International dealer, and leased the newly constructed facility within which to operate its sales and repair business. Mr. Boot had no prior experience in vehicle sales or the operation of a new motor vehicle franchise. One of the reasons for acquiring the International franchise was to have access to the International parts program. During its tenure as an International dealer, Corning's main emphasis has been on sales of repairs and parts, rather than sales of new trucks. Under the terms of its franchise, Corning is entitled to sell truck parts and new medium-duty trucks, not heavy-duty trucks. Because of its location along Interstate 5 it has significant exposure to a large number of passing heavy-duty trucks for repair and parts sales, but its rural location means that many of its sales customers are involved in farming and related activities which make use of medium-duty trucks.

10. Corning's Area Of Responsibility ("AOR") under the franchise agreement is all of Tehama and Glenn Counties, and parts of Butte and Colusa Counties. The city of Corning is located approximately 110 miles north of Sacramento and 50 miles south of Redding. Corning is also an authorized dealer for truck parts manufactured by Caterpillar, Cummins, Detroit Diesel, and Allison.

11. In 1997, Corning decided to expand its business. It obtained a Small Business Administration ("SBA") loan of $745,500. It retired around $242,000 of existing debt, put $220,000 into the construction of a building which is used to service recreational vehicles ("RVs") and lubricate trucks, and purchased in excess of $50,000 of special tools

and parts for the truck business. Corning also assumed liability for $96,500 as its share of repair to the streets and infrastructure adjacent to the property, with 50% due immediately and 50% due when development occurred on other portions of the seven (7) acre parcel. The Boots estimate that around $650,000 was spent in total on the dealership, but no specific breakdown was given, other than as described above.

12. The business expansion did not result in financial success, and by 1999 Corning was in severe financial trouble. The large debt incurred in 1997 had resulted in a cash flow crises. Also contributing to the problem was the effect of flooding which had occurred in Corning's market area in 1997, hurting the farming industry. Corning sought additional financing, and succeeded in obtaining an extension on the repayment of the infrastructure grant. In 1999, the Boots agreed to sell 2.2 acres of the seven (7) acre parcel, anticipating a cash sale which would soon close. The sale did not close until February 2001, and then on terms of 15% down and the remainder payable over time. Now Corning is hoping that the purchaser will not start development and trigger the payment of the amount remaining due under the infrastructure repair agreement.

13. Corning's financial problems led to delinquency in its open account with International. The open account, sometimes called the parts account, is an account maintained between International and its dealers which is used to obtain parts, tools, sales materials, and the like on credit. At the end of each month the financial arm, IFG, purchases these accounts receivables from International and collects the amounts due from the dealers. It is expected that the accounts will be paid current each month, and no debt will be carried over. By March

2000, Corning had become delinquent on its parts account. At that time Corning owed in excess of $60,000 on the parts account, and a $31,000 partial payment was dishonored by Corning's bank. As a result, IFG revoked Corning's credit status and placed it on cash status. This means that the dealer can no longer use its open account for the purchase of parts, and must either pay cash at the time of ordering the parts or set up an escrow account out of which parts purchases can be paid prior to shipment to the dealer. There is no contention by Corning that the imposition of the cash status was improper, or that the open account should have been reopened. The delay necessarily attendant to having to pay cash prior to the parts being shipped did adversely affect Corning's parts sales.

14. The March 2000 imposition of cash status on Corning's parts purchases also resulted in IFG placing Corning's flooring account on "inventory control status." This is not a total revocation of credit with which to purchase trucks, but does mean that IFG looks carefully at each order made by Corning and will only give a flooring loan if it is assured of payment. This means that loans are usually only made on "sold orders" when the identity of the buyer is known and an assignment of sales proceeds can be obtained. Absent current financial statements from the dealer showing a means of payment and a good recent payment history, flooring would not normally be granted to purchase a truck to be held in inventory. Corning could not provide such information.

15. Corning's poor financial condition meant that Corning had to cut back on advertising, has been unable to maintain an inventory of new trucks for sale, and has often been unable to stay current with its other suppliers. The proceeds from the sale of the 2.2 acre parcel has improved Corning's cash flow to the extent that all of Corning's other

suppliers have reopened credit accounts, but it remains on a cash basis with International as to parts and on inventory control as to truck purchases.

16. Corning's problems increased in October 2000 when Mr. Boot had a heart attack and was off work full-time for six weeks and part-time for four or five months. A dispute exists in the testimony as to whether International employees involved in making decisions as to the termination of Corning's franchise were made aware of the heart attack prior to sending the notice of intention to terminate. Mrs. Boot testifies that she remembers telling members of International's Dealer Operations group that Mr. Boot had suffered a heart attack in the period between its occurrence and the sending of the notice of termination. The members of that group deny being so advised. The only written document mentioning Mr. Boot's condition is a fax dated November 7, 2000, which Mrs. Boot sent to an International employee in a department having no input on the subject of evaluation of dealership performance or deciding on termination. No mention of Mr. Boot's health problem was made in any of the written correspondence between the parties regarding International's notice of breach or notice of intent to terminate.

17. In August 2000, International sent Corning a "breach letter" advising that it considered Corning to be in breach of the franchise agreement due to poor sales of trucks and poor penetration of its market, poor stocking levels of truck inventory and demonstrators, lack of an effective prospect system, insufficient working capital and net worth to fulfill its duties, and failure to provide sufficient annual financial and operating statements. It gave Corning until March 15, 2001, to take appropriate corrective action in order to avoid receipt of a notice of termination.

18. On September 8, 2000, Corning responded to the breach letter. It agreed that it had "failed to achieve a reasonable market share in the Class 5 new truck market," but noted that parts sales continued to increase, albeit not as much as the goals set by International. It noted the infusion of capital which had been made in 1997, and assured that Corning was actively pursuing a financial plan with its bank which should revive its credit status. It also noted that Corning was working hard to maintain its market share, and asserted that it did have one truck in inventory with one more on order.

19. By March 15, 2001, Corning was still facing financial difficulties. The sale of the 2.2 acres had not raised much cash, no new bank financing had been obtained, and Corning had sold only one new truck during the intervening seven months. During the preceding five year period Corning had sold a total of 11 new trucks, of which nine were in its AOR. By that time it had a negative working capital of over $150,000, and a net worth of only a little over $50,000, down from the almost $160,000 it had been nine months earlier. It was on a cash basis for its parts purchases and on a very limited flooring line. International served Corning and the Board with its notice of intention to terminate the franchise. This Protest followed.

ANALYSIS[2]

Has Corning Transacted an Adequate Amount of Business Compared to the Business Available?

20. In the five fiscal years ending October 31, 2001, Corning sold nine new trucks into its AOR, an average of less than two per year.

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[2] Findings of fact are grouped in the most logical category and have been considered for each of the good causes factors and "the existing circumstances."

This figure alone, however, does not show how Corning's sales compared to the business available to it in the market. To derive this information International, as do almost all automobile and truck franchisors, makes use of registration data furnished by the R.L. Polk Company which allow a determination of a dealer's penetration rate or share of the sales made of certain types of vehicles in the dealer's AOR, as compared to the penetration rate of other International dealers in the area in their AORs. Here, all the dealers compared were franchised to sell medium-duty trucks in an area known as Area 624 which comprised most of California and Nevada. By using a comparison of sales of similar types of vehicles in a surrounding geographic area, similar market factors effect most or all of the dealers used for comparison.

21. For the six year period ending October 31, 2000, Corning's penetration rate in its AOR, as compared to the other International dealers' penetration rates in their AORs is as follows:

One-Year Period Ending	**Corning's Market Penetration (Percent)**	**Average Penetration of Other Dealers in Area 624 (Percent)**	**Corning's Rank Among Other Dealers in Area 624**
10/31/95	12.5	22.2	10/10
10/31/96	4.8	24.1	14/15
10/31/97	13.0	21.5	11/15
10/31/98	7.1	33.8	15/15
10/31/99	16.7	30.3	13/14
10/31/00	4.5	23.3	13/14

Corning did not dispute the accuracy of these figures.

22. Corning's expert witness conceded that comparing Corning's sales penetration to that of other International dealers in the California/Nevada area was a fair method to use, that Corning should be able to meet the average penetration of the International dealers in the

area absent special circumstances, and that based on penetration rate figures alone International would have good cause to terminate Corning as a dealer.

23. Corning's annual sales numbers also indicate that Corning's low sales were consistent. In fiscal year 1998, it sold three. In fiscal year 1999, it sold one. In fiscal year 2000, it sold two. In fiscal year 2001, it sold three.

24. Parts purchases cannot be measured by reference to penetration rates, because of the unavailability of registration data. The uncontradicted expert testimony presented by International was that the standard industry measurement is based on the amount of parts purchased by the dealer, that in the truck industry dealers are expected to achieve 100% of the goals set by the franchisor, and most do. Corning's parts purchases were as follows:

One-Year Period Ending	**Corning's Parts Purchases (Dollars)**	**Corning's Parts Goal (Dollars)**	**Purchases as Percentage of Goal**
10/31/98	703,032	819,540	85.8
10/31/99	720,505	810,000	89.0
10/31/00	692,297	803,290	86.2
10/31/01	467,757	737,162	63.5

25. International's expert witness also testified that truck dealers should normally turn over their parts inventory four times per year. Corning indicated that its goal was a turn over rate of three times per year. Corning's actual turn over rate during the period 1995-2001 ranged between 1.5 and 1.9 times per year.

26. Based on the facts set out above, it is concluded that Corning has not transacted an adequate amount of business as compared to the

business available to it.

What Investment Has Necessarily Been Made And What Obligations Incurred by Corning to Perform Its Part of The Franchise?

27. While Corning is a corporation, its only shareholders are Mr. and Mrs. Boot, who are the landowners and the persons who have obligated themselves on loans and infrastructure repayment agreements over the years, and have been the management team who have run the dealership since its inception. It would grant too much importance to the legal fiction of the corporation to ignore the obligations and investments of the Boots in determining this and other similar issues in this case.

28. The dealership sits on an approximately five (5) acre parcel remaining from the seven (7) acres purchased in 1980. The SBA loan obtained in 1997 used the land as security, and over $600,000 of the loan proceeds were invested in the business. While much of that money was used to construct a facility used to service both trucks and RVs, no testimony was presented which would allow an allocation of cost or fair market value to the uses which are incurred by reason of the International franchise. Suffice it to say, since 1980 a substantial investment has been made in the business facility which is used for the sale and repair of trucks, and in the parts and tools necessary to perform that work. Since 1997, the financial condition of the dealership has eroded, as detailed elsewhere, and Corning is unable to operate the business with open account credit or with an unrestricted flooring loan.

29. The infrastructure repayment agreement was an obligation incurred to improve the streets and utilities around the parcel on which the dealership is located. While one effect of this work was to make the parcel a more marketable commodity, it also had the effect of

improving the access to the dealership, and improving the parking along the adjoining street. Again, no allocation can be made, but it was a substantial obligation which was incurred, in part, to perform the dealer's part of the franchise.

Is There a Permanent Investment in the Dealership?

30. The dealership has been in operation at the same site since 1980. It has a sales and repair facility. The dealership is owned by the same people who own the land on which it sits. It has had a staff of employees it has paid over that 22 year period. It has purchased parts, tools, and trucks from International for 22 years. Even after the financial difficulties it has faced for the last few years the corporate fixed assets were valued on its books at over $200,000. Substantial obligations were incurred to improve the infrastructure of the dealership property.

31. There has been a permanent investment made in the dealership.

Would it Be Injurious or Beneficial to The Public Welfare For The Business of the Franchisee to Be Terminated?

32. With new truck sales of less than two per year, even Corning's expert witness conceded that termination of the dealership's ability to sell new International trucks would not have a substantial effect on the public's ability to buy trucks. International's witnesses testified that if a dealer closes or is terminated they take steps to see that the AOR is not left "open," but is reassigned to adjoining dealer(s) or a new dealer is appointed in the AOR as soon as an acceptable candidate can be located.

33. In 2000, Corning performed around $52,000 in warranty repair work. In 2001, Corning performed around $75,000 in warranty repair work. International's witnesses testified that if a dealer closes or is

terminated, International uses its sales and service records to contact customers in the area and let them know how their warranty and non-warranty repair work will be taken care of. That is accomplished by directing customers to the nearest International dealers, and contacting surrounding International dealers to see that they make their mobile maintenance vehicles available in the area until a new dealer can be established. If the area is determined to be unsuitable for a new sales facility, International will appoint a service dealer who is authorized to perform warranty work and acquire parts directly from International. In fact, this arrangement was suggested to Corning by International as long ago as 1995.

34. As to non-warranty work on International trucks and work on other lines of trucks, Corning and the other repair facilities in the area who have been doing the work in the past will be able to continue to do the work. The only effect of termination would be that Corning could no longer order parts directly from International, but would have to buy them from another International dealer. Since Corning has been delayed in obtaining parts from International due to its cash upon ordering status, there should not be any significant difference in the delay attendant to obtaining parts from another dealer. Corning may have to pay more for the parts from another dealer, than it does from International, but there was no testimony as to whether Corning has charged less for parts than other independent dealers in the area, so no conclusion can be reached as to the effect this might have on the consuming public.

35. Since Corning has factory-trained technicians on its staff, if Corning is terminated as a franchisee and no new sales franchise is to be established in that area, it would be sensible for International to

again offer to make Corning an authorized parts and service dealer, and for Corning to accept that offer. Even until such time as Corning could regain open account status, it would benefit from buying parts at wholesale and representing itself as an authorized warranty repair facility.

36. It is concluded that termination of Corning as an authorized International sales franchise will have no significant injurious effect on the public welfare. Termination as an authorized International warranty dealer may have some injurious effect for the interim period until a new authorized warranty facility can be established in the area, using either Corning or one of the many other repair facilities in the area but it cannot be said that the effect would be significant. There will be no effect on the public's ability to obtain non-warranty repair work on trucks of any make. There is no basis for concluding that there will be any significant benefit to the public, since it would not appear that the City of Corning is necessarily an appropriate place to locate a replacement sales franchise. If it were to be replaced by a dealer in that area which sold trucks at a rate comparable to other International dealers in the general area, the increased inter-brand and intra-brand competition would benefit the public.

Does Corning Have Adequate Sales and Service Facilities, Equipment, Parts and Service Personnel, and Has it Been Rendering Adequate Service to The Public?

37. International does not contend that Corning's sales and service facilities, equipment, parts or service personnel are inadequate, or that Corning has been rendering inadequate service to the public. This question may, thus, be answered in the affirmative.

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Has Corning Failed to Fulfill the Warranty Obligations Of The Franchisor Which it Is to Perform?

38. International does not contend that Corning has failed to perform any of International's warranty obligations which Corning is to perform. This question may, thus, be answered in the negative.

To What Extent Has Corning Failed to Comply with The Terms of the Franchise?

39. Paragraph 16 of the franchise agreement is entitled "Operation Requirements" and sets forth a number of terms and conditions which are to be met by the franchisee, and which International contends have been breached by Corning.

40. The first of these is paragraph 16(a)(2) which requires the franchisee: "To provide at all times sufficient working capital and net worth to enable it to fulfill properly all of the Dealer's responsibilities and duties under the Agreement."

41. Since the expansion of the business in 1997, Corning's financial condition has eroded to the point that it is unable to operate in a reasonable business manner. It has lost its credit status with its principal supplier of parts, it is on an inventory control flooring status which severely restricts its ability to maintain any sort of adequate inventory of trucks for sale or to be used as demonstrators, and by the Spring of 2001 its net worth had declined to only slightly more than $50,000, and its working capital was negative by over $150,000.

42. While Corning concedes that IFG did not act wrongfully in revoking Corning's open account privileges, it seems to contend that because it imposed a requirement of cash upon ordering, rather than a cash upon delivery requirement, Corning's failure to comply with

paragraph 16(a)(2) should be excused. The problem, of course, with this argument is that the revocation of credit was caused by Corning's already poor financial condition, i.e., being put on a cash basis did not cause the business to lose its credit-worthiness, rather its loss of credit-worthiness was caused by a variety of events, some external and some internal, and that resulted in being put on a cash basis. While cash on ordering may be considered more onerous than cash on delivery, no convincing evidence was presented from which it could be determined that imposition of the latter would have resulted in Corning being able to comply with paragraph 16(a)(2) of the franchise agreement. On the record which exists, the breach of this provision by Corning is substantial.

43. At the time of the hearing Corning also asserted that IFG had somehow increased the severity of Corning's financial problems by refusing to release its UCC-1 (a security interest filing). No mention of this position is made in Corning's post-hearing brief, however, and the evidence showed it to be without merit. International was under no legal obligation to release its UCC-1. No written demand was ever made of such a release until the eve of hearing. It became clear that what Corning really may have wanted was a "subordination," but had never asked for one. No convincing showing was ever made that third-party financing would have been forthcoming if a release or subordination had been requested and granted.

44. The second provision asserted to have been breached is paragraph 16(b)(1) which requires the dealer to "achieve a reasonable share of the market." The provision goes on at length to detail that the market share is measured in the dealer's trade area (its AOR), that the dealer's market penetration in its AOR will be compared to other

International dealers in their AORs, and that: "In any event, [International] will consider any factors relevant to the Dealer's performance as an entity, so that while the dominant tests are to be objective ones, equities of the Dealer shall temper the results of such tests."

45. As shown above, since 1995 Corning's penetration rate has been, at best, barely half that of the average penetration rate of the California/Nevada dealers to which it was compared, and many years it has been much worse. It has ranked near or at the bottom of all of the International dealers in that area. As Corning's expert conceded, if only the numbers are examined there is no question that good cause exists to terminate the dealership.

46. Corning contends, however, that International has not considered, as an equitable factor which should temper the results of those penetration surveys, that Mr. Boot suffered a heart attack in October 2000. A dispute exists as to whether any International employee involved in the evaluation of Corning's performance was made aware of Mr. Boot's heart attack. Even if it is assumed that International was aware of his condition at some point after October 2000, it cannot be concluded that such knowledge would have been such as to wipe out the dominate objective penetration results. Mr. Boot's heart attack did not occur until almost the complete end of fiscal year 2000, which is the last year of the six-year penetration rate study set out above. It, thus, had no effect on the very poor showing which Corning had been making for years, and simply cannot be used to "temper" those results or the conclusion to which they lead as to Corning's failure to achieve a reasonable share of the market. Neither did the heart attack result in an "incapacity" which would trigger termination of the franchise under

paragraph 30, or deferral of termination for incapacity under paragraph 31 of the franchise agreement. Similarly, the fact that Corning's expansion occurred at around the same time as a flood which hurt the local economy and lead to financial problems, cannot explain away a poor market share which preceded the event and continued on after the event. The fact of the matter is that Corning did not ever emphasize truck sales, and viewed itself as a truck repair facility that also sold a few trucks. This resulted in very poor sales and a very poor penetration rate, without regard to Mr. Boot's health or the effect of a flood.

47. The third provision asserted to have been breached is paragraph 16(b)(2) which requires the dealer to aggressively promote truck sales. The only reasonable explanation for Corning's poor sales figures and poor penetration rates is Corning's failure to aggressively promote the sale of trucks, and instead emphasize repair work to a very high degree.

48. The fourth provision asserted to have been breached is paragraph 16(b)(4) which requires the dealer to maintain a sufficient inventory of trucks. While Corning may have had a truck or two in inventory on occasion, the inventory control status of its flooring line made it very difficult to maintain an adequate inventory. It is clear that on the date of the notice of termination, March 15, 2001, Corning did not have any International truck in inventory, and was in breach of this provision.

49. The fifth provision asserted to have been breached is paragraph 16(b)(5) which requires the dealer to place orders for trucks. Again, while Corning had clearly ordered trucks over the time it was a dealer, its financial problems and the resultant inventory control status of its flooring line made the ordering of trucks a rare event in

recent years. At the time of the breach letter and the termination letter, Corning had no truck on order. It did order a truck after the breach letter but without making any payment provisions so that order was canceled. At the time of the termination letter and at the time of the hearing, Corning was in breach of this provision.

50. The sixth provision asserted to have been breached is paragraph 16(b)(6) which requires the dealer to participate in demonstrator programs. At the time the breach letter was sent, International was conducting a demonstrator program in which dealers were to exhibit trucks to potential customers in various ways. Corning did not participate in this program. It was in breach of this provision.

51. The seventh provision asserted to have been breached is paragraph 16(b)(7) which requires the dealer to maintain an effective prospect system by which to locate prospective purchasers. Corning's poor sales performance would indicate that it did not have an effective system for customer prospecting. It does do some advertising, in the form of calendars, mailings, and Yellow Pages listings, along with some limited television ads and ads in industry publications. Corning did not, however, present any evidence of having a "current list of prospective purchasers of International vehicles" as is required by paragraph 16 (b)(7).

52. While breaches of the requirements to participate in demonstrator programs and keep lists of prospective purchasers would not, individually, be of a substantial nature, when viewed as part of a systematic failure to perform virtually all of the obligations which result in satisfactory sales of the trucks, they take on more importance. A dealer cannot hope to sell trucks if it does not order

and stock trucks, and aggressively work to sell those trucks, thereby achieving a reasonable share of the market. It cannot order and stock trucks if it does not have sufficient working capital and net worth to obtain those trucks under the normal flooring arrangements used by dealers. Here, Corning's failure to comply with the terms of the franchise agreement has been extensive and substantial. This is especially so since the sale of vehicles is the very essence of the agreement between a new motor vehicle franchisor and its dealers, and it is the provisions dealing with that obligation which Corning has failed to perform for many years. A franchisor is entitled to have as its franchisee, one which will adequately perform these crucial aspects of the franchise agreement.

Has International Dealt Unfairly With Corning?

53. In its post-hearing brief, Corning makes four contentions of bad faith or unfair treatment by International which it asserts should result in denial of the termination. The first of these is that, in the breach and termination letters, International had asserted that Corning had breached paragraph 25 of the franchise agreement which requires dealers to furnish International each year with audited financial and operating statements. At the outset of the hearing, International conceded that it had so habitually accepted unaudited statements from its dealers, including Corning, that it had waived that contractual requirement and would not seek to assert in this proceeding that Corning was in breach of that provision. Corning had never sought to provide audited statements, and no evidence was presented of any harm befalling Corning between the time of the breach letter and the acknowledgment of waiver on the first day of the hearing. This claim cannot provide a bar to termination.

54. The second claim of bad faith is that International employees involved in evaluating Corning's performance did know of Mr. Boot's heart attack soon after it occurred but deny such knowledge. The testimony is directly contradictory, and no documentary evidence has been produced which speaks to the issue. As stated above, Mr. Boot's heart attack occurred so late in the relationship, after years of poor sales performance and severe financial decline, it could not be said that it should have tempered the evaluation in any event. Absent that, there does not seem to have been any damage suffered by Corning even if it is assumed that International did have knowledge of the heart attack before it sent the termination letter. This claim cannot provide a bar to termination.

55. The third claim of bad faith is that IFG put Corning on cash on ordering status, rather than on cash on delivery status. Corning conceded that revoking Corning's credit status was not wrongful. A creditor is entitled to take such steps as are reasonably required to protect itself against default, and it cannot be said that invoking one form of cash status rather than another is an act of bad faith. This is especially so in that there was no convincing showing that imposition of cash on delivery rather than cash on ordering would have made any significant change in Corning's financial condition. This claim does not provide a bar to termination.

56. The final claim of bad faith is that International did not allow Corning to set up an escrow account arrangement so that Corning could purchase engine oil from a third-party using the International open account. International's witness explained that the problem with such an arrangement would be that a dealer could order unlimited amounts from the third-party supplier and those amounts would go onto the open

account without any control by International, and could easily exceed the amount which had been placed in escrow with International. Because International could not control the purchases from the third-party, they refused to authorize the procedure. It cannot be said that such a response was an act of bad faith, especially in light of Corning's lack of credit-worthiness. This claim cannot be a bar to termination.

Determination of Issues

57. Corning has not transacted a sufficient amount of business, as compared to the business available to it.

58. Corning made a significant investment and incurred sufficient obligations at the commencement of the business, but financial reversals stemming from expansion of the business in 1997 and poor truck sales have resulted in Corning having insufficient capital and cash flow to operate the business with open account credit or with an unrestricted flooring loan. Corning's poor credit status prevents it from ordering or stocking new trucks on a normal basis, and from obtaining parts for repair work or resale on as timely a basis as would normally occur.

59. Corning has a significant permanent investment in the dealership.

60. It would not be injurious or beneficial to the public welfare for the franchise to be terminated.

61. Corning has adequate sales and service facilities, equipment, vehicle parts and qualified service personnel to reasonably provide for the needs of the consumers for the International trucks handled by it, and is rendering adequate service to the public.

62. Corning has not failed to fulfill the warranty obligations of International to be performed by Corning.

63. Corning has failed to comply with the terms of the franchise

to a significant extent, by its failure to sell a sufficient number of trucks or to have a sufficiently high penetration rate in its market area. This has resulted from a failure to aggressively promote sales, to provide sufficient working capital and net worth to enable it to fulfill its obligations under the franchise, to maintain a sufficient inventory in stock or as demonstrators, to order new trucks on a timely basis, to participate in demonstrator programs, or to maintain an effective prospect system. Each of these failures resulted in significant breaches of material terms of the franchise.

64. International has not acted unfairly or in bad faith in its dealings with Corning.

65. International has established that good cause exists to terminate the franchise.

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PROPOSED DECISION

The protest of Corning is overruled. Respondent has established that there is good cause to terminate Protestant's franchise. Respondent shall be permitted to terminate the franchise upon the effective date of this decision.

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

DATED: May 14, 2002

By ______________________
J. KEITH MCKEAG
Administrative Law Judge

Steven Gourley, Director, DMV
Terri Thurlow, Chief,
Licensing Branch,

STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

DOAH CASE NOS.: 04-2247

FINAL ORDER #: HSMV-06-471-FOF-DMV

LOVE NISSAN, INC.,

Petitioner,

vs.

NISSAN NORTH AMERICA, INC.,

Respondents.

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Sutherland, Asbill & Brennan
TALLAHASSEE OFFICE

FINAL ORDER

This matter came before the Department for entry of a Final Order upon submission of a Recommended Order by Ella Jane P. Davis, an Administrative Law Judge of the Division of Administrative Hearings, a copy of which is attached and incorporated by reference in this order[1]. The Department hereby adopts the Recommended Order as its Final Order in this matter.

WHEREFORE, it is Ordered that Love Nissan's Protest/Petition is dismissed and Nissan's April 1, 2004 Notice of Termination is ratified.

DONE AND ORDERED this 12th day of April, 2006, in Tallahassee, Leon County, Florida.

CARL A. FORD, Director
Division of Motor Vehicles
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
Tallahassee, Florida 32399
Filed with the Clerk of the
Division of Motor Vehicles
this 12th day of August, 1999.

[1] Petitioner, Love Nissan filed exceptions to the Recommended Order. Respondent, Nissan North America, Inc. filed a response to the exceptions. These exceptions are ruled on in the Appendix to this Order.

NOTICE OF APPEAL RIGHTS

Judicial review of this order may be had pursuant to section 120.68, Florida Statutes, in the District Court of Appeal for the First District, State of Florida, or in any other district court of appeal of this state in an appellate district where a party resides. In order to initiate such review, one copy of the notice of appeal must be filed with he Department and the other copy of the notice of appeal, together with the filing fee, must be filed with the court within thirty days of the filing date of this order as set out above, pursuant to Rules of Appellate Procedure.

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Exhibit D

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of S & C MOTORS, INC. dba S & C KIA, Protestant, v. KIA MOTORS AMERICA, INC., Respondent.	Protest No. PR-1859-03

DECISION

At its regularly scheduled meeting of September 21, 2005, the Public members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 21ST DAY OF SEPTEMBER 2005.

GLENN E. STEVENS
Presiding Public Member
New Motor Vehicle Board

NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
Sacramento, California 95814
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

S & C MOTORS, INC. dba S & C KIA,

Protestant,

v.

KIA MOTORS AMERICA, INC.,

Respondent.

Protest No. PR-1859-03

PROPOSED DECISION

PROCEDURAL BACKGROUND

PRELIMINARY FINDINGS

1. By letter dated April 17, 2003, Kia Motors America, Inc. (hereinafter "KMA" or "Respondent") gave notice pursuant to Vehicle Code section 3060[1] to Protestant S & C Motors, Inc. dba S & C Kia (hereinafter "S & C" or "Protestant") of Kia's intention to terminate S & C Kia's franchise.

2. S & C filed a protest on May 13, 2003.

3. On September 29, 2004, KMA issued a supplemental notice of termination.

[1] Statutory references are to the California Vehicle Code, unless stated otherwise.

4. KMA is a distributor of new motor vehicles and licensed by the California Department of Motor Vehicles. Respondent is located at 9801 Muirlands, P.O. Box 52410, Irvine, California. S & C is a licensed new motor vehicle dealer doing business at 2001 Market Street, San Francisco, California, and is a franchisee of KMA.

5. A hearing on the merits of the Protest was held on May 23 through May 26, 2005, before Administrative Law Judge, Richard J. Lopez.

6. Michael M. Sieving, Esq., of Law Offices of Michael M. Sieving, 350 University Avenue, Suite 105, Sacramento, California, represented Protestant.

7. Maurice Sanchez, Esq. and Michael P. Norton, Esq., formerly of Adorno, Yoss, Alvarado & Smith, 4 Park Plaza, Suite 1200, Irvine, California, represented Respondent. Mr. Sanchez and Amy Toboco Kun, Esq., of Baker & Hostetler LLP, 600 Anton Boulevard, Suite 900, Costa Mesa, California, 92626, currently represent Respondent.

8. At the outset of the hearing both the Protestant and the Respondent filed pre-hearing briefs. The briefs were read and considered by the Administrative Law Judge prior to the receipt of evidence.

9. Oral and documentary evidence and evidence by way of stipulation and official notice was received.

10. Two expert witnesses gave testimony. Thomas W. Longo, Managing Director, Western Region of Urban Science testified to dealer performance and John E. Altstadt testified as a forensic accountant.

11. Following the hearing, a briefing schedule was set, post-hearing briefs were filed, and the matter was submitted for decision on August 10, 2005.

ISSUE PRESENTED

Whether KMA Has Good Cause For The Termination Of The S & C Franchise

12. Pursuant to Section 3066(b), KMA has the burden to establish good cause for the termination of S & C's franchise. In determining whether KMA has established good cause for the termination, Section 3061 requires that the Board consider the "existing circumstances", including but not limited to all of the following:

(a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee;

(b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise;

(c) Permanency of the investment;

(d) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public;

(e) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee;

(f) Extent of the franchisee's failure to comply with the terms of the franchise.

FINDINGS OF FACT

Preliminary Findings

13. S & C Motors, Inc. has been a successful Ford dealer for many years in San Francisco. One of its three principal owners and

its President, Ray Siotto, has been active in automotive sales since 1971. Another of its principal owners, Fred Lautze, following his grandfather and father, is a third generation Ford dealer who oversees fleet sales. Fleet sales approximate 80% of the Ford business.

14. In late summer of 1999, representatives of KMA approached Mr. Siotto to inquire into the conditions upon which S & C Motors, Inc. would take on a Kia franchise and provide KMA with representation in San Francisco and thus become the first Kia dealer in that city.

15. Negotiations between S & C Motors, Inc. and Respondent ensued and on September 23, 1999, the parties entered into a Kia Dealer Sales and Service Agreement (hereinafter "Agreement" or "Franchise Agreement") thus establishing the S & C Kia franchise.

16. The Agreement delineated S & C's Area of Primary Responsibility (APR) to be, generally, the City of San Francisco and certain adjacent postal zip codes.

17. As part of the negotiations leading to the formation of the Franchise Agreement KMA prepared a Business and Operating Plan for S & C. That plan covered, among other items, the dealership business and ownership structure, the facilities, S & C staffing, advertising and merchandizing. Additionally, performance standards set average monthly goals of new Kia vehicle sales of 50 (30 Sephias and 20 Sportages) for the remainder of 1999 and 65 (40 Sephias and 25 Sportages) for 2000.

18. The Business and Operating Plan was signed and acknowledged by Mr. Siotto on behalf of S & C.

19. At the time of the formation of the Agreement KMA had in place a "cure" program in an attempt to increase sales of those dealers who - in the judgment of KMA - were underperforming. Part of

the cure program included placing a dealer on written notice of the underperformance and offering suggestions and assistance to increase vehicle sales productivity to cure the perceived underperformance. Additionally, the cure letter specified a schedule of sales that KMA expected the dealer to achieve in the ensuing months.

20. KMA is a subscriber to the R.L. Polk & Co.[2] vehicle registration data and thereby obtains periodic data for each KMA dealer's APR. KMA compares the APR registrations of all purchased vehicles against which Kia competes (Retail Competitive Group) to the total sales made by the Kia dealer located in the APR. KMA computes a Kia Sales Proficiency rating for each dealer and thereby has a measure for each Kia dealer against the Retail Competitive Group.

21. Using the methodology referenced in finding 20, KMA sent the first of a series of cure letters, dated February 20, 2001, to S & C to cure what KMA determined to be sales deficiencies that constituted a breach of the Agreement. Further, the cure letter informed S & C that KMA, acting though its District Sales Manager, would assist in formulating a plan of action to increase sales.

22. In March 2000, during the second year under the Agreement and prior to the first cure letter, KMA, as an inducement to increase sales by S & C, allocated $60,000 in "co-op"[3] funds for advertising on a "50-50" ratio. KMA thereby promised to reimburse $60,000 for $120,000 expended by S & C for advertising.

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[2] R.L. Polk & Co: A data provider to automobile manufacturers and others to help them track vehicles and vehicle trends by providing automotive information services and statistical reporting in the automotive marketplace.

[3] Co-operative advertising is a program wherein a manufacturer or distributor in this case KMA, will defray the cost of some dealer advertising.

23. From the time of the initial cure letter, KMA continued to apply the methodology referenced in finding 20 and continued to determine - in its judgment - that S & C was underperforming in its APR and in KMA's Western Region and thus continued to send cure letters to S & C.

24. Following the initial cure letter, a total of fourteen other cure letters were sent by KMA to S & C in the period between April 24, 2000 and August 9, 2002. The cure letters had the same general format as the initial cure letter.

25. The cure period, originally set to expire on November 30, 2001, was extended to July 31, 2002. Thereafter, discussions were held by principals of the parties which did not resolve the issue in dispute - S & C's performance under the Agreement - thus leading to the KMA Notice of Termination and the filing of the S & C Protest.

Findings Relating To The Amount Of Business Transacted By S & C As Compared To The Business Available To It (Sec. 3061(a))

26. In 1999, the total population of the San Francisco APR was approximately 666,000 with approximately 297,000 households. In 2004, the total population of that APR was estimated to be 658,000 with an estimated 294,000 households. San Francisco is the third largest city in population in California, the most populous state in the United States.

27. In 1999, the annual average employment in San Francisco County was 404,105[4] and in 2004 the annual average employment was 379,597. In 1999, the annual average employment in the San Francisco Metropolitan Area (San Francisco, Marin and San Mateo counties) was

[4] The data source for the demographic statistics is from the Bureau of Labor and Statistics as utilized by Urban Science Applications, Inc.

956,080 and in 2004, the annual average employment in that area was 861,174.

28. During the period of the Franchise Agreement the average household income in San Francisco was approximately $70,000, compared to the average household income of the typical Kia buyer which was approximately $55,000.

29. During the period of 1999 through 2003, using Polk data, the vehicle registrations for the Kia retail competitive segment in the APR ranged from a low of 5,872 in 1999 to a high of 11,685 in 2002.

30. During the period of 1999 through 2003, using Polk data, the Kia retail expected registrations in the San Francisco APR, when compared with the Western Region APR's average, were 320 for 1999; 325 for 2000; 409 for 2001; 491 for 2002 and 449 for 2003.

31. The combined factors present in S & C's APR, that is: total population; income levels; annual average employment; and sales of vehicles competitive to Kia vehicles demonstrate that significant business is available to S & C in its APR, as confirmed by finding 30.

32. As part of its quality control KMA issues a calendar year Business and Operating Plan (Plan) in conjunction with its dealers. The Plans, including the initial Plan referenced in Finding 17, are incorporated by reference in the Agreement pursuant to Part VIII of the Agreement.

33. The Plan expressly states: if sales proposed by a dealer are less than sales based on the predicted amount of business available in the dealer's APR during the calendar year then market potential will not be attained.

34. For 1999, the Kia California dealer average for retail sales was 419 and the Western Region dealer average was 482. In the first

10 months of operations, S & C averaged 5 sales per month. That number was well below the amount of business reasonably available in S & C's APR and, therefore, market potential was not attained in 1999.

35. The year 2000 was the first full year of the franchise. For that year the Kia California dealer average for retail sales was 474 and the Western Region dealer average was 438. The amount of business reasonably available, according to the Plan, was 584 vehicle sales. In 2000, S & C sold 67 Kia vehicles. Accordingly, market potential for the year 2000 was not attained.

36. For the year 2001, the Kia California dealer average for retail sales was 472 and the Western Region dealer average was 554. In the 2001 Plan, the predicted amount of business (sales) in S & C's APR was 827. S & C, in that Plan, proposed 217 sales. Actual sales for that year totaled 121. Accordingly, market potential was not attained for the year 2001.

37. For the year 2002, the Kia California dealer average was 554 and the Western Region dealer average was 717. The 2002 Plan predicted the amount of business in S & C's APR was 657 while S & C proposed 207 sales. Actual sales for that year totaled 61. Thus, market potential was not attained for the year 2002.

38. For the year 2003, the Kia California dealer average was 512 and the Western Region dealer average was 742. In the 2003 Plan, the predicted amount of business in S & C's APR was 632 sales while S & C proposed 150 sales. Actual sales for that year totaled 34. Thus, market potential for the year was not attained.

39. Since April 23, 2003 (the date of the termination notice) to the present, S & C has failed to achieve market potential. In 2004, S & C sold 17 Kia vehicles. S & C sold 5 Kia vehicles in the 1st

quarter of 2005. In the period just prior to this hearing, May 5 through May 22, S & C sold no Kia vehicles. Further, in year 2004 the annualized Kia California dealer average was 529 and the Western Region dealer average was 805.

40. Between the period March through November 2001, 24 Kia dealers were subject to KMA's cure program. Eleven of that group exceeded the cure program sales objectives; six were close to achieving the objectives. S & C was last in achievement having reached approximately 30% of the Western Region dealer average.

41. In sum, during each year of the term of the Agreement, S & C did not capture the opportunity for sales in its APR. The population, income and other demographic features of the APR presented an opportunity for a significant number[5] of sales during each year of the term of the franchise.

Findings Relating To The Investment Necessarily Made And Obligations Incurred By The Franchisee To Perform Its Part Of The Franchise (Sec. 3061(b))

42. S & C Motors, Inc., operating out of the present facilities since the 1970's as a Ford dealer in the San Francisco metropolitan area, commenced business there in 1928. As such it has significant and permanent investment in those categories that provide success and the expectation of profit as a Ford dealer: facilities (on site, storage and service); equipment; personnel; new Ford inventory including Ford demonstrators; signage and advertising; and an S & C Ford website.

43. The Kia product line shares the facility with the Ford product line. At the time of the formation of the Franchise Agreement

[5] Using any of the following measures: Polk data; Operating and Business Plan performance objectives; California Dealer Average; and Western Region Dealer Average.

the Kia product line consisted of two models. Presently, there are six Kia models. Protestant has made no investment at any time or undertaken any obligation during the time period of the Franchise Agreement to increase the facilities (physical plant) to accommodate the line of Kia vehicles.

44. A small area of the sales facility is dedicated to Kia sales and at any given time during the period of the franchise few Kias were on display. At no time has the full line of Kias been on display. There has been insufficient, that is minimal, investment in providing a sales area to allow such a display.

45. A small area of the facility is dedicated to the service of Kia vehicles and storage of Kia parts. Protestant did not store sufficient parts and therefore, had to resort to emergency orders to attempt to satisfy consumer demands. There has been insufficient (minimal) investment in Kia service and parts to consistently satisfy the purchasers of new Kia vehicles. As a result, S & C was consistently in the bottom 10% of Kia dealers in the United States in KMA's KSI (Kia Service Index) evaluations.

46. Despite repeated requests to do so from KMA, S & C has not invested the necessary funds and time to train sales personnel dedicated to handling the Kia new vehicle business exclusively and has not invested the funds necessary to hire and retain a sales manager to oversee the Kia new car business exclusively. There was at no time during the period of the franchise a sales force that sold only Kia vehicles.

47. Despite the KMA "co-op" program and despite KMA's repeated request to advertise the Kia product line, Protestant failed to invest sufficient funds in an advertising program to take advantage of a

viable Kia market in its APR.

48. The investment in advertising was deficient in the following particulars: there was little spent on print or television advertising directed toward the San Francisco area's Spanish Language population; there was little spent for regular weekly advertising; and there was no S & C Kia website, a potent form of advertising.

49. Over the period of time of the franchise Protestant has failed to invest in a sufficient inventory of new Kias to fulfill sales requirements set forth in the Business and Operating Plans. Protestant's monthly inventories were as follows for each year in operation as a Kia dealer.

Year	Monthly Average
1999	43.3
2000	45.3
2001	35.2
2002	22.2
2003	16.1
2004	7.4
2005 (through April)	8.5

At the time of the hearing, on May 23, 2005 Protestant had 1 vehicle in stock.

50. The generally accepted industry standard, as recommended by the National Automotive Dealers of America, is a 60-day supply of inventory. At no time during the period of the franchise did S & C meet that standard. To quote, the credible testimony of Kia's District Sales Manager, Don Smith: "...you can't sell them if you don't have them...Without inventory there's no starting point..." At no time during the course of the franchise was there sufficient inventory to allow the use of a demonstrator by a prospective Kia purchaser. Mr. Smith did testify, credibly, with regard to the 2004 monthly average of 7.4 that: "It's (S & C) basically out of business

for all intents and purposes."

51. In sum, over and above the investment in Ford, no additional money or capital was invested in equipment, personnel, or facilities, to support a viable Kia enterprise. Sufficient monies laid out for advertising and an adequate inventory on hand were obligations under the Agreement of S & C. Protestant failed to incur those obligations and thus failed to establish, in fact, a Kia enterprise.

Findings Relating To The Permanency Of The Investment (Sec. 3061(c))

52. There was no expansion of the existing facility by S & C Motors, Inc. and, therefore, there was no capital outlay for physical plant and, therefore, there was no permanent investment in the facilities other than as a Ford dealer. Pursuant to the Franchise Agreement, KMA will repurchase all new, used and unsold vehicles as well as parts, signs, and tools should the franchise be terminated. At the time of the hearing there was no permanent investment in inventory.

53. There were some funds expended by S & C to train personnel with regard to the Kia product line. However, the funds that were spent were minimal and sporadic.

54. S & C did install a "Kia" sign below a "Ford" sign at the entrance to the facility. However, other advertising - print, radio and television - was minimal and sporadic. Additionally, S & C refused to outlay monies of its own at times when "co-op" funds were available to it for Kia advertising. There was no investment in Internet advertising.

55. The lack of a permanent investment in the Kia enterprise is demonstrated as follows: In 2000, the total Kia sales (vehicle,

service and parts) were 1.00% of total dealership (Ford and Kia) sales; in 2001, total Kia sales were 1.66% of total dealership sales; in 2002, Kia sales were 0.86% of the total; in 2003, Kia sales were 0.75% of the total; in 2004, Kia sales were 0.57%, or a de minimis part, of the total. Because of the lack of investment, S & C's Kia operations have lost money in each year of the franchise except for 2004.

56. In sum, S & C's investment was minimal and at no time was there sufficient investment to allow S & C to meet its obligations under the Agreement. There were no outlays, permanent or otherwise, for plant and equipment. Monies spent for advertising and the training of personnel were not lasting but were sporadic and, therefore, were not permanent.

Findings Relating To Whether It Is Injurious Or Beneficial To The Public Welfare For The Franchise To Be Modified Or Replaced Or The Business Of The Franchisee Disrupted (Sec. 3061(d))

57. S & C is conveniently located in a densely populated city. Its competitors are doing well. Despite these circumstances S & C has averaged but 60 sales per year for the five full years of its operation: 2000-2004. Because of a failure to advertise and promote the sale of Kia vehicles, too few vehicle consumers are aware that there is, in fact, a Kia dealer in San Francisco.

58. At present, KMA can make available to S & C the full line (six models) of Kia vehicles. Combining the six models with the permutations that exist for each model - color, trim, and other options - a wide choice of Kia vehicles is available for the consideration of the public. Assuming the consuming public is aware of S & C as a Kia dealer, the lack of inventory, demonstrators and

fully trained sales personnel deprive the consuming public of a reasonable choice in the potential purchase of a Kia vehicle.

59. Under the Franchise Agreement, S & C has an obligation to meet the needs of the consuming public in the APR. The public lacks awareness of S & C as a Kia dealer. The absence of a reasonable choice of Kia vehicles available to the public demonstrates that S & C's operation as a Kia dealer fails to meet the needs of consumers in the APR.

60. If the S & C Kia franchise is terminated, S & C Motors, Inc. will continue to do what it has done for a number of decades: operate as a Ford dealership. Therefore, the public will not be denied the presence of a dealer who meets the needs of the public marketplace with regard to the Ford line of vehicles. Operating as the sole Kia dealership in San Francisco, S & C has not met, and is not meeting, the needs of the public marketplace in that city.

61. If the S & C franchise is terminated, KMA intends to replace it with a new dealership in the existing APR which will meet KMA's sales and performance objectives and which will provide customer care and service by a trained and qualified staff.

62. In sum, S & C, operating as a Kia dealer, has failed to serve the public in the APR marketplace. Therefore, the appointment of a new Kia dealer in that marketplace will be beneficial to the public interest.

Findings Relating To Whether The Franchisee Has Adequate Motor Vehicle Sales And Service Facilities, Equipment, Vehicle Parts, And Qualified Personnel To Reasonably Provide For The Needs Of The Consumers For The Motor Vehicles Handled By The Franchisee And Has Been And Is Rendering Adequate Services To The Public (Sec. 3061(e)).

63. S & C's KSI is below the average for dealers in the Kia

Western Region. Limited space is devoted to Kia service and limited space is set aside for equipment and vehicle parts, therefore, the motor vehicle sales and service facilities, including equipment and vehicle parts, fail to provide for the needs of the consumers for the Kia vehicles handled by S & C.

64. Over the course of the franchise there has been no management program to assign personnel solely to the Kia line for sales and service. There are no computer-trained personnel assigned to the Kia line. KMA does offer, through Kia University, on-line training for dealer personnel. For the calendar year 2005 to date, and before that time, no on-line training was undertaken by S & C personnel and no tests with regard to the Kia product line were taken.

65. KMA does maintain a website (www.Kia.com) wherein a prospective purchaser can be "linked" to any Kia dealer nationwide. By use of this website a number of potential customers made Internet inquiry with S & C. A few of those persons were contacted by S & C but most were not. Thus, this Internet tool for leads to potential sales was not utilized by S & C.

66. In the third and fourth quarters of 2004, Protestant failed to achieve any of KMA's training requirements. In 2005, Protestant failed to achieve any of KMA's training requirements, including tests, with regard to any of the models.

67. In sum, the dealership facilities have not been modified to reasonably accommodate Kia sales or provide for adequate service or equipment and there is an inadequate number of trained personnel. Accordingly, S & C is rendering inadequate services to the public.

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Findings Relating To Whether The Franchisee Fails To Fulfill Warranty Obligations Of The Franchisor To Be Performed By The Franchisee (Sec. 3061(f))

68. No evidence was proffered to establish that S & C failed to perform the warranty obligations under the Franchise Agreement, and KMA does not contend that S & C failed to satisfy its warranty obligations.

Findings Relating To the Extent of the Franchisee's Failure To Comply With The Terms Of The Franchise (Sec. 3061(g))

69. The Dealer Sales and Service Agreement referenced in this Decision as the Franchise Agreement or Agreement, sets forth the duties, obligations and responsibilities of KMA and S & C under the Agreement. The sections referenced in the Findings that follow, all appear in Part 2 - Standard Provisions of the Agreement.

70. Section II of the Agreement provides, in part:

> Dealer accepts its appointment as an authorized Kia Dealer and agrees to (i) vigorously and aggressively sell and promote Kia Products...
> (Exh. 11, p. 5).

Section IX(B)(1) of the Agreement provides:

> Area Of Primary Responsibility. DEALER shall vigorously and aggressively promote, solicit and make sales of Kia Products within its APR. DEALER'S APR may be altered or adjusted by COMPANY at any time. The APR is a tool used by COMPANY to evaluate DEALER'S performance of its obligations. DEALER agrees that it has no right or interest in any APR that COMPANY may designate. As permitted by applicable law, COMPANY may add new dealers to, relocate dealers into or remove dealers from the APR assigned to DEALER.
> (Exh. 11, p. 13).

71. As has been demonstrated with particularity in Findings 34 through 39, 50, 52 through 55, 57 and 58, Protestant failed to achieve the market potential available in its APR; failed to advertise and promote Kia products; did not have a permanent investment in the Kia

enterprise; and at no time had a sufficient inventory and trained personnel. Those failures and omissions establish that S & C did not vigorously and aggressively sell or promote or solicit for sale Kia products within its APR. Accordingly, Protestant has breached Sections II(i) and IX(B)(1) of the Agreement.

72. In conjunction with its duty to vigorously and aggressively sell and promote Kia Products, S & C agreed to provide Business and Operating Plans with updates to describe how S & C intended to fulfill its obligations under the contract including the obligations to sell and promote Kia products.

73. Section VIII of the Agreement provides in pertinent part:

> A. <u>BUSINESS AND OPERATING PLAN</u>:
>
> In consultation with COMPANY, DEALER has prepared a business and operating plan ("Plan")...which describes how DEALER will (i) develop the Area of Primary Responsibility ("APR") assigned to DEALER by COMPANY and set forth in the Plan and (ii) fulfill its sales and service commitments under this Agreement.... DEALER hereby agrees to develop its APR and conduct its operations in accordance with the Plan, as revised from time to time pursuant to Paragraph B below.
>
> B. <u>ANNUAL PLAN REVIEW</u>
>
> DEALER agrees to update the Plan annually or more often as desired or necessary and submit it to COMPANY for joint review. The process of updating each Plan shall include a performance evaluation and review of proposed modifications to the prior year's Plan as contemplated by Paragraph C below. The Plan shall be subject to COMPANY's final approval.
>
> C. <u>PERFORMANCE EVALUATION</u>
>
> DEALER's performance of its obligations is essential to the effective representation of Kia Products and to the reputation and goodwill of COMPANY, DEALER and other Kia Dealers. Therefore, DEALER agrees to review its performance against the prior year's Plan in its updated Plan. COMPANY and DEALER will use this analysis and any other factors COMPANY or DEALER deems appropriate as the basis for jointly evaluating DEALER's performance so that any necessary improvements

> can be made. Factors considered in evaluating DEALER's performance will include, without limitations, the attainment of or failure to attain the prior year's objectives, DEALER's performance trends, DEALER's financial performance and the manner in which DEALER has conducted its operations....
> (Exh. 11, pp. 8-9).

74. In the initial Plan as set forth in Finding 17, S & C agreed that it would sell an average of 65 Kia vehicles per month in 2000. S & C sold 67 vehicles during 2000, or about 5.6 vehicles per month. S & C represented that it would spend $30,000 per month on advertising from October 1999 through December 2000. S & C spent $5,820 per month in advertising in 2000. S & C failed to use $269,180 in advertising co-op funds in its first 12 months of operation. Under the co-op advertising program, KMA agreed to reimburse S & C on a 66% - 33% basis, meaning KMA would pay 2/3 and S & C would only have to spend 1/3 in approved advertising to receive up to $300,000 in reimbursement for the 12 month period.

75. In the 2001 Plan, KMA suggested that S & C sell 827 Kia vehicles. S & C stated it could sell 217 vehicles. In 2001, S & C sold 121 vehicles, 706 below what Kia had proposed, and 96 below what S & C had promised to sell. S & C's average monthly inventory for the year was 35 vehicles.

76. In the 2002 Plan, KMA suggested that S & C sell 657 Kia vehicles. S & C stated it could sell 207 Kia vehicles. In 2002, S & C sold 61 vehicles, 596 below what Kia had proposed and 146 below what S & C agreed to sell. S & C's average monthly inventory for the year was 22 vehicles.

77. In the 2003 Plan, KMA suggested that S & C sell 632 Kia vehicles. S & C stated it could sell 150 Kia vehicles. In 2003, S & C sold 34 vehicles, 598 below what KMA had proposed and 116 below

what it had agreed to sell. S & C's average monthly inventory for the year was 16 vehicles.

78. In 2004, S & C sold 17 vehicles, an average of only 1.4 vehicle sales per month. S & C's average monthly inventory for the year was 7 vehicles.

79. For its five full years in operation (2000 - 2004), S & C's sales effectiveness has averaged only 8.7% or less of Western Region average. This deficiency has continued despite an increase of the Kia model lineup from two models in 1999 to six models in 2004.

80. Protestant failed to develop its APR, failed to fulfill sales commitments and failed to conduct its operations in accordance with the Business and Operating Plans. Accordingly, Protestant has breached Section VIII of the Agreement.

81. In conjunction with its duty to vigorously and aggressively sell and promote Kia Products, S & C agreed to an advertising effort to enhance sales opportunities.

82. Section IX(A)(9) of the Agreement provides in pertinent part:

> Advertising. COMPANY and DEALER agree that a "three-tier" advertising and merchandising effort is an effective way to establish and maintain focus on (1)(sic) national and Product messages, (ii) regional Kia Dealer group messages, and (iii) local and individual Kia dealer messages. COMPANY shall take full responsibility for, and fund, as COMPANY deems appropriate, advertising for (i) and (ii) above...DEALER shall take full responsibility for, and fund advertising for (iii) above, bearing in mind sales and customer satisfaction needs and applicable laws and regulations in developing and delivering its advertising and merchandising messages.
> (Exh. 11, p. 13).

83. S & C Motors, Inc.'s advertising budget has increased over the past few years, however S & C has spent only minimal amounts on

advertising its Kia dealership and its Kia advertising has decreased every year. At the outset of the franchise, S & C represented that it would expend approximately $30,000 per month on Kia advertising from October 1999 through December 2000. S & C spent only in $5,820 per month in advertising in 2000. In 2004, S & C spent only $47 on Kia advertising.

84. Protestant failed to promote Kia products. Accordingly, Protestant has breached Section IX(A)(9) of the Agreement.

85. In conjunction with its duty to vigorously and aggressive sell and promote Kia products, S & C agreed to maintain an adequate inventory of Kia vehicles and to have demonstrators on hand.

86. Section IX(B)(2) of the Agreement provides:

> 2. Stocks. Subject to COMPANY's filling DEALER's orders, DEALER shall maintain in showroom-ready condition stocks of Kia vehicles and other Kia Products of an assortment and quantity adequate to meet DEALER's share of current demand in DEALER's APR and DEALER's sales and services responsibilities under this Agreement.
> (Exh. 11, p. 13).

Section IX(B)(4) of the Agreement provides:

> 4. Demonstrators. From its inventory, DEALER shall keep available at all times in good appearance and running order current model year demonstrators of each model of Kia vehicle in such quantities as are sufficient to satisfy customer test drive demands.
> (Exh. 11, p. 13).

87. To compete with the Retail Competitive Group, S & C should maintain, at minimum, an inventory of approximately 60 to 80 vehicles. In 2001, S & C's average monthly Kia inventory for the year was 35 vehicles. In 2002, S & C's average monthly Kia inventory for the year was 22 vehicles. In 2003, S & C's average monthly Kia inventory for the year was 16 vehicles. In 2004, S & C's average monthly Kia

inventory for the year was 7 vehicles. Over the years of the franchise, S & C has never approximated the minimum inventory.

88. As of December 2003, S & C stocked a total of 10 new Kia vehicles and its annual inventory is inadequate to promote the Kia line. Between October and December of 2003, S & C stocked 3 Kia vehicles.

89. S & C does not maintain demonstrators for each model of Kia vehicle and at times there are no demonstrators available for prospective purchasers.

90. Protestant failed to maintain a sufficient inventory to meet S & C's share of current demand in its APR and failed to fulfill its sales and service responsibilities. Accordingly, Protestant has breached Section IX(B)(2) of the Agreement.

91. Protestant failed to have on hand current model-year demonstrators, at any time, to satisfy customer test-drive requests or demands. Accordingly, Protestant has breached Section IX(B)(4) of the Agreement.

92. In conjunction with its duty to vigorously and aggressively sell and promote Kia products, S & C agreed to comply with Kia programs and to develop its own programs designed to develop and foster good relationships with its customers and satisfy basic customer satisfaction levels.

93. Section X of the Agreement provides in pertinent part:

> DEALER shall comply with COMPANY programs and develop and maintain its own programs designed to develop good relationships among COMPANY, DEALER and the consuming public. DEALER shall make every effort to handle satisfactorily all matters brought to its attention relating to the sale and servicing of Kia vehicles and other Kia Products and make regular contact with owners and users of Kia vehicles and other Kia Products in DEALER's APR...

(Exh. 11, p. 16).

94. S & C has provided substandard customer service as reflected in its KSI figures which have been consistently low as compared to the 170 to 180 dealers in the Western Region. In 2002, S & C ranked 131st in the Western Region. S & C's KSI ranking declined to 167th in 2003, 164th in 2004 and 168th year-to-date in 2005. S & C's Kia Purchase Index ("KPI") rankings have also been consistently below average in the Western Region. S & C ranked 30th in 2002, 133rd in 2003, 130th in 2004 and 153rd, year-to-date, in 2005. S & C does not maintain a sufficient stock of parts inventory to satisfy customers on a daily basis. Instead, S & C relies on emergency parts orders resulting in delay and inconvenience to its customers.

95. Protestant has failed to comply with its duty to customers and maintain good relations with its Kia customers. Accordingly, Protestant has breached Section X of the Agreement.

96. In conjunction with its duty to vigorously and aggressively sell and promote Kia products, S & C agreed to hire and train a sufficient number of competent personnel to comply with its obligations under the Agreement.

97. Section IX(A)(4) of the Agreement provides:

> 4. Personnel. DEALER shall employ and train a sufficient number of competent personnel of good character, including one or more persons who will function as sales manager, service manager and parts manager, sales persons, service technicians and parts personnel to fulfill all of DEALER's responsibilities under this Agreement and as recommended by COMPANY, and shall cause such personnel to attend such training schools as COMPANY may from time to time require at DEALER's sole expense.
> (Exh. 11, p. 10).

98. S & C Motors, Inc. did not hire any new Kia salespeople after obtaining the Kia dealership. The dealership's salespeople sell

both Ford and Kia products. The employees hired by S & C Motors, Inc. are not adequately trained to sell the Kia products line and did not participate in on-line training courses offered by Kia.

99. Protestant has failed to train, establish and dedicate a sales force to fulfill S & C's responsibilities under the agreement to promote, sell and service Kia vehicles. Accordingly, Protestant has breached Section IX(A)(4) of the Agreement.

100. In sum, S & C has failed to promote the sale of Kia products, has failed to maintain an adequate inventory of vehicles, and has failed to achieve an acceptable level of Kia sales given the potential number of sales available to it in its APR and has, therefore, materially breached the Agreement.

DETERMINATION OF ISSUES

101. KMA has established that S & C is not conducting an adequate amount of business as compared to the business available to it. [Section 3061(a)]

102. KMA has established that S & C has not made the investment necessary and incurred the obligations necessary to perform its part of the Kia franchise. [Section 3061(b)]

103. KMA has established that S & C's investment was not permanent. [Section 3061(c)]

104. KMA has established that it would not be injurious and would likely be beneficial to the public welfare for the franchise to be replaced. [Section 3061(d)]

105. KMA has established that S & C does not have adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by it and has not been and is

not rendering adequate services to the public. [Section 3061(e)]

106. KMA has not established that S & C failed to fulfill the warranty obligations of KMA to be performed by S & C. [Section 3061(f)]

107. KMA established that S & C has failed to comply with the terms of the franchise. [Section 3061(g)]

108. By reason of the foregoing Determination of Issues and the Findings herein, Respondent has met the statutory burden of proof required by Section 3066(b) and did establish, under Section 3061, good cause for the termination of the S & C franchise.

PROPOSED DECISION

The protest is overruled.

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

DATED: September 7, 2005

By: RICHARD J. LOPEZ
Administrative Law Judge

Joan Borucki, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV