

1 NEW MOTOR VEHICLE BOARD
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of)
12 CALABASAS MOTORCARS, INC.,) Protest No. PR-1771-01
13 Protestant,)
14 vs.) RULING ON RESPONDENT'S MOTION
15 VOLVO CARS OF NORTH AMERICA, INC.) TO REJECT PROTEST FOR LACK
16 Respondent.) OF JURISDICTION
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7 1. This matter comes before the Public Members of the Board to
8 consider the ruling of Administrative Law Judge Skrocki in the matter of
9 Volvo Cars of North America's, Inc. (VCNA or Volvo) Motion to Dismiss the
10 Protest of Calabasas Motorcars, Inc. (CMI) on the grounds that this Board
11 does not have jurisdiction to decide this case on the merits.

12 2. Judge Skrocki ruled on October 29, 2001, that an evidentiary
13 hearing will be necessary to determine whether or not VCNA has complied
14 with the terms of the 1994 Sales Agreement (SA), specifically paragraph
15 I(H), and whether the appointment of Galpin Jaguar Lincoln Mercury, Inc.,
16 dba Galpin Volvo (Galpin) as a dealer within the area of responsibility
17 (AOR) claimed by CMI is allowed under the terms of the SA. The SA, the
18 declarations, the briefs, and the case law have been read and considered
19 by us in making this ruling. We disagree with Judge Skrocki's ruling.

20 3. It is incumbent upon this Board to determine if the proposed
21 modification violates that SA. Both parties here agree that the 1994 SA
22 is the franchise agreement which is relevant in determining whether VCNA
23 has effectively modified CMI's rights to operate a dealership in the Van
24 Nuys area of the San Fernando Valley. Neither party suggests that the
25 establishment of the Galpin facility on Roscoe Boulevard is within the 10
26 (ten) mile relevant market area (Vehicle Code¹ section 507) of its existing
27 facility, and there is no issue that the Roscoe location is within the
28 current AOR contemplated in the SA. All cases brought before this Board

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

1 under section 3060 are borne in contract.

2 Consideration of Request to Dismiss

3 4. CMI has argued that this Board does not have jurisdiction to
4 entertain motions to dismiss in protest matters. This issue has been
5 brought before the Board and been decided in favor of the Board having the
6 power to rule on motions to dismiss (See *Automotive Management Group, Inc.*
7 *v. New Motor Vehicle Board* (1993) 20 Cal.App.4th 1002, 1011-1013).

8 The Interpretation of the Sales Agreement

9 5. According to the terms of the SA, VCNA is allowed to establish
10 dealers within its sole discretion and within the AOR from time to time.
11 Paragraph I(E) of the SA gives CMI nonexclusive rights to the AOR.
12 Similarly, the SA not only allows for the addition of a new franchisee
13 within the North Hills market, it provides specifically detailed steps
14 that VCNA must first take in order to appoint a second dealer into that
15 AOR.

16 6. These steps are twofold. First, VCNA must provide 30 day
17 written notice, second, VCNA must provide a written survey showing need
18 thereof. VCNA has complied with both requirements.

19 7. Both the published decisions of *BMW of North America, Inc. v.*
20 *New Motor Vehicle Board* (1984) 162 Cal.App.3d 980, and *Ri-Joyce, Inc.*
21 *v. New Motor Vehicle Board* (1992) 2 Cal.App.4th 445, were considered by
22 this Board. Both decisions reviewed dealer protests for modification of
23 dealership franchise agreements. Neither *BMW* nor *Ri-Joyce* has held that
24 the Automobile Franchise Act (section 3000, et seq.) preclude a
25 franchisor from granting an exclusive dealership beyond an existing
26 dealer's relevant 10-mile market area, or that a franchisee would be
27 precluded from protesting the modification of such an agreement by
28 establishment of a new dealer within the AOR. In other words, the

1 establishment of 10-mile AOR's may be modified by agreements between the
2 parties, and in these cases, the agreements will control. These
3 arrangements are matters which are left to the agreement between the
4 parties. If a franchise agreement does grant a dealer an exclusive,
5 unmodifiable trading area, then encroachment upon that area may
6 constitute a modification of the franchise which is subject to protest
7 under section 3060 (*Ri-Joyce v. NMVB, supra*, 2 Cal.App.4th at p.456).
8 Conversely, if the agreement makes an AOR nonexclusive, or otherwise
9 diminishes the rights of a dealer to protest the eventual appointment of
10 a successive dealership, those contractual obligations will not be
11 disturbed (See *BMW v. NMVB, supra*, 162 Cal.App.3d at p. 990.)

12 8. Although CMI may argue that the survey submitted by VCNA is
13 insufficient, and thus ripe for challenge and review as being
14 incomplete, inadequate, or not compliant with industry standards, or
15 will argue that the conclusion suggesting the need for a new dealership
16 is faulty, CMI has no rights to object to the appointment of the Galpin
17 dealership into the AOR for two reasons. First, the SA, and the
18 territory given to CMI is nonexclusive. Second, the agreement
19 specifically states that nothing contained in the agreement shall
20 require or be construed to require dealer's approval of Distributor's
21 appointment of any authorized dealer. The plain meaning of this text is
22 that despite any arguable insufficiency within the survey, the contact
23 between the parties does not give CMI the right to protest who, when, or
24 where a dealership is appointed into the AOR now enjoyed by CMI.

25 9. In reading the SA, principles of contract construction are
26 utilized to decide both the plain meaning of the contract, and the
27 intentions of the parties. Contracts are to be read and decided based
28 on the following fundamental principles of construction:

1 a. Civil Code section 1636: "A contract must be so interpreted
2 as to give effect to the mutual intention of the parties as it existed
3 at the time of contracting, so far as the same is ascertainable and
4 lawful."

5 b. Code of Civil Procedure section 1858: "In the construction of
6 a statute or instrument, the [trier of fact] is simply to ascertain and
7 declare what is in terms or in substance contained therein, not to
8 insert what has been omitted, or to omit what has been inserted; and
9 where there are several provisions or particulars, such a construction
10 is, if possible, to be adopted as will give effect to all."

11 c. Civil Code section 1639: "When a contract is reduced to
12 writing, the intention of the parties is to be ascertained from the
13 writing alone, if possible; subject, however, to the other provisions of
14 this Title."

15 d. Code of Civil Procedure section 1856: "(a) Terms set forth in
16 a writing intended by the parties as a final expression of their
17 agreement with respect to such terms as are included therein may not be
18 contradicted by evidence of any prior agreement or of a contemporaneous
19 oral agreement."

20 10. Since there is no issue of whether CMI is performing its
21 obligations, we have assumed that it is, and the first clause of
22 paragraph I(H) will not be addressed. The rights reserved by VCNA are
23 extensive. It has the right to change the AOR from time to time, it has
24 the right to appoint second, or third dealers in the AOR, and; it has
25 the right to determine, in conjunction with CMI, the performance
26 standards applicable to the agreement. CMI does not have the right to
27 challenge, select or even object to the appointment of another Volvo
28 dealer within the AOR, and the only requisites mandated are those

1 discussed in this opinion.

2 11. The terms of the SA are sufficiently clear. The rights of
3 VCNA to do what they are proposing to do are both nonexclusive, and done
4 in compliance with the prerequisite steps of advising CMI of Volvo's
5 intentions to allow a new dealership into North Hills. Similar to the
6 facts in *BMW, supra*, the agreement clearly and unequivocally provides
7 that CMI, despite its contentions to the contrary, is not automatically
8 entitled to object to the establishment of a new dealership within the
9 Van Nuys AOR, which is more than 10 miles from its existing Calabasas
10 store. Volvo expressly reserved the right to appoint other dealers into
11 that area, and CMI agreed to that contractual provision. The contract
12 cannot be reasonably construed to contain any other logical conclusion.

13 12. This matter is distinguishable from the conclusion of *Ri-*
14 *Joyce, supra*, in that the agreement in *Ri-Joyce* was subject to multiple
15 interpretations as to the definition of the term, "near." The *Ri-Joyce*
16 court stated: "'Near'" is not defined in the agreement. Mazda asserts
17 that 'near' should be construed consistent with section 3062 so that it
18 corresponds with *Ri-Joyce's* relevant market area. That is one, but not
19 the only, possible interpretation of the contractual term" (*Ri-Joyce v.*
20 *NMVB, supra*, 2 Cal.App.4th at p.456).

21 13. As stated above, *BMW* and *Ri-Joyce* were very similar,
22 factually. In both cases, the dealer maintains that the alteration of
23 its AOR by establishment of another dealership would constitute a
24 modification of its franchise which may be protested under section 3060.
25 *Ri-Joyce*, however, is distinguishable because its franchise agreement
26 was not clear, and subject to multiple interpretations. *BMW* is more
27 akin to our facts, and is more directly on point.

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1 The Applicability of the Parol Evidence Rule

2 14. Since this Board has the power to hear the motion brought by
3 VCNA, we next consider the Administrative Law Judge's ruling that Parol
4 Evidence must be taken at the eventual hearing in this matter to clear
5 up inconsistencies in the SA. Parol Evidence is only allowed to be
6 considered if the extrinsic evidence clarifies what the agreement meant
7 to say. *Tahoe National Bank v. Phillips* (1971) 4Cal.3d. 11, 22-23,
8 cited in *BMW* on page 989.

9 15. Since we view the 1994 SA as controlling between these
10 parties, and not containing any ambiguities which require a hearing on
11 the merits of the matter, parol evidence would be inadmissible at any
12 possible hearing.

13 Conclusion

14 16. Because the contract between CMI and VCNA is clear,
15 unambiguous and void of any rights that CMI has to protest the
16 appointment of the Galpin Group, the ruling of the Administrative Law
17 Judge is overruled, and this ruling of the Board is substituted in its
18 place.

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1 17. While it is unfortunate and understandable that CMI would
2 object to the appointment of Galpin Volvo as a dealer servicing the Van
3 Nuys AOR, CMI and this Board are powerless to stop that process. It has
4 not been overlooked that these two litigants have been in and out of
5 both the Federal and State Court system. Pending lawsuits are geared to
6 provide CMI relief that this Board cannot provide, and we are relatively
7 certain that whatever the outcome here, the lawsuits will continue.

8 SO ORDERED.

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10 DATED: November 27, 2001

NEW MOTOR VEHICLE BOARD

11
12 By Tom Flesch RPP
13 ROBERT T. (TOM) FLESH
14 President
New Motor Vehicle Board

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27 Steven Gourley, Director, DMV
28 Terry Thurlow, Chief,
Licensing Branch, DMV