

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
)
SOUTAR'S NISSAN, a California) Protest No. PR-1825-02
corporation,)
)
) Protestant,)
)
) v.)
)
NISSAN NORTH AMERICA, INC.,)
)
) Respondent.)

DECISION

At its regularly scheduled meeting of November 16, 2005, the Public members of the Board met and considered the administrative record and "Proposed Order Granting Respondent's Motion to Dismiss Protest" in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as modified: Protest No. PR-1825-02 is dismissed without prejudice.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 18th DAY OF NOVEMBER 2005.



GLENN E. STEVENS
Presiding Public Member
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 SOUTAR'S NISSAN, a California) Protest No. PR-1825-02
13 corporation,)
14 Protestant,)
15 v.) PROPOSED ORDER GRANTING
16 NISSAN NORTH AMERICA, INC.,) RESPONDENT'S MOTION TO
17 Respondent.) DISMISS PROTEST

18
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1 4. The first two letters, March 1, 2002 and October 21, 2003,
2 are notices of non-designation and each contains language beyond the
3 notice of non-designation. The additional language expands or
4 explains what NNA states it intends to do or not do in the future as a
5 result of the decision to non-designate the Barstow PMA.

6 5. A third letter, dated June 2, 2005, (hereafter "rescission
7 letter") stated that it rescinded the letters of March 1, 2002 and
8 October 21, 2003.

9 6. The fourth letter, also dated June 2, 2005, gave another
10 notice of non-designation of the PMA but without any of the two
11 earlier letters' additional language expanding or explaining what NNA
12 intends to do or not do in the future as a result of the decision to
13 non-designate the Barstow PMA. The parties sometimes refer to this
14 fourth letter as the "new notice" letter.

15 7. Soutar's, Inc., in its protest filed on September 26, 2002
16 in response to the first letter (March 1, 2002), asserts that what NNA
17 has done, or is attempting to do, constitutes a modification of the
18 franchise.² Soutar's, Inc. did not file an amended protest in response
19 to NNA's second letter (October 21, 2003) but Soutar's, Inc. did file
20 an amended protest (July 18, 2005) after the rescission letter and
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23 ² Because Soutar's, Inc. will be permitted to operate under the existing franchise
24 until one of the stated events occurs, neither NNA nor Soutar's, Inc. is desirous of
25 treating the letters which gave notice of non-designation as notices of termination.
26 For a discussion of whether the letters from NNA could constitute notices of
27 termination see Attachment A which is a previous Order Denying Motion to Dismiss
28 dated February 2, 2005, at pages 92-102. This alternative interpretation of the
"notice of non-designation" being a "notice of termination" was also raised to
counsel for the parties by the administrative law judge on August 11, 2005 at the
hearing on this motion. Both sides responded that they did not consider the notices
of non-designation to be notices of attempted termination of the franchise of
Soutar's, Inc.

1 "new notice" letter (both dated June 2, 2005) which was after NNA's
2 current Motion to Dismiss filed on July 5, 2005.

3 8. In this motion to dismiss, (the third filed by NNA), NNA
4 contends that its rescission letter of June 2, 2005 negated what was
5 stated by NNA in the first two notices of non-designation and that the
6 only notice of non-designation currently in existence is the "new
7 notice" of non-designation dated June 2, 2005.

8 9. NNA is seeking to have the protest dismissed as NNA claims
9 that its rescission letter of June 2, 2005 rendered the protest moot.

10 10. Soutar's, Inc., in opposing this motion to dismiss, asserts,
11 "However, simply rescinding the letters upon which the Protest was
12 based does not mean that the Protest is 'moot' because the controversy
13 resulting from those letters still exists." (Opposition, page 2,
14 lines 20 - 22.)

15 THE LANGUAGE OF THE FIRST NOTICE OF NON-DESIGNATION -
16 MARCH 1, 2002

17 11. On March 1, 2002, NNA sent a letter to Soutar's, Inc. that
18 in part provided:

19 Our analysis and experience indicate that it is no
20 longer practical to continue Nissan representation in
21 the Barstow primary market area ("PMA"). Our analysis
22 is based upon the market as a whole and not individual
23 dealer performance. The Barstow PMA is no longer a
24 practical location for the distribution of Nissan
25 products.

26 This letter is to notify you that Nissan will not
27 provide for the continuation of representation in the
28 Barstow PMA. Soutar's Nissan ("Dealer") may continue
its representation in the PMA so long as Soutar's
Nissan is an authorized Nissan Dealer; however, *Nissan
will not consider a proposal to transfer, sell, move,
or relocate Dealer. Nissan will discontinue
representation in the PMA upon Dealer's demise or
attempt to transfer, sell, move or relocate Dealer, as
provided for in the dealer agreement. (Emphasis
added.)*

1 THE PROTEST - SEPTEMBER 26, 2002 (FILED AFTER THE FIRST LETTER OF
2 NON-DESIGNATION SENT ON MARCH 1, 2002 AND PRIOR TO THE SECOND
3 LETTER OF NON-DESIGNATION SENT OCTOBER 21, 2003)

4 12. The protest was filed September 26, 2002,³ asserting that NNA
5 "... has modified Protestant's franchise without complying with
6 Vehicle Code Sections⁴ 3060(b)(1) and 3061 requirements" and that
7 "Respondent does not have good cause to modify the franchise..."

8 THE DENIAL OF NNA'S FIRST MOTION TO DISMISS

9 13. In February 2003, ALJ McKeag denied NNA's first Motion to
10 Dismiss. There is a discussion of ALJ McKeag's ruling in the second
11 Order Denying Motion to Dismiss (Attachment A, pages 16-19). ALJ
12 McKeag's ruling was based primarily upon the determination that the
13 terms of the franchise were not properly before him and that the Board
14 could not take judicial notice of the terms of the franchise as
15 requested by NNA.

16 THE LANGUAGE OF THE SECOND NOTICE OF NON-DESIGNATION -
17 OCTOBER 21, 2003

18 14. Subsequently, on October 21, 2003, (thirteen months after
19 the protest was filed, more than a year and seven months after the
20 first notice of non-designation, and eight months after the hearing
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25 ³ Although no protest was filed until almost seven months after the March 1, 2002
26 letter from NNA, no claim is made by NNA that the protest filing was untimely.
27 Section 3060(b)(1) establishes a time period of 30 days to file a protest from the
28 time of receipt of a notice of modification that complied with the statute's
provisions. Apparently because NNA is contending that there is no modification of
the franchise, NNA did not attempt to comply with the statutorily imposed
requirements of Section 3060(b)(1). Therefore, if the letter were an attempted
modification of the franchise, the time to file a protest would not have expired
as NNA had not complied with the statutory requirements. If the NNA letter is not
an attempted modification, the issue of whether the protest is timely is moot.

⁴ All statutory references are to the Vehicle Code unless stated otherwise.

1 on the first Motion to Dismiss), NNA sent a "letter to clarify⁵ your
2 (Soutar's, Inc.'s) inquiry regarding two aspects of the March 1, 2002
3 letter."

4 15. NNA's October 21, 2003 letter (second notice of non-
5 designation) reads in part as follows:

6
7 First, in response to your inquiry, in the event
8 that you at any point in the future submit a proposal
9 to Nissan for the *sale or transfer* of any or all of
10 the assets of or ownership interests in Soutar's
11 Nissan, Nissan will consider any such proposal in the
12 context of its decision to non-designate the Barstow
13 PMA. Second, also in response to your inquiry, in the
14 event that you at any point in the future submit a
15 proposal to Nissan to *move, relocate, or change the*
16 *usage* of any of your Dealership Facilities, Nissan
17 will consider any such proposal in the context of its
18 decision to non-designate the Barstow PMA. (Emphasis
19 added.)

20 By making these clarifications, *Nissan does not*
21 *change its non-designation decision nor waive its*
22 *right to assert its previous notice of non-designation*
23 *as a basis to object to or otherwise withhold its*
24 *consent to a proposed transfer or relocation in its*
25 *discretion, following its consideration.* (Emphasis
26 added.)

27 16. As stated above, Soutar's, Inc. did not file an
28 amended protest as a result of this October 21, 2003 letter.

29 **THE ORDER DENYING NNA'S SECOND MOTION TO DISMISS -**
30 **FEBRUARY 2, 2005**

31 17. The present posture of this case can best be understood by
32 incorporating as part of this ruling the prior order issued on
33 February 2, 2005 which denied the second motion to dismiss filed by

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⁵ NNA indicates that the letter of October 21, 2003, in clarification of the first notice of non-designation (March 1, 2002), was sent partly because of comments by ALJ McKeag at the February 2003 hearing (that the notice of non-designation would not constitute a modification, but that a refusal to consider a buy/sell proposal would). (Second NNA Motion, page 3, fn1.)

1 NNA.⁶ As indicated above, a copy of this February 2, 2005 order is
2 Attachment A.⁷

3 18. In the second motion to dismiss, NNA asserted that:

4 The Dealer Agreement between NNA and Soutar's expressly
5 gives NNA the right to give Soutar's notice that NNA
6 does not intend to continue representation in Soutar's
7 PMA. NNA's exercise of that right cannot, as a matter
of law, constitute a modification of the Dealer
Agreement. (Second NNA Motion, page 2, lines 5-7.)

8 19. In brief, the order of February 2, 2005 denied NNA's second
9 motion to dismiss because NNA had not established, as a matter of law,
10 that the two notices of non-designation quoted from above were stating
11 merely what the terms of the Dealer Agreement expressly authorized NNA
12 to do or not do in connection with the issuance of a notice of non-
13 designation. The order of February 2, 2005 made no determinations as
14 a matter of law or fact that there were or were not any modifications
15 or attempted modifications of the franchise.

16 NNA'S COMMUNICATIONS LEADING UP TO THE CURRENT
17 (THIRD) MOTION TO DISMISS

18 THE JUNE 2, 2005 NOTICE OF RESCISSION OF THE FIRST TWO NOTICES OF
19 NON-DESIGNATION

20 20. As stated above, NNA had issued two letters (March 1, 2002
21 and October 21, 2003) stating with some ambiguity what NNA intended to
22 do or not do in the future as a result of NNA's decision to non-
23 designate the PMA of Soutar's, Inc.

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26 ⁶ Unlike the first motion to dismiss heard by ALJ McKeag, NNA supplied ALJ Skrocki
with copies of the franchise and supporting documentation so there was no need to
rely upon judicial or official notice in ruling upon NNA's second motion.

27 ⁷ Because neither of the prior orders which denied NNA's motions to dismiss was
28 dispositive of the protest, there was no requirement for action by the Board itself
in regard to the orders denying the motions of NNA. The present situation arises as
a result of a third motion to dismiss filed by NNA.

1 21. After the February 2, 2005 Order Denying NNA's Motion to
2 Dismiss, NNA, on June 2, 2005, sent Soutar's, Inc. two letters. One,
3 Attachment B, rescinded the first two notices of non-designation.

4 22. This letter of rescission states in its entirety:

5 Nissan North America, Inc. herewith rescinds its
6 letters dated March 1, 2002 and October 21, 2003,
copies of which are attached hereto.

7 **THE THIRD NOTICE OF NON-DESIGNATION - ALSO DATED JUNE 2, 2005,**
8 **THE SAME DATE AS THE LETTER OF RESCISSION**

9 23. The other letter of June 2, 2005 was another notice of non-
10 designation (Attachment C).

11 24. The June 2, 2005 notice of non-designation in its
12 substantive entirety states:

13 This is to provide notice to Soutar's Nissan ("Dealer")
14 from Nissan North America, Inc. ("Seller") as follows:
15 Seller's market representation plans do not provide for
continuation of representation in Dealer's Primary
16 Market Area.

17 25. Unlike the first two notices of non-designation, this "new
18 notice" contains no explanations or other references stating what NNA
19 intends to do or not do in the future as a result of the issuance of
20 this third notice of non-designation. There is no mention of what NNA
21 may or may not do in the event of any attempt to transfer, sell, move,
or relocate, or in the event of any death.

22 THE CURRENT MOTION TO DISMISS BEFORE THE BOARD

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24 26. On July 5, 2005, NNA filed this current NOTICE OF MOTION AND
25 MOTION OF RESPONDENT NISSAN NORTH AMERICA, INC. TO DISMISS SOUTAR'S
26 NISSAN'S PROTEST. On July 18, 2005, Soutar's, Inc. filed its
27 OPPOSITION TO MOTION TO DISMISS PROTEST.

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1 27. Also on July 18, 2005 Soutar's, Inc. filed a First Amended
2 Protest which alleges in part: "Thus, by stating an intention to
3 discontinue Nissan representation in the Barstow PMA and to
4 *potentially disapprove any future sale or transfer of Protestant's*
5 *Nissan operations*, Respondent has modified Protestant's franchise
6 without complying with Vehicle Code Sections 3060(b)(1) and 3061
7 requirements." (First Amended Protest, page 3, lines 26-28, page 4,
8 line 1.) (Italics added.)

9 28. The italicized language is not contained in the "new notice"
10 of non-designation.

11 29. On August 9, 2005, NNA filed its REPLY BRIEF IN SUPPORT OF
12 MOTION OF RESPONDENT NISSAN NORTH AMERICA, INC. TO DISMISS SOUTAR'S
13 NISSAN'S PROTEST.

14 30. In essence, NNA's contentions are:

15 A. On June 2, 2005, NNA rescinded the first two letters⁸;
16 and

17 B. As a result of the rescission of both the first letter
18 and the explanatory second letter, the subject protest
19 filed in response to the first letter is moot.

20 31. Soutar's, Inc. contends that:

21 The Protest is Not Moot Since Respondent Submitted a
22 New Letter Providing Notice that Respondent Does Not
23 Plan to Provide for Continuation of Representation In
24 Dealer's Primary Market Area. (Opposition, page 3,
25 lines 25 - 26:)

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⁸ The first letter (March 1, 2002) gave rise to the protest which asserted NNA was attempting a modification of the franchise. The second letter (October 21, 2003) was sent after the protest was filed and was purportedly sent in explanation of the first letter.

1 Notice as a modification of its Dealer Agreement, it should be
2 required to do so procedurally by filing a new protest." (NNA's Reply
3 Brief, page 3, lines 24 - 26.)

4 38. Soutar's, Inc. asserts that the new notice is "raising the
5 same issue" and that "The essential controversy remains the same: does
6 the Dealer Agreement give Respondent the right to discontinue
7 representation in Protestant's PMA and effectively terminate
8 Protestant's franchise?"⁹ (Opposition, page 7, lines 4 - 7.)

9 DETERMINATIONS

10 39. NNA in rescinding its letters of March 1, 2002 and October
11 21, 2003 removed from immediate consideration whether NNA had the
12 right to do or not do what those letters stated to be NNA's future
13 intentions as a result of the non-designation of Soutar's PMA.

14 40. The Board should not be addressing the issues of whether the
15 content of the two earlier letters would constitute a modification of
16 the franchise after NNA has rescinded the statements contained in
17 those letters. Whether NNA will do or not do what NNA stated in those
18 prior letters is unknown at this time. The order denying the second
19 motion to dismiss indicated that it was questionable as to which or
20 how much of the statements by NNA in those letters would be permitted
21 by the terms of the franchise and that a hearing would be required to
22 determine if those letters constituted an attempt to modify the
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25 ⁹ Soutar's, Inc., in its Opposition, indicates that the letter will "effectively
26 terminate Protestant's franchise", and that if Soutar's, Inc. is "forced to file
27 another Protest"... "Any such new Protest would be based on the same claims of
28 modification or termination." (Opposition, page 7, lines 7, and 13 - 15.) (Emphasis
added.) However, Soutar's, Inc. appears unwilling to treat the fact situation as one
giving rise to a potential protest right under the termination provisions of Section
3060. As stated earlier, this possibility was discussed in the written order denying
NNA's second motion to dismiss and was also discussed with both counsel during the
hearing of August 11, 2005 on this current motion.

1 franchise of Soutar's, Inc. However, the "new notice" does not
2 contain the language used in the first two notices.

3 41. The only stated intention on the part of NNA as of this date
4 is what is stated in NNA's letter of June 2, 2005, which is that NNA
5 has given Soutar's, Inc. notice that: "Seller's market representation
6 plans do not provide for continuation of representation in Dealer's
7 Primary Market Area."

8 42. Again, whether this letter is or could constitute a
9 modification of the franchise of Soutar's, Inc. is not part of this
10 motion to dismiss. Whether the Dealer Agreement, by its terms, allows
11 NNA to take such action or give notice of its intent to do so is not
12 presently before the Board. Whether and to what extent NNA will
13 attempt to do or not do what it stated in its first two notices of
14 non-designation is unknown and speculative.

15 43. To recap, the only issues are:

16 A. Whether NNA has rescinded the first two letters
17 (March 1, 2002 and October 21, 2003); and

18 B. If so, whether that rescission has made the protest and
19 amended protest¹⁰ moot.
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22 ¹⁰ As stated earlier, Soutar's, Inc. filed an amended protest after this motion to
23 dismiss was filed by NNA. However, the amended protest appears to be re-stating the
24 contentions as to the effects on Soutar's, Inc. and the public as a result of the
25 first two notices of non-designation - "the absence of a potential successor dealer"
26 and "to potentially disapprove any future sale or transfer of Protestant's Nissan
27 operations." (First Amended Protest, page 3, lines 15-16, 27-28.) Whether these
28 results are implicit in the non-designation letter of June 2, 2005 could raise the
issue of whether the non-designation letter of June 2, 2005 operates to modify the
franchise of Soutar's, Inc., but, as discussed in this order, that is a separate
issue from whether the rescission letter of June 2, 2005 made the present protest
moot. Neither of these events is mentioned in the non-designation letter of June 2,
2005.

1 44. As to both of these issues, the rulings are in the
2 affirmative as follows:

3 A. NNA's letter of June 2, 2005 rescinded the statements
4 of NNA as contained in the letters of March 1, 2002 and
5 October 21, 2003; and

6 B. The protest filed on September 26, 2002 and the amended
7 protest filed on July 18, 2005 are moot.

8 45. Both NNA and Soutar's, Inc. agree that Soutar's, Inc. can
9 file another protest to challenge the new notice of June 2, 2005, as
10 an attempted modification of the franchise.

11 46. It may be that one could treat the amended protest as the
12 equivalent of a "new protest", as it was filed subsequent to the "new
13 notice" of non-designation. However, as stated by Protestant,
14 "Tellingly, this Amended Protest is substantially identical to the
15 original Protest, except it contains a reference to Respondent's June
16 2, 2005, notice letter..." (Opposition, page 2, lines 15 - 17.)
17 Therefore, the amended protest is not limited to the contents of the
18 "new notice" of June 2, 2005 and is challenging the right of NNA to do
19 or not do those specific things listed in the first two notices of
20 non-designation when, as a result of the letter of rescission, there
21 is nothing before the Board at this time indicating that NNA intends
22 to do or not do those previously-enumerated things.

23 47. Although it is likely implicit that NNA intends to do or not
24 do something NNA claims as franchise rights that flow from the giving
25 of the notice of non-designation, it cannot be determined as of this
26 time what NNA will attempt to do (or not do) in connection with those

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1 claimed rights of NNA.¹¹

2 48. NNA has given notice of its rescission of its first two
3 letters of non-designation which would include whatever may have been
4 found to be stated in them. As NNA has rescinded those two letters,
5 it is not appropriate to proceed to a hearing on whether what was
6 contained in them constituted a modification of the franchise of
7 Soutar's, Inc.

8 49. Whatever may be the right of Soutar's, Inc. to file a new
9 protest challenging the "new notice" of non-designation as either a
10 modification or as a termination of its franchise is not affected by
11 this order granting NNA's current motion to dismiss.

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27 ¹¹ The order denying the second motion to dismiss contained a detailed dissection of
28 the franchise terms as compared to the first two letters of non-designation. It may
be that, as a result of that analysis, NNA has recognized that what it stated it
intended to do or not do in the first two letters of non-designation are not
permitted by the terms of the franchise.

