

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)
)
VICTORY AUTO PLAZA, INC.,) **Protest No. PR-1826-02**
)
) Protestant,)
)
) v.)
)
NISSAN DIESEL AMERICA, INC.,)
)
) Respondent.)
)
_____)

DECISION

The attached "Order Granting Respondent's Motion to Dismiss the Protest" of the Administrative Law Judge was considered by the Public members of the New Motor Vehicle Board at its Special meeting of December 5, 2002. After such consideration and in reliance on the opinion in *Sonoma Subaru, Inc. v. New Motor Vehicle Board* (1987) 189 Cal.App.3d 13, the Public members of the Board adopted the Order Granting Respondent's Motion to Dismiss the Protest as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

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



GLENN E. STEVENS
Vice President
New Motor Vehicle Board

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

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 VICTORY AUTO PLAZA, INC.,)
13)
14 Protestant,)
15 v.)
16 NISSAN DIESEL AMERICA, INC.,)
17 Respondent.)

Protest No. PR-1826-02
ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS THE
PROTEST

18
19 TO: Bruce Nye, Esq.
20 Attorney for Protestant
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21 633 Battery Street, Fifth Floor
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22 Edward O. Hunter, Esq.
23 Jeffrey A. Robinson, Esq.
24 Attorneys for Respondent
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26 Dean Bunch, Esq.
27 Attorney for Respondent
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28 2282 Killearn Center Boulevard
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1 The Time Within Which a Protest Could Be Timely Filed

2 7. Vehicle Code section 3060(a)(2)¹ provides that a franchisee
3 may, within 30 days of receipt of such a notice, file a protest with
4 the New Motor Vehicle Board ("Board"). Thirty calendar days from the
5 date Victory received the notice (August 15) would result in the time
6 to file a protest expiring on September 14, a Saturday. Extending the
7 time to the first business day thereafter, Monday, would result in the
8 time to file a protest expiring on September 16.

9 Victory's Protest

10 8. On September 20, 2002, the Board received a letter from
11 Victory dated September 18, 2002. (Exhibit C, attached.) The letter,
12 which was not sent by registered or certified mail, stated that Victory
13 was contesting the termination. Even assuming that the letter
14 qualified as a protest and even assuming that it was effective when
15 sent it would not operate as a timely protest as the statutory time to
16 file a protest had expired at the latest on September 16, 2002.

17 9. On September 30, 2002, the Board received the formal protest
18 from Victory. (Exhibit D, attached.) As stated above, the statutory
19 time to file a protest had expired, at the latest, on September 16,
20 2002.

21 NDA's Motion to Dismiss

22 10. On October 15, 2002, NDA filed a Motion to Dismiss the
23 protest. In this motion, NDA asserted that the Dealer Agreement
24 contained a "Mandatory Arbitration Provision" and that "Victory's
25 Purported Protest is Barred as Untimely".

26
27
28 ¹ All statutory references are to the California Vehicle Code
unless otherwise indicated.

1 11. On November 4, 2002, Victory filed its "Memorandum in
2 Opposition" to NDA's Motion to Dismiss.

3 12. On November 12, 2002, NDA filed its "Reply" to Victory's
4 Memorandum in Opposition.

5 The Hearing on the Motion to Dismiss

6 13. A scheduled telephonic hearing of NDA's Motion to Dismiss was
7 held on November 19, 2002, before Anthony M. Skrocki, Administrative
8 Law Judge. During the hearing, Victory was represented by Bruce Nye,
9 of Adams, Nye, Sinunu, Walker, LLP. NDA was represented by Edward G.
10 Hunter, of Robinson & Robinson, LLP, and Dean Bunch, of Sutherland
11 Asbill & Brennan, LLP.

12 ISSUES PRESENTED

13 14. NDA asserts the Protest should be dismissed for two reasons:

14 A. There is an arbitration provision in the Dealer
15 Agreement that would preclude a hearing of the protest
16 before the Board.

17 Victory asserts that the arbitration provision was
18 waived.

19 B. The purported protest of Victory was not timely filed.
20 (NDA also asserts that, because of the arbitration
21 agreement, the issue of timeliness of the protest should
22 be resolved through arbitration. However, the
23 timeliness issue will be addressed here as its
24 resolution by the Board will render moot the issue of
25 applicability of the arbitration provision.)

26 Victory asserts that the issue of timeliness cannot be
27 resolved by way of a motion to dismiss but that an
28 evidentiary hearing is required.

1 15. Although NDA raised the two issues in the sequence stated
2 above, the issues will be addressed in the opposite order.

3 Whether the Protest Was Timely Filed

4 16. During the hearing on the motion to dismiss the protest,
5 counsel for Victory candidly admitted that the protest filed by Victory
6 was not timely. Notwithstanding this admission, the following findings
7 are presented.

8 17. Section 3060(a)(2) in part provides that:

9 ... The franchisee may file a protest with the board
10 within 30 days after receiving a 60-day notice, ... or
11 within 30 days after the end of any appeal procedure
12 provided by the franchisor ..."

13 18. NDA has no established "appeal procedure" so the 30-day time
14 period applicable would begin when Victory received NDA's notice of
15 termination.

16 19. The notice of termination sent by NDA was dated August 6,
17 2002. It satisfied the requirements of section 3060 as to content and
18 form, including the mandated "NOTICE TO DEALER". To be effective
19 however, the notice must be "received" both by the Board and by Victory
20 as required by section 3060(a)(1).

21 20. The notice of termination was received by the Board on August
22 9, 2002. (See paragraph 6 above and Exhibit B.)

23 21. The facts as to when the notice of termination was received
24 by Victory are not clear. In its formal protest filed with the Board
25 on September 30, 2002, Victory states that the notice was received by
26 Victory "on or about August 8, 2002." The U.S. Postal Service return
27 receipt form (Exhibit A) evidences that the notice was received by
28 Victory on August 15, 2002. For the purpose of determining whether

1 Victory's protest was timely filed with the Board, the date of August
2 15, 2002, will be used as the date Victory received the notice.

3 22. Counting the days as indicated in paragraph 7, Victory would
4 have had through September 16, 2002, to file a timely protest.

5 23. The first communication received by the Board from Victory in
6 connection with the termination was a letter dated September 18, 2002,
7 which was received by the Board on September 20, 2002. (Exhibit C)
8 This letter did not satisfy the Board's requirements for a protest.
9 However, assuming it did, it would not have been timely. The protest
10 would have had to have been filed with the Board no later than
11 September 16, 2002. The time to file with the Board had expired even
12 before the letter was sent. A formal protest (Exhibit D) was filed
13 with the Board on September 30, 2002, which was well past the September
14 16, 2002, time limitation.

15 Whether an Evidentiary Hearing Is Necessary to
16 Resolve the Issue of Timeliness of the Protest

17 24. It is determined that there are no factual issues involved
18 that would require an evidentiary hearing as to the timeliness of the
19 protest. All of the dates used for computing the timeliness of the
20 protest have been applied in a manner that most favors Victory and no
21 other conclusion is possible other than that the protest was not timely
22 filed. No evidentiary hearing is necessary as to the timeliness of the
23 filing of the protest. Also, as stated above, Victory admitted that
24 the Protest was not timely filed.

25 Conclusion as to Whether the Protest Was Timely Filed

26 25. It is determined that Victory's protest was not timely filed.

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1 Whether an Evidentiary Hearing Is Necessary to Provide
2 Victory with an Opportunity to Establish Equitable Factors
3 That May Act to Toll the Time Period to File this Protest

4 26. Victory in its Memorandum in Opposition to the Motion to
5 Dismiss, asserts:

6 Second, and more substantively, Victory is entitled to
7 an evidentiary hearing on the question of why it filed
8 its protest when it did, and equitable factors that may
9 act to toll the statute of limitations. *Automotive*
10 *Management Group v. New Motor Vehicle Board* (1993) 20
11 Cal.App.4th 1002. Thus the question of whether the
12 protest is or is not time-barred may not be determined
13 on Motion to Dismiss.

14 27. In *Automotive Management Group*, the dealer asserted that the
15 franchisor should have been estopped from relying upon the time
16 requirements of section 3060. The claim in that case was that there
17 was conduct by the franchisor that caused the delay in submitting the
18 protest and an evidentiary hearing was held on that issue. One of the
19 issues that brought the case to the court of appeal, was the fact that
20 the Administrative Law Judge did not submit the matter to the Board
21 after the evidentiary hearing.

22 28. In the *Automotive Management Group* protest, the Board
23 determined that it could consider the estoppel defense raised by the
24 dealer and an evidentiary hearing was in fact held. The appellate
25 court stated:

26 What is important is that AMG's estoppel defense was
27 ultimately the subject of an evidentiary hearing. An
28 ALJ was authorized to consider the issue, an evidentiary
 hearing was held, and AMG had an opportunity to present

1 its position. Four witnesses testified. Twenty-two
2 exhibits were introduced. (*Automotive Management Group*
3 *v. New Motor Vehicle Board*, supra, 20 Cal. App. 4th at
4 pp. 1013.)

5 29. The appellate court concluded that it was not error to allow
6 an Administrative Law Judge to preside over this hearing, but that the
7 final decision had to be made by the Board. The court also stated:

8 A proceeding before an administrative officer or board
9 is adequate if the basic requirements of notice and
10 *opportunity for hearing* are met. (7 Witkin, Summary of
11 Cal. Law (9th ed. 1988) Constitutional Law, sec. 518, p.
12 715, italics in original.) The sufficiency of the
13 notice and hearing is determined by considering the
14 purpose of the procedure, its effect on the rights
15 asserted and other circumstances. (*Automotive*
16 *Management Group v. New Motor Vehicle Board*, supra, 20
17 Cal. App. 4th at pp. 1012.)

18 30. The issue in the present case of Victory, is not whether an
19 administrative law judge would be empowered to preside over a hearing
20 on the existence of "equitable factors that may act to toll" the
21 statutory time period or whether the decision must be submitted to the
22 Board. The issue here is whether a protestant is automatically
23 entitled to an evidentiary hearing on an issue as to which there are no
24 obvious facts nor any preliminary or prima facie showings as to the
25 existence of any facts that would necessitate a hearing.

26 31. Victory in its pleadings alleges no specific facts to
27 indicate the nature of the "equitable factors that may act to toll" the
28 time to file the protest. No declarations were submitted in support of

1 Victory's general assertion and no documents were submitted that would
2 make a prima facie showing of any reason to toll the statutory time
3 period. The only document attached to Victory's opposition papers was
4 a document entitled "Purchase Agreement" with an effective date of
5 March 24, 2000, that pertained to the sale to Victory of previously
6 leased trucks. This document has no relevance to the issues in this
7 matter.

8 32. During the arguments at the hearing on the motion Victory was
9 asked what reasons there were for the delay in filing the protest. The
10 only reason given for the protest not being timely was that Victory was
11 attempting to contact NDA. There is a letter from Victory to NDA dated
12 August 23, 2002, (an attachment to Exhibit C) but its tone evidences an
13 acquiescence by Victory in the termination and a desire by Victory to
14 arrive at an agreement for the orderly conclusion of the relationship.

15 33. The entire assertion by Victory as to the existence of a
16 possible excuse from a timely filing of the protests is as follows:

17 Victory is entitled to an evidentiary hearing to present
18 evidence as to equitable factors affecting the
19 timeliness of its protest. (Memorandum in Opposition to
20 Respondent's Motion to Dismiss, Introduction, page 1,
21 lines 25, 26.)

22 and,

23 Second, and more substantively, Victory is entitled to
24 an evidentiary hearing on the question of why it filed
25 its protest when it did, and equitable factors that may
26 act to toll the statute of limitations. (Memorandum in
27 Opposition to Respondent's Motion to Dismiss, page 4,
28 lines 13-15.

1 34. When as here, the protest is not timely filed, and admittedly
2 so, it would appear appropriate for a party seeking to be relieved from
3 the consequences of non-timely filing to allege specific facts upon
4 which it intends to rely to avoid the legislatively established time
5 limits. Something in the way of an offer of proof, or declarations, or
6 documents, or even specific factual assertions should be provided in
7 order to justify the additional delay and expense inherent in such
8 further proceeding. To require a further hearing solely upon
9 unsupported general assertions would be counter to the purpose and
10 intent of statutes which were intended to provide efficient and
11 expeditious resolution of the parties' disputes.

12 Conclusion as to Whether an Evidentiary Hearing Is Necessary
13 To Provide Victory with an Opportunity to Establish Equitable
14 Factors That May Act to Toll the Time Period to File this Protest

15 35. Because no specific facts were alleged or documents or
16 declarations submitted, it is determined that an evidentiary hearing
17 to establish a possible justification for extending or tolling the
18 statutorily limited time for filing a protest is not appropriate. Had
19 Victory made any preliminary showing of specific facts to show what
20 "equitable factors" existed that would be addressed at such an
21 evidentiary hearing, then an evidentiary hearing would have been
22 appropriate. But, if the arbitration agreement is enforceable, a
23 hearing before the Board on the merits of the protest would not be
24 permitted. Therefore it would be pointless to have an evidentiary
25 hearing to determine whether Victory should be excused from its late
26 filing in order to proceed to a protest hearing which cannot be legally
27 held.

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1 A written provision ... in a contract evidencing a
2 transaction involving commerce to settle by arbitration
3 a controversy thereafter arising out of such contract
4 ... shall be valid, irrevocable, and enforceable, save
5 upon such grounds as exist at law or in equity for the
6 revocation of any contract.

7 41. As this Board has previously recognized, if there is a valid
8 arbitration agreement, the provisions of the California Vehicle Code
9 are preempted by the Federal Arbitration Act.

10 42. The Dealer Agreement contains the following language
11 (selectively quoted):

12 **23. ARBITRATION:**

13 Any dispute between Company and Dealer, including
14 but not limited to any relating to termination of
15 this Agreement, or the settlement of accounts
16 following termination of this Agreement ... shall
17 be referred to arbitration pursuant to the rules of
18 the American Arbitration Association ("AAA")...

19
20 If the arbitrator finds that termination of the
21 Agreement would be consistent with the terms of the
22 Agreement and applicable state law, ... the
23 arbitrator shall render an award in favor of
24 Company ...

25
26 If the arbitrator in a termination case rules in
27 favor of Dealer, the Notice of Termination shall be
28 void and shall not be deemed to constitute a breach

1 of this Agreement.

2
3 **38. APPLICABLE LAW; SEVERABILITY**

4 ...

5 If any provision of this Agreement is determined to
6 be invalid or is prohibited by any applicable
7 local, state or federal law or regulation, such
8 provision shall be deemed severable and all other
9 provisions of this Agreement shall remain in
10 effect. **This Section regarding severability does**
11 **not apply to the arbitration provisions in Section**
12 **23 hereof. (Emphasis added.)**

13 43. The interpretation of the above provisions results in the
14 finding that the Dealer Agreement does contain an enforceable
15 arbitration provision (Section 23) that is not negated by the
16 severability provision (Section 38).

17 44. The general language, "Any dispute", and the specific
18 language "including but not limited to any relating to termination or
19 settlement of accounts after termination" indicate the intentions of
20 the parties that this dispute be arbitrated. The language also
21 specifically makes reference to whether the termination is consistent
22 with the terms of the agreement and applicable state law, and that if
23 the arbitrator finds in favor of Dealer that the Notice of Termination
24 shall be void.

25 45. Pursuant to Section 23 of the Dealer Agreement, such
26 arbitration will necessitate the application of the substantive
27 portions of California law, including section 3061, in determining
28 whether NDA can prove good cause for termination.

1 Conclusion as to Whether There Is an Enforceable
2 Agreement to Arbitrate this Dispute

3 46. The Dealer Agreement does contain an agreement to arbitrate
4 and it is worded in such a way that it is applicable to this dispute.
5 Because there is a written agreement to arbitrate this dispute, the
6 provisions of the Vehicle Code are preempted by the Federal Arbitration
7 Act.

8 Whether NDA Waived the Arbitration Provision

9 47. Victory contends that NDA, by quoting in its notice of
10 termination the statutorily required "NOTICE TO DEALER" language
11 advising Victory of its right to file a protest with the Board, waived
12 the provisions of Section 23 of the Dealer Agreement.

13 48. Specifically, Victory contends that:

14 Here, (a) NDA gave notice of termination in a manner
15 inconsistent with the arbitration right. While
16 including the thirty day notice language required by
17 Veh. Code § 3060(a)(1)(C), NDA failed to notify Victory
18 that, in NDA's opinion, the protest mechanism was not
19 available, and Victory would have to avail itself of
20 contractual arbitration; (b) to this day, NDA has not
21 sought arbitration; (c)² *NDA's unlawful attempt to modify*
22 *the franchise agreement with the "Purchase Agreement,"*
23 *combined with its fraudulent representations concerning*
24 *the scope of the "Purchase Agreement" and its insistence*
25 *that the modification/"Purchase Agreement" remain in*
26

27 ² Subsection (c) quoted here in added italics is confusing because
28 it has no relevance to any of the issues and is included merely for
accuracy of the quotation.

1 effect while the franchise is terminated constitute bad
2 faith; and (d) Victory will be substantially prejudiced
3 as NDA apparently seeks to prevent Victory from any
4 remedy whatsoever. (Memorandum in Opposition to
5 Respondent's Motion to Dismiss, page 3, lines 13 - 21)

6 49. As to point (a) above, Victory is correct in stating that NDA
7 did not specifically point out in its notice letter that the
8 arbitration provision of the Dealer Agreement would preclude Victory
9 from utilizing the protest mechanism provided by the Vehicle Code.
10 However, NDA did comply with the law by including the mandated language
11 of "You have the right to file a protest with the NEW MOTOR VEHICLE
12 BOARD in Sacramento and have a hearing ..." Victory's contention is
13 that the failure of NDA to inform Victory of the fact that the Vehicle
14 Code provisions may be trumped by the combination of the arbitration
15 provisions and the Federal Arbitration Act, should operate as a waiver
16 by NDA of the arbitration provision of the Dealer Agreement.

17 50. The Dealer Agreement prohibits any modification of its terms
18 by the following language:

19 **36. ENTIRETY; MODIFICATIONS:**

20
21 ... Except for those addenda and other changes
22 permitted to be made unilaterally by Company
23 hereunder, no amendment, change or variance from
24 the Agreement shall be binding unless executed by
25 the Executive Vice President or Senior Vice
26 President of Company and by an authorized officer
27 or agent of Dealer in writing.

28 ///

1 31. **SUPPLEMENTS TO THIS AGREEMENT:**

2 Any and all supplements, addenda or amendments to
3 this Agreement shall be in writing duly executed in
4 accordance with Section 37 herein and shall be
5 attached to and become part of this Agreement.

6 51. Because of the above language, there can be no claim that
7 there was an effective modification of the Dealer Agreement which
8 excluded the arbitration provision.

9 52. There is no language in the Dealer Agreement that requires
10 waivers to be in writing. The only language pertaining to waivers is
11 in Section 33 which states, "No waiver by either party of a breach of
12 any provision hereof shall constitute a waiver of any prior or
13 subsequent breach of any provision of this Agreement." This language
14 is not applicable to the claimed waiver of the arbitration provision.

15 53. "Waiver" generally is defined as "a voluntary relinquishment
16 of a known right." It is possible for Victory to have construed
17 reasonably the notice of termination from NDA, which specifically
18 referred to the Vehicle Code mechanism, as a communication from NDA
19 evidencing NDA's intent to submit to the Board's jurisdiction rather
20 than insist upon arbitration. To avoid such an interpretation by a
21 franchisee, it might behoove franchisors to communicate clearly that
22 the obligatory notice of protest rights was provided in order to comply
23 with the statute but that the franchisor was not waiving any
24 arbitration agreement which, by virtue of the supremacy clause of the
25 U.S. Constitution, would preempt the right to a hearing before the
26 Board.

27 54. However, this Board is not a law-making body and cannot
28 require franchisors to add additional language to their notices to

1 their dealers.

2 55. Further, treating NDA's compliance with the legislatively-
3 mandated language as simultaneously negating the arbitration agreement,
4 could have the effect of state law preempting the Arbitration Act,
5 which would constitute a violation of the Supremacy Clause of the
6 United States Constitution (U.S. Const., art. VI, cl.2). And, because
7 NDA was mandated by the Vehicle Code to include the "NOTICE TO DEALER"
8 language, it is difficult if not impossible to conclude that NDA was
9 communicating a "voluntary relinquishment" of its right to arbitration.

10 56. As to point (b) raised by Victory, that "to this day, NDA has
11 not sought arbitration", it is noted that the section 23 of Dealer
12 Agreement provides, "Any claim by Dealer related to termination of this
13 Agreement must be filed no later than thirty (30) days after receipt of
14 Notice of Termination." (Emphasis added.)

15 57. There is no requirement that NDA seek arbitration of the
16 issues raised by its notice of termination. The burden of initiating a
17 challenge to the propriety of termination is on Victory. Of course, if
18 Victory had filed for arbitration, NDA in the arbitration proceeding
19 would have had the burden to prove good cause to terminate.

20 58. The Dealer Agreement in the penultimate paragraph of Section
21 23, does provide that, "The first paragraph of this Section 23
22 regarding arbitration shall be subject to Company's right to seek
23 injunctive relief to enforce its rights under this Agreement and any
24 amendments thereto."

25 59. This language evidences that had Victory filed a timely
26 protest with the Board, then NDA would have been empowered by the
27 agreement to seek an injunction prohibiting Victory from proceeding
28 with any hearing before the Board. However, because Victory did not

1 file a timely protest with the Board, there is no reason for NDA to
2 take any action under Section 23 either by affirmatively seeking
3 arbitration or by way of injunctive relief to enforce its rights to
4 arbitration. Therefore, the fact that NDA did not seek arbitration or
5 an injunction does not constitute a waiver of NDA's right to
6 arbitration.

7 60. In point (d) raised by Victory above, Victory asserts it
8 "will be substantially prejudiced" by NDA having failed to notify
9 Victory of the fact that arbitration was required rather than a hearing
10 before the Board, "as NDA apparently seeks to prevent Victory from any
11 remedy whatsoever." This assertion cannot be supported by the facts.

12 61. Victory asserts it was misled into believing that it had a
13 right to file a protest with the Board rather than complying with the
14 arbitration provision in the Dealer Agreement.

15 62. Not telling Victory about the requirement of arbitration
16 could not have been the cause of Victory's failure to file a timely
17 protest with the Board. The "NOTICE TO DEALER" specifically informed
18 Victory in part as follows: **"You must file your protest with the board**
19 **within 30 calendar days after receiving this notice or within 30**
20 **calendar days after the end of any appeal procedure provided by the**
21 **franchisor or your protest right will be waived."** (In bold as required
22 by the statute.) Had Victory filed a timely protest with the Board, as
23 Victory was notified it had a right to do, it may be that NDA would not
24 have challenged the timely filing, and therefore NDA would have waived
25 its right to arbitration. Alternatively, had a timely protest been
26 filed, NDA may have sought injunctive relief to enforce its right to
27 arbitration pursuant to Section 23 of the Dealer Agreement (quoted
28 above). Either way, Victory would not have been without a remedy.

1 63. Because there was no prejudice to Victory caused by any
2 conduct or lack thereof by NDA, Victory has not established that the
3 concept of waiver should be applied to permanently preclude NDA from
4 asserting its right under the arbitration agreement.

5 Conclusion as to Whether NDA Waived the Arbitration Provision

6 64. It is concluded that NDA did not waive the arbitration
7 provision by not specifically notifying Victory of the provisions of
8 the Dealer Agreement; that NDA did not waive the arbitration agreement
9 by failing to file for arbitration; and that even if there had been a
10 waiver there was no prejudice to Victory caused by the waiver in that
11 Victory's failure to file a timely protest with the Board was not due
12 to the claimed waiver of the arbitration agreement.

13 Conclusion as to Whether the Arbitration Agreement
14 Contained in the Dealer Agreement Precludes a Hearing
15 Before the Board on the Merits of the Protest

16 65. It was previously concluded in paragraph 46 that the Dealer
17 Agreement does contain an agreement to arbitrate that is applicable to
18 this dispute. It has also been concluded in paragraph 64 that the
19 arbitration agreement was not waived by NDA. Therefore, it is
20 determined that the arbitration agreement does preclude a hearing
21 before the Board on the merits of the protest.

22 Conclusion as to Whether the Protest Was Timely Filed

23 66. It was previously concluded in paragraph 25 that Victory's
24 protest was not timely filed. Because Victory did not file a timely
25 protest, there is no protest before the Board.

26 67. Whether Victory will be able to proceed to arbitration
27 pursuant to the provisions of the Dealer Agreement is not before the
28 Board.

28 ///

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Victor Gonella
Victory Auto Plaza, Inc.
1360 Auto Center Drive
Petaluma, CA 92701

2. Article Number

(Transfer from service label)

7001 1940 0005 4888 6573

PS Form 3811, August 2001

Domestic Return Receipt

102595-01-M-2509

COMPLETE THIS SECTION ON DELIVERY

A. Signature

[Handwritten Signature]

Agent

Addressee

B. Received by (Printed Name)

STIVEN R 8/15/03

C. Date of Delivery

D. Is delivery address different from item 1? Yes

If YES, enter delivery address below. No

3. Service Type

Certified Mail

Express Mail

Registered

Return Receipt for Merchandise

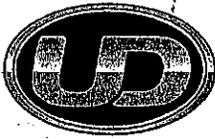
Insured Mail

C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

EXHIBIT A



TRUCKS
Nissan Diesel America, Inc.

RECEIVED
New Motor Vehicle Board
AUG 09 2002

August 6, 2002

Victor Gonella
Victory Auto Plaza, Inc.
1360 Auto Center Drive
Petaluma, CA 92701

Sent by
Certified Mail
Postmarked 8-6-02
DATE
Rec'd by NMVB 8-9-02
DATE
7001-1940-0005-24888-6566

Dear Mr. Gonella:

This is notice of termination of the Nissan Diesel America, Inc. Sales and Service Agreement between Victory Auto Plaza, Inc. ("Victory") and Nissan Diesel America, Inc. ("NDA"). Termination of the Nissan Diesel America, Inc. Sales and Service Agreement between Victory and NDA ("Dealer Agreement") is effective at 12:01 a.m. on the sixty-first (61st) day after Victory receives this letter.

NOTICE TO DEALER: You have a right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days after receiving this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived.

As specific grounds for termination of the Dealer Agreement, NDA cites:

1. Section 4(a) of the Dealer Agreement requires Victory "to attain or exceed the minimum inventory and sales goal requirements for UD Products as specified in Supplement I hereto."

Victory's minimum NDA product inventory requirement, as specified in Supplement I to Dealer Agreement (Exhibit "A"), is a minimum inventory combination of eight (8) units. According to the UD Trucks Dealer Analysis Contact Report ("Contact Report") (all referenced Contact Reports are enclosed as composite Exhibit "B") dated July 14, 2000, Victory's inventory of NDA motor vehicles as of that date was four. According to the Contact Report dated September 12, 2001, Victory's inventory as of that date was five. According to Exhibit C, Victory's current inventory is zero.

EXHIBIT B

C O R P O R A T E O F F I C E S

P.O. Box 152034, Irving, Texas 75015-2034 • 5930 West Campus Circle Drive, Irving, Texas 75063

Telephone 972-756-5500 • Fax 972-550-1255

<http://www.udtrucks.com>

According to Exhibit A, Victory's sales goal requirement for the period ending March 31, 2002, is 32 units. According to Exhibit C, Victory's sales quota for the first quarter of 2002 was seven. Victory sold one. Victory's sales quota for the second quarter of 2002 was seven. Victory sold zero. Victory's sales quota for the current quarter of 2002 is seven. Victory has sold zero to date.

Finally, you informed Evan Smith, Director of Sales for NDA, that Victory would no longer order NDA motor vehicles and would order NDA motor vehicles only if it was sold.

For these reasons, Victory has failed to fulfill its obligations set forth in Section 4(a) of the Dealer Agreement.

2. Section 4(b) of the Dealer Agreement requires Victory "[t]o use best efforts to exceed the goals and requirements set forth in Section 4(a)[.]" As is shown above, Victory has not met, much less exceeded, the requirements set forth in Section 4(a). For this reason, Victory has failed to fulfill its obligations set forth in Section 4(b).

3. Section 4(d) of the Dealer Agreement requires Victory "[t]o maintain an adequate supply of the most commonly used genuine UD branded or approved parts and accessories[.]" NDA has learned that Victory had transferred its all or substantially all of its NDA parts inventory to Ryden Diesel in Fresno, California. For this reason, Victory has failed to fulfill its obligations set forth in Section 4(d).

4. Section 4(e) requires Victory "to accept and maintain or exceed minimum requirements for such new or additional UD Products". As was noted, you informed Evan Smith, Director of Sales for NDA, that Victory would no longer order NDA motor vehicles and would order NDA motor vehicles only if it was sold. Accordingly, you have noted your intent to not fulfill your obligations set forth in Section 4(e).

5. Section 4(h) requires Victory "[t]o conspicuously display . . . an approved sign relating to the sales and service of UD Products". Victory does not display the required NDA signage. (Ex. B, 9/12/01 Contact Report.) For this reason, Victory has failed to fulfill its obligations set forth in Section 4(h).

6. Section 4(j) requires Victory "[t]o protect the good name of [NDA] and its UD Products in all of Dealer's activities". As is noted above, Victory has abandoned its duties as an NDA dealer and has essentially ceased marketing NDA products, parts, and accessories. For these reasons, Victory has failed to fulfill its obligations set forth in Section 4(j).

7. Section 4(k) requires Victory "[t]o maintain an adequate number of efficient, [NDA-] trained service and parts personnel". Pete Bohardt, Brian Bricker, and Ron Schlesinger were last trained on November 6, 2000. Jacob Walker has received less than 10 percent (10%) of the required training. Victory employs no trained parts personnel.

(See composite Exhibit D.) For these reasons, Victory has failed to fulfill its obligations set forth in Section 4(k).

Please contact me upon receipt of this letter so that we might discuss the appropriate steps to bring about a prompt and efficient resolution to Victory's status as an NDA dealer.

Sincerely,

Dave Trussell

cc. Dayle Wetherell
Evan Smith
Nick Carter
New Motor Vehicle Board
Department of Motor Vehicles
State of California

enclosures



COMMERCIAL TRUCK CENTER

BUSINESS & FLEET SALES/LEASING

RECEIVED
New Motor Vehicle Board
SEP 20 2002 September 18, 2002



Jeep



New Motor Vehicle Board
1507 21st Street, Suite 330
Sacramento, CA 95814

Re: Appeal of Franchise Termination

Dear New Motor Vehicle Board:

I am contesting the termination of franchise agreement between Victory Auto Plaza, Inc. (Victory) and Nissan Diesel America, Inc. (UD).

The events leading up to the allegations set forth in UD's termination notice stem from neglect by the manufacturer with regards to all aspects of the franchise agreement – sales, service and parts.

As evidenced by "Exhibit A" contained herein, we have corresponded with UD with regards to this termination and the lack of support we have received during our business relationship, and feel this correspondence set in motion our appeal effective as of that date.

As a result, I am formally requesting a pre-hearing conference. If we are unable to resolve this matter during that conference, I believe the hearing will take less than one day to hear all of the facts and rule on the motions and I would like to appear before the Board.

The franchisee and mailing address is: Victory Auto Plaza, Inc., 1360 Auto Center Drive, Petaluma, CA 94952.

Thank you for your assistance in this matter.

Very truly yours,

Victor Gonella
President

EXHIBIT C



**COMMERCIAL
TRUCK CENTER**
BUSINESS & FLEET SALES/LEASING

August 23, 2002

VIA FACSIMILE

Nissan Diesel America, Inc.
Attn: Dave Trussell
972-550-1255 - FAX

Re: Termination of UD Truck Franchise

Dear Mr. Trussell:

I am in receipt of your letter of August 6, 2002 addressed to Victor Gonella and sent via certified mail. Regarding the contents of the letter, I regret the business relationship failed to blossom but am sympathetic toward UD's position.

In closing this relationship, I require information regarding the return of all new and unused parts remaining in our stock, currently \$5,365.33. Additionally, I would like to be reimbursed for miscellaneous expenses associated with the termination of this franchise such as the obsolete parts sent with our initial order, which I subsequently had to wholesale at a loss; costs associated with stationary, signage and business cards; and costs associated with equipment and manual purchases required to consummate this business relationship initially.

For future reference, you may address future correspondence regarding this matter to either Mr. Gonella or myself; facsimile transmissions are acceptable when original signatures are not required. My fax number is 707-313-0161.

Very truly yours,

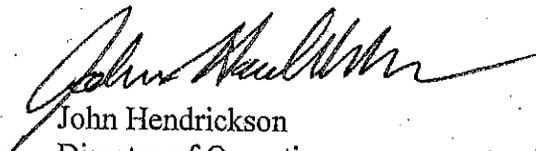
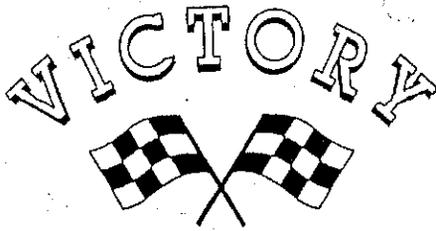

John Hendrickson
Director of Operations



EXHIBIT A.



1360 Auto Center Drive
Petaluma, CA 94952-6507
(707) 762-2300

Chevrolet
Chevy Trucks
Cadillac
•
Chrysler
Jeep
Dodge
Dodge Trucks
Kia



1370 Auto Center Drive
Petaluma, CA 94952-6507
(707) 762-2712

Fax

To: <u>DAVE TRUSSELL</u>	From: John Hendrickson
Firm: <u>NISSAN BASEL AMERICA</u>	Pages: <u>2</u> , including cover sheet
Fax: <u>972-550-1255</u>	Date: <u>8/23/02</u>
Phone:	CC:
Re: <u>FRANCHISE TERMINATION</u>	CC Fax:

- Urgent
 FYI
 Please Comment
 Please Reply
 Per Your Request

• **Comments:** Return fax (707) 313-0161 – if you do not receive all these pages please call John Hendrickson at 707-762-2712. The communication enclosed is for the recipient only. Should you receive this communication in error, please call John Hendrickson at 707-762-2712.

Return Fax 707-313-0161

Aug 23 2002 4:37pm

Last Fax

<u>Date</u>	<u>Time</u>	<u>Type</u>	<u>Identification</u>	<u>Duration</u>	<u>Pages</u>	<u>Result</u>
Aug 23	4:36pm	Sent	19725501255	0:52	2	OK

Result:

OK - black and white fax
Okay color - color fax

RECEIVED
New Motor Vehicle Board
SEP 30 2002

1 Victory Auto Plaza, Inc. (in pro per)
1360 Auto Center Drive
2 Petaluma, CA 94952
707-762-2300
3 707-313-0161 (Facsimile)

4 STATE OF CALIFORNIA
5 NEW MOTOR VEHICLE BOARD

FILED
NEW MOTOR VEHICLE BOARD
DATE 9-30-02
BY [Signature]

6 In the Matter of the Protest of
7 VICTORY AUTO PLAZA, INC.,
8 Protestant,
9 v.
10 NISSAN DIESEL AMERICA, INC.,
11 Respondent.

) Protest No.
)
) PROTEST PR-1826-02
) [V.C. sec 3060]
)
)
)
)

13 Protestant, Victory Auto Plaza, Inc., files this protest under the
14 provision of California Vehicle Code section 3060 and alleges as follows:
15

16 1. Protestant is a new motor vehicle selling UD Trucks, and is located
17 at 1360 Auto Center Drive, Petaluma, California 94952. Protestant's
18 telephone number is 707-762-2300.

19 2. Respondent distributes UD Truck's products and is the franchisor of
20 Protestant.

21 3. Protestant is appearing pro se.

22 4. On or about August 8, 2002, Protestant received from Respondent a
23 notice that Respondent intends to terminate its existing franchise agreement
24 effective 60 days from Protestant's receipt of said notice.

25 5. Protestant generally denies each and every allegation contained in
the written notice of termination.

EXHIBIT D

1 6. Respondent does not have good cause to terminate the franchise by
2 reason of the following facts:

3 (a) Protestant has made a substantial and permanent investment in the
4 dealership.

5 (b) Protestant has transacted and is transacting an adequate amount of
6 UD Truck business compared to the business available to it.

7 (c) Protestant has fulfilled the warranty obligation to be performed
8 by it.

9 (d) The extent of any failure of Protestant to comply with the terms
10 of the franchise agreement is immaterial.

11 (e) Protestant has adequate motor vehicle sales and service
12 facilities, equipment, vehicle parts, and qualified service personnel to
13 reasonably provide for the needs of UD Truck buyers and owners in the market
14 area and is rendering adequate service to the public.

15 (f) It would be injurious to the public welfare for the franchise to
16 be terminated or for Respondent to refuse to continue the existing franchise.

17 7. Protestant desires to appear before the Board and estimates that
18 the hearing in this matter will take one day to complete.

19 8. A Pre-Hearing Conference is requested.

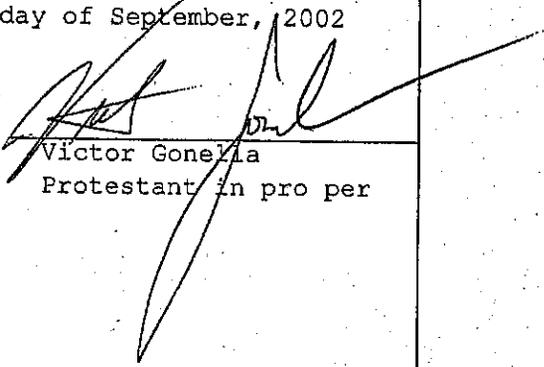
20 WHEREFORE, Protestant prays as follows:

21 1. That the Board sustain this protest and order Respondent not to
22 terminate Protestant's franchise.

23 2. That pending the hearing in this matter, the Board or its secretary
24 or authorized representative immediately order Respondent not to
25 terminate Protestant's franchise until such time as Respondent has

1 established good cause for such actions under the provision of the
2 Vehicle Codes sections 3060 and 3061.

3 Dated this 20th day of September, 2002

4
5 
6 Victor Gonetia
7 Protestant in pro per
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PROOF OF SERVICE BY MAIL

SONOMA COUNTY

STATE OF CALIFORNIA

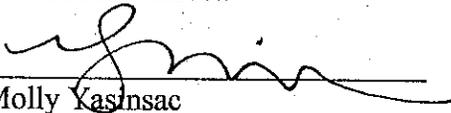
I, Molly Yasinsac, declare:

I am a citizen of the United States, a resident of Sonoma County, and am over 18 years of age. I am not a party to the within entitled action. My business address is 1370 Auto Center Drive, Petaluma, California. On September 24, 2002 I served a copy of the attached Protest in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at 1370 Auto Center Drive, Petaluma, California, addressed as follows:

Nissan Diesel America, Inc.
P.O. Box 152034
Irving, TX 75015

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: September 24, 2002


Molly Yasinsac