

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

HANLEES HILLTOP NISSAN,

Protestant,

v.

NISSAN NORTH AMERICA, INC.,

Respondent.

Protest No. PR-2291-11

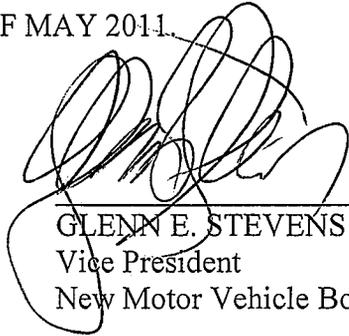
DECISION

At its regularly scheduled meeting of May 26, 2011, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protest as Untimely", in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as modified as its final Decision in this matter. The following citations to the April 27, 2011, telephonic hearing transcript have been added:

1. Page 2, Footnote 2, RT, p. 14:12-18;
2. Page 4, Footnote 4, RT, p. 24:2-25 and p. 25:1-21; and
3. Page 7, Footnote 9, RT p. 27:11-18 and p. 28:1-5.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 26th DAY OF MAY 2011.



GLENN E. STEVENS
Vice President
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 HANLEES HILLTOP NISSAN,
13 Protestant,
14 v.
15 NISSAN NORTH AMERICA, INC.,
16 Respondent.

Protest No. PR-2291-11

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTEST AS UNTIMELY**

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1 **PROCEDURAL BACKGROUND**

2 1. On February 25, 2011, protestant Hanlees Hilltop Nissan (hereinafter referred to as
3 "Hanlees" or "protestant") filed this protest (PR-2291-11) with the New Motor Vehicle Board (hereinafter
4 referred to as "Board") against respondent Nissan North America, Inc. (hereinafter referred to as "Nissan"
5 or "respondent"), pursuant to Vehicle Code section 3065.1 [claims arising out of franchisor incentive
6 program].¹

7 2. On April 1, 2011, respondent filed the instant Motion to Dismiss Protest as Untimely.

8 3. On April 27, 2011, a telephonic hearing regarding the Motion to Dismiss was held before
9 Administrative Law Judge Diana Woodward Hagle. Nelson Mullins Riley & Scarborough, LLP, by
10 M. Ronald McMahan, Jr., Esquire, appeared as counsel for respondent and moving party Nissan North
11 America, Inc., and Law Offices of Michael M. Sieving, by Tina Hopper, Esquire, appeared as counsel for
12 protestant.

13 **FACTS**

14 4. The facts are not in dispute.

15 5. Hanlees Hilltop Nissan, a new motor vehicle dealer located in Richmond, California, is a
16 franchisee of Nissan North America, Inc. (Protest)

17 6. Between October 5, 2009, and December 9, 2009, Nissan auditor Stephaney Bell
18 conducted an audit of payments to Hanlees related to Nissan's franchisor incentive program.² (Affidavit
19 of Patricia Brown, Exhibit C) The audit covered the period July 1, 2008, through September 30, 2009.
20 (Affidavit of Stephaney Bell, p. 1)

21 7. During the audit, Ms. Bell determined that several claims made by Hanlees were not
22 eligible for incentive payments (which had already been paid by Nissan) under the program rules and had
23 resulted in a net overpayment to Hanlees of \$70,500.³ On December 9, 2009, she held a "closing
24 meeting" with Jason Tran, Hanlees' general sales manager who had been appointed by the dealer
25 principal to coordinate with Nissan regarding the audit. Ms. Bell provided Mr. Tran with a written report
26

27 ¹ Unless otherwise indicated, all statutory references are to the California Vehicle Code.

28 ² During oral argument, counsel expressly agreed that this case arose from a "franchisor incentive program".

³ The audit also apparently surfaced monetary credits coming to Hanlees. (Affidavit of Stephaney Bell, Exhibit A)

1 identifying the specific incentive claims which were being disapproved, the reasons for disapproval, and
2 the net chargeback to the dealership. (Affidavit of Stephaney Bell, p. 1)

3 8. On January 5, 2010, Nissan received an undated appeal letter from Hanlees challenging
4 some or all of Nissan's determinations and, as a result, the amount of the chargeback was reduced from
5 \$70,500 to \$67,875. After additional negotiations, Nissan further reduced the amount of the chargeback
6 to \$64,350. (Affidavit of Patricia Brown, pp. 1-2, and Exhibit A) Nissan so advised the dealership in a
7 letter (with attachments detailing the disputed claims) dated February 26, 2010; Hanlees received this
8 letter on March 2, 2010. (Affidavit of Patricia Brown, p. 2, and Exhibit C)

9 **ISSUE**

10 9. Where a franchisor conducts an audit of franchisee records pursuant to Vehicle Code
11 section 3065.1 and disapproves payments it has previously made to the franchisee under a franchisor
12 incentive program, what is the limitation period within which a franchisee must file a protest with the
13 New Motor Vehicle Board to challenge the chargeback?

14 **CONTENTIONS OF NISSAN NORTH AMERICA, INC. (MOVING PARTY)**

15 10. The protest to challenge the franchisor's disapproval of an incentive claim under Section
16 3065.1 was untimely as it was not filed within one year following notice to protestant of the disapproval
17 of previously-paid claims. The fact of an audit and an appeal of the audit results do not change or toll the
18 statutory one-year limitation period. Hanlees failed to file a protest within one year of December 9, 2009,
19 the date of the "closing meeting", in which the Nissan auditor informed the dealership representative of
20 the disapproval of certain claims and provided documents supporting the decision.

21 **CONTENTIONS OF HANLEES HILLTOP NISSAN**

22 11. Section 3065.1(a), requiring franchisees to file protests within one year after receiving
23 notice that a claim pursuant to a franchisor incentive program is disapproved, applies only to "claims
24 submitted and disapproved in the first instance", not to claims previously paid by the franchisor and then
25 charged back following an audit. The fact of the audit presents a different scenario which section 3065.1
26 does not address, so the applicable limitation period for filing a protest challenging the chargeback is four
27 years, as provided in Code of Civil Procedure section 343. In support of this argument, protestant relies
28 on the Board Decision in *S & C Motors, Inc. dba S & C Kia v. Kia Motors America, Inc.* (Protest No. PR-

1 1894-04).

2 12. Alternatively, protestant argues that if the one-year limitation period is applicable, then it
3 must run from the date of notice to protestant of Nissan's final determination of chargeback monies due
4 which, in this case, is March 2, 2010. Since the protest was filed on February 25, 2011, it is within the
5 statutory one-year period.

6 **ANALYSIS**

7 13. The sole issue here is the application of Section 3065.1 to undisputed facts.

8 14. Vehicle Code section 3065.1, which pertains to franchisor incentive programs, provides
9 the following:

10 3065.1 (a) All claims made by a franchisee for payment under the terms of a
11 franchisor incentive program shall be either approved or disapproved within 30 days after
12 receipt by the franchisor. When any claim is disapproved, the franchisee who submits it
13 shall be notified in writing of its disapproval within the required period, and each notice
14 shall state the specific grounds upon which the disapproval is based. Any claim not
15 specifically disapproved in writing within 30 days from receipt shall be deemed approved
16 on the 30th day. Following the disapproval of a claim, a franchisee shall have one year
17 from receipt of the notice of disapproval in which to appeal the disapproval to the
18 franchisor and file a protest with the board. All claims made by franchisees under this
19 section shall be paid within 30 days following approval. Failure to approve or pay within
20 the above specified time limits, in individual instances for reasons beyond the reasonable
21 control of the franchisor, do not constitute a violation of this article.

22 (b) Audits of franchisee incentive records may be conducted by the franchisor on
23 a reasonable basis, and for a period of 18 months after a claim is paid or credit issued.
24 Franchisee claims for incentive program compensation shall not be disapproved except for
25 good cause, such as ineligibility under the terms of the incentive program, lack of material
26 documentation, or fraud. Any chargeback to a franchisee for incentive program
27 compensation shall be made within 90 days of the completion of the audit. If a false claim
28 was submitted by a franchisee with the intent to defraud the franchisor, a longer period for
audit and any resulting chargeback may be permitted if the franchisor obtains an order
from the board. (Emphasis added.)⁴

15 15. The language of Section 3065.1 is clear---once a franchisee gets notice that an incentive
16 claim has been disapproved by the franchisor, the franchisee has two courses of action if it wishes to

27 ⁴ During oral argument, the parties agreed that franchisors rarely, if ever, affirmatively "approve" a claim; they simply pay it,
28 presumably within 60 days of the claim being made. Also, "claims", "payments" and "chargebacks" are simply line-items in
ongoing financial dealings between dealers and manufacturers.

1 dispute the disapproval and may pursue one or both in its discretion. The franchisee may “appeal the
2 disapproval to the franchisor” and may “file a protest with the board”. But either action must be initiated
3 by the franchisee no later than one year following receipt of notice of the disapproval. The condition
4 precedent to appeal or to file a protest is the receipt by the franchisee of a notice of disapproval, whether
5 that notice is received within 30 days of the claim being made or after an audit.

6 16. The statutory right of a franchisor to conduct an audit of incentive claims does not change
7 this procedural timeline in any way, and protestant's argument that the one-year limitation period applies
8 only to “claims submitted and disapproved in the first instance” is expressly rejected. The critical date
9 which starts the clock running for the franchisee to take action is the date that it is notified of the
10 franchisor's “disapproval” of claims, whether that is within the first 30 days after the claim is made
11 [section 3065.1(a)] or after a timely audit of claims previously paid [section 3065.1(b)]. Those are the
12 only two “scenarios” contemplated by the statute.⁵

13 17. Protestant’s argument appears to be that since the language stating the one-year limitation
14 period only appears in sub-section (a) of the statute, it applies exclusively to claims disapproved within 30
15 days, since the statutory right of the franchisor to conduct an audit is found in sub-section (b). However,
16 this is a strained interpretation of the statute. Section 3065.1 must be read as an integrated whole, with
17 the language of its two sub-sections interrelated; any other interpretation is erroneous.

18 18. Protestant contends that---like the “deemed approved” scenario in the Board’s Decision in
19 *S & C Motors, Inc. dba S & C Kia v. Kia Motors America, Inc.* (PR-1894-04)⁶ ---post-audit disapprovals
20 are a “different scenario” which Section 3065.1 does not address. However, *S & C Motors* lends no
21 support to this argument. In fact, the Decision expressly recognizes that “the one-year limitation provided
22 by Section 3065.1...is expressly made applicable to protests filed after the disapproval of a claim by a
23 franchisor in which a notice of disapproval is given to the franchisee”. (Declaration of Tina Hopper,
24 Exhibit B, ¶16)

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27 ⁵ As explained *infra*, there is no such thing as a “deemed approved” scenario under Section 3065.1, as argued by Hanlees.

28 ⁶ The Board did not designate the *S & C Motors* decision as a precedent decision pursuant to Government Code section 11425.60 and therefore it may not be expressly relied on as precedent.

1 19. The protestant in *S & C Motors* was not seeking to challenge the franchisor's disapproval
2 of claims made under a franchisor incentive program, but rather was "asserting the failure of the
3 franchisor to pay a claim deemed approved under a franchise incentive program". (Declaration of Tina
4 Hopper, Exhibit B, ¶1) The franchisor had never disapproved the protestant's \$100,000 claim and, in fact,
5 had "never disputed that the sum of \$100,000 was the amount that had been agreed to be paid".
6 (Declaration of Tina Hopper, Exhibit B, ¶24) However, since the Board does not award damages, the
7 protestant was asking for relief which the Board could not give; protestant was left "to determine the
8 method to be used to recover any monetary award", although it did prevail in its argument that the
9 applicable limitation period for filing this particular protest was "the four-year period set out in Code of
10 Civil Procedure section 343.⁷ (Declaration of Tina Hopper, Exhibit B, ¶¶19, 24) The "deemed approved"
11 scenario presented in *S & C Motors* does not, of itself, give rise to a dispute pursuant to Section 3065.1,
12 nor are the unique facts of the case instructive here.⁸

13 20. Protestant's second argument, that the one-year limitation period began on the date it
14 received Nissan's final decision on its appeal of the audit results, is also rejected. Nothing in the statute
15 supports protestant's argument. The statute is clear that the one-year limitation period begins to run from
16 the date the franchisee receives the written notice that an incentive claim is being disapproved, not from
17 the end of any internal appeal process.

18 21. Section 3065.1 is a clear statement of the rights and responsibilities of franchisor and
19 franchisee in regard to claims made pursuant to franchisor incentive programs. It has been in effect---
20 without amendments---since January 1, 1994. It also evidences a legislative intention to resolve claim
21 disputes expeditiously (i.e., the franchisor has 30 days after receipt of claim to disapprove a claim in the
22 first instance, and 90 days after completion of audit to make chargeback). To adopt protestant's argument
23 would frustrate this legislative intent. Here, the audit covered a period starting July 1, 2008; under
24
25

26 ⁷ Code of Civil Procedure section 343 states that "[a]n action for relief not hereinbefore provided for must be commenced
27 within four years after the cause of action shall have accrued."

28 ⁸ In fact, the Superior Court, in granting respondent's petition for writ of mandate, held that the particular agreement was not a
"franchise incentive program" at all. [*Kia Motors America, Inc. v. California New Motor Vehicle Board (S & C Motors, Real
Party in Interest)*, (Sacramento Superior Court Case No.05CS00283)]

1 protestant's interpretation, if the four-year limitation period began on March 2, 2010,⁹ protestant would
2 have until March 1, 2014, almost six years after the original claim which gave rise to the protest. The
3 legislature did not intend this result.

4 **CONCLUSION**

5 22. An "audit" is simply the process of examining documents, records or financial statements
6 to verify their correctness. An audit is retrospective; it surveys past actions. Here, Nissan conducted an
7 audit---timely under the statute---to verify the accuracy of incentive payments it had made in the past to
8 Hanlees. As a result of the audit, Nissan disapproved some payments previously made. On December 9,
9 2009, in a face-to-face meeting, the Nissan auditor advised the Hanlees' representative that Nissan was
10 disapproving some previously-paid claims and gave Mr. Tran documents supporting Ms. Bell's decision.
11 Section 3065.1 is clear: If Hanlees wished to challenge the determination of the auditor, December 9,
12 2009, was the date which started the one-year period during which Hanlees could file a protest with the
13 Board. (Hanlees did, in fact, immediately pursue its other remedy by sending an appeal letter to Nissan.)

14 **PROPOSED ORDER**

15 After consideration of the pleading, briefs, exhibits, and oral arguments of counsel, it is hereby
16 ordered that the motion of respondent Nissan North America, Inc., to dismiss protest as untimely is
17 hereby granted. Protest No. PR-2291-11 (*Hanlees Hilltop Nissan v. Nissan North America, Inc.*) is
18 dismissed with prejudice.

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

24 DATED: May 4, 2011

25 By: 
26 DIANA WOODWARD HAGLE
27 Administrative Law Judge

28 ⁹ Protestant's brief was silent on exactly when the four-year limitation period would start. Protestant's attorney, during oral argument, opined that it was March 2, 2010, the day that protestant received the final determination of amount from Nissan. Even if the starting date were earlier, on December 9, 2009, the date of the notice of disapproval to protestant following the audit, a four-year limitation period would push the permissible time to file a protest to December 8, 2013.