

NEW MOTOR VEHICLE BOARD  
1507 - 21st Street, Suite 330  
Sacramento, California 95811  
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

LEEHAN INC. HANLEES HILLTOP NISSAN,

Protestant,

v.

NISSAN NORTH AMERICA, INC.,

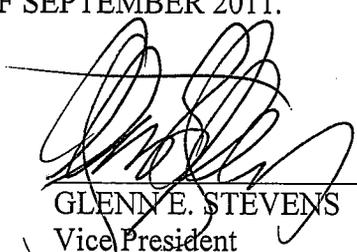
Respondent.

**Protest No. PR-2307-11**

DECISION

At its regularly scheduled meeting of September 27, 2011, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Amended Proposed Order Granting Respondent's Motion to Dismiss Second Protest", in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as its final Decision in this matter.

IT IS SO ORDERED THIS 27<sup>th</sup> DAY OF SEPTEMBER 2011.

  
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GLENN E. STEVENS  
Vice President  
New Motor Vehicle Board

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2 Sacramento, California 95811  
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**CERTIFIED MAIL**

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8 STATE OF CALIFORNIA  
9 NEW MOTOR VEHICLE BOARD

11 In the Matter of the Protest of

12 LEEHAN, INC. HANLEES HILLTOP NISSAN,

13 Protestant,

14 v.

15 NISSAN NORTH AMERICA, INC.,

16 Respondent.

**Protest No. PR-2307-11**

**AMENDED PROPOSED ORDER  
GRANTING RESPONDENT'S  
MOTION TO DISMISS SECOND  
PROTEST**

17  
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Columbia, South Carolina 29201

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1 1. Protestant Leehan, Inc. Hanlees Hilltop Nissan (hereinafter Hanlees or protestant) is a new  
2 motor vehicle dealer in Richmond, California and a franchisee of respondent Nissan North America  
3 (hereinafter NNA or respondent). On June 21, 2011, Hanlees filed this protest pursuant to Vehicle Code  
4 section 3065.1 (claims arising out of franchisor incentive programs). On July 15, 2011, NNA filed a  
5 motion to dismiss the protest as untimely.

6 2. This is Hanlees' second protest regarding NNA's franchisor incentive program. It alleges  
7 that a chargeback of \$64,350 was untimely as it was made more than 90 days after the completion of the  
8 program audit. Hanlees relies on the language in section 3065.1(b) in support of its argument.

9 **FACTUAL BACKGROUND**

10 3. The following facts are not in dispute.

11 4. From October 5 to December 9, 2009, NNA conducted an audit of payments made to  
12 Hanlees pursuant to NNA's franchisor incentive program. The period covered by the audit was July 1,  
13 2008 - September 30, 2009. The auditor determined that Hanlees had received a net overpayment during  
14 this period of \$70, 500.

15 5. The audit result was communicated to Hanlees at a closing meeting on December 9, 2009,  
16 orally and with documentation. On that date NNA also gave Hanlees notice of a forthcoming chargeback  
17 in the amount of \$70, 500.

18 6. On January 5, 2010, NNA received an appeal letter from Hanlees challenging the audit  
19 determinations. The letter initially led to a reduction of the amount of the proposed chargeback from  
20 \$70,500 to \$67,875. Additional negotiations led to a further reduction to \$64,350. NNA so advised  
21 Hanlees in a letter, with detailed attachments, dated February 26, 2010. NNA charged back the \$64,350  
22 in two installments. The first was in the amount of \$8,775 on March 10, 2010, and the second was in the  
23 amount of \$55,575 on April 12, 2010.

24 7. On February 25, 2011, Hanlees filed its first Vehicle Code section<sup>1</sup> 3065.1 protest with  
25 the New Motor Vehicle Board (hereinafter Board), Protest No. PR-2291-11, challenging the audit  
26 findings (hereinafter referred to as the first Hanlees protest). At the May 26, 2011, General Meeting, by  
27 \_\_\_\_\_

28 <sup>1</sup> Unless otherwise indicated, all statutory references are to the California Vehicle Code.

1 a unanimous vote, the Public Members adopted the Proposed Order which dismissed the first Hanlees  
2 protest as untimely.

3 8. On June 21, 2011, Hanlees filed this protest (Protest No. PR-2307-11), challenging not  
4 the audit findings (the subject of the first Hanlees protest), but rather the timing of the chargeback of the  
5 finalized amount of \$64,350 (hereinafter referred to as the second Hanlees protest).

6 9. On July 15, 2011, NNA filed a motion to dismiss the second Hanlees protest as untimely.  
7 On August 10, 2011, a telephonic hearing was held before Administrative Law Judge (hereinafter ALJ)  
8 Jerold A. Prod. Nelson Mullins Riley & Scarborough, LLP, by M. Ronald McMahon, Jr., appeared for  
9 respondent and moving party NNA. Callahan Thompson Sherman & Caudill, LLP, by Tina Hopper,  
10 appeared for protestant and responding party Hanlees.

11 10. On July 29, 2011, Hanlees objected to any consideration of the Board's May 26, 2011,  
12 decision in the first Hanlees protest that resulted in the dismissal of Protest No. PR-2291-11. The  
13 objection was on the ground that the decision has not been designated as precedent by the Board. (See  
14 Gov. Code §§ 11425.10(a)(7) and 11425.60) During the telephonic hearing on August 10, 2011, ALJ  
15 Prod overruled Hanlees' objection because the decision in Protest No. PR-2291-11 is part of the  
16 administrative record in the first Hanlees protest and involves the same parties and the same audit that is  
17 at issue in this protest.

### 18 ISSUE

19 11. The only issue is whether NNA's chargebacks of \$8,775 on March 10, 2010 and \$55,575  
20 on April 12, 2010 were timely within the meaning of section 3065.1. If the chargebacks were timely the  
21 motion to dismiss must be granted. If the chargebacks were untimely the motion must be denied.

22 12. Section 3065.1 provides as follows:

23 (a) All claims made by a franchisee for payment under the terms of a franchisor incentive  
24 program shall be either approved or disapproved within 30 days after receipt by the  
25 franchisor. When any claim is disapproved, the franchisee who submits it shall be notified  
26 in writing of its disapproval within the required period, and each notice shall state the  
27 specific grounds upon which the disapproval is based. Any claim not specifically  
28 disapproved in writing within 30 days from receipt shall be deemed approved on the 30<sup>th</sup>  
day. Following the disapproval of a claim, a franchisee shall have one year from receipt of  
the notice of disapproval in which to appeal the disapproval to the franchisor and file a  
protest with the board. All claims made by franchisees under this section shall be paid  
within 30 days following approval. Failure to approve or pay within the above specified  
time limits, in individual instances for reasons beyond the reasonable control of the

1 franchisor, do not constitute a violation of this article.

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

### 11 NNA'S POSITION

12 13. NNA argues that the one year period allowed from the disapproval of a franchisor  
13 incentive program claim for a franchisee to file a protest applies to all activities covered by section  
14 3065.1(a) and 3065.1(b), and not just the disapproval of the claim referenced in 3065.1(a). The  
15 contention is that since this second protest regarding the timing of the chargeback referenced in section  
16 3065.1(b) was filed more than one year after the disapproval of the underlying claims on December 9,  
17 2009, it is untimely and must be dismissed, as was the first Hanlees protest. The argument is that the one  
18 year statute of limitations in 3065.1(a) makes no distinction between a protest challenging the audit and a  
19 protest challenging the chargeback pursuant thereto.

20 14. NNA argues that the rationale in the first Hanlees decision is persuasive for purposes of  
21 this proceeding. It relies on dicta in the decision stating that section 3065.1 must be read as an integrated  
22 whole. It is inferred that the one year limitation on protests challenging claim disapprovals in section  
23 3065.1(a) also serves as a one year limitation on protests challenging untimely chargebacks.

### 24 HANLEES' POSITION

25 15. Hanlees contends that the one year period allowed for franchisee appeals to the franchisor  
26 and protests to the Board of denied franchisor incentive program claims set forth in section 3065.1(a) does  
27 not apply to chargebacks made by the franchisor (section 3065.1(b)). The argument is that the limitation  
28 period properly at play in this proceeding is the one in section 3065.1(b), giving a franchisor no more than  
90 days from the completion of any audit to make chargebacks. Hanlees contends that since the one year  
period to file a protest set forth in section 3065.1(a) is inapplicable, the appropriate statute of limitations  
to file a protest alleging an untimely chargeback is the four year limit in Code of Civil Procedure section

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1 343.<sup>2</sup>

2 PROCEDURAL SETTING OF THIS MOTION

3 16. Hanlees' first protest was dismissed by the Board on May 26, 2011, as untimely filed. The  
4 decision held that the one year period in which to file a protest commenced on December 9, 2009, the date  
5 Hanlees was notified that its claims under the franchisor incentive program were disapproved. Hanlees  
6 had one year from December 9, 2009, to appeal this disapproval to the franchisor and to file a protest with  
7 the Board. Hanlees did not file its first protest until February 25, 2011. NNA's motion to dismiss was  
8 therefore granted. Hanlees accepts that for now the ruling is binding on the parties unless and until  
9 reversed. Hanlees has sought superior court review of the decision in the first protest, which is presently  
10 set for hearing in January 2012.

11 17. The timeliness of the chargebacks of March 10 and April 12, 2010, were not at issue in  
12 first Hanlees protest. This issue was not addressed in the Board's May 26, 2011 decision on that protest.

13 ANALYSIS

14 18. There are several time limitations in section 3065.1 concerning franchisor incentive  
15 programs. They are in both subsection (a) and subsection (b), as follows:

- 16 1. Claims under the franchisor incentive program by a franchisee must be approved or  
17 disapproved by the franchisor within 30 days after receipt by the franchisor (failure to act  
18 constitutes approval).
- 19 2. Following the disapproval of a claim, the franchisee must appeal the disapproval to the  
20 franchisor and file a protest with the Board within one year from receipt of the notice of  
21 the disapproval. The application of this limitation was the subject of the first Hanlees  
22 protest.
- 23 3. All approved franchisee claims must be paid within 30 days following approval.
- 24 4. Audits of franchisee incentive records can be conducted by the franchisor on a reasonable  
25 basis for a period of 18 months after a claim is paid or credit issued.

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28 <sup>2</sup> Section 343 of the Code of Civil Procedure provides as follows: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

1           5.     Any chargeback to a franchisee flowing from a completed audit of franchisee records by  
2           the franchisor must be made within 90 days of the completion of the audit. This is the  
3           limitation directly applicable in the instant motion.

4           19.    The controlling fact in this proceeding is that NNA's chargebacks to Hanlees of \$64,350  
5           on March 10 and April 12, 2010, were made within 90 days of the February 26, 2010, completion of the  
6           audit. Prior to February 26, 2010, the final amount resulting from the audit had not been determined.

7           20.    Moving party NNA argues that because section 3065.1 must be read as a whole, the one  
8           year limitation on the filing of a protest challenging the disapproval of a claim must also be the limitation  
9           on the filing of a protest challenging the timing of the chargeback. Responding party Hanlees argues that  
10          the date of the completion of the audit is the same date as the disapproval of the claim, i.e., December 9,  
11          2009. Hanlees contends that the chargebacks occurred more than 90 days after the completion of the  
12          audit and were therefore untimely.

13          21.    Neither argument is persuasive. The disapproval of the claim and the completion of the  
14          audit are not the same. The limitation on the time to file a protest on the disapproval of the claim is a  
15          limitation on the franchisee. The limitation on the time to make a chargeback pursuant to a completed  
16          audit is a limitation on the franchisor. They are dealt with separately in subsections (a) and (b) of section  
17          3065.1.

18          22.    The claims were disapproved on December 9, 2009. This was communicated by NNA to  
19          Hanlees at a closing meeting on that date, together with the results of the audit, which at the time  
20          indicated an overpayment to Hanlees of \$70,500. Hanlees appealed the result of the audit, which appeal  
21          was accepted by NNA on January 5, 2010. The amount of the proposed \$70,500 chargeback was reduced  
22          in two steps. The first was to \$67,875 as the result of an internal review by NNA. The second was to  
23          \$64,350, resulting from additional negotiations with Hanlees.

24          23.    The illogic of Hanlees' contention that the audit was completed on December 9, 2009, is  
25          apparent. Suppose that the internal review by NNA and the subsequent negotiations with Hanlees had not  
26          been concluded at the amount of \$64,350 by February 26, 2010, but rather, say, April 26, 2010. Hanlees  
27          would then be in the absurd position of contending that NNA was duty bound to charge back against it the  
28          entire earlier amount of \$70,500, and to have done it no later than March 9, 2010 (90 days after December

1 9, 2009).

2 24. That did not happen in this case, although the 90 days allowed NNA to charge back the  
3 \$64,350 commenced on February 26, 2010, the date the final amount flowing from the audit was  
4 established. It cannot logically be concluded that the audit was completed any earlier than the date the  
5 final amount thereof was determined. Hanlees maintains that it is not challenging the findings of the  
6 audit, and also that the audit was completed on December 9, 2009. It is doubtful that Hanlees is arguing  
7 that it is bound to give up the \$6,150 it gained on February 26, 2010, by its appeal from the December 9,  
8 2009, audit result of \$70,500.

9 25. Respondent NNA is correct to point out that the entire legislative scheme establishing the  
10 Board and its proceedings is oriented toward expeditious resolution of disputes. NNA makes this point in  
11 refuting Hanlees' contention that if a franchisor takes 91 days to make a chargeback pursuant to a  
12 completed audit, the franchisee has four years to file a protest challenging the timing of the chargeback.  
13 NNA is not necessarily correct, however, in its assertion that the one year limitation on the time to file a  
14 protest of a disapproved claim (section 3065.1(a)) also applies to a protest over the timing of any  
15 chargeback.

16 26. In light of the fact that the chargeback was timely made, it is not necessary to decide  
17 whether protestant has four years from December 9, 2009 to file a protest, or whether the protest should  
18 be dismissed on the sole ground that it was untimely filed.

19 **CONCLUSION**

20 This protest was filed solely on the ground that the chargeback of \$64,350 allegedly was not made  
21 within 90 days of the completion of the audit (argued to have been on December 9, 2009). The  
22 chargeback was in fact made within 90 days of the completion of the audit on February 26, 2010. A  
23 dismissal of the protest is therefore in order, although not on the precise ground moved by NNA.

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