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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

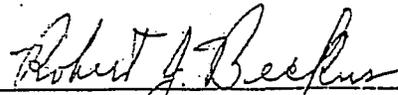
In the Matter of the Petition of)
ROBERT D. NESEN; NESEN MOTOR CAR) Petition No. P-187-89
CAR COMPANY, INC., dba NESEN)
CADILLAC,)
Petitioners,)
vs.)
GENERAL MOTORS CORPORATION,)
CADILLAC MOTOR CAR DIVISION,)
Respondent.)

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 15TH day of December, 1989.


ROBERT J. BECKUS
President
New Motor Vehicle Board

Thousand Oaks, California, and is the franchisor of Nesen.

2. The petition alleges seven causes of action relating to certain promises allegedly made by Cadillac between 1970 and the present to refrain from establishing Cadillac representation in the Calabasas area.^{2/} In its answer, Cadillac denies that it made any such promises and raises several affirmative defenses.

3. The Board, after consideration of the allegations of the petition, referred the matter to an Administrative Law Judge for a hearing on the issues raised by the petition.

4. By stipulation of the parties, the hearing was scheduled to commence on September 12, 1989.

5. The hearing was held before Stuart A. Wein, Administrative Law Judge of the Board, on September 12, 13, 14, 15, 21, and 22, 1989 at Los Angeles, California.

6. Nesen and Robert Nesen were represented by Steven H. Gentry, Esq., of Good, Wildman, Hegness & Walley, 5000 Campus Drive, Newport Beach, California.

7. Cadillac was represented by Gregory R. Oxford, Esq. of O'Melveny & Myers, 400 South Hope Street, Los Angeles, California, and by L. Joseph Lines, III, Esq., of the General Motors Corporate Legal Staff, 3031 West Grand Boulevard, Detroit, Michigan.

^{2/} Nesen initially attempted to challenge the new Calabasas point by a protest filed pursuant to Vehicle Code section 3062 (Protest Number PR-1006-88). On February 23, 1989, the Board granted Cadillac's motion to dismiss that protest for lack of jurisdiction on the ground that Nesen was more than 10 miles from the site for the proposed Calabasas dealership.

ISSUES PRESENTED

8. Counsel for the parties stipulated that the issues to be addressed at the hearing were as follows^{3/}:

(a) Whether Cadillac orally promised not to appoint a new dealer in the Calabasas area.

(b) Whether Cadillac breached its promise by its 1988 decision to establish a new dealer point in Calabasas.

(c) Whether Cadillac's conduct constituted intentional or negligent misrepresentation, intentional or negligent infliction of emotional distress, unlawfully interfered with Nesen's business interests, or violated Vehicle Code section 11713.2(e).^{4/}

FINDINGS OF FACT

(a) Facts Relating to Petitioner's Move from Oxnard to Thousand Oaks and Operations During the 1970s.

9. Robert Nesen became a Cadillac dealer in 1953 when he added the Cadillac franchise to his Oldsmobile dealership in Oxnard. The dealership, Nesen Oldsmobile-Cadillac, operated a dual dealership in Oxnard until Robert Nesen and his son William ("Greg") Nesen, with Cadillac's approval, decided to relocate

^{3/} Counsel stipulated that the hearing on the petition could be bifurcated with all issues pertaining to damages to be addressed at a later hearing if necessary.

^{4/} Vehicle Code section 11713.2(e) prohibits a manufacturer from coercing or attempting to coerce any dealer "To enter into any agreement with the manufacturer ... or to do any other act prejudicial to the dealer by threatening to cancel a franchise or any contractual agreement existing between the dealer and manufacturer ..."

the dealership to Thousand Oaks. The relocation occurred in February 1971.^{5/}

10. A 1979 survey by Cadillac recommended the establishment of a Cadillac dealership in the Woodland Hills/Calabasas area and an undualing of Nesen's Cadillac-Oldsmobile dealership.

11. For various economic reasons, no action was taken by Cadillac to initiate the Calabasas point immediatly following the survey.

(b) Facts Relating to Cadillac's 1984-1985 Decision to Make Calabasas a Study Area and Nesen's Decision to Undual

12. From 1981 to 1985, Greg Nesen functioned as the dealer-operator and managed the day-to-day affairs of the business while Robert Nesen was serving as U.S. Ambassador to Australia. Robert Nesen's younger son, Gary Nesen, served as the dealership's General Manager.

13. On May 16, 1984, Cadillac Zone Manager, Charles Gallacher, met with Jim Bess, a Mercedes-Benz dealer in Canoga Park, to discuss the possibility of a Cadillac franchise on property leased to Bess in Calabasas. Gallacher opined that the

^{5/} The petition alleged that in 1970 Cadillac promised to refrain from appointing a dealer in the Thousand Oaks/Agoura Hills/Calabasas market area. This promise was allegedly reiterated when Nesen undertook an expansion in the mid-1970's. (Petition paragraphs 5, 7) The Zone Manager of Cadillac, George Harrison, specifically denied any such oral or written commitments. The existence of any such promise is irrelevant, since Nesen's at-hearing theory was that Nesen had separated its Cadillac-Oldsmobile dealership ("undualed") in 1986 in exchange for Cadillac's 1984/85 promise not to establish a dealership in Calabasas.

property was "ideally suited" as a location for a Cadillac dealership, and on May 20, 1984, Bess submitted a dealer application and financial information.

14. By letter dated July 18, 1984, Cadillac notified Nesen and other interested dealers within the Los Angeles Northern Multiple Dealer Area, which included Neill Lehr Cadillac and Casa de Cadillac, of its intention to conduct a market survey.

15. On December 4, 1984, Gallacher met with Neill Lehr, Jim Wilson and Greg and Gary Nesen (the principals from Neill Lehr Cadillac, Casa de Cadillac and Nesen, respectively) to discuss the results of the market survey and to announce Cadillac's tentative decision to add representation in Calabasas. At the meeting, Greg Nesen stated that he was not pleased with Cadillac's tentative decision, pointing out that growth in the Thousand Oaks area had not been as predicted, and indicating that the addition of the dealer in Calabasas would have a significant impact on Nesen's business. Greg Nesen further stated that the dealership was planning on spending some \$750,000 to expand the service facility, which decision might be reconsidered if Cadillac proceeded to add a Calabasas dealer.

16. Greg and Gary Nesen also communicated their concerns to Robert Nesen, who was, at the time, in Australia. Robert Nesen called Cadillac General Manager, John Grettenberger, who directed Assistant Sales Manager, Jere Kitzmiller, to attend a

meeting with the Nesens at their dealership in Thousand Oaks.

17. On December 14, 1984, Kitzmiller and Gallacher met with Greg and Gary Nesen to review the results of the market survey and to discuss Cadillac's tentative decision to add the Calabasas point. Robert Nesen was enroute from Australia, but Kitzmiller and Gallacher were unable to wait until his arrival. The Nesens were particularly upset when the Cadillac representatives left without meeting with Robert Nesen. Robert Nesen had returned to California earlier than he had planned in order to attend the meeting.

18. By letter dated December 21, 1984, from Greg Nesen to Gallacher, Greg Nesen reiterated the dealership's displeasure with Cadillac's tentative decision to add a Calabasas point, disputed Cadillac's demographic information, pointed out the adverse financial impact that the additional point would have on Nesen, stated that Nesen could not continue its planned service expansion and body shop addition (on which \$50,000 had already been spent) if the Calabasas point were added, and indicated that it was Nesen's intention to protest any such proposed establishment with the Board.

19. Despite letters of complaint from Neill Lehr Cadillac, Casa de Cadillac, Modern Motors and Nesen, Cadillac Dealer Development personnel remained convinced that the Calabasas dealership should be established.

20. On December 20, 1984, protests were filed with the Board against the Calabasas point by Neill Lehr Cadillac, Casa

de Cadillac and Nesen. By letter dated January 8, 1985, General Motors advised the Board and counsel for the three protesting dealers that Cadillac's decision to establish a dealership in Calabasas had been only "tentative" and no final decision had been made. General Motors requested that the protests be dismissed as premature. The Executive Secretary of the Board, with the concurrence of the dealers, dismissed these protests on January 28, 1985.

21. In mid-January of 1985, the General Motors Sales Section advised Cadillac that General Motors would not give final approval to establish representation in Calabasas, because General Motors "could not justify the deal."

22. In mid-January of 1985, Gary Nesen suggested to Cadillac the possibility of Nesen undualing the Cadillac and Oldsmobile operation in an effort to encourage Cadillac to reconsider its position on the Calabasas point.^{6/}

23. By an internal memorandum of January 23, 1985, Kitzmiller recommended that Cadillac commence a "fall-back" position, including the undualing of Nesen's dealership and the establishment of a dealership in the Saugus-Newhall area (Cadillac-Oldsmobile dual). Kitzmiller's plan was to "go back,

^{6/} While Nesen might gain some advantage by undualing, e.g., the availability of an additional franchise for either Gary or Greg Nesen, and had indeed planned an expansion prior to Cadillac's Calabasas decision, the undualing was of primary benefit to Cadillac, and was suggested by the Nesens in an albeit unsuccessful effort to obtain a quid pro quo concerning Calabasas.

have a meeting and inform the dealers that Cadillac would hold off on Calabasas if Nesen undualed, representation was established at Saugus-Newhall, ~~Neill Lehr Cadillac~~ improved its CSI (Customer Satisfaction Index), Casa de Cadillac installed new signs, etc." Copies of the memorandum were directed to the Zone Offices, but its content was not communicated to the Nesens.

24. Gallacher further researched files in pursuit of his goal to go ahead with the Calabasas point, but Cadillac's Central Office ultimately decided (on or about February 22, 1985) to forego establishing additional representation in Calabasas "for the time being", and instead maintain the area as a "study area" subject to future review as later data became available. Cadillac also determined to proceed toward obtaining representation in the Saugus-Newhall area, and its internal correspondence stated it was "desirous of moving forward with (Nesen's) immediate undualing."

25. On March 11, 1985, Gallacher and Cadillac Regional Manager, Karl Pierce, met with Greg Nesen, Lehr and Wilson, individually, to inform them of Cadillac's decision to designate Calabasas as a study area, with no immediate plans for dealer representation, and that a dealer would be appointed in the Saugus-Newhall area. Demographic and sales data for the L. A. North Metro Area was reviewed. Greg Nesen was advised that Cadillac was concerned about performance in the L. A. North Metro Area, and that Cadillac intended to monitor the situation on a very close basis. Greg Nesen was told that "one of the steps that had to be taken as soon as possible by R. D. Nesen

Oldsmobile-Cadillac was the undualing." Wilson was advised that Cadillac wanted him to get involved in a new sign program and Lehr was told of Cadillac's concerns regarding his dealership's CSI (Customer Satisfaction Index).^{7/}

26. On March 11, 1985, Gallacher notified Bess of Cadillac's decision to designate Calabasas as a study area. Gallacher advised Bess that Calabasas would probably remain a study area for several years, subject to quarterly and annual review.

27. The agreement of the parties with respect to Nesen's Oldsmobile-Cadillac undualing was reduced to written form in a 2 1/2 page letter dated June 27, 1985, and signed by Robert Nesen on July 1, 1985. The agreement made no reference to the Calabasas point, and provided that, "When executed, this letter agreement cancels and supersedes any other agreements or understandings between us on the subjects discussed herein."

^{7/} Conflicting testimony concerning Nesen's sales performance and CSI ratings are irrelevant to ultimate findings in the case, since Nesen did not establish that Cadillac agreed to forebear from establishing a dealership in Calabasas for any definite period of time or pursuant to any readily definable standards (e.g., specific CSI levels, penetration percentages, etc.) Moreover, the performance sought by Cadillac related to all of the relevant dealers as a group rather than to the specific achievements of any one. Cadillac, thus, was under no obligation to delay its Calabasas representation because the Nesens undualed, or Lehr improved his CSI, or Wilson added better signage.

28. By letter of July 9, 1985, the Nesens submitted to Cadillac plans for the undualing, and explained the new organizational structure of ~~the two~~ dealerships (Greg Nesen would become the Cadillac dealer; Gary Nesen would take over as the Oldsmobile dealer, with Robert Nesen listed as dealer principle in both of the franchises.) Additionally, the Nesens suggested that an adjacent 2 1/2 acre parcel (encroached upon by the undualing plan) would be a suitable spot for a General Motors Saturn dealership in the future, stating that "(they) would expect Cadillac and Oldsmobile Division to make whatever contacts necessary to accomplish this as a future goal of this Company." Because of the additional costs incurred and utilization of adjacent property, the Nesens felt that "'Nesen Cadillac' should, by agreement, be assured that no further consideration will be given to a dealer point in the Agoura, Calabasas, Woodland Hills area or any other area currently covered by our existing Sales and Service Agreement."

29. In Cadillac's view the plans submitted by the Nesens were not an acceptable undualing, and meetings were scheduled in August, 1985, to review the matter further.

30. At the conclusion of the meeting on August 6, 1985, Cadillac and Nesen were not in agreement concerning the specifics of the undualing proposal. Gallacher recommended to the Central Office that if Cadillac approved Nesen's proposal, that "(Cadillac) probably should proceed to go ahead with the Calabasas study further."

31. Another meeting was held on August 9, 1985. Cadillac repeated its concerns for separating the two franchises. Robert Nesen repeated his concern about "spending all this money with no guarantee that (Cadillac) would not put a dealer in Calabasas 'down the road'". Gallacher stated that Cadillac could not guarantee that a new dealer would not be added, and that it was Nesen's success in sales and service improvement which was the key to whether or not the Calabasas point was added.

32. A day or two later, Greg Nesen delivered revised undualing plans at Gallacher's office and again sought Cadillac's commitment to forego Calabasas. Gallacher replied that Calabasas was a separate issue, that Calabasas was still being retained as a study area, and that Cadillac would monitor the progress of Nesen and the other L. A. North Area dealers to determine in the future whether or not another Cadillac

dealership was needed. 8/

8/ That Cadillac did not commit to staying out of Calabasas for any fixed period of time was highlighted by the Nesens' singular lack of uniformity in attributing such a commitment from any of the franchisor's personnel:

Gary Nesen: "A minimum of ten to fifteen years and possibly never."

Greg Nesen: "A minimum of five years from one survey to the next and there was nothing to worry about so long as everything was going well."

Robert Nesen: "I don't recall any specific time element. I'm only relying on the fact that Mr. Harrison and I had made an agreement 15 years prior, as far as that they wouldn't move Ventura and that they wouldn't put a dealer in the west valley if I would move to Thousand Oaks, so it was about a 15-year time span."

And from the latter's deposition testimony:

Q: "Granted that your contention is that this was an agreement during 1985 that Cadillac would refrain from adding another new dealer in Calabasas, what, if anything, did the representatives of Cadillac say to you about how long they would refrain from adding a dealer in Calabasas?"

A: "I don't recall that there was ever a definite time element. We discussed the amount of money that we were going to expend and, as I recall, we referred back to the previous agreement that was made 15 years before, and the money that I expended over what I had invested in Oxnard to -- and that had been 15 years, and as I recall the 15-year figure, my statement to -- as I recall, I said something to the effect that this is a larger expenditure than that, and so to me it was 15, 20 years, something like that. I don't know if those figures were -- that is just a rough estimation as to what I recall was said when we discussed it."

Q: "When you say you recall about what was said, you are talking now about what you said?"

A: "What I said."

Q: "What, if anything, do you recall about what Cadillac said?"

A: "I don't recall what they said, but there was never a negative to it or we would have probably dropped the thing and gone into or come to some agreement, but there was nothing said, so I don't recall anything being said other than that."

33. The Nesen undualing proposal was finally approved at a later date by Cadillac's Central Office, and the project was completed in the spring of 1986--at a cost between two and three million dollars.

(c) Facts Relating to Cadillac's 1988 Decision to Add a Dealer in Calabasas.

34. In the fall of 1986, after Cadillac's new Zone Manager, Denis O'Shaughnessy, had been on the job for some six months, Robert Nesen queried whether Cadillac was "thinking of doing anything in Calabasas." O'Shaughnessy replied that he was not aware of any activity, but that it was a study point which meant that there could be activity in the future.

35. In the fall of 1987, O'Shaughnessy was approached by a Zone Manager for Buick concerning a potential minority candidate with interest in the Calabasas area. Robert Nesen became aware of this interest (via a concurrent inquiry to Oldsmobile), and discussed Cadillac's position with O'Shaughnessy in January of 1988. O'Shaughnessy informed Robert Nesen that Cadillac was not interested in that particular proposal, but had a continuing interest in Calabasas.

36. In late 1987, Robert Nesen told O'Shaughnessy that he believed there was an agreement with Cadillac not to appoint an additional dealer in Calabasas. O'Shaughnessy replied that he was unaware of any such agreement but would review the files and check with employees who might be knowledgeable on the matter. He subsequently related to Robert Nesen that he could find no such agreement.

37. By letter of December 11, 1987, Cadillac was advised of Greg Nesen's resignation and the dealership's recommendation to

permit Gary Nesen to take his brother's place. Additionally, Nesen proposed to relocate the Oldsmobile sales display to the west showroom of the main building (in the same building with Cadillac), displacing Subaru.

38. In a "suggested letter" prepared by Cadillac's Central Office on December 23, 1987, Cadillac indicated that it had intentionally delayed implementation of its long range plan for additional representation in Calabasas to enable Nesen Cadillac to take full advantage of its sales and service potential. O'Shaughnessy did not send the letter to Nesen Cadillac.

39. Rather, O'Shaughnessy met with Robert Nesen on January 22, 1988, to attempt to convince the Nesens that their plans, which Cadillac considered a rebranding, were not in their best interests.

40. By letter of February 3, 1988, Nesen requested that the Cadillac dealer be changed from Greg Nesen to Gary Nesen; that the dealership name be changed to the Nesen Motor Car Company; that the facility address (not location) be changed; and that the Cadillac and Oldsmobile showrooms would remain separate facilities "for the present time."

41. By an internal memorandum of March 22, 1988, O'Shaughnessy requested a "mini-survey" of the Los Angeles-San Fernando Multiple Dealer Area, urging Cadillac to initiate action to establish the Calabasas study area as an open point.

42. In May 1988, Kitzmiller ^{9/} observed changes in the Nesen Dealership, specifically the relocation of Oldsmobile back to the Cadillac building, and he recommended that a new dual dealership agreement be executed. ^{10/}

43. In June 1988, the Nesens met with O'Shaughnessy and the Oldsmobile Zone Manager to discuss the facilities change which was ultimately approved by Cadillac.

44. In July 1988, Kitzmiller and O'Shaughnessy met with Bess to discuss the Calabasas point. The Cadillac representatives concurred that the proposed location was the best that could be hoped for, and that the facility proposal was excellent. O'Shaughnessy requested that Calabasas immediately be designated as an open point. Kitzmiller agreed and Dealer Development was requested to proceed to obtain open point status for Calabasas.

45. The Nesens were notified by letter of August 3, 1988, that Cadillac had tentatively decided to establish additional dealer representation in "the Los Angeles Section 3 - San Fernando Multiple Dealer Area of Primary Responsibility."

^{9/} In January 1986, Kitzmiller was designated Cadillac's Area Sales, Service and Marketing Manager for the Western half of the country, and relocated to Thousand Oaks.

^{10/} The Nesens decided to use the Oldsmobile showroom for a Lexus franchise and it is currently being so used.

46. By letter of November 2, 1988, Cadillac confirmed that it had advised the Nesens at a meeting of October 27, 1988, of its final decision to establish a dealer in the Calabasas area.^{11/}

47. The Dealer Sales and Service Agreement (effective February 16, 1988) provides in pertinent part (Article 7.10):

7.10 Sole Agreement of Parties

Except as otherwise provided or referred to herein, General Motors has made no promises to Dealer or any Dealer Operator or owner and there are no other agreements or understandings, either oral or in writing, between the parties affecting this Agreement or relating to any of the subject matter covered by this Agreement.

Except as otherwise provided herein, this Agreement cancels and supersedes all previous agreements between the parties that relate to any matters covered herein, and no change in, addition to (except the filing in of blank lines) or erasure of any printed portion of this Agreement, will be binding unless it is approved in a written agreement executed in accordance with Paragraph SIXTH of this Agreement.

^{11/} The record is inconclusive as to what triggered the final decision by Cadillac to establish the Calabasas point in 1988. Cadillac denies any relationship between what they perceived as the Nesen "redualing" and the Calabasas decision. The tentative decision, however, was not made until Kitzmiller observed the Oldsmobile relocation.

DETERMINATION OF ISSUES

As a result of the above findings of fact, it is determined that:

48. There was linkage between the decision to undual Nesen Oldsmobile-Cadillac in 1985 and Cadillac's decision to designate Calabasas as a study area at that time. Any future decision by Cadillac concerning Calabasas depended upon the performance of all Northern Los Angeles Metropolitan Area dealers. To encourage increased sales and improved performance, Cadillac requested undualing by Nesen Cadillac, improved CSI (Customer Satisfaction Index) from Neill Lehr Cadillac, and new signage from Casa de Cadillac.

49. However, no promise, either written or oral or inferable by conduct of the parties, was made by any Cadillac personnel to the Nesens which obligated Cadillac to refrain from establishing a dealership in Calabasas for any certain period of time.

50. Cadillac's decision to maintain Calabasas as a study area was tied only to the performance achieved by the relevant dealers. No specific guidelines or standards were ever contemplated by the parties.

51. As there was no binding agreement between the parties, there is no need to discuss whether or not either side committed a breach by virtue of its 1988 conduct. Nor is it necessary to conduct a further hearing on the issue of damages.

52. Cadillac was under no duty to notify the Nesens of the early-1985 internal difference of opinion between its Dealer Development Office and General Motors Sales. Rather, Cadillac

was obligated to and did timely notify the Nesens of its decision to designate Calabasas as a study area, which notification took place during the meeting of March 11, 1985. Cadillac did not intentionally or negligently misrepresent its position in this regard.

53. Having concluded that no promise had been made, and no intentional or negligent misrepresentation established, I find that Petitioners have not proven that Cadillac has intentionally or negligently inflicted emotional distress upon Robert Nesen. Nor have Petitioners established Cadillac's unlawful interference with business interests.

54. There is no evidence to support Nesen's claim that Cadillac coerced Nesen into the 1985 undualing in violation of Vehicle Code section 11713.2(e).

PROPOSED DECISION

THEREFORE, the following proposed decision is respectfully submitted:

The relief sought by the petition is denied.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing held before me on the above date and recommend adoption of this proposed decision as the decision of the New Motor Vehicle Board.

Dated: December 5, 1989

Stuart A. Wein

STUART A. WEIN
Administrative Law Judge
New Motor Vehicle Board