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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Petition of)
)
MARK L. ELWARD, MICHAEL L. ELWARD) Petition No. P-290-94
and WILLIAM R. WINTERHALDER,)
)
Petitioners,)
)
vs.) PROPOSED DECISION
)
MAZDA MOTOR OF AMERICA, INC.,)
)
Respondent.)
_____)

PROCEDURAL BACKGROUND

1. In November 1993, Mark K. Elward, Michael L. Elward and William R. Winterhalder ("Petitioners") filed a civil complaint in the Superior Court of the State of California, County of Santa Clara, against Mazda Motor of America, Inc. ("Respondent or MAZDA").

2. Respondent demurred to petitioners' complaint based on their failure to exhaust administrative remedies before the New Motor Vehicle Board ("Board").

3. The Board filed a brief amicus curiae, on February 24,

1994, supporting the doctrine of exhaustion of administrative remedies.

4. The Court dismissed petitioners' complaint based on their failure to exhaust administrative remedies before the Board.

5. On April 6, 1994 petitioners filed the instant petition with the Board, pursuant to Vehicle Code § 3050, against Respondent Mazda Motors of America, Inc.

6. Petitioners are individuals acting collectively as prospective buyers to purchase an automobile dealership.

7. Respondent is a manufacturer and distributor of new motor vehicles in California.

8. An eleven (11) day hearing was held before Merilyn Wong, Administrative Law Judge, commencing on February 24, 1995, and ending on May 31, 1995.

9. Pursuant to oral stipulation of the parties, through their respective counsel, the issues of liability and damages were bifurcated. The only issues presented at this hearing are related to liability.

10. Petitioners were represented by Michael T. Morrissey, of The Morrissey Law Firm, 84 W. Santa Clara Street, Suite 590, San Jose, California.

11. Respondent was represented by Marjorie E. Lewis, of Gibson, Dunn & Crutcher, 333 South Grand Avenue, Los Angeles, California.

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CONTENTIONS OF THE PARTIES

12. On February 28, 1992, Petitioners and Santa Cruz Motors entered into a written agreement whereby Santa Cruz Motors agreed to sell the assets and goodwill of the Santa Cruz Motors' dealership to petitioners. The dealership held Mazda, BMW, and Oldsmobile franchises. ¹

13. The franchise agreement between Santa Cruz Motors and MAZDA required the consent of Respondent to the assignment of the Mazda franchise agreement to third parties, such consent not to be unreasonably withheld.

14. On May 22, 1992, by a letter of intent, MAZDA conditionally approved the assignment of the franchise to the petitioners. The conditions of approval imposed by respondent included: the commitment that petitioners would construct or renovate (and continue to operate the facilities from its existing location) in order to bring the facilities into compliance with MAZDA's minimum guides within two years; the petitioners would immediately provide approximately 65,000 square feet for the Mazda operation; the petitioners would provide acceptable signage within approximately 3 months.

15. Petitioners contend that because Respondent's

¹ The agreement represents a buy/sell of the Santa Cruz Motors dealership to the Petitioners. Initially, the location of the dealership was to remain the same. Factual analysis regarding the possible relocation of the dealership to an automall is detailed in the Findings of Fact.

requirements were impossible and/or unreasonable, these conditions were tantamount to the unreasonable withholding of consent to the assignment of the franchise.

16. Petitioners' contend liability under the following legal theories and laws: Intentional or Negligent Interference with Economic Relations; Breach of Implied Covenant of Good Faith and Fair Dealing; and Vehicle Code § 11713.3(d).

17. Respondent denies that it unreasonably withheld consent to Petitioners' purchase of Santa Cruz Motors. Respondent contends that it acted in good faith in the exercise of prudent business judgment based on its legitimate business interests. Respondent contends that, in fact, it had approved Petitioners as Mazda dealer candidates. Respondent further contends that Petitioners abandoned the buy-sell for reasons, unrelated to any acts by respondent, including the fact that they could not persuade the city to use its powers of eminent domain to acquire nearby property; they could not persuade MAZDA and BMW to withdraw their facilities requirements; and because they had negotiated an unfavorable sales price with Santa Cruz Motors. Respondent contends that these were the reasons Petitioners chose to abandon the buy-sell agreement and not because of any conduct on the part of Respondent.

ISSUES PRESENTED

A. Did Respondent MAZDA violate Vehicle Code § 11713(d) which provides, in relevant part, as follows:

It is unlawful and a violation of this code for any manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:

(d) To prevent or require, or attempt to prevent or require, by contract or otherwise, any dealer, or any officer, partner, or stockholder of any dealership, the sale or transfer of any part of the interest of any of them to any other person or persons. No dealer, officer, partner, or stockholder shall, however, have the right to sell, transfer, or assign the franchise, or any right thereunder, without the consent of the manufacturer or distributor except that the consent shall not be unreasonably withheld.

B. Did the conduct of Respondent MAZDA constitute intentional or negligent interference with economic relations?

C. Did the conduct of Respondent MAZDA constitute a breach of the implied covenant of good faith and fair dealing?

FINDINGS OF FACT

18. The threshold question is whether respondent MAZDA's conditions for approval amounted to the unreasonable withholding of consent by Mazda.

A. THE EXISTING FACILITIES

19. The Santa Cruz Motor facilities were originally built in 1972. By 1992 the existing facilities were cramped, crowded and inefficient, although the owners had expanded and improved the facilities during its 20 years of operation.

20. The facilities at the Santa Cruz Motors dealership was shared with three line makes: Mazda, BMW and Oldsmobile.

Petitioners initially sought to acquire all three franchises.

21. The new car showroom at Santa Cruz Motors was 915 square feet, representing 57.2% of MAZDA's minimum guide of 1,600 square feet for new car display. This percentage does not take into consideration the fact that MAZDA and BMW shared the new car showroom.

22. The parts building was 1,955 square feet which represented 51.2% of MAZDA's minimum guide of 3,821 square feet for parts sales and storage.

23. There was no customer parking on the dealership premises which left Santa Cruz Motors at 0% compliance with MAZDA's minimum guide of 4,500 square feet for customer parking.

24. The new car display and storage of 21,000 square feet was 82.7% of MAZDA's minimum guide of 25,380 square feet.

25. The used car display and storage of 12,584 square feet was 69% of MAZDA's minimum guide of 18,240 square feet for used car display and storage.

26. The inadequacy of the parts department required the owners of Santa Cruz Motors to add three "Sea Train" trailers to the service department along with space saving bins to accommodate parts storage.

27. The used car operation was located across the street from the main facility. This situation created logistical and operational problems with employees who had to staff the used car lot away from the main facility.

28. The new car display was in two locations - the main showroom and across the street. Customers visiting the main showroom who were unaware of the new car display across the street often felt that there was an inadequate selection of new cars.

29. The facilities deficiencies of Santa Cruz Motors were routinely brought to the attention of the owners through contact visits with the MAZDA District Sales Manager and through the annual "Dealer Review and Action Plan" (DRAP Reports) of the Mazda Dealer Agreement. Santa Cruz Motors worked at correcting various deficiencies brought up in the annual DRAP reports, however the facilities were never fully brought into compliance with MAZDA's guides.

30. The Mazda Dealer Agreement for Santa Cruz Motors included a section entitled "Dealer Review and Action Plan" which provides: (1) that Mazda will prepare and present an individualized annual action plan for each dealer addressing the dealer's "operations, facilities, personnel, tools, equipment and support services which Mazda reasonably determines need to be improved to provide effective representation of Mazda under the Mazda Dealer Agreement;" (2) that "Dealer agrees to consider seriously and to use its best efforts to accomplish within a reasonable period of time on a cost effective basis for dealer, those goals for improvement which Mazda presents to dealer in an action plan;" and (3) "Dealer acknowledges that its failure to make adequate progress toward accomplishing the goals suggested by Mazda in an action plan

may mean that dealer will not be able to provide effective representation of Mazda in the local area in which dealer does business, and that Mazda will not be able to fulfill its reasonable expectations for the business relationship with dealer contemplated by the Mazda Dealer Agreement."

B. CHRONOLOGY OF EVENTS

31. In March of 1992, the Mazda's Regional Dealer Development Manager ("Manager") contacted Petitioner Winterhalder after learning that Santa Cruz Motors had entered into an agreement to sell their dealership to Petitioners. During this conversation, the deficiencies of the facilities were discussed, and the Petitioners were advised that the facilities were below Mazda's facilities guides. Petitioner Winterhalder assured the manager that the facilities deficiencies would be cured when Mazda was relocated to a new facility at an auto mall which they were in the process of developing.

32. The subject of the deficient facilities was again discussed telephonically on April 23, 1992. Once again Petitioner Winterhalder told the Manager that he was seeking an alternate site in an auto mall for his existing Ford dealership as well as the proposed new Mazda dealership. Petitioner Winterhalder indicated that he anticipated receiving final approval of the auto mall plans sometime in August of 1992.

33. Again on April 24, 1992, in a telephone conversation, the

Manager sought and received assurances from Petitioner Winterhalder that the Mazda dealership would be relocated to an auto mall concurrently with the anticipated Ford dealership relocation.

34. On May 1, 1992, at Mazda Regional Offices in Irvine, California, Petitioners and MAZDA representatives once again discussed the deficient facilities issue. Petitioners represented that the facilities deficiencies would be cured by moving to an auto mall which they were working on developing. Once the construction of the auto mall was approved by the appropriate governmental authorities it would be operational in 1 1/2 years to 2 years. Based on this projected time frame Respondent developed the 2 year time frame contained in paragraph 1.5 of its letter of intent dated May 22, 1992.

35. The buy-sell agreement and conditional approval of the assignment to Petitioners was evidenced by respondent's Letter of Intent dated May 22, 1992. The purpose of the Respondents Letter of Intent was to set forth the commitment made by the dealer candidate with respect to MAZDA's conditions for approval of the buy-sell and to obtain a signature verifying those commitments.

36. After Petitioners received the Letter of Intent, Respondent learned that they were reluctant to agree to the two-year time period for bringing the facilities into compliance.

37. Since Respondent was truly interested in having Petitioners as MAZDA dealers, it offered to reconsider other time periods for compliance, including an extension of time, and to work

with Petitioners to try to save the deal. However, Petitioners were unwilling to sign a commitment for any time period and declined to respond to MAZDA's overtures to try to save the deal.

38. Instead, Petitioners indicated that they were no longer interested in consummating the sale. In their conversation with MAZDA representatives they stated that part of their reasons for abandoning the sale had to do with the additional facilities demands being made by BMW.

39. Like MAZDA, BMW sent Petitioners a letter of agreement which set forth certain conditions for approval including: the Petitioners "... provide and/or maintain an exclusive showroom display area of 1200 square feet in which a minimum of three (3) BMW automobiles shall be displayed;" and that Petitioners comply with its corporate identity requirements by installing certain letters, signs, colors, carpet, tile and ceiling finishes. Petitioners were required to comply with these requirements within one year.

40. The assets of Santa Cruz Motors were eventually sold to another dealer in May of 1993.

C. MAZDA'S CORPORATE POLICIES REGARDING FACILITIES DEFICIENCIES

41. In 1992, in a buy-sell situation involving facilities which were deficient, MAZDA routinely required the prospective buyer to either immediately provide the facilities meeting MAZDA's

minimum guides or commit to a compliance date to meet the minimum guides, in order to obtain approval.

42. MAZDA's policy of requiring a date certain for compliance was necessary, because without a specific date there was really no commitment to bring the facilities up to guide.

43. In 1983, MAZDA employees were charged with the task of developing a set of standard dealership operating guides for MAZDA. The original MAZDA guides of 1970 had been abandoned in 1974 or 1975.

44. The employees worked with a study which had been previously commissioned by The Northwood Institute, a 4-year college with close ties to the domestic automobile industry.

45. After about a years work, three sets of guides were produced entitled: "Mazda New Vehicle Sales and Administrative Operating Guidelines," "Mazda Service Department Operating Guidelines," and "Mazda Parts Department Operating Guidelines."

46. These guides developed and used by MAZDA are comparable to other line makes such as Mitsubishi, Honda, and Nissan.

47. Respondent has learned that dealers who meet MAZDA's minimum guidelines with respect to facilities, capital, and other requirements, have a better chance of success and are ultimately more successful than dealers who do not. ²

48. Facilities which are in compliance with MAZDA's guides

² This was particularly critical for Petitioners because of their lack of experience in selling import vehicles.

and are attractive to customers will lead to a more successful dealership. Facilities which are up to guide also allow a dealer to provide a wide selection of vehicles to customers. Adequate facilities lead to timely and efficient service of vehicles.

49. Inadequate facilities can often create marketing problems and can be a source of dissatisfaction to customers.

50. In 1991-1992 it became increasingly necessary for MAZDA to require complying facilities because MAZDA was introducing 5 new products, two of which were designed to compete with high-line models such as Lexus and Infiniti.

51. From 1990 to 1992, MAZDA car and truck sales were losing market share in the Santa Cruz/Capitola Primary Market Area, while Toyota and Honda were gaining market share. In contrast, MAZDA had increased car penetration during the same time period in the district.

52. The location of the Santa Cruz Motors facilities and its outdated appearance put MAZDA at a competitive disadvantage with its other competitors, Toyota and Honda. These latter two line-makes had relocated to spacious new facilities at the Capitola Auto Mall.

D. REQUIREMENTS OF MAZDA'S LETTER OF INTENT TO PETITIONERS

1. MAZDA'S TWO YEAR CONDITION (Paragraph 1.5)

53. MAZDA's Letter of Intent includes the following paragraph:

"1.5) Secure property and provide dealership facilities, either by new construction or by renovation of existing facilities, to meet or exceed all Mazda facility guides including allowance for any approved dual lines. The facility location and plan shall be subject to prior approval by Mazda and shall be operational no later than June 1, 1994."

54. Since 1986, Petitioners, along with some other dealers, tried to develop and build a new auto mall. Although several promising attempts were made to secure a site, none of the plans were successful for a variety of reasons and, as of the time of the hearing, a new auto mall has not yet been built.

55. The impetus and idea for new construction at an auto mall came exclusively from Petitioners. Respondent neither requested nor required relocation to an auto mall as a condition for its approval.

56. Although Petitioners were uncertain about their latest site negotiations, they were confident that an auto mall would be developed and that they would be operational at the auto mall within 1 1/2 to 2 years. Based on these discussions with Petitioners, Respondent developed the 2-year time frame contained in paragraph 1.5.

57. MAZDA's Letters of Intent involving curing facilities deficiencies always specify a time period. The usual time frame is one to two years with three years occasionally granted.

58. A specific time period is required by MAZDA because without it there is no true commitment to cure the deficiencies.

59. If Petitioners were unable to construct a new facility at

an auto mall, paragraph 1.5 clearly permits Petitioners to achieve compliance through renovation of the existing facilities.

60. The existing property was large enough to expand the showroom and to double its size. Santa Cruz Motors had received tentative approval for such an expansion from the City of Santa Cruz.

61. Alternatively, Petitioners could have expanded the facilities through the purchase or lease of several nearby properties.

62. One such property which was available for lease was the Palomar Garage, where a number of dealerships had been housed over the years. It was equipped with stalls and lifts in the service department and had over 20,000 square feet more than enough to satisfy MAZDA's guides.

63. Toward the end of 1991, Petitioner Winterhalder and the owner of the Palomar Garage entered into negotiations for Petitioners to lease the building. Petitioners then had a change of heart and decided that they wanted to own the Palomar Garage which was not for sale. Petitioners then unsuccessfully attempted to have the City of Santa Cruz Redevelopment Agency exercise its powers of eminent domain to acquire the Palomar Garage for Petitioners.

64. Marina Motors, which was located at the Capitola Auto Mall, purchased the Santa Cruz Motors dealership in May 1993. Marina Motors relocated the franchise to the Capitola Auto Mall.

For Marina Motors to be approved, Respondent required Marina Motors to make similar commitments to provide facilities meeting MAZDA's minimum guides. Marina Motors was required to: terminate its Subaru franchise in order to meet MAZDA guides, extend its service hours to open a minimum of 8 hours on Saturdays, and increase its storage capacity to meet guides. The fact that a sale was transacted with Marina Motors is further indication that MAZDA's requirements were neither unreasonable nor impossible.

2. MAZDA'S MINIMUM SQUARE FOOTAGE CONDITION

(Paragraph 1.1)

65. MAZDA's Letter of Intent also included the following provision:

"1.1) Provide property for Mazda dealership operations at 1219 Soquel Ave. in Santa Cruz, California which will be no less than 65,480 square feet in size."

66. According to the petition this was an impossible condition because it would involve: "(1) increasing the square footage of property for Mazda dealership operations at 1219 Soquel Avenue where said facility was bordered by city streets on three sides and bordered by another automobile dealer's property on the fourth side."

67. If all of the facilities used by the Santa Cruz Motors dealership are measured, the square footage of the dealership exceeds 65,000 square feet, although Petitioners may have mistakenly believed that the facilities were smaller. The total

square footage of the entire operation was 87,048.

3. MAZDA'S SIGNAGE CONDITION (Paragraph 1.3)

68. The final condition for approval set forth in MAZDA's Letter of Intent, which Petitioners contend is unreasonable, states as follows:

"1.3) Install on the premises of the property specified in Condition no. 1.1 all exterior signs, all interior signs, the Showroom Elements Program and the Interior Environment Program as deemed necessary by Mazda. Dealer must agree to provide a professional maintenance program for the Mazda exterior channel letter logo sign which is acceptable to Mazda. These actions will be completed by August 31, 1992.

69. According to the petition this was an impossible or unreasonable condition because it would involve: "(2) installation of interior and exterior signs on the facility to Mazda's approval, even though the facility possessed such signs which satisfied Mazda's guidelines."

70. Respondent had requested that MAZDA brand identification and MAZDA colors be more prominently displayed.

71. Petitioners had agreed to some of the terms such as painting, signage, installation, and maintenance of the building to improve the present image of the facility.

72. Petitioners did not contest the signage requirements except to point out to MAZDA representatives appropriate locations for some of the signage and problems with the city approval for signs of certain heights.

73. It appears that there was never any agreement or

disagreement over the signage, because the more critical issues of Mazda's facilities requirements were never resolved.

E. FACTORS RELATING TO PETITIONERS ABANDONING THE BUY-SELL

74. It is not known what the true reasons were for Petitioners abandoning the buy-sell with Santa Cruz Motors. However, Petitioners had negotiated a sales price which included \$600,000 in good will. Petitioners and Santa Cruz Motors had arrived at and agreed to a purchase price within 24 hours of an initial discussion. Petitioners had agreed to the purchase price without having examined any financial statements or records of Santa Cruz Motors.

75. From 1991 to 1994, in reviewing 23 buy-sells, with one exception, no Mazda store received over \$350,000 in good will.

76. It would seem that several factors, including the large amount of money negotiated in good will and the facilities requirements of both MAZDA and BMW, led Petitioners to reconsider their decision to go forward with the buy-sell. The Petitioners independent decision to abandon the buy-sell, whether by whim or by careful consideration, was in no way caused by Respondent.

DETERMINATION OF THE ISSUES

Whether Respondent violated Vehicle Code § 11713.3(d)?

77. The threshold question to be addressed is whether or not Petitioners, who are not franchisees, have standing to bring an

action under this provision.³

78. Vehicle Code § 11713.3(d) must be read together with § 3050. As set forth in the Board's brief amicus curiae at page 5, filed in the Superior Court of the State of California:

" The amendments to section 3050 and 3051, when viewed in conjunction with the Board's power to hear petitions, resulted in the legislative grant of jurisdiction for the Board to hear virtually any matter or complaint brought by any person against an entity holding an occupational license in any of the categories stated in the Act."

Further in the Board's brief amicus curiae at page 11, it states:

"The Board has the authority pursuant to section 3050, subdivision (c) to consider the allegations made by the Plaintiffs as to the misconduct of the Defendant Mazda, who is a licensee specified in sections 3050, subdivision (c) and 3051 is under the Board's jurisdiction. The Plaintiffs would accomplish this by filing a 'petition' with the Board. (see Cal. Code Regs., Title 13, Section 554, et seq.)"

79. Petitioners' have standing to bring their action under Vehicle Code § 3050 and § 11713.3(d). However, Petitioners have failed to establish that Respondent MAZDA imposed conditions which resulted in the unreasonable withholding of consent to the assignment of the franchise agreement.

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³ This issue was raised at a hearing on November 28, 1994 on Respondents Motion to Dismiss for Lack of Standing and Failure to State a Valid Claim. The motion was denied without prejudice. Respondent was given an opportunity to renew its motion after the hearing on the merits of the petition. This issue was raised post-hearing on August 10, 1995.

Whether respondent negligently or intentionally interfered with economic relations?

80. The elements for these torts are: an economic relationship between Petitioner and a third party, with probable future economic benefit to Petitioner, Respondent's knowledge of the relationship, acts on the part of Respondent which disrupt the relationship, and economic harm to Petitioner caused by Respondent's acts. It was established that Petitioners and Santa Cruz Motors had entered into a buy-sell agreement, with probable economic benefit to Petitioners. It was established that Respondent knew of this relationship. However, Petitioners have failed to show that Respondent acted in any way to harm the relationship.

Whether Respondent breached the covenant of good faith and fair dealing?

81. It is well established that, inherent in every contract, is a covenant of good faith and fair dealing. In this case Petitioners failed to sign the Letter of Intent and failed to sign any other contracts with Respondent. Petitioners failed to establish that there existed a contract between Respondent and Petitioner from which a duty of good faith and fair dealing arises. Therefore, there was no duty owed to Petitioner.

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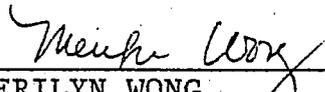
PROPOSED DECISION

THEREFORE, the proposed decision is respectfully submitted:

1. The relief sought by the petition by MARK L. ELWARD, MICHAEL L. ELWARD and WILLIAM R. WINTERHALDER 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: August 25, 1995



MERILYN WONG
Administrative Law Judge
New Motor Vehicle Board