

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

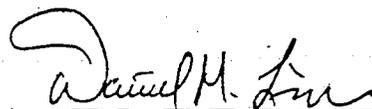
In the Matter of the Petition of)
)
QUAID IMPORTS, INC.,) Petition No. P-355-96
)
) Petitioner,)
)
) vs.)
)
NISSAN MOTOR CORPORATION IN)
U.S.A.,)
) Respondent.)
)
_____)

DECISION

At its regularly scheduled meeting of January 22, 1998, the Public members of the Board met and considered the administrative record and proposed decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 22nd DAY OF JANUARY 1998.



DANIEL M. LIVINGSTON

President

New Motor Vehicle Board

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11 In the Matter of the Petition of)
12 QUAID IMPORTS, INC.,) Petition No. P-355-96
13 Petitioner,)
14 vs.) PROPOSED DECISION
15 NISSAN MOTOR CORPORATION IN)
16 U.S.A.,) Respondent.
17

18 PROCEDURAL BACKGROUND

19 1. Quaid Imports, Inc. ("Quaid") is a licensed new motor
20 vehicle dealer.

21 2. Nissan Motor Corporation in U.S.A. ("Nissan") is a
22 licensed distributor of new motor vehicles in California.

23 3. On February 16, 1996, Quaid filed a petition with the
24 New Motor Vehicle Board ("Board") pursuant to Vehicle Code
25 section¹ 3050(c). The Board assigned Petition No. P-355-96.
26

27
28 ¹ All statutory references are to the Vehicle Code unless
otherwise noted.

1 limitations on the exercise of judicial functions that an agency
2 can undertake are as follows:

3 An agency may hold hearings, determine facts, apply the law
4 to those facts, and order relief (including certain types of
5 monetary relief) so long as: (a) such activities are
6 authorized by legislation and are reasonably necessary to
7 effectuate the agency's primary legitimate regulatory
8 purposes; and (b) the power to make enforceable, binding
9 judgments remains ultimately in the courts, through review
10 of agency determinations.

11 17. The Board has the statutory authority to do the
12 following:

13 Consider any matter concerning the activities or practices
14 of any person holding a license as a new motor
15 vehicle ... manufacturer ... submitted by any person.
16 Vehicle Code § 3050(c).

17 * * *

18 After that consideration, the Board may do any one or any
19 combination of the following:

- 20 (1) ...
21 (2) ...
22 (3) Order the Department [of Motor Vehicles] to
23 exercise any and all authority or power that the department
24 may have with respect to the issuance, renewal, refusal to
25 renew, suspension, or revocation of the license of any new
26 motor vehicle ... manufacturer ... as that license is
27 required under Chapter 4 (commencing with Section 11700) of
28 Division 5.

18. Section 1 of Statutes of 1973, Ch. 996, sets forth the
Board's primary legitimate regulatory purpose:

The Legislature finds and declares that the distribution and
sale of new motor vehicles in the State of California
vitally affects the general economy of the state and the
public welfare and that in order to promote the public
welfare and in the exercise of its police power, it is
necessary to regulate and to license vehicle dealers
manufacturers, manufacturer branches, distributors,
distributor branches, and representatives of vehicle
manufacturers and distributors doing business in California
in order to avoid undue control of the independent new motor
vehicle dealer by the vehicle manufacturer or distributor
and to insure that dealers fulfill their obligations under
their franchises and provide adequate and sufficient service

1 to consumers generally.

2 19. Several cases have held that one of the Board's primary
3 functions is to prevent undue control of an independent dealer by
4 a manufacturer. *Miller v. Superior Court* (1996) 50 Cal.App.4th
5 1665, 58 Cal.Rptr.2d 584; *British Motor Car Distributors v. NMVB*
6 (1987) 194 Cal.App.3d 81; *Yamaha Motor Corp. v. Superior Court*
7 (1986) 185 Cal.App.3d 1232.

8 20. Judicial review of the Board's decisions is provided
9 for in § 3068:

10 Either party may seek judicial review of final decisions of
11 the board.

12 21. Quaid has the burden of proof that Nissan breached the
13 duty to defend in the franchise agreement as well as that it had
14 performed all conditions required on its part pursuant to the
15 Dealer Agreement. *Reichert v. General Ins. Co.* (1968) 68 Cal.2d
16 822, 830, 69 Cal.Rptr. 321; *De La Falaise v. Gaumont-British*
17 *Picture Corp.* (1940) 39 Cal.App.2d 461, 468; Civil Code section
18 1439.

19 22. If there is a written indemnity agreement between two
20 parties, its terms control the duties between the parties and the
21 doctrine of equitable indemnity does not apply. *Rossmoor*
22 *Sanitation Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.

23 23. The pertinent part of the Dealer Agreement relating to
24 defense contains two conditions precedent (Section 11, paragraph
25 2, subparagraphs (i) and (iii)) and one condition subsequent
26 (Section 11, paragraph 2, subparagraph (ii)):

27 A condition precedent to a contract "is one which is to be
28 performed before some right dependent thereon accrues, or
some act dependent thereon is performed." Civil Code §

1 1436.

2 "A condition subsequent is one referring to a future event,
3 upon the happening of which the obligation becomes no longer
4 binding upon the other party, if he chooses to avail himself
5 of the condition." Civil Code § 1438.

6 24. California Rule of Professional Conduct 3-310(C)
7 provides that a lawyer may, with informed written consent of each
8 client, represent adverse interests which might potentially
9 conflict.

10 FINDINGS OF FACT RELATING TO THE
11 INDEMNIFICATION OF NISSAN DEALERS.

12 25. Robert Quaid is an automobile dealer and owner of Quaid
13 Imports, Inc.

14 26. Quaid is an authorized Nissan dealership located at
15 8330 Indiana Avenue, Riverside, California 92540.

16 27. Nissan is the distributor of Nissan vehicles in the
17 United States and is the franchisor of Quaid.

18 28. As owner of the authorized Nissan dealership, Robert
19 Quaid voluntarily executed the Dealer Agreement

20 29. The indemnification of Nissan dealers is governed by
21 the Dealer Agreement.

22 30. Section 11 of the Standard Provisions, which are
23 incorporated into the Dealer Agreement, provides, in pertinent
24 part:

25 * * *

26 Subject to Section 11.C, and upon Dealer's written request,
27 Seller [Nissan] shall:

28 2. Indemnify and hold Dealer harmless from any and all
settlements made which are approved by Seller and final
judgments rendered with respect to any claims described in
Section 11.A.1; provided, however, that Seller shall have no

1 obligation to indemnify or hold Dealer harmless unless
2 Dealer: (i) promptly notifies Seller of the assertion of
3 such claim and the commencement of such action against
4 Dealer; (ii) cooperates fully in the defense of such action
5 in such manner and to such extent as Seller may reasonably
6 require; (iii) consents to the employment of attorneys
7 selected by Seller and agrees to waive any conflict of
8 interest then existent or which may later arise, thereby
9 enabling Seller's selected attorneys to represent Seller
10 and/or the manufacturer of a Nissan Product throughout the
11 defense of the claim;. . . Dealer shall pay all costs of its
12 own defense incurred prior to Seller's assumption of
13 Dealer's defense and thereafter to the extent that Dealer
14 employs attorneys in addition to those selected by Seller.
15 (emphasis added).

16 31. Pursuant to Section 11 of the Dealer Agreement, Nissan
17 drafted a proposed Indemnity Agreement for Quaid in both the
18 Camping and Peck actions. The substance of such Indemnity
19 Agreements are standard, but the specific terms are modified to
20 fit the specific circumstances of each case.

21 32. The Indemnity Agreements offered in the Camping and
22 Peck cases provide in relevant part:

23 4. That if it should become necessary for the defense of
24 Dealer to be withdrawn, Dealer agrees that the law firm of
25 . . . may defend Nissan without any suggestion of
26 impropriety or conflict of interest in regard to such
27 continued representation, and that in such event, Dealer
28 waives its right to contend that conflicts of interest or
29 attorney-client privilege require disqualification of that
30 law firm.

31 5. That Dealer shall fully cooperate with Nissan and its
32 attorneys in the defense of this lawsuit, including
33 forwarding a copy of its litigation file and all sales and
34 service documents for the Vehicle, until such time as that
35 retender of the defense may be made to the Dealer by Nissan.

36 * * *

37 7. That this agreement to indemnify and defend is not
38 retroactive but shall be prospective only, and that Dealer
39 will be responsible for any and all fees and expenses
40 incurred prior to providing an executed copy of this letter
41 agreement. . .

42 33. The Dealer Agreement provides that a Dealer must make

1 its request for indemnification in writing, and must comply with
2 all terms of the Dealer Agreement.

3 34. There is no provision in the Dealer Agreement for
4 attorneys' fees.

5 35. As a matter of policy, Nissan grants a large percentage
6 of indemnification requests, provided the dealer requesting
7 indemnity cooperates with Nissan and otherwise complies with the
8 terms of the Dealer Agreement.

9 36. Generally, indemnification requests from dealers are
10 granted by Nissan unless there is an issue.

11 FINDINGS OF FACT RELATING TO THE
12 UNDERLYING CAUSES OF ACTION.

13 A. The Camping Action.

14 37. Wanda Camping was the owner of a 1991 Nissan 300 ZX.

15 38. The Camping vehicle experienced severe engine problems,
16 and the engine "seized."

17 39. Ms. Camping requested that Nissan repair the vehicle
18 under warranty at the Quaid dealership.

19 40. Nissan denied the request based on its belief that the
20 Camping vehicle was improperly maintained.

21 41. On or about February 22, 1995, Wanda Camping filed a
22 lawsuit against Quaid and Nissan, Wanda Camping v. Nissan et al.,
23 Orange County Superior Court Case No. 743172 (hereinafter "the
24 Camping action"), for breach of warranty. Ms. Camping
25 specifically alleged a cause of action for punitive damages as a
26 result of Quaid's lack of cooperation and its continued refusal
27 to provide service records to her.

28 42. On or about March 15, 1995, Quaid submitted a request

1 for indemnification to Nissan. The request for indemnification
2 was submitted thirteen (13) days after Quaid was served with a
3 complaint.

4 43. On or about April 10, 1995, Nissan, through its
5 attorneys and in response to Quaid's indemnification request and
6 in accordance with Section 11 of the Dealer Agreement
7 Indemnification Standard Provisions, requested service records
8 and other documentation regarding Camping's vehicle.

9 44. Nissan did not offer to defend Quaid until June 7,
10 1995, almost three months after Quaid's request for
11 indemnification.

12 45. Nissan refused to provide Quaid a defense until he
13 signed a waiver of conflict for its attorneys, as required by
14 Subparagraph (iii) of the indemnity provisions of the Dealer
15 Agreement.

16 46. Nissan assumed Quaid's defense even though Nissan did
17 not have a duty to defend Quaid in connection with the cause of
18 action for punitive damages.

19 47. Under the terms of the Dealer Agreement, independent
20 causes of action against Nissan dealers are not required to be
21 defended.

22 48. On or about June 20, 1995, Nissan received a letter
23 from Mr. Hite stating that Quaid had accepted Nissan's proposed
24 Indemnity Agreement, except for Section 7 of the Agreement.

25 49. Section 7 of the indemnity Agreement barred Quaid from
26 seeking recovery of costs and fees incurred prior to Nissan
27 granting indemnification. Section 7 was derived from the terms
28 of the Dealer Agreement which Quaid had previously agreed to.

1 50. Nissan refused to allow Quaid to modify the provisions
2 of the Dealer Agreement by requiring Nissan to pay attorneys'
3 fees incurred by Quaid prior to the indemnification.

4 51. In Mr. Hite's June 20, 1995 correspondence to Nissan's
5 counsel, Mr. Hite stated that Quaid's only objection was to
6 Section 7 of the Indemnity Agreement.

7 52. No other objections were ever made by Quaid as to other
8 provisions in the Indemnity Agreement.

9 53. On or about July 19, 1995, Mr. Hite notified Nissan as
10 to Quaid's withdrawal of its objection to Section 7 of the
11 Indemnity Agreement and accepted indemnity on the terms found in
12 the Dealer Agreement.

13 54. On or about August 23, 1995, Nissan's counsel
14 substituted into the Camping action for Quaid's counsel.

15 55. Thereafter, on February 29, 1996, Nissan entered into a
16 settlement with the plaintiff in the Camping action and obtained
17 a release of claims against all defendants, including Quaid.

18 **B. The Peck Action.**

19 56. On or about October 25, 1995, Quaid requested
20 indemnification from Nissan in connection with a lawsuit filed by
21 John and Nicole Peck against Quaid and Nissan, John and Nicole
22 Peck v. Nissan et al., Riverside Superior Court Case No. 272476
23 (hereinafter "the Peck action"), for breach of warranty.

24 57. On or about January 25, 1996, Nissan provided a
25 proposed Indemnity Agreement to Quaid's counsel of record in the
26 Peck action, Mr. Boyd, of the Law Offices of Dryden, Margoles,
27 Shimaneck, Hartman, Kelly & Waite, within one week after Nissan
28 received the sales jacket information from Quaid.

1 58. The Indemnity Agreement offered by Nissan in the Peck
2 action contained virtually the same provisions as the Indemnity
3 Agreement offered to Quaid in the Camping action.

4 59. On February 1, 1996, Nissan received a letter from Mr.
5 Boyd. Mr. Boyd notified Nissan that the terms of the proposed
6 Indemnity Agreement were satisfactory. Accordingly, he stated
7 that he would recommend that Quaid agree to the same.

8 60. At no time did Mr. Hite, Mr. Boyd or Quaid convey any
9 alleged objections to the provisions in the proposed Indemnity
10 Agreement to Nissan or Nissan's counsel.

11 61. Even though Quaid never accepted the indemnification
12 offered by Nissan in the Peck action, on April 12, 1996, Nissan
13 entered into an agreement to settle all claims asserted by the
14 plaintiff in the Peck action and obtained a release against all
15 defendants, including Quaid.

16 62. Quaid expended money in the defense of the Camping case
17 from April 15, 1995 to June 7, 1995, in the amount of \$3,255.00
18 plus costs of \$144.69, and from July 19, 1995 to August 23, 1995,
19 in the amount of \$1,875.00 for fees and \$2.14 for costs for a
20 total of \$5,276.83. Said fees and costs were reasonable and
21 necessary.

22 63. Quaid expended money in the defense of the Peck case
23 from November 24, 1995 to January 25, 1996, in the amount of
24 \$437.50, and from February 1, 1996 to April 12, 1996, in the
25 amount of \$9.39 in costs for a total of \$446.89. Said fees and
26 costs were reasonable and necessary.

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28 ///

1 incurred prior to Nissan assuming its defense.

2 68. In fact, Section 5 of the Indemnity Agreement, in both
3 the Camping and Peck actions, also stated that the agreement to
4 indemnify Quaid did not apply retroactively, but would be
5 prospective only.

6 69. Quaid did not communicate any additional reservations
7 it may have had with the Indemnity Agreements it was offered in
8 either the Camping or Peck actions. Therefore, Quaid waived any
9 unexpressed objections it may have had to the Indemnity
10 Agreements.

11 70. Since Quaid accepted and signed the Dealer Agreement,
12 Quaid knew that it was not contractually entitled to the recovery
13 of costs and fees prior to the time indemnity was granted in the
14 Camping and Peck actions. There is no basis for indemnity in the
15 two cases other than provided by the Dealer Agreement. Nissan
16 should not be held responsible for costs and fees incurred by
17 Quaid since the Dealer Agreement specifically excludes such
18 recovery.

19 71. Nissan had no intention of denying Quaid indemnity, but
20 Nissan did unreasonably delay in granting indemnification to
21 Quaid in the Peck and Camping actions. Nissan had a duty to act
22 reasonably and prudently to offer Quaid indemnity. The
23 Legislature allows 30 days for a defendant to respond to a
24 complaint, and a 30 day period is quite reasonable to allow
25 Nissan to investigate and offer indemnity to Quaid. Thus, Nissan
26 should have offered Quaid indemnity in the Camping case by April
27 15, 1995. It did not and should bear the costs of defense for
28 Quaid between April 15, 1995, and June 7, 1995, when it did offer

1 a defense. Similarly, Nissan should have offered Quaid a defense
2 in the Peck matter 30 days after a request for a defense or by
3 November 24, 1995. It did not do so until January 25, 1996, and
4 should bear the costs of defense for that period.

5 72. In addition, Quaid is entitled to costs of defense for
6 the period after he accepted the indemnity agreements and until
7 Nissan began defending. For Camping, this is the period from
8 July 19, 1995, to August 25, 1995; for Peck, this is the period
9 between February 1, 1996, and April 12, 1996, when Nissan settled
10 with the Pecks.

11 73. The language of the Standard Provisions relating to
12 Quaid's duty to cooperate (Section 11, paragraph 2, subparagraph
13 (ii)) with Nissan pertains to a condition subsequent. In other
14 words, Quaid had no duty to cooperate with Nissan's defense of
15 Quaid until Nissan in fact defended Quaid. This apparent anomaly
16 is created because of the language of the agreement drafted by
17 Nissan and this ambiguity must be construed against Nissan.
18 Therefore, all evidence of Quaid's failure to cooperate is
19 irrelevant to the issue of whether Nissan owed a duty to defend
20 Quaid because that was the agreement Nissan had with Quaid.

21 74. Before Quaid was entitled to a defense, Quaid was
22 required to fulfill the two conditions precedent of the Dealer
23 Agreement's provisions for indemnity, to wit:

24 (i) promptly notif[y] Seller of the assertion of such claim
25 and the commencement of such action against Dealer; (ii)
26 [irrelevant]; (iii) consents to the employment of attorneys
27 selected by Seller and agrees to waive any conflict of
28 interest then existent or which may later arise, thereby
enabling Seller's selected attorneys to represent Seller
and/or the manufacturer of A Nissan Product throughout the
defense of the claim; (emphasis added).

1 75. Quaid met these two conditions when it agreed to the
2 language of the indemnity agreements offered, on July 19, 1995,
3 as to the Camping case and on February 1, 1996, as to the Peck
4 case.

5 76. Subparagraph (iii) of the indemnity provisions of the
6 Dealer Agreement is not illegal, since California Rules of
7 Professional Conduct authorize a lawyer, in this case Nissan's
8 defense lawyers in the Camping and Peck cases, to represent
9 potentially adverse interests in circumstances such as these.

10 77. Since the Dealer Agreement provides, "Dealer shall pay
11 all costs of its own defense incurred prior to Seller's
12 assumption of Dealer's defense and thereafter to the extent that
13 Dealer employs attorneys in addition to those selected by
14 Seller", Quaid is responsible for all defense costs prior to the
15 two dates when Quaid agreed to the language of the indemnity
16 agreement (emphasis added.)

17 78. Quaid is entitled to restitution of the moneys expended
18 in the defense of the Camping case in the amount of \$5,276.83 and
19 of the Peck case in the amount of \$446.89 for a total of
20 \$5,723.72.

21 79. There being no provision in the Dealer Agreement
22 providing attorney's fees between the parties, none are found
23 due.

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1 PROPOSED DECISION

2 If Nissan Motor Corporation in U.S.A. does not reimburse
3 Quaid Imports, Inc., the sum of \$5,723.72, the Department of
4 Motor Vehicles is instructed to exercise any and all authority or
5 power that the Department may have with respect to the suspension
6 of the license of Nissan Motor Corporation in U.S.A.
7

8 I hereby submit the foregoing
9 which constitutes my proposed
10 decision in the above-entitled
11 matter, as a result of a
12 hearing before me on the above
13 dates, and recommend the
14 adoption of this proposed
15 decision as the decision of
16 the New Motor Vehicle Board.

17 DATED: 1/12/98

18 By 

19 DOUGLAS H. DRAKE
20 Administrative Law Judge
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