

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)	
TOYOTA OF VISALIA, INC.,)	Protest No. PR-1189-90
Protestant,)	
vs.)	DECISION
TOYOTA MOTOR DISTRIBUTORS, INC.,)	
Respondent.)	

PROCEDURAL BACKGROUND

1. By letter dated August 17, 1990, Toyota Motor Distributors, Inc. ("TMD" or "Respondent"), 2451 Bishop Drive, Post Office Box 5005, San Ramon, California, gave notice pursuant to California Vehicle Code section 3060^{1/} to Toyota of Visalia ("TOV" or "Protestant"), 3000 South Mooney Boulevard, Visalia, California, of TMD's intention to terminate TOV's Toyota franchise. The notice was received by the New Motor Vehicle ("Board") on August 20, 1990.

1/ All statutory references are to the Vehicle Code unless otherwise indicated.

2. In its August 17, 1990 letter to TOV, TMD listed the following grounds for termination:

(1) Breach of Section XX(B)(1)(c) (of the Toyota Dealer Sales and Service Agreement ("Dealer Agreement")): An administrative finding of consumer fraud was made against your dealership.

(2) Breach of Section XX(B)(1)(f) (of the Dealer Agreement): Your license to sell new motor vehicles was suspended for thirty days.

(3) Breach of Section XX(B)(2)(h) (of the Dealer Agreement): The reputation of your dealership and, by extension, Toyota, has been damaged by the publicity accompanying both the consumer fraud and the suspension.

(4) Breach of Section XX(B)(1)(a) (of the Dealer Agreement): The dealership's sales department was closed for seven consecutive business days.

(5) Breach of Section XX(B)(2)(k) (of the Dealer Agreement): Your ongoing conduct has destroyed the franchise relationship between the parties.

(6) Breach of Section XX(B)(2)(e) (of the Dealer Agreement): Your dealership has been operating without sufficient net working capital for the past four months.

3. On September 12, 1990, TOV filed a protest with the Board pursuant to the provisions of section 3060.

4. TOV received a second notice of termination from TMD dated February 7, 1991. That notice set forth the following alleged breaches of the dealership agreement and grounds for termination:

(1) Your dealership and/or an owner or officer of your dealership has been found or adjudicated to have been engaged in misrepresentation or unfair or deceptive trade practices. Section XX(B)(1)(c) of the Dealer Agreement.

(2) Your dealership's licence to sell motor vehicles was suspended for thirty days. Section XX(B)(1)(f) of the Dealer Agreement.

(3) Your dealership's sales department was closed for a period of at least seven consecutive days. Section XX(B)(2)(h) of the Dealer Agreement.

(4) The reputation of your dealership, its management and, by extension, the Toyota name have been impaired by your dealership's conduct, and/or its management's conduct, by the suspension of its license, by the closure of its vehicle sales department and by related circumstances. Section XX(B)(2)(h) of the Dealer Agreement.

(5) Your dealership has operated inconsistent with the requirements in your Toyota Dealer Agreement regarding sufficient net working capital. Sections XX(B)(2)(e & k) & XVII(A) of the Dealer Agreement.

(6) Your dealership has refused to permit TMD to examine or audit your accounts and records upon receipt of written notice requesting such permission or information. Section XX(B)(2)(i) of the Dealer Agreement.

(7) Your on going conduct has destroyed the business relationship between TMD and your dealership. Section XX(B)(2)(k) of the Dealer Agreement.

(8) The factors which the Legislature has mandated the New Motor Vehicle Board to consider, among others, are not to the contrary of terminating your Toyota Dealer Agreement, but would instead corroborate a finding of good cause for termination, e.g., adequacy of services to the public provided by your dealership and impact on public welfare from termination. (California Vehicle Code Sec. 3061)

4. TOV filed an amended protest on March 1, 1991.

5. By letter dated June 3, 1991, TMD withdrew ground (5) of the amended notice of termination, i.e., the allegation of insufficient net working capital.

6. The hearing was held before George R. Coan, administrative law judge of the Board, on July 22 through July 26

in Sacramento, California, and July 29, 30 and 31 and August 1, 7, 8, 9 and August 12 through 16, 1991, in San Francisco, California.

7. On January 3, 1992, Judge Coan was stricken with a fatal heart attack, and died prior to producing a proposed decision to submit to the Board.

8. On January 27, 1992, the public members of the Board were sent complete copies of the administrative record prepared as a result of the hearing before Judge Coan.

9. On April 8, 1992, the public members of the Board met and considered the legal options available for resolving this matter in light of the death of Judge Coan. Counsel for the parties presented arguments on this issue. After due consideration, the Board decided to render its own decision on the merits of the protest based upon an independent review of the administrative record. Thereafter, the Board rendered its decision in this regard, and instructed the staff of the Board to prepare the instant written decision to embody the findings, determinations, and decision rendered by the Board.

10. Protestant was represented by Michael J. Flanagan, Esq., Coder, Tuel & Flanagan, 8801 Folsom Boulevard, Suite 172, Sacramento, California, and Michael R. Pinatelli, Jr., Esq., 45 Franklin Street, Suite 220, San Francisco, California.

11. Respondent was represented by Robert L. Ebe, Esq., and Richard B. Ulmer, Jr., Esq., McCutchen, Doyle, Brown & Enersen, Three Embarcadero Center, San Francisco, California.

ISSUES PRESENTED

12. Section 3061 provides that, in determining whether there is good cause for terminating a franchise, the Board shall take into consideration the existing circumstances, including but not limited to the following:

- (a) Amount of business transacted by the franchisee, as compared as to the business available to the franchisee {section 3061(a)}.
- (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise {section 3061(b)}.
- (c) Permanency of the investment {section 3061(c)}.
- (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted {section 3061(d)}.
- (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchises and has been and is rendering adequate services to the public {section 3061(e)}.
- (f) Whether the franchisee fails to fulfill the obligations of the franchisor to be performed by the franchisee {section 3061(f)}.
- (g) Extent of franchisee's failure to comply with the terms of the franchise {section 3061(g)}.

CONTENTIONS OF THE PARTIES

Respondent's Contentions

a. Respondent contends that good cause exists for terminating the franchise due to the following:

- 1. The closure of the dealership for a period of seven (7) consecutive days in violation of sections XX(B)(1)(a), XX(B)(2)(k) and XVI(B) of the Dealer Agreement,

2. The suspension of the dealership license for a period of 30 days in violation of section XX(B)(1)(f) of the Dealer Agreement,

3. TOV's sustained adjudication on the issue of consumer-fraud violations resulted in negative publicity. The reputations of TOV, Ottmar Thomas ("Thomas") and TMD were adversely affected and impaired as to honesty and fair dealing in violation of sections XX(B)(1)(c) and XX(B)(2)(h) of the Dealer Agreement,

4. TOV's sales and service practices impaired the reputations of TOV and Thomas as to customer service in breach of section XX(B)(2)(h) of the Dealer Agreement,

5. The destruction of the business relationship between TOV and TMD by the conduct of Thomas in violation of sections XX(B)(2)(i) and (k) of the Dealer Agreement, and

6. The existence of each of the good cause factors set forth in section 3061.

b. Respondent further contends that each of the grounds in it's amended notice of termination is independently sufficient to justify termination.

c. Respondent also contends that it stated specific grounds for termination in its amended notice to TOV and is not required to state all evidence supporting each termination ground.

Protestants' Contentions

a. The Protestant contends that a material breach of the dealer agreement is not sufficient ground for termination in the absence of good cause. Pursuant to section 3060 good cause must be shown to terminate a franchise "notwithstanding the terms of any franchise agreement".

b. Protestant further contends that the section 3061 good cause factors should only be considered as they apply to specific grounds for termination set out in the Respondent's notice. The Protestant therefore seeks to exclude as irrelevant evidence of

alleged financial improprieties, poor sales performance, and inadequate owner satisfaction index ("OSI") performance and effectiveness as these matters were not specifically raised in the notice of termination. In its notice of termination, Respondent merely referred to the good cause factors set forth in section 3061 without setting forth the specifics relied upon. Protestant claims that Respondent has thereby violated the specific notice requirements of section 3060 and that therefore the good cause factors set forth in section 3061 cannot in this case be used as separate ground for termination.

c. Protestant also contends that by entering into a new six-year franchise agreement in August 1988, TMD waived its right to raise any prior conduct on the part of TOV and Thomas as grounds for termination.

GENERAL FINDINGS OF FACT

13. On January 25, 1980, the Department of Motor Vehicles (the "DMV") filed an accusation against TOV alleging a variety of consumer frauds. A hearing was held, and on November 13, 1980, the administrative law judge submitted a proposed decision to the Director of the DMV revoking the license of TOV. This decision was adopted by the Director on November 26, 1980.

14. On November 26, 1980, TOV filed with the DMV a petition for reconsideration. On December 24, 1980, the Director of the DMV issued an order denying the petition.

15. On appeal to this Board^{2/}, it was determined that TOV knowingly and fraudulently misled the consuming public and found for revocation. The Board's final order, dated July 14, 1981, contained the following findings:

Department's Finding IV

Failure to mail or deliver reports of sale of six vehicles, together with other documents required to transfer the registration of the said vehicles within 40 days from the date of sale. The Board reduced the penalty from a 15-day license suspension to a probation period of two years.

Department's Finding V

Added to the selling price license or transfer fees in excess of fees due and paid to the state. The Board affirmed the penalty of a 15-day license suspension.

Department's Finding VI

Sale of advertised vehicles at a higher than advertised price causing the purchasers to suffer loss. The Board reversed the finding and penalty and finds no violation.

Department Finding VII

Untrue and misleading advertising as to free giveaways. The Board affirmed the penalty of license suspension.

Department Finding IX

Untrue and misleading advertising as to leasing. The Board affirmed the penalty of license revocation.

Department Finding X

Employment of salesperson's not licensed pursuant to vehicle code section 11800. The Board modified the penalty from a 60-day license suspension to a 30-day license suspension.

Department Finding XI

Failure to give written notice to the DMV before the end of the fifth calendar day after the transfer of certain vehicles. The Board modified the penalty from a 30 day license suspension to a 5-day license suspension.

^{2/} The Board is empowered to hear appeals from final decisions of the Director of the DMV which adversely affect the license of specified occupational licensees, including new motor vehicle dealers. (Sections 3050(b), 3052 et seq.)

Department Finding XII

Sale of advertised vehicles at a higher than advertised price causing loss to purchasers. The Board reversed the decision and found no violation.

Department Finding XIII

Advertised vehicles for sale more than 48 hours after the vehicles had been sold. The Board affirmed the license revocation.

Department Finding XIV

Untrue and misleading advertising. "PAC" stickers with information as to accessories, and their prices, delivery and freight charges, that differed from federal window sticker information placed on 20 vehicles. The Board modified the penalty of license suspension of 60 days to license revocation.

16. On July 30, 1981, TOV filed a Petition for Writ of Administrative Mandamus with the Tulare County Superior Court (case number 102426). On November 2, 1982, the court ordered the issuance of a Peremptory Writ of Mandate vacating the Board's order and commanding the Board reconsider the penalty.

17. On November 12, 1982, the Board appealed the judgment granting Peremptory Writ to the Fifth District Court of Appeal. On May 2, 1984, the Court of Appeal affirmed the superior court's determination that the Board's penalty of revocation was excessive and directed the superior court to remand the matter to the Board.

18. Pursuant to the order of remand, the Board entered an order dated December 7, 1984, suspending TOV's dealer's license for a period of 30 days.

19. Subsequent court challenges and appeals culminated in the Board's final order of May 10, 1990. Pursuant to this order, TOV's 30-day suspension and closure began on May 13, 1990.

FINDINGS OF FACT REGARDING THE ISSUE OF WAIVER

20. On January 15, 1976, TMD entered a Dealer Agreement with TOV which was subsequently amended on January 25, 1979, and renewed February 23, 1982.

21. On January 25, 1980, DMV brought an accusation (Case No. D-2181) against TOV seeking disciplinary actions for various alleged violations of the Vehicle Code.

22. In August of 1988, a new Dealer Agreement between TMD and TOV was executed. At that time the disciplinary actions referenced in Paragraph 13, above, were still being adjudicated and had not yet become final.

23. TOV contends that by entering into a new six-year franchise agreement in August 1988, TMD waived its right to raise any prior conduct on the part of TOV and Thomas as grounds for termination.

24. If TMD had refused to continue the franchise, or had proposed a qualified agreement that was arguably a substantial modification of the franchise agreement, TOV may have had a right to file a protest under section 3060.

25. TMD made the informed decision to delay any efforts at termination until after the conclusion of the disciplinary proceedings.

26. In entering into the new dealer agreement the Respondent did not waive it's right to rely on pre-August 1988 conduct of the Protestant as ground for termination.

FINDINGS OF FACT REGARDING
SECTION 3061 - GOOD CAUSE FACTORS

a. Amount of Business Transacted by the Franchise, as Compared to the Business Available to the Franchise. (section 3061(a))

27. In 1979 TOV reported annual new vehicle sales of 1,797. Since then, TOV's annual new vehicle sales have declined. In 1990 new vehicle sales were 758.

28. In the period 1980 to 1990, the populations of Tulare and Kings counties, which are located in the Central Valley, increased 26.9% and 37.8% respectively.

29. There are six (6) Toyota dealers in the Central Valley Toyota Dealer's Association. Between 1988 and 1990 TOV's sales volume declined by 33.7%. This decline was greater than that experienced by any other Central Valley Toyota dealer.

30. In the period 1986 to 1990 TOV's sales efficiency (the measure of new Toyota sales in which 100 percent is the region average) declined from 141.2% to 63.2% for cars, and from 84.5% to 38.3% for trucks.

b. Investment Necessarily Made and Obligations Incurred by the Franchisee to Perform its Part of the Franchise. (section 3061(b))

31. On the opening of the Toyota dealership at Visalia in 1973, Thomas entered into a buy/sell and partnership agreement with Fred Heckel. Thomas started off with a 25% interest and in May 1976 exercised his option to buy the remaining interest for the purchase price of approximately \$880,000.

32. Accounting records of TOV show Thomas has invested a total of \$837,039 in the business.

33. In February 1989 Thomas personally guaranteed a loan to TOV in the amount of \$400,000.

c. Permanency of the Investment. (section 3061(c))

34. The dealership currently operates on property leased at \$13,500 a month.

35. In June of 1974, TOV moved to a newly constructed facility. In 1977 and 1979, a total of over \$200,000 was spent on improvements. These improvements consisted of another service and body shop and detail facility, and a second story on the main facility.

36. The lease of the premises expires in 1994. There is an option to renew for an additional 5 year period.

d. Whether it is Injurious or Beneficial to the Public Welfare for the Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted. (section 3061(d))

37. On January 25, 1980, the DMV filed an accusation against TOV alleging a variety of consumer frauds. On appeal to the Board, it was concluded that TOV knowingly and fraudulently misled the consuming public.

38. On February 14, 1980, the consumer fraud division of the Fresno District Attorney's office filed civil case number 252612-7 against Pioneer-Dodge, Inc., (owned by Thomas) Toyota of Visalia, Inc., and Thomas individually, alleging violations of specified consumer protection laws.

39. Civil case number 252612-7 alleged consumer fraud and sought penalties, restitution and an injunction. There was testimony that the complaint alleged the most numerous and most flagrant violations that had ever been prosecuted by the District

Attorney's consumer fraud division. The case was settled by consent decree dated May 14, 1982.

40. In one 18-month period from November 1984 to April 1986, the DMV determined that at least four customer complaints it had received against TOV were based upon actions of TOV which involved deceit and moral turpitude. These complaints contained allegations of theft of a cruise control, forgery of signature to a vehicle's ownership certificate, refusal to return a down payment, and misrepresentation of the condition of a vehicle.

41. During 1988 and 1989 TOV misrepresented 371 consumer contracts to finance sources through undisclosed use of dealer rebates. TOV checks made payable to customers were immediately signed back over to TOV. On the contracts these amounts were recorded as cash down payment.

42. To maintain TOV's profit margin, the vehicles described in paragraph 42, above, were sold above the advertised price. Customers were committed to finance contracts they may not have had the ability to repay. Finance sources that ultimately purchased the contracts were not aware of the rebate.

43. There was expert testimony that account balances were altered between the general ledger and the dealer financial statements for the years 1987, 1988, and 1989.

44. There was testimony that Thomas instructed personnel to change the monthly financial statements that were being prepared for submission to TMD. This resulted in an entire series of financial statements being falsified.

45. The OSI provides the best measurement of how a customer feels about Toyota and the dealership. In response to the question "Would you recommend this dealer to a friend?", TOV has been below the region average in every year since 1986. Thomas described the OSI to one TMD employee as being "bullshit".

e. Whether the Franchise has Adequate Motor Vehicle Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Provide Reasonably for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and has Been and is Rendering Adequate Services to the Public. (section 3061(e))

46. There has been a high employee turnover in sales and service at TOV compared to other Toyota dealerships. This has led to a loss of technological expertise in repairing vehicles and a loss of product expertise with sales people leaving.

47. TOV parts and service employees did not attend TMD training classes. The subsequent misordering of parts is attributable to this lack of training.

48. Some TOV positions were eliminated because of the 30-day suspension. There were two layoffs in the parts department thereby leaving that department under staffed.

f. Whether the Franchise Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee. (section 3061(f))

49. No evidence concerning this factor was introduced into the record.

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g. Extent of Franchisee's Failure to Comply With the Terms of the Franchise. (section 3061(g))

Closure of the Dealership

50. Section XX(B)(1)(a) of the 1988 Dealer Agreement provides that the distributor shall have the right to immediately terminate the Dealer Agreement if a dealership is closed for a period of seven (7) consecutive days. Section XV(B) of the 1988 Dealer Agreement provides that the dealer operate the dealership during business hours that are customary for the locality. TOV was closed for a period of thirty (30) consecutive days from May 13, 1990, through and including June 13, 1990, as the result of the suspension of its occupational license. TOV therefore failed to comply with sections XX(B)(1)(a) and XV(B) of the Dealer Agreement.

Adjudication by a Government Agency that TOV has Engaged in Misrepresentation or Unfair Trade Practices

51. Section XX(B)(1)(c) of the 1988 Dealer Agreement states that the distributor shall have the right to immediately terminate the Agreement if a dealership is adjudicated by any court of competent jurisdiction or any governmental agency of engaging in misrepresentation or unfair trade practices. TOV was adjudicated to have engaged in consumer fraud i.e., misrepresentation, by the Board on May 10, 1990, and thus has failed to comply with section XX(B)(1)(c) of the Dealer Agreement.

Misrepresentation or Unfair or Deceptive Trade Practices

52. Section XVI(B)(2) states that the dealer shall maintain a high standard of ethics in advertising and shall not engage in any misrepresentation or unfair or deceptive trade practices. In addition to the charges of consumer fraud noted in paragraphs 37

through 42, above, TOV was involved in unfair and deceptive trade practices during the period of its license suspension. When a new motor vehicle dealer's license is under suspension, that dealer is legally precluded from selling new motor vehicles at retail. This is due to the fact that the DMV takes possession of the new car report of sale books and materials which are necessary for the dealer to culminate such a transaction. In an effort to avoid the effect of the suspension, TOV wholesaled a number of new Toyota vehicles to Mooney Auto Center (another licensed dealership owned by Thomas). Thomas then advertised those vehicles as used vehicles and for sale to customers at a price \$1,000 less than a new vehicle. In fact, these vehicles were sold for the same price as they would have sold at the Toyota dealership. As a result of this conduct, TOV failed to comply with section XVI(B)(2) of the Dealer Agreement.

Suspension of Dealership's License to Sell Motor Vehicles

53. Section XX(B)(1)(f) provides for immediate termination of the agreement upon suspension of any license necessary for the conduct by the dealer of the franchise business. TOV's dealer's license was suspended for a period of thirty (30) days beginning May 13, 1990. TOV therefore failed to comply with section XX(B)(1)(f) of the Dealer Agreement.

Impairment of Reputation

54. Section XX(B)(2)(h) provides for termination of the Dealer Agreement upon sixty-days notice upon impairment of the reputation of the dealer. The following findings of fact are related to this issue:

a. Twenty-two newspaper articles (including 14 dated after August 1988) were introduced into evidence. All 22 articles mention Thomas and most mention TOV and the name Toyota.

b. The District Attorney for Fresno County filed a civil complaint against Pioneer-Dodge, Inc., (owned by Thomas) Toyota of Visalia, Inc., and Thomas individually on February 14, 1980, as civil case number 252612-7. The District Attorney's complaint was reported in five (5) articles appearing in the Fresno Bee. An article dated February 15, 1980, noted that TOV was charged with "deceptive and unfair business practices", there were over 100 persons listed as victims, damages of over two million dollars was claimed, and four (4) of the 17 counts alleged were detailed. By stipulation for entry of consent decree and final judgment dated May 13, 1982, the Defendants in the civil action agreed to permanently restrain from engaging in or performing unfair business practices. Pursuant to the terms of settlement, the Defendants paid \$12,600 to those persons who purchased motor vehicles in excess of advertised sale prices, and \$15,000 in civil penalties. The payment of a further civil penalty in the sum of \$20,000 was stayed for three (3) years, or permanently in the event of compliance with all the provisions of the permanent injunction.

c. The status of the DMV accusation against TOV was reported in four (4) articles appearing in the Fresno Bee. An article dated June 7, 1980, reported the allegations of excessive transfer fees being added to the purchase price, and untrue and misleading advertising as to free giveaways.

d. The status of the legal proceedings that followed the DMV order of revocation of November 26, 1980, was reported in the Fresno Bee and Visalia Times-Delta.

e. On May 15, 1990, the Visalia Times-Delta carried a front page headline which stated that "Toyota suspension attracts local traffic". It was reported that Toyota vehicles on the Mooney lot "carried \$1,000 mark-ups over the manufacturer's suggested retail price". In reply, Thomas stated "that's the same mark-up he applied at Toyota of Visalia".

f. Expert testimony established that the volume of business and reputation of a dealership can be damaged by bad publicity and word of mouth that flow from bad service.

g. In an article dated June 13, 1990, Thomas stated that "the publicity surrounding the case, the odd situation of selling new cars as used cars, and the suspension slowed business considerably".

TOV breached section XX(B)(2)(h) of the Dealer Agreement by significantly impairing the reputation of the dealer subsequent to the execution of the Dealer Agreement.

Refusal to Permit Audit

55. Section XX(B)(2)(i) states the franchise agreement may be terminated upon sixty-days (60) notice for refusing to permit TMD to audit TOV's books and records upon written notice. On November 30, 1990, TMD served TOV with written notice of TMD's desire to inspect the books and records of TOV pursuant to this provision of the Dealer Agreement. By letter dated January 17, 1991, TOV indicated its refusal to allow TMD to inspect the books and records. TOV argued that the Dealer Agreement does not contemplate a review of the books and records during the period of time that TMD is involved in an attempt to terminate the franchise. However, no such restriction is contained in the Dealer Agreement. Accordingly, TOV's refusal to permit the inspection requested by TMD constitutes a violation of the provisions of section XX(B)(2)(i) of the Dealer Agreement.

Destruction of the Business Relationship

56. Section XX(B)(2)(k) of the Dealer Agreement provides for termination upon sixty-days (60) notice upon breach or violation of any other provision of the Dealer Agreement. The parties acknowledged in the second paragraph of the Dealer Agreement that the success of the relationship is based on the mutual understanding, cooperation, trust and confidence of both TMD and TOV. The following findings relate to the destruction of the

business relationship:

a. During the first few days of TOV's suspension, TMD's district parts manager Clair Moreland-Girma visited Thomas to confirm he was not selling new vehicles from the Toyota dealership. She saw Thomas each morning to make that determination. On the third morning she again asked Thomas if he was selling any new vehicles from the dealership. He turned toward her and shouted "What is this shit?" and "What the hell do you want?". She testified that she was physically afraid of Thomas.

b. On a number of occasions prior to the period of suspension, Thomas would not make himself available to TMD visiting field personnel. On the few occasions when he was available, he was uncooperative and abusive. He would keep field personnel waiting for long periods of time, dismiss suggestions for improvement with comments like "That won't work in my store" and refer to the OSI program as "bullshit". On one occasion Marc Giammona, TMD Regional Service Manager, was told by Thomas to get out of his dealership after suggesting TOV join the Automatic Clearing House Program. Thomas would refer to the field personnel as "peons", and made comments suggesting that the factory people were those who did not have the ability to be successful in the retail sale of vehicles.

c. In early 1988, TMD's regional staff manager Robert Neis and district sales manager Don Lombardo attempted to meet with Thomas in Visalia to discuss TOV's performance. Thomas refused to meet with them and later interrupted their meeting with TOV's acting general manager, Ken Searcy, stating "This program is shit" and "You guys are shit".

d. It was the custom of Tony Merritt, TMD's regional general manger, to add personal comments in letters to particular dealers in his own handwriting. This was his method of attempting to motivate dealers. In a letter dated July 10, 1989, Merritt wrote on the bottom of the letter to Thomas "Why don't you sell your dealership and concentrate on GM! Tony. Time is constantly changing!" In response, Thomas scrawled "Fuck you" in red ink across the letter and sent it back to Merritt.

e. In 1988, Thomas, apparently dissatisfied with the current deliveries of Toyota vehicles to TOV, had a conversation with Pat Cordova, a TMD employee. During this conversation, Thomas loudly and profanely accused her and TMD of intentionally delaying deliveries to TOV. Cordova was so upset that she requested that her supervisor take all future calls from Thomas.

f. Thomas did not allow employees to attend training classes.

g. In the 1980's TOV was in the practice of giving dealership checks to buyers who had poor credit. Sales personnel would write a check out of company funds, the check would be signed back to TOV, and the face value of the check would be shown as a cash down payment on the sales contract. To protect its profit margin, TOV would raise the price of the vehicle. This "dealer rebate program" was not known to the finance sources who were buying the contracts. As a result, these finance sources were required to finance greater amounts than would normally be required, often in excess of the value of the vehicle, thus jeopardizing the security of the individual loans.

As a result of the foregoing, TOV failed to act with the understanding, trust, and cooperation required under the Dealer Agreement and therefore did not comply with section XX(B)(2)(k).

Failure to Provide Accurate Financial Information

57. Section XX(B)(2)(j) provides for termination upon sixty-days (60) notice for failure to furnish accurate sales or financial information and related supporting data in a timely fashion. In 1989, Thomas failed to return the net working capital agreement to TMD for execution. At Thomas's request, the monthly financial statements sent to TMD were changed almost every month. Fictitious journal entries were made in TOV's records to make it appear that TOV's bank account was stable. The result was that the entire series of financial statements were falsified. Improprieties in financial records prompted TMD to request an audit of TOV's

books. As a result of this practice, TOV breached section XX(B)(2)(j) of the Dealer Agreement.

DETERMINATION OF THE ISSUES

Based on the foregoing, the following determinations are made:

1. In entering into the new dealer agreement, TMD did not waive its right to rely on pre-August 1988 conduct of TOV as grounds for termination.

2. Evidence of adverse publicity carried by newspapers, television and word of mouth, established that TOV's behavior had an adverse effect upon TOV's reputation and harmed the good reputation of TMD and its products.

3. Thomas used foul and offensive language toward various TMD employees in a rude and sometimes personally insulting manner. He further exhibited offensive behavior on a variety of occasions. This behavior made interpersonal business relationships very difficult and interfered with the business relationship in a significant way.

4. It is further determined that:

a) TMD proved that TOV had not transacted an adequate amount of business as compared to the business available to it {Vehicle Code section 3061(a)}.

b) TMD failed to prove that TOV has not made the necessary investment and incurred the necessary obligations to perform its part of the franchise relationship {Vehicle Code section 3061(b)}.

c) TMD proved that the investment made by TOV is not permanent {Vehicle Code section 3061(c)}.

d) TMD proved it would be beneficial and that it would not be injurious to the public welfare for the franchise of TOV to be modified or replaced or the business of the franchise disrupted {Vehicle Code section 3061(d)}.

e) TMD proved TOV does not have adequate motor vehicle sales and service facilities and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by TOV, and has not been rendering adequate services to the public {Vehicle Code section 3061(e)}.

f) TMD failed to prove that TOV has failed to fulfill the warranty obligations of the franchisor as to be performed by the franchisee {Vehicle Code section 3061(f)}.

g) TMD proved that TOV has materially breached the terms of the franchise agreement in that:

1. TOV was closed for a period of seven (7) consecutive days,
2. TOV was adjudicated by a government agency as having engaged in misrepresentation or unfair trade practices,
3. TOV engaged in misrepresentation or unfair or deceptive trade practices,
4. TOV's license to sell new motor vehicles was suspended,
5. TOV's reputation was impaired subsequent to the execution of the Dealer Agreement,
6. TOV refused to permit TMD to inspect TOV's books and records pursuant to a written request, and

7. TOV effectively destroyed the business relationship which existed between the parties.

DECISION

The protest is overruled. Respondent Toyota Motor Distributors, Inc. shall be permitted to terminate the franchise of Protestant Toyota of Visalia, Inc.

Dated: April 24, 1992

NEW MOTOR VEHICLE BOARD


MARTIN G. CASTILLO
Board Member