

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

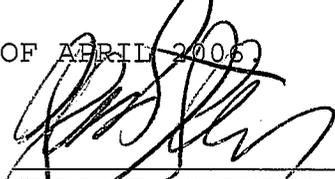
In the Matter of the Protest of)
S & C MOTORS, INC. dba S & C KIA,) Protest No. PR-1894-04
Protestant,)
v.)
KIA MOTORS AMERICA, INC.,)
Respondent.)

DECISION

In accordance with the Sacramento County Superior Court's Judgment Granting Kia Motors America, Inc.'s Petition for Writ of Administrative Mandate or Other Appropriate Relief, at its regularly scheduled meeting of April 5, 2006, the Public members of the Board set aside the Board's January 26, 2005 Decision sustaining the protest and dismissed the above-entitled protest.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 5th DAY OF APRIL 2006



GLENN E. STEVENS
Presiding Public Member
New Motor Vehicle Board

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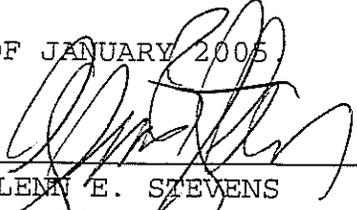
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S & C MOTORS, INC. dba S & C KIA,) Protest No. PR-1894-04
Protestant,)
v.)
KIA MOTORS AMERICA, INC.,)
Respondent.)

DECISION

At its regularly scheduled meeting of January 26, 2005, the Public members of the Board met and considered the administrative record and Proposed Decision After Remand in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision After Remand as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 26th DAY OF JANUARY 2005



GLENN E. STEWENS
President
New Motor Vehicle Board

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7 STATE OF CALIFORNIA
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10 In the Matter of the Protest of)
11 S & C MOTORS, INC. dba S & C KIA,) **Protest No. PR-1894-04**
12 Protestant,)
13 v.) **PROPOSED DECISION AFTER**
14 KIA MOTORS AMERICA, INC.,) **REMAND**
15 Respondent.)
16

17
18 1. This is a proceeding brought under the provisions of Vehicle
19 Code Section¹ 3065.1, asserting the failure of the franchisor to pay a
20 claim deemed approved under a franchisor incentive program.

21 2. A hearing on the merits was held on September 8 and 9, 2004,
22 before J. Keith McKeag, Administrative Law Judge.

23 3. Law Offices of Michael M. Sieving, Michael M. Sieving, Esq.,
24 350 University Avenue, Suite 105, Sacramento, California represented
25 Protestant S&C Motors, Inc., dba S&C Kia (hereinafter "S&C Kia" or
26 "Protestant").

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

1 4. Adorno, Yoss, Alvarado & Smith, Maurice Sanchez, Esq. and
2 Michael P. Norton, Esq., 4 Park Plaza, Suite 1200, Irvine, California
3 represented Kia Motors America, Inc. (hereinafter "Kia" or
4 "Respondent").

5 5. Post-hearing briefs were filed, and the matter was submitted
6 for decision on November 3, 2004.

7 **FACTUAL BACKGROUND**

8 6. At all times mentioned herein, S&C Kia has been a Ford
9 dealer in San Francisco, California. In 1999, Kia embarked on a
10 number of "re-launch programs" by which it intended to increase the
11 number of Kia dealers in California. One of the markets it sought to
12 re-enter, and which was deemed to be an important market, was San
13 Francisco. In the summer of 1999 representatives of Kia approached
14 Ray Siotto, S&C Kia's President, to inquire whether S&C Kia would be
15 interested in taking on the Kia line as an additional franchise.

16 7. After some negotiations between Mr. Siotto and John Meyer,
17 Kia's Dealer Development Manager, Protestant and Respondent entered
18 into an agreement in September 1999, which provided, inter alia, that
19 in return for S&C Kia agreeing to take on the Kia line, Kia would
20 reimburse S&C Kia \$500.00 per unit for the first 200 units sold by it,
21 payable in 50 unit increments. As Mr. Siotto described the payment in
22 his testimony: "This is what Mr. Meyer offered as an inducement, as
23 an incentive to take on the Kia franchise in San Francisco." As to
24 why the reimbursement was tied to the actual sale of automobiles, Mr.
25 Siotto testified Mr. Meyer told him: "They didn't want to set a
26 precedent for buying a dealership." There was no express time limit
27 on how long S&C Kia would have to sell the vehicles. The terms of the
28 payment were memorialized in a September 2, 1999 letter from Terry

1 Timms, Kia's Western Region Sales Manager to Mr. Siotto. The parties
2 entered into a franchise agreement on September 23, 1999.

3 8. S&C Kia sold the first fifty vehicles by July 2000, but did
4 not claim reimbursement at that time. S&C Kia did not sell 200
5 vehicles until December 2001, and did not make any claim for
6 reimbursement of the \$100,000 until February 2002.

7 9. S&C Kia's claim for reimbursement under the agreement took
8 the form of an oral request by Mr. Siotto to Donald Smith, Kia's
9 District Sales Manager, in February 2002 that he check into the status
10 of some money that was owed to S&C Kia under an agreement made in
11 1999. Mr. Siotto thinks he may have given a copy of the September 2,
12 1999 letter to Mr. Smith, but Mr. Smith denies ever receiving such a
13 copy, and testified convincingly that the first time he had ever seen
14 it was at this hearing. Mr. Smith took no action to investigate the
15 claim, or notify anyone else within Kia of the claim.

16 10. No response to this claim was ever made by Kia, either in
17 the form of an acceptance or a rejection. No one from Kia ever
18 indicated that a written claim would be required.

19 11. The claim was never paid. The amount of the claim is
20 \$100,000.00. This Protest was filed January 15, 2004.

21 12. In general, franchisor incentive programs in the automobile
22 industry have the following characteristics: A monetary rebate or
23 reward is offered to all the dealers in a geographic area, e.g.,
24 nationally or regionally, to promote the sale of a specific model or
25 models of vehicles. The rebate or reward increases as certain levels
26 or stair steps of sales are reached, and the program takes place
27 during an expressly limited time period within one model year,
28 pursuant to a detailed set of published, non-negotiable, rules setting

1 out the amounts of and terms under which the rebate or reward per unit
2 will be paid and how claims are to be made.

3 APPLICABLE LAW

4 13. Section 3065.1, as it pertains to this case, provides:

5 (A) All claims made by a franchisee for payment under the
6 terms of a "franchisor incentive program" shall be either
7 approved or disapproved within 30 days after receipt by the
8 franchisor.

9 (B) Any claim not specifically disapproved in writing
10 within 30 days from receipt shall be deemed approved on the 30th
11 day.

12 (C) All claims made by franchisees under the program shall
13 be paid within 30 days following approval.

14 (D) Failure to pay within the time limit, unless for
15 reasons beyond the reasonable control of the franchisor,
16 constitutes a violation of the statute.

17 14. Sections 3066 and 3067 authorize the Board to hear protests
18 filed pursuant to Section 3065.1, and render decisions thereon.

19 PROCEDURAL BACKGROUND

20 15. On the facts and law described above, the Administrative Law
21 Judge presented the Public members of New Motor Vehicle Board
22 ("Board") with a Proposed Decision, which determined that the
23 agreement in dispute was not a franchisor incentive program within the
24 meaning of Section 3065.1, and as a result the Board did not have
25 jurisdiction over the dispute. The Board disagreed, and on December
26 20, 2004 issued an order rejecting that Proposed Decision and
27 remanding it to the Administrative Law Judge with instructions that
28 the agreement was to be considered a franchisor incentive program

1 covered by Section 3065.1, and directing the Administrative Law Judge
2 to consider and determine the other issues that had been raised by the
3 parties.

4 **ANALYSIS**

5 16. Respondent contends that the action is barred by various
6 Statutes of Limitation. Its first attack is based on the one-year
7 limitation provided by Section 3065.1 itself, but this limitation is
8 expressly made applicable to protests filed after the disapproval of a
9 claim by the franchisor in which a notice of disapproval is given to
10 the franchisee. Here we are dealing with a "deemed approved" claim
11 which was never disapproved and for which no notice was given.
12 Section 3065.1 does not provide a limitation period for filing a
13 protest regarding failure to pay a claim, which was deemed approved by
14 reason of failure to disapprove the claim within thirty days.

15 17. Respondent's second attack is based on the one-year
16 limitation of Code of Civil Procedure Section 340(a), but this
17 limitation is applicable only to an action based "...upon a statute
18 for a penalty or forfeiture." Section 3065.1 does not provide for any
19 penalty or any forfeiture, but provides a procedure and a forum for
20 the resolution of disputes between motor vehicle manufacturers and
21 dealers relating to certain payment programs.

22 18. Respondent's final attack is based on the two-year
23 limitation provided by Code of Civil Procedure Section 339, but this
24 limitation is applicable to actions based on breach of an oral
25 contract. Here, while certainly the dispute involves an oral
26 agreement between the parties, the legal basis for the protest is the
27 violation of the statutory rights granted by Section 3065.1, not the
28 breach of that contract.

1 19. The Board has determined that this is a protest properly
2 brought under Section 3065.1, to enforce the rights granted to the
3 franchisee by that statute. That statute provides its own limitation
4 period as to one type of protest which may be filed thereunder, but
5 does not provide a limitation for protests filed for violation of the
6 statute by failure to pay a claim deemed approved due to not having
7 been rejected within the applicable time periods. In such a case,
8 i.e., where no other limitation period is provided, the applicable
9 limitation period is the four-year period set out in Code of Civil
10 Procedure Section 343.

11 20. Here, the limitation period would not have commenced to
12 accrue at the earliest until sixty days after the first fifty cars
13 were sold in July 2000. Since the Protest was filed in January 2004,
14 it was not barred.

15 21. Respondent's next defense to the Protest is that
16 Protestant never made a proper claim under the agreement. Mr. Meyer,
17 Kia's then western region dealer development manager, who negotiated
18 the agreement with Protestant's president in 1999 testified
19 convincingly that this was a special program which did not require any
20 particular sort of claim to be made in order to initiate payment upon
21 the sale of fifty vehicles. As he put it: "No, they're just supposed
22 to get a check. We knew when they sold 50 units." There is no
23 dispute that Mr. Siotto, Protestant's president made an oral request
24 in February 2002 to Mr. Smith, the Kia representative who called on
25 Protestant on a regular bases, to look into the status of money owed
26 to Protestant under a 1999 agreement, and that this request was made
27 after 200 vehicles had been sold. Mr. Smith did not know the terms of
28 the 1999 agreement, but neither did he make any effort to learn them.

1 Mr. Timms, who had been the regional sales manager for Kia in 1999 was
2 still with Kia at the time and could have advised Mr. Smith if he had
3 been asked. In sum, by early 2002 Kia was aware, from monthly sales
4 reports, that Protestant had sold 200 units, and a request for payment
5 was made which was never approved or rejected because the Kia
6 representative of whom it was made did not understand the nature of
7 the request being made, but took no action to look into the matter in
8 any way. Based on the testimony of Kia's then dealer development
9 manager, no more formal "claim" was required, and the failure of the
10 Kia representative to take action cannot be held against Protestant.

11 22. Respondent's final contention is that Protestant is
12 ineligible to recover under the incentive program because it did not
13 sell the vehicles within the time period required. It bases this
14 claim on the fact that Mr. Timms, in his September 2, 1999 letter to
15 Protestant, described the incentive as a "launch" assistance program,
16 which connotes a short period of time, and ascribes to Protestant the
17 estimate that it could sell the 200 units within two or three months.
18 Mr. Meyer, Kia's then dealer development manager, who negotiated the
19 deal, testified convincingly that the estimates made of future sales
20 at the time of entering the franchise were those of Kia's consultants,
21 that Mr. Siotto had no idea how Kia would do in the San Francisco
22 market, and that Protestant did nothing more than accept the
23 consultant's numbers. Most importantly, Mr. Meyer makes it clear that
24 no time limit was ever set on the sale of the vehicles, even though
25 all parties naturally hoped they could be sold as quickly as possible.
26 Under the terms of the agreement in dispute, the length of the time
27 period taken to sell the 200 vehicles does not provide a defense to
28 the Protest.

1 23. In sum, based on the Board's determination that the
2 agreement in dispute is a franchisor incentive program within the
3 meaning of Section 3065.1, the Protest should be sustained. The
4 Protestant sold the required number of vehicles, no time limit within
5 which the sales were to occur had been agreed upon, demand for payment
6 was made by the franchisee but never acted upon by the franchisor
7 resulting in the claim being deemed approved, and the failure to pay
8 the claim resulted in a violation of Section 3065.1 which authorizes
9 the filing of a protest. The Protest was filed within the applicable
10 limitation period.

11 24. Respondent has never disputed that the sum of \$100,000.00
12 was the amount that had been agreed to be paid, and that it has never
13 been paid. However, neither Section 3065.1, nor any other statute
14 conferring authority on the Board, authorize the Board to award
15 damages, and recent judicial decisions have held that, while
16 administrative entities may be allowed to impose restitution as a
17 probationary condition to license discipline, they may not award
18 damages when such recovery is the primary focus of the matter.
19 Clearly, this is not a license discipline proceeding. It must,
20 therefore, be left to Protestant to determine the method to be used to
21 recover any monetary award based on its Protest having been sustained
22 in this forum.

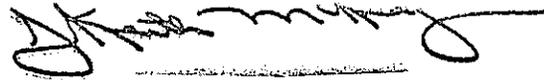
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PROPOSED DECISION

The Protest is sustained.

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

DATED: January 5, 2005



By: _____
J. KEITH MCKEAG
Administrative Law Judge

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Joan Borucki, Director, DMV
Mary Garcia, Manager
Occupational Licensing, DMV