

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
FERRARI OF SACRAMENTO, INC.,) Protest No. PR-973-88
Protestant,)
vs.)
FERRARI NORTH AMERICA,)
Respondent.)

DECISION

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

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 28th day of February, 1991.

By


MANNING J. POST
Vice-President
New Motor Vehicle Board

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Protestant,)	
vs)	
FERRARI NORTH AMERICA, INC.,)	PROPOSED DECISION
Respondent)	

PROCEDURAL BACKGROUND

1. By letter dated May 5, 1988, Ferrari North America, Inc. ("FNA"), of 777 Terrace Avenue, Hasbrouck Heights, New Jersey, gave notice pursuant to Vehicle Code Section 3060^{1/} to Ferrari of Sacramento, Inc. ("FOS"), 8099 Madison Avenue, Fair Oaks, California, of FNA's intention to terminate the Ferrari franchise held by FOS. The notice of termination was received by the New Motor Vehicle Board ("Board") on May 9, 1988.

2. On May 18, 1988, FOS filed a protest with the Board pursuant to section 3060.

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

3. A settlement conference regarding this matter was held on June 16, 1988, before an administrative law judge for the Board. As a result of this settlement conference, the parties executed and submitted to the Board a Stipulation for Decision and Order ("Stipulated Decision"), pursuant to section 3050.7.

4. The Stipulated Decision was adopted by the Board on July 21, 1988.

5. Pursuant to the terms of the Stipulated Decision, the franchise of FOS would automatically terminate, with no right to review or appeal, upon the occurrence or nonoccurrence of specified conditions.

6. On November 1, 1988, FNA filed with the Board a notice of termination accompanied by supporting affidavits. The notice of termination alleged that FOS had violated the terms of the Stipulated Decision in that a) it failed to obtain a wholesale line of credit no later than October 30, 1988, and b) it failed to timely reimburse FNA for the cost of auditing its books and records. Pursuant to the terms of the Stipulated Decision, the failure of either of these conditions would result in the automatic termination of the franchise.

7. On November 17, 1988, at the request of FOS, an evidentiary hearing was held before an administrative law judge of the Board.

8. On December 8, 1988, the administrative law judge issued a proposed ruling in which he determined that a) FOS had failed to obtain a wholesale line of credit by the stipulated

date, and b) it had failed to timely reimburse FNA for the cost of the audit.

9. By Order dated December 8, 1988, the Executive Secretary of the Board adopted the proposed ruling and determined that the failure of FOS to comply with the terms of the Stipulated Decision resulted in the termination of the franchise.

10. On January 23, 1989, FOS filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 in the Sacramento County Superior Court, case number 360374. The petition named the Board and the Executive Secretary as respondents and FNA as real party in interest. Official notice was taken of this case at the request of the Respondent filed November 19, 1990.

11. On April 10, 1990, the superior court issued a Peremptory Writ of Mandate which ordered the Board to a) set aside the order of the Executive Secretary which upheld the termination of the franchise of FOS, and b) to conduct an evidentiary hearing to determine 1) whether any of the conditions specified in the Stipulated Decision had occurred, 2) whether any such occurrence constituted good cause for termination of the franchise considering the factors set forth in section 3061, and 3) whether the termination of the franchise would constitute a forfeiture as that term is defined by Civil Code section 3275. The Writ of Mandate further required that the Board file a return to the writ "on or before 1990, setting forth what the Board has done to comply."

12. An Amended Peremptory Writ of Mandate issued on April 20, 1990, specifying that the Board's return was to be filed on or before June 30, 1990.

13. The Board and FNA appealed from the judgment directing issuance of these writs. At the time of the administrative hearing on this matter, those appeals were still pending in the Court of Appeal, Third Appellate District under case number 3-Civil-C008840. Official notice was taken of these proceedings at the request of the Respondent filed November 19, 1990.

14. On July 24, 1990, FOS moved the superior court pursuant to Code of Civil Procedure section 1110b for an order that the appeals did not stay the judgment of the writ of mandate.

15. By orders dated August 10, 1990, and August 21, 1990, the superior court granted relief sought by FOS pursuant to Code of Civil Procedure section 1110b. FNA has appealed under case numbers 3-Civil-009530 and 3-Civil-009531.

16. On September 6, 1990, FOS moved the superior court for a supplemental writ of mandate seeking to require the Board to affirmatively set aside the Executive Secretary's order of December 8, 1988, and to compel FNA to resume its franchise relationship with FOS pending the appeal.

17. By order dated September 24, 1990, the superior court denied the relief sought against FNA and ordered the issuance of a Supplemental Writ of Mandate directing the Board to comply with the Amended Writ of Mandate.

18. In compliance with the Supplemental Writ of Mandate issued on October 9, 1990, the Board set aside the Order of the

Executive Secretary dated December 8, 1988, and ordered that a hearing be conducted in accordance with paragraph B of the Amended Writ of Mandate.

19. An evidentiary hearing was held on October 16, 17 and 31, and November 1, 2 and 6, 1990, before Administrative Law Judges Robert Kendall and Marilyn Wong. Judge Wong was present at all sessions of the hearing but took no part in the preparation of this proposed decision.

20. FNA was represented by Nicholas Browning III, Esq., Herzfeld & Rubin, 1925 Century Park East, Suite 600, Los Angeles, California 90067, and Sonia Sotomayor, Esq., Pavia & Harcourt, 600 Madison Avenue, New York, New York 10022.

21. FOS was represented by Donald M. Licker, Esq., 100 Howe Avenue, Suite 111 North, Sacramento, California 95825, and Jay-Allen Eisen, 1000 G Street, Suite 300, Sacramento, California 95814.

ISSUES PRESENTED

22. The amended writ of mandate issued on April 20, 1990, required the Board, inter alia, to conduct an evidentiary hearing to determine:

1. whether any conditions specified in the Board's stipulated order of July 21, 1988, for termination of petitioner's franchise agreement with real party in interest, Ferrari North America, have occurred; and
2. whether any such occurrence constituted good cause for termination of the franchise under all the existing circumstances, including at a minimum, all of the circumstances described in Vehicle Code section 3061;

3. whether termination of the franchise of Ferrari of Sacramento pursuant to the stipulated order of July 21, 1988, would constitute a forfeiture or penalty made illegal by Civil Code section 3275, which provides as follows:

Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.

23. In determining whether good cause has been established for terminating or refusing to continue a franchise, section 3061 requires the Board to take into consideration the existing circumstances, including, but not limited to:

- (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 franchisee and has been and is rendering adequate services to the public. {Section 3061(e)}

- (f) Whether the franchisee fails to fulfill the warranty 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

24. FNA contends that the failure by FOS to comply with paragraphs 16E and 17 of the Stipulated Decision constituted good cause for termination. FNA further contends that good cause existed for termination of FOS' franchise under all existing circumstances, including the factors set forth in section 3061. Finally, FNA contends that the Stipulated Decision must be specifically enforced and that termination of the franchise in accordance with the Stipulated Decision would not constitute a forfeiture, as a matter of law, and that FOS was grossly negligent in its failure to comply with the Stipulated Decision.

25. FOS contends that it complied with paragraphs 16E and 17 of the Stipulated Decision. FOS alleges that it paid all instalments due to FNA for the cost of the audit of FOS' books and records. When the final instalment became due, FOS had an off-setting credit in its parts and warranty account sufficient to cover the final instalment. FOS also alleges that it

obtained a wholesale line of credit for \$200,000 effective October 28, 1988; however, due to an inadvertence on the part of the bank, FNA was not notified of this credit line until after October 30, 1988. FOS further contends that FNA has not demonstrated that it suffered any actual harm or detriment from any delay in tendering the final payment for the cost of the audit or in receiving notice of the credit line, and that the termination of the valuable franchise for alleged failures to comply strictly with the terms of the Stipulated Decision would constitute unlawful forfeiture.

BURDEN OF PROOF

26. Section 3066 imposes upon FNA the burden of establishing the existence of good cause to terminate or refuse to continue the franchise of FOS.

27. The burden of proving entitlement to relief from forfeiture is on FOS. (Palo and Dodini v. City of Oakland, 79 Cal.App.2d 739, (1947); Cal.Jur.3d, Forfeitures, 24, pg 354.)

FINDINGS OF FACT

A. Facts relating to the Stipulation for Decision and Order.

1. Facts Relating to Compliance with Paragraph 17 of the Stipulated Decision.

28. Paragraph 8(c) of FNA Dealer standard provisions requires Ferrari dealers to maintain a wholesale line of credit

with a responsible financial institution exclusively for the purchase of Ferrari automobiles.

29. To have a wholesale line of credit in place, FNA requires its dealers to provide at least two letters. One is a letter from the dealer to FNA authorizing it to draw cash drafts on the dealer's bank credit line. The other is a letter from the bank advising FNA as to the limit of the line of credit to be made available and authorizing FNA to present cash drafts for payment on delivery of vehicles to the dealer. There is also an optional letter on bank letterhead authorizing FNA to send title documents for the vehicle direct to the dealer.

30. FOS has been owned and operated by Omar and Miki Mujagic since March of 1986. The Mujagics were aware of the letters required by FNA as they had previously established two lines of credit exclusively for the purchase of Ferrari vehicles and had submitted to FNA a Dealer's letter and a Bank's letter.

31. By letter dated February 8, 1988, FOS was notified by First Interstate Bank ("FIB") that its line of credit was suspended.

32. By letter dated May 5, 1988, FNA notified FOS of its intention to terminate the franchise of FOS. One of the grounds for termination stated by FNA was the failure of FOS to maintain a permanent wholesale line of credit.

33. On May 18, 1988, FOS filed a protest with the Board pursuant to the provisions of section 3060. On June 16, 1988,

the parties entered into the Stipulated Decision. Paragraph 17 of the Stipulated Decision provides in relevant part, that:

Dealer has failed to maintain a wholesale line of credit in the minimum amount of \$200,000, as required by the Dealer Operating Requirements Agreement. If the examination required pursuant to Section 16 reflects that the Dealer is not insolvent, Dealer shall use its best efforts to obtain a good and sufficient wholesale line of credit acceptable to Ferrari N.A. within three (3) months of the date of the accountants' issuance of the certified balance sheet referred to above, but no later than October 30, 1988. Until Dealer obtains such wholesale line of credit, Dealer warrants and represents that it presently has sufficient financial resources to purchase, for cash, at least those vehicles currently allocated to it by Ferrari N.A. If Dealer fails or is otherwise unable, for any reason whatsoever, to obtain the wholesale line of credit required within the time specified above, the franchise shall be immediately terminated, upon the filing with the Board of Ferrari N.A.'s affidavit of such failure to secure the required wholesale line of credit.

34. On October 27, 1988, Omar and Miki Mujagic met with Robert Menicucci, the then Vice President and Manager of the Lafayette office of Security Pacific National Bank ("SPNB"), to discuss obtaining a line of credit. On October 28, 1988, Miki Mujagic telephoned Mr. Menicucci and was advised that a line of credit had been approved.

35. Mr. Menicucci decided to grant the line of credit without security based on the oral information provided by the Mujagics. Upon granting the credit line, Mr. Menicucci dictated a letter to FNA verifying that a credit line had been established effective October 28, 1988. This letter, although dated October 28, 1988, was not immediately sent due to an inadvertence on the part of the bank.

36. On November 9, 1988, a facsimile was transmitted by Omar Mujagic to FNA together with a copy of the letter from SPNB dated October 28, 1988, advising that a wholesale line of credit had been established for FOS. The original letter from SPNB was received by FNA on November 16, 1988, and was postmarked November 10, 1988. This correspondence was the first written notification which FNA had received that a wholesale line of credit had been established for FOS.

37. FOS has argued that to 'obtain' a line of credit by October 30, 1988, in accordance with paragraph 17 of the Stipulated Decision, is to have a line of credit 'effective' from that date. Such an interpretation is contrary to the plain meaning of the Stipulated Decision which expressly provides that the line of credit must be 'acceptable' to FNA. Without the bank and dealer letters, FNA would have no way of reviewing the credit line to determine whether it is acceptable. At the very least FNA should have received written confirmation by October 30, 1988, that a line of credit had been established.

38. On October 31, 1988, Omar Mujagic met with Hugh Steward, National Sales Manager of FNA, in New Jersey. There is conflicting evidence as to whether Omar Mujagic advised Hugh Steward at this meeting that a wholesale line of credit had been established. In any event, as the deadline set forth in the Stipulated Decision had expired on October 30, 1988, any oral communications made thereafter are irrelevant.

39. On November 1, 1988, counsel for FOS hand-delivered a letter to the Board which stated, in pertinent part, that:

"...(FOS) has performed as provided in Paragraph 17 but for the requirement to have a wholesale line of credit in place no later than October 30, 1988."

This correspondence confirms that there was no wholesale line of credit approved by FNA which had been established by the date as set forth in the Stipulated Decision.

40. As of October 30, 1988, FNA had not received notification that a wholesale line of credit had been obtained. The evidence establishes that a line of credit was not formally established by SPNB until sometime after October 30, 1988.

2. Facts Relating to Compliance with Paragraph 16E of the Stipulated Decision.

41. In FNA's notice of termination, dated May 5, 1988, an additional ground listed for the proposed termination was the failure of FOS to meet the minimum net working capital requirements pursuant to the dealership agreement.

42. Pursuant to Paragraph 16A of the Stipulated Decision, the parties agreed to the appointment of the accounting firm of Peat, Marwick, Main & Co. ("Peat Marwick"), to audit FOS and determine whether it meets minimum net working capital requirements.

43. Paragraph 16E of the Stipulated Decision provides that:

The cost of the examinations and reports required under this section shall be advanced by Ferrari N.A. and the Dealer shall reimburse Ferrari N.A. in full for such costs within twenty (20) days of the submission by Ferrari N.A. to Dealer of the accountants' statement. If Dealer fails to reimburse Ferrari N.A. when reimbursement is due pursuant to this paragraph, it shall be conclusively presumed that the Dealer is insolvent and the franchise shall forthwith be terminated upon filing with the Board of Ferrari N.A.'s affidavit of nonpayment.

44. On August 23, 1988, FOS received from FNA the first request for reimbursement for the services of Peat Marwick in the amount of \$24,447. Payment of this amount by FOS was received by FNA on September 16, 1988, three days after it was due.

45. On September 6, and 13, 1988, FNA forwarded to FOS further requests for reimbursement in the amounts of \$12,218 and \$9,800 respectively. Neither payment was received by FNA within the required payment period.

46. On October 7, 1988, FOS received invoice number 63133 from FNA for audit work undertaken between August 2, and September 2, 1988. The amount of this invoice was \$2,900. Payment of this account was due on October 27, 1988.

47. On November 14, 1988, FNA received a check from FOS for reimbursement of audit fees set out in invoice number 63133. The check was dated November 1, 1988, and the envelope was postmarked November 9, 1988.

48. As payment was to be received by FNA no later than October 27, 1988, according to the terms of the Stipulated Decision, the check was returned to FOS on November 16, 1988.

49. FOS did not notify FNA of its expectation that FNA would apply FOS' warranty claims against the amounts due to FNA for the Peat Marwick reimbursement. No such offset had ever occurred with the three prior invoices. The balance of FOS' parts and warranty account with FNA at the end of October was insufficient to cover the amount of the required payment.

50. On October 27, 1988, FOS had failed to comply with the requirement of paragraph 16E of the Stipulated Decision.

B. Facts Relating to Good Cause to Terminate FOS' Franchise.

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

51. The Dealer Retail Sales and Service Agreement between FNA and FOS is dated February 1, 1986. FOS commenced business as a Ferrari dealer on March 11, 1986.

52. FNA imports Ferraris from Italian-based Ferrari SPA. Ferrari automobiles are high-priced, high-performance, limited production sports cars, catering to a very exclusive market segment.

53. In 1986 the price range of a Ferrari was from \$59,000 to \$94,000, and in 1988 from \$68,000 to \$125,000. The Ferrari customer is typically a wealthy individual with substantial assets and is a multiple-car owner.

54. Between 1986 and 1988, 3,600 to 4,000 Ferraris were produced each year of which 1,000 to 1,050 were imported annually into the United States.

55. In 1988 there were 43 Ferrari dealers in the United States, five of which were situated in northern California. The four Ferrari dealers in northern California, excluding FOS, are located in Walnut Creek, San Francisco, Los Gatos and Monterey.

56. The Sacramento market area includes the counties of Amador, El Dorado, Sacramento, Solano, Sutter, Yolo and Yuba.

57. From 1986 to 1988, demand for Ferrari vastly exceeded supply.

58. The planning volumes for FOS and actual delivery of Ferrari vehicles to FOS prior to November 1, 1988, the date upon which it was determined that the franchise of FOS had terminated, were as follows:

<u>YEAR</u>	<u>PLANNING VOLUME</u>	<u>VEHICLES DELIVERED</u>
1986	18	18
1987	16	16
1988	17	13
	--	--
TOTAL	51	47

59. Of the 47 vehicles sold by FOS, 25 had warranty service work performed by authorized Ferrari dealers other than FOS.

60. In 1987 and 1988, FOS performed warranty service on about 29 Ferrari vehicles per year, of which 21 vehicles were originally sold by FOS.

61. For the 7 month period ending September 30, 1988, FOS performed under 10 hours a week of services for Ferrari vehicles for which customers were obligated to pay, and under five hours per week on warranty service for which FNA reimbursed FOS.

62. FOS' average sales of parts and accessories for the 7 month period ending September 30, 1988 was approximately one-third of the bench mark utilized by FNA based on the dealer's planning potential.

63. The fact that FOS sold all of the Ferraris it was allocated was largely due to the high demand for Ferraris which began in 1986 with the introduction of the Ferrari Testarossa. Many of the Ferraris sold by FOS were outside the Sacramento market area at a time when Ferrari customers were waiting, as a national average, as long as two years for delivery. In such circumstances it is not possible to draw any accurate conclusion as to the sales performance by FOS as there was an abundance of available business to all Ferrari dealers during the term of the FOS Ferrari franchise. On the other hand, FOS' parts and service business was far less than that of comparable Ferrari franchises and nowhere near the 1,200 service customers it originally claimed to have had. In 1985, FOS represented to FNA that it had approximately 800 service customers including three Ferrari customers. Since 1986, the number of service customers has dropped to 200. The decline in service volume was not as a result of any action on the part of FNA.

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

64. On or about June 30, 1983, Omer and Miki Mujagic made application for the Ferrari dealership on behalf of Omer's Auto World Inc.

65. The architectural drawings and plans that the Mujagics submitted were for an office building at 8099 Madison Avenue, Fair Oaks, which included space for a dealership.

66. Upon the site of the dealership was erected a building at an estimated cost of \$3.5 million. Construction of this facility was completed in December of 1985. The Mujagics, as opposed to FOS, owned the building.

67. As a condition for appointment as a Ferrari dealer, FNA required that FOS obtain certain specialized equipment, parts and tools, having an approximate value of \$41,000.

68. The investment FOS made in the building, facilities and equipment exceeded FNA's requirements. However, much of this was neither required by FNA or necessarily made by FOS to perform its obligations under the franchise.

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

69. In 1977 the Mujagics purchased the real property located at 8099 Madison Avenue which in 1984 was appraised at \$700,000.

70. The following approximate amounts were expended by the Mujagics prior to construction; \$300,000 for architects, \$100,000 for rezoning, \$70,000 for the construction loan,

\$30,000 for demolition and \$150,000 for a takeout loan on the construction financing.

71. The three-story structure was 44,000 square feet in area. FOS was to occupy 4,500 square feet of the first floor as a showroom and office and 10,000 square feet of the basement.

72. The cost of constructing the building was \$3.5 million. The Mujagics, as opposed to FOS, incurred the debt for construction, which was financed by a loan from Commercial Center Bank.

73. The repayment of the financing for construction was extended beyond the building's completion to June 1986. As permanent financing was not forthcoming, a bridge loan was arranged through Mr. Ben Caramella.

74. By July 1985, the Mujagic's financial pressures had become such that Caramella-Ballardini Ltd. ("C-B") was admitted as a 25% limited partner in Ferrari Building Associates, an entity formed to control ownership of the building. The Mujagics received \$800,000 and retained a 75% interest in the building.

75. In March 1987, C-B's interest was increased to 50% with the promise of a further payment in the sum of \$850,000 and a letter of credit to guarantee FOS' wholesale line of credit with FIB.

76. In March 1987, C-B paid \$400,000 to the Mujagics. In an effort to compel payment of the remaining balance of \$450,000, FOS sold three vehicles out of trust.

77. As a result of sales out of trust, FIB instituted legal action against FOS and, by stipulation of the parties, a

receiver was appointed to take possession of the vehicle inventory financed by FIB.

78. A series of lawsuits and counter-suits began between the Caramella interests and the Mujagics over their respective rights and responsibilities with regard to the Madison Avenue premises. On or about June 27, 1988, the Mujagics conveyed all their right, title and interest in and to the premises to Ben Caramella.

79. On September 13, 1988, Ben Caramella filed an unlawful detainer action against FOS seeking eviction from the premises and damages.

80. Subsequently, FOS settled all its claims with the Caramallas and received a cash payment, as well as the right to occupy the building for a limited time thereafter.

81. As of November 1, 1988, the Mujagics had lost their investment in both the land and the building. This was in no way caused by any action on the part of FNA.

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)).

82. The closest Ferrari dealership to Sacramento consumers is Walnut Creek, a distance of approximately approximately 60-70 miles.

83. Due to the limited number of Ferrari dealers and Ferrari vehicles distributed in the United States, it is not unusual for customers to be located at great distances from an

authorized dealer or to have vehicles serviced and repaired by independent repair shops.

84. FOS continues to operate as an unlicensed Ferrari service facility at 11511 Folsom Blvd., Rancho Cordova, California.

85. FOS operated without a wholesale line of credit between February 5, 1988, and November 1, 1988.

86. The failure of dealers to maintain a wholesale line of credit can affect the ability of FNA to ship automobiles efficiently to its dealers.

87. In October 1988, FOS paid cash for two Ferrari vehicles but had to refuse to accept delivery of a third Ferrari vehicle as it lacked a wholesale line of credit.

88. The high price of Ferrari vehicles places Ferrari customers at a substantial risk when dealers are not financially stable. On occasions, Ferrari customers are required to entrust dealers with substantial prepayments while awaiting delivery of Ferrari vehicles. If the dealer is not financially able to accept and pay for the vehicle upon delivery, there is risk of loss to the customer who makes the prepayment.

89. The history of the FOS franchise was plagued with financial losses resulting from its inability to properly manage its business, and resulted in a series of lawsuits filed by and against FOS in 1988.

90. In the initial application to obtain the Ferrari franchise Mrs. Mujagic failed to disclose that Mr. Mujagic had

entered a guilty plea to a criminal charge four years earlier, for which he had been placed on probation.

91. When the existence of the lawsuit filed against FOS by FIB for sales out of trust came to the attention of FNA, FOS denied the existence of the lawsuit.

92. FOS attempted to mislead FNA in submitting false claims and deposits in the amount of \$86,000 from retail customers for the purchase of Ferrari vehicles when in fact, it had taken one order in the amount of \$5,000.

93. Rather than accept responsibility for the deficiencies in the operation of its dealership, FOS has repeatedly blamed other parties, including its accountant, attorneys, bank and business partner.

94. The Ferrari customers in the Sacramento area were not injured by the termination of FOS.

- 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 Franchisee and has been and is Rendering Adequate Services to the Public.
(Section 3061(e)).

95. FOS exceeded FNA standards in terms of facilities and equipment while it occupied the Madison Avenue premises.

96. FOS has a reputation among its customers for the high quality and caliber of its sales, service, and repairs.

97. Between 1986 and November 1988, FOS sold all of the vehicles delivered to it.

98. Due to lack of service customers and turnover, an adequate supply of parts was not maintained.

99. In September 1989, FOS relocated to a new facility at 11511 Folsom Boulevard, Sacramento, where it continues to operate its Maserati dealership and to provide service and repairs for Ferrari and other vehicles.

100. The adequacy of the facility at 11511 Folsom Boulevard is not relevant to the termination of FOS, since the occupancy of this facility was subsequent to the notice of termination of FOS dated November 1, 1988.

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

101. In 1987 and 1988 warranty work was undertaken on 29 vehicles each year. None of the Ferrari vehicles sold by FOS are now covered by warranties; however, FOS continues to carry out warranty work on Ferraris sold by other dealers.

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

102. The Ferrari Dealer Agreement states in pertinent part:

"12(b)...Ferrari N.A. shall have the right to terminate this agreement for cause, with the immediate effect of termination by sending written notice thereof to Dealer...upon the occurrence of any of the following events...

(2) Any change, whether voluntary or by operation of law, in the ownership of the beneficial interests in the dealership.

(5)(i) Insolvency or business failure of Dealer; (ii) Dealer's inability to pay its debts as such debts become due; (iii) appointment of a receiver or

custodian for all or any part of the property of Dealer . . . (vi) subjecting all or any Ferrari products to execution or other judicial process . . . (6) Any sale, assignment or transfer or attempted sale, assignment or transfer of the Dealer Retail Sales and Service Agreement by Dealer, in whole or in part, or any sale or attempted sale by Dealer of its Ferrari operations, without the prior express written consent of Ferrari N.A.

(8) Any assignment, transfer, lease, sale or other disposition of Ferrari Products or any interest therein except in Dealer's ordinary course of business and as authorized by Ferrari N.A. in writing;

(13) Failure on the part of Dealer, for any reason whatsoever, to execute a Dealer Operating Requirements Agreement or to comply with the requirements of any present or future Operating Requirements Agreement pursuant to the terms and conditions specified in Paragraph 3(d) of these Standard Provisions.

12(c) . . . Ferrari N.A. shall have the right to immediately terminate the Dealer Retail Sales and Service Agreement, if any one of the following situations continue to exist thirty (30) days after Ferrari N.A. has sent written notice to Dealer with respect thereto:

(3) Impairment of the reputation or financial standing of Dealer or any of Dealer's owners, offices, or general managers, or ascertainment by Ferrari N.A. of any facts existing at or prior to the time of execution of the Dealer Retail Sales and service Agreement which tend to impair the reputation or financial standing of Dealer.

(4)...(ii) any change in the financial or any other condition of Dealer that, in the sole opinion of Ferrari N.A., may unreasonably impair Ferrari N.A.'s security under the Dealer Retail Sales and Service Agreement, . . .

103. The Ferrari North America Dealer Operating Requirements Agreement states, in pertinent part, that:

C. DEALER'S OPERATING REQUIREMENTS

(1) Dealer's minimum net working capital shall be two hundred fifty thousand (\$250,000) dollars.

(2) Dealer's wholesale line of credit shall be in the minimum amount of two hundred thousand (\$200,000) dollars.

In addition to the Operating Requirements set forth above by FNA, Dealer agrees with FNA to take the following action by the time specified herein, if any.

1. Dealer agrees to supply a monthly financial statement on Ferrari by the 15th of each month, for the preceding month.

104. On May 5, 1988, FNA gave notice of intention to terminate FOS' Ferrari franchise for violations of the provisions of the Dealer Agreement.

105. In breach of FNA Dealer Operating Requirements Agreement clause C.1., FOS failed to submit fully completed monthly financial statements to FNA. No statements were submitted for the period February 1986, to December 1986, and only partial monthly statements were received for the period January 1987, through January 1988. The first full and complete financial statements that FOS provided to FNA were sent under the cover of a letter dated June 13, 1988. Those statements were for the period 11-2-87 to 4-30-88.

106. On March 18, 1987, FOS entered into a Dealer Flooring Agreement with FIB. C-B agreed to become a surety for FOS' indebtedness to FIB and guarantee the same in the event of default. On or about January 4, 1988, FIB discovered that a vehicle held in trust had been sold on or about December 17, 1987, and, thereafter, sought and was paid this amount by C-B.

107. On February 8, 1988, FIB suspended FOS' wholesale line of credit. Thereafter, FOS conducted business without a wholesale line of credit and in breach of FNA Dealer Operating Requirement Agreement clause C(2).

108. Sales out of trust by FOS resulted in the commencement of legal proceedings. (First Interstate Bank v. Omer Mujagic and Miki Mujagic and Ferrari of Sacramento, Sacramento Superior Court Number 356427, and Caramella-Ballardini Ltd. v. Ferrari of Sacramento, Sacramento Superior Court Number 501056).

109. On March 8, 1988, a receiver was appointed to take possession of FOS' inventory of vehicles, including four Ferrari vehicles.

110. The reputation of FOS and FNA were impaired by these lawsuits and the publicity that ensued.

111. With the financial stability of FOS in question, there was concern that FOS was in breach of the minimum net working capital requirements of clause 2(1) of the Dealer Operating requirements. As a result, the stipulation between FNA and FOS dated June 16, 1988, made provision for the appointment of an accountant to audit the books and records of FOS to determine if the net capital requirements of the dealer operating agreement were met. The audit report prepared by Peat Marwick, Certified Public Accountants, concluded that FOS met the minimum net working capital requirement.

112. In breach of clause 15 of the Dealer agreement, FOS failed to give FNA 90 days written advance notice that a Maserati dealership was to be added.

113. There is no evidence that there had been a transfer, sale or assignment of the dealer operating agreement other than allegations made by C-B in its action against FOS.

C. Facts Relating to the Issue of Forfeiture.

114. Vehicle Code Section 3050.4 specifically provides for a mandatory settlement conference in any protest which comes before the Board. Pursuant to Section 3050.7 the Board has authority to adopt a stipulated decision and proposed order that results therefrom.

115. At the settlement conference held June 16, 1988, FOS entered into a Stipulated Decision that expressly provided for the termination of the Ferrari franchise should FOS fail to perform any of the obligations contained therein. At the time FOS entered into the Stipulated Decision, it was represented by counsel and was fully informed of and understood its rights, duties and obligations. The Board adopted the Stipulated Decision on July 21, 1988.

116. On November 1, 1988, FNA filed with the Board a Notice of Termination accompanied by supporting affidavits detailing FOS' failure to comply with the Stipulated Decision. This operated to terminate the Ferrari franchise in accordance with paragraph 8 of the Stipulated Decision.

117. On November 17, 1988, at the request of FOS, an evidentiary hearing was held before an administrative law judge for the Board to determine the merits of the allegations contained in FNA's Notice of Termination. On December 8, 1988, Sam W. Jennings, Chief Administrative Law Judge/Executive Secretary of the Board, adopted the proposed ruling of the administrative law judge which determined that the failure of

FOS to comply with the terms of the Stipulated Decision resulted in the termination the franchise.

118. FOS subsequently brought proceedings in the superior court and in compliance with a supplemental writ of mandate that issued therefrom, the Board set aside the order of its Executive Secretary. The superior court further ordered that the Board commence a hearing conducted in accordance with paragraph B of the Amended Writ of Mandate, which required the Board to consider:

Whether the termination of the franchise of FOS pursuant to the stipulated order of July 21, 1988, would constitute a forfeiture or penalty made illegal by Civil Code section 3275.

119. Civil Code Section 3275 codifies the equitable rule that, "wherever a penalty or forfeiture is used merely to secure the payment of a debt, for the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such forfeiture by awarding compensation instead thereof, proportionate to the damages actually resulting from the nonpayment, nonperformance, or non-enjoyment according to the Stipulated Decisions of the agreement . . . A court of equity will never, by its affirmative action, or by the affirmative provisions of its decree, enforce a penalty or forfeiture, or any stipulation of that nature . . ." Lentz v. McMahon, 49 Cal.3d 393 (1989), quoting Pomeroy's Equity Jurisprudence, 381,433 and 459.

120. In the present case, the 'real thing' intended by the parties upon entering into the Stipulated Decision was to resolve the parties' dispute regarding the proposed termination of the franchise and to secure FOS' performance of its obligations under the franchise agreement. The threat of the termination of the franchise was used to secure such performance and may be characterized as an 'accessory' thereto.

121. Equitable relief is, however, only available to he who comes to equity with clean hands. Section 3275 expressly provides that relief from forfeiture is not available "in the case of a grossly negligent, willful, or fraudulent breach of duty".

122. Pursuant to the terms of the Amended Peremptory Writ of Mandate issued on April 20, 1990, the Board is required to consider the question of whether termination pursuant to the terms of a Stipulated Decision constitutes a unlawful forfeiture from which the aggrieved party may be granted relief. This relief is not available to a party who breaches a duty imposed by an agreement as a result of the aggrieved party's gross negligence.

123. The Ferrari Dealer Agreement and Dealer Operating Requirements Agreement expressly provide that the Ferrari dealer is to maintain a minimum wholesale line of credit of \$200,000 with a responsible financial institution exclusively for the purchase of Ferrari automobiles.

124. In breach of the dealer agreements, FOS operated without a wholesale line of credit for the period February 5, 1988, to November 1, 1988.

125. The failure of a dealer to maintain a wholesale line of credit can affect the ability of FNA to ship vehicles efficiently to its dealers. In October 1988, FOS had to refuse to accept delivery of a Ferrari vehicle as it lacked a wholesale line of credit.

126. Paragraph 17 of the Stipulated Decision provided that FOS was to have a good and sufficient wholesale line of credit acceptable to FNA within three months of the date of the accountant's issuance of the certified balance sheet, but no later than October 30, 1988.

127. Although FOS had contact with representatives of SPNB on other matters for two years prior to October 27, 1988, it was not until that date, three days before the deadline, that it applied to SPNB to obtain a wholesale line of credit. FOS knew it had to have a wholesale line of credit by October 30, 1988, and that time was of the essence.

128. With the termination of the Ferrari franchise pending, the Mujagics were not diligent and prudent in their efforts from June of 1988 to obtain a wholesale line of credit by October 30, 1988.

129. The Mujagics had two previous lines of credit and were aware of the documentation required by FNA. With the termination of the Ferrari franchise pending, it is reasonable to have expected the Mujagics to have ensured that SPNB had full

and complete instructions as to what FNA required in the event of approval being granted.

130. The Mujagics chose to leave the destiny of their Ferrari franchise in the hands of Mr. Menicucci on the Friday afternoon before his week long vacation in Mexico. The Mujagics should have taken a more active and decisive role in communicating SPNB's approval of the line to FNA using the documentation required by FNA. Having merely obtained oral approval on Friday, October 28, 1988, one would have expected Mr. Mujagic to have had, at the very least, the bank's approval in writing to hand to Mr. Steward at their New Jersey meeting on October 31, 1988. Alternatively, arrangements could have been made for Mr. Steward to make telephonic contact with SPNB officials to confirm the existence of the credit line. No credible explanation for this failure was offered by the Mujagics at the hearing.

131. FOS was grossly negligent in the performance of its obligation under the Stipulated Decision in failing to obtain a wholesale line of credit no later than October 30, 1988.

132. Paragraph 16E of the Stipulated Decision required FOS to reimburse FNA for the cost of the examination of FOS' books and records within 20 days of receipt of an account.

133. FOS had failed to remit timely reimbursement payments to FNA on three occasions. On each occasion FNA notified FOS that it had failed to timely remit the payment.

134. The assertion by FOS that it assumed that the final payment of \$2,900 would be offset against the balance in FOS'

parts and warranty account is not supported by the evidence in that no request was made in this regard and had such request been made, an insufficient credit balance would have precluded the action sought.

135. With the fate of their Ferrari franchise in the balance, it is reasonable to have expected FOS to have made prompt payment and certainly not have risked termination by relying on the offset of a supposed credit from its parts and warranty account.

136. FOS was grossly negligent in willfully failing to timely remit to FNA the amount of the payment required pursuant to paragraph 16E of the Stipulated Decision.

137. The failure by FOS to comply with the provisions of the Stipulated decision was caused by its gross negligence in the operation of its business and the conduct of its business affairs. As a result, FOS is not entitled to the equitable relief provided by Civil Code Section 3275.

Determination of Issues

1. FOS failed to obtain a wholesale line of credit as required by paragraph 17 of the Stipulated Decision by October 30, 1988, and failed to fully reimburse FNA for the audit pursuant to paragraph 16E of the Stipulated Decision.

2. By reason of the violation of the Stipulated Decision by FOS, good cause existed for the termination of its franchise on November 1, 1988, considering all existing circumstances, including those set forth in Vehicle Code Section 3061:

- a. FNA established that as of November 1, 1988, FOS did not transact an adequate amount of business as compared with the business available to it.
- b. FNA established that FOS had no significant investment or obligations in regard to the performance of its part of the franchise.
- c. FNA established that FOS' investment in the Ferrari franchise was not permanent.
- d. FNA established that it would not be injurious to the public welfare to terminate its franchise with FOS.
- e. FNA did not establish that FOS did not have adequate motor vehicle sales and service facilities, equipment, and qualified personnel to reasonably provide for the needs of consumers of motor vehicles handled by FOS at the time of its termination on November 1, 1988. FNA did establish that FOS, while a dealer, did not maintain sufficient vehicle parts to reasonably provide for the needs of consumers of Ferrari vehicles and that FOS was subsequently required to vacate its facility as a result of unrelated disputes between the principals of FOS and C-B.
- f. FNA did not establish that FOS had failed to fulfill its warranty obligations.
- g. FNA established that FOS failed to comply with the terms of the Dealer Agreement and the Stipulated Decision.

3. Given all the facts and circumstances, good cause exists for termination of the franchise.

4. The termination of the franchise of FOS pursuant to the Stipulated Decision did not constitute a forfeiture or penalty made illegal by Civil Code Section 3275 in that the termination occurred in accordance with the provisions of the Automobile Franchise Act, and that the defaults of FOS of paragraphs 16E and 17 were caused by the gross negligence of FOS and its willful disregard of its obligations under the Stipulated Decision.

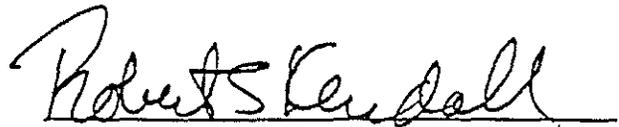
Proposed Decision

The following proposed decision is respectfully submitted:

The protest is overruled. Respondent Ferrari North America, Inc. shall be permitted to terminate the franchise of Protestant Ferrari of Sacramento, Inc.

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: February 4, 1991



ROBERT S. KENDALL
Administrative Law Judge
New Motor Vehicle Board