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Edition

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New Motor Vehicle Board

In-Site

SEPTEMBER 17, 2014 SPECIAL BOARD MEETING

The New Motor Vehicle Board (“Board”) held a Special meeting on September 17, 2014, in San Diego, California. At that meeting, the Public Members considered one case, *Santa Cruz Nissan, Inc., dba Santa Cruz Nissan v. Nissan North America, Inc.*, Protest No. PR-2358-13.

Nissan sought to terminate Santa Cruz Nissan’s franchise because of unsatisfactory sales penetration performance related to operational deficiencies and breach of the dealer agreement. Protestant contended that Respondent failed to meet its burden in establishing good cause to terminate their franchise.

A 12-day merits hearing was held before Administrative Law Judge Diana Woodward Hagle on January 27 through February 7, 2014, and March 6 and 7, 2014. The Proposed Decision dated July 3, 2014, sustained the protest and did not permit Nissan to terminate Santa Cruz’s Nissan franchise.

At the July 15, 2014, General meeting the Public Members conditionally sustained the protest and remanded the matter to the ALJ to recommend conditions for the Board to impose consistent with section 3067 and establish a time frame for Santa Cruz Nissan to comply with

these conditions. The parties were encouraged to engage in settlement discussions and participated in a mandatory settlement conference with ALJ Marilyn Wong; however, the matter did not settle.

A hearing on remand was held on August 26. ALJ Hagle issued a “Proposed Decision Following Board’s Order Sustaining the Protest and Remanding the Matter” on September 5, 2014. The decision contained the following recommended conditions and incorporated the Proposed Decision dated July 3, 2014:

A. Effective no later than 30 days from

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the effective date of this decision, and continuing until December 31, 2015;

(1) Protestant shall be open for service of Nissan vehicles on Saturdays (excluding holidays) from 8:00 A.M. to 4:30 P.M., and shall have available for Saturday customers on-demand shuttle bus services and loaner cars; and

(2) Protestant shall, at all times its Nissan dealership is open for sales, have at least one salesperson available who is conversant with the Spanish language; and

(3) Protestant shall, in its print, radio and TV advertising, devote no less than 20% (this percentage was agreed to by the parties during the August 26th telephonic hearing) of its advertising budget for each of those media to Spanish-language advertising. (Section 3.A. of the Dealer Agreement)

B. James Courtright (if serving as the Executive Manager or General Manager of protestant) shall successfully complete the Dealer Training Academy program of the National Automobile Dealers Association ("NADA") within 24 (twenty-four) months from the effective date of this decision. Inability to enroll in the program because of restrictions imposed by NADA shall not constitute a violation of this condition. (This condition relates to Section 1.Q of the Dealer Agreement)

C. In regard to the above conditions in paragraphs A. (1) - (3) and B., protestant shall have the burden of proof of verifying compliance. Upon request of Nissan, protestant shall provide verification of compliance with any of the above conditions within 30 days of the request.

D. Effective immediately to December 31, 2015, the Board shall have exclusive jurisdiction to assess the sales performance of protestant and the following calculation shall be the exclusive

measurement of protestant's sales performance to December 31, 2015.

(1) The assessment shall compare protestant's sales to the sales of the 10 dealers other than protestant in Nissan's District 8. (In addition to protestant, District 8 dealers are Nissan of Bakersfield, Selma Nissan, Lithia Nissan of Fresno, Nissan of Visalia, My Nissan (Salinas), Gilroy Nissan, Coast Nissan (San Luis Obispo), Santa Maria Nissan, Nissan of Clovis, and Cardinale Nissan (Seaside).)

(2) No less frequently than quarterly, Nissan shall calculate the average percentage increase (or decrease) in number of sales of new Nissan vehicles of the 10 dealers in District 8 other than protestant and transmit the calculation to protestant.

(3) The number of protestant's sales shall meet or exceed the average percentage increase in sales of the 10 dealers.

(4) In any proceeding before the Board regarding protestant's sales performance using the foregoing standard, protestant will not challenge the reasonableness of the standard, nor shall respondent be required to prove the reasonableness of the standard.

E. Respondent may file a written request to the Board for an appropriate order if protestant fails to meet any of the foregoing conditions.

F. In any proceeding where termination of protestant's franchise may be ordered, respondent shall have the burden of proof of showing "good cause" to terminate the franchise.

G. The Board shall retain continuing jurisdiction over this matter.

At the meeting, the Public Members of the Board adopted the ALJs Proposed Decision and recommended conditions with one minor amendment to a typographical error.

SEPTEMBER 19, 2014 SPECIAL BOARD MEETING

The Board held a Special meeting on September 19, 2014, in San Diego, California. At that meeting, the Board Members considered the revised text to proposed rulemaking increasing the Annual Board Fee (13 CCR §§ 553 and 553.20). The Public and Dealer Members participated in this meeting.

Historically, the Annual Board Fee per manufacturer or distributor has been \$.45 per vehicle with a minimum of \$300 and the dealer fee has been \$300. In an effort to reduce the Board's excessive surplus, the Annual Board Fee was reduced to \$0 in 2000. Those fees were reinstated in 2001 and ultimately reduced in 2002 to \$.338 per vehicle with a minimum fee of \$225 per manufacturer or distributor and the dealer fee was reduced to \$225. This fee structure was in place for nine years from 2002-2011.

The reduced fees coupled with the economic downturn in 2007-2011, made it necessary for the Board to supplement its annual income with its cash reserve. In 2011, the Board conservatively forecasted continued slow growth and recovery in the new motor vehicle industry. Therefore, the Annual Board Fee per manufacturer or distributor was reinstated from \$.338 to \$.45 per vehicle with a minimum of \$300 instead of \$225, and the dealer fee was reinstated from \$225 to \$300. This fee reinstatement became effective on March 30, 2012.

At the March 13, 2013, General Meeting, the members approved an amendment to Section 553 to increase the Annual Board Fee from \$300 per year to \$400 per year for new motor vehicle dealers and increase the annual fee paid to the Board by new motor vehicle manufacturers or distributors by raising the numerical coefficient on which the fee is based, from \$0.45 to \$0.60 per new motor vehicle sold, leased or otherwise distributed in California to a consumer of such new motor vehicles during the preceding calendar year. The proposed amendment would also limit the Annual Board Fee due from a manufacturer or distributor to \$300 if only 1-250 vehicles were distributed or \$450 if only 251-806 vehicles were distributed.

The notice of proposed rulemaking was published in the California Regulatory Notice Register on October 25, 2013. The Board had one year from this date to submit a final rulemaking packet for review by the Office of Administrative Law. Due to concerns raised by the Department of Finance (Finance) regarding the tiered fee structure and the projections for new vehicle sales, on April 9, 2014, the Board approved a per unit fee of \$0.55 for manufacturers and distributors with a \$400 minimum if less than 727 vehicles are sold, and a \$400 fee for dealerships.

After additional discussions with Finance, further amendments to the proposed fee structure were required prior to the Board going forward with the fee increase. In early September 2014, it was suggested that a per unit fee of \$0.50 for manufacturers and distributors with a \$350 minimum if less than 700 vehicles are sold, and a \$350 fee for dealerships was more in line with projected vehicle sales.

In light of the above background, the members unanimously adopted the revised fee increase. After a 15-day public comment period, the final rulemaking packet was submitted to Finance on October 8. However, it was unable to approve the proposed regulations indicating that based on its forecasts of new vehicle sales, the fees currently assessed by the Board appear to be sufficient to maintain its operations. The Board anticipates reviewing its fee structure at the December 11, 2014, General Meeting.

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National Association of Motor Vehicle Boards and Commissions

NAMVBC 2014 FALL WORKSHOP

The full agenda and power point presentations of the topics discussed are available on the NAMVBC website at www.namvbc.org.

The National Association of Motor Vehicle Boards and Commissions (“NAMVBC”) held its Fall Workshop at the Embassy Suites San Diego Bay-Downtown on September 17-21, 2014. Government regulators from many states, associate NAMVBC members and representatives from various industry associations, and vehicle dealers and manufacturers were present for the three day event. A packed agenda with the theme “Maintaining Momentum in an Evolving Industry” highlighted expert keynote speakers discussing industry issues and providing valuable information and ideas of common interest. Brian Kelly, California State Transportation Agency Secretary, greeted guests on behalf of the state of California at the Welcome Reception held Wednesday evening, September 17, 2014.

Thursday morning began with a welcome by Jean Shiomoto, Director, California Department of Motor Vehicles. She was followed by Jonathan Morrison, President, Auto Advisory Services, who tackled the topic California Zero Emissions Vehicle Mandates, Legal and Market Expectations Intertwined. Mr. Morrison’s informative talk tracked the development of the zero emission vehicle market and revealed the potential consequences of increasing stringent fleet penetration requirements.

The next topic, Internet Advertising and Marketing was moderated by Aaron Jacoby, Esq., Arent Fox. The panel participants included Bruce Zulauf, Director, Department of Revenue, Auto Industry Division, Colorado Motor Vehicle Dealer Board and Ken Levin, General Counsel, Edmunds.com.

The afternoon agenda proved to be very interesting and generated significant audience participation. A panel made up of Jonathan Chang, Associate General Counsel, Tesla Motor Company, Bruce Gould, Executive Director, Virginia Motor Vehicle Dealer Board and Mark Schienberg, President, Greater New York Automobile Dealers Association discussed the positives and negatives of Tesla’s marketing program and its impact on the dealer community. Several states have created legislative carve-outs allowing Tesla to sell direct to consumers, while other states have refused to do so, and require sales of Tesla vehicles only by authorized dealers. California law doesn’t prohibit Tesla from manufacturing vehicles and directly selling to consumers. (Veh. Code sections 507, and 11713.3(o)).

The following topic was keynoted by Tom Fullington, Director, Arizona Automobile Dealers Association and Andrew Conway, Chief, Registration Policy and Automation Branch, California DMV. Both speakers outlined what their states are doing to promote better business partnerships between government and the automotive industry. The discussion included electronic titling, future concepts for paperless transactions, temporary license plates and better automation.

The day concluded with Norma Ortega, Deputy Director of Finance, California Department of Transportation, outlining the difficulties of financing repairs and maintenance of California highways by relying upon the gas tax. She described a problem that is looming for the nation as a whole as gas tax dollars are not enough to handle existing repair and maintenance requirements. She identified several reasons why gas tax alone is not enough, such as: millennials not driving, new cars are more

gas efficient, growth of alternative fuel vehicles, etc. She identified VMT (vehicle miles traveled) as a potential new way to collect tax revenue to support infrastructure repairs. California is watching Oregon's program and will pilot its own test program as the state searches for a solution to this problem.

Friday's agenda was equally ambitious. The day started with a panel discussion regarding autonomous vehicles, led by Bernard Soriano, Deputy Director, Enterprise Risk Management, California DMV, Ron Medford, Google and Bryant Walker Smith, Assistant Professor at the School of Law and the School of Engineering at the University of South Carolina. Mr. Soriano described the regulatory process which had just been completed that will allow for testing autonomous vehicles on California roadways starting on January 1, 2015. Mr. Medford gave background on the development of Google's car and discussed advancements in autonomous technology by other manufacturers. Mr. Walker-Smith acknowledged the excitement and development of the technology, but added a cautionary note that a fully autonomous vehicle is still many years away and will be subject to numerous hurdles before universally accepted.

The next topic, "Year of the Recall" was a panel group comprised of Stephen Lending, Managing Counsel, Toyota Motor Sales, USA, Inc., Doug Greenhaus, Chief Counsel, National Automobile Dealers Association and Rosemary Shahan, President, Consumers for Auto Reliability and Safety ("CARS"). Wide audience participation followed the presentations.

Before lunch, Glenn Mercer, a nationally known automobile industry consultant, spoke on "Dealerships of the Future". Mr. Mercer supported his presentation with graphs, data and good wit. His conclusions are thought provoking and foretells a much different dealership community than exists today. Computer technology and access to reliable, timely information will drive changes.

Mr. Mercer's comments proved to be a great introduction to the next speaker, Sheryl Connelly, Ford Motor Company Futurist. Ms. Connelly confirmed Mr. Mercer's observations but from a different perspective. She spoke of the Millennial Generation and how its driving habits and transportation expectations will help change the industry. Beyond the vehicle industry, Ms. Connelly discussed how the latest generation thinks, acts and what it expects from us and each other. Unfortunately, she embargoed her presentation, so it is not on the NAMVBC website.

Before the day came to an end, two more presentations were made. Christina Tusan, of the Federal Trade Commission Western Regional Office in Los Angeles, updated the attendees on recent FTC actions regarding auto dealer advertising. It was evident from Ms. Tusan's remarks that the FTC has heightened its oversight role regarding auto dealer advertising and that we should expect to learn of new enforcement actions in the near future.

And, finally, ending the day Friday, there was a panel discussion on "Subprime Loans". The panel included Michael Rothe, Director, Legal Department and Mary Jane South, Deputy Registrar with the Ontario Motor Vehicle Industry Council, James Moors, Senior Counsel and Director of Franchising and State Law, NADA and Jonathan Morrison, President, Auto Advisory Services.

That evening, most of the attendees enjoyed the Giants/Padres baseball game at Petco Park.

Saturday was the final day of the workshop. The session was open to all attendees and offered an opportunity for anyone to express any additional ideas or concerns not already discussed. The regular session was concluded and the government members continued their business meeting. Bill Brennan, NMVB executive director was re-elected president for 2015.

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