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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of

12 SANTA MONICA AUTO GROUP, dba SANTA
13 MONICA INFINITI,

14 Protestant,

15 v.

16 INFINITI WEST, a Division of NISSAN NORTH
17 AMERICA, INC.,

18 Respondent.

Protest No. PR-2330-12

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTEST**

19
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1 **THE MOTION TO DISMISS**

2 6. On April 30, 2012, Infiniti filed this "Motion to Dismiss Protest" contending that "SMI
3 has, however, asserted its protest in direct violation of its unambiguous written agreement in which it both
4 (a) acknowledged good cause existed to establish Infiniti representation in the [Beverly Hills] Open Point
5 and (b) unequivocally agreed not to take any action to protest, prevent or delay the establishment of an
6 Infiniti dealer in the Beverly Hills market (the 'Waiver Agreement')." (Motion to Dismiss, p. 1, lines 27-
7 28, p. 2, lines 1-3; Declaration of Eric Anderson in Support of Motion to Dismiss, Exh. B)

8 7. On May 19, 2012, SMI filed its "Opposition to [Respondent's] Motion to Dismiss Protest"
9 alleging that the Waiver Agreement does not constitute an enforceable waiver of Protestant's protest
10 rights: (1) it is unlawful under both the previous and current versions of Section 11713.3(g); (2) the letter
11 is not admissible into evidence by application of the parol evidence rule; and (3) it cannot be viewed as a
12 separate agreement between the parties because it is not supported by independent consideration. SMI
13 contends it is entitled to a merits hearing pursuant to Sections 3062, 3063, and 3066. (Protestant's
14 opposition, p. 2, lines 7-13)

15 8. On May 25, 2012, Infiniti filed its reply in support of its motion to dismiss protest
16 contending that the Waiver Agreement is binding and enforceable in this case. (Respondent's reply, p. 2,
17 lines 4-6)

18 **FACTS NOT IN ISSUE**

19 9. Infiniti and SMI entered into a Waiver Agreement signed on September 24, 2010 by Eric
20 Anderson, Regional Vice president, Infiniti West Region, and Kayvan Naimi, Principal Owner, Santa
21 Monica Auto Group.

22 10. Eric Anderson, representing Infiniti and Kayvan Naimi, representing SMI, were authorized
23 to bind their respective organizations to the Waiver Agreement.

24 **ISSUES**

- 25 11. Was the Waiver Agreement enforceable?
26 a. Was there adequate consideration given?
27 b. Did the integration clause in the Infiniti Dealer Term Sales and Service Agreement (herein
28 "Dealer Agreement") and the Standard Provisions bar the Waiver Agreement from being incorporated

1 into the Dealer Agreement?

2 (1) Did Section 15.E. of the Standard Provisions and Article Eleventh of the Dealer
3 Agreement allow for an amendment to the Dealer Agreement?

4 (2) What was the impact, if any, of the Parole Evidence Rule on the Waiver Agreement and
5 the Dealer Agreement?

6 a. Did Vehicle Code Section 11713.3(g) bar the enforceability of the Waiver Agreement?

7 (1) What is the impact of the *Lew Williams* case on the enforceability of the Waiver
8 Agreement?

9 **APPLICABLE LAW**

10 12. Civil Code section 1625 provides:

11 The execution of a contract in writing, whether the law requires it to be written or not,
12 supersedes all the negotiations or stipulations concerning its matter which preceded or
accompanied the execution of the instrument.

13 13. Code of Civil Procedure section 1856(a) provides:

14 Terms set forth in a writing intended by the parties as a final expression of their
15 agreement with respect to such terms as are included therein may not be contradicted by
evidence of any prior agreement or of a contemporaneous oral agreement.

16 14. Section 11713.3(g), prior to December 31, 2011, provided:

17 It is unlawful and a violation of this code for any manufacturer, manufacturer branch,
18 distributor, or distributor branch licensed under this code to do any of the following:

19 ...
20 (g) To require a dealer to prospectively assent to a release, assignment, novation, waiver,
21 or estoppel that would relieve any person from liability to be imposed by this article or to
22 require any controversy between a dealer and a manufacturer, distributor, or
representative, to be referred to any person other than the board, if the referral would be
binding on the dealer. This subdivision does not, however, prohibit arbitration before an
independent arbitrator.

23 15. Section 11713.3(g) as amended by Senate Bill 642 and effective January 1, 2012, makes it
24 unlawful for a licensed manufacturer or distributor to obtain from a dealer or enforce against a dealer an
25 agreement, provision, release, assignment, novation, waiver or estoppel that does any of the following:

26 (1) modifies or disclaims a duty or obligation of the manufacturer, distributor, or a right or privilege of a
27 dealer; (2) limits or constrains the right of a dealer to file, pursue or submit evidence in connection with a
28 protest before the board; (3) provides for the termination of the franchise by a dealer; or (4) requires a

1 controversy between a manufacturer or distributor and a dealer to be referred to a person for a binding
2 determination. Subdivision (g)(2) provides that “[a]n agreement, provision, release, assignment,
3 novation, waiver, or estoppel prohibited by this subdivision shall be unenforceable and void.” However,
4 as provided in Subdivision (g)(3) “[t]his subdivision does not do any of the following:

5 ...
6 (D) Affect the enforceability of a provision in any contract entered into on or before December
7 31, 2011.

8 ...
9 (H)(i) Prohibit a voluntary waiver agreement, supported by valuable consideration, other than the
10 consideration of renewing a franchise, to waive the rights of a dealer to file a protest under Section 3062
11 for the proposed establishment or relocation of a specific proposed dealership,”

12 16. In *DaimlerChrysler v. Lew Williams, Inc.*, 142 Cal.App.4th 344, 353, the court stated,

13 Keil argues its waiver contained in the Letter Agreement is void under Vehicle Code section
14 11713.3. That statute makes it unlawful for a manufacturer to “require a dealer to prospectively
15 assent to a release, assignment, novation, waiver, or estoppel which would relieve any person
16 from liability to be imposed by this article [article 1 of chapter 4, division 5 of the Vehicle Code]”
17 or to “modify, replace, enter into, relocate, terminate or refuse to renew a franchise in violation of
18 Article 4 (commencing with Section 3060) of Chapter 6 of Division 2.” (Veh. Code, § 11713.3,
19 subds. (g), (l).) The statute does not invalidate Keil's waiver. First, DaimlerChrysler did not
20 “require” Keil to assent to the waiver. The waiver was the result of an arm's length voluntary
21 transaction where for valuable consideration, DaimlerChrysler agreed not to exercise its right to
22 reestablish a franchise on Florin Road within the time period statutorily exempt from protests in
23 exchange for Keil agreeing not to protest should DaimlerChrysler eventually reestablish a
24 dealership there.

20 CONTENTIONS OF THE PARTIES

21 RESPONDENT'S CONTENTIONS:

22 17. Infiniti argues in support of its Motion to Dismiss the Protest filed by SMI, that SMI was
23 fully informed of Infiniti's intent to establish a new dealership in the Beverly Hills Open Point when the
24 Dealer Agreement was negotiated and entered into by the parties. (RT 16:22-25) The parties were
25 dealing at arm's length relative to the appointment of SMI as a dealer. (RT 16:6-11 and 17:1-19) The
26 Waiver Agreement was also executed by SMI and Infiniti in consideration for SMI's appointment as an
27 Infiniti dealer on the condition that SMI expressly agreed not to take any action, whether in court or
28 before the Board, seeking to prevent or delay the establishment of a new dealer in the Beverly Hills Open

1 Point. (Motion to Dismiss, p. 2, lines 6-11; RT 5:17-23 and 7:8-11) The Waiver Agreement was signed
2 by SMI (by Kayvan Naimi, Principal Owner) and Infiniti (by Eric Anderson, Regional Vice President) on
3 the same date as the Dealer Agreement, September 24, 2010. (Motion to Dismiss, p. 3, lines 1-8; RT 6:7-
4 9, 14:5-8, and 15:6-9)

5 18. In support of its Motion to Dismiss, Infiniti submitted the Waiver Agreement:

6 September 13, 2010

7 ...

8 Dear Mr. Naimi:

9 Infiniti Division, Nissan North America, Inc. ("Infiniti") intends to appoint an Infiniti
10 dealer in Beverly Hills, California to replace the prior dealer in that market. This action
11 may be protestable by you, pursuant to CA Vehicle Code Section 3062.

12 You acknowledge that good cause exists to establish Infiniti representation in Beverly
13 Hills, and that such establishment would be reasonable and in the best interests of Infiniti
14 consumers and Infiniti dealers in the metro. You shall not take any action, whether in court
15 or before the California New Motor Vehicle Board, or any other legal, equitable, or
16 administrative tribunal, to prevent or delay the establishment of Infiniti representation in
17 the Beverly Hills market, or to seek damages as a result of such actions.

18 Please sign this letter where indicated below and return this original to my attention at
19 Infiniti West Region.

20 Sincerely,

21 Eric Anderson
22 Regional Vice President
23 Infiniti West Region

24 I, Kayvan Naimi, Principal Owner, Santa Monica Auto Group, agree to the foregoing.

25 (Declaration of Eric Anderson in Support of Motion to Dismiss, Exh. B)

26 Both undisputed signatures of Eric Anderson and Kayvan Naimi appear on the document along with a
27 hand written date of 9-24-2010.

28 19. Infiniti contends that SMI would argue that Section 11713.3(g) would void the Waiver
Agreement. (Motion to Dismiss, p. 6, lines 17-19) Prior to January 1, 2012, Section 11713.3(g) provided
that it was unlawful for a manufacturer to: "require a dealer to prospectively assent to a release,
assignment, novation, waiver, or estoppel that would relieve any person from liability to be imposed by
this article..." (Motion to Dismiss, p. 6, lines 20-22)

20. Respondent argued that "[a]fter January 1, 2012, this section [Veh. Code § 11713.3(g)]

1 provides that it is unlawful for a manufacturer or distributor:

2 (1) Except as provided in paragraph (3), to obtain from dealer or enforce against a
3 dealer an agreement, provision, release, assignment, novation, waiver, or estoppel that
4 does any of the following:

5 (A) Modifies or disclaims a duty or obligation of a manufacturer, manufacturer
6 branch, distributor, distributor branch, or representative, or a right or privilege of a dealer,
7 pursuant to Chapter 4...of Division 5 or Chapter 6...of Division 2.” (Motion to Dismiss,
8 p. 6, lines 23-28, and p. 7, lines 1-4; underline in original)

9 21. Respondent argued that: “[a]lthough the new version of this section also provides a
10 mechanism for a dealer to waive its right to file a protest under Section 3062 to the establishment of a
11 dealership, the new version also expressly provides in paragraph (3) that: “This subdivision does not do
12 any of the following: ... (D) Affect the enforceability of a provision in any contract entered into on or
13 before December 31, 2011.”” (Motion to Dismiss, p. 7, lines 5-9; Respondent’s reply, p. 2, lines 13-19
14 and p. 3, lines 16-19; RT 11:12-16)

15 22. Respondent contends that “[b]ecause the Waiver Agreement at issue in this case was
16 entered into in September 2010 and the new version of Section 11713.3(g), by its express terms, does not
17 affect the enforceability of agreements entered into before December 31, 2011, the only statutory
18 provision applicable to the Waiver Agreement is the prior version of Section 11713.3(g) in effect until
19 January 1, 2012.” (Motion to Dismiss, p. 7, lines 10-14; RT 11:17-20)

20 23. With respect to Section 11713.3(g)(3)(H)(i), Respondent argued that this provision does
21 not prohibit a voluntary waiver agreement by a manufacturer in the appointment of a new dealer of the
22 new dealer’s right to file a protest while negotiating the new dealer’s contract. The Board also has the
23 authority to determine the enforceability of waiver agreements. (RT 12:19-25 and 13:1-7)

24 24. Respondent further argued that:

- 25 ■ In “[i]nterpreting this language, the California courts have held that a waiver agreement with
26 language almost identical to the Waiver Agreement at issue in this case was valid and fully
27 enforceable. *DaimlerChrysler Motors Company et. al. v. Lew Williams, Inc. et. al* (2006) 142
28 Cal.App.4th 344.” (Motion to Dismiss, p. 7, lines 18-21; RT 12:3-6);

- 1 ▪ “At the time of its appointment as an Infiniti dealer and execution of the Waiver Agreement, SMI
2 was entirely free either to forego its rights to protest an additional dealer in Beverly Hills, or not.
3 Similarly, INFINITI was free not to agree to appoint SMI as its authorized dealer in Santa Monica,
4 unless it agreed not to protest the establishment of a Beverly Hills dealer. SMI had choices with
5 respect to the rights of its prospective dealership as did INFINITI. Neither party had yet attained
6 any economic power over the other.” (Motion to Dismiss, p. 9, lines 9-15);
- 7 ▪ “As explained by the *Lew Williams* court: [The protesting dealer] waived its right to protest, then
8 dupliciously protested. It should not be allowed to shield itself from liability under the cloak of a
9 statute designed to protect a right [that the protesting dealer] voluntarily relinquished in return for
10 economic benefit in now holds. *DaimlerChrysler v. Lew Williams*, 142 Cal.App.4th at 354.”
11 (Motion to Dismiss, p. 9, lines 20-26); and
- 12 ▪ “Here, Protestant was appointed as an Infiniti dealer, because of and concurrently with, its consent
13 to enter into the Waiver Agreement. Thus the appointment of Protestant as an Infiniti dealer
14 constitutes adequate consideration...” (Respondent’s reply, p. 4, lines 5-7)

15 25. In the alternative Respondent argued with regards to consideration, that where two
16 instruments are executed simultaneously and are meant to be part of the same transaction, such as a
17 promissory note and a guaranty, the same consideration supports both agreements. Both the Dealer
18 Agreement and Waiver Agreement were executed by the parties on the same date and as part of the same
19 transaction. Respondent cited the following cases to support its contention: *Mortgage Guarantee Co. v.*
20 *Chotnier* (1936) 8 Cal.2d 110, 112; *Home Federal Sav. & Loan Assn. v. Ramos* (1991) 229 Cal.App.3d
21 1609, fn.1; *Shafer v. Wholesale Frozen Foods* (1957) 151 Cal.App.2d 96, 100 [reversed by *Schafer v.*
22 *Wholesale Frozen Foods, Inc.* (1959) 171 Cal.App.2d. 232]. (Respondent’s reply, p. 4, lines 9-15; RT
23 13:17-25 and 14:1-13)

24 26. As to a second alternative with regard to consideration, Respondent argues that
25 “Protestant’s promise not to protest the appointment of an Infiniti dealer in the Beverly Hills Open Point
26 may be enforced through the doctrine of promissory estoppel. The estoppel is a substitute for
27 consideration in a contract. 1 Witkin Summary of California Law, *Contracts*, § 244 et seq., and cases
28 cited therein, e.g., *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685.” The elements of estoppel as

1 cited by Respondent are: “(1) a promise made by a promisor and (2) relied upon by the promisee and/or a
2 third party (3) to their detriment. Rest. 2d, *Contracts*, § 90(1).” “In this case, INFINITI relied on
3 Protestant’s written promise not to protest the appointment of a dealer in the Beverly Hills Open Point by
4 expending significant time and resources in locating dealer candidates, screening them and seeking to
5 appoint one of them as its dealer. The candidate also found property in Beverly Hills for the
6 dealership...and is expending substantial sums of money to retain the option to open a dealership there.”
7 (Respondent’s reply, p. 4, lines 16-27; RT 14:14-25)

8 27. The integration clause in the Standard Provisions of the Dealer Agreement provides in
9 Section 15.E. as follows:

10 This Agreement contains the entire understanding of the parties hereto with respect to the
11 subject matter contained herein and may be amended only by a written instrument
12 executed by each of the parties or their respective personal representatives, successors
13 and/or assigns. This agreement supersedes any and all prior agreements with respect to
14 the subject matter hereof, and there are no restrictions, promises, warranties, covenants or
15 undertakings between the parties other than those expressly set forth in this Agreement,...

16 (Respondent’s reply, p. 5, lines 23-28, and p. 6, lines 1-9; Declaration of Michael M. Sieving in support of
17 Protestant’s opposition, Exh. A)

18 28. The Infiniti Dealer Agreement at Article Eleventh: Execution of Agreement, has the
19 following provision:

20 This Agreement, and any Addendum or amendment or notice with respect thereto, shall be
21 valid and binding on Seller only when it bears the signature of either the President or an
22 authorized Vice-President of Seller ... This Agreement shall bind Dealer only when it is
23 signed by a duly authorized officer or executive of Dealer if a corporation...

24 (Motion to Dismiss, p. 6, lines 1-9; Declaration of Eric Anderson in Support of Motion to Dismiss, Exh.
25 A; RT 18:10-14)

26 29. Infiniti does not seek to alter or modify the standard terms of the Dealer Agreement but to
27 memorialize the Waiver Agreement between the parties on a subject not otherwise covered in the Dealer
28 Agreement. Therefore, the Waiver Agreement constitutes an amendment which is expressly allowed
pursuant to Section 15.E. of the Standard Provisions and Article Eleventh of the Dealer Agreement. The
Integration Clause in the Dealer Agreement nullifies only prior or contemporaneous understandings as to
the subject matter of the Dealer Agreement. It does not restrict the parties from entering into an

1 additional agreement not covered by the Dealer Agreement. (Respondent's reply, p. 6, lines 10-26; RT
2 18:12-14)

3 30. Infiniti contends that the Parole Evidence Rule in Civil Code section 1625 and Code of
4 Civil Procedure section 1856(a) do not nullify the separate Waiver Agreement in this matter. As
5 indicated above, the integration clause in Section 15.E. of the Standard Provisions provides in part, "This
6 Agreement contains the entire understanding of the parties hereto with respect to the subject matter
7 contained herein and may be amended only be a written instrument of the parties or their respective
8 personal representatives, successors and/or assign."... (Emphasis added by Respondent; Respondent's
9 reply, p. 6, lines 1-3) The parole evidence rule has no application because the Dealer Agreement and the
10 Waiver Agreement dealt with separate issues. The Waiver Agreement was an amendment to the Dealer
11 Agreement and both agreements were part of the same transaction. (Respondent's reply, p. 6, lines 2-3;
12 RT 14:7, 15:21, 31:23-24, 32:1-2, 33:8-17, and 35:11-12)

13 31. Infiniti argues further with regard to the Parole Evidence Rule, that "[u]nder well-settled
14 California law, SMI is prohibited from asserting or relying upon any purported verbal representations or
15 understandings that contradict or modify the clear and unambiguous terms of the Waiver Agreement.
16 *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343-344 [Extrinsic evidence may not be used to
17 contradict or vary the terms of an unambiguous writing]. In addition, there are no disputed facts in this
18 case that would necessitate an evidentiary hearing...Because there are no disputed facts and extrinsic
19 evidence is not allowed to modify the express language of the Waiver Agreement, the issues here present
20 only a matter of law and no evidentiary hearing on the merits of this motion is either required or
21 appropriate." (Motion to Dismiss, p. 10, lines 12-22)

22 **PROTESTANT'S CONTENTIONS:**

23 32. Protestant argues that there is no evidence to support a finding that SMI entered into the
24 purported waiver with "eyes wide open". (RT 24:23-24) There is also no record of evidence
25 demonstrating the parties were dealing at arm's length. Therefore, Respondent's contention that the
26 element of consideration was met by Infiniti and SMI in terms of, "We'll go forward with the
27 appointment, if you sign the waiver agreement," has no evidentiary basis. (RT 26:7-17)

28 33. Protestant SMI argues in support of its opposition to Infiniti's Motion to Dismiss Protest

1 that “[t]he Infiniti Dealer Sales and Service Agreement attached as Exhibit A to the Declaration of Eric
2 Anderson, which accompanied Infiniti’s motion, is incomplete as it does not include the Standard
3 Provisions that are part of SMI’s sales and service agreement...The standard provisions, section 15.,
4 subsection E. set forth that the sales and service agreement is an integrated agreement. As is evident from
5 the face of the documents, the letter attached as Exhibit B to the Declaration of Eric Anderson, is not
6 integrated into the sales and service agreement whereas Exhibits A through C attached to the agreement
7 specifically are. With respects to contracts, California Civil Code Section 1625 reads as follows:

8 ‘The execution of a contract in writing, whether the law requires it to be written or not, supersedes
9 all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of
10 the instrument.’ (Civ. C. Section 1625).³

11 Here the sales and service agreement contract was executed, as a fully integrated agreement, yet
12 the purported waiver letter was not incorporated by reference. Pursuant to Civ. C. Section 1625, the sales
13 and service agreement’s terms supersede the letter agreement. Since the sales and service agreement does
14 not contain a protest waiver, no enforceable protest waiver was entered into between the parties and
15 SMI’s protest must be allowed to proceed.” (Protestant’s opposition, p. 3, lines 19-22 and p. 4, lines 1-
16 12)

17 34. Protestant argues that the Waiver Agreement was not supported by independent
18 consideration whereas the Dealer Agreement was supported by consideration in that SMI agreed to
19 renovate the facility and abide by certain qualifications of its executive manager in exchange for Infiniti
20 agreeing to appoint SMI as its authorized dealer in Santa Monica. These agreements were incorporated in
21 the Dealer Agreement. Civil Code section 1550 clearly sets forth “consideration” and “a lawful object” as
22 elements essential to the existence of a contract. (Protestant’s opposition, p. 4, lines 14-25 and p. 5, lines
23 1-6) In terms of an amendment to the Dealer Agreement, an amendment requires separate consideration
24 to impose additional burdens on the party beyond those burdens they had agreed to under the original
25 agreement. (RT 24:16-20) Protestant also cited *Main Street and Agricultural Park Railroad Company v.*

26
27 ³ Footnote 5 in the cite provides as follows: “The Parole Evidence rule prohibits the introduction of any extrinsic evidence,
28 whether oral or written, to vary, alter or add to the terms of an integrated written instrument.” *Casa Herrera, Inc. v. Beydown*,
32 Cal.4th 336, 342 (2004) (Citing *Alling v. Universal Manufacturing Corp.*, 5 Cal.App.4th 1412, 1433 (1992).”

1 *Los Angeles Traction Company* (1900) 129 Cal. 301 as authority that an amendment to a contract must
2 have separate consideration. (RT 39:4-8)

3 35. Protestant argues that use of the *Lew Williams* case by Respondent in its Motion to Dismiss
4 dealt with a completely different factual situation. “The crux of the court’s opinion in *Lew Williams* was
5 the fact that the dealer received valuable consideration in exchange for the waiver, such that the waiver
6 itself could stand alone as an enforceable agreement, independent of the franchise between the parties. In
7 the present case, we don’t have any of the elements present in *Lew Williams*.” (Protestant’s opposition, p.
8 5, lines 9-21)

9 36. Protestant argues the purported waiver is not a contract, is unlawful and unenforceable
10 under both the previous and present versions of the Vehicle Code. The January 1, 2012 amendments to
11 Section 11713.3(g) were intended to prevent and make it unlawful for a manufacturer or distributor to
12 “obtain from a dealer or enforce against a dealer” any waiver that modified or disclaims a “right or
13 privilege of a dealer”, including a protest right, subject to very limited exceptions. (Protestant’s
14 opposition, p. 6, lines 11-14; RT 26:24-25, and 27:12-14)

15 DETERMINATIONS

16 37. There is no dispute that Infiniti and SMI entered into a Waiver Agreement on September
17 24, 2010. It is undisputed that both Infiniti and SMI representatives had the authority to sign the
18 agreement to bind them contractually to the terms and conditions of the Waiver Agreement. The Waiver
19 Agreement was signed by Eric Anderson for Infiniti and by Kayvan Naimi, Principal Owner of SMI. The
20 Waiver Agreement specifically stated that Infiniti intended to establish a dealer in Beverly Hills, that good
21 cause exists to establish the Beverly Hills Infiniti dealer, and that the Principal Owner would take no
22 action to protest Infiniti’s action.

23 38. Protestant argued that despite the parties having entered into the Waiver Agreement, it is
24 unenforceable in violation of the integration clause in the Dealer Agreement; that the Parole Evidence rule
25 prohibits the introduction of any extrinsic evidence, whether oral or written, to vary the terms of the
26 integrated written agreement; that the intent of Section 11713.3(g) is to bar the use of waiver agreements;
27 and the Waiver Agreement is not supported by independent consideration. All of these arguments fail for
28 the following reasons:

1 a. The Dealer Agreement provides at Section 15.E.:

2 This Agreement contains the entire understanding of the parties hereto with respect to the
3 subject matter contained herein and may be amended only by a written instrument
4 executed by each of the parties or their respective personal representatives, successors
5 and/or assigns. This agreement supersedes any and all prior agreements with respect to
6 the subject matter hereof, and there are no restrictions, promises, warranties, covenants or
7 undertakings between the parties other than those expressly set forth in this Agreement....

8 However, Section 15.E. of the Dealer Agreement also has a provision for amending the agreement and
9 Article Eleventh of the Standard Provisions provides:

10 This Agreement, and any Addendum or amendment or notice with respect thereto, shall be
11 valid and binding on Seller only when it bears the signature of either the President or an
12 authorized Vice-President of Seller... This Agreement shall bind Dealer only when it is
13 signed by a duly authorized officer or executive of Dealer if a corporation....

14 At the time Infiniti and SMI negotiated the Dealer Agreement, they also negotiated the Waiver
15 Agreement. Both agreements were signed on the same date by the same representatives having the
16 authority to bind their respective organizations. Accordingly, the Integration clause in the Dealer
17 Agreement did not bar an amendment to that agreement and is in conformity with the provisions in that
18 agreement.

19 b. The question now becomes, was the Waiver Agreement intended to be an amendment to
20 the Dealer Agreement. There is no evidence to the contrary that the Waiver Agreement was not
21 negotiated openly and there is no evidence that any element of coercion was involved in the discussions.
22 While the parties argued the pros and cons about negotiating with their "eyes wide open" and at "arm's
23 length", there is no evidence in the record to establish a specific factual basis for either of them.
24 However, it is clear that the terms of the Waiver Agreement specified that "good cause exists to establish
25 Infiniti representation in Beverly Hills" and that "you [SMI] shall not take any action, whether in court or
26 before the California New Motor Vehicle Board,..." provided sufficient evidence alone that the parties
27 intended the Waiver Agreement to be in addition to the Dealer Agreement. Therefore, the Waiver
28 Agreement was an amendment to the Dealer Agreement.

c. As to the Parole Evidence rule, the Respondent's contention is most persuasive that the
rule has no application in terms of the Waiver Agreement and the Dealer Agreement. While the Dealer
Agreement had an integration clause, that same agreement could be amended by a written instrument

1 executed by each of the parties. The Dealer Agreement was amended to add the Waiver Agreement and
2 both parties executed the amendment with their respective signatures on September 24, 2010. These facts
3 are not disputed and extrinsic evidence cannot be introduced to modify the express language of the Dealer
4 Agreement and Waiver Agreement.

5 d. The Waiver Agreement is not in violation of Section 11713.3(g)(3)(D) and is enforceable
6 as that subdivision exempts any provision of a contract entered into on or before December 31, 2011. The
7 Waiver Agreement was entered into on September 24, 2010. The Waiver Agreement does not violate
8 Section 11713.3(g)(3)(H)(i) because the amendments were not effective until January 1, 2012.

9 e. The *DaimlerChrysler v. Lew Williams, Inc.* case cited by both parties dealt with the
10 application of Section 11713.3 and waiver agreements. The court determined that the Statute does not
11 invalidate waiver agreements provided the waiver was the result of an arm's length voluntary transaction
12 and was supported by valuation consideration. It has already been found that there is no evidence to the
13 contrary that the Waiver Agreement was not negotiated openly and there is no evidence that any element
14 of coercion was involved in the discussions. The evidence demonstrates that while the parties were
15 negotiating the Dealer Agreement, the Waiver Agreement was also part of those negotiations. They were
16 simultaneous documents and were signed on the same day, September 24, 2010. Infiniti fully disclosed
17 that it intended to establish another dealership in the Beverly Hills Open Point and SMI freely agreed to
18 waive any protest rights it would have otherwise had when that establishment occurred. The
19 consideration was that SMI was being appointed as an Infiniti dealership in exchange for its agreement to
20 waive protest rights to Infiniti's intent to establish another Infiniti dealership in Beverly Hills. No other
21 conclusion can be drawn from these facts, and SMI received valuable and independent consideration
22 when it signed the Waiver Agreement amendment to the Dealer Agreement. In view of this finding, there
23 is no need to rule on the issues of a promissory note and guaranty, or promissory estoppel.

24 CONCLUSIONS

25 38. The Waiver Agreement entered into by Infiniti and SMI is enforceable because:

26 a. While the Dealer Agreement contained an Integration clause, that same Agreement
27 provided that the parties could amend it.

28 b. The Waiver Agreement was negotiated and signed by the parties simultaneously with the

1 Dealer Agreement and found to be an amendment to the Dealer Agreement.

2 c. The Waiver Agreement dated September 24, 2010 was not barred by the application of
3 Section 11713.3(g) which was effective January 1, 2012, because it does not “[a]ffect the enforceability of
4 a provision in any contract entered into on or before December 31, 2011.”

5 d. The Parole Evidence rule had no application as the Waiver Agreement was an amendment
6 to the Dealer Agreement and the Dealer Agreement specified that the agreement could be amended.

7 e. The Waiver Agreement was also not barred by Section 11713.3(g) because, consistent with
8 the ruling in *DiamlerChrysler v. Lew Williams, Inc.*, the parties negotiated the amendment to the Dealer
9 Agreement openly and fairly. Adequate consideration was given by Infiniti in conferring upon SMI its
10 appointment as an Infiniti dealer in exchange for its promise not to protest Infiniti’s express intention to
11 establish another dealer in the Beverly Hills Open Point.

12 f. Therefore, because the Waiver Agreement is enforceable and SMI agreed to waive its right
13 to protest the establishment of an additional Infiniti dealership in the Beverly Hills Open Point, Infiniti’s
14 Motion to Dismiss SMI’s protest is granted.

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1 PROPOSED ORDER

2 After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered
3 that Respondent's Motion to Dismiss Protest is granted. Protest No. PR-2330-12 (*Santa Monica Auto*
4 *Group, dba Santa Monica Infiniti v. Infiniti West, a Division of Nissan North America, Inc.*) is dismissed
5 with prejudice.

6
7 I hereby submit the foregoing which constitutes my
8 proposed order in the above-entitled matter, as the
9 result of a hearing before me, and I recommend this
10 proposed order be adopted as the decision of the
11 New Motor Vehicle Board.

12 DATED: July 6, 2012

13 By: 
14 LONNIE M. CARLSON
15 Administrative Law Judge
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27 George Valverde, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV