

NEW MOTOR VEHICLE BOARD  
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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Petition of )  
SWIFT DODGE, INC., dba SWIFT )  
AVANTI, )  
Petitioner, )

Petition No. P-219-91

vs. )

PROPOSED DECISION

AVANTI AUTOMOTIVE CORPORATION )  
and THE CAFARO COMPANY, )  
Respondents. )

PROCEDURAL BACKGROUND

1. On February 11, 1991, Petitioner Swift Dodge, Inc., a California Corporation, dba Swift Avanti, ("Swift" or "Petitioner") located at 6250 Florin Road, Sacramento, California 95823, filed the above-captioned petition with the New Motor Vehicle Board ("Board") pursuant to the provisions of Vehicle Code section 3050(c). The petition alleges that the Respondents Avanti Automotive Corporation ("Avanti") and the Cafaro Company have engaged in continuous unlawful conduct

in the State of California and unilaterally breached the franchise agreement between the parties.

2. On March 8, 1991, a notice of appearance was filed in behalf of the Cafaro Company in which it is stated that the Cafaro Company is an Ohio Corporation, with its principle place of business at 2445 Belmont Avenue, Youngstown, Ohio. On the same date a notice of appearance was filed in behalf of Avanti, in which it is stated that Avanti is a Delaware Corporation, whose mailing address is P.O. Box 176, Youngstown, Ohio.

3. On March 18, 1991, the Cafaro Company filed a Notice of Motion and Motion for Demurrer alleging a lack of personal and subject matter jurisdiction over the Cafaro Company.

4. Swift filed an opposition to said demurrer on March 27, 1991.

5. A hearing on the demurrer of the Cafaro Company, as well as the evidentiary hearing on the merits of this petition, were held on March 27, 1991 before Michael M. Sieving, Administrative Law Judge and Assistant Executive Secretary of the Board, in Sacramento, California.

6. Post-hearing briefs and responses thereto were submitted on various dates up to and including June 12, 1991.

7. By letter dated August 12, 1991, Petitioner requested that the Board reconvene the hearing on the merits based upon the alleged existence of newly discovered relevant

evidence pertaining to the liability of Respondent the Cafaro Company.

8. On August 13, 1991, proceedings were suspended pending order of the Board.

9. On September 10, 1992, a pre-hearing conference was held for the purpose of selecting dates for the submission of an Offer of Proof and related documents concerning the newly discovered evidence.

10. On November 5, 1991, Petitioner's request to present additional evidence on the issue of the Cafaro Company's liability was granted.

11. On November 19, 1991, a pre-hearing conference was held for the purpose of selecting a discovery schedule with respect to the additional evidence. Counsel for parties engaged in discovery until approximately January 31, 1992.

12. On February 13, 1992, Petitioner filed an Ex Parte Application to Enforce Authorized Discovery and Temporarily Suspend Proceedings. Respondent's opposition thereto was filed with the Board on March 19, 1992.

13. A telephonic conference to rule on Petitioner's application was scheduled for May 26, 1992. This conference was continued to June 1, 1992, due to the unavailability of counsel, and thereafter continued pending further order of the Board based upon a request from counsel for Petitioner.

14. Swift was represented by Chris C. Vaughan, Esq., 12268 Blue Ridge Court, Auburn, California, 95603.

15. Avanti and the Cafaro Company were represented by Mark I. Wallach, Esq., and Kathryn K. Vanderwist, Esq., of Calfee, Halter & Griswold, 1800 Society Building, Cleveland, Ohio 44114, and Michael M. McKone, Jr., Esq., of Caulfield, Davies & Donahue, 3500 American River Drive, Sacramento, California, 95814.

#### ISSUES PRESENTED

##### A. Issues Presented with Respect to the Demurrer.

16. The Cafaro Company contends that the Board does not have subject matter jurisdiction over it pursuant to Vehicle Code section 3050(c) in that the Cafaro Company does not engage in the sale or manufacture of new vehicles in the state, nor does it hold or has it applied for, a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative.

17. The Cafaro Company also contends that the Board does not have personal jurisdiction over it in that the Cafaro Company and Avanti are separate legal entities, and that the Cafaro Company has had no contacts with California sufficient to provide a nexus upon which to base personal jurisdiction.

18. Swift contends that Avanti is an alter ego of the Cafaro Company and therefore subject to California jurisdiction under State law.

19. Swift further contends that the Cafaro Company should be estopped from denying its association with and financial support of Avanti, having held itself out as a

"corporate affiliate" of Avanti in Avanti automobile literature distributed and oral statements made throughout the State.

B. Issues Presented with Respect to the Merits of the Petition.

20. The allegations contained in the petition require the Board to make determinations as to the following issues:

- a. Whether Respondents have breached the terms of the franchise between the parties;
- b. Whether Swift should be permitted to rescind the franchise and be paid restitution based on Respondents' willful breach of the franchise;
- c. Whether Swift been damaged as a result of the conduct of Respondents and, if so, the amount of such damages; and
- d. Whether Swift should be allowed to recover attorney's fees as a result of the conduct of Respondents.

21. By its petition, Swift has requested that the Board issue its order permitting Swift to rescind the franchise with Avanti and to be paid restitution based upon Respondents' conduct, including an award of reasonable attorney's fees.

FINDINGS OF FACT

A. Facts Relating to Demurrer.

22. Swift entered into the dealer sales and service agreement with Avanti on July 20, 1989.

23. David J. McKelvey, Vice President of Avanti, represented himself as an officer and director of both the

Cafaro Company and Avanti when he discussed the Avanti franchise with Swift's dealer principle, Charles O. Swift. These discussions occurred prior to the time that Swift became an Avanti franchisee.

24. Mr. McKelvey informed Mr. Swift that Avanti had the backing and financial support of the Cafaro Company and that the Cafaro Company had sufficient financial resources available to make Avanti successful.

25. Mr. Swift relied upon the representations of Mr. McKelvey as well as the financial statements shown to him about the Cafaro Company in deciding to become an Avanti franchisee.

26. Avanti is described in the literature distributed by Avanti as a "corporate affiliate" of the Cafaro Company.

27. The advertising literature which describes Avanti as a corporate affiliate of the Cafaro Company was distributed to prospective Avanti dealers at the various dealer shows, as well as to members of the public, through the Swift dealership.

28. The Cafaro Company has never engaged directly in any business with Swift or Swift Dodge, Inc.

29. The Cafaro Company's principal business is commercial real estate development of shopping malls and strip centers.

30. Mr. McKelvey is not an employee, agent, officer or director of the Cafaro Company. There was no evidence presented to establish that any representative of the Cafaro Company ever made any oral or written representations to Swift

that Avanti had the financial backing of the Cafaro Company. Furthermore, the Cafaro Company did not authorize any person or entity to make any such representations.

31. At all times, the books and records of the Cafaro Company have been maintained separate from the books and records of Avanti.

32. The Cafaro Company does not own property in the State of California. The Cafaro Company has no designated agent for service of process in the State of California, and has no employees, agents, officers or directors located in the State. Furthermore, the Cafaro Company has no office, business address, telephone number, property, or bank accounts in the State of California.

33. The Cafaro Company has never applied for or received a license from the State of California as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative. The Cafaro Company does not now, nor ever has, engaged in the business of manufacturing or distributing new motor vehicles in California or elsewhere.

34. The Cafaro Company has not regularly engaged in or solicited business from the State of California, nor has it engaged in any course of conduct or derived substantial revenues from goods used or services rendered in California.

35. The Cafaro Company has never received any assets or capital from Avanti or received any return or financial gain by reason of any affiliation with Avanti.

36. The Cafaro Company does not now nor ever has engaged in or controlled the business of Avanti.

37. The Cafaro Company's board is composed of four directors. Only one of the the Cafaro Company directors served on Avanti's board at any relevant time. At all times, the Cafaro Company board has conducted meetings separate and independent of the Avanti board.

38. John J. Cafaro is the president of Avanti. From 1987 to the present, Avanti received in excess of \$15 million in debt and equity investments from Mr. Cafaro personally, but has not received any debt or equity from the Cafaro Company.

39. Avanti applied for, and obtained, a new motor vehicle manufacturer's license from the California Department of Motor Vehicles. Avanti has issued stock and holds regular shareholders' meetings, which are in all ways independent of the Cafaro Company. Avanti has conducted business operations, including but not limited to, entering into contracts and leases, and obtaining credit, separately and independently from the Cafaro Company.

40. The Cafaro Company owns no stock in Avanti, and there is no overlap in shareholders between the Cafaro Company and Avanti. The only "affiliation" between the Cafaro Company and Avanti is that some of the individuals and/or trusts which hold beneficial interests in the stock of Avanti also hold beneficial interests in the stock of the parent corporation of the Cafaro Company.

41. The Board of Directors of Avanti is composed of (3) three directors. Only one Avanti director has served on the the Cafaro Company board at any relevant time. At all times, separate corporate books and records and separate bank accounts have been maintained by Avanti.

B. Facts Relating to the Merits of the Petition.

42. Charles O. Swift is the owner of Swift Dodge Inc., and has been a new motor vehicle dealer for a number of years.

43. In July of 1989, Mr. Swift was contacted by Mr. McKelvey concerning the prospect of Swift Dodge, Inc. becoming an Avanti franchisee.

44. Mr. Swift understood Mr. McKelvey to be an officer and/or director of the Cafaro Company as well as Avanti.

45. During the meeting with Mr. McKelvey in July of 1989, Mr. Swift was shown brochures and provided information about the Cafaro Company and Avanti, and was told that the Cafaro Company was backing and financially supporting Avanti in the manufacture and distribution of Avanti automobiles.

46. At the time of the July, 1989 meeting with Mr. McKelvey, Mr. Swift, based on his experience in the automobile business, knew that several unsuccessful efforts had been made to manufacture and market Avanti vehicles during the 1980's.

47. Mr. Swift was assured by Mr. McKelvey that with the support of the Cafaro Company, Avanti had sufficient capital and other commitments to make Avanti successful.

48. On the basis of Mr. McKelvey's statements, Mr. Swift elected to become an Avanti franchisee. Mr. Swift signed the Avanti Dealer Sales and Service Agreement effective July 20, 1989.

49. After becoming an Avanti franchisee, Swift received the Avanti product literature. This literature was distributed by Swift to the general public at auto shows and to prospective customers at the Swift dealership. This product literature describes Avanti as a "corporate affiliate" of the Cafaro Company.

50. As part of the inducement for Swift to become an Avanti franchisee, Avanti agreed to provide Fifteen Thousand Dollars (\$15,000) towards the introduction and initial advertising of the Avanti product in the Sacramento area market. As of the date of the hearing, this money had not been paid by Avanti. Furthermore, Swift spent well in excess of \$15,000 in the initial introduction and promotion of the Avanti product.

51. As part of the new dealership requirements, Swift purchased Three Thousand Two Hundred Dollars (\$3,200.00) in initial parts, a New Dealer Merchandising Kit, and Avanti signs. This initial capital investment was made at the time the executed Sales and Service agreement was forwarded to Avanti on August 2, 1989.

52. During the latter part of 1989, Swift received and sold several Avanti vehicles.

53. In early 1990, Swift received its first 1990 four-door Avanti. This vehicle was not saleable and was plagued with a number of serious safety problems.

54. The original 1990 four-door Avanti delivered to Swift was eventually exchanged by Avanti for a different vehicle. The agreement between Swift and Avanti was that the 1990 four-door which was not saleable would be exchanged for a saleable vehicle. Rather than exchange the vehicles as agreed, Avanti charged to Bank of America, Swift's flooring institution, the full unit price for the replacement vehicle. The effect of such a charge was to cause Swift to incur additional finance charges for the "replacement" vehicle over and above those which had already been incurred for the vehicle which was to be returned.

55. The finance charge incurred by Swift for the original four-door Avanti amounted to Two Thousand Eight Hundred and Sixty Two Dollars and Nine Cents (\$2,862.09). As of the time of the hearing, this amount had not been reimbursed by Avanti.

56. Respondents have failed to pay warranty claims submitted in a timely fashion by Swift. At the time of the hearing, the total amount of unpaid warranty claims was Four Thousand Seventy-Four Dollars and Twenty-Six Cents (\$4,074.26). The claims unpaid date back to work performed as early as January 31, 1990. The warranty claims were submitted shortly following completion of the service work. Avanti has taken no action to dispute the validity of these claims.

57. In June of 1989, Swift earned a Three Thousand Dollar (\$3,000.00) sales incentive from Avanti for the sale of a 1989 Avanti convertible. As of the time of the hearing, this incentive money had not been paid.

58. Numerous problems have been experienced by Swift in getting replacement parts and accessories from Avanti for customers who have purchased Avanti vehicles from Swift.

59. By letter dated October 10, 1990 to Mr. Gary Fielding of Avanti, Swift sought to terminate the Dealer Sales and Service Agreement and asked Avanti to pay all monies due, ship all replacement parts previously ordered, repurchase the vehicles in inventory and cancel all further orders. This letter represented the first attempt by Swift to seek rescission and restitution of the Avanti franchise.

60. No response was received by Swift to its letter of October 10, 1990. By letter dated October 22, 1990, Swift referred Mr. Fielding's attention to its October 10 letter and again requested a response to Swift's requests.

61. On October 24, 1990, Swift sent a facsimile message to Mr. Fielding regarding the ongoing as well as additional service problems which were being experienced by a customer who had purchased an Avanti vehicle from Swift.

62. Having received no response from Avanti to its previous communications, Swift again wrote to Mr. Fielding on October 31, 1990, reiterating its request for a response to Swift's demands as set forth in its prior letters. Avanti did not respond to this communication either.

63. By letter dated November 16, 1990, Swift sent by certified mail a letter to John J. Cafaro, at the Cafaro Company, asking for responses to the prior letters.

64. On December 12, 1990, having still not received a response to its requests, Swift wrote another letter to the Cafaro Company and Avanti seeking a written response to its prior communications.

65. The first written response to Swift's many letters to both Cafaro and Avanti was received by Swift on December 28, 1990. This letter acknowledged that Avanti was indebted to Swift for flooring interest, incentives and warranty claims, but made no specific commitment as to when these monies would be paid.

66. In June of 1990, Swift leased an Avanti convertible to Dr. Bruce Bob. Dr. Bob's vehicle suffered numerous breakdowns and mechanical problems during the first six months of the lease. On December 18, 1990, Swift received a letter from the attorneys for Dr. Bob requesting an immediate termination of the lease agreement.

67. As a direct result of the various mechanical problems with his vehicle, Dr. Bob refused to pick up the vehicle from Swift after the last repair attempt in December of 1990. Dr. Bob has now been deemed to be in default of the lease that he had with Swift Leasing Company, a division of Swift Dodge, Inc.

68. Swift repeatedly informed Avanti of the difficulty with the vehicle leased by Dr. Bob. In spite of being advised

as to this situation, Avanti failed to take any serious steps whatsoever to resolve the problems with Dr. Bob's vehicle.

C. Facts Relating to Damages Incurred By Swift.

69. Swift has incurred interest charges on the returned Avanti vehicle as well as additional interest charges on the "replacement" vehicle, the invoice price for which was improperly charged to Swift's flooring account. At the time of the hearing, the amount of these interest charges was Three Thousand One Hundred Forty-Eight Dollars and Twenty-Nine Cents. (\$3,148.29).

70. Swift has earned and not been paid a sales incentive for the sale of an Avanti convertible of Three Thousand Dollars (\$3,000.00).

71. Swift has performed certain warranty service work and has submitted timely warranty claims to Avanti which were unpaid at the time of the hearing. The amount of these unpaid warranty claims was Four Thousand Seventy-Four Dollars and Twenty-Six Cents (\$4,074.26).

72. Swift has paid a total of Sixteen Thousand Five Hundred Twenty-Three Dollars and Twenty-One Cents (\$16,523.21) in interest charges to floor Avanti products since 1989.

73. The initial introduction publicity cost of Fifteen Thousand Dollars (\$15,000.00) to be paid by Avanti has never been paid.

74. There has been a default on the contract to lease an Avanti vehicle to a Dr. Bruce Bob resulting in the return of the vehicle to Swift Avanti due to manufacturing defects.

75. The Avanti vehicles in inventory which Swift is in the process of purchasing based on demand of Bank of America is Ninety-Five Thousand Four Hundred Nineteen Dollars and Fifty Cents (\$95,419.50).

76. Swift has incurred \$3,200 in expenses on the initial parts and accessories order.

77. No evidence was presented to establish that the prevailing party to this litigation before the Board would be entitled to recover an award of reasonable attorney's fees, either by statute or by contract.

D. Facts Relating to the Swift's Claim of Rescision and Restitution.

78. Swift gave notice to Avanti of Swift's demand for rescission and restitution by letter dated October 10, 1990.

79. The Avanti franchise sets forth the respective rights and obligations of the parties. With respect to the obligations and duties of Avanti, the franchise specifies the following:

The Avanti Automotive Corporation manufactures and distributes prestige, performance vehicles and parts and accessories therefor. . . . Manufacturer and Dealer recognize (sic) that the success of the distribution of such vehicles depends upon goodwill and that, accordingly, Manufacturer must distribute only quality Avanti Vehicles to quality dealers . . .

Manufacturer will provide merchandising programs designed to assist dealers in selling and servicing Avanti vehicles and parts and accessories therefor.

80. There has been a complete and total failure by Avanti to communicate or otherwise conduct business with Swift since September of 1990.

DETERMINATION OF ISSUES

A. Issues Presented With Respect To Demurrer.

1. There is no basis for the Board to exercise direct subject matter jurisdiction over the Cafaro Company. Pursuant to Vehicle Code section 3050(c), the Board is empowered to consider any matter concerning the activities and practices of an applicant or a holder of a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative. The Cafaro Company has not applied for or held a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative in California. As such, the Board does not have direct subject matter jurisdiction over the Cafaro Company.

2. There is likewise no basis for the Board to exercise personal jurisdiction over the Cafaro Company. Under Code of Civil Procedure section 410.10, personal jurisdiction may be exercised on any basis not inconsistent with the Constitution of this state or the United States. The courts have construed this provision to mean there must exist certain minimum contacts with the forum state such that the maintenance of the action does not offend traditional notions of fair play and substantial justice. Swift has failed to establish that the Cafaro Company has had sufficient minimum

contacts with California to justify exercise of personal jurisdiction over the Cafaro Company in this matter.

3. Swift has failed to establish that Avanti is an "alter ego" of the Cafaro Company, and therefore subject to California jurisdiction. In order to apply the alter ego doctrine, the following conditions precedent must exist:

A. It must appear that the corporation is influenced and governed by the alter ego and there is such a unity of interest and ownership that the individuality or separateness of alter ego corporation has ceased, and

B. The adherence to the fiction of a separate existence of the corporation, under the particular circumstances, would sanction a fraud or promote injustice. (Arnold v. Browne (1972) 27 Cal.App.3d 386, 394; 163 Cal. Rptr. 775; Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 837; 26 Cal.Rptr. 806). Swift has failed to establish the existence of the condition precedent that Avanti and the Cafaro Company had such a unity of interest and ownership that individuality or separateness of Avanti and the Cafaro Company had ceased to exist. Hence, there is insufficient evidence to support the application of the alter ego doctrine by the Board to justify the exercise of personal jurisdiction over the Cafaro Company.

4. Swift failed to establish facts necessary to support a proper application of estoppel as to the Cafaro Company. Swift produced sufficient evidence to establish that Avanti held itself out as a "corporate affiliate" of the

Cafaro Company in Avanti automobile literature distributed throughout California. However, insufficient evidence was presented to establish that any authorized representative of the Cafaro Company made such representations or otherwise ratified the conduct of Avanti in disseminating this information. Furthermore, Swift failed to establish that Avanti in fact had the financial support of or any other legal relationship with the Cafaro Company. The evidence presented supports a determination that John J. Cafaro (who is not a party to this action) personally supported Avanti financially. Accordingly, Swift failed to establish facts necessary to support a determination that the Cafaro Company should be estopped from denying its association with and financial support of Avanti.

B. Issues Presented With Respect To The Petition.

5. The Board has personal and subject matter jurisdiction over Avanti due to the fact that Avanti was licensed as a new motor vehicle manufacturer in California and Avanti did business in California during the period of time which is the subject of this action.

6. There is sufficient, uncontroverted evidence to support a determination that Avanti materially breached the provisions of its franchise with Swift.

7. As a result of the conduct of Avanti, Swift has sustained damages in the amount of \$140,365.26.

8. The amount of monetary damages awarded Petitioner shall not include attorney's fees.

9. There is insufficient evidence to support a determination that Respondent the Cafaro Company is jointly and severably liable for the damages sustained by Swift.

PROPOSED DECISION

THEREFORE, the following proposed decision is respectfully submitted:

The relief sought by the petition is granted as follows:

1. The demurrer of Respondent the Cafaro Company is sustained.
2. Petitioner Swift Avanti shall be permitted to rescind the franchise with Avanti.
3. Petitioner Swift Avanti shall be permitted to return to Avanti all of its Avanti vehicle inventory, including the vehicle leased by Dr. Bob. Avanti shall compensate Swift Avanti an amount of money equal to the invoice price of the vehicles, less any applicable holdbacks or paid incentives from Avanti.

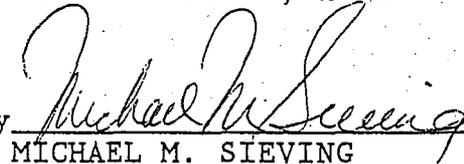
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4. Respondent Avanti Automotive Corporation is hereby ordered to pay to Petitioner Swift Avanti damages in the sum of \$140,365.26.

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

DATED: October 9, 1992

By



MICHAEL M. SIEVING  
Administrative Law Judge/  
Assistant Executive Secretary