

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

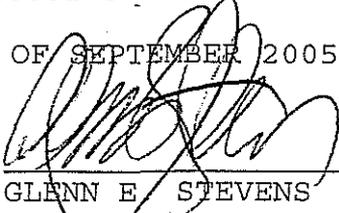
In the Matter of the Protest of)
S & C MOTORS, INC. dba S & C KIA,) Protest No. PR-1859-03
Protestant,)
v.)
KIA MOTORS AMERICA, INC.,)
Respondent.)

DECISION

At its regularly scheduled meeting of September 21, 2005, the Public members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 21ST DAY OF SEPTEMBER 2005.



GLENN E. STEVENS
Presiding Public Member
New Motor Vehicle Board

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10 In the Matter of the Protest of)
11 S & C MOTORS, INC. dba S & C KIA,) Protest No. PR-1859-03
12 Protestant,)
13 v.) PROPOSED DECISION
14 KIA MOTORS AMERICA, INC.,)
15 Respondent.)
16

17 PROCEDURAL BACKGROUND
18 PRELIMINARY FINDINGS

19 1. By letter dated April 17, 2003, Kia Motors America, Inc.
20 (hereinafter "KMA" or "Respondent") gave notice pursuant to Vehicle
21 Code section 3060¹ to Protestant S & C Motors, Inc. dba S & C Kia
22 (hereinafter "S & C" or "Protestant") of Kia's intention to terminate
23 S & C Kia's franchise.

24 2. S & C filed a protest on May 13, 2003.

25 3. On September 29, 2004, KMA issued a supplemental notice of
26 termination.

27
28 ¹ Statutory references are to the California Vehicle Code, unless stated otherwise.

4. KMA is a distributor of new motor vehicles and licensed by the California Department of Motor Vehicles. Respondent is located at 9801 Muirlands, P.O. Box 52410, Irvine, California. S & C is a licensed new motor vehicle dealer doing business at 2001 Market Street, San Francisco, California, and is a franchisee of KMA.

5. A hearing on the merits of the Protest was held on May 23 through May 26, 2005, before Administrative Law Judge, Richard J. Lopez.

6. Michael M. Sieving, Esq., of Law Offices of Michael M. Sieving, 350 University Avenue, Suite 105, Sacramento, California, represented Protestant.

7. Maurice Sanchez, Esq. and Michael P. Norton, Esq., formerly of Adorno, Yoss, Alvarado & Smith, 4 Park Plaza, Suite 1200, Irvine, California, represented Respondent. Mr. Sanchez and Amy Toboco Kun, Esq., of Baker & Hostetler LLP, 600 Anton Boulevard, Suite 900, Costa Mesa, California, 92626, currently represent Respondent.

8. At the outset of the hearing both the Protestant and the Respondent filed pre-hearing briefs. The briefs were read and considered by the Administrative Law Judge prior to the receipt of evidence.

9. Oral and documentary evidence and evidence by way of stipulation and official notice was received.

10. Two expert witnesses gave testimony. Thomas W. Longo, Managing Director, Western Region of Urban Science testified to dealer performance and John E. Altstadt testified as a forensic accountant.

11. Following the hearing, a briefing schedule was set, post-hearing briefs were filed, and the matter was submitted for decision on August 10, 2005.

its President, Ray Siotto, has been active in automotive sales since 1971. Another of its principal owners, Fred Lautze, following his grandfather and father, is a third generation Ford dealer who oversees fleet sales. Fleet sales approximate 80% of the Ford business.

14. In late summer of 1999, representatives of KMA approached Mr. Siotto to inquire into the conditions upon which S & C Motors, Inc. would take on a Kia franchise and provide KMA with representation in San Francisco and thus become the first Kia dealer in that city.

15. Negotiations between S & C Motors, Inc. and Respondent ensued and on September 23, 1999, the parties entered into a Kia Dealer Sales and Service Agreement (hereinafter "Agreement" or "Franchise Agreement") thus establishing the S & C Kia franchise.

16. The Agreement delineated S & C's Area of Primary Responsibility (APR) to be, generally, the City of San Francisco and certain adjacent postal zip codes.

17. As part of the negotiations leading to the formation of the Franchise Agreement KMA prepared a Business and Operating Plan for S & C. That plan covered, among other items, the dealership business and ownership structure, the facilities, S & C staffing, advertising and merchandizing. Additionally, performance standards set average monthly goals of new Kia vehicle sales of 50 (30 Sephias and 20 Sportages) for the remainder of 1999 and 65 (40 Sephias and 25 Sportages) for 2000.

18. The Business and Operating Plan was signed and acknowledged by Mr. Siotto on behalf of S & C.

19. At the time of the formation of the Agreement KMA had in place a "cure" program in an attempt to increase sales of those dealers who - in the judgment of KMA - were underperforming. Part of

1 the cure program included placing a dealer on written notice of the
2 underperformance and offering suggestions and assistance to increase
3 vehicle sales productivity to cure the perceived underperformance.
4 Additionally, the cure letter specified a schedule of sales that KMA
5 expected the dealer to achieve in the ensuing months.

6 20. KMA is a subscriber to the R.L. Polk & Co.² vehicle
7 registration data and thereby obtains periodic data for each KMA
8 dealer's APR. KMA compares the APR registrations of all purchased
9 vehicles against which Kia competes (Retail Competitive Group) to the
10 total sales made by the Kia dealer located in the APR. KMA computes a
11 Kia Sales Proficiency rating for each dealer and thereby has a measure
12 for each Kia dealer against the Retail Competitive Group.

13 21. Using the methodology referenced in finding 20, KMA sent the
14 first of a series of cure letters, dated February 20, 2001, to S & C
15 to cure what KMA determined to be sales deficiencies that constituted
16 a breach of the Agreement. Further, the cure letter informed S & C
17 that KMA, acting through its District Sales Manager, would assist in
18 formulating a plan of action to increase sales.

19 22. In March 2000, during the second year under the Agreement
20 and prior to the first cure letter, KMA, as an inducement to increase
21 sales by S & C, allocated \$60,000 in "co-op"³ funds for advertising on
22 a "50-50" ratio. KMA thereby promised to reimburse \$60,000 for
23 \$120,000 expended by S & C for advertising.

24
25
26 ² R.L. Polk & Co: A data provider to automobile manufacturers and others to help
27 them track vehicles and vehicle trends by providing automotive information services
and statistical reporting in the automotive marketplace.

28 ³ Co-operative advertising is a program wherein a manufacturer or distributor in this
case KMA, will defray the cost of some dealer advertising.

23. From the time of the initial cure letter, KMA continued to apply the methodology referenced in finding 20 and continued to determine - in its judgment - that S & C was underperforming in its APR and in KMA's Western Region and thus continued to send cure letters to S & C.

24. Following the initial cure letter, a total of fourteen other cure letters were sent by KMA to S & C in the period between April 24, 2000 and August 9, 2002. The cure letters had the same general format as the initial cure letter.

25. The cure period, originally set to expire on November 30, 2001, was extended to July 31, 2002. Thereafter, discussions were held by principals of the parties which did not resolve the issue in dispute - S & C's performance under the Agreement - thus leading to the KMA Notice of Termination and the filing of the S & C Protest.

Findings Relating To The Amount Of Business Transacted By S & C As Compared To The Business Available To It (Sec. 3061(a))

26. In 1999, the total population of the San Francisco APR was approximately 666,000 with approximately 297,000 households. In 2004, the total population of that APR was estimated to be 658,000 with an estimated 294,000 households. San Francisco is the third largest city in population in California, the most populous state in the United States.

27. In 1999, the annual average employment in San Francisco County was 404,105⁴ and in 2004 the annual average employment was 379,597. In 1999, the annual average employment in the San Francisco Metropolitan Area (San Francisco, Marin and San Mateo counties) was

⁴ The data source for the demographic statistics is from the Bureau of Labor and Statistics as utilized by Urban Science Applications, Inc.

1 956,080 and in 2004, the annual average employment in that area was
2 861,174.

3 28. During the period of the Franchise Agreement the average
4 household income in San Francisco was approximately \$70,000, compared
5 to the average household income of the typical Kia buyer which was
6 approximately \$55,000.

7 29. During the period of 1999 through 2003, using Polk data, the
8 vehicle registrations for the Kia retail competitive segment in the
9 APR ranged from a low of 5,872 in 1999 to a high of 11,685 in 2002.

10 30. During the period of 1999 through 2003, using Polk data, the
11 Kia retail expected registrations in the San Francisco APR, when
12 compared with the Western Region APR's average, were 320 for 1999; 325
13 for 2000; 409 for 2001; 491 for 2002 and 449 for 2003.

14 31. The combined factors present in S & C's APR, that is: total
15 population; income levels; annual average employment; and sales of
16 vehicles competitive to Kia vehicles demonstrate that significant
17 business is available to S & C in its APR, as confirmed by finding 30.

18 32. As part of its quality control KMA issues a calendar year
19 Business and Operating Plan (Plan) in conjunction with its dealers.
20 The Plans, including the initial Plan referenced in Finding 17, are
21 incorporated by reference in the Agreement pursuant to Part VIII of
22 the Agreement.

23 33. The Plan expressly states: if sales proposed by a dealer
24 are less than sales based on the predicted amount of business
25 available in the dealer's APR during the calendar year then market
26 potential will not be attained.

27 34. For 1999, the Kia California dealer average for retail sales
28 was 419 and the Western Region dealer average was 482. In the first

1 10 months of operations, S & C averaged 5 sales per month. That
2 number was well below the amount of business reasonably available in S
3 & C's APR and, therefore, market potential was not attained in 1999.

4 35. The year 2000 was the first full year of the franchise. For
5 that year the Kia California dealer average for retail sales was 474
6 and the Western Region dealer average was 438. The amount of business
7 reasonably available, according to the Plan, was 584 vehicle sales.
8 In 2000, S & C sold 67 Kia vehicles. Accordingly, market potential
9 for the year 2000 was not attained.

10 36. For the year 2001, the Kia California dealer average for
11 retail sales was 472 and the Western Region dealer average was 554.
12 In the 2001 Plan, the predicted amount of business (sales) in S & C's
13 APR was 827. S & C, in that Plan, proposed 217 sales. Actual sales
14 for that year totaled 121. Accordingly, market potential was not
15 attained for the year 2001.

16 37. For the year 2002, the Kia California dealer average was 554
17 and the Western Region dealer average was 717. The 2002 Plan
18 predicted the amount of business in S & C's APR was 657 while S & C
19 proposed 207 sales. Actual sales for that year totaled 61. Thus,
20 market potential was not attained for the year 2002.

21 38. For the year 2003, the Kia California dealer average was 512
22 and the Western Region dealer average was 742. In the 2003 Plan, the
23 predicted amount of business in S & C's APR was 632 sales while S & C
24 proposed 150 sales. Actual sales for that year totaled 34. Thus,
25 market potential for the year was not attained.

26 39. Since April 23, 2003 (the date of the termination notice) to
27 the present, S & C has failed to achieve market potential. In 2004,
28 S & C sold 17 Kia vehicles. S & C sold 5 Kia vehicles in the 1st

1 quarter of 2005. In the period just prior to this hearing, May 5
2 through May 22, S & C sold no Kia vehicles. Further, in year 2004 the
3 annualized Kia California dealer average was 529 and the Western
4 Region dealer average was 805.

5 40. Between the period March through November 2001, 24 Kia
6 dealers were subject to KMA's cure program. Eleven of that group
7 exceeded the cure program sales objectives; six were close to
8 achieving the objectives. S & C was last in achievement having
9 reached approximately 30% of the Western Region dealer average.

10 41. In sum, during each year of the term of the Agreement, S & C
11 did not capture the opportunity for sales in its APR. The population,
12 income and other demographic features of the APR presented an
13 opportunity for a significant number⁵ of sales during each year of the
14 term of the franchise.

15 Findings Relating To The Investment Necessarily Made And
16 Obligations Incurred By The Franchisee To Perform
Its Part Of The Franchise (Sec. 3061(b))

17 42. S & C Motors, Inc., operating out of the present facilities
18 since the 1970's as a Ford dealer in the San Francisco metropolitan
19 area, commenced business there in 1928. As such it has significant
20 and permanent investment in those categories that provide success and
21 the expectation of profit as a Ford dealer: facilities (on site,
22 storage and service); equipment; personnel; new Ford inventory
23 including Ford demonstrators; signage and advertising; and an S & C
24 Ford website.

25 43. The Kia product line shares the facility with the Ford
26 product line. At the time of the formation of the Franchise Agreement

27
28 ⁵ Using any of the following measures: Polk data; Operating and Business Plan
performance objectives; California Dealer Average; and Western Region Dealer Average.

the Kia product line consisted of two models. Presently, there are six Kia models. Protestant has made no investment at any time or undertaken any obligation during the time period of the Franchise Agreement to increase the facilities (physical plant) to accommodate the line of Kia vehicles.

44. A small area of the sales facility is dedicated to Kia sales and at any given time during the period of the franchise few Kias were on display. At no time has the full line of Kias been on display. There has been insufficient, that is minimal, investment in providing a sales area to allow such a display.

45. A small area of the facility is dedicated to the service of Kia vehicles and storage of Kia parts. Protestant did not store sufficient parts and therefore, had to resort to emergency orders to attempt to satisfy consumer demands. There has been insufficient (minimal) investment in Kia service and parts to consistently satisfy the purchasers of new Kia vehicles. As a result, S & C was consistently in the bottom 10% of Kia dealers in the United States in KMA's KSI (Kia Service Index) evaluations.

46. Despite repeated requests to do so from KMA, S & C has not invested the necessary funds and time to train sales personnel dedicated to handling the Kia new vehicle business exclusively and has not invested the funds necessary to hire and retain a sales manager to oversee the Kia new car business exclusively. There was at no time during the period of the franchise a sales force that sold only Kia vehicles.

47. Despite the KMA "co-op" program and despite KMA's repeated request to advertise the Kia product line, Protestant failed to invest sufficient funds in an advertising program to take advantage of a

1 viable Kia market in its APR.

2 48. The investment in advertising was deficient in the following
3 particulars: there was little spent on print or television advertising
4 directed toward the San Francisco area's Spanish Language population;
5 there was little spent for regular weekly advertising; and there was
6 no S & C Kia website, a potent form of advertising.

7 49. Over the period of time of the franchise Protestant has
8 failed to invest in a sufficient inventory of new Kias to fulfill
9 sales requirements set forth in the Business and Operating Plans.
10 Protestant's monthly inventories were as follows for each year in
11 operation as a Kia dealer.

	<u>Year</u>	<u>Monthly Average</u>
12		
13	1999	43.3
	2000	45.3
14	2001	35.2
	2002	22.2
15	2003	16.1
	2004	7.4
16	2005 (through April)	8.5

17 At the time of the hearing, on May 23, 2005 Protestant had 1 vehicle
18 in stock.

19 50. The generally accepted industry standard, as recommended by
20 the National Automotive Dealers of America, is a 60-day supply of
21 inventory. At no time during the period of the franchise did S & C
22 meet that standard. To quote, the credible testimony of Kia's
23 District Sales Manager, Don Smith: "...you can't sell them if you
24 don't have them...Without inventory there's no starting point..." At
25 no time during the course of the franchise was there sufficient
26 inventory to allow the use of a demonstrator by a prospective Kia
27 purchaser. Mr. Smith did testify, credibly, with regard to the 2004
28 monthly average of 7.4 that: "It's (S & C) basically out of business

1 for all intents and purposes."

2 51. In sum, over and above the investment in Ford, no additional
3 money or capital was invested in equipment, personnel, or facilities,
4 to support a viable Kia enterprise. Sufficient monies laid out for
5 advertising and an adequate inventory on hand were obligations under
6 the Agreement of S & C. Protestant failed to incur those obligations
7 and thus failed to establish, in fact, a Kia enterprise.

8 Findings Relating To The Permanency
9 Of The Investment (Sec. 3061(c))

10 52. There was no expansion of the existing facility by S & C
11 Motors, Inc. and, therefore, there was no capital outlay for physical
12 plant and, therefore, there was no permanent investment in the
13 facilities other than as a Ford dealer. Pursuant to the Franchise
14 Agreement, KMA will repurchase all new, used and unsold vehicles as
15 well as parts, signs, and tools should the franchise be terminated.
16 At the time of the hearing there was no permanent investment in
17 inventory.

18 53. There were some funds expended by S & C to train personnel
19 with regard to the Kia product line. However, the funds that were
20 spent were minimal and sporadic.

21 54. S & C did install a "Kia" sign below a "Ford" sign at the
22 entrance to the facility. However, other advertising - print, radio
23 and television - was minimal and sporadic. Additionally, S & C
24 refused to outlay monies of its own at times when "co-op" funds were
25 available to it for Kia advertising. There was no investment in
26 Internet advertising.

27 55. The lack of a permanent investment in the Kia enterprise is
28 demonstrated as follows: In 2000, the total Kia sales (vehicle,

1 service and parts) were 1.00% of total dealership (Ford and Kia)
2 sales; in 2001, total Kia sales were 1.66% of total dealership sales;
3 in 2002, Kia sales were 0.86% of the total; in 2003, Kia sales were
4 0.75% of the total; in 2004, Kia sales were 0.57%, or a de minimis
5 part, of the total. Because of the lack of investment, S & C's Kia
6 operations have lost money in each year of the franchise except for
7 2004.

8 56. In sum, S & C's investment was minimal and at no time was
9 there sufficient investment to allow S & C to meet its obligations
10 under the Agreement. There were no outlays, permanent or otherwise,
11 for plant and equipment. Monies spent for advertising and the
12 training of personnel were not lasting but were sporadic and,
13 therefore, were not permanent.

14 Findings Relating To Whether It Is Injurious Or Beneficial
15 To The Public Welfare For The Franchise To Be Modified Or
Replaced Or The Business Of The Franchisee Disrupted (Sec. 3061(d))

16 57. S & C is conveniently located in a densely populated city.
17 Its competitors are doing well. Despite these circumstances S & C has
18 averaged but 60 sales per year for the five full years of its
19 operation: 2000-2004. Because of a failure to advertise and promote
20 the sale of Kia vehicles, too few vehicle consumers are aware that
21 there is, in fact, a Kia dealer in San Francisco.

22 58. At present, KMA can make available to S & C the full line
23 (six models) of Kia vehicles. Combining the six models with the
24 permutations that exist for each model - color, trim, and other
25 options - a wide choice of Kia vehicles is available for the
26 consideration of the public. Assuming the consuming public is aware
27 of S & C as a Kia dealer, the lack of inventory, demonstrators and
28

1 fully trained sales personnel deprive the consuming public of a
2 reasonable choice in the potential purchase of a Kia vehicle.

3 59. Under the Franchise Agreement, S & C has an obligation to
4 meet the needs of the consuming public in the APR. The public lacks
5 awareness of S & C as a Kia dealer. The absence of a reasonable
6 choice of Kia vehicles available to the public demonstrates that
7 S & C's operation as a Kia dealer fails to meet the needs of consumers
8 in the APR.

9 60. If the S & C Kia franchise is terminated, S & C Motors, Inc.
10 will continue to do what it has done for a number of decades: operate
11 as a Ford dealership. Therefore, the public will not be denied the
12 presence of a dealer who meets the needs of the public marketplace
13 with regard to the Ford line of vehicles. Operating as the sole Kia
14 dealership in San Francisco, S & C has not met, and is not meeting,
15 the needs of the public marketplace in that city.

16 61. If the S & C franchise is terminated, KMA intends to replace
17 it with a new dealership in the existing APR which will meet KMA's
18 sales and performance objectives and which will provide customer care
19 and service by a trained and qualified staff.

20 62. In sum, S & C, operating as a Kia dealer, has failed to
21 serve the public in the APR marketplace. Therefore, the appointment
22 of a new Kia dealer in that marketplace will be beneficial to the
23 public interest.

24 Findings Relating To Whether The Franchisee Has Adequate
25 Motor Vehicle Sales And Service Facilities, Equipment,
26 Vehicle Parts, And Qualified Personnel To Reasonably
27 Provide For The Needs Of The Consumers For The Motor
28 Vehicles Handled By The Franchisee And Has Been And Is
Rendering Adequate Services To The Public (Sec. 3061(e)).

63. S & C's KSI is below the average for dealers in the Kia

1 Western Region. Limited space is devoted to Kia service and limited
2 space is set aside for equipment and vehicle parts, therefore, the
3 motor vehicle sales and service facilities, including equipment and
4 vehicle parts, fail to provide for the needs of the consumers for the
5 Kia vehicles handled by S & C.

6 64. Over the course of the franchise there has been no
7 management program to assign personnel solely to the Kia line for
8 sales and service. There are no computer-trained personnel assigned
9 to the Kia line. KMA does offer, through Kia University, on-line
10 training for dealer personnel. For the calendar year 2005 to date,
11 and before that time, no on-line training was undertaken by S & C
12 personnel and no tests with regard to the Kia product line were taken.

13 65. KMA does maintain a website (www.Kia.com) wherein a
14 prospective purchaser can be "linked" to any Kia dealer nationwide.
15 By use of this website a number of potential customers made Internet
16 inquiry with S & C. A few of those persons were contacted by S & C
17 but most were not. Thus, this Internet tool for leads to potential
18 sales was not utilized by S & C.

19 66. In the third and fourth quarters of 2004, Protestant failed
20 to achieve any of KMA's training requirements. In 2005, Protestant
21 failed to achieve any of KMA's training requirements, including tests,
22 with regard to any of the models.

23 67. In sum, the dealership facilities have not been modified to
24 reasonably accommodate Kia sales or provide for adequate service or
25 equipment and there is an inadequate number of trained personnel.
26 Accordingly, S & C is rendering inadequate services to the public.

27 ///

28 ///

1 Findings Relating To Whether The Franchisee Fails To
2 Fulfill Warranty Obligations Of The Franchisor To
3 Be Performed By The Franchisee (Sec. 3061(f))

4 68. No evidence was proffered to establish that S & C failed to
5 perform the warranty obligations under the Franchise Agreement, and
6 KMA does not contend that S & C failed to satisfy its warranty
7 obligations.

8 Findings Relating To the Extent of the Franchisee's Failure
9 To Comply With The Terms Of The Franchise (Sec. 3061(g))

10 69. The Dealer Sales and Service Agreement referenced in this
11 Decision as the Franchise Agreement or Agreement, sets forth the
12 duties, obligations and responsibilities of KMA and S & C under the
13 Agreement. The sections referenced in the Findings that follow, all
14 appear in Part 2 - Standard Provisions of the Agreement.

15 70. Section II of the Agreement provides, in part:

16 Dealer accepts its appointment as an authorized Kia
17 Dealer and agrees to (i) vigorously and aggressively
18 sell and promote Kia Products...
19 (Exh. 11, p. 5).

20 Section IX(B)(1) of the Agreement provides:

21 Area Of Primary Responsibility. DEALER shall
22 vigorously and aggressively promote, solicit and make
23 sales of Kia Products within its APR. DEALER'S APR may
24 be altered or adjusted by COMPANY at any time. The APR
25 is a tool used by COMPANY to evaluate DEALER'S
26 performance of its obligations. DEALER agrees that it
27 has no right or interest in any APR that COMPANY may
28 designate. As permitted by applicable law, COMPANY may
 add new dealers to, relocate dealers into or remove
 dealers from the APR assigned to DEALER.
 (Exh. 11, p. 13).

29 71. As has been demonstrated with particularity in Findings 34
30 through 39, 50, 52 through 55, 57 and 58, Protestant failed to achieve
31 the market potential available in its APR; failed to advertise and
32 promote Kia products; did not have a permanent investment in the Kia

1 enterprise; and at no time had a sufficient inventory and trained
2 personnel. Those failures and omissions establish that S & C did not
3 vigorously and aggressively sell or promote or solicit for sale Kia
4 products within its APR. Accordingly, Protestant has breached
5 Sections II(i) and IX(B)(1) of the Agreement.

6 72. In conjunction with its duty to vigorously and aggressively
7 sell and promote Kia Products, S & C agreed to provide Business and
8 Operating Plans with updates to describe how S & C intended to fulfill
9 its obligations under the contract including the obligations to sell
10 and promote Kia products.

11 73. Section VIII of the Agreement provides in pertinent part:

12 A. BUSINESS AND OPERATING PLAN:

13 In consultation with COMPANY, DEALER has prepared
14 a business and operating plan ("Plan")...which
15 describes how DEALER will (i) develop the Area of
16 Primary Responsibility ("APR") assigned to DEALER by
17 COMPANY and set forth in the Plan and (ii) fulfill its
18 sales and service commitments under this Agreement....
19 DEALER hereby agrees to develop its APR and conduct its
20 operations in accordance with the Plan, as revised from
21 time to time pursuant to Paragraph B below.

18 B. ANNUAL PLAN REVIEW

19 DEALER agrees to update the Plan annually or more often
20 as desired or necessary and submit it to COMPANY for
21 joint review. The process of updating each Plan shall
22 include a performance evaluation and review of proposed
23 modifications to the prior year's Plan as contemplated
24 by Paragraph C below. The Plan shall be subject to
25 COMPANY's final approval.

23 C. PERFORMANCE EVALUATION

24 DEALER's performance of its obligations is essential to
25 the effective representation of Kia Products and to the
26 reputation and goodwill of COMPANY, DEALER and other
27 Kia Dealers. Therefore, DEALER agrees to review its
28 performance against the prior year's Plan in its
updated Plan. COMPANY and DEALER will use this
analysis and any other factors COMPANY or DEALER deems
appropriate as the basis for jointly evaluating
DEALER's performance so that any necessary improvements

1 can be made. Factors considered in evaluating DEALER's
2 performance will include, without limitations, the
3 attainment of or failure to attain the prior year's
4 objectives, DEALER's performance trends, DEALER's
5 financial performance and the manner in which DEALER
6 has conducted its operations....

(Exh. 11, pp. 8-9).

7 74. In the initial Plan as set forth in Finding 17, S & C agreed
8 that it would sell an average of 65 Kia vehicles per month in 2000.
9 S & C sold 67 vehicles during 2000, or about 5.6 vehicles per month.
10 S & C represented that it would spend \$30,000 per month on advertising
11 from October 1999 through December 2000. S & C spent \$5,820 per month
12 in advertising in 2000. S & C failed to use \$269,180 in advertising
13 co-op funds in its first 12 months of operation. Under the co-op
14 advertising program, KMA agreed to reimburse S & C on a 66% - 33%
15 basis, meaning KMA would pay 2/3 and S & C would only have to spend
16 1/3 in approved advertising to receive up to \$300,000 in reimbursement
17 for the 12 month period.

18 75. In the 2001 Plan, KMA suggested that S & C sell 827 Kia
19 vehicles. S & C stated it could sell 217 vehicles. In 2001, S & C
20 sold 121 vehicles, 706 below what Kia had proposed, and 96 below what
21 S & C had promised to sell. S & C's average monthly inventory for the
22 year was 35 vehicles.

23 76. In the 2002 Plan, KMA suggested that S & C sell 657 Kia
24 vehicles. S & C stated it could sell 207 Kia vehicles. In 2002,
25 S & C sold 61 vehicles, 596 below what Kia had proposed and 146 below
26 what S & C agreed to sell. S & C's average monthly inventory for the
27 year was 22 vehicles.

28 77. In the 2003 Plan, KMA suggested that S & C sell 632 Kia
vehicles. S & C stated it could sell 150 Kia vehicles. In 2003,
S & C sold 34 vehicles, 598 below what KMA had proposed and 116 below

1 what it had agreed to sell. S & C's average monthly inventory for the
2 year was 16 vehicles.

3 78. In 2004, S & C sold 17 vehicles, an average of only 1.4
4 vehicle sales per month. S & C's average monthly inventory for the
5 year was 7 vehicles.

6 79. For its five full years in operation (2000 - 2004), S & C's
7 sales effectiveness has averaged only 8.7% or less of Western Region
8 average. This deficiency has continued despite an increase of the Kia
9 model lineup from two models in 1999 to six models in 2004.

10 80. Protestant failed to develop its APR, failed to fulfill
11 sales commitments and failed to conduct its operations in accordance
12 with the Business and Operating Plans. Accordingly, Protestant has
13 breached Section VIII of the Agreement.

14 81. In conjunction with its duty to vigorously and aggressively
15 sell and promote Kia Products, S & C agreed to an advertising effort
16 to enhance sales opportunities.

17 82. Section IX(A)(9) of the Agreement provides in pertinent
18 part:

19 Advertising. COMPANY and DEALER agree that a "three-
20 tier" advertising and merchandising effort is an
21 effective way to establish and maintain focus on
22 (1)(sic) national and Product messages, (ii) regional
23 Kia Dealer group messages, and (iii) local and
24 individual Kia dealer messages. COMPANY shall take
25 full responsibility for, and fund, as COMPANY deems
26 appropriate, advertising for (i) and (ii)
27 above...DEALER shall take full responsibility for, and
28 fund advertising for (iii) above, bearing in mind sales
and customer satisfaction needs and applicable laws and
regulations in developing and delivering its
advertising and merchandising messages.
(Exh. 11, p. 13).

83. S & C Motors, Inc.'s advertising budget has increased over
the past few years, however S & C has spent only minimal amounts on

1 advertising its Kia dealership and its Kia advertising has decreased
2 every year. At the outset of the franchise, S & C represented that it
3 would expend approximately \$30,000 per month on Kia advertising from
4 October 1999 through December 2000. S & C spent only in \$5,820 per
5 month in advertising in 2000. In 2004, S & C spent only \$47 on Kia
6 advertising.

7 84. Protestant failed to promote Kia products. Accordingly,
8 Protestant has breached Section IX(A) (9) of the Agreement.

9 85. In conjunction with its duty to vigorously and aggressive
10 sell and promote Kia products, S & C agreed to maintain an adequate
11 inventory of Kia vehicles and to have demonstrators on hand.

12 86. Section IX(B) (2) of the Agreement provides:

13 2. Stocks. Subject to COMPANY's filling DEALER's
14 orders, DEALER shall maintain in showroom-ready
15 condition stocks of Kia vehicles and other Kia Products
16 of an assortment and quantity adequate to meet DEALER's
17 share of current demand in DEALER's APR and DEALER's
18 sales and services responsibilities under this
19 Agreement.

(Exh. 11, p. 13).

- - -

18 Section IX(B) (4) of the Agreement provides:

19 4. Demonstrators. From its inventory, DEALER shall
20 keep available at all times in good appearance and
21 running order current model year demonstrators of each
22 model of Kia vehicle in such quantities as are
23 sufficient to satisfy customer test drive demands.

(Exh. 11, p. 13).

23 87. To compete with the Retail Competitive Group, S & C should
24 maintain, at minimum, an inventory of approximately 60 to 80 vehicles.
25 In 2001, S & C's average monthly Kia inventory for the year was 35
26 vehicles. In 2002, S & C's average monthly Kia inventory for the year
27 was 22 vehicles. In 2003, S & C's average monthly Kia inventory for
28 the year was 16 vehicles. In 2004, S & C's average monthly Kia

1 inventory for the year was 7 vehicles. Over the years of the
2 franchise, S & C has never approximated the minimum inventory.

3 88. As of December 2003, S & C stocked a total of 10 new Kia
4 vehicles and its annual inventory is inadequate to promote the Kia
5 line. Between October and December of 2003, S & C stocked 3 Kia
6 vehicles.

7 89. S & C does not maintain demonstrators for each model of Kia
8 vehicle and at times there are no demonstrators available for
9 prospective purchasers.

10 90. Protestant failed to maintain a sufficient inventory to meet
11 S & C's share of current demand in its APR and failed to fulfill its
12 sales and service responsibilities. Accordingly, Protestant has
13 breached Section IX(B)(2) of the Agreement.

14 91. Protestant failed to have on hand current model-year
15 demonstrators, at any time, to satisfy customer test-drive requests or
16 demands. Accordingly, Protestant has breached Section IX(B)(4) of the
17 Agreement.

18 92. In conjunction with its duty to vigorously and aggressively
19 sell and promote Kia products, S & C agreed to comply with Kia
20 programs and to develop its own programs designed to develop and
21 foster good relationships with its customers and satisfy basic
22 customer satisfaction levels.

23 93. Section X of the Agreement provides in pertinent part:

24 DEALER shall comply with COMPANY programs and develop
25 and maintain its own programs designed to develop good
26 relationships among COMPANY, DEALER and the consuming
27 public. DEALER shall make every effort to handle
28 satisfactorily all matters brought to its attention
relating to the sale and servicing of Kia vehicles and
other Kia Products and make regular contact with owners
and users of Kia vehicles and other Kia Products in
DEALER's APR...

1 (Exh. 11, p. 16).

2 94. S & C has provided substandard customer service as reflected
3 in its KSI figures which have been consistently low as compared to the
4 170 to 180 dealers in the Western Region. In 2002, S & C ranked 131st
5 in the Western Region. S & C's KSI ranking declined to 167th in 2003,
6 164th in 2004 and 168th year-to-date in 2005. S & C's Kia Purchase
7 Index ("KPI") rankings have also been consistently below average in
8 the Western Region. S & C ranked 30th in 2002, 133rd in 2003, 130th in
9 2004 and 153rd, year-to-date, in 2005. S & C does not maintain a
10 sufficient stock of parts inventory to satisfy customers on a daily
11 basis. Instead, S & C relies on emergency parts orders resulting in
12 delay and inconvenience to its customers.

13 95. Protestant has failed to comply with its duty to customers
14 and maintain good relations with its Kia customers. Accordingly,
15 Protestant has breached Section X of the Agreement.

16 96. In conjunction with its duty to vigorously and aggressively
17 sell and promote Kia products, S & C agreed to hire and train a
18 sufficient number of competent personnel to comply with its
19 obligations under the Agreement.

20 97. Section IX(A)(4) of the Agreement provides:

21 4. Personnel. DEALER shall employ and train a
22 sufficient number of competent personnel of good
23 character, including one or more persons who will
24 function as sales manager, service manager and parts
25 personnel to fulfill all of DEALER's responsibilities
26 under this Agreement and as recommended by COMPANY, and
27 shall cause such personnel to attend such training
28 schools as COMPANY may from time to time require at
DEALER's sole expense.
(Exh. 11, p. 10).

98. S & C Motors, Inc. did not hire any new Kia salespeople
after obtaining the Kia dealership. The dealership's salespeople sell

1 both Ford and Kia products. The employees hired by S & C Motors, Inc.
2 are not adequately trained to sell the Kia products line and did not
3 participate in on-line training courses offered by Kia.

4 99. Protestant has failed to train, establish and dedicate a
5 sales force to fulfill S & C's responsibilities under the agreement to
6 promote, sell and service Kia vehicles. Accordingly, Protestant has
7 breached Section IX(A) (4) of the Agreement.

8 100. In sum, S & C has failed to promote the sale of Kia
9 products, has failed to maintain an adequate inventory of vehicles,
10 and has failed to achieve an acceptable level of Kia sales given the
11 potential number of sales available to it in its APR and has,
12 therefore, materially breached the Agreement.

13 DETERMINATION OF ISSUES

14 101. KMA has established that S & C is not conducting an
15 adequate amount of business as compared to the business available to
16 it. [Section 3061(a)]

17 102. KMA has established that S & C has not made the investment
18 necessary and incurred the obligations necessary to perform its part
19 of the Kia franchise. [Section 3061(b)]

20 103. KMA has established that S & C's investment was not
21 permanent. [Section 3061(c)]

22 104. KMA has established that it would not be injurious and
23 would likely be beneficial to the public welfare for the franchise to
24 be replaced. [Section 3061(d)]

25 105. KMA has established that S & C does not have adequate motor
26 vehicle sales and service facilities, equipment, vehicle parts, and
27 qualified personnel to reasonably provide for the needs of the
28 consumers for the motor vehicles handled by it and has not been and is

1 not rendering adequate services to the public. [Section 3061(e)]

2 106. KMA has not established that S & C failed to fulfill the
3 warranty obligations of KMA to be performed by S & C. [Section
4 3061(f)]

5 107. KMA established that S & C has failed to comply with the
6 terms of the franchise. [Section 3061(g)]

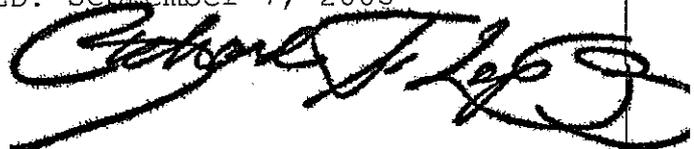
7 108. By reason of the foregoing Determination of Issues and the
8 Findings herein, Respondent has met the statutory burden of proof
9 required by Section 3066(b) and did establish, under Section 3061,
10 good cause for the termination of the S & C franchise.

11 PROPOSED DECISION

12 The protest is overruled.

13
14
15 I hereby submit the foregoing which
16 constitutes my proposed decision in
17 the above-entitled matter, as the
18 result of a hearing before me and I
19 recommend this proposed decision be
20 adopted as the decision of the New
21 Motor Vehicle Board.

22 DATED: September 7, 2005



23 By: _____
24 RICHARD J. LOPEZ
25 Administrative Law Judge

26
27 Joan Borucki, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV