

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NISSAN NORTH AMERICA, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case Nos. 05-3680  
 ) 05-3987  
 LOVE NISSAN, INC.; ROBERT L. )  
 HALLEEN; AND CHAD A. HALLEEN, )  
 )  
 Respondents. )  
 )  
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 LOVE NISSAN, INC.; ROBERT L. )  
 HALLEEN; AND CHAD A. HALLEEN, )  
 )  
 Petitioners, )  
 )  
 vs. )  
 )  
 NISSAN NORTH AMERICA, INC., )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on December 12, 2005, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Nissan North America, Inc.'s (Nissan) rejection of the proposed transfer of the equity interest in Love Nissan, Inc. (Love), from Robert Halleen and Chad Halleen to Marilyn Halleen, is in violation of the laws regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers, as set forth in Sections 320.61-320.70, Florida Statutes.

PRELIMINARY STATEMENT

In April 2004 Nissan presented Love a Notice of Termination of its Dealer Sales and Service Agreement. The purpose of this Notice was to effect a severance of the contractual relationship between Nissan, a manufacturer of motor vehicles and a "licensee" of the Florida Department of Highway Safety and Motor Vehicles (DHSMV), and Love, a motor vehicle dealer. Upon receipt of the Notice, Love timely filed a protest with DHSMV, which sent the matter to the Division of Administrative Hearings (DOAH) for a formal administrative hearing.

On July 14, 2005, Administrative Law Judge Ella Jane Davis entered a Recommended Order recommending that the Department uphold the proposed termination. Insofar as the record in this case reveals, DHSMV has yet to enter a final order in that case.

On July 25, 2005, Robert Halleen and Chad Halleen served notice on Nissan of their intent to transfer their entire equity ownership to Marilyn Halleen, the wife of Robert Halleen and the mother of Chad Halleen. In response, Nissan on September 20, 2005, informed Robert, Chad, and Marilyn Halleen that it was rejecting the transfer, and by way of explanation, enclosed a verified Petition for Determination of Invalid Proposed Transfer pursuant to Section 320.643, Florida Statutes, and Notice of Rejection of Proposed Transfer. The verified Petition was filed

with DHSMV on September 21, 2005. DHSMV forwarded the Petition to DOAH for formal hearing and it was assigned DOAH Case No. 05-3680.

The Nissan Petition named Robert Halleen, Chad Halleen, and Marilyn Halleen as parties. Love moved to dismiss the action on October 10, 2005. The motion was denied in part and granted in part on October 27, 2005. It was granted only to the extent that Marilyn Halleen was dismissed as a party.

On October 20, 2005, Robert Halleen and Chad Halleen filed a Petition for Determination of Wrongful Turndown with DHSMV that was filed with DOAH on October 26, 2005. It was assigned DOAH Case No. 05-3987. On November 8, 2005, the two cases were consolidated for hearing.

At the final hearing Nissan presented the testimony of Patrick Doody (vice president of the Southeast Region for Nissan), Robert Halleen (principal owner of Love), Chad Halleen (minority owner and executive manager of Love), and Marilyn Halleen (the proposed transferee). Nissan also presented the deposition testimony of Robert Halleen, Chad Halleen, and Marilyn Halleen. Nissan's Exhibits numbered 1 through 12, 14-15, and 18-20, were admitted into evidence.

At the final hearing Robert and Chad Halleen presented the testimony of Chad Halleen. Love Exhibits numbered 8, 20, 30, 33, and 34 were admitted into evidence.

The two-volume Transcript was filed on December 28, 2005. After the hearing, Petitioner and Respondent filed Proposed Findings of Fact and Conclusions of Law on January 9, 2006.

Because the contract in this case was executed in 1999, the substantive law in existence at that time controls this case. Accordingly, statutory citations are to Florida Statutes (1999) unless otherwise noted.

#### FINDINGS OF FACT

1. Nissan is a "licensee" as defined by Section 320.60(8), Florida Statutes.

2. Love is a "motor vehicle dealer" as defined by Section 320.60(11)(a)1, Florida Statutes. Love serves a territory centered on Homosassa, Florida.

3. Nissan and Love are parties to a Dealer Sales and Service Agreement (Agreement), which is an "agreement" or "franchise agreement," as defined by Section 320.60(1), Florida Statutes.

4. Robert Halleen and Chad Halleen became owners of Love as the result of a 1999 gift of the equity of Love from Robert's father and Chad's grandfather. Subsequent to the donation, Robert became a 90 percent owner of Love and Chad became a ten percent owner.

5. Robert Halleen and Chad Halleen entered into the Agreement with Nissan on March 4, 1999. Since that time

Robert Halleen has served as the Dealer Principal and Principal Owner of Love Nissan, and Chad Halleen has served as the Executive Manager and Other Owner. The Agreement has never been amended.

6. The Agreement clearly states that Nissan relied on the personal qualifications of the Principal Owner, Other Owner, and Executive Manager in entering into the Agreement. In addition to personal qualifications, the Agreement recites expertise, reputation, integrity, experience, and ability, as characteristics expected of the Principal Owner, Other Owner, and Executive Manager.

7. Since Robert and Chad Halleen became owners of Love the dealership has never met the regional average sales penetration. The regional average sales penetration is the measurement used by Nissan to evaluate the sales performance of each of its dealers. Subsequent to the inception of the Agreement, Nissan has issued multiple Notices of Default to Love citing Love's poor sales performance.

8. In an effort to facilitate Love's success, Nissan contracted their primary market area on several occasions. This and other efforts to bolster Love's performance failed. As a result, Nissan issued a Notice of Termination of the Dealer Sales and Service Agreement between itself and Love, dated April 1, 2004. This precipitated a protest and a formal hearing

before Administrative Law Judge Ella Jane Davis who recommended that DHSMV dismiss the protest and ratify the Notice of Termination.

9. As noted above, DHSMV has not issued a final order. Because it has not, and because an appeal could follow, Nissan has not yet entered into a franchise with a new dealer for the Homosassa primary market area. It is Nissan's intention to award the area to a qualified minority candidate.

10. Eleven days after the issuance of Judge Davis's order, on July 25, 2005, Robert and Chad Halleen notified Nissan of their intent to sell all of their stock in Love to Marilyn Halleen. In a short letter to Nissan, the selling price was said to be \$100 with an increase to \$5,000,000 should the sale ultimately be made to a third party. The dealership, if sold on the open market, would bring much more than \$100. It could sell for as much as five million dollars. The letter also averred that there would not be a change in the executive management.

11. The decision to sell all of the stock in Love to Marilyn Halleen was made by Robert Halleen. Chad Halleen was instructed by his father to comply with his decision to sell and he did as instructed.

12. Prior to the issuance of Judge Davis's Recommended Order, Robert and Chad Halleen decided that if the termination

case had an unfavorable outcome, they would avoid it by selling Love to a family member. They attempted to give effect to this course of action by discussing with Robert Halleen's father the possibility of transferring ownership to him. Robert and Chad Halleen desired to keep the dealership in the family and to ensure that Chad remained employed.

13. Pursuant to the contemplated transfer to Robert Halleen's father, Chad Halleen would continue as Executive Manager, which was also the case in the proposed transfer to Marilyn Halleen. The discussion with Robert Halleen's father did not ripen into a course of action.

14. During their tenure at Love, Robert and Chad Halleen informally divided the operational responsibilities between themselves. Chad Halleen was primarily responsible for the sales department and Robert Halleen focused on supervising the day-to-day operations of the parts, service, and accounting departments. However, it is clear that Robert Halleen, has been since the inception of the Agreement, and was, at least up to the date of the formal hearing, in ultimate overall charge of all of the operations of Love.

15. Robert Halleen asserted at the hearing that he would abandon his role in the management of Love. Love attempted to prove that Chad Halleen was capable of successfully managing the operation without the aid of his father. However, the evidence



taken as a whole, indicated that he had never operated the dealership without the assistance of Robert Halleen and that he would have difficulty doing so without that assistance.

16. Subsequent to the proposed transfer, the management of Love would, allegedly, consist of Marilyn Halleen and Chad Halleen. They would be, under the Agreement, the "executive management," which is the term used in the Agreement to describe the Dealer Principal and the Executive Manager.

17. It is not necessary under the Agreement, for a Dealer Principal to be actively involved in the daily business of the dealership, and because a Dealer Principal may own dealerships in more than one geographical area, it is not unusual to find a Dealer Principal who is not active in the day-to-day management of dealerships she or he owns. However, in this case it is contemplated, and Marilyn Halleen has so stated, that she and Chad Halleen would operate the business together. Currently, Marilyn Halleen's participation in the operation of the dealership has been working as a bookkeeper in the accounting department.

18. Marilyn Halleen stated that should the transfer be approved, she would make the decisions about running the dealership, how the dealership is capitalized, new car sales, used car sales, allocation and ordering, marketing, management of the parts and service departments, and all of the other

myriad responsibilities incumbent on a manager of an automobile dealership. However, her work experience does not qualify her to successfully accomplish all of these tasks and this plan is contrary to the assertion in the notice to Nissan that there would be no change in executive management.

19. Marilyn Halleen has never owned a dealership or any other business. Her management experience is limited to filling a position as an office manager in a Buick dealership many years ago. In various automobile dealerships she has worked as a title clerk, receptionist, cashier, and in a warranty department. Prior to becoming bookkeeper at Love she worked full-time selling cosmetics for Mary Kay.

20. Nissan was unaware of the details of Marilyn Halleen's business experience, or lack of it, at the time they determined that they would reject the proposed transfer. However, the notice to Love that the proposed transfer was rejected, dated September 20, 2005, recited in the attachment that the rejection was based on Nissan's belief the transfer was a sham. Marilyn Halleen's lack of experience is evidence tending to prove that the transfer was a sham. To find as a fact that Robert and Chad Halleen were really going to give Marilyn Halleen complete ownership and control over Love would require a suspension of disbelief.

21. Having observed the lackluster performance of Robert and Chad Halleen over a five-year period, Nissan reasonably concluded that Marilyn Halleen was unlikely to ramp up Love's performance.

22. Although Section 320.943(2), Florida Statutes, does not require that a transfer of an equity interest be at arms-length, the fact that a purported transfer is not an arms-length transaction, when considered with other evidence, may tend to demonstrate, as it does in this case, that the purported transfer is a sham.

23. The fact that the purchase price is remarkably below market value does not in every case mean that a purported transfer is a sham. Under the facts of this case, however, the below market sales price tends to prove that the purported transfer is illusory.

24. The evidence, taken as a whole, proves that the purported transfer is an artifice or device designed to avoid the consequences of the poor performance of Love while under the command of Robert and Chad Halleen. Thus the proposed transfer is not a real transfer; it is a sham designed to avoid Judge Davis's Recommended Order upholding the termination.

25. Marilyn Halleen, although a human being separate from her spouse and off-spring, cannot be considered "any other person or persons." She is the alter ego of Robert and Chad

Halleen and, should the transfer be approved, the evidence demonstrates she will be a mere agent or tool of the current owners and the inept management of Love will continue.

26. It was not proven that Marilyn Halleen lacked good character as that term is used in Section 320.643(2), Florida Statutes, which governs the transfer of an equity interest in a dealership.

27. The question of whether or not the proposed transfer involved a change in executive management at Love, which might trigger consideration of Section 320.643(1) or 320.644, Florida Statutes, a question advanced by Nissan, at the hearing, and in Nissan's Proposed Recommended Order, need not be addressed for the reasons set forth in paragraph 23, above. In order for those sections to be invoked there must first be a valid transfer.

#### CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.57(1) (2005) and 320.643(2), Fla. Stat.

29. The burden of proof by a preponderance of the evidence is on Nissan. §§ 120.57(1)(j) (2005) and 320.643(2) Fla. Stat.

30. Section 320.643(2)(a), Florida Statutes, provides as follows:

§ 320.643. Transfer, assignment, or sale of franchise agreements

\* \* \*

(2) Notwithstanding the terms of any franchise agreement, a licensee shall not, by contract or otherwise, fail or refuse to give effect to, prevent, prohibit, or penalize, or attempt to refuse to give effect to, prevent, prohibit, or penalize, any motor vehicle dealer or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest therein from selling, assigning, transferring, alienating, or otherwise disposing of, in whole or in part, the equity interest of any of them in such motor vehicle dealer to any other person or persons, including a corporation established or existing for the purpose of owning or holding the stock or ownership interests of other entities, unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not, or whose controlling executive management is not, of good moral character. A motor vehicle dealer, or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest in the motor vehicle dealer, who desires to sell, assign, transfer, alienate, or otherwise dispose of any interest in such motor vehicle dealer shall notify, or cause the proposed transferee to so notify, the licensee, in writing, of the identity and address of the proposed transferee. A licensee who receives such notice may, within 60 days following such receipt, file with the department a verified complaint for a determination that the proposed transferee is not a person qualified to be a transferee

under this section. The licensee has the burden of proof with respect to all issues raised by such verified complaint. The department shall determine, and enter an order providing, that the proposed transferee either is qualified or is not and cannot be qualified for specified reasons; or the order may provide the conditions under which a proposed transferee would be qualified. If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement shall be deemed amended to incorporate such transfer or amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order.

31. A comparison of the statute cited above and the current version of the statute reveals that amendments subsequent to 1999 have changed only the procedure. Substantively, the 1999 version and the law as it exists at this writing are identical for purposes of this Recommended Order.

32. Section 320.641(3), Florida Statutes, entitled Unfair Cancellation of Franchise Agreements, provides that a motor vehicle dealer who receives a notice of intent by the licensee to terminate their franchise agreement, may file a complaint for a determination of whether the action is unfair or prohibited and sets forth standards for making that determination. A reading of Section 320.641, Florida Statutes, in its entirety reveals that its purpose is to equalize the relationship between

the licensee and the motor vehicle dealer. The motor vehicle dealer is protected from arbitrary cancellation by the licensee by this statute, but the licensee may, when appropriate, sever its relationship with an unsatisfactory dealership.

33. Nissan sought to cancel its agreement with Love pursuant to Section 320.641, Florida Statutes, because of its determination that Love was unable to sell enough automobiles to suit the reasonable expectations of Nissan. Love protested and after an eight-day hearing, Judge Davis found for Nissan and against Love. Love Nissan vs. Nissan North America, Inc., Case No. 04-2247 (DOAH July 14, 2005).

34. If Love is permitted to avoid that result by feigning a transfer of its equity, with the result that Love will be able to continue to provide disappointing sales, then termination under Section 320.641, Florida Statutes, becomes ignis fatuus, and is rendered meaningless.

35. Courts are required to adopt statutory interpretations which harmonize related, but conflicting provisions, so that both can be given effect. The proposed transfer cannot be viewed in a vacuum. Hawkins vs. Ford Motor Company, 748 So. 2d 993 (Fla. 1999).

36. Courts should avoid interpretations of statutes which render them meaningless. Unruh vs. State, 669 So. 2d 242 (Fla. 1996). An interpretation of Section 320.643(2), Florida

Statutes, which would allow an illusory transfer to defeat the operation of Section 320.641, Florida Statutes, would render the latter statute meaningless.

37. In matters of statutory construction, it is fundamental that "legislative intent is the polestar by which [the] Court must be guided." State vs. Webb, 398 So. 2d 820, 824 (Fla. 1981). Courts determine legislative intent by considering a variety of factors, including the language used, the subject matter, the purpose designed to be accomplished, and all other relevant and proper matters. American Bakeries Co. vs. Haines City, 131 Fla. 790, 809, 180 So. 524, 532 (Fla. 1938).

38. An interpretation of Section 320.643(2), Florida Statutes, which permits an automobile dealer to evade the effects of Section 320.641, Florida Statutes, would be contrary to the apparent legislative intent. Therefore, there was no "transfer" as contemplated by Section 320.643(2), Florida Statutes.

39. The facts in this case are not unlike Nissan Motor Corporation vs. Rick Starr Lincoln-Mercury, Inc., Case No. 94-3103 (DOAH August 29, 1994). In that case, Nissan Motor Corporation announced its intent to terminate the franchise agreement with Rick Starr Lincoln-Mercury, Inc. The matter became the subject of a formal administrative hearing in which



an Administrative Law Judge found that Nissan's termination was appropriate. The eponymous principal of Rick Starr Lincoln-Mercury, Inc., Rick Starr, attempted to avoid the effects of the recommended termination by transferring the franchise agreement to Nissan of St. Lucie, Inc., which was surreptitiously controlled by Rick Starr. Administrative Law Judge Joyous D. Parrish found that the transaction was not to "another person" but was merely a device created to evade the recommended termination. The Recommended Order was adopted as a final order of DHSMV by Order HSMV-94-0740-FOF-DMV (DHSMV October 4, 1994).

40. In this case there was a proposed transfer of equity rather than a transfer of the franchise agreement and the transferee was to a person rather than a corporation. Nevertheless, the controlling principle is the same. Accordingly, if for sake of argument one would assert that in this case a real transfer was proposed, it would nevertheless not be to an "other person."

#### RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Highway Safety and Motor Vehicles enter a Final Order stating that pursuant to Nissan's verified Petition for Determination of Invalid Proposed Transfer Pursuant to Section 320.643, Florida Statutes, and Notice of

Rejection of Proposed Transfer, no transfer under Section 320.643, Florida Statutes, is proposed and Nissan's rejection of it was proper. Further, the Department of Highway Safety and Motor Vehicles should enter a Final Order dismissing Robert Halleen and Chad Halleen's Petition for Determination of Wrongful Turndown.

DONE AND ENTERED this 18th day of January, 2006, in Tallahassee, Leon County, Florida.



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HARRY L. HOOPER  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 18th day of January, 2006.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.