



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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Andrew Chevrolet Inc., Complainant

Case No.: TR-08-0010

v.

Nissan North America, Inc., Respondent

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FINAL DECISION

On March 10, 2008, Andrew Chevrolet, Inc., (Andrew) filed a complaint against Nissan North American, Inc., (Nissan) pursuant to Wis. Stat. § 218.0134(2)(b). The complaint alleges that there is good cause to allow a proposed transfer of Andrew's Nissan franchise to Melvin Schlesinger. The Complainant also demanded mediation pursuant to Wis. Stat. § 218.0136. On March 11, 2008, the Division of Hearings and Appeals (Division) issued an Order Suspending Proceedings until after mediation. By letter dated June 11, 2008, Attorney Paul R. Norman advised the Division that the parties had completed mediation without resolution and requested that a prehearing conference be scheduled. Pursuant to this request, the Order Suspending Proceedings was vacated and a prehearing conference was scheduled.

Pursuant to due notice, the Division held a hearing on October 26, 27, 28, and 29, 2009, in Madison, Wisconsin. Administrative Law Judge Mark J. Kaiser presided. The parties filed post-hearing briefs. Nissan filed its initial brief on February 11, 2010; Andrew filed a response brief on March 8, 2010; and, Nissan filed a reply brief on April 1, 2010.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Andrew Chevrolet, Inc., Complainant, by

Attorney Paul R. Norman  
Boardman Law Firm  
P. O. Box 927  
Madison, WI 53707-0927

Nissan North America, Inc., Respondent, by

Attorney Steven J. Wells  
Attorney John Rock  
Dorsey & Whitney, LLP  
50 South Sixth Street, Suite 1500  
Minneapolis, MN 55402

The ALJ issued a Proposed Decision in this matter on December 20, 2010. No comments on the Proposed Decision were received. The Proposed Decision is adopted as the final decision in this matter.

#### Issues to be decided

1. Whether the proposed transfer of Andrew's Nissan dealership assets to Melvin Schlesinger does not constitute a "Proposed Action" for purposes of Wis. Stat. § 218.0134 either because the proposed transfer is a sham transaction and does not meet the conditions of Section I of the Settlement Agreement or because the proposed transfer is not a proposed transfer to another person.

2. If the proposed transfer does constitute a "Proposed Action," whether good cause exists for not permitting the Proposed Action to be undertaken. Wis. Stat. § 218.134(3)(am) provides that the Division of Hearings and Appeals may determine there is good cause for not permitting a Proposed Action to be undertaken only if the prospective benefits to the affected grantor and motor vehicle dealer, the public, and other dealers if the Proposed Action is not undertaken outweigh the prospective benefits to the affected grantor and motor vehicle dealer, the public, and other dealers if the Proposed Action is undertaken. The burden of proof to show that good cause does not exist is on the respondent.

#### Applicable Statute

Wis. Stat. § 218.0134 provides:

(1) In this section, "affected grantor" means a manufacturer on direct dealerships, a distributor on indirect dealerships or an importer on direct dealerships that has entered into an agreement with a motor vehicle dealer and that is directly affected by an action proposed to be undertaken by the dealer under this section.

(2)(a) If a motor vehicle dealer's agreement with an affected grantor requires the grantor's prior approval of an action proposed to be undertaken by the dealer under this section, a dealer may not voluntarily change its ownership or executive management, transfer its dealership assets to another person, add another franchise at the same location as its existing franchise or relocate a franchise without giving prior written notice of the proposed action to the affected grantor and to the department of transportation. Within 20 days after receiving the notice, the affected grantor may serve the dealer with a written list of the information not already known or in the possession of the grantor that is reasonably necessary in order for the grantor to determine whether the proposed action should be approved. The grantor shall, in good faith, confirm in writing to the dealer the date on which it has received from the dealer or from other sources all the information specified on the list.

(b) An affected grantor who does not approve of the proposed action shall, within 30 days after receiving the dealer's written notice of the proposed action or within 30 days after receiving all the information specified in a written list served on the dealer under par. (a), whichever is later, file with the department of transportation and serve upon the

dealer a written statement of the reasons for its disapproval. The publication of the reasons given for the disapproval or any explanation of those reasons by the manufacturer, distributor or importer shall not subject the manufacturer, distributor or importer to any civil liability unless the reasons given or explanations made are malicious and published with the sole intent to cause harm to the dealer or a transferee of the dealer. Failure to file and serve a statement within the applicable period shall, notwithstanding the terms of any agreement, constitute approval of the proposed action by the grantor. If an affected grantor files a written statement within the applicable period, the dealer may not voluntarily undertake the proposed action unless it receives an order permitting it to do so from the division of hearings and appeals under sub. (3)(b).

(c) A dealer who is served with a written statement by an affected grantor under par. (b) may file with the department of transportation and the division of hearings and appeals and serve upon the affected grantor a complaint for the determination of whether there is good cause for not permitting the proposed action to be undertaken. The burden of proof for showing there is good cause for not permitting the proposed action shall be on the affected grantor. The division of hearings and appeals shall promptly schedule a hearing and decide the matter. The proposed action may not be undertaken pending the determination of the matter.

(3)(am) The division of hearings and appeals may determine there is good cause for not permitting a proposed action to be undertaken only if the prospective benefits to the affected grantor, the dealer, the public, and other dealers if the proposed action is not undertaken outweigh the prospective harms to the dealer, the affected grantor, the public, and other dealers if the proposed action is not undertaken.

(b) The decision of the division of hearings and appeals shall be in writing and shall contain findings of fact and a determination of whether there is good cause for not permitting the proposed action to be undertaken. The decision shall include an order that the dealer be allowed or is not allowed to undertake the proposed action, as the case may be. The order may require fulfillment of appropriate conditions before and after the proposed action is undertaken.

### Findings of Fact

The Administrator finds:

1. Andrew Chevrolet, Inc., (Andrew) is a motor vehicle dealer licensed by the Wisconsin Department of Transportation (WisDOT). Andrew holds a franchise from Nissan North America, Inc., (Nissan) granting Andrew the right to buy, sell, and service Nissan automobiles and light duty trucks.

2. Nissan is a California corporation with principal offices located at 1919 Torrance Boulevard, Torrance, California. Nissan is licensed by WisDOT to engage in business as a motor vehicle manufacturer or distributor in Wisconsin. Nissan distributes Nissan automobiles and light duty trucks and parts through a network of dealers in the United States.

3. Melvin Schlesinger has been involved in the automobile business at various dealerships in the Milwaukee area since 1949. In 1990, Melvin Schlesinger operated a Chevrolet dealership at 8711 Brown Deer Road in Milwaukee and a Toyota dealership at 1520 West Silver Spring Road in Glendale. In the fall of 1990, Melvin Schlesinger was awarded a Nissan dealership. Melvin Schlesinger formed a company incorporated as Schlesinger Nissan, Inc., to be named as the Dealer for the Nissan franchise.

4. In November of 1990, Nissan entered into a Nissan Sales and Service Agreement (Nissan SSA) with Schlesinger Nissan, Inc. (SNI) establishing SNI as a Nissan dealer. SNI's dealership facilities were located at 1500 West Silver Spring Drive, Glendale, Wisconsin. SNI was 100% owned and operated by Melvin Schlesinger. Pursuant to the Nissan SSA, SNI was assigned the Glendale Primary Market Area (Glendale PMA) as its area of sales responsibility. The Glendale PMA is part of the Milwaukee metro market.

5. In 1993, Melvin Schlesinger acquired a second Chevrolet dealership which he also operated from the 1500 West Silver Spring Drive facility. Melvin Schlesinger retired from the automotive business in 1994. Prior to retiring, he began transferring his interest in the various franchises he owned to his son, Andrew Schlesinger. Andrew Schlesinger took over management of the franchises and was named the dealer principal for the franchises in 1994. The names of the corporations holding the franchises were also changed.

6. In June 1993, Andrew Schlesinger formed Schlesinger Chevrolet on Silver Spring, Inc. (SCSS). SCSS was formed to own and operate the Chevrolet dealership at the 1500 West Silver Spring Drive facility. SCSS had two classes of stock, class A voting stock and class B non-voting stock. SCSS issued fifty shares of class A and fifty shares of class B stock to Mel Schlesinger and 900 shares of class B stock to the Andrew C. Schlesinger Irrevocable Trust. In June of 1994, the corporate name of SCSS was changed to Andrew Chevrolet, Inc.

7. In the fall of 1994, the corporate name of SNI was changed to Andrew Nissan, Inc. It was then merged into Andrew Chevrolet, Inc. After the merger, the ownership of corporate stock remained with the Andrew C. Schlesinger Irrevocable Trust owning 90% of the outstanding shares of stock and Melvin Schlesinger owning the remaining 10%, including all of the voting shares. After the merger, Nissan entered into a new Nissan Dealer Sales and Service Agreement with Andrew. The new agreement recognized the Andrew C. Schlesinger Irrevocable Trust as the "principal owner" of the franchise and Melvin Schlesinger as an "other owner." Andrew Schlesinger is listed as the executive manager of the dealership (exh. 54).

8. Melvin Schlesinger testified at the hearing that he retained the voting stock in Andrew Chevrolet, Inc., as security for the money Andrew Schlesinger owed him for the various motor vehicle dealer franchises Melvin Schlesinger transferred to him and to protect the interests of other family members, including his wife and four other children.

9. Andrew is located in what was formerly referred to as Nissan's North Central Region. The North Central Region was bordered by the Dakotas on the west, Cleveland and Cincinnati on the east, and Louisville and St. Louis on the south. In April of 2009, the name of the region was changed to the Midwest Region and the boundaries were slightly modified.

10. Andrew dualled the Nissan dealership and the Chevrolet franchise at the 1500 West Silver Spring Drive facility. By letter dated March 8, 2004, Andrew proposed relocating the Nissan dealership facilities to an exclusive Nissan facility to be constructed at 1640 West Silver Spring Drive in Glendale and to be considered for enrollment in Nissan's NREDI initiative (exh. 71)<sup>1</sup>. The 1640 West Silver Spring Drive site consisted of 3.1 acres and is adjacent to Andrew's Toyota dealership facilities.

11. Nissan approved Andrew's request and set forth a "stair step" schedule with a proposed completion date for the new facility of June 1, 2006. Nissan's approval was in the form of a commitment letter dated October 8, 2004, to be signed by Nissan and Andrew (exh. 80). Andrew did not sign this commitment letter, but rather initiated a series of letters adjusting the stair step schedule. In June of 2005, Nissan and Andrew finally agreed to a schedule for the construction of the new facility. The terms of the offer were set forth in a commitment letter dated June 28, 2005 (exh. 90). The letter set out a "stair step" schedule culminating with the completion of the new dealership facilities by November 30, 2006. Andrew Schlesinger signed the commitment letter acknowledging his agreement to the terms and conditions of Nissan's offer.

12. By September of 2006, Andrew had not commenced any of the work for the proposed Nissan facility at 1640 West Silver Spring Road. At that time, Andrew was also negotiating for the purchase of a Buick-Pontiac-GMC (BPG) franchise from Rank & Son Buick GMC, Inc. On September 8, 2006, Andrew executed an agreement with General Motors Corporation (GM) to acquire the BPG franchise. Andrew's agreement with GM required it to provide an exclusive BPG facility (exh. 119). In a letter received by Nissan on September 12, 2006, Andrew informed Nissan that it intended to acquire additional franchises that it would add to the 1500 West Silver Spring facility. Andrew proposed to Nissan that it would move its Nissan sales to a temporary facility on the 1640 West Silver Spring property and continue to conduct Nissan service at the 1500 West Silver Spring facility until a permanent facility for Nissan could be completed at that location (exh. 122). In the September letter, Andrew set forth a tentative timetable with completion of a new Nissan facility on June 30, 2008.

13. Nissan responded to Andrew's notification with a letter dated September 20, 2006. Nissan declined Andrew's proposal to move Nissan sales to a temporary facility and denied the request to add additional franchises to the 1500 West Silver Spring facility (exh. 123). Despite Nissan's response, Andrew completed its acquisition of the BPG franchise and moved it into the 1500 West Silver Spring facility. Andrew also continued to operate the Nissan franchise from the 1500 West Silver Spring facility. Although this apparently constituted a breach of Andrew's Dealer Agreement with GM, GM did not take any action against Andrew to enforce the provisions of the Dealer Agreement.

14. On October 24, 2006, Nissan delivered to Andrew a notice of default based on Andrew's adding the BPG franchise to its 1500 West Silver Spring facilities without Nissan's permission (exh. 140). This notice of default was supplemented on November 7, 2006 (exh. 141). Pursuant to the November 7, 2006 notice, Andrew had until November 14, 2006, to cure the alleged material breach of its Dealer Agreement. Curing the alleged breach would have

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<sup>1</sup> NREDI stands for National Retail Environmental Initiative, a specific design for a motor vehicle dealership facility developed by Nissan.

required Andrew to remove the BPG franchise from the 1500 West Silver Spring facility. Andrew did not cure the default and on November 21, 2006, Nissan issued a notice of termination to Andrew. Andrew filed a complaint pursuant to Wis. Stat. § 218.0114(7)(d), with the Division of Hearings and Appeals challenging the termination. Andrew's complaint was assigned docket number TR-06-0058.

15. On October 23, 2007, Nissan and Andrew executed a Settlement Agreement resolving the disputed issues in TR-06-0058 (exh. 1). Under the terms of the Settlement Agreement, Nissan rescinded the notice of termination issued to Andrew and Andrew agreed to voluntarily terminate its Dealer Agreement with Nissan by March 31, 2008. However, Section I of the Settlement Agreement provided that prior to Andrew voluntarily terminating the Dealer Agreement, Nissan would give Andrew an opportunity to propose a transfer of its Nissan dealership assets in the form of an asset purchase agreement. Nissan agreed to consider any proposed transfer of Andrew's Nissan dealerships submitted to it by 5:00 p.m. on January 15, 2008.

16. Andrew submitted to Nissan an asset purchase agreement dated November 8, 2007. The asset purchase agreement proposed to transfer Andrew's Nissan dealership assets to Ernie Von Schloedorn (Von Schloedorn) for \$950,000. Nissan disapproved this proposed transfer because Von Schloedorn intended to relocate the Nissan dealership to Port Washington. The proposed relocation would have been within the relevant market area of another enfranchised Nissan dealer. Andrew then began negotiating with Ralph Mauro (Mauro). Andrew and Mauro agreed on a price for Andrew's dealership assets. However, Andrew never submitted the proposed transfer to Nissan for approval because Mauro also intended to relocate the Nissan dealership to a site within the relevant market area of another enfranchised Nissan dealer.

17. As the January 15<sup>th</sup> deadline neared, Andrew began putting together a proposal to transfer its Nissan dealership assets to Melvin Schlesinger. At 4:29 p.m. on January 15, 2008, Andrew faxed to Nissan an asset purchase agreement. Pursuant to the asset purchase agreement, Melvin Schlesinger agreed to pay one million dollars for Andrew's Nissan dealership assets (exh. 189). By letter dated January 15, 2008, Nissan acknowledged receipt of the asset purchase agreement and provided to Andrew and Melvin Schlesinger a list of the documentation Nissan required to evaluate the proposal (exh. 193). Pursuant to the Settlement Agreement, the deadline for the submission of this documentation was February 1, 2008.

18. On January 31, 2008, Melvin Schlesinger submitted documentation to Nissan in support of proposed transfer of the Nissan dealership. The submission included the following items:

- a) Source of Funds - The source of funds for the asset purchase and start up capital for the proposed dealership was the Andrew Chevrolet CAP and Andrew Buick Pontiac GMC accounts. Melvin Schlesinger asserted that of the combined balance of \$2,290,000 in these two accounts, approximately \$1,600,000 was Melvin Schlesinger's personal funds that he had invested in these accounts;
- b) Management - That Dennis Kendall would be named as the Executive Manager of the proposed dealership. Mr. Kendall would have full management authority and would be present at the dealership on a daily basis. Dennis Kendall was Andrew's Nissan sales manager;

- c) Sales Performance and Customer Satisfaction Data- For these items, Melvin Schlesinger indicated that he had been involved in the operation of the franchises operated by the Andrew Automotive Group (Toyota, Chevrolet, Buick, Pontiac, GMC, and Nissan) for the previous thirteen years and presented the sales and customer satisfaction scores for those dealerships;
- d) Facility Plans – Melvin Schlesinger submitted facility plans for a proposed new facility to be constructed at 5902-5910 North Green Bay Road in Glendale (a 1.3 acre parcel). Melvin Schlesinger indicated that the new facility would be completed within eighteen months of Nissan's approval of the purchase of the Nissan franchise. Melvin Schlesinger further indicated that he owned a two acre parcel located a half mile from the proposed new facility and was negotiating to acquire a parcel adjacent to the proposed new facility. The two acre parcel was available for storage. Until the new facility was completed, Melvin Schlesinger proposed to lease space from Andrew at the 1500 West Silver Spring facility for sales of new Nissan vehicles. Melvin Schlesinger further proposed to lease space to service Nissan vehicles at the 1500 West Silver Spring facility until June 30, 2008. From July 1, 2008, until the new facility was completed, Nissan service would be provided at a facility located at 5900 North Green Bay Road.

(exh. 206)

19. On February 29, 2008, Nissan sent Andrew a letter informing Andrew that it disapproved the proposed transfer (exh. 220). In the letter, Nissan stated that its grounds for disapproval were:

- a) The proposed transfer was a sham transaction;
- b) Melvin Schlesinger was the alter ego of Andrew;
- c) Andrew and Melvin Schlesinger's proposal to keep Nissan sales at Andrew's existing location for eighteen months directly conflicted with Andrew's contractual obligations to GM;
- d) The site of the proposed new dealership facilities was too small and otherwise inadequate, and Andrew's history of failed commitments provided no reasonable basis for Nissan to believe the buyer, Andrew's alter ego, would make good on its relocation and facility commitments;
- e) The proposed Executive Manager was not qualified; and,
- f) The proposal for temporary services was unacceptable.

With respect to the size of the proposed facilities, the parcel on which Melvin Schlesinger intended to construct a new Nissan facility was only 1.3 acres. Based on the planning volume for the dealership, Nissan's guidelines called for a minimum of 2.61 acres.

20. Prior to terminating its Nissan franchise, Andrew's sales were effective during the years 2005 -2007. A memorandum prepared after Nissan rescinded the notice of termination issued to Andrew indicates that Andrew's sales were 133.29% of the regional average in 2005; 160.40% of the regional average in 2006; and, 132.28% in the first eight months of 2007 (exh. 171). The same memorandum indicates that Andrew's customer satisfaction scores were comparable to the region and district averages.

21. After Andrew resigned its Nissan franchise, Nissan began searching for a replacement dealer for the Glendale PMA. Nissan eventually chose John Amato as the replacement dealer. Amato operated a Cadillac dealership at 5200 North Port Washington Road in Milwaukee, which is within the Glendale PMA. Amato resigned its Cadillac franchise and converted the dealership facilities to an exclusive Nissan dealership facility. Amato began operating as a Nissan dealer on August 24, 2009.

22. Nissan did not have representation in the Glendale PMA from April 2, 2008, the date Andrew ceased its Nissan operations, until August 24, 2009, the date Amato commenced its Nissan operations. During this time period Nissan registration penetration in the Glendale PMA remained relatively strong. Nissan's registration penetration in the Glendale PMA for the period when there was no dealer representation was 6.4%. This exceeds the regional penetration, which was 5.2% in 2008 and was comparable to the Milwaukee metro average (testimony of Jennifer Moser, Tr. pp 381-386, exh. 186). However, Nissan owners in the Glendale PMA had to travel outside of the Glendale PMA for warranty work during the time period that Nissan did not have a dealer in the Glendale PMA.

#### Discussion

The grounds for Nissan's disapproval of the Andrew's proposed transfer of its Nissan dealership assets fall into two categories. The first category is that the proposed transfer was a sham transaction because the proposed buyer of Andrew's Nissan dealership assets, Melvin Schlesinger, is the alter ego of Andrew. Alternatively, Nissan alleges that it has good cause to disapprove the proposed action. If it is determined that the proposed transfer was a sham transaction, then it is not a "Proposed Action" for purposes of Wis. Stat. § 218.0134(2)(a) and it is not necessary to consider whether good cause exists for approving the proposed transfer.

At the time of the proposed transfer, Melvin Schlesinger controlled all of the voting stock in Andrew. Andrew Schlesinger testified that despite the fact that Melvin Schlesinger controlled all the voting stock, he, Andrew Schlesinger, made all the management decisions related to the operation of the Nissan franchise. Nissan's witnesses acknowledged that since Melvin Schlesinger retired in 1994 they primarily dealt with Andrew Schlesinger. Although Andrew Schlesinger clearly handled the day-to-day operations of the Nissan dealership, Melvin Schlesinger retained legal control of Andrew, the corporation which was named as the dealer principal in the Nissan SSA.

Melvin Schlesinger testified that the reason he retained 100% of the voting stock in Andrew was because of all the money Andrew Schlesinger owed him for the purchase of the various motor vehicle dealer franchises and to protect the interests of his wife and other children. Melvin Schlesinger further testified that since he retired he has not overridden any decisions made by Andrew Schlesinger; however, because the corporation owed him a large sum of money it was important that he retain legal control of the corporation in the event that something happened to Andrew Schlesinger. This testimony demonstrates that although he has not exercised it, Melvin Schlesinger clearly intended to retain legal control over the corporation and understood he had the authority to wrest authority from Andrew Schlesinger, if necessary. Accordingly, Andrew is proposing to transfer its Nissan dealership assets from one corporation controlled by Melvin Schlesinger to another corporation in which he would be the sole shareholder.

Aside from Melvin Schlesinger's involvement in both corporations involved in the proposed transfer, the components of the proposed transfer also demonstrate that the proposed transfer was a sham. The asset purchase agreement was put together by Andrew Schlesinger and employees of Andrew in literally the last minutes before the deadline for submitting a proposed transfer of Andrew's Nissan dealership assets. The subsequent documentation submitted in support of the proposed transfer was also prepared by Andrew Schlesinger and employees of Andrew. There is no indication of any significant involvement by Melvin Schlesinger in preparing any part of the proposal. There is also no evidence of any negotiations between the "buyer" and "seller" on this proposal. The payment for Andrew's Nissan dealership assets involved a transfer of funds already in Andrew's GM CAP accounts back into the same accounts, the dealership would continue to be operated from Andrew's 1500 West Silver Spring facility for a time period of up to eighteen months, and the operation of the dealership would involve the sharing of sales staff and other employees with Andrew's BPG franchise. Based on the evidence presented, the proposed transfer of Andrew's Nissan dealership assets to Melvin Schlesinger is a sham transaction.

Even if the proposed transfer was not a sham transaction, good cause exists for the disapproval of the "Proposed Action." The Division of Hearings and Appeals "may determine there is good cause for not permitting a proposed action to be undertaken only if the prospective benefits to the affected grantor, the dealer, the public, and other dealers if the proposed action is not undertaken outweigh the prospective harms to the dealer, the affected grantor, the public, and other dealers if the proposed action is not undertaken." The determination of good cause thus is based on a balancing of the prospective benefits and prospective harms if the proposed action is not undertaken.

If the proposed action were approved, Nissan would be harmed by having to continue a relationship with a dealer that has failed to honor commitments it has made with respect to operating a stand alone Nissan dealership facility. Even if one accepted Andrew's contention that Melvin Schlesinger is a separate entity, Melvin Schlesinger proposed to continue to operate the Nissan dealership from Andrew's facilities for an extended period of time and then to move it to an inadequately sized facility.<sup>2</sup> It is a benefit to Nissan to make a complete break from Andrew and Melvin Schlesinger and to have a strong, stable Nissan dealer with a properly sized, stand alone Nissan facility representing it in the Glendale PMA.

If the proposed action were not approved, Andrew would be harmed. The harm would be the loss of the value of the Nissan franchise. However, the value of Andrew's Nissan franchise on January 15, 2006, is difficult to assess. The value of the Nissan franchise was clearly not the one million dollars that Melvin Schlesinger agreed to pay for it. The price Melvin Schlesinger agreed to pay for the franchise was not the result of an arms length negotiating process. At one time, Andrew had two presumably legitimate offers of \$950,000 to purchase its Nissan

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<sup>2</sup> Andrew attempted to show that other Nissan dealers whose facilities did not meet Nissan's guidelines were still successful. There is no reason to doubt that a Nissan dealer could be successful even with facilities that do not meet Nissan's facility guidelines. However, the Settlement Agreement provided that Nissan had no obligation to consider any transfer if the proposed buyer failed to agree to provide "an exclusive stand-alone Nissan facility in accordance with Nissan's current facility guides within eighteen (18) months after Nissan approve[d] the Proposed Action" (exh. 1, p. 3 (Bates page A2-00191)). Accordingly, the fact that Melvin Schlesinger was proposing to construct a facility on a parcel that does not meet Nissan's guidelines, is another reason that the proposed transfer of Andrew's Nissan dealership assets to him does not constitute a "Proposed Action" for purposes of Wis. Stat. § 218.0134(2)(a).

dealership assets. However, both of these offers were contingent on relocating the franchise to a site that would be in the relevant market area of another existing Nissan dealer. As the January 15, 2006 deadline under the Settlement Agreement approached, Andrew's Nissan dealership assets had a limited value.

The other party to consider is the public. In the short run, the public was harmed by the disapproval of the Proposed Action because of a lack of Nissan representation in Andrew's relevant market area. This harmed the public by decreasing interbrand competition in this market and by the absence of a dealer to provide warranty and other Nissan service work for Nissan owners in the market. In the long run, the public will benefit from having a healthy, strong Nissan dealer in the Glendale PMA. A strong Nissan dealer in the Glendale PMA will increase interbrand competition in the Glendale PMA and provide additional intrabrand competition in the Milwaukee metro market. The proposal to transfer Andrew's Nissan dealership assets to Melvin Schlesinger would not have provided a strong Nissan dealer in the Glendale PMA. Overall, the benefits from disapproving the proposed action outweigh the harm from disapproving the proposed action.

#### Conclusions of Law

The Administrator concludes:

1. The proposal of Andrew Chevrolet, Inc., to transfer its Nissan dealership assets to Melvin Schlesinger was a sham transaction because at the time of the proposal Melvin Schlesinger owned 100% of the voting stock in Andrew Chevrolet, Inc., the corporate owner of the franchise, as well as for the additional reasons discussed above. Accordingly, the proposed transfer is not a "Proposed Action" pursuant to Wis. Stat. § 218.0134(2)(a).

2. Alternatively, if the request made by Andrew Chevrolet, Inc., to transfer its Nissan franchise to Melvin Schlesinger is deemed to constitute a "Proposed Action" pursuant to Wis. Stat. § 218.0134(2)(a), for the reasons set forth above the prospective benefits if the Proposed Action is not undertaken outweigh the prospective harms if the Proposed Action is not undertaken.

3. Pursuant to Wis. Stat. §§ 218.0134(3)(b) and 227.43(1)(bg), the Division of Hearings and Appeals has the authority to issue the following order.

Order

The Administrator orders:

The complaint of Andrew Chevrolet, Inc., is hereby DISMISSED and Andrew Chevrolet, Inc., shall not be allowed to transfer its Nissan franchise to Melvin Schlesinger.

Dated at Madison, Wisconsin on January 18, 2011.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
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By: \_\_\_\_\_  
David H. Schwarz  
Administrator

## NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.