



## California New Car Dealers Association

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September 14, 2011

The Honorable Edmund G. Brown, Jr.  
Governor, State of California  
State Capitol, First Floor  
Sacramento, California 95814

**FOR ENROLLED BILL FILE**

***Re: SB 642 (Padilla) – Dealer Franchise Law Improvements***  
***Position: SIGNATURE REQUESTED***

Dear Governor Brown:

The California New Car Dealers Association (CNCDA) is a statewide trade association that represents the interests of over 1100 franchised new car and truck dealer members. CNCDA members are primarily engaged in the retail sale and leasing of new and used motor vehicles, but also engage in automotive service, repair and part sales. We are writing to urge your signature on SB 642 which would update the laws regulating the relationship between vehicle auto manufacturers and franchised dealers. *The bill had broad, bipartisan support of the legislature and amendments were accepted that removed the opposition of both trade associations that represent all the automobile manufacturers.*

### **Background**

Unfortunately, with over 340 new car dealerships closed in the last three years, multi-national auto manufacturers continue to use the lopsided disparity in their bargaining power to: impose unreasonable requirements on surviving dealers such as provisions to waive their statutory rights to protest terminations; exert pressure to sell certain “approved” products; and use manufacturer-owned dealerships to engage in unfair competition.

The finding and declarations of the SB 642 sum up the bill’s intent:

- (a) The new motor vehicle franchise system, which operates within a strictly defined and highly regulated statutory scheme, provides customers with a well-organized distribution system for the availability and sale of new motor vehicles throughout the state; provides a network of quality warranty, recall, and repair facilities to maintain those vehicles; and creates a cost-effective method for the

state to police those systems through the licensing and regulation of private sector franchisors and franchisees.

- (b) It is the intent of the Legislature, in acting (sic) this act to prohibit franchisors from avoiding state franchise protection laws, to ensure fair competition among new motor vehicle dealer franchisees that are independently owned and those owned by their franchisors, and to clarify that the existing prohibition against franchisor ownership of a dealership located within a 10-mile radius of a nonfranchisor-owned dealership of the same line-make is subject only to certain limited exceptions that may not be used to justify any improper purpose, including the operation of a dealership by a sophisticated investor operator posing as a dealer development candidate.

Particularly in light of the current economic conditions facing new car dealers throughout California, SB 642 levels the playing field by restoring the proper competitive balance between dealers and their manufacturers so that independent franchised dealers can continue to service the needs of their communities and customers.

## **SB 642**

### **Waiver of Statutory Rights**

Subdivision (g) of Vehicle Code Section 11713.3 currently prohibits a manufacturer from *requiring* a dealer to prospectively waive statutory protest rights. However, a 2006 California Appellate Court decision (*DaimlerChrysler Motors Co. v. Lew Williams, Inc.*) effectively held that the waiver of a protest right is permissive unless a manufacturer uses coercion to obtain the waiver. Ever since the decision was issued, several manufacturers have expanded their use of “voluntary” agreements for dealers to waive their statutory rights to protest their own termination, and/or any proposed additions or relocations of competing dealerships within their relevant market area. Manufacturers have also begun a practice of avoiding termination protest rights altogether by inserting provisions in dealer agreements under which a dealer must agree to “self-termination” if certain events occur (such as failure to achieve manufacturer-established sales or service standards).

SB 642 prohibits a manufacturer from obtaining or enforcing any agreement with a dealer that modifies or disclaims any manufacturer obligations or dealer rights or privileges under California’s franchise laws. The bill also prohibits manufacturers from, among other things: (1) obtaining or enforcing any agreement that requires a dealer to “self-terminate” *unless* the agreement is conditioned only on a specified time for termination or payment of consideration to the dealer; (2) requiring a dispute to be referred to any person for binding determination, absent mutual agreement, or (3) requiring a dealer waive protest rights for the establishment or relocation of a specific proposed dealership *unless*, for valuable consideration, the waiver agreement specifically describes the size, location and other key elements of the proposed facility.

### **Unfair Competition by Factory-Owned Dealerships**

Competing at retail against an auto manufacturer that directly controls a dealer's franchise is an unfair fight because auto manufacturers also control product development, distribution and allocation (including vehicles and parts), vehicle pricing, warranty reimbursements and audits, and have direct access to each of their franchisee's operating and financial statements, customer lists, and other highly proprietary information. A majority of states ban outright any manufacturer ownership of new car dealerships in order to curb unfair competition. California takes a different tack -- it prohibits a manufacturer from owning a dealership within ten-miles of a privately owned dealership of the same line-make with two limited exceptions: temporary ownership (not to exceed one year); and, a partial factory-owned dealership operated by a "bona fide dealer development candidate" who has money invested at risk in the dealership and is in the process of acquiring a majority ownership interest. Existing law requires manufacturers to file written notices with the New Motor Vehicle Board to report factory stores operating under the exceptions, but the filings are not very informational. The Vehicle Code also prohibits a manufacturer from unfairly discriminating in favor of a factory-owned dealership (whether located within ten-miles or not) and identifies several specific types of unfair competition: unfairly allocating vehicles, parts and/or accessories, using confidential dealership or customer information, or referring prospective purchasers to a factory-owned store. Unfortunately, at least one auto manufacturer appears to be currently operating a factory-owned store within 10-miles of a privately owned dealership which has led to renewed concerns and fear of unfair competition.

SB 642 underscores and tightens up the unfair competition laws as follows: (1) the exception for temporary manufacturer-ownership is limited to situations where a manufacturer commences operation of a dealership at the same location that has been out of business for less than six months; (2) the filing requirements are enhanced to provide more public information; and (3) the unfair competition provisions are expanded to prohibit a manufacturer from providing a manufacturer owned dealership with sales or service incentives, discounts, or promotional programs that are not made available to all California franchisees of the same-line make on an equivalent basis.

### **Product Discrimination**

Some auto manufacturers and their affiliated finance companies pressure their franchised dealers to sell manufacturer products and services that are not covered under the franchise agreement, such as maintenance plans, service contracts, debt cancellation agreements, etc. Dealers who desire to sell alternative products (which may be more affordable or of higher quality) sometimes face discrimination by manufacturer representatives, including threats against their franchise, and reduced access to vehicles, parts, or incentives. Dealers, as independent businesses, should have the right to sell ancillary products of their choosing without the threat of manufacturer retribution.

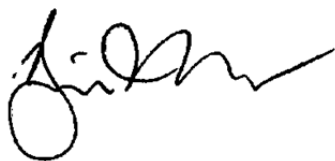
SB 642 prohibits manufacturers from discriminating against franchised dealers for selling non-approved or sponsored debt cancellation agreements, maintenance plans, and service contracts or similar products. However, the bill makes clear that the prohibition does not extend to manufacturer "certified" used car programs. Moreover, SB 642 does not restrict manufacturers from incentivizing the sale of approved or sponsored products on a voluntary-participation basis, nor from requiring a statutorily authorized disclosure by dealers to consumers about non-factory backed service contracts.

### Conclusion

SB 642 has been carefully crafted to assist dealers with needed statutory protections, while at the same time ensuring that the compliance with its provisions is reasonable for manufacturers. In striking this balance, SB 642 will provide relief to dealers, their employees and their communities, enabling them to better weather this economic downturn and continue to be the robust engine of economic activity that employ over 111,000 Californians and generates over \$65 billion in retail sales.

Based upon the foregoing, we respectfully urge your signature on SB 642.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brian Maas", with a large, stylized initial "B" and a long, sweeping underline.

Brian Maas  
Director of Government Affairs

BWM:ef

cc: The Honorable Alex Padilla  
Gareth Elliott, Legislature Secretary  
Ralph Simoni, California Advocates, Inc.  
Mike Belote, California Advocates, Inc.