

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into this 18th day of September 2013 by and between Tesla Motors, Inc. ("Tesla"), the Virginia Automobile Dealers Association ("VADA"), and Richard D. Holcomb, in his official capacity as Commissioner of the Department of Motor Vehicles for the Commonwealth of Virginia ("Commissioner"). Each of the foregoing referred to individually as a "Party" or collectively as the "Parties."

RECITALS

WHEREAS Tesla had previously filed a request for hearing with the Commissioner pursuant to Va. Code §§ 46.2-1572(4) and 46.2-1573 for authorization to own, operate or control a motor vehicle franchise dealership in the Commonwealth of Virginia;

WHEREAS the Commissioner issued a final ruling regarding the hearing on April 22, 2013 (a copy of the ruling is attached hereto as Exhibit A);

WHEREAS Tesla timely filed a petition for appeal of the Commissioner's final ruling in the Circuit Court for the County of Fairfax, and that appeal was given Case No. 2013-10491;

WHEREAS VADA participated in the proceeding before the Commissioner and would seek to intervene in the appeal if the Parties had not reached a resolution;

WHEREAS Tesla, VADA and the Commissioner, by counsel, have engaged in discussions regarding resolution of the appeal during the pendency of same;

WHEREAS Tesla has provided the Parties with additional information regarding its products and the issues associated with the operation of a dealership in Virginia at the present time (*See* documentation attached as Exhibit B);

WHEREAS VADA has agreed in the interest of administrative and judicial efficiency and the public interest to set aside the concerns it raised in the proceeding before

the Commissioner to enter this Agreement and resolve the pending matter (See documentation attached as Exhibit C); and

WHEREAS the Parties have resolved the issues that are pending in Case No. 2013-10491 and desire to end that proceeding via this Agreement, the Parties hereby agree as follows:

1. In exchange for the representations and agreements set forth herein, Tesla agrees to dismiss with prejudice Case No. 2013-10491 that is currently pending in the Circuit Court for the County of Fairfax. However, consistent with Paragraph 8 below, nothing in this Agreement or in the dismissal of Case No. 2013-10491 shall have any effect on any future application that Tesla may file.

2. Said dismissal shall be accomplished by Tesla presenting a proposed consent order (a copy of which is attached as Exhibit D) ("proposed Order") to the Circuit Court for the County of Fairfax and that Court entering the proposed Order or an order similar thereto.

3. Pursuant to the exception found in Va. Code § 46.2-1572(4), the Commissioner authorizes Tesla to own, operate or control either directly or through any affiliate, a manufacturer-owned new motor vehicle dealership, including a warranty and non-warranty service facility associated with said dealership, in the Commonwealth of Virginia subject to the following conditions:

(a) This Agreement allows Tesla to obtain a dealer license and to own, open and operate only one such dealership and that dealership must be located in the designated trade area, which is comprised of Fairfax County, Fairfax City, Arlington County, Loudoun County, the City of Alexandria, and the City of Falls Church;

(b) Prior to owning and operating said dealership, Tesla must meet the statutory requirements for operating a dealership found in Chapter 15 of Title 46.2 of the Code of Virginia and obtain a license from the Motor Vehicle Dealer Board ("MVDB") pursuant to Va. Code § 46.2-1508 and the Parties anticipate that the license application will be processed on a timeline comparable to any other dealer license and not be unreasonably delayed; and

(c) During the application process and Tesla's ownership and operation of said dealership, it shall be bound by all of the requirements regarding licensure put in place by statute/applicable regulation and shall be treated by the MVDB as any other dealer.

4. Provided that TESLA seeks a license from the MVDB within 18 months of this Agreement and based on the Commissioner's determination of the public interest, the authorization granted by the Commissioner for Tesla to own, operate and control such dealership shall be effective for a period of 30 months from the date that Tesla receives its dealer's license from MVDB. At the conclusion of that 30-month period, Tesla may continue to own and operate said dealership unless a person or entity with standing to bring an action pursuant Va. Code § 46.2-1572(4) brings such action and makes the requisite statutory showing regarding a willingness and ability to, consistent with the public interest without otherwise being contrary to law, serve as a Tesla franchise dealer. If Tesla fails to apply for a license from the MVDB within 18 months of this Agreement, the authorization shall expire. Nothing herein, however, shall be construed to prevent Tesla from opposing any action against it based on Va. Code § 46.2-1572(4) or based on any other authority.

5. This determination by the Commissioner is limited to a determination under Va. Code § 46.2-1572(4). Nothing in this Agreement shall limit, restrict or enlarge the operation of Virginia law or the authority granted to the Commissioner or the MVDB.

6. It is the understanding and agreement of the Parties that the ban on a manufacturer operating a service center found in Va. Code § 46.2-1572.1 does not apply to Tesla's dealership allowed by this Agreement so long as a warranty and non-warranty service center is operated in conjunction with and in proximity to said dealership and, to the extent any such ban would apply and is waivable, it is waived.

7. Tesla and VADA hereby agree that, except as is necessary to enforce any rights under this Agreement, they shall keep the Agreement and the resolution of this appeal confidential to the extent permitted by law, except to the extent that any of the Parties may note that settlement has been reached. However, VADA shall be permitted to inform its Board of Directors of the terms of the Agreement and resolution of this appeal. In addition, notwithstanding the foregoing, the Parties may agree to work together to craft a joint statement to respond to any inquiries that arise.

8. VADA agrees that it will not oppose Tesla's application for licensure to operate the dealership referenced in Paragraph 3 or the warranty and non-warranty service center referenced in Paragraph 6 before the MVDB so long as Tesla meets the requirements for a dealer license that are imposed upon VADA's members.

9. The Parties agree that nothing in this Agreement shall affect, one way or the other, any future proceeding in which the propriety of a Tesla operation (e.g., gallery, store or service facility) is disputed or where Tesla seeks authority from the Commissioner to own, operate or control, either directly or through any affiliate, a manufacturer-owned new motor vehicle dealership or other facility in the Commonwealth of Virginia.

10. If any court, agency, or tribunal should hold or find any provision of this Agreement to be void or voidable, or unlawful for any reason, such finding shall in no way affect the enforceability or validity of the remainder of this Agreement.

11. All of the recitals to this Agreement are material and integral parts hereof and are fully incorporated herein and are made part of this Agreement by this reference.

12. Each person executing this Agreement on behalf of any Party hereto hereby warrants and represents that such person has the full authority to do so and that each Party has the full and complete authority to enter into and to comply with the terms of this Agreement.

13. Each Party agrees, warrants and represents that all persons or entities whose signatures are necessary in order to effectuate the purpose and intent of this Agreement have been disclosed and are signatories to this Agreement.

14. This Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Faxed signatures shall be deemed the same as an original signature.

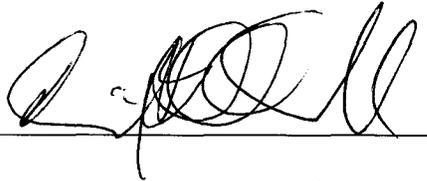
15. This Agreement shall be construed under the laws of the Commonwealth of Virginia.

16. This Agreement represents the entirety of the agreement of the Parties on the subject matters set forth herein.

17. This Agreement is effective as of the last date set forth below.

[Signature page to follow]

TESLA MOTORS, INC.

BY: 

DATE: 9/18/13

TITLE: VICE PRESIDENT

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION

BY: 

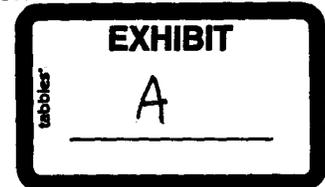
DATE: 9/24/13

TITLE: Pres + CEO

RICHARD D. HOLCOMB, in his official capacity
as Commissioner of the Department of Motor Vehicles
for the Commonwealth of Virginia

BY: 

DATE: 9-27-13



COMMONWEALTH of VIRGINIA

Department of Motor Vehicles
2300 West Broad Street

Richard D. Holcomb
Commissioner

Post Office Box 27412
Richmond, VA 23269-0001

HEARING DECISION

April 22, 2013

Billy M. Donley, Esq.
Baker & Hostetler
1000 Louisiana Street
Suite 2000
Houston, Texas 77002

Anne Gambardella, Esq.
Virginia Automobile Dealers Association
P.O. Box 5407
Richmond, Virginia 23220

Dena S. Kessler, Esq.
Baker & Hostetler
1052 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

Re: Formal Evidentiary Hearing: Tesla Motors, Inc. - Request for a Hearing Pursuant to Va. Code §§ 46.2-1572(4) and 46.2-1573 to be a Dealer

Dear Counsel:

This matter is before the Department of Motor Vehicles ("DMV") a second time for an agency decision on the request of Tesla Motors, Inc. ("Tesla") under *Va. Code* § 46.2-1572(4) for authorization to own, operate or control a motor vehicle franchise dealership in the Commonwealth. This matter was previously before this agency pursuant to a request by Tesla dated March 16, 2012, to determine whether Tesla, a DMV licensed manufacturer, was eligible to operate as both a manufacturer and a dealer of its electric motor vehicles under Virginia law. An initial administrative hearing occurred on June 19, 2012, and the Hearing Officer submitted a recommendation to this agency by letter dated September 13, 2012. DMV then received comments from the Virginia Automobile Dealers Association ("VADA") opposing the recommendations of the Hearing Officer and requesting that the hearing process, in essence, be re-opened to address its concerns. After reviewing the matter, a Hearing Decision dated November 15, 2012, was entered remanding the matter to the Hearing Officer for a re-evaluation of the issues raised by VADA and to give VADA an opportunity to present its concerns. DMV has received and reviewed a new recommendation from the Hearing Officer.

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PROCEDURAL AND FACTUAL BACKGROUND

As stated in the Hearing Decision entered November 15, 2012, Tesla is a California-based manufacturer of electric motor vehicles that began operating in 2008. Tesla now seeks to locate a dealership in Northern Virginia at Tyson's Corner Center, 1961 Chain Bridge Rd. # 105, McLean, Virginia 22102. The initial Hearing Decision contained a "Procedural and Factual Background" and it is unnecessary to repeat those facts. Rather, the Procedural and Factual Background found in pages 1 to 4 of the Hearing Decision dated November 15, 2012 is incorporated herein, and is relied upon in the issuance of this Hearing Decision.

Upon remand, the parties participated in a pre-hearing conference with the Hearing Officer and agreed that there was (1) no need for any additional public notices regarding this matter, and (2) no need for an additional in-person administrative hearing. Rather, the parties agreed that they would submit briefs addressing the issues. The dates of the filing of those briefs are found in the Hearing Officer's Recommendation dated February 20, 2013.

In the process of rendering my decision in this matter, I have carefully reviewed and considered the entire record of this proceeding forwarded by the Hearing Officer including the exhibits; the transcript of the June 19, 2012 hearing; the initial Recommendation of the Hearing Officer dated September 13, 2012; the briefs submitted by the parties since the remand of this case; and the most recent Recommendation of the Hearing Officer dated February 20, 2013. After full examination of this record, my final decision is set forth below.

DISCUSSION

The parties have submitted extensive arguments on what should be considered in evaluating a request under *Va. Code* § 46.2-1572, which states in pertinent part:

It shall be unlawful for any motor vehicle manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, to own, operate, or control any motor vehicle dealership in the Commonwealth. However, this section shall not prohibit: . . . (4) [t]he ownership, operation, or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof if the Commissioner determines, after a hearing at the request of any party, that there is no dealer independent of the manufacturer or distributor, factory branch or distributor branch, or subsidiary thereof available in the community or trade area to own and operate the franchise in a manner consistent with the public interest.

The statute establishes a general rule prohibiting manufacturer-owned dealerships and creates an exception to that rule. That exception applies if the Commissioner determines, following a hearing on the matter, that there is no dealer available, other than the manufacturer, in the relevant community to own and operate the franchise in a manner consistent with the public interest. If the Commissioner determines there is no such dealer, the manufacturer may be

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able to operate its own dealership.¹ Pursuant to *Va. Code* § 46.2-1572, the Commissioner's determination rests on two primary factors: (1) whether any dealer independent of the manufacturer is available in the community and (2) whether such dealer can own and operate a dealership in a manner consistent with the public interest.

The General Assembly and the judicial system have provided what could be considered to be guidance on the meaning of "public interest" in *Va. Code* § 46.2-1572(4). First, *Va. Code* § 46.2-1503 directs that the Commissioner "shall promote the interest of the retail buyers of motor vehicles and endeavor to prevent unfair methods of competition and unfair or deceptive acts or practices." Second, courts note that the motor vehicle dealer franchise laws are designed for the "promotion of fair dealing" and "to prevent unfair or oppressive trade practices." See *American Motors Sales v. DMV, et. al.*, 592 F.2d 219, 222 (4th Cir. 1979), quoting from *New Motor Vehicle Board v. Orrin W. Fox Co.*, 99 S.Ct. 403 (1978).

Less guidance is available, however, for the factors that I should consider to determine whether an independent dealer is available in the community. The Commissioner is simply instructed to make a decision after a hearing on the issue. It has been the experience of this agency that when a hearing under *Va. Code* § 46.2-1572(4) is requested, there has been at least one dealer who has argued it could own and operate a dealership for the manufacturer in a manner consistent with the public interest. In this case, no candidate has stepped forward to suggest that it could operate as an independent dealer. The presence of an available candidate is not, however, a pre-requisite to a hearing under *Va. Code* § 46.2-1572(4) or the sole criteria to my determination.

Further complicating the issue, *Va. Code* § 46.2-1572(4) requires the Commissioner to determine whether there is *no* dealer independent of the manufacturer available. In order to make that determination, I require sufficient evidence to show that no one other than the manufacturer can operate the franchise in a manner consistent with the public interest. The factors affecting my determination and the extent to which parties present evidence depend on the circumstances of each case.

In this case, Tesla claims that the nature of its dealerships would not be acceptable or profitable to dealer candidates. Its business model differs from traditional car dealerships in several ways: the dealership would consist only of a showroom called a "design studio," with no inventory available for immediate sale; customers would learn about Tesla vehicles using touch-screen monitors, an in-store model, and vehicles available for test driving; the dealerships contain a limited number of employees; the dealerships would not have a service department; the dealerships would not sell used vehicles or accept trade-ins; and customers will have to wait up

¹ It should be noted that obtaining approval under *Va. Code* § 46.2-1572 from DMV is only the first step in the process of a manufacturer operating a motor vehicle dealership. Once approval has been obtained from DMV under *Va. Code* § 46.2-1572(4), the manufacturer must still apply for a license from the Motor Vehicle Dealer Board and must meet all the statutory prerequisites for such a license. This decision does not express any opinion regarding whether Tesla is entitled to such a license since the issuance of such a license is in the sole discretion of the Motor Vehicle Dealer Board.

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to six months to take delivery. Tesla stressed that the dealerships would involve a large financial investment with little profit margin. Finally, the sophistication of the electronic technology in the vehicles requires highly-specialized mechanics.²

VADA avers that that Tesla has not shown its vehicles to be so unique, require special training or skill to sell or repair, or such an investment that a dealer could not be found to sell such vehicles. While the Tesla business model is different from a traditional motor vehicle dealership, it is not so unusual that some candidate might not be willing to meet those requirements.

There is no information in the record pertaining to dealer candidates. Prior to the hearing, Tesla placed a notice in the classified sections of the Washington Post on June 11, 2012, and the Washington Times on June 13, 2012. The notices alerted readers of a hearing at DMV to determine whether Tesla may be licensed as a dealer and that the hearing would address whether any other dealer is available to operate the dealership in a manner consistent with the public interest. After I asked for additional arguments, the parties agreed that no further notices were necessary.

Fairfax County is consistently ranked as one of the wealthiest localities in the United States. It has a dense population containing many sophisticated and intelligent business persons. Yet, the record reflects no information regarding research into the availability of a dealer other than Tesla in the relevant market area. Tesla has provided testimony on the *improbability* of available dealers, citing general technical and business concerns. Neither Tesla nor VADA have provided information specific to dealer candidates in the market area or of any effort to locate and assess such candidates.

Finally, Tesla's arguments and the testimony in the hearing center on why a traditional motor vehicle dealer would not be able to operate a Tesla design studio. I understand that the Tesla design studio will not be a traditional dealership and Tesla will tightly control the overall look and presentation of its dealership. The question before me is not whether a person skilled in operating a traditional dealership is available to operate a Tesla store. Rather, to meet the exception to the basic rule against manufacturer-owned dealerships, I must determine that no one else can operate, in the public interest, a Tesla dealership, whatever the particular parameters of such a dealership may be. The fact that a person able to operate a traditional dealership might not be willing to operate a Tesla dealership is not determinative of the question before me.

CONCLUSION

After careful review and consideration of the entire record, I am unable determine that no dealer independent of Tesla is available in the community or trade area to own and operate a dealership franchise in a manner consistent with the public interest.

² As noted above, this decision does not express any opinion regarding whether Tesla is entitled to a license issued by the Motor Vehicle Dealer Board.

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Tesla has shown that its business model for dealerships is unique and outside the traditional model of motor vehicle dealerships in Virginia. In light of that fact, I need more comprehensive information than has been provided to make a reasonable determination. I cannot determine that there is no dealer independent of Tesla available in the community to own and operate the franchise in a manner consistent with the public interest without further evidence of an effort to identify or solicit candidates in the relevant market that could operate a Tesla dealership in a manner consistent with the public interest. Therefore, I am unable at this time to authorize Tesla to operate a dealership in Virginia. This decision does not preclude Tesla from requesting a new hearing based on additional evidence pursuant to *Va. Code* § 46.2-1572.

Any party has the right to appeal this decision to an appropriate Virginia Circuit Court, in accordance with *Va. Code* § 2.2-4025, *et seq.*, and Part 2A of the Rules of the Supreme Court of Virginia. In order to do so, the party must file a notice of appeal with the Agency Secretary, Department of Motor Vehicles, Post Office Box 27412, Richmond, Virginia 23269-0001, within 33 days from the date of this decision, and then file a petition for appeal in the circuit court within the time set out in Part 2A of the Rules. Filing an appeal does not automatically prevent the decision from becoming effective. If no party files a notice of appeal in a timely manner, this decision will become final and unappealable.

Issued in the Office of the Commissioner of the Department of Motor Vehicles in Richmond, Virginia.



Richard D. Holcomb

RDH: apo

C: W. James Dangoia, Hearing Officer
Bruce Gould, Executive Director, MVDB

Exhibit B

Both Tesla Motors, Inc.'s ("Tesla") business model and vehicle models it produces are unique in the automotive industry in many respects including, but not limited to, the following:

(1) Tesla produces only all electric, highway capable motor vehicles with the longest range of any electric vehicle on the market today (i.e., up to 265 miles of range based on EPA testing). Tesla's vehicles are powered by a unique and proprietary all electric powertrain that is developed in house by Tesla.

(2) Because Tesla's all-electric vehicles are so new and novel with features not seen in traditional automobiles, sales of these vehicles require the ability to educate customers regarding the technology involved. Vehicles that incorporate all the features of Tesla electric vehicles are not being manufactured anywhere else in the world. Tesla is a relatively new manufacturer of a specialized vehicle.

(3) Tesla has been in existence since 2003, however, its currently produced vehicle, the Model S, has been in commercial production since June 2012.

(4) Tesla has no independent dealers or distributors in any jurisdiction in the United States.

(5) Tesla is currently a licensed dealer of motor vehicles in many states.

(6) Tesla has the expertise, experience, work force, equipment, and resources to operate as a full-service automobile dealer for Tesla products in Virginia.

(7) Tesla dealerships do not maintain any significant inventory of vehicles for sale.

(8) Tesla has limited production volumes and a low volume of sales.

(9) Sales of Tesla vehicles typically begin with an individual customer's custom order. Vehicles that Tesla manufacture are made to the individual customer's specifications.

(10) After a customer places an order, it takes up to 120 days or more for the ordered vehicle to be delivered to the customer.

(11) Tesla is unaware of any independent dealer in the United States that sells only all-electric vehicles.

(12) Tesla locates its dealerships in expensive real estate areas and incurs high costs required for build out of store design.

(13) As a result of the sophistication and complexity of Tesla vehicle's electronic technology and systems, even ASC certified mechanics are not qualified to do service or repair work on the electronic portions of Tesla vehicles.

(14) Tesla dealerships perform a minimal level of maintenance and service work, but must make a large investment in specialized service tools.

(15) Tesla dealerships do not sell used motor vehicles of other makes.

**VIRGINIA
AUTOMOBILE
DEALERS
ASSOCIATION**



September 10, 2013

The Honorable Richard D. Holcomb
Commissioner
Virginia Department of Motor Vehicles
2300 West Broad Street
Richmond, VA 23269-0001

Re: Tesla Request for Exception to Virginia Code §46.2-1572

Dear Commissioner Holcomb:

As you know, The Virginia Automobile Dealers Association participated in the proceeding before the Department of Motor Vehicles concerning the request by Tesla Motors, Inc. for a dealer license under an exception in Virginia Code §46.2-1572.

VADA has agreed in the interest of administrative and judicial efficiency and the public interest to set aside the concerns we raised in the proceeding to enter an agreement between Tesla, DMV and the VADA and resolve the pending matter.

Sincerely,

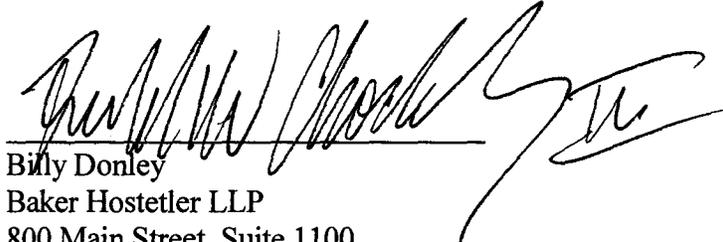
A handwritten signature in black ink that reads "Donald L. Hall".

Donald L. Hall
President and CEO

P.O. BOX 5407
RICHMOND, VA 23220-0407

PHONE 804.359.3578
FAX 804.358.8036

SEEN AND AGREED:


Billy Donley
Baker Hostetler LLP
800 Main Street, Suite 1100
Houston, Texas 77002

Frederick W. Chockley III (VSB No. 21982)
Baker Hostetler LLP
1050 Connecticut Avenue, NW, Suite 1100
Washington, D.C. 20036
Telephone: 202-861-1680
Counsel for Petitioner

SEEN AND AGREED:


KENNETH T. CUCCINELLI, II
Attorney General of Virginia

Jeffrey Allen
Senior Assistant Attorney General

Steven P. Jack (VSB No. 65580)) Please mail all correspondence to this addressee.
Assistant Attorney General)
Office of the Attorney General)
900 East Main Street)
Richmond, Virginia 23219)
Telephone: 804-371-2381
Facsimile: 804-692-1647
Counsel for Respondent