

THE WANADA BULLETIN

NEWS AND INFORMATION FOR AND ABOUT FRANCHISED NEW CAR DEALERS IN THE WASHINGTON AREA

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WANADA Celebrates Black History Month

In 1939 Prince George's County landowner McCager Mills met with Doffrey Jones, then manager of the Washington Blacksox, a semi-professional African American baseball club in the area. He agreed to construct a baseball diamond, dugouts and a grandstand on his property where the team would play their games until 1947, including against the Negro League's Homestead Grays and Baltimore Black Sox. He could not have known, of course, that the site would one day become an African American owned car dealership, Nissan of Bowie.



Damon Lester

Though America certainly has a long way to go to achieve something resembling racial equality, moving from a society where African Americans are barred from participating in pro sports leagues to one in which they are pillars in all aspects of life is undoubtedly progress. WANADA Director Damon Lester, Nissan of Bowie's owner and the president of the National Association of Minority Automobile Dealers (NAMAD), agrees. "Access, opportunity, and capital are all challenges to enter our industry, and this is especially true for ethnic minorities as we weren't allowed to become dealer owners until post civil rights movement," Lester said. "When the playing field is level, we all win. Diversity in any industry equals growth."

Black History Month is an annual celebration of achievements by African Americans and a time for recognizing their central role in U.S. history. Additionally, it is important to recognize the role that African Americans play in the DC region's retail automobile industry. WANADA joins dealer associations across the country in saluting its African American dealers and dealership employees during Black History Month and echoes [NADA's commitment](#) to diversity, equity and inclusion.

Mike Charapp: On Disclaimers and OEM Price Restraints

Nationally renowned attorney-at-law Michael Charapp, now at Mahdavi, Bacon, Halfhill, & Young, PLLC, has long been on the leading edge of issues related to dealership compliance. Given the current market conditions, driven by lower inventories and higher demand on in-stock units, Mr. Charapp has prepared two invaluable articles related to MSRP. WANADA has received permission from Mr. Charapp to reprint the articles in full below because of their timeliness and utility. If you are interested in seeking legal advice from Mr. Charapp on these or any other topics, he may be reached at mcharapp@mbhylaw.com or (703) 352-1300.

Mythbusters: Effects of a Disclaimer

Dealers often face a dilemma when advertising prices of vehicles. Competitors unlawfully advertise at prices at which they will not deliver vehicles, which in today's market are scarce. Dealer personnel feel they must meet or beat that price, and they advertise at a price at which they do not intend to sell the vehicle.

When confronted, dealer personnel claim they can do this if they use a disclaimer that the actual selling price of the vehicle may be higher because of prevailing market conditions. They believe the warning in the disclaimer solves the unrealistic pricing issue.

That is a myth, and it is **busted**.

It is basic law of the FTC and states that if you advertise a price, vehicles (or at least one if you advertise by stock number) must be available at that price. Advertising at a price intending to sell it for a higher price is an act of bait and switch, the cardinal sin for the FTC and under state unfair and deceptive acts or practices statutes.

For the FTC, bait and switch is a deceptive sales tactic in violation of section 5 of the FTC act that prevents unfair or deceptive acts or practices. Most state laws prevent the same activities. For example, the law in Virginia is typical and makes it an unfair, deceptive, or misleading act or practice to use bait advertising:

"Bait" advertising, in which an advertiser may have no intention to sell at the price or terms advertised, shall not be used. By way of example, but not by limitation:

- a. If a specific vehicle is advertised, the seller shall be in possession of a reasonable supply of said vehicles, and they shall be available at the advertised price. If the advertised vehicle is available only in limited numbers or only by order, that shall be stated in the advertisement. For purposes of this subdivision, the listing of a vehicle by stock number or vehicle identification number in the advertisement is one means of satisfactorily disclosing a limitation of availability.
- b. Advertising a vehicle at a certain price, including "as low as" statements, but having available for sale only vehicles equipped with dealer added cost "options"

which increase the selling price, above the advertised price, shall also be considered "bait" advertising.

Far from curing the bait and switch problem, a disclaimer warning consumers that vehicles may be sold at higher prices because of prevailing market conditions will actually make the problem worse. Regulators will use that as proof that the dealership did not intend to sell vehicles at the prices advertised.

A disclaimer is used to explain the advertised terms. It cannot be used to negate the advertising. You must be prepared to sell vehicles at the prices advertised.

Mythbusters: OEMs Setting Prices

Dealers are facing increased pressure from their OEMs to limit selling prices of certain vehicles – usually new model battery electric vehicles (BEVs) – to MSRP. Dealers, who for years have struggled to eke out a profit in competition with other dealers, feel they should be free to sell at whatever price they can get. After all, they reason, MSRP is “SUGGESTED”. They argue that any agreement they would have with their competitors could land them in jail for price fixing, so how can OEMs fix prices?

The answer comes from a U.S. Supreme Court case decided in 2007. That an OEM may not impose price restraints on its dealers is a myth that is **busted**.

A Texas retailer, Kat’s Kloset, sold purses known as “Brighton bags” at a discount. The California manufacturer refused to continue to supply the retailer because the shop violated the manufacturer’s policy against discounting. A Texas jury ruled that the supplier had engaged in unlawful resale price maintenance and awarded \$4 million to Kat’s Kloset. A federal appeals court upheld the decision. The United States Supreme Court agreed to review that.

Resale price maintenance, a form of price fixing, had been a “per se” violation of the anti-trust laws for nearly a century, dating back to the 1911 U.S. Supreme Court ruling in Dr. Miles Medical Company v. John. D. Park & Sons. For a per se violation, a jury only has to find that the price fixing took place to find that the law was violated. It need not determine whether there was an unreasonable impact on competition.

In Leegin Creative Leather Products, Inc. v. PSKS, Inc. d/b/a Kat’s Kloset, the Court ruled that the century old doctrine prohibiting suppliers from imposing price restrictions on products they sell under the per se doctrine of the anti-trust laws is no longer the law. The court ruled that such restraints must be considered by the rule of reason to determine anti-competitive impact.

What does this mean for the car business today? Franchisor price restrictions are not automatically illegal. If a dealer wants to challenge such a restriction, a court must now consider the policy on a case-by-case basis to determine the impact on competition, a very stringent test. That is especially the case for BEVs where the OEM will argue that what they consider price gouging will negatively affect the OEM’s attempt to build its BEV acceptance in a very competitive market.

Dealers – horizontal competitors – may not agree on selling prices or terms because those agreements are still per se violations of the antitrust laws. But price restrictions imposed by an OEM on its dealers – vertical price restraints -- are not per se illegal, and OEMs will use them as

they see fit to limit prices at which vehicles may be sold or to prohibit advertising at discount prices.

RSVP for the WANADA Reception at NADA

If you're attending the NADA Show this year in Las Vegas, be sure to [RSVP](#) for WANADA's reception. The formerly "tri-association" reception will now bring together four dealer groups, as the Kentucky Auto Dealers Association will join WANADA, MADA and VADA for the first time. The reception will be held on Friday, March 11 from 6:30 – 8:30 p.m. at Alexxa's inside the Paris Hotel. WANADA would like to thank the event's generous



sponsors: ACV Auctions, Armatus Dealer Uplift, Cox Automotive, DealerTrack, Doyle Construction, HHM, Naked Lime, Penney Design Group, Sherwin Williams, Reynolds & Reynolds, Rifkin Weiner Livingston LLC, TrueCar, Truist, and Zurich.

[Click here](#) to RSVP today!

DC DMV Update

In their [most recent dealer newsletter](#), DC DMV noted that they are now using the National Motor Vehicle Title Information System (NMVTIS) to verify vehicle titles. NMVTIS is a nationwide vehicle title database which allows titling jurisdictions to instantly and reliably verify vehicle titles with the jurisdictions that previously issued them.

NMVTIS is designed to protect consumers from fraud and unsafe vehicles and to keep stolen vehicles from being resold. NMVTIS is also a tool that assists jurisdictions and law enforcement in deterring and preventing vehicle title fraud and other crimes.

When processing vehicle titles and registrations, DC DMV will be using NMVTIS to verify the vehicle title history for both new and used vehicles. If there is some historical error or unverifiable data on a vehicle's NMVTIS inquiry, the title and registration transaction package will be returned to the dealer for correction and resolution.

In other news, please note that DC DMV will accept work for a "Title Only" if a vehicle needs titling with being registered or plated. Please note that their Online Dealer Interface System (ODIS) is not currently programmed for title-only transactions, but they are working on adding this feature. ODIS is DC DMV's electronic titling system. If you are currently sending hard-copies of work to DC DMV via mail and/or couriers and are interested in signing up for ODIS, please contact Joe Koch at jk@wanada.org or 202-821-5824 who can connect you with the appropriate persons within DC DMV to begin the process.

Update Your Membership Info Today!

Now that it's officially 2022, it's important that all membership information that WANADA has on file be reviewed and updated accordingly. Often we find that membership records can have outdated information, including old email addresses or even "usual representatives" that are no longer with your company. It is incumbent on each member to ensure that the information is correct.

WANADA now uses a system called "Member Leap" to manage all membership information, including billing. Please [click here](#) to access Member Leap to review your membership info and pay any outstanding invoices. Each company's Usual Representative should have received an email from Member Leap to pay 2022 dues as well.

If you have any questions about your membership record or Member Leap, please contact Kathy Teich at kt@wanada.org or 202-800-4190.

WANADA Insurance: Now Accepting ACH Payments

The WANADA Insurance Department is pleased to announce that ACH payments can now be accepted for all WANADA Trust products. The WANADA Trust utilizes volume discounts for certain employee benefits, including dental, life, disability and vision, to offer the most affordable pricing in the marketplace from nationally recognized carriers and providers.

"Because we specialize in car dealerships and have these exclusive deals within our Trust, there is truly no competition for pricing and service when it comes to these benefits," said WANADA Vice President of Insurance Ed Mullaney. "Even if a dealership gets their medical coverage through another broker, they should look at the WANADA Trust for dental, life and disability and/or vision insurance because we're confident we can save any dealership a lot of money."

For more information about the WANADA Trust or, if you are an existing client and would like to set up ACH to pay your WANADA Trust invoices, please contact Ed Mullaney or Connie Ryan at 202-237-7200 or em@wanada.org and cr@wanada.org respectively.

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