

Judicial Review

Either the Protestant/Petitioner/Appellant or Respondent seeks judicial review of the Board's Decision or Final Order by way of a petition for writ of administrative mandamus (Code of Civil Procedure § 1094.5)

1. LEEHAN, INC. dba HANLEES HILLTOP NISSAN, Petitioner v. CALIFORNIA NEW MOTOR VEHICLE BOARD, Respondent, NISSAN NORTH AMERICA, INC., Real Party in Interest.

California Superior Court, Sacramento County Case No. 34-2011-80000897; New Motor Vehicle Board Case No. CRT-253-11, Protest No. PR-2291-11

Background: Protestant Hanlees Hilltop Nissan (Hanlees) filed a protest with the Board on February 25, 2011, alleging that Respondent Nissan North America, Inc. (Nissan) improperly charged back and refused to pay incentive monies to Hanlees in the amount of approximately \$60,000.00. On April 1, 2011, Nissan filed a motion seeking dismissal of Hanlees' protest based on Nissan's contention that Hanlees' protest was untimely, in that Hanlees allegedly failed to file the protest within one year after receiving notice of Nissan's disapproval of Hanlees' incentive claims. Nissan's motion was heard by Administrative Law Judge Diana Woodward Hagle, and on May 4, 2011, Judge Woodward Hagle issued a Proposed Order granting Nissan's motion. At its regularly scheduled meeting on May 26, 2011, the Board modified the Proposed Order (without changing the result) and adopted the Proposed Order as modified as the Board's final Decision in the matter.

On June 24, 2011, Hanlees (acting in its corporate name, Leehan, Inc.) filed a Petition for Writ of Administrative Mandamus, in the California Superior Court for Sacramento County. The petition seeks a judgment (i.e., writ of mandate) that would (a) set aside and vacate the Board's decision and order of May 26, 2011, and (b) deny Nissan's motion of April 1, 2011 (discussed above). A hearing on the petition has been scheduled to begin at 1:30 p.m., on Friday, January 13, 2012, in Department 42 of the Superior Court.

It has been determined that there is no substantial state interest at issue, thus the Board will not be participating in this action.

2. POWERHOUSE MOTORSPORTS GROUP, INC. and TIMOTHY L. PILG v. YAMAHA MOTOR CORP, INC.; POWERHOUSE MOTORSPORTS, Petitioner v. NEW MOTOR VEHICLE BOARD, Respondent, YAMAHA MOTOR CORP INC., Real Party in Interest.

Second Appellate District Court, Ventura Division, Case No. B230699; San Luis Obispo Superior Court No. CV09-8090; New Motor Vehicle Board Case No. CRT-249-09, Protest No. PR-2122-08

On June 5, 2009, the Board upheld a May 22, 2009, proposed Order granting Yamaha's Motion to Dismiss Powerhouse's Protest against termination of its franchise. The Order found that Powerhouse had failed to timely file its Protest

and Powerhouse failed to establish that Yamaha was estopped from terminating the dealership.

The original complaint, filed March 6, 2009, alleges Yamaha unreasonably withheld its consent for Powerhouse to transfer its dealership in violation of Vehicle Code section 11713.3, intentionally interfered with Powerhouse's contractual relations, intentionally interfered with Powerhouse's business advantage, and breached its contract with Powerhouse. Identical causes of action were alleged in behalf of dealer principal Timothy L. Pilg. In its First Amended Complaint, filed July 7, 2009, Powerhouse added a Petition for a Writ of Administrative Mandamus challenging the Board's June 5, 2009, Final Decision Dismissing Protest No. PR-2122-08. The Petition seeks to reverse the Board's Final Decision alleging the Board prejudicially abused its discretion and exceeded its jurisdiction.

On July 23, 2009, Board President Flesh determined the Board would not participate in the action by means of the Attorney General's Office. The matters before the court: a Motion to Strike, a Motion to Bifurcate, and a Demurrer to the First Amended Complaint were heard November 17, 2009, resulting in a Final Ruling denying the Demurrer and the Motion to Strike. The Motion to Bifurcate was granted, the court ruled that the Writ Petition would be tried by the court separately prior to the other causes of action and further stayed all discovery until the conclusion of the Writ action. At a December 23, 2009, trial setting conference the Writ was set for hearing on April 15, 2010, at 9:00 a.m. in Department P-2. On the Court's own motion the hearing on the Writ was continued until June 11, 2010. Yamaha prevailed on the Writ action. Mediation on December 2, 2010, was unsuccessful.

A Hearing on a Motion for Summary Judgment was held on January 4, 2011. The court initially took the matter under submission and on January 31, 2011, entered a ruling denying Yamaha's motion for summary judgment and in the alternative summary adjudication. The ruling is adverse to the Board's jurisdiction and the Judge indicated that the Board does not have jurisdiction over protests and "...invocation of the Board's limited authority [is] optional..."

A jury trial scheduled for February 7, 2011, on the remaining causes of action, was continued to February 14, 2011, and then continued to May 31, 2011. On February 7, 2011, Yamaha filed in the Second Appellate District Court a "Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief". The Board in consultation with Jeffrey Schwarzschild, Deputy Attorney General and Augustin Jimenez, General Counsel, Business, Transportation & Housing Agency ("Agency") filed a declaration containing statistical information on the types of actions filed with the Board, i.e., protests, petitions, and appeals. On February 10, 2011, the court denied the writ because "...petitioner neglected to cite or argue the application of Vehicle Code section 3050, subdivision (e), and *South Bay Creditors Trust v. General Motors Acceptance Corp.* (1999) 69 Cal.App.4th 1068, 1079-1080. Yamaha re-filed the writ with the above references and arguments on February 14 along with the Board's declaration. On February 17, 2011, the court denied the writ and request for stay.

On February 28, 2011, Yamaha filed a Petition for Review in the California Supreme Court. The Board received the necessary approvals from Glenn Stevens, the Public Members of the Board, Agency, and the Governor's Office to file an amicus curiae letter in support of Yamaha's petition for review on the jurisdictional issue of whether final Board decisions are binding with regard to other legal proceedings when the underlying writ concerning the final Board decision is denied, or whether these decisions are subject to re-litigation in a subsequent court action. The amicus curiae letter was filed on March 9, 2011. On April 13, 2011, the California Supreme Court denied Yamaha's Petition for Review and Application for Stay. In a letter dated May 5, Yamaha requested that the superior court review the Board's amicus curiae letter. Counsel for Yamaha indicated that it will subpoena Robin Parker to testify concerning the content of the amicus curiae letter around May 31 or June 1. Agency has been apprised of this.

A multi-day jury trial began on May 31, 2011. After being subpoenaed by Yamaha, Robin Parker testified on June 13. The jury awarded Powerhouse and Mr. Pilg \$1,136,000 in compensatory damages and \$200,000 in punitive damages. During the course of the trial, the bankruptcy trustee (Namba) was substituted for Mr. Pilg.

A briefing schedule was set on Yamaha's judgment notwithstanding the verdict and motion for new trial. An in-person hearing was held on August 2, 2011. Both motions were denied. Counsel for Yamaha indicated that a notice of appeal would be filed.

Plaintiffs filed a "Motion for Prejudgment Interest under Civil Code section 3287(a), or in the Alternative, Civil Code section 3287(b)." A hearing was held on August 9, 2011. The tentative order concluded that attorneys' fees are allowed under Vehicle Code section 11726(a) but not under the contract. Plaintiffs requested \$703,000 adjusted upward by a 1.7 multiplier. The court indicated this amount will be reduced by the fees incurred in connection with the protest and petition for writ of administrative mandate.

Yamaha filed a "Motion to Tax Costs Requested by Plaintiff's". This matter was resolved by counsel based on the court's ruling on the attorney's fees.

Powerhouse sought to enforce the \$2,175,000 judgment against Yamaha prior to the time period for Yamaha to file an appeal, i.e., October 17, 2011. On September 7, 2011, Yamaha filed an Ex Parte Application for an Order Staying Enforcement of Judgment. A hearing was held on September 8, 2011. The motion was granted and enforcement of the judgment was stayed until October 17.

3. SERPA AUTOMOTIVE GROUP, INC., Petitioner v. NEW MOTOR VEHICLE BOARD, Respondent; VOLKSWAGEN OF AMERICA, INC., Real Party in Interest. Tulare Co. Sup. Court (Visalia Division) No. 06-221437, New Motor Vehicle Board Case No. CRT-241-06, Protest No. PR-1977-05

This writ petition was filed on November 13, 2006. It challenges the Board's Final Decision, of September 28, 2006, which overruled Protest No. PR-1977-05,

thereby allowing the termination of Petitioner's Volkswagen franchise.

The writ petition alleges the Board committed a prejudicial abuse of discretion and failed to proceed in a manner required by law in that the Decision is not supported by the findings, and the findings are not supported by the facts (Code Civ. Proc. §1094.5). Petitioner bases its arguments on an incorrect independent judgment standard of review, rather than the substantial evidence standard. It has been determined that there is no substantial state interest at issue, thus the Board will not be participating in this action via the Attorney General.

On November 21, 2006, Petitioner filed a request to stay the Board's Decision pending the outcome of the Writ Petition. On December 21, 2006, Volkswagen filed its Answer to the Writ. The Clerk's office at the Tulare County Superior Court, states that there has been no activity in the case since January 2007, and there are no future dates set in the matter. *Board counsel contacted the Court on September 9, 2011, and learned that the matter remains pending, but with no activity scheduled. On September 9, 2011, Board counsel attempted without success to contact Philip Bourdette, counsel for Petitioner.*