NEW MOTOR VEHICLE BOARD
1507 – 21ST Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of D&A AUTOMOTIVE, O.C. GENUINE SCOOTERS OF SANTA ANA, Protestant, v. GENUINE SCOOTERS, Respondent.	**Protest No. PR-2355-12** **RECOMMENDATION THAT RESPONDENT'S MOTION TO DISMISS BE GRANTED** **PROPOSED ORDER GRANTING RESPONDENT'S MOTION TO DISMISS**
In the Matter of the Protest of D&A AUTOMOTIVE, O.C. GENUINE SCOOTERS OF TUSTIN, Protestant, v. GENUINE SCOOTERS, Respondent.	**Protest No. PR-2356-12**

To: Terry Tuchman
In Pro Per
O.C. GENUINE SCOOTERS OF SANTA ANA
230 E Dyer Road #E
Santa Ana, California 92707

Terry Tuchman
In Pro Per
O.C. GENUINE SCOOTERS OF TUSTIN
15401 Redhill Avenue #G
Tustin, California 92780

Michael J. Flanagan
Gavin M. Hughes
Attorneys for Respondent
LAW OFFICES OF MICHAEL J. FLANAGAN
2277 Fair Oaks Boulevard, Suite 450
Sacramento, California 95825

1. This matter came on regularly for telephonic hearing on Friday, June 28, 2013, before Anthony M. Skrocki ("ALJ Skrocki"), Administrative Law Judge for the New Motor Vehicle Board ("Board"). Mr. Terry Tuchman, Pro Per, represented Protestants. Gavin M. Hughes, Esq. of The Law Offices of Michael J. Flanagan represented Respondent. Ms. Peggy Tuchman, daughter-in-law of Mr. Terry Tuchman, was also telephonically present with Mr. Tuchman. Upon inquiry at the request of counsel for Respondent, Ms. Tuchman stated she was present merely as an observer and did not intend to participate in the hearing in behalf of Protestants.

2. The matter before the Board now is whether the Board should grant Respondent's Motion to Dismiss the two protests because of:

(1) The failure of Protestants to attend the Mandatory Settlement Conference and;

(2) The failure of Protestants to comply with their discovery obligations in accordance with the Board's Pre-Hearing Conference Order.

FACTUAL AND PROCEDURAL BACKGROUND

3. Protestant D&A Automotive, O.C. Genuine Scooters of Santa Ana ("Genuine Scooters of Santa Ana") is located at 230 E Dyer Road, #E, Santa Ana, California. Protestant D&A Automotive, O.C. Genuine Scooters of Tustin ("Genuine Scooters of Tustin") is located at 15401 Red Hill Avenue,

///

///

///

////

#G, Tustin, California. Protestants[1] are new motor vehicle dealers and authorized franchisees of Genuine Scooter. (Protest No. PR-2355-12, p. 1; Protest No. PR-2356-12, p. 1)

4. Protestants are represented by Terry Tuchman, dealer principal, in pro per.

5. Respondent Genuine Scooter Company ("Respondent" or "Genuine Scooter") is a licensed manufacturer and the franchisor of Protestants. Genuine Scooter is located at 5400 N. Damen Avenue, Chicago, IL.

6. The initial appearance in behalf of Genuine Scooter before the Board was by Carl T. Duren, III, an employee of Genuine Scooter. On April 2, 2013, The Law Offices of Michael J. Flanagan, Michael J. Flanagan, Esq. and Gavin M. Hughes, Esq., 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California, began representing Respondent.

7. By letter dated November 28, 2012, Genuine Scooter gave notice to Protestants and the Board of General Scooter's intent to establish a dealer "of the same line-make within the relevant market area of your dealership #35537..."[2] The original of the notice was sent to O.C. Genuine Scooters of Tustin with a "cc" sent to O.C. Genuine Scooters of Santa Ana.

8. On December 14, 2012, Genuine Scooters of Santa Ana (Protest No. PR-2355-12) and Genuine Scooters of Tustin (Protest No. PR-2356-12) filed timely protests pursuant to the provisions of Vehicle Code section 3062.[3]

9. By order dated January 18, 2013, the protests were consolidated for purposes of hearing.

///

---

[1] At this stage of the proceedings, it is unclear whether there are two franchises with D&A Automotive as a franchisee of each, or just a single franchise authorizing one franchisee, D&A Automotive, to operate at two locations under separate fictitious names. The fact that D&A Automotive filed two protests indicates that the parties are treating the two locations as separately franchised dealerships with Genuine Scooters of Santa Ana" as a franchisee and "Genuine Scooters of Tustin" as a separate franchisee. Therefore, this Proposed Order will refer to Protestants in the plural. Whether Genuine Scooters of Santa Ana and Genuine Scooters of Tustin are part of one entity with two "DBAs" or separate entities with separate franchises has no effect upon this proposed order as the facts and law are applicable equally to either situation and the results reached would be the same.

[2] The "relevant market area" is defined in Vehicle Code section 507 which states: "The 'relevant market area' is any area within a radius of 10 miles from the site of a potential new dealership." Although the notice does not state a specific address for the proposed new dealership, the protests allege that the proposed dealership location is in Costa Mesa, California. There is no contention that either of the D&A Automotive locations is outside of the relevant market area of the intended new dealership. The specific address of the proposed additional dealership is not relevant to the issues presented by the Motion to Dismiss.

[3] All statutory references are to the Vehicle Code, unless noted otherwise.

THE ISSUANCE OF THE NOTICE OF MANDATORY SETTLEMENT CONFERENCE AND THE ISSUANCE OF THE PRE-HEARING CONFERENCE ORDER

10. A scheduled telephonic Pre-Hearing Conference was held on February 28, 2013.[4] Based upon the stipulations of the representatives of the parties during this conference (Mr. Tuchman for Protestants and Mr. Duran for Respondent), the Board, on March 5, 2013, issued both a "Notice of Mandatory Settlement Conference" and a separate "Pre-Hearing Conference Order".

THE NOTICE OF MANDATORY SETTLEMENT CONFERENCE

11. During the Pre-Hearing Conference with the Board's staff on February 28, 2013, Protestants' representative, Mr. Tuchman, and Respondent's representative Mr. Duran, agreed upon the date of April 3 to file and serve the required Settlement Conference Statement. Both representatives also agreed that the mandatory settlement conference would be held in Sacramento at the Board's offices on April 10, 2013.

12. These agreements were incorporated into the Board's "Notice of Mandatory Settlement Conference" issued on March 5, 2013 by the Board's Executive Director.

13. The Notice of Mandatory Settlement Conference required that the written Settlement Conference Statement "shall contain a detailed statement of facts, statement of issues, and a good faith settlement proposal".

14. Attached to the Notice of Mandatory Settlement Conference was a copy of the Board's standard form setting forth in detail what is expected of the parties in connection with the settlement conference and the sanctions that may be imposed if a party failed to appear or be prepared or have authority to settle. (See Section 3050.4)

FACTS RELATING TO THE FAILURE OF PROTESTANTS TO PARTICIPATE IN THE MANDATORY SETTLEMENT CONFERENCE

15. Genuine Scooter timely filed its Settlement Conference Statement with the Board along with a proof of service upon Protestants. However, no Settlement Conference Statement was filed with

---

[4] The Board's staff had scheduled the Pre-Hearing Conference on the earlier dates of January 3, 2013 and January 9, 2013, however the parties each time requested and agreed to continue the Pre-Hearing Conference. February 28, 2013, was the third date set for the Pre-Hearing Conference.

the Board in behalf of Protestants. These statements were due on April 3, 2013.

16. On April 4, 2013, the day after the date for submission of the Settlement Conference Statement was due, counsel for Respondent sent an e-mail to Mr. Tuchman confirming their April 4 discussion, that included the following: Respondent's counsel agreed not to oppose a late filing by Protestants of Protestants' Settlement Conference Statement; and confirming that Mr. Tuchman stated he would be attending the Mandatory Settlement Conference beginning at 10:00 a.m. on April 10.

17. Despite the above, and despite additional inquiries by the Board's Staff, no Settlement Conference Statement has yet been submitted in behalf of Protestants.

18. On April 8, 2013, two days before the date the settlement conference was to be held, the Board received a fax from Mr. Tuchman in which he requested a "30 day continuance of the settlement conference for my health. In addition, I am invoking my right to obtain legal counsel and bring them up to speed." The basis for deciding to seek legal counsel was asserted to be because Mr. Tuchman had been informed only as of April 4, 2013,[5] that Respondent had changed "from an In Pro Per status to obtaining legal counsel."

19. The fax from Mr. Tuchman included a "doctor's note" typed on a prescription pad and dated April 8, 2013, stating that Mr. Tuchman "is unable to travel due to medical condition. If you have any questions please call my office." The note contained the signature of the physician.

20. Mr. Tuchman, in other communications, stated that his "medical condition" that prevented travel was "vertigo".

21. On April 9, 2013, the day before the Settlement Conference was to occur, the Board issued its "Notice Taking Mandatory Settlement Conference Off Calendar". This notice, in its entirety

---

[5] Inconsistently, Mr. Tuchman, in a fax, stated that "I requested 30 days on or about March 17, 2013 to find council (sic). [This was over three weeks prior to the April 8 request based upon the same alleged need to find an attorney.] On April 17, 2013 I was able to secure council (sic)." Mr. Tuchman in later communications stated he had provided the name of Robin Boren-Coleman Sexton as his counsel in these matters, and complained that the Board had not made contact with her. The Board had never received any communications from Ms. Sexton informing the Board of her representation and when the Board contacted Ms. Sexton regarding the need for her to file a substitution of counsel, Ms. Sexton, on May 7, 2013, replied that although she had filed an action in Orange County Superior Court in behalf of Mr. Tuchman and Protestants against Genuine Scooter, "I am not representing Mr. Tuchman in the matter now before the New Motor Vehicle Board." Although these protests were filed on December 14, 2012, and despite requests from Mr. Tuchman for continuances for additional time to obtain counsel, as well as representations that counsel had already been obtained, as of this date, some seven months after the protests were filed, Protestants have not obtained counsel for the matters before the Board.

stated: "YOU ARE HEREBY NOTIFIED that the Mandatory Settlement Conference scheduled for Wednesday, April 10, 2013, at 10:00 a.m. (Pacific Time) is taken off calendar pending further order of the Board." Mr. Tuchman's request for a continuance was made on April 8, giving the representatives of Genuine Scooter only a day or at most a day and a half to cancel their travel arrangements from Chicago to Sacramento.

22. The Board's staff, in a communication to the parties dated April 8, 2013, instructed Mr. Tuchman to provide the Board with dates for a rescheduled settlement conference or to work with opposing counsel in doing so. No dates were provided by Mr. Tuchman.

23. Contrary to the subsequent claims of Mr. Tuchman, there was no language in the Notice Taking Mandatory Settlement Conference Off Calendar indicating, or that could be interpreted to indicate, that any of the events required by the Pre-Hearing Conference Order establishing the discovery schedule were affected by the notice regarding the settlement conference being taken off-calendar. There was no communication from the Board at any time indicating that the discovery schedule was affected by taking the settlement conference off calendar. The settlement conference dates and obligations were contained in a separate order from the Pre-Hearing Conference Order containing the discovery schedule.

FACTS RELATING TO THE FAILURE OF PROTESTANTS TO COMPLY WITH THE AGREED UPON AND BOARD ORDERED DISCOVERY SCHEDULE AS CONTAINED IN THE PRE-HEARING CONFERENCE ORDER OF MARCH 5, 2013

24. The Pre-Hearing Conference Order of March 5, 2013, established a discovery schedule, based upon an agreement of the parties that ordered the following:[6]

A. Filing and serving Requests for Production of Documents – no later than Thursday, March 21, 2013;

B. Filing and serving any objections to the other side's Requests for Production of Documents – no later than Wednesday, April 3, 2013;

---

[6] In *Nader Automotive Group, LLC, et al. v. New Motor Vehicle Board* ("Nader") (2009) 178 Cal. App. 4th 1478 the appellate court upheld a dismissal of a protest for the failure of Protestant to comply with authorized discovery. As the court pointed out in that case and as was done here, the discovery schedule had been set after stipulation of all parties to the dates. It is noted that the Pre-Hearing Conference here was held, and the stipulation as to the discovery schedule occurred, on February 28, 2013, with the time for filing the Requests for Production of Documents to occur on March 21, a period of 19 days. It is also noted that these protests had been filed in December 2012, over four months prior.

C. Requiring the representatives of the parties to meet and confer on Wednesday, April 17, 2013, to attempt to resolve their respective objections to the other sides requested discovery;

D. As to any Discovery Requests not resolved during the meet and confer of April 17, 2013; filing and serving a Statement of Disputed Discovery Requests no later than 12:00 p.m. on Friday, April 26, 2013;

E. Requiring the parties to participate in a telephonic conference to be held on Thursday, May 2, 2013 for ruling on any objections to requested discovery. Representatives for the parties were instructed to call "...(877) 402-9753 and enter access code no. 437282 to join the telephonic conference."

25. Although the Pre-Hearing Conference Order continued with additional discovery obligations and dates (discussed below), it was the failure of Protestants to participate in the May 2, 2013 telephonic conference with the ALJ to rule on any unresolved discovery request issues that led to the Board vacating the Pre-Hearing Conference Order and the filing by Respondent of the Motion to Dismiss that is presently before the Board.

26. The Pre-Hearing Conference Order of March 5, 2013, continued with additional dates establishing what must be done subsequent to the May 2, 2013 conference to rule on the parties objections to requested discovery. The subsequent events were ordered to occur as follows:

A. May 22, 2013, as the latest date for the parties to exchange documents to be produced;

B. May 29, 2013, as the latest date for filing and serving preliminary lists of witnesses intended to be called at the merits hearing of the protests;

C. June 5, 2013, as the latest date for filing and serving final lists of witnesses intended to be called at the merits hearing of the protests;

D. June 21, 2013, at 10:00 a.m. (Pacific Time) as the date and time for a Hearing Readiness Conference;

E. June 12, 2013, as the latest date for the parties to exchange expert reports and supporting documents;

F. June 26, 2013, as the latest date for the parties to exchange supplemental expert reports and supporting documents;

G. July 7, 2013, as the last date for the taking of depositions;

H. July 18, 2013, as the specific date for the parties to exchange hearing exhibits and demonstrative evidence.

DISCUSSION RE: THE IMPORTANCE OF COMPLYING WITH THE DISCOVERY SCHEDULE AS CONTAINED IN THE BOARD'S ORDER

27. As can be seen, the totality of the discovery schedule is quite detailed and all the events are dependent upon the timely occurrence of each of the events which are prior in time. It is noted that all of the above dates and events were initially chosen with the consent ("stipulation") of the parties (during the conference held on February 28 and thereupon were placed in an "order of the Board" (issued on March 5) with the goal being to keep the parties on track and preparing for the hearing on the merits of the protests tentatively set for July 22, 2013. If all proceeded as agreed and ordered, the Board, within 60 days of July 22, 2013, would have issued its Order of Time and Place of Hearing as required by Section 3066, setting July 22, 2013, as the date for the hearing on the merits of the protests.

THE EFFECT OF PROTESTANTS' FAILURE TO COMPLY WITH THE DISCOVERY OBLIGATIONS

28. Because Protestants had failed to comply with the earlier deadlines requiring the filing of their Requests for Production, the filing of Protestants' Objections to Respondent's Requests, followed by failing to participate in a meet and confer session, failing to submit a Statement of Disputed Discovery Requests, and failing to participate in the telephonic Conference to Rule on Disputed Discovery Requests), none of the discovery deadlines that were ordered to occur subsequent to the telephonic conference scheduled to be held on May 2, 2013 could occur. The agreed-upon, carefully crafted, and specifically ordered discovery schedule contained in the Pre-Hearing Conference Order was rendered a nullity by the failure of Protestants to act in accordance with its terms.

29. All of the obligations as stated in the Pre-Hearing Conference Order must occur timely or the necessary discovery will not be accomplished in an orderly or expeditious manner, and the failure of one party to comply with the terms of the order will preclude the ability of the other party to comply with the remainder of the order. This will render the Pre-Hearing Conference Order and the carefully constructed discovery schedule meaningless resulting in unnecessary and unreasonable delay in the

adjudication of protests. The effect of a failure to comply with the ordered (and orderly) discovery schedule is to permit what is a statutory stay (imposed by the legislature precluding the establishment of the additional dealership) to be prolonged by the conduct, or lack thereof, of a party who intentionally or even unintentionally fails to participate in the discovery process. Permitting a party to have such a "de facto power to extend the statutory stay" is of even greater concern if the party's conduct or lack thereof is in derogation of an order of the Board the purpose of which was to give the parties the time needed to prepare for the hearing that is required to resolve the dispute, and also comply with the need to keep the procedure on an expedited track.

30. As was said by the appellate court in *Nader*:

> The statutory scheme evinces the Legislature's intent to provide for an expedited procedure for resolving a protest by a car dealer. For example, upon receiving notice of termination from the car manufacturer, the dealer has from 10 to 30 days to file the protest. (§ 3060, subd. (a)(2).) Upon receiving the notice of protest, the board must fix a time for the hearing, "within 60 days of the order." (§ 3066, subd. (a).) The date may be accelerated or postponed on "good cause" "but may not be rescheduled more than 90 days after the board's initial order." (Ibid.) Among other things, the expedited timeframes that apply to protests promote finality, which benefits the public, car manufacturers, and car dealers, and reduces uncertainty in the minds of all parties. (See *Sonoma Subaru* v. *New Motor Vehicle Bd.* (1987) 189 Cal.App.3d 13, 21-22 [234 Cal.Rptr. 226].) It is not our job to pass on the wisdom of the expedited timeframes set by the Legislature. As our court has succinctly stated, "We cannot, by judicial fiat, extend what the Legislature has been careful to circumscribe." (Id. at p. 21.) (*Nader Automotive Group, LLC, et al. v. New Motor Vehicle Board* (2009) 178 Cal. App. 4th 1478, 1485)

31. Sanctions for violations of the Board's orders establishing discovery schedules are necessary and are discussed below. Otherwise violation of the Board's orders establishing discovery schedules would be the "norm" for any protestant desiring to maintain the status quo and preclude the intended establishment of an additional dealership, even though there may be a lack of good cause to preclude the establishment. Not imposing sanctions would improperly create in a party the power to extend the legislatively-created stay by the simple expedient of the failure of the party to participate in the needed discovery. In addition, delaying the procedure before the Board could impose severe hardship upon the intended franchisee who is likely also required to meet time limitations and incur expenses relating to the location, facilities, financing, etc. It is also possible that the delay itself could cause the intended establishment not to occur and deny the public the benefit of a needed additional dealership.

///

PROTESTANTS' FAILURE TO COMPLY WITH THE BOARD'S ORDER RE: DISCOVERY

PROTESTANTS' REQUESTS FOR PRODUCTION OF DOCUMENTS WERE NOT FILED WITH THE BOARD

32. The Board did not receive Protestants' Requests for Production of Documents that were to be filed with the Board no later than March 21. The Board's Pre-Hearing Conference Order of March 5, 2013, included the following: "Documents are deemed filed when the documents with attached proofs of service are received by the Board during regular business hours via hand delivery, e-mail, facsimile, regular mail, or overnight mail." (Underline added.) Protestants assert that the Requests for Production were faxed to the corporate offices of Respondent on March 21, but the Requests were not sent to or received by the Board.[7]

PROTESTANTS' OBJECTIONS TO RESPONDENT'S REQUESTS FOR PRODUCTION OF DOCUMENTS WERE NOT FILED WITH THE BOARD

33. Although Respondent did timely file its Requests for Production of Documents, the Board did not timely receive Protestant's Objections to Respondent's Requests for Production of Documents. Protestants' Objections were to be filed no later than April 3.

34. A copy of what purports to be Protestants' Objections was forwarded to the Board by Respondent's counsel on May 1, 2013. It is dated April 3, 2013 and appears to be directed to Respondent's corporate office.

35. On April 4, 2013, Mr. Tuchman, on behalf of Protestants, faxed a letter dated April 3, 2013, to Respondent's counsel.[8] The letter came from both Genuine Scooters of Santa Ana and Genuine Scooters of Tustin. As indicated below, the letter objected to Respondent's requests, indicated Protestants needed sufficient time to compile the requested documents, requested a 36 month continuance, and referenced its own requests for production of documents.

---

[7] Respondent was not represented by its current counsel, The Law Offices of Michael J. Flanagan, until April 2, 2013. A Notice of Appearance was filed with the Board on April 3, 2013.

[8] The Board received a copy of this fax from Respondent's counsel when the Board inquired of Respondent's counsel if it had received copies of Protestants' requests for production of documents. There were no exhibits attached nor was there a proof of service. Although the clerical staff "filed" this document on May 1, 2013; it should not have been filed because it did not come from Protestants, did not conform to the Board's regulations concerning the filing of pleadings (13 CCR §§ 594 and 595), and there was no proof of service attached.

36. The following is the text of the letter sent by Protestants to Respondent (not the Board).

...
State of California
New Motor Vehicle Board, In The matter of Protest of Genuine Scooters of Chicago, IL 60625
Protestant,
Vs. Genuine Scooters of Chicago, IL a LLC Co.
Respondent

Case No. # PR-2355-12

The respondent Genuine Scooters, LLC first request for production of documents

In the request for documents from Production No. 1 to Production No. 38

Mr. Trey Duren if you feel that you need from your list the production of documents from No. 1 to No. 38 for your case then I want the opportunity to produce each and every document possible. Since many of your demand documents far exceed the statue [sic] of limitations, and many need to be retrieved from my archives. Some of the documents requested need to be researched and reproduced. This process can take thousands of hours time. To adequately fulfill your requests to the best of my ability I need time.

I also feel that the 32 production of documents that I am requesting are pertinent to my case also may exceed the statue [sic] of limitations, and require you to dig in your archives, as well. Some of the documents will require you to conduct interviews, in person and over the telephone. Even more may require original signatures to authenticate.

Thus to be fair to both of us, I am requesting this case be continued for 36 months which hopefully will allow both of us to acquire all of the information requested.

If you refuse this continuance to occur then which is in the best interest for both of us, then, I am objecting to the following production of documents.

No. 2, No. 3, No. 4, No. 5, No. 7, No. 8, No. 9, No. 11, No. 12, No. 16, No. 17, No. 18, No 19, No. 21, No. 23, No. 24, No. 25, No. 26, No. 27, No. 28, No. 32, No. 33, No. 34, No. 37.

Exhibit A, Genuine Scooter LLC Request for production of documents
Exhibit B, D&A Auto, O.C. Genuine Scooters etal. [sic]

PROTESTANT FAILED TO PARTICIPATE IN THE MEET AND CONFER SESSION THAT WAS TO BE HELD ON APRIL 17, 2013

37. Protestants' representative failed to comply with the requirement that they meet and confer with Respondent's representative on April 17, 2013 to attempt to resolve their respective objections to requested discovery. Such a meet and confer session is usually done telephonically. In the hearing on the Motion to Dismiss, counsel for Respondent indicated that their attempts to communicate with Mr. Tuchman regarding the meet and confer requirement were not productive. (RT p. 7, line 2, and

p. 8 lines 1-3)

38. Because there was no meet and confer held, neither party filed a Statement of Disputed Discovery Requests. Such a document was intended to be filed after the meet and confer and was to list the disputed requests not resolved by the parties during the meet and confer. This document was required to be filed with the Board no later than April 26, 2013, to be used by the ALJ and the parties during the telephonic hearing to be held on May 2, 2013. Because of the lack of a "meet and confer session", neither party was able to provide a Statement of Disputed Discovery Requests.

PROTESTANTS FAILED TO PARTICIPATE IN THE TELEPHONIC CONFERENCE TO RULE ON THEIR REMAINING OBJECTIONS TO REQUESTS FOR PRODUCTION OF DOCUMENTS

39. The scheduled telephonic hearing to rule on the parties' respective objections to the other's discovery requests was to begin at 10:00 a.m. on Thursday, May 2, 2013, with ALJ Skrocki presiding. At the designated time, ALJ Skrocki was joined telephonically by Gavin M. Hughes, Esq. representing Respondent. There was no joinder by anyone in behalf of Protestants.

40. After waiting several minutes, the Board's Senior Staff Counsel, Robin Parker, was asked to join the telephonic conference and was then asked to attempt to make contact with Mr. Tuchman. Ms. Parker did make telephonic contact with Mr. Tuchman and then rejoined the telephonic conference with ALJ Skrocki and Mr. Hughes. Ms. Parker stated that Mr. Tuchman had informed her that he was not aware that the telephonic hearing had been scheduled for today but would call in to join it. ALJ Skrocki and Mr. Hughes waited until approximately 10:25 a.m. but Mr. Tuchman did not join the telephonic conference or otherwise make contact with the staff of the Board. In light of the failure of Protestants to engage in a meet and confer session, the absence of the needed documents from Protestants, and in light of the failure of a representative of Protestants to participate in the hearing, there was nothing that could be done to further proceed with the discovery process regarding the production of documents. On May 3, 2013, the Board's March 5, 2013, Pre-Hearing Conference Order was vacated. (May 3, 2013, Order Vacating March 5, 2013, Pre-Hearing Conference Order due to Protestants' Failure to File Documents and Participate in Hearing on Discovery Objections, pp. 2-3)

41 At the conclusion of the May 2, 2013 telephonic conference, Mr. Hughes stated that Respondent would be filing a Motion to Dismiss both protests due to the failure of Protestants to comply

with the Pre-Hearing Conference Order regarding discovery, including the failure of Protestants to participate in the telephonic hearing of May 2, 2013.

THE MOTION TO DISMISS

42. On May 24, 2012, Genuine Scooter filed this "Motion to Dismiss"[9] contending that the Protestants have been provided every opportunity to pursue these protests and/or to secure counsel to assist them in doing so but have "...all but abandoned [these matters] and at this point, the needless waste of both the Board's and Respondent's valuable time and resources must come to an end." (Respondent's Motion to Dismiss, p. 1)

43. On June 10, 2013, Protestants filed their Response to the Motion to Dismiss contending that they have been timely corresponding with Respondent's counsel and filing necessary documents as required. Furthermore, Protestants contend that the failure to participate in the telephonic ruling on objections on May 2 "...is invalid because such hearing was taken off calendar on April 8, 2013 via email communication to both parties." (Protestant's [sic] Response to Motion to Dismiss, p. 2) Protestants further contend that all documents requested have been provided and the protests should not be dismissed. (Protestant's [sic] Response to Motion to Dismiss, pp. 4, 7) [10]

44. Protestant's contentions are without merit. Protestants did not file any of the documents with the Board as required and only some of the documents were directed by Protestants to Respondent's counsel.

45. In addition, as to Protestants' contention that the proceedings before the Board were all taken off calendar, the only event taken off calendar, prior to the failure of Protestants to participate in the May 2, 2013 conference to rule on objections to requested discovery, was the settlement conference that was to be held on April 10. The settlement conference was taken off calendar solely because of Mr. Tuchman's "last-minute claim" of being unable to travel to Sacramento. The order of April 9, 2013,

---

[9] Respondent asserts that it waited three weeks to file its Motion to Dismiss to give Protestants the opportunity to obtain counsel and attempt to reconstruct the discovery schedule. As stated above, Protestants' have not obtained counsel for the proceedings before the Board.

[10] Mr. Tuchman also alleges that The Law Offices of Michael Flanagan should be disqualified from representing Genuine Scooter due to a conflict of interest. Mr. Tuchman contacted Mr. Flanagan on June 20, 2012 for advice and was charged and paid for one-tenth of an hour for legal services. Whether what was discussed and what relationship resulted from the discussion is sufficient to disqualify Mr. Flanagan's law office from representing Genuine Scooter is not within the limited jurisdiction of the Board to address.

was by its terms limited to taking off calendar only the settlement conference set for the following day, April 10, 2013. There was nothing submitted to the Board, or that could be implied from the physician's statement that Mr. Tuchman "is unable to travel due to medical condition", (described by Mr. Tuchman as vertigo) also incapacitated Mr. Tuchman from participating in the discovery process, including the telephonic hearing of May 2, 2013.

46. On June 17, 2013, Respondent filed its reply in support of its motion to dismiss contending that these protests have been pending for six months and are no closer to resolution than the day they were filed. Protestants refusal to pursue these protests continues to unduly prejudice Respondent. Respondent cites the following as examples of Mr. Tuchman's delay tactics on behalf of Protestants: 1. Computer and e-mail problems; 2. Health issues that had never previously been suggested might preclude Mr. Tuchman was participating at the scheduled mandatory settlement conference; 3. Failure to appear at the May 2 ruling on objections; and, 4. "A litany of false statements to the Board, the majority ex parte, concerning communications with Board staff and the Law Offices of Michael J. Flanagan." (Respondent's Reply to Protestant's [sic] Response to Motion to Dismiss, p. 2)

APPLICABLE LAW AND ANALYSIS

FAILURE TO ATTEND THE SETTLEMENT CONFERENCE

47. Section 3050.4 is applicable to settlement conferences. The statute states as follows:

> In a protest or petition before the board, the board, its executive director, or an administrative law judge designated by the board or its executive director, may order a mandatory settlement conference. The failure of a party to appear, to be prepared, or to have authority to settle the matter may result in one or more of the following:
> ...
> (b) The board, its executive director, or an administrative law judge designated by the board or its executive director, may dismiss the proceedings or any part thereof before the board with or without prejudice.
> ...
> (d) The board, its executive director, or an administrative law judge designated by the board or its executive director, may deem that the party at fault has abandoned the matter. (Underline added.)

48. Although Mr. Tuchman's last minute claim that he was prevented him from attending the settlement conference because of vertigo could give rise to suspicions as to why such a condition was not brought up sooner, the settlement conference was taken off calendar and the claim of vertigo cannot

be found by itself to have been made in bad faith or that it was false. However, it is noted that this was a "last-minute" claim and that when directed to provide the Board with other dates for a settlement conference, there was no attempt to do so.

49. Likewise, it cannot be found that Mr. Tuchman or Protestants have "abandoned the matter" as would be permissible pursuant to Section 3050.4(d). The conduct of Protestants is indicative of intent to delay the matter rather than abandoning the matter.

50. Therefore, the failure of Protestants' representative to attend the settlement conference ordered to be held on April 10, 2013, is not sufficient by itself to grant the Motion to Dismiss.

FAILURE TO COMPLY WITH AUTHORIZED DISCOVERY

51. Discovery procedures in Board proceedings involving protests are authorized by Section 3050.1(a) and (b). Section 3050.1(b) provides in part as follows:

> (b) For purposes of discovery, the board or its executive director may, if deemed appropriate and proper under the circumstances, authorize the parties to engage in the civil action discovery procedures in Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure, excepting the provisions of Chapter 13 (commencing with Section 2030.010) of that title...

52. As for sanctions for failure to comply with discovery procedures, Section 3050.2(b) provides in part:

> (b) Compliance with discovery procedures authorized pursuant to subdivision (b) of Section 3050.1 may be enforced by application to the executive director of the board. The executive director may, at the direction of the board, upon a showing of failure to comply with authorized discovery without substantial justification for that failure, dismiss the protest or petition or suspend the proceedings pending compliance. The executive director may, at the direction of the board, upon a failure to comply with authorized discovery without substantial justification for that failure, require payment of costs incurred by the board, as well as attorney's fees and costs of the party who successfully makes or opposes a motion to compel enforcement of discovery...
> (Underline added.)

53. The recitals herein of what Protestants have failed to do is sufficient to show a "failure to comply with authorized discovery" and there is nothing to show there was "substantial justification for that failure". Thus there is reason to "dismiss the protest" in accordance with Section 3050.2(b).

54. There is no question that there was a "failure to comply with authorized discovery", and that the failure to do so was material. The only question that could exist is whether Protestants were

"without substantial justification for that failure".

55. Protestants claim as to why the protests should not be dismissed may meet a test of "some justification" for the failure to proceed timely, properly, and for its failures in some cases to proceed at all, but the standard in the statute is that of "without substantial justification for that failure".

56. The Board's notices, orders, and the several communications between the Board and Mr. Tuchman were clear as to what was required and in no way misled Mr. Tuchman to believe that Protestants were not required to comply with the discovery schedule.

57. Here there were several obligations of Protestants that had failed to occur, the cumulative effect of which resulted in not just disruption of the discovery schedule, but destruction of the discovery schedule. These failures of Protestants, coupled with the inaccurate representations that Protestants had not been informed of the conference of May 2, 2013 and had not been informed as to how to join the conference, include: the claim that the Board had suspended all of the proceedings before it when the Board took off calendar only the Settlement Conference (necessary solely because of Mr. Tuchman's belated claim that he would not be attending due to vertigo); inaccurate representations that Protestants had already obtained counsel for the proceedings before the Board; and the need for additional time to retain such counsel. The cumulative effect of Protestants' conduct and lack thereof lead to the conclusion that Protestants were deliberately engaging in such tactics solely to delay the proceedings before the Board.

58. It is therefore concluded that dismissal of the protests is warranted pursuant to Section 3050.1(b) as there has been a "showing of failure to comply with authorized discovery without substantial justification for that failure."

59. As to whether dismissal of the protests is too harsh a sanction, the following language from the appellate court in the *Nader* opinion is illuminating:

> As to Nader's argument the board should have considered a lesser sanction than dismissal, the plain language of the statute defeats his argument. The Legislature has vested in the executive director (at the direction of the board) power to "dismiss the protest" upon a showing of failure to comply with authorized discovery without substantial justification. (§ 3050.2(b).) The statutory scheme does not require the board to consider a lesser sanction first. (*Nader Automotive Group, LLC, et al. v. New Motor Vehicle Board* (2009) 178 Cal. App. 4th 1478, 1485-1486)

///

60. Further, the provisions of the Code of Civil Procedure ("CCP") that are also applicable here, include the following:

> 2023.030. To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:
> ...
> (d) The court may impose a terminating sanction by one of the following orders:
> ...
> (3) An order dismissing the action, or any part of the action, of that party.
> ...

61. As used in the above statute, what is included in "misuse of the discovery process" needed for the imposition of this sanction is found in CCP section 2023.010, as follows:

> Misuses of the discovery process include, but are not limited to, the following:
> ...
> (d) Failing to respond or to submit to an authorized method of discovery.
> ...
> (g) Disobeying a court order to provide discovery.
> ...

62. Protestants failed to respond to an authorized method of discovery (CCP section 2023.010(d)) and disobeyed the Board's Pre-Hearing Conference Order to provide discovery (CCP section 2023.010(g))

63. Dismissals of the protests are warranted pursuant to the CCP as well as the provisions of the Vehicle Code as stated above.

///

///

///

///

///

///

RECOMMENDATION

It is recommended that the Executive Director seek direction from the Board that *D&A Automotive, O.C. Genuine Scooters of Santa Ana* v. *Genuine Scooters*, Protest No. PR-2355-12, and *D&A Automotive, O.C. Genuine Scooters of Tustin* v. *Genuine Scooters*, Protest No. PR-2356-12 be dismissed with prejudice.

PROPOSED ORDER

After consideration of the pleadings, exhibits, and oral arguments, it is hereby ordered that Respondent's Motion to Dismiss is granted.

I hereby submit the foregoing which constitutes my proposed order in the above-entitled matters, as the result of a hearing before me, and I recommend this proposed order be adopted as the decision of the New Motor Vehicle Board.

DATED: July 11, 2013

By: _____
ANTHONY M. SKROCKI
Administrative Law Judge

Jean Shiomoto, Chief Deputy Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV