

1 LAW OFFICES OF MICHAEL J. FLANAGAN  
2 MICHAEL J. FLANAGAN State Bar #93772  
3 GAVIN M. HUGHES State Bar #242119  
4 DANIELLE R. VARE State Bar #277844  
5 2277 Fair Oaks Boulevard, Suite 450  
6 Sacramento, CA 95825  
7 Telephone: (916) 646-9100  
8 Facsimile: (916) 646-9138  
9 E-mail: lawmjf@msn.com

10 ATTORNEYS FOR PROTESTANT

11 **STATE OF CALIFORNIA**

12 **NEW MOTOR VEHICLE BOARD**

13 In the Matter of the Protest of:

14 GUARANTEE FORKLIFT, INC., dba  
15 GFL, INC.,

16 Protestant,

17 v.

18 CAPACITY OF TEXAS, INC.,

19 Respondent.

**Protest No: PR-2361-13**

**PROTESTANT'S POST-  
HEARING OPENING BRIEF**

20 **I. INTRODUCTION**

21 On February 5, 2013, Respondent, Capacity of Texas, Inc. ("Capacity"), sent Protestant,  
22 Guarantee Forklift, Inc., dba GFL, Inc. ("GFL"), a Notice of Termination for the alleged breach  
23 of the dealer agreement. GFL filed this Protest pursuant to California Vehicle Code § 3060  
24 against Respondent, Capacity. Capacity seeks to terminate GFL's franchise agreement, alleging  
25 there was a breach of the franchise agreement in the use of Respondent's online parts ordering  
26 system, as well as alleged misrepresentations regarding a former employee. Neither of these  
27 allegations, even if true, constitutes a breach of the franchise agreement and certainly does not  
28 demonstrate good cause to terminate Protestant's franchise.

1           The parties in this matter presented testimony to Administrative Law Judge Pipkin  
2 (“ALJ”), of the New Motor Vehicle Board, at a hearing held on December 11, 2013. The  
3 totality of the evidence plainly supports the fact that Respondent has failed to demonstrate good  
4 cause to permit the termination of Protestant’s franchise.

5           The parties entered into a Stipulation dated October 11, 2013 and agreed to the  
6 following facts concerning the good cause factors set forth in California Vehicle Code § 3061:

- 7           • Franchisee, GFL, transacts an adequate amount of business compared to the business  
8 available to it. (Cal. Veh. Code § 3061(a).)
- 9           • Franchisee, GFL, has made investments and incurred obligations necessary to perform  
10 its part of the franchise. (Cal. Veh. Code § 3061(b).)
- 11           • Franchisee’s investment in its franchise is permanent. (Cal. Veh. Code § 3061(c).)
- 12           • The parties agreed not to present evidence regarding California Vehicle Code § 3061(d)  
13 concerning whether it would be injurious or beneficial for the business of Protestant to  
14 be disrupted, due to the limited scope of the issues giving rise to the issuance of the  
15 Notice of Termination.
- 16           • Franchisee, GFL, has adequate motor vehicle sales and service facilities, equipment,  
17 vehicle parts and qualified service personnel to reasonably provide for the needs of  
18 consumers for the motor vehicles handled by the franchisee and has been and is  
19 rendering adequate services to the public. (Cal. Veh. Code § 3061(e).)
- 20           • Franchisee, GFL, does not fail to fulfill its warranty obligations under the franchise.  
21 (Cal. Veh. Code § 3061(f).)

22           The sole good cause factor remaining before the New Motor Vehicle Board (“Board”) at the  
23 hearing in this matter is Vehicle Code § 3061(g): the extent of franchisee’s failure to comply  
24 with the terms of the franchise. Based upon the above stipulation and the evidence presented at  
25 hearing, Protestant has substantially and materially complied with the terms of its franchise  
26 agreement.

27 //

28 //

1 **II. STATEMENT OF FACTS**

2 **A. Background**

3 GFL became a franchised Capacity dealer in July of 1995. (RT 13:3-10; 13:17-14:7; Ex.  
4 J 1.) Capacity is a manufacturer of yard trucks, which are shuttle trucks that move large  
5 containers around freight yards or pull containers to airports. Yard trucks increase the moving  
6 time of freight trailers. (RT 14:19-15:4.) Capacity has two dealers in the city of Oakland. (RT  
7 15:23-25.) Protestant's dealership is located at 689 4<sup>th</sup> Street, Oakland, California. (RT 16:1-2.)

8 **B. Hearing Record**

9 Protestant employed former Capacity employee, Steve Mehrens, at GFL for  
10 approximately 12 years, beginning in 2001. (RT 17:17-23.) Mr. Mehrens left his employment  
11 at GFL on October 22, 2012, after giving his two-week notice to GFL's owner, Denise Rosen,  
12 on October 1, 2012. (RT 18:8-11; 130:9-14.) During the period of time before Mr. Mehrens left  
13 GFL, Ms. Rosen faced extreme adversity in her personal life which consumed a great deal of  
14 her time and attention. Mr. Mehrens began managing the majority of the business at GFL  
15 during this time. Prior to Mr. Mehrens leaving GFL on October 22, 2012, Ms. Rosen's mother  
16 had been hit by a car, had hip replacement surgery and suffered a major stroke. Ms. Rosen's  
17 mother spent two months in rehabilitation and was finally brought home in hospice. Ms.  
18 Rosen's mother required 24 hour per day, 7 day per week, around-the-clock care given that she  
19 was paralyzed. During this time when Ms. Rosen was her mother's primary caregiver, she also  
20 assumed responsibility of caring for her 92 year-old grandmother and her 87 year-old husband  
21 who had dementia. Ms. Rosen was driving approximately 1,000 miles per week in order to care  
22 for her family members and she was extremely stressed and emotionally drained. Ms. Rosen  
23 was blindsided, and her business was destabilized as a result, when Mr. Mehrens chose to leave  
24 his employment at GFL. (RT 52:14-53:17.)

25 In late 2008, Capacity first introduced an online parts ordering system that allows users  
26 access to research parts needed on Capacity trucks, as well as engine serial numbers,  
27 transmission serial numbers, and other parts references. (RT 35:10-24; 87:12-14; 204:25-205:3.)  
28 There were three log-ins assigned to GFL for access to the online parts ordering system: one

1 assigned to Denise Rosen (“DRosen”) and two assigned to Steve Mehrens (“SMehrens” and  
2 “smehren”). (RT 25:15-26:2; 26:11-19; 30:10-17.) One log-in (“smehren”) had limited access  
3 only to the parts list price, and the other two had full access to the entire online parts ordering  
4 system. (RT 31:17-21; 36:3-6.) When Mr. Mehrens left GFL, Ms. Rosen had to learn to use the  
5 online website because Mr. Mehrens had previously been the main user for GFL. (RT 37:15-24;  
6 53:17-21.) After Mr. Mehrens left his employment at GFL, Ms. Rosen changed the passwords  
7 to the GFL login accounts previously used by Mr. Mehrens in order to remember them easily  
8 and make all the logins uniform. (RT 32:16-33:8; 57:15-25; 58:1-9.) In order to access the  
9 online parts system, a user must first agree to the “Terms and Conditions”, which includes the  
10 following statement, “By entering this web site, you agree that the information within this site  
11 will be used only to identify and order parts from CAPACITY and any use of the information  
12 provided, without the express written approval of CAPACITY...will be considered a breach of  
13 the terms and conditions of this web site and may constitute an infringement or violation of  
14 CAPACITY’s intellectual property rights. Violation of this agreement could result in loss of the  
15 use of the web site.” (Ex. J 2.) There is no clause in the Terms and Conditions which set forth  
16 termination of a franchise as a consequence of violation.

17 When Mr. Mehrens left his employment at GFL, Mr. Mehrens told Capacity that he was  
18 going on medical leave, when in fact he had secured a job with Mid Pacific, an Ottawa dealer  
19 and competitor of GFL. (RT 19:17-19; 20:20-21:9; 54:12-15; 135:15-18.) Ms. Rosen sent  
20 Capacity an email requesting that all emails be forwarded to her and repeating that Mr. Mehrens  
21 was going on medical leave. (RT 54:16-20; Ex. R 108.) Ms. Rosen corroborated Mr. Mehrens’  
22 misrepresentation because she was afraid that Capacity was going to try and cancel GFL as a  
23 dealer. (RT 54:23-55:3; 74:14-21.) Ms. Rosen was terrified her franchise might be terminated  
24 given everything else going on in her life. (*Id.*) Ms. Rosen’s only source of income was from  
25 the Capacity franchise and she was concerned about her status as a Capacity dealer because  
26 Capacity previously tried to terminate Ms. Rosen’s franchise in 1998. (RT 55:7-17; 74:14-21.)  
27 The prior termination matter was resolved between the parties via settlement agreement and Ms.  
28

1 Rosen agreed to allow a Capacity dealer to be placed down the street from her dealership. (RT  
2 56:13-20; 75:7-10.)

3 In January 2013, Capacity discovered that Mr. Mehrens was accessing the parts website  
4 through GFL's log-in after he had left the employment of GFL. (RT 49:1-4; 86:3-23; 97:19-  
5 98:12.) At that time Capacity terminated GFL's access to the online system. (*Id.*) According to  
6 Mr. Mehrens, he received the password to access the website through a text message. (RT  
7 137:23-138:5.) Ms. Rosen adamantly denies sending Mr. Mehrens the password to GFL's log-  
8 ins for the Capacity online parts system. (RT 33:9-11; 39:8-11.) Ms. Rosen explained there were  
9 four people who had access to the password at the time it was texted to Mr. Mehrens, as well as  
10 the rest of the 8 week period in which Mr. Mehrens was no longer employed at GFL and GFL  
11 still had online access. (RT 41:13-15; 61:18-62:5; 75:24-76:13.)

12 Mr. Jerry Looney, Vice President of Sales, is the Capacity employee who made the  
13 decision to terminate GFL's franchise based upon an alleged violation of the terms and  
14 conditions of the web site. (RT 78:10-11; 83:1-3; 101:24-102:1; 102:2-14.) However, neither  
15 Mr. Looney, nor any other witness, can point to any paragraph in the dealer agreement that has  
16 been violated and is the basis for the proposed termination of Protestant. (RT 105:8-12.) It  
17 appears that Respondent relied on a different version of its dealer agreement, which is not in  
18 effect and does NOT govern these parties. Therefore, Respondent attempted to allege in the  
19 Notice of Termination ("NOT") that the Agreement between the parties can be terminated with  
20 30 days prior notice for good cause for termination and termination events include "Authorized  
21 Representative's [GFL] fraudulent conduct or substantial misrepresentation in any dealings with  
22 Capacity or with others concerning Capacity Products." In addition, "Authorized Representative  
23 [GFL] shall maintain the strict confidentiality of all trade secrets and proprietary methods,  
24 information and materials owned by Capacity to which the Authorized Representative [GFL]  
25 gains access." However, these clauses were not agreed to by the parties and are not present in  
26 the governing Authorized Representative Agreement. Respondent did not even have a copy of  
27 the actual governing agreement to reference before it made the decision to terminate Protestant.  
28 Respondent likely assumed the controlling agreement between the parties was its most recent

1 version of the dealer agreement. However, the actual, signed agreement between the parties,  
2 from 1995, does not include the statements claimed by Respondent above.

3 **III. ARGUMENT**

4 **A. Legal Standard**

5 Pursuant to California Vehicle Code § 3066(b), “[i]n a hearing on a protest filed  
6 pursuant to Section 3060..., the franchisor shall have the burden of proof to establish that there  
7 is good cause to...refuse to continue a franchise.” In order to determine whether the franchisor  
8 has met this burden of proof, the Board reviews the good cause factors set forth in Vehicle Code  
9 § 3061. However, as explained above, the parties have stipulated to the facts surrounding all  
10 but one of the good cause factors and the only remaining issue before this Board is whether  
11 Capacity can demonstrate the existence of good cause to terminate GFL’s franchise based upon  
12 GFL’s alleged breach of its franchise agreement. In this case, GFL has complied with the terms  
13 of its franchise agreement and Capacity is unable to demonstrate good cause to terminate GFL’s  
14 franchise.

15 **B. Protestant has not breached any term of its franchise agreement with Capacity.**

16 Respondent’s evidence concerning the existence of good cause to terminate Protestant’s  
17 franchise was limited to whether or not Protestant breached the franchise agreement when a  
18 former employee accessed the Capacity parts ordering system. Even assuming this can be  
19 considered a breach of the agreement by Protestant, the question before the Board would then  
20 be whether this breach alone is sufficient good cause to result in the forfeiture of Protestant’s  
21 franchise – it is not.

22 Former GFL employee, Steve Mehrens’, access of the Capacity Parts Ordering System  
23 is not a breach of the franchise agreement between Protestant and Respondent. Respondent  
24 cannot point to any paragraph or provision of the franchise agreement that Protestant is alleged  
25 to have breached. In fact, when Respondent sent its Notice of Termination, it did not review the  
26 franchise agreement in place between the parties because it did not even have a copy. (RT  
27 104:21-105:2; 105:13-18; 111:14-17.)

28 //

1           In addition, Respondent is unable to prove how Mr. Mehrens gained access to the online  
2 parts ordering system and there is good reason to question the reliability of Mr. Mehrens'  
3 testimony. Several Capacity employees acknowledge that Mr. Mehrens lied to Capacity and is  
4 not an honest person. Mr. Mehrens was also clearly in fear of losing his job at Mid Pacific and  
5 concerned about future legal action as well. He was contacted by Respondent's counsel and  
6 was frightened by the possible repercussions of his actions. Mr. Mehrens received a letter from  
7 Capacity's counsel, Mr. Anthony Jones, which alleges Mr. Mehrens committed illegal acts and  
8 Capacity threatened legal and criminal action against him. Mr. Mehrens was highly concerned  
9 with the allegations and list of demands made by Capacity's attorney. (RT 148:6-16, 149:8-13,  
10 150:24-152:18; Prot. Ex. 17.) As a result of this evidence, the testimony offered by Mr.  
11 Mehrens is unavoidably tainted by his self-interest. Finally, Mr. Mehrens suffers from recurring  
12 seizures that affect his memory. Whether for this, or any other reason, Mr. Mehrens cannot say  
13 with any certainty who sent him the password to Capacity's online parts ordering system.

14           Even if Respondent were somehow able to establish that Protestant breached the  
15 franchise agreement by acting or failing to act to prevent Mr. Mehrens' access of the parts  
16 ordering system, this does not represent good cause to terminate Protestant's franchise. Mr.  
17 Mehrens' access of the parts ordering system was, at most, a breach of the terms and conditions  
18 for continued use of the online parts system. (RT 105:25-107:24; Ex. J 2.) Respondent has  
19 already terminated Protestant's access to the system, as was its remedy under the terms and  
20 conditions page contained on Respondent's website. (RT 107:25-108:4.) Further, there is no  
21 condition under the terms of use for the website that suggests that if a dealer violates these terms  
22 it might result in the termination of its franchise. (RT 51:16-20; RT 105:25-107:24; 216:3-  
23 217:10; Ex. J 2.) Lastly, Respondent cannot demonstrate that any actual harm resulted from Mr.  
24 Mehrens' access of the parts ordering system because, in fact, no actual harm resulted from Mr.  
25 Mehrens' actions, and no evidence of actual harm was introduced at the hearing.

### 26           **C. Implied Covenant of Good Faith and Fair Dealing**

27           Respondent alleges that the implied covenant of good faith and fair dealing applies to  
28 the Authorized Representative Agreement which governs the parties in this matter. Respondent

1 also suggests that Protestant did not uphold the implied covenant of good faith and fair dealing  
2 when Mr. Mehrens accessed GFL's online parts account while he was employed at another  
3 dealership. There is no reliable testimony or evidence that Protestant provided its password to  
4 Mr. Mehrens to access the online parts system. The implied covenant of good faith and fair  
5 dealing does not apply to this dealer agreement. The covenant is relevant in contract causes of  
6 action heard in Superior Court, which this is not. The Board needs to only consider, pursuant to  
7 the Vehicle Code and Stipulation between the parties, whether Protestant has breached any  
8 terms of its franchise agreement and whether any alleged breach is good cause to terminate  
9 Protestant's franchise.

10 Furthermore, although the precise nature and extent of the duty imposed by the covenant  
11 of good faith and fair dealing depends on the contractual purposes, the covenant cannot impose  
12 substantive duties or limits on the contracting parties beyond those incorporated in the specific  
13 terms of their agreement. (*Agosta v. Astor*, 120 Cal.App.4<sup>th</sup> 596 (4<sup>th</sup> Dist. 2004); 14A Cal.Jur.3d  
14 Contracts § 240.) Protestant should not be punished because it did not violate any substantive  
15 duty to Respondent. In this case, it is unclear who texted GFL's online password to Mr.  
16 Mehrens and Protestant cannot be definitively held responsible. Therefore, it is impossible to  
17 find Protestant's actions have violated the implied covenant of good faith and fair dealing.

#### 18 **D. Merger Clause**

19 In general, a merger clause is a clause written into a contract that states the contract to be  
20 the complete and final agreement of the parties. In paragraph 9 of the Authorized  
21 Representative Agreement signed by both parties, it states, "This Agreement contains the entire  
22 Agreement between Capacity and authorized Representative [GFL] and there are no oral or  
23 collateral Agreements of any kind." (Ex. J 1.) Despite this clause in the governing dealer  
24 agreement, Respondent is arguing that the terms and conditions users agree to before entering  
25 the website (Ex. J 2) are an implicit part of the Authorized Representative Agreement governing  
26 the parties. Respondent is also arguing that Protestant's franchise should be terminated as a  
27 result of Mr. Mehrens' violation of the terms and conditions of Capacity's website because, in  
28 essence, the terms and conditions are one in the same with the governing franchise agreement.

1 However, this is not a logical result and this conclusion cannot be permitted. The website terms  
2 and conditions are agreed to by users separately and apart from the dealer agreement and have  
3 their own set of repercussions, which Respondent has already utilized.

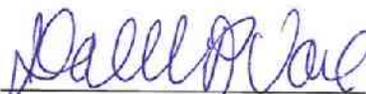
4 **IV. CONCLUSION**

5 As described above, good cause does not exist to terminate Protestant's franchise. First,  
6 Respondent has not demonstrated that Protestant breached its franchise agreement. Second,  
7 even if Respondent demonstrated that Protestant breached its franchise agreement when Steve  
8 Mehrens accessed the online parts ordering system, this act alone does not provide sufficient  
9 good cause to terminate Protestant's franchise, which would result in the forfeiture of  
10 Protestant's substantial and permanent investment.

11 Protestant therefore urges that its Protest be sustained.

12  
13  
14 Dated: January 31, 2014

LAW OFFICES OF  
MICHAEL J. FLANAGAN

15  
16 By:   
17 Danielle R. Vare

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

