

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

7 ATTORNEYS FOR PROTESTANT  
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10 STATE OF CALIFORNIA  
11 NEW MOTOR VEHICLE BOARD  
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14 In the Matter of the Protest of:  
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17 GUARANTEE FORKLIFT, INC., dba  
GFL, INC.,

18 Protestant,

19 v.  
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21 CAPACITY OF TEXAS, INC.,  
22

23 Respondent.  
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**Protest No: PR-2361-13**

**PROTESTANT'S PROPOSED  
FINDINGS OF FACT AND  
PROPOSED DECISION**

1 **I. PROCEDURAL BACKGROUND**

2 **A. Statement of the Case**

3 1. By letter dated February 1, 2013, Capacity of Texas, Inc. (“Capacity”), provided notice to  
4 Protestant, Guarantee Forklift, Inc., dba GFL, Inc. (“GFL”), of its intent to terminate the franchise  
5 under Vehicle Code section 3060<sup>1</sup>.

6 2. On February 27, 2013, Protestant filed a timely Protest pursuant to Vehicle Code section  
7 3060.

8 3. A hearing was held before Administrative Law Judge (“ALJ”) Kymberly Pipkin on  
9 December 11, 2013.

10 **B. Parties and Counsel**

11 4. GFL is an authorized Capacity “franchisee” within the meaning of Vehicle Code sections  
12 331.1 and 3062(a)(1). Protestant was represented by Gavin M. Hughes, Esq. and Danielle R. Vare,  
13 Esq. of the Law Offices of Michael J. Flanagan.

14 5. Respondent Capacity is a “franchisor” within the meaning of sections 331.2 and 3062(a)(1).  
15 Capacity was represented by Rita Hoop, Esq. of Waits, Brownlee, Berger & Dewoskin.

16 **C. Summary of Witnesses’ Testimony and Exhibits Introduced**

17 6. GFL called the following witness: Denise Rosen-Kendrick, Dealer Principal, CEO and  
18 president of GFL.

19 7. Capacity called the following witnesses: Denise Rosen-Kendrick, Dealer Principal, CEO  
20 and president of GFL; Jerry Looney, Vice President of Sales at Capacity; Stephen Mehrens, former  
21 General Manager of GFL; and Dawn Hebert, Service and Aftermarket Parts Operations Manager at  
22 Capacity.

23 8. Protestant submitted deposition excerpts of the following deponents for the record: Virginia  
24 Shanklin (October 25, 2013 and November 21, 2013), Melissa Childers and Pete Heaslip. Protestant  
25 also submitted objections to Respondent’s designations.

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27  
28 <sup>1</sup> All statutory references are to the Vehicle Code unless otherwise indicated.

1 9. Respondent submitted deposition excerpts of the following deponents for the record:  
2 Michael Yates, Virginia Shanklin, Denise Kendrick (Rosen), Melissa Childers, Cliff Huff, and Stephen  
3 Mehrens.

4 10. The parties offered approximately 11 exhibits at the hearing.

5 11. The parties agreed to a Stipulation of Facts ("Stip. of Facts"). (Listed below under A.  
6 **Preliminary Findings**)

7 12. The parties also signed a Stipulation ("Stip.") regarding the good cause factors set forth in  
8 California Vehicle Code §3061.

## 9 II. ISSUES PRESENTED

10 13. Has Respondent demonstrated there is good cause to terminate GFL's franchise, under  
11 Vehicle Code sections 3060 and 3061, taking into account the good cause factors of section 3061 and  
12 the existing circumstances?

13 14. Pursuant to Vehicle Code section 3061, in order to determine whether good cause has been  
14 established to terminate GFL's franchise, the Board shall take into consideration the existing  
15 circumstances, including, but not limited to:

16 (a) Amount of business transacted by the franchisee, as compared to the business  
17 available to the franchisee.

18 (b) Investment necessarily made and obligations incurred by the franchisee to perform  
19 its part of the franchise.

20 (c) Permanency of the investment.

21 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be  
22 modified or replaced or the business of the franchisee disrupted.

23 (e) Whether the franchisee has adequate motor vehicle sales and service facilities,  
24 equipment, vehicle parts, and qualified service personnel to reasonably provide for the  
25 needs of the consumers for the motor vehicles handled by the franchisee and has been  
26 and is rendering adequate service to the public.

1 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be  
2 performed by the franchisee.

3 (g) Extent of franchisee's failure to comply with the terms of the franchise.

4 15. Under this statute, Respondent has the burden to prove there is good cause to terminate the  
5 GFL franchise. (Veh. Code § 3066(b).)

6 **III. PROTESTANTS' CONTENTIONS**

7 16. Protestant contends the following: GFL has not violated any terms of its franchise  
8 agreement with Capacity and there is not good cause to terminate Protestant's franchise.

9 **IV. RESPONDENT'S CONTENTIONS**

10 17. Respondent contends the following: GFL violated an unidentified term of the franchise  
11 agreement between the parties and made false statements to Capacity. These alleged actions result in  
12 good cause for Respondent to terminate Protestant's franchise.

13 **V. FINDINGS OF FACT**

14 18. The parties agreed to the following preliminary findings in their Joint Stipulation of Facts,  
15 as well as the Stipulation dated October 11, 2013:

16 **A. Preliminary Findings**

17 19. Capacity Trucks, Inc. is a corporation organized in Texas and is a manufacturer of yard  
18 trucks with its corporate headquarters in Longview, Texas. (Stip. of Facts, para. 1.)

19 20. Capacity manufactures vehicles for both on and off highway use. (Stip. of Facts, para. 2.)

20 21. Guaranteed Fork Lift (GFL) is a corporation organized in California and is a dealer of  
21 Capacity yard trucks and parts since 1995. (Stip. of Facts, para. 3.)

22 22. The principal, president and sole shareholder of GFL is Denise Rosen-Kendrick. (Stip. of  
23 Facts, para. 4.)

24 23. Stephens Mehrens was an employee of GFL for approximately 13 years. (Stip. of Facts,  
25 para. 5.)

26 24. Immediately prior to coming to work for GFL, Mr. Mehrens was employed by Capacity.  
27 (Stip. of Facts, para. 6.)

28

1 25. Stephen Mehrens' employment at GFL ended October 22, 2012. (Stip. of Facts, para. 7.)

2 26. Stephen Mehrens did not leave his employment at GFL to go on medical leave as he had  
3 originally represented to Capacity. (Stip. of Facts, para. 8.)

4 27. Carrie Jantzen was assisting in the business of GFL on November 21, 2012. (Stip. of Facts,  
5 para. 9.)

6 28. Denise Rosen changed the password on the "Smehrens" and the "smehren" log-ins in early  
7 November to "Darlene". (Stip. of Facts, para. 10.)

8 29. Capacity has since terminated GFL's access to the Capacity online parts ordering system.  
9 (Stip. of Facts, para. 11.)

10 30. GFL has purchased more Capacity parts in 2013 than in 2012. (Stip. of Facts, para. 12.)

11 31. Mid Pac is an Ottawa dealer and is a direct competitor to (*sic*) GFL. (Stip. of Facts, para.  
12 13.)

13 32. The Terms and Conditions (Joint Ex. 2) screen comes up each time a user logs on to the  
14 Capacity online parts ordering system. (Stip. of Facts, para. 14.)

15 33. A user of the Capacity online parts ordering system must accept the Terms and Conditions  
16 on Joint Exhibit 2 in order to move past that screen. (Stip. of Facts, para. 15.)

17 34. In a letter dated February 1, 2013, Respondent provided notice to Protestant of its intent to  
18 terminate the franchise agreement with Respondent. (Stip. para. 1.)

19 35. The basis of the termination was an alleged breach of the agreement in the use of (*sic*)  
20 proprietary ordering system offered by Capacity of Texas, Inc. for the benefit of customers and dealers,  
21 and alleged misrepresentation regarding a former employee. (Stip. para. 2.)

22 36. Protestant has filed a protest as to the proposed termination which was set for hearing  
23 November 12, 2013. (Stip. para. 3.)

24 37. The following facts were established during the hearing held before ALJ Pipkin on  
25 December 11, 2013:

26 38. During the period of time before Mr. Mehrens left GFL, Ms. Rosen faced extreme  
27 adversity in her personal life which consumed a great deal of her time and attention. Mr. Mehrens  
28

1 began managing the majority of the business at GFL during this time. Prior to Mr. Mehrens leaving  
2 GFL on October 22, 2012, Ms. Rosen's mother had been hit by a car, had hip replacement surgery and  
3 suffered a major stroke. Ms. Rosen's mother spent two months in rehabilitation and was finally  
4 brought home in hospice. Ms. Rosen's mother required 24 hour per day, 7 day per week, around-the-  
5 clock care given that she was paralyzed. During this time when Ms. Rosen was her mother's primary  
6 caregiver, she also assumed responsibility of caring for her 92 year-old grandmother and her 87 year-  
7 old husband who had dementia. Ms. Rosen was driving approximately 1,000 miles per week in order  
8 to care for her family members and she was extremely stressed and emotionally drained. (RT 52:14-  
9 53:17.)

10 39. In late 2008, Capacity first introduced an online parts ordering system that allows users  
11 access to research parts needed on Capacity trucks, as well as engine serial numbers, transmission  
12 serial numbers, and other parts references. (RT 35:10-24; 87:12-14; 204:25-205:3.)

13 40. There were three log-ins assigned to GFL for access to the online parts ordering system:  
14 one assigned to Denise Rosen ("DRosen") and two assigned to Steve Mehrens ("SMehrens" and  
15 "smehren"). (RT 25:15-26:2; 26:11-19; 30:10-17.)

16 41. One log-in ("smehren") had limited access only to the parts list price, and the other two  
17 had full access to the entire online parts ordering system. (RT 31:17-21; 36:3-6.)

18 42.) When Mr. Mehrens left GFL, Ms. Rosen had to learn to use the online website because  
19 Mr. Mehrens had previously been the main user for GFL. (RT 37:15-24; 53:17-21.)

20 43. After Mr. Mehrens left his employment at GFL, Ms. Rosen changed the passwords to the  
21 GFL login accounts previously used by Mr. Mehrens in order to remember them easily and make all  
22 the logins uniform. (RT 32:16-33:8; 57:15-25; 58:1-9.)

23 44. Ms. Rosen sent Capacity an email requesting that all emails be forwarded to her and  
24 repeating that Mr. Mehrens was going on medical leave. (RT 54:16-20; Ex. R 108.)

25 45. Ms. Rosen corroborated Mr. Mehrens' misrepresentation because she was afraid that  
26 Capacity was going to try and cancel GFL as a dealer. (RT 54:23-55:3; 74:14-21.) Ms. Rosen was  
27 terrified her franchise might be terminated given everything else going on in her life. (*Id.*)  
28

1 46. Ms. Rosen's only source of income was from the Capacity franchise and she was  
2 concerned about her status as a Capacity dealer because Capacity previously tried to terminate Ms.  
3 Rosen's franchise in 1998. (RT 55:7-17; 74:14-21.) The prior termination matter was resolved  
4 between the parties via settlement agreement and Ms. Rosen agreed to allow a Capacity dealer to be  
5 placed down the street from her dealership. (RT 56:13-20; 75:7-10.)

6 47. In January 2013, Capacity discovered that Mr. Mehrens was accessing the parts website  
7 through GFL's log-in after he had left the employment of GFL. (RT 49:1-4; 86:3-23; 97:19-98:12.)

8 48. According to Mr. Mehrens, he received the password to access the website through a text  
9 message. (RT 137:23-138:5.)

10 49. Ms. Rosen did not send Mr. Mehrens the password to GFL's log-ins for the Capacity  
11 online parts system. (RT 33:9-11; 39:8-11.)

12 50. There were four people who had access to the password at the time it was texted to Mr.  
13 Mehrens, as well as the rest of the 8 week period in which Mr. Mehrens was no longer employed at  
14 GFL but GFL still had online access. (RT 41:13-15; 61:18-62:5; 75:24-76:13.)

15 51. Mr. Jerry Looney, Vice President of Sales, is the Capacity employee who made the  
16 decision to terminate GFL's franchise based upon an alleged violation of the terms and conditions of  
17 the web site. (RT 78:10-11; 83:1-3; 101:24-102:1; 102:2-14.)

18 52. When Respondent sent its Notice of Termination, it did not review the franchise agreement  
19 in place between the parties because it did not have a copy of it. (RT 104:21-105:2; 105:13-18; 111:14-  
20 17.)

21 53. In determining whether or not there is good cause for the termination of the franchise, the  
22 board is required to consider seven (7) factors set out in Section 3061 of the Vehicle Code. (Stip. para.  
23 4) For the purposes of the good cause hearing, and for no other purpose, the parties have agreed to  
24 stipulate to the following facts concerning the good cause factors set forth in Vehicle Code section  
25 3061:

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1 **B. Findings Related Amount of Business Transacted by Franchisee (Vehicle Code Section**  
2 **3061(a))**

3 54. That Guaranteed Fork Lift, Inc., franchisee, transacts an adequate amount of business  
4 compared to the business available to it. (Stip. para. 5(a).)

5 **C. Findings Related to the Investment Necessarily Made and Obligations Incurred by the**  
6 **Franchisee to Perform Its Part of the Franchise (Vehicle Code Section 3061(b))**

7 55. Franchisee has made investments and incurred obligations necessary to perform its parts of  
8 the franchise. (Stip. para. 5(b).)

9 **D. Findings Related to Permanency of Investment (Vehicle Code Section 3061(c))**

10 56. Franchisee's investment in its franchise is permanent. (Stip. para. 5(c).)

11 **E. Findings Related to Whether It Is Injurious or Beneficial to the Public Welfare for the**  
12 **Franchise to be Replaced or the Business of the Franchisee Disrupted (Vehicle Code**  
13 **Section 3061(d))**

14 57. Due to the limited scope of the issues giving rise to the issuance of Respondent's Notice of  
15 Termination to Protestant, the parties stipulate that they will not present evidence regarding Vehicle  
16 Code Section 3061(d) concerning whether it would be injurious or beneficial for the business of  
17 Protestant to be disrupted. (Stip. para. 5(d).)

18 **F. Findings Related to Whether the Franchisee has Adequate Motor Vehicle Sales and**  
19 **Service Facilities, Equipment, Vehicle Parts and Qualified Service Personnel to**  
20 **Reasonably Provide for the Needs of Consumers for the Motor Vehicles Handled by the**  
21 **Franchisee and has been and is Rendering Adequate Services to the Public (Vehicle Code**  
22 **Section 3061(e))**

23 58. Franchisee has adequate motor vehicles sales and service facilities, equipment, vehicle  
24 parts and qualified service personnel to reasonably provide for the needs of the consumers for the  
25 motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.  
26 (Stip. para. 5(e).)

1 **G. Findings Related to Whether the Franchisee Fails to Fulfill the Warranty Obligations of**  
2 **the Franchisor to be Performed by the Franchisee (Vehicle Code Section 3061(f))**

3 59. Franchisee does not fail to fulfill the warranty obligations of the franchisor to be performed  
4 by the franchisee. (Stip. para. 5(f).)

5 **H. Findings Related to the Extent of the Franchisee's Failure to Comply with the Terms of**  
6 **the Franchise (Vehicle Code Section 3061(g))**

7 60. Former GFL employee, Steve Mehrens', access of the Capacity Parts Ordering System is  
8 not a breach of the franchise agreement between Protestant and Respondent.

9 61. Neither Mr. Looney, nor any other witness, can point to any paragraph in the dealer  
10 agreement that has been violated and is the basis for the proposed termination of Protestant. (RT  
11 105:8-12.)

12 62. Respondent didn't prove Protestant breached the franchise agreement by acting or failing  
13 to act to prevent Mr. Mehrens' access of the parts ordering system. Even so, this alleged type of  
14 breach would not represent good cause to terminate Protestant's franchise. Mr. Mehrens' access of the  
15 parts ordering system was, at most, a breach of the terms and conditions for continued use of the online  
16 parts system. (RT 105:25-107:24; Ex. J 2.)

17 63. There is no condition under the terms of use for the website that suggests that if a dealer  
18 violates those terms it might result in the termination of its franchise. (RT 51:16-20; RT 105:25-  
19 107:24; 216:3-217:10; Ex. J 2.)

20 **I. Findings Related to any other Existing Circumstances which Demonstrate that there is**  
21 **not Good Cause to allow the Termination of GFL**

22 64. Respondent is unable to prove how Mr. Mehrens gained access to the online parts ordering  
23 system and there is good reason to question the reliability of Mr. Mehrens' testimony.

24 65. Mr. Mehrens was also clearly in fear of losing his job at Mid Pacific and concerned about  
25 future legal action as well. Mr. Mehrens received a letter from Capacity's counsel, Mr. Anthony  
26 Jones, which alleges Mr. Mehrens committed illegal acts and threatened legal and criminal action  
27 against him. Mr. Mehrens was highly concerned with the allegations and list of demands made by  
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1 Capacity's attorney. (RT 148:6-16, 149:8-13, 150:24-152:18; Prot. Ex. 17.) As a result of this  
2 evidence, the testimony offered by Mr. Mehrens is unavoidably tainted by his self-interest.

3 66. Respondent cannot demonstrate that any actual harm resulted from Mr. Mehrens' access of  
4 the parts ordering system because, in fact, no actual harm resulted from Mr. Mehrens' actions, and no  
5 evidence of actual harm was introduced at the hearing.

6 67. The implied covenant of good faith and fair dealing does not apply to this dealer  
7 agreement. The covenant is relevant in contract causes of action, which this is not.

8 68. Paragraph 9 of the Authorized Representative Agreement signed by both parties states,  
9 "This Agreement contains the entire Agreement between Capacity and authorized Representative  
10 [GFL] and there are no oral or collateral Agreements of any kind." (Ex. J 1.) No other "agreements",  
11 including the "Terms and Conditions" set forth on Capacity's website, can be considered integrated  
12 into the original franchise agreement.

13 **VI. CONCLUSIONS/ANALYSIS OF GOOD CAUSE FACTORS**

14 **A. Amount of Business Transacted (Vehicle Code Section 3061(a))**

15 69. The parties have agreed that GFL transacts an adequate amount of business compared to  
16 the business available to it.

17 **B. Investment Made and Obligations Incurred (Vehicle Code Section 3061(b))**

18 70. The parties have agreed that GFL has made investments and incurred obligations necessary  
19 to perform its parts of the franchise.

20 **C. Permanency of Investment (Vehicle Code Section 3061(c))**

21 71. The parties have agreed that GFL's investment in its franchise is permanent.

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25 **D. Whether it is Injurious to Public Welfare for Franchise to be Replaced (Vehicle Code**  
26 **Section 3061(d))**

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1 72. The parties have agreed that, due to the limited scope of the issues giving rise to the  
2 issuance of Respondents Notice of Termination to Protestant, the parties stipulated that they will not  
3 present evidence regarding Vehicle Code Section 3061(d).

4 **E. Whether the Franchisee has Adequate Sales/Service Facilities, Equipment, Parts and**  
5 **Qualified Service Personnel to Reasonably Provide for Needs of Consumers and has been**  
6 **Rendering Adequate Service to the Public (Vehicle Code Section 3061(e))**

7 73. The parties agreed that GFL has adequate motor vehicle sales and service facilities,  
8 equipment, vehicle parts and qualified service personnel to reasonably provide for the needs of the  
9 consumers for the motor vehicles handled by GFL and has been and is rendering adequate services to  
10 the public.

11 **F. Whether the Franchisee Fails to Fulfill Warranty Obligations of Franchisor (Vehicle**  
12 **Code Section 3061(f))**

13 74. The parties agreed that GFL does not fail to fulfill the warranty obligations of Capacity to  
14 be performed by GFL.

15 **G. Extent of Franchisee's Failure to Comply with the Terms of the Franchise (Vehicle Code**  
16 **Section 3061(g))**

17 75. Franchisee has complied with all terms of the franchise agreement.

18 **VII. DETERMINATIONS OF ISSUES**

19 76. Respondent has not sustained its burden of proof of establishing a lack of amount of  
20 business transacted by the franchisee, as compared to the business available to the franchisee.

21 77. Respondent has not sustained its burden of proof to show the investment necessarily made  
22 and obligations incurred by the franchisee to perform its part of the franchise are lacking.

23 78. Respondent has not sustained its burden of proof that there is a lack of permanency of  
24 investment.

25 79. Respondent has not sustained its burden of proof that it is not injurious, or is beneficial, to  
26 the public welfare for the business of the franchisee to be disrupted.

1 80. Respondent has not sustained its burden of proof that the franchisee does not have  
2 adequate motor vehicle sales and service facilities, equipment, vehicle parts and qualified service  
3 personnel to reasonably provide for the needs of consumers of the motor vehicles handled by the  
4 franchisee or that franchisee is not rendering adequate service to the public.

5 81. Respondent has not sustained its burden of proof that franchisee fails to fulfill the warranty  
6 obligations of the franchisor.

7 82. Respondent has not sustained its burden to prove that franchisee has failed to comply with  
8 the terms of the franchise.

9 83. Respondent has not sustained its burden to prove that there is good cause to terminate  
10 Protestant's franchise.

11 **VIII. PROPOSED DECISION**

12 Protest No. PR-2361-13 is hereby sustained. Respondent has not met its burden of proof under  
13 Vehicle Code section 3066(b) to prove there is good cause to terminate the GFL dealership.  
14 Respondent Capacity shall not be permitted to proceed with the termination of the GFL franchise.

15 Dated: January 31, 2014

NEW MOTOR VEHICLE BOARD

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17  
18 By: \_\_\_\_\_  
19 KYMBERLY PIPKIN  
20 Administrative Law Judge  
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