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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.

20 Protest No: PR-2361-13

21 PROTESTANT'S POST-
22 HEARING REPLY BRIEF

23 I. INTRODUCTION

24 Respondent, Capacity of Texas, Inc. ("Capacity"), submitted a Post Hearing Opening
25 Brief that is neither instructive to, nor compelling upon, this Board. Thus, the arguments made
26 by Respondent in its Post Hearing Opening Brief should be disregarded and this Protest should
27 be sustained.

28 II. ARGUMENT

A. **Mischaracterizations and Inaccurate Representations of the Hearing Record**

Respondent has made several representations in its Opening Brief that are misleading
and not supported by the record. For example, on page 3, line 7 of its Opening Brief,

1 Respondent writes that Mid-Pac is Capacity Trucks' largest competitor. Though Respondent
2 lists several citations in support of this statement, none of those citations substantiate this claim.
3 Mid-Pac is not a competitor with Capacity. Mid-Pac is a competitor with GFL.

4 Respondent further goes on to misstate the evidence in the record when it claims that
5 "[o]nly authorized Capacity Dealers have access to COPOS [Capacity Online Parts Ordering
6 System]." (Resp. Post Hearing Opening Brief, p. 4, line 2.) In fact, Capacity also grants access
7 to COPOS to certain national accounts and people to whom Capacity sells directly. (RT 89:21-
8 23.) Capacity also claims that every dealer goes through training before being given access to
9 COPOS. However, Respondent cannot recall if Protestant ever had such training. (RT 205:12-
10 14.) The truth is, at the time COPOS was introduced, training for the program was voluntarily
11 requested by the dealer. (RT 204:25-205:8.) There is no evidence to demonstrate that Ms.
12 Rosen or Mr. Mehrens ever received training regarding the COPOS system. (RT 205:9-14.)

13 Finally, Respondent claims that "Steve Mehrens received the password to the COPOS
14 website from Denise Rosen after he left his employment at GFL and during a time that he
15 worked for a non-Capacity truck parts dealer." (emphasis added) (Resp. Post Hearing Opening
16 Brief, p. 9, lines 14-17.) However, this statement is contradicted by the record: the citation
17 listed by Respondent does not, and cannot, corroborate the claim that Mr. Mehrens received the
18 password from Denise Rosen. Mr. Mehrens' testimony on this point was uncertain, at best. (RT
19 143:4-12.) Ms. Rosen testified that she "took the business back over October 23rd" and during
20 that eight-week period (through the date Capacity suspended GFL's online access), she doesn't
21 believe any GFL employees accessed the Capacity online system. (RT 38:20-39:5.) However,
22 even if Ms. Rosen gave Mr. Mehrens the password, which she did not, that would not be a
23 breach of the dealer agreement between the parties. (RT 33:9-11; 39:8-11.)

24 **B. Board Jurisdiction**

25 **1. New Motor Vehicle Board's Authority Pursuant to the California Vehicle** 26 **Code**

27 Pursuant to Vehicle Code §3050(d), the California New Motor Vehicle Board ("Board")
28 has the authority to "[h]ear and decide, *within the limitations and in accordance with the*

1 *procedure provided*, a protest presented by a franchisee pursuant to Section 3060...” (emphasis
2 added) Notwithstanding the subdivision mentioned above, “...the *courts* have jurisdiction over
3 all *common law* and *statutory claims* originally cognizable in the courts. For those claims, a
4 party may initiate an action directly in any court of competent jurisdiction.” (emphasis added)
5 (Cal. Veh. Code §3050(e).) In fact, California courts have found that the New Motor Vehicle
6 Board’s jurisdiction is specific and limited by statute to certain types of claims (mentioned
7 above). (*Mazda Motor of America, Inc. v. California New Motor Vehicle Bd.* (2003) 110
8 Cal.App.4th 1451, 1455.) Jurisdiction does not extend to common law claims not specifically
9 reserved to the Board. (*South Bay Creditors Trust v. General Motors Acceptance Corp.* (1999)
10 69 Cal.App.4th 1068.) The case of *Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2
11 Cal.App.4th 445, 455 is even more explicit when it states, “[t]he Board’s jurisdiction under
12 section 3060 encompasses disputes arising over the attempted termination, replacement or
13 modification of a franchise agreement. Claims arising from disputes with other legal bases must
14 be directed to a different forum.” (emphasis added) The bases for Respondent’s arguments
15 include the California Uniform Trade Secrets Act, the Federal Economic Espionage Act and the
16 implied covenant of good faith and fair dealing. (See Section III(C) of Protestant’s Post-Hearing
17 Opening Brief.) None of these arguments can be decided or remedied by this Board.

18 Given the clear mandate of both statutory and case law, there can be little doubt that the
19 Board’s jurisdiction is specifically limited to the matters set forth in the Vehicle Code. In this
20 case, §3050(d) does not extend to common law claims specifically reserved for California
21 courts. Respondent is clearly asking this Board to go beyond its jurisdiction and determine that
22 Capacity’s COPOS program is a trade secret as defined in the California Uniform Trade Secret
23 Act (Civil Code §3426.1), determine there has been a violation of the Federal Economic
24 Espionage Act (18 U.S.C. §1831) and to find there has been a violation of the implied covenant
25 of good faith and fair dealing. None of these arguments are appropriate for the Board to
26 consider given the specific authority granted to it listed above in Cal. Veh. Code §3050.

27 The parties stipulated that this protest would proceed before the Board specifically and
28 solely on the “extent of franchisee’s failure to comply with the terms of the franchise.” (Cal.

1 Veh. Code §3061(g).) Respondent has failed to demonstrate that Protestant failed to comply
2 with any term of the franchise agreement. Neither Jerry Looney, the Capacity employee who
3 made the decision to terminate GFL's franchise, nor Dawn Hebert, the Capacity employee who
4 terminated GFL's online access, can point to any section of the franchise agreement that
5 Protestant may have violated. (RT 105:8-12; 218:13-17.) Mr. Looney was asked the following
6 under oath, "But you can't – as we sit here today you can't point to her Honor which paragraph
7 of this agreement has been violated and is the basis for the proposed termination of Protestant,
8 can you?" He responded, "No." (RT 105:8-12.) Ms. Hebert was similarly asked, "And if I
9 were to – if we were to go back to Exhibit – Joint 1 you would not be able to point to any
10 provision in this agreement that it's been breached, would you?" She answered, "Not
11 specifically, no." (RT 218:13-17.)

12 Given this lack of evidence, coupled with the fact that Respondent did not even review
13 the franchise agreement before issuing the Notice of Termination to terminate Protestant
14 because it did not have a copy (RT 104:21-105:2; 105:13-18), it is clear that Respondent failed
15 to meet its burden to prove there is good cause to terminate Protestant's franchise.

16 **2. Contract analysis, including breach of covenant of good faith and fair**
17 **dealing, is not appropriate for this Board's review.**

18 Respondent claims that "[i]n examining the agreement and determining whether there is
19 a breach, in support of the explicit terms in the document the finder of fact must look at the
20 conduct of the party accused of the breach in relationship to the obligations of that party under
21 the same agreement," (emphasis added) (Resp. Post Hearing Opening Brief, p. 18, lines 12-16.)
22 Respondent also argues that "GFL has an obligation under the contract 'to use all reasonable
23 endeavors to achieve maximum sales of to (*sic*) products.'" (Resp. Post Hearing Opening Brief,
24 p. 18, lines 26-27.) However, Respondent has not demonstrated any breach of this term by
25 GFL. In fact, Respondent's witnesses cannot point to any term of the franchise agreement that
26 GFL allegedly violated. (RT 105:8-12, 218:13-17.) In addition, the parties again stipulated, in
27 Protestant's favor, the submission or discussion of any evidence regarding sales performance.
28 Sales performance is not an issue in this Protest.

1 **C. Respondent’s Attempt to Analogize this Case to the *Mack Trucks* Case is not**
2 **Instructive or Valuable to this Board**

3 Respondent claims that the Ohio Court of Appeals case, *Mack Trucks, Inc. v. Motor*
4 *Vehicles Dealers Bd.*, Ohio-2748 (2006) has “nearly identical facts” and “is persuasive and
5 instructive” to this Board. (Resp. Post Hearing Opening Brief, p. 12, lines 2-5.) However, this
6 claim is unsupported. The facts in the *Mack Trucks* case are clearly not identical to those before
7 the Board here and this Board should not use the application of common law by an Appeals
8 Court in another state as instructive for an administrative hearing on this Protest.

9 There are key distinctions to be noted between the instant case and the *Mack Trucks*
10 case. In the *Mack Trucks* case, the 3rd party at issue (PAI) was buying and reselling parts
11 through the product ordering system set up by the manufacturer. In addition, PAI was reverse-
12 engineering such parts and reselling them as imitation parts. (*Id.* at ¶ 4.) The damages as a
13 result of PAI’s actions were fairly pervasive and identifiable. The franchised dealer proactively
14 and deceptively set up a new company in order to order parts through the Mack Truck parts
15 system. It was proven that PAI did order parts from Mack, resell them and reengineer them.

16 In this case, Mr. Mehrens accessed COPOS in order to help the end-customers: Capacity
17 customers. (RT 155:15-156:10.) Mr. Mehrens did not order parts from Respondent Capacity to
18 resell or reengineer them. Mr. Mehrens only goal was to assist Respondent’s customers with
19 their Capacity trucks. (*Id.*) Further, Respondent cannot identify any damages incurred by it as a
20 result of Mr. Mehrens’ temporary access to the COPOS program. In fact, it is more likely than
21 not that Mr. Mehrens’ assistance of Capacity and its customers did not result in any harm to any
22 party. In addition, the Board is prohibited from awarding damages to the parties in Board
23 protests. (*Hardin Oldsmobile v. New Motor vehicle Bd.* (1997) 52 Cal.App.4th 585.)

24 **1. Trade Secret Definition**

25 Respondent also repeatedly claims that there is no dispute between the parties that the
26 COPOS program was a trade secret and that Protestant conceded COPOS was a trade secret.
27 (Resp. Post Hearing opening Brief, p. 8, line 1 and page 22, line 7.) These statements are
28 patently false. Protestant does not concede that the COPOS program is a trade secret.

1 Respondent's only source for the alleged concession is based upon the questionable deposition
2 testimony of Denise Rosen. Ms. Rosen was misleadingly asked if she believed the COPOS
3 program was a trade secret. As a non-lawyer, she cannot make a legal conclusion regarding the
4 definition of a trade secret and for Capacity's attorney to suggest she understands the technical
5 and legal definition of such a term is disingenuous. In fact, Respondent chose to cite testimony
6 from Ms. Rosen's deposition, rather than her hearing testimony, at which time ALJ Pipkin
7 properly sustained an objection that the question called for a legal conclusion. (RT 37:1-5.)
8 Respondent has not proven COPOS is a trade secret nor is it for this Board to make a
9 determination concerning this question.

10 **III. CONCLUSION**

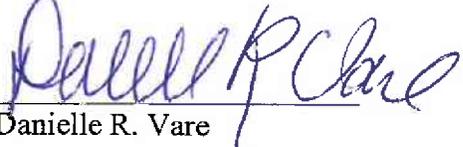
11 As described above, good cause does not exist to terminate Protestant's franchise
12 because Respondent has not met its burden under Vehicle Code §3061. All of the good cause
13 factors were stipulated in Protestant's favor, except for Vehicle Code §3061(g) which analyzes
14 "the extent of franchisee's failure to comply with the terms of the franchise." First, Respondent
15 has failed to demonstrate that Protestant breached its franchise agreement. Second, even if
16 Respondent had demonstrated that Protestant breached its franchise agreement when Steve
17 Mehrens accessed the online parts ordering system (and it did not), this act alone does not
18 provide good cause to terminate Protestant's franchise, which would result in the forfeiture of
19 Protestant's substantial and permanent investment.

20 Protestant therefore urges that its Protest be sustained.

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Dated: February 24, 2014

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By: 
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