



DECISION COVER SHEET

ACTION BY: Public Members Only

ACTION BY: All Members

To : BOARD MEMBERS

Date: December 2, 2014

From : ADMINISTRATIVE LAW JUDGE: Anthony M. Skrocki

CASE: SAN JOSE YAMAHA v. YAMAHA MOTOR CORPORATION, U.S.A.
Protest No. PR-2394-14

TYPE: Vehicle Code section 3060 Termination

Motion to Dismiss Protest: This motion was filed by Yamaha Motor Corporation, U.S.A. ("Yamaha") alleging that:

- (1) The protest should be dismissed for failure to comply with the Pre-Hearing Conference Order and Ruling on Objections. This is based upon the failure of Protestant to comply with authorized discovery, with dismissal of the protest authorized by Section 3050.2(b).
- (2) "Yamaha issued a second notice of termination but San Jose Yamaha did not file a protest in response to the second notice. This resulted in the franchise terminating (pursuant to Section 3060) as of November 16, 2014. As the franchise has been terminated, the Board no longer has jurisdiction to hear the protest to the first notice of termination and the issues raised therein have become moot."

As to (1), Vehicle Code section 3050.2(b) provides in part: "...**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. ...") (Emphasis added.)

Recommendation of the ALJ: The ALJ has recommended that the Executive Director obtain "direction of the board" to "dismiss the protest", in accordance with the statutory language.

Request of the Executive Director: The Executive Director concurs in the findings of the ALJ and is requesting the Board direct that the protest be dismissed with prejudice.

PROCEDURE SUMMARY:

- PROTEST FILED ON CALENDAR: April 22, 2014
- MOTION FILED OCTOBER 30, 2014: Respondent's Motion to Dismiss Protest

- COUNSEL FOR PROTESTANT: John Masi, in Pro Per
- COUNSEL FOR RESPONDENT: Colm A. Moran, Esq.
Hogan Lovells US LLP

EFFECT OF PROPOSED ORDER: If the Board grants the request of the Executive Director, the Executive Director will issue an Order of Dismissal with Prejudice and the protest will be dismissed. There will be no hearing before an ALJ of the Board as to the merits of the protest.

SUMMARY OF PROPOSED ORDER:

Failure of Protestant to comply with authorized discovery:

- The ALJ found that the elements of Section 3050.2(b) were satisfied in that:
 - There was a “failure to comply with authorized discovery” by Protestant; and,
 - Protestant was “without substantial justification for that failure”.
- The findings include the following:
 - Protestant failed to submit a Statement of Disputed Discovery Requests that had been ordered to be served and filed no later than July 25, 2014.
 - Protestant failed to produce any documents by August 22, 2014, the date ordered for production.
 - After further contact with Mr. Masi, Protestant, on September 4, in response to the 45 requests from Respondent, produced a total of 9 pages of documents. This production on September 4 was almost 2 weeks beyond the date ordered for production (August 22) and the 9 pages are the only documents produced by Protestant to date.
 - Protestant failed to provide a Preliminary Witness List that was ordered to be provided no later than September 4, 2014.
 - Protestant failed to provide a Final Witness List that was ordered to be provided no later than October 27, 2014.
- As for whether there was “substantial justification” for the above failures:
 - Protestant failed to submit an “Opposition to the Motion to Dismiss” that had been ordered to be submitted no later than November 13. Therefore, there are no pleadings setting forth specific reasons for the failure of Protestant to comply with the discovery obligations. The Board’s staff contacted Mr. Masi on November 14 to inquire about the missing Opposition. Mr. Masi stated that he would file it on Monday, November 17, however no Opposition was ever filed. The hearing on the motion was conducted on November 21.

- As for being unable to comply with the discovery obligations, Mr. Masi stated that he was out of the country from September 5 to September 15 due to his fiancé's father having open-heart surgery; and, he was too busy just trying to keep the dealership operating.
- As for not providing the witness lists, Mr. Masi (for the first time, during the hearing on the Motion to Dismiss on November 21) stated that he did not intend to call any witnesses.
- Rather than addressing the issues raised in the Motion to Dismiss pertaining to the failure of Protestant to engage in discovery and not filing a timely protest to the second notice of termination, Mr. Masi spent most of the time during the hearing on the Motion to Dismiss challenging the need for the restraining order that had been obtained against him in Superior Court and expressing his opinion as to the character of Yamaha's representatives, including Mr. Moran.

The effect of the failure of Protestant to file a protest challenging the second notice of termination

- The first notice of termination was dated March 24, 2014. It alleged misconduct by Mr. Masi as the basis for termination. A timely protest was filed in response. This is the only protest before the Board and is the subject of the Motion to Dismiss.
- Almost 6 months later, a second notice of termination was issued on September 15 and received by Protestant on September 17. It alleged the loss of floorplan financing as the basis for termination. The time to file a protest as to this notice expired as of October 17. Without a protest, Section 3060 allows termination to occur 60 days after the notice is received, which in this case was as of November 16.
- The ALJ found that Section 3060 had been complied with by Yamaha as to the second notice and that the franchise had terminated as of November 16. There is no longer a "franchise" in existence and San Jose Yamaha is no longer a "franchisee" of Yamaha. The Board is without the power to order that the protest be sustained and cannot preclude Yamaha from terminating the franchise which has already been terminated.
- The ALJ also concluded that, even if the Board had continuing jurisdiction over the protest notwithstanding the termination of the franchise, the issues raised in the protest and factors that must be considered by the Board are all now moot. For the Board to conduct a hearing on the merits of the Protest would be a waste of resources of the Board and create unnecessary expense for both parties. A decision and order of the Board sustaining the protest would be meaningless as there is no longer a franchise in existence.

RELATED MATTERS:

- Related Case Law: *Nader Automotive Group, LLC, et al. v. New Motor Vehicle Board* (2009) 178 Cal. App. 4th 1478.
- Applicable Statutes and Regulations: Vehicle Code sections 331, 331.1, 3050.1(b), 3050.2(b) and 3060.