

1 NEW MOTOR VEHICLE BOARD
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

10
11 In the Matter of the Protest of
12 SAN JOSE YAMAHA POWERSPORTS,
13 Protestant,
14 v.
15 YAMAHA MOTOR CORPORATION, U.S.A.,
16 Respondent.

Protest No. PR-2394-14

- 1. RECOMMENDATION THAT
RESPONDENT'S MOTION TO
DISMISS PROTEST BE GRANTED;**
- 2. PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS**

17
18 To: John Masi
In Pro Per
19 SAN JOSE YAMAHA POWERSPORTS
776 N. 13th Street
20 San Jose, California 95112

21 Colm A. Moran, Esq.
Attorney for Respondent
22 HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
23 Los Angeles, California 90067

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1 Yamaha to terminate the agreement based on, among other things, any “conduct...by Dealer...which
2 affects adversely Dealer’s operations or the goodwill and reputation of Dealer, Yamaha or [Yamaha’s]
3 products.”

4 8. In response to this notice of termination, on April 22, 2014, San Jose Yamaha filed a
5 timely protest under Vehicle Code section 3060² alleging that there is not good cause for the termination
6 of its franchise.

7 9. This protest was assigned Protest No. PR-2394-14. Although there is a second notice of
8 termination as discussed below, this is the only protest pending before the Board between these parties
9 and is the protest subject to this Motion to Dismiss.

10 **THE SECOND NOTICE OF TERMINATION - DATED SEPTEMBER 15, 2014**

11 10. In a letter dated September 15, 2014³, Yamaha gave a second notice to Protestant stating
12 Yamaha’s intent to terminate San Jose Yamaha’s franchise based on Protestant’s “...failure to maintain
13 floorplan financing as required by Section 5.5 of the Dealer Agreement...”. Among the allegations
14 contained in this notice are that “Yamaha has given the Dealership multiple opportunities to cure this
15 breach and obtain a replacement floorplan. For example, we wrote to the Dealership about this issue on
16 February 27, 2014, May 21, 2014, June 18, 2014, July 15, 2014, and July 29, 2014. The Dealership,
17 however, has not obtained replacement financing. Indeed, the only substantive response we have received
18 from you on this issue was in your email dated July 24, 2014, in which you stated that ‘getting another
19 \$1.2 million in flooring is setting myself up as a glutton for punishment.’”

20 11. As the second notice of termination, dated September 15, 2014, was received by Protestant
21 on Wednesday, September 17, 2014, Protestant, per Section 3060(a)(2), had until October 17, 2014, to
22 file a timely protest.⁴ As of November 21, 2014 (the date of the hearing on this Motion to Dismiss),
23 Protestant had not filed or attempted to file a protest in response to Yamaha’s second notice of
24 termination. Respondent alleges that as no protest was filed to this second notice of termination,

25 _____
26 ² All statutory references are to the Vehicle Code unless otherwise indicated.

27 ³ This second notice, dated September 15, 2014, was almost 6 months after the first notice of termination dated March 24,
2014.

28 ⁴ The Board received the second notice of termination on September 18, 2014. Section 3060(a)(1) requires that the franchisee
and the Board both receive the written notice of termination. Arguably, a protest could have been timely filed through
Monday, October 20, since the Board did not receive the notice until September 18.

1 Protestant's franchise was terminated as of November 16, 2014. This date is 60 days from September 17,
2 2014, the date the second notice of termination was received by Protestant, and is the time period stated in
3 the statutes. (Section 3060(a)(1)(A) and Section 3060(a)(3))

4 **THE MOTION TO DISMISS**

5 12. Respondent is seeking dismissal of the Protest for two reasons:

6 a. The alleged failure of Protestant to participate in the discovery process, including the
7 failure to comply with the discovery schedule contained in the Board's Pre-Hearing Conference Order
8 dated June 11, 2014, and the August 6, 2014 Rulings on Objections to Requests for documents (See
9 Section 3050.2(b))⁵; and,

10 b. The Board no longer has jurisdiction to consider the only protest before it. This protest
11 was filed in response to the first notice of termination. However, the failure to file a protest in response to
12 the second notice of termination resulted in the termination of the franchise as of November 16, 2014, as
13 provided in Section 3060(a)(1)-(3).⁶ Thus the Protest against the first notice is moot.

14 **PROCEDURAL FACTS AS TO RESPONDENT'S MOTION TO DISMISS**
15 **LEADING TO THE HEARING ON NOVEMBER 21, 2014**

16 13. Respondent filed its Motion to Dismiss Protest on October 30, 2014.

17 14. Upon receipt of the Motion to Dismiss, the Board's staff, on October 31, 2014, contacted
18 Mr. Masi and Mr. Moran who mutually agreed to dates for a briefing schedule and hearing date for the
19 Motion to Dismiss. The briefing schedule and hearing date were set forth in the Board's "Order
20 Establishing Briefing Schedule Re: Respondent's Motion to Dismiss" and "Order of Time and Place of
21 _____"

22 ⁵ Section 3050.2(b) provides: "Compliance with discovery procedures authorized pursuant to subdivision (b) of Section 3050.1
23 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." (Underline added)

24 ⁶ Section 3060 provides in part as follows:

25 (a) Notwithstanding...the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise
unless all of the following conditions are met:

26 (1) The franchisee and the board have received written notice from the franchisor as follows:

(A) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

27 ...

(2) ...The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, satisfying the
requirements of this section,...

28 (3) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has
elapsed. (Underline added.)

1 Telephonic Hearing” issued on October 31, 2014. The relevant dates and what did or did not transpire
2 follow.

3 15. Protestant agreed and was ordered to file and serve its Opposition to the Motion to Dismiss
4 no later than November 13, 2014.

5 (a) Protestant did not submit or serve its Opposition to the Motion to Dismiss on November
6 13.

7 (b) On November 14, 2014, the Board’s staff (by email and telephone) contacted Mr. Masi to
8 inquire about the Opposition that had not been filed and to remind him that there was a mandatory hearing
9 on the Motion to Dismiss set for November 21. Mr. Masi responded that he needed more time to file the
10 Opposition and that it would be filed the afternoon of Monday, November 17.

11 (c) Protestant failed to file its Opposition to the Motion on the 17th, or before the hearing on
12 November 21, or to date.

13 16. Respondent was to file and serve its Reply to Protestant’s Opposition no later than
14 November 19, 2014.

15 (a) Because Protestant did not file its Opposition, no Reply to the Opposition was warranted.

16 (b) On November 20, 2014, because nothing had been filed in behalf of Protestant, the Board’s
17 staff emailed Mr. Masi to remind him that the hearing on the Motion to Dismiss would be held the next
18 day, November 21, at 11:00 a.m., and again provided him with the telephone numbers needed for him to
19 join the hearing.

20 17. On November 21, 2014, the telephonic hearing on the Motion to Dismiss commenced at
21 11:00 a.m. as scheduled, with Anthony M. Skrocki, an ALJ of the Board, presiding. Protestant was
22 represented by Mr. Masi. Respondent was represented by Mr. Moran.

23 18. Mr. Masi, in response to an inquiry by the ALJ, stated that Mr. Hogan, Protestant’s former
24 counsel, was no longer being utilized as “back up” and would not be participating in the telephonic
25 hearing.

26 **APPLICABLE LAW AS TO THE FAILURE OF PROTESTANT**
27 **TO COMPLY WITH AUTHORIZED DISCOVERY**

28 19. As indicated in footnote 5, Section 3050.2(b) provides in pertinent part: “...The executive

1 director may, at the direction of the board, upon a showing of failure to comply with authorized discovery
2 without substantial justification for that failure, dismiss the protest or petition or suspend the proceedings
3 pending compliance. ...”⁷

4 20. The Third District Court of Appeal has upheld the Board’s authority to dismiss a protest
5 because of the failure of the protestant to comply with authorized discovery. See *Nader Automotive*
6 *Group, LLC, et al. v. New Motor Vehicle Board* (2009) 178 Cal. App. 4th 1478.

7 **ANALYSIS OF WHETHER PROTESTANT HAS FAILED TO COMPLY**
8 **WITH AUTHORIZED DISCOVERY**

9 21. There are two orders of the Board that allegedly were not complied with by Protestant.
10 These are (1) the Pre-Hearing Conference Order of June 11, 2014 setting forth the discovery schedule
11 leading up to a tentative date for a hearing on the merits of the protest of December 8, 2014; and (2) the
12 August 6, 2014 Order regarding the Rulings on Objections to the Requests for Production of Documents.

13 **The Board’s Pre-Hearing Conference Order of June 11, 2014**

14 22. A scheduled telephonic Pre-Hearing Conference was conducted on June 9, 2014. At that
15 time, Protestant was represented by Christopher J. Hogan, Esq. of the Law Office of Christopher J.
16 Hogan. Respondent was represented by Colm A. Moran, Esq. of Hogan Lovells US LLP.

17 23. The following shows what was stipulated to by counsel and ordered by the Board in the
18 Pre-Hearing Conference Order dated June 11, 2014, and what was done or not done is indicated in
19 brackets.

- 20 1. Counsel for the parties shall file and serve all requests for identification and
21 production of documents no later than Monday, June 30, 2014. [This was timely done by
22 both parties. Mr. Hogan still represented Protestant.]

23
24 ⁷ The alternative sanction of the power to “suspend the proceedings pending compliance” is not appropriate when the conduct
25 of the franchisee is at issue. This sanction may be used when it is the franchisor that has failed to comply with authorized
26 discovery. Suspending proceedings when the franchisee fails to comply with authorized discovery would result in franchisees
27 routinely failing to engage in discovery. In such case, the franchisee would benefit from its own misconduct as suspending
28 proceedings would preserve the status quo and summarily prevent franchisors from accomplishing what the franchisors desire.
Likewise, the sanction of dismissal of the protest is a sanction applicable only when it is a franchisee that fails to comply with
authorized discovery. A franchisee complaining about the failure of a franchisor to engage in discovery would not be seeking
dismissal of its own protest as a sanction for the misconduct of the franchisor. If dismissal of the protest were the appropriate
sanction for the failure of a franchisor to participate in discovery, no franchisor would engage in discovery.

1 2. Objections, if any, to the requests for documents shall be filed and served
2 no later than Monday, July 14, 2014. [This was timely done by both parties. Mr. Hogan
3 still represented Protestant.]

4 3. Counsel for the parties shall confer on Monday, July 21, 2014, in an
5 attempt to resolve their respective objections to the requested discovery. [This was timely
6 done. Mr. Hogan still represented Protestant.]

7 4. Counsel for the parties shall submit via facsimile transmission or e-mail a
8 Statement of Disputed Discovery Requests, if any, by 12:00 p.m. (Pacific Time), on
9 Friday, July 25, 2014. ... [This was subsequently changed by agreement of counsel to
10 August 1, 2014, as indicated in the First Amended Pre-Hearing Conference Order dated
11 July 23, 2014. A Statement was timely submitted in behalf of Respondent but no
12 Statement was submitted in behalf of Protestant. Mr. Hogan was no longer representing
13 Protestant.]

14 5. A telephonic conference shall be held on Wednesday, July 30, 2014, at
15 10:00 a.m. (Pacific Time) to rule on any objections to the requested discovery. ... [By
16 prior agreement of counsel and Board Order, this had been changed to August 6, 2014 (see
17 First Amended Pre-Hearing Conference Order). This conference was held with Mr. Masi
18 representing Protestant. [See discussion below.]

19 6. Documents requested and not objected to, and documents ordered to be
20 produced following the ruling on objections, shall be simultaneously exchanged no later
21 than Friday, August 22, 2014, at 5:00 p.m. (Pacific Time), in a manner to be mutually
22 agreed upon. [Protestant, represented by Mr. Masi, did not timely produce any
23 documents. After being contacted by Mr. Moran regarding this failure to comply with the
24 Board's order, Mr. Masi, on September 4, 2014, produced a total of 9 pages of
25 documents.]

26 7. Preliminary lists of witnesses intended to be called shall be filed and served
27 no later than Friday, September 5, 2014, at 5:00 p.m. (Pacific Time). [Protestant did not
28 comply with this portion of the Board's order and has not yet submitted a preliminary list

1 of witnesses. A Statement was timely submitted in behalf of Respondent.] Final witness
2 lists including experts shall be filed and served no later than Monday, October 27, 2014, at
3 5:00 p.m. (Pacific Time). The lists shall state the names, addresses, telephone numbers,
4 and capacity or status of the witnesses. [Protestant did not comply with this portion of the
5 Board's order and has not yet submitted a final list of witnesses. A Statement was timely
6 submitted in behalf of Respondent.]

7 8. A telephonic Hearing Readiness Conference shall be held on Friday,
8 October 31, 2014, at 10:00 a.m. (Pacific Time), to determine whether the parties are ready
9 to proceed with the merits hearing tentatively scheduled for Monday, December 8, 2014.
10 [Mr. Masi and Mr. Moran participated in this conference but, due to the failure of Mr.
11 Masi to comply with the discovery obligations, it was not possible to discuss readiness for
12 the hearing of the protest. Rather, the conference became one that established an agreed
13 upon briefing schedule for Respondent's Motion to Dismiss Protest, which had been filed
14 the day prior on October 30, 2014.

15 9. Counsel for the parties shall mutually exchange expert reports and
16 supporting documents no later than Monday, October 6, 2014, at 5:00 p.m. (Pacific Time),
17 in a manner to be jointly agreed upon. [These documents are not filed with the Board, so it
18 is unknown if the expert reports were "mutually" exchanged.]

19 10. Counsel for the parties shall mutually exchange supplemental expert
20 reports and supporting documents no later than Monday, October 27, 2014, at 5:00 p.m.
21 (Pacific Time), in a manner to be jointly agreed upon. [These documents are not filed
22 with the Board, so it is unknown if the supplemental expert reports were "mutually"
23 exchanged.]

24 11. All depositions shall be taken no later than Friday, November 21, 2014,
25 with a minimum of 72 hours notice. [The Board has no knowledge as to whether any
26 depositions were taken of party witnesses; no deposition subpoenas were issued by the
27 Board for non-party witnesses. The Board issued a subpoena duces tecum for GE Capital
28 Retail Bank dated July 25, 2014, on behalf of Respondent.]

1 ...
2 24. The above discovery process and obligations were authorized and contained in the Pre-
3 Hearing Conference Order dated June 11, 2014, signed by the Board's Executive Director, William G.
4 Brennan. (See Sections 3050.1(b) and 3050.2(b))

5 **The August 6, 2014 Hearing and Order re: the Rulings on Objections to**
6 **Requests for Production of Documents**⁸

7 25. The participants in this August 6 hearing were Mr. John Masi, in Pro Per, and Mr. Colm
8 Moran, representing Respondent. ALJ Skrocki presided.

9 26. At the beginning of this hearing, the ALJ inquired of Mr. Masi whether Mr. Christopher
10 Hogan represented Protestant. Mr. Masi stated that Mr. Hogan no longer represented Protestant but that
11 Mr. Hogan was still available as a "backup" and would be assisting Mr. Masi as needed.

12 **Protestant's Discovery Requests**

13 27. Protestant's Discovery Requests were submitted by Mr. Hogan while he was still counsel
14 for Protestant. Prior to the August 6, 2014 hearing to resolve the discovery disputes, Mr. Moran
15 (representing Respondent) and Mr. Hogan (while still representing Protestant) had resolved any concerns
16 they had regarding the discovery requests submitted by Protestant. No rulings were necessary as to
17 Protestant's Discovery Requests.

18 **Respondent's Discovery Requests**

19 28. While Mr. Hogan still represented Protestant, he and Mr. Moran had reached agreement as
20 to much of what would be produced by Protestant in response to the discovery requests of Respondent.
21 However, in a letter dated July 30, 2014 to Mr. Masi (after Mr. Hogan ceased his representation of
22 Protestant), of the 45 requests submitted by Respondent, Mr. Moran listed 17 outstanding specific
23 requests to which Mr. Hogan had filed objections but which the two attorneys in their "meet and confer"
24 had discussed, along with a proposed resolution for each of the remaining 17 requests. The letter from
25 Mr. Moran asked Mr. Masi if Protestant would agree with the proposed resolution and withdraw its
26 objections to Respondent's Requests. Mr. Masi did not respond to the letter prior to the hearing held on

27 _____
28 ⁸ The Pre-Hearing Conference Order dated June 11, 2014, established the date of July 30, 2014 for the telephonic conference for the Ruling on Objections. However, at the joint request of the parties, the date for this was changed to August 6, 2014.

1 August 6, 2014.

2 29. During the hearing held on August 6, 2014 to rule on the objections to the discovery
3 requests, the ALJ asked Mr. Masi if he agreed to produce the documents in response to Respondent's
4 requests as clarified in the July 30, 2014 letter from Mr. Hogan. Mr. Masi stated that he agreed to do so.

5 30. That left only four of Respondent's Requests unresolved. These were No. 22, 24, 25, and
6 26. After a discussion during which Respondent agreed to modify the requests, Mr. Masi "agreed to
7 produce the requested documents".

8 31. On August 6, 2014, ALJ Skrocki issued his "RULINGS ON OBJECTIONS TO
9 REQUESTS FOR PRODUCTION OF DOCUMENTS" memorializing the agreements, as an Order of the
10 Board.

11 32. The concluding paragraph of this document stated: "NOTE: As stated by the
12 Administrative Law Judge and agreed by the parties, the remaining schedule established by the
13 Board's Pre-Hearing Conference Order dated June 11, 2014, continues in effect."

14 (Bold and underline in the original.)

15 33. As indicated above, pursuant to paragraph 6 of the Pre-Hearing Conference Order of June
16 11, 2014, the requested documents were ordered to be exchanged no later than Friday, August 22, 2014.

17 **PROTESTANT'S FAILURE TO COMPLY WITH THE PRE-HEARING CONFERENCE**
18 **ORDER AND THE RULINGS ON THE OBJECTIONS TO THE DISCOVERY REQUESTS**

19 **Failure to Produce Documents**

20 34. Although both the Pre-Hearing Conference Order of June 11, 2014 and the Rulings on
21 Objections to Requests for Production of Documents of August 6, 2014 required that Protestant produce
22 documents no later than August 22, 2014, Protestant failed to produce any documents.

23 35. On September 2, 2014, counsel for Respondent sent emails to Protestant inquiring about
24 the status of the overdue documents, along with a description of the documents that should have been
25 produced. (Motion to Dismiss Protest, p. 4, lines 13-15; Exhibits E and F to Colm Moran's Declaration)

26 36. On September 4, 2014, Protestant produced a total of 9 pages of documents. (Motion to
27 Dismiss Protest, p. 4, lines 15-17; Exhibit G to Colm Moran's Declaration) This was in response to 45
28 separate requests from Respondent.

1 37. On September 8, 2014, Respondent's counsel again sent emails to Protestant demanding
2 that Protestant comply with the Pre-Hearing Conference Order and the Order regarding the Ruling on
3 Objections. (Motion to Dismiss Protest, p. 4, lines 20-22; Exhibit H to Colm Moran's Declaration)

4 38. To this date, Protestant has not produced any documents other than the 9 pages produced
5 on September 4, 2014.

6 **Failure to Provide Witness Lists**

7 39. As stated above, Protestant has also failed to file and serve its preliminary as well as its
8 final witness lists, due respectively on September 5, 2014 and October 27, 2014. Reminders from Mr.
9 Moran to Mr. Masi did not result in their production.

10 40. At the hearing on the Motion to Dismiss, when the ALJ asked Mr. Masi why he had not
11 provided the witness lists, Mr. Masi stated that he did not intend to call any witnesses.

12 **CONCLUSION AS TO WHETHER PROTESTANT HAS FAILED TO**
13 **COMPLY WITH AUTHORIZED DISCOVERY**

14 41. It is determined that Protestant has failed to comply with authorized discovery without
15 substantial justification for that failure.

16 42. Protestant failed to comply with the Board's Pre-Hearing Conference Order of June 11,
17 2014 and the Order regarding the Ruling on Objections to Requests for Production of Documents dated
18 August 6, 2014, in that Protestant:

19 (a) Failed to produce documents on August 22, 2014;

20 (b) Inadequately produced some documents on September 4, 2014, with the total production
21 amounting to only 9 pages in response to 45 separate requests from Respondent. As stated by Yamaha,
22 "For example, it included no documents relating to GE Capital (one of the vendors that was the subject of
23 Mr. Masi's abuse), only five emails between YMUS and San Jose Yamaha, no internal communications,
24 and no documents related to YMUS's supposedly wrongful conduct toward San Jose Yamaha." (See
25 Colm Moran's Declaration, p. 3, paragraph 15, and Exhibit H thereto; for a comparison between what was
26 contained in the 9 pages produced and what was included in the 45 requests for production and agreed
27 upon or ordered, see Mr. Moran's e-mails to Mr. Masi and the attachments thereto in Exhibit F);

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1 (c) Failed to provide a preliminary list of witnesses as well as a final list of witnesses.⁹

2 **APPLICABLE LAW AS TO THE EFFECT OF THE FAILURE OF PROTESTANT TO**
3 **FILE A PROTEST IN RESPONSE TO THE SECOND NOTICE OF TERMINATION**

4 43. Vehicle Code section 3060 in relevant part states:

5 (a) Notwithstanding...the terms of any franchise, no franchisor shall terminate or refuse
6 to continue any existing franchise unless all of the following conditions are met:

7 (1) The franchisee and the board have received written notice from the franchisor as
8 follows:

9 (A) Sixty days before the effective date thereof setting forth the specific grounds for
10 termination or refusal to continue.

11 (2)...the board finds that there is good cause for termination or refusal to continue,
12 following a hearing called pursuant to Section 3066. The franchisee may file a protest
13 with the board within 30 days after receiving a 60-day notice, satisfying the requirements
14 of this section,... When a protest is filed, the board shall advise the franchisor that a
15 timely protest has been filed, that a hearing is required pursuant to Section 3066, and that
16 the franchisor may not terminate or refuse to continue until the board makes its findings.

17 (3) The franchisor has received the written consent of the franchisee, or the appropriate
18 period for filing a protest has elapsed. (Underline added.)

19 44. Under this statute, Protestant would have 30 days from the time the notice is received to
20 file a timely protest and, if a timely protest had been filed, Yamaha would be precluded from terminating
21 the franchise unless it established good cause for the termination during a hearing on the merits of the
22 protest.

23 45. However, if no protest is filed within the 30 day time period, there is no right to a hearing
24 before the Board and the franchise may be terminated upon the passage of 60 days from the receipt of the
25 notice.

26 **ANALYSIS OF WHETHER THE TERMINATION OF THE FRANCHISE BY**
27 **YAMAHA WAS EFFECTIVE ON NOVEMBER 16, 2014**

28 46. There is no dispute that Respondent complied with the requirements of Section 3060 in
providing the notices mandated by the statute and that the notice to Protestant was received by Protestant
on September 17, 2014. Respondent has established that it sent a conforming notice to Protestant by
certified mail via the U.S. Post Office and that the notice was delivered on September 17, 2014 at
Protestant's dealership address.

⁹ Although Protestant is not required to call any witnesses, a reasonable interpretation of the requirements of producing the witness lists would mean that the party who has decided not to call any witnesses should so advise the opposing party.

1 47. There is no dispute that Protestant did not file a protest in response to this second notice
2 within the 30 days provided in Section 3060.

3 48. Therefore, Yamaha's notice of termination, received on September 17, 2014, effectively
4 terminated Protestant's Yamaha franchise as of November 16, 2014.

5 **THE EFFECT OF THE TERMINATION OF THE FRANCHISE ON**
6 **NOVEMBER 16, 2014, UPON THE PROTEST FILED ON APRIL 22, 2014**

7 49. Protestant's franchise has been effectively terminated as of November 16, 2014. The
8 termination occurred pursuant to Section 3060, as proper notice was given and received and Protestant
9 failed to file a timely protest.

10 50. Whether Yamaha could establish good cause to terminate the franchise of Protestant
11 pursuant to Section 3061 as to the first notice of termination is irrelevant.

12 51. As to the protest that was filed in response to the first notice of termination, the Board no
13 longer has the power to issue an order that would sustain the protest and order that the franchise not be
14 terminated.

15 52. The Board would be engaging in a useless act, both in holding the hearing to determine if
16 Yamaha could meet its burden of proving good cause to terminate the franchise and, if not, in issuing an
17 order that would purport to order Yamaha not to terminate a franchise that no longer exists.

18 53. As there is no longer a "franchise" in existence between the parties, and thus, San Jose
19 Yamaha is no longer a "franchisee",¹⁰ Respondent is correct that the Board no longer has jurisdiction over
20 the dispute and is without the power to act on the protest.

21 54. Even if there is some basis for finding continuing jurisdiction over the Protest (perhaps
22 because there was a "franchise" in existence when the protest was filed and San Jose Yamaha was a
23 "franchisee" at the time), Respondent is also correct that the issues raised by the notice and the protest
24 filed in response thereto are moot as there is no longer a franchise in existence. Resolving the issue of
25 whether there is good cause to terminate a franchise that does not exist in order to decide whether the
26

27 ¹⁰ Sections 331 and 331.1 define "franchise" and "franchisee". Section 3050(d) creates the power in the Board to "Hear and
28 decide... a protest presented by a franchisee pursuant to Section 3060...". Section 3060(a) by its terms applies to "any existing
franchise". (Underline added.) As the "franchise" is no longer in existence, Protestant is no longer a "franchisee" of Yamaha.

1 franchisor should be permitted to terminate the non-existent franchise would be meaningless. It would be
2 a waste of the Board's resources and a waste of the resources of the parties to proceed to a hearing on the
3 merits of the Protest if there is no longer a franchise in existence. Holding a hearing to determine if
4 Yamaha has good cause to terminate a non-existent franchise would be a useless act.

5 **THE FAILURE OF PROTESTANT TO PARTICIPATE IN THE**
6 **PROCEEDINGS INVOLVING THE MOTION TO DISMISS**

7 55. In addition to failing to engage in discovery, and failing to file a protest in response to the
8 Notice of Termination received by Protestant on September 17, 2014, it is noted that Protestant also failed
9 to participate meaningfully in addressing the issues raised in Respondent's Motion to Dismiss.

10 56. Mr. Masi failed to submit any Opposition to the Motion to Dismiss (neither timely nor
11 tardy), even though the time within which to submit the Opposition was part of an order of the Board and
12 based upon dates chosen by the parties, including Mr. Masi.

13 57. Further, it is noted that the Board's staff has spent considerable time and effort in attempts
14 to assist Mr. Masi and follow-up with him regarding his failure to comply with schedules contained in the
15 Board's orders, the dates to which he had previously agreed. Unfortunately, in return the Board's staff
16 received abuse rather than appreciation, and the staffs' efforts did not motivate Mr. Masi to timely action.

17 58. During the hearing on the Motion to Dismiss, it was clear to the ALJ that Mr. Masi was
18 anxious to vent regarding his alleged mistreatment by the representatives of Respondent, and Mr. Masi
19 was given some leeway to do that. However, even after the ALJ requested Mr. Masi to cease his personal
20 attacks on the character of Nissan's representatives, including Mr. Moran, Mr. Masi continued to spend
21 most of the time expressing his opinions of the character of those persons as well as defending against the
22 Restraining Order issued against him by the Orange County Superior Court, rather than providing
23 "substantial justification" for Protestant's failure to comply with authorized discovery. (Section
24 3050.2(b)) Providing such "substantial justification" during the hearing was particularly important as
25 Protestant had failed to provide its Opposition to the Motion that had been ordered.

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1 RECOMMENDATION

2 It is recommended that the Executive Director seek direction from the Board that the Protest of
3 *San Jose Yamaha v. Yamaha Motor Corporation, U.S.A.*, Protest No. PR-2394-14, be dismissed with
4 prejudice.

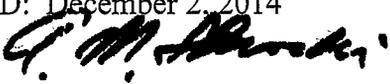
5
6 PROPOSED ORDER

7 Respondent Yamaha Motor Corporation, U.S.A.'s Motion to Dismiss Protest is hereby granted.
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11 I hereby submit the foregoing which are my
12 findings, recommendation, and Proposed Order in
13 the above-entitled matter, as the result of a hearing
14 before me. I recommend that the Executive Director
15 submit this to the New Motor Vehicle Board to be
16 adopted as the decision of the Board and that the
17 Executive Director seek direction from the Board to
18 dismiss this protest with prejudice.

19 DATED: December 2, 2014

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By: _____


ANTHONY M. SKROCKI
Administrative Law Judge

Jean Shiimoto, Director, DMV
Tim Corcoran, Branch Chief,
Occupational Licensing, DMV