



## DECISION COVER SHEET

ACTION BY: Public Members Only

ACTION BY: All Members<sup>1</sup>

To : BOARD MEMBERS

Date: August 10, 2015

From : ADMINISTRATIVE LAW JUDGE: Anthony M. Skrocki

CASE: FUN BIKE CENTER v. BOMBARDIER RECREATIONAL PRODUCTS, INC., BRP US INC.  
Protest No. PR-2405-14

TYPE: Vehicle Code section 3060(b) Modification

### PROCEDURE SUMMARY:

- FILED ON CALENDAR: August 15, 2014
- MOTIONS FILED: Respondent's (first) Motion to Dismiss Protest (denied)  
Respondent's Motion for Reconsideration of Denial of Motion to Dismiss Protest (denied)  
Protestant's Motion for Order to Set Aside Notice of Intent to Modify Franchise or, in the Alternative Stay Proceedings (denied)  
Respondent's Post-Discovery Motion to Dismiss Protest (this is the motion currently before the Board.)
- COUNSEL FOR PROTESTANT: Michael Sieving, Esq.  
Attorney at Law
- COUNSEL FOR RESPONDENT: R. Bryan Martin, Esq.  
Haight Brown & Bonesteel LLP

EFFECT OF PROPOSED ORDER: Adoption of the Proposed Order would result in the dismissal of the protest with prejudice

### SUMMARY OF PROPOSED ORDER:

- Respondent, BRP, gave notice of its intent to establish an additional dealer and that this would result in the change of the Primary Market Area (PMA) contractually assigned to Protestant, Fun Bike Center (FBC). FBC initially filed both a 3062 establishment protest and a 3060(b) modification protest. As FBC is more than 10 miles from the intended location of the new dealer the establishment protest was dismissed on request of FBC.
- This motion to dismiss is directed at the 3060(b) modification protest that alleges that the change in the PMA assigned to FBC is a "modification" that comes within Section 3060(b).

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<sup>1</sup> Counsel for both parties stipulated to allow Dealer Board Member participation in consideration of the Proposed Order.

- Generally in a modification protest there would be the need for an evidentiary hearing addressing (1) whether there is an intended modification of the franchise; and (2) if so, whether the modification would affect the protestant's sales or service obligations or investment, with the burden of proof as to these allocated to the protestant. If these are established, the hearing would then proceed with the issue being whether there is good cause for the modification, with the burden of proof then being allocated to the franchisor.
- BRP filed its first motion to dismiss alleging that no hearings as to the protest were needed, because, as a matter of law, a change in the PMA due to the establishment of the additional dealership did not constitute a modification of any of the terms of the franchise. The ALJ denied this first motion to dismiss as all of the various portions of the franchise were not before the Board and thus its terms could not be determined. The ALJ then authorized discovery limited to the threshold issues (1) and (2) above.
- After the parties engaged in such discovery, BRP filed its current Motion to Dismiss alleging that there is no need for an evidentiary hearing because, as a matter of law, the change in the PMA assigned to FBC does not constitute a modification of the franchise. FBC alleges that the documents obtained in discovery indicate that the PMA is included in the franchise, that it is being modified, and that a FBC is entitled to a hearing to establish that the modification would substantially affect FBC's sales or service obligations or investment.
- FBC relies upon the language in Section 3060(b)(1) that states in part: "(1) Notwithstanding ... the terms of any franchise, no franchisor shall modify ... a franchise...". However, this language would be applicable only if there is a modification.
- The ALJ concluded that the two Appellate Court cases involving similar protests before the Board were controlling. The Appellate court found that, as a matter of law, the change in a dealer's non-exclusive assigned marketing area ("PMA" or equivalent) caused by the establishment of an additional dealer does not constitute modification of the franchise. The franchise expressly provided for the right of a franchisor to establish an additional dealership at a location in the assigned PMA and to deny the franchisor this right would be to grant the protestant an exclusive marketing area contrary to the terms of the franchise. There was no right to protest the establishment under Section 3062 as the existing dealer is not within the statutorily established 10-mile relevant market area and there is no right to protest under Section 3060(b)(1) unless the franchise had provided the dealer with an exclusive marketing area.

#### **RELATED MATTERS:**

- Related Case Law: *BMW of North America, Inc. v. New Motor Vehicle Board* (1984) 162 Cal.App.3d 980, *Ri-Joyce, Inc. v. New Motor Vehicle Board* (1992) 2 Cal.App.4<sup>th</sup> 445 and *Duarte & Witting v. New Motor Vehicle Board* (2004) 104 Cal.App.4<sup>th</sup> 626.
- Applicable Statutes and Regulations: Vehicle Code sections 3060-3066.