

1 R. Bryan Martin (Bar No. 221684)
bmartin@hbblaw.com
2 HAIGHT BROWN & BONESTEEL LLP
2050 Main Street, Suite 600
3 Irvine, California 92614
Telephone: 714.426.4600
4 Facsimile: 714.754.0826

5 Attorneys for Respondent
BRP US INC.

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8 **STATE OF CALIFORNIA**
9 **NEW MOTOR VEHICLE BOARD**
10

11 In the Matter of the Protest of
12 FUN BIKE CENTER,

13 Protestant,

14 v.

15 BOMBARDIER RECREATIONAL
PRODUCTS, INC., BRP US INC.,,

16 Respondent.
17

Case No. PR-2405

**RESPONDENT BRP US INC.'S POST-
DISCOVERY MOTION TO DISMISS
PROTECT**

Date: May 21, 2015
Time: 10:00 a.m.
Place: Telephonic

18
19 Where a franchisee asserts that a franchisor is attempting to modify his franchise the *first*
20 *step is to determine what rights were granted under the franchise.*

21 Within the meaning of Section 3060 *a franchise is a written agreement of the parties*
which is subject to the normal rules relating to the interpretation of contracts.¹

22 **I. INTRODUCTION AND PROCEDURAL HISTORY**

23 The issues presented in this post-discovery Motion to Dismiss have been well-briefed.
24 Respondent BRP brings this instant motion because the pure question of law at issue (*i.e.*, whether a
25 Section 3060 “modification” has taken place by Respondent’s proposed change of Protestant’s
26

27 ¹ *Ri-Joyce, Inc. v. New Motor Vehicle Board* (1992) 2 Cal.App.4th 445, 458 (citing *Vehicle*
28 *Code* Section § 331; *BMW of North America, Inc. v. New Motor Vehicle Board* (1984) 162
Cal.App.3d 980, 990) (emphasis added).

1 Primary Market Area (“PMA”) to accommodate the establishment of a new dealer more than 10 miles
2 from Protestant) is ripe for summary disposition now that discovery has been completed.

3 On December 3, 2014, Administrative Law Judge Anthony Skrocki heard and denied
4 Respondent’s Motion for Reconsideration of Denial of its Previous Motion to Dismiss heard on
5 November 20, 2014. In denying Respondent’s Motion for Reconsideration, ALJ Skrocki ruled, in
6 part:

7 So, at this point, I’m wondering whether I have enough in front of me to rule, again, as
8 a matter of law, that the protest should be dismissed because there is no modification
9 that comes within [Section] 3060.

10 * * *

11 ...the ALJ is going to be deciding, as a matter of law, based upon what evidence Mr.
12 Sieving can present to show that there is an ambiguity or some other reason to not
13 decide it, based upon the parol evidence rule, and determine whether extrinsic
14 evidence is going to be admissible to show modification. If that ALJ at that level,
15 initial level, will be in a better position than I am now, to make that decision, because,
16 by then, he will have answered all of my concerns that I have expressed, if you think
17 they are worth answering, ***or you would have at least presented to the ALJ all of the
18 documents that comprise the franchise, and given that ALJ the opportunity to hear
19 the claimed arguments for why there is an ambiguity.*** Or the modern test, you don’t
20 have to show an ambiguity, but merely that the language in the franchise is reasonably
21 susceptible...of that alternative interpretation.

22 * * *

23 ***So I think Mr. Sieving should have the opportunity to do some preliminary
24 discovery, limited to the potential parol evidence rule issues, if that can be done; that
25 the matter should be presented to the ALJ of the board on the initial threshold question
26 of whether there is a modification or whether it’s barred by the parol evidence rule;
27 taking into account all of the listed portions of the, quote, agreement, end quote; and
28 then you would be in a better position, again, essentially, to have a better review of
what the issue is before me now, of the dismissal of the protest because of, in this case,
the parol evidence rule, because there is no modification of whether the language of
notwithstanding the terms of any franchise, there shall be no modification if it
substantially impairs franchisee’s sales or service obligations or investment.***

(emphasis added.) [See Transcript of December 3, 2014 Telephonic Hearing on Respondent’s Motion
for Reconsideration of Denial of Motion to Dismiss, pp. 26-29; Martin Declaration ¶ 6; Exhibit J.]

With the merits hearing set for June 2, 2015, discovery has been completed. As such,
Protestant has had its opportunity to conduct discovery as to all the documents making up the
franchise agreement and the parol evidence rule issues. Indeed, during discovery, protestant requested

1 and received all documents that comprise the Dealer Agreement and any other contractual terms that
2 exist between Protestant and Respondent.² This included:

- 3 1. The Dealer Agreement and all current addenda thereto;
- 4 2. The Dealer Agreement General Provisions;
- 5 3. The current Operations Standards (Martin Declaration ¶ 9; Exhibit M);
- 6 4. The current Warranty and Service Guide;
- 7 5. A copy of the Dealer Binder applicable to Protestant;
- 8 6. The “BRP invoices” (as that term is used in the Dealer Agreement General Provisions);
- 9 7. The “other Policies” (as that term is used in the Dealer Agreement General Provisions);
- 10 and
- 11 8. The “other BRP Policies and documents” (as that term is used in the Dealer Agreement
- 12 General Provisions.

13 [See Protestant’s Request for Identification and Production of Documents – Set Number 2, Martin
14 Declaration, ¶ 7; Exhibit K.]

15 In response to these seven categories of documents requested, Respondent produced 1,546
16 documents. [Martin Declaration ¶ 8; Exhibit L.] These documents encompass the entirety of the
17 terms and conditions comprising the franchise agreement between the parties.

18 As Respondent has set forth to date, *BMW of North America, Inc. v. New Motor Vehicle Board*
19 (1984) 162 Cal.App.3d 980, 984 and *Ri-Joyce, Inc. v. New Motor Vehicle Board* (1992) 2 Cal.App.4th
20 445 are dispositive of the instant protest in Respondent’s favor as Respondent’s proposed alteration of
21 Protestant’s PMA to accommodate the appointment of a new dealer does not change a single term of
22 the subject franchise agreement and consequently cannot constitute a Section 3060 “modification” as a
23 matter of law. With discovery now complete, Protestant cannot point to a single provision of the
24 franchise agreement or any other document that is being violated by Respondent’s proposed action,
25 nor can Protestant point to any language in the franchise agreement or any other document that is
26 reasonably susceptible to an interpretation that the altering of Protestant’s PMA somehow constitutes
27 action inconsistent with the terms of the franchise agreement.

28 Simply put, with discovery now complete, all of the documents and evidence that could be
presented at the merits hearing, is now before Protestant and the ALJ, making the ruling on this protest

² Protestant also had the opportunity to conduct depositions of Respondent’s
representatives, but chose not to go forward with such depositions given the limited nature of this
phase of the protest.

1 appropriate for summary disposition. Determining this legal issue on the instant motion promotes the
2 goal of administrative efficiency and is consistent with the Board's purpose. *See Duarte & Witting v.*
3 *New Motor Vehicle Board* (2004) 104 Cal.App.4th 626, 647-48.

4 In sum, Protestant is protesting the alteration of its PMA to accommodate the appointment of a
5 new BRP dealer 11.6 miles (outside the "relevant market area" as defined in Vehicle Code section
6 507) from Protestant's dealership. Under the terms of the franchise agreement Protestant is a *non-*
7 *exclusive* dealer and BRP has the *unqualified* right to "change, alter or modify" Protestant's PMA at
8 its sole discretion and to appoint new dealers in any location whether inside or outside an existing
9 dealer's geographic area.

10 Respondent is simply seeking to do that which it is already entitled to do, and to which
11 Protestant agreed, under the agreement. Pursuant to *BMW* and *Ri-Joyce*, Respondent's proposed action
12 does not change a single provision of the franchise and thus, as a matter of law, cannot constitute a
13 "modification" under *Vehicle Code* Section 3060. Because there is no statutory basis for the protest, it
14 should be summarily dismissed at this juncture.

15 II. FACTUAL BACKGROUND

16 By letter dated July 28, 2014, Respondent BRP notified two of its dealers, Protestant Fun Bike
17 and South Bay Motorsports, that it intended to modify the Primary Market Areas (PMA) of these two
18 BRP dealers due to the appointment in El Cajon, California of a new BRP dealer, Vey's Motorsports
19 ("Vey's"). Vey's is located approximately 11.6 miles from Fun Bike and 15.3 miles from South Bay
20 Motorsports, respectively. BRP's longstanding policy is to assign the zip code of the physical address
21 of its dealer to that dealer's PMA, and to have no overlapping zip codes between BRP dealers of the
22 same product line(s). Because Vey's is located within Fun Bike's current PMA (but outside its
23 relevant market area), BRP sought to alter and adjust Fun Bike's PMA to maintain the integrity of its
24 dealer zip code system, which in turn also necessitated modification to South Bay Motorsports' PMA.

25 South Bay Motorsports did not protest BRP's proposed PMA alteration. On August 15, 2014,
26 however, Fun Bike filed two protests: an additional franchise protest under *Vehicle Code* Section 3062
27 regarding the establishment of Vey's, which at all times was communicated would be 11.6 miles from
28 Fun Bike; and a modification protest under *Vehicle Code* Section 3060 regarding the proposed

1 alteration of Fun Bike's PMA. On October 7, 2014, given that Vey's was to be located beyond the
2 10-mile relevant market area, Protestant requested dismissal of its Section 3062 protest. The New
3 Motor Vehicle Board (the "Board") officially dismissed the protest two days later.

4 **III. UNDISPUTED FACTS**

5 There is no dispute as to the following facts:

6 1. Protestant Fun Bike is an authorized dealer of Bombardier vehicles with its principal place
7 of business at 5755 Kearny Villa Road, San Diego, California 92123. Respondent BRP is a distributor
8 of new motor vehicles licensed by the California Department of Motor Vehicles. [See Declaration of
9 Frederic Audet ("Audet Declaration"), ¶ 4.]

10 2. On or about December 10, 2013, Fun Bike entered into a BRP US Inc. Dealer Agreement
11 (the "Dealer Agreement") with BRP. [Audet Declaration, ¶ 5; a true and correct copy of the Dealer
12 Agreement is attached as Exhibit A to the Audet Declaration.]

13 3. The Dealer Agreement at page 2, paragraph 1(a) under the heading, "**Appointment**,"
14 provides:

15 (a) Appointment of Non-Exclusive Dealer. BRP hereby appoints
16 Dealer as an authorized non-exclusive retail dealer of Products, as
17 defined in paragraph (c) of this Section 1, at the approved location
18 designated in Addendum A to this Agreement ("Dealer Location").
19 ***BRP expressly reserves its right, in its sole discretion, to appoint or
20 relocate other dealers of any Products in any location, including
21 within or outside Dealer's Primary Market Area.*** In addition, BRP
22 also reserves its right to sell Products through alternative or additional
23 retailers or channels and to promote Products on the Internet, other
24 multi-media networks or otherwise. (Emphasis added.)

25 4. The Dealer Agreement at page 3, paragraph 2(a) under the heading, "**General Provisions
26 and BRP Dealer Operation Standards**," provides:

27 (a) Other Dealer Documents. The BRP US Inc. Dealer Agreement
28 General Provisions ("General Provisions") and the BRP US Inc. Dealer
Operation Standards ("Operation Standards") are collectively referred
to as the Other Dealer Documents ("Other Dealer Documents"), and
are hereby expressly made a part of this Agreement and incorporated
herein. Throughout the term of this Agreement, the Operation
Standards are subject to revision or modification by BRP at its
discretion. Dealer expressly acknowledges that copies of the Other
Dealer Documents have been provided to Dealer by BRP and have
been read and agreed to by Dealer.

1 5. The Dealer Agreement contains an integration clause at page 4, paragraph 6 under the
2 heading, "**Additional Terms and Conditions**," providing:

3 "This Agreement, including the Addenda A, B, C and if applicable
4 Addendum D and the Other Dealer Documents incorporated herein by
5 reference, *contains the entire understanding between the Parties with
6 respect to the subject matter hereof and supersedes any prior
7 understanding or written or oral agreements among them with
8 respect thereto*. No representations or statements other than those
9 expressly set forth or referred to in these documents, or in Dealer's
10 written application documents, were made or relied upon in entering
11 into this Agreement. Each Addendum may be amended at any time by
12 mutual agreement of Dealer and BRP, through the later execution by
13 both Parties of a replacement, which then shall be deemed part of this
14 Agreement. This Agreement shall not be modified except as expressly
15 authorized in writing signed by both Parties hereto; provided, however,
16 that the Parties agree that any and all changes that BRP may make to
17 the Operation Standards (as applicable to all of its Dealers) shall be
18 binding upon Dealer as if such changes were adopted expressly in
19 writing by Dealer as amendments to this Agreement. (Emphasis
20 added.)"

13 6. The BRP US Inc. Dealer Agreement General Provisions ("General Provisions") at page 2,
14 paragraph 1(h) under the heading, "**Definitions**," provides:

15 (h) "Dealer Primary Market Area" or "PMA" means an assigned, non-
16 overlapping geographical area designated by BRP *in its sole discretion*
17 in which Dealer is responsible for retailing, servicing, and otherwise
18 representing [BRP] Products to a collection of past, current and
19 potential consumers. BRP may designate a PMA, for each Product, by
20 sending a notice to Dealer. *BRP may modify, alter or adjust Dealer's
21 PMA at any time*. (Emphasis added.)

19 [Audet Declaration, ¶ 6; a true and correct copy of the General Provisions is attached as Exhibit B to
20 the Audet Declaration.]

21 7. The General Provisions at page 19, paragraph 23(h) under the heading, "Entire
22 Agreement," provides, in part:

23 (h) Entire Agreement. ...[] It is expressly agreed and understood that
24 the following documents, are incorporated herein by reference and
25 have the same binding effect as this Agreement: *the Addenda to this
26 Agreement, the Operation Standards, the Warranty Service Guide,
27 the Dealer Binder, the BRP invoices, and all other Policies*. In case
28 of conflict, the order of precedence shall be: 1) Addenda to this
Agreement; 2) this Agreement (including the General Provisions); 3)
the Operation Standards; 4) the current Warranty Service Guide; 5) the
other BRP Policies and documents. (Emphasis added.)

1 8. On or about July 28, 2014, BRP sent a letter via certified mail to Fun Bike formally
2 notifying it of a modification to its Primary Market Area (“PMA”) based on the potential appointment
3 of another BRP dealer, Vey’s Motorsports Inc., to be located at 690 N. 2nd Street, El Cajon,
4 California. [Audet Declaration, ¶7; a true and correct copy of this July 28, 2014 letter to Fun Bike is
5 attached as Exhibit C to the Audet Declaration.]

6 9. Also on or about July 28, 2014, BRP sent a letter via certified mail to the Board notifying it
7 that pursuant to California Motor Vehicle Code Section 3060(B)(1), BRP intended to modify the
8 PMAs of two BRP dealers, Fun Bike Center and South Bay Motorsports, due to the potential
9 appointment of a new BRP dealer, Vey’s Motorsports, to be located at 690 N. 2nd Street, El Cajon,
10 California. [Audet Declaration, ¶8; a true and correct copy of this July 28, 2004 letter to the Board is
11 attached as Exhibit D to the Audet Declaration.]

12 10. On August 15, 2014, Fun Bike filed Protest No.: PR-2405-14 with the Board under
13 Vehicle Code Section 3060 alleging that the proposed modification to its PMA would substantially
14 affect its sales and service obligations and investment in the franchise, and that good cause did not
15 exist for permitting BRP to undertake the proposed action. [Declaration of R. Bryan Martin (“Martin
16 Declaration”), ¶ 2; a true and correct copy of Fun Bike’s Protest PR-2405-14 is attached as Exhibit F
17 to the Martin Declaration.]

18 11. Also on August 15, 2014, Fun Bike filed Protest No.: PR-2404-14 with the Board under
19 Vehicle Code Section 3062 alleging that it was located within the relevant market area of the proposed
20 new BRP dealer and that good cause did not exist for permitting BRP to undertake the proposed
21 action. [Martin Declaration, ¶ 3; a true and correct copy of Fun Bike’s Protest PR-2404-14 is attached
22 as Exhibit G to the Martin Declaration]

23 12. On August 26, 2014, BRP sent a letter via certified mail to Fun Bike clarifying its original
24 notice of July 28 concerning the modification of Fun Bike’s PMA and which informed Fun Bike that
25 the proposed new BRP dealer, Vey’s Motorsports, was located 11.6 miles “as the crow flies” from
26 Fun Bike. [Audet Declaration, ¶ 9; a true and correct copy of the August 26 letter is attached as
27 Exhibit E to the Audet Declaration.]
28

1 13. Fun Bike is approximately 11.6 miles “as the crow flies” from Vey’s Motorsports and is
2 located outside Fun Bike’s “relevant market area” as defined in Vehicle Code section 507. [Audet
3 Declaration, ¶ 10.]

4 14. On or about October 7, 2014, after determining the proposed location for Vey’s
5 Motorsports was outside its “relevant market area,” Fun Bike filed a Request for Dismissal of Protest
6 PR-2404-14 brought under Vehicle Code Section 3062. [Martin Declaration, ¶ 4; a true and correct
7 copy of Fun Bike’s Request for Dismissal is attached as Exhibit H to the Martin Declaration.]

8 15. On or about October 9, 2014, the Board issued an Order of Dismissal of Fun Bike’s
9 Protest PR-2404-14 brought under Vehicle Code Section 3062. [Martin Declaration, ¶ 5; a true and
10 correct copy of the Board’s Order of Dismissal is attached as Exhibit I to the Martin Declaration.]

11 16. On or about January 22, 2015, Protestant served its Request for Production of Documents
12 – Set Number 2. [Martin Declaration, ¶ 7; Exhibit K.]

13 17. On or about January 30, 2015, Respondent served its responses to Protestant’s Request for
14 Production of Documents – Set Number 2, which included 1,546 documents produced concurrently
15 therewith. [Martin Declaration, ¶ 8; Exhibit L.]

16 **IV. ARGUMENT**

17 **A. There has been No Modification to Protestant’s Franchise as a Matter of Law**

18 The proposed alteration of Protestant’s PMA and appointment of an additional dealer more
19 than 10 miles from Protestant does not change a single provision of Protestant’s franchise and thus
20 cannot constitute a modification to trigger the statutory predicates in *Vehicle Code* Section 3060³.
21 BRP appointed Fun Bike as a *non-exclusive* dealer and reserved the *unqualified* power to appoint or
22 relocate other dealers in any location whether within or outside Fun Bike’s PMA. [Dealer Agreement
23 (Exhibit A), page 3, paragraph 2(a).] BRP also reserved the *unqualified* power to “modify, alter or
24 adjust [Fun Bike’s] PMA at any time.” [General Provisions (Exhibit B), page 2, paragraph 1(h).]

25 _____
26 ³ *Vehicle Code* Section 3060 (b)(1) provides in pertinent part that “...no franchisor shall
27 modify or replace a franchise with a succeeding franchise if the modification or replacement
28 would substantially affect the franchisee’s sale or service obligations or investment, unless the
days in advance of the modification or replacement.” The relevant factors to be considered by the
Board with respect to Section 3060 protest are set forth in *Vehicle Code* Section 3061.

1 Simply put, there has been no “modification” because BRP is only seeking to do that which it is
2 already contractually entitled to do under the Dealer Agreement. Fun Bike’s protest therefore fails as
3 a matter of law and must be dismissed as *Vehicle Code* Section 3060 is not implicated.

4 ***I. BMW of North America, Inc. v. New Motor Vehicle Board***

5 The exact scenario set forth above was addressed in favor of the franchisor in *BMW of North*
6 *America, Inc. v. New Motor Vehicle Board* (1984) 162 Cal.App. 3d 980. There, a BMW dealer in
7 Camarillo, in Ventura County, sought to protest the establishment of a new BMW dealership in the
8 Thousand Oaks-Westlake area of that same county. *Id.* at 983. As here, the dealer’s franchise
9 agreement reserved to the franchisor the power to appoint additional dealers and the new dealership
10 was to be located at a site beyond the relevant market area of the existing dealer. The franchise
11 agreement provided:

12 Dealer recognizes and agrees that its appointment as a dealer in BMW
13 Products does not confer upon it the exclusive right to deal in BMW
14 Products in any specific geographic area. Nothing contained in the
15 Agreement shall limit, or be construed to limit, the geographical area
16 within which, or the persons to whom, Dealer may sell BMW Products.
17 BMWNA reserves the right to grant or confer rights and privileges
18 covering the sale and servicing of BMW Products upon such other
19 Dealers selected and approved by BMWNA, whether located in
20 Dealer’s geographic area or elsewhere, as BMWNA, in its sole
21 discretion, shall deem necessary or appropriate.

18 *Id.* at 983-84. (Emphasis added.)

19 After conducting a market study of the region, BMW determined to appoint an additional
20 dealer in the Thousand Oaks-Westlake area to be located 15.2 miles from the existing dealer. *Id.* The
21 existing dealer filed a protest with the New Motor Vehicle Board, alleging that the appointment of the
22 new dealer in Ventura County constituted a “modification” of his franchise agreement. *Id.*

23 After an administrative hearing the administrative law judge prepared a proposed decision
24 finding that the appointment of the dealer constituted a modification of the franchise agreement and
25 that there was not good cause for the modification. *Id.* at 984-85. The Board adopted the proposed
26 decision. *Id.* BMW petitioned for a writ of mandate, which was denied by the trial court. BMW
27 appealed. On appeal, the appellate court reversed and remanded the matter to the trial court with
28

1 instructions to issue a peremptory writ of mandate directing the Board to vacate its decision granting
2 the dealer's protest and to issue a new decision denying the protest.

3 In reversing the Board's decision, the *BMW* court held that first reference must be to the terms
4 of the contract in determining the rights and liabilities of the parties under the franchise agreement.
5 *Id.* at 991. Dispositive to the court was that the agreement provided that the dealer was not granted the
6 exclusive right to deal in BMW products in any particular geographic area. BMW expressly reserved
7 the right to appoint other dealers in BMW products, whether located in the dealer's geographic area or
8 not. *Id.*

9 The court held this contract language could not be reasonably construed to provide the dealer
10 with the exclusive right to sell BMW products in Ventura County, or in any geographical area, *and*
11 *could not be construed to give the dealer the right to object to the appointment of a new dealer outside*
12 *its relevant market area.* *Id.* Thus, in deciding to appoint a new dealer in the Thousand Oaks-
13 Westlake area, BMW was acting pursuant to, rather than in derogation of, the dealer franchise
14 agreement. *Id.*

15 In rejecting the dealer's and trial court's public policy arguments regarding the contractual
16 reservation of right to appoint additional dealers, the *BMW* court discussed the interplay and
17 limitations of *Vehicle Code* Sections 3060 and 3062. With respect to Section 3060, the court
18 reaffirmed that a franchisor may be required to continue existing franchise agreements without
19 modification if a modification would substantially affect the franchisee's sales and service obligations
20 or investment. *Id.* Importantly, however, the court held that Section 3060 does not in any way dictate
21 what must be included in a franchise agreement, and it does not state or even imply that a franchisor
22 may not reserve the power to appoint new dealers or that a franchise must provide an exclusive trading
23 area to a dealer. *Id.*

24 The court also dealt with the dealer's assertion that the appointment of the new dealer would
25 constitute a "modification" of its franchise by changing the dealer's previous area of responsibility to
26 accommodate the new dealer. ***This is the exact assertion made in the instant protest.*** Under the
27 system at issue in *BMW*, every geographic area denominated by a zip code was assigned to an area of
28 responsibility ("A.O.R.") for an existing dealer. *Id.* at 992. The total group of zip code areas assigned

1 to a particular dealer was that dealer's A.O.R.⁴ *Id.* It followed that the appointment of a new dealer
2 would necessarily alter the A.O.R. of the nearest dealers, which the dealer in *BMW* argued constituted
3 a modification to his franchise agreement. *Id.*

4 The *BMW* court rejected this argument, holding that BMW was free to use whatever planning
5 mechanism it desired in determining how to market its products.⁵ *Id.* at 993. Because the dealer
6 agreement was not exclusive and because BMW reserved the right to appoint other dealers whether in
7 the existing dealer's geographic area or not, the Board's decision to uphold the protest was in error *as*
8 *it disregarded the terms of the franchise agreement and imposed contractual obligations upon BMW*
9 *to which it had never agreed and which no interpretation could support.* *Id.* (emphasis added.) The
10 dealer simply had no exclusive right within his A.O.R.

11 The *BMW* court also emphasized the Legislature's *limited* regulatory power over the
12 franchisor/franchisee relationship, and highlighted the well-settled rule of "unfettered competition and
13 freedom of contract." *Id.* Thus, in precluding BMW from establishing the new dealer, the Board
14 *ignored rather than enforced* the franchise agreement, and gave the dealer something that neither his
15 contract nor the New Motor Vehicle Board Act gave it – an exclusive trading territory in excess of its
16 relevant market area. *Id.* (emphasis added.)

17 In closing, the *BMW* court accepted that the creation of any new dealership would necessarily
18 change the A.O.R. of some existing dealers. The court, however, refused to accept that if the dealer's
19 position was sustained, BMW could never create a new dealership without establishing good cause
20 before the Board, "the result of which would be that existing dealers would be given perpetual
21 territorial monopolies, in contravention of the express terms of their franchises." *Id.* In rejecting such
22 an outcome, the court concluded:

23 The short answer is that the appointment of a new dealer does not
24 change a single provision of [the dealer's] franchise and consequently
25 cannot constitute a modification." The power of the Board arises under
the statute only when franchisor improperly 'terminate[s] or refuse[s]

26 ⁴ BRP's PMA system is similar to the A.O.R. system in *BMW*.

27 ⁵ The court further held that such planning mechanisms were not relevant and were not
28 admissible to establish a meaning of a written contract where the contract was not reasonably
susceptible of the meaning urged by the protesting dealer.

1 to continue any existing franchise' or impermissibly 'modif[ies] or
2 replace[s] a franchise with a succeeding franchise.' (§ 3060.) None of
3 the statutory predicates occurred here. Instead, in violation of the parol
4 evidence rule, [the dealer] and the Board would rewrite the franchise to
5 read that BMW reserves the right to create other dealers in the present
6 dealer's geographic area, 'provided that the new dealership does not
7 change the area of responsibility or units in operation.' Having
8 rewritten the agreement, the Board then finds that BMW modified the
9 recast franchise without good cause. Because there was no competent
10 evidentiary basis for that finding and because the Board has no general
11 power over franchises absent statutory enablement, the Board exceeded
12 its jurisdiction.

13 *Id.* at 993-94. (Emphasis added.) Accordingly, the court reversed the trial court's judgment and
14 ordered that the Board deny the dealer's protest.

15 2. *Ri-Joyce, Inc. v. New Motor Vehicle Board*

16 In *Ri-Joyce*, the Board and Mazda Motors of America, Inc. appealed from a judgment of the
17 trial court granting a petition for a peremptory writ of mandate in favor of *Ri-Joyce*. *Id.* at 449. *Ri-*
18 *Joyce*, a Mazda dealer, had attempted to protest the establishment of a new Mazda dealership more
19 than 10 miles from *Ri-Joyce*'s dealership. *Id.* at 449-50. The Board found the court's decision in
20 *BMW* to be controlling and *summarily dismissed* the protest without a merits hearing. *Id.* at 450. The
21 trial court issued a writ of mandate directing the Board to set aside its decision and to consider the
22 protest on its merits. *Id.* An appeal followed.

23 As in both *BMW* and here, the *Ri-Joyce* franchise agreement reserved to the franchisor the
24 power to appoint additional dealers and the new dealership was to be located at a site beyond the
25 relevant market area of the existing dealer. *Id.* at 451. Also, as in *BMW* and here, Mazda had used a
26 planning mechanism referred to as an APR (area of primary responsibility), under which postal zip
27 codes were assigned to the APR of a nearby dealer, similar to the A.O.R. system in *BMW* and the
28 PMA system in this case. *Id.* at 453. ***Moreover, as in BMW and here, the Ri-Joyce dealer maintained that the alteration of its APR by establishment of another dealership would constitute a "modification" of its franchise under Section 3060.*** *Id.*

Attempting to distinguish its case from *BMW*, where such arguments were rejected, the dealer
in *Ri-Joyce* asserted that its situation was different because in *BMW* the A.O.R. scheme was an
"internal planning mechanism" ***that was not contained in the franchise agreement***, while in *Ri-Joyce*

1 (as here) the APR scheme, when in use, *was set forth in the Mazda dealer agreement*. *Id.* This is the
2 same distinction made during the hearing on the previous Motion to Dismiss as distinguishing this
3 case from the facts, holding and outcome in *BMW*. *Significantly, however, the Ri-Joyce court stated*
4 *that “[t]his distinction lacks legal significance.” Id.*

5 Instead, the *Ri-Joyce* court’s focus and decision turned on the terms of the franchise agreement
6 to determine what rights were granted under the agreement and whether there was a proposed
7 modification to the agreement’s terms. The court found that throughout the period Mazda used the
8 APR planning system its franchise agreement specifically provided that a dealer’s appointment was
9 *non-exclusive* and Mazda reserved the right to establish new dealerships. *Id.* at 454. Moreover, the
10 court found that at all relevant times, with respect to its dealer APR areas, that the “[d]ealers
11 acknowledged that the [APR] is subject to modification by Mazda and that dealer’s rights with respect
12 to such area are non-exclusive.” *Id.* The court rejected the dealer’s claim that its franchise agreement
13 gave it exclusive and unmodifiable rights within an APR as being in direct conflict with the written
14 terms of its franchise agreement and the parol evidence rule, as applied in *BMW*. *Id.* As such, the
15 court ruled that the Board would have no authority to uphold Ri-Joyce’s protest under Section 3060
16 based on such arguments. *Id.*

17 At their core, these are the same arguments that have been offered to date by Protestant in this
18 case – that the subject Dealer Agreement gives it the exclusive and unmodifiable rights within its
19 PMA. For the same reasons these arguments were rejected in *BMW* and *Ri-Joyce*, they should be
20 rejected here.

21 Ultimately, the *Ri-Joyce* court found that the case was inappropriate for summary dismissal
22 due to significant differences between the *BMW* and *Ri-Joyce* franchise agreements. Specifically, the
23 *Ri-Joyce* court noted that the *BMW* franchise agreement had reserved the *unqualified* power to
24 appoint new dealers whether in the dealer’s geographic area or elsewhere. *Id.* at 456 (citing *BMW*,
25 162 Cal. App.3d at 984). In contrast, the *Ri-Joyce/Mazda* dealer agreement reserved to the franchisor
26 the *qualified* right to appoint new dealers. That franchise agreement provided:

27 Dealer and Mazda acknowledge that they may not fulfill their respective expectations
28 for the business contemplated by the Mazda Dealer Agreement and agree that in such
 event the parties may take any one or more of the following actions, consistent with

1 applicable law: (i) Dealer of Mazda may elect to terminate or not renew the Mazda
2 Dealer Agreement as provided herein; (ii) Dealer may elect to utilize some of its
3 resources to engage in businesses involving the promotion, sale and service of
4 products other than Mazda Products, including those which may be competitive with
5 Mazda Products; or (iii) if Mazda determines it would be in the best interests of
6 customers for Mazda to do so, *Mazda may elect to appoint another dealer to promote,
7 sell and service Mazda Products near Dealer's Approved Location.* Dealer and
8 Mazda shall give each other at least sixty days' written notice prior to taking any of the
9 foregoing actions, *for the purpose of enabling the parties to discuss whether there
10 exist any mutually agreeable alternative to the proposed action.* To the extent any
11 consent is required from a party, such party will not unreasonably withhold its consent
12 to any of the foregoing actions by the other.

13 *Id.* at 456-57. (Emphasis added.)

14 Under this language, the *Ri-Joyce* court held the franchise agreement reserved a *qualified* right
15 to establish a new dealership "*near*" Ri-Joyce's approved location. *Id.* at 457. Determinative to the
16 court was the fact that the term "near" was not defined in the agreement, which gave rise to
17 competing, reasonably susceptible meanings of the contract urged by both parties. *Id.* This created an
18 issue as to the meaning and scope of Mazda's reservation of power to appoint another dealer near Ri-
19 Joyce's approved location which could be clarified by extrinsic evidence which Ri-Joyce had to be
20 given an opportunity to present. *Id.* Additionally, under the terms of the franchise agreement,
21 Mazda's unilateral establishment of a nearby dealership without conferring with Ri-Joyce and without
22 any attempt at justification under the agreement would be contrary to the agreement's terms and
23 constitute an attempted *modification of the contract* (as opposed to a general alteration of Ri-Joyce's
24 APR) which would be subject to protest under Section 3060.

25 It is these facts that distinguished *Ri-Joyce* from *BMW* and which prevented summary
26 dismissal in the franchisor's favor – not that the A.O.R. in *BMW* was *not* contained in the franchise
27 agreement. Here, as in *BMW* but unlike in *Ri-Joyce*, under the terms of the BRP Dealer Agreement,
28 Respondent reserved the *unqualified* power to appoint new dealers whether in a dealer's geographical
area or elsewhere and to "modify, alter or adjust Dealer's PMA at any time." [Exhibit B to Motion to
Dismiss, page 2, paragraph 1(h).] In no way can it be argued that the Dealer Agreement granted
Protestant an exclusive, unmodifiable PMA for which intrusion into that area could constitute a

1 “modification” of the franchise under Section 3060⁶. See *id.* at 456. Yet, that is exactly the effect of
2 what Protestant argues here.

3 In short, there has been no Section 3060 “modification” as a *matter of law* because there has
4 not been a single change to any provision of the Dealer Agreement. See *BMW* at 993-94. Under the
5 following “flow-chart” analysis gleaned from *Ri-Joyce*, there can be no dispute as to this fact:

6 1. Where a franchisee asserts that a franchisor is attempting to modify his franchise *the first*
7 *step is to determine what rights were granted under the franchise.* *Id.* at 458.

8 a. Within the meaning of Section 3060 a franchise is a written agreement of the parties
9 which is subject to the normal rules relating to the interpretation of contracts. *Id.*

10 2. Where a franchise agreement is reasonably susceptible to the meaning urged by a
11 franchisee, the Board must hear and consider such extrinsic evidence as the franchisee can produce in
12 order to determine what rights were granted under the agreement. *Id.*

13 a. Only then can it be determined whether the franchisor’s proposed action constitutes
14 a modification of the franchise. *Id.*

15 3. Where a franchise agreement is *not* reasonably susceptible to a meaning urged by a
16 franchisee, the Board does *not* need to hear and consider evidence, but can rule as a matter of law that
17 no modification to the franchise agreement occurred. *Id.*

18 4. If the franchisor’s proposed action does *not* modify the terms of the franchise agreement,
19 then the franchisor is entitled to prevail on summary disposition. *Id.*

20 5. If the franchisor’s proposed action does modify the terms of the franchise agreement, then
21 the Board must proceed with further consideration of the protest. *Id.*

22 ⁶ As explained in *Ri-Joyce*, nothing in the *Vehicle Code* or elsewhere, precludes a
23 franchisor from granting an exclusive trading area beyond a dealer’s relevant market area or that a
24 franchisee would be precluded from protesting the modification of such an agreement by the
25 appointment of a new dealer within the exclusive trading area. *Id.* At 456 (citing *BMV AT 991.*)
26 “*That is a matter left to the agreement of the parties.* If a franchise agreement *does* grant a
27 dealer modification of the franchise which is subject to protest under Section 3060.” *Id.* (Emphasis
28 added.)

Here, Protestant’s position would have merit only if it was granted an *exclusive* area of
responsibility under the contract, in which case Respondent’s unilateral attempt to modify that
area would be a proposed modification to the contract’s exclusivity term. Of course, that is not the
case here as it is undisputed that Protestant is a non-exclusive dealer whose geographic area is
subject to unilateral alteration under the Dealer Agreement.

1 In *Ri-Joyce*, the terms of the franchise agreement *were* reasonably susceptible to the meaning
2 urged by the franchisee; thus, it was entitled to an evidentiary hearing to present evidence in support
3 of its interpretation. In contrast here, no terms of the Dealer Agreement are claimed to be ambiguous
4 or claimed to contain a meaning that is reasonably susceptible to interpretation such that extrinsic
5 evidence is necessary. Protestant does not challenge the meaning of any terms and does not argue that
6 Respondent did not contractually reserve the unqualified power to appoint new dealers and “modify,
7 alter or adjust” dealer PMAs. Protestant simply concludes that such action, regardless whether agreed
8 to by Protestant and allowed under the Dealer Agreement, constitutes a Section 3060 “modification”
9 and thus is not allowed under the section⁷. This is strictly at odds with the facts and holdings in *BMW*
10 and *Ri-Joyce*.

11 3. The Terms of the Franchise Agreement Control

12 In both *BMW* and *Ri-Joyce*, the dealers maintained that the alteration of their AOR (area of
13 responsibility) and APR (area of primary responsibility) by establishment of another dealership would
14 constitute a modification (in the most general sense) of its franchise which could be protested under
15 Section 3060. *BMW, supra, at 991-92; Ri-Joyce, supra, at 453*. This is the exact same argument
16 Protestant makes here.

17 In rejecting such a general proposition, the *Ri-Joyce* court set forth the dispositive standard for
18 answering this question: “[w]here a franchisee asserts that a franchisor is attempting to modify his
19 franchise *the first step is to determine what rights were granted under the franchise.*” *Ri-Joyce* at
20 458; *see also BMW* at 991 (“In determining the rights and liabilities of [the franchisor and franchisee]
21 under the franchise agreement the first reference must be to the written terms of the contract.”) Thus,
22 the terms of the agreement control.

23 Here, The Dealer Agreement provides that Protestant is a “non-exclusive” dealer, and that
24 Respondent expressly reserves the right, in its sole discretion, to appoint or relocate other dealers
25 within or outside an existing dealer’s Primary Market Area. [BRP US Inc. Dealer Agreement, page 2,
26

27 ⁷ Significantly, Protestant does not, nor can it, contend that such proposed action violates
28 the terms of the Dealer Agreement.

1 paragraph 1(a); Exhibit A to Motion to Dismiss.] Moreover, the BRP US Inc. Dealer Agreement
2 General Provisions provides that Respondent, in its sole discretion, may “modify, alter or adjust” its
3 dealers’ PMAs at any time. [BRP US Inc. Dealer Agreement General Provisions, page 2, paragraph
4 1(h); Exhibit B to Motion to Dismiss.] Protestant expressly agreed to these terms as part of the
5 franchise relationship. Protestant, however, is encouraging the Board to ignore these terms, as well as
6 the *BMW* and *Ri-Joyce* opinions, which hold the contract terms dispositive to the issues litigated. In
7 deciding to appoint a new dealer more than 10 miles from Protestant and to alter Protestant’s PMA to
8 accommodate the new dealer, Respondent is simply doing that which it is already entitled to do under
9 the Agreement. That is the *only* inquiry that is relevant for “modification” analysis under *Ri-Joyce*
10 and *BMW*.

11 **4. BMW is not Distinguishable – Its Holding Controls Here**

12 To date, Protestant has attempted to distinguish the *BMW* and *Ri-Joyce* cases on the fact that
13 the *BMW* AOR “was merely an internal planning mechanism” and was “not addressed in the
14 franchise” as opposed to the PMA in this case which is contained in the franchise agreement.
15 (Opposition, p.2:12-13.) As noted, however, this same argument was made by the dealer in *Ri-Joyce*
16 (where the APR was contained in the franchise agreement) and readily rejected by the court *as a*
17 *distinction lacking any legal significance*. See *Ri-Joyce* at 453.

18 Protestant has also asserted that *BMW* is further distinguishable because the BRP franchise
19 agreement imposes obligations upon the dealer related to the dealer’s designated PMA. (Opposition,
20 p.2:18-19.) Examples of these obligations, according to Protestant, are the “dealer’s sales
21 responsibilities related to the PMA,” “the dealer’s minimum sales performance in the PMA,” “the
22 requirement for the dealer to have a service facility sufficient to meet its service responsibilities in the
23 PMA,” the dealer’s staffing and training requirements relate to the anticipated demand of the “market”
24 (ie. PMA) serviced by the dealer,” and “the potential for termination of the franchise for a breach of
25 these obligations, including those related to unit sales in the assigned PMA.” (Opposition, p.2:19-
26 3:4.) These very arguments were made and rejected both in *BMW* and *Ri-Joyce*.

27 In *Ri-Joyce*, the court recognized that under the applicable dealer agreement, Mazda performed
28 periodic reviews of a dealer’s past performance and of anticipated sales, service, parts and other

1 matters affecting the past, present and future conduct of the dealer's business and its relationship with
2 Mazda. *Ri-Joyce* at 453. ***Mazda utilized its APR in performing this function.*** *Id.* (emphasis added.)

3 Similarly, in *BMW*, the franchisor utilized data tied to its AOR, which reported annual new car
4 registrations by post office zip code. This information enabled BMW to determine whether it was
5 achieving sufficient market penetration in any particular area, and was used as the estimation of
6 required service and parts facilities. *BMW* at 992. From this data, BMW derived the number of units
7 in operation, which in proximity to a dealer's location was a factor which BMW considered in
8 determining the levels of service and parts facilities a dealer had to maintain to provide adequately for
9 the demand for services and parts. *Id.*

10 In considering these factors (tied to both the APR and AOR in the above cases), the *BMW* and
11 *Ri-Joyce* courts rejected both of the dealer's arguments that the mere alteration of their APR/AOR, by
12 establishment of another dealership, would constitute a "modification" of its franchise that could be
13 protested under Section 3060. In so doing, the *Ri-Joyce* court held: "[i]f only these circumstances
14 were present, the *BMW* decision would appear to be directly controlling [here]." *Ri-Joyce* at 453.

15 Instead, the *Ri-Joyce* court had to look at the terms of the franchise agreement, which it found
16 were different from the terms of the franchise agreement in *BMW*. Specifically, the *Ri-Joyce* court
17 noted that the *BMW* franchise agreement reserved the ***unqualified*** power to appoint new dealers
18 whether in the dealer's geographic area or elsewhere (*Id.* at 456 (citing *BMW* at 984)), while the Ri-
19 Joyce/Mazda dealer agreement reserved to the franchisor the ***qualified*** right to appoint new dealers
20 "near" *Ri-Joyce*'s approved location. *Ri-Joyce* at 456-57. This created an issue as to the meaning and
21 scope of the franchise agreement's term "near," which was reasonably susceptible to a meaning urged
22 by the franchisee such that the parol evidence rule did not apply. *Id.* There also was a requirement
23 under the franchise agreement that Mazda had to confer with Ri-Joyce in good faith to discuss
24 whether there existed any mutually agreeable alternatives to Mazda's proposed action. *Id.* Mazda's
25 proposed actions violated the terms of the agreement, unlike here, where the proposed action is
26 expressly allowed under the agreement.

27 Also in opposition to date, Protestant argues that the *Ri-Joyce* court considered, distinguished
28 and clarified its holding in *BMW*, stating "that it was not necessary to address application of the parol

1 evidence rule to support its decision, specifically because the Mazda franchise did in fact discuss APR
2 and thus the parol evidence rule was inapplicable.” (Opposition, p.3:27-4:2.) This is a complete
3 misreading of *Ri-Joyce*.

4 It was the differences in the contract language between the *Ri-Joyce* and *BMW* agreements,
5 and that alone, that distinguished those cases and prevented summary dismissal in the franchisor’s
6 favor – nothing more, nothing less. The *Ri-Joyce* court found the *contractual* term “near” ambiguous
7 and thus reasonably susceptible to interpretation supported by extrinsic evidence and the *contractual*
8 requirement for the franchisor to “confer” in good faith with the franchisee before establishing the
9 new dealership as dispositive as to why the parol evidence rule did not apply. It had nothing to do
10 with whether the APR was discussed within the franchise agreement.

11 Those same circumstances apply here. There are no ambiguities or terms in the BRP/Fun Bike
12 Center Dealer Agreement, and Protestant has never argued to the contrary. As in *BMW*, Respondent
13 reserved the *unqualified* power to appoint new dealers whether in a dealer’s geographic area or
14 elsewhere, and to “modify, alter or adjust” a dealer’s PMA at any time. For this reason alone,
15 summary dismissal should be granted because Respondent is not seeking to do anything that is
16 contrary to any terms of the franchise agreement. Under *BMW* and *Ri-Joyce*, this should summarily
17 end this matter. There can be no dispute as to that.

18 Moreover, after recognizing the unqualified reservation of power set forth in the franchise
19 agreement in *BMW*, the *BMW* court held there was nothing in the New Motor Vehicle Board Act that
20 precluded a franchisor from reserving such power or that entitled a franchisee to object to the exercise
21 of such reserved power beyond his relevant market area. *Ri-Joyce* at 456 (citing *BMW* at 991). The
22 *BMW* court further clarified it did not hold the Act precluded a franchisor from granting a exclusive
23 trading area beyond a dealer’s relevant market area or that a franchisee would be precluded from
24 protesting the modification of such an agreement by establishment of a new dealer within such an
25 exclusive trading area. *Id.* Most significantly, the *BMW* court then stated, “[t]hat is a matter which is
26 left to the agreement of the parties.” *Id.*

27 In that same vein, the *Ri-Joyce* court explained:
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Although some dealers seem to believe that the New Motor Vehicle Board Act was enacted to protect them against competition, quite the contrary is true. The act recognizes that a new motor vehicle dealership may require significant investment and that there is a disparity of bargaining power and thus the act was intended to protect new motor vehicle dealerships ***against unfair or oppressive trade practices.*** [citation.] But the act recognizes that the needs of consumers are important and that competition is in the public interest. [citation.] Accordingly, ***a dealer cannot prevail on a protest simply by asserting a desire to limit competition.*** Moreover, since the interests of consumers are to be considered (ibid.), where a franchisor has granted an exclusive trading area beyond a relevant market area, ***justification for modifying the franchise will be more easily established the further a new franchise is located from the existing dealer's location.***

Id. at 456, fn. 4. (emphasis added.)

Here, Respondent's proposed alteration of Protestant's PMA to accommodate the establishment of a new dealer more than 10 miles from Protestant, are actions that must be left to the agreement of the parties. See *Ri-Joyce* at 456. Such actions are expressly allowed under the franchise agreement. Protestant cannot now be allowed to rewrite the agreement to give it an exclusive trading territory in excess of his relevant market area and automatically saddle Respondent with a "good cause" burden anytime it seeks to do that which it already is entitled to do under the franchise agreement. Such exact scenarios were struck down in *BMW* and *Ri-Joyce* and must be struck down here.

V. CONCLUSION

For the reasons set forth in the moving papers and above, Respondent respectfully requests reconsideration of the denial of its Motion to Dismiss and that Protestant's protest be dismissed with prejudice.

Dated: May 18, 2015

HAIGHT BROWN & BONESTEEL LLP

By: 
R. BRYAN MARTIN
Attorneys for Respondent
BRP US INC.

Haight

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

Fun Bike v. BRP
Case No. PR-2405-14

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 2050 Main Street, Suite 600, Irvine, CA 92614.

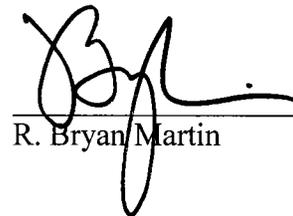
On May 18, 2015, I served true copies of the following document(s) described as **RESPONDENT BRP US INC.'S POST-DISCOVERY MOTION TO DISMISS PROTECT** on the interested parties in this action as follows:

Michael M. Sieving	Attorney for Protestant
Attorney at Law	
8865 La Riviera Drive, Unit B	(916) 942-9761
Sacramento, California 95826	

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address bmartin@hbblaw.com to the persons at the e-mail addresses listed in the Service List. The document(s) were transmitted at or before 5:00 p.m. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 18, 2015, at Irvine, California.



R. Bryan Martin