

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
PH AUTOMOTIVE HOLDING CORPORATION)
dba PACIFIC HONDA,) Protest No. PR-1945-05

Protestant,)

v.)

AMERICAN HONDA MOTOR CO., INC.,)

Respondent.)

In the Matter of the Protest of)
CUSH AUTOMOTIVE GROUP dba CUSH)
HONDA SAN DIEGO,) Protest No. PR-1946-05

Protestant,)

v.)

AMERICAN HONDA MOTOR CO., INC.,)

Respondent.)

In the Matter of the Protest of)
TIPTON ENTERPRISES, INC., dba)
TIPTON HONDA,) Protest No. PR-1947-05

Protestant,)

v.)

AMERICAN HONDA MOTOR CO., INC.,)

Respondent.)

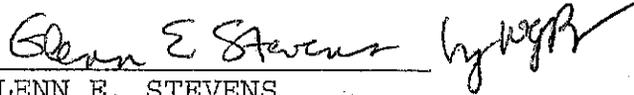
In the Matter of the Protest of)	
BALL AUTOMOTIVE GROUP dba BALL)	
HONDA,)	Protest No. PR-1948-05
)	
Protestant,)	
)	
v.)	
)	
AMERICAN HONDA MOTOR CO., INC.,)	
)	
Respondent.)	

DECISION

At its regularly scheduled meeting of April 5, 2006, the Public members of the Board met and considered the administrative record and "Proposed Order Granting Respondent's Motion to Dismiss Protest of Cush Automotive Group d.b.a. Cush Honda San Diego (Protest No. PR-1946-05) and Denying Request to Strike Findings" in the above-entitled matters. After such consideration, the Board adopted the Proposed Order as its final Decision in this matter. The Administrative Law Judge shall not consider any evidence pertaining to UnitedAuto Group's acquisition of Cush Honda, when the matter is decided during the upcoming Remand Hearing.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 6th DAY OF APRIL 2006.



 GLENN E. STEVENS
 Presiding Public Member
 New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95814
Telephone: (916) 445-2080

CERTIFIED MAIL

8 STATE OF CALIFORNIA

9 NEW MOTOR VEHICLE BOARD

10 In the Matter of the Protest of)
11 PH AUTOMOTIVE HOLDING CORPORATION)
12 dba PACIFIC HONDA,)

Protest No. PR-1945-05

13 Protestant,)

PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTEST OF CUSH
AUTOMOTIVE GROUP D.B.A. CUSH
HONDA SAN DIEGO (PROTEST NO.
PR-1946-05) AND DENYING
REQUEST TO STRIKE FINDINGS

14 v.)

15 AMERICAN HONDA MOTOR CO., INC.,)

16 Respondent.)

17
18 In the Matter of the Protest of)

19 CUSH AUTOMOTIVE GROUP dba CUSH)
HONDA SAN DIEGO,)

Protest No. PR-1946-05

20 Protestant,)

21 v.)

22 AMERICAN HONDA MOTOR CO., INC.,)

23 Respondent.)

24 In the Matter of the Protest of)

25 TIPTON ENTERPRISES, INC., dba)
TIPTON HONDA,)

Protest No. PR-1947-05

26 Protestant,)

27 v.)

28 AMERICAN HONDA MOTOR CO., INC.,)

Respondent.)

1 In the Matter of the Protest of)
2 BALL AUTOMOTIVE GROUP dba BALL) Protest No. PR-1948-05
HONDA,)
3 Protestant,)
4 v.)
5 AMERICAN HONDA MOTOR CO., INC.,)
6 Respondent.)

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21 700 Van Ness Avenue
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24 ///
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26 ///
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28 ///

1 13. On February 1, 2006, the Board issued an ORDER REMANDING THE
2 PROPOSED DECISION DATED JANUARY 23, 2006. The Order of Remand
3 contained the following instructions.

4 1. The ALJ shall consider the effect that the
5 establishment of a new Honda franchise in Lemon Grove will
6 have on the retail motor vehicle business and on the
7 consuming public's welfare within the relevant market area
8 (Veh. Code § 3063(b)), solely as it may relate to the
9 financial impact on Tipton Enterprises, Inc., dba Tipton
10 Honda ("Tipton Honda").

11 2. The ALJ shall consider whether the establishment of
12 the additional franchise in Lemon Grove would increase
13 competition and therefore be in the public interest (Veh.
14 Code § 3063(e)), or would the increased competition be
15 detrimental or ruinous to the financial welfare of Tipton
16 Honda.

17 3. In considering the above "good cause factors" only,
18 the ALJ may reopen the record to take additional evidence
19 and/or briefing from the parties.

20 4. The ALJ shall make these factual determinations on
21 the financial impact on Tipton Honda without consideration of
22 whether Tipton Honda could mitigate this effect by changing
23 the way it does business (see paragraphs 99-100 in Proposed
24 Decision) in order to adapt to the new established franchise.

25 PROCEDURAL BACKGROUND RELATING TO THIS MOTION TO
26 DISMISS THE PROTEST OF CUSH HONDA

27 14. On February 9, 2006, prior to any further evidentiary
28 proceedings with respect to the Order of Remand, AHM filed this MOTION

1 TO DISMISS PROTEST OF CUSH AUTOMOTIVE GROUP D.B.A. CUSH HONDA SAN
2 DIEGO.

3 15. On February 17, 2006, counsel for the Protestants filed
4 PROTESTANTS' OPPOSITON TO MOTION TO DISMISS PROTEST OF CUSH AUTOMOTIVE
5 GROUP DBA CUSH HONDA SAN DIEGO.

6 16. On February 23, 2006, AHM filed its REPLY BRIEF IN SUPPORT
7 OF AHMC'S MOTION TO DISMISS PROTEST OF CUSH AUTOMOTIVE GROUP D.B.A.
8 CUSH HONDA SAN DIEGO (PROTEST NO. PR-1946-05)

9 17. On February 23, 2006, a hearing on the motion commenced
10 before Anthony M. Skrocki, an administrative law judge for the Board.
11 Protestants were represented by Michael J. Flanagan, Esq., of The Law
12 Offices of Michael J. Flanagan, and by Jonathan A. Michaels, Esq., of
13 Burkhalter, Michaels, Kessler & George, LLP. Wallace M. Allan, Esq.,
14 and Eric Y. Kizirian, Esq., of O'Melveny & Myers, LLP, represented
15 AHM.

16 18. During this hearing, counsel for Protestants objected to the
17 content of the briefs submitted by AHM, asserting that, in response to
18 a specific inquiry during the establishment of the briefing schedule,
19 he had been told that there was no authority upon which AHM would rely
20 other than what was in AHM's initial motion and supporting documents,
21 but that AHM included authority in AHM's Reply Brief. Protestants'
22 counsel requested that no ruling be made on AHM's motion until
23 Protestants had been given an opportunity to submit additional
24 pleadings in response to the citations of authority which appeared for
25 the first time in AHM's Reply Brief of February 23, 2006.

26 19. After hearing the arguments of counsel on the issues and
27 considering the pleadings, Protestants' counsel's request for
28 additional briefing was granted and the hearing on the motion was

1 continued.

2 20. On March 2, 2006, Protestants submitted PROTESTANTS'
3 RESPONSE TO RESPONDENT'S REPLY BRIEF IN SUPPORT OF AHMC'S MOTION TO
4 DISMISS PROTEST OF CUSH AUTOMOTIVE GROUP D.B.A. CUSH HONDA SAN DIEGO
5 (PROTEST NO. PR-1946-05).

6 21. On March 9, 2006, AHM submitted its SUPPLEMENTAL REPLY BRIEF
7 IN SUPPORT OF AHMC'S MOTION TO DISMISS PROTEST OF CUSH AUTOMOTIVE
8 GROUP D.B.A. CUSH HONDA SAN DIEGO (PROTEST NO. PR-1946-05).

9 22. On March 13, 2006, the hearing on AHM's motion resumed
10 before Anthony M. Skrocki, administrative law judge for the Board.
11 Counsel appearing for Protestants were Michael J. Flanagan, Esq., of
12 The Law Offices of Michael J. Flanagan, and Rosamund M. Lockwood,
13 Esq., of Burkhalter, Michaels, Kessler & George LLP. Counsel
14 appearing for AHM were Wallace M. Allan, Esq., and Eric Y. Kizirian,
15 Esq., of O'Melveny & Myers LLP.

16 FACTS ASSERTED BY AHM GIVING RISE TO THE MOTION TO
17 DIMISS THE PROTEST OF CUSH HONDA

18 23. Subsequent to the September 30, 2005 conclusion of the
19 initial evidentiary hearing before Judge Wong, but before she
20 submitted her Proposed Decision on January 23, 2006, there was a
21 "transfer" (sale) of the Cush Automotive Group, including the Cush
22 Honda San Diego dealership (the Protestant), to the UnitedAuto Group
23 ("UAG"). As a result of the sale, Cush Honda ceased being a
24 franchisee of AHM and the former Cush Honda dealership, now owned by
25 UAG, is operating under the name "Honda Mission Valley".

26 24. A document submitted by AHM in support of its motion to
27 dismiss reads as follows:

28 ///

1 This is to confirm that on January 9, 2006 the transfer of
2 ownership and/or certain assets of M.S.M. GROUP, INC. dba
3 CUSH HONDA SAN DIEGO has been completed in accordance with
4 the documentation previously submitted for approval by
5 American Honda Motor Co. Inc. This further confirms that we
6 understand that this transaction is a transfer of the
7 dealership or "franchise" and not a termination of a
8 dealership or "franchise", and that it does not entitle
9 either of us to claim any rights that might exist or arise
10 in connection with a termination.

11 25. Stephen P. Cushman signed the document in behalf of M.S.M.
12 GROUP, INC. (Seller), and Robert V. Miller signed in behalf of UAG SAN
13 DIEGO, H1, Inc. (Buyer).

14 26. AHM also submitted a document dated January 9, 2006, from
15 the Honda Automobile Division signed by Richard Colliver, Executive
16 Vice President of AHM. This document was addressed to the Dealer
17 Licensing Section of the Department of Motor Vehicles and reads as
18 follows:

19 This will certify that the undersigned (sic), as a distributor
20 for Honda Motor Co., Ltd. automobiles, was appointed this date:

21 UAG San Diego H1, Inc.
22 dba Honda Mission Valley
23 5812 Mission Gorge
24 San Diego, CA 92120

25 This will certify that the undersigned (sic), as a distributor
26 for Honda Motor Co., Ltd. automobiles, was cancelled this date:

27 M.S.M. Group, Inc.
28 dba Cush Honda San Diego
5812 Mission Gorge
San Diego, CA 92120

as a dealer for HONDA automobiles.

29 27. In addition to the above documents, AHM submitted a letter
30 dated January 12, 2006, from UAG addressed to the Board which states
31 in part as follows:

32 On January 9, 2006, UnitedAuto Group acquired the Cush
33 Automotive Group including Cush Honda San Diego. The
34 dealership has since been renamed Honda Mission Valley.

1 UnitedAuto Group is requesting that the protest by Cush
2 Automotive Group to the addition of a Honda franchise in
3 Lemon Grove, CA. be dismissed. It is our intention not to
4 protest the appointment of the new Honda dealership.

5 28. This letter was signed in behalf of UAG by Bob Miller, Vice
6 President for Manufacturer Relations, with copies sent to Frank
7 Beniche of AHM, as well as Roger Penske Sr., and George Brochick.

8 29. The former owner of Cush Honda has refused to dismiss the
9 protest voluntarily.

10 CONTENTIONS OF AHM AS TO WHY THE PROTEST OF CUSH HONDA
11 SHOULD BE DISMISSED AND AHM'S REQUEST TO
12 STRIKE PROPOSED FINDINGS

13 30. In its Motion, AHM contends that Cush Honda "no longer has
14 any standing to protest the proposed new dealership in Lemon Grove.",
15 and that "[t]o permit a non-dealer, with absolutely no stake in the
16 outcome of this protest, to continue with its protest runs afoul of
17 the requirements of California Vehicle Code § 3062, which only allows
18 a 'franchisee' to protest the proposed establishment of Honda
19 representation in Lemon Grove." (AHM Motion, page 3, lines, 11-13,
20 and 16-19)

21 31. AHM "requests" two things in connection with its motion:
22 a. "[T]hat Cush's protest be dismissed with prejudice"; and
23 b. "[A]ny proposed findings relating specifically to Cush be
24 struck from Judge Wong's Proposed Decision." (AHM Motion, page 3,
25 lines 19-21)

26 32. AHM did not, in its motion, specifically identify which
27 proposed findings AHM desired to have stricken. However, during the
28 initial hearing on the motion, the administrative law judge began the
proceeding by asking counsel for AHM about the findings at issue. AHM
at that time identified the findings as numbers 27 through 30 and 129

1 through 131. (RT page 4, lines 23-25, page 5, lines 1-2, page 7, lines
2 9-16)

3 33. For ease of reference, these findings are presented here as
4 follows:

5 Cush Honda³(The footnote is footnote number 5 in the
6 Proposed Decision.)

7 27. John Turja, testifying on behalf of Cush Honda, has
8 been its general manager for 7 ½ years. Steve Cushman owns
9 Cush Honda.

10 28. Cush Honda has been in operation since 1993. In
11 1998 it moved to its current location at 5812 Mission Gorge,
12 San Diego.

13 29. The current facility, a former Nissan store, is
14 located on about 5 acres of land with about 5,000 square feet
15 of facilities space. In 2004 the buildings owned by the
16 dealership were valued at \$2.3 million.

17 30. The property is leased from a separate entity
18 unrelated to the dealership, although the dealership does
19 have an option to purchase the property.

20
21 Cush Honda

22 129. Cush Honda has won the prestigious Honda
23 President's Award in the years 1999, 2000, 2002, and 2003.
24 The President's Award recognizes the top 20% of the dealers

25
26 ³ On January 13, 2006, the Board received a letter from UnitedAuto stating that it
27 had purchased Cush Automotive Group including Cush Honda and sought to dismiss
28 Protest No. PR-1946-05. As of the signing of this Proposed Decision, a request for
dismissal has not been received and therefore, Cush Honda is included in this
Proposed Decision.

1 in the country. Cush Honda also received the Honda Masters
2 Award in 2000 and 2001 for outstanding sales achievements.
3 Cush Honda ranks 94 among all 1,014 Honda dealers nationwide.

4 130. Cush Honda's remodeled facilities include 33 (25
5 are Honda dedicated) service stalls with 28 of the stalls
6 with lifts. The service department is opened six days a
7 week. Cush Honda employs seven service technicians and 18
8 sales persons. Cush Honda's remodeled facilities exceed
9 AHM's guidelines for both sales and service facilities.

10 131. The year-end QDS and TSI scores for Cush Honda met
11 or exceeded district and zone averages from 2000 through
12 2004. Cush Honda had one of the initial pilot programs for
13 the EXCELL program and since then has enjoyed continuous
14 EXCELL certification.

15 PROTESTANTS' OPPOSITON TO THE MOTION TO DISMISS

16 34. Protestants' counsel correctly contended that AHM initially
17 provided no specific authority in support of its Motion to Dismiss.
18 Protestants also contend that Section 3063 requires the Board consider
19 the factors enumerated and that there is no reason to disregard the
20 evidence after the record has been completed merely because a
21 protesting dealer has been sold. (Protestants' Opposition, page 2,
22 lines 9-23)

23 PROTESTANTS' OPPOSITION TO THE REQUEST TO STRIKE
24 THE SPECIFIC FINDINGS RELATING TO CUSH HONDA

25 35. Protestants' counsel also correctly contended that AHM
26 provided no authority in support of its request that the findings
27 specific to Cush Honda be stricken from the Proposed Decision.
28 (Protestants' Opposition, page 2, lines 25-26).

1 36. Further, Protestants' counsel correctly asserted that
2 certain facts pertaining to any dealership of the same line-make in
3 the relevant market area would be generally within the mandate of what
4 must be considered by the Board in determining the impact of the
5 proposed additional dealership upon the relevant market area.⁴
6 (Protestants' Opposition, page 3, lines 8-17).

7 37. Protestants' counsel, in connection with the opposition to
8 this Motion to Dismiss and request to strike the findings specific to
9 Cush Honda, submitted a declaration which was not countered or
10 contested by AHM. This declaration states in part:

11 4. The hearing in these matters commenced on Monday,
12 September 19, 2005, in Sacramento, California. Prior to the
13 presentation of opening statements in these consolidated
14 matters, I advised Administrative Law Judge Wong and
15 Respondent's counsel that all of the evidence presented by
16 Protestants would be introduced in behalf of each and all of
17 the Protestants' cases. Neither Administrative Law Judge
18 Wong nor Respondent's counsel objected to, or disagreed with,

19
20 ⁴ 3063. In determining whether good cause has been established for not entering
21 into or relocating an additional franchise for the same line-make, the board shall
22 take into consideration the existing circumstances, including, but not limited to,
23 all of the following:
24 (a) Permanency of the investment.
25 (b) Effect on the retail motor vehicle business and the consuming public in the
26 relevant market area.
27 (c) Whether it is injurious to the public welfare for an additional franchise to be
28 established.
(d) Whether the franchisees of the same line-make in that relevant market area are
providing adequate competition and convenient consumer care for the motor vehicles of
the line-make in the market area which shall include the adequacy of motor vehicle
sales and service facilities, equipment, supply of vehicle parts, and qualified
service personnel.
(e) Whether the establishment of an additional franchise would increase competition
and therefore be in the public interest.

1 this proposition. This discussion occurred off the record
2 and as a result does not appear in the transcript of the
3 proceedings.

4 38. One of the effects of this was to give notice that,
5 regardless of the source of the offered testimony and documents, the
6 evidence was not being offered specifically in support of the merits
7 of any one of the protests. Thus, the evidence presented by or
8 through a representative of Cush Honda, or from the records of Cush
9 Honda or some other source that contained facts pertaining to Cush
10 Honda, was also being offered in support of each of the Protestant's
11 cases as being relevant to the factors enumerated in Section 3063
12 quoted above pertaining to the impact of the proposed additional
13 dealership upon the relevant market area.

14 AHM'S CONTENTIONS ASSERTED IN ITS REPLY BRIEF

15 39. In its reply brief, "first" AHM cites authority for its
16 claim that the protest of Cush Honda should be dismissed for lack of
17 standing and cites a United States Supreme Court case for the
18 proposition that "the requisite personal interest that must exist at
19 the commencement of the litigation (standing) must continue throughout
20 its existence." *Arizonans for Official English et al. v. Arizona et*
21 *al.* (1997) 520 U.S. 43, 45, 68; 3 Witkin, *Cal Proc.* 4th (1997 & 2005
22 Supp.) Actions, § 73.

23 40. "Second", AHM also claims the protest of Cush Honda be
24 dismissed because Cush Honda is no longer a "franchisee" as required
25 by Section 3062.

26 41. "Finally", AHM contends that the record is not yet closed
27 due to the Order of Remand. As to this point, AHM contends that all
28 of the evidence pertaining to Cush Honda "...is now inherently

1 unreliable because different evidence would potentially apply for the
2 UAG-owned Cush dealership...Thus, findings in the proposed decision
3 that relate to Cush are not only irrelevant, but may be based on
4 potentially unreliable evidence that Cush presented at trial."

5 PROTESTANTS' CONTENTIONS AS ASSERTED IN ITS
6 RESPONSE TO AHM'S REPLY BRIEF

7 42. As to the standing issue, although not conceding that Cush
8 Honda no longer has standing or that its protest is moot, Protestants
9 distinguish the cited case in several ways including what is referred
10 to as the Public Interest Doctrine which "allows a court to consider
11 an otherwise moot or potentially moot action where it is in the public
12 interest. 3 Witkin, Cal. Proc. 4th (1997 & 2005 Supp.) Actions § 79."
13 Other cases are cited as well. (Response to Reply Brief, page 4, lines
14 4-10) Protestants contend that the statutory good cause factors
15 evidence a concern about the public welfare and therefore the protest
16 of Cush Honda should not be dismissed even if it is moot.

17 AHM'S CONTENTIONS AS STATED IN ITS SUPPLEMENTAL REPLY BRIEF

18 43. In addition to citing additional federal and California
19 authority on the issue of mootness and standing, AHM contends that the
20 concerns about the impact of the establishment upon the public will be
21 adequately addressed in the protest disputes that continue involving
22 the other three franchisees and AHM.

23 ISSUES PRESENTED IN THIS MOTION TO DISMISS

24 44. Has Cush Honda lost standing to maintain its protest or has
25 the protest of Cush Honda become moot?⁵

26
27 ⁵ Although AHM has cited authority for the proposition that "mootness [is] the
28 doctrine of standing set in a time frame" (Supplemental Reply Brief, page 2, lines 21-
22), a determination that the issues have become "moot" is not necessarily the same

1 45. Even if Cush Honda has lost standing or if its protest has
2 become moot, should its protest be allowed to continue under the
3 "Public Interest Doctrine"?

4 46. Should the findings of fact specific to Cush Honda be
5 stricken from the Proposed Decision?

6 ANALYSIS OF WHETHER THE PROTEST OF CUSH HONDA SHOULD
7 BE DISMISSED DUE TO LACK OF STANDING OR DUE TO BECOMING MOOT

8 47. There was and is no challenge to the standing of Cush Honda
9 to have filed the protest. The contention now is that the protest of
10 Cush Honda should be dismissed due to the loss of standing which
11 occurred when Cush Honda sold the dealership to UAG and Cush Honda
12 ceased being a franchisee of AHM.

13 48. Had Cush Honda sold its dealership to UAG prior to the
14 protest being filed, Cush Honda would not have had standing to bring
15 the protest before the Board. Had Cush Honda sold its dealership to
16 UAG subsequent to the filing of the protest but prior to the
17 commencement of a hearing on the protest, Cush Honda would have had
18 standing at the time the protest was filed. However, it would be
19 extremely unlikely that Cush Honda, after having sold its dealership,
20 would be willing to go forth with the expense and time commitment
21 necessary for an evidentiary hearing. And, even if it were so
22 inclined, it would be difficult to reach any conclusion other than
23 that the protest should be dismissed prior to a hearing either because
24

25 as a determination that a party lacks standing, although the result could be the
26 same. A lack of a party to have standing could be found to be an issue involving
27 jurisdiction, whereas, in the U.S., being "moot" is determining that, although the
28 party may have standing, the issue has become insignificant and not deserving of
resolution or that it is purely of academic interest. If the issues are deemed to be
moot, the deciding entity should have the right to decline to hear the matter or
dismiss the action as a matter of public policy.

1 of a lack of standing or because the issues would be moot, and being
2 moot, (absent the Public Interest Exception discussed below) it would
3 not be in the interests of administrative justice or efficiency to
4 proceed to a hearing.

5 49. The different fact here is that the evidentiary proceedings
6 pertaining to Cush Honda have been completed and Cush Honda, having
7 already expended its resources, is claiming a right to have
8 adjudication on the merits of its protest even though Cush Honda is no
9 longer in existence as a franchisee in the relevant market area.⁶

10 50. The issue of mootness arises more frequently in cases
11 involving class actions, appeals or writs of review. One such case
12 involved a case pending before the appellate court in which it was
13 determined that a city's own postjudgment conduct had rendered its
14 appeal moot. *MHC Operating Limited Partnership v. City of San Jose*
15 (2003) 106 Cal.App.4th 204. In discussing "mootness", the court
16 stated:

17 A case is moot when the decision of the reviewing court
18 "can have no practical impact or provide the parties
19 effectual relief. [Citation.]" (*Woodward Park Homeowners*
20 *Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888 [92
21 Cal. Rptr. 2d 268].) "When no effective relief can be
22 granted, an appeal is moot and will be dismissed." (*In re*
23 *Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316 [94 Cal.
24 Rptr. 2d 798], citing *Eye Dog Foundation v. State Board of*

25
26
27 ⁶ The only further evidentiary proceeding pending is the hearing on the Order of Remand,
28 which by its terms is limited to the impact upon Tipton Honda with no reference to Cush Honda.

1 *Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541 [63 Cal.
2 Rptr. 21, 432 P.2d 717].)

3 51. Applying the above language, sustaining of the protest of
4 Cush Honda would "have no practical impact" upon Cush Honda or provide
5 Cush Honda any "effectual relief" from too much competition.

6 52. No assertion was made by Cush Honda that the buy-sell
7 between Cush Automotive Group and UAG was contingent upon or would be
8 otherwise impacted by the Protest of Cush Honda being sustained. In
9 fact, UAG has notified the Board of the desire of UAG to have the Cush
10 Honda protest dismissed and that UAG has no objections to the
11 establishment of the Honda dealership in Lemon Grove.

12 53. The court in the *City of San Jose* case (*supra*) found that it
13 was the City's own post-judgment conduct that resulted in the mootness
14 of its appeal.

15 54. Here, no facts have been presented to indicate anything
16 other than Cush Honda's own "post-protest" conduct as the cause of the
17 potential loss of standing and mootness. There was no evidence
18 presented as to what motivated or induced the sale of Cush Honda so
19 that it ceased being a "franchisee" of AHM or that it was a "forced
20 sale" attributable to pressures applied by AHM. The letter notifying
21 the Board of the sale stated that "UnitedAuto Group acquired the Cush
22 Automotive Group including Cush Honda San Diego", which is interpreted
23 to mean that there were other dealerships of Cush Automotive Group
24 included in the sale. No evidence was presented to show that some
25 superseding or intervening event of nature or a third party caused the
26 removal of Cush Honda from the relevant market area. There were no
27 facts shown similar to those situations in which a prison inmate may
28 have lost standing as a "prisoner" because the sentence has been

1 served, or a person who may have lost standing as an "employee"
2 because of being discharged.

3 55. Cush Honda, having voluntarily removed itself from existence
4 as a "franchisee" in the relevant market area, appears to be the sole
5 cause of its own loss of standing as a franchisee and the sole cause
6 of the mootness of the issues raised by its protest.

7 PROPOSED DETERMINATIONS AS TO WHETHER CUSH HONDA CONTINUES
8 TO HAVE STANDING AND WHETHER THE CUSH HONDA PROTEST IS MOOT

9 56. It is determined that:

- 10 a. Cush Honda is no longer a franchisee of AHM;
11 b. Cush Honda no longer has standing to maintain its
12 protest; and
13 c. The protest of Cush Honda is moot.

14 ANALYSIS OF WHETHER THE PROTEST OF CUSH HONDA SHOULD BE ALLOWED TO
15 CONTINUE UNDER THE "PUBLIC INTEREST DOCTRINE" EVEN THOUGH
16 CUSH HONDA NO LONGER HAS STANDING AND ITS PROTEST HAS BECOME MOOT

17 57. As stated above, Protestants urge that even if Cush Honda no
18 longer has standing or the protest is moot, that an exception should
19 apply because the statutory good cause factors evidence a legislative
20 concern about the impact upon the public welfare if the proposed
21 dealership is established. It is argued that the exception "allows a
22 court to consider an otherwise moot or potentially moot action where
23 it is in the public interest. 3 Witkin, Cal. Proc. 4th (1997 & 2005
24 Supp.) Actions § 79." Other cases are cited as well.⁷

25 58. California cases recognize this public interest exception
26 under some circumstances.

27 ⁷ It is unclear from the record as to whether the Public Interest Exception
28 applies only to mootness or whether it also applies when there is a lack of standing.
Regardless of whether it applies to only mootness or both, it will not apply here for
the reasons stated.

1 59. In the *MHC Operating Limited Partnership v. City of San Jose*
2 case (*supra*), the court stated:

3 Alternatively, the City urges us to consider its appeal
4 on the merits--even if moot--because it presents issues of
5 continuing public interest. "[I]f a pending case poses an
6 issue of broad public interest that is likely to recur, the
7 court may exercise an inherent discretion to resolve that
8 issue even though an event occurring during its pendency
9 would normally render the matter moot." (*In re William M.*
10 (*1970*) 3 Cal.3d 16, 23 [89 Cal. Rptr. 33, 473 P.2d 737]. see
11 also *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th
12 725, 746.) The City argues that its appeal raises two
13 issues of critical importance to future rent control
14 disputes: (1) whether mobilehome park tenants are
15 indispensable parties in rent control proceedings; and (2)
16 what rights and responsibilities mobilehome park owners have
17 when base year records are lost or destroyed.

18 60. After analyzing the claims of "public interest" made by the
19 City, the court "...decline (d) to exercise our discretion to resolve
20 the moot questions presented here."

21 61. Protestants correctly assert that "[t]he public interest
22 exception requires a consideration of the public or private nature of
23 the question presented, the desirability of an authoritative
24 adjudication for the future guidance of public officials, and the
25 likelihood of a future recurrence of the same or a similar problem."
26 (Citations omitted). (Protestants' Response to Reply Brief, page 4,
27 lines 5-9). Although asserting that these three factors are present
28 in the protest of Cush Honda, there is no specific application of the

1 facts to show why they would be unique to the protest of Cush Honda
2 and not encompassed within the protests of the other three Honda
3 franchisees in the relevant market area whose protests are before the
4 Board.

5 62. The Public Interest Exception is based upon a need to have
6 adjudication of a dispute (even though it has become moot) for the
7 three reasons stated above. Here, the public interest issues have
8 been addressed in the already-conducted hearing and will be considered
9 in the Board's decisions on the remaining three protests; there will
10 be an adjudication (authoritative or otherwise) as to the impact of
11 the proposed Lemon Grove dealership upon the public in the relevant
12 market area for what future guidance it may provide; and there is
13 little likelihood that there will be a future recurrence of what has
14 occurred here, which is open to characterization in many ways, but is
15 essentially what the impact of an additional Honda dealership in Lemon
16 Grove would have upon the public welfare in the relevant market area.
17 As stated above, the impact upon the public has been and will continue
18 to be addressed in the protest disputes involving the other three
19 Honda franchisees and AHM.

20 63. Further, the evidence and findings pertaining to the Cush
21 Honda facilities, etc., and Cush Honda's historical performance, are
22 already in the record before the Board and addressed in the Proposed
23 Decision of Judge Wong. As will be discussed below, it is recommended
24 that the findings not be stricken and therefore can be used in
25 evaluating the impact upon the public even if the protest of Cush
26 Honda is no longer before the Board due to the loss of standing or
27 because of mootness. And, as was stated in the declaration submitted
28 in opposition to AHM's motion, the evidence presented at the

1 consolidated hearing before Judge Wong that related to one protest was
2 presented in support of all protests.

3 PROPOSED DETERMINATIONS AS TO WHETHER THE PROTEST OF
4 CUSH HONDA SHOULD BE ALLOWED TO CONTINUE UNDER THE
5 "PUBLIC INTEREST DOCTRINE" EVEN THOUGH CUSH HONDA
6 NO LONGER HAS STANDING AND ITS PROTEST HAS BECOME MOOT

7 64. It is determined that the reasons for application of the
8 Public Interest Doctrine do not exist here and therefore the protest
9 of Cush Honda should not be permitted to continue.

10 ANALYSIS OF WHETHER THE FINDINGS SPECIFIC TO
11 CUSH HONDA AS CONTAINED IN THE PROPOSED DECISION
12 SHOULD BE STRICKEN

13 65. AHM urges that the findings specific to Cush Honda be
14 stricken from the Proposed Decision. AHM argues that "...whatever
15 evidence was presented as to Cush's alleged permanency of investment,
16 adequacy of representation, and other good cause factors is now
17 inherently unreliable because different evidence would potentially
18 apply for the UAG-owned Cush dealership (which has been renamed 'Honda
19 Mission Valley'." (Reply Brief, page 3, lines 12-18)

20 66. However, although AHM desires that the Board strike the
21 findings pertaining to Cush Honda, AHM does not suggest that the
22 record be re-opened to take into consideration the fact of the
23 existence of Honda Mission Valley at the Cush Honda location even
24 though, as recognized by AHM, there would be "different evidence" that
25 "would potentially apply for the UAG-owned Cush dealership".

26 67. The following discussion is intended to explore the
27 unfairness of an attempt at this time to "erase" or "delete" the
28 findings pertaining to Cush Honda but not replace them with findings
29 pertaining to Honda Mission Valley, which is now operating at the Cush
30 Honda location. This could be done during the hearing after the

1 remand. As is pointed out by AHM, "...it is not true, as Cush
2 represents, that the 'record in this matter is now closed.' The Board
3 has yet to resolve these consolidated protests, and indeed, the
4 consolidated protests have been remanded to Judge Wong for additional
5 hearings." (Reply Brief, page 3, lines 5-8). The consideration of the
6 existence of Honda Mission Valley in the relevant market area of the
7 proposed Lemon Grove dealership, would be, as explained below, within
8 the scope of the Order of Remand and there would be no need for a
9 further re-opening of the record.

10 68. AHM is urging that the facts as to Cush Honda be ignored
11 because Cush Honda is no longer in existence. Of course, there has
12 been and is a continuing "Honda presence" at the location of the
13 former Cush Honda and it is possible that the facilities, etc. are
14 likely to remain the same. It is also possible that with the new
15 ownership, as AHM states, that there will be "different evidence" for
16 the "UAG-owned Cush dealership", which could include plans for
17 improvements to the facilities, the operation, and the performance of
18 the dealership. AHM appears to desire that the findings as to the
19 ability of Cush Honda to serve the public in the relevant market area
20 be stricken but AHM does not suggest there be any attempt to take into
21 consideration the possible effect upon the relevant market area as a
22 result of the establishment of the Lemon Grove dealership with Honda
23 Mission Valley in operation under the ownership of UAG with its
24 legendary leader, Roger Penske.

25 69. The three remaining protesting dealers will not only be
26 possibly competing with the proposed new dealership in Lemon Grove but
27 also with whatever changes may occur under the new ownership by UAG of
28 the former Cush Honda dealership.

1 70. It is highly likely that UAG did its evaluation of the
2 market prior to its acquisition of Cush Honda, including projections
3 of number of sales, service opportunities, which would also include
4 plans for improving penetration of the market, plans for growth, etc.,
5 some of which, if not confidential, may be admissible in addressing
6 the good cause factors stated in Section 3063 as to the effect of the
7 proposed dealership in Lemon Grove.

8 71. It is possible that the establishment of the dealership in
9 Lemon Grove will affect Tipton Honda (as ordered to be addressed on
10 remand) to a greater (or lesser) extent because of the ownership by
11 UAG of the Cush Honda dealership than would occur if Cush Honda were
12 still in place.

13 72. To strike the findings pertaining to Cush Honda leaves a gap
14 in the record as to the contributions (actual or potential) of "a"
15 Honda dealership at that location towards analyzing the good cause
16 factors enumerated by Section 3063 in considering the establishment of
17 the Lemon Grove dealership. To ignore the findings as to Cush Honda
18 as well as the existence of the UAG-owned Honda Mission Valley
19 dealership in evaluating whether there is good cause to not allow the
20 additional dealership in Lemon Grove is to ignore the reality of the
21 "existing circumstances" no matter what time frame is applicable.

22 73. The "existing circumstances" could be either the
23 circumstances as they existed at the time the protests were filed and
24 at the time of hearing (with Cush Honda in existence but with UAG
25 poised for entry) or the circumstances as they exist today (with Honda
26 Mission Valley in existence). If the request of AHM to strike the
27 findings as to Cush Honda were granted, the result would be the
28 evaluation of good cause under circumstances that never existed, a

1 fictional time when there was a proposed establishment in Lemon Grove
2 but with neither Cush Honda nor Honda Mission Valley in existence in
3 the relevant market area ("non-existing circumstances").

4 74. Asking the Board to strike findings based upon evidence
5 already in the record as to the existing circumstances (as of the time
6 of the notice, or the time of hearing) because the circumstances have
7 changed due to the "non-existence" of Cush Honda should logically lead
8 to the conclusion that the "existing circumstances" now include the
9 existence of Honda Mission Valley. Therefore, the striking of the
10 evidence as to Cush Honda and its ability to serve the public should
11 require that evidence pertaining to Honda Mission Valley and its
12 ability to serve the public be substituted in its place in determining
13 whether there is good cause not to establish the additional dealership
14 in Lemon Grove. Trying to ignore the fact there is a "Honda presence"
15 in the relevant market area at the Cush Honda location (now the UAG-
16 owned Honda Mission Valley), would be like, as it is sometimes said,
17 "Trying to ignore the elephant in the living room."

18 75. If AHM wishes the "snapshot" of the existing circumstances
19 in the relevant market area to be "touched up" by eliminating the
20 findings pertaining to Cush Honda as it is no longer in existence,
21 then the "touching up" should include the evidence pertaining to the
22 effect of the UAG ownership of the former Cush Honda dealership as the
23 UAG dealership is already in existence and there was never a relevant
24 time when there was not a Honda franchisee in operation at the Cush
25 Honda/Honda Mission Valley location. As AHM has argued that the
26 evidence relating to Cush Honda "...is now inherently unreliable
27 because different evidence would potentially apply for the UAG-owned
28 Cush dealership...." (Reply Brief, page 3, line 13-15), one could

1 conclude that the evidence as to the UAG-owned Cush dealership, would
2 provide a more accurate "snapshot" of the existing circumstances in
3 the relevant market area than would the "inherently unreliable"
4 evidence pertaining to Cush Honda.

5 76. Whether UAG desires to maintain a protest in behalf of Honda
6 Mission Valley or not is irrelevant to the right of the other three
7 Protestants to have their cases decided upon the realities of that
8 point in time referred to as the "existing circumstances" as stated in
9 Section 3063. There has been no assertion that UAG acquired ownership
10 of the entity that owns Cush Honda. Therefore, UAG's request that the
11 protest of Cush Honda be dismissed would not be the equivalent of a
12 request of Cush Honda, the protesting party.

13 77. Because the buy-sell between UAG and Cush Honda was likely
14 pending for quite some time, one cannot help but wonder why the
15 potential change in dealerships was not brought to light sooner than
16 it was. If one were to speculate, one might conclude that AHM would
17 prefer that the "existing circumstances" be evaluated without the
18 impending presence of UAG in the relevant market area. Otherwise, if
19 AHM had known about the pending buy-sale, one would have expected AHM
20 to object to the introduction of the evidence as to Cush Honda as AHM
21 objects now, that "...different evidence would apply to the UAG-owned
22 Cush dealership...".

23 78. If the term "existing circumstances" is interpreted to mean
24 "at the time of the notice from AHM as to the intended establishment",
25 or "the time of the filing of the protest", the subsequent changes in
26 circumstances could be irrelevant. However, if the term "existing
27 circumstances" is interpreted to mean "at the time of hearing", then
28 it would be a question of fact as to when AHM (and Cush Honda and

1 others) became aware of the intended entry of UAG into the relevant
2 market area, which certainly happened sooner than will occur with the
3 Lemon Grove point. As quoted above in footnote 3 (footnote 5 in the
4 Proposed Decision),

5 On January 13, 2006, the Board received a letter from
6 UnitedAuto stating that it had purchased Cush Automotive
7 Group including Cush Honda and sought to dismiss Protest No.
8 PR-1946-05. As of the signing of this Proposed Decision, a
9 request for dismissal has not been received and therefore,
10 Cush Honda is included in this Proposed Decision.

11 79. As a reminder, the chronology was as follows:

- 12 ▪ September 30, 2005 - Evidentiary portion of the protest
13 hearing concluded.
- 14 ▪ December 23, 2005 - Case deemed submitted to the
15 Administrative Law Judge (after receipt of the briefs
16 of the parties).
- 17 ▪ January 13, 2006 - Notice of the buy-sell between UAG
18 and Cush Honda received by the Board.
- 19 ▪ January 23, 2006 - ALJ's Proposed Decision submitted to
20 the Board.

21 80. As buy-sells do not happen overnight, it seems obvious that
22 the fact, or likelihood, of entry of UAG into the relevant market area
23 was known by some (Cush Honda, UAG and AHM?) much earlier than January
24 13, 2006. In fact, a document dated January 9, 2006, and submitted by
25 AHM in connection with this Motion to Dismiss makes reference to the
26 buy-sell and states that the buy-sell "has been completed in
27 accordance with the documentation previously submitted for approval by
28 American Honda Motor Co. Inc."

81. Regardless of who knew what and when, the reality now is
that UAG is the Honda franchisee at the location of what was Cush

1 Honda. It is assumed that the administrative law judge presiding over
2 the remand proceedings will soon have the opportunity to take into
3 account the reality of the existence of UAG as the Honda franchisee at
4 the Cush Honda location in addressing the directives as stated in the
5 Order of Remand.

6 82. For example, addressing the directives in the Order of
7 Remand - Evidence as to the presence of the UAG-owned Honda Mission
8 Valley dealership (in place of Cush Honda) and the consequences
9 thereof may be relevant in determining:

10 "...the effect that the establishment of a new Honda
11 franchise in Lemon Grove will have on the retail motor
12 vehicle business and on the consuming public's welfare
13 within the relevant market area (Veh. Code § 3063(b)),
14 solely as it may relate to the financial impact on Tipton
15 Enterprises, Inc., dba Tipton Honda." (Order of Remand,
16 Paragraph 1) [With Honda Mission Valley in operation in the
17 relevant market area]; and

18 "...whether the establishment of the additional
19 franchise in Lemon Grove would increase competition and
20 therefore be in the public interest (Veh. Code § 3063 (e)),
21 or would the increased competition be detrimental or ruinous
22 to the financial welfare of Tipton Honda." (Order of
23 Remand, Paragraph 2) [With Honda Mission Valley in operation
24 in the relevant market area].

25 83. One could conclude that the impact of the additional
26 dealership at Lemon Grove upon the financial welfare of Tipton
27 Honda must take into account the realities of the competition in
28 the relevant market area as they exist with the presence of UAG

1 as the owner of Honda Mission Valley at the location of the
2 former Cush Honda dealership. This could be so because, as AHM
3 itself has argued,

4 ...whatever evidence was presented as to Cush's alleged
5 permanency of investment, adequacy of representation, and
6 other good cause factors is now inherently unreliable
7 because different evidence would potentially apply for the
8 UAG-owned Cush dealership (which has been renamed "Honda
Mission Valley"). Thus, findings in the proposed decision
that relate to Cush are not only irrelevant, but may be
based on potentially unreliable evidence that Cush presented
at trial. (Reply Brief, page 3, lines 11-18)

9 PROPOSED DETERMINATION AS TO WHETHER THE FINDINGS SPECIFIC TO CUSH
10 HONDA AS CONTAINED IN THE PROPOSED DECISION BE STRICKEN

11 84. It is determined that the request of AHM to strike the
12 findings specific to Cush Honda as contained in the Proposed Decision
13 be denied. Additionally, it is determined that the administrative law
14 judge, in addressing the directives contained in the Order of Remand
15 as to the financial impact upon Tipton Honda caused by the
16 establishment of the additional franchise in Lemon Grove, may, in her
17 discretion, evaluate the factors to be addressed taking into account
18 the contemplated and now finalized acquisition of the Cush Honda
19 dealership by UAG. The administrative law judge may consider the
20 evidence as to the UAG-owned Honda Mission Valley dealership in lieu
21 of, or as supplemental to, the evidence pertaining to Cush Honda.
22 Although neither Cush Honda nor Honda Mission Valley are protestants,
23 the existence of Honda Mission Valley in the relevant market area may
24 be considered in evaluating the impact of the additional dealership in
25 Lemon Grove upon the financial welfare of Tipton Honda.

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27 ///

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1 PROPOSED RULINGS

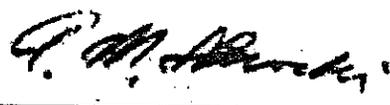
2 The MOTION TO DISMISS PROTEST OF CUSH AUTOMOTIVE GROUP dba CUSH
3 HONDA SAN DIEGO is granted.

4 The protest of CUSH AUTOMOTIVE GROUP dba CUSH HONDA SAN DIEGO,
5 PR-1946-05, is dismissed.

6 The request of AHM to strike the findings relating specifically
7 to Cush Honda from the Proposed Decision prepared by Administrative
8 Law Judge Wong, dated January 23, 2006, is denied.

9
10
11 I hereby submit the foregoing,
12 which constitutes my proposed order
13 in the above-entitled matters, as
14 the result of a hearing before me,
15 and I recommend this proposed order
16 be adopted as the decision of the
17 New Motor Vehicle Board.

18 DATED: March 21, 2006

19 By: 

20 ANTHONY M. SKROCKI
21 Administrative Law Judge

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23
24
25
26
27 Ken Miyao, Acting Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV