

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of
12 BISA ENTERPRISES, INC. dba SUZUKI OF
13 EL CAJON,
14 Protestant,
15 v.
16 AMERICAN SUZUKI MOTOR CORPORATION,
17 Respondent.

Protest No. PR-2031-06

**ORDER REMANDING THE
PROPOSED ORDER DATED
OCTOBER 26, 2007**

18 To: Kasra Sadr, Esq.
Attorney for Protestant
19 SADR & BARRERA, APLC
401 West A Street, Suite 1815
20 San Diego, California 92101

21 James M. Mulcahy, Esq.
Rex T. Reeves, Esq.
22 Raymond Chan, Esq.
Attorneys for Respondent
23 MULCAHY REEVES LLP
1 Park Plaza, Suite 225
24 Irvine, California 92614

25
26 At its regularly scheduled meeting of November 15, 2007, the Public members of the New Motor
27 Vehicle Board ("Board") met and considered the administrative record and "Proposed Order Denying
28 Motion of Protestant BISA Enterprises' Request to withdraw its Dismissal" ("Proposed Order") dated

1 October 26, 2007, in the above-entitled matter.

2 After such consideration, the Board rejected the Administrative Law Judge's ("ALJ") Proposed
3 Order and granted "Motion of Protestant Bisa Enterprises' Request to withdraw its Dismissal." This
4 matter is remanded to the ALJ with the following instructions:

5 1. Under California Code of Civil Procedure section 473(c), counsel for Respondent shall file
6 an original declaration outlining its attorneys' fees and costs associated with Protestant's motion within
7 10 days of receipt of this Order.

8 2. ALJ Skrocki shall establish an expedited briefing schedule and telephonic hearing to
9 determine the reasonableness of the requested attorneys' fees and costs. Counsel for Protestant shall pay
10 the attorneys' fees and costs as ordered by ALJ Skrocki within 10 days of receipt of such order.

11 3. ALJ Skrocki is directed to set a telephonic hearing on Respondent's Motion to Compel that
12 was previously filed and briefed.

13 4. ALJ Skrocki is directed to establish a schedule for any outstanding discovery and set a
14 merits hearing date as expeditiously as possible.

15 6. Unless otherwise stated, all communications required by this Order to be sent between the
16 parties and to the Board shall be by e-mail by 5:00 p.m. (Pacific Time), on the date stated and by United
17 States Postal Service Mail. The Board's e-mail address is [nmvb@nmvb.ca.gov](mailto:nm vb@nm vb.ca.gov).

18 7. Documents are deemed filed when the originals with attached proof of service are received
19 at the Board's offices in Sacramento. Facsimile transmissions and e-mails are not deemed original
20 documents.

21 SO ORDERED.

22
23 DATED: November 20, 2007

NEW MOTOR VEHICLE BOARD

24
25 By 
ROBERT T. (TOM) FLESH
26 for Vice President

27 George Valverde, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV

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13 EL CAJON,
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15 v.
16 AMERICAN SUZUKI MOTOR CORPORATION,
17 Respondent.

Protest No. PR-2031-06

PROPOSED ORDER DENYING "MOTION
OF PROTESTANT BISA ENTERPRISES'
REQUEST TO WITHDRAW ITS
DISMISSAL"

18 To: Kasra Sadr, Esq.
Attorney for Protestant
19 SADR & BARRERA, APLC
401 West A Street, Suite 1815
20 San Diego, California 92101

21 James M. Mulcahy, Esq.
Rex T. Reeves, Esq.
22 Raymond Chan, Esq.
Attorneys for Respondent
23 MULCAHY REEVES LLP
1 Park Plaza, Suite 225
24 Irvine, California 92614

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1 THE PARTIES AND THEIR ATTORNEYS

2 1. Protestant is Bisa Enterprises, Inc. dba Suzuki of El Cajon ("Bisa" or "Protestant") a
3 California corporation, located at 464 West Main Street, El Cajon, California. Bisa is represented by
4 Kasra Sadr, of Sadr & Barrera, A Professional Law Corporation, 401 West A Street, Suite 1815, San
5 Diego, California.¹

6 2. Respondent is American Suzuki Motor Corporation ("ASMC" or "Respondent"), and is
7 located at 3251 East Imperial Highway, Brea, California. ASMC is represented by James M. Mulcahy,
8 Rex T. Reeves, and Raymond Chan of Mulcahy Reeves LLP, 1 Park Plaza, Suite 225, Irvine, California.

9 3. At the time the protest was filed, Bisa was a franchisee of ASMC, the franchisor.

10 PROCEDURAL BACKGROUND

11 The Notice of Termination and the Filing of the Protest

12 4. By letter dated November 17, 2006, in compliance with California Vehicle Code section
13 3060,² ASMC gave notice to Bisa, and the Board, of ASMC's intent to terminate the Suzuki franchise of
14 Bisa.

15 5. On December 15, 2006, a timely protest was filed in behalf of Bisa by its attorneys, who at
16 that time were Mr. Gattis and Mr. Kuncz of Gattis & Kuncz.

17 The Pre-Hearing Conferences and Discovery Schedule

18 6. December 19, 2006 - The Board issued its Notice of Pre-Hearing Conference setting the
19 conference for January 2, 2007.

20 7. The purpose of the Pre-Hearing Conference is to discuss any preliminary motions,
21 establish a discovery schedule and tentative date for the merits hearing, and/or a date for a Mandatory
22 Settlement Conference. The Board's practice is to give counsel for the parties as much leeway as
23 possible in the setting of the discovery dates and in choosing the eventual date for a hearing on the merits
24 of the protest, but keeping in mind that the policy of the Board is to have the protests resolved as
25 expeditiously as is practicable.

26
27 ¹ When the protest was filed on December 15, 2006, Richard E. Gattis, Esq., and Timothy A. Kuncz, Esq. of Gattis & Kuncz,
APC, 2729 Fourth Avenue, Suite 3, San Diego, California represented Bisa. On August 3, 2007, Sadr & Barrera were
28 substituted in as attorneys for Bisa.

² All statutory references shall be to the California Vehicle Code unless otherwise indicated.

1 8. December 28, 2006 – At the request of Bisa and with the consent of ASMC, the Pre-
2 Hearing Conference was re-scheduled from January 2 to January 12, 2007.

3 9. January 12, 2007 – The Pre-Hearing Conference was held and resulted in the establishment
4 of a discovery schedule that would lead to a tentative date of June 25, 2007, for a hearing on the merits of
5 the protest. All of these dates were chosen by counsel. The discovery schedule included the obligation of
6 each side to exchange documents no later than March 21, 2007. The discovery schedule agreed to during
7 the conference on January 12, 2007 was formalized by a Pre-Hearing Conference Order issued on
8 January 16, 2007.

9 10. March 21, 2007 – This was the date for production of documents as agreed to by the
10 attorneys on January 12, 2007 and as ordered by the Board in the Pre-Hearing Conference Order issued on
11 January 16, 2007. Bisa produced no documents.

12 11. March 28, 2007 – Bisa made a partial production of documents accompanied by a letter
13 indicating that additional documents would be produced in the near future. In addition to being
14 incomplete, the production was also a week late.

15 12. April 27, 2007 – No additional production had been made by Bisa. The attorneys for
16 ASMC sent a letter stating which documents had not yet been produced. (Respondent's Motion to
17 Compel, Exhibit D)

18 13. May 8, 2007 – The Board issued a First Amended Pre-Hearing Conference Order. Counsel
19 for the parties contacted the Board requesting a new tentative date for hearing of the protest and a revision
20 of what remained on the discovery schedule. The Board accommodated the request by issuing the First
21 Amended Pre-Hearing Conference Order. The date of March 21, 2007 originally set for the exchange of
22 requested documents had already passed and was not changed.

23 14. The new agreed-upon tentative date for the hearing was August 27, 2007.

24 15. June 29, 2007 – Bisa produced some additional documents, but it too was allegedly
25 incomplete. All documents were to have been produced on March 21, 2007.

26 16. July 3, 2007 – The Board issued the Second Amended Pre-Hearing Conference Order. In
27 the latter part of June, Bisa's counsel wished to move the tentative hearing date from August 27, 2007 to
28 November 13, 2007. ASMC would not agree to that date and the attorneys eventually agreed to a new

1 hearing date of October 15, 2007 with changes in the remaining discovery schedule to accommodate the
2 new tentative date for the hearing of the protest.

3 17. Again, it is noted that the March 21, 2007 date for the exchange of requested documents
4 had already passed and was not changed by the Second Amended Pre-Hearing Conference Order.

5 18. August 3, 2007 - The law firm of Sadr & Barerra was formally substituted in as attorneys
6 for Bisa in place of Gattis & Kuncz.

7 19. August 16, 2007 - Mr. Sadr, of Sadr & Barerra, by letter of that date, requested that
8 ASMC agree to extend the dates established by the Second Amended Pre-Hearing Conference Order.
9 This request could not include the March 21, 2007 date for production of documents as the March 21 date
10 had not been changed in either the First or Second Amended Pre-Hearing Conference Orders. ASMC
11 refused to agree to an extension. There was no mention in the letters from Mr. Sadr of the document
12 production that was overdue as of March 21 and no request to extend the document production date from
13 March 21. (Mulcahy Declaration, dated October 2, 2007, Exhibit D)

14 20. August 20, 2007 - Mr. Sadr again requested that ASMC agree to an extension of the
15 remaining discovery dates. ASMC did not respond to this letter.

16 21. At no time had Protestant's original attorneys nor current attorneys filed a motion with the
17 Board for a change in the document production schedule.

18 **The Failure of Bisa to Produce Documents during Discovery**

19 22. Bisa's failure to produce documents as required by Order of the Board led to a Motion to
20 Compel Production which was filed by ASMC.³

21 23. August 20, 2007 - ASMC filed a Motion to Compel Production of Documents.⁴ The
22 March 21, 2007 production date, which was chosen by the parties on January 12, 2007 and incorporated
23 into the Board's Order of January 16, 2007, had never been changed.

24
25
26 ³ It should be noted that the Dismissal of the Protest was in no way related to the Motion to Compel Production of Documents
27 which was filed by ASMC. The Motion to Compel Production of Documents was merely the stage upon which Bisa's request
28 for dismissal of its own protest was set. Other than a concern about delaying the proceedings, the delay in producing the
documents and any sanctions that might have been imposed for this delay, have nothing to do with the issue before the Board,
which is whether the Board should vacate the Order of Dismissal which Bisa itself had requested.

1 24. August 23, 2007 - The Board's staff conducted a telephonic conference with Mr. Sadr,
2 representing Bisa and Mr. Mulcahy representing ASMC. As a result of this conference, a briefing
3 schedule and a date for telephonic hearing were established on Respondent's Motion to Compel
4 Production of Documents.

5 25. September 5, 2007 - The Board received Protestant's faxed opposition to Respondent's
6 Motion to Compel Production of Documents. The pleading was entitled "Further Responses of Protestant
7 Bisa Enterprises, Inc. to Respondent's Request for Production of Documents, Set One" and was filed on
8 September 10, 2007, when the original was received by the Board.

9 26. September 6, 2007 - Anthony M. Skrocki, Administrative Law Judge ("ALJ") for the
10 Board, began the telephonic hearing on ASMC's Motion to Compel Production.

11 27. Mr. Sadr represented Bisa, and Messrs. Mulcahy and Reeves represented ASMC.

12 28. At the very beginning of the hearing, Mr. Sadr stated that it would not be necessary to
13 proceed with the hearing on the Motion to Compel. This was stated by Mr. Sadr to be as a result of
14 discussion he had had with his client that resulted in the client's decision to surrender the franchise under
15 what Mr. Sadr referred to as the usual and customary terms for voluntary termination.

16 29. The representations of Mr. Sadr and the agreements of both counsel were incorporated into
17 a "Notice Continuing Hearing on American Suzuki's Motion to Compel Production of Documents" as
18 written and signed by ALJ Skrocki on September 7, 2007. This Board document reads in part as follows:

19
20 3. Prior to any discussion of the merits of the motion, **counsel for Protestant**
21 **stated that his client agrees to a termination of the franchise, wishes to withdraw the**
22 **protest, and desires to have the protest dismissed without further proceedings before**
23 **the Board.** (Emphasis added.)

24 4. Counsel for both parties agreed that the hearing on Respondent's Motion to
25 Compel Production of Documents would be continued pending receipt by the Board of a
26 written Request for Dismissal of the Protest submitted by Protestant.

27 5. Counsel for the parties also agreed that all schedules and other proceedings
28 pertaining to this matter before the Board will remain in effect and on calendar pending
receipt of Protestant's Request for Dismissal of the Protest.

6. Counsel for the parties further agreed that, if the Request for Dismissal of
the Protest is not submitted to the Board by Protestant, the hearing on Respondent's Motion

4 It was during the telephonic hearing on ASMC's Motion to Compel Production, held on September 6, 2007, that Bisa's attorney first stated to the Board that Bisa would voluntarily surrender the franchise and that dismissal of the Protest would be requested.

1. to Compel Production of Documents will resume on Monday, September 10, 2007, at a
2. time to be determined by the Board.
3. SO ORDERED.
4. ...

5. 30. No challenge has ever been made by Mr. Sadr as to the accuracy of the content of the
6. above language.

7. **The Request for Dismissal of the Protest**

8. 31. September 6, 2007 - A "Request for Dismissal of Protest", signed by Mr. Sadr, was e-
9. mailed, faxed and sent by U.S. Mail to the Board.

10. 32. September 10, 2007 - The hard copy of the Request for Dismissal was received and filed
11. by the Board.

12. **The Order of Dismissal**

13. 33. In accordance with Protestant's Request for Dismissal of Protest, the protest was dismissed
14. on September 11, 2007, by an Order of Dismissal, signed by the Executive Director of the Board.⁵

15. 34. No attempt was made by Mr. Sadr to withdraw Bisa's Request for Dismissal of Protest
16. between September 6 and the time the Board's Order of Dismissal was issued on September 11, 2007.
17. Had Mr. Sadr withdrawn the Request for Dismissal during this time period, the Order of Dismissal would
18. not have been issued. The protest would have remained on the Board's docket and the hearing on
19. ASMC's Motion to Compel Production would have resumed.

20. 35. In accordance with the Board's practice, a request for dismissal submitted by a Protestant
21. is processed and issued without formal Board Member approval or adoption. If there had been a hearing
22. on a contested matter that resulted in a Recommendation of Dismissal of the Protest by an ALJ, this
23. would have been placed on an agenda and considered by the Board at a noticed meeting. However, there
24. was no contested proceeding here. The Order of Dismissal was issued at the request of Protestant.

25. ///

26. ///

27. ⁵ A protestant's Request for Dismissal is honored on its face and the Executive Director of the Board will issue the Order of
28. Dismissal as promptly as possible. All pending discovery, briefing, motion and/or merits hearing dates are vacated by
operation of the dismissal of the protest.

1 41. Granting Protestant's current motion would vacate the Board's Order of Dismissal. This
2 would have the effect of reviving and re-imposing the statutory stay of the intended conduct of the
3 franchisor. The stay would be effective as of the date of the filing of the protest (as though the Order of
4 Dismissal had never been issued), and vacating the Order of Dismissal would reinstate the protesting
5 dealer's right to a hearing before the Board as to whether there is good cause to terminate the dealer's
6 franchise. If the protest is re-instated it will be necessary to establish a new discovery schedule and new
7 dates for a hearing on the merits of the protest before an ALJ.

8 42. Denying the motion before the Board would leave the September 11, 2007, Order of
9 Dismissal.

10 **The Hearing and Briefs on Bisa's Motion to Vacate the Dismissal**

11 43. The telephonic hearing on this motion was held on October 9, 2007, before ALJ Skrocki.

12 44. Kasra Sadr, Esq. of Sadr & Barrera, APLC represented Protestant. James M. Mulcahy,
13 Esq. and Raymond Chan, Esq. of The Mulcahy Law Firm represented Respondent.

14 **Authority Cited by Protestant in Support of this Motion**

15 45. Protestant relies upon the California Code of Civil Procedure ("CCP") section 473(b) in
16 seeking to have the Order of Dismissal vacated.⁸ This section states in relevant part:

17 **473(b) The court may, upon any terms as may be just, relieve a party or his or her**
18 **legal representative from a judgment, dismissal, order, or other proceeding taken**
19 **against him or her through his or her mistake, inadvertence, surprise, or excusable**
20 **neglect. Application for this relief shall be accompanied by a copy of the answer or other**
21 **pleading proposed to be filed therein, otherwise the application shall not be granted, and**
22 **shall be made within a reasonable time, in no case exceeding six months, after the**
judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment,
dismissal, order, or other proceeding determining the ownership or right to possession of
real or personal property, without extending the six-month period, when a notice in
writing is personally served within the State of California both upon the party against
whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or

23 ⁸ There are no specific provisions in the Vehicle Code or in the Board's regulations that expressly provide for the relief sought
24 by Bisa. Although no authority has been cited that requires the application of CCP section 473(b) to Board proceedings,
25 ASMC has not asserted that the CCP language is not applicable. It is possible that the CCP language is intended to apply only
26 to those situations in which the adverse party, in this case ASMC, in some manner was the moving party seeking the dismissal.
27 This is because the statutory language refers to "a dismissal... taken against him" and a "dismissal entered against his or her
28 client". Here there was no action by ASMC asking the Board to enter a dismissal "against" Bisa. The dismissal was entered at
the request of Bisa's attorney and would not be a "dismissal... taken against (itself). There is no language in the statute relied
upon by Bisa that refers to a "dismissal entered at the request of" (as compared to "a dismissal taken against") the party who is
now seeking the dismissal it requested be vacated. However, as no such limitation upon the language of the CCP has been
suggested by ASMC, it is assumed that the language of CCP section 473(b) should be broadly interpreted and applied to
possibly grant relief to Bisa if the requirements of the CCP are met.

1 her attorney of record, if any, notifying that party and his or her attorney of record, if any,
2 that the order, judgment, dismissal, or other proceeding was taken against him or her and
3 that any rights the party has to apply for relief under the provisions of Section 473 of the
4 Code of Civil Procedure shall expire 90 days after service of the notice, then the
5 application shall be made within 90 days after service of the notice upon the defaulting
6 party or his or her attorney of record, if any, whichever service shall be later. No affidavit
7 or declaration of merits shall be required of the moving party. **Notwithstanding any
8 other requirements of this section, the court shall, whenever an application for relief
9 is made no more than six months after entry of judgment, is in proper form, and is
10 accompanied by an attorney's sworn affidavit attesting to his or her mistake,
11 inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk
12 against his or her client, and which will result in entry of a default judgment, or (2)
13 resulting default judgment or dismissal entered against his or her client, unless the
14 court finds that the default or dismissal was not in fact caused by the attorney's
15 mistake, inadvertence, surprise, or neglect.** The court shall, whenever relief is granted
16 based on an attorney's affidavit of fault, direct the attorney to pay reasonable
17 compensatory legal fees and costs to opposing counsel or parties. However, this section
18 shall not lengthen the time within which an action shall be brought to trial pursuant to
19 Section 583.310.
20 (Emphasis added.)

21 46. Bisa's attorney, Mr. Sadr, asserts in the motion that relief should be granted because "The
22 request for dismissal ... was filed by the mistake, inadvertence, surprise, or neglect of BISA's counsel,
23 Kasra Sadr". (Motion, page 2, lines 11-12 and Sadr Declaration dated September 26, 2007, page 2, lines
24 3-4) Such a broad pleading could be characterized as a "shotgun" approach in that all four of the
25 statutorily stated grounds for relief are recited without stating which of the four are the specific grounds
26 for the relief sought. However, the motion goes on to allege what appears to be a claim of "mistake".⁹

27 47. Mr. Sadr's assertions of "mistake" as raised in the motion (and in the order as presented in
28 the motion) are:

A. He "... believed that to begin a voluntary surrender of the (sic) BISA's franchise, this
matter should have been dismissed first." (Motion, page 2, lines 14-15 and Sadr Declaration dated
September 26, 2007, page 2, lines 5-6)

B. He "... mistakenly believed that a verbal agreement had been reached between the parties

⁹ Towards the end of the hearing on the Motion to Vacate, Mr. Sadr raised for the first time the possibility that the Request for Dismissal had been made due to his "neglect". The factual assertion made as to neglect was that Mr. Sadr had neglected to obtain a settlement agreement on the terms that his client desired prior to filing the Request for Dismissal. This is a somewhat more specific factual explanation of "neglect" as compared to the litany of "mistake, inadvertence, surprise or neglect" as stated in the motion. However, because it was made as an afterthought and because it too is inconsistent with: (1) the contention there was a settlement agreement already in existence; and (2) the representation that there would be voluntary termination on the usual and customary terms, there will not be a separate analysis of the claim of "neglect". A large portion of the discussion of the claim of "mistake" and the other facts also applies to the claim of "neglect".

1 as to the terms of that surrender” and “In fact, no concrete agreement has been agreed upon by the
2 parties...” (Motion, page 2, lines 16-17 and Sadr Declaration dated September 26, 2007, page 2, line 7-9)
3 Mr. Sadr also asserts that:

4 C. “Bisa in no way had authorized the dismissal. The act was taken by Bisa’s counsel.”
5 (Motion, page 2, line 21 and Sadr Declaration dated September 26, 2007, page 2, lines 11-12)

6 D. The Board has no discretion but to grant the motion as “The provisions of CCP 473 are
7 **Mandatory** (not just optional) (sic). (The bolding, the capital “M” and the brackets are all in the
8 original.) (Sadr Declaration dated October 3, 2007, page 2, line 4 and Motion, page 3, lines 11, 20)

9 48. These contentions will be taken in reverse order. It is necessary to take the last of these
10 contentions first, as, if what has been labeled D is correct, there is nothing left that needs to be decided.

11 **Whether the Board is Mandated by CCP Section 473 to Vacate the Order of Dismissal?**

12 49. Contention D is that the Board has no discretion but to grant the motion as the provisions
13 of CCP section 473 are mandatory. The asserted authority for this is the following language from CCP
14 473:

15 ... **the court shall**, whenever an application for relief is made no more than six months
16 after entry of judgment, is in proper form, and is accompanied by an attorney's sworn
17 affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, **vacate any ...
dismissal entered against his or her client...**” (Emphasis added.)

18 However, the statute continues with the language;

19 “...unless the court finds that the default or dismissal was not in fact caused by the
20 attorney's mistake, inadvertence, surprise, or neglect.

21 50. This latter language permits (if not mandates) that there be an inquiry into whether the
22 assertions of the “attorney’s mistake, inadvertence, surprise, or neglect” are supported by the facts.
23 Therefore, it is not mandatory that the Board grant the motion. The Board may deny the motion to vacate
24 the Board’s Order of Dismissal if the Board finds that the facts are such that the dismissal was “... not in
25 fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.”

26 51. There must be an inquiry into the facts to determine if they support Mr. Sadr’s claim that
27 the dismissal was caused by his “mistake, inadvertence, surprise or neglect.”

28 ///

1 Whether Bisa Authorized the Dismissal?

2 52. The contention labeled C, that "Bisa in no way had authorized the dismissal" will be next
3 addressed.

4 53. Mr. Sadr is urging that CCP section 473 allows for vacating the dismissal as the dismissal
5 was caused by "the attorney's mistake, inadvertence, surprise or neglect" and not the client's.

6 54. Mr. Sadr asserts that "Bisa in no way had authorized the dismissal. The act was taken by
7 Bisa's counsel." (Motion, page 2, line 21 and Sadr Declaration dated September 26, 2007, page 2, lines
8 11-12) However, this is in direct conflict with the express language of the order of ALJ Skrocki dated
9 September 7, 2007 and quoted above. This order was issued in connection with the continuance of a
10 telephonic hearing to rule on ASMC's Motion to Compel Production of Documents. At the beginning of
11 that hearing on September 6, 2007, Mr. Sadr stated that there was no need to continue with the hearing on
12 the Motion to Compel Production as there was going to be a voluntary surrender of the franchise and the
13 protest was going to be dismissed.

14 55. ALJ Skrocki specifically queried Mr. Sadr as to whether he had discussed the dismissal
15 with his client and if that is what his client had agreed to. Part of Mr. Sadr's response to ALJ Skrocki was
16 incorporated into the order of September 7, 2007 which was issued as a result of the September 6, 2007
17 representations of Mr. Sadr. This order stated in part:

18 "3. Prior to any discussion of the merits of the motion, counsel for Protestant stated that
19 his client agrees to a termination of the franchise, wishes to withdraw the protest, and desires to
20 have the protest dismissed without further proceedings before the Board."

21 Whether the Facts Evidence that Mr. Sadr "... Mistakenly Believed that a Verbal Agreement
22 had been Reached between the Parties...?"

23 56. What has been labeled Contention B of Mr. Sadr is as follows:

24 B. Mr. Sadr "mistakenly believed that a verbal agreement had been reached between
25 the parties as to the terms of that surrender" and "In fact, no concrete agreement has been agreed upon by
26 the parties..." (Motion, page 2, lines 16-17 and Sadr Declaration dated September 26, 2007, page 2, line
27 7-9)

28 57. The communications between the parties can be looked at to determine whether this

1 contention is supported by facts sufficient to show the claimed mistake (as permitted by CCP section
2 473).

3 58. On September 4, 2007, just two days prior to the hearing on ASMC's Motion to Compel
4 Production of Documents, Mr. Sadr sent a letter via U.S. Mail and Facsimile to ASMC's attorneys but not
5 the Board which in its entirety read:

6 "In furtherance of our phone conversation, I would like to propose that we settle this matter by
7 **Bisa voluntarily giving up the Suzuki franchise under the usual and customary terms.**"¹⁰

8 (Emphasis added.)

9 59. This letter does not evidence that Mr. Sadr believed a settlement agreement already
10 existed. At best it is merely a "proposal" or "offer" to settle the dispute. In addition, the language "under
11 the usual and customary terms" negates an interpretation that, if there was an existing agreement between
12 Bisa and ASMC, it was on some special terms other than those provided by the franchise in the event of a
13 termination. If the "proposal" had been accepted by ASMC, the resulting settlement agreement would
14 have been "under the usual and customary terms" and not the special terms Bisa is now seeking as alleged
15 below.

16 60. Bisa's Request for Dismissal was signed by Mr. Sadr on September 6, 2007, the same date
17 as the hearing on ASMC's Motion to Compel Production.

18 61. The Request for Dismissal did recite that it was "Pursuant to the settlement of the
19 parties..." However, Mr. Sadr's own subsequent communications indicate that there was no such
20 "settlement".

21 62. In a letter dated September 10, 2007, from Mr. Sadr to Messrs. Reeves and Mulcahy,
22
23

24 ¹⁰ There was no reporter present during the hearing on September 6, 2007 for ASMC's Motion to Compel Production of
25 Documents, however, the recollection of ALJ Skrocki is that, when he questioned Mr. Sadr about whether Mr. Sadr's client
26 had agreed to the withdrawal and dismissal of the protest, Mr. Sadr, replied using very similar language - that his client desired
27 a voluntary surrender of the franchise under the usual and customary terms. There was no indication from Mr. Sadr that any
28 further negotiations or "finalizing" of any agreement was needed. If there had been any indication that any further negotiation
of an agreement was desired or needed, the hearing on ASMC's Motion to Compel Production of Documents would not have
been continued from Thursday, September 6 to resume on Monday September 10, 2007 "if the Request for Dismissal of the
Protest is not submitted to the Board by Protestant" by that date. (Board Order dated September 7, 2007, page 2, lines 15-17).
Mr. Sadr's letter of September 4, 2007, was written two days prior to the September 6, 2007 hearing before ALJ Skrocki but
was not seen by ALJ Skrocki until October 4, 2007, when ASMC filed its Opposition to Bisa's Motion to Vacate.

1 Mr. Sadr explains why Protestant's Request for Dismissal stated that it was pursuant to the settlement of
2 the parties:

3 ... why our dismissal stated that it was pursuant to the "settlement" of the parties. The
4 Settlement (sic) part was really for two reasons. First, it was a direct copy of the sample
5 that was given to our firm from the court.¹¹ (If you look at the sample that was emailed,
6 that language is used). Second it really is meant to be filled (sic) **pursuant to the
7 settlement that we offered** (that being a voluntary withdrawal in return for a repurchase.)
8 I'm not sure if I could have used better or more clear language, but I recommend that we
9 continue with the repurchase. (Bold added but brackets in original.)

7 Shawn Sagart and someone from your side had discussed the terms of the repurchase.
8 Some or all of the below may have been mentioned. Would you please ascertain if the
9 below provisions are satisfactory with your client ..." (Mulcahy Declaration, dated October
2, 2007, Exhibit H)

10 63. There then followed a list of seven terms to be part of the proposed repurchase. As can be
11 seen, the language in this letter of September 10, 2007, makes reference only to "a settlement that we
12 offered", that Mr. Sagart of Bisa "had discussed the terms of the repurchase" with someone from ASMC,
13 and Mr. Sadr inquires if the listed provisions are satisfactory to ASMC.

14 64. The above indicates that Mr. Sadr is merely proposing an agreement which is inconsistent
15 with the claim that Mr. Sadr, "mistakenly believed that a verbal agreement had been reached between the
16 parties as to the terms of that surrender", which is asserted to be the basis for the "mistake" sufficient to
17 justify that the Order of Dismissal, be vacated. (Motion, page 2, lines 16-18 and Sadr Declaration dated
18 September 26, 2007, page 2, line 7-9)

19 65. In an e-mail from Mr. Sadr on September 11, 2007 to ASMC's attorneys, Mr. Sadr states:

20 I may have jumped the gun in dismissing our case, but I don't want to take any action until
21 I hear back from you regarding my letter which had the term (sic) that my client wanted in
22 the voluntary surrender. I guess I should have made sure everyone is on board as to the
23 terms of the voluntary surrender, before the case was dismissed.

23 In any case, my client and Raj Gupta [of ASMC] had talked and agreed on those terms.
24 My client wants me to bring a motion to put the case "back on" if those terms are not
25 going to be agreed upon.

25 I'm not sure if the case can be brought back on or not, but I guess I would have to bring

26 ¹¹ At the conclusion of the proceedings on September 6, 2007, Mr. Sadr inquired as to the format for a Request for Dismissal.
27 A member of the Board's staff who had arranged the call and was monitoring the proceedings offered to forward Mr. Sadr a
28 sample copy of a Request For Dismissal that had been used in other Board cases. This sample did have the language to which
Mr. Sadr refers. However, the form was what it was stated to be, a "sample" form, not a required form that would fit all fact
situations.

1 some sort of a CCP473 motion. Before I try that however, would you both be kind
2 enough to talk to Mr. Gupta and determine if in fact those terms were agreed on. ...
(Mulcahy Declaration, dated October 2, 2007, Exhibit I)

3 66. These paragraphs are inconsistent to say the least. In one place the communication states
4 there was an agreement (“my client and Raj Gupta... agreed on those terms”) and in another place it
5 indicates there may not have been an agreement (“if those terms are not going to be agreed upon”... “and
6 determine if in fact those terms were agreed on.”)

7 67. In conclusion, as to Contention B, the communications from Mr. Sadr do not convincingly
8 indicate that there was a “mistake” on the part of Mr. Sadr in believing that there was a settlement
9 agreement between the parties. If there was no mistake, then the dismissal could not have been caused by
10 his “mistake”. In fact, the communications from Mr. Sadr more clearly indicate that Mr. Sadr was aware
11 there was no settlement agreement with separate provisions distinct from the “usual and customary
12 terms”.

13 68. Mr. Sadr’s communications, both before and after the Request for Dismissal was filed,
14 were only proposing settlement. The only difference being that the proposal prior to the Request for
15 Dismissal was “on the usual and customary terms” and the proposal after the Request for Dismissal listed
16 seven items that are likely beyond the “usual and customary terms” in the event of franchise termination.

17 69. Prior to the Request for Dismissal being filed, the language used in Mr. Sadr’s letter of
18 September 4, 2007, was, “In furtherance of our phone conversation, I would like to propose that we settle
19 this matter by Bisa voluntarily giving up the Suzuki franchise **under the usual and customary terms.**”
20 (Emphasis added.) (Mulcahy Declaration, dated October 2, 2007, Exhibit E)

21 70. This letter was written just two days prior to the September 6, 2007 hearing on ASMC’s
22 Motion to Compel Production during which Mr. Sadr orally stated that his client desired to withdraw the
23 protest under the usual and customary terms.

24 71. This proposal to settle “under the usual and customary terms” must be compared to Mr.
25 Sadr’s letter of September 10, 2007, which stated that “... pursuant to the settlement that we offered (that
26 being a voluntary withdrawal in return for a repurchase)” and which then concluded with a listing of the
27 following seven terms:

- 28 1. Suzuki to purchase all new Suzuki Parts. Including current and non current at dealer cost.

- 1 2. Suzuki to purchase Suzuki sign. Dealer to be reimbursed full value.
- 2 3. Purchase all 2006 brand new vehicles (there is only one Firenza and one Grand Vitara) at Dealer Invoice net net price.
- 3 4. Purchase all 2007 new vehicles at net net plus any dealer installed option at dealer cost (we have only one FX4 that has Suzuki SWT package).
- 4 5. Suzuki to pay all pending warranty claims.
- 5 6. Purchase all special tools at dealer cost.
- 6 7. Suzuki to pay Dealer money paid to Suzuki Architect for Drawings (sic) new show room (approximately \$10,000).
- 7
- 8

9 (Mulcahy Declaration, dated October 2, 2007, Exhibit H)

10 **The Jurisdiction of the Board**

11 72. The only jurisdiction the Board has is the jurisdiction to resolve whether there is good
12 cause to terminate the franchise of Bisa.

13 73. The Board does not have jurisdiction to resolve:

14 A. Whether a settlement agreement (oral or written) exists between Bisa and ASMC;

15 B. If there is a settlement agreement, what the terms of the settlement agreement may be (the
16 “usual and customary terms” and what may be included therein, or all or some of the listed seven terms in
17 Mr. Sadr’s letter or September 10, 2007 or others);

18 C. If an oral settlement agreement exists and if its terms can be established, whether the
19 agreement will be unenforceable due to Mr. Sadr’s concerns about “the Statute of Frauds” (which may
20 require a writing signed by an authorized representative of ASMC). A valid oral contract can exist even
21 though there is a statute that prevents its enforcement unless there is a signed writing. The oral contract
22 can be enforced despite the lack of a statutorily required signed writing if the defense is not timely
23 asserted by the other party, or if one of several exceptions to the writing requirement exists.

24 D. What the franchise provides as to the parties’ rights and obligations in the event of a
25 termination.

26 E. Whether ASMC is honoring or repudiating its contractual obligations under the terms of
27 the franchise as they pertain to termination.

28 74. All of the above are contract disputes that are resolvable by and within the jurisdiction of

1 the Superior Court, not the Board.

2 75. If Bisa recognizes that good cause exists to terminate its franchise and if Bisa is desirous of
3 surrendering the franchise as it appears to be, any dispute as to the contractual obligations of the parties
4 upon such termination belongs in Superior Court.

5 **The Purpose of the Board and the Policy of the Board**

6 76. Not only does the Board not have jurisdiction over a dispute as to whether there was a
7 contract and what its terms may be, it would be improper for a franchisee to utilize the provisions of the
8 Vehicle Code solely to attempt to obtain more than that to which the franchisee would be entitled under
9 the terms of its franchise/contract. If this occurred, the statutory scheme will have become a sword being
10 wielded by a franchisee rather than what the Legislature intended, which was for the statutes to be a
11 protective shield against a franchisor's conduct.

12 77. There is some possibility of this occurring here. There is no doubt that Bisa was willing
13 and remains willing to surrender its franchise and that one of the stated concerns of Bisa is that if the
14 dismissal is not vacated Bisa will be in the position of "giving up any kind of bargaining power" to obtain
15 the terms it wants upon termination. (October 9, 2007, Reporters Transcript ("RT"), page 17, lines 14-15;
16 page 21, lines 11-14; page 23, lines 12-13)

17 78. ASMC has always been and remains willing to honor its franchise obligations that apply
18 upon a termination and Bisa is desirous of surrendering its franchise. However, Bisa apparently wants to
19 obtain more than what the franchise provides. The Board is sensitive to the possibility of a franchisee
20 using the legislatively-created "power of the protest" as a bargaining chip and will closely scrutinize the
21 facts. Here it appears as though the primary if not the only reason for attempting to vacate the Order of
22 Dismissal is not to avoid the loss of the franchise, but to have a "voluntary surrender" of the franchise on
23 terms more favorable than those provided in the franchise agreement.¹²

24 79. The possible unfair use of the "bargaining power" of a franchisee arises from the
25 legislatively created "stay" upon the franchisor's intended conduct which arises upon the filing of a
26

27 ¹² As stated by Mr. Sadr, "I caused the case to go away, and now I don't have any bargaining power or leverage to get those
28 terms that my client wanted" (RT page 8, lines 8-11); and "Whereas, I believe that if this case does come back on and, you
know, we get our dates, hopefully the parties will come to some agreement." (RT page 3, lines 8-10).

1 protest by a franchisee. In this case, the stay arose when the protest was filed in December 2006 and
2 continued for nine months until the Order of Dismissal was entered on September 11, 2007. If the Motion
3 to Vacate is granted, the stay will again arise and continue into the indefinite future. The stay will cease
4 only if and when the Board makes its findings that ASMC has good cause to terminate the franchise of
5 Bisa, or in this case, perhaps earlier if Bisa is successful in obtaining the terms it desires upon termination.
6 In these latter circumstances, instead of the settlement of the protest being based upon a compromise of
7 the dispute as to whether good cause exists for the termination, the settlement would be based upon
8 "lifting the stay", or surrendering "the power of the protest". The statutorily created stay will have
9 become a "bargaining chip". It would be a "settlement" in which the price being paid to the franchisee
10 was influenced and the amount possibly modified by the effect of the protest upon the franchisor rather
11 than the effect upon the franchisee.

12 80. Under these circumstances, the right to file a protest will have its own intrinsic economic
13 value regardless of the legislatively mandated requirements that there be good cause for the intended
14 action (regardless of which side has the burden of proof). However, this is not the result that the
15 Legislature intended. It would result in using the protest power as a sword to affirmatively extract
16 compensation just for its surrender, rather than the protest being a shield protecting the franchisee from
17 conduct of the franchisor for which there is no good cause.

18 81. As argued by counsel for ASMC in referring to this type of situation, "But what's, I think,
19 very alarming, and the reason that I have been exercised about this proceeding is what I just heard a
20 moment ago from Mr. Sadr. What he's saying is, please put it back on the docket, so that I can continue
21 to take Suzuki out of the market until we have a new hearing date, which is probably the third or fourth
22 continuation or fifth continuation. This case has been pending now for some nine to 12 months. And
23 what he's suggesting is that I [Mr. Sadr] will use that to try to secure a settlement from them through
24 some sort of blunt strategy. And if we're talking about something that is entirely unfair and inappropriate,
25 it is precisely that." (RT, page 25, lines 23-25; page 26, lines 1-8)

26 **Whether Mr. Sadr was Mistaken as to his Belief that the Protest had to be Dismissed First**
27 **Prior to Beginning a Voluntary Surrender of the Franchise?**

28 82. What has been labeled Contention A is as follows:

1 A. Mr. Sadr "believed that to begin a voluntary surrender of the (sic) BISA's franchise, this
2 matter should have been dismissed first." (Motion, page 2, lines 14-15 and Sadr Declaration dated
3 September 26, 2007, page 2, lines 5-6)

4 83. There are no factual assertions that would support or explain the basis for this belief let
5 alone facts to show why such a belief would be reasonable.

6 84. In fact, an assertion that Mr. Sadr "believed that to begin a voluntary surrender, this matter
7 should have been dismissed first" is quite consistent with the other statements of Mr. Sadr that his client
8 desired to dismiss the protest and had agreed to a voluntary termination or surrender on the usual and
9 customary terms. A protest would serve no purpose if there were going to be a "voluntary surrender" of
10 the franchise and dismissing the protest would be the logical first step in doing so. There is no mistake in
11 that belief. This is no basis for vacating the Order of Dismissal.

12 85. In addition, if there was going to be a voluntary surrender of the franchise; it would make
13 no sense to continue with the expense of discovery and preparation for a hearing. However, the ALJ had
14 told Mr. Sadr and Mr. Sadr agreed that there would be no continuances or extensions of any upcoming
15 dates so long as the Protest remained pending. The Order issued on September 7, 2007 after the start of
16 the hearing on ASMC's Motion to Compel Production of Documents stated in part:

17 5. Counsel for the parties also agreed that all schedules and other proceedings
18 pertaining to this matter before the Board will remain in effect and on calendar pending
19 receipt of Protestant's Request for Dismissal of the Protest.

20 86. Also, if there were a basis for the belief that the protest would have to be dismissed first in
21 order to have a settlement on some special terms, such an assertion would then be inconsistent with the
22 contention that Mr. Sadr "mistakenly believed that a verbal agreement had been reached between the
23 parties as to the terms of that surrender." (Sadr Declaration dated September 26, 2007, page 2, lines 7-8)

24 87. This is so because if a settlement agreement already existed between the parties (as Mr.
25 Sadr also alleges) there would again be no reason not to dismiss the protest.

26 88. In fact, the ALJ had ordered that, if the Request for Dismissal were not promptly received,
27 all that would happen would be that the hearing on ASMC's Motion to Compel Production would resume
28 in a few days and that all of the remaining discovery dates and obligations would remain in effect. The
language in the order was:

1 6. Counsel for the parties further agreed that, if the Request for Dismissal of
2 the Protest is not submitted to the Board by Protestant, the hearing on Respondent's Motion
3 to Compel Production of Documents will resume on Monday, September 10, 2007, at a
4 time to be determined by the Board.

5 89. The Request for Dismissal was unquestionably submitted to the Board for filing in order to
6 conclude the protest and to take all of the remaining proceedings before the Board off calendar.

7 90. No request for a continuance of any pending schedule was made that would have enabled
8 Mr. Sadr to do what he states he should not have done – "I should not have dismissed the matter until
9 which (sic) time a concrete agreement had been reached." (Sadr Declaration dated September 26, 2007,
10 page 2, lines 9-10)

11 91. What has been labeled as Contention A that Mr. Sadr "believed that to begin a voluntary
12 surrender of BISA's franchise, this matter should have been dismissed first", not only has no other
13 allegations of fact to support it but the facts that do exist show no basis for why such a belief would be a
14 "mistake" if there was to be a voluntary settlement on the usual and customary terms.

15 92. In an effort to avoid an inference being drawn that the Request for Dismissal followed by
16 the Motion to Vacate the Order of Dismissal were motivated by a desire to merely delay the proceedings
17 and obtain a continuance, Mr. Sadr offered to adhere to the original schedules that had been established.
18 In his subsequent declaration dated October 3, 2007, he states:

19 4. This is NOT some concerted effort to "delay" these proceedings. Approximately 7
20 days after the dismissal I even offered that if counsel agreed to re-institute the
21 matter I would abide by the original dates as set forth.

22 (Subsequent Sadr Declaration dated October 3, 2007)

23 93. The problems with this is that to "re-instate the matter" and "abide by the original dates as
24 set forth" would not be practical for either party and would likely result in a disadvantage to ASMC, the
25 party with the burden of proving that there was good cause to terminate BISA's franchise.

26 94. The Request for Dismissal was filed on September 6, 2007 and the representation by Mr.
27 Sadr that it would be filed was the sole reason for not proceeding with a hearing on ASMC's Motion to
28 Compel Production of Documents.

 95. All the documents should have been produced by BISA on March 21, 2007. They had not
all been produced on that date nor has there been an offer to produce them all at any definite time let

1 alone in time to comply with the remaining portion of the discovery schedule.

2 96. There were still uncompleted discovery obligations to be performed and the opportunity
3 for ASMC to prepare adequately to meet its burden of proving good cause would have been made
4 significantly more difficult if the Protest had been re-instated with the original schedule and dates left
5 intact as proposed by Mr. Sadr.

6 97. Mr. Sadr's offer to abide by the schedules and dates that had been in effect when he
7 submitted the Request for Dismissal of the Protest was both meaningless and impractical. It was
8 meaningless as the dates could not be complied with due to the failure of Bisa to comply with its earlier
9 discovery obligations. It was impractical as any attempt to maintain the schedule would have put an
10 unfair hardship upon ASMC and would likely have made it more difficult if not impossible to meet the
11 remaining discovery schedule and to prepare adequately to meet its burden of proving that there was good
12 cause to terminate Bisa's Suzuki franchise.

13 **ATTORNEY'S FEES REQUESTED BY ASMC**

14 98. ASMC has requested that "If the Board Allows Bisa to Withdraw its Dismissal, It Should
15 Direct Bisa's Counsel to Pay Reasonable Compensatory Legal Fees and Costs to American Suzuki" and
16 cites the following language of CCP section 473(b):

17 ... the court shall, whenever relief is granted based on an attorney's affidavit for fault,
18 direct the attorney to pay reasonable compensatory legal fees and costs to opposing
19 counsel of parties.

20 99. As the Board is not allowing Bisa to "Withdraw its Dismissal" and there is no relief being
21 granted to Bisa or its attorney, the statutory language is not applicable. As no other authority has been
22 cited for awarding attorney's fees to ASMC, there will be no order for payment of attorneys' fees in
23 connection with the motion.

24 **CONCLUSION**

25 100. It is determined that "the dismissal was not in fact caused by the attorney's mistake,
26 inadvertence, surprise or neglect."

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PROPOSED ORDER

The "Motion of Protestant Bisa Enterprises' Request to Withdraw its Dismissal" is hereby denied. There will be no further proceedings in this matter before the Board. Bisa Enterprises, Inc. dba Suzuki of El Cajon v. American Suzuki Motor Corporation, Protest No. PR-2031-06, shall remain dismissed by Order of the Board dated September 11, 2007.

I hereby submit the foregoing which constitutes my Proposed Ruling in the above-entitled matter, as the result of a hearing before me and I recommend this Proposed Ruling be adopted as the decision of the New Motor Vehicle Board.

DATED: October 26, 2007

By: 

ANTHONY M. SKROCKI
Administrative Law Judge

George Valverde, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV