

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888
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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 NADER AUTOMOTIVE GROUP, LLC, and
13 NADER EGHTESAD,
14 Protestant,
15 v.
16 VOLKSWAGEN OF AMERICA, INC.,
17 Respondent.

Protest No. PR-2045-07

**(PROPOSED) ORDER OF THE NEW
MOTOR VEHICLE BOARD
DIRECTING THE EXECUTIVE
DIRECTOR TO DISMISS THE
PROTEST**

18 To: Michael M. Sieving, Esq.
Manish Parikh, Esq.
19 Christopher J. Wrabel, Esq.
Attorneys for Protestant
20 LAW OFFICES OF MICHAEL M. SIEVING
350 University Avenue, Suite 105
21 Sacramento, California 95825

22 Neil C. Erickson, Esq.
Allen Resnick, Esq.
23 Amy Lerner Hill, Esq.
Attorneys for Respondent
24 JEFFER, MANGELS, BUTLER & MARMARO LLP
1900 Avenue of the Stars, Seventh Floor
25 Los Angeles, California 90067-4308

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1 **(PROPOSED) ORDER OF THE NEW MOTOR VEHICLE BOARD DIRECTING**
2 **THE EXECUTIVE DIRECTOR TO DISMISS THE PROTEST**

3 At its regularly scheduled meeting of November 15, 2007, the Public Members of the Board met
4 and considered the findings and recommendation of the Administrative Law Judge and the Executive
5 Director. After such consideration, it is hereby determined that that there has been a failure of Protestant
6 to comply with authorized discovery without substantial justification for that failure. (Vehicle Code
7 section 3050(b)(2)).

8 The findings of the Administrative Law Judge are hereby adopted and the Executive Director is
9 directed to dismiss the protest of *Nader Automotive Group, LLC and Nader Eghtesad*, Protestant, v.
10 *Volkswagen of America, Inc.*, Respondent, Protest No. PR-2045-07, with prejudice.

11 This Decision shall become effective forthwith.

12 IT IS SO ORDERED THIS 15th DAY OF NOVEMBER 2007

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14 _____
15 ROBERT T. (TOM) FLESH
16 Vice President
17 New Motor Vehicle Board

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

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CERTIFIED MAIL

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9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of
12 NADER AUTOMOTIVE GROUP, LLC, and
13 NADER EGHTESAD,
14 Protestant,
15 v.
16 VOLKSWAGEN OF AMERICA, INC.
17 Respondent.

Protest No. PR-2045-07

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

18 To: Michael M. Sieving, Esq.
Manish Parikh, Esq.
19 Christopher J. Wrabel, Esq.
Attorneys for Protestant
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PROCEDURAL BACKGROUND¹

The Parties

1. Protestant is Nader Automotive Group, LLC, dba Nader Volkswagen (“Nader” or “Protestant”), and is located at 301 7th Street, Eureka, California.² Protestant is licensed as a new motor vehicle dealer by the Department of Motor Vehicles (“DMV”) and is a franchisee of Volkswagen of America, Inc.³

2. Respondent is Volkswagen of America, Inc. (“Volkswagen” or “Respondent”), located at 3800 Hamlin Road, Auburn Hills, Michigan. Volkswagen is the franchisor of Nader and is licensed as a distributor by the DMV.

Counsel for the Parties

3. Nader was originally represented by Michael T. Morrissey, Esq. of the Law Offices of Michael T. Morrissey, 1110 North First Street, San Jose, California, but is now represented by Michael M. Sieving, Esq., Manish Parikh, Esq., and Christopher J. Wrabel, Esq. of the Law Offices of Michael M. Sieving, 350 University Avenue, Suite 105, Sacramento, California. Volkswagen is represented by Neil C. Erickson, Esq., Allen Resnick, Esq., and Amy Lerner Hill, Esq. of Jeffer, Mangels, Butler & Marmaro LLP, 1900 Avenue of the Stars, Seventh Floor, Los Angeles, California.

The Notice of Termination and Protest

4. By letter dated March 6, 2007, Volkswagen gave notice to Nader, pursuant to Vehicle Code section 3060,⁴ of Volkswagen’s intent to terminate the Volkswagen franchise of Nader. The notice of intended termination was received by the New Motor Vehicle Board (“Board”) on March 12, 2007.

5. A timely protest was filed in behalf of Nader on April 5, 2007, by Michael T. Morrissey, Esq. of the Law Offices of Michael T. Morrissey. On April 11, 2007, William G. Brennan, the Board’s Executive Director, sent Mr. Morrissey a detailed letter indicating that due to a number of procedural

¹ The references to testimony, exhibits, or other parts of the record contained herein are examples of the evidence relied upon to reach a finding, and are not intended to be all-inclusive.

² The protest as filed states the Protestants to be “Nader Automotive Group, LLC, and Nader Eghtesad”. Mr. Eghtesad is the owner and dealer principal but is not the franchisee. Mr. Eghtesad has no standing to file a protest in his individual capacity.

³ Another protest was also filed entitled *Nader Automotive Group, LLC, and Nader Eghtesad v. Audi of America, Inc.*, Protest No. PR-2046-07. These matters were not consolidated for purposes of hearing on the merits of the protests but were tracking the same discovery schedules.

⁴ Unless otherwise indicated all statutory references will be to the California Vehicle Code.

1 deficiencies with the protest, an amended protest should be filed. An Amended Protest was filed by Mr.
2 Morrissey on May 31, 2007 (eight weeks after the filing of the original protest). Subsequently, Mr.
3 Morrissey withdrew as counsel for Nader and Michael M. Sieving of the Law Offices of Michael M.
4 Sieving, began representing Nader.

5 **The Attempts to Set and Hold a Pre-Hearing Conference**

6 6. The Board, upon receipt of the protest on April 5, 2007, issued a notice setting a Pre-
7 Hearing Conference to be held on April 19, 2007.

8 7. Upon request of counsel for Nader, the Pre-Hearing Conference set for April 19 was
9 rescheduled to April 24.

10 8. Upon another request of counsel for Nader, the April 24, Pre-Hearing Conference was
11 taken off calendar and subsequently rescheduled for May 3.

12 9. The Pre-Hearing Conference began on May 3. However, at this time, Mr. Morrissey who
13 was then counsel for Nader stated that he intended to withdraw as counsel and requested a two-week
14 continuance. No formal request for withdrawal or consent of his client or substitution of attorneys was
15 submitted. The Board, on May 3, granted Mr. Morrissey's request for a two week continuance and
16 resumed the Pre-Hearing Conference on May 17. Due to the three continuances requested by Protestant,
17 the Pre-Hearing Conference initially set for April 19, was not held until four weeks later on May 17.

18 10. On May 17, Mr. Morrissey was still counsel of record for Nader and participated in the
19 Pre-Hearing Conference on that date.

20 **The Pre-Hearing Conference of May 17, 2007 and the Order Establishing the Discovery Schedule**

21 11. The telephonic Pre-Hearing Conference was held on May 17, 2007. Robin P. Parker, the
22 Board's Senior Staff Counsel, presided. Nader was represented by Mr. Morrissey. Volkswagen was
23 represented by Mr. Neil C. Erickson.

24 12. During the telephonic conference, counsel for the parties stipulated to a discovery
25 schedule⁵ as follows:
26 _____

27 ⁵ Provided the dates are reasonable and come within any statutorily imposed time limitations, it is the Board's practice to
28 accommodate the attorneys' schedules and their clients' schedules in regard to establishing a discovery schedule and choosing
hearing dates. As is common, the discovery schedule dates for this protest (as well as the contemplated hearing dates) were

- 1 ▪ Requests for identification and production of documents were to be filed and served no
- 2 later than Friday, June 8.⁶
- 3 ▪ Objections, if any, to the requests for documents were to be filed and served no later than
- 4 Friday, June 22.
- 5 ▪ Counsel for the parties were to confer on Friday, June 29 to attempt to resolve any
- 6 objections to the discovery requests.
- 7 ▪ Counsel for the parties were to submit a Statement of Disputed Discovery Requests by
- 8 noon on Friday, July 6.
- 9 ▪ A telephonic conference was scheduled for Thursday, July 12 with an Administrative Law
- 10 Judge of the Board to rule on any objections to the requested discovery.
- 11 ▪ Documents requested and not objected to, and documents ordered to be produced as a
- 12 result of the July 12 conference and rulings were to be exchanged no later than Thursday,
- 13 August 9. **It is this provision of the Board's Order that is at the crux of the Motion to**
- 14 **Dismiss. Nader produced no documents on August 9.**
- 15 ▪ Preliminary witness lists were to be filed and served no later than Thursday, August 9.
- 16 ▪ Final witness lists were to be filed and served no later than Friday, September 14.
- 17 ▪ Expert witness reports and supporting documents were to be exchanged by counsel no later
- 18 than Friday, September 14.
- 19 ▪ A telephonic Hearing Readiness Conference was to be held on Friday, October 5.
- 20 ▪ Supplemental expert witness reports and supporting documents were to be exchanged no
- 21 later than Friday, October 5.

22

23 chosen by counsel for the parties. The entire discovery schedule was established so as to lead up to a hearing on the merits of

24 the protest tentatively scheduled to start on Wednesday, November 7, 2007 and continue through Tuesday, November 20,

25 2007. These dates were also chosen by counsel. Out of Protestant's concern that these dates would not be sufficient to

26 conclude the hearing, the dates of January 7, 2008 through January 11, 2008 were also set aside at Protestant's request to be

27 used if necessary. All of the above discovery dates established in the Board's order were stipulated to by counsel for the

28 parties and incorporated into a formal Pre-Hearing Conference Order signed by the Executive Director of the Board. Because

of the language of Section 3066(a) requiring that the hearing date be within 60 days of the order setting the hearing, the formal

order of the Board setting the date of November 7, 2007, for the commencement of the hearing could not have been issued until

some time after September 7, 2007.

⁶ Stipulated language in the Pre-Hearing Conference Order allowed the parties to submit documents via facsimile transmissions with originals to follow via regular mail.

- 1 ▪ All depositions to be taken had to be completed no later than Friday, October 19.
- 2 ▪ Hearing exhibits and demonstrative evidence were to be exchanged on Wednesday,
- 3 October 31.

4 Events Subsequent to the Pre-Hearing Conference of May 17, 2007

5 13. During the Pre-Hearing Conference held on May 17, Mr. Morrissey stated that he would
6 be filing an Amended Protest by May 25. (He had been instructed to do so by the Executive Director of
7 the Board by letter dated April 11.) Mr. Morrissey did not file the Amended Protest until May 31. On
8 that same date, Mr. Morrissey's Notice of Withdrawal of Counsel was also received and filed.

9 14. This Notice of Withdrawal was signed only by Mr. Morrissey. There was nothing to
10 indicate that Protestant or Mr. Eghtesad consented to the withdrawal by Mr. Morrissey. No substitution
11 of attorneys documents were received by the Board.

12 15. Because the Notice of Withdrawal of Counsel (filed by Mr. Morrissey on May 31) did not
13 include a substitution of attorneys and because there was nothing from Protestant assenting to the
14 withdrawal or to indicate that Protestant would be represented by its Dealer Principal, Mr. Eghtesad, the
15 Board, in an effort to determine the state of representation for the Protestant corporation, attempted to
16 conduct a non-scheduled telephonic conference on that same date, May 31. Mr. Morrissey and counsel
17 for Volkswagen, Mr. Erickson, were available to participate but Mr. Eghtesad could not be located.

18 16. The Board then issued a formal notice of a telephonic Status Conference to be held on June
19 4. This telephonic conference was initiated on June 4 but, as explained below, Mr. Eghtesad requested
20 that the June 4 conference call be re-scheduled to June 6. His request was granted. Mr. Morrissey, Mr.
21 Eghtesad, and Mr. Erickson participated in the June 4 conference along with Mr. Sieving (who is now, but
22 was not then, representing Nader). Mr. Sieving was added to the call at the request of Mr. Eghtesad.

23 17. Anthony M. Skrocki, an administrative law judge for the Board ("ALJ Skrocki"), presided
24 over the May 31, June 4, and June 6 conference calls.

25 18. The participants in the June 6 conference call were Mr. Morrissey (who still then
26 represented Nader), Mr. Eghtesad (the Dealer Principal), and counsel for Respondent, Mr. Resnick. Mr.
27 Sieving was not included in the call (as he was not yet representing any party as of that date) and neither
28 he nor anyone else requested his participation.

1 19. The conference call of June 6 resulted in an Order being issued on June 7.⁷ This Order in
2 part states:

3 4. On May 31, 2007, Mr. Morrissey filed a "Notice of Withdrawal of
4 Counsel". An informal telephonic conference was held on that same date to discuss the
5 state of the representation of Protestant. Participants in this conference were Mr.
6 Morrissey, Mr. Neal Erickson, Esq., representing Respondent, and Administrative Law
7 Judge Skrocki. Neither Mr. Morrissey nor the Board staff could reach Mr. Eghtesad.
8 Given his unavailability, this call was formally noticed for Monday, June 4, 2007, at 11:00
9 a.m.

10 5. On June 1, 2007, Michael M. Sieving, an attorney, contacted Robin Parker,
11 Senior Staff Counsel, concerning his potential representation of Nader Automotive Group,
12 LLC, and Nader Eghtesad in Protest Nos. PR-2045-07 and PR-2046-07. Mr. Sieving
13 indicated that the June 4, 2007, telephonic conference may not be necessary if a
14 substitution of counsel was filed with the Board prior to the June 4, 2007, conference. The
15 Board did not receive a Notice of Substitution of Attorneys and the conference was
16 initiated on June 4, 2007, with Mr. Morrissey, Mr. Erickson, Mr. Eghtesad and Mr. Sieving
17 present. Mr. Sieving was added to the conference at Mr. Eghtesad's request. Mr. Eghtesad
18 requested the conference be continued to June 6, 2007, with the representation that the
19 Substitution of Attorney would be filed prior to June 6, 2007.

20 6. No Substitution of Attorneys was received and the conference was held on
21 June 6, 2007. As stated above, the participants were Mr. Morrissey (still counsel of record
22 for Protestant), Mr. Eghtesad, Mr. Resnick (counsel for Respondent), and Administrative
23 Law Judge Skrocki.

24 **REPRESENTATIONS MADE DURING THE JUNE 6, 2007 CONFERENCE**

25 7. The following representations were made by the participants during the June
26 6, 2007, telephonic conference:

- 27 • Mr. Eghtesad did not obtain the services of Mr. Sieving to represent the Protestant
28 and no Substitution of Attorneys will be filed by Mr. Sieving.
- Mr. Eghtesad, in behalf of Protestant, will consent to allow Mr. Morrissey to
withdraw as attorney for Protestant.
- Mr. Eghtesad will file a request to be allowed to represent Protestant in the
proceedings before the Board.
- Mr. Morrissey will assist in providing Mr. Eghtesad with the documents to be
submitted to the Board to accomplish the above.
- Mr. Eghtesad will continue with his attempts to obtain the services of another
attorney to represent Protestant, at which time there will be filed a Substitution of
Attorneys to allow the new attorney to represent Protestant.

29 **ORDER RE: "NOTICE OF WITHDRAWAL OF COUNSEL"**

30 8. Preliminarily, it is noted that this protest was filed on April 5, 2007 with Mr.

31 ⁷ Because of the uncertainties as to what had occurred and what was going to occur with respect to the representation of Nader,
32 this Order was unusually long and detailed for what is generally a simple substitution of attorneys.

1 Morrissey representing Protestant. Mr. Morrissey participated in a Pre-hearing Conference
2 held on May 17, 2007, and agreed to the discovery schedule contained in the Pre-Hearing
3 Conference Order dated May 21, 2007. Mr. Morrissey did not file his "Notice of
4 Withdrawal of Counsel" until May 31, 2007. This was eight weeks to the day after the
5 Protest was filed, and only six business days prior to June 8, 2007, the time that counsel for
6 the parties were required to exchange and file their Requests for Production of Documents
7 (the first step in the discovery schedule as contained in the Pre-hearing Conference Order
8 of May 21, 2007, to which Mr. Morrissey had agreed).

9 9. Mr. Morrissey's "Notice of Withdrawal of Counsel" did not state that it was
10 being filed with the consent of Protestant or any agent of Protestant. Nor did it state any
11 facts indicating good cause for the Notice of Withdrawal.

12 10. Therefore, Mr. Morrissey shall remain counsel of record for Protestant and
13 will not be relieved of his duties until the following conditions are satisfied:

14 a. The Board receives the signed consent of Mr. Eghtesad, in behalf of
15 Protestant, to allow Mr. Morrissey to withdraw as counsel for Protestant; and

16 b. The Board receives the signed request of Mr. Eghtesad to be allowed
17 to represent Protestant.

18 11. When the above 2 conditions are satisfied, the Board will:

19 a. Relieve Mr. Morrissey as counsel of record for Protestant;

20 b. Recognize Mr. Eghtesad as representing Protestant; and

21 c. Issue an amendment to its Pre-hearing Conference Order that will
22 change the date for the exchange and filing of the parties' Requests for Production
23 of Documents from June 8, 2007 to June 15, 2007. This change of dates, which
24 was agreed to by Mr. Resnick in behalf of Respondent, will be effective only if the
25 Pre-hearing Conference Order is amended as a result of the satisfaction of the above
26 requirements. All other dates and requirements of the Pre-hearing Conference
27 Order shall remain as stated therein.

28 20. As the Board did not receive any of the documents required, the date of June 8, for the
parties to file their Requests for Production of Documents was not changed and Respondent filed its
Request for Production of Documents on that date as originally scheduled.

21 21. On June 15, Mr. Morrissey submitted and the Board filed a document captioned "Consent
22 to Substitution of Attorney". It was signed only by Mr. Morrissey and its text in the entirety reads:

23 "PLEASE TAKE NOTICE THAT Michael T. Morrissey **consents** to Protestant, Nader Automotive

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1 Group, LLC and Nader Eghtesad's substitution of themselves in his place and stead."⁸ (Emphasis in
2 original.) As stated, there were no other signatures or language signifying the consent of Protestant.

3 22. On June 15, Protestant submitted its "Request for Identification and Production of
4 Documents". These were submitted by Christopher J. Wrabel, Esq. of the Law Offices of Michael M.
5 Sieving, the attorneys who are now representing Protestant.⁹ These Requests for Production of
6 Documents were seven (7) days late as they had been due on June 8.

7 23. On July 6, each side (Mr. Sieving representing Nader and Ms. Amy Lerner Hill
8 representing Volkswagen) submitted their Statement of Disputed Discovery Requests which indicated that
9 there were no disputes as to the production of the requested documents. This meant that production of the
10 documents would occur without the need for the ALJ to rule on any objections to the scope of the requests
11 for production. As counsel stated they had no disputes as to what was to be produced on August 9, the
12 July 12 hearing to resolve any such dispute was taken off calendar.

13 24. The next requirement of the Pre-Hearing Conference Order was the exchange of
14 documents. The exchange was to occur "no later than Thursday, August 9, 2007".

15 25. As stated above, this date for production of the documents was chosen by Mr. Morrissey
16 (as counsel for Nader) and by counsel for Volkswagen. Their joint stipulation of May 17 choosing
17 August 9 as the date for production of documents was incorporated into the Board's formal Pre-Hearing
18 Conference Order issued on May 21.

19 26. At no time was there any request by former counsel Mr. Morrissey, current counsel Mr.
20 Sieving, or Dealer Principal Mr. Eghtesad to seek an extension of the document production date of
21 August 9.¹⁰ As stated above, it was Mr. Sieving, having taken over the representation of Nader, who
22 signed the document filed on July 6 stating that there was no dispute as to what was to be produced by
23

24 ⁸ There was a similar document from Mr. Morrissey pertaining to PR-2046-07, the companion case involving Protestant's
25 franchise with Audi of America. Although the text of the document was identical, the caption of this document was just
26 "Substitution of Attorney" rather than "Consent to Substitution of Attorney." See Paragraph 21.

⁹ Mr. Sieving, Mr. Eghtesad, and Mr. Morrissey had all signed Substitution of Attorneys forms showing dates of June 1, 2007,
but the documents with original signatures were not submitted to the Board for filing until July 13, 2007, six weeks later.

¹⁰ The only extension sought was as to the date for the initial Request for Identification and Production of Documents. The
27 date for that request had been conditionally extended from June 8 to 15. However, the conditions had not occurred so that date
28 was not changed. The order referencing this possible change expressly stated that all other dates remained in effect. See
Paragraph 19.

1 Nader in compliance with Respondent's Requests for Production of Documents. Mr. Sieving had to have
2 consulted with his client as to the Requests for Production in order to determine whether there would be
3 any dispute or other difficulties as to the requests. There was no indication to the Board or to
4 Volkswagen from Mr. Eghtesad or any of Protestant's attorneys that there would be any difficulty in
5 producing the documents requested by Respondent.

6 Summary of Relevant Procedural Dates

7 27. A summary of the relevant dates and facts from the above follows.

- 8 ■ May 17 – Counsel for the parties agreed to the discovery schedule and their agreement was
9 incorporated into the Board's Pre-Hearing Conference Order dated May 21, 2007.
- 10 ■ June 8 – Respondent timely filed and served its Request for Production of Documents.
- 11 ■ June 15 – Protestant filed and served its Request for Production of Documents. Protestant's
12 Request was seven (7) days late. No reason was given by Protestant or its counsel for the tardy
13 filing and service.
- 14 ■ June 29 – Counsel for the parties were to meet and confer to attempt to resolve their respective
15 objections to the other's requested discovery.
- 16 ■ July 6 – Both sides submitted their Statements of Disputed Discovery Requests which stated that
17 there were no disputes as to the Requests for Production of Documents. The hearing scheduled for
18 July 12 for an ALJ to rule on any disputes was taken off calendar.
- 19 ■ August 9 – Documents were to be produced by each party. No documents were produced by
20 Protestant. There was not even partial production by Protestant. There were no communications
21 from Protestant to Volkswagen or the Board indicating that the documents were going to be late
22 nor any attempt or offer by Protestant to make a partial production.

23 THE MOTION TO DISMISS THE PROTEST

24 28. On August 23, Volkswagen filed "Respondent Volkswagen of America, Inc.'s Motion to
25 Dismiss Pursuant to California Vehicle Code §3050.2(b)".

26 29. The Motion to Dismiss is based upon the failure of Nader to comply with its discovery
27 obligations. Section 3050.2(b) in part states:

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

4 BOARD ACTION SOUGHT BY THIS MOTION

5 30. This motion filed by Volkswagen is seeking dismissal of the protest without a hearing that
6 would normally be required on the merits of the protest. If the motion is granted, Volkswagen will be
7 permitted to terminate the franchise of Nader without having to prove that there is good cause to do so.
8 This is a most serious request by Volkswagen. If granted, Nader will lose the right to a hearing before the
9 Board, a right that was granted by the Legislature as part of the overall statutory scheme. As will be
10 discussed below, the reason for the motion is the failure of Nader to comply with its obligations to
11 produce documents during the discovery stage of the proceedings before the Board. Whether there was
12 "substantial justification" for Nader's failure to produce the documents will also be discussed.

13 The Statutory Scheme Generally

14 31. The Legislature indicated its desire to protect franchisees from possible unwarranted
15 terminations of automotive franchises and the consequences that may follow, which could include
16 unfairly depriving the franchisees of their investment and adversely impacting the consuming public in
17 the communities being served by the franchisees. Under the statutes, a franchisee is entitled to have: (1)
18 Written notice from the franchisor of its intent to terminate the franchise; (2) A right to file a protest and
19 have an evidentiary hearing before the Board to determine whether good cause exists to allow the
20 termination; and, (3) Certain factors evaluated by the Board in determining whether good cause exists for
21 the termination. In addition, and very significantly, the Legislature determined that it should be the
22 franchisor that would have the burden of proving the existence of good cause to terminate the franchise.

23 32. A franchisee has these rights even though the franchise duration expressly agreed to by the
24 parties was coming to an end, or that there was some other agreed-upon provision in the franchise that
25 gave the franchisor the contractual right to terminate the franchise prior to the stated expiration date.

26 The Power of the Protest

27 33. A franchisee can cloak itself with the protection provided by the Legislature by the simple
28 act of filing a protest with the Board. When a franchisee files a protest, the effect of doing so is the
automatic continuance of a legislatively created "stay" prohibiting the franchisor from engaging in its

1 intended conduct, i.e., termination of Nader's franchise. This occurs merely by the franchisee alone
2 submitting a simple document to the Board, a pleading called a protest.¹¹ This is followed by the non-
3 discretionary ministerial act of the Board's staff filing the protest and issuing a notice to the franchisor
4 that a protest has been filed and that the franchisor may not terminate the franchise until the Board makes
5 its findings.¹² The effect of the franchisee's decision to exercise its rights by filing the protest permitted
6 under the Vehicle Code is to maintain the status quo until there has been an evidentiary hearing required
7 by the Vehicle Code and the Board members¹³ determine whether good cause exists for the intended
8 action of the franchisor. This is a powerful right created in the franchisee by the Legislature.

9 34. As is common when rights are created, and as especially needed when there is a right as
10 powerful as this, there will be legislative limitations upon the ability to exercise the rights. These
11 limitations will be discussed below.

12 What the Motion is Seeking

13 35. With the legislative intent to provide special protection so strongly manifested, there is
14 now a motion by Volkswagen asking the Board to dismiss this protest without a hearing. Granting the
15 motion would deny Nader the right to a hearing before the Board and relieve Volkswagen from having to
16 meet its burden of proving the existence of the statutory elements that are required to be addressed in
17 determining whether there is good cause to terminate the franchise. In other words, the motion is seeking
18 that the Board issue an order that would effectively annul the statutory protections provided to Nader.

19 The Reason for the Motion

20 36. What is the reason for this apparently audacious request of Volkswagen that would deprive
21 Nader of its statutory right to a hearing before the Board and relieve Volkswagen of its statutory
22
23

24 ¹¹ Actually, it is Section 3060 itself that imposes a "stay" on the intended termination of the franchise. Even without the filing
25 of the protest, the statute prevents termination unless there is written notice received by the franchisee and the Board. Once the
26 notices are received, Section 3060 requires that the status quo be maintained for either an additional 60 days or 15 days and, if
within 30 days of receiving a "60-day notice" or within 10 days of receiving a "15-day notice", the franchisee files a protest
with the Board, the stay will continue as "the franchisor may not terminate until the board makes its findings."

27 ¹² Section 3060(a)(2) states in part: "When a protest is filed, the board shall advise the franchisor that a timely protest has been
filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until
the board makes its findings."

28 ¹³ Dealer Board Members "may not participate in, hear, comment, advise other members upon, or decide, any matter involving
a protest filed pursuant to Article 4 (commencing with Section 3060), unless all parties to the protest stipulate otherwise."

1 obligation to prove there is good cause to terminate the franchise of Nader? It is the failure of Nader to
2 comply with its
3 obligations to produce documents during the discovery stage of the proceeding.

4 37. The specific facts relating to this failure will be addressed in detail below but what will
5 first be explored is whether the Legislature, when it created these extraordinary rights in the franchisee
6 imposed some conditions upon their exercise.

7 38. As explained below, there are at least two possible causes for the loss of the franchisee's
8 statutory protection.

9 **What Must Be Done by the Franchisee to Preserve its Rights?**

10 A. **The Right to a Hearing before the Board will be Lost if the Protest is Not Timely**
11 **Filed**¹⁴

12 39. The first limitation upon the exercise of a franchisee's right to continue the legislative stay
13 and challenge the intent of the franchisor to terminate the franchise is that the protest must be timely filed
14 with the Board. The time to file a protest is very short and the failure of the franchisee to act promptly
15 will result in a loss of the rights provided by the statutes.

16 40. The Legislature's decision as to how quickly a protest must be filed recognizes that a
17 franchisor is entitled to very prompt notice of the franchisee's decision to protest the intended termination
18 and that there should be an expeditious resolution of the dispute. In a termination situation, the applicable
19 time periods for a franchisee to invoke its rights to a hearing and require that the franchisor establish good
20 cause for the intended termination are in Section 3060(a)(2). This provision allows a franchisee as much
21 as 30 days or as little as 10 days to file a protest, with the time commencing to run from the date the
22 franchisee received the notice of termination from the franchisor.¹⁵ Whether the franchisee has 10 days or
23

24 ¹⁴ Although this protest was timely filed, the discussion as to the need for timely filing is included to show that the Legislature
25 clearly intended that a franchisee act in accordance with the statutory requirements, including timeliness, or face the effects of
26 failing to do so, which is the loss of the statutory protection.

27 ¹⁵ Part of Section 3060((a)(2) states: "The franchisee may file a protest with the board within 30 days after receiving a 60-
28 day notice, satisfying the requirements of this section, or within 30 days after the end of any appeal procedure provided by the
franchisor, or within 10 days after receiving a 15-day notice, satisfying the requirements of this section, or within 10 days
after the end of any appeal procedure provided by the franchisor. (Emphasis added.) When a protest is filed, the board shall
advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the
franchisor may not terminate or refuse to continue until the board makes its findings."

1 30 days to file its protest is dependent upon the grounds for termination as stated in the notice of
2 termination received by the franchisee.

3 41. The Legislature has also indicated the consequence of the lack of a timely filing.
4 Subsection (a)(3) of Section 3060 states that the termination of the franchise will be permitted to occur if
5 "... the appropriate period for filing a protest has elapsed."

6 42. What is telling about the above is that the Legislature has clearly indicated that: (1) There
7 is an emphasis on prompt action by the franchisee to bring this matter before the Board (within either 10
8 days or 30 days); (2) The failure to act timely in filing the protest (being one day late beyond the 10 day
9 or 30 day time limit) has the effect of denying to the franchisee the right to a hearing before the Board;
10 and (3) the franchisor is relieved from any obligation to prove that there is good cause for the intended
11 termination of the franchise. It is also noted that there are no statutory or regulatory provisions that would
12 allow for any extension of the 10 day or 30 day time within which a protest must be filed. The
13 Legislature has clearly manifested its intent that the significant rights given to a franchisee can be lost by
14 the failure of the franchisee to act in a timely manner despite the seriousness of the loss relative to what
15 might be considered a de minimis or trivial delay. The right to a hearing before the Board would be lost
16 due to the franchisee's one-day delay even without any need for the franchisor to show that it has been
17 prejudiced by the delay.¹⁶

18 43. As can be seen, the Legislature has stated that the franchisee's failure to act promptly in
19 filing its protest has the consequence to the franchisee of losing the rights that had been granted by the
20 Legislature.

21 ///

22 ///

23 _____
24 ¹⁶ Section 3060(a)(1)(C) mandates that the dealer be informed of its right to file a protest and have a hearing before the Board.
25 The statutorily-required language also warns the dealer of the consequence of not filing the protest within the time limits. The
26 notice that must be given to the dealer is as follows: "NOTICE TO DEALER: You have the right to file a protest with the
27 NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your
28 franchise under provisions of the California Vehicle Code. You must file your protest with the board within 10 calendar
days [or 30 calendar days] after receiving this notice or within 10 days [or 30 days] after the end of any appeal procedure
provided by the franchisor or your protest right will be waived." (Emphasis added. The notice will state either 10 days or 30
days depending upon the reasons for the termination.)

1 **B. The Right to a Hearing may be Lost if the Protestant Fails to Comply with its**
2 **Discovery Obligations**

3 44. Another legislatively imposed condition that must occur at the risk of losing its rights is
4 that the franchisee must participate in discovery. Just as a franchisee who fails to file a timely protest will
5 lose the right to a hearing before the Board, so could a franchisee who fails to comply with its discovery
6 obligations lose the protection provided by the statutes. Whether it is the failure to file a timely protest or
7 the failure to participate in discovery, what these two conditions have in common is that it will be the
8 failure of the franchisee itself that would or could cause it to lose the right to have a hearing before the
9 Board.

10 45. The legislative intent to protect the franchisee from unwarranted termination is clear.
11 However, just as clear is the legislative intent that: (1) The franchisee file a timely protest; (2) That the
12 parties engage in meaningful discovery; and (3) The analogous consequences of the failure on the part of
13 the franchisee to do either of these would or could result in the loss of the statutory right to a hearing
14 before the Board.

15 (1) The Discovery Rights and Obligations of the Parties

16 46. The Legislature has granted to the parties in a protest proceeding the right to engage in
17 limited discovery, part of which includes the right to inspect and the obligation to produce documents.
18 However, just as the Legislature requires that a franchisee must file a timely protest (or lose the right to a
19 protest hearing before the Board), so does the Legislature require that a franchisee comply with the
20 authorized discovery or also face the possible loss of the right to a protest hearing before the Board.

21 47. The relevant statutory language cited by Volkswagen is as follows:

22 Section 3050.2

23 ...

24 (b) Compliance with discovery procedures authorized pursuant to subdivision (b) of
25 Section 3050.1 may be enforced by application to the executive director of the board.
26 **The executive director may, at the direction of the board, upon a showing of failure**
27 **to comply with authorized discovery without substantial justification for that**
28 **failure, dismiss the protest or petition or suspend the proceedings pending**
 compliance. The executive director may, at the direction of the board, upon a failure to
 comply with authorized discovery without substantial justification for that failure, require
 payment of costs incurred by the board, as well as attorney's fees and costs of the party

1 who successfully makes or opposes a motion to compel enforcement of discovery...
2 (Emphasis added.)

3 48. The section expressly provides for only two sanctions for failure to comply with authorized
4 discovery: (1) "dismiss the protest"; or, (2) "suspend the proceedings pending compliance." It is
5 apparent that the statute was drafted to address the "failure to comply" of either the franchisor or the
6 franchisee, in that one of the sanctions is appropriate if it is the franchisee (Nader) that failed to comply
7 and the other is appropriate if it is the franchisor (Volkswagen) that failed to comply.

8 (2) **If the franchisor (Volkswagen) Failed to Comply with Discovery**

9 49. If the franchisor failed to comply with authorized discovery, the appropriate sanction
10 COULD NOT be to "dismiss the protest". If dismissal of the protest were the sanction for the
11 franchisor's failure to comply, every franchisor would fail to comply in the hopes of getting what it
12 wanted through its own "failure to comply", which would be dismissal of the protest without the necessity
13 of the franchisor having to prove good cause at an evidentiary hearing. Of course, no franchisee would
14 seek the sanction of dismissal of the protest for the failure of a franchisor to comply with discovery. The
15 only stated sanction left that would be appropriate for a franchisor's failure to comply would be to
16 "suspend the proceedings pending compliance". This would have the effect of continuing the statutory
17 stay indefinitely and preventing the franchisor from engaging in its intended conduct. Suspending the
18 proceedings would also provide what the franchisee wants which is that the franchisor cannot undertake
19 its intended action and the status quo would be maintained for some indefinite period. The franchisor
20 could not be heard to complain about the suspension of the proceedings (which would continue the
21 automatic stay) as it would be the franchisor's own misconduct that led to that result.

22 3. **If the Franchisee (Nader) Failed to Comply with Discovery**

23 50. Here, it is the franchisee (Nader) who has failed to comply with the authorized discovery.
24 Certainly the sanction for the franchisee's failure SHOULD NOT be that the proceedings would be
25 suspended. If this were so, then there would be non-compliance by every franchisee, as the franchisee
26 could obtain what it wanted, indefinite suspension of the protest proceedings, through the franchisee's
27 own failure to comply with the authorized discovery. No franchisor would seek the sanction of
28 suspension of the proceedings due to a franchisee's failure to comply with discovery. The only statutory

1 sanction left that would be appropriate for a franchisee's failure to comply would be to "dismiss the
2 protest".

3 **4. Conclusion Regarding Nader's Failure to Comply with Discovery**

4 51. The Board has the power to grant the relief requested in this motion by Volkswagen. The
5 Protestant, Nader, must comply with authorized discovery or run the risk of dismissal of the protest.
6 Section 3050.2(b) empowers the Board to order the Executive Director to dismiss the protest "upon a
7 showing of failure to comply with authorized discovery without substantial justification for that failure".

8 **THE MERITS OF THE MOTION**

9 52. For the motion to be granted, Section 3050.2(b) requires that there must be "a showing of
10 failure to comply with authorized discovery without substantial justification for that failure".

11 53. On its face, this language mandates two areas of inquiry:

- 12 A. Whether there was a "showing of failure to comply with authorized discovery"? and
13 B. Whether there was "substantial justification for that failure"?

14 **What was the "Failure to Comply with Authorized Discovery"?**

15 54. On May 17, the Board's staff conducted a Pre-Hearing Conference, one of the purposes of
16 which was to establish a discovery schedule that would lead to a date for the hearing on the merits of the
17 protest. It is the Board's policy and practice to allow the attorneys great latitude in choosing the
18 discovery dates and hearing date so long as there is an agreement between them on the dates and
19 the dates chosen meet the Board's concerns about moving the matter to an expeditious resolution.

20 55. The Board issued its Pre-Hearing Conference Order, signed by the Executive Director, on
21 May 21. This order established the discovery schedule as agreed upon by the attorneys for the parties,
22 and among other things set August 9 as the date for production of documents.

23 56. Nader failed to produce any documents on August 9, the date they were required to be
24 produced.

25 57. The following is an abbreviated chronology of what occurred:

- 26
 - 27 ■ May 17 - Pre-Hearing Conference held (after three continuances at request of Nader's
28 counsel) and discovery dates chosen by attorneys.
 - May 21 - The Board issued its Pre-Hearing Conference Order setting the date of

1 August 9, as chosen by the attorneys, as the date by which production of documents was to
2 occur.

- 3 ▪ August 9 - No documents were produced by Nader.
- 4 ▪ August 23 - Volkswagen filed this Motion to Dismiss.
- 5 ▪ August 27 - Nader filed its "Opposition to Respondent's Motion to Dismiss" and
6 supporting Declaration of Nader Eghtesad. No documents were produced by Nader.
- 7 ▪ August 29 - Received e-mail copy of Volkswagen's "Reply Brief in Support of its Motion
8 to Dismiss Pursuant to Vehicle Code §3050.2(b)", and supporting Declaration of Amy
9 Lerner Hill.
- 10 ▪ Thursday, August 30 - The first hearing on the Motion to Dismiss was held before ALJ
11 Skrocki. Counsel for Nader stated that he "hoped" and "expected" that the documents
12 would be produced to Volkswagen on the next day, August 31 (Friday). This hearing was
13 continued to September 5 at 11:00 a.m. to allow Nader an extra day to produce the
14 documents and to allow time for Volkswagen to review what was to be produced. (The
15 documents were expected to be received by Volkswagen on Friday. It was decided that if
16 the documents were delivered to Volkswagen on Friday, as the upcoming Monday was
17 Labor Day, Volkswagen would need Tuesday to review the documents to evaluate their
18 sufficiency.)
- 19 ▪ Wednesday, September 5 - The second hearing on the Motion to Dismiss was held. The
20 documents that had been expected to be received by Volkswagen on Friday, August 31, or
21 at the latest, Tuesday, September 4 (the day after Labor Day), were not received by
22 Volkswagen until the morning of Wednesday, September 5, shortly before the hearing on
23 the Motion to Dismiss resumed. (They had been sent from Sacramento on Tuesday,
24 September 4.) The quantity of the documents was described as being about one and a half
25 inches high. The hearing was continued to September 6 at 3:00 p.m., to give Volkswagen
26 time to review the documents.
- 27 ▪ Thursday, September 6 - When the hearing was held at 3:00 p.m., the discussion involved
28 whether what had been produced the day before was adequate or sufficient compliance

1 with the discovery requests. Mr. Sieving, counsel for Nader, contended that the production
2 was in compliance with the discovery requests. The hearing was continued to Monday,
3 September 10, so that copies of what had been produced could be provided to the ALJ for
4 his review. Mr. Sieving also asserted that there was a statutory obligation that the
5 attorneys "meet and confer" before there could be a determination by the ALJ as to the
6 extent of production. Volkswagen agreed to cooperate and participate in a meet and
7 confer. Mr. Sieving suggested that the meet and confer be held on Friday (September 7) so
8 that he could obtain any additional documents over the weekend and have them ready for
9 the following Monday's hearing. Volkswagen agreed to the date and time desired by Mr.
10 Sieving for the meet and confer. Despite his insistence upon a meet and confer and his
11 arguments for its importance, Mr. Sieving failed to participate in the meet and confer.

- 12 ■ Monday, September 10 - The hearing on the Motion to Dismiss resumed. (This was the
13 fourth day of the hearing covering a span of ten calendar days.) Prior to the resumption of
14 the hearing, the ALJ reviewed the documents that had been provided to Volkswagen by
15 Nader. The ALJ had also reviewed each of the comments that Volkswagen had made as to
16 each of Volkswagen's discovery requests as compared to the documents that had been
17 produced by Nader. On the resumption of the hearing, the ALJ inquired as to the meet and
18 confer and learned that despite Mr. Sieving's insistence upon the meet and confer (to give
19 him another chance to address Volkswagen's concerns about the claimed inadequacy of the
20 documents that had been produced), and despite Mr. Sieving's arguments as to the
21 importance that it be held on Friday, September 7, (so that he could obtain over the
22 weekend any additional documents that may be needed before the resumption of the
23 hearing on Monday, September 10), Mr. Sieving failed to participate in the meet and
24 confer. Because there had been no meet and confer, Volkswagen's concerns about the
25 completeness of the documents had not been addressed and there was no resolution
26 between the attorneys as to their differences in opinion regarding the extent of the
27 ~~September 5 production. Nader made no other production. Final oral arguments were~~
28 heard on the Motion to Dismiss. The ALJ advised counsel for the parties that he intended

1 to recommend that the Executive Director seek direction from the Board that
2 Volkswagen's Motion to Dismiss be granted.

3 **What is NOT in Dispute Between the Parties?**

4 **A. There is No Dispute as to which Documents were to be Produced**

5 58. In accordance with the parties' agreement, as incorporated into the Board's Pre-Hearing
6 Conference Order, on June 8, counsel for Respondent timely submitted its Requests for Production of
7 Documents via facsimile (the original was filed on June 11). Protestant's Request for Identification and
8 Production of Documents was untimely filed on June 15. In compliance with their agreement and the
9 Board's Pre-Hearing Conference Order, counsel for the parties timely served and filed their respective
10 Objections to (the other's) Requests for Production of Documents. A telephonic hearing had been
11 scheduled for July 12, at which time an ALJ would have made rulings on their respective objections.
12 However, on July 6, counsel for the parties notified the Board that they had resolved their differences as
13 to what was to be produced and that the hearing before the ALJ would not be necessary. Because counsel
14 for the parties had agreed as to what was to be produced, the hearing set for July 12 was taken off
15 calendar by a notice of the Board dated July 9.

16 59. Counsel for Nader admitted during the hearings on the Motion to Dismiss that Volkswagen
17 was entitled to the documents requested.

18 **B. There is No Dispute as to when the Documents were to be Produced**

19 60. On May 17, during a scheduled Pre-Hearing Conference conducted by the Board's Staff
20 Counsel, Nader agreed to the entire discovery schedule including the date of August 9 for the documents
21 to be produced. This agreement was incorporated into a Pre-Hearing Conference Order which was signed
22 by the Board's Executive Director¹⁷ and became an Order of the Board dated May 21.

23
24
25 ¹⁷ The Pre-Hearing Conference Order, signed by the Executive Director, established what discovery was authorized and when
26 it was to be done. Section 3050.2 (b) designates the Executive Director as the initial "enforcer" of the obligations of the parties
27 to comply with the authorized discovery. Section 3050.2(b) in part provides "Compliance with discovery procedures
28 authorized pursuant to subdivision (b) of Section 3050.1 may be enforced by application to the executive director of the
board. The executive director may, at the direction of the board, upon a showing of failure to comply with authorized
discovery without substantial justification for that failure, dismiss the protest or petition or suspend the proceedings
pending compliance." (Emphasis added.)

1 61. Nader did not make any request of the Board, formally or informally, for an extension or
2 modification of the discovery schedule as to the time for production of the documents.

3 **C. There is no Dispute that the Documents were not Produced Timely**

4 62. The documents were agreed and ordered to be produced on August 9. They were not
5 produced on that date by Nader and it was not until September 5, which was on the morning of the second
6 day of hearing on this Motion to Dismiss that any documents were produced to Volkswagen.

7 63. Nader admits that its production is late. Nader could not contend otherwise.

8 64. Therefore, because there was no dispute as to what was to be produced, and no dispute as
9 to the time when production was due, neither of these could have been the reason for the failure of Nader
10 to comply with the authorized and required discovery. Further there was no dispute as to when
11 production was actually made and that it was made late.

12 **THE MOTION TO DISMISS**

13 65. On August 23, Volkswagen filed its Motion to Dismiss Protest Pursuant to California
14 Vehicle Code §3050.2(b). The motion was filed after Volkswagen contacted Mr. Sieving's office and
15 could not get any indication as to when the documents would be produced. As Volkswagen pointed out,
16 when the motion was filed it "... was four and a half months after the protests were filed, two and a half
17 months after we served our document requests, and a month and a half after the protestants filed the
18 statement that there ... [were no] ... disputes." (RT Vol. I, page 7, lines 3-8) Not only was Nader late,
19 but Nader's Counsel had given no indication as to when any of the documents would be produced.

20 66. On August 27, Protestant filed its Opposition to Respondent's Motion to Dismiss, and
21 Declaration of Nader Eghtesad.

22 67. On August 29, the Board received by e-mail transmission Respondent's Reply Brief in
23 Support of its Motion to Dismiss Pursuant to California Vehicle Code §3050.2(b), and Declaration of
24 Amy Lerner Hill. (The originals were received and filed on September 13.)

25 **The Contentions of Protestant as Contained in its Opposition to the Motion to Dismiss**

26 68. The Declaration of Mr. Nader Eghtesad in support of the Opposition to Respondent's
27 Motion to Dismiss states only that "I have had great difficulty assembling the documents, but fully expect
28 to be ready to produce the responsive documents by Friday, August 31, 2007." (Eghtesad Declaration,

1 page 2, lines 1-2) (Emphasis added.) The bolded language is far from reassuring. In fact, this statement
2 is so non-committal as to be worthless. The statement is merely that he “fully expects” and then states
3 that even this expectation is only that he will “be ready” to produce. There is no statement that production
4 will occur by Friday, August 31 or any other definite time.

5 69. Protestant’s attorney is more definite in Protestant’s Opposition to Respondent’s Motion to
6 Dismiss; this pleading states in one place “Protestants will be producing documents by the end of this
7 week” and in another it states, “While this task is burdensome, it will be completed by the end of this
8 week – Friday August 31, 2007.” Unfortunately, as will be discussed below, neither Mr. Eghtesad’s
9 “expectations”, nor his attorney’s more definite commitment came to fruition.

10 **The Hearing on the Motion to Dismiss began on Thursday, August 30, 2007**

11 70. On August 30 (the Thursday before Labor Day weekend), the hearing on the Motion to
12 Dismiss was conducted before ALJ Skrocki. Protestant was represented by Michael M. Sieving and
13 Respondent was represented by Allen Resnick. During the hearing, and at the request of Protestant’s
14 counsel, the hearing was continued to Wednesday, September 4 at 11:00 a.m. Mr. Sieving, counsel for
15 Protestant stated that he had been in communication with his client “on numerous occasions” (RT Vol. I,
16 page 8, lines 18-19), that his client “was scampering” to get the responsive documents together, that “We
17 expect to get those to [Volkswagen] as soon as we can” (RT Vol. I, page 9, lines 2-3), and that he was
18 “hoping” to get them “to [Volkswagen] by tomorrow.” (RT Vol. I, page 9, line 14)

19 71. Mr. Sieving acknowledged that Volkswagen and Audi were entitled to the documents and
20 stated that if he did not “see the documents either today [Thursday – August 30] or early -- well, hopefully
21 today, I’m going to be spending my weekend down digging through boxes, myself.”¹⁸ (RT Vol. I, page
22 10, lines 11-17)

23 72. Another representation was that “they’re too voluminous is why they weren’t produced on
24 time”. (RT Vol. I, page 14, lines 18-19)

27 ¹⁸ Mr. Sieving did not “see the documents” as he had hoped on that day. As will be indicated below, Mr. Sieving did not see
28 any documents until Tuesday, September 4, five days after he had hoped to see them. Obviously Mr. Sieving did not spend
“the weekend down digging through the boxes” himself as he stated he would do to be sure the documents got to Volkswagen
as promised.

1 73. At one point Mr. Sieving, in response to questions from the ALJ, stated that he had not
2 been told by his client that there was any difficulty in getting the production out and that "last week
3 sometime" Mr. Eghtesad told him that Mr. Eghtesad was under the impression that "this material had
4 been sent out by his people." (RT Vol. I, page 12, lines 18-25; page 13, lines 18-20) As this statement
5 was made by Mr. Sieving on Thursday, August 30, his discussion with Mr. Eghtesad "last week
6 sometime" means that they spoke during the week of August 20. The statement that his client ran a small
7 dealership and was having difficulty with the production is somewhat inconsistent with the statement of
8 Mr. Eghtesad a week earlier that he believed that the materials had already been sent out by his people.

9 74. At another point, Mr. Sieving stated that "I first learned of the problem with the production
10 --- my client did not advise me of that until just a couple of days prior to the actual scheduled production
11 date [of August 9]. And I will represent that we have diligently been pursuing this issue to get the
12 documents we need." (RT Vol. I, page 19, lines 9-15) (Just a couple of days prior to the August 9
13 production date would have been about August 6 or 7.)

14 75. When queried by the ALJ as to whether there could not have been at least partial
15 production, the response was that "There were a lot of attempts between this office [Mr. Sieving's] and
16 the client to get the documents that had been copied to produce in discovery", but "Our attempts were
17 unsuccessful in that regard." (RT Vol. I, page 15, line 25 through page 16, lines 1-15)

18 76. Based upon the Thursday, August 30, representations of Mr. Sieving that if he got the
19 documents from his client "today" that they would be in the hands of counsel for Volkswagen "by
20 tomorrow" (RT Vol. I, page 25, lines 5-6), the hearing was continued from that day (Thursday) to the
21 following Wednesday, September 5, at 11:00 a.m. The date and time were chosen by counsel. The
22 additional time was allowed to give the attorneys for Volkswagen time to review what they received.
23 Given that Monday was Labor Day, it was contemplated that Volkswagen would use Tuesday, September
24 4, to review the production that was contemplated to occur.

25 **The September 5, 2007, Resumption of the Hearing on the Motion to Dismiss**

26 77. On Wednesday, September 5, the hearing on the Motion to Dismiss resumed at 11:00 a.m.
27 The documents that were expected to be received by Volkswagen on the previous Friday were not
28 received until shortly before the resumption of the hearing which was Wednesday. Protestant's attorney

1 stated that he had not received the documents from his client until the morning of Tuesday, September 4.
2 The documents were then sent by him to Volkswagen's attorneys.

3 78. No reasons were given by Protestant's counsel in explanation as to why the documents
4 were not produced until shortly before the time of the resumption of the hearing on Wednesday,
5 September 5, other than the fact that the dealerships are in Eureka and the main corporate operation is in
6 Martinez. (RT Vol. II, page 4, lines 5-11; page 7, lines 7-25; page 8, lines 1-7) These circumstances of
7 two locations are not new or intervening circumstances that would have prevented production either on
8 time on August 9 or as promised during the first hearing on this motion, when the representation was that
9 the documents would be received by Mr. Sieving on Friday, August 31 and sent out that day to
10 Volkswagen (RT Vol. II, page 6, lines 21-25; page 7, lines 1-3), or that Mr. Sieving would spend the
11 weekend getting the documents himself.

12 79. It is difficult to reconcile the excuses for the delay in producing the documents with the
13 quantity of the documents that were produced. One would expect that the quantity or mass of the
14 documents produced would be somewhat proportionate to the claimed degree of burden imposed or time
15 required in connection with producing the documents. Here, not only had two months gone by between
16 the time the production was requested and when it should have been produced, but an additional four
17 weeks had gone by from the time the production was late until the time there was some production. There
18 was no correlation between what was produced and the claimed difficulty and time allegedly needed to
19 make the production.

20 80. It is noteworthy that:

21 A. Present counsel for Protestant entered the picture at least as of June 15, which was almost
22 eight (8) weeks prior to the time production was due on August 9. Nader's Request for
23 Production of Documents was submitted by Mr. Sieving's office and filed on June 15. It
24 was also his office that filed the statement on July 6, that there were no disputes between
25 the parties as to what production was required;

26 B. No request was made for an extension of time for production;

27 C. No notice was given prior to August 9 that Nader's production would not be timely;

28 D. Even after Protestant and its counsel were aware that a Motion to Dismiss had been filed,

1 no commitment was made as to any definite date for production;

2 E. Even though Protestant and its counsel were aware that production was late, there was no
3 apparent concentrated effort to move promptly to provide the documents;

4 F. During the first day of hearing on the Motion to Dismiss (Thursday, August 30), although
5 assurances were given that the documents would be forwarded to Volkswagen possibly
6 that Thursday afternoon, but in no event later than Friday, August 31, the documents were
7 not received by Volkswagen until Wednesday, September 5 shortly prior to the resumption
8 of the hearing on the Motion to Dismiss;

9 G. There was not even an attempt to make a partial production on the due date of August 9, or
10 at any time between August 9 and September 5;

11 H. The small quantity of documents eventually produced on its face raises the issue of the
12 credibility of the claim that Protestant had been diligent in attempting to comply with the
13 discovery request within the time period before production was due.

14 81. These concerns are put in even sharper focus when one considers there were no documents
15 forthcoming during the additional four weeks beyond the time production had been due. Even when
16 facing the pending Motion to Dismiss, the production did not occur.

17 **Protestant's Production of Documents on September 5, 2007**

18 82. The documents received by Volkswagen were described as being in a Federal Express box
19 about three inches high. There were in reality two sets of the same documents in the three-inch box,
20 meaning that the documents produced for Volkswagen were only about an inch and a half high. The fact
21 that there were two identical sets of documents in that three-inch box was confirmed by Mr. Sieving
22 during the next hearing. (RT Vol. III, page 27, lines 3-11) Volkswagen pointed out that after being four
23 weeks late, allegedly because of the voluminous nature of the requests¹⁹ and the magnitude of the task, the
24 total production amounted to only an inch and a half of documents, and upon cursory review, given the
25 limited time for Volkswagen to examine them, the documents were not sufficient to comply with the
26 _____

27 ¹⁹ Although there are references to the voluminous number of requests ("over 300"), in reality there were only 163 requests
28 from Volkswagen and an identical 163 requests from Audi of America pertaining to the intended termination by Audi of
America of the Nader Audi franchise.

1 discovery requests. If this position of Volkswagen was accurate, that meant that the failure of Nader to
2 comply with the discovery requests was ongoing and about to enter its second month. In order to give
3 Volkswagen sufficient time to review the documents, ALJ Skrocki ordered the hearing to resume on
4 Thursday, September 6, at 3:30 p.m.

5 **The September 6, 2007, Resumption of the Hearing on the Motion to Dismiss**

6 83. On Thursday, September 6, the hearing on the Motion to Dismiss resumed at
7 3:30 p.m. Volkswagen had received some documents from Nader the day before. Because some
8 documents had been received, the discussion between counsel involved the completeness of the
9 documents. The problem then became two pronged.

10 A. Was the failure to produce any documents at all until September 5, sufficient in itself to
11 grant the motion to dismiss the protest? and

12 B. If the delay alone was not sufficient to grant the motion, was the combination of the delay
13 coupled with what was alleged to be inadequate production sufficient to grant the motion to dismiss the
14 protest?

15 84. Because the ALJ was now being asked to evaluate the extent of the production, in addition
16 to the effect of the late production, it was necessary to have copies of the documents provided to the ALJ
17 for his review. (RT Vol. III, pages 9-10, 21)

18 85. Mr. Resnick sent Mr. Sieving comments by Volkswagen specifically stating Volkswagen's
19 contentions as to each of the 163 requests from Volkswagen. However, Mr. Sieving had not seen the
20 comments (Vol. III, page 21, lines 16-25) and ALJ Skrocki did not have the documents that had been
21 produced by Nader before him.

22 86. Mr. Sieving argued that the hearing on the Motion to Dismiss could not proceed as the
23 California Code of Civil Procedure ("CCP") required that there first must be a meet and confer between
24 counsel prior to proceeding with the hearing as to the adequacy of what had been produced by Nader. Mr.
25 Resnick, although stating that he did not believe a meet and confer was needed, agreed to participate and
26 the ALJ instructed counsel to conduct the "meet and confer" as urged by Mr. Sieving. (RT Vol. III, page
27 27, line 21-25; page 28, lines 11-18; page 31, lines 4-22; page 32, lines 2-19) Counsel agreed upon a
28 telephonic meet and confer to be conducted on Friday, September 7 at 1:30 p.m.

1 87. A copy of the documents that had been produced by Nader would also be forwarded to
2 ALJ Skrocki for his review so that he would have them in the event the meet and confer between the
3 attorneys did not resolve the dispute.

4 88. Because of the above, the hearing on the Motion to Dismiss was continued for another four
5 days to resume on Monday, September 10 at 1:30 p.m.

6 **The September 10, 2007, Resumption of the Hearing on the Motion to Dismiss**

7 89. On Monday, September 10, the hearing on the Motion to Dismiss resumed at 1:30 p.m.
8 The ALJ had received and reviewed the documents which had been produced by Nader on September 6.
9 No other documents had been produced to Volkswagen in the interim. The ALJ also had the comments
10 showing Volkswagen's contentions as to the production that was made in response to each of the 163
11 requests.

12 90. At the beginning of the hearing on Monday, September 10, the ALJ inquired as to the
13 outcome of the meet and confer that had been argued by Mr. Sieving as being mandatory and which the
14 attorneys had agreed would occur on Friday, September 7, at 1:30 p.m., a date and time chosen by Mr.
15 Sieving. Much to the surprise of the ALJ, the meet and confer did not occur because Mr. Sieving was
16 "tied up" on an "unrelated" matter at the time that he and counsel for Volkswagen had agreed upon to
17 have the telephonic meet and confer.²⁰

18 91. Mr. Sieving, with no prior notice to Volkswagen, failed to participate in the meet and
19 confer that he had argued was required.²¹ Not only was he unapologetic but, apparently in the belief that
20

21 ²⁰ Some of Mr. Sieving's comments during the hearing on Thursday, September 6 about the "required" meet-and-confer were
22 as follows: "I just want to make sure that we have a discussion about what it is that Mr. Resnick thinks exists that weren't
23 produced. And I can look at the production and say, you're absolutely right, these weren't produced. Or I can direct Mr.
24 Resnick's attention to documents that we feel are responsive to the individual requests." (RT Vol. III, page 32, lines 3-10)
25 After Mr. Sieving agreed that Friday, September 7 would be the day to hold the meet and confer, Mr. Sieving, when discussing
26 the time for it to occur stated, "... so earlier would be better tomorrow [Friday] so that to the extent it is necessary for me to
27 obtain additional documents that I agree with you are responsive that exist, we can do that. And I can get them in on Saturday
28 and get them back out the door so you have them on Monday, so that we can address that issue on Monday..." Of course,
because Mr. Sieving was unavailable for the meet and confer, none of the above occurred. (RT Vol. III, page 34, lines 21-25;
page 35, lines 1-3)

²¹ The ALJ pointed out to Mr. Sieving that CCP section 2023.010 relied upon by him for insisting upon a meet and confer also
states under (i) a failure to confer in person, by telephone, et cetera, is a misuse of the discovery process (for which sanctions
could be imposed). (RT Vol. IV, page 8, lines 23-25; page 9, lines 1-3) Sanctions may be imposed for the failure to meet and
confer unless there was "substantial reason for such failure". Mr. Sieving did not explain what caused him to be "tied up" and
unavailable for the meet and confer. These circumstances indicated that the initial insistence (on Thursday) upon the meet and
confer was an attempt to delay the proceedings in the hope that the client would produce more documents. If this was the

1 the best defense is a good offense, he attempted to place responsibility for the failure to have the meet and
2 confer upon opposing counsel. Despite the fact that three calendar days had elapsed – Friday, Saturday
3 and Sunday – and no meet and confer had occurred, Mr. Sieving continued to argue on the following
4 Monday when the hearing resumed, that the failed meet and confer should be rescheduled prior to taking
5 any action on Volkswagen’s Motion to Dismiss.

6 92. The transcript relating to why the meet and confer did not occur is as follows:

7 ADMINISTRATIVE LAW JUDGE SKROCKI: Okay.

8 In our last discussion counsel were going to have a meet-and-confer of some
9 format or another; was to occur on Friday, September 7. Did that occur?

10 MR. SIEVING: It did not, Your Honor. Friday afternoon I did get a call from Ms.
11 Lerner Hill and was tied up on Friday afternoon. I did call her this morning [Monday].
12 She was tied up. Did speak to her at noon. She had a lunch meeting. So we have not
13 been able to do the meet-and-confer with respect to the allegations of the fact that the
14 discovery production has been inadequate. (RT Vol. IV, page 1, lines 23-25, page 2, lines
15 1-9)

16 [Mr. Sieving continued on with why he thought it was “essential” to re-schedule a meet
17 and confer despite his failure to be available for the meet and confer on the date and time
18 that he had chosen and for which he so strongly advocated.]

19 ...

20 MR. RESNICK: Your Honor, we are now ten days into this process [of attempting
21 to conclude the hearing on the Motion to Dismiss]. Mr. Sieving indicated that he wanted a
22 meet-and-confer. I don’t believe a meet-and-confer was either necessary or even
23 appropriate. But we certainly agreed to cooperate.

24 We agreed upon a time. He was called at exactly the time that we indicated. He
25 said that he was tied up and would call us back in 15 minutes. And that was Friday
26

27 motive, the hope was not realized as no additional documents were produced by Nader. Likewise, one could infer that the
28 continuing insistence by Mr. Sieving on Monday, September 10, that the hearing again be continued to allow the meet and
confer to be re-scheduled was another attempt to delay the resolution of the Motion to Dismiss.

1 afternoon at 1:30. He never called back.

2 He did call this morning at 10:30 and left a message which Amy did not receive
3 until shortly before noon. And by the time she received it she had another meeting. She
4 offered to speak to him. Mr. Sieving indicated to her that there was a least a few requests
5 that he thought that he differed in the documents.

6 But he wanted to go through every request. And Amy said, at this point I can't go
7 through every request. I do have a little bit of time, let's go over whatever we can. Why
8 don't you identify the ones you think are inaccurate. And Mr. Sieving elected not to do
9 that. ... (RT Vol. IV, page 3, lines 23-25, page 4, lines 1-22)

10 ...

11 ADMINISTRATIVE LAW JUDGE SKROCKI: [To Mr. Sieving]

12 ...

13 What reasons were there for your failure to meet and confer in accordance with
14 your agreement in our discussion that was held on the last meeting on September 6th?

15 MR. SIEVING: Well, a couple things. With respect to Friday's meet-and-confer,
16 we did agree that we would do that around 1:30 yesterday afternoon -- Friday afternoon. I
17 did receive a call from Ms. Lerner on Friday afternoon.

18 And I had issues that came up on my office unrelated to this case that took a bulk of
19 my afternoon.²²

20 Factually, with all due respect to Mr. Resnick's argument, he wasn't present during
21 the conversation this morning. I did place a call to Ms. Lerner Hill this morning. It was
22 earlier than 10:30, I don't know what time it was, but it was, I would say, in the 9:30 range.

23 I did receive a call back at two minutes to 12:00. Ms. Lerner Hill told me that she
24

25 ²² Why some attempt was not made to contact Volkswagen's attorneys prior to the time for the Friday meet and confer and
26 reschedule it for later that day or over the weekend was not explained by Mr. Sieving. Nor was there any explanation as to
27 why a later phone call could not have been made by Mr. Sieving during what remained of the afternoon after the "bulk" of his
28 time had been spent on the "unrelated" matter. One would think that there would have been someone available in Mr.
Sieving's office to handle what would be a simple courtesy call to Volkswagen's attorneys advising them of a problem rather
than having Volkswagen's attorneys "left hanging" on the phone after they had blocked out the time and made themselves
ready for the meet and confer, and then waiting for the promised return phone call that never occurred.

1 had five minutes before she had to walk out the door for a lunch meeting. And I said,
2 we're not going to resolve any of these issues in five minutes.

3 There was absolutely no way I could go through any of these issues in five minutes
4 to get them resolved prior to this conference call now.

5 Ms. Lerner Hill told me that when she got back from her lunch meeting she would
6 call me before this hearing scheduled for 1:30 and we could discuss these issues. I did not
7 receive a return phone call. (RT Vol. IV, page 9, lines 4-25; page 10, lines 1-9)

8 ...
9 MS. LERNER HILL: No, I told you that I would call you back if I got back in time
10 before the hearing. And I had a prescheduled meeting for this afternoon. (RT Vol. IV,
11 page 10, lines 11-14)

12 ...
13 ADMINISTRATIVE LAW JUDGE SKROCKI: Now I have essentially three
14 issues. One is the failure to produce the documents at all in accordance with the discovery
15 -- or in accordance with the order of the Board establishing the discovery schedule.

16 The second one is whether the tardy production would have been adequate had it been
17 timely.

18 The third, I guess, is whether the production is adequate considering its untimeliness.

19 And now we've added a fourth which is a possible failure to meet and confer
20 without substantial reason for such failure.

21 And so now, it's getting deeper and deeper insofar as the issues that are involved.
22 And, Mr. Sieving, they're all pointing against your client. (RT Vol. IV, page 10, lines 16-
23 25; page 11, lines 1-8)

24 93. At the outset of this fourth day of hearing, Mr. Sieving admitted there were "some
25 deficiencies" in the production but asserted that "the bulk of what was requested has been produced."
26 (RT Vol. IV, page 3, lines 9-13)

27 94. The hearing concluded with the ALJ advising counsel for the parties that he had gone
28 through the documents that had been produced by Nader and that he intended to recommend that the

1 Board grant the Motion to Dismiss.

2 ANALYSIS

3 The Delay Alone

4 95. The sole issue when the Motion to Dismiss was first being heard on August 30, 2007, was
5 whether the Protest should be dismissed due to the failure of Nader to produce any documents on August
6 9 (when the production was due), and the continuing failure to produce anything, not only as of the date
7 of filing of the motion on August 23, but not producing or even committing to produce anything as of the
8 first day of the hearing on the Motion to Dismiss, which was August 30, 2007.

9 96. The Board's Pre-Hearing Conference Order gave Protestant two months to produce the
10 requested documents in a timely manner (from June 8 when Volkswagen's Request for Production was
11 served to August 9 when production was due).

12 97. By the time the Motion to Dismiss was filed on August 23, an additional two weeks had
13 elapsed with no attempt by Nader to produce any documents.

14 98. At the time of the commencement of the hearing on August 30, an additional week had
15 expired with no production or attempted production of any kind by Nader. This meant there had been a
16 total time of almost 12 weeks (one day short) from the time of the Requests for Production (June 8) and
17 the date the hearing on the Motion to Dismiss was first held (August 30). As of the date of the hearing on
18 the Motion to Dismiss, which was three weeks beyond the date production was due, Nader had not
19 produced one piece of paper nor made any commitment as to when production would occur.

20 99. But for the fact that it has actually happened here, it would be inconceivable that a party,
21 served with a Motion to Dismiss its protest would not, during the week between the filing of the Motion
22 and the date of the hearing, have completed production or have made at least partial production and
23 produced those documents it had identified (over the prior three months) as being responsive. At the very
24 least, one would have expected a firm commitment as to a date for their production, even though tardy.
25 There were no such attempts by Nader.

26 100. Despite being late as of August 9, despite having been served with the Motion to Dismiss
27 on August 23, and despite the hearing being conducted on August 30, Nader made no production of any
28 documents or offer of production nor did Nader give a date certain by which production would be made.

1 101. During the hearing on August 30, counsel for Nader represented that he "expected" or
2 "hoped" that the production would occur "the next day" or "tomorrow". The hearing on the motion was
3 then continued for five days to September 5. It was then continued again to September 6 and continued a
4 final time to September 10. In total, there were four "hearing dates" over a span of ten days between the
5 first hearing date and the last hearing date. All of the continuances were granted by the ALJ in the hope
6 that there would be adequate production by Nader sufficient to allow the ALJ to avoid having to make the
7 recommended ruling that is now being submitted. There were also warnings by the ALJ to be
8 communicated by Mr. Sieving to his client.

9 102. Volkswagen did receive some documents on the morning of September 5, the second day
10 of the hearing on the motion. However the production consisted of a stack of documents about an inch
11 and a half high. Counsel for Nader asserted that the production made on that morning constituted full
12 compliance with Nader's production obligations.²³

13 103. This dispute had the effect of injecting a secondary issue, which was; if the delay between
14 August 9 (when the documents should have been produced) and September 5 (when they were produced)
15 was not sufficient in itself to grant the Motion to Dismiss, were the documents as produced so deficient as
16 to constitute "a failure to comply with authorized discovery"? (Section 3050.2(b))

17 104. Said another way, the motion now requires that the following issues be addressed:

18 A. Was the delay alone in not producing any documents until September 5, "a failure to
19 comply with authorized discovery" warranting dismissal of the protest? and,

20 B. Whether the documents produced on September 5 were sufficient to cure the tardy
21 production or was the production so deficient as to constitute another "failure to comply with authorized
22 discovery"?

23 ///

24 ///

25 _____
26 ²³ Counsel for Nader offered to produce additional documents if Volkswagen would indicate what was missing and if such
27 documents existed. Under the circumstances, such an offer was nothing more than the equivalent of a request for additional
28 time to comply with the discovery obligations which had been due over a month earlier. However, Volkswagen did do just
what Nader asked and also agreed to a meet and confer. As it turned out, Volkswagen's efforts to accommodate Nader were
fruitless and futile.

Interpretation of the Statute to Avoid Forfeiture

105. It is noted that the statutory language is merely whether there is “a **showing of failure to comply** without substantial justification for that failure”. (Emphasis added.) (Section 3050.2(b)) Because dismissal of the protest would result in Nader’s loss of its right to a hearing before the Board, the concern is whether the language of the statute should be interpreted to require that Nader’s “failure to comply” be “substantial” or “material”.

106. There is no language that there be “a ...**substantial** failure to comply” or that the “failure to comply” be “**material**”. The statute omits the words “substantial” or “material” as modifiers of the “failure to comply” and uses “substantial” only in relation to evaluating whether there is “substantial justification for that failure”. Therefore, by its express language the statute seems to allow for dismissal if there is any “failure to comply”. Arguments could be made that the word “substantial” or “material” cannot be added to the statute to convert “failure to comply” to a “substantial failure to comply” or a “material failure to comply”. Certainly the Legislature knew of the existence of the word “substantial” as it was used in connection with those words which would negate the effect of or excuse a “failure to comply”, that is whether there was “substantial justification for that failure.”

107. By the express terms of the statute, a dismissal of a protest would be permitted if there was any “failure to comply” and the failure to comply would be excused only if there was “substantial justification for that failure.” Read literally, a one day delay in the production of documents could be the basis for a dismissal of a protest unless there was substantial justification for the one-day delay.²⁴ Counterarguments could be made that justice inherently requires that one must weigh the severity of the default so that there is some corollary degree of magnitude of fault sufficient to justify the harshness of the sanction that could result from the “failure to comply”. If this is so, then the standard to be applied is whether there was “*substantial* failure to comply” or whether the “failure to comply *was material*”²⁵ and “without substantial justification for that failure to comply”.

²⁴ There is no attempt for this analysis to have any application to the statutory times within which to file a protest. The statutory time periods to file a protest are not at issue here and the language in those sections do not require interpretation or construction.

²⁵ Whether the failure to comply was “substantial” or “material” could be looked at either by looking to the extent of the production alone to determine if it was “substantial” or it could be evaluated by looking at the significance or “materiality” of

1 108. It is doubtful that any agency or court would find, absent specific facts to show there was
2 some effect upon the proceedings or the parties that was beyond de minimis, that the one-day delay would
3 be of sufficient status to justify a dismissal of a protest even if there was no "substantial justification" for
4 that one-day delay.

5 109. Just as Nader was given ample factual opportunity to cure its failure to comply and thus
6 avoid the forfeiture that could result from its own "failure to comply with authorized discovery", so will
7 Nader be given the benefit of the policy of law and equity that favors liberal interpretation of statutory
8 language in order to avoid forfeiture. Therefore, for purposes of this ruling, what Nader has done or
9 failed to do will be analyzed to determine whether it constituted "*substantial or material* failure to comply
10 with authorized discovery."

11 110. Whether such a liberal interpretation or construction of the statute is proper or not is moot
12 because the analysis below concludes that the extent of Protestant's "failure to comply" was in fact
13 "substantial" and "material" and if these higher standards are met, then certainly the standard established
14 by the literal reading of the statute ("failure to comply") would also be met.

15 111. As will be explained below, under the facts of this case, the effect upon Volkswagen of
16 Nader's failure to comply for a four week period is more than de minimis and is "substantial" and
17 "material". Therefore, whether the statute is strictly construed as requiring only any "failure to comply"
18 or is construed to require that the "failure to comply" be "substantial" or "material", the result is the same
19 here. The delay alone was a "failure to comply" and the delay under the circumstances here was
20 "*substantial and material* failure to comply." Likewise, the production, when it was made, was so
21 deficient that this too constituted a substantial and material failure to comply with Nader's discovery
22 obligations. In addition, as will be discussed below, there was no showing that there was "substantial
23 justification for that failure" to comply.

24 ///

25 ///

26
27 the failure to produce, that is the impact upon the aggrieved party, or a combination of the two. Whichever interpretation is
28 applied here, the result is the same. The production by Nader was not substantial and the effect of the non-production upon Volkswagen was material in that the lack of production had a material affect upon Volkswagen's ability to prepare for the hearing.

Whether the Delay by Nader in Producing the Documents was a Substantial
or Material Failure to Comply with its Discovery Obligations

112. The protest had been filed on April 5, 2007.

113. Counsel for the parties, during the Pre-Hearing Conference held on May 17, agreed upon the discovery schedule, the dates of which would lead to a tentative date of November 17, for a hearing on the merits of the protest. The discovery schedule was incorporated into a Pre-Hearing Conference Order dated May 21. Included in the order was the obligation to produce documents no later than August 9. Without document production, the other steps in the discovery schedule could not be taken.

114. Nader failed to produce any documents on August 9. If the analysis stopped at this point, it is unquestionable that "the failure to produce" any documents is "substantial or material failure to comply" as there was no production at all.

115. After August 9, when Volkswagen inquired as when it could expect the documents, counsel for Nader replied that they did not know because they had not received any documents from their client.

116. As of Thursday, August 30, the first day of the hearing on the Motion to Dismiss, the production by Nader was overdue by three weeks.

117. Protestant in its "Opposition to Respondent's Motion To Dismiss" filed on August 27, in one place stated "Protestants will be producing documents by the end of this week." (Opposition, page 1, lines 20-21) In another portion of Protestant's same pleading, counsel stated that, "While this task is burdensome, it is **expected to be completed by the end of this week - Friday August 31, 2007.**" (Emphasis added) (Opposition, page 1, lines 26-27) In oral argument on Thursday, August 30, 2007, counsel for Nader made the far-from-reassuring statement that, "We expect to get those to [Volkswagen] as we can." (RT Vol. I, page 9, lines 5-6)

118. Attached to the Opposition was a declaration from Mr. Nader Eghtesad, which in its entirety states:

1. I am General Manager of Protestant Nader Automotive Group, which is located at 301 Seventh St., Eureka, CA 95501.

2. I have a limited staff of administrative assistants who are assisting me in

1 preparing documents responsive to the 322 demands served on me by Respondent and
2 [Volkswagen of America].

3 3. I have had great difficulty assembling the documents, but **fully expect to**
4 **be ready to produce** the responsive documents by Friday August 31, 2007. (Emphasis
5 added.)

6 119. This declaration of Mr. Eghtesad was dated August 27, 2007, which was the prior Monday.

7 120. Except for the first statement quoted from Protestant's Opposition, which was in a caption
8 of Protestant's pleading, the remainder of these statements are at best vague, uncertain and noncommittal
9 ("... expected to be completed..." and "expect to get those to [Volkswagen] as soon as we can", and even
10 worse "... fully expect to be ready to produce..."). However, in an effort to give Nader the opportunity
11 to avoid the loss of its right to a hearing on the merits of its protest, the hearing on the Motion to Dismiss
12 the Protest was continued from Thursday, September 30, 2007, to Wednesday, September 5, 2007.

13 121. Despite the "squishy" assurances quoted above (or perhaps as should have been expected
14 due to the lack of any commitment in the language quoted above), there was no production on Friday,
15 August 31, 2007.

16 122. In fact, no production of any documents occurred until the morning of Wednesday,
17 September 5, 2007, which was the day the hearing on the Motion to Dismiss was to resume. By this time,
18 production was four weeks past the date it had been due and five days after the date that production had
19 been "hoped" for or "expected" by Nader's attorneys.

20 123. Hearings before the Board are calendared on a relatively accelerated basis. Because of
21 this, counsel for the parties are given great leeway in being permitted to choose dates for discovery that
22 best suit their schedules so that the essential discovery can be completed in a timely manner. In this case,
23 the dates chosen by counsel and ordered by the Board included, in part, the following (see also Paragraph
24 12):

- 25 ▪ June 8 – File and serve Identification and Requests for Production of Documents.
- 26 ▪ June 22 – File and serve Objections to Requests for Production of Documents.
- 27 ~~▪ June 29 – Counsel to meet and confer to resolve their objections.~~
- 28 ▪ July 6 – Counsel to submit a Statement of Disputed Discovery Requests.

- 1 ▪ July 12 – Tentative date for a hearing before an ALJ to rule on the Objections to Requests
- 2 for Production of Documents. (This hearing was not conducted as counsel advised the
- 3 Board that they had resolved any differences they had and there were no disputes as to
- 4 what documents were to be produced.)
- 5 ▪ August 9 – Produce documents. (The documents were not produced until September 5.)
- 6 ▪ August 9 – File and serve preliminary lists of witnesses.
- 7 ▪ September 14 – File and serve final witness lists. (Volkswagen would have had only ten
- 8 days from the time the documents were in fact received to do this. As explained below,
- 9 even if the production had been complete, this would not have been sufficient time.)
- 10 ▪ September 14 – Exchange witness reports and supporting documents.
- 11 ▪ October 5 – Exchange supplemental reports of expert witnesses and supporting documents.
- 12 ▪ October 19 – Last date for taking depositions. Depositions required a minimum
- 13 notice of 72 hours for those that could be taken “on notice”. (This meant that the parties
- 14 would have only until October 16, to give notice of the taking of the last deposition.
- 15 However, parties to protest proceedings will commence taking depositions long before the
- 16 cut-off date and certainly before the time to exchange “final witness lists”.)
- 17 ▪ November 7 – Tentative date for commencement of the hearing of the protest.

18 124. As can be seen from the above dates, had Volkswagen received the documents on the due
19 date of August 9, Volkswagen would have had five weeks (to September 14) to file and serve its “final
20 witness lists”. This five week period would have been used to review the documents and prepare for and
21 take the depositions of those determined from the documents to be potential witnesses to be called at the
22 hearing. However, not receiving the documents until September 5 reduced the time available to only nine
23 days before Volkswagen had to provide its final witness list. This meant that Volkswagen would have to
24 review all of the documents produced, possibly in consultation with their experts, executives, or other
25 employees of their client (who may or not be available on short notice or perhaps not even in California),
26 decide who should be deposed based upon the documents received, and use the documents to prepare for
27 the depositions. After the depositions were taken, Volkswagen would then decide if the persons deposed
28 (or some other person) would or would not be placed on the final witness list that had to be exchanged on

1 September 14.

2 125. Because 72 hours notice was needed for the notice of the taking of depositions, and
3 because of the delay in production by Nader, the time available to Volkswagen to depose all those
4 identified in the documents as potential witnesses, and then commit to its final witness list, had shrunk to
5 only a six-calendar-day window. (This would not even take into consideration the possibility that those
6 depositions could identify others to depose as well.)

7 126. Even in the unlikely event that Volkswagen was able to review all the documents that
8 should have been produced on the day of receipt (Thursday, September 5), and if Volkswagen gave notice
9 of the depositions on that very day, the depositions could not begin until September 8 or September 9, (a
10 Saturday and Sunday), at the soonest. In reality, Volkswagen would have only five business days (from
11 Monday, September 10 to Friday, September 14) to accomplish all of what had to be done.

12 127. For example, assume that Volkswagen reviewed the documents on the day of receipt
13 (September 5) and on that same day utilized them to identify "Employee X" of Nader, or utilized them to
14 prepare for taking the deposition of "Employee Y". Volkswagen would be required to give 72 hours
15 notice of the taking of the depositions of "X" and "Y" (or anyone else). If Volkswagen gave notice on
16 Thursday, September 5, the very day the documents were received, that it desired to take the depositions
17 of X and Y, the earliest the depositions could be taken would be three days later, which would be
18 Saturday, September 8 (effectively meaning Monday, September 10). That would then leave only four
19 days to have the depositions transcribed and reviewed by Volkswagen's experts (or anyone else) before
20 the time the final witness lists were due on Friday, September 14.

21 128. It would be unrealistic to assume that Volkswagen could complete the discovery it needed
22 in the reduced time available to it. Even assuming the depositions were taken within the four or five days
23 available to Volkswagen before being required to provide its "final witness lists" on September 14,
24 Volkswagen would likely not have the deposition transcripts back in time for them to be reviewed by its
25 experts or others before Volkswagen had to commit itself as to who would or would not be called as
26 witnesses.

27 129. In addition to the increased burden imposed upon Volkswagen due to the lack of time to
28 prepare, Volkswagen would also likely have its expenses increased as well. Not only would

1 Volkswagen's personnel, attorneys and experts be working within a compressed time period, but even the
2 deposition transcript costs would be significantly increased depending upon how short of a "turn-around
3 time" was needed for them to be received and reviewed prior to the final witness list date of September
4 14.

5 130. Denying the Motion to Dismiss would result in the following:

6 A. Nader would be given the power to disregard the Board's Pre-Hearing Conference Order
7 (based upon dates which Nader had chosen); and,

8 B. Nader would have been given the unilateral power to reduce the time available to
9 Volkswagen to prepare for the hearing (a hearing during which Volkswagen would have the burden of
10 proving that Volkswagen had good cause to terminate the franchise of Nader); or

11 C. If the schedule is adjusted to allow additional time for Volkswagen to prepare properly, the
12 effect of Nader's failure to comply with its discovery obligations would be to give Nader the power to
13 reward itself for its own dereliction with a de facto continuance of the proceedings without the need for
14 any sort of motion to do so. In effect, the "misuse of the discovery process"²⁶ would enable Nader to take
15 advantage of its own wrong; and,

16 D. If the schedule is adjusted out of a concern for giving Volkswagen more time to prepare for
17 the hearing, Nader, by its own improper conduct, will have been given the unilateral power to extend the
18 legislatively created "stay" imposed by Section 3060; and,

19 E. In addition, there is something inherently unfair and unjust in ruling in favor of a party whose
20 representations and conduct prior to and subsequent to the filing of the Motion to Dismiss, show disregard
21 of the Board's orders and demonstrate attempts to delay the proceedings before the Board.

22 131. These include representations as to when the documents would be produced, what had
23 been occurring in regard to the production, what efforts were continuing to occur, what additional efforts
24

25
26 ²⁶ CCP section 2023.010 provides in part: "Misuses of the discovery process include, but are not limited to, the following: ...
27 (d) Failing to respond or to submit to an authorized method of discovery. ... (g) Disobeying a court order to provide
28 discovery. (i) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and
good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery
motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made." The
facts in this case evidence "misuses" within these three subsections.

1 would be undertaken to ensure their production, and the failure to participate in a meet and confer that
2 was so strongly urged and which was one of the reasons for granting a continuance.

3 132. Although Board decisions can not generally be relied upon as precedents, how the Board
4 responds to a fact situation is closely watched by the industry. Neither side should be permitted to engage
5 in conduct (or fail to act) if such conduct or lack thereof would be inconsistent with the purposes of the
6 legislative scheme which include protecting a franchisee from conduct of the franchisor which may not
7 have good cause, taking into account the interests of the consuming public, and providing a forum for the
8 expeditious resolution of the disputes that are subject to the Board's jurisdiction. Under the
9 circumstances that exist here, it is the franchisee's own inaction that is under scrutiny as a franchisee
10 should not, by its own dilatory conduct, be allowed to "extend the statutory stay" provided by Section
11 3060.²⁷

12 133. The burden of proving good cause for the intended termination is placed on Volkswagen
13 by the language in the Vehicle Code. There is no question that the delay alone in producing the
14 documents would adversely affect the ability of Volkswagen to meet its burden and there is no doubt that
15 the effect of the delay alone on Volkswagen was "substantial" or "material". (See footnote 27 as it relates
16 to "a resulting hardship upon the other party.") Volkswagen would not only have significantly less time
17 to do what had to be done to prepare for the hearing on the Protest, but many people would be required to
18 adjust their schedules to conform to the "new" time limits which had been unilaterally imposed by the
19 deliberate failure of Nader to comply with its discovery obligations.

20 134. As stated by Volkswagen in its Motion to Dismiss, "Volkswagen cannot prepare for
21 depositions or determine who to depose or call as witnesses at the hearing without Protestant's
22 documents." (Motion, page 2, lines 14-16) This statement was accurate when made, and remains
23 accurate despite the tardy and incomplete production of documents by Nader on September 5.

24 _____
25 ²⁷ It is true that this is a termination protest and that in establishment and relocation protests there are third parties whose
26 interests would also be greatly affected by any "de facto" continuance resulting from the failure of a protestant to comply with
27 discovery requests. However, the legislative intent and the Board's policies are applicable to all protests before the Board and
28 the parties before the Board should be aware that close scrutiny will be given to any failure by either side to comply with
discovery schedules or any other Board orders, especially if there will be a resulting hardship upon the other party or the
public, or there will be a delay in the resolution of the dispute.

1 135. At the time the Motion to Dismiss was filed on August 23, and even as of August 30, when
2 the hearing on the motion began Nader had produced no documents. Without the documents,
3 Volkswagen could not prepare properly for the depositions (or for the hearing). If this motion were to be
4 resolved based upon that point in time (as it perhaps should be), the only issue would be whether Nader
5 had substantial justification for its failure to comply with authorized discovery.

6 136. While Nader did produce some documents on September 5, this production was not only
7 too late but it was also inadequate to enable Volkswagen to comply with the remaining discovery
8 schedule and to prepare for the upcoming hearing on the merits of the protest.

9 Whether there was "Substantial Justification" for the Failure of Nader to
10 Comply with Authorized Discovery?

11 137. Section 3050.2(b) provides in part: "The executive director may, at the direction of the
12 board, upon a showing of failure to comply with authorized discovery without substantial justification for
13 that failure, dismiss the protest or petition or suspend the proceedings pending compliance." It is noted
14 that, the statutory standard for excusing the "failure to comply" is not just whether there was
15 "justification" for that failure, but whether there was "**substantial** justification for that failure."
16 (Emphasis added.)

17 138. It appears that, but for the Motion to Dismiss, Protestant may never have produced any
18 documents and was quite willing to maintain the status quo. Even when confronted with the Motion to
19 Dismiss, to use an old expression, it was "like pulling teeth" to get anything from Nader. It was difficult
20 not only to get the documents, but it was difficult to get even a commitment as to when the documents
21 would be produced. There was no partial production or even an offer or commitment for providing partial
22 production. Had Nader done anything in compiling documents in response to the Request for Production,
23 surely there would have been some documents available that could have been produced in an effort to
24 show a good faith attempt to comply with the discovery obligations.

25 139. As can be seen by other comments herein, it appears as though Nader's failure to comply

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1 with its discovery obligations was deliberate, intentional, willful or at best grossly negligent.²⁸ Nader had
2 ample notice of what was to be produced, ample time to locate what was to be produced, admitted that
3 there was no dispute as to what was supposed to be produced, admitted that Volkswagen was entitled to
4 receive the documents it had requested, admitted that the documents were due on the date agreed upon
5 and ordered for their production, yet no documents were produced until Nader was facing the possible
6 consequences of a Motion to Dismiss the protest and even then, Nader seemed to be inclined to drag the
7 process out as long as possible. What is usually a short "all-in-one-day" hearing on such a motion, turned
8 into four hearings spread over ten days. The additional three hearing days and additional nine days
9 encompassed during the process were allowed to Nader, and to a certain extent agreed to by Volkswagen,
10 in an effort to give Nader as much opportunity as possible to make a production of the documents and
11 avoid depriving Nader of the opportunity of having a hearing before the Board.²⁹

12 140. The only excuse initially proffered by counsel for Nader for the non-production was that
13 the requests themselves were voluminous and that Nader has "a small staff". (Opposition, page 1, line 25)

14 Other reasons that were asserted were:

- 15 ■ The records were in two locations, Eureka where the dealership is located and Martinez where it
16 had other offices. (RT Vol. II, page 4, lines 5-11; page 7, lines 7-15);
- 17 ■ A week or so before the hearing on the Motion to Dismiss, Mr. Eghtesad told his attorney that Mr.
18 Eghtesad "...was under the impression that this material had been sent out by his people." (RT
19 Vol. I, page 12, lines 22-25) (Mr. Eghtesad's declaration made no reference to this. His
20 declaration merely stated that he had a "...limited staff of administrative assistants who are
21 assisting me in preparing documents..." (Mr. Eghtesad's Declaration, page 1, line 23);
- 22 ■ Counsel for Nader stated, "But it has been a big process for my clients to put together the vast
23

24 ²⁸ It is common for courts, when evaluating whether a party has "substantially" performed or is in "material" breach of its
25 obligations, to look to whether that party has acted in good faith or whether the failure to perform was willful. (See for
26 example, Restatement Contracts 2nd, section 241, and Restatement Contracts, 1st, section 275)

27 ²⁹ Volkswagen agreed that, in return for the agreement of counsel to have all the depositions taken in their offices in Los
28 Angeles, it would be satisfied if Nader made substantial production on Friday, August 31 (RT Vol. I, page 23, lines 3-16);
Counsel for Nader agreed. (RT Vol. I, page 26, lines 1-10) Unfortunately, there was no production on Friday, August 31.
Instead, only partial production occurred on Wednesday, September 5, and this partial production has been found not to be
substantial.

1 **number of documents** that are responsive to the requests that that have been propounded.”

2 (Emphasis added.) (RT, Vol. I, page 9, lines 23- 25; page 10, line 1) (As stated herein, the “vast
3 number of documents” that were eventually produced for Volkswagen was a stack of documents
4 approximately 1 ½ inches high);

5 ▪ That as of August 29, the day before the hearing, Mr. Eghtesad had told his attorney that “...he
6 was working on getting everything shipped out as of yesterday” (RT Vol. 1, page 13, lines 3-5),
7 that “...he and the service manager and the office manager have been spending a lot of time
8 digging the files out; making copies of what needs to be produced in the discovery responses.”
9 (RT Vol. 1, page 13, lines 13-17);

10 ▪ “...They’re too voluminous is why they weren’t produced on time” (RT Vol. I, page 14, lines 17-
11 19);

12 ▪ “...my clients are still apparently assembling the documents you need.” (RT Vol. I, page 15, lines
13 17-18);

14 ▪ “... it wasn’t so much the volume of the actual production, it was the volume of the requests...”
15 (RT Vol. II, page 9, lines 10-12)

16 141. It is determined that none of the above allegations, even if true, would constitute
17 “substantial justification” for the failure of Nader to comply with authorized discovery. Nader had two
18 months, from June 8 until August 9, to comply with the requests for production of documents. Some
19 production did occur on September 5, almost a month after the date production was due.

20 142. The production that did occur on September 5, almost three months later, consisted of two
21 stacks of identical documents each of which were approximately 1 ½ inches high.

22 143. In response to Nader’s request for more specific information as to the alleged deficiencies
23 in the production, Volkswagen sent to Mr. Sieving, a copy of Volkswagen’s Request for Production of
24 Documents, with specific comments stating the inadequacy of what was produced in connection with each
25 of the individual 163 requests that had been made. The comments by Volkswagen were interlined
26 between each request and this document will be referred to as Volkswagen’s “Comments as to
27 Insufficiencies”.

28 144. The letter accompanying the “Comments as to Insufficiencies” described the total

1 production by Nader as consisting of two identical sets of 283 pages and stated in part:

2 ...
3 There was no indication as to which of the documents purported to be in response
4 to Volkswagen's document requests, as opposed to the document requests of Audi of
5 America in another pending protest filed by Nader. The few responsive documents were
6 scattered randomly among irrelevant or illegible documents, including illegible copies of
7 checks to and from Nader, illegible copies of documents in a foreign language, and
8 documents related to motor vehicle franchises other than Audi or Volkswagen.

9 Attached please find a copy of Volkswagen's Request for Production of
10 Documents, with our comments on Nader's inadequate production interlineated in each of
11 Volkswagen's 163 document requests. For example, Volkswagen's Request for
12 Production No. 87 required Nader to produce all documents evidencing cash flow
13 statements, financial statement, balance sheets and tax returns from January 1, 2002
14 through the present, which Nader agreed to produce. Nader's production consisted of two
15 monthly financial statements, one for March 2007 and the other for April 2007.

16 Other examples of Nader's failure to produce key documents in response to
17 Volkswagen's requests include documents related to dealership employees (no documents
18 produced), vehicle inventory (no documents produced), equipment and special tools (no
19 documents produced), warranty work (no documents produced), and basic accounting
20 documents such as general ledgers, accounts payable and receivable, and cash receipt and
21 disbursement ledgers (no documents produced.)

22 Even a cursory review of Volkswagen's document requests makes it abundantly
23 clear that Nader's production is not only too late, it is woefully inadequate.

24 145. After reviewing the documents produced by Nader, it is determined that the comments of
25 Volkswagen as stated above accurately describe the extent of the production by Nader, in particular that
26 "Nader's production is not only too late, it is woefully inadequate."

27 ATTORNEYS' FEES

28 146. On September 10, at the conclusion of the last day of the hearing on the Motion to
Dismiss, the ALJ informed counsel of his intended actions. This was formalized in a document dated
September 11. Among other things, this document:

- 29 A. Gave notice to the parties that the ALJ intended to recommend that the protest be
30 dismissed;
- 31 B. Gave notice to the parties that the ALJ intended to recommend that attorney fees and costs
32 be awarded to Volkswagen; and,
- 33 C. Established a briefing schedule and a hearing date for determining the amount of attorneys'
34 fees and costs to which Volkswagen may be entitled.

1 147. However, on September 21, the Board received and filed "Respondent Volkswagen of
2 America Inc.'s Notice of Withdrawal of Request for Attorneys' Fees and Costs in Connection with its
3 Motion to Dismiss Pursuant to California Vehicle Code §3050.2(b)".

4 148. This document stated that "[Volkswagen] believes that dismissal of the Protest is an
5 appropriate and sufficient remedy for the failure of Protestants to comply with authorized discovery
6 without any credible justification." Volkswagen then stated that it was withdrawing its request for
7 attorneys' fees and costs and requesting that the Board "adopt" the "recommendation to dismiss the
8 Protest."

9 149. It appears that Volkswagen is conditionally waiving its right to attorneys' fees and costs.
10 Therefore, Volkswagen's withdrawal of its request for attorneys' fees and costs is without prejudice to its
11 right to renew and reassert Volkswagen's claim to attorneys' fees and costs if Nader further contests the
12 Motion to Dismiss, whether before the Board or some other forum.

13 150. In light of the above, there is no recommendation that attorneys' fees and costs be awarded
14 to Volkswagen at this time.

15 **DETERMINATIONS**

16 151. It is determined that:

17 A. Nader failed to comply with its discovery obligations by failing to produce any documents
18 prior to September 5, 2007;

19 B. Nader's failure to produce any documents prior to September 5, 2007 was material and
20 constituted a substantial failure to comply with its discovery obligations;

21 C. There was no substantial justification for the failure of Nader to produce the documents in
22 a timely manner;

23 D. The documents that were produced by Nader on September 5, 2007, even if they had been
24 produced timely, were not adequate and did not constitute substantial compliance with Nader's discovery
25 obligations;

26 E. The insufficiency of the documents that were produced on September 5, 2007 was material
27 and constituted a substantial failure of Nader to comply with its discovery obligations;

28 F. There was no substantial justification for the insufficient and inadequate production by

1 Nader;

2 G. Even if the lateness of the production, considered by itself, would not be deemed sufficient
3 to find that Nader had failed to comply with its discovery obligations, the late production combined with
4 the inadequate production are sufficient to constitute a substantial and material failure by Nader to comply
5 with its discovery obligations;

6 H. There was no substantial justification for Nader to have failed both to produce the
7 documents in a timely manner and to make adequate production.

8 I. Nader's failure to comply with its discovery obligations was deliberate or at best grossly
9 negligent;

10 J. Nader did not make a good faith attempt to comply with its discovery obligations;

11 K. Counsel for Nader, with no advance notice to opposing counsel or the Board, failed to
12 meet and confer with opposing counsel in what should have been a good faith attempt to resolve the
13 dispute as to the adequacy of the document production; and,

14 L. There was no substantial justification established for the failure of Nader's attorney to
15 meet and confer with opposing counsel.³⁰

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25 ³⁰ Determinations A through J all relate to the failure of Nader to produce documents and are sufficient justifications for
26 granting the Motion to Dismiss. Determinations K and L relate to the failure of Nader's counsel to meet and confer with
27 Volkswagen's counsel on September 7. Volkswagen's Motion to Dismiss, filed on August 23, could not have included this as
28 an issue. However, determinations K and L are made in corroboration of the conclusion that there was an ongoing pattern by
Nader of: Delaying the process before the Board; A lack of concern about complying with statutory obligations or Board
orders; and, A failure to honor its own representations to Volkswagen and the Board.

1 RECOMMENDATION

2 It is recommended that the Executive Director seek direction from the Board that the Protest of
3 *Nader Automotive Group, LLC and Nader Eghtesad, Protestant, v. Volkswagen of America, Inc.*,
4 Respondent, Protest No. PR-2045-07, be dismissed with prejudice.
5

6 PROPOSED ORDER

7 "Respondent Volkswagen of America, Inc.'s Motion to Dismiss Pursuant to California Vehicle
8 Code §3050.2(b)" is hereby granted.
9

10
11 I hereby submit the foregoing which are my
12 findings, recommendation, and Proposed Order in
13 the above-entitled matter, as the result of a hearing
14 before me. I recommend that the Executive Director
15 submit this to the New Motor Vehicle Board to be
16 adopted as the decision of the Board and that the
17 Executive Director seek direction from the Board to
18 dismiss this protest with prejudice.

19 DATED: November 8, 2007

20 
21 By: _____
22 ANTHONY M. SKROCKI
23 Administrative Law Judge
24
25
26

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

1 NEW MOTOR VEHICLE BOARD
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2 Sacramento, California 95811
Telephone: (916) 445-1888
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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
10

11 In the Matter of the Protest of
12 NADER AUTOMOTIVE GROUP, LLC, and
13 NADER EGHTESAD,
14 Protestant,
15 v.
16 VOLKSWAGEN OF AMERICA, INC.,
17 Respondent.

Protest No. PR-2045-07

**(PROPOSED) REQUEST THAT
EXECUTIVE DIRECTOR BE
DIRECTED TO DISMISS THE
PROTEST (Vehicle Code section
3050.2(b))**

18 To: Michael M. Sieving, Esq.
19 Manish Parikh, Esq.
20 Christopher J. Wrabel, Esq.
21 Attorneys for Protestant
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22 Neil C. Erickson, Esq.
23 Allen Resnick, Esq.
24 Amy Lerner Hill, Esq.
25 Attorneys for Respondent
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1900 Avenue of the Stars, Seventh Floor
Los Angeles, California 90067-4308

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1 **(PROPOSED) REQUEST THAT EXECUTIVE DIRECTOR BE DIRECTED**
2 **TO DISMISS THE PROTEST (Vehicle Code section 3050.2(b))**

3 I, William G. Brennan, am the Executive Director of the New Motor Vehicle Board. Upon
4 consideration of the record in the above entitled matter, I concur with and adopt the findings of the
5 Administrative Law Judge that there has been a failure of Protestant to comply with authorized discovery
6 without substantial justification for that failure. (Vehicle Code section 3050.2(b)). I recommend that the
7 New Motor Vehicle Board adopt the findings of the Administrative Law Judge and I be directed by the
8 Board to dismiss the protest with prejudice.

9
10 DATED: November 8, 2007

NEW MOTOR VEHICLE BOARD

11
12 By 
13 WILLIAM G. BRENNAN
14 Executive Director

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26
27 ~~George Valverde, Director, DMV~~
28 ~~Mary Garcia, Branch Chief,~~
~~Occupational Licensing, DMV~~