

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 EGHTEHAD,
14 Protestant,
15 v.
16 AUDI OF AMERICA, INC.
17 Respondent.

Protest No. PR-2046-07

**(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. *Audi*
10 *of America, Inc.*, Respondent, Protest No. PR-2046-07, 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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17 Respondent.

Protest No. PR-2046-07

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

1 PROCEDURAL BACKGROUND¹

2 The Parties

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

6 2. Respondent is Audi of America, Inc. ("Audi" or "Respondent"), located at 3800 Hamlin
7 Road, Auburn Hills, Michigan. Audi is the franchisor of Nader and is licensed as a distributor by the
8 DMV.

9 Counsel for the Parties

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

16 The Notice of Termination and Protest

17 4. By letter dated March 6, 2007, Audi gave notice to Nader, pursuant to Vehicle Code
18 section 3060,⁴ of Audi's intent to terminate the Audi franchise of Nader. The notice of intended
19 termination was received by the New Motor Vehicle Board ("Board") on March 12, 2007.

20 5. A timely protest was filed in behalf of Nader on April 5, 2007, by Michael T. Morrissey,
21 Esq. of the Law Offices of Michael T. Morrissey. On April 11, 2007, William G. Brennan, the Board's
22 Executive Director, sent Mr. Morrissey a detailed letter indicating that due to a number of procedural
23 deficiencies with the protest, an amended protest should be filed. An Amended Protest was filed by Mr.
24

25 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.

26 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.

27 ³ Another protest was also filed entitled *Nader Automotive Group, LLC, and Nader Eghtesad v. Volkswagen of America, Inc.*,
Protest No. PR-2045-07. These matters were not consolidated for purposes of hearing on the merits of the protests but were
tracking the same discovery schedules.

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

1 Morrissey on May 31, 2007 (eight weeks after the filing of the original protest). Subsequently, Mr.
2 Morrissey withdrew as counsel for Nader and Michael M. Sieving of the Law Offices of Michael M.
3 Sieving, began representing Nader.

4 The Attempts to Set and Hold a Pre-Hearing Conference

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

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

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

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

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

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

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

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

25 _____
26 ⁵ Provided the dates are reasonable and come within any statutorily imposed time limitations, it is the Board's practice to
27 accommodate the attorneys' schedules and their clients' schedules in regard to establishing a discovery schedule and choosing
28 hearing dates. As is common, the discovery schedule dates for this protest (as well as the contemplated hearing dates) were
chosen by counsel for the parties. The entire discovery schedule was established so as to lead up to a hearing on the merits of
the protest tentatively scheduled to start on Wednesday, November 7, 2007 and continue through Tuesday, November 20,

- 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 ▪ All depositions to be taken had to be completed no later than Friday, October 19.

24
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 ▪ Hearing exhibits and demonstrative evidence were to be exchanged on Wednesday,
2 October 31.

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

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

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

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

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

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

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

28 ///

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. Eghestad'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 Audi) submitted their Statement of Disputed Discovery Requests which indicated that there
9 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 Audi. Their joint stipulation of May 17 choosing August 9 as
17 the date for production of documents was incorporated into the Board's formal Pre-Hearing Conference
18 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-2045-07, the companion case involving Protestant's
25 franchise with Volkswagen 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.

27 ⁹ Mr. Sieving, Mr. Eghtesad, and Mr. Morrissey had all signed Substitution of Attorneys forms showing dates of June 1, 2007,
28 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
date for that request had been conditionally extended from June 8 to 15. However, the conditions had not occurred so that date
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 Audi from
4 Mr. Eghtesad or any of Protestant's attorneys that there would be any difficulty in producing the
5 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 Audi or the Board indicating that the documents were going to be late nor any
22 attempt or offer by Protestant to make a partial production.

23 THE MOTION TO DISMISS THE PROTEST

24 28. On August 23, Audi filed "Respondent Audi of America, Inc.'s Motion to Dismiss
25 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:

28 ///

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 Audi is seeking dismissal of the protest without a hearing that would
6 normally be required on the merits of the protest. If the motion is granted, Audi will be permitted to
7 terminate the franchise of Nader without having to prove that there is good cause to do so. This is a most
8 serious request by Audi. If granted, Nader will lose the right to a hearing before the Board, a right that
9 was granted by the Legislature as part of the overall statutory scheme. As will be discussed below, the
10 reason for the motion is the failure of Nader to comply with its obligations to produce documents during
11 the discovery stage of the proceedings before the Board. Whether there was "substantial justification" for
12 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 Audi asking the Board to dismiss this protest without a hearing. Granting the motion
15 would deny Nader the right to a hearing before the Board and relieve Audi from having to meet its burden
16 of proving the existence of the statutory elements that are required to be addressed in determining whether
17 there is good cause to terminate the franchise. In other words, the motion is seeking that the Board issue
18 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 Audi that would deprive Nader
21 of its statutory right to a hearing before the Board and relieve Audi of its statutory obligation to prove
22 there is good cause to terminate the franchise of Nader? It is the failure of Nader to comply with its
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
27 within 30 days of receiving a "60-day notice" or within 10 days of receiving a "15-day notice", the franchisee files a protest
28 with the Board, the stay will continue as "the franchisor may not terminate until the board makes its findings."

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."

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 obligations to produce documents during the discovery stage of the proceeding.

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

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

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

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

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

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

23
24
25 ¹⁴ Although this protest was timely filed, the discussion as to the need for timely filing is included to show that the Legislature
clearly intended that a franchisee act in accordance with the statutory requirements, including timeliness, or face the effects of
failing to do so, which is the loss of the statutory protection.

26 ¹⁵ Part of Section 3060((a)(2) states: "The franchisee may file a protest with the board within 30 days after receiving a 60-
27 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
28 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 41. The Legislature has also indicated the consequence of the lack of a timely filing.
2 Subsection (a)(3) of Section 3060 states that the termination of the franchise will be permitted to occur if
3 "... the appropriate period for filing a protest has elapsed."

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

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

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

21 44. Another legislatively imposed condition that must occur at the risk of losing its rights is
22 that the franchisee must participate in discovery. Just as a franchisee who fails to file a timely protest will
23 lose the right to a hearing before the Board, so could a franchisee who fails to comply with its discovery

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 obligations lose the protection provided by the statutes. Whether it is the failure to file a timely protest or
2 the failure to participate in discovery, what these two conditions have in common is that it will be the
3 failure of the franchisee itself that would or could cause it to lose the right to have a hearing before the
4 Board.

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

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

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

16 47. The relevant statutory language cited by Audi is as follows:

17 Section 3050.2

18 ...

19 (b) Compliance with discovery procedures authorized pursuant to subdivision (b) of
20 Section 3050.1 may be enforced by application to the executive director of the board.

21 **The executive director may, at the direction of the board, upon a showing of failure**
22 **to comply with authorized discovery without substantial justification for that**
23 **failure, dismiss the protest or petition or suspend the proceedings pending**
24 **compliance.** The executive director may, at the direction of the board, upon a failure to
25 comply with authorized discovery without substantial justification for that failure, require
26 payment of costs incurred by the board, as well as attorney's fees and costs of the party
27 who successfully makes or opposes a motion to compel enforcement of discovery...
28 (Emphasis added.)

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

1 and the other is appropriate if it is the franchisor (Audi) that failed to comply.

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

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

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

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

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

26 51. The Board has the power to grant the relief requested in this motion by Audi. The
27 Protestant, Nader, must comply with authorized discovery or run the risk of dismissal of the protest.
28 Section 3050.2(b) empowers the Board to order the Executive Director to dismiss the protest "upon a

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

1 showing of failure to comply with authorized discovery without substantial justification for that failure”.

2 **THE MERITS OF THE MOTION**

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

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

6 A. Whether there was a “showing of failure to comply with authorized discovery”? and

7 B. Whether there was “substantial justification for that failure”?

8 **What was the “Failure to Comply with Authorized Discovery”?**

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

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

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

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

- 20 ■ May 17 - Pre-Hearing Conference held (after three continuances at request of Nader’s
21 counsel) and discovery dates chosen by attorneys.
- 22 ■ May 21 - The Board issued its Pre-Hearing Conference Order setting the date of
23 August 9, as chosen by the attorneys, as the date by which production of documents was to
24 occur.
- 25 ■ August 9 - No documents were produced by Nader.
- 26 ■ August 23 - Audi filed this Motion to Dismiss.
- 27 ■ August 27 - Nader filed its “Opposition to Respondent’s Motion to Dismiss” and
28 supporting Declaration of Nader Eghtesad. No documents were produced by Nader.

- 1 ▪ August 29 - Received e-mail copy of Audi's "Reply Brief in Support of its Motion to
2 Dismiss Pursuant to Vehicle Code §3050.2(b)", and supporting Declaration of Amy Lerner
3 Hill.
- 4 ▪ Thursday, August 30 - The first hearing on the Motion to Dismiss was held before ALJ
5 Skrocki. Counsel for Nader stated that he "hoped" and "expected" that the documents
6 would be produced to Audi on the next day, August 31 (Friday). This hearing was
7 continued to September 5 at 11:00 a.m. to allow Nader an extra day to produce the
8 documents and to allow time for Audi to review what was to be produced. (The
9 documents were expected to be received by Audi on Friday. It was decided that if the
10 documents were delivered to Audi on Friday, as the upcoming Monday was Labor Day,
11 Audi would need Tuesday to review the documents to evaluate their sufficiency.)
- 12 ▪ Wednesday, September 5 - The second hearing on the Motion to Dismiss was held. The
13 documents that had been expected to be received by Audi on Friday, August 31, or at the
14 latest, Tuesday, September 4 (the day after Labor Day), were not received by Audi until
15 the morning of Wednesday, September 5, shortly before the hearing on the Motion to
16 Dismiss resumed. (They had been sent from Sacramento on Tuesday, September 4.) The
17 quantity of the documents was described as being about one and a half inches high. The
18 hearing was continued to September 6 at 3:00 p.m., to give Audi time to review the
19 documents.
- 20 ▪ Thursday, September 6 - When the hearing was held at 3:00 p.m., the discussion involved
21 whether what had been produced the day before was adequate or sufficient compliance
22 with the discovery requests. Mr. Sieving, counsel for Nader, contended that the production
23 was in compliance with the discovery requests. The hearing was continued to Monday,
24 September 10, so that copies of what had been produced could be provided to the ALJ for
25 his review. Mr. Sieving also asserted that there was a statutory obligation that the
26 attorneys "meet and confer" before there could be a determination by the ALJ as to the
27 extent of production. Audi agreed to cooperate and participate in a meet and confer. Mr.
28 Sieving suggested that the meet and confer be held on Friday (September 7) so that he

1 could obtain any additional documents over the weekend and have them ready for the
2 following Monday's hearing. Audi agreed to the date and time desired by Mr. Sieving for
3 the meet and confer. Despite his insistence upon a meet and confer and his arguments for
4 its importance, Mr. Sieving failed to participate in the meet and confer.

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

23 What is NOT in Dispute Between the Parties?

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

25 58. In accordance with the parties' agreement, as incorporated into the Board's Pre-Hearing
26 Conference Order, on June 8, counsel for Respondent timely submitted its Requests for Production of
27 Documents via facsimile (the original was filed on June 11). Protestant's Request for Identification and
28 Production of Documents was untimely filed on June 15. In compliance with their agreement and the

1 Board's Pre-Hearing Conference Order, counsel for the parties timely served and filed their respective
2 Objections to (the other's) Requests for Production of Documents. A telephonic hearing had been
3 scheduled for July 12, at which time an ALJ would have made rulings on their respective objections.
4 However, on July 6, counsel for the parties notified the Board that they had resolved their differences as
5 to what was to be produced and that the hearing before the ALJ would not be necessary. Because counsel
6 for the parties had agreed as to what was to be produced, the hearing set for July 12 was taken off
7 calendar by a notice of the Board dated July 9.

8 59. Counsel for Nader admitted during the hearings on the Motion to Dismiss that Audi was
9 entitled to the documents requested.

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

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

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

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

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

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

22 64. Therefore, because there was no dispute as to what was to be produced, and no dispute as
23 to the time when production was due, neither of these could have been the reason for the failure of Nader

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 to comply with the authorized and required discovery. Further there was no dispute as to when
2 production was actually made and that it was made late.

3 THE MOTION TO DISMISS

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

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

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

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

17 68. The Declaration of Mr. Nader Eghtesad in support of the Opposition to Respondent's
18 Motion to Dismiss states only that "I have had great difficulty assembling the documents, but **fully expect**
19 **to be ready to produce** the responsive documents by Friday, August 31, 2007." (Eghtesad Declaration,
20 page 2, lines 1-2) (Emphasis added.) The bolded language is far from reassuring. In fact, this statement
21 is so non-committal as to be worthless. The statement is merely that he "fully expects" and then states
22 that even this expectation is only that he will "be ready" to produce. There is no statement that production
23 will occur by Friday, August 31 or any other definite time.

24 69. Protestant's attorney is more definite in Protestant's Opposition to Respondent's Motion to
25 Dismiss; this pleading states in one place "Protestants will be producing documents by the end of this
26 week" and in another it states, "While this task is burdensome, it will be completed by the end of this
27 week - Friday August 31, 2007." Unfortunately, as will be discussed below, neither Mr. Eghtesad's
28 "expectations", nor his attorney's more definite commitment came to fruition.

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

1
2 70. On August 30 (the Thursday before Labor Day weekend), the hearing on the Motion to
3 Dismiss was conducted before ALJ Skrocki. Protestant was represented by Michael M. Sieving and
4 Respondent was represented by Allen Resnick. During the hearing, and at the request of Protestant's
5 counsel, the hearing was continued to Wednesday, September 4 at 11:00 a.m. Mr. Sieving, counsel for
6 Protestant stated that he had been in communication with his client "on numerous occasions" (RT Vol. I,
7 page 8, lines 18-19), that his client "was scampering" to get the responsive documents together, that "We
8 expect to get those to Audi as soon as we can" (RT Vol. I, page 9, lines 2-3), and that he was "hoping" to
9 get them "to Audi by tomorrow." (RT Vol. I, page 9, line 14)

10 71. Mr. Sieving acknowledged that Volkswagen and Audi were entitled to the documents and
11 stated that if he did not "see the documents either today [Thursday -- August 30] or early -- well, hopefully
12 today, I'm going to be spending my weekend down digging through boxes, myself."¹⁸ (RT Vol. I, page
13 10, lines 11-17)

14 72. Another representation was that "they're too voluminous is why they weren't produced on
15 time". (RT Vol. I, page 14, lines 18-19)

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

24 74. At another point, Mr. Sieving stated that "I first learned of the problem with the production
25 --- my client did not advise me of that until just a couple of days prior to the actual scheduled production
26

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 Audi as
promised.

1 date [of August 9]. And I will represent that we have diligently been pursuing this issue to get the
2 documents we need.” (RT Vol. I, page 19, lines 9-15) (Just a couple of days prior to the August 9
3 production date would have been about August 6 or 7.)

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

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

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

16 77. On Wednesday, September 5, the hearing on the Motion to Dismiss resumed at 11:00 a.m.
17 The documents that were expected to be received by Audi on the previous Friday were not received until
18 shortly before the resumption of the hearing which was Wednesday. Protestant’s attorney stated that he
19 had not received the documents from his client until the morning of Tuesday, September 4. The
20 documents were then sent by him to Audi’s attorneys.

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

1 documents himself.

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

10 80. It is noteworthy that:

- 11 A. Present counsel for Protestant entered the picture at least as of June 15, which was almost
12 eight (8) weeks prior to the time production was due on August 9. Nader's Request for
13 Production of Documents was submitted by Mr. Sieving's office and filed on June 15. It
14 was also his office that filed the statement on July 6, that there were no disputes between
15 the parties as to what production was required;
- 16 B. No request was made for an extension of time for production;
- 17 C. No notice was given prior to August 9 that Nader's production would not be timely;
- 18 D. Even after Protestant and its counsel were aware that a Motion to Dismiss had been filed,
19 no commitment was made as to any definite date for production;
- 20 E. Even though Protestant and its counsel were aware that production was late, there was no
21 apparent concentrated effort to move promptly to provide the documents;
- 22 F. During the first day of hearing on the Motion to Dismiss (Thursday, August 30), although
23 assurances were given that the documents would be forwarded to Audi possibly that
24 Thursday afternoon, but in no event later than Friday, August 31, the documents were not
25 received by Audi until Wednesday, September 5 shortly prior to the resumption of the
26 hearing on the Motion to Dismiss;
- 27 G. There was not even an attempt to make a partial production on the due date of August 9, or
28 at any time between August 9 and September 5;

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

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

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

8 82. The documents received by Audi were described as being in a Federal Express box about
9 three inches high. There were in reality two sets of the same documents in the three-inch box, meaning
10 that the documents produced for Audi were only about an inch and a half high. The fact that there were
11 two identical sets of documents in that three-inch box was confirmed by Mr. Sieving during the next
12 hearing. (RT Vol. III, page 27, lines 3-11). Audi pointed out that after being four weeks late, allegedly
13 because of the voluminous nature of the requests¹⁹ and the magnitude of the task, the total production
14 amounted to only an inch and a half of documents, and upon cursory review, given the limited time for
15 Audi to examine them, the documents were not sufficient to comply with the discovery requests. If this
16 position of Audi was accurate, that meant that the failure of Nader to comply with the discovery requests
17 was ongoing and about to enter its second month. In order to give Audi sufficient time to review the
18 documents, ALJ Skrocki ordered the hearing to resume on Thursday, September 6, at 3:30 p.m.

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

20 83. On Thursday, September 6, the hearing on the Motion to Dismiss resumed at
21 3:30 p.m. Audi had received some documents from Nader the day before. Because some documents had
22 been received, the discussion between counsel involved the completeness of the documents. The problem
23 then became two pronged.

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

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

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

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

7 85. Mr. Resnick sent Mr. Sieving comments by Audi specifically stating Audi's contentions as
8 to each of the 163 requests from Audi. However, Mr. Sieving had not seen the comments (Vol. III, page
9 21, lines 16-25) and ALJ Skrocki did not have the documents that had been produced by Nader before
10 him.

11 86. Mr. Sieving argued that the hearing on the Motion to Dismiss could not proceed as the
12 California Code of Civil Procedure ("CCP") required that there first must be a meet and confer between
13 counsel prior to proceeding with the hearing as to the adequacy of what had been produced by Nader. Mr.
14 Resnick, although stating that he did not believe a meet and confer was needed, agreed to participate and
15 the ALJ instructed counsel to conduct the "meet and confer" as urged by Mr. Sieving. (RT Vol. III, page
16 27, line 21-25; page 28, lines 11-18; page 31, lines 4-22; page 32, lines 2-19) Counsel agreed upon a
17 telephonic meet and confer to be conducted on Friday, September 7 at 1:30 p.m.

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

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

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

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

28 90. At the beginning of the hearing on Monday, September 10, the ALJ inquired as to the

1 outcome of the meet and confer that had been argued by Mr. Sieving as being mandatory and which the
2 attorneys had agreed would occur on Friday, September 7, at 1:30 p.m., a date and time chosen by Mr.
3 Sieving. Much to the surprise of the ALJ, the meet and confer did not occur because Mr. Sieving was
4 "tied up" on an "unrelated" matter at the time that he and counsel for Audi had agreed upon to have the
5 telephonic meet and confer.²⁰

6 91. Mr. Sieving, with no prior notice to Audi, failed to participate in the meet and confer that
7 he had argued was required.²¹ Not only was he unapologetic but, apparently in the belief that the best
8 defense is a good offense, he attempted to place responsibility for the failure to have the meet and confer
9 upon opposing counsel. Despite the fact that three calendar days had elapsed – Friday, Saturday and
10 Sunday – and no meet and confer had occurred, Mr. Sieving continued to argue on the following Monday
11 when the hearing resumed, that the failed meet and confer should be rescheduled prior to taking any
12 action on Audi's Motion to Dismiss.

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

14 ADMINISTRATIVE LAW JUDGE SKROCKI: Okay.

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

17 MR. SIEVING: It did not, Your Honor. Friday afternoon I did get a call from Ms.
18 Lerner Hill and was tied up on Friday afternoon. I did call her this morning [Monday].

19
20 ²⁰ Some of Mr. Sieving's comments during the hearing on Thursday, September 6 about the "required" meet-and-confer were
21 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
22 produced. And I can look at the production and say, you're absolutely right, these weren't produced. Or I can direct Mr.
23 Resnick's attention to documents that we feel are responsive to the individual requests." (RT Vol. III, page 32, lines 3-10)
24 After Mr. Sieving agreed that Friday, September 7 would be the day to hold the meet and confer, Mr. Sieving, when discussing
25 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
26 obtain additional documents that I agree with you are responsive that exist, we can do that. And I can get them in on Saturday
27 and get them back out the door so you have them on Monday, so that we can address that issue on Monday...." Of course,
28 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
motive, the hope was not realized as no additional documents were produced by Nader. Likewise, one could infer that the
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 She was tied up. Did speak to her at noon. She had a lunch meeting. So we have not
2 been able to do the meet-and-confer with respect to the allegations of the fact that the
3 discovery production has been inadequate. (RT Vol. IV, page 1, lines 23-25, page 2, lines
4 1-9)

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

8 ...

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

13 We agreed upon a time. He was called at exactly the time that we indicated. He
14 said that he was tied up and would call us back in 15 minutes. And that was Friday
15 afternoon at 1:30. He never called back.

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

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

24 ...

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

26 ...

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

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

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

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

9 I did receive a call back at two minutes to 12:00. Ms. Lerner Hill told me that she
10 had five minutes before she had to walk out the door for a lunch meeting. And I said,
11 we're not going to resolve any of these issues in five minutes.

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

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

17 ...

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

21 ...

22 ADMINISTRATIVE LAW JUDGE SKROCKI: Now I have essentially three
23 issues. One is the failure to produce the documents at all in accordance with the discovery
24

25
26
27
28 ²² Why some attempt was not made to contact Audi's attorneys prior to the time for the Friday meet and confer and reschedule it for later that day or over the weekend was not explained by Mr. Sieving. Nor was there any explanation as to why a later phone call could not have been made by Mr. Sieving during what remained of the afternoon after the "bulk" of his 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 Audi's attorneys advising them of a problem rather than having Audi'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 -- or in accordance with the order of the Board establishing the discovery schedule.

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

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

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

7 And so now, it's getting deeper and deeper insofar as the issues that are involved.

8 And, Mr. Sieving, they're all pointing against your client. (RT Vol. IV, page 10, lines 16-
9 25; page 11, lines 1-8)

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

13 94. The hearing concluded with the ALJ advising counsel for the parties that he had gone
14 through the documents that had been produced by Nader and that he intended to recommend that the
15 Board grant the Motion to Dismiss.

16 ANALYSIS

17 The Delay Alone

18 95. The sole issue when the Motion to Dismiss was first being heard on August 30, 2007, was
19 whether the Protest should be dismissed due to the failure of Nader to produce any documents on August
20 9 (when the production was due), and the continuing failure to produce anything, not only as of the date
21 of filing of the motion on August 23, but not producing or even committing to produce anything as of the
22 first day of the hearing on the Motion to Dismiss, which was August 30, 2007.

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

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

28 98. At the time of the commencement of the hearing on August 30, an additional week had

1 expired with no production or attempted production of any kind by Nader. This meant there had been a
2 total time of almost 12 weeks (one day short) from the time of the Requests for Production (June 8) and
3 the date the hearing on the Motion to Dismiss was first held (August 30). As of the date of the hearing on
4 the Motion to Dismiss, which was three weeks beyond the date production was due, Nader had not
5 produced one piece of paper nor made any commitment as to when production would occur.

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

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

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

23 102. Audi did receive some documents on the morning of September 5, the second day of the
24 hearing on the motion. However the production consisted of a stack of documents about an inch and a
25 half high. Counsel for Nader asserted that the production made on that morning constituted full

26 ///

27 ///

28 ///

1 compliance with Nader's production obligations.²³

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

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

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

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

12 Interpretation of the Statute to Avoid Forfeiture

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

18 106. There is no language that there be "a ... **substantial** failure to comply" or that the "failure
19 to comply" be "**material**". The statute omits the words "substantial" or "material" as modifiers of the
20 "failure to comply" and uses "substantial" only in relation to evaluating whether there is "substantial
21 justification for that failure". Therefore, by its express language the statute seems to allow for dismissal if
22 there is any "failure to comply". Arguments could be made that the word "substantial" or "material"
23 cannot be added to the statute to convert "failure to comply" to a "substantial failure to comply" or a
24 "material failure to comply". Certainly the Legislature knew of the existence of the word "substantial" as

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

1 it was used in connection with those words which would negate the effect of or excuse a "failure to
2 comply", that is whether there was "substantial justification for that failure."

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

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

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

22 110. Whether such a liberal interpretation or construction of the statute is proper or not is moot
23 because the analysis below concludes that the extent of Protestant's "failure to comply" was in fact

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

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

1 “substantial” and “material” and if these higher standards are met, then certainly the standard established
2 by the literal reading of the statute (“failure to comply”) would also be met.

3 111. As will be explained below, under the facts of this case, the effect upon Audi of Nader’s
4 failure to comply for a four week period is more than de minimis and is “substantial” and “material”.
5 Therefore, whether the statute is strictly construed as requiring only any “failure to comply” or is
6 construed to require that the “failure to comply” be “substantial” or “material”, the result is the same here.
7 The delay alone was a “failure to comply” and the delay under the circumstances here was “*substantial*
8 *and material* failure to comply.” Likewise, the production, when it was made, was so deficient that this
9 too constituted a substantial and material failure to comply with Nader’s discovery obligations. In
10 addition, as will be discussed below, there was no showing that there was “substantial justification for that
11 failure” to comply.

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

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

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

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

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

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

27 117. Protestant in its “Opposition to Respondent’s Motion To Dismiss” filed on August 27,
28 in one place stated “Protestants will be producing documents by the end of this week.” (Opposition,

1 page 1, lines 20-21) In another portion of Protestant's same pleading, counsel stated that, "While this task
2 is burdensome, it is expected to be completed by the end of this week - Friday August 31, 2007."
3 (Emphasis added) (Opposition, page 1, lines 26-27) In oral argument on Thursday, August 30, 2007,
4 counsel for Nader made the far-from-reassuring statement that, "We expect to get those to Audi as soon as
5 we can." (RT Vol. I, page 9, lines 5-6)

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

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

10 2. I have a limited staff of administrative assistants who are assisting me in
11 preparing documents responsive to the 322 demands served on me by Respondent and
12 [Audi of America].

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

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

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

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

26 122. In fact, no production of any documents occurred until the morning of Wednesday,
27 September 5, 2007, which was the day the hearing on the Motion to Dismiss was to resume. By this time,
28 production was four weeks past the date it had been due and five days after the date that production had

1 been "hoped" for or "expected" by Nader's attorneys.

2 123. Hearings before the Board are calendared on a relatively accelerated basis. Because of
3 this, counsel for the parties are given great leeway in being permitted to choose dates for discovery that
4 best suit their schedules so that the essential discovery can be completed in a timely manner. In this case,
5 the dates chosen by counsel and ordered by the Board included, in part, the following (see also Paragraph
6 12):

- 7 ▪ June 8 – File and serve Identification and Requests for Production of Documents.
- 8 ▪ June 22 – File and serve Objections to Requests for Production of Documents.
- 9 ▪ June 29 – Counsel to meet and confer to resolve their objections.
- 10 ▪ July 6 – Counsel to submit a Statement of Disputed Discovery Requests.
- 11 ▪ July 12 – Tentative date for a hearing before an ALJ to rule on the Objections to Requests
12 for Production of Documents. (This hearing was not conducted as counsel advised the
13 Board that they had resolved any differences they had and there were no disputes as to
14 what documents were to be produced.)
- 15 ▪ August 9 – Produce documents. (The documents were not produced until September 5.)
- 16 ▪ August 9 – File and serve preliminary lists of witnesses.
- 17 ▪ September 14 – File and serve final witness lists. (Audi would have had only ten days
18 from the time the documents were in fact received to do this. As explained below, even if
19 the production had been complete, this would not have been sufficient time.)
- 20 ▪ September 14 – Exchange witness reports and supporting documents.
- 21 ▪ October 5 – Exchange supplemental reports of expert witnesses and supporting documents.
- 22 ▪ October 19 – Last date for taking depositions. Depositions required a minimum
23 notice of 72 hours for those that could be taken "on notice". (This meant that the parties
24 would have only until October 16, to give notice of the taking of the last deposition.
25 However, parties to protest proceedings will commence taking depositions long before the
26 cut-off date and certainly before the time to exchange "final witness lists".)
- 27 ▪ November 7 – Tentative date for commencement of the hearing of the protest.

28 124. As can be seen from the above dates, had Audi received the documents on the due date of

1 August 9, Audi would have had five weeks (to September 14) to file and serve its "final witness lists".
2 This five week period would have been used to review the documents and prepare for and take the
3 depositions of those determined from the documents to be potential witnesses to be called at the hearing.
4 However, not receiving the documents until September 5 reduced the time available to only nine days
5 before Audi had to provide its final witness list. This meant that Audi would have to review all of the
6 documents produced, possibly in consultation with their experts, executives, or other employees of their
7 client (who may or not be available on short notice or perhaps not even in California), decide who should
8 be deposed based upon the documents received, and use the documents to prepare for the depositions.
9 After the depositions were taken, Audi would then decide if the persons deposed (or some other person)
10 would or would not be placed on the final witness list that had to be exchanged on September 14.

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

16 126. Even in the unlikely event that Audi was able to review all the documents that should have
17 been produced on the day of receipt (Thursday, September 5), and if Audi gave notice of the depositions
18 on that very day, the depositions could not begin until September 8 or September 9, (a Saturday and
19 Sunday), at the soonest. In reality, Audi would have only five business days (from Monday, September
20 10 to Friday, September 14) to accomplish all of what had to be done.

21 127. For example, assume that Audi reviewed the documents on the day of receipt (September
22 5) and on that same day utilized them to identify "Employee X" of Nader, or utilized them to prepare for
23 taking the deposition of "Employee Y". Audi would be required to give 72 hours notice of the taking of
24 the depositions of "X" and "Y" (or anyone else). If Audi gave notice on Thursday, September 5, the very
25 day the documents were received, that it desired to take the depositions of X and Y, the earliest the
26 depositions could be taken would be three days later, which would be Saturday, September 8 (effectively
27 meaning Monday, September 10). That would then leave only four days to have the depositions
28 transcribed and reviewed by Audi's experts (or anyone else) before the time the final witness lists were

1 due on Friday, September 14.

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

7 129. In addition to the increased burden imposed upon Audi due to the lack of time to prepare,
8 Audi would also likely have its expenses increased as well. Not only would Audi's personnel, attorneys
9 and experts be working within a compressed time period, but even the deposition transcript costs would
10 be significantly increased depending upon how short of a "turn-around time" was needed for them to be
11 received and reviewed prior to the final witness list date of September 14.

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

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

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

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

23 D. If the schedule is adjusted out of a concern for giving Audi more time to prepare for the
24 hearing, Nader, by its own improper conduct, will have been given the unilateral power to extend the

25 _____
26 ²⁶ CCP section 2023.010 provides in part: "Misuses of the discovery process include, but are not limed 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 legislatively created "stay" imposed by Section 3060; and,

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

5 131. These include representations as to when the documents would be produced, what had
6 been occurring in regard to the production, what efforts were continuing to occur, what additional efforts
7 would be undertaken to ensure their production, and the failure to participate in a meet and confer that
8 was so strongly urged and which was one of the reasons for granting a continuance.

9 132. Although Board decisions can not generally be relied upon as precedents, how the Board
10 responds to a fact situation is closely watched by the industry. Neither side should be permitted to engage
11 in conduct (or fail to act) if such conduct or lack thereof would be inconsistent with the purposes of the
12 legislative scheme which include protecting a franchisee from conduct of the franchisor which may not
13 have good cause, taking into account the interests of the consuming public, and providing a forum for the
14 expeditious resolution of the disputes that are subject to the Board's jurisdiction. Under the
15 circumstances that exist here, it is the franchisee's own inaction that is under scrutiny as a franchisee
16 should not, by its own dilatory conduct, be allowed to "extend the statutory stay" provided by Section
17 3060.²⁷

18 133. The burden of proving good cause for the intended termination is placed on Audi by the
19 language in the Vehicle Code. There is no question that the delay alone in producing the documents
20 would adversely affect the ability of Audi to meet its burden and there is no doubt that the effect of the
21 delay alone on Audi was "substantial" or "material". (See footnote 27 as it relates to "a resulting hardship
22 upon the other party.") Audi would not only have significantly less time to do what had to be done to
23 prepare for the hearing on the Protest, but many people would be required to adjust their schedules to
24

25 _____
26 ²⁷ It is true that this is a termination protest and that in establishment and relocation protests there are third parties whose
27 interests would also be greatly affected by any "de facto" continuance resulting from the failure of a protestant to comply with
28 discovery requests. However, the legislative intent and the Board's policies are applicable to all protests before the Board and
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 conform to the "new" time limits which had been unilaterally imposed by the deliberate failure of Nader
2 to comply with its discovery obligations.

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

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

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

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

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

23 138. It appears that, but for the Motion to Dismiss, Protestant may never have produced any
24 documents and was quite willing to maintain the status quo. Even when confronted with the Motion to
25 Dismiss, to use an old expression, it was "like pulling teeth" to get anything from Nader. It was difficult
26 not only to get the documents, but it was difficult to get even a commitment as to when the documents
27 would be produced. There was no partial production or even an offer or commitment for providing partial
28 production. Had Nader done anything in compiling documents in response to the Request for Production,

1 surely there would have been some documents available that could have been produced in an effort to
2 show a good faith attempt to comply with the discovery obligations.

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

15 140. The only excuse initially proffered by counsel for Nader for the non-production was that
16 the requests themselves were voluminous and that Nader has "a small staff". (Opposition, page 1, line 25)
17 Other reasons that were asserted were:

- 18 ■ The records were in two locations, Eureka where the dealership is located and Martinez where it
19 had other offices. (RT Vol. II, page 4, lines 5-11; page 7, lines 7-15);
- 20 ■ A week or so before the hearing on the Motion to Dismiss, Mr. Eghtesad told his attorney that Mr.
21 Eghtesad "...was under the impression that this material had been sent out by his people." (RT
22 Vol. I, page 12, lines 22-25) (Mr. Eghtesad's declaration made no reference to this. His
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 Audi agreed that, in return for the agreement of counsel to have all the depositions taken in their offices in Los Angeles, it
28 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 declaration merely stated that he had a "...limited staff of administrative assistants who are
2 assisting me in preparing documents..." (Mr. Eghtesad's Declaration, page 1, line 23);

3 ■ Counsel for Nader stated, "But it has been a big process for my clients to **put together the vast**
4 **number of documents** that are responsive to the requests that that have been propounded."
5 (Emphasis added.) (RT, Vol. I, page 9, lines 23- 25; page 10, line 1) (As stated herein, the "vast
6 number of documents" that were eventually produced for Audi was a stack of documents
7 approximately 1 ½ inches high);

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

13 ■ "...They're too voluminous is why they weren't produced on time" (RT Vol. I, page 14, lines 17-
14 19);

15 ■ "...my clients are still apparently assembling the documents you need." (RT Vol. I, page 15, lines
16 17-18);

17 ■ "... it wasn't so much the volume of the actual production, it was the volume of the requests..."
18 (RT Vol. II, page 9, lines 10-12)

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

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

25 143. In response to Nader's request for more specific information as to the alleged deficiencies
26 in the production, Audi sent to Mr. Sieving, a copy of Audi's Request for Production of Documents, with
27 specific comments stating the inadequacy of what was produced in connection with each of the individual
28 163 requests that had been made. The comments by Audi were interlineated between each request and

1 this document will be referred to as Audi's "Comments as to Insufficiencies".

2 144. The letter accompanying the "Comments as to Insufficiencies" described the total
3 production by Nader as consisting of two identical sets of 283 pages and stated in part:

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

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

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

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

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

ATTORNEYS' FEES

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

32 A. Gave notice to the parties that the ALJ intended to recommend that the protest be
33 dismissed;

34 B. Gave notice to the parties that the ALJ intended to recommend that attorney fees and costs
35 be awarded to Audi; and,

1 C. Established a briefing schedule and a hearing date for determining the amount of attorneys'
2 fees and costs to which Audi may be entitled.

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

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

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

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

16 **DETERMINATIONS**

17 151. It is determined that:

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

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

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

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

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

1 F. There was no substantial justification for the insufficient and inadequate production by
2 Nader;

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

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

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

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

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

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

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24 _____
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 Audi's counsel on September 7. Audi's Motion to Dismiss, filed on August 23, could not have included this as an issue.
28 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 Audi and the Board.

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RECOMMENDATION

It is recommended that the Executive Director seek direction from the Board that the Protest of *Nader Automotive Group, LLC and Nader Eghtesad, Protestant, v. Audi of America, Inc.*, Respondent, Protest No. PR-2046-07, be dismissed with prejudice.

PROPOSED ORDER

“Respondent Audi of America, Inc.’s Motion to Dismiss Pursuant to California Vehicle Code §3050.2(b)” is hereby granted.

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

DATED: November 8, 2007

By: 

ANTHONY M. SKROCKI
Administrative Law Judge

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

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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 EGHTEHAD,

14 Protestant,

15 v.

16 AUDI OF AMERICA, INC.

17 Respondent.

Protest No. PR-2046-07

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

18 To: Michael M. Sieving, Esq.
Manish Parikh, Esq.
19 Christopher J. Wrabel, Esq.
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21 Sacramento, California 95825

22 Neil C. Erickson, Esq.
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24 JEFFER, MANGELS, BUTLER & MARMARO LLP
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25 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 William G. Brennan
13 WILLIAM G. BRENNAN
14 Executive Director

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