

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

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of
NICK ALEXANDER IMPORTS, a California
corporation, d/b/a NICK ALEXANDER
IMPORTS,

Protestant,

v.

BMW OF NORTH AMERICA, LLC,

Respondent.

Protest No. PR-2049-07 (3062R Cars)
Protest No. PR-2062-07 (3062R Trucks)

DECISION

At its regularly scheduled meeting of June 26, 2008, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Recommendation for Payment by Protestant Nick Alexander Imports, Inc. of Attorney's Fees and Costs of Respondent BMW of North America, LLC" in the above-entitled matter. After such consideration, the Board adopted the Recommendation in this matter. Protestant is ordered to pay Respondent's attorneys' fees and costs in the sum of \$12,159.14.

This Order shall become effective forthwith.

IT IS SO ORDERED THIS 26th DAY OF JUNE 2008


ROBERT T. (TOM) FLESH
Vice President
New Motor Vehicle Board

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2 Sacramento, California 95811
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
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12 NICK ALEXANDER IMPORTS, a California
13 corporation, d/b/a NICK ALEXANDER
IMPORTS,
14 Protestant,
15 v.
16 BMW OF NORTH AMERICA, LLC,
17 Respondent.

Protest No. PR-2049-07 (3062R Cars)
Protest No. PR-2062-07 (3062R Trucks)

**RECOMMENDATION FOR
PAYMENT BY PROTESTANT NICK
ALEXANDER IMPORTS, INC. OF
ATTORNEY'S FEES AND COSTS OF
RESPONDENT BMW OF NORTH
AMERICA, LLC**

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HISTORICAL SUMMARY OF THE PROTESTS

1
2 1. Nick Alexander Imports, Inc., a California corporation, d/b/a Nick Alexander Imports
3 (“Nick Alexander Imports”) is one of five franchisees of BMW of North America, LLC (“BMWNA”) that
4 received notices of the intention of BMWNA to approve the plans of Beverly Hills BMW to: (A) Relocate
5 most of its passenger car and light truck operations from its address on Wilshire Boulevard in Beverly
6 Hills to another address on Wilshire Boulevard in Los Angeles; and (B) Concurrently with this, to open a
7 satellite sales facility for both BMW passenger cars and light trucks at an address also on Wilshire
8 Boulevard, across the street from its current location in Beverly Hills.¹

9 2. Because BMWNA utilizes separate franchises for its passenger cars and light trucks,
10 BMWNA eventually sent out 18 notices to the five dealers and the five dealers filed a total of 18 protests.
11 Four of the dealers were within the relevant market area of the proposed Los Angeles location as well as
12 within the relevant market area of the proposed Beverly Hills location. These four dealers filed four
13 protests each which made up 16 of the 18 protests filed. For each of these four dealers, two of their four
14 protests challenged the intended action in regard to the proposed Los Angeles location (one for passenger
15 cars and one for light trucks) and their other two protests challenged the intended action in regard to the
16 proposed Beverly Hills location (also one for passenger cars and one for light trucks). However, Nick
17 Alexander Imports is within the relevant market area only of the proposed Los Angeles location and
18 therefore it could file only two protests. These two protests challenged the intended action with regard to
19 the passenger car franchise and the light truck franchise at the proposed Los Angeles location.

20 3. Each of the protesting dealers was represented by different counsel with the exception of
21 Nick Alexander Imports and Center Automotive Inc., dba Center BMW (“Center BMW”) which were
22 both represented by the law firm of Bishton•Gubernick. There were a total of 10 attorneys from six law
23 firms involved.

24 _____
25 ¹ The proposed new primary location for most of the passenger cars and light trucks was to be at 5151 Wilshire Boulevard and
26 5070 Wilshire Boulevard, Los Angeles, and the proposed new satellite location for both passenger cars and light trucks was to
27 be at 8844 Wilshire Boulevard, Beverly Hills (across the street from the current location which is at 8825 Wilshire Boulevard,
28 and 8833 Wilshire Boulevard, Beverly Hills). Because all locations are on Wilshire Boulevard, for purposes of simplicity, the
proposed new primary location will be referred to as “the proposed Los Angeles location” and the proposed new satellite sales
location will be referred to as “the proposed Beverly Hills location”.

1 4. Upon request by all counsel, all 18 of the protests were consolidated for purposes of
2 discovery and hearing.

3 5. Due to the number of protests, the number of law firms involved, and the resulting
4 complexity of calendaring the required discovery, it was more important than usual for the parties to
5 adhere to the common discovery schedule that was established.

6 6. Because Nick Alexander Imports and two of the other dealerships had failed to produce the
7 documents during discovery (as agreed to by their counsel and as ordered by the Board), BMWNA filed
8 motions² seeking dismissal of these protests or alternatively other sanctions. The Motion seeking
9 sanctions against Nick Alexander Imports was initially filed on November 19, 2007. The history of that
10 and other motions pertaining to Nick Alexander Imports will be discussed below. After submission of
11 briefs by Nick Alexander Imports and a hearing on the motion, Administrative Law Judge Anthony M.
12 Skrocki ("ALJ Skrocki"), on January 2, 2008, issued a Notice of Intended Rulings informing the parties
13 that he would not recommend dismissal of the protests but, in lieu of dismissal, he intended to recommend
14 that attorney's fees and costs be awarded to BMWNA. The Notice also directed BMWNA to submit
15 specific documents verifying the amounts of attorney's fees and costs that had already been incurred by
16 BMWNA and the additional incremental amounts of attorney's fees and costs that BMWNA stated would
17 be incurred in the future. The amounts claimed could not be determined until there was complete
18 production of documents by Nick Alexander Imports and until the depositions of Nick Alexander
19 Imports' witnesses were completed.

20 7. On January 28, 2008, BMWNA submitted verification of its claims for attorney's fees and
21 costs and also filed an additional motion in which BMWNA claimed that full production still had not been
22 made by Nick Alexander Imports. In this motion, BMWNA sought an order that would preclude Nick
23 Alexander Imports from introducing evidence relating to the subject of the unproduced documents at the
24 hearing on the merits of the protests. BMWNA also stated that additional claims of increased attorney's
25 fees and costs would be forthcoming from BMWNA at some time in the future.

26
27 ² The first filing by BMWNA on November 19, 2007 cited an incorrect code section. Upon being advised of this by the
28 Board's staff, BMWNA, on November 20, 2007, corrected the error and filed an "Amended Notice of Motion and Motion to Dismiss..." As there is no substantive difference between these two motions, the original Motion and the Amended Motion will not be distinguished and may be referred to as "The Motion to Dismiss".

1 8. As it turned out, eventually all 18 of the protests were dismissed without the need for the
2 consolidated evidentiary hearing which had ultimately been scheduled to commence on April 14, 2008.
3 Of the 18 protests, all but the two protests of Nick Alexander Imports were resolved by settlement
4 agreements between the Protestants and BMWNA. (Some of these dismissed protests also involved
5 claims of sanctions sought by BMWNA against the other Protestants for the failure to comply with
6 discovery obligations, however, the settlement of these protests also included settlement of the claims of
7 BMWNA for sanctions.)

8 9. The two protests of Nick Alexander Imports were the last of the 18 protests to be
9 dismissed but, unlike the other protests, there was no settlement agreement between Nick Alexander
10 Imports and BMWNA. On March 19, 2008, less than a month before the hearing was to commence, Nick
11 Alexander Imports filed a request for dismissal of its protests. No reason was given for the request. Just
12 as there was no settlement agreement between Nick Alexander Imports and BMWNA as to the protests
13 filed by Nick Alexander Imports, likewise there was no settlement as to BMWNA's claims for the
14 sanctions of payment of attorney's fees and costs sought by BMWNA against Nick Alexander Imports.³

15 10. After the Request for Dismissal was filed on March 19, 2008, BMWNA, on March 21,
16 2008, filed its "Objection to Unconditional Dismissal and Motion for Board to Dismiss Proceeding on
17 Merits but to Retain Jurisdiction to Resolve Sanctions." In this motion, BMWNA stated that it concurred
18 in the request of Nick Alexander Imports that its two protests be dismissed with prejudice but BMWNA
19 requested that the dismissal be "subject ... to the condition that the Board retains jurisdiction for the sole
20 and limited purpose of issuing an order regarding BMWNA's pending motion for recovery of
21 sanctions..." (Respondent's Proposed Order, page 2, lines 3-5)

22 11. On March 24, 2008, ALJ Skrocki conducted a telephonic conference with counsel for the
23

24
25 ³ The sanctions that had been sought by BMWNA against Nick Alexander Imports during the course of this discovery dispute
26 included: (a) Dismissal of the protests; (b) Denying Nick Alexander Imports the right to introduce evidence during the hearing
27 of the protests on those issues as to which Nick Alexander had failed to produce certain documents; and (c) Attorney's fees and
28 costs incurred by BMWNA. As will be explained below, the ALJ: (a) Declined to recommend dismissal of the protests; and,
(b) Deferred the ruling on the issue of evidence preclusion to the ALJ who would be hearing the protests on their merits. As
the protests have now been dismissed at the request of Nick Alexander Imports, the propriety of the ALJ's actions as to the
requests for the sanctions of dismissal of the protests, or precluding evidence from being offered at the hearing on the protests,
have become moot. The only issues remaining now involve (c), which are whether BMWNA should recover its attorney's fees
and costs, and, if so, in what amount.

1 parties to discuss this Motion filed by BMWNA. Counsel for Nick Alexander Imports stated that he took
2 no position on the issue raised by the motion of BMWNA for the Board to retain jurisdiction to order
3 sanctions after the dismissal of the protests. Counsel for Nick Alexander Imports also stated that he did
4 not desire to file any opposition pleadings and did not want a hearing for oral arguments on the motion of
5 BMWNA. Counsel for BMWNA stated that it too waived oral arguments and would submit the motion
6 on the pleadings filed by it. The ALJ requested counsel for both parties to submit written confirmations of
7 the above and on March 27, 2008 the Board received an e-mail from each attorney confirming their oral
8 statements that neither further briefing nor a hearing on the motion was desired.

9 12. Both protests of Nick Alexander Imports were dismissed on April 1, 2008, by an order of
10 the Board's Executive Director. The Order of Dismissal expressly stated that the Board was retaining
11 jurisdiction over the issue of sanctions of the payment of attorney's fees and costs sought to be imposed
12 against Nick Alexander Imports.

13 13. The discovery dispute between the parties has been ongoing (up through the time that Nick
14 Alexander Imports filed its Request for Dismissal of the Protests on March 19, 2008). As stated above,
15 the first motion for sanctions was filed by BMWNA on November 19, 2007 and as late as January 25,
16 2008, BMWNA stated in its supplemental pleadings that it intended to submit further claims for
17 additional attorney's fees and costs it claimed would be incurred in connection with stopping and having
18 to resume the depositions of Nick Alexander Imports' witnesses at some uncertain future dates. The need
19 to interrupt depositions was due to the failure of Nick Alexander Imports to have produced the documents
20 even as of the date of the depositions.⁴ (BMWNA Motion for Recovery of Attorneys' Fees and Costs
21 from Nick Alexander Imports and for Discovery Sanctions, page 10, lines 2-4; page 12, lines 7-11)

22 14. As of now, no such additional claims have been submitted by BMWNA and, as there will
23 no longer be any discovery between the parties due to the dismissal of the protests on April 1, 2008, it is
24 assumed that no such additional claims will be made.

25 ///

26 _____
27 ⁴ As explained below, the interruption and resumption of the depositions by BMWNA was expressly authorized by a prior
28 ruling of ALJ Skrocki if the need to do so was caused by the failure of Nick Alexander Imports to have produced the required
documents and was subject to the right of Nick Alexander Imports to object to the need to do so.

1 16. On May 4, 2007, Nick Alexander Imports filed a timely protest asserting that BMWNA
2 did not have good cause for the above proposed actions. As only one notice was initially given by
3 BMWNA (covering both passenger cars and light trucks for both locations), Nick Alexander Imports
4 initially filed only one protest. This protest was assigned Protest No. PR-2049-07.

5 **The Second Set of Notices from BMWNA – dated May 14, 2007**

6 17. This second set of notices was issued to comply with the Board's policy that requires
7 separate notices not only to each dealer but also for each franchise held by that dealer. In this case a
8 separate notice to each dealer for passenger cars and another for light trucks was required for each
9 location.

10 18. By letter dated May 14, 2007, BMWNA gave notice to Nick Alexander Imports of the
11 intent to relocate almost all of Beverly Hills BMW's *passenger car operations* from 8825 Wilshire
12 Boulevard and 8833 Wilshire Boulevard, Beverly Hills, CA 90211 to 5151 Wilshire Boulevard and 5070
13 Wilshire Boulevard, Los Angeles, CA 90036.⁹

14 _____
15 ⁹ Eight months after these amended notices, BMWNA, by letters dated January 25, 2008, again amended the notices as to the
16 intended action. In this third notice, BMWNA advised Nick Alexander Imports that BMWNA was modifying its May 14,
17 2007, notices by moving all of the operations of Beverly Hills BMW to the Los Angeles location with no part of the operations
18 moving to the previously proposed new "across the street" location in Beverly Hills. This meant that there would be no
satellite sales facility located at the Beverly Hills location as stated in the first two sets of notices. The January 25, 2008 letters
provided in part as follows:

19 Under the revised plan, BMWNA intends to approve the request of FAA Beverly Hills, Inc. dba Beverly Hills
20 BMW to relocate all of its BMW [*passenger car* and *light truck*] operations from 8825 Wilshire Boulevard
and 8833 Wilshire Boulevard, Beverly Hills, CA 90211 to 5070 (including 5050) Wilshire Boulevard and
5151 Wilshire Boulevard, Los Angeles, CA 90036. (Emphasis added.)

21 The January 25, 2008 notices deleted the proposed Beverly Hills satellite location. On February 11, 2008, Nick Alexander
22 Imports filed a motion to set aside the prior notices (given about 8 months earlier) from BMWNA pertaining to both the Los
23 Angeles location and the Beverly Hills location (a location which Nick Alexander Imports could not protest). As discussed
24 above, the two protests filed by Nick Alexander Imports challenged only the car and light truck operations intended for the
25 Los Angeles location as Nick Alexander Imports could not challenge the proposal for the Beverly Hills location whether the
26 move to that address was considered a "relocation" or an "establishment". After allowing time for the parties to brief the
27 issues, and after hearing oral arguments on the motion, the motion to set aside the prior notices was denied by ALJ Skrocki in
28 an Order dated February 21, 2008. Setting aside the prior notices would have required re-instituting the procedures before
the Board some eight months after the protests had been filed. There was no change as to the approval of BMWNA to allow
Beverly Hills BMW to operate at the Los Angeles location which is the subject of the two protests that had already been filed
by Nick Alexander Imports. The motion to set aside the prior notices appeared to be an attempt to delay the proceedings.
Nick Alexander Imports had originally been notified of the intent of BMWNA as to the Los Angeles location and nothing
would be gained by having the prior notices set aside and a new protest filed which would be challenging the same Los
Angeles location. As stated, because Nick Alexander Imports was not within the relevant market area of the proposed new
Beverly Hills location, there had been no protest filed by Nick Alexander Imports as to the Beverly Hills location. The only
difference between the January 25, 2008 notices and the prior notices is that the proposed new Beverly Hills satellite location

1 19. In response to the amended notice as to the passenger cars, Nick Alexander Imports filed
2 an amended protest on June 1, 2007, that pertained to the relocation of Beverly Hills BMW passenger car
3 operations to the Los Angeles location. (Protest No. PR-2049-07).

4 20. By another letter dated May 14, 2007, BMWNA gave a separate notice to Nick Alexander
5 Imports of the intention of Beverly Hills BMW to move almost all of its BMW *light truck (SAV)*
6 *operations* from 8825 Wilshire Boulevard and 8833 Wilshire Boulevard, Beverly Hills, CA 90211 to
7 5151 Wilshire Boulevard and 5070 Wilshire Boulevard, Los Angeles, CA 90036. In response to this
8 notice, on June 1, 2007, Nick Alexander Imports filed its second protest which specifically challenged the
9 relocation of Beverly Hills BMW light truck (SAV) operations to the Los Angeles location. (Protest No.
10 PR-2062-07).

11 21. A Pre-Hearing Conference Order dated August 6, 2007, established a stipulated discovery
12 schedule and a tentative merits hearing date of March 3, 2008, for all 18 protests.

13 22. In compliance with the Board's Pre-Hearing Conference Order, Nick Alexander Imports,
14 on August 24, 2007, and BMWNA, on August 27, 2007, timely filed their requests for production of
15 documents.¹⁰ Among other things, the Pre-Hearing Conference Order gave the parties until September
16 14, 2007, to file objections to the other's request for production and directed the parties to produce and
17 exchange their documents no later than October 17, 2007.

18 23. On September 14, 2007, the Pre-Hearing Conference Order was amended by stipulation of
19 all parties and order of the Board (First Amended Pre-Hearing Conference Order) to allow for the
20 transmission of objections via e-mail on September 17, 2007, instead of September 14, 2007. The
21 Objections of both Nick Alexander Imports and of BMWNA were received by the Board on September
22 18, 2007.

23 24. On September 25, 2007, again at the parties' joint request, a Second Amended Pre-Hearing
24

25 had been removed from the marketing plans so there would be no BMWNA representation at the proposed Beverly Hills
26 address, which is a location that Nick Alexander has no right to protest. If the market plan comes to fruition, the only change
27 from the current representation of BMWNA would be that Beverly Hills BMW would be operating only at the Los Angeles
28 location which was already the subject of the two protests filed by Nick Alexander Imports in June 2007.

¹⁰ Although the Board order permitted communications to be sent via e-mail with originals to follow via regular mail, a document is not actually filed by the Board until the original with attached proof of service is received.

1 Conference Order was issued. This Order amended the remaining discovery schedule and directed that
2 document production for all 18 of the protests was to occur simultaneously on November 2, 2007, rather
3 than on October 17, 2007, as originally agreed upon and ordered.

4 25. As established by the Board's Pre-Hearing Conference Order, a telephonic hearing for all
5 18 of the protests with the six law firms involved was held on October 9, 2007, before ALJ Skrocki to
6 rule on the outstanding objections to requested discovery. The date for production of the documents
7 remained unchanged as November 2, 2007.

8 26. On November 19, 2007,¹¹ as a result of the stipulation by all counsel, the Board issued a
9 Third Amended Pre-Hearing Conference Order that amended the dates pertaining to final witness lists,
10 expert witness reports and supplemental reports, the telephonic hearing readiness conference, the taking
11 of expert witness depositions, the deposition cut-off date, and a tentative merits hearing commencing on
12 April 14, 2008 (rather than March 3, 2008).¹² The date of November 2, 2007, for production of
13 documents had already passed and remained unchanged.

14 **THE FAILURE OF NICK ALEXANDER IMPORTS TO PRODUCE ANY DOCUMENTS**

15 27. November 2, 2007, was the document production date for all 18 of the protests. As stated
16 in Paragraph 24, the original date for production had been changed from October 17 to November 2 as a
17

18 ¹¹ At this time, all 18 of the protests were still pending. Counsel for the parties had earlier contacted the Board and all had
19 orally agreed to the amendments as indicated. By the time the Board received all of the signed writings needed, the date for
20 production of documents (November 2, 2007) had already passed without any party expressing a request to extend the time for
21 production.

22 ¹² The two most important factors taken into account in setting or amending a discovery schedule are: (1) The need for
23 expeditious resolution of the protests; and, (2) Providing the parties reasonable opportunity to obtain the facts needed to
24 prepare for the evidentiary hearing. This latter factor is especially important to the party that has the burden of proof which in
25 this case is Nick Alexander Imports. But regardless of which side has the burden of proof, it is generally the franchisee that
26 desires a more leisurely and extended discovery schedule with a hearing date as far into the future as possible (perhaps
27 motivated by the desire to maintain the status quo), and it is the franchisor that desires an early hearing date with a concomitant
28 very short discovery period. Of course, operating in the franchisor's favor is the fact that in most cases the franchisor would
have had ample time to evaluate and study the intended conduct prior to sending the notices whereas the franchisee generally
would not have had such an opportunity. Because the factors mentioned above and the parties' interests in choosing a hearing
date may be at odds with each other, the Board's policy is to attempt to accommodate the agreements of the parties' attorneys
as to the dates preferred by them for scheduling discovery within the relatively short time period available. So long as the
matter is proceeding towards a hearing and the agreements of counsel are reasonable, the Board's orders for the needed
discovery will generally closely reflect or even mirror the dates chosen by the attorneys. Because the time available for
discovery is shorter than in civil actions, there is a need for the parties to adhere to the dates established by the order. Failure
to do so can result, as happened here, in disrupting the tightly choreographed schedule needed to complete the discovery as
efficiently and fairly as possible. There is generally no hardship upon the parties in complying with the ordered discovery
schedule as the dates are commonly those originally chosen by counsel in the give and take of a scheduled pre-hearing
conference and are not dates that are thrust upon them against their objection or without their participation.

1 result of the joint agreement of all counsel and formalized by the Board's Second Amended Pre-Hearing
2 Conference Order issued on September 25, 2007. This change in date provided more than an additional
3 two weeks beyond that which had initially been agreed upon and ordered. The Board received via e-mail
4 BMWNA's Requests for Production of Documents on August 22, 2007. Assuming that Nick Alexander
5 Imports also received them on that date would mean that Nick Alexander Imports had over 10 weeks to
6 produce the requested documents in a timely manner.

7 28. Nick Alexander Imports did not produce any documents by November 2, 2007, as required
8 by the Board's order.

9 29. On November 1, 2007, the day before production of the documents was due and with no
10 prior indication of a problem, Mr. Gubernick, counsel for Nick Alexander Imports, contacted counsel for
11 BMWNA and requested a 1 or 2 day extension of time to produce the documents.¹³ BMWNA's counsel
12 agreed to the additional time provided that BMWNA would not be required to produce its documents
13 until production was being made by Nick Alexander Imports.

14 30. On November 7, 2007, as no production had yet occurred, BMWNA inquired of Nick
15 Alexander Imports as to whether production was going to be made that day and if not when production
16 would be made.

17 31. On November 15, 2007, when no production had been made, BMWNA sent a letter to the
18 Board with a copy to Nick Alexander Imports reciting the unsuccessful attempts to obtain the documents
19 from Nick Alexander Imports and asking the Board to order Nick Alexander Imports to produce the
20 documents immediately. BMWNA also sought "any other remedy" the Board saw fit to impose or allow.
21 (The Board's staff advised BMWNA that the Board had already issued an order under which Nick
22 Alexander Imports was required to produce the documents as of November 2 and that if BMWNA chose
23 to seek "any other remedy" as stated in its letter, the proper procedure would be to file a motion which
24 would give the other side an opportunity to respond.)

25 32. On November 19, 2007, when no documents had yet been produced and with no indication
26 as to when they would be produced, BMWNA filed a motion with the Board captioned "BMW of North
27

28 ¹³ There was no attempt on the part of Nick Alexander Imports to contact the Board to request an extension of the time for production of the documents.

1 America, LLC's Notice of Motion and Motion to Dismiss Protests of Nick Alexander Imports and Center
2 Automotive, Inc.”¹⁴

3 33. Upon receipt of the Motion, the Board's staff scheduled a conference call to establish a
4 briefing schedule and date for hearing of the Motion.

5 34. In accordance with the briefing schedule agreed to by the parties, Nick Alexander Imports,
6 on December 3, 2007, filed its "Opposition to Motion to Dismiss Protests of Nick Alexander Imports and
7 Center Automotive, Inc." Also filed were declarations from Jeffrey S. Gubernick and Elizabeth
8 Alexander of Nick Alexander Imports.

9 35. On December 5, 2007, BMWNA filed "BMW of North America, LLC's Reply in Support
10 of Motion to Dismiss Protests of Nick Alexander Imports and Center Automotive, Inc." Andrew Tran
11 also filed a declaration.

12 36. The motion to dismiss the protests was based upon the uncontested fact that Nick
13 Alexander Imports had not produced any documents in accordance with the discovery schedule that had
14 been agreed upon by the attorneys and ordered by the Executive Director.

15 37. A telephonic hearing on the above motion was held on December 7, 2007, before ALJ
16 Skrocki.

17 **The Motion of BMWNA filed on November 19, 2007**

18 38. This motion sought the sanction of dismissal of the two protests of Nick Alexander
19 Imports and also sought monetary sanctions for the claimed failure of Nick Alexander Imports to comply
20 with its discovery obligations.

21 39. The motion of BMWNA was based upon the following:

- 22 ■ Nick Alexander Imports was obligated to produce all documents no later than Friday,
23 November 2, 2007.
- 24 ■ Around November 1, 2007, counsel for Nick Alexander Imports contacted counsel for
25

26 ¹⁴ As can be seen from the title, this motion was filed against both Nick Alexander Imports and Center BMW which were
27 represented by the same law firm. No documents had been produced by either dealership and the facts as to the failure to
28 produce by both dealerships are the same. The motion for sanctions against Center BMW is not before the Board as the claims
for sanctions against Center BMW were resolved by the parties when they mutually agreed to settlement of the Center BMW
protests.

1 BMWNA to request an extension of "1 or 2 additional days" to produce the documents.
2 BMWNA agreed to the request. (Because November 1 was a Friday, a 1 or 2 day extension
3 could be deemed to be an extension to Monday, November 5 or Tuesday, November 6, 2007.)

- 4 ■ In accordance with an agreement of counsel, and in anticipation of receiving the documents
5 from Nick Alexander Imports on November 2, BMWNA previously scheduled depositions of
6 witnesses and persons at Nick Alexander Imports with the depositions to be taken during the
7 week of December 10, 2007.
- 8 ■ The documents which were originally ordered to have been produced by Nick Alexander
9 Imports no later than Friday, November 2, 2007, were not produced as required by the Board
10 order or within the additional 1 or 2 days as subsequently agreed by counsel.
- 11 ■ On November 7, 2007, counsel for BMWNA asked counsel for Nick Alexander Imports when
12 the documents would be produced. BMWNA claims it made "repeated efforts" to determine
13 when the documents would be produced but their requests were "met with repeated delays."
14 The attempts by BMWNA included the formal letter of November 15, 2007 to the Board and
15 counsel for Nick Alexander Imports and Center BMW.

16 40. As of November 19, 2007, when no documents had been produced and no definite time
17 had been given for their production, BMWNA filed its Motion to Dismiss the Protests.

18 The Opposition to the Motion to Dismiss Protests

19 41. On December 3, 2007, Nick Alexander Imports filed its Opposition to BMWNA's Motion
20 to Dismiss the Protests.

21 42. The Opposition asserted the following:

- 22 ■ Nick Alexander Imports, although agreeing that "dismissal of a Protest is authorized by
23 Section 3050.2(b), the remedy should be used with extreme caution". (Opposition, page 3,
24 lines 6-7) In lieu of the sanction of dismissal, counsel for Nick Alexander Imports argued that
25 the lesser sanctions provided for in the Code of Civil Procedure should be considered.¹⁵

27
28 ¹⁵ The case cited by Nick Alexander Imports referred to section 2034(d) of the Code of Civil Procedure ("CCP"). It is assumed
that this section has now been incorporated into CCP section 2016.010.

1 (Opposition, page 3, lines 10-13) (These sanctions include the possibility of the award of
2 attorney's fees and costs to BMWNA.)

- 3 ■ That although Nick Alexander Imports failed to comply with the document production,
4 "Protestants' Missing of a Discovery Deadline is not a 'Failure to Comply With Authorized
5 Discovery", pursuant to Vehicle Code¹⁶ section 3050.2(b). (Opposition, page 4, lines 19-21)
- 6 ■ Protestants' delay "of a few weeks" does not rise to the level of "without substantial
7 justification".¹⁷ (Opposition, page 5, lines 2-3, 22-25) The justification for the delay was
8 asserted to be that Protestants had mistakenly underestimated the task required in producing
9 the documents. (Opposition, page 5, lines 24-25) (It is noted that the declarations submitted
10 by the representatives of Nick Alexander Imports and Center BMW as to the reasons for the
11 delay were word for word identical with the exception of the names of the dealerships and both
12 stated only that they had underestimated the time required for producing the documents.)
- 13 ■ BMWNA should be estopped from seeking dismissal as BMWNA conditioned its agreement
14 to extend the time for Protestants to produce their documents upon BMWNA not producing
15 documents until receipt of Protestants' documents. (Opposition, page 6, lines 2-3)
- 16 ■ BMWNA was not prejudiced by the delay (Opposition, page 6, line 20) as the time agreed to
17 for BMWNA to depose Nick Alexander's witnesses could be re-scheduled. (Opposition, page
18 6, lines 21-26)

19 **Facts Pertaining to the Failure to Produce Documents**

20 43. Counsel for Nick Alexander had no choice but to concede that the documents were not
21 produced in a timely manner. The requests for production were served on August 20, 2007, which was
22 two and a half months before production was due on November 2, 2007. There was no production on
23 November 2, 2007 nor was there production within the next 1 or 2 days as had been promised by Nick
24 Alexander Imports.

25 44. This motion of BMWNA was filed on November 19, 2007. No production occurred until
26

27 ¹⁶ All statutory references are to the California Vehicle Code unless indicated otherwise.

28 ¹⁷ This contention is blending the two elements of the statute, which are whether there was a delay, and if so, whether there was substantial justification for the delay.

1 after the motion was filed.¹⁸ (BMWNA's reply, page 4, lines 6-7; December 4, 2007, Tran Declaration
2 page 13, lines 8-9)

3 45. Section 3050.2(b) establishes a two-prong standard for determining whether sanctions may
4 be imposed under these circumstances. The first is that there has been "a failure to comply with
5 authorized discovery" and the second is whether there was "substantial justification for that failure." As
6 there was no dispute that the documents were not produced as required by the Board's Order, or within
7 the additional time agreed to by counsel for BMWNA, the first requirement is clearly met.

8 46. Thus the only issue to be determined was whether there was "substantial justification" for
9 the failure of Nick Alexander Imports to comply with its discovery obligations. It is noted that the
10 standard established by the statute for the "justification" required, is that it be "substantial".

11 47. The primary reason asserted for the delay in production was that Protestant, as indicated in
12 Elizabeth Alexander's Declaration, had "seriously underestimated the effort that would be involved in
13 identifying all of (sic) responsive documents required to be produced." (Ms. Alexander Declaration, line
14 10-11)

15 48. As the evaluation of whether there was a showing of "substantial justification" for the
16 failure to produce the documents is the very essence of the issue before the Board, the November 28,
17 2007, Declaration of Elizabeth Alexander is provided in pertinent part as follows:

18 I, Elizabeth Alexander, declare:

19 1. I am the Center Operator for Nick Alexander Imports, a California corporation,
20 d/b/a Nick Alexander Imports ("Nick Alexander"), one of the Protestants in the captioned
21 matter.

22 2. The facts set forth herein are personally known to me, I have first-hand
23

24 ¹⁸ Partial production was made by Nick Alexander Imports on November 20, 2007. ("BMW of North America, LLC's Reply
25 in Support of Motion to Dismiss Protests of Nick Alexander...", page 4, lines 6-10) Additional but still incomplete production
26 was made on November 28 and 29, 2007. As can be seen, these dates are far beyond the additional 1 or 2 days requested by
27 Nick Alexander Imports on November 1. Even though counsel for Nick Alexander Imports had agreed and was aware that
28 depositions of the Nick Alexander Imports people were set for December 10 and 11, 2007, the production remained incomplete
as of November 29, 2007 when additional partial production was made. BMWNA later learned that even on the day the
depositions were being taken (December 10 and 11), Nick Alexander Imports still had failed to produce all the documents it
had agreed and been ordered to produce. BMWNA later alleged that even as of January 25, 2008, it still had not received all of
the documents that Nick Alexander Imports had conceded were to be produced.

1 knowledge of the same, and, if called as a witness, I could and would testify thereto.

2 3. I am responsible for coordinating the production of documents in response to
3 BMW's First Set of Requests for Production of Documents and Things to Nick Alexander.
4 While I have been diligent in this task, I seriously underestimated the effort that would be
5 involved in identifying all of [sic] responsive documents required to be produced. While
6 some of the requests are quite clear in calling for the production of financial statements
7 and correspondence, others were far more difficult to analyze. As a result, the task took
8 far more time that I had ever estimated. I have never been involved in a Protest and have
9 little experience in litigation.

10 4. Because many of the document requests required analysis and evaluation, I was
11 not able to simply delegate the collection of documents to office workers. Rather, I had to
12 work with my senior management to identify responsive documents. Unfortunately, those
13 employees had numerous other responsibilities related to operating the dealership, and
14 therefore were not able to devote the time that we soon realized [sic] necessary to meet the
15 discovery deadline. We have, however, worked diligently and in good faith to produce
16 responsive documents.

17 5. Nick Alexander's failure to produce the documents on time was the result of a
18 serious underestimation of the task rather than any attempt to avoid Nick Alexander's
19 discovery obligation.

20 ...

21 49. The statement that the Declarant "soon realized" (Paragraph 4 of the Declaration) that she
22 was not able to devote the time necessary raises the questions as to why no earlier contact was made with
23 opposing counsel about the inability to produce rather than contacting BMWNA the day before
24 production was due and why there was never any contact with the Board. In addition, there is no
25 explanation as to why there was no partial production of what had been compiled as of the due date of
26 November 2 or any production within the next 1 or 2 days thereafter as their counsel had represented that

27 ///

28 ///

1 1 or 2 days were all that were needed to complete the production.¹⁹

2 50. As of the date of the Declaration, November 28, 2007, Nick Alexander Imports still had
3 not completed production. (Although it was not known at the time of the December 7 hearing on the
4 Motion, several hundred additional pages were not produced until the taking of Ms. Alexander's
5 deposition on December 10 and 11, 2007 with even more documents produced on December 14, 2007,
6 after the taking of her deposition.) And, although the Declaration referred to difficulty in analyzing the
7 scope of the requests with no specifics, one area for which production had not been made related to the
8 permanency of investment of Nick Alexander Imports. In a subsequent pleading filed by BMWNA,
9 BMWNA stated:

10 "... at the deposition of Elizabeth Alexander, BMWNA's counsel asked whether
11 Nick Alexander had produced documentation regarding the purchase prices of the
12 dealership's real property, the terms of purchase, the current fair market value, any
13 appraisals, and any financial statements that would show that land as an asset to any
14 person. (Citation omitted.)

15 Nick Alexander and its counsel acknowledged that they had not produced such
16 documents, in particular with respect to the main dealership property at 6333 South
17 Alameda Street, but that such documents were relevant because the documents related to
18 the dealership's contention that it has a significant permanency of investment. Nick
19 Alexander agreed on the record to produce the additional permanency of investment
20 documents.

21 On January 15, 2008, Nick Alexander's counsel again confirmed to BMWNA by
22 E-mail that it would produce additional permanency of investment documents. However,
23 to date [January 25, 2008] Nick Alexander has produced no additional documents, despite
24

25 ¹⁹ As stated earlier, the Motion to Dismiss was also jointly directed at Center BMW as Center BMW was represented by the
26 same law firm. A declaration of Mr. Farguson, a representative of Center BMW, was submitted in explanation of the failure of
27 Center BMW to produce its documents. Mr. Farguson's Declaration and Ms. Alexander's Declaration were word-for-word
28 identical with the exception of the name of the dealership and the name of the Declarant. In addition to the concerns expressed
here as to whether the declarations were substantively sufficient to evidence facts sufficient to meet the standard established by
the Vehicle Code of "substantial justification" for the failure to produce the documents, the weight of each declaration was
somewhat diminished due to the remarkable verbatim recitation of identical facts and circumstances that allegedly prevented
the two declarants and their dealerships from producing the documents as required.

1 inquiries by BMWNA's counsel." (BMWNA's Motion of January 25, 2008, page 10,
2 lines 14-26 and page 11, lines 1-3, attached deposition transcript, and attached e-mails.)

3 **Conclusion as to Whether There Had Been a Failure on the Part of Nick Alexander Imports to**
4 **Comply With Its Discovery Obligations Without Substantial Justification for that Failure**

5 51. The ALJ determined that:

6 A. It was undisputed that there had been a failure on the part of Nick Alexander Imports to
7 comply with its discovery obligations; and

8 B. There was no showing of "substantial justification" for the failure to produce the
9 documents by November 2, 2007, the date ordered by the Board and agreed to by counsel. (The failure of
10 Nick Alexander Imports to produce the documents continued beyond the date of the hearing on the
11 Motion which was December 7, 2007. As stated above, some additional documents were produced on
12 December 10 and 11, 2007, when the deposition of Ms. Alexander was being taken. BMWNA, on
13 January 28, 2008, (received via e-mail on January 25, 2008) filed another motion seeking further
14 sanctions for the continuing failure even as of that date to produce the documents.)

15 **WHAT SANCTIONS SHOULD BE IMPOSED**

16 52. Although the ALJ found no merit in any of the contentions of Nick Alexander Imports as
17 to "whether sanctions should be imposed", the ALJ did agree with the contention of counsel for Nick
18 Alexander Imports that, under the circumstances here, the sanction of dismissal of the protests, as
19 requested by BMWNA, would be too harsh.²⁰ The ALJ questioned counsel for Nick Alexander Imports
20 as to alternative sanctions that may be appropriate. One suggestion of counsel was that reasonable
21 attorney's fees for having to file the motion could be awarded to BMWNA.

22 53. Because the deposition schedule for Nick Alexander Imports personnel had already been
23 established and could not be changed without major disruption, the delay in producing the documents
24 meant that BMWNA's attorneys would have less time to prepare for the taking of the Nick Alexander
25 Imports depositions. The result would be that weekend work by BMWNA's attorneys and their support
26 staff would likely be required. (RT pages 12-15; RT page 18, line 9-16)

27
28 ²⁰ Had it been known at the time of the hearing on December 7, 2007, that the failure to produce the documents would continue through the end of January 2008, it is possible that the sanction of dismissal would have been found to be appropriate.

1 54. During the hearing, counsel for Nick Alexander Imports concurred that, in regard to any
2 additional costs incurred by BMWNA caused by the delay in production, it would be fair to put BMWNA
3 in as close to the position that BMWNA would have been had the documents been produced timely,
4 provided that the amounts claimed for additional fees and costs were supported by a subsequent
5 declaration from BMWNA itemizing the costs and a subsequent hearing was held to determine their
6 reasonableness. (RT page 27, lines 14-19; RT page 28, lines 1-6)

7 **Conclusion as to Sanction to Be Recommended and Instructions to Counsel**

8 55. At the conclusion of the hearing on the motion of BMWNA, the ALJ informed counsel
9 that: (A) It was apparent and uncontested that Nick Alexander Imports had failed to comply with its
10 discovery obligations; (B) Although contested by Nick Alexander Imports, the ALJ found there was not
11 substantial justification for the failure to produce the documents; (C) Although the statute provided for
12 possible dismissal of the protests, the ALJ concurred with the position of Nick Alexander Imports that
13 dismissal would be too harsh a sanction,²¹ and (D) The more appropriate/sanction would be to allow
14 BMWNA to recover its reasonable attorney's fees and costs in bringing the motion and also to recover
15 any incremental attorney's fees and costs that BMWNA would incur due to the lack of time to prepare for
16 the already-scheduled Nick Alexander Imports' depositions.

17 56. The ALJ informed the parties that he intended to recommend that the Executive Director
18 seek approval from the Board for an order directing Nick Alexander Imports to pay reasonable attorney's
19 fees and costs to BMWNA based upon what BMWNA could justify in itemized documentation to be
20 submitted when such costs were determined by BMWNA. The attorney's fees and costs recoverable were
21 to include those incurred in connection with the motion as well as any incremental fees and costs incurred
22 by BMWNA during the future discovery process due to the delay by Nick Alexander Imports in
23 complying with its discovery obligations.²² Upon receipt of the itemization from BMWNA, there would
24 then be scheduled a time for Nick Alexander Imports to submit any opposition and a time for a hearing on

25 _____
26 ²¹ See prior footnote.

27 ²² BMWNA claimed that it would suffer not only great inconvenience but also additional costs in attempting to complete its
28 discovery and prepare for the scheduled deposition of the Nick Alexander Imports witnesses. Because the extent of these
additional future costs could not be determined as of the date of the hearing, BMWNA was instructed to provide specific
information and verification as to any such additional costs and fees.

1 the requested sums.

2 57. In addition, the ALJ, subject to specified conditions listed below, granted BMWNA the
3 right to continue the upcoming depositions of the Nick Alexander Imports witnesses or, if needed, adjourn
4 a deposition and resume it at a later date if BMWNA had not had sufficient time to prepare.

5 58. The oral rulings and instructions were incorporated into a formal "Notice of Intended
6 Rulings on BMW of North America LLC's Amended Motion to Dismiss Protests of Nick Alexander
7 Imports" and "Directions to Counsel Re: Verification; and Conditional Grant of Request to Suspend and
8 Resume Depositions".²³

9 59. The salient terms of this document are as follows:

10 ...

11 3. At the time this motion was filed, there had been a failure by Nick
12 Alexander Imports to comply with authorized discovery;

13 4. No production had been made by Nick Alexander Imports until after the
14 filing of the motion;

15 5. The failure of Nick Alexander Imports to comply with authorized
16 discovery was without substantial justification.

17 ...

18 9. At the hearing on the Motion, discussion was had as to the appropriate
19 sanction to be imposed for the failure of the two dealerships [the motion had also been
20 filed seeking dismissal of the four protests of Center BMW] to comply with their
21 discovery obligations. As an alternative to, and in lieu of the sanction of the dismissal of
22 the protests which is authorized by Vehicle Code section 3050.2(b), the discussion
23 included whether it would be appropriate to allow BMWNA to recover not only the
24 attorneys' fees and costs involved in bringing this motion, but also to allow BMWNA to
25

26
27 ²³ As the motion had been filed jointly against Center BMW also, some of the rulings pertained to both Nick Alexander
28 Imports and Center BMW jointly and some applied only to one. The sanctions that applied separately to Nick Alexander
Imports were due to the fact that the effect on BMWNA caused by the failure of Nick Alexander Imports to produce
documents was greater than the effect on BMWNA caused by the failure of Center BMW to produce its documents.

1 recover the attorneys' fees and costs it will incur as a consequence of the tardy
2 production of documents by the two dealerships.

3 ...

4 12. BMWNA asserted that it would incur significantly increased attorneys'
5 fees and costs due to the failure of Nick Alexander Imports to produce its documents in a
6 timely manner so as to enable counsel for BMWNA to prepare for and meet the
7 deposition schedule that had already been established as to Nick Alexander Imports.

8 [Footnote 3 omitted]

9 ...

10 15. In lieu of a recommendation that the protests of Nick Alexander Imports
11 or Center BMW be dismissed [footnote 4 omitted], it will be recommended to the
12 executive director of the Board that the executive director seek direction from the Board
13 to require:

14 (A) Payment to BMWNA by Nick Alexander Imports and by Center BMW of
15 attorneys' fees and costs, in amounts to be determined, that were incurred by BMWNA in
16 connection with the bringing of this motion, and unless, there is good cause shown to do
17 otherwise, with the amount to be paid borne equally by Nick Alexander Imports and
18 Center BMW.

19 (B) Payment to BMWNA by Nick Alexander Imports of attorneys' fees and
20 costs, in amounts to be determined, that will be incurred by BMWNA as a consequence
21 of the failure of Nick Alexander Imports to comply with its discovery obligations; ...

22 **DIRECTIONS TO COUNSEL RE: VERIFICATION**

23 16. BMWNA is to submit detailed, itemized lists of attorneys' fees and costs
24 incurred, with declarations of fact supporting the time and amounts claimed, including
25 that the hours and sums claimed were in fact billed to and were paid or will be paid by
26 BMWNA in the ordinary course of representation, and with corroboration by a
27 representative of BMWNA.

28 17. The itemizations and supporting documentation shall include the fees and

1 costs incurred in connection with the combined motion separately from the additional
2 fees and costs incurred as a result of the dealerships' differing delays in production
3 The additional fees and costs claimed as a result of the delays in production..., and the
4 documentation in support, shall separately show the claims asserted against each
5 dealership with a fact-specific explanation as to why the sums would not otherwise have
6 been expended if the productions had been timely.

7 **BMWNA'S REQUEST FOR LEAVE TO SUSPEND AND RESUME**
8 **DEPOSITIONS**

9 18. The request of BMWNA that it be permitted to suspend and resume the
10 depositions relating to Nick Alexander Imports is granted on the following conditions:

- 11 (a) There is a good faith belief by counsel for BMWNA that the suspension is essential;
12 (b) The need for suspension is due to the lack of sufficient time for counsel for BMWNA
13 to prepare for the deposition; and (c) The lack of time to prepare was caused by the
14 failure of Nick Alexander Imports to comply with its discovery obligations in a timely
15 manner.

16 19. Counsel for Nick Alexander Imports has the right to object to the suspension
17 of the deposition if he or she reasonably believes any of the above conditions do not
18 exist. Objections can be made by contacting the Board's staff to arrange for an ALJ of
19 the Board to rule on the propriety of the suspension and resumption of the deposition.
20 ...

21 **The Verification of the Amounts Claimed by BMWNA and Further Motion by**
22 **BMWNA for Discovery Sanctions - January 28, 2008**

23 60. On January 28, 2008, the Board filed "BMW of North America, LLC's Motion for
24 Recovery of Attorneys' Fees and Costs from Nick Alexander Imports and for Discovery Sanctions." This
25 pleading included verification of the amounts sought by BMWNA from Nick Alexander Imports. In
26 addition, BMWNA alleged that Nick Alexander Imports "continues to abuse the discovery process by

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28 ///

1 withholding highly relevant documents in its possession.”²⁴

2 61. After a telephonic conference with counsel for the parties, the Board, on February 1, 2008,
3 issued an “Order Establishing Briefing Schedule Re: Respondent BMW of North America, LLC’s
4 Motion for Recovery of Attorneys’ Fees and Costs from Nick Alexander Imports and for Discovery
5 Sanctions.”

6 62. On February 13, 2008, Nick Alexander Imports filed its “Opposition to Motion for
7 Recovery of Attorneys’ Fees and Costs and for Discovery Sanctions.”

8 63. On February 22, 2008, BMWNA filed “BMW of North America, LLC’s Reply in Support
9 of its Motion for Recovery of Attorneys’ Fees and Costs and for Discovery Sanctions”.

10 64. On February 22, 2008, Nick Alexander Imports filed a letter response to BMWNA’s Reply
11 refuting some assertions of BMWNA.

12 65. After receipt of the letter from Nick Alexander Imports, BMWNA, also on February 22,
13 2008,²⁵ filed a letter response in which it stated that BMWNA disagreed with Nick Alexander’s
14 characterization of the facts but that BMWNA “will not further rebut the points made in Nick Alexander’s
15 letter.”

16 **The Sums Sought by BMWNA**

17 66. The sums sought by BMWNA include: (A) Attorney’s fees in connection with the motion
18 of November 19, 2007; (B) Costs incurred by BMWNA for a paralegal and a courier service in preparing
19 for the Nick Alexander Imports depositions; and (C) Attorney’s fees in connection with the motion of
20 January 28, 2008 and complying with the Board’s instructions.

21 67. BMWNA is seeking \$5,953.28 for attorneys’ fees in connection with the Motion to
22 Dismiss filed on November 19, 2007. This sum is arrived at based upon the following:

23 _____
24 ²⁴ In addition to listing the attorney’s fees and costs claimed by BMWNA, the motion also sought the additional “discovery
25 sanction of evidence preclusion, precluding Nick Alexander from introducing any documents not already produced as evidence
26 of the cost, value or permanency of the dealership’s investments.” (Motion, page 11, lines 4-8) As this portion of the motion
27 pertained to determining what evidence could be admitted at the hearing of the protests, the ALJ believed that it would be
28 better to have this issue resolved by the ALJ assigned to hear the merits of the protests, which would be at a time when
discovery had been completed and the possible prejudice to BMWNA could be better evaluated. Therefore, the ALJ hearing
the motion on the sanction for fees and costs did not rule on this portion of the motion which sought the sanction of precluding
introduction of certain evidence by Nick Alexander Imports at the hearing on the merits of the protests. Because the protests
have been dismissed, this portion of the motion is moot.

²⁵ This letter inaccurately states the date to be 2007.

| Task | Attorney's Fees ²⁶ |
|---|--|
| Andrew Tran, Esq., 18.1 hours @ \$355.50 per hour | \$ 6,434.55 |
| Robert Ebe, Esq., 9.5 hours @ \$576.00 per hour | \$ 5,472.00 |
| Total Attorneys' Fees | \$11,906.55 (1/2 to be paid by Nick Alexander Imports = <u>\$ 5,953.28</u>) |

As the total sum of \$11,906.55 was recommended to be split evenly between Nick Alexander Imports and Center BMW, the amount to be paid by Nick Alexander Imports is \$5,953.28.²⁷ (January 25, 2008, Tran Declaration, page 2, lines 1-15)

68. In addition to the above, BMWNA is seeking \$4,275.36 (from Nick Alexander Imports only) for the incremental paralegal and courier costs incurred in connection with preparing for the depositions of Nick Alexander Imports personnel caused solely by the late production of documents by Nick Alexander Imports. This sum is arrived at as follows:

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²⁶ The hourly rate for Mr. Ebe, as initially stated in a Declaration filed by an associate in his firm, was stated to be \$640 per hour (versus \$576 shown here) and that of Mr. Tran was stated to be \$395 (versus \$355.50 shown here). (Tran Declaration, November 19, 2007, page 4 of BMWNA's Motion, lines 13-14; Tran Declaration, Dec. 4, 2007, page 14 of BMWNA's Reply, line 3) These same higher hourly rates of \$640 and \$395 were communicated by counsel for BMWNA to counsel for Nick Alexander Imports in a December 21, 2007 letter which stated that it was an "itemized list of costs and fees" as of that date and seeking payment based on those higher sums. However, in the documents submitted to the Board on January 25, 2008, in verification of the attorney's fees charged to or paid by BMWNA, the hourly rates were shown to be \$576 and \$355.50. The discrepancy in the hourly rates claimed was explained in a footnote to the verification documents required to be filed with the Board as follows: "The letter to Nick Alexander and Center erroneously informed that Mr. Tran's billing rate was \$395 and Mr. Ebe's rated (sic) was \$640. However, the rates charged to BMWNA are 10% less. This motion seeks recovery for fees actually charged to BMWNA." (BMWNA motion of January 28, 2008, page 4, footnote 2)

²⁷ These attorney's fees were incurred when the protests of both Nick Alexander Imports and Center BMW were pending and were incurred in connection with the bringing of the joint motion against both of them. The sharing of the costs of this portion of the attorney's fees was in accordance with the Notice of Intended Ruling of the ALJ and is explained in that document.

| Expenses | Costs |
|--|--------------------------------|
| Karen Ramos, Paralegal, 28.0 hours @ \$110.00 per hour | \$3080.00 |
| Round trip air fare between San Francisco and Los Angeles | \$ 268.80 |
| Hotel cost for December 9, 2007 | \$ 204.16 |
| Meals, cab fare and parking relating to weekend work and attending deposition on December 10, 2007 | \$ 120.96 |
| Sub-total for Karen Ramos | <u>\$3,673.92</u> |
| Expedited courier costs – Network Global Logistics (shipment of documents for delivery in Los Angeles on Sunday, December 9, 2007) | \$ 601.44 |
| Total incremental costs for paralegal and courier | <u>\$4,275.36²⁸</u> |

(January 25, 2008, Tran Declaration- page 4, lines 1-23)

69. Plus, BMWNA is seeking an additional \$1,930.50 for attorneys' fees and costs (from Nick Alexander Imports only) in connection with the Motion and supporting documentation filed on January 28, 2008. (January 28, 2008, Motion, page 5, lines 14-16) This sum was arrived at as follows:

| Task | Attorney's Fees |
|--|------------------------|
| Andrew Tran, Esq., 3.0 hours @ \$355.50 per hour | \$ 1,065.50 |
| Robert Ebe, Esq., 1.5 hours @ \$576.00 per hour | \$ 864.00 |
| Total Attorneys' Fees | <u>\$ 1,930.50</u> |

(January 25, 2008, Tran Declaration, page 6, lines 7-11)

This motion covered both the attempt to seek further sanctions for the apparently uncontested continuing failure of Nick Alexander Imports to produce all the documents required as well as the preparation of the documents needed to verify the amounts claimed as previously ordered by the Board. As such, these fees were also incurred by BMWNA as a result of the failure of Nick Alexander Imports to perform its discovery obligations.

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²⁸ None of this pertained to Center BMW so no sharing of the expenses is appropriate.

1 **TOTAL CLAIM FOR FEES AND COSTS TO BE PAID BY NICK ALEXANDER IMPORTS**

2 70. The following summarizes the amounts indicated above:

3

| Task | Attorney's Fees/Costs |
|--|---------------------------|
| November 19, 2007 Motion - Attorneys' Fees - 1/2 of total incurred shared by Center BMW | \$ 5,953.28 |
| Incremental Paralegal costs to prepare for deposition | \$ 3,673.92 |
| Additional Courier costs in connection with deposition | \$ 601.44 |
| January 28, 2008 Motion and Verification Documentation - Attorneys' Fees | \$ 1,930.50 |
| TOTAL CLAIM FOR FEES AND COSTS²⁹ | <u>\$12,159.14</u> |

9

10 71. Nick Alexander Imports has not contended that the hourly rates charged were
11 unreasonable but has contended that the hours claimed were excessive as they were beyond what should
12 have been spent or that the time would have been spent even if Nick Alexander's production had been
13 timely.

14 72. However, it is difficult to evaluate what amount of time is reasonable and what, in the
15 opinion of counsel for Nick Alexander Imports, is excessive or improperly claimed.

16 73. BMWNA, the client, has submitted documentation indicating that it has paid the sums
17 shown to have been charged by its attorneys for their fees and other costs. There has been a prima facie
18 showing by BMWNA sufficient to support the amounts it has paid and is now claiming were reasonable
19 and were incurred as a result of the failure of Nick Alexander Imports to comply with its discovery
20 obligations. There is no basis for concluding otherwise.

21 74. Denying the claim of BMWNA would impliedly be concluding that its attorneys have
22 over-billed BMWNA or that BMWNA itself is engaging in some nefarious attempt to pass off the usual
23

24
25 ²⁹ In the Motion of January 28, 2008, Counsel for BMWNA have alleged that, due to the failure of Nick Alexander Imports to
26 produce all of the documents even as of the December 10 and 11, 2007 dates for the deposition of Ms. Alexander, that it was
27 necessary to suspend and reschedule her deposition. (Motion, page 9, lines 15-25; page 10, lines 1-11) BMWNA has
28 requested that Nick Alexander Imports also be ordered to pay the additional incremental fees and costs that will be incurred in
connection with the resumption of the deposition of Ms. Alexander. BMWNA stated that "The amount of such fees is yet to be
determined." As of the preparation of this Recommendation, BMWNA has not submitted additional itemization for these fees
and costs, and as the protests of Nick Alexander Imports have now been dismissed, it is assumed that there will be no
additional fees or costs incurred in connection with discovery.

1 costs of representation that it would customarily bear in a protest proceeding. There is no basis for either
2 conclusion.

3 75. The Board is sensitive to the need for prompt resolution of protests. Delaying discovery
4 without "substantial justification" (as occurred here) raises the inference that the party is seeking to delay
5 the resolution of the protests. The statutorily provided sanctions are intended to discourage such
6 attempts.

7 76. Any party before the Board could avoid the costly predicament in which Nick Alexander
8 Imports now finds itself simply by complying with its discovery obligations. Doing so would negate any
9 concerns about whether the failure to produce documents was part of an attempt to delay resolution of the
10 protests and would be far more economical for all sides. Complying with its discovery obligations,
11 would also obviate the need of the party at fault to request that the Board find either an excuse for its
12 failure to produce or have the Board delve into issues involving the innocent party's attorney-client
13 relationship as to the hourly rates charged and whether the actual hours billed by the attorney to the client
14 were not only expended but were necessary and reasonable.

15 77. Here there is no question that: (A) Nick Alexander Imports failed to comply with its
16 discovery obligations; and (B) There was no substantial justification for that failure; and (C) The failure
17 of Nick Alexander Imports to do so caused BMWNA to incur additional attorney's fees and costs; and
18 (D) BMWNA made a prima facie showing that the amounts claimed were reasonable. To negate this
19 prima facie showing and establish that the amounts charged BMWNA by its attorneys should not be
20 recovered would require a stronger showing by the defaulting party than what was provided here.

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RECOMMENDATION

It is recommended that the Executive Director seek direction from the Board that an order be issued awarding attorney's fees and costs to BMWNA requiring Nick Alexander Imports to pay BMWNA the sum of \$12,159.14.

I hereby submit the foregoing which constitutes my recommendation that the Executive Director seek direction from the Board that an order be issued requiring Nick Alexander Imports to pay BMWNA the sum of \$12,159.14.

DATED: April 10, 2008

By: 

ANTHONY M. SKROCKI
Administrative Law Judge

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

The following summarizes the 18 BMWNA protests that were filed with the New Motor Vehicle Board concerning the establishment and relocation of Beverly Hills BMW passenger car operations and BMW light truck (SAV) operations:

- *NICK ALEXANDER IMPORTS, a California corporation, d/b/a NICK ALEXANDER IMPORTS v. BMW OF NORTH AMERICA, LLC*
Protest No. PR-2049-07 (3062R Cars)
Protest No. PR-2062-07 (3062R Trucks)

- *CENTER AUTOMOTIVE, INC., a California corporation, d/b/a CENTER BMW v. BMW OF NORTH AMERICA, LLC*
Protest No. PR-2050-07 (3062R Cars)
Protest No. PR-2063-07 (3062R Trucks)
Protest No. PR-2064-07 (3062E Cars)
Protest No. PR-2065-07 (3062E Trucks)

- *DEL MONTELL MOTORS, LTD., dba SANTA MONICA BMW v. BMW OF NORTH AMERICA, LLC*
Protest No. PR-2051-07 (3062R Cars)
Protest No. PR-2059-07 (3062R Trucks)
Protest No. PR-2060-07 (3062E Trucks)
Protest No. PR-2061-07 (3062E Cars)

- *CENTURY WEST BMW, LLC v. BMW OF NORTH AMERICA, LLC*
Protest No. PR-2052-07 (3062R Cars)
Protest No. PR-2066-07 (3062R Trucks)
Protest No. PR-2067-07 (3062E Cars)
Protest No. PR-2068-07 (3062E Trucks)

- *FINCHEY CORPORATION OF CALIFORNIA, INC. dba PACIFIC BMW v. BMW OF NORTH AMERICA, LLC*
Protest No. PR-2053-07 (3062R Cars)
Protest No. PR-2055-07 (3062R Trucks)
Protest No. PR-2056-07 (3062E Cars)
Protest No. PR-2057-07 (3062E Trucks)