

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

JACKSON FORD-MERCURY, INC., dba THE
NEW JACKSON FORD-MERCURY,

Protestant,

v.

FORD MOTOR COMPANY,

Respondent.

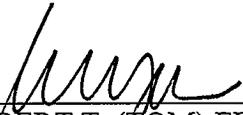
Protest No. PR-2180-09

DECISION

At its regularly scheduled meeting of August 24, 2010, the Public and Dealer Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protest", in the above-entitled matter. After such consideration, the Board adopted the Proposed Order.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 24th DAY OF AUGUST 2010.



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

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1507 - 21ST Street, Suite 330
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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11 In the Matter of the Protest of
12 JACKSON FORD-MERCURY, INC., dba THE
13 NEW JACKSON FORD-MERCURY,
14 Protestant,
15 v.
16 FORD MOTOR COMPANY,
17 Respondent.

Protest No. PR-2180-09

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTEST**

18
19 To: Charles L. Smith, President
In Pro Per
JACKSON FORD-MERCURY, INC.
20 dba THE NEW JACKSON FORD-MERCURY
909 Erie Street
21 Oakland, California 94610

22 Mark Joseph Kenney, Esq.
23 Duane M. Geck, Esq.
Donald H. Cram, Esq.
24 Attorneys for Respondent
SEVERSON & WERSON
25 One Embarcadero Center, Suite 2600
San Francisco, California 94111

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27 ///

28 ///

1 (commencing with section 583) of the California Code of Regulations.”¹ Mr. Brennan expressly stated
2 that “[p]ursuant to section 598² of the regulations, your letter has not been accepted for filing. We are
3 returning a copy of your letter, along with a copy of the relevant Vehicle Code sections, a copy of the
4 Board’s regulations, and a sample protest.”³

5 9. Subsequent to the letter from the Board, there were two protests received from Mr. Smith
6 in behalf of Jackson Ford.

7 **THE FIRST PROTEST RECEIVED BY THE BOARD**

8 10. One protest was received by the Board via UPS on September 16, 2009, filed on that date,
9 and assigned Protest No. PR-2180-09. This document identifies the Protestant as: Jackson Ford-
10 Mercury, Inc., dba The New Jackson Ford-Mercury and states that it is “located at” 11400 Highway 49,
11 Martel, California 95654 which is also the address shown in the upper left corner of the first page of the
12 document. It is signed in behalf of Protestant by: Charles L. Smith, President. This Protest indicates a
13 signing date of “September 11, 2009” and that the filing is “In Pro Per”.

14 **THE SECOND PROTEST RECEIVED BY THE BOARD**

15 11. The other protest document was received by the Board via UPS, a day later, on September

16
17 ¹ Although reciting a string of words and numbers may be required for technical specificity, doing so is recognized by the
18 Board as not being meaningful in many cases. Therefore, as is stated, the Board included with its letter, as is its practice, not
19 only a copy of the statutes and regulations, but also a copy of a sample protest that could be used as a guide.

20 ² Section 598 of Title 13 of the California Code of Regulations provides as follows:

21 (a) A document which purports to be a protest pursuant to Vehicle Code section 3060, 3062, 3070, or 3072, which
22 is received at the offices of the Board shall not be filed until the executive director has reviewed it for compliance
23 with the Board's enabling statutes and Title 13, Subchapter 2 of the California Code of Regulations. If the executive
24 director deems the document to comply, said document shall be filed. The executive director may reject any
25 document that does not comply with the Board's enabling statutes and Title 13, Subchapter 2 of the California Code
26 of Regulations. (Emphasis added.) [Note that the regulation mandates that the “document...shall not be filed until
the executive director reviews it for compliance...” and that thereafter the “document shall be filed” only if the
Executive Director deems the document to comply with the statutes and regulations.]

(b) A protest accepted for filing by the executive director shall be recorded as filed as of the date it was received at
the Board's offices or the date of certified or registered mailing.

(c) The executive director may, for good cause shown, accept for filing any papers that do not comply with the
Board's enabling statutes and Title 13, Subchapter 2 of the California Code of Regulations. Good cause issues and
challenges to the executive director's compliance determinations may be resolved by law and motion proceedings
before an administrative law judge. [There was no claim in behalf of Jackson Ford that there was “good cause
shown” to accept the letter for filing nor were there any “challenges to the Executive Director’s compliance
determinations”.]

27 ³ The Board’s practice and what was done here comports with the requirements as stated in footnote 2. Filing of the document
28 by the Board’s staff without first submitting it to the Executive Director would be a violation of the regulations. The Executive
Director is mandated to review the document and in doing so must make a determination as to whether it may properly be filed.
There is no question that the document failed to comply with the Board’s regulations and was properly rejected.

1 17, 2009. This second document also identifies the Protestant as: Jackson Ford-Mercury, Inc., dba The
2 New Jackson Ford-Mercury, but rather than showing its location, it states that "its mailing address" is 909
3 Erie Street, Oakland, California 94610 which is also the address shown in the upper left corner of the first
4 page of the document. No other address is shown. This document was also signed in behalf of Protestant
5 by: Charles L. Smith, President. It too indicates "pro per" but has a signing date of September 16, 2009
6 (compared to September 11, 2009, on the first document).

7 12. With the exception of the addresses and the dates signed, the content of the two protests is
8 identical. Because they are identical, only the first protest was assigned a protest number.

9 13. The protests assert that Protestant is Jackson Ford-Mercury, Inc., dba The New Jackson
10 Ford-Mercury ("Jackson Ford" or "Protestant"). The first protest states it is located at 11400 Highway
11 49, Martel, California. The second protest gives no location but states a mailing address of 909 Erie
12 Street, Oakland, California. They both provide the same phone number for Protestant (510) 882-2750.
13 Both allege that Protestant is a new motor vehicle dealer and franchisee authorized to sell Ford vehicles
14 and parts. (Protests, page 1, lines 20-22)

15 14. Both protests indicate that Charles L. Smith is the President of Jackson Ford and that Mr.
16 Smith is representing Jackson Ford in pro per before the Board.

17 15. The Respondent and franchisor of Jackson Ford is Ford Motor Company headquartered in
18 Dearborn, Michigan. (Notice, page 1) Ford Motor Company is licensed by the Department of Motor
19 Vehicles as a manufacturer.

20 16. By letter dated July 23, 2009, Ford Motor Company issued a 15-day notice of termination
21 ("Notice") to Protestant because of "Insolvency of the Dealer - inability to meet debts as they mature" and
22 "Failure of the Dealer to function in the ordinary course of business." (Notice, page 1) Among other
23 assertions, the Notice also stated that: "the dealership has been on finance hold with FMCC since
24 October 2, 2007; and is in an out of trust position when [it] ceased operations on March 24, 2009; and
25 "that that dealer filed for Chapter 11 bankruptcy on December 15, 2008..."

26 **THE NOTICE AS GIVEN AND THE PROTESTS AS RECEIVED BY THE BOARD**

27 17. The Notice from Ford Motor Company expressly applies to both a "Ford" franchise and a
28 "Mercury" franchise of Protestant.

1 18. The Notice stated that termination was being "...given by Ford Motor Company
2 ('Company') of the Ford Sales and Service Agreement ('Agreement') dated January 14, 2002 and
3 Mercury Sales and Service Agreement dated January 14, 2002..." The letterhead on the Notice carries
4 the names and logos for "Ford", "Lincoln" and "Mercury" and also indicates that it came from the
5 "Market Representation Office, Ford and Lincoln Mercury, Marketing and Sales" as well as "Ford Motor
6 Company, 16800 Executive Plaza Dr., 8 SWC, Dearborn, MI 48126". It was signed by "A.J. Said,
7 Assistant Secretary, FORD MOTOR COMPANY". Based only upon this information, it appears that the
8 "franchisor" giving the notice of termination of both the Ford franchise and the Mercury franchise is
9 "Ford Motor Company".

10 19. Although it appears there is just one franchisor, Ford Motor Company and one franchisee,
11 Jackson Ford, there are two franchises sought to be terminated, one for the "Ford" line-make and the other
12 for the "Mercury" line-make. The Notice as issued was a single notice applicable to both franchises.⁴

13 **WHETHER THE PROTESTS REFER ONLY TO THE "FORD" FRANCHISE**

14 20. As stated above, the Board assigned a protest number only to the protest received on
15 September 16, 2009. Both it, and the protest received on September 17, 2009, allege that Jackson Ford is
16 filing them with the New Motor Vehicle Board ("Board") pursuant to Vehicle Code⁵ section 3060.

17 21. Both protests by their terms refer to a "franchise agreement" in the singular and use only
18 the term "Ford" with no reference to the Mercury line-make or Mercury franchise. There is nothing to
19 differentiate the two protests substantively or to indicate that one is to apply to the Ford franchise and the
20 other to the Mercury franchise. However, it is possible that the use of the name "Ford" in the protests
21 meant vehicles manufactured by the parent "Ford Motor Company", including the Mercury line-make. It
22 appears that both line-makes are administratively handled by the "Ford Motor Company" through the
23 same office and personnel.

24 22. Alternatively, it is also possible to interpret the protests by their terms to be limited only to
25 the franchise for the Ford line-make, especially because of the reference to the singular "franchise". The

26
27 ⁴ There has been no claim made that the notice was not adequate or not in compliance with the Vehicle Code requirements
28 regarding form and content as to the Ford franchise or the Mercury franchise. Whether and when the notice was "received" by
Protestant will be discussed later.

⁵ All statutory references are to the California Vehicle Code unless noted otherwise.

1 only apparent reason for the two protests is the difference in the address shown for Protestant.

2 23. If the first interpretation is correct, then, although there should have been a separate protest
3 filed applicable to the Mercury franchise, the protests as received and the protest as filed can be deemed
4 sufficient for both the Ford franchise and the Mercury franchise. However, if the second interpretation is
5 correct, then there was no protest filed regarding the Mercury franchise and the time to do so has expired.

6 **WHETHER FORD MOTOR COMPANY IN ITS MOTION TO DISMISS IS TREATING**
7 **THE PROTEST WHICH WAS FILED AS BEING APPLICABLE TO BOTH THE**
8 **FORD FRANCHISE AND THE MERCURY FRANCHISE⁶**

9 24. The Motion to Dismiss Protest was filed in behalf of “Ford Motor Company”, the
10 Respondent. It refers to both the “Ford and Mercury Sales and Service Agreements” (Motion, page 2, line
11 3); and refers to the “Mercury Sales and Service Agreement” or Mercury franchise (Memorandum of
12 Points and Authorities “Memorandum”, page 1, lines 13-14 and 23) as follows:

- 13 ▪ “franchises” in the plural (for example, Memorandum, page 1, line 23, page 2, line 24, and page 4,
14 lines 2 and 7);
- 15 ▪ “The franchise agreements at issue in the instant protest...” (Memorandum, page 4, line 19);
- 16 ▪ the “Ford and Mercury franchises” (Memorandum, page 5, lines 17-18, and 24);
- 17 ▪ that Jackson Ford failed to exhaust its administrative remedies as required by “Paragraph 18(b) of
18 the Ford and Mercury Sales and Service Agreements...” (Memorandum, page 6, lines 16-20, and
19 page 7, line 7)

20 25. It therefore appears that Ford Motor Company is treating the single protest referred to by
21 Ford Motor Company in its pleadings as applicable to both the franchise for the Ford line-make as well as

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26 ⁶ It is unknown if Ford Motor Company received both versions of the protests. Each proof of service attached to the protests
27 was improperly completed. Rather than showing the protests were addressed to Ford Motor Company, each proof of service
28 states that the protests were addressed to: “UPS Store, 4096 Piedmont Ave, P.O. Box 259, Oakland, CA 94511-5221”, which
is likely their place of mailing. One proof of service is dated September 15, and the other is dated September 16, 2009. The
documents submitted by Ford Motor Company along with the motion to dismiss included Exhibit H, which is a copy of the
protest received and filed by the Board on September 16, 2009 with the proof of service dated September 15, 2009.

1 the franchise for the Mercury line-make.⁷ To avoid confusion and cumbersome language, unless
2 indicated otherwise, the remainder of this proposed order will also refer to the protest in the singular.

3 26. Regardless of whether the protest and motion to dismiss are applicable only to the Ford
4 franchise or applicable to both the Ford and Mercury franchises, the result will be the same as to the
5 Mercury franchise. If the notice of termination was effective as to both franchises as having been
6 “received” by Jackson Ford (discussed below), and if the protest challenged only the termination of the
7 Ford franchise, then no protest has ever been filed as to Mercury. As the time to file a protest as to the
8 Mercury franchise has expired, the Mercury franchise has already terminated. If the protest is applicable
9 to the Mercury franchise (as well as the Ford franchise), and if the Board adopts the recommendation as
10 stated in this proposed order, the Mercury franchise (along with the Ford franchise) will terminate as of
11 the date stated in the Board’s order.

12 27. Unless otherwise indicated, all references hereafter to “Jackson Ford” will mean the
13 corporation, “Jackson Ford-Mercury, Inc.,” as both the Ford franchisee and the Mercury franchisee.

14 PROCEDURAL BACKGROUND

15 28. On December 15, 2008, Jackson Ford filed for relief under Chapter 11 of the Bankruptcy
16 Code (Case No. 08-38452-A-7). (Request for judicial notice, Exhibit A)

17 29. On March 24, 2009, Jackson Ford’s bankruptcy case was converted to a Chapter 7
18 proceeding and a Chapter 7 trustee was appointed. (Request for judicial notice, Exhibit A)

19 30. On September 16, 2009, the protest was filed with the Board. However, the proceedings
20 before the Board are of the type subject to the “automatic stay” as mandated by the Bankruptcy Code and
21 no action can be taken regarding the protest unless the stay is lifted by the Bankruptcy Court.

22 31. On April 19, 2010, the Bankruptcy Court entered a Final Decree closing the bankruptcy
23 case. (Request for judicial notice, Exhibit D)

24 _____
25 ⁷ If it is determined, as a matter of law, that the protest cannot be interpreted to include the Mercury franchise, the fact that Ford
26 Motor Company is treating it as such is of no significance. The filing of a timely protest challenging the termination of the
27 Mercury franchise is necessary for the Board to have jurisdiction as to the termination of the Mercury franchise. The parties
28 cannot, by consent, conduct, waiver, or otherwise, confer or create jurisdiction in the Board if it does not exist under the
statutes enacted by the legislature. If the protest as filed did not include the Mercury franchise, the Board would have no
jurisdiction as to the termination of the Mercury franchise and the lack of jurisdiction cannot be waived by Ford Motor
Company.

1 32. During the Board's June 8, 2010, telephonic Status Conference re: Status of Bankruptcy,
2 the parties (Charles L. Smith on behalf of Protestant and Donald Cram on behalf of Respondent) indicated
3 that the bankruptcy case had been concluded. Counsel for Ford Motor Company stated that he intended
4 to file a motion to dismiss and a briefing schedule was established, with the dates agreeable to both sides.

5 33. By order dated June 9, 2010, Ford Motor Company was to file and serve its motion to
6 dismiss by June 16, 2010, Jackson Ford was to file and serve its opposition by June 30, and Ford Motor
7 Company was to file and serve its reply by July 7.

8 34. On June 16, 2010, the Board filed Ford Motor Company's "Notice of Motion and Motion
9 to Dismiss Protest..." and "Request for Judicial Notice in Support of Motion to Dismiss Protest".

10 35. Jackson Ford did not file an opposition on June 16, 2010, the time agreed to and as ordered
11 by the Board. On July 6, 2010, Polly Rigggenbach, Staff Counsel/Administrative Law Judge ("ALJ"), was
12 informed by Charles Smith, pro per for Jackson Ford that he did not intend to file an opposition or appear
13 for the telephonic hearing. (Transcript, page 6, lines 3-18)

14 36. Ford Motor Company did not file a reply as no opposition was filed. The reply would
15 have been due on July 7.

16 37. As had been scheduled, on July 14, 2010, a telephonic hearing on the motion to dismiss
17 was held before ALJ Anthony M. Skrocki. At the commencement of the telephonic hearing, Robin
18 Parker, Senior Staff Counsel, attempted to contact Mr. Smith concerning his participation. The attempt to
19 contact Mr. Smith was not successful. As no one answered Ms. Parker's phone call, a voicemail message
20 was left. There has been no reply to the voicemail message. No appearance was made on behalf of
21 Jackson Ford. Ford Motor Company was represented by Donald H. Cram, Esq. of Severson & Werson.

22 38. During the hearing, the ALJ expressed concern that there was nothing submitted to
23 indicate that the notice of termination had in fact been "received"⁸ by Jackson Ford as is required by the
24 Vehicle Code.

25 39. Counsel for Ford Motor Company stated that there was a document indicting when this

26 _____
27 ⁸ Section 3060(a)(2) provides in part: "...The franchisee may file a protest with the board within 30 days after receiving a 60-
28 day notice, satisfying the requirements of this section, or within 30 days after the end of any appeal procedure provided by the
franchisor, or within 10 days after receiving a 15-day notice, satisfying the requirements of this section, or within 10 days after
the end of any appeal procedure provided by the franchisor." (Emphasis added.)

1 had occurred and that it would be provided. Ford Motor Company was given until July 23, 2010, to file
2 and serve documentation and declarations establishing when and where the Notice had been received by
3 Jackson Ford.

4 **PRELIMINARY STATEMENT OF ISSUES**

5 **THE ALLEGATIONS OF THE PROTEST FILED BY JACKSON FORD**

6 40. Jackson Ford contends that Ford Motor Company does not have good cause to terminate
7 “the franchise” based upon the good cause factors contained in Section 3061. (Protest, page 2, lines 2-20)
8 (See earlier discussion as to whether this could refer to both the Mercury franchise as well as the Ford
9 franchise.)

10 **THE MOTION TO DISMISS FILED BY FORD MOTOR COMPANY**

11 41. Ford Motor Company seeks dismissal of the protest on the following grounds:

12 a. “Jackson Ford lacks standing to prosecute the instant protest.” (Motion, page 1, line 25;
13 Memorandum, page 1, lines 5-6) Ford Motor Company contends that “Jackson Ford has no standing to
14 pursue these claims. The Chapter 7 trustee is the only party with standing.” (Memorandum, page 5, lines
15 1-3)

16 b. “Jackson Ford is prohibited from pursuing the instant protest under the doctrine of judicial
17 estoppel.” (Motion, page 1, lines 26-27; Memorandum, page 1, line 6) Respondent Ford Motor Company
18 maintains that Jackson Ford did not list its Ford and Mercury franchises or any claims arising from the
19 franchises as assets on its Bankruptcy Schedules. (Memorandum, page 5, lines 17-19; Request for
20 judicial notice, Exhibit C) As such, the trustee relied upon the “...inaccurate schedules in issuing its
21 Report of No Distribution” and the “...court relied upon the inaccurate schedules in entering a Final
22 Decree.” (Memorandum, page 5, lines 19-25, and page 6, lines 1-3) Therefore, Ford Motor Company
23 argues that judicial estoppel applies.

24 c. “Jackson Ford’s protest is barred by [its] failure to initiate and complete an appeal of the
25 termination to Ford’s Dealer Policy Board, as required under paragraph 18(b) of the Ford and Mercury
26 Sales and Service Agreements.” (Motion, page 2, lines 1-6; Memorandum, page 1, lines 7-9)
27 Furthermore, “Jackson Ford has failed to comply with a condition precedent to bringing this protest and
28 the franchises have terminated. Completion of the internal appeal is an express precondition to the

1 dealer's pursuit of any other remedy available under [the] law, Jackson Ford's protest is premature.
2 Jackson Ford is contractually barred from pursuing it." (Memorandum, page 8, lines 7-10)

3 d. "The filing of Jackson Ford's protest is untimely." (Motion, page 2, line 7; Memorandum,
4 page 1, lines 9-10) Ford Motor Company alleges that it provided Jackson Ford with a 15-day Notice on
5 July 23, 2009. Jackson Ford did not file the protest until September 16, 2009 – 55 days after the Notice
6 was dated. (Memorandum, page 8, lines 15-18)

7 **FORD MOTOR COMPANY'S REQUEST FOR JUDICIAL NOTICE**

8 42. Ford Motor Company, on June 16, 2010, filed with the Board a "Request for Judicial
9 Notice in Support of Motion to Dismiss Protest" requesting that the Board take judicial notice of certain
10 documents identified in the Request. Proof of service, submitted by Ford Motor Company, indicated
11 service by mail was made to the following addresses:⁹

12 Jackson Ford-Mercury, Inc.
13 c/o Charles L. Smith, President
14 909 Erie Street
Oakland, CA 94610¹⁰

15 Jackson Ford-Mercury, Inc.
16 c/o Charles L. Smith, President
(home address redacted)
Sutter Creek, CA 95685

17 43. The proof of service also indicated service by electronic transmission to "e-mail addresses
18 designated for each party identified above." The Oakland address was identified as Jackson Ford's
19 mailing address in the second protest received by the Board on September 17, 2009. There has been no
20 opposition to the Request for Judicial Notice. Ford Motor Company's Request for Judicial Notice is
21 granted.

22 **FORD MOTOR COMPANY'S CONTENTIONS IN ITS MOTION TO DISMISS**

23 **JACKSON FORD LACKS STANDING TO INITIATE AND PROSECUTE THE PROTEST**

24 44. Ford Motor Company claims that the rights under the franchises became the property of
25 the bankruptcy estate and that only the bankruptcy trustee may assert any claims relating to the franchises.
26 Therefore Jackson Ford lacks standing to pursue the protest. (Memorandum, pages 3-5)

27 ⁹ These are the same as shown on the proof of service of the motion to dismiss and supporting documents attached to it.

28 ¹⁰ This is the address shown in the second protest which was received by the Board on September 17, 2009.

1 45. As no opposition was filed in behalf of Jackson Ford in response to these contentions Ford
2 Motor Company's position is uncontested.

3 **THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDES JACKSON FORD FROM PROCEEDING**

4 46. Ford Motor Company claims that when Jackson Ford filed for bankruptcy protection in
5 December 2008: Jackson Ford did not properly list the two franchises nor any claims arising from them
6 as assets in the Bankruptcy Schedules; Jackson Ford did not amend the Schedules after the protest was
7 filed on September 16, 2009; the Bankruptcy Court relied upon the Schedules as submitted when it
8 entered a final decree closing the case; and that judicial estoppel precludes Jackson Ford from pursuing
9 any post-bankruptcy claims relating to the franchises. (Memorandum, pages 5- 6)

10 47. As no opposition was filed in behalf of Jackson Ford in response to these contentions Ford
11 Motor Company's position is uncontested.

12 **JACKSON FORD HAS FAILED TO EXHAUST ITS CONTRACTUAL REMEDIES**

13 48. Ford Motor Company claims that "Paragraph 18(b) of the Ford and Mercury Sales and
14 Service Agreements..." requires that "In any dispute about dealer termination, the dealer must appeal to
15 the [Ford] Dealer Policy Board as a condition precedent to pursuing any other remedy." (Memorandum,
16 page 6, lines 20-21, page 7, lines 7-9) Ford Motor Company then contends that "Jackson Ford has failed
17 to comply with a condition precedent to bringing this protest and the franchises have terminated."
18 (Memorandum, page 8, lines 7-8) Ford Motor Company also contends that "Jackson Ford is contractually
19 barred from pursuing [the protest]." (Memorandum, page 8, line 6-10)

20 49. No opposition was filed in behalf of Jackson Ford in response to these contentions.

21 50. However, on its face, this contention is not meritorious because of Section 3060(a) which
22 in part states: "Notwithstanding ...the terms of any franchise, no franchisor shall terminate or refuse to
23 continue any existing franchise unless all of the following conditions are met: ..."

24 51. Therefore, even though the language of the franchises may permit termination as stated by
25 Ford Motor Company, the Vehicle Code provides a right to Jackson Ford to file a protest before the Board
26 "Notwithstanding ...the terms of any franchise."

27 **JACKSON FORD'S PROTEST IS UNTIMELY**

28 52. In its motion Ford Motor Company alleged that Jackson Ford had only 10 days within

1 which to file a protest (citing Section 3060(a)(2)); that Ford Motor Company had "... provided Jackson
2 Ford with a...notice of termination on July 23, 2009"; that "Jackson Ford did not file the instant protest
3 until on or about September 16, 2009 - 55 days after the date of notice"; and that "Jackson Ford's protest
4 is untimely and should be dismissed. (Memorandum, page 8, lines 13-18)

5 53. Although no opposition to this contention was filed in behalf of Jackson Ford, the
6 contention as made and the initial documents submitted were not sufficient to conclude that the protest
7 was "untimely". The contention is that Ford Motor Company "provided Jackson Ford" with a notice of
8 termination and the focus in the motion is upon the "date of notice". What must be proven to show that
9 the time to file a protest has expired is not that notice was "provided" but that the notice was "received"
10 and the critical date is not the "date of notice" but the date when the notice was "received".

11 ANALYSIS

12 54. The analysis is going to focus on this last contention of Ford Motor Company, which is the
13 claim that the protest was not timely filed. If the protest was not timely filed with the Board then the
14 other grounds alleged for granting Respondent's motion to dismiss are moot.

15 APPLICABLE STATUTORY PROVISIONS

16 55. Section 3060(a) provides: "Notwithstanding ... the terms of any franchise, no franchisor
17 shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:
18 (1) The franchisee and the board **have received** written notice from the franchisor..." (Emphasis added).
19 Section 3060(a)(2) further states that "[t]he franchisee may file a protest with the board...within 10 days
20 after **receiving** a 15-day notice, satisfying the requirements of this section..." (Emphasis added).

21 56. Because the Notice from Ford Motor Company listed the "insolvency of the dealer" and
22 "failure of the dealer to function in the ordinary course of business [cessation of business]" as the reasons
23 for termination of Jackson Ford, Section 3060 permits the franchisor to give what is termed a "15-day
24 notice" of termination. This would allow the franchisor to terminate the franchise 15 days after the notice
25 is received by the franchisee unless the franchisee files a protest with the Board "within 10 days after
26 receiving a 15-day notice." The legislative shortening of the time for termination from 60 days (if
27 termination is for other reasons) to 15 days and, even more important, limiting the time to file a protest to
28 only 10 days from receipt of the notice (compared to 30 days if the termination is based upon other

1 reasons) is an indication of the significance the legislature placed on the reasons for termination and the
2 prompt action needed by a franchisee if the reasons for termination were cessation of operations or
3 insolvency, as alleged here by Ford Motor Company. As explained by the court in *Sonoma Subaru, Inc.*
4 *v. New Motor Vehicle Board*, 189 Cal. App. 3d 13, 234 Cal. Rptr. 226 (Cal. Ct. App. 1987), the 10-day
5 filing deadline is strictly applied:

6 Where no protest of the termination is filed within the allotted time, the Legislature's
7 obvious intent is to let the franchisor treat the termination as final and effective...
8 Sanctioning late filings would undercut that finality and create uncertainty in the minds
9 of franchisors as to whether they may treat their relationship with unsatisfactory
10 franchisees as concluded. We conclude that the Legislature did not intend that the 10-day
11 filing deadline be extended.

12 *Sonoma Subaru, Inc.*, 189 Cal. 3d at 22 (affirming the Board's refusal to hear a protest that was untimely
13 by five days).

14 57. Because the time to file a protest is very short, 10 days, there is no doubt that the
15 legislature chose the terms "within 10 days after receiving" such a notice rather than "the date of the
16 notice" or the date the notice was "sent" or when it was "given".

17 58. The Vehicle Code does not define the term "received". However, the California Uniform
18 Commercial Code ("UCC")¹¹ contains the following definitions:¹²

19 Section 1202 provides in part:

20 (e) Subject to subdivision (f), a person¹³ "receives" a notice or notification when:
21 (1) it comes to that person's attention; or
22 (2) it is duly delivered in a form reasonable under the circumstances at the place of
23 business through which the contract was made or at another location held out by that
24 person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective
for a particular transaction from the time it is brought to the attention of the individual
conducting that transaction and, in any event, from the time it would have been brought to
the individual's attention if the organization had exercised due diligence. An organization

¹¹ Section 1101 of California code states: "This code may be cited as the Uniform Commercial Code."

¹² Copies of the franchises were not provided to the Board. In the absence of any indication to the contrary as to choice of law, it is assumed that California law will apply to the franchise. And, because the franchise would be one that involves a sale of goods or transactions in goods, Division 2 of the UCC would be applicable, as would the definitions in Division 1 of the UCC. Michigan has also adopted the Uniform Commercial Code and language similar to UCC section 1202 is contained in Michigan's statutes at Section 440.1201(26) and (27). Therefore even if the franchise called for application of Michigan law, the analysis as to when a notice is "received" will be the same.

¹³ "Person" is defined in section 1201(b)(27) of the UCC to include a "corporation" as well as an "individual".

1 exercises due diligence if it maintains reasonable routines for communicating significant
2 information to the person conducting the transaction and there is reasonable compliance
3 with the routines. Due diligence does not require an individual acting for the organization
4 to communicate information unless the communication is part of the individual's regular
5 duties or the individual has reason to know of the transaction and that the transaction
6 would be materially affected by the information.

7 59. Ford Motor Company, in its Memorandum, stated only that "On July 23, 2009, Ford
8 sent Jackson Ford a Notice of Termination of the franchises..." (Memorandum, page 2, line 24, and
9 Request for judicial notice, Exhibit G)

10 60. This information did not establish if or when the notice had been "received" which is
11 required by the Vehicle Code to begin the running of the 10-day period within which Jackson Ford could
12 timely file its protest with the Board. The notice itself indicated only that it had been sent via Certified
13 Mail - Return Receipt Requested to:

14 Mr. Charles L. Smith, President
15 Jackson Ford-Mercury, Inc.
16 dba The New Jackson Ford-Mercury
17 11400 Highway 49
18 Martell, CA 95654

19 And to: Mr. Charles L. Smith (home address)

20 61. As stated earlier, neither the return receipts nor the information they may have contained
21 had been provided to the Board as of the time of the hearing of the motion on July 14, 2010. ALJ Skrocki
22 expressed his concern that although there was documentation stating when the notice was sent or "given",
23 there was nothing indicating when it had been "received" or even that it had been "received".

24 62. Mr. Cram, counsel for Ford Motor Company, stated that such documents existed and could
25 be provided. The ALJ agreed to allow additional time to Ford Motor Company to supplement its motion
26 with evidence regarding the receipt of the notice of termination.

27 **THE SUPPLEMENTAL DOCUMENTATION FROM FORD MOTOR COMPANY**

28 63. On July 22, 2010, the Board received a "Declaration of Anthony J. Said in Support of
Motion to Dismiss Protest" with exhibits.

64. Mr. Anthony J. Said is the person who signed the notice of intent to terminate, dated July
23, 2009, that had been referred to above. He is "a Dealer Contracts Supervisor" and "Assistant Secretary
for Ford and Lincoln Mercury Marketing and Sales Division".

ANALYSIS AS TO WHETHER THE PROTEST WAS TIMELY FILED

65. As stated above, the date of sending of the notice of termination is not the controlling date as to the commencement of the 10 days within which Jackson Ford could file a timely protest. Section 3060 clearly requires that the notice be “received” and that a protest would be timely only if filed “within 10 days after receiving” the notice.¹⁴

66. Both protests state that “Protestant received from Respondent a notice that Respondent intends to terminate Protestant’s franchise agreement (Protests, page 1, line 25), but neither of them state when the notice was “received”. Therefore, the question really is narrowed down to “when” the notice was received.

67. The notice dated July 23, 2009, was sent via Certified Mail, Return Receipt Requested to “Mr. Charles L. Smith, President, Jackson Ford-Mercury, Inc., dba The New Jackson Ford Mercury, 11400 Highway 49, Martell, CA 95654. (Declaration, Exhibit A) This letter was returned to Ford Motor Company. The envelope had a label¹⁵ from the Postal Service with a date of “07/24/09” and indicating “Return to Sender - The New Jackson Ford Mercury Moved - Left No Address - Unable to Forward - Return to Sender”. (Declaration, Exhibit B)

68. The same notice sent to “Mr. Charles L. Smith, (home address redacted) Sutter Creek, CA” was also returned to Ford Motor Company. (Declaration, Exhibit A) This letter had on its envelope a label¹⁶ from the post office “08/25/09 - Return to Sender – No such number¹⁷ – Unable to forward)”. (Declaration, Exhibit B)

69. Neither of these notices could be deemed to have been “received” by Jackson Ford as required by the Vehicle Code.

70. On August 11, 2009, Ford resent the notice by Certified Mail, Return Receipt Requested to “Mr. Charles Smith, c/o Mr. David Foyil, 18 Bryson Lane, Sutter Creek, CA 95685.” (Declaration, Exhibit C) Mr. Foyil was Jackson Ford’s bankruptcy counsel. (Declaration, page 2, lines 14-17) The

¹⁴ Section 3060 alternatively allows for a protest to be filed “within 10 days after the end of any appeal procedure provided by the franchisor”, but the facts here indicate Jackson Ford did not utilize Ford Motor Company’s internal appeal procedure.

¹⁵ This label obscured what is likely the “49” after “11400 Highway” and also the numbers after “9” in the zip code.

¹⁶ This label obscured part of “Creek, CA” as well as the zip code”.

¹⁷ As discussed later, the notice was resent on August 20, 2009, to Mr. Smith at this same address via Federal Express and was delivered on August 24, 2009, with no indication of “No such number”.

1 "Track & Confirm" from the Postal Service indicates this letter was delivered at the address shown on
2 August 14, 2009, at 10:03 a.m. (Declaration, Exhibit D) Although it is possible that the notice, which
3 was addressed to Mr. Smith, could have been brought to the attention of Mr. Smith as the person
4 representing Jackson Ford,¹⁸ or that receipt by Mr. Foyil as attorney for Jackson Ford would be deemed
5 "received" by Jackson Ford, there is insufficient information to so conclude.

6 71. Also on August 11, 2009, Ford resent the notice by Certified Mail, Return Receipt
7 Requested to "Mr. Charles L. Smith, c/o Mr. Ed Wright, 112 J Street, Second Floor, Sacramento, CA
8 95814. (Declaration, Exhibit C) Mr. Wright was Mr. Smith and Jackson Ford's "state law counsel."
9 (Declaration, page 2, lines 14-17) The "Track & Confirm" from the Postal Service indicates this letter
10 was delivered at the address shown on August 14, 2009, at 1:45 p.m. There is a hand-written note on the
11 "Track & Confirm" that says "c/o Ed Wright (court counsel) returned – no longer representing Mr.
12 Smith." (Declaration, Exhibit D) As with the notice delivered to Mr. Foyil's office, this notice was
13 addressed to Mr. Smith, however, there is insufficient information to conclude that this notice would
14 operate as "received" by Jackson Ford. And, as above, it is not necessary to decide this in order to rule on
15 this motion to dismiss.

16 72. On August 20, 2009, Ford Motor Company resent the Notice by Federal Express to "Mr.
17 Charles L. Smith, (home address redacted), Sutter Creek, CA. (Declaration, Exhibit E) Federal Express
18 provided a "Proof of Delivery" indicating that the envelope had been delivered at the location shown on
19 August 24, 2009, at 11:36 a.m. (Declaration, Exhibit F) There was no signature for the delivery as none
20 had been requested.

21 73. Also on August 20, 2009, Ford resent the notice by Federal Express to "Mr. Charles Smith,
22 c/o Mr. David Foyil, 18 Bryson Drive, Sutter Creek, CA 95685". (Declaration, Exhibit E) Federal
23 Express provided a "Proof of Delivery" indicating that the envelope had been delivered on August 24,
24 2009, at 11:21 a.m., and that it had been signed for by "L. FOYIL". (Declaration, Exhibit F)

25 74. As stated above, the protest must be filed within 10 days of when this notice of termination
26

27 ¹⁸ This would satisfy the need for the notice having been received by Jackson Ford per UCC section 1202(f) which provides in
28 part: "(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from
the time it is brought to the attention of the individual conducting that transaction and,..."

1 was received by Jackson Ford. As the protest was filed on Wednesday, September 16, 2009, for it to be
2 deemed timely would require the notice to have been received at some time on or after September 6,
3 2009. Said another way, if the notice was received by Jackson Ford on or before September 5, 2009, then
4 the protest would be untimely.

5 75. The facts before the Board establish that a notice of termination, proper in form and
6 content was delivered to the following locations on the dates indicated:¹⁹

	ADDRESSEE	PLACE DELIVERED	DATE DELIVERED	
7	1	Mr. Charles Smith c/o Mr. David Foyil	18 Bryson Lane Sutter Creek, CA	August 14, 2009
8	2	Mr. Charles Smith c/o Mr. Ed Wright	112 J Street Sacramento, CA	August 14, 2009
9	3	Mr. Charles Smith c/o Mr. David Foyil	18 Bryson Lane Sutter Creek, CA	August 24, 2009
10	4.	Mr. Charles Smith	(home address redacted) Sutter Creek, CA	August 24, 2009

11
12 76. Ford Motor Company was confronting three difficult tasks that have been imposed upon
13 franchisors by the legislature. Here, these are: (1) Take steps to see that Jackson Ford “received” the
14 notice of termination; (2) Prove that the notice was in fact “received” by Jackson Ford; and (3) Prove
15 when the notice was received by Jackson Ford.

16 77. In a typical case, this can be accomplished by use of the Postal Service or some other
17 carrier utilizing the “return receipt requested” procedure they all have established. Such a procedure,
18 when it functions normally, is effective in satisfying all three of the above requirements. However, when
19 the franchisee closes its doors (or in some cases may be deliberately attempting to avoid receipt of some
20 notices), the “usual” method of complying with the above three requirements becomes much more
21 difficult.

22 78. This appears to be one of the difficult times. It must be remembered that the first two
23 attempts to have the notice delivered (one to the dealership address and one to Mr. Smith’s home address)
24 were not successful as they were not “delivered”, but were returned to Ford Motor Company.

25 79. Taking in the order listed above the four “deliveries” that had occurred, we must
26 determine if any of them can be deemed to have resulted in the notice being “received” by Mr. Smith

27
28 ¹⁹ The other two earlier attempts are not included here as the envelopes were returned to Ford Motor Company and not delivered.

1 representing Jackson Ford “in pro per”, within the definition of “received” as stated above. If they do not
2 establish actual “receipt”, do they establish at least a rebuttable presumption of having been “received”
3 within the statutory definition?

4 80. For ease of reference, the definition of “received” as contained in the UCC is repeated here
5 and is as follows:

6 (e) Subject to subdivision (f), a person²⁰ “receives” a notice or notification when:

- 7 (1) it comes to that person's attention; or
8 (2) it is duly delivered in a form reasonable under the circumstances at the place of
9 business through which the contract was made or at another location held out by that
10 person as the place for receipt of such communications.

11 (f) Notice, knowledge, or a notice or notification received by an organization is effective
12 for a particular transaction from the time it is brought to the attention of the individual
13 conducting that transaction and, in any event, from the time it would have been brought to
14 the individual's attention if the organization had exercised due diligence. An organization
15 exercises due diligence if it maintains reasonable routines for communicating significant
16 information to the person conducting the transaction and there is reasonable compliance
17 with the routines. Due diligence does not require an individual acting for the organization
18 to communicate information unless the communication is part of the individual's regular
19 duties or the individual has reason to know of the transaction and that the transaction
20 would be materially affected by the information.

21 81. Per the standards in the statute, the notice could be received by Jackson Ford c/o Mr. Smith
22 per subdivision (e)(1) when it comes to Mr. Smith’s attention; or under subdivision (e)(2) when it is duly
23 delivered at the place of business through which the contract was made or at another location held out by
24 that person as the place for receipt of such communications.²¹ And, as Jackson Ford is an “organization”,
25 the notice would be deemed “effective” under subdivision (f) “for a particular transaction” when it is
26 “brought to the attention of the individual conducting that transaction”. None of these have been clearly
27 established to have occurred as to receipt by Jackson Ford or Mr. Smith.

28 **Delivery #1**

82. This was addressed to Mr. Smith c/o of Mr. Foyil, his bankruptcy attorney. The letter was
delivered to the attorney’s address. What is unknown is whether that notice came to Mr. Smith’s attention
and if so when. And, it is unknown if this was the place held out by Jackson Ford, or Mr. Smith acting in
its behalf, as the place for sending communications as the dealership had closed.

²⁰ “Person” is defined in section 1201(b)(27) of the UCC to include a “corporation” as well as an “individual”.

²¹ It is unknown what the Sales and Service Agreement(s) may say about the place for receipt of notices.

1 **Delivery #2**

2 83. This was addressed to Mr. Smith c/o another of his attorneys. This letter too was delivered
3 to the attorney's address. What is unknown, is whether this notice came to Mr. Smith's attention and if so
4 when. And, as above, it is unknown if this was the place held out by Jackson Ford, or Mr. Smith acting in
5 its behalf, as the place for sending communications as the dealership had closed.

6 **Delivery #3**

7 84. This, like Delivery #1, was addressed to Mr. Smith c/o of his bankruptcy attorney and was
8 delivered to the attorney's address. Like, the other two deliveries, it is unknown whether the notice came
9 to Mr. Smith's attention and if so when or if this place had been held out as the place for sending such
10 communications.

11 **Delivery #4**

12 85. This notice was addressed to Mr. Smith at what is purportedly his home address. It too
13 was delivered but it is unlikely that the place of delivery was the place of business through which the
14 contract was made. However, it is unknown if this was the place held out by Jackson Ford as another
15 location for receipt of such communications per subdivision (e)(2).

16 **The addresses "held out" by Jackson Ford**

17 86. It is noted that the protest filed on September 16 states Jackson Ford "is located at 11400
18 Highway 49, Martel California 95634". This is the address to which the notice was initially sent but not
19 delivered as it was returned to Ford Motor Company with the label that read: "Return to Sender - The
20 New Jackson Ford Mercury Moved - Left No Address - Unable to Forward - Return to Sender". It is also
21 noted that the "second protest" which was received by the Board on September 17, 2009, stated only
22 Jackson Ford's mailing address and that it was "909 Erie Street, Oakland, California".

23 87. Although it may be understandable, there was no apparent attempt to make delivery of the
24 notice at the "Erie Street" address in Oakland.²² And there was no attempt to make personal delivery to
25 Mr. Smith or to "manually" deliver or leave a copy of the notice at the dealership's premises.

26 _____
27 ²² As stated earlier, it is unknown if this second protest was received by Ford Motor Company. The only protest attached to
28 Ford Motor Company's pleading was the first protest received by the Board. Also, see discussion re: Proof of service being inaccurately completed as to both protests.

1 88. The documents submitted pertaining to the 4th delivery show that there was delivery to the
2 address shown, which is purported to be Mr. Smith's home address. There is no doubt that Mr. Smith is
3 an authorized agent of Jackson Ford in his capacity as President. It would be illogical to conclude that the
4 requirement that the notice be "received" could be satisfied by leaving a copy of the notice at the
5 dealership (that has been admitted by Mr. Smith to have been closed, and indicated by the Postal Service
6 to have moved with no forwarding address) but that delivering a copy of the notice to the home address of
7 the CEO of the company would not constitute the notice being "received". The policy and purpose
8 underlying the requirement of the statutes that the notice be "received" by Jackson Ford is unquestionably
9 more likely to be more effectively accomplished by delivering it to the home of its CEO, Mr. Smith, than
10 leaving it under a door at the dealership's address if the dealership had "closed" (per Mr. Smith) and had
11 "moved with no forwarding address" (per the U.S. Postal Service).

12 89. Therefore, it is determined that the delivery to Mr. Smith's home address constituted
13 "receipt" of the notice of termination by an authorized agent for the receipt of the Notice. This delivery
14 occurred on August 24, 2009. The protest was not filed until September 16, 2009, which is more than 10
15 days from August 24, 2009.

16 **WHETHER THE PROTEST SHOULD BE DISMISSED DUE TO THE FAILURE**
17 **OF JACKSON FORD TO SUBMIT ITS BRIEF IN OPPOSITION AS ORDERED**
18 **BY THE BOARD AND DUE TO ITS FAILURE TO APPEAR AT THE**
19 **SCHEDULED HEARING ON THE MOTION TO DISMISS THE PROTEST**

20 **WHETHER JACKSON FORD SHOULD BE DEEMED TO HAVE ABANDONED ITS PROTEST?**

21 90. The Board's regulations as contained in Title 13 of the California Code of Regulations
22 provide as follows:

23 Section § 589. Failure to Appear.

24 Any party who fails to appear at a hearing will not be entitled to a further opportunity to be
25 heard unless good cause for such failure is shown to the board or to the administrative law
26 judge within five days thereafter. The lack of such showing of good cause may, in the
27 discretion of the board or the administrative law judge, be interpreted as an abandonment
28 of interest by such party in the subject matter of the proceeding.

29 91. Following the telephonic conference held on June 8, 2010, during which Mr. Smith
30 participated in behalf of Jackson Ford, the Board issued its order setting a briefing schedule and a hearing
31 date for the motion to dismiss. Jackson Ford made no objection to the dates (and in fact participated in

1 selecting them). However, subsequent to that conference, Mr. Smith advised the Board's staff that he did
2 not intend to file an opposition or appear for the telephonic hearing. (Transcript, page 6, lines 3-18)
3 Jackson Ford did not file its brief in opposition (due on June 30) nor did Mr. Smith or anyone else in
4 behalf of Jackson Ford participate in the scheduled hearing on the motion held on July 14, 2010.

5 92. The ALJ, counsel for Ford Motor Company, the Board's staff, and a Reporter were
6 "connected" and ready to proceed on July 14, 2010, at the time set for hearing of the motion to dismiss.
7 The parties, in the Board's Order of June 9, 2010, had been given instructions for the procedure to do so
8 and none had any difficulty joining the hearing. As Mr. Smith had not "dialed-in" as instructed, the
9 Board's staff attempted to contact him at the phone number the Board had for him, but the call was
10 "taken" by a voice-mail system. A message was left asking that Mr. Smith contact the Board if he wanted
11 to participate in the telephonic hearing which was about to begin. There was no return call or other
12 response from Mr. Smith or anyone else in behalf of Jackson Ford. The hearing commenced without an
13 appearance by Jackson Ford. It concluded with the instructions from the ALJ to Ford Motor Company to
14 provide the additional information concerning the issue of whether the notice of termination had been
15 received by Jackson Ford.

16 93. Therefore, the failure to file an opposition brief, the statement of Mr. Smith that the brief
17 would not be filed and that he would not appear for the telephonic hearing, followed by the actual failure
18 to participate in the hearing on the motion to dismiss, and the failure to respond to the message left on the
19 day of the hearing are sufficient to conclude that Jackson Ford has manifested an abandonment of interest
20 in the proceedings.

21 94. It is therefore recommended that the protest be dismissed for the following reasons:

22 The protest was not timely filed.

23 Jackson Ford has manifested an abandonment of interest in the proceedings.

24 ///

25 ///

26 ///

27 ///

28 ///

1 PROPOSED ORDER

2 After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered
3 that Respondent's motion to dismiss protest is granted with respect to *Jackson Ford-Mercury, Inc., dba*
4 *The New Jackson Ford-Mercury v. Ford Motor Company*, Protest No. PR-2180-09, and the protest is
5 hereby dismissed with prejudice.

6
7 I hereby submit the foregoing which constitutes my
8 proposed order in the above-entitled matter, as the
9 result of a hearing before me, and I recommend this
10 proposed order be adopted as the decision of the
11 New Motor Vehicle Board.

12 DATED: August 5, 2010



13 By: _____
14 ANTHONY M. SKROCKI
15 Administrative Law Judge
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25
26

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