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

CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

SAN JOSE YAMAHA,

Protestant,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,

Respondent.

Protest No. PR-2394-14

ORDER OF DISMISSAL

To: John Masi
In Pro Per
SAN JOSE YAMAHA POWERSPORTS
776 N. 13th Street
San Jose, California 95112

Colm A. Moran, Esq.
Attorney for Respondent
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067

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Pursuant to the "Order of the New Motor Vehicle Board Directing the Executive Director to Dismiss the Protest" dated December 11, 2014, IT IS HEREBY ORDERED THAT the above-entitled Protest is dismissed with prejudice.

There will be no further proceedings in this case before the New Motor Vehicle Board.

SO ORDERED.

DATED: December 12, 2014

NEW MOTOR VEHICLE BOARD

By: _____
WILLIAM G. BRENNAN
Executive Director

Jean Shiomoto, Director, DMV
Tim Corcoran, Branch Chief,
Occupational Licensing, DMV

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In the Matter of the Protest of

SAN JOSE YAMAHA POWERSPORTS,

Protestant,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,

Respondent.

Protest No. PR-2394-14

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

To: John Masi
In Pro Per
SAN JOSE YAMAHA POWERSPORTS
776 N. 13th Street
San Jose, California 95112

Colm A. Moran, Esq.
Attorney for Respondent
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067

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

At its regularly scheduled meeting of December 11, 2014, the Public Members of the Board met and considered the findings and recommendation of the Administrative Law Judge and the Executive Director. After such consideration, it is hereby determined that there has been a failure of Protestant to comply with authorized discovery without substantial justification for that failure. (Vehicle Code section 3050.2(b))

The findings of the Administrative Law Judge are hereby adopted and the Executive Director is directed to dismiss the protest of *San Jose Yamaha* v. *Yamaha Motor Corporation, U.S.A.*, Protest No. PR-2394-14, with prejudice.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 11th DAY OF DECEMBER 2014

for William J Brennan

GLENN E. STEVENS
President
New Motor Vehicle Board

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

CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

SAN JOSE YAMAHA POWERSPORTS,

Protestant,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,

Respondent.

Protest No. PR-2394-14

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

To: John Masi
In Pro Per
SAN JOSE YAMAHA POWERSPORTS
776 N. 13th Street
San Jose, California 95112

Colm A. Moran, Esq.
Attorney for Respondent
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067

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

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

DATED: December 2, 2014

NEW MOTOR VEHICLE BOARD

By _____
WILLIAM G. BRENNAN
Executive Director

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

CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

SAN JOSE YAMAHA POWERSPORTS,

Protestant,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,

Respondent.

Protest No. PR-2394-14

1. RECOMMENDATION THAT RESPONDENT'S MOTION TO DISMISS PROTEST BE GRANTED;

2. PROPOSED ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

To: John Masi
In Pro Per
SAN JOSE YAMAHA POWERSPORTS
776 N. 13th Street
San Jose, California 95112

Colm A. Moran, Esq.
Attorney for Respondent
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067

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1. This matter came on regularly for telephonic hearing on Friday, November 21, 2014, before Anthony M. Skrocki, Administrative Law Judge ("ALJ") for the New Motor Vehicle Board ("Board"). John Masi, Pro Per, represented Protestant. Colm A. Moran, Esq. of Hogan Lovells US LLP represented Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

2. San Jose Yamaha ("Protestant") is located at 776 N. 13th Street, San Jose, California 95112. Protestant is a new motor vehicle dealer and franchisee of Respondent, authorized to sell Yamaha motorcycles, ATVs, side-by-side vehicles, watercraft and power equipment.[1]

3. Protestant is represented by John Masi, dealer principal, in pro per.

4. The protest was filed on April 22, 2014 by Mr. Masi in behalf of Protestant. Shortly thereafter, around June 2, 2014, Christopher J. Hogan, Esq. of the Law Office of Christopher J. Hogan undertook the representation of Protestant. However, on July 24, 2014, Mr. Masi elected to represent Protestant and Mr. Hogan ceased representation of Protestant.

5. Respondent Yamaha Motor Corporation, U.S.A. ("Respondent" or "Yamaha" or "YMUS" as referred to in Respondent's pleadings) is a licensed distributor and the franchisor of Protestant. Yamaha is located at 6555 Katella Avenue, Cypress, California 90630.

6. Respondent is represented by Colm A. Moran, Esq. of Hogan Lovells US LLP.

THE FIRST NOTICE OF TERMINATION - DATED MARCH 24, 2014

7. By letter dated March 24, 2014, Yamaha gave notice to Protestant and the Board of Yamaha's intent to terminate San Jose Yamaha's franchise due to Mr. Masi's alleged "abusive and threatening conduct toward both third parties and our own employees." Among the specific facts alleged are "threats of violence directed to employees of GE Capital Retail Bank" with the result being that "GE Capital has refused to do any business with the Dealership in the future." Other allegations include that "Customers have lodged similar complaints about your threats and verbal abuse.", and that "you have repeatedly screamed at and used profanities toward Yamaha employees." The notice stated that "Your conduct...constitutes grounds for termination of the Dealer Agreement under Section 6.2(d), which allows

[1] The Board's statues do not apply to a dealer agreement, or that portion of a dealer agreement, pertaining to "side-by-side vehicles", watercraft, or power equipment.

Yamaha to terminate the agreement based on, among other things, any "conduct...by Dealer...which affects adversely Dealer's operations or the goodwill and reputation of Dealer, Yamaha or [Yamaha's] products."

8. In response to this notice of termination, on April 22, 2014, San Jose Yamaha filed a timely protest under Vehicle Code section 3060[2] alleging that there is not good cause for the termination of its franchise.

9. This protest was assigned Protest No. PR-2394-14. Although there is a second notice of termination as discussed below, this is the only protest pending before the Board between these parties and is the protest subject to this Motion to Dismiss.

THE SECOND NOTICE OF TERMINATION - DATED SEPTEMBER 15, 2014

10. In a letter dated September 15, 2014[3], Yamaha gave a second notice to Protestant stating Yamaha's intent to terminate San Jose Yamaha's franchise based on Protestant's "...failure to maintain floorplan financing as required by Section 5.5 of the Dealer Agreement...". Among the allegations contained in this notice are that "Yamaha has given the Dealership multiple opportunities to cure this breach and obtain a replacement floorplan. For example, we wrote to the Dealership about this issue on February 27, 2014, May 21, 2014, June 18, 2014, July 15, 2014, and July 29, 2014. The Dealership, however, has not obtained replacement financing. Indeed, the only substantive response we have received from you on this issue was in your email dated July 24, 2014, in which you stated that 'getting another $1.2 million in flooring is setting myself up as a glutton for punishment.'."

11. As the second notice of termination, dated September 15, 2014, was received by Protestant on Wednesday, September 17, 2014, Protestant, per Section 3060(a)(2), had until October 17, 2014, to file a timely protest.[4] As of November 21, 2014 (the date of the hearing on this Motion to Dismiss), Protestant had not filed or attempted to file a protest in response to Yamaha's second notice of termination. Respondent alleges that as no protest was filed to this second notice of termination,

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[2] All statutory references are to the Vehicle Code unless otherwise indicated.
[3] This second notice, dated September 15, 2014, was almost 6 months after the first notice of termination dated March 24, 2014.
[4] The Board received the second notice of termination on September 18, 2014. Section 3060(a)(1) requires that the franchisee and the Board both receive the written notice of termination. Arguably, a protest could have been timely filed through Monday, October 20, since the Board did not receive the notice until September 18.

Protestant's franchise was terminated as of November 16, 2014. This date is 60 days from September 17, 2014, the date the second notice of termination was received by Protestant, and is the time period stated in the statutes. (Section 3060(a)(1)(A) and Section 3060(a)(3))

THE MOTION TO DISMISS

12. Respondent is seeking dismissal of the Protest for two reasons:

a. The alleged failure of Protestant to participate in the discovery process, including the failure to comply with the discovery schedule contained in the Board's Pre-Hearing Conference Order dated June 11, 2014, and the August 6, 2014 Rulings on Objections to Requests for documents (See Section 3050.2(b))[5]; and,

b. The Board no longer has jurisdiction to consider the only protest before it. This protest was filed in response to the first notice of termination. However, the failure to file a protest in response to the second notice of termination resulted in the termination of the franchise as of November 16, 2014, as provided in Section 3060(a)(1)-(3).[6] Thus the Protest against the first notice is moot.

PROCEDURAL FACTS AS TO RESPONDENT'S MOTION TO DISMISS LEADING TO THE HEARING ON NOVEMBER 21, 2014

13. Respondent filed its Motion to Dismiss Protest on October 30, 2014.

14. Upon receipt of the Motion to Dismiss, the Board's staff, on October 31, 2014, contacted Mr. Masi and Mr. Moran who mutually agreed to dates for a briefing schedule and hearing date for the Motion to Dismiss. The briefing schedule and hearing date were set forth in the Board's "Order Establishing Briefing Schedule Re: Respondent's Motion to Dismiss" and "Order of Time and Place of

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[5] Section 3050.2(b) provides: "Compliance with discovery procedures authorized pursuant to subdivision (b) of Section 3050.1 may be enforced by application to the executive director of the board. The executive director may, at the direction of the board, upon a showing of failure to comply with authorized discovery without substantial justification for that failure, dismiss the protest or petition or suspend the proceedings pending compliance." (Underline added)

[6] Section 3060 provides in part as follows:
(a) Notwithstanding...the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:
(1) The franchisee and the board have received written notice from the franchisor as follows:
(A) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.
...
(2)...The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, satisfying the requirements of this section,...
(3) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed. (Underline added.)

Telephonic Hearing" issued on October 31, 2014. The relevant dates and what did or did not transpire follow.

15. Protestant agreed and was ordered to file and serve its Opposition to the Motion to Dismiss no later than November 13, 2014.

(a) Protestant did not submit or serve its Opposition to the Motion to Dismiss on November 13.

(b) On November 14, 2014, the Board's staff (by email and telephone) contacted Mr. Masi to inquire about the Opposition that had not been filed and to remind him that there was a mandatory hearing on the Motion to Dismiss set for November 21. Mr. Masi responded that he needed more time to file the Opposition and that it would be filed the afternoon of Monday, November 17.

(c) Protestant failed to file its Opposition to the Motion on the 17th, or before the hearing on November 21, or to date.

16. Respondent was to file and serve its Reply to Protestant's Opposition no later than November 19, 2014.

(a) Because Protestant did not file its Opposition, no Reply to the Opposition was warranted.

(b) On November 20, 2014, because nothing had been filed in behalf of Protestant, the Board's staff emailed Mr. Masi to remind him that the hearing on the Motion to Dismiss would be held the next day, November 21, at 11:00 a.m., and again provided him with the telephone numbers needed for him to join the hearing.

17. On November 21, 2014, the telephonic hearing on the Motion to Dismiss commenced at 11:00 a.m. as scheduled, with Anthony M. Skrocki, an ALJ of the Board, presiding. Protestant was represented by Mr. Masi. Respondent was represented by Mr. Moran.

18. Mr. Masi, in response to an inquiry by the ALJ, stated that Mr. Hogan, Protestant's former counsel, was no longer being utilized as "back up" and would not be participating in the telephonic hearing.

APPLICABLE LAW AS TO THE FAILURE OF PROTESTANT TO COMPLY WITH AUTHORIZED DISCOVERY

19. As indicated in footnote 5, Section 3050.2(b) provides in pertinent part: "...The executive

director may, at the direction of the board, upon a showing of failure to comply with authorized discovery without substantial justification for that failure, dismiss the protest or petition or suspend the proceedings pending compliance. ..."[7]

20. The Third District Court of Appeal has upheld the Board's authority to dismiss a protest because of the failure of the protestant to comply with authorized discovery. See *Nader Automotive Group, LLC, et al.* v. *New Motor Vehicle Board* (2009) 178 Cal. App. 4th 1478.

ANALYSIS OF WHETHER PROTESTANT HAS FAILED TO COMPLY WITH AUTHORIZED DISCOVERY

21. There are two orders of the Board that allegedly were not complied with by Protestant. These are (1) the Pre-Hearing Conference Order of June 11, 2014 setting forth the discovery schedule leading up to a tentative date for a hearing on the merits of the protest of December 8, 2014; and (2) the August 6, 2014 Order regarding the Rulings on Objections to the Requests for Production of Documents.

The Board's Pre-Hearing Conference Order of June 11, 2014

22. A scheduled telephonic Pre-Hearing Conference was conducted on June 9, 2014. At that time, Protestant was represented by Christopher J. Hogan, Esq. of the Law Office of Christopher J. Hogan. Respondent was represented by Colm A. Moran, Esq. of Hogan Lovells US LLP.

23. The following shows what was stipulated to by counsel and ordered by the Board in the Pre-Hearing Conference Order dated June 11, 2014, and what was done or not done is indicated in brackets.

1. Counsel for the parties shall file and serve all requests for identification and production of documents no later than Monday, June 30, 2014. [This was timely done by both parties. Mr. Hogan still represented Protestant.]

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[7] The alternative sanction of the power to "suspend the proceedings pending compliance" is not appropriate when the conduct of the franchisee is at issue. This sanction may be used when it is the franchisor that has failed to comply with authorized discovery. Suspending proceedings when the franchisee fails to comply with authorized discovery would result in franchisees routinely failing to engage in discovery. In such case, the franchisee would benefit from its own misconduct as suspending proceedings would preserve the status quo and summarily prevent franchisors from accomplishing what the franchisors desire. Likewise, the sanction of dismissal of the protest is a sanction applicable only when it is a franchisee that fails to comply with authorized discovery. A franchisee complaining about the failure of a franchisor to engage in discovery would not be seeking dismissal of its own protest as a sanction for the misconduct of the franchisor. If dismissal of the protest were the appropriate sanction for the failure of a franchisor to participate in discovery, no franchisor would engage in discovery.

2. Objections, if any, to the requests for documents shall be filed and served no later than Monday, July14, 2014. [This was timely done by both parties. Mr. Hogan still represented Protestant.]

3. Counsel for the parties shall confer on Monday, July 21, 2014, in an attempt to resolve their respective objections to the requested discovery. [This was timely done. Mr. Hogan still represented Protestant.]

4. Counsel for the parties shall submit via facsimile transmission or e-mail a Statement of Disputed Discovery Requests, if any, by 12:00 p.m. (Pacific Time), on Friday, July 25, 2014. ... [This was subsequently changed by agreement of counsel to August 1, 2014, as indicated in the First Amended Pre-Hearing Conference Order dated July 23, 2014. A Statement was timely submitted in behalf of Respondent but no Statement was submitted in behalf of Protestant. Mr. Hogan was no longer representing Protestant.]

5. A telephonic conference shall be held on Wednesday, July 30, 2014, at 10:00 a.m. (Pacific Time) to rule on any objections to the requested discovery. ... [By prior agreement of counsel and Board Order, this had been changed to August 6, 2014 (see First Amended Pre-Hearing Conference Order). This conference was held with Mr. Masi representing Protestant. [See discussion below.]

6. Documents requested and not objected to, and documents ordered to be produced following the ruling on objections, shall be simultaneously exchanged no later than Friday, August 22, 2014, at 5:00 p.m. (Pacific Time), in a manner to be mutually agreed upon. [Protestant, represented by Mr. Masi, did not timely produce any documents. After being contacted by Mr. Moran regarding this failure to comply with the Board's order, Mr. Masi, on September 4, 2014, produced a total of 9 pages of documents.]

7. Preliminary lists of witnesses intended to be called shall be filed and served no later than Friday, September 5, 2014, at 5:00 p.m. (Pacific Time). [Protestant did not comply with this portion of the Board's order and has not yet submitted a preliminary list

of witnesses. A Statement was timely submitted in behalf of Respondent.] Final witness lists including experts shall be filed and served no later than Monday, October 27, 2014, at 5:00 p.m. (Pacific Time). The lists shall state the names, addresses, telephone numbers, and capacity or status of the witnesses. [Protestant did not comply with this portion of the Board's order and has not yet submitted a final list of witnesses. A Statement was timely submitted in behalf of Respondent.]

8. A telephonic Hearing Readiness Conference shall be held on Friday, October 31, 2014, at 10:00 a.m. (Pacific Time), to determine whether the parties are ready to proceed with the merits hearing tentatively scheduled for Monday, December 8, 2014. .... [Mr. Masi and Mr. Moran participated in this conference but, due to the failure of Mr. Masi to comply with the discovery obligations, it was not possible to discuss readiness for the hearing of the protest. Rather, the conference became one that established an agreed upon briefing schedule for Respondent's Motion to Dismiss Protest, which had been filed the day prior on October 30, 2014.

9. Counsel for the parties shall mutually exchange expert reports and supporting documents no later than Monday, October 6, 2014, at 5:00 p.m. (Pacific Time), in a manner to be jointly agreed upon. [These documents are not filed with the Board, so it is unknown if the expert reports were "mutually" exchanged.]

10. Counsel for the parties shall mutually exchange supplemental expert reports and supporting documents no later than Monday, October 27, 2014, at 5:00 p.m. (Pacific Time), in a manner to be jointly agreed upon. [These documents are not filed with the Board, so it is unknown if the supplemental expert reports were "mutually" exchanged.]

11. All depositions shall be taken no later than Friday, November 21, 2014, with a minimum of 72 hours notice. [The Board has no knowledge as to whether any depositions were taken of party witnesses; no deposition subpoenas were issued by the Board for non-party witnesses. The Board issued a subpoena duces tecum for GE Capital Retail Bank dated July 25, 2014, on behalf of Respondent.]

...

24. The above discovery process and obligations were authorized and contained in the Pre-Hearing Conference Order dated June 11, 2014, signed by the Board's Executive Director, William G. Brennan. (See Sections 3050.1(b) and 3050.2(b))

The August 6, 2014 Hearing and Order re: the Rulings on Objections to Requests for Production of Documents[8]

25. The participants in this August 6 hearing were Mr. John Masi, in Pro Per, and Mr. Colm Moran, representing Respondent. ALJ Skrocki presided.

26. At the beginning of this hearing, the ALJ inquired of Mr. Masi whether Mr. Christopher Hogan represented Protestant. Mr. Masi stated that Mr. Hogan no longer represented Protestant but that Mr. Hogan was still available as a "backup" and would be assisting Mr. Masi as needed.

Protestant's Discovery Requests

27. Protestant's Discovery Requests were submitted by Mr. Hogan while he was still counsel for Protestant. Prior to the August 6, 2014 hearing to resolve the discovery disputes, Mr. Moran (representing Respondent) and Mr. Hogan (while still representing Protestant) had resolved any concerns they had regarding the discovery requests submitted by Protestant. No rulings were necessary as to Protestant's Discovery Requests.

Respondent's Discovery Requests

28. While Mr. Hogan still represented Protestant, he and Mr. Moran had reached agreement as to much of what would be produced by Protestant in response to the discovery requests of Respondent. However, in a letter dated July 30, 2014 to Mr. Masi (after Mr. Hogan ceased his representation of Protestant), of the 45 requests submitted by Respondent, Mr. Moran listed 17 outstanding specific requests to which Mr. Hogan had filed objections but which the two attorneys in their "meet and confer" had discussed, along with a proposed resolution for each of the remaining 17 requests. The letter from Mr. Moran asked Mr. Masi if Protestant would agree with the proposed resolution and withdraw its objections to Respondent's Requests. Mr. Masi did not respond to the letter prior to the hearing held on

[8] The Pre-Hearing Conference Order dated June 11, 2014, established the date of July 30, 2014 for the telephonic conference for the Ruling on Objections. However, at the joint request of the parties, the date for this was changed to August 6, 2014.

August 6, 2014.

29. During the hearing held on August 6, 2014 to rule on the objections to the discovery requests, the ALJ asked Mr. Masi if he agreed to produce the documents in response to Respondent's requests as clarified in the July 30, 2014 letter from Mr. Hogan. Mr. Masi stated that he agreed to do so.

30. That left only four of Respondent's Requests unresolved. These were No. 22, 24, 25, and 26. After a discussion during which Respondent agreed to modify the requests, Mr. Masi "agreed to produce the requested documents".

31. On August 6, 2014, ALJ Skrocki issued his "RULINGS ON OBJECTIONS TO REQUESTS FOR PRODUCTION OF DOCUMENTS" memorializing the agreements, as an Order of the Board.

32. The concluding paragraph of this document stated: "**NOTE: As stated by the Administrative Law Judge and agreed by the parties, the remaining schedule established by the Board's Pre-Hearing Conference Order dated June 11, 2014, continues in effect.**" (Bold and underline in the original.)

33. As indicated above, pursuant to paragraph 6 of the Pre-Hearing Conference Order of June 11, 2014, the requested documents were ordered to be exchanged no later than Friday, August 22, 2014.

PROTESTANT'S FAILURE TO COMPLY WITH THE PRE-HEARING CONFERENCE ORDER AND THE RULINGS ON THE OBJECTIONS TO THE DISCOVERY REQUESTS

Failure to Produce Documents

34. Although both the Pre-Hearing Conference Order of June 11, 2014 and the Rulings on Objections to Requests for Production of Documents of August 6, 2014 required that Protestant produce documents no later than August 22, 2014, Protestant failed to produce any documents.

35. On September 2, 2014, counsel for Respondent sent emails to Protestant inquiring about the status of the overdue documents, along with a description of the documents that should have been produced. (Motion to Dismiss Protest, p. 4, lines 13-15; Exhibits E and F to Colm Moran's Declaration)

36. On September 4, 2014, Protestant produced a total of 9 pages of documents. (Motion to Dismiss Protest, p. 4, lines 15-17; Exhibit G to Colm Moran's Declaration) This was in response to 45 separate requests from Respondent.

37. On September 8, 2014, Respondent's counsel again sent emails to Protestant demanding that Protestant comply with the Pre-Hearing Conference Order and the Order regarding the Ruling on Objections. (Motion to Dismiss Protest, p. 4, lines 20-22; Exhibit H to Colm Moran's Declaration)

38. To this date, Protestant has not produced any documents other than the 9 pages produced on September 4, 2014.

Failure to Provide Witness Lists

39. As stated above, Protestant has also failed to file and serve its preliminary as well as its final witness lists, due respectively on September 5, 2014 and October 27, 2014. Reminders from Mr. Moran to Mr. Masi did not result in their production.

40. At the hearing on the Motion to Dismiss, when the ALJ asked Mr. Masi why he had not provided the witness lists, Mr. Masi stated that he did not intend to call any witnesses.

CONCLUSION AS TO WHETHER PROTESTANT HAS FAILED TO COMPLY WITH AUTHORIZED DISCOVERY

41. It is determined that Protestant has failed to comply with authorized discovery without substantial justification for that failure.

42. Protestant failed to comply with the Board's Pre-Hearing Conference Order of June 11, 2014 and the Order regarding the Ruling on Objections to Requests for Production of Documents dated August 6, 2014, in that Protestant:

(a) Failed to produce documents on August 22, 2014;

(b) Inadequately produced some documents on September 4, 2014, with the total production amounting to only 9 pages in response to 45 separate requests from Respondent. As stated by Yamaha, "For example, it included no documents relating to GE Capital (one of the vendors that was the subject of Mr. Masi's abuse), only five emails between YMUS and San Jose Yamaha, no internal communications, and no documents related to YMUS's supposedly wrongful conduct toward San Jose Yamaha." (See Colm Moran's Declaration, p. 3, paragraph 15, and Exhibit H thereto; for a comparison between what was contained in the 9 pages produced and what was included in the 45 requests for production and agreed upon or ordered, see Mr. Moran's e-mails to Mr. Masi and the attachments thereto in Exhibit F);

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(c) Failed to provide a preliminary list of witnesses as well as a final list of witnesses.[9]

APPLICABLE LAW AS TO THE EFFECT OF THE FAILURE OF PROTESTANT TO FILE A PROTEST IN RESPONSE TO THE SECOND NOTICE OF TERMINATION

43. Vehicle Code section 3060 in relevant part states:

> (a) Notwithstanding…the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:
> (1) The franchisee and the board have received written notice from the franchisor as follows:
> (A) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.
> …
> (2)…the board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, satisfying the requirements of this section,… When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.
> (3) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed. (Underline added.)

44. Under this statute, Protestant would have 30 days from the time the notice is received to file a timely protest and, if a timely protest had been filed, Yamaha would be precluded from terminating the franchise unless it established good cause for the termination during a hearing on the merits of the protest.

45. However, if no protest is filed within the 30 day time period, there is no right to a hearing before the Board and the franchise may be terminated upon the passage of 60 days from the receipt of the notice.

ANALYSIS OF WHETHER THE TERMINATION OF THE FRANCHISE BY YAMAHA WAS EFFECTIVE ON NOVEMBER 16, 2014

46. There is no dispute that Respondent complied with the requirements of Section 3060 in providing the notices mandated by the statute and that the notice to Protestant was received by Protestant on September 17, 2014. Respondent has established that it sent a conforming notice to Protestant by certified mail via the U.S. Post Office and that the notice was delivered on September 17, 2014 at Protestant's dealership address.

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[9] Although Protestant is not required to call any witnesses, a reasonable interpretation of the requirements of producing the witness lists would mean that the party who has decided not to call any witnesses should so advise the opposing party.

47. There is no dispute that Protestant did not file a protest in response to this second notice within the 30 days provided in Section 3060.

48. Therefore, Yamaha's notice of termination, received on September 17, 2014, effectively terminated Protestant's Yamaha franchise as of November 16, 2014.

THE EFFECT OF THE TERMINATION OF THE FRANCHISE ON NOVEMBER 16, 2014, UPON THE PROTEST FILED ON APRIL 22, 2014

49. Protestant's franchise has been effectively terminated as of November 16, 2014. The termination occurred pursuant to Section 3060, as proper notice was given and received and Protestant failed to file a timely protest.

50. Whether Yamaha could establish good cause to terminate the franchise of Protestant pursuant to Section 3061 as to the first notice of termination is irrelevant.

51. As to the protest that was filed in response to the first notice of termination, the Board no longer has the power to issue an order that would sustain the protest and order that the franchise not be terminated.

52. The Board would be engaging in a useless act, both in holding the hearing to determine if Yamaha could meet its burden of proving good cause to terminate the franchise and, if not, in issuing an order that would purport to order Yamaha not to terminate a franchise that no longer exists.

53. As there is no longer a "franchise" in existence between the parties, and thus, San Jose Yamaha is no longer a "franchisee",[10] Respondent is correct that the Board no longer has jurisdiction over the dispute and is without the power to act on the protest.

54. Even if there is some basis for finding continuing jurisdiction over the Protest (perhaps because there was a "franchise" in existence when the protest was filed and San Jose Yamaha was a "franchisee" at the time), Respondent is also correct that the issues raised by the notice and the protest filed in response thereto are moot as there is no longer a franchise in existence. Resolving the issue of whether there is good cause to terminate a franchise that does not exist in order to decide whether the

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[10] Sections 331 and 331.1 define "franchise" and "franchisee". Section 3050(d) creates the power in the Board to "Hear and decide... a protest presented by a franchisee pursuant to Section 3060...". Section 3060(a) by its terms applies to "any existing franchise". (Underline added.) As the "franchise" is no longer in existence, Protestant is no longer a "franchisee" of Yamaha.

franchisor should be permitted to terminate the non-existent franchise would be meaningless. It would be a waste of the Board's resources and a waste of the resources of the parties to proceed to a hearing on the merits of the Protest if there is no longer a franchise in existence. Holding a hearing to determine if Yamaha has good cause to terminate a non-existent franchise would be a useless act.

THE FAILURE OF PROTESTANT TO PARTICIPATE IN THE PROCEEDINGS INVOLVING THE MOTION TO DISMISS

55. In addition to failing to engage in discovery, and failing to file a protest in response to the Notice of Termination received by Protestant on September 17, 2014, it is noted that Protestant also failed to participate meaningfully in addressing the issues raised in Respondent's Motion to Dismiss.

56. Mr. Masi failed to submit any Opposition to the Motion to Dismiss (neither timely nor tardy), even though the time within which to submit the Opposition was part of an order of the Board and based upon dates chosen by the parties, including Mr. Masi.

57. Further, it is noted that the Board's staff has spent considerable time and effort in attempts to assist Mr. Masi and follow-up with him regarding his failure to comply with schedules contained in the Board's orders, the dates to which he had previously agreed. Unfortunately, in return the Board's staff received abuse rather than appreciation, and the staffs' efforts did not motivate Mr. Masi to timely action.

58. During the hearing on the Motion to Dismiss, it was clear to the ALJ that Mr. Masi was anxious to vent regarding his alleged mistreatment by the representatives of Respondent, and Mr. Masi was given some leeway to do that. However, even after the ALJ requested Mr. Masi to cease his personal attacks on the character of Nissan's representatives, including Mr. Moran, Mr. Masi continued to spend most of the time expressing his opinions of the character of those persons as well as defending against the Restraining Order issued against him by the Orange County Superior Court, rather than providing "substantial justification" for Protestant's failure to comply with authorized discovery. (Section 3050.2(b)) Providing such "substantial justification" during the hearing was particularly important as Protestant had failed to provide its Opposition to the Motion that had been ordered.

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RECOMMENDATION

It is recommended that the Executive Director seek direction from the Board that the Protest of *San Jose Yamaha* v. *Yamaha Motor Corporation, U.S.A.*, Protest No. PR-2394-14, be dismissed with prejudice.

PROPOSED ORDER

Respondent Yamaha Motor Corporation, U.S.A.'s Motion to Dismiss Protest is hereby granted.

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

DATED: December 2, 2014

By: _____
ANTHONY M. SKROCKI
Administrative Law Judge

Jean Shiomoto, Director, DMV
Tim Corcoran, Branch Chief,
Occupational Licensing, DMV