NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

GUARANTEE FORK LIFT, INC., dba GFL, Inc., Protestant, v. CAPACITY OF TEXAS, INC., Respondent.	**Protest No. PR-2361-13**

DECISION

At its regularly scheduled meeting of April 9, 2014, the Public Members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board unanimously approved the following amendments.

1. The word "Protestant" in Paragraph 5, page 3, line 6 is added before "GFL" to read: "Protestant GFL is located at 689 Fourth Street, Oakland, California."

2. Footnote 2 on page 3, lines 23-24 is amended to read: "…; Mr. Hughes was substituted as counsel on July 12, 2013."

The Board adopted the Proposed Decision as its final Decision in this matter by a 2-to-1 vote with one dissent (see attached).

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 10th DAY OF APRIL 2014.

GLENN STEVENS
President
New Motor Vehicle Board

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GUARANTEE FORK LIFT, INC., dba GFL, Inc., Protestant, v. CAPACITY OF TEXAS, INC., Respondent.	**Protest No. PR-2361-13**

DISSENT

The New Motor Vehicle Board's jurisdiction under Vehicle Code section 3060 "encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement." (*Ri-Joyce* v. New Motor Vehicle Board, 2 Cal.App.4th 445, 455 (3d Dist. 1992). "Under the first portion of section 3060, a franchisor is prohibited from terminating or refusing to continue an existing franchise without complying with certain procedural requirements and, if a protest is filed, unless the Board finds there is good cause." (*Id.* at 450.) "A franchisor has the burden of establishing good cause for terminating or refusing to continue a franchise." (*Id.*; *see also* Vehicle Code § 3066(b).)

The question presented here is whether the franchisor Capacity of Texas, Inc. has established good cause for terminating or refusing to continue the franchise when the franchisee Guarantee Fork Lift, Inc. dba GFL, Inc. intentionally misrepresented the employment status of a key employee to the franchisor because the dealer principal feared franchise termination, affirmatively telling the franchisor that the employee was on medical leave when he had actually

left the company to work for the primary competitor of the franchisor. (*See* Decision, ¶¶ 41, 43, 45.)

The evidence also suggests that the dealer principal on behalf of the franchisee was not candid about sending the former employee the password to give him access to the franchisor's online parts ordering system ("COPOS") after his employment had ended. (Decision, ¶¶ 44, 46, 47, 48, 49, 56.) The Administrative Law Judge found that only authorized dealers had access to COPOS, that the dealer must obtain a unique user ID from the franchisor and select a password in order to access the system, and there were at least two levels of access to COPOS (full access and access only to list pricing). (Decision, ¶¶ 38, 39.) Under California law, a "trade secret" means information, including a program, that derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Civ. Code § 3426.1(d).) The levels of security exercised by the franchisor, the terms and conditions on the website that must be agreed to by users (Decision, ¶ 39), and the fact that the terminated employee tried unsuccessfully to access COPOS before being given the user name and password and subsequently accessed it 35 times during the two month period that he was wrongfully provided access to the system (Decision, ¶¶ 47, 52) evidence the economic value of having access and use of the system as well as the reasonable efforts of the franchisor to maintain its secrecy.

In concluding that the franchisor had not met its burden of proof under Vehicle Code section 3066(b), the Administrative Law Judge reviewed the seven enumerated factors contained in section 3061 and found that none formed the basis for good cause to terminate the franchise. (*See* Decision, ¶¶ 63-69.) The Administrative Law Judge acknowledged that the list of good cause factors set forth in section 3061 for termination of a franchise is not exclusive, but found no other factors to be relevant. (*Id.*, ¶ 70.)

I disagree with the Administrative Law Judge's conclusion that no other factors were relevant to the determination as to whether the franchisor had shown good cause to terminate the franchise.

"Within the meaning of section 3060 a franchise is a written agreement of the parties which is subject to the normal rules relating to the interpretation of a contract." (*Ri-Joyce*, 2 Cal.App.4th at 458.) "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale* v. *Traders and General Ins. Co.*, 50 Cal.2d 654, 658 (1958).)

Under the terms of the Authorized Representative Agreement, the franchisee agreed to "use all reasonable endeavors to achieve maximum sales of the products." It was inconsistent with this obligation for the franchisee to misrepresent to the franchisor the status of the former employee, particularly because the franchisee made the misrepresentation because the dealer principal was concerned that the franchisor would attempt to terminate the franchise if it knew the employee was no longer employed by the franchisee. (Decision, ¶¶ 26, 27, 45 n.11.) It was also inconsistent with this obligation for the franchisee to provide access to the franchisor's trade secret, password protected, online parts ordering system to a competitor of the franchisor.

The Authorized Representative Agreement also required the franchisee to "maintain selling, administrative and product service facilities (including an inventory of service parts)." It was inconsistent with this obligation for the franchisee to provide access to the franchisor's trade secret, password protected online parts ordering system to a competitor of the franchisor, allowing the competitor to purchase and sell service parts directly by accessing this system to its economic advantage.

For the foregoing reasons, I would find that the franchisor has met its burden of proof under Vehicle Code section 3066(b) to establish good cause to terminate GFL's Capacity of Texas franchise.

DATED: April 28, 2014

By: Kathryn E. Doi

KATHRYN E. DOI
Public Member
New Motor Vehicle Board

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CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of GUARANTEE FORK LIFT, INC., dba GFL, Inc., Protestant, v. CAPACITY OF TEXAS, INC., Respondent.	**Protest No. PR-2361-13** **PROPOSED DECISION**

PROCEDURAL BACKGROUND

Statement of the Case

1. By letter dated February 5, 2013, Capacity of Texas, Inc. ("Capacity" or "Respondent"), gave notice to Guarantee Fork Lift, Inc. dba GFL, Inc. ("GFL" or "Protestant") pursuant to California Vehicle Code section 3060[1] of its intention to terminate GFL's Capacity of Texas "Authorized Representative Agreement". The New Motor Vehicle Board ("Board") received the notice on February 27, 2013.

2. The notice states in pertinent part the following reasons for termination:

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[1] Unless otherwise indicated, all statutory references are to the California Vehicle Code.

...The Capacity Agreement requires [GFL] to protect proprietary information and trade secrets. Such information is not to be divulged to any person, company, entity or organization other than officers and employees of [GFL] who need access to the information to access the information [sic]. Further, the agreement provides that any substantial misrepresentation in dealings with Capacity is grounds for termination. Therefore this termination is "for cause" under the specific terms of the Agreement.

...

The Capacity agreement provides Termination with Cause provides (sic): Unless otherwise prohibited by applicable state statute, this Agreement can be terminated by CAPACITY for good cause at any time by giving Authorized Representative [GFL] thirty (30) days' prior written notice. The parties acknowledge and agree that any one of the following events shall constitute good case for termination:

Termination events include, "Authorized Representative's fraudulent conduct or substantial misrepresentation in any dealings with Capacity or with others concerning Capacity Products." In addition, "Authorized Representative shall maintain the strict confidentiality of all trade secrets and proprietary methods, information and materials owned by Capacity to which the Authorized Representative gains access."

You and your essential employees were granted access to the propriety [sic] and confidential parts ordering systems subject to specific terms of use and a contractual duty to protect that information. You have breached the agreement by failing to restrict access to the proprietary ordering information of Capacity to a former employee [Steve Mehrens], and failing to notify Capacity of the separation of that employee to join a competitor [Mid-Pac]. Not only is the requirement regarding access to the parts ordering system set out in the agreement, there is a specific notice that requires approval before access is granted to the system.

Further, you have failed to notify Capacity of the separation of the former employee and have participated in his continued use of the system. Capacity has received inconsistent and conflicting information from you regarding the status of the former employee which has aggravated the situation. The access by the former employee is illegal theft of trade secrets and may expose you to money damages and equitable relief under federal law and California state law. Further, pursuant to 18 USC §1832 and California statutes you may be subject to criminal penalties for the improper access and use of the system information.

...

Several other provisions of the Agreement are relevant and applicable to the rights and obligations of the parties surrounding this termination:

Paragraph 15(f) provides: ...

Paragraph 15(g) states: ...

Paragraph 16 NO COMPENSATION UPON TERMINATION reads: ...

Paragraph 17 POST TERMINATION ORDERS states: ...

...

(Exh. J1)

3. On February 27, 2013, GFL filed a timely protest pursuant to the provisions of Vehicle Code section 3060.

4. A one-day hearing on the merits was held December 11, 2013, before Administrative Law Judge Kymberly Pipkin.

Parties and Counsel

5. GFL is located at 689 Fourth Street, Oakland, California. GFL is an authorized Capacity "franchisee" within the meaning of Sections 331.1 and 3060(a)(1).

6. Protestant is represented by Michael J. Flanagan, Esq., Gavin M. Hughes, Esq. and Danielle R. Vare, Esq. of the Law Offices of Michael J. Flanagan, 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California.[2]

7. Respondent is a manufacturer[3] of terminal tractors sold under the trade name "Trailer Jockey"[4] and is a franchisor within the meaning of sections 331.2 and 3060(a)(1). Capacity is located at 401 Capacity Drive, Longview, Texas.

8. Respondent is represented by Maurice Sanchez, Esq. and Kevin M. Colton, Esq. of Baker & Hostetler LLP, 600 Anton Boulevard, Suite 900, Costa Mesa, California, and Timothy R. Brownlee, Esq., Tony V. Jones, Esq., and Rita L. Hoop, Esq. of Wait, Brownlee, Berger & Dewoskin, 401 West 89th Street, Kansas City, Missouri.

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[2] Denise L. Rosen-Kendrick, in pro per, represented GFL until July 11, 2013; Mr. Hughes was substituted as counsel on July 12, 2012.

[3] On August 14, 2013, Administrative Law Judge Anthony M. Skrocki issued an "Order Denying Respondent's Motion to Dismiss and Strike Protest." There were sufficient facts alleged to establish that the "Authorized Representative Agreement" between Capacity (a "motor vehicle manufacturer") and GFL (a "new motor vehicle dealer") was a franchise pursuant to Section 331. It was determined that terminal tractors (yard tractors) are within the Board's jurisdiction if certified with equipment that would enable them to be registered with DMV for use on the public highways including streets.

[4] As stated in Respondent's Motion to Dismiss and Strike Protest, "A terminal tractor is used to move cargo in an efficient and quick manner, typically on private property in a limited area such as a shipping dock or distribution center. These are specialty vehicles designed to quickly attach and separate from semi-trailers to move over very short distances, as opposed to a semi-truck tractor, which would transport trailers over long distances on the highway." (Motion, p. 2)

Summary of Witnesses' Testimony and Exhibits Introduced at Hearing[5]

Respondent's Witnesses' Testimony and Exhibits[6]

9. Respondent called the following witnesses: Denise Rosen-Kendrick (hereinafter Ms. Rosen), Dealer Principal, CEO and president of GFL; Jerry Looney, Vice President of Sales, Capacity; Stephen Mehrens, former General Manager of GFL; and Dawn Hebert, Service and Aftermarket Parts Operations Manager, Capacity.

10. Respondent submitted deposition excerpts of the following deponents for the record: Melissa Childers, Customer Service Representative, Capacity; Cliff Huff, Product Support Specialist, Capacity; Mr. Mehrens; Virginia Shanklin, Senior Customer Service Specialist, Capacity; and Michael Yates, Product Support Specialist, Capacity.

Protestant's Witnesses' Testimony and Exhibits

11. Protestant called Ms. Rosen.

12. Protestant submitted deposition excerpts of the following deponents for the record: Ms. Shanklin, Ms. Childers, and Pete Heaslip, Dealer Development Manager, Capacity.

ISSUES PRESENTED

13. Pursuant to Section 3066(b), Capacity has the burden to establish good cause for the termination of GFL's Capacity of Texas franchise. In determining whether Capacity has established good cause for the termination, Section 3061 requires that the Board consider the "existing circumstances", including but not limited to all of the following:

(a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee;

(b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise;

(c) Permanency of the investment;

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[5] Twelve exhibits offered by the parties were received into evidence. Most were pre-marked for identification. Exhibits numbered J-1, et seq. were offered jointly by the parties. Exhibits numbered P-1, et seq. were offered by Protestant, and Exhibits numbered R-101, et seq. were offered by Respondent. The numbers marked on the exhibits do not reflect either the numerical or chronological order in which they were offered or admitted into evidence at this hearing. The individually numbered exhibits may also contain several different but related documents.

[6] Respondent has the burden of proof so it put on its case first. (Section 3066)

(d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public;

(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee; and

(g) Extent of the franchisee's failure to comply with the terms of the franchise.

RESPONDENT'S CONTENTIONS

14. Respondent contends that GFL materially breached its obligations to Capacity under the franchise agreement and the terms and conditions accepted by the user of the online parts ordering system, by providing the access password to the online parts ordering system to a former employee. Respondent contends that GFL's action was a violation of state and federal law. (Respondent's Proposed Findings of Fact, p. 4) Respondent maintains that good cause exists to terminate GFL's franchise because "Protestant...violated a material contractual responsibility to protect confidential and proprietary trade secret information and has attempted to mislead or deceive Respondent regarding the misuse of access to the online parts ordering system." Respondent thus contends that Capacity has good cause under Section 3061 to terminate GFL's Capacity franchise. (Respondent's Post-Hearing Brief, p. 23)

PROTESTANT'S CONTENTIONS

15. Protestant contends that GFL has not breached any term of its franchise agreement [the Authorized Representative Agreement dated July 17, 1995] with Capacity. The parties stipulated to the facts surrounding all but one good cause factor, such that the only remaining issue before the Board is whether Capacity can demonstrate the existence of good cause to terminate GFL's franchise based upon GFL's failure to comply with the terms of the franchise. Protestant contends that GFL has complied with the terms of the franchise and that Capacity is not able to demonstrate good cause to terminate GFL's Capacity franchise. (Protestant's Post-Hearing Opening Brief, p. 6)

FRANCHISE AGREEMENT

16. The "Authorized Representative Agreement," entered into July 17, 1995, provides that "[f]or good cause shown, as defined by Texas statute, CAPACITY may terminate this Agreement without any liability by providing written notice of termination which shall be effective thirty (30) days after receipt by Authorized Representative [GFL]. Cause shall include but not be limited to the goals and objectives established by the parties hereto." (Exh. J-1, par. 6.b.(ii))

17. The franchise also provided that "[t]his Agreement contains the entire Agreement between CAPACITY and authorized Representative [GFL] and there are no oral or collateral Agreements of any kind." (Exh. J-1, par. 9)

18. The franchise was subject to the laws of Texas. (Exh. J-1, paragraph 11)

STIPULATION CONCERNING GOOD CAUSE FACTORS

19. On October 11, 2013, the parties entered into a stipulation, which states that regarding "...the good cause hearing, and for no other purpose, the parties have agreed to stipulate to the following facts concerning the good cause factors set forth in [Section] 3061:

a. "That [GFL], franchisee, transacts an adequate amount of business compared to the business available to it." (Stipulation, par. 5.a.)

b. "Franchisee has made investments and incurred obligations necessary to perform its parts (sic) of the franchise." (Stipulation, par. 5.b.)

c. "Franchisee's investment in its franchise is permanent." (Stipulation, par. 5.c.)

d. "Due to the limited scope of the issues giving rise to the issuance of Respondent's notice of Termination to Protestant, the parties stipulate that they will not present evidence regarding [Section] 3061(d) concerning whether it would be injurious or beneficial for the business of Protestant to be disrupted." (Stipulation, par. 5.d.)

e. "Franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public." (Stipulation, par. 5.e.)

f. "Franchisee does not fail to fulfill the warranty obligations of the franchisor to be

performed by the franchisee." (Stipulation, par. 5.f.)

20. The only good cause factor to be determined is GFL's failure to comply with the terms of the franchise. (Section 3061(g))

APPLICABLE LAW

21. Section 3060 begins as follows:

> 3060. (a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:..."
> (Underline added.)

FINDINGS OF FACT[7]

Stipulated Facts[8]

22. Capacity Trucks, Inc. is a corporation organized in Texas and is a manufacturer of yard trucks with its corporate headquarters in Longview, Texas. (Stipulated Facts, par. 1)

23. Capacity manufactures vehicles for both on and off highway use. (Stipulated Facts, par. 2)

24. Guaranteed Fork Lift (GFL) is a corporation organized in California and is [a] dealer of Capacity yard trucks and parts since 1995. (Stipulated Facts, par. 3)

25. The principal, president and sole shareholder of GFL is Denise Rosen-Kendrick. (Stipulated Facts, par. 4)

26. Stephens Mehrens was an employee of GFL for approximately 13 years. (Stipulated Facts, par. 5)

27. Immediately prior to coming to work for GFL, Mr. Mehrens was employed by Capacity. (Stipulated Facts, par. 6)

28. Stephen Mehrens' employment at GFL ended October 22, 2012. (Stipulated Facts, par. 7)

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[7] References to testimony, exhibits or other parts of the record are intended to be examples of evidence relied upon to reach a finding, and not to be exhaustive. Findings of Fact are organized under topical headings for readability only, and not to indicate an exclusive relationship to an issue denoted by the topic heading. The Board may apply a particular finding to any "existing circumstance" or "good cause" factor under Section 3061.

Citations to the record are for convenience of the Board. The absence of a citation generally signifies that the underlying facts are foundational or uncontested, or that the finding is an ultimate fact finding of the Board based upon other facts in the record and reasonable inferences therefrom.

[8] The parties entered into a Stipulation of Facts on December 2, 2013. (Exh J-4) Paragraph 12 of the Stipulation was struck by the parties at hearing.

29. Stephen Mehrens did not leave his employment at GFL to go on medical leave as he had originally represented to Capacity. (Stipulated Facts, par. 8)

30. Carrie Jantzen was assisting in the business of GFL on November 21, [2012]. (Stipulated Facts, par. 9)

31. Denise Rosen changed the password on the "Smehrens" and the "smehren" login in early November to "Darlene". (Stipulated Facts, par. 10)

32. Capacity has since terminated GFL's access to the Capacity online parts ordering system. (Stipulated Facts, par. 11)

33. Mid Pac is an Ottawa dealer and is a direct competitor to GFL. (Stipulated Facts, par. 13)

34. The Terms and Conditions (Joint Exhibit #2) screen comes up each time a user logs on to the Capacity online parts ordering system. (Stipulated Facts, par. 14)

35. A user of the Capacity online parts ordering system must accept the Terms and Conditions on Joint Exhibit #2 in order to move past that screen. (Stipulated Facts, par. 15)

Preliminary Findings

36. In late 2008, Capacity introduced an online parts ordering system, Capacity Online Parts Ordering System (COPOS), after nearly two years of development and at a cost of approximately half a million dollars. (RT 87:12-23) Capacity employs GGS, the firm which developed COPOS, as the web-site host to update and maintain COPOS at an additional monthly cost. (RT 94:13-95:3; Exh. R-113)

37. COPOS allows an authorized user to login, do research by VIN number, and find a breakdown of all parts used in the building of any truck built during the last fifteen years. (RT 89:1; 197:15-24; 204:25-205:3) The user receives realtime inventory and pricing, and can order parts online twenty-four hours a day. (RT 88:18-20; 198:13-14)

38. Only authorized dealers have access to COPOS.[9] (RT 199:15-17) The dealer must obtain a unique "user ID" from Capacity and select a password in order to access the system. (RT 200:16-21; Deposition of Ms. Shanklin dated November 21, 2013, 8:21 - 9:7)

39. After each log-in to COPOS, a Terms and Conditions screen must be "accepted" or

[9] Approximately a dozen national accounts (such as the United States Postal Service, FedEx, etc.) also have access to COPOS, restricted to those yard trucks the account purchased. These accounts service their own vehicles. (RT 199:24-200:15)

"declined" by the user. (Ex J-2) The Terms and Conditions read as follows:

> The information and capabilities provided on this website are provided solely to assist [CAPACITY] and its AUTHORIZED DEALERS AND CUSTOMERS, in the process of identifying and ordering parts from CAPACITY. *The information provided is the sole property of CAPACITY and is considered confidential by, and are trade secrets of, CAPACITY.* By entering this web site, you agree that the information within this site will be used only to identify and orders parts from CAPACITY, and any use of the information provided, without the express written approval of CAPACITY, including but not limited to downloading, printing, re-producing, or reverse engineering, will be considered *a breach of the terms and conditions of this web site and may constitute an infringement or violation of CAPACITY'S intellectual property rights. Violation of this agreement could result in loss of the use of the web site.* (Emphasis added)
>
> Access to this web site is restricted and allowed only for the above state[d] purposes. By logging in and entering this web site you acknowledge and agree that this web site contains information, software, photos, video, text, graphics, music, sounds or other material (collectively "Content") that are protected by copyright, patents, trademarks, trade secrets, or other proprietary rights, and that these rights are valid and protect in all forms, media, inventions and technologies existing now or hereafter developed. All Content is copyrighted under U.S. copyright laws. The trademarks and logo are CAPACITY'S trademarks. Any other trademarks or service marks appearing on this web site are the trademarks of their respective owners. You may not modify, publish, transmit, participate in the transfer or sale, create derivative work, or in any way exploit any Content in whole or in part. Nothing contained in this web site shall be deemed to grant a license to use any patent or trademark owned by CAPACITY or any related company. Unauthorized use of the Content in any manner will be considered an infringement of CAPACITY'S intellectual property rights and *CAPACITY may pursue any and all legal remedies available to it for such infringement.* This information is provided "as is" and CAPACITY assumes no responsibility for any typographical, technical, or other inaccuracies on this site. In order to protect CAPACITY proprietary and confidential information and/or trade secrets, this information may describe some aspects of CAPACITY design and/or technology in generalized terms, CAPACITY reserves the right to change information that is contained on this website; however, CAPACITY makes no commitment to provide any such changes, updates, enhancements, or other additions to this website in a timely manner, or at all. (Emphasis added)
>
> This website may contain references to third-party sources of technical documentation, illustrations, and information (collectively the "Third-Party Information"). CAPACITY does not control, and is not responsible for, any Third-Party Information, including, without limitation, the content, accuracy, copyright compliance, compatibility, performance, trustworthiness, legality, decency, links, or any other aspect of Third-Party Information. The inclusion of Third-Party Information on this website does not imply endorsement by CAPACITY of the Third-Party Information or the Third-Party in any way. Any Third-Party Information that is provided on this website is provided "as is". CAPACITY makes no representation, warranty or guarantee whatsoever in relation to the Third-Party Information and CAPACITY assumes no liability whatsoever in relation to the Third-Party Information even if CAPACITY has been advised of the possibility of such damages or can anticipate such damages.
>
> (Exh. J-2)

40. GFL had three user names with unique passwords to access COPOS: one assigned to Denise Rosen ("DRosen" with the password "aurs") and two assigned to Steven Mehrens ("SMehrens"

with the password "yass" and "smehren" with the password "Trevor"). (RT 25:15-26:10; 137:10-22) The "SMehrens" and "DRosen" accounts had full access to COPOS, while the "smehren" account had access only to the list pricing. (RT 25:14-26:18; 135:4-14)

41. On October 1, 2012, Mr. Mehrens orally gave Ms. Rosen his two weeks' notice, telling her that he was moving in with his girlfriend in Woodland [California] and going to work for Mid-Pacific, where his girlfriend worked. (RT 18:10-14; 22:19-22; 130:9-131:7) Ms. Rosen was upset by this news and the two did not speak in person or by telephone after this.[10]

42. While still employed at GFL, Mr. Mehrens represented to several Capacity employees that he would be going out on a medical leave of absence. (Declaration of Melissa Childers, p.7:23-8:7; RT 166:8-22; 168:9-169:8)

43. Mr. Mehrens continued to work at GFL until October 22, 2012, and began working at Mid-Pacific shortly thereafter. (RT 18:8-9; 130:9-131:7) Mid-Pacific, located in Woodland, is an Ottawa dealer, the primary competitor of Capacity. Ottawa has an eighty percent share of the market for yard trucks, compared to Capacity's twenty percent share. (RT 192:23; 81:15-25)

44. Mr. Mehrens retained his GFL cell phone until sometime in mid-January 2012. (RT 138:6-12) While working at GFL, Mr. Mehrens had created a contact in the cell phone for Ms. Rosen that identified a call or a text as "Denise" if it came from her cell phone. (RT 138:19-139:11)

45. On October 23, 2012, Ms. Rosen e-mailed Capacity:

> "As of today, Please send all e mails to me at GFLROSEN@AOL.COM instead of Steve. He is out on mediacl [sic] leave and I will be covering all the business for him right now. Thanks so much, Denise." (RT 22:3-13; Exh. R-108)[11]

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[10] Ms. Rosen had experienced a number of family traumas during 2012: her mother had been through a series of prolonged health challenges and ultimately passed away in hospice; Ms. Rosen had assumed responsibility for the care of her grandmother, who was unwell, and the grandmother's husband who suffered from dementia, who lived in Sonora. Ms. Rosen relied on Mr. Mehrens heavily, not only to manage GFL, but also personally. Mr. Mehrens lived with the Rosens for a number of years, and had helped to care for Ms. Rosen's mother. After Mr. Mehrens announced he was relocating to Woodland to be with his girlfriend, Ms. Rosen was upset and did not speak in person or by telephone to Mr. Mehrens until March of 2013. (RT 52:14-53:21; 54:4-10; 68: 10-20; 18:23 - 19:7; 19:22-20:5)

[11] Ms. Rosen testified that she knew Mr. Mehrens was not taking a medical leave of absence; that she did not learn that Mr. Mehrens was working at Mid-Pacific until three weeks after he had left; and that she was upset he had left because she feared Capacity would attempt to terminate her franchise again, as had occurred in 1998. (RT 20:21-21:9; 23:20-23; 54:16-55:14) Mr. Mehrens testified that he told Capacity that he was taking a medical leave of absence in an effort to help Ms. Rosen, who was afraid that Capacity would treat her differently if Mr. Mehrens was no longer employed by GFL. (RT 166:8-22) Ms. Rosen was the only one who stood to benefit from the "medical leave of absence" scenario.

46. In early November 2012, Ms. Rosen changed the passwords to all three log-in names to "DENISE." (RT 32:16-22; 211:10-20) She did not seek to have Mr. Mehren's user names deleted. (RT 58:1-24)

47. Shortly after Mr. Mehrens began working at Mid-Pacific, he attempted to use the COPOS system with the user name and password that he had used while working for GFL, but it no longer worked. (RT 136:7-12)

48. On November 21, 2012, Mr. Mehrens received two text messages on his cell phone, which identified the sender as "Denise." The first text was sent at 9:00 am: "I am in hospital w bill do u want password." [12] (Exh. R-102) The second text was sent at 9:05 am: "Same pricing as before password is darlene on all three accounts." (Exh. R-101)

49. Mr. Mehrens began accessing COPOS on November 21, 2012, using his still-active user names with the new "darlene" password, to assist Mid-Pacific customers who owned a Capacity product that needed servicing, and ordered those parts through GFL. (RT 156:8-25; RT 157:7-9) Mid-Pacific did not request that Mr. Mehrens access COPOS. (RT 156:1-5)

50. On or about January 24, 2013, another dealer informed Capacity's Aftermarket Parts Department that Mr. Mehrens was working at Mid-Pacific. (RT 207:2-7; RT 84:3-7)

51. Mr. Looney initiated an investigation, as Capacity still believed Mr. Mehrens was out on a medical leave of absence while employed by GFL. (RT 86:7-23) Capacity telephoned Mid-Pacific and Mr. Mehrens answered the telephone. (RT 208: 19-24)

52. Capacity then examined all accesses by GFL accounts to COPOS after Ms. Rosen had changed the passwords to all three log-ins (November 1, 2012). (RT 86:7-23; Exh. R-103) The first access was on November 21, 2012, at 12:29 pm, by the user "smehrens." COPOS records show that from November 21, 2012, through January 21, 2013, COPOS was accessed thirty-five times using the

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[12] Ms. Rosen testified that on November 21, 2012, she was with her grandmother, who was in the Intensive Care Unit at the hospital in Sonora, and that her grandmother's husband is William Tirey. (RT 44:13-18) Ms. Rosen denied sending the two text messages. (RT 33:9-11) She opined that her dog sitter, Carrie Jantzen, who assisted with GFL but did not have the passwords herself, must have (1) accessed Ms. Rosen's cell phone at Ms. Rosen's home in Stockton; (2) rummaged through Ms. Rosen's desk to find the password; and (3) sent Mr. Mehrens the password "darlene." (RT 42:7-43:21) Ms. Jantzen did not testify. Since Ms. Rosen placed Ms. Jantzen at Ms. Rosen's home that morning, there would have been no reason for Ms. Jantzen to text that she was "with Bill at the hospital." Ms. Rosen's version is not found credible.

"SMehrens" account and four times using the "smehrens" account. The accesses occurred on nine different days, and researched eight different VINs and 13 different parts. Each of these accesses occurred during Mr. Mehrens' tenure with Mid-Pacific. (Exh. R-103)

53. On or about January 25, 2013, Mr. Looney instructed Dawn Hebert to suspend GFL's access to COPOS. (RT 210:1-7) Ms. Hebert telephoned and left a message for Ms. Rosen. (RT 210:18-211:5).

54. On January 29, 2013, Ms. Hebert reached Ms. Rosen by telephone and informed her that Capacity had terminated GFL's online access to COPOS. (RT 209:16-18) Although GFL's access to COPOS was terminated, GLF remains able to call a Capacity Customer Service Representative who will research what parts are needed for GFL's customer and place GFL's order. (RT 100:13-18; 49:12-15)

55. By a letter dated January 30, 2013, Tony V. Jones, an attorney representing Capacity, informed Mr. Mehrens that Capacity had learned that Mr. Mehrens had accessed COPOS after his employment with GFL had ended and while employed by a dealer of a competing product. The letter warned Mr. Mehrens that "[y]our actions are blatant, illegal theft of trade secrets exposing you to money damages and equitable relief and remedies under federal law and California state law. Further, pursuant to 18 USC §1832 and California statutes you may be subject to criminal penalties for your access and use of the system information." (Exh. P-17)

56. On January 31, 2013, Mr. Mehrens, concerned by the letter, forwarded the two texts from Ms. Rosen to his e-mail account, as he believed the texts would show that he had Ms. Rosen's permission to use COPOS on behalf of Capacity customers.[13]

57. Mr. Looney made the decision to terminate GFL's Authorized Representative Agreement without reviewing the actual document. At the time he did so, Capacity did not have a copy of the Agreement with GFL. (RT 83:1-9; 104:21-105:2; 105:13-18)

Findings Relating to the Amount of Business Transacted by the Franchisee, as Compared to the Business Available to the Franchisee [§ 3061(a)]

58. The parties stipulated that GFL transacts an adequate amount of business compared to the

[13] Mr. Mehrens was fired by Mid-Pacific on February 4, 2013. (RT 171:6-8)

business available to it.

Findings Relating to the Investment Necessarily Made and Obligations Incurred by the Franchisee to Perform its Part of the Franchise [§ 3061(b)]

59. The parties stipulated that GFL has made the investment necessary and incurred the obligations necessary to perform its part of the Capacity franchise.

Findings Relating to Permanency of the Investment [§ 3061(c)]

60. The parties stipulated that GFL's investment in the Capacity franchise is permanent.

Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare for the Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted [§ 3061(d)]

61. The parties stipulated that they will not present evidence concerning whether it would be injurious or beneficial for the business of Protestant to be disrupted.

Findings Relating to Whether the Franchisee has Adequate Motor Vehicle Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and has been and is Rendering Adequate Services to the Public [§ 3061(e)]

62. The parties stipulated that GFL has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

Findings Relating to Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee [§ 3061(f)]

63. The parties stipulated that GFL does not fail to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

Findings Relating to the Extent of the Franchisee's Failure to Comply with the Terms of the Franchise [§ 3061(g)]

64. The Authorized Representative Agreement pre-dated COPOS by approximately thirteen years. (Exh. J-1) Capacity never sought to update or amend the Authorized Representative Agreement, even after it developed COPOS. (RT 110:10-111:3)

65. The sole clause in the Authorized Representative Agreement regarding Capacity's ability

to terminate the contract is quoted in paragraph 16 above. The Agreement states that there are no collateral agreements to the document, as quoted in paragraph 17 above.

66. The Terms and Conditions for the use of COPOS set forth two possibilities for unauthorized use of the system: (1) Capacity will consider such use to be an infringement of Capacity's intellectual property rights and "may pursue any and all legal remedies available to it;" and (2) such use "could result in loss of the use of the web site."

67. The termination of GFL's access to COPOS was made in accordance with the warning in the Terms and Conditions. The Terms and Conditions do not warn that the franchise could be terminated if the Terms and Conditions are violated.

68. The Notice of Termination quotes franchise provisions regarding terminable actions and reprints whole paragraphs (15(f), 15(g), 16 and 17), all purportedly from the Authorized Representative Agreement, none of which actually exist in the Authorized Representative Agreement between the parties. Mr. Looney described the current franchise that Capacity enters into with its dealers as being more voluminous and containing significant differences. (RT 110:19-111:3)

69. GFL did not violate any provisions of its Authorized Representative Agreement with Capacity.

OTHER FACTORS

70. The list of good cause factors set forth in Section 3061 for termination of a franchise is not exclusive. The existing circumstances must be considered, including, but not limited to the seven factors specifically set forth. No other factors are found relevant.

DETERMINATION OF ISSUES

71. Capacity has not established that GFL is not conducting an adequate amount of business as compared to the business available to it. [Section 3061(a)]

72. Capacity has not established that GFL has not made the investment necessary and incurred the obligations necessary to perform its part of the Capacity of Texas franchise. [Section 3061(b)]

73. Capacity has not established that GFL's investment is not permanent. [Section 3061(c)]

74. Capacity has not established that it would not be injurious to the public welfare for the franchise to be replaced. [Section 3061(d)]

75. Capacity has not established that GFL does not have adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and is not rendering adequate services to the public. [Section 3061(e)]

76. Capacity has not established that GFL failed to fulfill the warranty obligations of Capacity of Texas to be performed by GFL. [Section 3061(f)]

77. Capacity has not established that GFL failed to comply with the terms of the franchise. [Section 3061(g)]

PROPOSED DECISION

Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the Protest in *Guarantee Forklift, Inc. dba GFL, Inc. v. Capacity of Texas, Inc.*, Protest No. PR-2361-13, is sustained. Respondent had not met its burden of proof under Vehicle Code Section 3066(b) to establish that there is good cause to terminate GFL's Capacity of Texas franchise.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as the result of a hearing before me, and I recommend this Proposed Decision be adopted as the decision of the New Motor Vehicle Board.

DATED: March 18, 2014

By: Kymberly Pipkin
KYMBERLY PIPKIN
Administrative Law Judge

Jean Shiomoto, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV