



*New Motor Vehicle Board*

# *In-Site*

April 2014

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## **INDUSTRY ROUNDTABLE**

The Board hosted an Industry Roundtable on Thursday, April 10, 2014, at the Department of Motor Vehicles' Headquarters in Sacramento. The purpose of the event is to educate the members of the Board on industry-related issues and to provide them with an opportunity to interface with dealer and factory personnel. Many topics of interest were presented.

The event opened with welcoming remarks from Jean Shiomoto, Director of the Department of Motor Vehicles.

The first topic was Odometer Fraud, Roll Backs and Its Costs. Alan Skobin, General Counsel for Galpin Motors, Inc., who served as President and Vice-President during his 9 years with the Board, and Gary Mitchell, Special Agent in Charge from DOT-NHTSA spoke about \$1.139 billion odometer rollbacks in the United States. Fifty-three percent of rollbacks are more than 50,000 miles. A list of the top 10 states with odometer fraud was provided, with California ranking number 1. Patterns and trends in odometer fraud were discussed such as violence, organized crime, and firearms. A list of 18 unique odometer fraud schemes was presented. A presentation of old school and new odometer fraud tools was given.

Bernard Soriano, Deputy Director of Enterprise Risk Management, Department of Motor Vehicles made a presentation on Autonomous Vehicles, and the Status of DMV's regulatory package. He discussed Senate Bill 1298, which required DMV to adopt regulations setting forth requirements for manufacturers' testing of autonomous vehicles on public roadways. He provided information on NHTSA's four levels of autonomous vehicles. Mr. Soriano spoke about two regulatory packages. The first package, which is currently in final review, includes submission of evidence of insurance, data collection requirements, operator training and qualifications. Regulatory package 2, which has a target date of December 2014, consists of testing requirements, safety standards, operator license

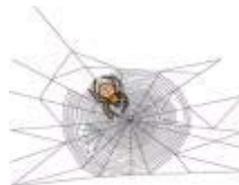
requirements, vehicle registration requirements, and other regulations.

Bryant Walker Smith, from The Center for Automotive Research at Stanford (CARS), and a lecturer at Stanford Law School, discussed the legal perspective on three misconceptions in vehicle automation. The first one is capability- cars will not be driving themselves soon but driving will gradually shift from human to computer. Second is deployment-vehicles being tested are not consumer-ready and the path from research to production is long. Lastly is connectivity- not all self-driving vehicles will talk to each other. He provided a table that summarizes the levels of driving automation for on-road vehicles.

A presentation was given by Jonathan Morrison, President of Auto Advisory Services on FTC "Operation Steer Clear Don't be Taken for a Ride". The FTC launched a long-term enforcement campaign against new and used car dealers for deceptive advertising. It included complaints filed against ten dealerships, nine of which were settled. The last complaint was recently settled. Settlements involved no monetary fines, but included 20 year consent decrees under which the dealers agreed not to violate laws cited in the complaint, a mandate to submit compliance plans to the FTC, and a requirement to retain all advertisements for inspection by the FTC for a five year period.

Andrew Conway, Chief of Registration Policy and Automation Branch with the Department of Motor Vehicles provided updates on DMVs Business Partnership, its Paperless Transaction Programs, and the proposal to implement temporary tags in California.

Robin Parker, Senior Staff Counsel with the New Motor Vehicle Board discussed Board case filings, trends and statistics.



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Catherine Dunwoody, Executive Director with the California Fuel Cell Partnership and Wade Crowfoot, Deputy Cabinet Secretary and Senior Advisor to the Office of California Governor Edmund G. Brown Jr., provided a presentation on The Drive to Zero - The Status of Hydrogen Fuel Cell and Plug-In Technology. They explained the benefits of hydrogen and fuel cell electric vehicles. Hundreds of zero-emission fuel cell electric vehicles are on the road today and tens of thousands are coming beginning in 2015. With about 100 stations statewide, customers will have sufficient access to hydrogen fuel to replace a conventional vehicle with a fuel cell electric vehicle. A list on the status of H2 stations and which ones are open and in development was provided. By 2020, California ZEV infrastructure will support up to 1 million vehicles including widespread use of zero emission vehicles for freight and public transit. By 2025, over 1.5 million zero emission vehicles will be in California. Mr. Crowfoot provided a chart that shows National and California Sales for Plug-In Electric Vehicles. The national cumulative total for 2014 was 21,940.

The Roundtable was well-received by those in attendance as well as the Board members. If you are interested in the PowerPoint presentations from the event, you can find them on the Board's website at [www.nmvb.ca.gov](http://www.nmvb.ca.gov).

## FEBRUARY 4, 2014 GENERAL MEETING

The Board held a General meeting on February 4, 2014, in Sacramento. At that meeting, the members considered one case and addressed a number of administrative matters.

### *Stockton Automotive Development LLC dba Stockton Nissan v. Nissan North America, Inc.*

Protest No. PR-2351-12

Nissan sought to terminate Stockton Nissan's franchise. However, Stockton Nissan consummated a buy-sell with Lithia and on October 1, 2013, signed a Voluntary Termination Letter. The notice of termination had not been withdrawn and the protest had not been dismissed. An Order to Show Cause why the protest should not be dismissed for lack of jurisdiction was issued by Administrative Law Judge Skrocki on November 5, 2013. A telephonic hearing was held before ALJ Skrocki on November 21, 2013. The ALJ found that the jurisdiction of the Board ceased on October 1, 2013, when the Voluntary Termination Letter became effective to terminate Protestant's Nissan franchise, and the ALJ recommended that the protest be dismissed for lack of jurisdiction. The Public Members unanimously adopted the ALJ's recommendation, and dismissed the protest.

### **Amicus Curiae Request**

In *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation, U.S.A.*, Protest No. PR-2122-08; San Luis Obispo County Superior Court No.

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CV098090; Second Appellate District Court of Appeal No. B236705; and California Supreme Court No. S215677, Yamaha requested that the Board file an amicus curiae letter in support of Yamaha's Petition for Review to the California Supreme Court of the November 26, 2013 published Court of Appeal decision upholding in all respects a verdict adverse to Yamaha.

On January 23, 2014, the Board received Yamaha's letter requesting to be heard at the February 4, 2014, General Meeting and urging the Board to file an amicus letter in support of Yamaha's Petition for Review of the Court of Appeal's decision. Yamaha "...believes that the Board has a substantial interest in having the Supreme Court grant review in this case, as the decision upends the Vehicle Code's termination protest mechanism by holding that a franchisor must continue to treat a franchisee who fails to file a timely protest to a Notice of Termination as having an active franchise. Moreover, by effectively holding that the filing of a timely protest to a statutorily compliant Notice of Termination is optional, the decision threatens a significant portion of the Board's jurisdiction – its jurisdiction over franchise terminations." Yamaha contends that the decision is contrary to Section 3060, cannot be reconciled with Sonoma Subaru, and "effectively holds that the failure to file a protest within the statutory deadline has no legal significance, despite the plain text of Section 3060."

On January 28, 2014, the Board received an opposition to Yamaha's request for amicus brief submitted on behalf of Powerhouse Motorsports Group, Inc. and Jerry Namba, successor in interest to Timothy L. Pilg and Chapter 7 Bankruptcy Trustee for the bankruptcy estate of Timothy Pilg and his wife Frances Pilg (collectively "Powerhouse"). Powerhouse contends that its claims are damage claims, which are required to be filed in court, "based on Yamaha's violation of section 11713.3 and related common law tort theories." It "does not contend or suggest that this Board lacks jurisdiction to hear protests." Furthermore, the Board "retains full jurisdiction to hear protests, and it has the authority to determine whether a protest is timely or untimely, just as it did in this case. But a party who has a statutory or common law damage claim cognizable in the courts is not precluded from pursuing that remedy simply because a protest was filed late, or not at all." Lastly, Powerhouse contends that "[a]n amicus brief will alter the balance of the playing field, and it is unnecessary because the issues are factual in nature and unique to this case."

Marjorie E. Lewis, Esq. of Gibson, Dunn & Crutcher LLP and Maurice Sanchez, Esq. of Baker & Hostetler LLP on behalf of Yamaha presented public comments. Dennis D. Law, Esq. of Andre, Morris & Buttery on behalf of Powerhouse Motorsports Group, Inc. and Tim Pilg presented public comments.

Mr. Brooks abstained from consideration of this matter. After a lengthy discussion, Ms. Rusnak moved to deny Yamaha's request. Mr. Hassanally seconded the motion. The motion carried unanimously with Mr. Brooks abstaining.

#### ***Administrative Matters***

Jonathan Morrison, Director of Legal & Regulatory Affairs for the California New Car Dealers Association (CNCDA), discussed Senate Bill 155 and its impact on the industry. The CNCDA, according to Mr. Morrison, is a non-profit trade association representing the interests of California new car dealers. It participates before regulatory agencies, the legislature, and the courts to promote the interests of the industry. In 2013, Senate Bill 155 made non-controversial changes that cleaned-up a number of statutes. It also made substantive changes to warranty and franchisor incentive program protests. Several changes were made to the Unlawful Acts section of the Vehicle Code (Sections 11713.3 and 11713.13). The Alliance of Automobile Manufacturers was also invited to make a presentation to the Board regarding Senate Bill 155.

Robin Parker, Senior Staff Counsel, provided the programmatic impact of the changes and highlighted the new protests that can be filed for warranty and franchisor incentive programs. Ms. Parker did not anticipate that the Board's caseload would increase. The legal staff is working to educate the industry and hosted an Attorney Roundtable in January. There were 43 attendees from various manufacturers, dealers, and associations. Ms. Parker indicated that given the size of the Board's staff, it was going to take several more months to update the Board's website and publications.

Glenn E. Stevens, Public Member, was unanimously elected Board President and Victoria Rusnak, Dealer

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Member, was unanimously elected Vice President. The new officers will serve on the Executive Committee. President Stevens made new Board Committee appointments that are reflected on page 7.

A recap of the January 24-27, 2014, National Automobile Dealers Association (“NADA”) Convention was provided by Mr. Stevens. He encouraged all of the members to attend the convention next year since it will be in San Francisco.

A year end report on the Consumer Mediation Program was provided. A total of 269 cases were filed, and 709 telephone calls were received in fiscal year 2012-2013. Of the 269 cases received, 222 were mediated; 66% were mediated successfully. Bill Brennan, Executive Director, reported that this is a successful program that is supported by both manufacturers and dealers. After a lengthy discussion, it was determined that the staff and the Policy and Procedure Committee will consider whether to promote and expand this program.

The Board approved three out-of-state trip requests for fiscal year 2014-2015, authorizing the Executive Director and two Public Members to attend the Recreational Vehicle Industry Association’s 52nd National Trade Show December 2-4, 2014, in Louisville, Kentucky. Mr. Brennan indicated that he does not anticipate the Board being allocated any funds for out-of-state travel in fiscal year 2014-2015. However, if the travel restrictions are eased, staff will submit these requests to the Department of Motor Vehicles, the California State Transportation Agency (“Agency”), the Department of Finance and the Governor’s office for final approval. Once final administration approval is received, the Executive committee will authorize which individuals will actually attend these trips.

The National Association of Motor Vehicle Boards and Commissions meeting is September 17-21, 2014, in San Diego, and the NADA Convention is January 22-25, 2015, in San Francisco. Since these events are both in California, it is anticipated that the members will attend and Board meetings will be scheduled to coincide.

The Annual Board Fee collection from manufacturers and distributors within the Board’s jurisdiction resulted in \$859,840.95 being collected from 154 licensees for the 1,854,826 vehicles sold in calendar year 2012. Mr. Brennan indicated that the Board originally forecast 1.62 million vehicles so actual sales were considerably higher. Mr. Brennan indicated that the proposed rulemaking increasing the annual Board fee was approved by Agency but the

Department of Finance did not like the proposed tier system for manufacturer fees and thought the numbers used for the projections were understated. Therefore, the fee structure will be reviewed at a future meeting.

Since it has been several years since the Board has done rulemaking to improve and clarify case management, it adopted a number of regulatory amendments; some of the changes are substantive and some are not. The proposed changes are summarized as follows:

Proposed Stipulated Decision and Order (13 CCR § 550(u) and (z), and § 551.22)

For Article 4 and most recently Article 5 protests or petitions, the parties can enter into a written settlement agreement that the parties agree to submit to the Board for it to become adopted by the Board as a “Stipulated Decision and Order of the Board.” If adopted by the Board, the “Stipulated Decision and Order” will have the same effect as if the decision and order flowed from a hearing.

Upon receipt of a proposed stipulated decision from the parties, the legal staff reviews the document and prepares a summary that is transmitted to the Public Members of the Board unless the parties stipulate to Dealer Board Member Participation.

The Proposed Stipulated Decision and Order is deemed to be adopted by the Board unless a member notifies the Executive Director of an objection within 10 days of the Board Member’s receipt of the Proposed Stipulated Decision and Order.

In practice, if a Board Member objects to the Proposed Stipulated Decision and Order, the matter is put on the agenda for consideration at the next regularly scheduled Board meeting. However, there are no definitions in the regulations pertaining to stipulated decisions and orders, nor is there a mechanism in the event that the Board objects to one. Proposed regulations have been drafted that parallel the treatment of petitions upon first consideration (13 CCR § 557).

Subpoenas - Motion to Quash (13 CCR § 551.2)

The proposed amendments authorize an ALJ to issue subpoenas and permit either a copy or original proof of service be filed with the Board following service upon the witness or deponent.

Peremptory Challenges (13 CCR § 551.12)

It was never the Board’s intention to have peremptory challenges apply to law and motion hearings but only to merits hearings so amendments are being proposed to clarify this.

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#### Sanctions - Bad Faith Actions (13 CCR § 551.21)

The proposed amendment specifies that sanctions could also be ordered by the Board in addition to the ALJ.

The non-substantive changes clean-up all references to “subchapter”; the proper reference is “chapter” (13 CCR §§ 550.10 and 598) and make changes to more accurately reflect the authority and reference (13 CCR §§ 551, 551.1, 551.6, 553.40 and 583).

The Board unanimously adopted the 2014 Rulemaking Calendar, which was approved by Agency, and ultimately published by the Office of Administrative Law in the California Regulatory Notice Register.

The Board adopted policies approved in 2013 pertain to annual updates of the Board’s publications, the resignation of Judge Prod, and improvements to the Transcript Policy to pattern it more closely to the courts. There were no substantive changes. At the members’ request, a footnote will be added to reflect the change from “Business, Transportation & Housing Agency” to the “California State Transportation Agency”.

The assignment of cases to Board ALJs in 2013 was summarized by Ms. Parker; there were four merits hearings, one remand hearing, 12 mandatory settlement conferences, nine discovery hearings, and 15 law and motion hearings.

The Board approved the following amendments to the assignment of cases:

If an ALJ’s case resolves prior to the commencement of the hearing but after assignment of the matter, the ALJ is inserted first in the rotation so that he or she would be the next ALJ to receive the first opportunity to preside over a merits hearing.

If an ALJ must decline presiding over a merits hearing because he or she was the Mandatory Settlement Conference ALJ, then the ALJ is inserted back into the rotation. Once the merits hearing in which the conflict arose is assigned; the ALJ with the conflict would be the next judge to receive the first opportunity to preside over a merits hearing.

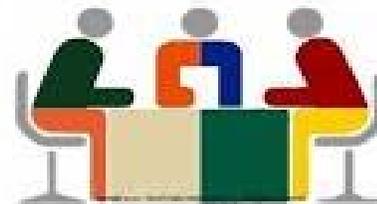
Mr. Brennan reported on the status of the Car Buyers Protection Act ballot initiatives sponsored by Consumers for Auto Reliability and Safety (CARS) and indicated that one version proposes to limit the Board’s ability to hear appeals from decisions made by the DMV Director. From the staff’s perspective, appeals serve a deterrent to the DMV and the industry to resolve disputes. Future reports will be provided at upcoming meetings.

Administrative matters that identified all pending projects, the Board staff and committee assigned, estimated completion dates, and status was reported by Mr. Brennan.

Ms. Parker reported that since the members received their written report, there had been no new protests filed or dismissed. A total of 18 protests were pending. With regards to judicial matters, Ms. Parker reported that an appeal was filed by Roadtrek in *Mega RV* pertaining to the Board’s modification decisions. Additionally, a writ was filed by Kawasaki in the *Burbank Kawasaki* matter as a placeholder but the Board had not been served.

Kathy Tomono and Eugene Ohta co-chaired the CSECC campaign this year and did a terrific job. The Board raised a total of \$3,691 for the 2013 campaign through generous donations made by Board Members, Administrative Law Judges and staff, and through the fundraising events. Donations were also provided by former employees and Board members.

## MEDIATION SERVICES



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Mediation Services Staff  
at (916) 445-1888  
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## CNCDA 2014 DEALER DAY

The California New Car Dealers Association held their 2014 Dealer Day on April 9, 2014, at the Sheraton Grand Hotel in Sacramento. CNCDA is the country's largest state association of franchised new car and truck dealers. Members of the CNCDA, sponsors, and guests attended the luncheon. This year's speaker was P.J. O'Rourke, author and political comedian.

Attendees were briefed on pending legislation that impacts the vehicle industry. Bills of interest discussed were SB 994 (Monning) concerning how unknown third party entities would have potentially limitless remote access to a customer's vehicle and its data. SB 686 (Jackson) would prohibit dealers from selling or leasing any used vehicle subject to a manufacturer's recall until repaired regardless of how minor the recall is or if a part is available.

Following the legislative briefing, CNCDA members met with legislators to discuss the various bills of interest. Several Board members and staff attended the luncheon.



## APRIL 9, 2014 SPECIAL BOARD MEETING

The Board held a Special meeting on April 9, 2014, in Sacramento. At that meeting, the members considered two cases.

### ***Guarantee Fork Lift, Inc., dba GFL, Inc. V. Capacity of Texas, Inc., Protest No. PR-2361-13***

Capacity of Texas sought to terminate GFL's Capacity franchise because it contends that GFL materially breached its obligations to Capacity under the franchise 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. Protestant contends that GFL has not breached any term of its franchise 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.

A merits hearing was held before Administrative Law Judge Kymberly Pipkin on December 11, 2013. The proposed decision sustaining the protest was unanimously adopted by the Public Members by a 2-to-1 vote with one dissent.

### ***McCconnell Chevrolet Buick, Inc. v. General Motors, LLC***

#### **Protest Nos. PR-2382-14 and PR-2383-14**

Kent Steffes, on behalf of Protestant, filed termination protests with the Board on February 14, 2014. Protests involving the same dealership were filed on June 27, 2013, and July 1, 2013, respectively. A merits hearing was held before ALJ Hagle and at the November 12, 2013, Special Meeting, the Public Members of the Board adopted the Proposed Decision overruling the protests.

GM contends that since the Board already found that GM had demonstrated that there was 'good cause' for termination, GM terminated McConnell's dealer agreements on November 14, 2013. Furthermore, GM contends that the new protests improperly seek to challenge the termination of Dealer Agreements that already have been terminated pursuant to a final decision of the Board.

Protestant contends that the Board has jurisdiction to hear these protests and the notices of termination issued in 2013 were not properly served on Protestant due to a change in ownership of the dealership. A telephonic hearing was held before ALJ Skrocki on March 17, 2014. The ALJ recommended that the protests be dismissed with prejudice but the order of dismissal be held in abeyance pending resolution of Respondent's Motion for an Award of Sanctions. The Public Members unanimously adopted the Administrative Law Judge's Proposed Order as amended. Respondent's Motion to Dismiss was granted and the protests were dismissed with prejudice. Respondent's Motion for an Award of Sanctions was denied.



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### POLICY AND PROCEDURE COMMITTEE

Kathryn Ellen Doi, Chair  
Bismarck Obando, Member

## APRIL 9, 2014 GENERAL BOARD MEETING

The Board held a General meeting on April 9, 2014, in Sacramento. At that meeting, the members addressed several administrative matters.

David P. Harris, Deputy Director and Chief Counsel for DMV, provided members with an informative overview of the DMV Legal Division, and the challenges it faces. There are three sections within the Legal Affairs Division: Administrative Law, General Law, and Support Staff. He discussed SB 1298 (Padilla), this bill would authorize the operation of an autonomous vehicle, as defined, on public roads for testing purposes, by a driver who possesses the proper class of license for the type of vehicle being operated if specified requirements are met. The bill would prohibit, except as provided for testing purposes, the operation of

such a vehicle on public roads until the manufacturer submits an application to the department that includes various certifications.

The annual review of the Board's Mission and Vision Statements were discussed. Mr. Brennan recommended that the Board continue with the current statements.

The annual update on training programs attended by staff was presented to the members. Ms. Tomono reported that most of the training has been at no or low cost to the Board.

The revised *Guide to the New Motor Vehicle Board* was a unanimously adopted.

A number of resource materials along with summaries of the Administrative Procedure Act, Bagley-Keene Open Meeting Act, Political Reform Act, and Public Records Act were provided to the Board members. Ms. Parker indicated that there were no substantive changes.

The Board's financial condition for the 2nd quarter of fiscal year 2013-2014 was discussed. Ms. Luke indicated that the Board expended 45% of its appropriated budget through the second quarter of fiscal year. Mr. Brennan indicated that the annual fee paid by manufacturers and distributors was approximately \$859,000, which is significantly higher than in fiscal year 2012-2013 (\$641,000). However, dealer fees are trending about \$90,000 less than the previous fiscal year. According to Mr. Brennan, the dealer fees fluctuate because of the two-year occupational license.

The issue concerning an alteration of the Board's formal request to increase dealer and manufacturer fees was discussed. Ms. Kindel reported that about a year ago the members approved a fee increase that was tiered for manufacturers and distributors. This was necessary because the Board was spending more than it collected each year and its reserves were being reduced. During the rulemaking process, the Department of Finance indicated that it would not approve the proposed fees because of the tiered structure and the data relied upon by the Board for new vehicle sales projections was too low. Mr. Brennan and Ms. Kindel met with the DMV to reformulate the proposed fee increase; the tiered structure was deleted and its forecasts and expenditures were revised. The Board approved a per unit fee of \$0.55 for manufacturers and distributors with a minimum of \$400 if less than 727 vehicles are sold, and a \$400 fee for dealers.

The revised *Informational Guide for Manufacturers and Distributors* was unanimously adopted.

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The Car Buyers Protection Act was approved for circulation as a contender for the November 4, 2014 ballot as an initiated state statute. One version of the initiative impacts the Board and seeks to eliminate Board administrative review of consumer protection violations, i.e., appeals. Under the initiative, any appeal from the DMV Director's decision would be removed from the Board's jurisdiction.

The Board expressed an interest in promoting the mediation program. The feasibility of increasing the visibility and awareness of the program was explored. The website was revised to highlight the Mediation Program and letters were sent to government, public, and private sector providers that have an interest in the new vehicle industry. A survey will be sent to current and past mediation participants to find out how they heard about the program and to solicit constructive criticism. The CNCDA will also publish an article on the Mediation Program in its newsletter.

During public comment Mary Beth Farber of the California Arts Council presented comments to the members about the California Arts Council license plate and the benefit the plates provide in funding the council and the need to reach out to dealers.

With regards to judicial matters, in Roadtrek Motorhomes, Inc. v. California New Motor Vehicle Board; Mega RV Corp, d/b/a McMahan's RV, Ms. Parker reported that appeals were filed by Mega RV and Roadtrek, and the Fourth Appellate District Court of Appeal stayed the Board's modification decisions pending the Roadtrek appeal. In light of this, DMV ceased the investigation of Roadtrek. In Powerhouse Motorsports Group., Inc. and Timothy L. Pilg v. Yamaha Motor Corp., Inc., the California Supreme Court denied the petitions for review filed by Powerhouse and Yamaha.

## David Wilson

### Lifetime Achievement Award

Great choice!! Former Board Member David Wilson, CEO of Wilson Automotive Group, received the 2014 David F. Mungenast Lifetime Achievement Award from the American International Automobile Dealers Association (AIADA) during their 44th Annual Meeting and Luncheon in New Orleans. Mr. Wilson has over 40 years of involvement in the auto retail industry and has been recognized as one of the ten largest dealership groups in the country, with 17 dealerships and over 2,000 employees. He spent several years on the Board and served twice as Vice President and President during his tenure. Congratulations, Dave!



## UPCOMING NAMVBC EVENT

### National Association of Motor Vehicle Boards and Commissions

San Diego, California

FALL WORKSHOP

September 17-20, 2014

For additional information contact

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INDUSTRY ROUNDTABLE SELFIE!

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