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

STOCKTON AUTOMOTIVE DEVELOPMENT LLC dba STOCKTON NISSAN,

Protestant,

v.

NISSAN NORTH AMERICA, INC.,

Respondent.

Protest No. PR-2351-12

PROPOSED ORDER DISMISSING THE PROTEST FOR LACK OF JURISDICTION

To: Michael J. Flanagan, Esq.
Gavin M. Hughes, Esq.
Attorneys for Protestant
LAW OFFICES OF MICHAEL J. FLANAGAN
2277 Fair Oaks Boulevard, Suite 450
Sacramento, California 95825

Kevin M. Colton, Esq.
Maurice Sanchez, Esq.
Attorneys for Respondent
BAKER & HOSTETLER LLP
600 Anton Boulevard, Suite 900
Costa Mesa, California 92626-7221

///

///

///

///

1. This matter is now before the New Motor Vehicle Board ("Board") after a telephonic hearing on Thursday, November 21, 2013, before Anthony M. Skrocki, Administrative Law Judge ("ALJ Skrocki") for the Board. Michael J. Flanagan, Esq. of the Law Offices of Michael J. Flanagan represented Protestant. Maurice Sanchez, Esq. of Baker & Hostetler LLP represented Respondent.

2. The decision before the Board is whether the Board should dismiss the protest for lack of jurisdiction and, if so, what should be the reason for the lack of jurisdiction. There is no dispute that the Board had jurisdiction when the protest was filed. At that time there was a franchise in existence and Protestant was a franchisee of Respondent. However, it is also undisputed that since the filing of the protest Protestant has voluntarily terminated its franchise by a signed letter stating the voluntary termination was to be "Effective concurrent with Nissan North America, Inc.'s (Nissan) execution on (sic) a Nissan Sales and Service Agreement with Nissan of Stockton..."[1] (See Voluntary Termination Letter dated October 1, 2013.)

3. Despite the parties' agreement that there is no longer a franchise in existence and that Protestant is no longer a franchisee of Respondent, this matter is before the Board because:

(a) Respondent refuses to withdraw its notice of termination unless Protestant executes a settlement agreement and release of all claims that would be applicable to bar other civil litigation between the parties; but,

(b) Protestant refuses to execute a settlement agreement and release of all claims; and,

(c) Protestant refuses to request a dismissal of its protest unless Respondent withdraws its notice of termination;

(d) The parties are at a stalemate as to the above.

(e) Respondent asserts that even though the franchise has already been terminated, Respondent is not required to withdraw its notice of termination and that Protestant is free to withdraw its protest regardless of whether or not Respondent withdraws its notice of termination;

---

[1] Nissan of Stockton (Lithia Motors, Inc.) is the buyer under an Asset Purchase Agreement with Protestant (a "buy-sell"). The buy-sell was approved by Respondent and Nissan of Stockton/Lithia is now the successor franchisee to Protestant/Stockton Nissan. The business names of the two entities are similar. Protestant is "Stockton Nissan" and the new franchisee is "Nissan of Stockton". As will be discussed, it was necessary to determine whether there had in fact been the execution of a new franchise with Nissan of Stockton as the voluntary termination of Protestant's franchise would not become effective until that event occurred.

(f) Even if Protestant acted first by withdrawing its protest or requesting dismissal of its protest, Respondent will not withdraw its notice of termination unless Protestant executes a settlement agreement and release as to other claims that may exist and over which the Board has no jurisdiction.

4. Regardless of this dispute, if the termination of the franchise is found to be effective:

(a) Protestant would no longer be a "franchisee" and would have no right to have a hearing on its protest;

(b) The Board would no longer have jurisdiction over the protest as there no longer is a "franchise" in existence; and

(c) Even if the Board retained jurisdiction, the Board could not grant the relief requested (which is to order that Respondent not terminate the franchise) and thus the matter would be moot.

5. If the Board has no jurisdiction, the Board can (and must) dismiss the protest even though Respondent has declined to withdraw its Notice of Termination and even though Protestant has declined to request dismissal of its protest. The Board does not need the consent of the parties, or even the request of a party, to dismiss a protest over which it has no jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

6. On November 15, 2012, when the protest was filed, Protestant, Stockton Automotive Development, LLC dba Stockton Nissan ("Protestant" or "Stockton Nissan") was located at 3077 E. Hammer Lane, Stockton, California. There was at that time a "franchise" in existence between Respondent, Nissan North America, Inc. ("Respondent" or "Nissan" or "NNA"), by the terms of which Protestant was a "franchisee" of Respondent. Both terms, "franchise" and "franchisee", are defined in the Vehicle Code as will be discussed.

7. By letter dated November 7, 2012, Respondent gave notice to Protestant and the Board of Respondent's intent to terminate Protestant's "Nissan Dealer Term Sales and Service Agreement" ("Dealer Agreement" or "franchise"). The notice was received by Protestant and the Board and indicated the following grounds for termination:

a. Unsatisfactory sales penetration performance.

b. Change in usage of the dealership facilities - Kia was dualed with Nissan in November 2009.

8. Respondent asserted in the notice that Protestant had breached the Dealer Agreement under Standard Provisions Sections 2.A, 2.C, 3 and 6.K, in addition to the Facilities Addendum, in a manner that warranted termination of Protestant's Nissan franchise.

9. On November 15, 2012, Stockton Nissan filed a timely protest pursuant to the provisions of Vehicle Code section 3060.[2]

NECESSITY FOR ORDER TO SHOW CAUSE

10. Because neither party was willing to initiate the usual procedure for dismissal of a protest without formal Board action,[3] it was found necessary for the Board's ALJ to issue an Order to Show Cause why the protest should not be dismissed. Proceeding in this manner provides each party due process with the opportunity to be heard prior to the issuance of an order affecting the dispute that was properly brought before the Board for adjudication and over which the Board initially had jurisdiction.

11. The Board, as an administrative agency, has the power to determine its own jurisdiction. Thus, the Board may decide a jurisdiction issue without a request or motion by either side.

Facts Giving Rise to the Order to Show Cause

12. It is undisputed that on or about October 1, 2013, Protestant, with the approval of Respondent, finalized the sale of its Nissan franchise[4] to Lithia Motors, Inc. ("Lithia").

13. In connection with the transfer of the franchise, Protestant, as was required by Respondent, executed what is called a Voluntary Termination Letter, dated October 1, 2013.[5]

14. The Voluntary Termination Letter reads in its entirety as follows:

> Effective concurrent with Nissan North America, Inc.'s (Nissan) execution on (sic) a Nissan Dealer Sales and Service Agreement with Nissan of Stockton [Lithia], the undersigned [Michael Rosvold,. Principal Owner of Protestant Stockton Nissan]

---

[2] All statutory references are to the California Vehicle Code, unless otherwise indicated.

[3] Under these circumstances, the usual procedure would be for the franchisor to withdraw its notice of termination and for the franchisee concurrently to request that the Board dismiss the protest. If this had occurred, there would be no need for consideration or a decision by the Board itself and the Board's Executive Director would issue an Order of Dismissal.

[4] Although the terminology of "sale of the franchise" is sometimes used, technically there was no "sale of the franchise" nor was there a "transfer of the franchise" or an "assignment of the franchise". Rather there was an "asset purchase agreement" (referred to as a buy-sell) between Protestant and Lithia, done with the approval of Respondent. There was then a voluntary termination by Protestant of its Nissan franchise and a new Nissan "Dealer Sales and Service Agreement" (franchise) entered into between Respondent and Lithia.

[5] It is stated in Protestant's Response to the OSC that, "The Voluntary Termination Letter is a form letter, drafted by Nissan." (Protestant's Reply, p. 2, line 17) This statement is incorporated into the Declaration of Mr. Flanagan, Protestant's Counsel. (Flanagan Declaration, p. 2) See also Declaration of Michael Rosvold, p. 2, paragraph 5. When inquiry was made by the ALJ at the hearing on the OSC, Respondent's counsel stated that he believed but did not know for a fact that the language was drafted by Respondent. (RT, p. 9, lines 16-25; and p. 10, lines 1-3)

> voluntarily elects to terminate and does hereby terminate in accordance with the terms thereof any and all agreements that the undersigned has at any time entered into with Nissan relating to the purchase and sale of Nissan motor vehicles, if and to the extent now in effect, including, without limitation, that certain Nissan Dealer Sales and Service Agreement currently in effect between Nissan and the undersigned.

The Voluntary Termination Letter was signed by Michael L. Rosvold as "Principal Owner" of Protestant and, as stated, was required by Respondent in connection with the approval of the buy-sell between Protestant and Lithia. (RT p. 9, lines 16-23; p. 10, lines 1-25; p. 11, line 1; and p. 13, lines 1-12)

15. Even though Protestant no longer had a franchise relationship with Respondent, the protest could not be dismissed by agreement of the parties as Respondent would not withdraw its notice of termination and Protestant would not request dismissal of its protest.

16. In an effort to resolve this impasse informally, a telephonic conference was held on November 1, 2013, with ALJ Skrocki presiding. In earlier e-mail communications to the Board, counsel for the parties discussed whether "since the franchise has been sold the matter is moot". (Protestant's e-mail of October 30, 2013) Although both sides agreed that there should be no hearing on the merits of the protest, each side refused to initiate any motion or request that would lead to the dismissal of the protest by informal Board action.

17. During the telephonic conference of November 1, 2013, the ALJ pointed out that, if there was no longer an existing franchise between the parties, the problem would not merely be the mootness of the protest but rather there would likely be a lack of jurisdiction, a more significant problem than mootness.[6] If the franchise had terminated due to the Voluntary Termination Letter, Protestant would no longer be a "franchisee" as there would not be a "franchise". Both terms are defined in the Vehicle Code. If there is no franchise, Section 3060 would not be applicable as there would be no "franchisor" seeking to terminate a "franchise", and there is no right to file a protest that would proceed to a hearing before the Board unless the protestant is a "franchisee".

---

[6] The Board, like a court, has jurisdiction to determine its own jurisdiction and the Board has no power to proceed or act on a matter over which it has no jurisdiction. Although there may be some overlap between mootness and lack of jurisdiction, the issue of mootness generally arises when, even though there may be jurisdiction over the parties or the subject matter, it is not possible for the court, or Board in this case, to grant the relief sought by a party who prevails in the proceeding. If the matter is moot, the Board may still have the legal power to act and issue an order but, because of the facts, doing so would not have any effect upon the dispute. However, if the Board is without jurisdiction, the Board has no power to act or issue an order. Even if the order would purport to grant the relief sought or resolve the dispute, without jurisdiction to do so, such an order is of no legal effect.

18. The ALJ also pointed out that the Voluntary Termination Letter of October 1, 2013, stated expressly that it was to be effective "concurrent with ... execution [of] a Nissan Dealer Sales and Service Agreement with Nissan of Stockton [Lithia]". This was a factual issue but there was nothing submitted by the parties to establish there had in fact been a new franchise entered into between Respondent and Lithia.

19. If there was no new franchise executed between Respondent and Lithia, the Voluntary Termination Letter may not have been effective to terminate the franchise of Protestant and the Board would continue to have jurisdiction over the protest. But, if there was a new franchise between Respondent and Lithia, Protestant's franchise would have been terminated by the letter and there would be no "franchise" by the terms of which Protestant was a "franchisee".

20. Whether the issue involves lack of jurisdiction or mootness, the critical fact that had to be determined in either case was whether there had been execution of a new franchise between Respondent and Lithia. If there had been, then the Voluntary Termination Letter would be effective to terminate the franchise of Protestant, rendering the case not only moot but also resulting in the loss of jurisdiction over the protest.

21. Neither side, during the telephonic conference of November 1, 2013, could confirm whether or not there had been a new Nissan Dealer Sales and Service Agreement executed between Respondent and Lithia.

22. And, although both sides agreed that there was no need for a hearing on the merits of the protest, counsel could not agree to a procedure whereby the protest could be dismissed without formal action of the Board.

23. In view of the unresolved impasse, the ALJ stated he intended to issue an Order to Show Cause ("OSC") why the protest should not be dismissed for lack of jurisdiction, with the parties to address whether the franchise between Protestant and Respondent had been terminated by the Voluntary Termination Letter, which was factually dependent upon whether a new franchise had been executed between Respondent and Lithia.

24. A briefing schedule was established based on dates chosen by counsel and an OSC was issued on November 5, 2013, incorporating the briefing schedule and setting November 21, 2013 as the

date for a hearing on the OSC.

25. As stated above, the critical issue is whether Protestant's Voluntary Termination Letter of October 1, 2013, was effective. As this was expressly dependent upon whether there had been a new franchise executed between Respondent and Lithia, the OSC contained the following instructions:

> The pleadings of the parties shall include supporting declarations, or a stipulated statement of fact, as to the existence or non-existence of a franchise relationship between the parties. (See Vehicle Code sections 331, and 331.1, 3050(d), and 3060(a)(3))

Protestant's Response to the OSC

26. On November 8, 2013, Protestant timely filed its response to the OSC. Protestant contends that "the Voluntary Termination Letter was executed only as a requirement of completion of the franchise transfer"[7] and "was not connected in any way to the Protest proceedings, nor was it part of any effort to settle the pending Protest." (Protestant's Response, p. 2; Declaration of Michael Rosvold, p. 2) Protestant contends that the "Board never held a hearing or made any determinations or findings of fact concerning [Nissan's] allegations nor Protestant's denial of those allegations, nor did the parties stipulate to any facts or reach any agreement regarding Nissan's allegations or Protestant's denials of those allegations." (Protestant's Response, p. 2)

27. Protestant argues that any dismissal of the protest without a withdrawal of the notice of termination by Respondent could have "severe adverse consequences for Protestant should it attempt at any time to acquire an additional franchise" because the dismissal could be interpreted "as an adverse termination based on the allegations in the Notice of Termination, or based upon some failure on the part of Protestant to file a proper and timely protest, or a failure by [P]rotestant to comply with Board orders while the Protest was pending." (Protestant's Response, p. 3)

28. Protestant maintains that Nissan will not withdraw its notice of termination unless Protestant executes a "Settlement and Release of All Claims", which Protestant refuses to do. Protestant asserts that because the matter is moot there is nothing to settle and therefore no need for a release. (Protestant's Response, p. 3)

29. Protestant does not object to an order dismissing this protest for lack of jurisdiction as long

---

[7] Respondent agreed that the Voluntary Termination Letter was required by it in connection with its approval of the buy-sell. (See Footnote 5)

as the order "sets forth on its face, in sufficient detail, the background and context of the Order of Dismissal, such that there can be no misinterpretation of the dismissal that might have adverse consequences for Protestant", as outlined above. (Protestant's Response, p. 4)

30. As can be seen, the above assertions of Protestant do not address the critical factual issue of whether there had been a new franchise executed between Lithia and Respondent, which was the express condition needed for the Voluntary Termination Letter of Protestant to become effective.

31. At the request of ALJ Skrocki, on November 14, 2013, Protestant filed an amended response to the OSC affirming that its Nissan franchise "has been terminated pursuant to the Voluntary Termination Letter executed by Protestant on October 1, 2013, and made effective upon Lithia's execution of a new Nissan franchise". However, as to whether the new franchise with Lithia was in fact executed, the amended response goes on to say only that the execution of the Lithia franchise "is presumed to have occurred after the completion of the Buy-sell Agreement between Protestant and its Buyer, Lithia Motors, Inc." (Protestant's Amended Response, p. 2, lines 1-5)

32. In explanation of why there are no specific facts regarding the execution of the Lithia franchise, the pleading continues as follows:

> Protestant and its counsel do not have personal knowledge (even after consultation with Respondent's counsel) that a new franchise was executed by the buyer [Lithia], but aver on information and belief that a new franchise agreement has been executed by the buyer. (Protestant's Amended Response, p. 2, lines 6-9)

33. Based upon the above, Protestant's conclusion was that "Protestant's voluntary termination of its Nissan franchise agreement means there is no franchise agreement now in effect between Protestant and Respondent, and Protestant cannot be a franchisee under Sections 331, 331.1, 3050(d), and 3060(a)(3)." (Protestant's Amended Response, p. 2, lines 13-17)

Respondent's Response to the OSC and to Protestant's Response

34. On November 18, 2013, Respondent timely filed its reply to the OSC and to Protestant's response. Respondent agrees with Protestant's assertion that the "Board never held a hearing or made any determinations or findings of fact concerning Nissan's allegations, nor Protestant's denials of those allegations, nor did the parties stipulate to any facts or reach any agreement regarding Nissan's allegations or Protestant's denials of those allegations." (Respondent's Reply, pp. 1-2) Respondent asserts that any

findings the Board makes must be limited to the "undisputed facts which are contained in the declarations submitted by the parties" and be supported by substantial evidence. (Respondent's Reply, p. 2)

35. Respondent maintains that the notice of termination was properly issued and there is no need to withdraw it. Respondent further asserts that "... Protestant has consented to the termination of the Nissan franchise after receipt of the Notice of Termination, as set forth in Vehicle Code section 3060(a)(3). Thus, the Board lacks jurisdiction to continue with the protest in this matter as Protestant is no longer a Nissan franchisee." (Respondent's Reply, p. 2, lines 19-23)

36. As can be seen, the above asserts a conclusion that Protestant is no longer a Nissan franchisee due to the Voluntary Termination Letter but does not address whether or when the franchise with Lithia was executed, which is the expressly stated factual condition that must occur before the Voluntary Termination Letter would be effective to terminate Protestant's franchise.

37. However, in support of the above conclusions, Respondent submitted a Declaration of Chad Filiault the "Area General Manager, West Region" for Respondent. It is this declaration that contains a statement of fact as to whether there was a new franchise entered into between Respondent and "Nissan of Stockton" (as stated in the Voluntary Termination Letter) thus making the Voluntary Termination Letter effective. The language in Mr. Filiault's declaration is as follows:

> 3. On or about October 1, 2013 the Nissan Dealer Sales and Service Agreement between Stockton Automotive Development LLC, dba Stockton Nissan and NNA was voluntarily terminated in accordance with the terms of the letter dated October 1, 2013....A Nissan Dealer Sales and Service Agreement with a successor dealer[8] was entered into on October 1, 2013. There are no other "franchise" agreements as defined in California Vehicle Code section 331 between Protestant and Respondent in this matter." (Chad Filiault Declaration, lines 13-19; underline added)

38. In addition to stating its contention that its Notice of Termination does not need to be withdrawn for Protestant to request dismissal of its protest, Respondent explains the reasons for its refusal to withdraw its Notice of Termination as follows:

///

---

[8]Although the Voluntary Termination Letter was expressly conditioned to be effective concurrent with a new franchise with "Nissan of Stockton" (Lithia), and Mr. Filiault's Declaration refers only to a "successor dealer", it is undisputed that this "successor dealer" is in fact "Nissan of Stockton" (Lithia). Therefore, the Declaration of Mr. Filiault is deemed sufficient to establish that Protestant's Voluntary Termination Letter of October 1, 2013 was effective to terminate the franchise between Protestant and Respondent as of October 1, 2013, "concurrent with" Respondent's execution on that date of a new Nissan Dealer Sales and Service Agreement between Respondent and "Nissan of Stockton" (Lithia).

Further, just as Protestant is concerned that an unexplained Order of Dismissal of the Protest could be misinterpreted, a silent withdrawal of the Notice of Termination could similarly be misinterpreted. (Respondent's Reply, p. 2, line 17-19)

...

39. Respondent then explains why it insists upon a "Settlement Agreement and Release" before it will issue a withdrawal of its Notice of Termination, as follows:

> In order to resolve these ambiguities, Respondent offered to enter into a Settlement Agreement and Release with Protestant, wherein all of the issues could be fully explained. Further, the contentious relationship of the parties, which has included a lawsuit and an arbitration in addition to the instant Protest, could be fully and finally resolved. As Protestant has stated in its Response, it refused to enter into a Settlement Agreement and Release with NNA. (Citations omitted) Absent a Settlement Agreement and Release, further litigation between the parties remains a possibility. It is not unreasonable for NNA to want to protect itself in this manner and to seek to negotiate a withdrawal of the Notice of Termination in exchange for a Settlement Agreement and Release. Of course, Protestant is not required to enter into this arrangement. (Respondent's Reply, p.2, lines 25-28, p. 3, lines 1-6; underline added)

40. Respondent agrees that the Board lacks jurisdiction as Protestant is no longer a Nissan franchisee but that the Board's Order of Dismissal "should read, as do all such Orders of Dismissal, simply 'Dismissed.'" (Respondent's Reply, pp. 2-3; Declaration of Chad Filiault)

Protestant's Reply to Respondent's Reply to the OSC

41. On November 20, 2013, Protestant filed a reply to Respondent's reply to the OSC. Protestant argues that contrary to Respondent's claims, the Board is empowered to issue a comprehensive Order of Dismissal which sets forth all of the undisputed facts and substantial evidence contained in the parties' declarations. Protestant reiterated that the Voluntary Termination "had absolutely nothing to do with Respondent's Notice of Termination" and that this is an "undisputed fact" established by the declarations submitted by Protestant. (Protestant's Reply, pp. 1-3)

APPLICABLE LAW

42. The Board's power to hear protests is created by Section 3050(d) which states as follows:

> 3050. The board shall do all of the following:
>
> ...
>
> (d) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, 3065, or 3065.1. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060), unless all parties to the

protest stipulate otherwise.[9] (Underline added.)

43. This statute requires that the protest be presented by a "franchisee".

Section 331.1 defines a "franchisee" as follows:

> A "franchisee" is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in Section 111, or new trailers subject to identification pursuant to Section 5014.1 from the franchisor and who offers for sale or lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities. (Underline added.)

44. This section requires that there be a "franchise" in existence before a dealer can be a "franchisee".

Section 331.1 defines a "franchise" as follows:

> 331. (a) A "franchise" is a written agreement between two or more persons having all of the following conditions:
> (1) A commercial relationship of definite duration or continuing indefinite duration.
> (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail new motor vehicles or new trailers subject to identification pursuant to Section 5014.1 manufactured or distributed by the franchisor or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.
> (3) The franchisee constitutes a component of the franchisor's distribution system.
> (4) The operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor.
> (5) The operation of a portion of the franchisee's business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, or accessories.
> (Underline added.)
> ...

45. The above requires that, for there to be a "franchise" there be a written agreement in existence between the parties.

46. Section 3060 provides in pertinent part as follows:

> (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:
> (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.
> ...

---

[9] Section 3060 was amended by Senate Bill 155, effective January 1, 2014. The prior version of Section 3060 is referenced as that was the language in effect at the time of these events and there are no substantive differences applicable here.

(2) Except as provided in Section 3050.7, the board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. ...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.)

ANALYSIS

47. The statutes give the Board the power to hear and decide protests filed by a "franchisee"; give a "franchisee" the right to file a protest with the Board under certain situations; prevent the termination of an "existing franchise" unless certain notices are given by the "franchisor" and received by the franchisee and the Board, and, if a timely protest is filed, the statutes prevent the termination of an existing "franchise" unless the "franchisor", in a hearing before the Board, establishes good cause for the termination of the "franchise"; and, if the franchisor does not meet its burden of proving good cause for the termination, the Board may sustain the protest and order that the franchisor not terminate the franchise.[10]

48. It is undisputed that, because of these statutes, for the Board to have jurisdiction to hear and act upon the protest, there must be an existing "franchise", under which Protestant is a "franchisee" and Respondent is the "franchisor".

49. Contrarily, the Board would not have jurisdiction if there were no "franchise" in existence as Protestant would not be a "franchisee" and Respondent would not be the "franchisor.

50. It is undisputed that at the time the notice of termination was signed (November 7, 2012) and when the protest was filed (November 15, 2012) there was a franchise in existence and that Protestant was the franchisor and Respondent a franchisee.

51. It is also undisputed that Protestant, on October 1, 2013, executed what is called a Voluntary Termination Letter and that this letter by its terms was to be effective "concurrent with" the execution of a new "Nissan Dealer Sales and Service Agreement with Nissan of Stockton [Lithia]".

52. It is undisputed that Lithia is the buyer in the "buy-sell" agreement with Protestant and

---

[10] In addition, Section 3060 permits a franchisor to terminate a franchise if "(3) The franchisor has received the written consent of the franchisee". Whether this is applicable will be discussed below.

that this transaction was approved by Respondent.

53. It has been established by the Declaration of Mr. Filiault that the Nissan Dealer Sales and Service Agreement with Lithia was entered into on October 1, 2013.

54. It has thus been established that the Voluntary Termination Letter dated October 1, 2013, by its terms, was also effective as of that date, "concurrent with" the execution of the Dealer Sales and Service Agreement between Respondent and Lithia.

55. Therefore, the franchise that formerly existed between Protestant and Respondent was terminated as of October 1, 2013.

DETERMINATIONS

As to Jurisdiction

56. As of October 1, 2013, there was no longer an effective written agreement between the parties that satisfies the statutory definition of a "franchise".

57. As of October 1, 2013, Protestant was no longer a "franchisee" of Respondent.

58. As of October 1, 2013, Respondent was no longer the "franchisor" of Protestant.

59. As of October 1, 2013, the Board had no jurisdiction to hear the protest.

As to Mootness

60. If looked at as an issue of mootness, the same facts lead to the same conclusions as to the existence of a franchise and the relationship of the parties.

61. The Voluntary Termination Letter became effective on October 1, 2013, when a new franchise was executed between Respondent and Lithia, the successor franchisee.

62. Even though the Board had jurisdiction on November 15, 2012, when the protest was filed, upon the effective termination of the franchise on October 1, 2013, the Board no longer had the power or the ability to order any meaningful relief.

63. As the Board no longer had jurisdiction over the protest as of October 1, 2013, the Board no longer had the power to order that Respondent not terminate the franchise.

64. Even if the jurisdiction of the Board had continued, as of October 1, 2013, the matter before the Board had become moot as the Board could not grant the relief as requested by the protest.

65. An order of the Board that the protest be sustained would not maintain the existence of the

franchise (or prevent the termination of the franchise) as the franchise had already terminated, and an order sustaining the protest could not revive the franchise.

As to the effect of Section 3060(a)(3)

66. Section 3060(a)(3) 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:
> ...
> (3) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.
> ...

67. As indicated above, Respondent asserts that: "... Protestant has consented to the termination of the Nissan franchise after receipt of the Notice of Termination, as set forth in Vehicle Code section 3060(a)(3). Thus, the Board lacks jurisdiction to continue with the Protest in this matter, as Protestant is no longer a Nissan franchisee." (Respondent's Reply, p. 2, lines 19-23)

68. Respondent is correct that Section 3060(a)(3) permits a franchisor to terminate a franchise if the franchisor has received the written consent of the franchisee. However, under the facts as presented to the Board, it is not the franchisor that terminated the franchise.

69. Section 3060 is applicable to limit the power and right of a franchisor to terminate a franchise. However, Section 3060(a)(3) permits a franchisor to terminate a franchise if "The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed." This subsection permits a franchisor to terminate the franchise if the franchisee has provided "written consent" to the termination sought by the franchisor, or, after the required notices of termination have been received by the franchisee and the Board, if "the appropriate period for filing a protest has elapsed". In either case, upon the written consent of the franchisee to the franchisor's intended termination or the failure to file a timely protest, it can be expressly or impliedly concluded that the franchisee is concurring with the franchisor's intention to terminate and is not challenging whether there is good cause for the termination. Thus, in either scenario, it would be the franchisor that would be doing the "terminating".

70. Here it is the franchisee that terminated the franchise. The termination that occurred was as a result of the "Voluntary Termination Letter" of the franchisee, which by its terms clearly indicates

that the termination is occurring as a result of Protestant's decision to voluntarily terminate rather than evidencing "consent" pursuant to Section 3060 that the franchisor may terminate the franchise.

71. The language of the Voluntary Termination Letter of October 1, 2013, contains the following: "... the undersigned [Mr. Rosvold, Principal Owner of Protestant] voluntarily elects to terminate and does hereby terminate in accordance with the terms thereof any and all agreements... including... that certain Nissan Dealer Sales and Service Agreement currently in effect...".

72. As can be seen, the Voluntarily Termination Letter does not state that the franchisee is consenting to a termination by the franchisor. Rather, it clearly states it is the franchisee that is affirmatively (and "voluntarily") terminating the franchise with its Voluntary Termination Letter to become effective concurrent with the execution of a new franchise between Respondent and Lithia. As the facts indicate that the new franchise between Respondent and Lithia was executed on October 1, 2013, Protestant's election to voluntary terminate its franchise became effective as of that date.

73. It is noted that Respondent concurs that the Voluntary Termination Letter of Protestant was effective to terminate the franchise, concurs there is no need for a hearing on the merits of the protest, and concurs that the Board no longer has jurisdiction over the dispute. Curiously however, Respondent refuses to withdraw its notice of termination, implicitly indicating that it considers the matter unresolved asserting that, "It is not unreasonable for NNA to want to protect itself in this manner and to seek to negotiate a withdrawal of the Notice of Termination in exchange for a Settlement Agreement and Release". Respondent continues stating: "Of course, Protestant is not required to enter into the arrangement."

74. Just as "Protestant is not required to enter into the arrangement", meaning the Settlement Agreement and Release, being demanded by Respondent in return for the withdrawal of the notice of termination, likewise Respondent is not required to withdraw the notice of termination.

75. However, because Protestant exercised its right to voluntarily terminate the franchise (a right unfettered by Section 3060), the withdrawal by Respondent of its notice of termination is not only unnecessary it would be performing an act without any legal or practical significance. That is so because as of October 1, 2013, there was no longer any franchise for Respondent to terminate - with or without the consent of Protestant. Offering to "negotiate a withdrawal of the Notice of Termination in exchange

for a Settlement Agreement and Release" is offering to do that which is meaningless and would be, as stated, without any legal or practical significance.

76. The Voluntary Termination Letter was not "written consent of the franchisee" to allow the franchisor to terminate the franchise within the language of Section 3060(a)(3). (See paragraph 66 above.) Rather, based upon the facts before the Board and its express language, the Voluntary Termination Letter was the exercise of the right and power of the franchisee who, as stated "... voluntarily elects to terminate and does hereby terminate..." the franchise. This was not passive consent of the franchisee to permit the franchisor to terminate the franchise in conformance with Section 3060, but was the active affirmative exercise of the franchisee's "voluntary elect[ion] to terminate" which "does terminate" the franchise (with the termination to be effective "concurrent" with the execution of a new franchise between Respondent and Lithia, the buyer in the buy-sell between Protestant and Lithia).

77. The conclusion that it was the Voluntary Termination Letter of October 1, 2013, that terminated the franchise on the terms stated in the Voluntary Termination Letter is supported by the declaration of Mr. Filiault (an employee of Respondent) part of which is as follows:

> 3. On or about October 1, 2013 the Nissan Dealer Sales and Service Agreement between Stockton Automotive Development LLC, dba Stockton Nissan and NNA was voluntarily terminated in accordance with the terms of the letter dated October 1, 2013.... (Chad Filiault Declaration, lines 13-19; underline added)

Conclusion as to the Application of Section 3060(a)(3)

78. As it was the franchisee that voluntary terminated the franchise, Section 3060(a)(3), which allows the franchisor to terminate the franchise, is not applicable.

79. Even if the Voluntary Termination Letter is deemed "consent" to allow termination pursuant to Section 3060(a)(3), the Voluntary Termination Letter is nonetheless, by its terms, allowing the franchisor to terminate the franchise on the terms as contained in the Voluntary Termination Letter of October 1, 2013, rather than consent to the termination as alleged in the Notice of Termination of November 7, 2012.

As to the parties' desires regarding the scope of the Board's Order

80. Respondent urges that the Board is limited to issuing an Order of Dismissal that reads, "simply 'Dismissed.'" (As sought by Respondent in its Reply, pp. 2-3)

81. Protestant asserts that, "... the Board, contrary to Respondent's claims, is empowered to issue a comprehensive Order of Dismissal, setting forth all of the undisputed facts and substantial evidence contained in the declarations submitted by the parties. Protestant urges that the Board must do so, in order to avoid a misleading or misinterpreted understanding of what occurred in this case..." (Protestant's Reply, p. 2, lines 16-23)

82. Protestant is concerned that an Order of Dismissal without recital of the facts and evidence presented could be misinterpreted as an adverse termination based upon the Notice of Termination.

83. Respondent asserts:

> Further, just as Protestant is concerned that an unexplained Order of Dismissal of the Protest could be misinterpreted, a silent withdrawal of the Notice of Termination[11] could similarly be misinterpreted. (Respondent's Reply, p. 2, line 17-19)

84. Respondent also asserts, "In order to resolve these ambiguities, Respondent offered to enter into a Settlement Agreement and Release with Protestant, wherein all of the issues could be fully explained."

85. Both sides have expressed concern about possible "misinterpretation" of what has transpired.

86. Regardless of their concerns, as to this order, put simply, the Board does not consider that it has before it any issue regarding whether there is good cause for the "termination of a franchise" as contained in the Notice of Termination or pursuant to the applicable statutes. The only issue before the Board is whether the Board has jurisdiction to hear and decide a protest that has been filed in response to a notice of termination of a franchise when the undisputed facts indicate and the parties agree that a franchise no longer exists and neither desires a hearing on the merits of the protest.

87. Just as parties cannot agree to create jurisdiction or confer jurisdiction if jurisdiction does not exist, likewise the parties cannot by their agreement preclude the existence or exercise of jurisdiction if jurisdiction, as conferred by the legislature, does exist. Said another way, "Jurisdiction cannot be created or destroyed by agreement of the parties." Here, neither party will take the initiative to seek

---

[11] Respondent's concerns that the withdrawal of its notice of termination could be misinterpreted because it is a "silent withdrawal" could be alleviated by Respondent itself. The Board has no required format for such a document. To avoid the withdrawal being "silent', Respondent could submit a withdrawal of its notice of termination with whatever language it deems appropriate. Any issues arising as to such language would be decided on a case-by-case basis.

dismissal of the protest administratively, without the need for a formal order of the Board.

88. Therefore, the Board can and must decide the issue of its jurisdiction over this matter.

89. And, in order to resolve this issue of jurisdiction, it is necessary for the Board to make findings of fact and conclusions of law as to existence or non-existence of its jurisdiction, which in this case, for reasons discussed above, is the factual determination of whether the franchise has been terminated. And, in order to determine "whether" or "if" the franchise was terminated, it is necessary for the Board to make findings of fact and conclusions as to "how and when" the termination occurred.

90. Therefore, the Board cannot, as requested by Respondent, merely state in its order that the protest is dismissed.

As to Respondent's Refusal to withdraw its Notice of Termination and Protestant's Refusal to Request Dismissal of its Protest

91. As stated above, Respondent refuses to withdraw its Notice of Termination unless Protestant agrees to a Settlement Agreement and Release of All Claims. Respondent is correct that no authority has been cited that requires Respondent to withdraw its Notice of Termination. (Respondent's Reply, p. 2, lines 15-16) However, based upon the facts as stated herein, the Board considers the Notice of Termination a nullity and of no legal significance and the Protest thus unnecessary at this time. This is so because the franchise has already ceased to exist because of the following facts.

- There was a buy-sell proposed between Protestant and Lithia;
- Approval of the buy-sell was required by Respondent;
- In connection with approval of the buy-sell, as required by Respondent, Protestant submitted to Respondent a Voluntary Termination Letter (using language drafted by Respondent) stating that Protestant "voluntarily elects to terminate and does hereby terminate" its franchise;
- The voluntary termination was to become effective concurrently with the execution of a new franchise between Respondent and Lithia;
- A new franchise was executed between Respondent and Lithia on October 1, 2013;
- The buy-sell, the approval by Respondent of the buy-sell, the voluntary termination, and the new franchise between Respondent and Lithia all occurred chronologically after the

notice of termination had been issued;

- The only evidence before the Board regarding whether there was or was not a causal connection between the buy-sell and the notice of termination is that contained in the declaration of Mr. Michael Rosvold, Dealer Principal of Protestant, in which he stated:

> 4) The sale of the Nissan franchise was not connected in any way to the Protest proceedings, or to any attempt to settle that matter. Rather it resulted from a series of efforts and opportunities to sell the franchise even before the Notice of Termination was received.

92. There is undisputed evidence that the language of the Voluntary Termination Letter was drafted by Respondent and was submitted by Protestant as a requirement of Respondent in order for Respondent to grant approval of the buy-sell and enter into a new franchise with Lithia.

93. There is no substantial evidence that the buy-sell was entered into because of the Notice of Termination or that there was any causal connection between the Notice of Termination and the Voluntary Termination Letter.

94. In addition, it is noted that the October 1, 2013, Voluntary Termination Letter, which both sides agree is the operative document that terminated the franchise, both by its descriptive title given to it by the parties and by its content, indicates nothing in conflict with the declaration of Mr. Rosvold discussed above. Its given title, as referred to by the parties, is that it is a "Voluntary Termination Letter", evidencing an intent by Protestant to terminate its franchise in accordance with the terms contained therein. The language in the Voluntary Termination Letter cannot be interpreted to be the consent of Protestant to enable Respondent to terminate the franchise in accordance with the "Notice of Termination". The title given to it by the parties cannot be interpreted as anything other than what it has been called, that is, a "Voluntary Termination" by Protestant.

95. Likewise, and more significant and controlling, the text of the "Voluntary Termination Letter" states that "the undersigned voluntarily elects to terminate and does hereby terminate in accordance with the terms thereof... that certain Nissan Dealer Sales and Service Agreement currently in effect...". There is no indication that Protestant is consenting to termination in order to resolve the protest or, as discussed above, that Protestant is giving consent to allow Respondent to terminate in accordance with the Notice of Termination.

96. The language also states that the voluntary termination is "Effective concurrent with [Nissan's] execution on (sic) a Nissan Dealer Sales and Service Agreement with Nissan of Stockton [Lithia]", evidencing that the election to terminate was part of the buy-sell process in the three-way transactions involving Protestant and Lithia, Lithia and Respondent, and Protestant and Respondent. There is no language indicating that the termination was "concurrent with" or conditioned upon any other rights between Protestant and Respondent regarding the performance of, or failure to perform, the terms of the franchise, or to indicate that the Voluntary Termination Letter was part of an attempt to settle any disputes between the parties. Therefore, the conclusion, based upon what is before the Board, is that the Voluntary Termination Letter was required by Respondent in connection with its approval of the buy-sell with Lithia and was the exercise by Protestant of its election to terminate the franchise upon the conclusion of the buy-sell.

97. In addition, the language of the letter, "voluntarily elects to terminate" along with "and does hereby terminate in accordance with the terms thereof...including [the franchise]" is language of a voluntary termination by Protestant "in accordance with the terms of the franchise" and perhaps other agreements of the parties, rather than "a termination by Respondent" consented to pursuant to Section 3060(a)(3). There is nothing in the Voluntary Termination Letter giving Protestant's consent to Respondent in order to enable Respondent to terminate the franchise as permitted by Section 3060(a)(3).

Conclusion as to Respondent's Refusal to withdraw its Notice of Termination and Protestant's Refusal to Request Dismissal of its Protest

98. The evidence supports the conclusion that the "Voluntary Termination" was in conjunction with the buy-sell to Lithia, as described by Mr. Rosvold. And, as expressly stated in the Voluntary Termination Letter of October 1, 2013, termination would be effective concurrent with the new franchise to be entered into between Respondent and Lithia, rather than due to the Notice of Termination.[12]

99. If a termination of the franchise occurred due to the Voluntary Termination Letter, the Board would no longer have jurisdiction over this dispute. If the Board is without jurisdiction as to this

[12] As stated earlier, Respondent also considered the franchise terminated in accordance with the terms of the Voluntary Termination Letter. (See paragraph 77)

matter, neither withdrawal of the Notice of Termination by Respondent or a Request for Dismissal of the Protest from Protestant is necessary for the dismissal of this protest.

CONCLUSION

100. The questions of "whether there was" a termination of the franchise, and if so, "how" and "when" the termination occurred are answered as follows:

a. There was a termination of the franchise;

b. The termination occurred as a result of the "voluntary elect[ion] to terminate" by Protestant in connection with the buy-sell with Lithia, as stated in the Voluntary Termination Letter;

c. The termination was to be "effective concurrent" with the execution of a new franchise between Respondent and Lithia;

d. The new franchise between Respondent and Lithia was executed as of October 1, 2013;

e. As of October 1, 2013, there was no longer a franchise between Protestant and Respondent and Protestant was no longer a franchisee of Respondent; and,

f. As of October 1, 2013, the Board no longer had jurisdiction to hear and decide the protest and, as to this protest, the Board no longer had the power to exercise its powers granted by the legislature.

101. When there has been an undisputed termination of a franchise (regardless of when or how), the fact that one or both of the parties may be contemplating or anticipating further litigation of claims that can be presented only in a civil court action should not justify the parties deviating from proceeding in the customary manner to remove administratively (without a formal decision of the Board) the protest from the Board's calendar by withdrawal of the Notice of Termination and a concurrent request for dismissal of the protest that is challenging whether there is good cause for the termination.

///

///

///

///

///

///

PROPOSED ORDER

After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered that *Stockton Nissan Development, LLC dba Stockton Nissan* v. *Nissan North America, Inc.*, Protest No. PR-2351-12 is dismissed for lack of jurisdiction.

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

DATED: January 21, 2014

By: _____
ANTHONY M. SKROCKI
Administrative Law Judge

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