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9 YAMAHA MOTOR CORPORATION, U.S.A.

10 STATE OF CALIFORNIA
11 NEW MOTOR VEHICLE BOARD

12 In the Matter of the Protest of

13 SAN JOSE YAMAHA,

14 Protestant,

15 v.

16 YAMAHA MOTOR CORPORATION,
17 U.S.A.,

18 Respondent.

19 Protest No. PR-2394-14

20 **MOTION TO DISMISS PROTEST**

21 **[DECLARATION OF COLM A. MORAN**
22 **FILED CONCURRENTLY HEREWITH]**

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MOTION TO DISMISS PROTEST

1 Respondent Yamaha Motor Corporation, U.S.A. (YMUS) hereby submits the following
2 Motion to Dismiss Protest in the above-captioned matter and respectfully moves for an order
3 dismissing the Protest initiating this proceeding.

4 **I. INTRODUCTION**

5 YMUS has issued two notices of termination to San Jose Yamaha. The first, issued on
6 March 24, 2014 – and the subject of this protest – was based on the abusive conduct of John
7 Masi, the owner of Protestant San Jose Yamaha, toward YMUS employees, vendors, and
8 dealership customers. Mr. Masi’s conduct during the pendency of this Protest has been similarly
9 unacceptable. In fact, Mr. Masi’s misconduct has been so extreme that an Orange County
10 Superior Court judge issued a restraining order against Mr. Masi in August on the ground that Mr.
11 Masi had made credible threats of violence against the YMUS employee who signed the March
12 notice.

13 Mr. Masi has also acted in violation of the Prehearing Conference Order in this matter by
14 failing to participate in good faith in the discovery process. Despite multiple efforts by YMUS to
15 obtain documents and information, Protestant has produced a total of 9 pages of documents and
16 has failed to submit its required preliminary or final witness lists. Consequently, the Protest
17 should be dismissed pursuant to Vehicle Code section 3050.2(b), which allows for dismissal of a
18 protest where a party has “fail[ed] to comply with authorized discovery without substantial
19 justification” Cal. Veh. Code § 3050.2(b).

20 Additionally, on September 15, 2014, YMUS issued a wholly separate notice of
21 termination to San Jose Yamaha based on the dealership’s failure to maintain floorplan financing.
22 That second notice of termination was received by San Jose Yamaha on September 17, 2014.
23 Under Vehicle Code § 3060, San Jose Yamaha had until October 17, 2014, to file a protest
24 relating to the second notice of termination. No protest was filed by that date (nor has one been
25 filed as of the date of this motion). Consequently, the termination of San Jose Yamaha’s dealer
26 agreement will become effective on November 16, 2014 by operation of law.

27 The instant Protest should, therefore, be dismissed for two independent reasons: First,
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1 San Jose Yamaha has failed without justification to abide by its discovery obligations under the
2 Prehearing Conference Order in this matter and, even if it had fulfilled its obligations in that
3 regard, the instant Protest is now moot, since termination of San Jose Yamaha will have occurred
4 prior to the final hearing in this matter (which is scheduled to begin on December 8, 2014).

5 **II. STATEMENT OF FACTS**

6 **A. The March 24, 2014 Notice Of Termination And Protest**

7 YMUS issued a notice of termination to Protestant on March 24, 2014 (the “March
8 Notice”). Declaration of Colm A. Moran (“Moran Decl.”) ¶ 2, Exhibit A. The March Notice was
9 based on the abusive and threatening conduct of the owner of San Jose Yamaha, John Masi,
10 towards YMUS employees, vendors and customers. Id. On or about April 22, 2014, Protestant
11 filed a Protest with the Board in response to the March Notice. Moran Decl. ¶ 3.

12 On June 11, 2014, the Board issued its Pre-Hearing Conference Order (the “PHC Order”).
13 Moran Decl. ¶ 4, Exhibit B. The PHC Order required, among other things, that the parties (1) file
14 and serve requests for identification and production of documents by no later than June 30, 2014;
15 (2) produce all documents by August 22, 2014; (3) file and serve preliminary witness lists by
16 September 5, 2014; and (4) file and serve final witness lists by October 27, 2014. Id.

17 YMUS timely filed and served its requests for identification and production of documents.
18 Moran Decl. ¶ 5. Protestant served written responses and objections to YMUS’s document
19 requests on July 14, 2014. Moran Decl. ¶ 6.

20 On August 6, 2014, Judge Anthony Skrocki held a telephonic hearing to rule on
21 objections to the parties’ document requests. Moran Decl. ¶ 7. At the August 6 hearing, the
22 parties agreed to the scope of production Protestant would make in response to YMUS’s
23 document requests. Id. The parties and Judge Skrocki also specifically discussed the remaining
24 case schedule, including the August 22, 2014, deadline to produce documents in this matter. Id.
25 Both the parties’ agreement regarding the scope of discovery and the fact that all remaining
26 deadlines under the PHC Order remained in place is reflected in the Ruling on Objections to
27 Requests for Production of Documents (“Ruling on Objections”) issued on August 6, 2014.

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1 Moran Decl. ¶ 8, Exhibit C.

2 **B. Mr. Masi's Continued Misconduct And Failure To Participate In The**
3 **Discovery Process**

4 Despite a clear obligation to do so, San Jose Yamaha did not produce any documents on
5 August 22, 2014, as required by the PHC Order. Moran Decl. ¶ 9.

6 On the same day – August 22, 2014 – the Orange County Superior Court held an
7 evidentiary hearing on YMUS's application for a workplace violence restraining order against
8 Mr. Masi. Moran Decl. ¶ 10. After a hearing, the Court ruled that Mr. Masi had made a credible
9 threat of violence against YMUS employee Rocky Aiello, who signed the March Notice on behalf
10 of YMUS. Moran Decl. ¶ 11. Consequently, the Court issued a restraining order against Mr.
11 Masi prohibiting him from, among other things, continuing to harass Mr. Aiello. Moran Decl. ¶
12 12, Exhibit D.

13 On September 2, 2014, counsel for YMUS sent emails to Protestant inquiring about the
14 status of its overdue document production and a description of the documents it should have
15 produced. Moran Decl. ¶ 13, Exhibits E and F. On September 4, 2014, Protestant produced a
16 total of 9 pages of documents. Moran Decl. ¶ 14, Exhibit G. Protestant's document production
17 was plainly inadequate. For example, it included no documents relating to GE Capital (one of the
18 vendors that was the subject of Mr. Masi's abuse), only five emails between YMUS and San Jose
19 Yamaha, no internal communications, and no documents related to YMUS's supposedly wrongful
20 conduct toward San Jose Yamaha. Moran Decl. ¶ 15. On September 8, 2014, counsel for YMUS
21 again contacted Protestant about its document production and demanded that Protestant comply
22 with the PHC Order and the Ruling on Objections. Moran Decl. ¶ 16, Exhibit H. Counsel for
23 YMUS also noted in his September 8 correspondence that Protestant had failed to file and serve
24 its preliminary witness list on September 5, 2014, as required by the PHC Order. Moran Decl. ¶
25 17. Protestant has failed to produce any additional documents and has not provided preliminary
26 or final witness lists. Moran Decl. ¶ 18. The final hearing on the March Notice is tentatively
27 scheduled to begin on December 8, 2014. Moran Decl. ¶ 19.

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1 **C. YMUS Issues A Second Notice Of Termination**

2 On September 15, 2014, YMUS issued a second notice of termination (the “September
3 Notice”) to San Jose Yamaha based on the dealership’s failure to maintain floorplan financing for
4 the purchase of new Yamaha products. Moran Decl. ¶ 20, Exhibit I. As required by the Vehicle
5 Code, the September Notice contained a prominent notice informing the dealership that it had 30
6 days from receipt of the notice to file a protest with the Board. Id. The September Notice was
7 received by San Jose Yamaha on September 17, 2014. Moran Decl. ¶ 21, Exhibit J. As of the
8 date hereof, no protest has been filed relating to the September Notice. Moran Decl. ¶ 22.

9 **III. ARGUMENT**

10 There are two independent bases to dismiss the protest. First, the Board has authority to
11 dismiss the Protest based on Protestant’s failure to comply with the PHC Order and the Ruling on
12 Objections. Second, this matter is now moot and should be dismissed because San Jose Yamaha
13 has not filed a protest relating to the September Notice and its Yamaha franchise will terminate
14 prior to the scheduled hearing on the instant Protest. Allowing the Protest to proceed would,
15 therefore, constitute a futility and would require the expenditure of time and resources by the
16 parties and the Board without purpose.

17 **A. The Protest Should Be Dismissed For Failure To Comply With The PHC**
18 **Order And Ruling On Objections**

19 California Vehicle Code § 3050.2(b) provides in pertinent part that the “executive director
20 may, at the direction of the board, upon a showing of failure to comply with authorized discovery
21 without substantial justification for that failure, dismiss the protest or petition or suspend the
22 proceedings pending compliance.” Cal. Veh. Code § 3050.2(b); see also Nader Automotive
23 Group, LLC, et al. v. New Motor Vehicle Board, 178 Cal. App. 4th 1478 (2009) (upholding
24 Board’s authority to dismiss protest based on failure to comply with the discovery process).

25 Protestant’s failure to comply with the PHC Order and the Ruling on Objections is even
26 more egregious than in Nader. In Nader, the Board dismissed a protest following the protestant’s
27 untimely production of 283 pages of documents. Nader at 1483. In that case, the Board found
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1 that the protestant's document production contained only a few relevant documents. Id. In this
2 case, Protestant has produced a total of 9 pages of documents and has refused even to identify its
3 witnesses. Even a cursory review of Protestant's document production in this matter (Moran
4 Decl., Exhibit G) reveals that Protestant has not made a good faith effort to collect and produce
5 documents responsive to YMUS's document requests. The Board, consequently, should dismiss
6 the Protest.

7 **B. The Board Has No Jurisdiction To Consider A Challenge To The September**
8 **Notice, And Thus The Protest Against The March Notice Is Moot**

9 San Jose Yamaha's failure to protest the September Notice also forecloses an adjudication
10 of the merits of the September Notice and renders San Jose Yamaha's Protest of the March
11 Notice moot, even leaving aside Protestant's failure to abide by its discovery obligations.¹

12 California Vehicle Code § 3060 requires for most terminations that "[t]he franchisee and
13 the board have received written notice from the franchisor ... [s]ixty days before the effective
14 date thereof setting forth the specific grounds for termination or refusal to continue." Cal. Veh.
15 Code § 3060(a)(1). The Vehicle Code goes on to state that a franchisor may not thereafter
16 terminate a dealer's dealer agreement unless the Board finds "good cause for termination," the
17 "franchisor has received the written consent of the franchisee," or "the appropriate period for
18 filing a protest has elapsed." Cal. Veh. Code § 3060(a)(2)-(3); see also Sonoma Subaru, Inc. v.
19 New Motor Vehicle Board, 189 Cal. App. 3d 13, 22 (1987) (allowing a franchisor to "treat the
20 termination as final and effective" where "no protest of the termination is filed within the allotted
21 time"). The filing of the dealer's protest is what confers jurisdiction on the Board and triggers the
22 Vehicle Code's requirement that the Board hold a hearing on any timely filed protest. See e.g.,
23 Cal Veh. Code §§ 3060 and 3066.

24 Here, no protest has been filed in response to the September Notice, much less timely
25 filed. Accordingly, the Board cannot enter (and has not entered) any order concerning the
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27 ¹ San Jose Yamaha's failure to protest the September Notice also precludes a mere suspension of
28 the instant Protest and warrants its dismissal.

1 September Notice. Consequently, the Board has no jurisdiction to hear any challenge to that
2 notice and the termination will become effective without any further action by YMUS on
3 November 16, 2014. Since the dealership will be terminated pursuant to the September Notice,
4 San Jose Yamaha's Protest to the March Notice is moot and should be dismissed.

5 **IV. CONCLUSION**

6 YMUS respectfully requests that the Board issue an order dismissing the Protest.

7 Date: October 30, 2014

HOGAN LOVELLS US L.L.P.

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By: 
Colm A. Moran
Attorneys for Respondent
YAMAHA MOTOR CORPORATION, U.S.A.

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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I, the undersigned, certify and declare that I am over the age of 18 years, employed in the
4 County of Los Angeles, State of California, and not a party to the above-entitled action. My
business address is 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067.

5 On **October 30, 2014**, I served the foregoing document described as **MOTION TO**
6 **DISMISS PROTEST** upon the interested parties listed below by first transmitting via electronic
7 mail and then placing a true copy thereof enclosed in a sealed envelope addressed and sent as
follows:

8 Mr. John Masi
9 San Jose Yamaha
776 N. 13th Street
10 San Jose, CA 95112
Email: johnmasi@gmail.com

11 New Motor Vehicle Board
12 1507 – 21st Street, Suite 330
Sacramento, CA 95811
13 916-445-1888
14 E-mail: nmvb@nmvb.ca.gov

15 **BY MAIL:** I am “readily familiar” with the firm’s practice of collection and processing
16 correspondence for mailing. Under that practice it would be deposited with U.S. Postal
17 Service on that same day with postage thereon fully prepaid at Los Angeles, California in the
18 ordinary course of business. I am aware that on motion of the party served, service is
presumed invalid if the postal cancellation date or postage meter date is more than one day
after date of deposit for mailing in affidavit.

19 **BY ELECTRONIC MAIL:** I caused said document to be transmitted by e-mail per
20 agreement of the parties.

21 **BY UPS OVERNIGHT:** I caused such envelope to be delivered to UPS for overnight
22 courier service to the offices of the addressee(s) listed above.

23 I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

24 Executed on **October 30, 2014**, at Los Angeles, California.

25
26 Colm A. Moran
27 Printed Name


28 _____
Signature

MOTION TO DISMISS PROTEST