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CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of FUN BIKE CENTER, Protestant, v. BOMBARDIER RECREATIONAL PRODUCTS, INC.; BRP US INC, Respondent.	**Protest No. PR-2405-14** **PROPOSED ORDER GRANTING RESPONDENT'S POST-DISCOVERY MOTION TO DISMISS PROTEST**

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Respondent's Post-Discovery Motion to Dismiss Protest was heard telephonically on Thursday, July 2, 2015, before Anthony M. Skrocki, Administrative Law Judge for the New Motor Vehicle Board ("Board"). Michael M. Sieving, Esq., Attorney at Law,[1] represented Protestant. R. Bryan Martin, Esq. of Haight Brown & Bonesteel LLP represented Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

1. Protestant, Fun Bike Center ("Protestant" or "FBC"), is located at 5755 Kearny Villa Road, San Diego, California. Protestant is a new motor vehicle dealer and franchisee of BRP US, Inc. (Protest, page 1, lines 19-20; Declaration of Frederic Audet, p. 1, lines 23-25)

2. BRP US Inc. ("BRP"), the franchisor of Protestant, is located at 1111 J.A. Bombardier Boulevard SW, Palm Bay, Florida. BRP is a licensed distributor for and subsidiary of Bombardier Recreational Products, Inc., of Quebec, Canada, the manufacturer of the vehicles covered by the franchise. (Declaration of Frederic Audet, page 1 lines 8-9, and 26-28; Exhibit A to Declaration of Frederic Audet)

3. By letter dated July 28, 2014, BRP gave notice to Protestant and the Board of its intent to modify Protestant's Primary Market Area ("PMA")[2] based on the "potential" appointment of Vey's Powersports ("Vey's") for Can-Am ATVs, Side-by-Side vehicles and roadsters. (Exhibit C to Declaration of Frederic Audet)

4. On August 15, 2014, FBC filed two protests. PR-2404-14 was filed pursuant to Vehicle Code[3] section 3062.[4] It alleged that FBC was within the relevant market area ("RMA")[5] of the intended

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[1] Until October 6, 2014, Mr. Sieving represented Protestant while a partner in the law firm of Callahan, Thompson, Sherman & Caudill, LLP.

[2] The BRP Dealer Agreement General Provisions defines "Primary Market Area" as "an assigned, non-overlapping geographical area designated by BRP in its sole discretion in which Dealer is responsible for retailing, servicing, and otherwise representing Products to a collection of past, current and potential customers. BRP may designate a PMA, for each Product, by sending a notice to Dealer. BRP may review or modify the Operation Standards at any time." (Exhibit B to Declaration of Frederic Audet, page 2)

[3] All statutory references are to the Vehicle Code unless otherwise indicated.

[4] Because this protest was filed in 2014, the amendments to Vehicle Code section 111 which expanded the definition of all-terrain vehicle to include recreational off-highway vehicles and utility-terrain vehicles effective January 1, 2015, are not applicable. The proposed modification to Protestant's PMA only encompasses ATVs and not side-by-side vehicles.

[5] As defined in Section 507 "the 'relevant market area' is any area within a radius of 10 miles from the site of a potential new dealership."

location of Vey's and that there was not good cause for the establishment of Vey's. The second protest, PR-2405-14 was filed pursuant to Section 3060. It alleged that the change to the PMA of FBC was a modification of the franchise that would substantially affect FBC's sales or service obligations or investment and that there was not good cause to modify the FBC franchise.

5. By letter dated August 26, 2014, BRP issued a subsequent notice with the correct statutory language regarding FBC's protest right. Additionally, this notice clarified that the disclosure of the establishment of Vey's included in the July 28 notice was informational only. BRP's market studies concluded that the proposed location is 11.6 miles from FBC, as the crow flies, and therefore does not "contravene the 10 mile radius RMA statute..." (Exhibit E to Declaration of Frederic Audet)

6. Because FBC is not within the 10-mile RMA of the intended location of Vey's, FBC, on October 8, 2014, requested that its Section 3062 "establishment protest" (PR-2404-14) be dismissed. On October 9, 2014, the Board issued its order dismissing the Section 3062 protest.

7. This left only the Section 3060 "modification protest", PR-2405-14. What follows addresses BRP's motion to dismiss this protest.

First Motion to Dismiss (November 10, 2014) the Modification Protest

8. On November 10, 2014, BRP filed a Motion to Dismiss Protest, which was heard telephonically on November 20, 2014. After consideration of the pleadings, exhibits and oral arguments of counsel, Respondent's Motion to Dismiss Protest was denied. Administrative Law Judge Skrocki ("ALJ Skrocki") determined that not all of the documents comprising the Dealer Agreement were before the Board, thus, "[t]he record and materials presently before the Board are insufficient to rule, as a matter of law, that the intended change in the PMA of Protestant would not constitute a modification of Protestant's franchise." The protest was referred to a Board ALJ "...solely for the purpose of addressing the threshold issues of: (1) Whether the change in the PMA assigned to Protestant constitutes a modification of Protestant's franchise; and, if so, (2) Whether the modification will substantially affect Protestant's sales or service obligations or investment. (See Vehicle Code section 3060(b)(1))" The burden of proof as to both of the above issues was allocated to Protestant. Discovery as permitted by the applicable statutes was authorized and limited in scope to that which is necessary to address the above issues. If Protestant is unable to establish that the change in the PMA is a modification of the franchise

and that the modification will substantially affect Protestant's sales or service obligations or investment, the Board is without jurisdiction to hear the protest and the protest will be dismissed.

Respondent's Motion for Reconsideration (November 21, 2014)

9. On November 21, 2014, BRP filed a Motion for Reconsideration of Denial of Motion to Dismiss Protest. After consideration of the pleadings, exhibits and oral arguments of counsel, ALJ Skrocki denied Respondent's motion on December 3, 2014.

Discovery and June 2, 2015, Merits Hearing

10. During the time period from when the Motion for Reconsideration was denied through mid-May 2015, it appeared as though the protest would proceed with a June 2, 2015, merits hearing. However, instead of filing "Pre-Hearing Motions", as had been permitted by ALJ Victor Ryerson who was assigned to preside over the merits hearing, both Protestant and Respondent filed motions that required additional briefing and were really law and motion matters that were properly heard by ALJ Skrocki.

Protestant's Motion for Order to Set Aside Notice of Intent to Modify Franchise

11 . On May 18, 2015, Protestant filed a "Motion for Order to Set Aside Notice of Intent to Modify Franchise or, In the Alternative Stay Proceedings." After consideration of the pleadings, exhibits and oral arguments of counsel, ALJ Skrocki denied Protestant's motion.

Respondent's Post-Discovery Motion to Dismiss Protest

12. After the parties engaged in limited discovery and the merits hearing was scheduled, Respondent filed a Post-Discovery Motion to Dismiss Protest that is the subject of this Proposed Order. BRP requests that the Board conclude as a matter of law that the change to FBC's assigned PMA does not constitute a modification of the franchise that comes within Section 3060(b).

Respondent's Assertions in its Motion to Dismiss

13. BRP asserts that: "The proposed alteration of Protestant's PMA and appointment of an additional dealer more than 10 miles from Protestant does not change a single provision of Protestant's franchise and thus cannot constitute a modification to trigger the statutory predicates in *Vehicle Code* Section 3060." (Footnote omitted; Motion, page 8, lines 17-19)

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Protestant's Assertions in its Opposition

14. FBC asserts that: The maps of the current and proposed PMAs assigned to FBC are "contained in the Dealer Binder as well as the Policies maintained by BRP for Protestant's dealership.... the Dealer Binder and Policies are two of the category (*sic*) of documents incorporated by reference into the Dealer Agreement. In incorporating the Dealer Binder and Policies into the franchise, and by modifying the terms of documents contained in the Dealer Binder and Policies, BRP is in fact modifying the actual terms of the franchise." (Footnote omitted; Opposition, page 5, lines 12-18)

Respondent's Assertions in its Reply to the Opposition

15. BRP asserts that: There are no terms in the Dealer Agreement that can be interpreted (under any standard) that "Protestant is, in fact, an *exclusive* dealer with a *perpetual territorial monopoly*." (Italics in original; Reply, page 1, lines 20-26; page 2, lines 1-8) Additionally, BRP contends that "Alteration of Protestant's PMA is not a 'modification' as a matter of law." (Reply, page 3, lines 6-7)

APPLICABLE STATUTES

16. Because this is a case in which the claimed modification to the franchise is due to BRP's intent to establish an additional dealership, the following will include both the law applicable to a modification of the franchise (Section 3060(b)) as well as the law applicable to the establishment of an additional dealership (Section 3062). This is important given that the parties cite two opinions issued by the Third District Court of Appeal; *BMW of North America, Inc.* v. *New Motor Vehicle Board* (1984) 162 Cal.App.3d 980 and *Ri-Joyce, Inc.* v. *New Motor Vehicle Board* (1992) 2 Cal.App.4th 445. (See discussion on pages 10-15.)

Modification Protest (Section 3060(b))

17. Section 3060(b) states in part:

> (b) (1) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee written notice thereof at least 60 days in advance of the modification or replacement. Within 30 days of receipt of the notice, satisfying the requirement of this section, or within 30 days after the end of any appeal procedure provided by the franchisor, a franchisee may file a protest with the board and the modification or replacement does not become effective until there is a finding by the board

that there is good cause for the modification or replacement. ... (Underline added.)

18. If there is an intended modification that comes within Section 3060(b)(1), and if a timely protest is filed, the burden of proving good cause for the modification is on the franchisor; BRP in this case. (See Section 3066(b)) In addition to considering the existing circumstances, the Board is required to consider seven enumerated factors in determining whether the franchisor has established good cause for modifying a franchise. (Section 3061)

19. However, prior to a merits hearing on the issue of good cause to modify the franchise, a bifurcated hearing is generally held to determine:

(1) If the franchisor's proposed action constitutes a modification of Protestant's franchise (here changing the PMA assigned to FBC). The Protestant has the burden of proof as to this. If there is no modification of the franchise, there is no right to a protest hearing before the Board and the protest will be dismissed for lack of jurisdiction.

And, if there is a modification of the franchise:

(2) Whether the modification will substantially affect Protestant's sales or service obligations or investments. Protestant also has the burden of proof as to this. Absent a modification that substantially affects the franchisee's sales or service obligations or investment, there is no right to a protest hearing before the Board and the protest will be dismissed for lack of jurisdiction.

20. If the franchisee has established both that there will be a modification of the franchise, and that the modification will substantially affect the franchisee's sales or service obligations or investment, the hearing will continue as indicated in paragraph 18.

Establishment Protest (Section 3062)

21. The statute governing the right to protest an establishment of an additional dealership is contained primarily in Section 3062, which states in part as follows:

> (a)(1) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership, or seeks to relocate an existing motor vehicle dealership, that has a relevant market area within which the same line-make is represented, the franchisor shall, in writing, first notify the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership. Within 20 days of receiving the notice, satisfying the requirements of this section, or within 20 days after the end of an appeal procedure provided by the franchisor, a franchisee required to be given the notice may file with the board a protest to the proposed dealership establishment or

relocation described in the franchisor's notice. ...

ISSUE

22. It is undisputed that the modification of FBC's PMA is due to the intended establishment of Vey's, that FBC is not within the RMA of Vey's, and that Vey's proposed location is within the PMA currently assigned to FBC. (Motion, page 4, lines 22-25) As indicated in paragraph 6, Protestant's Section 3062 establishment protest was dismissed at its request because FBC is outside the 10-mile RMA of Vey's location. If FBC had been in the RMA of Vey's, then FBC would have had standing to pursue the Section 3062 establishment protest. The issue presented in this matter is whether a franchisee located outside the 10-mile RMA whose assigned PMA is being modified solely due to the proposed establishment of a same line-make dealer should be allowed to file a modification protest (really a de facto Section 3062 establishment protest)? Alternatively, whether a Section 3060(b) modification protest would be permissible if the proposed modification of a franchisee's PMA is the result of the establishment of a new same line-make dealer and the protesting dealer is outside the 10-mile RMA of the new dealer?

ANALYSIS

23. It is noted that, Protestant in its Opposition to the Motion to Dismiss and in distinguishing the *Duarte & Witting* v. *New Motor Vehicle Board* (2004) 104 Cal.App.4th 626 case, states that in this modification protest, "FBC clearly has a remedy. A decision sustaining the protest would result in a Board order that the franchise not be modified." (Opposition, page 3, lines 9-11)

24. In a 3062 establishment protest, a Board decision sustaining the protest would have the effect of precluding the establishment. Whatever ancillary changes to the protesting dealer's PMA that might have followed if there had been an establishment would not occur. If the 3062 establishment protest is sustained, there would no longer be the need to modify the PMA of any of the surrounding dealers.

25. However, in a 3060(b) modification protest, a Board decision sustaining the protest would be limited to precluding the modification. As stated in Section 3060(b)(1) "...<u>the modification</u> or replacement <u>does not become effective until there is a finding by the board that there is good cause for the modification</u>". (Underlined added.) What will not be addressed or affected by the Board order

sustaining the 3060(b)(1) protest (with findings that the franchisor has not met its burden of proving good cause for the modification) is the right of the franchisor to establish the additional dealership. Outside of Section 3062 and its companion sections, if there is only a 3060(b) modification situation (and the franchise has not granted the dealer an exclusive marketing area), there is nothing in the statutes that would act directly upon, or that give to the Board any power to act upon, the franchisor's right to establish the additional dealership.

26. The result would be that the modification protest would be "sustained" but, although the franchisor could not modify the franchise, the franchisor could nonetheless establish the additional dealership.

27. There would be the anomalous result that: If the 3060(b) modification protest is sustained, it was because the franchisor could not prove good cause to modify the franchise by changing the Protestant's PMA but the franchisor is nonetheless permitted to establish the additional dealership which is the sole reason why the franchisor was seeking to modify the Protestant's PMA.

28. It is not difficult to envision that the 3060(b) modification hearing (at which the franchisor, per Section 3066, has the burden of proving good cause to allow the modification) would quickly evolve into a hearing at which the franchisor, in order to meet its burden of proving good cause to allow the "modification", will be offering evidence to show there is "good cause to allow the establishment", as it is the establishment that is the triggering event for the intended modification of the PMA of the Protestant as well as any other surrounding dealers. This is the reverse of Section 3066 which places the burden on the franchisee to prove there is NOT good cause for the establishment. What should have been a "non-protestable establishment" (or if protestable, one in which the existing dealer would have the burden to prove <u>good cause not to permit the establishment</u>) has become a de facto protestable establishment with the statutory burden of proof to show good cause not to permit the establishment shifted from the Protestant to requiring the franchisor to prove good cause for the establishment as it is the establishment that is the primary, if not the sole, reason for the modification of the PMA of the Protestant.

29. Allowing a modification protest to be brought when the sole reason for the PMA modification is an establishment not only has the potential for creating confusion throughout the

industry[6] but upends the legislative scheme that the Board is charged with administering.

30. If changes in the PMAs due to the establishment of additional dealers are treated as "modifications" possibly subject to Section 3060(b), the franchisor would not be able to rely upon the 10-mile limitation of Section 3062 in making its decision regarding the establishment of the new dealership.

31. An existing dealer that is located within the RMA of the new dealer will have "two bites at the apple" if such a dealer can file both a Section 3062 establishment protest and a Section 3060(b) modification protest (as was attempted by FBC here). Not only will there be the uncertainties of procedure and burden of proof due to overlapping issues, but there may also be the possibility of inconsistent outcomes if both protests are permitted. Limiting an existing dealer located within the RMA to the right to file only a 3062 establishment protest (and not a 3060(b) modification protest challenging the change of the dealer's PMA) will not unfairly prejudice the existing dealer. This is so because the dealer with the right to file a Section 3062 establishment protest will be able to litigate any issues regarding the intended change to (modification of) that dealer's PMA as one of "the existing circumstances" that must be considered by the Board in determining whether the protesting dealer has established good cause to not permit the establishment as required by Section 3062.

32. Of course an existing dealer located outside of the RMA of the new dealer cannot file a 3062 establishment protest. But to give such a dealer, that does not have an exclusive territory but whose PMA will change because of the establishment, the right to file a 3060(b) modification protest would be inconsistent with legislative intent and will result in that dealer having tactical advantages as compared to a dealer filing a 3062 establishment protest. These are at least the following:

(i) The 10-mile limitation for a 3062 protest is not applicable. Even though the claimed modification of the franchise is caused by the intended establishment of an additional dealer, the existing dealer will be able to file a protest unhampered by the legislatively-created 10-mile limitation applicable to an establishment situation. The distance between the existing dealer and the intended location of the additional dealership that is the cause of the claimed modification could be far greater than 10 miles.

(ii) The burden of proving good cause for a claimed modification is placed upon the

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[6] It is undisputed that most if not all franchisors assign territories similar to the PMA utilized by BRP, sometimes called Area of Responsibility (AOR), or Area of Geographic Sales and Service Advantage (AGSSA), etc.

franchisor. This is the opposite of a 3062 protest in which the legislature has placed the burden of proving good cause not to allow the establishment on the protesting franchisee.

In either protest, the real reason for the protest is the intended establishment. However, because the burden of proving good cause for a claimed modification is upon the franchisor, a dealer located more than 10 miles from a new location may have a greater "chance of winning" a 3060(b) modification protest than a dealer located much closer (within the RMA) who files a 3062 establishment protest in which the burden of proving good cause for the establishment is upon the franchisee. Thus, a dealer close to the intended new location (within 10 miles) must prove that the additional competition will not be in the public interest, whereas a dealer located much further away from the intended location, who may be much less affected by the increased competition, has no such burden. (Compare Section 3061 and Section 3063, in particular 3063(e).)

(iii) The assigned RMAs will become the equivalent of "temporary exclusive territories" even though not so provided by the franchise or subject to the limited statutory restrictions imposed by Section 3062. Dealers located outside of the RMA of the intended dealership, whose PMAs will change, will have a "presumptive" exclusive territory equal to their PMAs (contrary to the language of the franchise) at least until such time as the franchisor meets its burden of proving good cause for the modification (i.e. good cause for the establishment). Regardless of its size, the PMA will remain the exclusive territory of the protesting dealer unless the franchisor proves good cause for the modification which in essence would be proving that there is good cause to establish the additional dealership. Such an interpretation would result in an "exclusive competition-free area" equal to the size of the PMA and without regard to the distance between the two locations. In a 3062 establishment protest, the existing dealer is at most given limited protection from excessive competition only for a distance of 10 miles and most importantly, the statutory restriction upon the franchisor's right to establish the additional franchisee will cease to exist only if the existing dealer proves good cause not to allow the establishment. In short, in a 3062 situation, the burden of proving good cause to "prevent competition" has been allocated to the existing franchisee. Allowing a modification protest to be pursued under 3060(b) when the modification is due to an establishment would have the effect of requiring the franchisor to prove good cause to "allow competition".

Appellate Court Opinions Re: Modification Protests Filed Pursuant to Section 3060(b)

33. As stated above, there are two appellate court cases applicable to this fact situation. These are *BMW of North America, Inc.* v. *New Motor Vehicle Board* (1984) 162 Cal.App.3d 980 and *Ri-Joyce, Inc.* v. *New Motor Vehicle Board* (1992) 2 Cal.App.4th 445. These will be referred to as *BMW* (or "Watkins") and *Ri-Joyce* (or "Mazda"), respectively.

34. Both are opinions of the Third District Court of Appeal and both involve claimed modifications of a franchise due to the intended establishment of an additional dealer. As is the case here, no Section 3062 establishment protests could be filed as the existing dealer in each protest was more than 10 miles from the new location and thus was not within the RMA of the intended new dealership. However, as with this protest, each dealer filed a Section 3060(b) modification protest with Watkins claiming a modification of its assigned "Area of Responsibility" ("AOR") and Ri-Joyce claiming a modification of its "Area of Primary Responsibility" ("APR"), geographic areas similar in concept and use to the PMA assigned by BRP to its dealers.

35. In the *BMW* case, the Board found there had been a modification of the AOR assigned to Watkins and sustained the 3060(b) protest. The Superior Court agreed. However, the Appellate Court in applying the parol evidence rule, as a matter of law found there was no modification of the franchise, reversed the Superior Court ruling, and directed that the Board "issue a new decision denying the protest".

36. The opinion of the Appellate Court in the *BMW* case included the following:

> In determining the rights and liabilities of BMW and Watkins under the franchise agreement the first reference must be to the written terms of the contract. That agreement clearly and unequivocally provides that Watkins was not granted the exclusive right to deal in BMW products in any particular geographic area and was not limited in the area in which he could trade. BMW expressly reserved the right to appoint other dealers in BMW products, whether located in Watkins' geographic area or not. This contract language, of course, cannot be reasonably construed to provide Watkins with the exclusive right to sell BMW products in Ventura County, or in any geographical area, and cannot be construed to give him the right to object to the appointment of a new dealer 15.2 miles from the site of his dealership. Accordingly, in determining to appoint a new dealer in the Thousand Oaks-Westlake area, BMW was acting pursuant to, rather than in derogation of, Watkins' franchise agreement.
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> ...
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> ... Since all geographic areas in the country are included within some A.O.R., it follows that the appointment of a new dealer will necessarily alter the A.O.R.'s of the nearest dealers. Indeed, BMW concedes that the A.O.R. for the new Thousand Oaks-Westlake

> dealer will include areas which were previously within the A.O.R.'s of Watkins in Camarillo and Bob Smith in Canoga Park.
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> ...
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> ...The Legislature has acted to regulate the relationship between franchisors and franchisees in the automobile industry, but has done so in a limited manner pursuant to clearly articulated and specifically expressed principles. Those principles provide that a franchisor may be required to continue unmodified an existing franchise agreement, or may be precluded from establishing or relocating a dealer within 10 miles of an existing dealer. Beyond those two qualifications (and others not relevant here) the Board has been given no power to regulate the relationship between franchisors and franchisees, and with those exceptions the rule is still unfettered competition and freedom of contract. In precluding BMW from establishing the Thousand Oaks-Westlake dealer the Board disregarded rather than enforced the franchise contract between Watkins and BMW, and gave Watkins something that neither his contract nor the act gave him, namely, an exclusive trading territory far in excess of his relevant market area.[7]
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> In sum, by the nature of BMW's internal planning formula, the creation of any new dealership would necessarily change the A.O.R. of some existing dealer and hence also the units in operation in his zone. If Watkins' position were sustained, BMW could never create a new dealership without establishing good cause before the Board. The result would be that existing BMW dealers, like Watkins, in contravention of the express terms of their franchises, would be accorded a perpetual territorial monopoly. The short answer is that the appointment of a new dealer does not change a single provision of Watkins' franchise and consequently cannot constitute a modification. The power of the Board arises under the statute only when franchisor improperly "[terminates] or [refuses] to continue any existing franchise" or impermissibly "[modifies] or [replaces] a franchise with a succeeding franchise." (§ 3060.) None of the statutory predicates occurred here. Instead, in violation of the parol evidence rule, Watkins and the Board would rewrite the franchise to read that BMW reserves the right to create other dealers in the present dealer's geographic area, "provided that the new dealership does not change the area of responsibility or units in operation." Having rewritten the agreement, the Board then finds that BMW modified the recast franchise without good cause. Because there was no competent evidentiary basis for that finding and because the Board has no general power over franchises absent statutory enablement, the Board exceeded its jurisdiction. ...

(*BMW, supra* 162 Cal.App.3d 991-994)

37. The Appellate Court in the *BMW* case in effect concluded that the Watkins protest alleging a "modification" was in reality a protest seeking to prevent the establishment of the additional dealership. As to this issue, the language of the contract stated that Watkins had no exclusive territory and that BMW had the unqualified right to appoint other dealers whether located in Watkins' AOR or not (subject of course to Section 3062). Concluding that the modification protest should be sustained would mean that an additional dealer could be appointed "provided that the new dealership does not change the area of responsibility" would be rewriting the franchise in violation of the parol evidence rule.

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[7] The term RMA is often misused. As the 10-mile radius is measured from the "potential new dealership", protesting dealers do not have an RMA. (See footnote 4)

38. Eight years later, the Appellate Court addressed the same issue in the *Ri-Joyce* case in which Mazda was the franchisor. In *Ri-Joyce*, the Court agreed with the Board that the Court's prior decision in the *BMW* case was controlling and that Mazda had the right to appoint another dealer within or without what Mazda called the Area of Primary Responsibility ("APR") assigned to Ri-Joyce (again subject to Section 3062).

39. There are two distinctions between the *BMW* facts and the *Ri-Joyce* facts, both of which are discussed by the Appellate Court below. One is that Mazda's right to appoint additional dealers was a "qualified" right the language of which was reasonably susceptible to the interpretation urged by Ri-Joyce. Thus, the parol evidence rule did not bar the right of Ri-Joyce to introduce extrinsic evidence in support of its claim. The second difference is that, unlike the situation in the *BMW* facts, the Mazda franchise included the APR scheme as part of the franchise. However, the Court stated that this was a distinction without legal significance for the reasons stated below, which are equally applicable to the FBC franchise.

40. The following is the relevant language from the Court's opinion in *Ri-Joyce*.

> ...
> A short and vernacular explanation of the parol evidence rule would be that a party to a written contract cannot be permitted to urge that a contract means something which its written terms simply cannot mean. In the *BMW* case the written terms of the parties' contract expressly provided that the dealer was not given the exclusive right to deal in BMW products in any particular geographic area and was not limited in the area in which he could trade. BMW expressly reserved the right to appoint other dealers in BMW products. This contractual language was not reasonably susceptible to a construction which would give the dealer an exclusive trading area or which would permit him to object to the establishment of a new dealership beyond the limits of his relevant market area. BMW's use of the A.O.R. planning system could not operate to modify the express terms of the dealer's contract. Since the dealer's franchise agreement permitted BMW to establish new dealerships and the new dealership was beyond the existing dealer's relevant market area,[8] we concluded that the Board exceeded its jurisdiction in upholding the dealer's protest. (162 Cal.App.3d at p. 994.)
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> The situation in this case bears many similarities to the *BMW* case. In the past Mazda has used a planning mechanism similar to the A.O.R. system which was used by BMW. Under its dealer agreement Mazda is required to perform periodic reviews of a dealer's past performance and of anticipated sales, service, parts and other matters affecting the past, present and future conduct of the dealer's business and its relationship with Mazda. Until at least 1982 Mazda utilized what it referred to as an "APR" (area of primary responsibility) in performing this function. Under the APR scheme postal zip codes were assigned to the APR of a nearby dealer. Here, as in the *BMW* case, the dealer maintains that the alteration

[8] See Footnote 7.

of its APR by establishment of another dealership would constitute a modification of its franchise which may be protested under section 3060. [Footnote omitted.]

If only these circumstances were present, the *BMW* decision would appear to be directly controlling. However, Ri-Joyce asserts that its situation is different because in *BMW* the A.O.R. scheme was an "internal planning mechanism" (162 Cal.App.3d at pp. 992-993), while in this case the APR scheme, when it was in use, was set forth in writing as part of Mazda's dealer operating standards, which are considered written instructions and part of the franchise agreement. This distinction lacks legal significance. Mazda's dealer agreement consists of a basic agreement, various additional agreements, and written instructions. The basic agreement provides: "If there is a conflict between them, provisions set forth in the Basic Agreement shall govern over the additional agreements, which shall govern over the written instructions." Throughout the period Mazda used the APR planning system its basic agreement specifically provided that a dealer's appointment was nonexclusive and, in a provision we will discuss more fully in a subsequent portion of this opinion, Mazda reserved the right to establish new dealerships. Moreover, throughout this period the written document by which Mazda informed a dealer of its APR specifically provided: "Dealer acknowledges that the above area is subject to modification by Mazda and that dealer's rights with respect to such area are non-exclusive." Ri-Joyce's claim that its franchise agreement gave it exclusive and unmodifiable rights within an APR is in direct contradiction to the written terms of its agreement and under the parol evidence rule, as applied in the *BMW* case, the Board would have no authority to uphold Ri-Joyce's protest under section 3060 based upon this argument.

...

Initially we must clarify an apparent misconception concerning the extent of the holding in the *BMW* case. The Board and Mazda seem to believe that we held in *BMW* that the Board has no jurisdiction to consider a protest based upon the establishment of a new dealership beyond an existing dealer's relevant market area regardless of the terms of the existing dealer's franchise agreement. The *BMW* decision was not so expansive. There the franchisor had expressly reserved the unqualified power to establish new dealerships and we held that nothing in the New Motor Vehicle Board Act precluded a franchisor from reserving such power or entitled a franchisee to object to the exercise of such reserved power beyond his relevant market area. (162 Cal.App.3d at p. 991.) We did not hold that the act precluded a franchisor from granting an exclusive trading area beyond a dealer's relevant market area or that a franchisee would be precluded from protesting the modification of such an agreement by establishment of a new dealer within such an exclusive trading area. (*Ibid.*) That is a matter which is left to the agreement of the parties. If a franchise agreement does grant a dealer an exclusive, unmodifiable trading area then encroachment upon that area may constitute a modification of the franchise which is subject to protest under section 3060. [Footnote omitted.]

In the *BMW* case the franchisor had reserved the unqualified power to appoint new dealers whether in the dealer's geographical area or elsewhere. (*BMW*, supra, 162 Cal.App.3d at p. 984.) In contrast, in Mazda's dealer agreement the franchisor reserved a qualified right to appoint new dealers. The agreement provides: "Dealer and Mazda acknowledge that they may not fulfill their respective expectations for the business contemplated by the Mazda Dealer Agreement and agree that in such event the parties may take any one or more of the following actions, consistent with applicable law: (i) Dealer of Mazda may elect to terminate or not renew the Mazda Dealer Agreement as provided herein; (ii) Dealer may elect to utilize some of its resources to engage in businesses involving the promotion, sale and service of products other than Mazda Products, including those which may be competitive with Mazda Products; or (iii) if Mazda determines it would be in the best interests of customers or Mazda to do so, Mazda may elect to appoint another dealer to promote, sell and service Mazda Products near Dealer's Approved Location. Dealer and

> Mazda shall give each other at least sixty days' written notice prior to taking any of the foregoing actions, for the purpose of enabling the parties to discuss whether there exist any mutually agreeable alternatives to the proposed action. To the extent any consent is required from a party, such party will not unreasonably withhold its consent to any of the foregoing actions by the other."
>
> Under this franchise agreement Mazda reserved a qualified right to establish a new dealership "near" Ri-Joyce's approved location. "Near" is not defined in the agreement. Mazda asserts that "near" should be construed consistent with section 3062 so that it corresponds with Ri- Joyce's relevant market area. That is one, but not the only, possible interpretation of the contractual term. The contract is reasonably susceptible of the meaning urged by Ri-Joyce, that is, that "near" includes a neighboring community which has traditionally been served by Ri-Joyce and which produces a significant portion of its business.
>
> Mazda's franchise agreement provides that the appointment of another dealer near Ri-Joyce's location is an action Mazda may take in the event its business expectations are not fulfilled and if Mazda determines that it would be in the best interests of customers or of Mazda to do so. This reservation of the power to establish another dealership is broad but not unlimited. A contract that confers discretionary decisionmaking authority upon one of the parties may be construed to require an objective standard of reasonableness or may be construed to permit the party to make a decision based upon subjective factors. In either case it will be implied that the party must exercise its judgment in good faith. ...The meaning and scope of Mazda's reservation of the power to appoint another dealer near Ri-Joyce's approved location is a matter which may be illuminated by extrinsic evidence and which Ri-Joyce must be accorded an opportunity to establish.

(Ri-Joyce, supra, 2 Cal.App.4th 451-453)

41. As can be seen, both Appellate Court cases have focused upon the fact that the changes in the areas assigned to the dealers were precipitated by the intended establishment of an additional dealer. When this is the situation, the right to protest such an establishment will arise either because the existing dealer is within the RMA of the intended new dealer and thus the existing dealer has a right to protest under Section 3062, or because a 3060(b) modification protest would be permitted as the existing dealer has been contractually given an exclusive trading area and the franchise terms preclude the franchisor from establishing an additional dealership in that area. The Appellate Court did not consider the claimed right of the dealer not to have an additional dealership established within its assigned area or even outside of its assigned area (either of which could change the boundaries of the assigned areas) by itself, to be a permissible claim. To allow even consideration of such a claim would be in derogation of the express terms of the contract that state the franchisor has the right to so appoint such dealer and thus would be in violation of the parol evidence rule. If the governing terms of the contract expressly permit such an establishment (within or outside of the PMA), to prevent such an establishment under the claim that to do

so would be a modification of the contract would be to (a) contradict the express terms of the contract (that allow such establishment) and (b) not be admissible as the language granting the unqualified right to appoint the additional dealership is not reasonably susceptible to the interpretation that "establishment can occur provided that there is no change to the PMA".

DETERMINATIONS

42. BRP's Post-Discovery Motion to Dismiss is granted and the protest is dismissed for the following reasons:

A. There is no right to file a protest under Section 3060(b) if the claimed modification is to an assigned, non-exclusive market area of the existing dealer and is due primarily or entirely to the intended establishment of an additional dealership. If the existing dealer is within the RMA of the additional dealership a protest may be brought under Section 3062 and the possible effect of a change in the Protestant's assigned, non-exclusive PMA will be among the existing circumstances that will be considered in determining whether there is good cause not to allow the establishment.

B. Section 3060(b) is not applicable to this situation because BRP's franchise has not granted an exclusive market area to FBC and the terms of the franchise provide an unqualified right to BRP to establish additional dealerships within or outside FBC's PMA.

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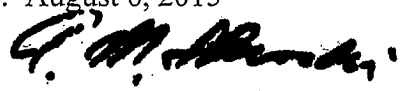
PROPOSED ORDER

After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered that Respondent's Post-Discovery Motion to Dismiss Protest is granted. Protest No. PR-2405-14 (*Fun Bike Center* v. *Bombardier Recreational Products, Inc., BRP US, Inc.)* is dismissed with prejudice.

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: August 6, 2015



By: _____
ANTHONY M. SKROCKI
Administrative Law Judge

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