

1 **MICHAEL M. SIEVING**, Esq. (SBN 119406)
2 Attorney at Law
3 8865 La Riviera Drive, Unit B
4 Sacramento, California 95826
5 Tel: (916) 942-9761
6 E-mail: msievinglaw@att.net

7 Attorney for Protestant

8 **STATE OF CALIFORNIA**
9 **NEW MOTOR VEHICLE BOARD**

10 In the Matter of the Protest of

11 FUN BIKE CENTER,

12 Protestant,

13 v.

14 BOMBARDIER RECREATIONAL
15 PRODUCTS, INC., BRP US INC.,

16 Respondent.

Protest No. PR-2405-14

**PROTESTANT'S OPPOSITION TO
RESPONDENTS' POST-DISCOVERY
MOTION TO DISMISS PROTEST**

Date: July 2, 2015

Time: 10:00 a.m.

ALJ: Anthony M. Skrocki

17 Protestant FUN BIKE CENTER ("FBC" or "Protestant") hereby files its Opposition to the
18 motion filed by Respondent BOMBARDIER RECREATIONAL PRODUCTS, INC., BPR US INC.
19 ("BRP" or "Respondent") captioned "RESPONDENT BRP US INC'S POST-DISCOVERY
20 MOTION TO DISMISS PROTECT" (sic) in the above-referenced matter as follows:
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22 **INTRODUCTION**

23 This Motion represents the *third* attempt by BRP to avoid an evidentiary hearing in this protest
24 by having the matter summarily dismissed as a matter of law. On November 10, 2014, BRP filed its
25 first motion to dismiss, raising arguments (with few exceptions discussed below) identical to those set
26 forth in the present motion. After a hearing, the first motion was denied by Order dated November
27 20, 2014. On the same day, BRP filed a motion for reconsideration of the order denying its motion to
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1 dismiss, which was also denied (after a hearing on the motion) by Order dated December 3, 2014.
2 BRP now seeks yet another reexamination of the legal authorities cited in the first two motions in an
3 attempt to avoid a hearing on the merits of whether there has been a substantial modification of the
4 franchise between the parties. For the reasons discussed below, this current Motion should also be
5 denied and this matter should properly be rescheduled for a merits hearing.¹
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7 ARGUMENT

8 1. The Fact that Discovery has been Conducted does not Change the Analysis of the Legal 9 Authorities Relied Upon by Respondent for Dismissal.

10 Subsequent to the denial of both the first motion to dismiss and the motion for reconsideration,
11 the parties engaged in preliminary discovery on this protest. It was agreed by the parties that the
12 scope of discovery would be limited to the issues involved in the first phase of this protest,
13 specifically whether there is a proposed modification of the franchise and, if so, whether the proposed
14 modification would substantially affect Protestant's sales or service obligations or investment. It was
15 further agreed that if FBC prevails at the first phase, the parties would engage in additional discovery
16 on the remaining issues, including those related to the "good cause" factors set forth in Vehicle Code
17 Section 3061.²
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20 The parties exchanged documents and BRP took the depositions of two percipient
21 representatives of FBC. BRP now again seeks a summary dismissal of this protest, without the
22 testimony of a single sworn witness, based upon its interpretation of what the evidence may or may
23 not show at the merits hearing. BRP once again cites *Duarte & Witting v. New Motor Vehicle Board*
24 (2004) 104 Cal.App.4th 626 in support of its argument for dismissal. (Motion at p. 3, line 24 – p. 4,
25 line 3).
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27 ¹ The Board is very familiar with the history and procedural background of this protest by virtue of the pleadings filed with respect to
28 the first motion to dismiss and the motion for reconsideration. As such, and for the sake of brevity, they will not be repeated here.

² All statutory references herein are the Vehicle Code unless otherwise indicated.

1 As was argued before, *Duarte* dealt with the situation where the remedy purportedly sought by
2 the Protestant therein (compelled continuance of the Plymouth line of vehicles) was beyond the
3 jurisdiction of the Board to award. *Duarte* in no way addressed the ability of the Board to summarily
4 dismiss a protest based upon an analysis of the sufficiency of the evidence to support the claims made
5 in that protest, specifically whether there was good cause for termination. The *Duarte* Court held that
6 it was not necessary for the Respondent therein to establish good cause for termination because, even
7 if it failed to do so, Protestant was without a remedy. That is a far different situation from what we
8 have here. FBC clearly has a remedy. A decision sustaining the protest would result in a Board order
9 that the franchise not be modified. *Duarte* provides no authority to summarily dismiss the protest
10 based upon the facts of this case.

13 The thrust of BRP's present motion seems to be predicated on the fact that, now that the first
14 phase of discovery has been completed, it cannot envision a way in which FBC could successfully
15 present evidence to prevail in this protest. This argument is entirely based upon the documents
16 exchanged by the parties, combined with the exact same legal arguments presented in BRP's first two
17 unsuccessful attempts at dismissal. BRP argues that the proposed change in the Protestant's PMA
18 "does not change a single provision of Protestant's franchise and thus cannot constitute a modification
19 to trigger the statutory predicates in *Vehicle Code* Section 3060". (Motion at p. 8, lines 18-19). Once
20 again, Respondent has misinterpreted the analysis of the various courts which have interpreted the
21 extent of the Board's jurisdiction under Section 3060.

24 Respondent again relies upon *BMW of North America v. New Motor Vehicle Board* (1984) 162
25 Cal.App.3d 980. The application (or lack thereof) of *BMW* to the present case has been thoroughly
26 briefed and argued in the previous motions, and will not be repeated herein. Suffice it to say, there is
27 nothing in *BMW*, nor has BRP cited a single reason why, the previous analysis and determinations
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1 made by the Board in response to the first two attempts at dismissal should overturned now simply
2 because the parties have engaged in preliminary discovery. Simply put, nothing has changed and, yet
3 again, *BMW* provides no authority for a summary disposition at this juncture.

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5 BRP again cites *Ri-Joyce, Inc. v. New Motor Vehicle Board* (1992) 2 Cal.App.4th 445 to
6 support its proposition that dismissal is now appropriate because the parties have engaged in limited
7 discovery. The application of *Ri-Joyce* has likewise been fully briefed and argued in the first two
8 motions. However, it is important to note once again that in *Ri-Joyce*, the Court found that the dealer
9 did in fact have a right to protest the proposed modification under Section 3060, despite the fact that
10 there were no actual changes to the wording of the franchise. In *Ri-Joyce*, the Mazda dealer
11 agreement imposed certain “meet and confer” obligations upon the franchisor when it sought to
12 establish an additional dealer “near” an existing franchisee. The term “near” was undefined in the
13 franchise. Mazda did not comply with these obligations prior to seeking the appointment of the new
14 dealer. The Court held that by its failure, Mazda could have engaged in a unilateral modification of
15 the agreement which would be subject to the Board’s protest jurisdiction.³ *Ri-Joyce* therefore does
16 not warrant dismissal of a modification protest simply because the actual terms of the agreement are
17 not being changed, as argued by BRP here. The Board has previously held that *Ri-Joyce* does not
18 provide sufficient authority to dismiss the present action. There is nothing contained in the present
19 Motion to suggest that the Board properly revisit its previous findings.
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23 2. In the Present Case, There has been an Actual Proposed Modification of the Terms of the
24 Franchise.

25 In the current protest, we do in fact have a proposed modification of the terms of the agreement
26 between the parties. As BRP notes in its Motion, it produced 1546 pages of documents in response to
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³ At the Board hearing, Ri-Joyce would of course had the initial burden to establish that there was a modification which substantially affected its sales or service obligations or investment prior to a hearing on the good cause issues.

1 the preliminary discovery requests. Although the documents were not indexed or otherwise
2 identified, presumably these documents include in their entirety those which comprise the Dealer
3 Agreement as well as “the *Addenda* to this Agreement, the *Operation Standards*, the *Warranty*
4 *Service Guide*, the *Dealer Binder*, the *BRP invoices*, and *all other Policies*”, which are those
5 documents specifically incorporated into the franchise between the parties. (General Provisions at p.
6 19, paragraph 23(h), Exhibit B to the Declaration of Frederic Audet filed concurrently with the
7 Motion, emphasis added).

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9 Included in the documents produced by Respondent were copies of the statutory notices given
10 in this case, with attached maps of the current and proposed PMAs assigned to FBC. Protestant
11 intends to present evidence at the merits hearing on this protest that these documents are contained in
12 the Dealer Binder as well as the Policies maintained by BRP for Protestant’s dealership. As noted
13 above, the Dealer Binder and Policies are two of the category of documents incorporated by reference
14 into the Dealer Agreement. In incorporating the Dealer Binder and Policies into the franchise, and by
15 modifying the terms of documents contained in the Dealer Binder and Policies, BRP is in fact
16 modifying the actual terms of the franchise.⁴

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19 3. The Documents Produced in Discovery Support Another Denial of Respondent’s Request
20 for Summary Dismissal.

21 Contrary to the arguments made by BRP in the current Motion, the fact that documents have
22 now been exchanged by the parties actually reinforces the previous rulings made by the Board to deny
23 the previous attempts at dismissal. FBC now has the evidence necessary to establish that the
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27 ⁴ The extent to which the proposed modification of the documents contained in the Dealer Binder and Policies conflict with other
28 provisions of the franchise, specifically those which purportedly permit Respondent to unilaterally “modify, alter or adjust” PMAs, will
be addressed at the merits hearing. In summary, Section 3060 specifically provides that “[n]otwithstanding . . . the terms of any
franchise” which would otherwise permit a unilateral modification, franchisors are prohibited from doing so without compliance with the
procedures set forth therein, which allow for protests.

1 modified PMA maps are incorporated into the franchise, and the proposed modification of the areas
2 contained in those maps does in fact constitute an actual modification of the agreement.⁵

3
4 **CONCLUSION**

5 BRP's somewhat lengthy Motion is nothing more than a rehash of the arguments previously
6 made in its first two failed attempts at dismissal. To the extent that it is necessary to do so, Protestant
7 hereby incorporates by reference herein all of the pleadings and arguments presented with respect to
8 the first Motion to Dismiss and Motion for Reconsideration of the Order Denying the Motion to
9 Dismiss, as well as the orders thereon. The fact that documents have been exchanged only supports
10 the propriety of the first two rulings. The PMA maps which contain the modifications were
11 incorporated into the franchise between the parties. BRP proposes to modify those areas. FBC will
12 present evidence at the merits hearing as to the substantial effect of the proposed modification. This
13 matter is not ripe for summary dismissal, and Respondent has provided no new evidence or authority
14 to suggest that it is. Accordingly, Protestant respectfully requests that Respondent's Motion be denied
15 in its entirety.
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18 DATED: June 18, 2015

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22 MICHAEL M. SIEVING
23 Attorney for Protestant
24 FUN BIKE CENTER, INC.
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28 ⁵ At the depositions of the two FBC witnesses, both witnesses provided testimony that the areas proposed to be excluded from the PMA (in particular the El Cajon market) are those with the highest concentration of sales for FBC due to unique market considerations which will be addressed at the merits hearing. This testimony, and the effect of the proposed modification upon FBC's sales or service obligations or investment, will of course be explored in detail at the merits hearing.

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
NEW MOTOR VEHICLE BOARD)

I am employed in the County of Sacramento, State of California, I am over the age of 18 years and not a party to the within action; my business address is 8865 La Riviera Drive, Unit B, Sacramento, California 95826.

On this date, June 18, 2015, I served the foregoing documents described as:

PROTESTANT’S OPPOSITION TO RESPONDENT’S POST-DISCOVERY MOTION TO DISMISS PROTEST

I enclosed a true copy of said documents in a sealed envelope or package addressed to the persons noted below.

 X (By United States Mail). I placed the envelope for collection and mailing, following our firm’s ordinary business practices. I am familiar with our firm’s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

 (By overnight delivery). I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

 (By messenger service). I served the documents by placing them in an envelope or package addressed to the persons at the addresses below and providing them to a professional messenger service for service.

 (By fax transmission). Based on agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

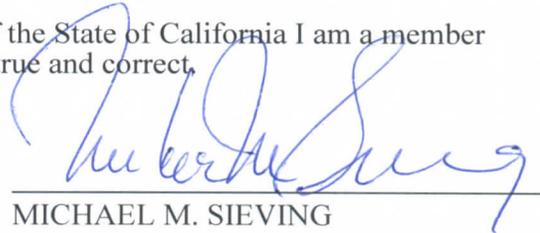
 (By electronic service). Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below.

 (By personal service). I served the documents by delivering the envelope, by hand, to the persons listed below.

 X By ATT E-Mail I caused the above-entitled documents to be served through ATT E-Mail addressed to all parties appearing on the ATT E-Mail electronic service list for the above-entitled case. The file transmission was reported as completed and a copy of the ATT E-Mail pages will be maintained with the original documents in our office. Service will be deemed effective as provided for in the Electronic Case Management Order. I have complied with California Rules of Court, Rule 2.257(a) and the original,

signed Proof of Service is available for review and copying at the request of the court or any party.

I declare under penalty of perjury under the laws of the State of California I am a member of the State Bar of California and that the above is true and correct.



MICHAEL M. SIEVING

SERVICE LIST

R. Bryan Martin, Esq.
2050 Main Street, Suite 600
Irvine, CA 92614
bmartin@HBBLaw.com