

Haight

1 R. Bryan Martin (Bar No. 221684)
bmartin@hbblaw.com
2 Haight Brown & Bonesteel LLP
2050 Main Street, Suite 600
3 Irvine, California 92614
Telephone: 714.426.4600
4 Facsimile: 714.754.0826
5 Attorneys for Respondent
BRP US INC.
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9 **STATE OF CALIFORNIA**
10 **NEW MOTOR VEHICLE BOARD**

11 In the Matter of the Protest of
12 FUN BIKE CENTER,
13 Protestant,
14 v.
15 BOMBARDIER RECREATIONAL
PRODUCTS, INC., BRP US INC.,,
16 Respondent.
17

Case No. PR-2405

**RESPONDENT BRP US INC.'S REPLY IN
SUPPORT OF POST-DISCOVERY
MOTION TO DISMISS PROTEST**

Date: July 2, 2015
Time: 10:00 a.m.
Place: Telephonic

18
19 **I. INTRODUCTION**

20 What terms of the subject Dealer Agreement relating to Protestant being a “non-exclusive”
21 dealer are ambiguous? What terms of the Agreement are reasonably susceptible to an interpretation
22 that Respondent *cannot* alter or adjust a dealer’s Primary Market Area (“PMA”) to appoint a dealer
23 outside the 10-mile relevant market area, when the terms of the Agreement hold that Respondent can?
24 [see Exhibit A to Audet Declaration at p. 2, paragraph 1(a); Exhibit B, page 2, paragraph 1(h).] What
25 terms of the Agreement are reasonably susceptible to an interpretation that Protestant is, in fact, an
26 *exclusive* dealer with a *perpetual territorial monopoly*? *Id.*

27 To date, despite three Opposition briefs and ALJ Skroki’s directives from the December 3,
28 2014 hearing on Respondent’s Motion for Reconsideration, Protestant has failed to even attempt to

1 answer these dispositive questions. Protestant's failure in this regard is understandable, however, as
2 there are no ambiguities or interpretations to support Protestant's position in this case. The Dealer
3 Agreement is clear: Protestant is a *non-exclusive* dealer; Respondent has the right, in its sole discretion,
4 to appoint or relocate other dealers within or outside a dealer's PMA; and Protestant may modify, alter
5 or adjust a dealer's PMA at any time. *Id.* These are the rights granted under the franchise to which
6 Protestant expressly agreed. See *Ri-Joyce, Inc. v. New Motor Vehicle Board* (1992) 2 Cal.App.4th
7 445, 458 (citing *Vehicle Code* Section 331; *BMW of North America, Inc. v. New Motor Vehicle Board*
8 (1984) 162 Cal.App.3d 980, 990).

9 In short, Respondent's proposed alteration of Protestant's PMA to accommodate the
10 appointment of a new dealer outside the 10-mile relevant market area does not change a single term of
11 the franchise agreement and consequently cannot constitute a Section 3060 "modification" as a matter
12 of law. As there is no statutory basis for the protest, it should now be summarily dismissed.

13 **II. THE BOARD HAS INHERENT AUTHORITY TO SUMMARILY DISMISS**
14 **THIS PROTEST WITHOUT A MERITS HEARING**

15 In its Opposition, Protestant curiously continues to assert that the Board does not have
16 authority to summarily dismiss a protest. Such a contention ignores *Duarte & Witting v. New Motor*
17 *Vehicle Board* (2004) 104 Cal.App.4th 626 and *Nader Automotive Group, LLC v. New Motor Vehicle*
18 *Board* (2009) 178 Cal.App.4th 1478, 1485 (citing *Duarte & Witting* for the proposition that the
19 Board's authority to grant motions to dismiss is "settled law.") In both cases, the courts unequivocally
20 held that the Board has implied authority to dismiss a protest without a merits hearing where there is
21 no dispute as to the basic facts, and where a question of law will decide the matter. *Duarte & Witting*,
22 104 Cal.App.4th at 637; *Nader*, 178 Cal.App.4th at 1485. In such circumstances, the Board has broad
23 implied power to summarily dismiss protests without a merits hearing through a procedure akin to a
24 motion for summary judgment. *Id.* at 647-48.

25 In an attempt to avoid summary dismissal, Protestant maintains that it is necessary for sworn
26 witness to be presented at the merits hearing. (Opposition, 2:21-24.) Protestant is ignoring, however,
27 that the only question at issue is one of pure law based upon the interpretation of the parties'
28 agreement. There simply is no dispute as to any material facts and Protestant has never argued

1 otherwise. The threshold question of whether there has been a Section 3060 “modification” is simply
 2 a legal question appropriate for summary determination by the ALJ on this motion. To conduct a
 3 hearing on this legal issue would entail the wasteful expenditure of public funds. *Id.* Dismissal of the
 4 protest at this juncture furthers the goal of administrative efficiency and is consistent with the Board’s
 5 purpose. *Id.*

6 **III. ALTERATION OF PROTESTANT’S PMA IS NOT A “MODIFICATION” AS A**
 7 **MATTER OF LAW**

8 **A. The Terms of the Franchise Agreement Control**

9 As noted, in both *BMW* and *Ri-Joyce*, the dealers maintained that the alteration of their
 10 AOR (area of responsibility) and APR (area of primary responsibility) [by the establishment of
 11 another dealership] would constitute a modification (in the most general sense) of its franchise
 12 which could be protested under Section 3060. *BMW, supra*, at 991-92; *Ri-Joyce, supra*, at 453.

13 This is the same argument Protestant makes here.

14 In rejecting such a general proposition, the *Ri-Joyce* court set forth the dispositive standard
 15 for answering this question: “[w]here a franchisee asserts that a franchisor is attempting to modify
 16 his franchise *the first step is to determine what rights were granted under the franchise.*” *Ri-*
 17 *Joyce* at 458; *see also BMW* at 991 (“In determining the rights and liabilities of [the franchisor and
 18 franchisee] under the franchise agreement the first reference must be to the written terms of the
 19 contract.”) Thus, the terms of the agreement control.

20 Here, The Dealer Agreement provides that Protestant is a “non-exclusive” dealer, and that
 21 Respondent expressly reserves the right, in its sole discretion, to appoint or relocate other dealers
 22 within or outside an existing dealer’s Primary Market Area. [BRP US Inc. Dealer Agreement,
 23 page 2, paragraph 1(a); Exhibit A to Motion to Dismiss.] Moreover, the BRP US Inc. Dealer
 24 Agreement General Provisions provides that Respondent, in its sole discretion, may “modify, alter
 25 or adjust” its dealers’ PMAs at any time. [BRP US Inc. Dealer Agreement General Provisions,
 26 page 2, paragraph 1(h); Exhibit B to Motion to Dismiss.] Protestant expressly agreed to these
 27 terms as part of the franchise relationship. Protestant, however, wants the Board to ignore these
 28 terms, as well as the *BMW* and *Ri-Joyce* opinions, which hold the contract terms dispositive to the

1 issues litigated. In deciding to appoint a new dealer more than 10 miles from Protestant and to
2 alter Protestant's PMA to accommodate the new dealer, Respondent is simply doing that which it
3 is already entitled to do under the Agreement. That is the *only* inquiry that is relevant for
4 "modification" analysis under *Ri-Joyce* and *BMW*.

5 **B. BMW and Ri-Joyce Require Summary Dismissal of this Protest**

6 In its Opposition, Protestant incorporates by reference its previous arguments regarding the
7 application (or lack thereof) of *BMW* and *Ri-Joyce* to the present case, maintaining that neither
8 case supports Respondent's position. (Opposition, 3:24-4:22). As briefed to date, to the contrary,
9 both cases mandate dismissal of the instant protest.

10 Previously, Protestant attempted to distinguish the *BMW* and *Ri-Joyce* cases on the fact
11 that the *BMW* AOR "was merely an internal planning mechanism" and was "not addressed in the
12 franchise" as opposed to the PMA in this case which is contained in the franchise agreement. As
13 previously noted, however, this same argument was made by the dealer in *Ri-Joyce* (where the
14 APR was contained in the franchise agreement) and readily rejected by the court *as a distinction*
15 *lacking any legal significance*. See *Ri-Joyce* at 453.

16 Protestant has also asserted to date that *BMW* is distinguishable in that the BRP franchise
17 agreement imposes obligations upon the dealer related to the dealer's designated PMA. Examples
18 of these obligations, according to Protestant, are the "dealer's sales responsibilities related to the
19 PMA," "the dealer's minimum sales performance in the PMA," "the requirement for the dealer to
20 have a service facility sufficient to meet its service responsibilities in the PMA," the dealer's
21 staffing and training requirements relate to the anticipated demand of the "market" (i.e., PMA)
22 serviced by the dealer," and "the potential for termination of the franchise for a breach of these
23 obligations, including those related to unit sales in the assigned PMA." These very arguments
24 were made and rejected both in *BMW* and *Ri-Joyce*.

25 In *Ri-Joyce*, the court recognized that under the applicable dealer agreement, Mazda
26 performed periodic reviews of a dealer's past performance and of anticipated sales, service, parts
27 and other matters affecting the past, present and future conduct of the dealer's business and its
28

1 relationship with Mazda. *Ri-Joyce* at 453. ***Mazda utilized its APR in performing this function.***
2 *Id.* (emphasis added.)

3 Similarly, in *BMW*, the franchisor utilized data tied to its AOR, which reported annual new
4 car registrations by post office zip code. This information enabled BMW to determine whether it
5 was achieving sufficient market penetration in any particular area, and was used as the estimation
6 of required service and parts facilities. *BMW* at 992. From this data, BMW derived the number of
7 units in operation, which in proximity to a dealer's location was a factor which BMW considered
8 in determining the levels of service and parts facilities a dealer had to maintain to provide
9 adequately for the demand for services and parts. *Id.*

10 In considering these factors (tied to both the APR and AOR in the above cases), the *BMW*
11 and *Ri-Joyce* courts rejected both of the dealer's arguments that the mere alteration of their
12 APR/AOR, by establishment of another dealership, would constitute a "modification" of its
13 franchise that could be protested under Section 3060. In so doing, the *Ri-Joyce* court held: "[i]f
14 only these circumstances were present, the *BMW* decision would appear to be directly controlling
15 [here]." *Ri-Joyce* at 453.

16 Instead, the *Ri-Joyce* court had to look at the terms of the franchise agreement, which it
17 found were different from the terms of the franchise agreement in *BMW*. Specifically, the *Ri-*
18 *Joyce* court noted that the *BMW* franchise agreement reserved the ***unqualified*** power to appoint
19 new dealers whether in the dealer's geographic area or elsewhere (*Id.* at 456 (citing *BMW* at 984)),
20 while the *Ri-Joyce/Mazda* dealer agreement reserved to the franchisor the ***qualified*** right to
21 appoint new dealers "near" *Ri-Joyce's* approved location. *Ri-Joyce* at 456-57. This created an
22 issue as to the meaning and scope of the franchise agreement's term "near," which was reasonably
23 susceptible to a meaning urged by the franchisee such that the parol evidence rule did not apply.
24 *Id.* There also was a requirement under the franchise agreement that Mazda had to confer with *Ri-*
25 *Joyce* in good faith to discuss whether there existed any mutually agreeable alternatives to
26 Mazda's proposed action. *Id.* Mazda failed to do so. Mazda's proposed actions thus violated the
27 terms of the agreement, unlike here, where the proposed action is expressly allowed under the
28 agreement.

1 Notably, it was the differences in the contract language between the *Ri-Joyce* and *BMW*
2 agreements, and that alone, that distinguished those cases and prevented summary dismissal in the
3 franchisor's (Mazda) favor – nothing more, nothing less. The *Ri-Joyce* court found the
4 *contractual* term “near” ambiguous and thus reasonably susceptible to interpretation supported by
5 extrinsic evidence and the *contractual* requirement for the franchisor to “confer” in good faith
6 with the franchisee before establishing the new dealership as dispositive as to why the parol
7 evidence rule did not apply.

8 In this case, there are no ambiguities or terms in the BRP/Fun Bike Center Dealer
9 Agreement, and Protestant has never argued to the contrary. As in *BMW*, Respondent reserved the
10 *unqualified* power to appoint new dealers whether in a dealer's geographic area or elsewhere, and
11 to “modify, alter or adjust” a dealer's PMA at any time. For this reason alone, summary dismissal
12 should be granted because Respondent is not seeking to do anything that is contrary to any terms
13 of the franchise agreement.

14 Indeed, after recognizing the unqualified reservation of power set forth in the franchise
15 agreement in *BMW*, the *BMW* court held there was nothing in the New Motor Vehicle Act that
16 precluded a franchisor from reserving such power or that entitled a franchisee to object to the
17 exercise of such reserved power beyond its relevant market area. *Ri-Joyce* at 456 (citing *BMW* at
18 991). The *BMW* court further clarified it did not hold the Act precluded a franchisor from granting
19 an exclusive trading area beyond a dealer's relevant market area or that a franchisee would be
20 precluded from protesting the modification of such an agreement by establishment of a new dealer
21 within such an exclusive trading area. *Id.* Most significantly, the *BMW* court then stated, “[t]hat
22 is a matter which is left to the agreement of the parties.” *Id.*

23 In that same vein, the *Ri-Joyce* court explained:

24 Although some dealers seem to believe that the New Motor Vehicle Board Act was
25 enacted to protect them against competition, quite the contrary is true. The act
26 recognizes that a new motor vehicle dealership may require significant investment and
27 that there is a disparity of bargaining power and thus the act was intended to protect
28 new motor vehicle dealerships *against unfair or oppressive trade practices*. [citation.]
But the act recognizes that the needs of consumers are important and that competition
is in the public interest. [citation.] Accordingly, *a dealer cannot prevail on a protest
simply by asserting a desire to limit competition*. Moreover, since the interests of
consumers are to be considered (ibid.), where a franchisor has granted an exclusive

1 trading area beyond a relevant market area, *justification for modifying the franchise*
2 *will be more easily established the further a new franchise is located from the*
3 *existing dealer's location.*

4 *Id.* at 456, fn. 4. (emphasis added.)

5 Here, Respondent's proposed alteration of Protestant's PMA to accommodate the
6 establishment of a new dealer more than 10 miles from Protestant, are actions that must be left to the
7 agreement of the parties. *See Ri-Joyce* at 456. Such actions are expressly allowed under the franchise
8 agreement. Protestant cannot now be allowed to rewrite the agreement to give it an exclusive trading
9 territory in excess of his relevant market area and automatically saddle Respondent with a "good
10 cause" burden anytime it seeks to do that which it already is entitled to do under the franchise
11 agreement. Such exact scenarios were struck down in *BMW* and *Ri-Joyce* and must be struck down
12 here.

13 C. **There Has Been No Proposed Modification of the Terms of the**
14 **Franchise**

15 In its Opposition, Protestant remarkably maintains that a proposed modification of the terms of
16 the Dealer Agreement actually occurred by virtue of the modified PMA maps being a part of the
17 franchise. (Opposition, pp. 5-6.) Protestant contends that because the PMA maps are incorporated
18 into the dealer relationship, any proposed change to the maps would constitute a change to the actual
19 terms of the Agreement. Such an interpretation is absurd and must be rejected.

20 In California, a court must interpret a contract to give effect to the mutual intention of the
21 parties as the intention existed at the time of contracting. *Civil Code* Section 1636. Further, the words
22 of a contract are to be understood in their ordinary and popular sense. *Beck v. American Health*
23 *Group Int., Inc.* (1989) 211 Cal.App.3d 1555, 1562. Finally, a court must avoid an interpretation
24 which would result in an absurdity. *County of Humboldt v. McKee* (2008) 165 Cal.App.4th 1476,
25 1498.

26 Here, the Dealer Agreement unambiguously provides that Protestant is a "non-exclusive"
27 dealer, and that Respondent expressly reserves the right, in its sole discretion, to appoint or relocate
28 other dealers within or outside an existing dealer's Primary Market Area. [Exhibit A to Audet
Declaration, page 2, paragraph 1(a).] Moreover, Respondent, in its sole discretion, may "modify, alter

1 or adjust” its dealers’ PMAs at any time. [Exhibit B to Audet Declaration, page 2, paragraph 1(h).]
2 There is no ambiguity as to the intent and effect of these terms.

3 Despite the existence of these provisions, Protestant maintains that when Respondent initially
4 assigned its PMA territory and corresponding PMA maps, that those maps were set in stone and can
5 *never* be changed, altered or adjusted by Respondent. Protestant’s interpretation maintains that
6 despite the clear “non-exclusive” dealer designations set forth throughout the franchise agreement,
7 Protestant nonetheless obtained “exclusive” status and maintains a perpetual territory monopoly as
8 long as it sees fit. Such an interpretation completely ignores the plain meaning of the above terms and
9 effectively writes them out of the contract as if they never existed, resulting in an absurdity. *See*
10 *County of Humboldt*, 165 Cal.App.4th at 1498. There simply is no basis for Protestant’s interpretation
11 and it should be rejected.

12 **IV. CONCLUSION**

13 To date, Protestant has misconstrued and ignored the holdings in *BMW* and *Ri-Joyce*, and
14 continues to incorrectly conflate a general “alteration or change” in PMA with a legal “modification”
15 under *Vehicle Code* section 3060. Protestant’s position is that any “change” or “alteration” of any
16 aspect of the franchisor/franchisee relationship, irrespective of what the terms of the franchise
17 agreement provide, constitutes a legal “modification” such that the franchisee can bind the franchisor
18 to costly and time-consuming litigation. This is not the law.

19 If Protestant’s position is allowed, it will ignore the franchise agreement’s express terms and
20 result in a situation where Respondent could *never* create a new dealership and/or alter an existing
21 dealer’s PMA without first establishing “good cause” before the Board in any and all circumstances.
22 The result would be that existing BRP dealers, like Protestant, would be afforded perpetual territorial
23 monopolies. Such a result flies in the face of the Dealer Agreement, the New Motor Vehicle Act, and
24 established case law in *BMW* and *Ri-Joyce*, which expressly rejected such potentialities. For all the
25 above reasons, Respondent respectfully requests that its Motion to Dismiss be granted and that
26 Protestant’s protest be dismissed with prejudice.

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Dated: June 26, 2015

HAIGHT BROWN & BONESTEEL LLP

By: 

R. BRYAN MARTIN
Attorneys for Respondent
BRP US INC.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

Fun Bike v. BRP
Case No. PR-2405-14

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 2050 Main Street, Suite 600, Irvine, CA 92614.

On June 26, 2015, I served true copies of the following document(s) described as **RESPONDENT BRP US INC.'S REPLY IN SUPPORT OF POST-DISCOVERY MOTION TO DISMISS PROTEST** on the interested parties in this action as follows:

Michael M. Sieving	Attorney for Protestant
Attorney at Law	
8865 La Riviera Drive, Unit B	(916) 942-9761
Sacramento, California 95826	E-Mail: msievinglaw@att.net

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address bmartin@hbblaw.com to the persons at the e-mail addresses listed in the Service List. The document(s) were transmitted at or before 5:00 p.m. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on June 26, 2015, at Irvine, California.

/s/ R. Bryan Martin
R. Bryan Martin